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CONSTITUTIONALIZATION*

GIRARDEAU A. SPANN**

I. INTRODUCTION

Students of constitutional law tend to suspect pretty early on that the Constitution simply means whatever the Supreme Court says that it means. Rather than fight that intuition, I think it is best to treat the student insight as one of the basic starting assumptions when teaching a course in Constitutional Law. The goal then becomes to help students figure out how best to maneuver and feel comfortable in a legal universe where the Constitution has only contingent meaning.

The Constitution is best understood as a repository of shifting cultural values. Normative preferences that the culture holds dear at any particular point in time are commonly said to emanate from the Constitution, thereby giving those preferences an aura of fundamental or transcendent importance. But the view that the Constitution itself prescribes values in a way that is independent of prevailing cultural norms now seems obsolete. The document is simply too imprecise, and is typically worded at too high a level of abstraction, for that view to be taken seriously in a culture that is striving to survive the insights of legal realism. Rather, the post-realist Constitution emerges as a metaphor for privileged normative values. And the practice of constitutional law emerges as the practice of generating constitutional meaning from normative preferences.

The process of transforming normative preferences into constitutional law is overseen primarily by the Supreme Court, through the institution of judicial review. Using its talent for analytical reasoning, the Court amalgamates input from various sources—including constitutional language, original intent, political theory, and pragmatic sensitivity—in a way that is intended to give operational meaning to the abstract principles said to emanate from the Constitution. In the process of divining constitutional meaning, the Court must of course consult the culture's prevailing normative values to ensure that the

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Court's constitutional pronouncements will be politically palatable. But the Court cannot simply defer to prevailing political preferences, for that would collapse the important distinction between constitutional law and ordinary politics on which the enterprise of counter-majoritarian constitutionalism depends for its legitimacy in a democratic society.

The line between permissible constitutional interpretation (that is *informed* by prevailing cultural values) and impermissible constitutional pronouncement (that is simply a *conduit* for prevailing political preferences) can be a difficult line to discern. And much of the Supreme Court's constitutional exposition can be understood as an effort to explain why the Court's decisions have not strayed from the permissible side of the line. But ultimately, the distinction between constitutional law and ordinary politics becomes untenable. Once scrutinized, the Supreme Court's constitutional jurisprudence appears not only to consist largely of political policy preferences but also to consist largely of the political policy preferences that are favored by a majority of the Court. Although the legitimacy of such judicial review is open to serious question, for present purposes, it is the *process* by which political preferences acquire constitutional stature that is of greater concern.

What the Supreme Court does when it clothes its political policy preferences in the garb of constitutional law can be described as the process of *constitutionalization*. The counter-majoritarian Court takes an action that would be viewed as having questionable legitimacy if the political or normative nature of the action were apparent, but the Court legitimates that action by arguing that the action is actually compelled by the Constitution. Among the analytical techniques that the Court uses to constitutionalize its policy preferences, three are of particular interest—as are their vulnerabilities. First, the Court often adopts tacit analytical baselines to mask the unstated political assumptions on which its constitutional assertions rest. However, the technique of *baseline shifting* can often be used to illuminate those baseline assumptions in a way that deprives the Court's arguments of their persuasive power. Second, the Court often adopts a tacit *level of generality* in conducting legal analysis that is designed to increase the intuitive appeal of the Court's arguments. However, by re-analyzing the Court's arguments at a different level of generality, those arguments can often be shown to rest on unsupported political preferences that the Court has adopted. Third, the Court typically structures its arguments in a syllogistic form designed to show that the Court's conclusions follow logically from a set of non-controversial starting assumptions that the Court has made. However, the Court's arguments can often be *deconstructed* to show that the Court's own starting assumptions lead not to the conclusion reached by the Court, but rather to the opposite conclusion. Although the use of these techniques is not limited to the realm of constitutional law, the meaning of the Constitution is heavily dependent upon the manner in which these techniques are invoked. Therefore, teaching how

the process of constitutionalization works is a good way to teach both the pragmatic and theoretical dimensions of constitutional law.

Part II of this Article discusses the concept of constitutionalization. Part II(A) discusses the manner in which legal realism supplanted doctrinal formalism as the prevailing conception of judicial review. Part II(B) discusses the emergence of constitutionalization as a means of protecting the legitimacy of judicial review from the insights of legal realism. Part III discusses the rhetorical techniques that the Supreme Court often uses to constitutionalize normative preferences and the ways in which those techniques can be manipulated to expose the political nature of the Court's decisions. Part III(A) discusses the technique of baseline shifting. Part III(B) discusses the technique of manipulating levels of generality. Part III(C) discusses the technique of deconstruction. Mastering the use of these techniques will not only help us decode what the Supreme Court is doing when it announces constitutional rules, but it will also help us to formulate arguments that we ourselves can use when we ask the Court to constitutionalize our own normative preferences. The article concludes that once Supreme Court constitutional adjudication comes to be widely regarded as a mere reflection of Supreme Court political preferences, society may wish to reconsider the advisability of judicial review. From the perspective of democratic self-governance, such reconsideration may well be overdue.

II. CONSTITUTIONAL REALISM

Since the advent of legal realism, it has been difficult to argue with a straight face that the Constitution itself resolves the many contentious political disputes that are often said to be settled in its name. Proponents and opponents of controversial practices such as abortion, school prayer, and affirmative action typically argue that the Constitution requires the outcomes that they personally prefer. But because that claim can be made with equal amounts of logical appeal by advocates on both sides of such issues, it seems that the normative preferences of the advocates—rather than the provisions of the Constitution—serve as the genesis of the desired results. That is the lesson of legal realism. And in the wake of legal realism, we are forced to confront the realization that constitutional meaning is largely the outgrowth of political preferences possessed by those who have the power to constitutionalize their normative values.

A. Legal Realism

In the beginning, the Constitution was thought to contain a set of determinate legal rules and standards that a reviewing court could consult in a fairly mechanical manner to ascertain the constitutionality of a challenged

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governmental action.[1] Indeed, under the late-nineteenth-century formalist conception of law as a "science," legal principles were thought to be "discovered" and refined through a process of successive adjudications that tested and retested judicial observations about the content of law in a manner that resembled the scientific method.[2] That formalist view of law was important to the legitimacy of judicial review because it entailed only a minimal need for the exercise of judicial discretion, thereby avoiding the counter-majoritarian problem that would exist if the Supreme Court were seen to be substituting its policy preferences for the policy preferences of the representative branches of government.[3] Luckily, the legal principles embedded in the Constitution provided the external constraint on judicial discretion that was needed to ensure the counter-majoritarian legitimacy of judicial review in a democratic society. And as long as the Supreme Court could credibly claim that it was "applying" law rather than "making" law, the politically unaccountable Court could avoid the charge that it was violating separation of powers principles by usurping policy-making authority from the elected branches.[4]

Legal realism has now made the claim that the Court is simply "applying" the law contained in the Constitution a hard claim to accept. Beginning as early as 1910, and proliferating during the 1920s and '30s, legal realists demonstrated that the ambiguities inherent in legal doctrine were so pervasive

1. This view of judicial review is captured by the following frequently quoted statement of Justice Roberts in *United States v. Butler*:

> It is sometimes said that the court assumes a power to overrule or control the action of the people's representatives. This is a misconception. . . . When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.

297 U.S. 1, 62 (1936), *quoted in* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 36 (4th ed. 2001). Contemporaneous with the *Butler* decision, some commentators questioned whether such nondiscretionary judicial review was realistically possible. *See, e.g.*, Vincent M. Barnett, Jr., *Constitutional Interpretation and Judicial Self-Restraint*, 39 MICH. L. REV. 213, 227–28 (1940). And it has been suggested that not even Justice Roberts actually contemplated the degree of nondiscretionary judicial review that is often attributed to him. *See* David P. Currie, *The Constitution in the Supreme Court: The New Deal, 1931-1940*, 54 U. CHI. L. REV. 504, 531 (1987).

2. *See* G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 20–37 (1980) (discussing nineteenth-century conception of law as science).

3. *See* STONE ET AL., *supra* note 1, at 35–45, 685–92 (discussing counter-majoritarian problems entailed in judicial review and contemporary theories of constitutional interpretation designed to constrain judicial discretion).

4. For example, President George W. Bush recently called for a constitutional amendment banning gay marriage, arguing that such an amendment is necessary to prevent activist judges from making law rather than merely applying law. *See* Robert S. Greenberger, *High Court Won't Review Challenge to Gay Marriage*, WALL ST. J., Nov. 30, 2004, at A2.

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that courts could not realistically be expected to resolve those ambiguities without ultimately resting their decisions on the exercise of judicial discretion. The realists were skeptical about the value of legal rules and principles in predicting judicial outcomes, and they were distrustful of supposed universal truths in the context of law.[5] This distrust of legal doctrine prompted some realists to shift their emphasis from law to various social sciences—such as sociology, psychology, and economics—as a way to ascertain the true basis of judicial decisions. This spawned the now-ubiquitous "law and" movements that have paired law with other disciplines.[6] Other realists chose to emphasize the importance of process—as opposed to substantive legal doctrine—in their efforts to justify the legitimacy of judicial decisions.[7]

The Critical Legal Studies and Postmodern movements that began in the 1970s and '80s took the realist rule skepticism insight to its logical next step. They applied realist rule skepticism to the claims of legal realism itself and argued that the indeterminacy highlighted by the realists in the context of legal doctrine also applied to the social science and process principles that the realists invoked to fill the void that had been created by their doctrinal indeterminacy insights. According to this Postmodern view, *all* principles are sufficiently indeterminate that they require resort to the normative values of the person applying those principles in order to acquire operational meaning. As a result, Postmodernists deem all meaning to be contingent rather than universal and therefore subject to the biases and predispositions of whoever is engaged in the act of interpretation. Although these more extreme Postmodern claims remain highly controversial, the rule skepticism and doctrinal indeterminacy insights of legal realism now seem to be both widely shared and widely regarded as preferable to the formalist account of law that preceded the advent

5. *See* WHITE, *supra* note 2, at 63–75 (discussing growth and nature of legal realism). Contemporary distrust of principled decision-making is the enduring legacy of the legal realists. *See, e.g.*, *In re* J. P. Linahan, Inc., 138 F.2d 650, 652–53 (2d Cir. 1943) (Frank, J.) (arguing that prejudices and preconceptions shared by society, as well as idiosyncratic sympathies of judges, find expression in society's legal system); JEROME FRANK, LAW AND THE MODERN MIND xiii, 115 (6th ed. 1963) (arguing that judicial temperament, training, biases, and predilections influence decisions); KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 3–4, 11–18, 393 (1960) (arguing that human psychology, particular circumstances, and inherent probabilities create a nonuniform pattern of decisions); *cf.* L.L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429, 435–38 (1934) (recognizing that judges often decide cases on policy grounds and then "wring" from doctrine an acceptable legal basis for the decision).

6. *See generally* Arthur Allen Leff, *Law and*, 87 YALE L.J. 989 (1978) (commenting on proliferation of "law and" movements in legal scholarship).

7. *See* BRIAN H. BIX, A DICTIONARY OF LEGAL THEORY 3–5 (2004) (discussing American legal realism and influence of social science and process theories); WHITE, *supra* note 2, at 63–75 (discussing legal realist attraction to social science and process theories).

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of legal realism.[8] In fact, a common contemporary cliché insists that "we are all realists now."[9]

The insights of legal realism have important consequences for constitutional law. If legal doctrine can no longer be counted on to insulate judicial decisions from the normative preferences of the judges who render them, the constitutional law that is being announced by judges will ultimately be shaped by the normative values of the judges themselves. That, in turn, threatens the legitimacy of judicial review because the realist indeterminacy insight means that the Constitution itself can no longer be counted on to impose any interesting degree of constraint on the exercise of judicial discretion. Stated more bluntly, there is nothing in the post-realist Constitution to prevent a judge from elevating that judge's own normative or political preferences to the level of constitutional law. And to make matters worse, the problem does not stem merely from the danger of judicial *abuse* at the hands of judges who are unable to exercise judicial self-restraint. Rather, the problem stems from the fact that judicial discretion is a *necessary incident* of judicial interpretation because the force of the realist indeterminacy insight is that legal rules and standards have no operational content *until* some meaning has been supplied through recourse to a judge's normative values.

This does not mean that judges are free to do whatever they like when they are "interpreting" the Constitution. There are meaningful, pragmatic, and political constraints on the exercise of judicial discretion. For example, one of my colleagues once wrote an article arguing that the Constitution required socialism rather than capitalism as the Nation's prevailing economic theory.[10] Although there are no logical flaws in the argument, everyone realizes that a contemporary court would never read the Constitution to require socialism. The economic and ideological forces that influence United States culture would not tolerate such an outcome. But the constraints that prevent unacceptable exercises of judicial power are pragmatic and political in nature. They are not *doctrinal* constraints. And because they are pragmatic and political, they cannot be counted on as a safeguard against abuses that are also pragmatic and political in nature. Pragmatic and political constraints may be adequate to prevent extreme abuses of judicial discretion, but they cannot be trusted to guard against the normative preferences of judges in the cases that

8. *See* BIX, *supra* note 7, at 4–5, 161–62 (discussing Critical Legal Studies and Postmodernism). *See generally* Note, *'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 HARV. L. REV. 1669, 1670–76 (1982) (discussing progression from legal realism to Critical Legal Studies).

9. BIX, *supra* note 7, at 4; LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960, at 229 (1986) ("'We are all realists now.' The statement has been made so frequently that it has become a truism to refer to it as a truism.").

10. Mark V. Tushnet, *Dia-Tribe*, 78 MICH. L. REV. 694 (1980) (reviewing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978)).

are realistically likely to be presented to the courts for constitutional adjudication. Controversies surrounding issues such as abortion, school prayer, and affirmative action are contentious precisely because there is no pragmatic or political consensus on how those issues should be resolved. What that means, as a matter of constitutional law, is that those issues can be resolved only through recourse to the normative or political preferences of the judges who adjudicate them. Once detached from the normative values of the decision-maker, the Constitution simply does not speak to the controversial policy issues of the day.

B. Constitutionalizing Norms

If judicial policy preferences—rather than the Constitution itself—are ultimately responsible for determining the constitutionality of controversial social practices such as abortion, school prayer, and affirmative action, the legitimacy of judicial review is called into serious question. If all that judges are doing when they rule on the constitutionality of the day's burning social issues is substituting their own policy preferences for the policy preferences of the representative branches of government, the institution of judicial review becomes difficult to square with the idea of democratic self-governance. Under our tripartite constitutional scheme of divided governmental powers, the politically accountable representative branches are given the power to formulate social policy. The politically unaccountable, "least dangerous" judicial branch[11] is given the power to nullify those policy choices only when they violate norms that are contained in the *Constitution*—not when they merely offend judicial ideas of policy prudence.[12] As a result, legal realism has forced the proponents of judicial review to propose justifications for the practice of judicial review that are designed to deflect the realist threat. Theories ranging from hard originalism, to natural law deontology, to process-based representation reinforcement have been proposed. To date, however, no post-realist theory of judicial review has been able to overcome the power of the realist indeterminacy critique, and no theory has been able to command consensus support.[13] Nevertheless, you may have noticed that the institution of

11. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–23 (1962) (noting the view of Alexander Hamilton that the judiciary is less threatening to political rights than other branches of federal government and discussing the limited competence of the Supreme Court to make social policy).

12. *See id.* (discussing counter-majoritarian problem entailed in judicial review); STONE ET AL., *supra* note 1, at 35–45 (also discussing counter-majoritarian problem entailed in judicial review).

13. *See* STONE ET AL., *supra* note 1, at 685–92 (discussing contemporary theories of constitutional interpretation designed to constrain judicial discretion in way that avoids counter-majoritarian problem).

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judicial review is still alive and well in the United States, notwithstanding the lack of a satisfactory solution to the post-realist counter-majoritarian problem.

The Supreme Court remains ultimately responsible for announcing constitutional rules in the United States, even though the contemporary Court is widely regarded as a political body. The Court consists of a recognized liberal voting bloc and a recognized conservative voting bloc. The conservative bloc presently comprises a political majority on the Court, and it typically prevails by 5–4 votes in cases involving controversial social issues. Close cases tend to be decided by the politically more moderate "swing" Justices on the Court.[14] Supreme Court nominees, as well as controversial lower court nominees, are subject to having their appointments blocked in the Senate through filibusters—solely because of partisan opposition to their political views.[15] And recently, partisan support for conservative nominees has even generated proposals to modify the long-standing Senate filibuster rules themselves, in order to prevent liberals in the Senate minority from blocking the appointment of conservative nominees who are viewed as having extreme political views.[16] Political litmus tests are also commonly used to determine the judicial "qualifications" of potential nominees, and those litmus tests are used with equal vigor by members of both major political parties.[17]

There can be little doubt that the judicial process is intensely political.[18] Politics determines judicial selection because those who select the judges suppose that politics will frequently determine how the selected judges will vote. And there can be little doubt that this supposition is correct. When the Supreme Court definitively "interprets" the Constitution, as the Court insists that it has the power to do,[19] the Justices have little choice but to constitutionalize their own normative values because the Constitution itself is too abstract to provide concrete case outcomes. The provisions of the Constitution, therefore, end up meaning whatever the political preferences of a Supreme Court majority cause them to mean at any given point in time. The

14. *See, e.g.*, GIRARDEAU A. SPANN, THE LAW OF AFFIRMATIVE ACTION: TWENTY-FIVE YEARS OF SUPREME COURT DECISIONS ON RACE AND REMEDIES 159–64 (2000) (discussing Supreme Court voting blocs on affirmative action issues).

15. *See* Helen Dewar, *Judiciary Panel Backs Specter: GOP Senators Elicit Pledge Not to Block Antiabortion Judges*, WASH. POST, Nov. 19, 2004, at A6; Michael A. Fletcher & Helen Dewar, *Bush Will Renominate 20 Judges: Fights in Senate Likely Over Blocked Choices*, WASH. POST, Dec. 24, 2004, at A1.

16. *See* Dewar, *supra* note 15; Fletcher & Dewar, *supra* note 15.

17. *See* Dewar, *supra* note 15.

18. *See id.*; Fletcher & Dewar, *supra* note 15.

19. Cooper v. Aaron, 358 U.S. 1, 17–20 (1958) (recognizing "the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution," and quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), for the proposition that "[i]t is emphatically the province and duty of the judicial department to say what the law is").

First Amendment now protects subversive advocacy,[20] even though it used to prohibit criticism of governmental policies.[21] The Equal Protection Clause now prohibits racial segregation[22] and discrimination against women,[23] even though the Constitution used to permit both.[24] The Due Process Clause now protects the right to abortion,[25] even though that right did not exist before 1973,[26] and even though it might cease to exist after the next Supreme Court appointment.[27] Throughout all of those changes in constitutional meaning, however, the language and original intent of the pertinent constitutional provisions has remained precisely the same. The only thing that has changed is the normative values of the Justices—informed by their own political preferences and by their perceptions of the political leanings of the culture at large.

Notwithstanding the obvious influence of judicial policy preferences on constitutional adjudication, the political character of judicial review has not produced the crisis in judicial legitimacy that one might have expected to follow the realist assault on the fig leaf of principled judicial neutrality. Even after the Supreme Court arguably delegated to itself the power to choose the next President of the United States in its 2000 *Bush v. Gore* decision,[28] the Court was able to escape largely unscathed from the vocal charges of politically motivated decision making that ensued.[29] One cannot help but wonder

20. *E.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969) (holding that the First Amendment protects subversive speech at Ku Klux Klan rally).

21. *E.g.*, Schenck v. United States, 249 U.S. 47 (1919) (holding that the First Amendment does not protect distribution of fliers claiming that military conscription violates the Thirteenth Amendment).

22. *E.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (holding that the Equal Protection Clause of the Fourteenth Amendment prohibits segregated education).

23. *E.g.*, United States v. Virginia, 518 U.S. 515 (1996) (holding that the Equal Protection Clause of the Fourteenth Amendment does not permit women to be excluded from unique Virginia military college).

24. *E.g.*, Plessy v. Ferguson, 163 U.S. 537 (1896) (holding that the Constitution permits Louisiana law requiring racial segregation of railroad passengers); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873) (holding that the Constitution permits Illinois law denying women license to practice law).

25. *E.g.*, Roe v. Wade, 410 U.S. 113 (1973) (holding that the Due Process Clause protects right to abortion).

26. *See id.*

27. *See* Webster v. Reprod. Health Servs., 492 U.S. 490, 537–38, 556, 560 (1989) (Blackmun, J., concurring in part and dissenting in part) (suggesting that new Supreme Court appointment could result in overruling right to abortion).

28. *See* Bush v. Gore, 531 U.S 98 (2000) (holding unconstitutional a Florida Supreme Court order to recount votes in the extremely close 2000 presidential election, thereby enabling George W. Bush to become President of the United States).

29. *See* Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1450–58 (noting there was only modest decline in popular support for the Court

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why a society that is formally committed to the principle of democratic self-governance would nevertheless permit the most controversial of its social policies to be determined by a politically unaccountable Supreme Court. The answer seems to be that United States culture is also committed to a principle of liberal individual rights, whose protection from the whims of self-interested majorities is guaranteed by the Constitution. And constitutional protection of liberal rights cannot work unless a counter-majoritarian body such as the Supreme Court can be trusted to enforce those rights against potentially oppressive political majorities.

The realists have now demonstrated that the Supreme Court cannot reliably be trusted to perform this function in a non-political way—that the Supreme Court itself might be the fox that is guarding the henhouse gates.[30] But that is an insight that society cannot acknowledge without risking a breakdown in the liberal conception of individual rights itself.[31] It appears that United States culture likes the idea of judicial review so much that it is often willing simply to overlook the counter-majoritarian problem created by the influence of judicial politics on constitutional adjudication. Rather than confront the separation of powers difficulties inherent in post-realist judicial review, the culture is inclined to accept any plausible invitation to look the other way when the Court permits its politics to influence its constitutional decisions.

Professor Mark Tushnet once noted that Senate confirmation hearings for federal judicial nominees ritualistically require nominees to assure the Judiciary Committee that they will follow the intent of the framers and "apply" the law of the Constitution, rather than allow their own political views to "make" constitutional law. That ritual is repeated in successive judicial nomination hearings, even though both the nominees and the Senators who question them ought to understand the hollowness of such assurances.[32] However, the persistence of those recurrent confirmation ceremonies suggests that the rituals associated with judicial neutrality may be more important than the reality of judicial politics. Performance rituals of this sort seek to reassure us about the legitimacy of judicial review, in the apparent belief that judicial

in the wake of *Bush v. Gore* and suggesting ways in which the Supreme Court may end up retaining or increasing its political capital in the aftermath of the decision).

30. *See, e.g.*, Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856) (upholding institution of slavery); Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874) (upholding denial of women's right to vote); Korematsu v. United States, 323 U.S. 214 (1944) (upholding exclusion order that led to World War II internment of Japanese-American citizens); Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding criminalization of homosexual conduct).

31. *See* Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 781–86 (1983) (arguing that neutral constitutional principles needed for judicial enforcement of liberal constitutional rights can come only from a conservative communitarian tradition that denies the importance of liberal individual rights).

32. *See id.*

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neutrality can be achieved through an act of will. They do this both by distracting us from the fact that it is the normative values of judges that generate the content of constitutional law and by focusing our attention on the alternate ideal of judicial neutrality. The rituals are not analytically responsive to the counter-majoritarian problem. But they appear to work because we want them to work. It is as if by reciting the words of a mantra frequently enough, we can make the aspirations of the mantra become true.

Law obviously serves an important legitimating function in the United States. In the past, we have relied on the legal system to justify practices such as slavery,[33] the seizure of land from indigenous Indians,[34] the wartime internment of Japanese-American citizens,[35] and the refusal to allow women to vote.[36] Now we rely on law to justify practices such as de facto racial discrimination,[37] capital punishment,[38] flag burning,[39] nude dancing,[40] and on-line pornography.[41] Whether such practices are Platonically "correct" could be endlessly debated, but we have generally accepted those practices as culturally appropriate when the Supreme Court has told us that they were constitutionally protected. As long as the Court honors the rituals associated with judicial review, we tend to view as legitimate the practices that the Court has chosen to authorize.

33. *Dred Scott*, 60 U.S. (19 How.) 393 (1856) (invalidating congressional statute prohibiting slavery in Louisiana Territory).

34. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) (holding that European discovery of land now constituting the United States, and conquest of indigenous Indian inhabitants, divested Indians of title to that land).

35. *Korematsu*, 323 U.S. 214 (1944) (upholding World War II military exclusion order leading to internment of Japanese-American citizens).

36. Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874) (upholding denial of women's right to vote).

37. Keyes v. Sch. Dist. No. 1, Denver, Colo., 413 U.S. 189, 208–09 (1973) (adopting expansive interpretation of de jure segregation but reaffirming prohibition on use of race-conscious remedies to eliminate de facto segregation); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 17–18 (1971) (same); *cf.*, Washington v. Davis, 426 U.S. 229, 238–48 (1976) (reading Equal Protection Clause to permit racially disparate impact not directly caused by intentional discrimination).

38. Gregg v. Georgia, 428 U.S. 153 (1976) (upholding constitutionality of capital punishment).

39. Texas v. Johnson, 491 U.S. 397 (1989) (invalidating under First Amendment a Texas statute prohibiting flag desecration).

40. Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) (finding First Amendment protection for nude dancing but upholding requirement that dancers wear pasties and G-strings).

41. Ashcroft v. ACLU, 124 S. Ct. 2783 (2004) (invalidating on First Amendment grounds federal Child Online Protection Act, which criminalized commercial posting on World Wide Web of pornographic material that would be harmful to minors).

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The ritual associated with judicial review that is of primary importance is the ritual of reasoned deliberation.[42] As long as the Supreme Court can announce its constitutional rulings in ways that appear to flow from the application of neutral principles to the pertinent provisions of the Constitution, the Court's rulings are likely to be generally accepted as legitimate.[43] To do this, the Court's opinions must, *inter alia*, demonstrate appropriate deference to precedent, to the text of the Constitution, to the intent of the framers, and to the rigors of syllogistic analysis. Those opinions, of course, must also exude the presence of judicial neutrality.[44] It is the *form* of reasoned deliberation that appears to legitimate the substance of the Court's constitutional rulings. This is true, even though the realists have taught us that judicial neutrality is likely to be *only* a matter of form.

I am not suggesting that Supreme Court Justices are engaged in a conspiracy that is designed to trick the American electorate into ceding policy-making power to the unelected judiciary. On the contrary, I am suggesting that the Supreme Court is simply doing precisely what we ask the Court to do. It is, of course, possible to view the Supreme Court as an agent of those who possess social power, whose judicial function is to manipulate those who lack social power into submitting to the demands of the existing power structure.[45] It is also possible to view the Court as a more sophisticated actor, whose true function is to convince us all that the existing distributional system operates fairly, so that those of us who lack power will continue to work within the existing system rather than trying to replace the system with more revolutionary alternatives.[46] However appealing such accounts might at times appear to be, I am suggesting that something more subtle is going on.

Professor Mark Kelman has argued that the process of successfully legitimating social practices and norms is more likely to be *cognitive* than *conspiratorial* in nature.[47] The process is a largely passive one that relies more

42. *See* BICKEL, *supra* note 11, at 188 (emphasizing that the Supreme Court possesses "resources of rhetoric" to convince political branches and the public of the importance of principles that the Court espouses).

43. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 16–20 (1959) (emphasizing the importance to judicial review of constitutional adjudication based on neutral principles that are disinterested, detached from political determinants, and that transcend the result in the case at issue).

44. *See id.* at 17.

45. *See* MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 262–63 (1987) (describing the process of legitimation); GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA 153 (1993) (also describing the process of legitimation).

46. *See* KELMAN, *supra* note 45, at 262–63 (describing legitimation as a process of depicting resource distribution system as fair); *see also* SPANN, *supra* note 45, at 153 (also describing legitimation as a process of depicting resource distribution system as fair).

47. KELMAN, *supra* note 45, at 269–95.

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on inertia than on guile.[48] The practices and norms that are legitimated could easily be questioned if we ever thought to scrutinize them. But it never occurs to us to subject them to analysis, because we simply accept them as foundational assumptions. Moreover, the culture's repeated reliance on such tacit assumptions further reinforces those assumptions, so that over time they grow stronger and therefore even more immune from subsequent scrutiny. This process of legitimation cannot fairly be termed conspiratorial because the legitimated assumptions actually have as much influence over those who gain power from their operation as over those to whom power is denied.[49] The process works because it ends up defining the cognitive categories in which all of us grow accustomed to thinking.[50] And, of course, the process works best when its operation is undetected.

Accordingly, the reason that the institution of judicial review has been able to survive the realist indeterminacy insight—an insight that should have caused judicial review to suffer a crisis of democratic legitimacy—is that the normative values and political preferences of judges that are needed to provide constitutional meaning are constitutionalized in a manner that is largely hidden from view. Because we want the process of judicial review to remain viable enough to prevent the collapse of our system of liberal constitutional rights, we have an interest in avoiding a confrontation with any theory that would threaten the coherence of that system of rights. We are, therefore, a receptive audience that is eager to embrace judicial opinions whose form suggests that they emanate from constitutional principles. And the institution of judicial review should continue to work well, as long as we do not analyze those judicial opinions too closely.

III. ANALYTICAL TECHNIQUES

Abstractly, the normative values contained in our organic Constitution are the values of the culture at large, as those values shift and develop at various points along the path of our cultural evolution. Operationally, however, the meaning of the post-realist Constitution is determined by the normative values and political preferences of the Supreme Court Justices who interpret the Constitution. The adjudicatory process by which judicial norms are given constitutional stature depends for its legitimacy more on the form of the constitutional arguments that the Court offers to justify its rulings than on the substance of those arguments. For those arguments to be convincing, it must appear that the Court's constitutional conclusions flow logically from the

48. SPANN, *supra* note 45, at 153.

49. KELMAN, *supra* note 45, at 262.

50. *See* KELMAN, *supra* note 45, at 269–95 (describing legitimation as a process of defining categories of social thought); SPANN, *supra* note 45, at 153 (also describing legitimation as a process of defining categories of social thought).

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provisions of the Constitution itself. Consciously or unconsciously, the Supreme Court often hides its own normative values and political preferences in the interstices of its opinions, where they are not readily apparent or easily evaluated. However, three analytical techniques are useful in uncovering the presence of such judicial preferences and in exposing the manner in which those preferences influence the Court's decisions. They are the techniques of *baseline shifting*, manipulating *levels of generality*, and *deconstruction*. I believe that teaching students to master these techniques is a good way to teach Constitutional Law.

Once students learn to use these techniques effectively, they will be able to identify for themselves the analytical weak spots in the Court's opinions and the role that judicial politics has played in generating the Court's decisions. In addition, they will be able to use these techniques to manipulate doctrine for themselves and make the Constitution generate the outcomes that they deem desirable—which is the essence of practicing constitutional law. But most importantly, once students learn to manipulate doctrine for themselves, they will no longer be able to doubt the legal realist critique of supposedly principled judicial decision making. This will force students to confront directly the troublesome questions that are raised about the legitimacy of judicial review in a post-realist legal culture. Perhaps there are still reasons why we should favor constitutionalization of the normative values and political preferences possessed by our judges. But if such reasons exist, students will have to formulate them in order to justify to themselves the continued desirability of counter-majoritarian judicial review.

A. Baseline Shifting

One way to expose the judicial preferences lying beneath the surface of a court's opinion is to focus on the baseline assumptions that the court makes in reaching its decision.[51] A good way to understand the concept of baseline shifting is to view a baseline as the thing that separates the propositions that an argument explicitly addresses from the propositions that the argument simply assumes without discussion. The propositions that receive explicit attention are located above the analytical baseline. The propositions whose validity is tacitly assumed lie beneath the baseline.

51. Portions of the baseline-shifting discussion included in this subsection are taken from text that I originally wrote for multimedia Contracts teaching materials prepared with Professors John Weistart and H. Jefferson Powell at the Duke University School of Law in 2001. Although those materials have not been published in any traditional form, they are contained on a multimedia DVD that the three authors and others have used to teach their first-year Contracts courses. *See* Videotape: The Contracts Experience (Duke University School of Law 2003) (on file with the author).

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Legal arguments made in support of particular propositions—including the arguments made in judicial opinions—always address issues that are above the analytical baseline. But their persuasive power often rests on tacit assumptions that lie beneath the baseline. If the tacit assumptions that drive a legal argument can be exposed and scrutinized, the argument may lose some of its persuasive force. The tacit assumptions on which a legal argument rests can often be exposed by shifting the analytical baseline so that the tacit assumptions can then be more readily scrutinized. In other words, baseline shifting enables us to evaluate the legitimacy of baseline assumptions that we might otherwise simply take for granted.

It is easiest to understand the concept of baseline shifting by using a concrete example. Here is a simple one. In the 1872 case of *Bradwell v. Illinois*,[52] the United States Supreme Court upheld a decision of the Illinois Supreme Court that denied a married woman the right to practice law. The Illinois Supreme Court justified its decision in part by noting that one of the things that lawyers had to be able to do was enter into enforceable contracts with their clients.[53] Because Illinois law did not permit married women to make legally binding contracts in their own names, it followed that married women could not be permitted to practice law.[54] The United States Supreme Court affirmed that decision on the grounds that the Illinois Supreme Court's gender-based denial of the right to practice law did not violate the Privileges and Immunities Clause of the United Stated Constitution.[55]

The portion of the Illinois Supreme Court's opinion denying Ms. Bradwell a license to practice law on contract incapacity grounds was explicit.[56] It existed above the analytical baseline. However, the argument rested on a tacit assumption that the Illinois law prohibiting women from making contracts was itself defensible. Although the Court's conclusion was utterly dependent upon the legitimacy of that assumption, the Court's opinion never even addressed the issue. Rather, the contractual incapacity assumption performed its dispositive function from its hiding place beneath the analytical baseline.[57]

By shifting the baseline down—so that the assumed inability of women to make contracts rises above the baseline, where its legitimacy can be scrutinized—the Court's argument loses any persuasive power that it might have had back in 1873. The assumption that married women lacked the capacity to make their own contracts was rooted in the belief that the property

52. 83 U.S. (16 Wall.) 130 (1872).
53. *In re* Bradwell, 55 Ill. 535 (Ill. 1869).
54. *Id.*
55. *Bradwell*, 83 U.S. at 139.
56. *In re Bradwell*, 55 Ill. at 535 (discussing the effect of contractual incapacity).
57. *Id*. at 539–40 (never attempting to justify contractual incapacity of married women).

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and business affairs of married women were best handled by their husbands.[58] Today, that view seems silly. But it seems silly only because we have now taken the trouble to scrutinize it. In 1873, when the dependence of married women on the superior judgment of their husbands was simply assumed without scrutiny, the assumption was able to drive the argument that women were not fit to practice law. And it was able to do so from beneath the baseline, where its influence was largely undetected.

Sometimes it is fairly obvious that a legal argument rests on a tacit assumption whose validity has not been established. In such circumstances, the baseline shifting needed to expose and evaluate the tacit assumption may occur easily and automatically. Few people in the twenty-first century would be tricked into believing that women could not practice law through blind acceptance of a nineteenth-century baseline assumption that women lack the capacity to contract. However, sometimes legal arguments rest on tacit assumptions that are too subtle for most of us to recognize at first glance. In such cases, considerable conscious effort may be required to shift the analytical baseline down far enough to expose those assumptions. Indeed, creative forms of legal argument that challenge traditional ways of thinking are often necessary to expose some of our most influential cultural assumptions. That is because those assumptions are so firmly rooted that we never think to question them. Here is an example:

In its famous 1905 *Lochner v. New York* decision,[59] the United States Supreme Court gave the doctrine of freedom of contract constitutional status. The Court invalidated a New York statute regulating the maximum number of hours that bakers could work in any one week or in any one day.[60] The law had been passed as a health and safety measure, designed to reduce some of the dangers that the New York legislature found to be posed by the excessive hours that bakers were being forced to work by their employers.[61] The Supreme Court held, however, that the statute violated the United States Constitution because the liberty interest protected by the Due Process Clause of the Fourteenth Amendment protected the right of employers and employees to make whatever employment contracts they desired without state interference in the form of maximum hours regulation.[62]

The decision was controversial at the time it was issued, but it has now been largely repudiated, both by commentators and by the Supreme Court

58. *See Bradwell*, 83 U.S. at 139–42 (Bradley, J., concurring) ("Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.").

59. 198 U.S. 45 (1905).

60. *Id.* at 64.

61. *Id.* at 57–63.

62. *Id.* at 64.

itself.[63] For present purposes, however, what is important is identifying the tacit baseline assumption on which that historic decision rested. The Supreme Court held that freedom of contract was protected by the Due Process Clause of the United States Constitution.[64] The Court further equated freedom of contract with the economic theory of laissez-faire capitalism—the belief that markets should not be distorted by government intervention.[65] The bulk of the majority opinion in *Lochner* was directed to the question of whether the occupation of being a baker was sufficiently hazardous to justify the need for regulation by the New York statute as a health and safety measure.[66] Because the Supreme Court majority believed that the statute could not be so justified, it viewed the statute as a form of economic regulation, rather than as a form of health and safety regulation.[67] And as economic regulation, the statute impermissibly violated the doctrine of laissez-faire freedom of contract.[68]

Stated more succinctly, the majority thought that the New York legislature was siding with the bakers rather than the employers in the labor contract negotiations that occurred between the two concerning hours of employment.[69] For the Supreme Court majority, this violated freedom of contract because the capitalist market rather than the state should determine the terms of a contract.[70] By siding with the bakers in their negotiations with their employers, the state provided a subsidy to the bakers in the form of increased bargaining power.[71] In economic terms, this subsidy distorted natural market ordering because it gave bakers artificial bargaining power that they would not possess in the absence of the market-distorting statute.[72] This is commonly understood to be the import of the majority opinion in *Lochner*,[73] and the Court's argument was presented above the analytical baseline in a way that was very visible.[74]

However, the Court's opinion diverted analytical attention to the issue of what did and did not constitute a permissible piece of health and safety

63. *See* STONE ET AL., *supra* note 1, at 718–29 (discussing the widespread condemnation and ultimate demise of the *Lochner* decision).

64. *Lochner*, 198 U.S. at 64.

65. *See id*. at 53–54.

66. *See id*. at 57–63 (discussing the public health and safety justifications behind the enactment of the statute).

67. *Id.*

68. *See id*. at 64 (holding that the statute violated the constitutionally protected right to freedom of contract).

69. *Lochner*, 198 U.S. at 63.

70. STONE ET AL., *supra* note 1, at 723.

71. *Lochner*, 198 U.S. at 57.

72. *Id.*

73. *See, e.g.*, STONE ET AL., *supra* note 1, at 718–23 (discussing the freedom of contract implications of *Lochner*).

74. *Lochner*, 198 U.S. at 64.

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legislation.[75] In so doing, the Supreme Court majority was able to take advantage of a tacit assumption lying beneath the baseline that gave the majority's argument whatever persuasive power it possessed. The majority tacitly assumed that the economic market in existence before New York enacted its statutory subsidy to bakers was a natural market. However, once the analytical baseline is shifted down to expose the unstated assumption that the pre-*Lochner* market was a natural market, the assumption can be subjected to analytical scrutiny. After such scrutiny, the tacit assumption becomes highly questionable.

Even prior to the enactment of the *Lochner* statute, the economic market was riddled with government subsidies.[76] For example, government right-of-way land grants subsidized railroads by permitting them to deflect some of their business costs to the taxpayers.[77] In addition, the government provided employers with more general subsidies, such as police and fire department services, which enabled employers to avoid the costs that they would otherwise need to incur in order to secure their own private police and fire protection. Even more subtly, the very existence of contract law is itself a "market-distorting" subsidy. In the absence of state-provided contract law and state-provided courts to enforce contracts, contracting parties would have to incur the expense of self-help measures to secure the enforcement of their agreements.

All of these subsidies made the market that pre-existed the *Lochner* statute a market that was far from a natural market. Accordingly, once the baseline is shifted down to permit examination of the assumption on which *Lochner* rested—that the pre-*Lochner* market was a natural market—the *Lochner* opinion ends up simply favoring one form of market subsidization over another. The *Lochner* opinion makes it clear that a majority of the Court had normative values and political preferences that favored employer-oriented business subsidies over labor-oriented redistributive subsidies. But although the Court's policy preferences determined the outcome of the case, those judicial preferences were never addressed, analyzed, or defended in the *Lochner* opinion.

Shifting the analytical baseline also suggests that the natural market ideal of *Lochner* is merely a metaphysical abstraction that cannot exist in real life. Regardless of how one feels about the various competing market subsidies that are at issue in *Lochner*, the decision looks very different once the tacit baseline

75. *See id*. at 57–63.

76. *See, e.g.*, STONE ET AL., *supra* note 1, at 723 (noting that *Lochner* adopted a "bad" baseline by assuming that the pre-*Lochner* market was free of redistributive subsidies).

77. *See generally* Danaya C. Wright & Jeffrey M. Hester, *Pipes, Wires, and Bicycles: Rails-to-Trails, Utility Licenses, and the Shifting Scope of Railroad Easements from the Nineteenth to the Twenty-First Centuries*, 27 ECOLOGY L.Q. 351, 365–89 (2000) (discussing the history of government land grant subsidies to railroads).

assumption has been exposed and scrutinized than it did when the natural market assumption remained hidden beneath the baseline. The *Lochner* illustration also demonstrates that creative lawyering can often reveal baseline assumptions that might otherwise be easily overlooked. It further suggests that we may often be able to uncover some unexamined baseline assumptions lying beneath our commonly held beliefs, if only we have the time, skill, and incentive to uncover them.[78]

Baseline shifting can also be used to illuminate the undefended judicial policy preferences that lie beneath the Supreme Court's resolution of controversies surrounding more contemporary issues of social policy. The issue of abortion is obviously quite controversial in current United States culture. The way that one feels about the issue is likely to be determined in large part by the baseline assumption that one makes about whether human life begins at conception or at birth.[79] Similarly, the way that one balances the competing interests between the fetus and the mother that are raised by the issue of abortion is likely to be determined by the same baseline assumption.[80] The baseline assumption that one makes about when life begins is so salient that it is unlikely to go unnoticed or unscrutinized in a judicial analysis of the right to abortion. However, the way that one feels about some of the collateral issues implicated in the abortion debate *are* likely to be determined by the tacit baseline assumptions that one makes.

A collateral issue that has generated continuing controversy is the issue of whether the Constitution requires a right to abortion *funding* by the government. In *Maher v. Roe*[81] and *Harris v. McRae*,[82] the Supreme Court held that the constitutional right to abortion that was recognized in *Roe v.*

78. Professor Cass R. Sunstein has made the following observation about *Lochner*:

> When the Court rejected *Lochner*, it did so largely on the ground that the common law baseline from which the Court had been operating could no longer be justified. The Court recognized that respect for the common law baseline and for the existing distribution of wealth and entitlements could itself be governmental "action" or the product of faction; the common law was itself a creation of the legal system. The lesson of the demise of *Lochner* was that common law or status quo baselines should no longer be used reflexively in public law.

Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 501–02 (1987) (footnotes omitted).

79. *See* Roe v. Wade, 410 U.S. 113, 156–62 (discussing whether a fetus is a "person" within the meaning of the Fourteenth Amendment).

80. *See id*. at 163–66 (using trimester structure to balance competing interests); *cf.* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 874–79 (joint opinion of O'Connor, Kennedy & Souter, JJ.) (adopting the "undue burden" balancing test to determine the constitutionality of restrictions on right to abortion).

81. 432 U.S. 464, 479–80 (1977) (upholding state regulation granting Medicaid benefits for childbirth but denying benefits for non-therapeutic abortions).

82. 448 U.S. 297, 326–27 (1980) (upholding federal "Hyde Amendment" denying funding for even therapeutic abortions where life of mother was not threatened).

Wade[83] does *not* compel the government to fund abortions for indigent women, even when the government chooses to fund medical services that are associated with childbirth. However, the Court's decisions denying a constitutional right to abortion-funding rest on an unstated baseline assumption whose validity can be called into question by shifting the analytical baseline.

Because *Roe v. Wade* recognized a constitutional right to abortion,[84] the government is precluded from penalizing the exercise of that right. Indeed, *Roe* itself invalidated a state statute that imposed criminal penalties on the act of procuring an abortion.[85] However, *Maher* and *Harris* held that the government refusals to fund abortions in those cases did not *penalize* the exercise of the right to abortion; they merely entailed a governmental decision not to *subsidize* the exercise of that right.[86] The inability of the plaintiffs in those cases to pay for the abortions that they sought resulted from their own indigence, not from the government's refusal to subsidize their desires.[87] Framed in this manner, the Court's argument sounds both plausible and persuasive. If the right to travel does not require the government to pay a traveler's bus fare, the right to abortion should not require the government to fund a woman's abortion.[88] But by shifting the analytical baseline, the Court's reasoning can be shown merely to rest on an unstated normative preference for childbirth over abortion.

The argument advanced by the Court in *Maher* and *Harris* tacitly assumed that the government was doing nothing more than declining to subsidize abortions and that it was doing so in a neutral manner that was not intended to penalize the right to abortion. But by shifting the analytical baseline to an earlier point in time, that tacit assumption loses its persuasive force. Prior to adopting the abortion-funding measures at issue in *Maher* and *Harris*, the government already had in place benefits programs that were designed to pay for the medical services associated with pregnancy. However, as the abortion issue became increasingly controversial, the government chose to exempt coverage for abortion services from those programs.[89] Once the baseline is shifted to emphasize this fact, the government decisions not to fund abortions

83. *Roe*, 410 U.S. at 164–66.

84. *Id*.

85. *Id*.

86. *Harris*, 448 U.S. at 316–18; *Maher*, 432 U.S. at 473–74.

87. *See Maher*, 432 U.S. at 473–74 (government was merely refusing to fund the right to abortion); *Harris*, 448 U.S. at 316–178 (holding that the constitutional right to abortion does not mean that a woman is entitled to the financial means to fund an abortion).

88. *See Maher*, 432 U.S. at 474 n.8 (using a bus fare analogy).

89. *See Harris*, 448 U.S. at 300–04 (discussing the recurring "Hyde Amendment" prohibition, first adopted in 1976, that restricts the use of federal funds for abortions under the Social Security Medicaid program adopted in 1965); *Maher*, 432 U.S. at 466 (discussing similar regulation adopted by the Connecticut Department of Welfare in 1975, restricting use of state funds for abortions).

no longer look like neutral revenue-saving measures. Rather, they look like discriminatory governmental actions that are intended to discourage the exercise of the right to abortion. Stated differently, the government's actions no longer look like mere refusals to subsidize but rather like the imposition of a penalty on the right to abortion. In amending the previous pregnancy benefits programs that were in place, the government decided that it would fund the termination of pregnancies when those pregnancies were terminated by childbirth but not when those pregnancies were terminated by abortion. It is not a woman's indigence that results in the denial of funding to terminate her pregnancy—indigent women *can* get government funding to terminate their pregnancies through childbirth.[90] Rather, it is the government's anti-abortion policy that results in the denial of the right to abortion. So viewed, the government's actions have both the intent and effect of penalizing the right to abortion. Once again, it is possible that there are analytically defensible reasons for permitting the government to refrain from funding abortions, but those reasons are never addressed or defended in the Supreme Court's abortion-funding opinions. The Court's decisions again rest on the normative values and political preferences of a majority of the Justices.

Skillfully used, the technique of baseline shifting can enable one to isolate the point in a court's analytical reasoning where the policy preferences of the judge are hidden. By uncovering those vulnerable points in the court's analysis, any unwarranted persuasive momentum created by a judicial opinion can be dissipated and a sounder analysis can be offered in its place. But if the realists are correct, the "sounder" analysis can ultimately be shown to rest simply on an alternate set of normative preferences as well.

B. Levels of Generality

A second technique that can be useful in uncovering normative preferences of judges that are hidden in judicial opinions is the technique of manipulating levels of generality. Legal arguments often assume a tacit level of generality in the analyses that they offer to justify their conclusions. However, an argument that initially seems persuasive when evaluated at one level of generality may lose its persuasive power when evaluated at a different level of generality. Therefore, shifting levels of generality is a good way to expose the vulnerable points in a court's constitutional arguments. Manipulating levels of generality can also be helpful in formulating constitutional arguments that advocates wish to have courts adopt.

A simple illustration of the way in which an argument's tacit level of generality can affect its persuasiveness is provided by the non-constitutional tort case of *Salinetro v. Nystrom*.[91] The plaintiff was injured in an automobile

90. *Harris*, 448 U.S. at 316–18; *Maher*, 432 U.S. at 473–74.

91. 341 So. 2d 1059 (Fla. Dist. Ct. App. 1977).

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accident when she was four to six weeks pregnant.[92] While treating the plaintiff for back injuries sustained in the accident, the defendant doctor took an X-ray of the plaintiff's pelvis, which appears to have caused the death of the plaintiff's fetus.[93] The plaintiff then sued the defendant doctor for malpractice, alleging that he had been negligent in exposing the plaintiff to an X-ray without first asking her whether she was pregnant.[94] However, the court affirmed a directed verdict for the defendant doctor because the plaintiff had not established that the doctor's alleged negligence *caused* the injury to the plaintiff's fetus.[95] The plaintiff's own testimony revealed that the plaintiff herself was not yet aware of her pregnancy; therefore, the plaintiff would not have been able to inform the defendant of her pregnancy even if the defendant had asked the plaintiff whether she was pregnant.[96] As a result the court concluded that there was no causal connection between the defendant doctor's alleged negligence and any injury to the plaintiff's fetus.[97]

The court's analysis seems persuasive when evaluated at the level of generality tacitly utilized in the court's opinion. However, if analyzed at a different level of generality, the court's decision becomes much less defensible. The court's analysis occurred at a relatively low level of generality, focusing on the question of whether the doctor had been negligent in failing to ask the plaintiff whether she was pregnant.[98] At that level of generality, the court's conclusion about the lack of causation seems correct. But if the analysis is conducted at a higher level of generality it is relatively easy to conclude that the doctor was negligent and that the doctor's negligence was the cause of the injury to the plaintiff's fetus.

If one views the negligence of the doctor as consisting of the failure to *ascertain* whether the plaintiff was pregnant—as opposed to merely failing to *ask* whether the plaintiff was pregnant—the plaintiff's case looks much stronger. Women with irregular menstrual cycles are often unaware that they are pregnant during the first four to six weeks of their pregnancies, and attentive doctors know that this is often the case. Therefore, it may well be negligent for a doctor to rely solely on a woman's negative answer to a question about her pregnancy, without asking follow-up questions about the date of

92. *Id.* at 1060.

93. *Id.* The actual cause of death is uncertain because the plaintiff followed her gynecologist's advice and underwent a therapeutic abortion. However, a pathology report indicates that the fetus was dead at the time of the abortion. *Id.*

94. *Id.*

95. *Id.* at 1061.

96. *Salinetro*, 341 So. 2d at 1061.

97. *Id.*

98. *Id.* ("Assuming arguendo that Dr. Nystrom's conduct fell below the standard of care in failing to inquire of Anna whether she was pregnant or not on the date of her last menstrual period, the omission was not the cause of her injury.").

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the woman's last menstrual cycle, or without administering a quick and inexpensive over-the-counter pregnancy test. Analyzed at this higher level of generality, the *Salinetro* court may well have been wrong to direct a verdict for the defendant. The level of generality at which a court's analysis is conducted can often end up being outcome determinative.

Although *Salinetro* was a non-constitutional tort case, the level-of-generality problem recurs frequently in constitutional cases. A large portion of contemporary constitutional law entails the balancing of competing interests.[99] And interest-balancing is heavily dependent on the level of generality at which the competing interests are balanced. Consider the constitutional case of *New York City Transit Authority v. Beazer*.[100] In *Beazer*, the plaintiffs filed a class action challenging a New York Transit Authority rule that denied employment to individuals who were narcotic drug users, including the plaintiffs, who were using the synthetic narcotic methadone as part of a drug treatment program for heroin addiction.[101] The District Court made factual findings that people who had successfully remained in a methadone maintenance program for at least one year were as employable as other members of the public for low-risk Transit Authority jobs.[102] As a group, they did not differ from other applicants in terms of their reliability, capability, safety, or efficiency.[103] Accordingly, the District Court held that the Equal Protection Clause prohibited the Transit Authority from using its overbroad narcotic rule to discriminate against employable applicants simply because they used methadone as part of a drug treatment program, and the Court of Appeals affirmed.[104]

The Supreme Court reversed in a majority opinion by Justice Stevens, holding that the Equal Protection Clause did *not* prohibit the Transit Authority from discriminating against employable applicants on the basis of their methadone use.[105] The Court conceded that exclusion by the Transit Authority of all methadone users from employment might be overbroad and even imprudent.[106] But the Court noted that the one-year rule adopted by the District Court would also be both overbroad and underinclusive.[107] The nature of general rules is that they have an imprecise fit with their intended objectives. The only way to avoid such an imperfect fit was to abandon a rule-based approach altogether and to grant individualized hearings to determine

99. *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 943–49 (1987) (discussing role of balancing in contemporary constitutional law).

100. 440 U.S. 568 (1979).

101. *Id.* at 570–72.

102. *Id.* at 573–74.

103. *Id*. at 575–76.

104. *Id*. at 578–79.

105. *Beazer*, 440 U.S. at 594.

106. *Id*. at 592.

107. *Id*. at 592–94.

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the employability of each applicant.[108] However, such hearings could be very expensive and might not be justified in terms of the benefits that they produced.[109] Accordingly, the Court held that the Equal Protection clause granted to the Transit Authority the discretion to strike the cost–benefit balance between general rules and individualized hearings at whatever point the Transit Authority deemed appropriate.[110] The only constraint imposed on the Transit Authority's discretion by the Equal Protection Clause was the requirement that the Transit Authority's policy be within the range of reasonableness.[111]

Justice Powell concurred in the majority's holding that the Equal Protection Clause permitted the Transit Authority to ban the employment of current methadone users. However, he dissented from the majority's refusal to consider the constitutional claims of former methadone users. The Transit Authority applied its narcotic rule to bar even the employment of individuals who had successfully completed a methadone treatment program, refusing to consider such individuals for employment until they had been drug-free for at least five years.[112] Because there was no evidence that this five-year delay was necessary to ensure employability, Justice Powell argued that the Equal Protection Clause did not permit the Transit Authority to discriminate against individuals who had been certified as drug-free after completing a methadone treatment program.[113]

Justice White dissented, emphasizing that the District Court findings were based on empirical evidence demonstrating that individuals who had successfully completed at least one year in a methadone treatment program were just as employable as members of the general population.[114] Moreover, the Transit Authority did not ban the employment of ex-offenders, former alcoholics, mental patients, diabetics, epileptics, and those currently using tranquilizers, even though some of those groups were on average *less* employable than the excluded methadone users.[115] Accordingly, Justice White argued that the Transit Authority rule discriminating against methadone users who had successfully completed one year of their treatment programs was so arbitrary that it violated the Equal Protection Clause.[116]

108. *Id*. at 589.

109. *Id*. at 590.

110. *Beazer*, 440 U.S. at 591–92.

111. *See id*. at 592–93.

112. *Id.* at 595 (Powell, J., concurring in part and dissenting in part).

113. *See id*. at 597 (Powell, J., concurring in part and dissenting in part).

114. *Id*. at 602–04 (White, J., dissenting).

115. *Beazer*, 440 U.S. at 610–11 (White, J., dissenting).

116. *Id*. at 611 (White, J., dissenting) (arguing that ban was unconstitutional as applied to applicants for low-risk positions who had successfully completed one year of methadone treatment).

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All of the Justices in *Beazer* were balancing the competing interests between fairness to particular job applicants on the one hand and fairness to the public through a safe and cost-efficient transit system on the other. The thing that differed among the various opinions in the case was the level of generality at which the Justices conducted their analyses. The majority opinion of Justice Stevens was written at the highest level of generality, permitting the exclusion of all methadone users, regardless of the specific circumstances surrounding their employability or methadone use.[117] Justice Powell's opinion was written at an intermediate level of generality, permitting the exclusion from employment of all *current* methadone users but not of *former* methadone users who had completed their treatment programs within the past five years.[118] Justice White's dissent was written at the lowest level of generality, permitting the exclusion from employment of only those methadone users who were statistically less likely than the general public to be employable because they had not yet successfully completed one year of drug treatment.[119]

The result that each Justice favored was determined by the level of generality that each Justice adopted. Justice Stevens favored reading the Equal Protection Clause to grant broad discretion to the Transit Authority because he viewed the life circumstances of particular applicants to be constitutionally irrelevant. At the other end of the spectrum, Justice White favored reading the Equal Protection Clause to grant much more limited discretion to the Transit Authority because he viewed the life circumstances of particular applicants to be constitutionally very relevant. The meaning of the Equal Protection Clause of the Constitution was, therefore, determined largely by the level of generality that each Justice deemed appropriate for the exercise of judicial review.

There is a sense in which the majority opinion written by Justice Stevens seems correct. The many imponderables entailed in trying to balance the costs and benefits of narrow employment rules that take account of particular life circumstances, against the costs and benefits of broad employment rules that ignore particular life circumstances, makes the task of balancing the competing interests both difficult and subjective. For example, how much should it matter that the public might object to the employment of former heroin addicts, even though the former addicts empirically pose little risk of unemployability? How much should it matter that applicants may feel as if they have been treated more fairly under particularized standards than under more mechanical rules? Should the cost–benefit analysis take account of the fact that the culture's drug problems may be exacerbated if recovering former addicts are unable to secure gainful employment and therefore revert to drug use? Should it matter if a rule addresses a marginal danger posed by methadone users but

117. *See id*. at 587–94 (Stevens, J.).

118. *See id*. at 594–97 (Powell, J., concurring in part and dissenting in part).

119. *See id*. at 602–11 (White, J., dissenting).

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wholly ignores a more serious danger posed by alcoholics? What if the bulk of methadone users are members of racial minority groups, while the bulk of alcoholics are not?[120] Is the degree to which an employment rule may have the effect of aggravating the culture's racial tensions relevant to the cost–benefit analysis at issue? Would it be better simply to abandon the use of rules altogether and use more costly adjudicatory hearings to determine employability? Would such a strategy help the economy by creating more jobs for lawyers and administrative hearing officials? Or would it harm the environment by increasing transit fares and discouraging the use of mass transit? Is a focus on the small danger posed by methadone use justifiable in a culture that largely ignores the more serious dangers posed by smoking and lax enforcement of speed limits?[121]

Intractable questions such as these are difficult to answer with any degree of confidence. Realizing this, the *Beazer* majority opinion stands for the proposition that deferential judicial review should be exercised in typical Equal Protection cases because the difficult task of striking the proper balance between the competing interests is a task that should be delegated to the politically accountable representative branches of government. In a democracy, the cost–benefit determinations made by the representative branches should not be overridden by politically unaccountable judges who typically have no special expertise.[122] Although we may never be able to say with confidence that we have struck the *correct* balance between competing imponderable interests, we should at least be able to say that we have struck the balance deemed appropriate by our democratically elected representatives. To do otherwise would risk the creation of a serious counter-majoritarian problem, where the Supreme Court holds an act of a coordinate branch of government unconstitutional simply because the Court disagrees with the way in which that branch of government balanced the competing interests.[123]

Beazer demonstrates that the level of generality at which a legal argument is formulated affects the persuasiveness of that argument. But the fact that legal outcomes are so heavily dependent on the applicable level of generality also affects the level of deference that is appropriate for judicial review in constitutional cases. As *Beazer* suggests, the Supreme Court typically

120. Justice White argued that such a factor may have been what motivated the Transit Authority's use of the methadone rule in *Beazer*. *See Beazer*, 440 U.S. at 609 n.15 (White, J., dissenting) (suggesting that methadone rule may have been product of racial animus).

121. *See* STONE ET AL., *supra* note 1, at 478–84 (discussing imponderables entailed in *Beazer* cost–benefit balancing).

122. *See Beazer*, 440 U.S. at 592–94 (applying deferential rational basis review to governmental classifications that do not entail invidious discrimination against an unpopular group).

123. *See* STONE ET AL., *supra* note 1, at 478–84 (discussing counter-majoritarian difficulties entailed in non-deferential review of interest balancing conducted by political branches).

exercises highly deferential, rational basis review in constitutional cases that do not involve suspect classifications or fundamental rights.[124] Because of the imponderables involved, it is rare for the Court to invalidate the action of a representative branch under rational basis review. However, there are some cases in which such invalidations do occur.[125]

In *Lawrence v Texas*,[126] the Supreme Court applied a rational basis standard of review but nevertheless held that a Texas statute criminalizing private homosexual activity unconstitutionally violated the right to liberty recognized by the Fourteenth Amendment Due Process Clause.[127] In so holding, the Court overruled its prior decision in *Bowers v. Hardwick*, which had upheld the application of a Georgia criminal sodomy statute to homosexual activity.[128] Justice Kennedy's majority opinion in *Lawrence* emphasized that the *Bowers* Court had erred in asserting that "[t]he issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."[129] Justice Kennedy instead characterized the issue as whether the Federal Constitution conferred a fundamental right to liberty that encompassed the freedom of consenting adults to express the bonds of their relationship by privately engaging in intimate sexual conduct.[130] What Justice Kennedy did was to shift his analysis to a higher level of generality, rejecting the decision of the *Bowers* Court to focus only on homosexual sodomy and replacing it with a more general focus on a right to intimate sexual privacy that is possessed by everyone.

Justice Scalia dissented in *Lawrence*, arguing that any constitutional liberty or privacy right that might be fundamental enough to warrant invalidating the Texas statute would have to be "'deeply rooted in this Nation's history and tradition,' or 'implicit in the concept of ordered liberty.'"[131] In claiming that this could not possibly be the case in light of the nation's long tradition of *opposition* to homosexual sodomy, Justice Scalia also shifted the level of generality. He shifted it from the higher level of general sexual privacy that had been utilized by the majority back down to the lower level of homosexual sodomy that had been utilized by the *Bowers* Court. But Justice Kennedy's

124. *Id.* at 474–75, 481–84 (discussing rationale for deferential review in constitutional cases not involving suspect classifications or fundamental rights).

125. *Id.* at 488–99 (discussing cases in which Supreme Court invalidated governmental action even under rational basis standard of review).

126. 539 U.S. 558 (2003).

127. *Id.* at 578 (apparently applying rational basis standard of review); *see also id.* at 579–85 (O'Connor, J., concurring) (indicating that majority had applied rational basis standard of review).

128. 478 U.S. 186, 190–96 (1986).

129. *Lawrence*, 539 U.S. at 566 (quoting *Bowers*, 478 U.S. at 190).

130. *Id.* at 566–67.

131. *See id.* at 596 (Scalia, J., dissenting) (quoting *Bowers*, 478 U.S. at 193–94).

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response was to shift to a higher level of generality yet again. In his *Lawrence* majority opinion, Justice Kennedy argued that there was not a long national tradition of opposition to homosexual sodomy, but rather a tradition of opposition to *all* sodomy, whether homosexual or heterosexual. Because the trend of enforcing sodomy laws against only homosexuals had begun as recently as the 1970s—and specific *homosexual* sodomy had been formally criminalized in only nine states—such discriminatory enforcement of the nation's sodomy laws could hardly be characterized as a longstanding tradition.[132] By manipulating the levels of generality that suited their instrumental objectives, Justices on both sides of the homosexual conduct debate were able to make their desired outcomes seem as if they flowed naturally from widely shared views of tradition and sexual privacy.

The Supreme Court exhibited similar manipulations of the level of generality in its decision concerning the so-called right to die. In *Cruzan v. Director, Missouri Department of Health*,[133] the Court was willing to assume for the sake of argument that competent individuals possessed a fundamental right to decline medical treatment—including nutrition and hydration—that was protected as a liberty interest by the Due Process Clause of the Fourteenth Amendment, even if declining treatment would result in death.[134] The plaintiff in *Cruzan* had been injured in an automobile accident and had been in a persistent vegetative state for a period of seven years, with no evidence of significant cognitive functions.[135] Because the plaintiff had virtually no chance of recovering her mental facilities, her parents wanted to terminate artificial nutrition and hydration life-support procedures.[136] The question presented in *Cruzan* was whether a Missouri statute could constitutionally require a surrogate to show by clear and convincing evidence that an incompetent person would desire the termination of treatment before the State would allow the termination of nutrition and hydration.

The Court, in a majority opinion by Chief Justice Rehnquist, held that the Due Process Clause did permit Missouri to adopt this clear and convincing procedural safeguard.[137] Rehnquist noted that a balance had to be struck between the constitutional rights of incompetents to terminate treatment and the right of a state to ensure the accuracy of treatment termination decisions.[138] He concluded that Missouri was constitutionally permitted to adopt a clear and convincing rule of decision as a means of ensuring such accuracy in order to

132. *See id.* at 567–73.
133. 497 U.S. 261 (1990).
134. *Id.* at 278–79.
135. *Id*. at 265.
136. *Id*. at 267.
137. *See id*. at 280.
138. *Cruzan*, 497 U.S. at 280.

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advance the state's important interest in the protection and preservation of human life.[139]

Justice Brennan dissented in a way that tacitly shifted the pertinent level of generality. Although the majority had found that the state had a high interest in the protection and preservation of human life,[140] Brennan argued that the state actually had *no* interest whatsoever in protecting the life of a person in a persistent vegetative state who wanted her treatment terminated.[141] The insistence on continued life-support against the wishes of such a person would serve no benefit to society or to any third person and would violate the very constitutional right to terminate treatment whose existence the majority had assumed.[142] Accordingly, the state's only interest was in ensuring accuracy, and that interest was better advanced by the normal preponderance standard of proof that is applied in ordinary civil cases than by a heightened clear and convincing standard of proof that could end up prolonging the plaintiff's treatment against the plaintiff's wishes.[143]

Both Chief Justice Rehnquist and Justice Brennan balanced the same competing interests between the plaintiff and the state. But they were able to arrive at different conclusions because they compared those competing interests to each other at different levels of generality. Both the nature of the plaintiff's interest in terminating treatment and the state's interest in protecting life can be stated at different levels of generality, and the level of generality can be outcome determinative. Like the technique of baseline shifting, the technique of manipulating levels of generality can be useful both to expose hidden weaknesses in a court's opinions and to hide potential weaknesses in an advocate's own arguments to a court.

C. Deconstruction

A third technique that can be useful in uncovering the normative values and political preferences of judges that may not be apparent on the face of a judicial opinion is the technique of deconstruction. The term "deconstruction" is now often used to refer to any process for questioning the soundness of an argument. My use of the term, however, is intended to be more precise. For me, deconstruction refers to the process of demonstrating that a logical argument can be reformulated to generate the opposite of the conclusion that it was originally offered to support. This process, in turn, reveals that it is the

139. *Id*. at 280–85.

140. *See id*.

141. *Id*. at 313 (Brennan, J., dissenting).

142. *Id*. at 314 (Brennan, J., dissenting).

143. *Cruzan*, 497 U.S. at 312–20 (Brennan, J., dissenting) (emphasizing that the state has no interest in preserving life of someone in persistent vegetative state who wishes to terminate treatment).

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normative preferences of the person making the argument—rather than the syllogistic application of logical rules to legal principles—that are responsible for the asserted conclusion.

Although the concept of deconstruction was initially associated with continental philosophy and critical literary theory, Professor Jack Balkin has described how the inversion of hierarchies can be used to deconstruct legal arguments.[144] Legal rules typically rest on hierarchical oppositions. A rule treats one state of affairs favorably because that state of affairs advances a socially desirable goal, and it treats the opposing state of affairs unfavorably because that state of affairs advances a socially undesirable goal. The process of deconstruction simply reverses the supposed connection between the opposing states of affairs and the pertinent goals, thereby inverting the hierarchy that was initially claimed to exist. Once a rule is deconstructed, therefore, it points not to the conclusion that it was initially offered to support, but rather to the opposite conclusion.[145]

Balkin offers a simple illustration of the process by deconstructing the constitutional law of standing. The Supreme Court has held that Article III of the Constitution limits the jurisdiction of the federal courts to cases in which the plaintiff suffers some real or threatened injury, as opposed to having a mere ideological interest in the resolution of a legal issue. The pertinent opposition, therefore, is the opposition between actual injury and mere ideological interest. The Article III standing rule establishes a hierarchy between these oppositions by privileging actual injury and disfavoring mere ideological interest. Injury is privileged because plaintiffs who suffer an actual injury are likely to be vigorous advocates in our adversary system and are likely to present the legal issues in a concrete factual context that is suitable for judicial resolution. Mere ideological interest is disfavored because ideological plaintiffs are unlikely to provide the adversary motivation or concrete factual context needed to help the court reach a proper and narrow resolution of the pertinent issues.[146]

The Article III law of standing can be deconstructed by inverting the hierarchies—or stated differently, by reversing the connections between the two oppositions and their supposed instrumental consequences. Although conventional Supreme Court wisdom privileges actual injury in order to promote vigorous advocacy in a concrete adversary context, actual injury is in fact a *bad* surrogate for those objectives because it does not ensure the

144. *See* J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 743–72 (1987) (discussing deconstruction); *see also* Girardeau A. Spann, *A Critical Legal Studies Perspective on Contract Law and Practice*, 1988 ANN. SURV. AM. L. 223, 233–50 (1988) (illustrating use of inversion of hierarchies technique to deconstruct various contract doctrines).

145. *See* Balkin, *supra* note 144, at 746–51 (discussing inversion of hierarchies); *see also* Spann, *supra* note 144, at 231–32 (same).

146. *See* Balkin, *supra* note 144, at 754–55 (discussing hierarchy established by Article III injury requirement for standing).

requisite motivational zeal. And although the conventional wisdom is that ideological interest is not likely to advance those objectives, ideological interest is actually a *good* surrogate for the Court's justiciability concerns because ideological commitment to an issue is likely to promote zealous legal advocacy.[147]

For example, under the traditional law of standing, a backwoods hermit having little interest or contact with outside civilization would have standing to complain about the environmental harm caused by a government construction project. This would be true even if the particularized adverse impact on the hermit was very small, and even if the hermit had limited resources and limited expertise to bring to bear on the environmental litigation. However, a recognized environmental group would not have standing to complain about the same injury, even if the environmental group would be a significantly better litigant in terms of motive, resources and expertise. This would be true even if the environmental group could provide the court with a much more highly developed factual context for the litigation, including scientific evidence about the pertinent environmental harms, as well as the costs and benefits of potential alternatives.[148] The ideological interest of a group that was formed for the express purpose of participating in environmental protection litigation is, therefore, much more likely to satisfy the Court's justiciability concerns than the presence of a technical injury to a random individual who happens to be a member of a population that is exposed to dirty air.

Deconstructing the Supreme Court's constitutional law of standing in this manner shows that the Court's own instrumental objectives are better served by reversing the Court's hierarchy of privileged and disfavored states of affairs. Because the standing rule does not advance the interests that are said to be advanced by that rule, something more subjective must be motivating the Court's standing decisions. This suggests that, whatever the Supreme Court's standing opinions may *say*, the law of standing actually rests on unarticulated normative values and political preferences possessed by the Justices.

The Supreme Court's current law of racial affirmative action can also be deconstructed. After more than a decade of flirting with the appropriate standard of review for benign racial affirmative action programs,[149] a majority of the Court has now settled on strict scrutiny as the appropriate standard for

147. *See id*. (inverting hierarchy established by Article III injury requirement for standing).

148. *See* Sierra Club v. Morton, 405 U.S. 727, 734–41 (1972) (holding that standing must be based on actual injury rather than mere ideological interest); *see also* Girardeau A. Spann, *Expository Justice*, 131 U. PA. L. REV. 585, 650 n.272 (1983) (discussing the curious fact that the law of standing would permit an environmental suit by the unsophisticated hermit but not by the sophisticated environmental group).

149. *See* SPANN, *supra* note 14, at 164–68 (discussing Supreme Court's difficulty in arriving at standard of review for racial affirmative action that was endorsed by a majority of the Court).

all racial classifications, whether benign or invidious.[150] Unlike the deferential rational basis review that the Court applied in cases such as *New York City Transit Authority v. Beazer*[151] and *Lawrence v. Texas*,[152] the strict judicial scrutiny that the Court applies to racial affirmative action is very *non*-deferential. A racial affirmative action plan can survive strict scrutiny under the Equal Protection Clause of the Constitution only if it is shown to the Court's satisfaction that the plan advances a compelling governmental interest and is narrowly tailored to the advancement of that interest.[153] Most recently, the Supreme Court upheld an affirmative action program for minority student admissions at the University of Michigan Law School in *Grutter v. Bollinger*,[154] finding that both prongs of the strict scrutiny standard were satisfied. On the same day, however, the Court also invalidated an affirmative action program for minority student admissions at the University of Michigan undergraduate college of Literature, Science and the Arts in *Gratz v. Bollinger*, finding that the undergraduate program was not narrowly tailored.[155]

The current Supreme Court's support of affirmative action is at best reluctant and ambivalent. The Supreme Court views the racial classifications used in affirmative action programs as sufficiently suspect to trigger strict scrutiny because the Court has endorsed a hierarchy under which colorblind race neutrality is privileged and race consciousness is disfavored.[156] Colorblind race neutrality is privileged because it promotes an allocation of societal resources that is based on merit rather than on the irrelevant happenstance of race. Race-conscious affirmative action classifications are disfavored because they distribute benefits and burdens solely on the basis of race, which is morally illegitimate in a liberal culture that is founded on the principle of respect for individual identity rather than mere group membership.[157] Stated more succinctly, most race-neutral allocations of

150. *See* Grutter v. Bollinger, 539 U.S. 306, 324–26 (2003) (applying strict scrutiny to racial affirmative action); Gratz v. Bollinger, 539 U.S. 244, 270 (2003) (same); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 223–37 (1995) (same).

151. 440 U.S. 568, 590–94 (1979) (applying rational basis standard of review); *see also supra* notes 100–25 and accompanying text (discussing *Beazer*).

152. 539 U.S. 558, 574 (2003) (apparently applying rational basis standard of review); *see id*. at 579–85 (O'Connor, J., concurring) (indicating that majority had applied rational basis standard of review); *see also supra* notes 126–32 and accompanying text (discussing *Lawrence*).

153. *See Grutter*, 539 U.S. at 324–29.

154. *Id.* at 322–24, 327–43.

155. 539 U.S. at 247–76.

156. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (stating that the Equal Protection Clause guarantees the personal right of all people to be free from racial discrimination).

157. *See, e.g.*, *Grutter*, 539 U.S. at 326 (stating that the Fourteenth Amendment protects individuals rather than groups and that group classifications are typically "irrelevant and therefore prohibited"); *Gratz*, 539 U.S. at 270 (stating that racial classifications are too pernicious to be

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resources are privileged because they advance racial equality, while most race-conscious affirmative action programs are disfavored because they are racially discriminatory.

Once again, the Supreme Court's affirmative action hierarchy can be inverted so that the consequences the Court associates with each pole of the hierarchy are first detached and then re-attached to the opposite poles. The Court asserts that race neutrality is good because it advances the culture's aspirational goal of achieving a society in which race becomes irrelevant to the allocation of resources. However, it is really race-conscious affirmative action that advances this goal. Due to centuries of past racial discrimination—ranging from the appropriation of Indian lands,[158] to slavery,[159] to official segregation,[160] to the internment of Japanese-American citizens,[161] to de facto segregation,[162]—racial minorities have been the victims of the race-conscious allocation of desirable resources to the white majority. As a result, racial minorities remain seriously underrepresented in the distribution of societal

tolerated without exacting scrutiny of their justifications); Adarand Constructors v. Peña, 515 U.S. 200, 214 (1995) ("The Court observed—correctly—that 'distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality,' and that 'racial discriminations are in most circumstances irrelevant and therefore prohibited.'" (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)); *id*. at 239 (Scalia, J., concurring in part and concurring in judgment) (maintaining that the government can never have a compelling interest in creating racial classifications and rejecting concept of racial entitlement as inconsistent with liberal focus on individuality); *id*. at 240–41 (Thomas, J., concurring in part and concurring in judgment) (racial distinctions are immoral and unconstitutional); *J.A. Croson*, 488 U.S. at 518 (Kennedy, J., concurring in part and concurring in judgment) ("The moral imperative of racial neutrality is the driving force of the Equal Protection Clause."); *id*. at 521 (Scalia, J., concurring in judgment) ("Discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society." (quoting ALEXANDER BICKEL, THE MORALITY OF CONSENT 133 (1975)).

158. *See* Johnson and Graham's Lessee v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) (holding that European discovery of land now constituting United States and conquest of indigenous Indian inhabitants divested Indians of title to that land).

159. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856) (invalidating congressional statute prohibiting slavery in Louisiana Territory).

160. *See* Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding separate-but-equal racial segregation).

161. *See* Korematsu v. United States, 323 U.S. 214 (1944) (upholding World War II military exclusion order that led to internment of Japanese-American citizens).

162. *See* Keyes v. Sch. Dist. No. 1, Denver, Colo., 413 U.S. 189, 208–09 (1973) (adopting expansive interpretation of de jure segregation but reaffirming prohibition on use of race-conscious remedies to eliminate de facto segregation); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 17–18 (1971) (same); *cf.* Washington v. Davis, 426 U.S. 229, 238–48 (1976) (reading the Equal Protection Clause to permit racially disparate impact not directly caused by intentional discrimination).

benefits and seriously overrepresented in the distribution of societal burdens.[163] By privileging prospective race neutrality in the allocation of resources, the Court is both freezing and perpetuating those existing inequalities. Therefore, a preference for colorblind race neutrality actually ends up constituting a preference for continued racial *discrimination* because it requires racial minorities to be *better* and to work *harder* than the white majority simply to catch up and keep pace with whites.

The Court also asserts that race-conscious affirmative action is bad because it forces us to think in terms of racial categories, which ignore the concept of individual identity that is essential to the foundations of our liberal culture. In so doing, we unfairly and stereotypically treat people as if their identities were determined merely by the racial groups in which they are members, rather than by their own particular attributes and abilities. However, it is really colorblind race neutrality that forces us to ignore individual identity and to think stereotypically in terms of racial categories. Because the white majority has the economic, political, and social power to define the norms that will prevail in United States culture, cultural norms end up being *white* norms. Racial minorities, therefore, tend to be judged not on their own merits but rather on the degree to which they do or do not live up to the white norms that govern appropriate appearance, attitudes, and behavior. Affirmative action seeks to counteract this tendency by ensuring that at least a small percentage of society's resources are distributed to racial minorities on the basis of their individual merit, rather than on the basis of their compliance with white cultural norms. It is affirmative action that advances the liberal ideal of individual identity by relaxing the hold that white culture has over racial minority identity.[164]

The Supreme Court's affirmative action hierarchy is backward. It is affirmative action that is good, because affirmative action promotes racial equality in the allocation of resources and advances our interests in liberal individuality and merit. And it is colorblind race neutrality that is bad, because colorblind race neutrality perpetuates our existing forms of racial discrimination and overrides our concern for individuality by insisting that everyone in our increasingly diverse culture comply with the norms of the prevailing white culture. Once again, it appears that the Supreme Court's normative values and political preferences—rather than the "law" of Equal Protection—are what have generated the Supreme Court's doctrinal views about affirmative action.

163. Justice Ginsburg's dissenting opinion in *Gratz* contains statistics illustrating existing racial inequalities in the distribution of societal resources. *See* Gratz v. Bollinger, 539 U.S. 244, 299–303 (2003) (Ginsburg, J., dissenting).

164. For more elaborate critiques that I have offered of the Supreme Court's law of affirmative action, see Girardeau A. Spann, *Affirmative Action and Discrimination*, 39 HOW. L.J. 1 (1995); Girardeau A. Spann, *The Dark Side of* Grutter, 21 CONST. COMMENT. 221 (2004); Girardeau A. Spann, *Neutralizing* Grutter, 7 U. PA. J. CONST. L. (forthcoming 2004).

It probably comes as no surprise to anyone that political preferences influence the arguments that Supreme Court Justices make with respect to controversial issues such as affirmative action. However, the process of deconstruction can also be used to reverse implicit hierarchies where the normative values and political preferences of the Justices are less apparent. Consider once again the case of *Lochner v. New York*,[165] where the Supreme Court invalidated a New York statute prescribing maximum hours for the employment of bakers on the grounds that the statute interfered with the freedom of contract protected by the Fourteenth Amendement's Due Process Clause.[166] As has been discussed,[167] that decision rested on the baseline assumption that a "natural" economic market was being distorted by the maximum-hours subsidy that the statute granted to workers. Shifting the analytical baseline, however, revealed that the maximum-hours legislation did not distort the market in favor of workers any more than the law's underlying enforcement of private contracts distorted the market in favor of employers.[168]

One possible response to this baseline shifting maneuver in *Lochner* is to distinguish the maximum-hours subsidy for workers from the contract-enforcement subsidy for employers. Unlike the market-distorting subsidies granted to workers in the form of maximum-hours legislation, state enforcement of private agreements through the regime of contract law is not really a market subsidy at all. Rather, public enforcement of contracts is designed to *structure* the economic market instead of providing a subsidy to particular players in that market. This attempted distinction rests on a hierarchy between market structuring and market subsidies. Government intervention designed to structure the market is privileged because properly functioning markets can be relied upon to facilitate the efficient allocation of goods and services in society by ensuring that goods and services go to those who value them most highly.[169] Government intervention designed to subsidize particular players in the market is disfavored because those subsidies distort market functioning in a way that undermines the efficient allocation of goods and services by permitting some goods and services to go to those who value them *less* highly than others.[170]

This distinction between market-*structuring* contract law and market-*distorting* subsidies can be deconstructed by inverting the supposed hierarchy

165. 198 U.S. 45 (1905).

166. *See id.* at 64–65.

167. *See supra* notes 59–78 and accompanying text (discussing *Lochner*).

168. *See id*.

169. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 1.2, at 13 (1998) (defining efficiency as "allocation of resources in which value is maximized"); *id*. § 3.1, at 36–39 (noting that efficiency is increased through transferability of rights in economic markets).

170. *See id*. § 1.2, at 16 (discussing potential inefficiency of forced exchanges as opposed to market exchanges); *id*. § 8.2, at 276 (discussing economic effect of subsidies).

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on which it rests. The initial hierarchy asserts that contract law is good because, by providing for the enforcement of private agreements, it structures the market in a way that promotes the efficient allocation of resources through market ordering. People who value goods and services more highly than others will feel secure in paying more than their competitors for those goods and services because the rules of contract law will protect their investments by enforcing their purchase agreements.[171] However, government enforcement of private agreements through the operation of contract law is actually bad because it ends up undermining efficient market ordering. That is because contract law will not enforce *all* private agreements, but rather will enforce only those private agreements of which contract law approves. It will not enforce a contract to purchase heroin or a contract to murder someone, no matter how highly the parties value those goods and services.[172] More mundanely, contract law will not enforce even the remedies for breach to which the parties themselves agree unless the rules of contract law approve of those remedies. Although the parties may agree that specific performance or penalty provisions will provide the appropriate level of incentive to ensure the performance of their mutual obligations, the law will award specific performance in only narrowly circumscribed circumstances[173] and will not enforce penalty provisions for mere breach of contract at all.[174] This selective enforcement of contract provisions distorts market ordering by depriving the parties of the ability to express the intensity of their preference through their willingness to pay. As a result, goods and services will not necessarily go to the users who value them most highly, but rather will go to those whom the many filtering rules of contract law deem most deserving.[175] No matter how much I want Reading pipe for the plumbing in my new house, contract law will not enforce my efforts to get Reading pipe if the law views the incentives I have chosen as excessive—even if I am willing to pay extra consideration to my contracting partner for those incentives as a means of expressing the intensity of my preference.[176] Contract law's variable enforcement of private

171. *See id*. § 4.1, at 101–08 (discussing economic function served by contract law enforcement of private agreements).

172. *See* 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 5.1 (3d ed. 2004) (discussing contract law restrictions on enforcement of illegal contracts).

173. *See* 3 *id*. §§ 12.4–12.8, at 161–203 (discussing contract law limitations on specific performance).

174. *See* 3 *id*. § 12.18, at 300 (discussing contract law refusal to enforce penalty provisions).

175. *See generally* 1 *id*. at xi–xix (Table of Contents listing plethora of contract rules that restrict enforcement of contracts).

176. *See* Jacob & Youngs, Inc. v. Kent, 129 N.E. 889 (1921) (refusing to award specific performance or substantial damages for breach of construction contract calling for use of Reading pipe); *see also* JOHN P. DAWSON ET AL., CONTRACTS: CASES AND COMMENT 833–34 (8th ed. 2003) (quoting explicit contract language requiring replacement of all non-conforming construction, which the court refused to enforce).

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agreements, therefore, does not structure the market, but rather distorts the market by selectively subsidizing only those agreements that the law of contracts deems desirable.

The initial hierarchy also asserts that maximum-hours legislation is bad because by subsidizing one side in employer–employee labor contract negotiations, such legislation distorts market ordering through the inefficient provision of employment benefits to the subsidized employees. Because those employees did not value the benefits highly enough to make the economic concessions necessary to secure them in contract negotiations with their employers, those benefits end up being extracted from the employers who value them *more* highly than they are valued by the employees—even though the employers would have been able to retain those benefits in the absence of the market-distorting subsidy to the employees.[177] However, the statutory maximum-hours subsidy is actually good because it ends up correcting for a serious market defect in a way that is necessary to permit the market to allocate goods and services in an efficient manner. In order for economic markets to operate efficiently, by allocating goods and services to those who value them most highly, some reliable scale has to be used to measure the intensity of competing preferences for goods and service.

Economics is premised on the belief that the willingness to pay money is a reliable measure of the intensity of one's preferences.[178] However, the marginal utility of money declines as one's wealth increases, so that a dollar is worth more to someone who is poor than it is to someone who is rich. This "wealth effect" distorts the operation of economic markets by undermining the reliability of willingness to pay as a measure of preference intensity.[179] Employers typically have considerably more wealth than employees, thereby permitting employers to extract inefficient bargaining concessions from employees during contract negotiations. That is because resources having economic value often end up being retained by employers, even though employees value them more highly, simply because employees lack the money necessary to express the intensity of their preferences. The one-sided subsidy that maximum-hours legislation gives to employees in labor contract negotiations with their employers, therefore, becomes an economic palliative for this wealth-effect market distortion. It not only helps employees accurately express the intensity of their preferences in the labor market, but more significantly, it helps the market itself allocate goods and services to the users who *genuinely* value them most highly.

177. *See* POSNER, *supra* note 169, § 1.2, at 16 (discussing the potential inefficiency of forced exchanges, as opposed to market exchanges); *id.* § 8.2 at 276 (discussing the economic effect of subsidies).

178. *See id*. § 1.2, at 12 (defining value as willingness to pay).

179. *See id*. (describing wealth effects).

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The initial economic hierarchy in *Lochner* is backward. The maximum-hours subsidy to workers is good, rather than bad, because it is that subsidy that permits economic markets to work efficiently in the allocation of goods and services to those who value them most highly by correcting for market-distorting wealth effects. And the market-structuring rules of contract law are bad, rather than good, because it is those rules that distort efficient market ordering by selectively enforcing only those market preferences of which contract law itself approves, thereby undermining the ability of the market to direct goods and services to the users who value them most highly. Even when legal doctrine is paired with other disciplines, such as economics, it is still the normative values and political preferences of judges that ultimately end up determining the outcome of constitutional cases.

The fact that constitutional arguments can be deconstructed by inverting the hierarchies on which those arguments rest does not mean that those constitutional arguments are wrong. It is important to remember that a deconstructed argument can always be deconstructed yet again, to re-establish the original hierarchy. For example, the market-structuring rules of contract law in *Lochner* can once again be made good, rather than bad, by emphasizing that the selective enforcement inclinations of contract law are actually efficient. Contract rules reflect centuries of experience with the types of preferences that individuals tend to have over the range of cases, thereby saving the administrative costs that would otherwise have to be incurred if we were to make efficiency determinations from scratch in each individual case.[180] And the maximum-hours subsidy to employees can again be made bad, rather than good, by emphasizing that haphazard efforts to correct for wealth effects are as likely to exacerbate as to correct for market distortions. Therefore, the most sensible way to make efficiency determinations is simply to assume the adequacy of the existing distribution of resources and to focus our attention on the prospective efficiency of market transactions.[181] There is no stopping point in the deconstruction process, short of the constraints imposed by limitations on our own analytical creativity.

IV. CONCLUSION

The meaning of the post-realist Constitution is ultimately determined by the normative values and political preferences of a majority of the Justices on the Supreme Court. Those normative values and political preferences are *constitutionalized* through Supreme Court opinions that purport to demonstrate how the Court's outcomes flow logically from the language, structure, and

180. *See id.* § 4.1, at 104–06 (discussing efficiency-enhancing function of contract default rules).

181. *See id.* § 1.2, at 15 (discussing economic focus on efficiency rather than distributional consequences).

original intent of the Constitution. But the analytical techniques that the Court uses to make such demonstrations can also be brought to bear on the Court's own arguments in a way that exposes the analytically vulnerable points in the Court's opinions. By *shifting the baselines* implicit in court's analyses, by manipulating the *level of generality* assumed in the Court's opinions, and by *deconstructing* the Court's instrumental arguments through the inversion of the hierarchies that the Court adopts, students of constitutional law can illuminate the manner in which the normative values and political preferences of the Court play a dispositive role in generating the Court's constitutional outcomes. These same techniques can also be used by practitioners and commentators to formulate arguments explaining why the Court should constitutionalize the normative values and political preferences that those practitioners and commentators believe to be appropriate. Mastering such techniques is the essence of learning how to do constitutional law.

A jurisprudentially more interesting question concerns what effect this view of the Constitution as a repository for privileged normative values and political preferences ought to have on the culture's continued commitment to the institution of judicial review. If the Constitution has only the content that the Supreme Court chooses to give it, why should the culture persist in believing that the institution of judicial review is an acceptable mode of public policy-making in a society that is committed to the principle of democratic self-governance? Why should the normative values and political preferences of the politically unaccountable Supreme Court ever take precedence over the normative values and political preferences of the people, as expressed through the actions of the representative branches of government? In a post-realist legal culture, the counter-majoritarian problem inherent in the exercise of judicial review looms as a potentially insoluble problem. If there are good reasons for the culture's continued adherence to the institution of post-realist judicial review, it makes sense to try to ascertain and articulate what those reasons might be. If there are no good reasons—or if the reasons are actually *bad* reasons that relate to the preservation of an often unjust and oppressive status quo—perhaps it is time to promote judicial review to the status of an intriguing artifact of the nation's pre-realist history. I suspect that the most important thing there is to teach about constitutional law is the need to formulate a considered position on the propriety of judicial review, rather than simply abstaining, as the bulk of contemporary culture seems so content to do.