CONSTITUTIONAL HYPOCRISY*

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INTRODUCTION

My legal realist inclinations leave me largely agnostic about the particular provisions that happen to be included in any particular constitution. That is because both written and unwritten constitutions seem more likely to reflect than to prescribe the normative values of the cultures that adopt them. As a result, the substantive, structural, and procedural provisions of the present United States Constitution seem perfectly adequate to promote justice—at least in a culture that is genuinely committed to the cause of justice. No constitution is likely to promote justice in a culture that lacks such a commitment. Nevertheless, there is one change that I would make if I were rewriting our current Constitution. I would eliminate the institution of judicial review.

Judicial review is commonly thought to facilitate an acceptable degree of convergence between the abstract principles celebrated in our written Constitution and the actual practices of our political culture in the conduct of its day-to-day affairs. However, I fear that judicial review, in fact, serves precisely the opposite function. For example, the United States Constitution rests heavily on the abstract principle of equality. The equality principle, which seems to be a staple of most mature legal cultures, incorporates an *a priori* normative belief that justice requires like things to be treated alike. But the political culture often prefers to allocate benefits and burdens in ways that violate the equality principle, by according differential treatment to individuals and groups based on characteristics such as race, gender, wealth, social class, sexuality, political affiliation,

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religious conviction, and the like. I suspect that the culture's commitment to abstract equality is as genuine as the culture's inability to resist the lure of self-interested favoritism. As a result, the hypocrisy entailed in proclaiming equality while practicing discrimination can be expected to generate a level of cognitive dissonance that, if left unchecked, would be destabilizing.

Contrary to what one might initially suspect, in this context, destabilization would be a good thing. It would exert pressure on the culture to cease its discriminatory behavior, or at least to abandon its claim of fidelity to the equality principle. But the perceived conflict between principle and practice will not have this salutary effect if the dissonance between the two can somehow be dissipated. My fear is that the institution of judicial review serves this dissonance-reduction function well enough to preserve and protect the hypocrisy of the political culture. The culture, of course, has other dissonance-reduction techniques at its disposal. But the hypocrisy function of judicial review is particularly offensive, because it utilizes self-deception to make the practice of oppression actually appear to be noble. Because it is difficult to identify any truly benign function that judicial review has served in United States culture, I would rewrite the Constitution to make the institution of judicial review itself unconstitutional. There are, of course, practical problems entailed in "rewriting" a Constitution to eliminate a provision that never actually appears in the Constitution, and in describing the precise forms of "judicial review" that I would preclude. But, as will become apparent, there is no need to resolve those practical details at the present time.[1]

I. REALISM

The legal realists have taught us that doctrine does not determine outcomes. Moreover, the postmodern extension of realist thought into the general realm of rational epistemology now engenders skepticism about all causal accounts that purport to transcend the normative perspectives of those who offer them. Because the United States Constitution is a repository of doctrinal assertions, resting on the particular set of epistemological conventions that we utilize to give the document

1. For an argument establishing the practical viability of abolishing judicial review with respect to acts of Congress see Mark Tushnet, *Abolishing Judicial Review*, 27 CONST. COMMENT. 581 (2011). My argument is more ethereal.

meaning, it would be unrealistic to expect the Constitution to do anything more than reflect the normative values of our political culture at particular points in its evolution. By "our culture" or "our political culture" I mean that idealized collection of "us" who believe in abstractions that are commonly thought to constitute the American way of life—*e.g.*, universal unalienable rights to life, liberty and the pursuit of happiness—but who also tolerate deviations in practice from the abstract norms that we espouse—*e.g.*, poverty, parochialism, and xenophobic intolerance. The Constitution cannot constrain our actions, or our beliefs, in a way that causes us to become someone other than who we are.

A. CONSTITUTIONALISM

Constitutionalism entails the belief that legitimate governmental power is limited by fundamental principles contained in a source of higher law that supersedes policies adopted through the ordinary political process. In United States culture, that higher law is articulated in a written Constitution, whose provisions are ultimately enforced through the institution of judicial review. *Marbury v. Madison*,[2] therefore, recognized a countermajoritarian power in the politically insulated Supreme Court to invalidate representative branch actions that violate the fundamental principles contained in the Constitution. That is the way that constitutionalism and judicial review are supposed to work.[3] But there are alternate accounts.

Legal realism has taught us that legal doctrine—including the doctrine embedded in the Constitution—is alone too indeterminate to resolve disputes. Whether focusing on constitutional text, original intent, or one's favored theory of constitutional interpretation, there is always adequate play in the doctrine to support divergent outcomes. As a result, constitutional meaning is inevitably vulnerable to the normative values and political preferences of those doing the interpreting—including Justices sitting on the Supreme Court.[4] It is, therefore, difficult to imagine a Supreme Court interpreting vague insistences on "due process" and "equal protection—or even absolute prohibitions

2. 5 U.S. (1 Cranch) 137 (1803).

3. *See, e.g.*, *Constitutionalism*, WIKIPEDIA, http://en.wikipedia.org/wiki/Constitutionalism (last visited Oct. 27, 2011); *Judicial Review,* WIKIPEDIA, http://en.wikipedia.org/wiki/Judicial_review (last visited Oct. 27, 2011).

4. *See* Note, *'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 HARV. L. REV. 1669, 1670–76 (1982).

on "abridging the freedom of speech" or "impairing the Obligation of Contracts"—without being influenced by the values and preferences of the Justices themselves.[5] If that were not the case, Supreme Court confirmation hearings would focus on a nominee's analytical abilities rather than on a nominee's position concerning controversial political issues, and Senators would not vote so closely along party lines.

The legal realists sought to counteract the indeterminacy of doctrine by pairing law with foundational principles rooted in procedural regularity, or in their own preferred social sciences. However, the critical legal studies movement then applied realist indeterminacy insights to the foundational principles of the realists themselves, in order to demonstrate that those principles were no more determinate than the legal doctrines they had been offered to bolster.[6] As described by Robin West, the critical legal studies movement emphasized that doctrinal interpretations tended to skew outcomes in favor of existing power relationships by reinforcing the view that those outcomes were not only neutral and necessary, but were properly divorced from extra-legal moral or political concerns. Utilizing the analytical technique of deconstruction to expose the illusion of "false necessity" on which doctrinal outcomes typically rested, the critical legal studies movement sought to neutralize the often oppressive power of "liberal legalism" to perpetuate the status quo. As a normative matter, therefore, the critical legal studies movement tended to favor progressive policies and politics. But as critical legal studies matured into a full-blown postmodern epistemological movement, the normative predispositions of critical legal studies themselves came to be recognized as yet another set of contingent and socially constructed principles.[7] So understood, postmodernism, carried indeterminacy to its *logical* extreme by, ironically, questioning the coherence of the *logical* rationality that is typically offered to justify the application of judicial power. Let me emphasize, it is not that there is no difference between right and wrong. It is only that doctrine and syllogistic analysis cannot reliably illuminate the distinction between the two.

5. *See,* U.S. CONST. amend. V (due process); *id*. amend XIV, § 1 (due process & equal protection); *id*. amend. I (free speech); *id.* art. I, § 10, cl. 1 (obligation of contracts).

6. *See* Note, *supra* note 4, at 1676–86 (1982).

7. *See* ROBIN WEST, *Critical Legal Studies—The Missing Years*, in NORMATIVE JURISPRUDENCE: AN INTRODUCTION Ch. 3 (2011).

B. TRICAMERALISM

Judges are not necessarily misbehaving when they consult extra-legal values and preferences in giving meaning to constitutional provisions. They have no other option. Abstract constitutional principles cannot acquire operative meaning in a way that is independent from the perspectives and experiences of the judges who interpret those principles. But it would be a mistake to think that something more than judicial *construction* is what is going on. Ultimately, it is the Justices on the Supreme Court—and not the provisions of the Constitution—that are resolving the constitutional disputes brought before the Court. That should cause us to have more *realist* expectations about the nature of constitutionalism. The Supreme Court is better understood as yet another policymaking branch of a tricameral legislature than as a reliable guardian of constitutional principles. As such, the Court is more likely to reflect than to prescribe the normative values of our culture.

Although it is now common for us to accord the Supreme Court final say over controversial social policy issues such as abortion, school prayer and affirmative action, this judicial policymaking was not within the original conception of judicial review. Bill Treanor has emphasized that, prior to *Marbury*, judicial review was viewed as a natural outgrowth of the popular sovereignty expressed in our written Constitution—but not as a substitute for popular sovereignty. Accordingly, state and federal courts invalidated statutes raising structural or process problems. They did so where legislation affected coordinate branch institutions such as juries or courts that were not part of the political process producing the statutes, or where a state statute infringed on a sphere of power reserved for the federal government. However, where such structural concerns were absent, courts generally deferred to the political judgments of state and federal legislatures.[8] In *Marbury* itself, Chief Justice Marshall disclaimed jurisdiction over questions that are "in their nature political."[9]

History and the *Marbury* admonition notwithstanding, contemporary judicial review now often entails the substitution of Supreme Court policy preferences for the legislative and

8. *See* WILLIAM MICHAEL TREANOR, THE ORIGINS OF JUDICIAL REVIEW IN THE UNITED STATES, 1780-1803, at 1–7 (2010) (unpublished manuscript); William Michael Treanor, *Judicial Review before* Marbury, 58 STAN. L. REV. 455, 457–60 (2005).

9. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803).

executive policy preferences that the Court invalidates in the exercise of judicial review. Such countermajoritarian judicial policymaking cannot be justified in the name of constitutionalism, because realist insights make it difficult to maintain that the Court's decisions emanate from the Constitution rather than from the discretion of the Justices themselves. Depending on the sympathies of the Justices, the Constitution could be read to require socialism,[10] or to support the laissez-faire ideology of the Tea Party movement.[11] Accordingly, some commentators have argued for a more limited judicial role, advocating judicial minimalism in the exercise of judicial review as a means of facilitating democratic policymaking.[12] And in the proposed Judiciary Act of 2009—reminiscent of the New Deal Court packing plan—highly regarded constitutional scholars across the political spectrum have favored heightened control over the Supreme Court by the political branches.[13]

Because there is no way to insulate judicial review from judicial policy preferences, the Supreme Court is better understood as a policymaking branch of government than as a branch that operates above politics. It is as if the Court were the third house of a tricameral legislature in which each house represents different constituencies.[14] Mark Tushnet has described how terms of office affect political responsiveness. The House of Representatives is directly elected to represent local constituencies, and its two-year term of office makes it responsive to relatively immediate political trends. The

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

11. *See* Matthew Continetti, *The Two Faces Of The Tea Party: Rick Santelli, Glenn Beck, And The Future Of The Populist Insurgency*, WEEKLY STANDARD, June 28, 2010, at 18, *available at* http://www.weeklystandard.com/articles/two-faces-tea-party.

12. *See, e.g.*, CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); MARK TUSHNET, WHY THE CONSTITUTION MATTERS (2010). *But see* Cass R. Sunstein, *Beyond Judicial Minimalism* (2008) (Harvard Univ. Pub. Law & Legal Theory Working Paper No. 08-40) (suggesting that "the justifications for judicial minimalism are unconvincing in many contexts"), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1274200

13. *See Four Proposals For A Judiciary Act* (February 9, 2009) (http://paulcarrington.com/Four%20Proposals%20for%20a%20Judiciary%20Act.htm).

14. *Cf.* GIRARDEAU A. SPANN, THE LAW OF AFFIRMATIVE ACTION: TWENTY-FIVE YEARS OF SUPREME COURT DECISIONS ON RACE AND REMEDIES 191–92 (2000) (suggesting that Supreme Court acts like a political policymaking body); ALEC STONE, THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE 3–19, 209–21 (1992) (arguing that the French Constitutional Council operates in ways similar to a legislative chamber).

President is elected indirectly by state electors in the Electoral College to represent the interests of the national majority, serving a four-year term that makes the President somewhat less responsive to immediate political trends. The Senate was initially elected indirectly by state legislatures to represent state constituencies. Although it is now directly elected, the Senate's six-year term of office makes it even less responsive to immediate political trends, but more responsive to durable political coalitions. The Supreme Court is "elected" indirectly, through Presidential nomination and Senate confirmation. Life tenure gives Supreme Court justices even longer "terms of office," with the actual tenure of a Supreme Court justice since 1970 averaging 26.1 years.[15] This not only insulates the Court from immediate political trends, but makes it sufficiently resistant to social change that the Court ends up representing those political constituencies who favor maintaining the status quo.[16] The Supreme Court can, therefore, be viewed either as the third branch of a policymaking legislature (consisting of the House, the Senate and the Court), or as the third branch of a policymaking federal government (consisting of Congress, the President and the Court).

Once the Supreme Court is viewed as a legislative-type policymaking body, it becomes unrealistic to expect the Court to expound constitutional meaning in a detached or disinterested manner. Because the Court is endogenous in the legislative policymaking process, it does not make sense to view Supreme Court adjudication as an exogenous check on legislative policymaking excesses. However, because judicial review gives the Court veto power at the final stage of the policymaking process, it does make sense to view Supreme Court adjudication as reflecting the evolving normative values of the culture at the time the adjudication occurs. It is as if the Court were utilizing constitutional exposition to certify cultural acceptance of policies

15. *See* Mark Tushnet, *The Politics Of Constitutional Law*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 223–26 (David Kairys ed., 1st ed. 1982) (discussing the political responsiveness of various branches); *see also* Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 770–71 (2006) (discussing the average Supreme Court tenure). The average tenure from 1789-1971 was 14.9 years. *See id.*

16. *See* GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND RACIAL MINORITIES IN CONTEMPORARY AMERICA 99–103 (1993). Although one might argue that the Supreme Court sometimes upsets rather than protects the status quo, such progressive victories can often be viewed as simply reflecting contemporary majoritarian political preferences. *See, e.g.*, Louis Michael Seidman, Brown *and* Miranda, 80 CAL. L. REV. 673 (1992).

that reflect the lowest common denominator among the various political constituencies represented by the three branches of our tricameral policymaking government. If the Constitution means only what the Supreme Court says it means—and the Supreme Court ends up reflecting rather than prescribing the normative values that are shared by the prevailing political culture—it probably does not much matter what particular provisions the Constitution happens to contain. Nevertheless, I would rewrite the Constitution to preclude judicial review as needlessly pernicious.

II. DISSONANCE

The reason that judicial review is pernicious is that it often facilitates hypocrisy. This can be illustrated by considering the manner in which the political culture has implemented the equality principle that permeates the Constitution. Although the culture's rhetorical commitment to the principle of abstract equality is demonstrably strong, the culture's operational commitment to the practice of actual equality is noticeably weak. The ensuing divergence between principle and practice can generate a degree of cultural dissonance that would be destabilizing if it were not somehow reduced. I do not intend to suggest that such dissonance is limited to the equality principle alone. In fact, I think dissonance can be generated in the implementation of any principle. But the dissonance attendant to the equality principle is usefully illustrative precisely because it is so foundational.

A. EQUALITY

The equality principle—which embodies the *a priori* belief that like things should be treated alike—seems to be ubiquitous in contemporary legal cultures.[17] In United States culture, the equality principle has even been viewed as flowing from natural law.[18] There can, of course, be difficulties in deciding when things

17. *See, e.g.*, UNIVERSAL DECLARATION OF HUMAN RIGHTS, G.A. Res. 217 (III)A, U.N. Doc A/810 at 71, pmbl., arts 1, 2, 7, 10, 16, 21, 23 & 26 (1948) ; RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 272–73 (1977); VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 197–99 (2010); JOHN RAWLS, A THEORY OF JUSTICE 237–38 (1971); Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 543 n.20, 547 n.33 (1982).

18. *See, e.g.*, THE DECLARATION OF INDEPENDENCE paras. 1–2 (U.S. 1776); Abraham Lincoln, Address Delivered at the Dedication of the Cemetery at Gettysburg, *reprinted in* ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 734 (Roy P. Basler, ed. 1946); Martin Luther King, Jr., Letter from a Birmingham Jail, *reprinted in* WHY WE CAN'T

are alike or different (*e.g.* determining whether particular gender differences are real or socially constructed). The equality principle can also conflict with a legal culture's commitment to other principles, such as the principle that protects individual liberty (*e.g.* determining whether prohibitions on racial discrimination are compelled by the equality principle, or precluded by the liberty principle's protection of associational freedom). Some liberal theorists, such as John Rawls, believe that the right to equal liberty has lexical priority over the right to equality in the distribution of economic and social resources.[19] Others, such as Ronald Dworkin, believe that equality is a necessary component of any liberty worth protecting.[20] Because the equality principle transcends legal cultures, theorists such as Vicki Jackson believe that comparative constitutional engagement can illuminate the range of approaches available to mediate the tensions that often exist between the equality and liberty principles, and within the equality principle itself.[21] Regardless of how one might resolve any potential conflict between liberty and equality, it seems plain that the equality principle is fundamental.

The emphasis that liberal theorists place on equality seems to be replicated in constitutional doctrine. Since 1868, the Fourteenth Amendment has contained an express Equal Protection Clause, but even the Fifth Amendment Due Process Clause adopted in 1791 constitutionalized an unwritten equality principle.[22] What might be less apparent is that many of the other substantive guarantees of the Constitution also rest on a requirement of government neutrality—a requirement that itself embodies a commitment to equal treatment, and that seems perfectly appropriate given the foundational role that the equality principle plays in our culture. For example, the so-called constitutional right to vote has been treated as more of a safeguard against discriminatory abridgment than as an unqualified grant of the franchise.[23]

WAIT 80 (1964), *available at* http://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html (1963).

19. *See* RAWLS, *supra* note 17, at 42–43, 60–65, 150–56, 243–51.

20. *See* DWORKIN, *supra* note 17, at 266–78.

21. *See* JACKSON, *supra* note 17 at 197–226.

22. *See* U.S. CONST. amend. XIV; *id*. amend. V; Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954) (finding an unwritten equality principle in the Fifth Amendment Due Process Clause).

23. *See, e.g.*, U.S. CONST. amend XV; Crawford v. Marion Cnty Election Bd., 553 U.S. 181, 189–91 (2008); Bush v. Gore, 531 U.S. 98, 104–05 (2000); Reynolds v. Sims, 977 U.S. 533, 554–56 (1964).

Although the First Amendment free speech guarantee is written in absolute terms, it has been interpreted to permit considerable government regulation of speech and expressive activity. But in the absence of a showing that would satisfy strict scrutiny, the government must remain neutral with respect to the content or viewpoint of the speech that it is regulating. That means that, as a regulator, the government cannot constitutionally discriminate in favor of speech that it likes or against speech that it dislikes.[24] Similar neutrality requirements prohibit government discrimination in regulating symbolic speech[25] or access to the public forum.[26] The First Amendment religion clauses preclude the government from establishing religion and from prohibiting the free exercise thereof.[27] But once again, the absolute language of the religion clauses has been read primarily to prohibit discriminatory departures from neutrality with respect to religion or religious denominations.[28]

The term "substantive due process" may be a literal oxymoron, but it is now firmly established in our constitutional jurisprudence. Substantive due process rights are rarely unqualified, but rather, are rights against which the Constitution tends to prohibit discrimination. Accordingly, the unenumerated substantive due process right to privacy does not guarantee a right to abortion, but rather requires only a semblance of government neutrality. The government, therefore, cannot punish someone for having an abortion. But it also need not fund someone's abortion, even if it funds other pregnancy-related health care including childbirth. All it need do is remain neutral with respect to an individual's own abortion preferences.[29] There also appears to be a substantive due process right to reject life-saving medical treatment[30] but not a right to assisted suicide.[31] By invoking the distinction between acts and

24. *E.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 381–90 (1992).

25. *E.g.*, Tex. v. Johnson, 491 U.S. 397, 406–07, 414–20 (1989).

26. *E.g.*, United States v. Grace, 461 U.S. 171, 176–78 (1983).

27. U.S. CONST. amend I.

28. *E.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947) (requiring State neutrality under the Establishment Clause); Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 876-82 (1990) (requiring State neutrality under the Free Exercise Clause).

29. *See, e.g.*, Harris v. McRae, 448 U.S. 297, 312–18 (1980); Maher v. Roe, 432 U.S. 464, 471–74 (1977).

30. *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U. S. 261, 278 (1990) ("The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions.")

31. Washington v. Glucksberg, 521 U.S. 702, 722–26 (1997).

omissions, the government is viewed as neutrally declining to penalize or subsidize individual end-of-life choices.

The substantive due process right to sexual privacy prohibits the government from penalizing same-sex intimate conduct,[32] although it does not presently require the government to subsidize same sex marriage with formal recognition.[33] Similarly, there is a substantive due process right to travel whose exercise the government may not penalize,[34] but the neutrality required by the equality principle does not require the government to subsidize the right by purchasing the traveler's bus ticket.[35] A recently revived view of the Fourteenth Amendment Privileges and Immunities Clause now contains a comparable prohibition on discrimination between old and new residents with respect to the distribution of government benefits,[36] and the Article IV Privileges and Immunities Clause contains an express prohibition on discrimination based on state citizenship.[37]

The state action requirement that serves as the gatekeeper for Fourteenth Amendment safeguards is notoriously elusive, because state action can be detected beneath any form of public or private action if one is inclined to look for it. As a result, the most coherent efforts to prescribe meaning for the state action requirement entail a determination of whether the government has remained neutral while engaging in the background state action that is at issue.[38] Accordingly, granting a liquor license to a racially discriminatory private club does not constitute state action when done as part of a neutral administrative scheme,[39] but enforcing a racially restrictive real property covenant does constitute state action when done as part of a pattern of historical discrimination.[40] Even the protection of fundamental liberties themselves that are guaranteed by the Constitution, such as the right to procreate, sometimes takes the form of prohibitions on discrimination. The Supreme Court has never

32. Lawrence v. Texas, 539 U.S. 558, 578–79 (2003).

33. Romer v. Evans, 517 U.S. 620, 631–36 (1996).

34. Shapiro v. Thompson, 394 U.S. 618, 629–38 (1969) (finding a right to travel).

35. *See* Maher v. Roe, 432 U.S. 464, 474 n.8 (1977) ("*Shapiro* . . . did not hold that States would penalize the right to travel interstate by refusing to pay the bus fares of the indigent travelers.").

36. *See* Saenz v. Roe, 526 U.S. 489, 502–07 (1999).

37. U.S. CONST. art. IV, § 2, cl. 1.

38. *See, e.g.*, DANIEL A. FARBER ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 229–31, 238–41, 245–48 (4th ed. 2009).

39. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 171–79 (1972).

40. Shelley v. Kraemer, 334 U.S. 1, 18–23 (1948).

reversed its decision permitting the involuntary sterilization of people who are mentally retarded,[41] but it has invalidated the use of such sterilization in a discriminatory manner.[42]

There is little doubt that the culture honors the abstract principle of equality. Equality is a widely shared moral precept, and it pervades many areas of contemporary constitutional law. Indeed, most of the interesting provisions in the Constitution ultimately boil down to mere guarantees of equal treatment. However, it is also clear that the culture fails to honor the abstract principle of equality in practice. This, of course, leaves the culture vulnerable to the charge of hypocrisy.

B. HYPOCRISY

Although United States culture is rhetorically committed to the principle that like things should be treated alike, in actual practice, the culture commonly discriminates against individuals and groups on the basis of characteristics that would seem to be illegitimate. Discrimination is illegitimate under the equality principle when it is based on characteristics that are irrelevant, or only marginally relevant, to the instrumental objectives for which a classification is being invoked. Unfortunately, much of the culture's discriminatory behavior falls into this category. It is readily apparent that the culture discriminates in the allocation of benefits and burdens on the basis of characteristics such as race, gender, wealth, social class, sexuality, political affiliation, and religious conviction. But those characteristics are rarely relevant to the culture's stated instrumental objectives. Rather, such discrimination is often based on inaccurate cultural stereotypes—or worse, is practiced in tacit defiance of the equality principle itself. And professing adherence to the equality principle while practicing invidious discrimination is, by definition, hypocritical.

As a statistical matter, it is no secret that white males in the United States tend to do better than racial minorities or women. Minorities are dramatically worse off than whites with respect to income, wealth, poverty, housing, employment, the criminal justice system, healthcare, and access to consumer goods.[43] Although women have made significant educational advances

41. Buck v. Bell, 274 U.S. 200, 207–08 (1927).

42. Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 537–43 (1942).

43. *See, e.g.*, Mario Barnes et al., *A Post-race Equal Protection?*, 98 GEO. L.J. 967, 982-92 (2010); Girardeau A. Spann, *Disparate Impact*, 98 GEO. L.J. 1133, 1151 (2010).

and now comprise half of the US workforce, women still remain worse off than men with respect to pay, promotions, job category tracking, education in high-paying disciplines, work schedule flexibility, homemaking and caregiving responsibilities, corporate leadership positions, and political leadership positions.[44] Women are also disproportionately the victims of sexual violence,[45] especially minority women.[46] But the statistics are largely beside the point.

Everyone who lives in the culture understands that we discriminate against those whom we view as different from ourselves. Recognizing this, a group of white college students in an informal study concluded that it would take $1 million per year in damages to compensate them if they were suddenly transformed from being white to being black.[47] And I suspect that few males think that their economic, social or political fortunes would be improved by sex change operations that permitted them to become female. In addition, the culture's tolerance for people with nontraditional sexual orientations has always been greatly outweighed by its intolerance, and we overwhelmingly continue to prohibit same-sex marriage. Being poor is not a crime, nor is being a member of a disadvantaged socio-economic group. But those of us who do not share those characteristics rarely live near, or spend much time with, those of us who do. As bad as the economic inequalities occasioned by race and poverty may be, they are in fact understated and exacerbated by incarceration inequalities that are also based on race and poverty.[48] Many of us are anxious to fight the perils of unlawful immigration with overbroad profiling techniques, even though those techniques will disproportionately require detention and identification papers for citizens and lawful aliens who do not appear to be of European descent.[49] The culture at

44. *See, e.g.*, Mary Ann Mason, *Still Earning Less*, CHRONICLE. HIGHER EDUC., Jan. 13, 2010, http://chronicle.com/article/Still-Earning-Less/63482/; *see generally* Maria Shriver, *The Shriver Report* (Heather Boushley & Ann O'Leary, eds. 2009) http://www.shriverreport.com/awn/shriverReport.pdf.

45. *See, e.g.*, Catharine A. MacKinnon, *Disputing Male Sovereignty: On* United States v. Morrison, 114 HARV. L. REV. 135, 137–45 (2000).

46. *See, e.g.,* Meghan Condon, *Bruise of a Different Color: The Possibilities of Restorative Justice for Minority Victims of Domestic Violence*, 17 GEO. J. ON POVERTY L. & POL'Y 487, 489–95 (2010).

47. *See* ANDREW HACKER, TWO NATIONS: BLACK & WHITE, SEPARATE, HOSTILE, UNEQUAL 32 (1992).

48. *See* BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 85–107 (2006).

49. *See* Jerry Markon & Stephanie McCrummen, *Judge Blocks Some Sections of Arizona Law*, WASH. POST, July 29, 2010, at A1, *available at* http://www.washingtonpost.

large is reasonably tolerant of the mainstream Republicans and Democrats among us. But if one wishes to denounce a politician with whom one disagrees, a sensible strategy may be to label the politician a socialist and to remind people that Hitler and Lenin were socialists too.[50] Since the recent economic recession began in 2007, the culture has become preoccupied with unemployment, even though overall unemployment rates are simply approaching the pre-recession unemployment rates that have typically been suffered by racial minorities.[51] And of course, if you want to build a religious cultural center near the site of the World Trade Center, it is probably best to ensure that your religion is Judeo-Christian rather than Islamic.[52]

Despite our emphatic cultural commitment to the equality principle, our cultural commitment to the practice of invidious discrimination appears to be equally strong. The duplicity entailed in this divergence between principle and practice triggers our cultural aversion to hypocrisy. Indeed, our aversion to hypocrisy, and the reliance that it upsets, is so strong that it underlies the very concept of estoppel—a concept that has been a part of our common law jurisprudence for centuries. For example, it is this distaste for hypocrisy that causes us to react with such anger and disappointment when we learn that officials who publicly endorse conventional propriety and family values have hypocritically engaged in illicit sexual improprieties.[53] And most of us failed to react well when we saw wealthy free-market bankers hypocritically ask for multibillion dollar government bailouts after their lending practices caused a financial collapse.[54]

com/wp-dyn/content/article/2010/07/28/AR2010072801794.html.

50. *See* Dana Milbank, *Wrong and Reich in Mason City*, WASH. POST., July 18, 2010, at A17, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/07/16/AR2010071602855.html.

51. *See* Kai Filion, *Downcast Unemployment Forecast: Targeted Job Creation Policies Necessary to Offset Grim 2010 Projections*, EPI ISSUE BRIEF #270, Jan 14, 2010 (http://epi.3cdn.net/d9904b716d3cf62538_psm6bnec9.pdf).

52. *See* Javier Hernandez, *Planned Sign of Tolerance Bringing Division Instead*, N.Y. TIMES, July 14, 2010, at A22, *available at* http://www.nytimes.com/2010/07/14/nyregion/14center.html; *see also* Liz Goodwin, *Anti-mosque Protests on the Rise, Say Muslim Advocates*, YAHOO NEWS, July 21, 2010 (http://news.yahoo.com/s/yblog_upshot/20100721/pl_yblog_upshot/anti-mosque-protests-on-the-rise-say-muslim-advocates).

53. *See* Ken Rudin, *Sanford the Latest in a Series of Political Sex Scandals*, NPR POLITICAL JUNKIE, June 24, 2009 (http://www.npr.org/blogs/politicaljunkie/2009/06/sanford_just_the_latest_sex_sc.html) (discussing hypocritical sexual behavior of officials including Mark Sanford, John Ensign, John Edwards, Kwame Kilpatrick, Eliot Spitzer, Larry Craig, David Vitter, Mark Foley, and Jim McGreevey).

54. *See generally* EMMA COLEMAN JORDAN & ANGELA P. HARRIS, ECONOMIC JUSTICE: RACE, GENDER, IDENTITY AND ECONOMICS 73–127 (2d ed. 2010) (describing

More to the point, I have an even stronger adverse reaction whenever I hear Senators and Supreme Court nominees hypocritically insist that Supreme Court justices should apply the law rather than make the law—as if they honestly believed that there was a meaningful distinction between the two activities.[55]

Cognitive dissonance theory predicts that when individuals experience high levels of hypocritical dissonance between their behavior and their beliefs, they will feel strong psychological pressure to reduce that dissonance.[56] If we assume heuristically that cognitive dissonance theory works the same way on the cultural level as it does on the individual psychological level—or if we assume that cultures can only act through individual agents who themselves respond to psychological pressures—cognitive dissonance theory can help to explain why judicial review is potentially pernicious. We do not like to think of ourselves as hypocrites. And judicial review is a cultural device that we can use to dissipate the dissonance that we would otherwise experience if forced to confront our own constitutional hypocrisy.

III. JUDICIAL REVIEW

Judicial review reduces cognitive dissonance by convincing the culture that its discriminatory behavior is consistent with—or even compelled by—the equality principle. While exploiting the inevitable indeterminacy of constitutional doctrine, the Supreme Court can rationalize our hypocrisy by turning it into praiseworthy constitutional behavior. Although judicial review is not the only dissonance-reduction technique that is available to the culture, it is perhaps the most offensive. By sanctifying deviations from the equality principle, judicial review permits the culture to feel as if it is doing something honorable when it engages in the practice of invidious discrimination.

A. RATIONALIZATION

Judicial review can *rationalize* the practice of illegitimate discrimination by making the culture's oppressive behavior seem as if it flows *rationally* from the equality principle embodied in

subprime lending collapse).

55. *See* Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principle*s, 96 HARV. L. REV. 781, 781–86 (1983) (discussing judicial confirmation ritual).

56. *See* LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE 1–31 (1957).

the Constitution. This, in turn, provides an excuse for engaging in cultural practices that would otherwise seem unconstitutionally invidious. One of my friends has politely characterized my skepticism about judicial review as "utterly unpersuasive." That characterization may prove ultimately correct, but to me it illustrates the strength of the hold that judicial review has on the culture. Given that other liberal democracies have historically favored parliamentary supremacy over judicial review[57]—and given the high degree of political deference that characterizes most judicial review even in the United States—one cannot help but wonder why judicial review has such a strong hold on us. I believe it is because judicial review helps us to camouflage our own hypocrisy.

Peter Westen has argued that the abstract idea of equality lacks substantive content until it is paired with some normative principle against which similarities and differences can be assessed. However, once the normative assessment of similarities and differences has been made, there is no additional work for the equality principle to do. The equality principle simply generates the tautological pronouncement of a conclusion that was already determined by the normative analysis on which the equality principle rests.[58] Whether or not one ultimately agrees with the Westen conclusion, his analysis—paired with the Realist indeterminacy insights discussed in Part I.A—does seem to illustrate that the concept of equality possesses sufficient imprecision to make it easily manipulable. And that imprecision also makes the concept available to facilitate constitutional hypocrisy.

Judicial review has historically been very helpful in depicting discriminatory behavior as if it complied with the equality principle. Mike Seidman has argued that the Supreme Court decision in *Brown v. Board of Education*[59] actually made it easier to maintain racially segregated schools by denominating single-race schools unitary, and that the decision in *Miranda v. Arizona*[60] made it easier to coerce confessions from criminal defendants by treating post-warning coerced confessions as if they were equivalent to voluntary confessions.[61] I have argued

57. *See, e.g.*, Tushnet, *supra* note 1 (discussing parliamentary supremacy in Netherlands)

58. *See* Westen, *supra* note 17, at 542–48.

59. 347 U.S. 483 (1954) (prohibiting official school segregation).

60. 384 U.S. 436 (1966) (requiring police to give *Miranda* warnings).

61. *See* Seidman, *supra* note 16.

that, by exercising veiled majoritarian judicial review, the Supreme Court has actually made it easier for the culture to perpetuate the oppression of racial minorities.[62] Indeed, most of the examples offered in Part II.A above, to illustrate how various substantive constitutional doctrines ultimately rest on the concept of equality, can also be offered to illustrate how the Supreme Court permits the culture to engage in discriminatory behavior under the guise of equality.[63]

Although we claim to make the right to vote equally available, the Supreme Court has permitted racial and political minorities to be disproportionately disenfranchised[64] and well-funded interest groups to have disproportionate influence over elections.[65] Despite the First Amendment claim that the government must remain neutral in its regulation of speech or access to the public forum, the Supreme Court has recognized exceptions when the government acts as a speaker,[66] educator,[67] or proprietor,[68] and has recognized exceptions when the government finds the speech to be particularly threatening.[69] The Court has also allowed the government to deviate from religious neutrality by "establishing" subsidies for mainstream religions[70] and suppressing the "free exercise" of non-mainstream religions.[71] The Court's conception of "neutrality" with the right to abortion ends up permitting the government to favor childbirth over abortion, and to impose burdens on the right to

62. *See generally* SPANN, *supra* note 16.

63. *See supra* text accompanying notes 17–42.

64. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 185–89, 200–04 (2008) (upholding partisan Indiana voter ID law with alleged disparate impact on Democrats, racial minorities, poor and elderly).

65. Citizens United v FEC, 130 S. Ct. 876, 913 (2010) (invalidating federal restrictions on corporate electioneering expenditures).

66. *See, e.g.*, Pleasant Grove City, Utah v. Summum, 129 S. Ct. 1125, 1129 (2009) (upholding denial of religious display in public park as exercise of government speech).

67. *See, e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484, U.S. 260, 270–73 (1988) (upholding regulation of school newspaper by school as educator).

68. *See, e.g.*, Lehman v. City of Shaker Heights, 418 U.S. 298, 303–04 (1974) (upholding advertising restriction on rapid transit vehicles by city acting in proprietary capacity).

69. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969) (permitting suppression of speech having intent and likely effect of producing imminent lawless action).

70. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 652–63 (2002) (upholding school voucher program that disproportionately benefitted religious schools).

71. *See, e.g.*, Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 874–76, 890 (1990) (upholding application of drug laws to prohibit religious use of peyote by Native American Church); Reynolds v. United States, 98 U.S. 145, 161–67 (1878) (upholding prohibition on polygamy then practiced by Mormon church).

abortion when favored by mobilized political majorities.[72] The Court makes the right to end-of-life medical deference discriminatorily available to those wish to end their suffering and indignity by declining medical interventions, but not to those who wish to do the same thing by receiving medical interventions.[73]

So far, the substantive due process right to sexual privacy recognized by the Supreme Court ends up protecting heterosexual marriage but not same-sex marriage.[74] Even the right to travel that the Court has held prohibits discrimination in the allocation of welfare benefits[75] appears to permit discrimination in the allocation of other benefits, such as government jobs[76] and tuition-free public education.[77] The Court's state action jurisprudence seems to permit or prohibit discrimination based on the Court's own approval or disapproval of the underlying government action.[78] And whether the Supreme Court would today permit involuntary sterilization—say, of a promiscuous mentally retarded woman who did not understand the consequences of having sex—is likely to turn on whether the Court approves of the underlying policy determination made by the political body that has authorized such sterilization.[79]

Because things are alike and different in myriad ways, the Supreme Court has enormous latitude in deciding what does and does not satisfy the equality principle. By manipulating analytical baseline assumptions and shifting levels of generality, the Court can decide when it wishes to protect or reject the culture's forays into self-interested hypocrisy.[80] The Court's affirmative action cases provide perhaps the clearest example. When the political culture was in favor of racial affirmative action, the Supreme Court read the Constitution to permit and sometimes require affirmative action, reasoning that the concept

72. *See* cases cited *supra* note 29; Gonzales v. Carhart, 550 U.S. 124, 132-33 (2007) (upholding federal statutory ban on so-called partial-birth abortions).

73. *See* cases cited *supra* note 32.

74. *See* cases cited *supra* note 33.

75. *See* cases cited *supra* notes 35–36.

76. *See* McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645, 646–47 (1976) (upholding residency requirement for fire department employees)

77. *See* Martinez v. Bynum, 461 U.S. 321, 333 (1983) (upholding residency requirement for tuition-free public schools).

78. *See supra* note 38–40.

79. *See supra* notes 41–42.

80. *See* Girardeau A. Spann, *Constitutionalization*, 49 ST. LOUIS U. L.J. 709, 721–46 (2005) (discussing analytical techniques).

of equality required prospective compensation for present inequalities.[81] Now that the political culture has come to oppose affirmative action, the Supreme Court has read the Constitution to hold affirmative action largely unconstitutional.[82] Ironically, the Court has even read *Brown* effectively to require the resegregation of public schools.[83]

Some of my colleagues have suggested that Supreme Court Justices are behaving in good faith when they endorse one of the many possible meanings of equality that the realists have taught us inevitably emanate from an indeterminate legal principle. Accordingly, decisions that I might view as discriminatorily oppressive do not necessarily generate dissonance on the part of the Court—or the culture that it represents—because those decisions are experienced as genuinely principled rather than as hypocritical by those who issue and endorse them. However, I do *not* believe that such decisions are made in good faith. The nation's history of invidious discrimination based on race, gender, religion and an unfortunately broad range of other traits, is simply too long and too stark to escape notice when perpetuated by contemporary Supreme Court decisions. I believe that the Court—like the culture that it represents—is affirmatively *choosing* to perpetuate such discrimination when it issues such decisions, and that it must find some way to manage the dissonance created by that self-knowledge. Barry Friedman has demonstrated that the Supreme Court has typically reflected the will of the people.[84] In a very fundamental sense, the will of the people has been to have their discriminatory inclinations sanctified by the Supreme Court. And the Supreme Court has performed that function with religious conviction.[85]

81. *See, e.g.*, Metro Broad. v. FCC, 497 U.S. 547, 552 (1990) (applying intermediate scrutiny and upholding broadcast affirmative action); *compare* Grutter v. Bollinger, 539 U.S. 306, 333–34 (2003) (upholding law school affirmative action) *with* Gratz v. Bollinger, 539 U.S. 244, 275–76 (2003) (invalidating college affirmative action); *cf.* United States v Paradise, 480 U.S. 149, 153–66 (1987) (plurality opinion) (upholding court-ordered affirmative action); Local 28, Sheet Metal Workers Int'l Ass'n v EEOC, 478 U.S. 421, 482–83 (1986) (upholding court-ordered affirmative action).

82. *See, e.g.*, Adarand Constructors v. Peña, 515 U.S. 200, 227 (1995) (applying strict scrutiny and overruling *Metro Broadcasting*).

83. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 709–11 (2007); *id*. at 745–48.

84. *See* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009).

85. *Cf*. Sanford Levinson, *"The Constitution" in American Civil Religion*, 1979 SUP. CT. REV. 123, 130–32; 137–48 (using religion analogy to help explain Supreme Court legitimation function).

B. SANCTIFICATION

The nature of judicial review is such that, when the Supreme Court pronounces the culture's discriminatory practices to be consistent with the Constitution, it is sanctifying both inequality and the cultural inferiority that inequality connotes. The concept of sanctification conveys not only the idea of imparting moral and social approval, but also an act of purification that establishes freedom from sin.[86] Moreover, the religious overtones of sanctification are appropriate because realist insights have taught us that a considerable leap of faith is required to believe that Supreme Court constitutional adjudication could genuinely turn discrimination into equality, and detach cultural discrimination from the invidiousness that it often reflects.

Two now-infamous Supreme Court decisions serve to illustrate the manner in which the Supreme Court can sanctify the practice of cultural discrimination by certifying it as consistent with the concept of equality. In *Dred Scott v. Sanford*,[87] the Court upheld the property rights of white slaveholders against the liberty interests of black slaves, by invalidating a congressional statute designed to limit the spread of slavery. In so doing, Chief Justice Taney used particularly demeaning language to constitutionalize the inferior status of blacks, whom the Court held could not be recognized as citizens within the meaning of the Constitution.[88] In *Bradwell v. Illinois*, the Court held that women could be denied the right to practice law because of their gender.[89] This time Justice Bradley's concurring opinion used demeaning language to emphasize the inferiority of women as individuals whose natural state made them destined to be wives and mothers, unfit for the occupations

86. *Sanctify Definition*, MERRIAM-WEBSTER.COM (last visited Oct. 1, 2010).

87. 60 U.S. (19 How.) 393 (1857) (holding that blacks could not be citizens within the meaning of the United States Constitution for purpose of establishing diversity jurisdiction and invalidating congressional statute enacted to limit spread of slavery, as interfering with property rights of slave owners), *superseded by constitutional amendment,* U.S. CONST. amends. XIII, XIV.

88. *Id.* at 404–05, 407, 451–52. I realize that *Dred Scott* is not the perfect example to offer in support of this proposition, because the North ultimately responded to the decision with a Civil War and then overruled the decision with the Fourteenth Amendment. *See* FARBER, *supra* note 38, at 16–25. However, I suspect that the decision *did* provide sanctification to the South by giving constitutional succor to views that had prevailed throughout most of the nation during most of the era of slavery. The *Dred Scott* Court simply misidentified the culture that it was supposed to be serving in 1857.

89. 83 U.S. (16 Wall.) 130, 139 (1872).

of civil life.[90] Today, those holdings—and the language in which they were expressed—seem anachronistically invidious. But that is only because the political culture has evolved beyond the forms of unapologetic oppression that prevailed at the time those cases were decided.

The culture now engages in other forms of discrimination that, in time, may come to be viewed as equally invidious. But contemporary judicial review continues to sanctify contemporary discrimination with demeaning language directed to the opponents of such discrimination. For example, Chief Justice Roberts has referred to race-conscious affirmative action remedies for past discrimination as "a sordid business"[91] that is "pernicious,"[92] and "odious to a free people whose institutions are founded upon the doctrine of equality,"[93] as well as "patently unconstitutional."[94] The Court thus continues to dissipate dissonance by assuring the culture that its present forms of disparate treatment are not only consistent with the equality principle, but are in fact noble. The culture's behavior is noble because it demonstrates the courage to reject claims alleging subtle forms of societal discrimination in favor of a straightforward understanding of facial equality that does not threaten to upset the status quo. Judicial review is particularly good at dissonance reduction because it facilitates self-interested self-deception.

My opposition to judicial review is subject to two rather obvious objections. First, United States culture may be able to withstand more hypocrisy-related dissonance than I imagine. For example, one cannot fail to notice the vocal opposition that was leveled against the proposed "ground zero mosque" in New York City, and against proposed Muslim sites of worship in other parts of the United States. I must admit that this unabashed religious hostility to Islam does suggest a higher degree of tolerance for the dissonance generated by raw cultural hypocrisy than I would previously have predicted.[95] However, I retain the hope that such opposition is both transient, and more of a marginal than a central component of contemporary United

90. *Id.* at 141 (Bradley, J., concurring).

91. League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part and dissenting in part).

92. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007).

93. *Id*. at 745–46.

94. *Id*. at 730, 732, 740.

95. *See supra* text accompanying note 52.

States culture. Nevertheless, I suspect that vocal mosque opposition would become even *more* widespread and durable if the Supreme Court were now to sanctify that opposition by ruling that the Constitution permits the forced relocation of Muslim sites of worship.

The second obvious objection to my disenchantment with judicial review relates to dissonance reduction. Even if I am correct about the discomfort normally attendant to cognitive dissonance, other dissonance reduction techniques may simply fill any void that is left by the absence of judicial review. I concede that there are always other dissonance reduction techniques that the culture can invoke to deal with the fact that it professes equality while practicing discrimination. In fact, one of the primary skills possessed by successful politicians is the ability to convince voters that their own parochial interests coincide with fundamental overriding principles shared by worthy segments of the culture at large. So, regressive tax cuts are good because they stimulate economic growth; racial profiling is permissible because it helps keep our borders secure; gay marriage is bad because it undermines the fabric of American family life; and the casualties of foreign military interventions are defensible because they advance the war on terror. However, everyone realizes that politicians engage in partisan rhetoric, with equally strong partisan claims emanating from the other side. This realization, therefore, dilutes the effectiveness of mere politics as a dissonance-reduction technique. But judicial review is different.

What makes judicial review a particularly offensive form of dissonance reduction is that not everyone concedes that the Supreme Court is just another political player. Most people insist that the Court is doing something different—something loftier, related to integrity, justice and fairness—when it interprets the Constitution. Even those who realize that the Court is *influenced* by politics are rarely willing to concede that the Court is simply engaged in political activity that is qualitatively indistinguishable from the actions of the representative branches. Judicial review is offensive because it is both offered to, and received by, the culture as a practice that is essentially good—rather than a practice that is essentially duplicitous. Even if it were shown—as perhaps it could be—that liberal democracies engage in precisely the same amount of hypocrisy whether they practice judicial review or not, I would still favor the elimination of judicial review. Utilizing doctrine to effectuate a form of collective

hypnosis, judicial review enables us to sidestep rather than confront our discriminatory and oppressive inclinations. It enables us to feel as if we are behaving in a principled manner, even though we must know that we are not. And it enables us to feel good about ourselves even though we do bad things to each other. That is why judicial review is well-suited to protecting our constitutional hypocrisy. And that is why judicial review is well-suited to be dispensed with in my rewritten Constitution.

CONCLUSION

Legal realist insights—combined with the imprecision inherent in the concept of equality that underlies most constitutional provisions—make it difficult to claim that the Supreme Court is doing anything other than exercising policymaking discretion when it engages in the process of constitutional adjudication. As a result, I believe that the Court is better viewed as a political arm of a tricameral legislature than as an institution that operates above ordinary politics. Accordingly, judicial review is more likely to reflect the prevailing normative biases and predispositions of the culture than to constrain them. Therefore, it does not much matter what official provisions the Constitution contains. The political branches—including the Supreme Court—will simply read the Constitution to correspond to the behavior in which the culture wishes to engage. Nevertheless, I would rewrite the Constitution to preclude judicial review.

United States culture relies on judicial review to ensure that its practices conform to its constitutional principles. But judicial review seems actually to legitimate discrepancies between principle and practice by convincing the culture that its baser discriminatory inclinations can be viewed as consistent with its loftier commitment to abstract equality. In so doing, judicial review serves to dissipate the cognitive dissonance that would otherwise provide pressure for the culture genuinely to live up to its constitutional principles. In short, judicial review facilitates the constitutional hypocrisy that is often practiced by United States culture, and it does so in a way that enables the culture to feel self-righteously proud of its expedient pursuit of political self-interest.

There is a paradox lurking beneath the surface of my argument. I claim that constitutional provisions do not much matter, because they will simply reflect rather than constrain the

political behavior of the culture. At the same time I claim that the Constitution should nevertheless be rewritten to preclude judicial review, because judicial review facilitates constitutional hypocrisy. Logically, I cannot have it both ways—either the Constitution matters or it does not. In fact, I have been less troubled by logical inconsistency since I learned that light can be both a particle and a wave, but I understand that some people still take logical contradictions pretty seriously. So I have a proposal. If you will agree to think of the Supreme Court as simply part of a tricameral legislative policymaking process, I will agree to let the Court continue upholding or invalidating representative branch actions in the exercise of its judicial discretion. It will be as if a legislative proposal has simply succeeded or failed to secure the approval of a legislative chamber needed for its enactment. From the outside, this will appear to be the exercise of traditional judicial review. But from the inside, we will secretly realize that the Supreme Court's function is simply to make us feel better about our often unprincipled cultural behavior. That way, we can begin to experience the dissonance that we should feel when we realize that our practices do not always live up to our aspirational norms, and we can then begin to make genuine efforts to try to do better. That way we can rewrite the Constitution without changing a single word. We can change its meaning simply by changing the way that we think about what is going on when we ask the Supreme Court to engage in the practice of judicial review.