DEMOCRACY AND THE DEATH OF KNOWLEDGE

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Judges are under unprecedented attack in the United States. As former Justice Sandra Day O'Connor wrote in the Wall Street Journal last month, "while scorn for certain judges is not an altogether new phenomenon, the breadth and intensity of rage currently being leveled at the judiciary may be unmatched in American history."[1] Popular unhappiness with particular decisions—which began even before the Constitution and has occurred continuously since then—has turned into something deeper: a rejection of judicial review itself and a belief that judges should bow to the wishes of the popular majority.

A few years ago, I diagnosed this phenomenon as the result of a misconception that all law is politics. I suggested that it was now conventional wisdom to believe that "constitutional adjudication is simply politics by another name."[2] And because politics is the province of the people and their representatives, judges should stay out of it. According to this conventional wisdom, judicial review is democratically illegitimate.

I was wrong—not about the problem, but about its source. The explanation for the attack on the judiciary runs much deeper than a failure to separate politics from *law*. It is part of a larger phenomenon: We have begun to conflate politics and *knowledge*. In the name of democracy, we have jettisoned the role of experts and expertise.

The problem takes a variety of different forms. First, there are claims that knowledge ought to be democratically created: What a majority of people believe is true ought to be considered true, regardless of the validity of the belief under scientific, empirical, historical, or other principles. Here, manufactured knowledge bubbles up from the democratic base and actual knowledge withers. Second, people may have an illusion of their own expertise where it does not exist, and make faulty decisions for that reason. This is a substitution of ill-informed popular opinion for expertise, related to but different from the direct

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1. Sandra Day O'Connor, *The Threat to Judicial Independence*, WALL ST. J., Sept. 27, 2006, at A18, *available at* http://www.opinionjournal.com/extra/?id=110009019.

2. Suzanna Sherry, *Politics and Judgment*, 70 MO. L. REV. 973, 975 (2005).

democratic creation of knowledge. Third, actual knowledge may become irrelevant to decision-making, so that only politics matters. Knowledge dies because it is entirely displaced.

All three of these phenomena are part of what I am calling the flight from expertise and the democratization of knowledge. They share a common irony and a common consequence. The irony is that it is paradoxical to be fleeing expertise at precisely the time that expertise (especially scientific expertise) is the deepest and most specialized that it has ever been. It is thus more difficult than ever for most of the population to acquire sufficient knowledge to make informed decisions on a broad range of questions. But—and here is the common consequence—if the knowledge of experts is no more valid than the beliefs of the populace, then expertise cannot serve as a legitimate reason for placing some types of decisions in the hands of experts rather than the general public. We therefore see an increased demand for popular decision-making in contexts that we previously left to experts. My goal in this lecture is to catalogue this blurring of the line between knowledge and democratic politics, to explore its possible origins, and to explain why I believe that it is pernicious.

Before I turn to some legal illustrations of the democratization of knowledge, let me begin with two paradigmatic examples from popular culture. First, consider Wikipedia. (For those of you who are dinosaurs like me—and do not have teenage children to keep you informed of such things—Wikipedia is an on-line encyclopedia, but with a twist: *Anyone* can add to or change the information contained in an entry. If disputes arise, there are various ways to resolve them. Most of the dispute-resolution methods are more or less democratic, and although a few of the methods involve designated decision-makers, none seem to rely on the opinions of recognized experts.[3])

Wikipedia illustrates two different aspects of the relationship between democracy and knowledge. Because it is freely available over the Internet, Wikipedia is an example of the democratic availability of knowledge: Everyone can easily obtain information on a broad variety of subjects. This is what is sometimes meant by the democratization of knowledge, and it is undeniably beneficial. A little knowledge may be a dangerous thing, but we should applaud any innovation that allows more people access to knowledge.

3. Wikipedia says that it "works by building consensus," and that "[t]o develop a consensus on a disputed topic, you may need to expose the issue to a larger audience." Wikipedia: Resolving Disputes, http://en.wikipedia.org/wiki/Wikipedia:Resolving_disputes, http://en.wikipedia.org/wiki/WP:Resolving_disputes (last visited Nov. 3, 2006).

But Wikipedia—and its democratization of knowledge—has a dark side as well. With the general public rather than experts as the source of (and primary check on) Wikipedia's content, misinformation is bound to creep in. Often, the misinformation is deliberate. Political satirist Stephen Colbert, for example, urged viewers of his television show, The Colbert Report, to edit the Wikipedia entry on elephants to state that the elephant population has tripled in the last six months. As he jokingly described Wikipedia's democratic process, "all we need to do is convince a majority of people that some factoid is true."[4] That is, in fact, a reasonably accurate description of both Wikipedia and the phenomenon that I am discussing.

If the democratic creation of knowledge can be amusing, however, it can also be chilling. John Seigenthaler Sr. is a respected journalist, a former newspaper editor, a friend of and pallbearer for Robert F. Kennedy, and the founder of the First Amendment Center, a think tank for the study of free speech. (He is also the father of NBC news anchor John Seigenthaler.) For four months, Seigenthaler's biography on Wikipedia also included statements that he had lived in the Soviet Union from 1971 to 1984, and that "he 'was thought to have been directly involved in the Kennedy assassinations of both John and his brother Bobby.'"[5]

Needless to say, neither of these last two statements is true. They were posted by an anonymous contributor, and were not removed until Seigenthaler himself complained directly to the operator of the web site.[6] One of Wikipedia's volunteer editors had even edited the entry to correct a misspelling, but no one had seen fit to correct the outright falsehoods.[7] Such are the consequences of replacing expertise with popular input.

Lest you dismiss Wikipedia as a technoid aberration, let me suggest a more mundane example of the democratization of knowledge. Once upon a time we left medical practice to experts, including doctors. They diagnosed what was wrong with us and prescribed drugs to treat it.

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4. The video clip was available at Youtube.com, http://www.youtube.com/watch?v=zmHm0rGns4I (last visited Oct. 5, 2006). It has since been removed to avoid copyright problems. Of course, since he suggested this on national television, Wikipedia blocked these particular edits.

5. See Katharine Q. Seelye, *Rewriting History; Snared in the Web of a Wikipedia Liar*, N.Y. TIMES, Dec. 4, 2005, at 41; John Seigenthaler, *A False Wikipedia "Biography,"* USA TODAY, Nov. 30, 2005, at 11A; John Seigenthaler, *Truth Can be at Risk in the World of the Web*, TENNESSEAN, Dec. 4, 2005, at 15A (clarification added Dec. 7 on p. 2A).

6. The contributor later came forward and apologized to Seigenthaler. See Katharine Q. Seelye, *A Little Sleuthing Unmasks Writer of Wikipedia Prank*, N.Y. TIMES, Dec. 11, 2005, at 151. Seigenthaler had tried to discover the identity of the contributor but had been stymied by federal privacy laws. *See* Seigenthaler, *Truth Can be at Risk*, *supra* note 5.

7. *See* Seigenthaler, *Truth Can be at Risk*, *supra* note 5.

Medical professionals were—and still are—the only ones with the power to authorize the use of prescription drugs. But the diagnosis of illness and the preliminary determination of appropriate treatment have been democratized.

Drug manufacturers now advertise their prescription drugs in the popular media, describing the symptoms of—and pushing their cure for—everything from heart disease and depression to toenail fungus and "restless leg syndrome." The drug companies are essentially trying to create in their audience an illusion of expertise. And people must be buying it, because otherwise these ads would not be proliferating at such a dizzying rate. Like Wikipedia, pharmaceutical advertising is not all positive: Some studies have concluded that it is one factor in the rising cost of prescription drugs and that it also has negative effects on the practice of medicine.[8]

Wikipedia and drug advertising are just two examples of how the expansion of democratic ideals into the domain of knowledge has diminished the role of experts. In both cases, the democratization of knowledge has led to unanticipated negative consequences. One lesson I take from these examples—a point to which I will return later—is that we should be cautious about abandoning expertise in favor of popular opinion.

Other legal scholars have apparently missed this lesson. The democratizing spirit has invaded the realm of legal knowledge, and it is not a pretty picture. In at least three different doctrinal areas—constitutional law, administrative law, and, most recently, civil procedure—prominent scholars are urging that expert decision-making be replaced with democracy. After briefly surveying this scholarship, I will talk a bit about the origins of the flight from expertise and then return to the underlying normative question: Is there such a thing as too much democracy?

Let us begin with constitutional law, and the movement toward "popular constitutionalism." This is part of the phenomenon that Justice O'Connor was lamenting. She was referring primarily to politicians and pundits, but I want to focus instead on legal scholarship.

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8. *See, e.g.*, Michele L. Creech, *Make A Run for the Border: Why the United States Government Is Looking to the International Market for Affordable Prescription Drugs*, 15 EMORY INT'L L. REV. 593 (2001); Andrew Harris, Note, *Recent Congressional Responses to Demands for Affordable Pharmaceuticals*, 16 LOY. CONSUMER L. REV. 219 (2004); Peter H. Stone, *PhRMA Fights Back*, NAT'L J., Jul. 21, 2001, at 2314; Spencer Swartz, *FDA Big Factor Behind High US Drug Costs—Economist*, FORBES.COM, Jan. 27, 2004, http://www.forbes.com/home_europe/newswire/2004/01/27/rtr1230471.html; Tamar V. Terzian, *Direct-To-Consumer Prescription Drug Advertising*, 25 AM. J. L. & MED. 149 (1999); Robert Steyer, *Do Drug Ads Educate or Mislead Consumers?* ST. LOUIS POST-DISPATCH, June 20, 1999, at A9.

It is a truism that our constitutional system includes what Alexander Bickel some forty years ago labeled the "countermajoritarian difficulty."[9] Unelected federal judges have the power to invalidate laws enacted by state and federal legislatures. Bickel himself, who lived in an age when expertise still mattered, resolved the dilemma by recognizing that judges and legislatures perform different functions. Legislatures represent the people, and judges are experts in legal interpretation—including constitutional interpretation. (Bickel and his followers had a lot more to say about the judicial function, but that is a different lecture.)

Many prominent contemporary constitutional scholars, however, have turned Bickel's idea of a countermajoritarian judiciary into a rejection of judicial review, contending that the Constitution should be interpreted by the people and their representatives rather than by the courts. The titles of two recent books should give you a flavor of the popular constitutionalists' claims: The People Themselves: Popular Constitutionalism and Judicial Review, by Larry Kramer (Dean of the Stanford Law School), and Taking the Constitution Away from the Courts, by Mark Tushnet (a professor at the Harvard Law School).[10]

Other scholars—including Professor Barry Friedman in his Taft lecture three years ago—have suggested that we have no countermajoritarian difficulty because judges already follow the wishes of the popular majority.[11]

Both these groups of constitutional scholars are necessarily rejecting the premise that judges perform a specialized function as experts in the interpretation of law. Instead, they suggest that the task of constitutional interpretation should—or, for some scholars, already does—fall to popular majorities. Democracy replaces expert knowledge. If even constitutional scholars are abandoning the idea of judges as legal experts, it should come as no surprise that politicians and members of the public are also attacking judicial authority.

Incidentally, in case you doubt that judges have more constitutional expertise than do popular majorities, you might consider the following facts. Only a quarter of Americans can name more than one of the rights

9. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962).

10. LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999). *See also* RICHARD D. PARKER, "HERE, THE PEOPLE RULE": A CONSTITUTIONAL POPULIST MANIFESTO (1994); Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003); JEREMY WALDRON, THE DIGNITY OF LEGISLATION (1999); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L. J. 1346 (2006).

11. Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257 (2004).

protected by the First Amendment, but more than half can name at least two of the cartoon characters from the television show The Simpsons.[12] Three times as many Americans can name two of the Seven Dwarfs as can name two Supreme Court Justices.[13] And, despite the increasing attacks on the federal judiciary, in the year 2000 only three percent of Americans knew that William Rehnquist was the Chief Justice.[14]

It is especially appropriate for me to critique popular constitutionalism in this lecture. In 1914, William Howard Taft wrote that he opposed measures that would take constitutional interpretation away from "the deliberate judgment of trained lawyers" and instead give them to "the fitful and uncertain vote of a probable minority of the electorate that cannot . . . understand the frequently complicated issues."[15]

Since Taft's day, matters have only gotten worse. Demands for democratic decision-making are spreading beyond constitutional interpretation to other legal contexts.

Administrative law scholarship provides a stark example of the increasing flight from expertise. Administrative agencies are seen as a constitutional anomaly because they seem to straddle the divide among the three branches of government. They are created by Congress, but are controlled more closely by the executive and ultimately overseen by the courts. Moreover, the agencies themselves sometimes act like a legislature by promulgating rules, and sometimes like a court by deciding disputes. And, of course, they are not mentioned in the Constitution and were not contemplated by its drafters—at least not in their current form.

For these reasons, administrative law scholars have long struggled to find models supporting the legitimacy of agencies. One of the earliest models—the one that animated the New Deal architects of our modern administrative state—relied on agency expertise. Congress makes general policy decisions, but the appropriate implementation of those decisions often depends on the particular factual context. In many cases, scientific or other specialized knowledge is necessary to make the appropriate trade-offs between, for example, clean air and consumer costs, automobile safety and gas mileage, or the risks and benefits of a new pharmaceutical product. The New Dealers believed that

12. *Aye, Carumba! U.S. Fails History*, NEWSDAY, Mar. 2, 2006, at A15.

13. Reuters, *We Know Bart, but Homer is Greek to Us*, L.A. TIMES, Aug. 15, 2006, at A14.

14. Martin Gilens, *Political Ignorance and Collective Policy Preferences*, 95 AM. POL. SCI. REV. 379, 393 (2001).

15. William Howard Taft, *The Courts and the Progressive Party*, SATURDAY EVENING POST, Mar. 28, 1914, at 9, 47.

administrative agencies could either provide that specialized knowledge themselves or evaluate and incorporate into their decisions evidence presented to them by outside experts.[16]

The expertise model of administrative agencies has, however, been replaced by one that grounds agencies' legitimacy on democratic accountability instead. Conventional wisdom—largely unchallenged among administrative law scholars—places control over administrative agencies in the president. Because the president is elected by the whole nation, the theory goes, agency action is legitimate solely because it is based on, and reflective of, majority will. Nothing else matters. Again, democracy has replaced expertise.[17]

Identifying judges as experts, as I have done in this lecture and in other work, is not intuitively obvious. But attributing expertise to administrative agencies, especially in contexts involving scientific knowledge, seems more natural. (For lawyers, law professors, and law students, the difference may result in part from the fact that we have so internalized legal expertise that we fail to recognize it as such.) That difference, however, strengthens my argument. If even in administrative law we envision a world in which popular majorities rather than experts make these sorts of decisions, democracy has inserted itself deep into the realm of knowledge.

My third example arguably takes us even deeper into that realm. It is hard to imagine anything that depends more on specialized expertise than the Federal Rules of Civil Procedure (the Rules)—as every first year law student learns, sometimes painfully. The Rules and their amendments are drafted by panels of experts: experienced judges, litigators, and law professors. Each proposed change goes through multiple levels of such expert committees before it reaches the Supreme Court, whose justices, of course, are legal experts in their own right. After the Supreme Court promulgates a new or amended Rule, it does not take effect until Congress has had an opportunity to veto it. This process, authorized in broad outline by the federal Rules Enabling Act,[18] is designed to take full advantage of expert knowledge in a context that cries out for such expertise.

But even here we see signs of encroaching majoritarianism. Civil procedure scholarship may be at a crossroads, one through which both

16. *See generally* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975) (describing administrative law scholarship).

17. *See, e.g.*, Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461 (2003) (describing and critiquing presidential control model).

18. 28 U.S.C. § 2072 (2006).

constitutional and administrative scholarship have already passed. Most of the current scholarship critical of the Federal Rules of Civil Procedure focuses on the problem of judicial discretion and its potential for arbitrariness, inconsistency, and discrimination.[19] That may well be a problem we should address (although I have written elsewhere that we have overlooked the need for *greater* judicial discretion in some litigation contexts).[20] My purpose here is not to evaluate these critiques but to place them in the context of the move from expertise to democratic control of knowledge.

These complaints about arbitrariness and judicial discretion echo earlier generations of scholarship in constitutional and administrative law. The earliest critiques of the expertise model of administrative agencies focused specifically on procedural defects that allowed arbitrary agency decision-making. And well before popular constitutionalism rejected judicial interpretation wholesale, constitutional scholars criticized particular cases and doctrines and looked for ways to constrain judicial discretion. In both fields, this tailored criticism eventually gave way to a broader rejection of expertise. Will the same thing happen in civil procedure scholarship?

I offer here one small piece of evidence that civil procedure scholarship is heading in that direction. One of the country's leading scholars in both civil procedure and constitutional law has recently published an article suggesting that the Rules Enabling Act is unconstitutional.[21] Why? He argues that because procedure inevitably affects substantive rights, the Federal Rules of Civil Procedure ought to be enacted by Congress rather than promulgated by the Supreme Court. In other words—although he does not put it this way—democracy should replace expertise in crafting the technical rules governing litigation.

His arguments are well-reasoned and plausible. Some will find them persuasive. But the article rests, at bottom, on the same mind-set that underlies popular constitutionalism and the presidential control model in administrative law: Political legitimacy depends entirely on democratic pedigree rather than on substantive validity. Once we make that move,

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19. *See, e.g.*, Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513 (2006); Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561 (2003); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

20. Suzanna Sherry, *Logic Without Experience: The Problem of Federal Appellate Courts*, 82 NOTRE DAME L. REV. 97 (2006).

21. Martin H. Redish & Uma M. Amuluru, *The Supreme Court, The Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 MINN. L. REV. 1303 (2006). *See also* Earl C. Dudley, Jr. & George Rutherglen, *Deforming the Federal Rules: An Essay on What's Wrong with the Recent* Erie *Decisions*, 92 VA. L. REV. 707 (2006); Tidmarsh, *supra* note 19.

whether in constitutional law, administrative law, or civil procedure, expert knowledge becomes essentially irrelevant—and maybe even suspect—because it is the product of, in Professor Kramer's words, "a trained elite of judges and lawyers."[22]

In rejecting the democratization of procedure, I can once again turn to Taft for support. In his commencement address to the University of Cincinnati College of Law in 1914, twenty years before the Rules Enabling Act, Taft proposed that "[t]he rules of procedure should be completely in control of the Supreme Court or a Council of Judges appointed by the Supreme Court."[23] Congress eventually implemented his suggestion, but the democratization of knowledge is now pushing us away from it.

I hope that these examples—from Wikipedia to the Federal Rules of Civil Procedure, which is quite a distance—illustrate both the breadth and the contours of the phenomenon that I am describing.

My second task in this lecture is more speculative: I want to explore the origins of the flight from expertise. In particular, why has legal scholarship—itself the product of trained experts—sought to democratize the production of knowledge?

I suggest that the flight from expertise is a domestication of the post-modernism that flourished in legal scholarship in the late 1980s and early 1990s. Post-modernists, in and out of the legal academy, denied the possibility of objective knowledge altogether.[24] They argued that knowledge and reality were socially constructed by those in power. This raw social constructionism, however, is not just absurd, but ultimately dangerous: As Dan Farber and I argued in a 1997 book, following social constructionism to its logical conclusions necessarily leads to anti-Semitism and authoritarianism.[25]

Post-modernist social constructionism in this strong form has faded from legal scholarship. Nevertheless, I see strong traces of it in the current movement.

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22. Kramer, *supra* note 10, at 7.

23. William Howard Taft, *The Attacks on the Courts and Legal Procedure*, 5 KY. L. J. 3, 14 (1916).

24. *See, e.g.*, CATHERINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 54 (1987); Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711, 1721 (1995); Alex M. Johnson, Jr., *Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship*, 79 IOWA L. REV. 803, 819 (1994); Deborah L. Rhode, *Missing Questions: Feminist Perspectives on Legal Education*, 45 STAN. L. REV. 1547, 1555 (1993); Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 806; Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886 (1989).

25. DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW (1997).

Consider the underlying premise of social constructionism: that knowledge is constructed by powerful elites in order to maintain and consolidate their power. If the corollary is that there is no such thing as objective knowledge, we arrive at a post-modern paradox. Whatever knowledge the post-modernists themselves are urging us to accept is *also* socially constructed, and we have no particular reason to prefer it to any other form of knowledge.

Watering down social constructionism into a democracy-based flight from expertise, however, eliminates the paradox *and* makes the arguments less absurd and more palatable. The alternative to knowledge created by elites and experts is no longer just some other socially constructed knowledge, but is now "real" knowledge with an additional patina of political legitimacy because of its democratic origins. Like social constructionism, then, the democratization of knowledge is an attack on expertise and objective measures of truth, but in a much more consumer-friendly package. Domesticating post-modernism in this way has allowed it to spread well beyond academics, as the original post-modernism never could.

There is an historical irony in all of this. The post-modern movement in legal academia can trace its roots back to the legal realism of the early twentieth century. Legal realists rejected the formalist notion that law embodies neutral general principles, which both derive from and determine the results in individual cases. Instead, the realists argued that legal principles are indeterminate, and their application could always vary with the substantive views of the particular judge.[26]

But the legal realists—unlike the post-modernists—did not believe that the indeterminacy of law left the judicial enterprise as a pure exercise of raw power. The realists instead put their faith in expertise and empirical data as constraints on adjudication.[27] Legal rules might be indeterminate, but knowledge itself was not—and knowledge did not depend on popular democracy. Post-modernists eventually applied the realists' indeterminacy thesis beyond legal doctrines to knowledge itself, leaving behind what they considered to be the legal realists' naive reliance on objective empiricism. For the post-modern social constructionists, *everything* was indeterminate.

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26. For descriptions of legal realism, *see, e.g.*, NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE (1995); FARBER & SHERRY, *supra* note 25; LAURA KALMAN, LEGAL REALISM AT YALE, 1927–1960 (1986); LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1996); G. EDWARD WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT (1978).

27. *See* JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE (1995).

And now, it seems, we have come full circle. Today's popular constitutionalists and their ilk have themselves abandoned the realists' adherence to legal indeterminacy—after all, they criticize the courts for reaching incorrect results—but have retained the post-modernist skepticism of expertise. The legal realists counted on expertise to remedy the dangers of legal indeterminacy, while today's democratizers find legal certainty by substituting majority will for expertise.

We arrive at last at the fundamental normative question: Is the wholesale substitution of majority will for expertise likely to be beneficial or harmful to our constitutional democracy? In the rest of my time this morning, I will give three reasons—one each from political theory, cognitive psychology, and history—to suspect that it might be more harmful than beneficial.

First, political theory: Our Constitution does not create, and was not designed to create, a pure democracy. A regime in which majorities can directly translate their every wish into law is, if examined closely, unappealing and even dangerous, because it is likely to result in intolerance and enforced conformity. Unless we are willing to ignore the rights of political minorities, we must limit majority tyranny in some way.

In our constitutional democracy, majority will is curbed in two familiar ways: by various mechanisms that filter the popular will, and by explicit prohibitions on legislative enactments.

Instead of referendums, we have representatives—and, especially in the case of the Senate, those representatives are not supposed to serve purely as faithful agents of the people's will but to exercise deliberate judgment and (in the words of James Madison) "protect the people against the transient impressions into which they themselves might be led."[28] Roger Sherman, another influential founder, suggested that "when the people have chosen a representative, it is his duty to meet others from the different parts of the Union, and consult, and agree with them to such acts as are for the general benefit of the whole community."[29] Indeed, when the Bill of Rights was debated in the House of Representatives in 1789, the House overwhelmingly rejected an amendment that would have given citizens the right to "instruct" their representatives.[30]

28. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 193 (Ohio University Press 1966).

29. 1 ANNALS OF CONG. 735 (Joseph Gales ed., 1789) (Debate in the House of Representatives, Aug. 15, 1789)).

30. *Id.* at 733 (motion), 747 (vote; 41–10 against).

Other structural aspects of our Constitution incorporate similar filtering mechanisms. The electoral college interposes what was originally meant to be another layer of deliberation into the election of the president. The federal judiciary is intentionally insulated from popular accountability in order to give judges, in Bickel's famous words, "the capacity to appeal to men's better natures, [and] to call forth their aspirations."[31]

What these various constitutional structures suggest is that the theory of representation underlying our constitutional democracy is not one of pure agency but rather relies on deliberation and the independent exercise of judgment. It is ironic, then, that those who clamor for democratic decision-making sometimes identify the president or the legislature as the appropriately democratic decision-maker. They have apparently lost sight of the political theory of the Constitution not only in calling for democracy to replace expertise but also in their characterization of the role of the elected branches.

In addition to the structural mechanisms that prevent popular majorities from directly implementing their preferences, the Constitution provides an even more important (and probably more familiar) limit: Substantive prohibitions in the Bill of Rights and elsewhere place some majority preferences out of bounds. These safeguards against majority tyranny would be of little use if—as popular constitutionalists urge—their interpretation were the province of the majority itself. Instead, our constitutional regime has always tried to separate law from politics and leave legal interpretation—including constitutional interpretation—to legal experts. It is this tradition that the flight from expertise rejects.

It is no accident that the political theory underlying the Constitution supposes that some decisions should be made by experts rather than by purely democratic means. The founding generation, strongly influenced by the Enlightenment and its reliance on reason rather than fiat, believed that government was a science.[32] As such, it could be done well or badly, and they tried to incorporate the best science of their day into the Constitution. Madison, for example, spent a good part of 1786 preparing for the constitutional convention by reading two trunkloads of books on "ancient & modern confederacies," which Thomas Jefferson had sent him from Paris. He took copious notes, closing his discussion

31. BICKEL, *supra* note 9, at 26.

32. *See generally* DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION (2d ed. 2005); DREW R. MCCOY, THE LAST OF THE FATHERS: JAMES MADISON AND THE REPUBLICAN LEGACY (1989); FORREST MCDONALD, *NOVUS ORDO SECLORUM*: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION (1985); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996).

of each regime with a list of its constitutional defects.[33]

Of course, just because the founding generation thought that the science of politics should leaven democracy does not necessarily mean that we must agree. We have to ask whether—in the context of constitutional interpretation, agency decision-making, or the Federal Rules of Civil Procedure—experts are likely to make better choices than those produced by popular majorities.

The first problem is to define what we mean by "better choices." The scholarly literature seems to have two different definitions in mind (although neither is made explicit).

Some scholars—too many, to my mind—seem to focus only on whether they agree or disagree with the substantive choices that the courts make. Half the majoritarian scholars applaud *Lawrence v. Texas*[34] (which invalidated anti-sodomy laws) and *Grutter v. Bollinger*[35](which upheld affirmative action), but lament *United States v. Morrison*[36] (which struck down the Violence Against Women Act) and *Washington v. Glucksberg*[37] (which upheld a ban on assisted suicide). The other half take exactly the opposite position. It seems that many popular constitutionalists advocate taking the constitution away from the courts only when they do not like the courts' interpretations. In other words, some fair-weather friends of the Warren Court have become popular constitutionalists in the last fifteen years—and some critics of the Warren Court have developed a previously undiscovered fondness for judicial activism. This is not a principled attack on judicial discretion; it is a political shooting match.

Aside from the inherent inconsistency of this approach, evaluating judges by whether we agree with substantive outcomes is also unlikely to produce consensus. In the constitutional context, citizens simply disagree on the best outcome; in the procedural context, factors such as efficiency, cost, predictability, and finality must be considered but do not always align with ideal outcomes; and administrative law suffers from both problems.

Enter the other common definition of "better": more democratic and therefore more politically legitimate. To avoid evaluating outcomes, some scholars maintain that because the legislative and executive branches are more politically accountable than the judiciary, the decisions of the former are necessarily better than those of the latter.

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33. RAKOVE, *supra* note 32, at 42–43.

34. 539 U.S. 558 (2003).

35. 539 U.S. 306 (2003).

36. 529 U.S. 598 (2000).

37. 521 U.S. 702 (1997).

This approach begs the question, of course. My contention this morning is that democratic accountability is a poor substitute for expertise. Merely asserting that democracy is—or should be—our only value is essentially a statement of personal opinion in favor of the democratization movement, not an argument.

In fact, empirical studies in the field of cognitive psychology have identified certain factors that improve decision-making, by experts and non-experts. The studies focus on decisions for which we can evaluate the soundness of the decision by looking at its outcome—such as chess games and predictions of future events—but the results can help us in the contexts I am exploring, in which we cannot use the outcome to evaluate the decision-making process.

These studies find that decision-makers are more likely to be successful if they satisfy four crucial criteria: if they take into account opposing evidence and arguments; if they engage in critical thinking; if they have enough training and experience to identify recurring patterns; and if they look at many factors in order to reach a principle of decision rather than imposing a pre-set principle of decision on the existing factors.[38]

That description of good decision-making should sound very familiar, especially to lawyers and law students. It is essentially a list of the professional skills that are taught in law school and are the hallmarks of a successful lawyer. Indeed, it is a description of the basic skills that most fields of study impart to their students, from physicists to historians. One can become an expert even without formal training, but the fact that formal training in most fields stresses the pre-requisites for good decision-making should lead us to conclude that experts are more likely to make good decisions than non-experts.

Regarding legal decisions in particular, the skills that serve law students and lawyers so well are reinforced further by the structure and function of the judiciary. Judges—who have already internalized these traits from law school, and, we hope, a successful legal practice—are thrust into a collegial, deliberative, incremental, repetitive, and case-specific decision-making milieu. Every discussion with a colleague, every opinion that has to be written and rewritten because of arguments

38. *See, e.g.*, JOHN R. ANDERSON, COGNITIVE PSYCHOLOGY AND ITS IMPLICATIONS (2d ed. 1985); PHILIP TETLOCK, EXPERT POLITICAL JUDGMENT: HOW GOOD IS IT? HOW CAN WE KNOW? (2005); Michelene T.H. Chi et al., *Categorization and Representation of Physics Problems by Experts and Novices*, 5 COGNITIVE SCI. 121 (1981); Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255 (1999); Alan Lesgold et al., *Expertise in a Complex Skill: Diagnosing X-ray Pictures*, *in* THE NATURE OF EXPERTISE 229–60 (Michelene T.H. Chi et al. eds., 1988); Keith E. Stanovich & Richard F. West, *Reasoning Independently of Prior Belief and Individual Differences in Actively Open-Minded Thinking*, 89 J. Ed. Psych. 342 (1997).

by counsel or other judges, every case that depends on precedent and common law reasoning, sharpens the abilities that the studies identify as improving expert decision-making.[39]

This does not mean that judges (or other experts) never make mistakes. Nor does it mean that all experts are equal or that ordinary citizens cannot make many decisions as well as experts. But it does suggest that on average, we are likely to get better results from a panel of trained experts than from a survey of ordinary citizens.

So what is the role of democracy in our constitutional regime? It is to make value choices: the choices that depend not on expertise but on policy preferences. The popularly elected branches decide, for example, whether to go to war. But if we want to wage war *successfully*, we ask military experts and if we want to wage war within constitutional bounds we ask legal experts. In both cases, we might not like what the experts tell us—and their decisions might end up preventing us from acting as we would prefer—but putting those questions to a popular vote is a recipe for disaster.

I will close with two such disasters, one historical and one currently threatened, both in the context of scientific rather than legal expertise. Scientific knowledge provides wonderful insights here for two reasons. First, it is falsifiable in ways that legal knowledge is not. And second, we can juxtapose scientific expertise against a variety of political methods for producing knowledge—we are not limited to democracies.

So what happens when the production of scientific knowledge is removed from the hands of experts and instead placed into the realm of politics? The Soviet Union tried to do just that with the science of genetics during the first half of the twentieth century.[40] By the 1930s, the basic principles of genetic inheritance were well-established (although the exact mechanisms were still unknown). For our purposes, the most important principle is that acquired characteristics are not

39. For descriptions of judges and judging along these lines, *see, e.g.*, STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005); STEVEN J. BURTON, JUDGING IN GOOD FAITH (1992); SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES (Cornell W. Clayton & Howard Gillman eds., 1999); KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960); Suzanna Sherry, *Politics and Judgment*, 70 MO. L. REV. 973 (2005); Suzanna Sherry, *Judges of Character*, 38 WAKE FOREST L. REV. 793 (2003).

40. For information on Lysenko and Lysenkoism discussed in this and the next three paragraphs, see, for example, LOREN R. GRAHAM, SCIENCE AND PHILOSOPHY IN THE SOVIET UNION (1972); JULIAN HUXLEY, SOVIET GENETICS AND WORLD SCIENCE: LYSENKO AND THE MEANING OF HEREDITY (1949); DAVID JORAVSKY, THE LYSENKO AFFAIR (1970); Richard Lewontin & Richard Levins, *The Problem of Lysenkoism*, *in* THE RADICALISATION OF SCIENCE (Hilary Rose & Steven Rose eds., 1976); ZHORES A. MEDVEDEV, THE RISE AND FALL OF T.D. LYSENKO (I. Michael Lerner trans., 1969); VALERY N. SOYFER, LYSENKO AND THE TRAGEDY OF SOVIET SCIENCE (Leo Gruliow & Rebecca Gruliow trans., 1994); CONWAY ZIRKLE, EVOLUTION, MARXIAN BIOLOGY, AND THE SOCIAL SCENE (1959).

inheritable: If you cut off an animal's tail, its offspring will *not* be born tailless. The theory that acquired characteristics *are* inheritable is known as Lamarckianism, after eighteenth century French scientist Jean-Baptiste Lamarck, and in the nineteenth century it was a respectable scientific theory. For example, Charles Darwin, lacking a mechanism for inheritance that would not be discovered until after his death, was arguably (although uncomfortably) a Lamarckian. By the early twentieth century, however, Mendelian genetics had disproved Lamarckianism to the satisfaction of all reputable scientists.

The Soviets, however, had two problems with Mendelian genetics: First, Marx himself had believed in the inheritability of acquired characteristics—no surprise, since that theory was scientifically viable at the time Marx wrote. But to the Soviets, to repudiate Lamarckianism was to repudiate Marx. Moreover, Marxist principles of "dialectical materialism" and of using nature for the benefit of the people require that humans be able to use science to mold themselves and their surroundings to fit the "brave new world" that the Soviets were trying to create. The principles of Mendelian genetics were thought inconsistent with these goals.

Stalin found a solution to this scientific dilemma in the person of a Soviet scientist named Trofim Lysenko. Lysenko put forth his own theory of Lamarckian genetics, denying the existence of genes and affirming the inheritability of acquired characteristics. Stalin was delighted with both Lysenko's scientific theories and his claimed ability to use them to increase agricultural production. The Communist Party endorsed Lysenkoism, using the many tools at its disposal—probably including murder—to eliminate the study of Mendelian genetics in the Soviet Union.

The results were disastrous. Not only did Lysenko's agricultural programs fail—adding to the mass starvation across the Soviet Union—but by silencing his critics, he was able almost single-handedly to erase decades of Soviet scientific progress in the area of genetics. It was not until at least the mid-1960s that Lysenkoism was finally discredited in the Soviet Union.

You may think that this example is far afield from a lecture on constitutional law, even one on democracy and the death of knowledge. But there is a parallel much closer to home.

Just as the principles of Mendelian genetics are now universally accepted, scientists uniformly accept the core of evolutionary theory: that natural biological processes are responsible for changes in populations across generations, including both greater complexity in

form and function and ultimately the development of new species.[41] Although there are disputes about the exact mechanisms by which evolution occurs—and the relative importance of such factors as natural selection and genetic drift—not a single reputable scientist denies that humans evolved from other species by these natural mechanisms. For all that it is commonly called a "theory," evolution is as much a fact as the theory that Earth orbits the sun rather than the other way around.

But there are many non-scientists who would deny the fact of evolution, primarily on the basis of religious beliefs. According to a recent poll, 51% of Americans reject evolution, believing instead that God created humans in their present form.[42] These non-experts claim a *democratic* right to determine what counts as knowledge. Despite uniform opposition by the scientific community, they demand that public education teach evolution not as fact but as one theory among many, and that schools thus portray their religiously-based views as alternative scientific explanation.

The democratic structure of our public education system gives these ideologues an opportunity to spread their ignorance. So far, the countermajoritarian judiciary has held the line, recognizing that creationists and their successors are attempting to substitute religion for science.[43] But the further we proceed with the democratization of knowledge and the flight from expertise, the more credible the anti-evolution claims will be. And just as Lysenko ensured that generations of Soviet scientists lagged behind their western contemporaries in scientific knowledge, capitulating to the democratizers on evolution will produce a generation of Americans ignorant of basic scientific facts. Perhaps as ominous is the prospect that the democratization of knowledge will distort legal principles the same way that Lysenkoism distorted scientific principles. Democratization thus threatens to turn American law into an institution as dysfunctional as the Soviet scientific academy.

So, yes, there can be such a thing as too much democracy, when it starts us down the road to the death of knowledge.

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41. *See generally* DOUGLAS F. FUTUYMA, EVOLUTIONARY BIOLOGY (Sinauer Assoc. 3d ed. 1997).

42. CBSNews.com, Poll: Majority Reject Evolution, www.cbsnews.com/stories/2005/10/22/opinion/polls/main965223.shtml (last visited Jan. 5, 2007).

43. *See* Edwards v. Aguillard, 482 U.S. 578 (1987); Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337 (5th Cir. 1999); Kitzmiller v. Dover Area School Dist., 400 F. Supp.2d 707 (M.D. Pa. 2005). *See also* EUGENIE CAROL SCOTT, EVOLUTION VS. CREATIONISM: AN INTRODUCTION (2004); Jay D. Wexler, *Darwin, Design, and Disestablishment: Teaching the Evolution Controversy in Public Schools*, 56 VAND. L. REV. 751 (2003).