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JUSTIFYING A SEARCH FOR A UNIFYING THEORY OF UNCONSTITUTIONAL CONDITIONS

ROBERTO L. CORRADA*

I. INTRODUCTION

The natural course for scholars is to make sense of things. One way of enhancing understanding is to discover underlying principles or theories that might be used to explain various otherwise unrelated ideas or occurrences. The classification of an idea or occurrence within a broader category allows deductions or inferences about the quality of the notion or event.¹ Despite the progression of knowledge represented by such explanatory principles, unifying theories have been increasingly attacked in many disciplines, including jurisprudence, as modernistic devices whose validity is no longer unassailable. In a postmodern world, unification is often seen as an attempt to escape from certain realities of the physical or the conceptual world. The world today, it would seem, is not unified, but disjointed and complex.²

* Assistant Professor of Law, University of Denver College of Law. B.A., George Washington University, 1982; J.D., Catholic University of America Law School, 1985. I would like to thank all of the participants in the Unconstitutional Conditions Symposium, and in particular Larry Alexander, Tom Merrill and Fred Schauer, whose thoughts inspired this essay. I am grateful to the following people who took the time to make comments on an earlier draft of the essay: David Barnes, Arthur Best, Burton Brody, Alan Chen, Theresa Corrada, Nancy Ehrenreich, and Steve Pepper. I owe a special debt of gratitude to the editors of the *Denver University Law Review*, particularly Bart Johnson, who provided substantial research assistance, Lisa Banks, who worked well beyond her term in completing the issue, and Sue Chrisman, for her technical expertise and leadership. Any errors are sure to be discovered over time, leaving intact only the best ideas contained herein.

1. In law, for example, Langdellian "conceptualism" served to usher in modern jurisprudence and was expressly anchored in "the powers of science and reason to uncover universal truths." GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END* 13 (1995). There are a variety of reasons why unifying theories are generally useful in law: they can provide a tool for deciding future cases, and for increasing predictability in law; they may help society or the legislature understand the underlying significance of a series of judicial decisions and thus expose those decisions to the controls of the political process; they may aid in the development of other fields of law; also, understanding a unifying theory may increase the legitimacy of a series of decisions, since it will protect them from the appearance of randomness or result-orientation.

2. See JEAN-FRANCOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* (Geoff Bannington & Brian Massumi trans., 1984), cited in MINDA, *supra* note 1, at 14 n.11 (1995) ("I define *postmodernism* as incredulity toward metanarratives."); J.M. Balkin, *What Is a Postmodern Constitutionalism?* 90 MICH. L. REV. 1966, 1971-72 (1992) ("In philosophy, postmodernism is an attack on what are called 'totalizing' theories or 'master narratives' that seek to explain all or substantially all of society, history, knowledge, the nature of femininity, or virtually anything else within a comprehensive and articulable theory.")

In law, and especially in constitutional law, unifying principles, and implicitly even merely the search for them, have been increasingly criticized as futile and simplistic.³ The arguments of some of the scholars in this symposium resonate with this general criticism of modernist constitutional jurisprudence in arguing against a unified theory of unconstitutional conditions. What Frederick Schauer has labeled "too hard,"⁴ Larry Alexander has deemed "impossible."⁵ Although Thomas Merrill's contribution to this symposium has attempted to unveil a possible unifying theory of the doctrine of unconstitutional conditions, the contribution contains little discussion of the need or justification for such a metanarrative.⁶ Thus, the need to make a comment on, if not to fully explain, the validity of a search for a metatheory of unconstitutional conditions has arisen.

To be sure, neither Alexander nor Schauer positions his criticism of a metadoctrine of unconstitutional conditions within the broader canvas of modernity and postmodernism. Alexander does not expressly draw any comparisons between law and science in arguing against a metatheory of unconstitutional conditions. Neither are Alexander and Schauer as monolithic about metanarratives in constitutional law as their contributions to this symposium might suggest, having expressly left open the idea of uniformity in other parts of constitutional jurisprudence.⁷ It is only with a metatheory of unconstitutional conditions that they care to quibble. It is precisely that neither scholar has chosen to explore the greater implications of his methodology and because each seems to have made some implicit (and in Schauer's case, explicit) assumptions about the differences between science and law that a commentary about their collective skepticism toward a metatheory of unconstitutional conditions is warranted.

This essay explores why many scholars, including Schauer and Alexander, feel that an attempt at unification of the doctrine of unconstitutional conditions is unworthy of scholarly attention. Although the subject of this particular essay is less ambitious than the many attempts that have been made to unify the

3. See, e.g., LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 24-30 (1991) (attacking the search for unifying principles in constitutional law as demonstrative of the interpretive fallacy known as "hyper-integration"); Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1334 (1988) (collecting authority on the movement away from grand theories in constitutional law).

4. See Frederick Schauer, *Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency*, 72 DENV. U. L. REV. 989 (1995).

5. See Larry Alexander, *Impossible*, 72 DENV. U. L. REV. 1007 (1995) [hereinafter Alexander, *Impossible*]. A more complete picture of Larry Alexander's reasons for deeming hopeless a search for a unifying principle of unconstitutional conditions can be found in Larry Alexander, *Constitutional Theory and Constitutionally Optional Benefits and Burdens*, 11 CONST. COMMENTARY 287 (1994) [hereinafter Alexander, *Benefits and Burdens*]; Larry Alexander, *Understanding Constitutional Rights in a World of Optional Baselines*, 26 SAN DIEGO L. REV. 175 (1989) [hereinafter Alexander, *Optional Baselines*].

6. See generally Thomas W. Merrill, *Dolan v. City of Tigard: Constitutional Rights as Public Goods*, 72 DENV. U. L. REV. 859 (1995).

7. See Alexander, *Impossible*, *supra* note 5, at 1007 (explaining that theoretical accounts are only impossible in "certain doctrinal areas"); Schauer, *supra* note 4, at 990 n.3 ("I do not claim that all or even most constitutional problems are doctrinally insoluble. I claim merely that some are, and that it is distinctly possible that the problem of unconstitutional conditions is one of these.").

doctrine of unconstitutional conditions, and indeed proposes no unifying theory itself, it nevertheless examines why attempts to explain the doctrine in a unified way might be valid even if no unification is ultimately possible. It also attempts to persuade that a unifying theory of the doctrine may be attainable, although such a doctrine is yet to be articulated. The essay seeks to justify the search for metatheories and to diminish skepticism about them by revealing some strengths of modern conceptualist thinking while at the same time embracing some of the ideas of postmodernism.⁸

II. JUSTIFYING A SEARCH FOR A UNIFYING THEORY OF UNCONSTITUTIONAL CONDITIONS

A. *Unifying Theories as Beneficial: The Lessons of Science*

The search for unifying principles in law is undoubtedly a difficult endeavor, but law has no monopoly on the difficulty of such an enterprise. The history of science, and in particular physics, has well demonstrated the great struggle represented by attempts at unification.⁹ One of the primary reasons for the difficulty is the indeterminacy of many answers to questions that require resolution prior to uncovering metatheories that can explain all or even substantially all outcomes in a particular area. In constitutional law, the piecemeal quality and the long history of constitutional interpretation make the search for a metatheory seem arrogant or even laughable.¹⁰ Nevertheless, despite similar uncertainties in the field of science, the search for unifying principles there has proven useful.¹¹

Physics serves as a good example of why the search for unification, even in an area as seemingly unpromising as unconstitutional conditions, can be meaningful.¹² One might start with Isaac Newton, who radically changed the

8. My approach more or less fits the view of J.M. Balkin, who has concluded: "I prefer to see postmodernism as a particular continuation of the Enlightenment, and a reevaluation of what was good and bad about the Enlightenment project." Balkin, *supra* note 2, at 1988. Obviously, despite my disclaimer above, the subject of this essay is fairly ambitious. While it attempts to make a point about the scholarly enterprise in law, it is important to acknowledge that the length of the essay forces some reductionism and generality. These should not serve, however, to diminish the overall message.

9. For two more recent descriptions of attempts at unification in science, see JAMES GLEICK, *CHAOS: MAKING A NEW SCIENCE* (1987); STEPHEN W. HAWKING, *A BRIEF HISTORY OF TIME: FROM THE BIG BANG TO BLACK HOLES* (1988).

10. Laurence Tribe and Michael Dorf have called the notion of a singular vision of the Constitution "an extraordinary intellectual conceit," one at odds with the "character of the Constitution's various provisions as concrete political enactments that represent historically contingent, and not always wholly coherent, compromises in a document that was made in stages, incrementally, over a period of two centuries." *TRIBE & DORF, supra* note 3, at 24.

11. See HAWKING, *supra* note 9, at 13.

12. I borrow from and have been influenced in this discussion by Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1 (1989), even though I am using references to Tribe's text in a way that is completely opposite of what he intended. Tribe does not hold with metatheoretical approaches to constitutional law in general and the analogy in his article is an analogy to the substance of the general theory of relativity which teaches that the physical world is not as mechanical or simplistic as Newton's discoveries would suggest. Tribe concludes that the state influences its subjects and is in turn influenced by its subjects in much the same way that the general theory tells us that everything is

world of science in the late 1600s when he explained his construction of "the first modern synthesis of the physical world."¹³ One of Newton's primary contributions involved his explanation of the law of gravity, suggesting that gravity was a much larger force in the physical world than previously believed. As great a contribution as Newton made, however, it turned out that his explanations were merely partial ones, something even Newton apparently acknowledged.¹⁴

Indeed, a good deal of physics in the second half of the nineteenth century was devoted to attacking Newton's mechanical view of the universe. Scientists like James Maxwell, Gustav Kirchhoff, Ernst Mach, and others chipped away at Newtonian notions of absolute space and time. It is extremely unlikely that the Ernst Machs and the James Maxwells of the scientific world decried attempts at a unifying theory as "impossible" or "too hard." And while it is true that they may not have believed it too hard or impossible to sum up the universe in one equation, it is doubtful that they would have spent a great deal of energy debunking attempts at a metatheory if they had. Although these scientists of the late nineteenth century criticized Newton's synthesis and did not substitute their own syntheses in place of his, they served as stepping stones for a later scientist, Albert Einstein, who would.

The point has been made that science and law are insufficiently related to draw any meaning from their comparison.¹⁵ The prevailing wisdom seems to be that science is undergirded by certain physical principles or constants that make unifying principles in science discoverable and useful.¹⁶ Law, on the

the physical world acts upon and is acted upon by its surroundings. Although Tribe's point is, of course, a good one, it is ironic that such an insight is drawn from a theory that is the product of a search for unification. As Stephen Hawking explains, "the search for the ultimate theory of the universe seems difficult to justify on practical grounds. (It is worth noting, though, that similar arguments could have been used against both relativity and quantum mechanics, and these theories have given us both nuclear energy and the microelectronics revolution!)." HAWKING, *supra* note 9, at 13.

13. RONALD W. CLARK, *EINSTEIN: THE LIFE AND TIMES* 74 (1971).

14. Laurence Tribe relates that Einstein did not hold with Newton's idea that "space" was uniquely different from other physical elements. See Tribe, *supra* note 12, at 7. Einstein himself wrote that the idea that "space" is somehow uninfluenced by other elements is unsatisfactory, and that "Newton had been fully aware of this deficiency, but he had also clearly understood that no other path was open to physics in his time." ALBERT EINSTEIN, *THE MEANING OF RELATIVITY* 140 (5th ed. 1956).

15. See, e.g., TRIBE & DORF, *supra* note 3, at 87-96 (subchapter entitled "How Law is Unlike Mathematics").

16. Comparing the struggle for constitutional understanding to scientific discovery, Schauer notes that

[u]nder what appears to be a common view of constitutional ontology, the correct solutions to constitutional problems are like scientific observations. Just as scientific observations are always explainable in theory, even if we have yet to discover that explanation, so too, according to a common view, are all correct constitutional outcomes in theory explainable by a constitutional doctrine that will generate them. Under this view, the development of constitutional doctrines and theories is ultimately a task of discovery.

Yet perhaps that is not so. Perhaps some constitutional problems are irredeemably intractable, and are so precisely because they replicate the deepest, hardest, and therefore least solvable problems of constitutional government. And perhaps some constitutional problems appear intractable because we are looking for coherent principles and usable doctrines in areas of policy, where questions of degree predominate, and where seemingly arbitrary lines are necessary to settle temporarily, but not to resolve in any deeper

other hand, is subject to the quirks and eccentricities of human emotion, irrationality, and misperception, and therefore cannot possibly develop along the same uniform and consistent lines used to describe physical events.¹⁷ Science, however, is not as certain or uniform as the prevailing wisdom would suggest.

As in constitutional law, the modernist notion that unifying principles abound in science has also been attacked as insufficiently explanatory. The argument is, fundamentally, that scientific knowledge and advances in physics can better be explained as resulting from "paradigms" or "models" that together make up a scientific work ethic of sorts rather than as resulting from some existing common thread of physical principles that merely need be uncovered.¹⁸ Nevertheless, unifying theories that explain physical events have been promulgated and celebrated in science, and the search for greater unification continues.¹⁹

There are, however, three ways in which science resembles law that have implications for the pursuit of a unifying theory of unconstitutional conditions. First, the definition of a useful theory in both science and law is roughly the same, making arguments about theory in both fields similar. Second, science is gripped by indeterminacy and uncertainty in this century (quantum mechanics and chaos theory) that resembles the quagmire of constitutional law described by both Schauer and Alexander. And yet despite these difficulties, unifying theories are still sought in science and partial theories have proved useful. Finally, there is much in science, like law, that is simply intuitive, and one of science's grand theories for explaining the state of the universe rests precisely on the existence and nature of human beings within it. Such a theory may suggest that human reasoning might follow certain patterns that simply need to be discovered. These three similarities are discussed more extensively in the following sections.

sense, intrinsically competing policy objectives.

Schauer, *supra* note 4, at 989-90 (emphasis added).

17. See, e.g., GRANT GILMORE, *THE AGES OF AMERICAN LAW* (1977). Gilmore explained: Man's fate will forever elude the attempts of his intellect to understand it. The accidental variables which hedge us about effectively screen the future from our view. The quest for the laws which will explain the riddle of human behavior leads us not toward truth but toward the illusion of certainty, which is our curse.

Id. at 100. Larry Alexander notes:

There is another reason why the unconstitutional conditions metadoctrines are such a mess. . . . The Constitution has increasingly come to be viewed, not as a list of fixed, determinate rules, but as a source of heavily moralized "principles." The various terms that our constitutional vocabulary employs—"legitimacy" and "compellingness" of state interest for example—invoke morality.

Alexander, *Impossible*, *supra* note 5, at 1010; see also Schauer, *supra* note 4, at 989-90.

18. See, e.g., Farber, *supra* note 3, at 1335-36 n.24 (quoting THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962)).

19. Stephen Hawking comments that

[u]ltimately, however, one would hope to find a complete, consistent, unified theory that would include all these partial theories as approximations and that did not need to be adjusted to fit the facts by picking the values of certain arbitrary numbers in the theory. The quest for such a theory is known as "the unification of physics." . . .

As I shall describe, the prospects for finding such a theory seem to be much better now because we know so much more about the universe.

HAWKING, *supra* note 9, at 155-56.

1. The Definition of Theory

Perhaps the best way to begin thinking about the ways in which law and science are related is definitionally. How, for example, would we know a "unifying principle" if one were posited? And, what would be particularly useful about it? In science, a "unifying principle" or "theory" is good or useful if it meets two requirements: "It must accurately describe a large class of observations on the basis of a model that contains only a few arbitrary elements, and it must make definite predictions about the results of future observations."²⁰ A useful theory cannot be merely descriptive, it must also be predictive.²¹ Newton's theory of gravity is a good one, then, because it is descriptive in that it tells us something about the relationship between physical bodies, and, moreover, it predicts the motions of the planets to a high degree of accuracy.²²

A jurisprudential definition of "unifying principle" or theory would be the same: descriptive and predictive. The problem so many commentators and judges encounter with the doctrine of unconstitutional conditions is not one of description, but one of prediction.²³ Most commentators and judges, for example, are able to identify when a problem of unconstitutional conditions might arise—any instance in which the government conditions the granting of a benefit on the surrender of a constitutional right. The rub comes in predicting when such a condition will be struck down as unconstitutional, since not every instance that implicates the doctrine yields a decision finding the government's action unconstitutional.

Thomas Merrill's article in this symposium is a good example of how a unifying principle in law might be approached. Merrill begins by explaining the weaknesses of other attempts at metatheories of unconstitutional conditions. He explains the weakness of unifying attempts based on coercion,²⁴ government monopoly power,²⁵ and the importance of the right to individuals who choose to waive it.²⁶ The method by which Merrill shows weakness is by describing important outcomes that are not predicted by the posited unifying notion. Thus, a coercion theory is not predictive because allowing unconstitutional conditions to attach to benefits creates a more optimal, and thus noncoercive, set of circumstances for individuals than those they would be confronted with if rights were inalienable.²⁷ The monopoly theory of uncon-

20. See *id.* at 9. Albert Einstein felt similarly that, "[a] theory . . . is the more impressive the greater the simplicity of its premises is, the more different kinds of things it relates, and the more extended is its area of applicability." CLARK, *supra* note 13, at 109.

21. According to Stephen Hawking, Aristotle's theory that everything is made out of four elements—earth, air, fire, and water—is not a good or useful theory because it fails to make any definite predictions about future outcomes. HAWKING, *supra* note 9, at 9.

22. *Id.* at 9-10.

23. And it is the predictive problem that motivates both Alexander and Schauer in their criticism of a unifying theory of unconstitutional conditions. See *infra* text accompanying notes 42-45.

24. See Merrill, *supra* note 6, at 859-60.

25. *Id.* at 860.

26. *Id.* at 860-61.

27. *Id.* at 859-60.

stitutional conditions is not predictive because it does not account for cases striking down unconstitutional conditions attached to nonmonopolistic government employment.²⁸ The theory seeking to explain the doctrine based on the importance of the individual right at stake is not sufficiently predictive because the doctrine of unconstitutional conditions has been applied more robustly to certain First Amendments rights and separation of powers controversies than it has been applied to arguably more individually important reproductive or criminal procedural rights.²⁹ Moreover, according to Merrill, none of the above attempts at unification can state why on occasion the cases applying the doctrine have required a nexus between the right being waived and some governmental interest arising from the benefits program under scrutiny.³⁰ To Merrill, implicitly, the proposed theories are insufficiently predictive if they cannot account for the cases involving a nexus requirement.

Into the gap, as it were, Merrill inserts his own unifying theory. He proposes that we might view constitutional rights from a public goods perspective in analyzing the doctrine of unconstitutional conditions. According to Merrill, exercises of certain constitutional rights produce external benefits which serve to advantage third parties.³¹ Merrill shows how a ranking of these rights according to the force of their external benefits better predicts the outcomes of court decisions involving the doctrine of unconstitutional conditions.

To Merrill, the public goods approach is better than many other past approaches to the doctrine of unconstitutional conditions because it can explain outcomes across a broad range of constitutional doctrines and therefore has superior *predictive* capacity. Merrill begins by showing how free speech and separation of powers, while having private benefits, also redound to the benefit of the public. Citing to Daniel Farber, Merrill explains the public goods aspect of information release and through it explains government subsidization of speech.³² Merrill also explains how separation of powers serves our system of checks and balances in a public sense, which, in turn, explains why waivers of these constitutional limits cannot be made by the individual beneficiaries of them.³³

By way of contrast, Merrill explains the lack of external benefits associated with rights raised as a defense to criminal prosecution. The desire to avoid criminal prosecution will ensure an adequate supply of both public and private benefits flowing from the right. However, Merrill distinguishes the contextual exercise of the right from the situation that arises when government seeks to purchase a waiver of the right in advance.³⁴ Merrill proceeds to show how a public goods approach to constitutional rights predicts outcomes in a wide-ranging array of areas of constitutional concern. He tracks the theory by apply-

28. *Id.* at 860.

29. *Id.* at 860-61.

30. *Id.* at 861.

31. *Id.* at 870.

32. *Id.* (citing Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554 (1991)).

33. Merrill, *supra* note 6, at 871.

34. *Id.*

ing it to the right to vote,³⁵ separation of powers,³⁶ abortion funding,³⁷ and the law of jurisdiction.³⁸ Merrill uses the public goods lens to explain the application of a nexus requirement in certain unconstitutional conditions cases,³⁹ and he suggests how the public goods approach may be more successful than other theories in explaining the distinction between "penalties" and "subsidies."⁴⁰ Finally, Merrill applies his public goods analysis to the Takings Clause in an attempt to explain the Court's result in *Dolan v. City of Tigard*.⁴¹

Just as Merrill critiques earlier unifying attempts, both Schauer and Alexander seek to discredit any possibility of a unifying theory of unconstitutional conditions by arguing that some doctrinal areas in constitutional jurisprudence are so chaotic that no single idea could explain case outcomes completely enough to predict future outcomes. Alexander discusses, for example, "benefits" and "burdens" in analyzing the Supreme Court's Dormant Commerce Clause cases, which emphasize distinctions between discriminatory *taxes* and discriminatory *subsidies*.⁴² To Alexander, there is no meaningful way to separate taxes from subsidies under the framework established by the Supreme Court for Dormant Commerce Clause cases. Accordingly, any attempt to develop a unifying theory of unconstitutional conditions will fail because there is effectively no way to bring the indeterminacy of Dormant Commerce Clause jurisprudence into the fold. The upshot is that Alexander believes no unifying theory is possible because the randomness of Dormant Commerce Clause interpretation makes any predictability impossible.

Schauer, likewise, begins by assuming the legitimacy of status quo doctrine in starting with the premise that the government cannot fund all art⁴³ and that the state as employer should not necessarily have to put up with criticism by its employees.⁴⁴ And, yet, intuitively these actions or omissions by government seem to violate at least one strongly accepted view of the First Amendment, and certainly would violate any cohesive doctrine of unconstitutional conditions that would strive to incorporate within it the First Amendment's Free Speech Clause. As a result, Schauer concludes, there can be no unifying theory of unconstitutional conditions because the "embedded exclusions" that exist now in First Amendment free speech doctrine will ensure the existence of unity-destroying exceptions.⁴⁵ To Schauer, since any unifying principle would be burdened by various exceptions that must swallow it, any predictive quality of a unifying theory would be too diluted to be useful.

35. *Id.* at 873-74.

36. *Id.* at 874.

37. *Id.* at 875.

38. *Id.* at 875-76.

39. *Id.* at 876-77.

40. *Id.* at 878.

41. *Id.* at 880-87 (discussing *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994)).

42. Alexander, *Impossible*, *supra* note 5, at 1007-08.

43. Schauer, *supra* note 4, at 994.

44. *Id.* at 1002-03.

45. *Id.* at 1002.

Thus, Merrill, Alexander, and Schauer all test the quality of theories, or potential theories, about the doctrine by saying something about their predictive nature. They argue for or against unification of the doctrine either positively by highlighting the predictive power of a unifying idea (in the case of Merrill) or negatively by showing how no single idea can possibly predict certain outcomes, making any theory of unconstitutional conditions useless (as in the case of Schauer and Alexander). All three commentators use the very rationalistic and Enlightenment-produced construct of a good theory, which they all implicitly believe is only useful if predictive. Thus, science and law are strongly related in a definitional sense. Indeed, if theories are to be judged by the same criteria in science and law, the two are certainly much more similar than they at first appear.

2. The Randomness of Science

Despite Schauer's characterization of science as a task of discovery, "always explainable in theory even if we have yet to discover [the] explanation," science, like law, is beset by uncertainties and irregularities—some so discontinuous and erratic as to be called "monstrosities" rather than scientific puzzles.⁴⁶ Two of these areas of uncertainty in science have implications for a unifying theory of unconstitutional conditions. They are quantum theory (particularly the principle of uncertainty) and chaos theory.

Quantum theory is characterized by uncertainty. The theory was introduced in 1900 by Max Planck who suggested that light and other waves were emitted in packets called quanta. This theory of energy emission accurately described observations of radiation emission from stars.⁴⁷ Using Planck's theory of quanta, Werner Heisenberg, in 1926, formulated his now famous principle of uncertainty. According to Heisenberg, the only way to determine the future position of a particle (like an electron) is to measure its present position and speed by shining light on it and observing how light is scattered by the particle. Planck's theory of quanta created a problem for Heisenberg. Since light is emitted in packets, one cannot use less than one quantum of light to measure the position and speed of a particle. But a quantum of light is substantial relative to the particle, meaning that the light will have an effect on the particle. Thus, the quantum of light used to measure the particle will also change the particle's velocity in a way that cannot be predicted.⁴⁸ Moreover, the more one desires to measure the exact position of a particle, the more light one will be required to emit. But more light has a greater unpredictable effect on the speed of the particle. "In other words, the more accurately you try to measure the position of the particle, the less accurately you can measure its speed, and vice versa."⁴⁹

Heisenberg's uncertainty principle presented a substantial barrier to any unifying theory of physics. While Einstein's theory of relativity unified large

46. See GLEICK, *supra* note 9, at 3.

47. See HAWKING, *supra* note 9, at 54.

48. *Id.* at 54-55.

49. *Id.* at 55.

scale physics, Heisenberg's uncertainty principle strongly argues against a deterministic model of the universe since an exact measurement of the present state of the universe can never be undertaken. It is interesting to note that a physicist thinking like Alexander or Schauer might have thrown up his hands in light of Heisenberg's discovery and maintained that the uncertainty principle confirms that no unification of all physics is possible. Heisenberg may well have taken this approach.

Instead, Heisenberg and other physicists in the 1920s created a new physics called quantum mechanics. These physicists worked with what they knew about the effects of quanta on particles. Thus, quantum mechanics does not predict a single definite result for an observation.⁵⁰ Rather, the theory predicts a number of different possible results and tells how likely each of these is.⁵¹ Quantum mechanics introduced unpredictability and randomness into science. Despite its uncertainty, quantum mechanics currently underlies nearly all of modern science and technology.⁵² According to Hawking, a combination of general relativity and quantum mechanics raises a new possibility not recognized before: "that space and time together might form a finite, four-dimensional space without singularities or boundaries, like the surface of the earth but with more dimensions."⁵³ Such a principle could serve to explain much of the universe, including the existence of human beings.⁵⁴

Another theoretical framework, chaos theory, has been used by scientists in the latter half of this century to explain the occurrence of events so chaotic that they had long been relegated to the scientific dustbin of problems "impossible" to crack. Chaos theory explores the nature of systems, particularly dynamic systems like the weather or waterfalls. One cannot, for example, predict where two bits of foam floating at the top of a waterfall will wind up at the bottom because the waterfall is subject to so many irregularities that any prediction of an outcome should be "impossible."⁵⁵

The seeming impossibility of predicting outcomes from chaotic systems may resemble the impossibility of deriving an explanatory principle that ties together the doctrine of unconstitutional conditions. Many scientists, in a manner similar to that of Schauer and Alexander, abandoned their efforts to understand and predict the results of chaotic systems.⁵⁶ And yet, in the 1960s scientists began to understand that "simple mathematical equations could model systems every bit as violent as a waterfall."⁵⁷ Scientists began to see that wild differences in output could be attributed to minute differences in input. Indeed,

50. *Id.*51. *Id.*52. *Id.* at 56 ("[Quantum mechanics] governs the behavior of transistors and integrated circuits, which are the essential components of electronic devices such as televisions and computers, and is also the basis of modern chemistry and biology.").53. *Id.* at 173.54. *Id.* at 173-74.55. GLEICK, *supra* note 9, at 4.56. *Id.* at 3.57. *Id.* at 8.

"a butterfly stirring the air today in Peking can transform storm systems next month in New York."⁵⁸

The ideas developed by chaos theorists were met with incomprehension, resistance, and anger by the scientific community. And who could blame that community. Chaos theory says that "[s]imple systems give rise to complex behavior. Complex systems give rise to simple behavior. And most important, the laws of complexity hold universally, caring not at all for the details of a system's constituent atoms."⁵⁹ The predictions of chaos theorists that complexity operates in uniform ways have connected systems that were previously thought entirely unrelated: chaos theory has allowed physiologists to find order in the chaos that develops in the human heart causing unexplained death; chaos theory has aided ecologists in understanding the unexplained rise and fall of gypsy moth populations; chaos theory has led economists to new kinds of analyses about stock prices.⁶⁰ Chaos theory suggests that science, like law, has its areas of unpredictability that might become explainable despite seemingly large odds against it.

Chaos theory has been applied to law by at least one commentator.⁶¹ Robert Scott makes the point that case outcomes in law resemble the complex systems that lie at the heart of chaos theory.⁶² Even slight differences in the facts of a case can result in wildly disparate judicial outcomes.⁶³ This observation has led many legal scholars, particularly adherents of the Critical Legal Studies movement, to conclude that the search for a just legal order is futile: chaos is inevitable.⁶⁴ Scott reminds us that the lessons of chaos theory are not that intuitive or simplistic; chaos theorists have concluded that chaotic processes are more stable than those in equilibrium, and that deep patterns are imbedded in all chaotic processes.⁶⁵ If Scott is correct, recurring patterns may be found in unpredictable and irregular human behavior, even in legal systems and legal decisions. Thus, complexity should not deter legal scholars from seeking patterns in judicial outcomes despite the irregularity and unpredictability of the justifications used by judges in reasoning toward a particular end result.

3. Science and Law as Functions of Human Behavior: The Anthropic Principle and Intuitionism

Comparing human reasoning and intuition to the natural phenomena modelled in physics or in mathematics at first blush seems foolish. The capricious-

58. *Id.* The "Butterfly Effect," as it is known, has become symbolic of chaos theory.

59. *Id.* at 304.

60. *Id.* at 3-4.

61. See Robert E. Scott, *Chaos Theory and the Justice Paradox*, 35 WM. & MARY L. REV. 329 (1993).

62. *Id.* at 348.

63. *Id.*

64. Although Robert Scott singles out the "crits" for their anti-foundationalist tendencies, it seems obvious that the questioning of master narratives is not exclusively their domain. See TRIBE & DORF, *supra* note 3; Alexander, *Impossible*, *supra* note 5; Farber, *supra* note 3; Schauer, *supra* note 4.

65. Scott, *supra* note 61, at 349.

ness and whimsy of human judgments seem far removed from the more orderly and predictable physical world. And yet one might ask whether the processes that lead to physical events are really that removed from the processes that yield results in disputes that are decided in courts of law. A complex set of physical events after all—the working of the human mind—produces the judicial outcomes that we wish to draw together by a single principle.

Scientists have thought about the connections between human existence—even human thought—and the state of our universe. The “anthropic principle” in metaphysics posits that the reason the universe is the way it is has something to do with the fact that we (humans) are here to see it.⁶⁶ A different way to state the idea, and one more useful for our purposes, is that unifying theories describing physical events are discoverable because those events are related in some way to the mind that seeks their explanation. Hawking strongly implies exactly this kind of determinism when he explains,

[t]he laws of science, as we know them at present, contain many fundamental numbers, like the size of the electric charge of the electron and the ratio of the masses of the proton and the electron. We cannot, at the moment at least, predict the values of these numbers from theory—we have to find them by observation. It may be that one day we shall discover a complete unified theory that predicts them all. . . . *The remarkable fact is that the values of these numbers seem to have been very finely adjusted to make possible the development of life.*⁶⁷

If in fact the universe has been fine-tuned to support life and if that life can evolve in such a way as to allow it ultimately to discover this, then there may be a unified explanatory principle to draw it all together. The analogy of anthropism to law may be found in Hawking's explanation of why human beings could come to discover a unifying principle of the universe. According to Hawking, Darwin's principle of natural selection says that in any population of self-reproducing organisms, the differences in the genetic material and upbringing that different individuals have “will mean that some individuals are better able than others to draw the right conclusions about the world around them and to act accordingly.”⁶⁸ These individuals will ultimately survive and their pattern of behavior will dominate.⁶⁹ We might ultimately expect that reasoning abilities honed by natural selection would lead us to a unified theory of physics, and not to the wrong conclusions.⁷⁰

Applied to decisional law, the argument would be similar. Natural selection has possibly led to Supreme Court decisions that tend to develop towards an explainable or predictable pattern. Likewise, the state of our law has evolved by virtue of the increasingly superior minds that have fashioned it. If the law has evolved in a regular way, then unifying principles that explain it

66. See HAWKING, *supra* note 9, at 124.

67. *Id.* at 125 (emphasis added).

68. *Id.* at 12.

69. *Id.*

70. *Id.* at 13.

should be discoverable. I understand the many problems with this nonfalseifiable argument, not the least of which would be the existence of dissenting opinions.⁷¹ But let's assume the notion is only roughly true. If so, there would be sufficient rationality across all outcomes of cases to allow some strong unifications.

Perhaps the parallel to the anthropic principle is not a sufficient argument to convince most that the human mind would over time and subconsciously produce case outcomes later capable of unification. Consider, however, what Albert Einstein wrote about the merger of rationality and intuition. In 1918, Einstein published an essay entitled, *Principles of Research*.⁷² In it he metaphorically described the origin of scientific method and expounded upon the ultimate ability of human reasoning to find the grand elemental laws.⁷³ He noted the direct correlation between the theories devised by the human mind and the order that is found in nature.⁷⁴ According to Einstein, the explanation for this is that our minds are guided by "preestablished harmony."⁷⁵ Gerald Holton, writing about Einstein's essay, concludes that "the synthesis of rationality and intuition—rather than their opposition—is the key to answering all questions of science, as we now understand the term."⁷⁶ Holton seems to mean that true understanding will not be achieved until we can couple what is rational—physics and mathematics, for example—with what is intuitional—like the mystical or spiritual. Holton's jolting conclusion suggests that the ultimate coupling of rationality and intuition may have implications beyond science. If so, science and law may not, indeed, be the polar opposites some would suggest. For example, law currently is a microcosm of Holton's suggestion—it is characterized by the rational as well as the intuitionistic. Some parts of constitutional law, for example, can be explained by underlying principles while other parts are unexplainable and seem to change on a case by case basis.

By comparing law to science, I hope to have revealed that science, like law, is not entirely an orderly system made up of known or discoverable rules. Science is beset by unpredictability and irregularity just like law despite the fact that some parts of both science and law are ordered and contain rules that lead to a high degree of predictability. Yet, whereas in science the unpredict-

71. An argument could be posited that dissenting opinions are opinions that did not prevail, and are therefore weaker. The argument is hard to make since there are a great deal of very well reasoned opinions. Another approach to dissenting opinions might be that the reasoning process that would yield a superior decision tends to break down once a Court majority has formed around a particular result since only a majority is required to establish law. If unanimity were required the end result of the Court opinion would be the same under a notion of darwinistic reasoning or intuitionism, but the reasons underpinning the decision might be more enduring or at least might more closely explain the result.

72. See Gerald Holton, *The Controversy over the End of Science*, SCIENTIFIC AMERICAN, Oct. 1995, at 191. Holton is the Mallinckrodt Professor of Physics and Professor of History of Science at Harvard University.

73. *Id.*

74. *Id.*

75. *Id.* Holton ascribes the notion of preestablished harmony to Leibniz, who held "that God allows productive resonance between the material and spiritual realms." *Id.*

76. *Id.*

ability of the velocity of particles or the irregular nature of weather patterns has not deterred the search for unification of physics or the search for universal principles of complexity, in law the seeming indeterminacy of some doctrines in constitutional jurisprudence has indeed served to stymie the search for metatheories. The next section explores why irregularity may have scared scholars away from the search for unifying principles and why that ultimately may have detrimental implications for the law's continued development.

B. *Do Science and Law Resemble Each Other?: Addressing Skepticism Towards a Unifying Theory of Unconstitutional Conditions*

My analogy of science and law might be criticized by skeptics as unrealistic, naive, or worse, inapt. I will address any possible critiques in the context of the doctrine of unconstitutional conditions by focussing on Schauer's and Alexander's criticisms of a metadoctrine of unconstitutional conditions in this symposium.⁷⁷

As a general matter, the two positions arguing against the possibility of a unifying theory of unconstitutional conditions share two common traits. The first of these is that they both use particular constitutional cases to make their point.⁷⁸ I do not disagree with the authors' descriptions of the various cases they choose to highlight. I agree that each case is complex and that some of these cases, either alone or in combination with other cases resolving similar issues, pose a seemingly intractable problem for a unifying theory of unconstitutional conditions.

It is the second common trait of each of these articles with which I take issue. Both authors assume that the Supreme Court's reasoning in each case must somehow control the metatheoretical inquiry. I know of no reason why this should be so. Both Schauer and Alexander articulate their arguments about the indeterminacy of First Amendment or Commerce Clause cases by relying on the rationales, rather than the outcomes, of the Court in those cases. To illustrate the fallacy of this approach with respect to the possibility of fashioning a unified theory of unconstitutional conditions, let me analogize again, but briefly, to physics. When Newton proposed his law of gravity, there was little question that it was a good theory because it served to predict the positions of the planets to a high degree of accuracy.⁷⁹ His theory, however, also made certain predictions about the speed of gravity. According to Newton, gravitational effects should travel with infinite velocity.⁸⁰

Obviously, Albert Einstein was well aware of Newton's theory of gravity and about the orbit of planets. Einstein's theories of relativity, interestingly, made the same accurate predictions about the orbits of planets as did

77. See Alexander, *Impossible*, *supra* note 5; Schauer, *supra* note 4.

78. Schauer primarily relies on *Rust v. Sullivan*, 500 U.S. 173 (1991); *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989); and *Pickering v. Board of Educ.*, 391 U.S. 563 (1968). Alexander primarily focuses his attention on *Bacchus Imports v. Dias*, 468 U.S. 263 (1984); and *West Lynn Creamery v. Healy*, 114 S. Ct. 2205 (1994).

79. See HAWKING, *supra* note 9, at 17.

80. *Id.* at 29.

Newton's law; however, in at least one case—the orbit of Mercury—Einstein's theories were more predictive than Newton's.⁸¹ What was astounding about this was that Einstein's theories conceived of gravity in a radically different way than Newton's law. Einstein's special theory of relativity, for example, predicted that nothing can travel faster than light, a notion inconsistent with the Newtonian theory of gravity.⁸² To explain this, Einstein devised his general theory of relativity, which departed extensively from Newtonian principles in suggesting that "gravity is not a force like other forces, but is a consequence of the fact that space-time is not flat, as had been previously assumed: it is curved, or "warped," by the distribution of mass and energy in it."⁸³ Einstein did not build on Newton's law so much as he created a new idea of gravity. Had Einstein been intent on proceeding from Newton's reasoning, rather than focusing independently on the outcomes of the physical events Newton was seeking to describe, we may well not have Einstein's theories of relativity today.

Schauer maintains that First Amendment doctrine has been characterized by a historical development that has taken the doctrine from one that tolerated no law abridging speech to one characterized by so many "embedded exclusions" that a singular theory of the clause is hard to imagine.⁸⁴ He argues further that the unconstitutional conditions doctrine, as applied in First Amendment cases, has followed a similar path.⁸⁵ Schauer's view of the case law certainly suggests that his conclusions are correct. But is Schauer focusing on the right things, and is he asking the proper questions? First, by focusing on the rationales of the decisions he highlights, rather than the outcomes, Schauer necessarily must conclude that the decisions are so irreconcilable as to strongly suggest no unification is possible. Second, as chaotic as the decisions seem, Schauer is able, by focusing on results, to make some very definite points about them *as a group*. If these cases may be linked by any common notion, then as disparate as they may seem, chaos theory suggests deep patterns may be found.

With respect to the former observation—that Schauer's focus on rationale necessarily leads to the conclusions he reaches—one way in which Schauer seeks to maintain that no unification is possible for the theory of unconstitutional conditions is by showing that the case law within any given constitutional law doctrine is incapable of being harmonized. Thus, under the Dormant Commerce Clause, even though it can generally be said that "state prohibitions on non-state commercial activity that are designed to increase one state's competitive advantage over another state's violate the Constitution,"⁸⁶ the Dormant Commerce Clause has been read by the Court not to apply in some circumstances when an analysis of economic effects argues that it should have

81. *Id.* at 10.

82. *Id.* at 28-29.

83. *Id.* at 29.

84. Schauer, *supra* note 4, at 1004.

85. *Id.* at 991-92.

86. Schauer, *supra* note 4, at 996.

been applied.⁸⁷ Likewise under the First Amendment, decisions that seek to produce robust and wide open debate on matters of public concern—the touchstone of free speech cases like *Sullivan* and *Pickering*—often do the opposite.⁸⁸ Similarly, the state action doctrine serves independently to limit pure application of a theory of unconstitutional conditions because of the Court's view that the Constitution was not intended to protect positive rights, meaning that direct and indirect prohibitions cannot be viewed in the same way.⁸⁹

Arguing against the notion of unification, Schauer takes the Court's decisions at face value. Thus, the Dormant Commerce Clause inhibits "protectionism," the free speech cases encourage "robust and wide open debate," and the Constitution only protects "negative rights." By accepting these statements about the thrust of the various constitutional provisions it becomes quite a simple exercise to show that the Court does not in every instance live up to these ideals. But is it possible that other notions or philosophies truly underpin some of these doctrines? Is Schauer a modern-day Newton whose theories about these doctrines, while seemingly correct, are, like Newton's theory of gravity, simply misguided? Although Merrill does not apply his public goods synthesis to the doctrines Schauer highlights, is it not possible to devise a different approach to the Dormant Commerce Clause or state action or free speech which, while not mentioned in any Supreme Court decision, nevertheless explains the outcomes of the cases? Merrill's attempt to unify through the application of a public goods analysis certainly serves to suggest that a focus on outcome rather than rationale can be useful.

Although Merrill ends his article with some suggestions about the weaknesses of a public goods approach, it is important to note that in making his argument he focuses not on the articulated rationale behind government and Court action within the doctrines he surveys, but rather on the outcomes, their effects, and a possible, hitherto unarticulated rationale. Indeed, there is scarcely a word quoted from the Supreme Court decisions he analyzes that suggests a judicial concern about the external benefits of rights. If anything, the opposite is true. Merrill's discussion of *Dolan*, for example, opens by quoting the Court's statement that the focus of the Takings Clause is to protect individuals from being required by government "to bear public burdens which . . . should be borne by the public as a whole."⁹⁰ Since *Dolan* held the Takings Clause right not to be waivable, a focus on the Court's language yields the conclusion that a "public goods" notion is not a valid predictive principle in the area of Takings Clause jurisprudence since the Clause exists to protect individuals. Merrill goes on to show, however, that despite the Court's statement, there are external benefits relating to the Takings Clause right that justify the Court's holding. Other partially explanatory theories of unconstitutional conditions, like coercion, operate in the same manner. Thus, it would seem that a unifying

87. *Id.* at 996-97.

88. *Id.* at 1002-03.

89. *Id.* at 997.

90. Merrill, *supra* note 6, at 880.

or explanatory theory might well ignore the reasoning, and instead focus only on the outcomes, of judicial decisions.

Now, with respect to the other observation about Schauer—that despite his attempts to demonstrate chaos, he in fact is able to make some cogent points about these cases *as a group*—chaos theory suggests there may be deeper relationships between the cases than an analysis of the words written by the justices in each opinion suggests. Schauer, despite his conclusion that there is irregularity, and even randomness, in certain areas of constitutional law, finds quite a few common elements in these irregularities. For example, he observes that most areas of constitutional law decided by courts are really only subsets of the full area of constitutional concern.⁹¹ Strangely, in addition to an explanation of Kant's theory about lying which sounds in many ways like Heisenberg's principle of uncertainty, the discovery of subsets that are defined by what the Court can take on suggests some uniformity that cuts across virtually all constitutional doctrines. This notion of uniformity is strengthened by Schauer's many statements that constitutional theory is characterized by "recurring" and "basic" tensions.⁹² Chaos theory suggests that these uniformities may be evidence of deeper patterns that exist beneath the thick layer of uncertainty that covers the surface. Complexity can ultimately be explained in a simple manner. Chaos theorists would posit exactly the opposite of Schauer's proposition that some problems may be intractable because of "seemingly arbitrary lines" and "intrinsically competing policy objectives."⁹³

Schauer states that believing that a correct rule, principle or standard exists for unconstitutional conditions requires "placing enormous faith in the processes that have produced these problem-oriented groupings and headings."⁹⁴ This is exactly what chaos theory requires—a faith in the processes that produce *outcomes*. But Schauer does not have that faith, and the reason he does not is revealed later in his article when he states that the unconstitutional conditions doctrine became "too hard" due to "pretheoretical intuitions (and practical realities) about permissible actions."⁹⁵ Schauer's implicit assumption is that intuition belies uniformity.⁹⁶ And yet, it could be argued that intuition is precisely the process in which chaos theorists (and Albert Einstein) would place enormous faith when applying rules of complexity to human reasoning.

In a fashion similar to Schauer's, Alexander points to case law surrounding the Dormant Commerce Clause, particularly *Bacchus* and *West Lynn Creamery*, to show that a rational, predictable approach to taxes versus subsidies cannot exist.⁹⁷ But in doing so, he implicitly accepts the framing of the question by the Supreme Court. Is it possible that some other tension, even within the notion of protectionism, can better describe the different outcomes

91. Schauer, *supra* note 4, at 994 n.19.

92. *Id.* at 996.

93. *Id.* at 990.

94. *Id.* at 990 n.3.

95. *Id.* at 994.

96. Schauer is not the first to suggest this. Intuitionism has been called counterfoundational.

See, e.g., Farber, *supra* note 3, at 1334.

97. Alexander, *Impossible*, *supra* note 5, at 1007-08.

in those cases? The answer from Alexander may be no, but I would ask him also to consider the way Merrill has approached his "public goods" notion of a unifying theory. Although Merrill ignores the Dormant Commerce Clause, he does use the public goods notion to explain case outcomes that were seemingly irreconcilable, and he does so with an idea that cannot be taken from the rationales used by the justices to explain their decisions.

Alexander suggests problems with other areas of constitutional law that create barriers for a workable theory of unconstitutional conditions, including the religion clauses, equal protection and free speech.⁹⁸ He asserts that these areas cannot be rationalized. When demonstrating why, however, he resorts to the core ideas that have been used by the Court to anchor these doctrines. He states, for example, that "neutrality" lies at the heart of the religion clauses and free speech.⁹⁹ He does not, however, explore whether neutrality may merely be a subset of a greater concern that might be gleaned from the outcomes of the cases in these areas, but not highlighted expressly by the Court in its decisions. Alexander does not address this possibility, and yet, he deems a unifying principle "impossible." In fairness to Alexander, this essay does not offer any unifying principle either. Thus, it does not very well serve to negate his point. There are, however, other scholars who seem intent on showing unification of First Amendment cases (religion and free speech) without relying on the statements of the Court in those cases.¹⁰⁰

Alternatively, what if we assume that Alexander is correct—that the Dormant Commerce Clause, for example, is a "constitutional oxymoron." None of the earlier analogies to scientific ideas require us to assume that Supreme Court constitutional jurisprudence has reached a perfect and harmonious end-state. The anthropic principle, and Hawking's Darwinistic analysis of it, states that we will evolve to a stage at which we will be able to explain outcomes through application of a single theory. If that is true, then it is possible that the Supreme Court may reverse itself with respect to its current Dormant Commerce Clause decisions. The Court has certainly done this in the past. One could argue, for example, that both *Lochner v. New York* and *Plessy v. Ferguson* are good examples of decisions that were weeded out by the process of natural selection as applied to judicial decisionmaking.

If we are not in the final, perfect end-state of constitutional jurisprudence, then it may be "too hard" or "impossible" now to "discover" a unifying theory of all constitutional law, and even of unconstitutional conditions. However, it lends credence to the Darwinist view of constitutional jurisprudence that there exist some *partial* unifying theories. In the area of unconstitutional conditions, Alexander has written about a small number of proposed unifying theories that he has proceeded to show hold no promise, at least in the current state of

98. *Id.* at 1008-09.

99. *Id.* at 1009.

100. Professor William Marshall, for example, is currently exploring whether the "search for truth" may better serve to explain First Amendment decisions involving both religion and free speech. See William Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. (forthcoming 1996).

constitutional doctrine, as a single explanatory principle.¹⁰¹ But, is it possible that one of those theories may ultimately prevail as principles that are only doctrinal pretenders fall by the wayside?

If it is possible that the Darwinist decisionmaking theory is true, then consider the hazards of abandoning the search for a unifying theory of unconstitutional conditions. Rather than exposing attempts at unifying theories to criticism that would offer up a better strand of the theory, constitutional scholars abandon the enterprise, resulting in the stagnation of constitutional jurisprudence. Of course, if this were to occur I suppose one could simply say that natural selection would have led to any prevailing system, meaning that it is superior.

Nonetheless, shouldn't we encourage the growth and development of constitutional jurisprudence? If the answer is yes, then shouldn't we encourage the development of metanarratives that can be used to test individual doctrines. If "public goods" can explain all case outcomes except those under the Dormant Commerce Clause, then which is wrong? Is it Dormant Commerce Clause decisionmaking to date or the "public goods" approach to constitutional rights?

The development of law in the area of contracts serves as a good example of this point. Contract law has evolved over time to yield the rules that now dominate our system. Interestingly, those rules developed in the same haphazard way that many scholars, including Schauer and Alexander, have ascribed to the development of constitutional law. However, in this century the development of economics as a science, and specifically its application to contract law, has shown that rules governing contracts tend to encourage efficiency.¹⁰² One major exception with respect to this is the American rule regarding attorneys' fees. In the United States, a successful litigant who has been the victim of a breach may not recover attorneys' fees and court costs even though logic dictates that, in a system that provides no punitive damages, recovery of these costs is critical to making the victim whole and encouraging efficiency. Despite this exception to the notion of efficiency, the development of these economics theories in contract law have been useful. Possibly also they will be the vehicle by which the American rule regarding fees and costs is reversed as an idea that cannot survive the further development of the law.

Alexander concludes his commentary by proposing that the Constitution is not viewed as a list of fixed rules but as a source of heavily moralized principles.¹⁰³ He then questions the fit between morality and the discrete provisions of the Constitution.¹⁰⁴ Alexander's position strongly implies the distinction between subjectivity and objectivity. If the Constitution is an objective document, as it purports facially to be, then morality is incapable of linking with it. Here, Alexander's argument resonates with Schauer's—rationality is

101. See Alexander, *Optional Baselines*, *supra* note 5.

102. See generally David W. Barnes, *A Dozen Efficient Breaches* (unpublished manuscript on file with author).

103. Alexander, *Impossible*, *supra* note 5, at 1010.

104. *Id.*

not an effective tool to describe what the Constitution has become through case law. This kind of thinking about rationality at its core is analogous to modernist, 19th century thinking about science that has been wiped away by quantum mechanics and chaos theory in this century. To prove it wrong, however, one would have to show that there is something similar about human reasoning and intuition that would produce case outcomes that are susceptible to explanation by a common or unifying principle. If there is a uniformity or rationality attributable to intuition, then Schauer and Alexander are wrong to focus on the rationales rather than purely the outcomes of the cases they discuss.

It is beyond the scope of this essay to prove anything in any real sense, but there are a few observations that can be made regarding a link between rationality and intuition. The first is that the regime of constitutional jurisprudence has indeed evolved from a system of rules to a system of standards. Many scholars have written about this phenomenon—Schauer and Alexander among them. Rules have been generally lauded as rational, while standards have been generally criticized as vague, and the decisionmaking process for implementing standards has been challenged as requiring too much intuition. And yet, the system of natural selection I have posited has generally yielded up an increasingly standard-oriented scheme. This development seems similar to the shift in metaphysics from the mechanistic world of Newton to the relativistic world of Einstein to the uncertain world of Heisenberg to the chaotic world of Lorenz.

The second observation is that the shift from the certain to the uncertain is not necessarily bad and not necessarily subjective. As Gerald Holton, discussing Einstein's essay on "preestablished harmony" has indicated, the key to answering all questions of "science" lies in the synthesis of rationality and intuition.¹⁰⁵ Einstein himself wrote in 1918 that from general laws "it should be possible to obtain by pure deduction the description, that is to say the theory, of every natural process, including those of life."¹⁰⁶ Einstein continued by saying that "the journey toward that goal will be neither fast nor direct" because "to the [grand] elemental laws there leads no logical path, but only intuition."¹⁰⁷ If Holton and Einstein are correct, constitutional scholars should spend less time criticizing the current chaos in constitutional jurisprudence while pining away for past certainty and more time attempting to understand the rationalities that underpin the chaotic veneer of current constitutional doctrines. The best way to do this, it seems to me, is to pursue unifying theories.

105. See Holton, *supra* note 72.

106. *Id.* (citing Albert Einstein, *PRINCIPLES OF RESEARCH* (1918)).

107. *Id.*