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BASELINE ANALYSIS: BROADENING THE JUDICIAL PERSPECTIVE

*The endless variety of our individualism means that we suffer different kinds of pain and may well experience pain differently. . . . If no one can really know another's pain, who shall decide how to treat pain, and along what calculus? These are questions of justice, not science. These are questions of complexity, not justifications for passivity, because failing to notice another's pain is an act with significance.*¹

Contemporary legal theorists continue to dispute whether or not there can be objectivity in the law.² Certain schools of legal thought assert that objectively correct answers to legal problems exist.³ Such approaches, however, ignore the fact that every person sees a given legal problem in a different light.⁴ Because of these divergent perspectives, the possibility of an "objective" point of view is impossible.⁵ Consequently, no single "correct" answer to a legal question can exist.⁶ Thus, one's perspective, embodied in "baselines,"⁷ profoundly affects one's analysis of a problem and ultimately may determine its resolution.⁸ Because the choice of baseline critically directs the judicial decision-making process, a court should explicitly acknowledge and identify its choice in its legal

¹ Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 11 (1987) (footnote omitted).

² Beermann & Singer, *Baseline Questions in Legal Reasoning: The Example of Property in Jobs*, 23 GA. L. REV. 911, 912 (1989); see Singer, *Legal Realism Now* (Book Review) 76 CALIF. L. REV. 467, 467 (1988) (reviewing L. KALMAN, *LEGAL REALISM AT YALE: 1927-1960* (1986)) (questioning why law is form of politics which continues to be explosive).

³ Beermann & Singer, *supra* note 2, at 911-12; see *infra* notes 32-38 and accompanying text.

⁴ See Beermann & Singer, *supra* note 2, at 913; *infra* notes 41, 45-48 and accompanying text.

⁵ See Minow, *supra* note 1, at 48 (Justice O'Connor implicitly acknowledged impossibility of objective observer by prefacing statement "in my view"); *infra* note 49 and accompanying text.

⁶ See Beermann & Singer, *supra* note 2, at 912-13.

⁷ See *id.* at 914-15; *infra* notes 57-58 and accompanying text. "Baselines" are starting points from which legal analysis proceeds. See Beermann & Singer, *supra* note 2, at 915.

⁸ See Beermann & Singer, *supra* note 2, at 914; *infra* notes 60-64 and accompanying text.

analysis.⁹

This Note, after situating baseline analysis within its historical context, will explore its benefits both as a descriptive and normative tool. Then, it will illustrate baseline analysis by its application to two recent constitutional law cases. Finally, this Note will advocate broadening the judicial perspective by incorporating baseline analysis into the judicial decision-making process.

I. LEGAL THOUGHT

A. *Classical Legal Thought/Formalism*

The "classical" school of thought¹⁰ espoused objectivity and certainty in the law¹¹ and believed that the law could be reduced to a finite number of general principles or concepts readily applicable to all facts and circumstances.¹² From these general concepts, specific legal rules could be generated through the process of deduction.¹³ Moreover, such fundamental legal principles were thought

⁹ See Beermann & Singer, *supra* note 2, at 915.

¹⁰ Representative classical legal scholars include Christopher C. Langdell, Samuel Williston, Joseph Beale, John Austin, and Sir William Blackstone. See R. SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* 136-59 (1982); Singer, *supra* note 2, at 496.

¹¹ See Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 11-13 (1983). Therefore, considerations of justice, convenience, social context and the intent of the parties were irrelevant, except to the extent they were embodied in the abstract principles. See *id.* at 15.

¹² See R. SUMMERS, *supra* note 10, at 138. These general principles form a universally formal ordered system. Grey, *supra* note 11, at 11.

Judges commonly applied general principles without regard to the specific facts and circumstances of the case. Singer, *supra* note 2, at 499; see R. SUMMERS, *supra* note 10, at 147 (judges treated statements made in prior cases as binding precedent without regard to factual context). Adapting the rules to the individual circumstances or unique facts of a case was discouraged because of the perceived potential for arbitrary and unpredictable results. See J. FRANK, *LAW AND THE MODERN MIND* 6-10, 18-20, 118-22, 125-31, 133 (1936). For this reason, classical theory is sometimes referred to as "mechanical jurisprudence." See Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 605-07 (1908).

¹³ Singer, *supra* note 2, at 497. An example of such formalistic reasoning is found in *Lochner v. New York*, 198 U.S. 45 (1905). The general principle is laid down as the major premise of a deductive syllogism. Oliphant & Hewitt, *Introduction to J. RUEFF, FROM THE PHYSICAL TO THE SOCIAL SCIENCES: INTRODUCTION TO A STUDY OF ECONOMIC AND ETHICAL THEORY* (1929), reprinted in W. REISMAN & A. SCHREIBER, *JURISPRUDENCE—UNDERSTANDING AND SHAPING LAW—CASES, READING COMMENTARY* 437 (1987). The case under consideration is the subject of the minor premise and the conclusion is derived from these two premises by the operation of the laws of deductive logic. *Id.*

A significant aspect of classical thought was its commitment to the principles of *laissez faire* and a self-regulating market. See Singer, *supra* note 2, at 477-82. The classical theorists endeavored to separate the private sphere of freedom of contract from the public sphere of government regulation. *Id.* at 478.

to exist in the abstract.¹⁴ Therefore, according to classical jurists, judges did not make law; they merely "discovered" it.¹⁵

B. *Legal Realism*

Legal realists¹⁶ rejected the notion of a legal system based on transcendent legal concepts.¹⁷ Instead, they embraced a functional approach, which sought to define all concepts in terms of *actual experience*.¹⁸ Legal concepts and rules were defined solely in terms of judicial decisions.¹⁹ Since a judicial decision was itself consid-

¹⁴ See G. GILMORE, *THE AGES OF AMERICAN LAW* 42-43 (1977). This follows from the proposition, first espoused by Christopher C. Langdell, that law is a science. *Id.* at 42; see also Langdell, "Teaching Law as a Science," speech reprinted in 21 AM. L. REV. 123 (1887). The principles had to be sufficiently abstract in order to cover the entire range of possible cases. Grey, *supra* note 11, at 12. These abstract concepts, however, could not be vague or ambiguous. *Id.*

Due to this belief in abstract concepts of law, the approach of the classical theorists is often referred to as the "transcendental approach." See Oliphant & Hewitt, *supra* note 13, at x-xxi, xxv-xxvii. The general principles can be discerned through induction from existing precedents. *Id.*

¹⁵ 1 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 69-70 (1st ed. 1890).

¹⁶ Representative legal realists include Morris and Felix Cohen, Walter Wheeler Cook, Jerome Frank, Oliver Wendell Holmes, Karl Llewellyn, Herman Oliphant, and Roscoe Pound.

¹⁷ See Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 821 (1935). The assault was on such abstractions as "title," "contract," "due process," "fair value" and "vested rights." See *id.* at 823. According to Felix Cohen, the legal concepts of the classical theorists are nothing more than unverifiable supernatural entities. See *id.* at 821. Because these concepts are not defined in terms of either empirical fact or ethics, any examination of social fact or policy is precluded. *Id.* at 820. By necessity, arguments based on such concepts are irrefutable. *Id.* at 821. Such a system of jurisprudence divorced from ethics and empirical facts is nothing more than "a branch of the science of transcendental nonsense." *Id.*

The legal theorists also reject the notion of a finite system of general principles applicable to all fact situations. See J. FRANK, *supra* note 12, at 6. "Even in a relatively static society, men have never been able to construct a comprehensive eternized set of rules anticipating all possible legal disputes and settling them in advance." *Id.*

Moreover, the realists view the law as inherently uncertain. See *id.* at 6-7. The impermanent nature of the law was deemed to be socially desirable, because it enabled the law to reflect the realities of ever-changing social and political conditions. *Id.*

¹⁸ See Cohen, *supra* note 17, at 821-49. "[I]nstead of assuming hidden causes or transcendental principles behind everything we see or do, we are to redefine the concepts of abstract thought as constructs, or functions . . . of the things that we do actually see or do." *Id.* at 826. "The life of the law has not been logic: it has been experience." O. HOLMES, *THE COMMON LAW* 1 (1923).

¹⁹ See Cohen, *supra* note 17, at 828. "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897); see J. FRANK, *supra* note 12, at 126. The judge makes law whenever she decides a case. *Id.* Moreover, it is considered the law of that case only, not the law of future cases, although it may influence a judge in a future case. *Id.*

ered to be a social event, a product of social forces²⁰ as well as a determinant of future social behavior,²¹ law was seen as a dynamic social *process*.²² Viewing legal reasoning not as a matter of logical deduction from fixed general principles,²³ judges weighed and balanced competing social policies and interests to arrive at a decision that would best promote the public interest.²⁴ According to legal

²⁰ Cohen, *supra* note 17, at 843. A judicial decision is a product of such social determinants as the economic, political, and professional background and activities of the judge. *Id.* at 846.

²¹ *Id.* at 844. A decision is also a determination of future behavior in that it affects the way people act. *Id.* at 843.

²² *Id.* at 844. Lawyers are like scientists engaged in the study of the behavior of human beings. J. FRANK, *supra* note 12, at 129-30 (quoting Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L. J. 457, 475-76 (1924)). Specifically, lawyers study the past behavior of judges in order to be able to predict how they will behave in the future. See Cohen, *supra* note 17, at 843-46. Therefore, a judicial decision can only take on meaning when placed in context, *i.e.*, its past and future. *Id.* at 844. Thus, the concept of law as a complete system of static principles transcending time and circumstance is incorrect. *Id.* at 844-45.

²³ Cohen, *supra* note 17, at 844-45. Nor does it involve the mechanical application of rigid rules to cases without regard to their specific factual context. According to Karl Llewellyn, legal rules are not "applied" by the judge; instead, they are reformulated—either expanded or contracted—so that the case at hand is either covered by the rule definitively or not at all. See Llewellyn, *The Case Law System in America*, 88 COLUM. L. REV. 989, 1005 (1988) [hereinafter *Case Law*] (published in Germany in 1933). Moreover, Llewellyn has contended that precedent is not binding, *id.* at 993, and the conception that precedent dictates the result in cases is false. K. LLEWELLYN, *THE COMMON LAW TRADITION* 62 (1960) [hereinafter *COMMON LAW*]. Often, precedent is not even followed, but serves merely to influence the judge. See *Case Law, supra*, at 992-93. A judge therefore has a considerable degree of leeway in the decision-making process. See *COMMON LAW, supra*. A judge also has leeway in that she decides what "the" facts are in a case. See *Case Law, supra*, at 997. A case will come out differently depending on how the facts are treated. *Id.* This is often reflected in differing versions of the statement of the facts as recounted by majority, concurring and dissenting opinions of the same case. See *id.* at 996-98. Any interpretation of the fact situation, Llewellyn has asserted, is neither right nor wrong; rather, each furthers a different purpose. *Id.* at 998.

A judge encounters institutional constraints in the decision-making process. See *id.* at 995-96. Such constraints include the fact that a judge has been legally trained, and desires to make her decision conform to existing legal doctrine. See *id.* at 995. A judge is further constrained by the fact that she has internalized the rules and institutions. *Id.*; see also *COMMON LAW, supra*, at 19-61 (discussing stabilizing factors in appellate judicial decision-making process).

²⁴ See Holmes, *supra* note 19, at 467. The very essence of the judicial task is to balance opposing individual claims and determine which the law should favor to promote the social welfare. See J. FRANK, *supra* note 12, at 120-21. It must take into account the social sciences—psychology, economics, and politics—rather than logic. See Cohen, *supra* note 17, at 847.

In addition, judges must be conscious of the fact that they themselves make the law. See J. FRANK, *supra* note 12, at 121. "[T]he self-delusion, that . . . they are merely applying the commands given them by some existing external authority, cannot but diminish their

realists, the classical approach permitted courts to hide the value judgments inherent in judicial decisions under the guise of objectivity.²⁵ As a consequence, realists maintained that legal criticism suffered.²⁶

The legal realists were not completely successful in their approach to legal reasoning since they failed to generate an alternative theory to formalism that would make normative argument possible.²⁷ Reacting to this flaw, contemporary schools of legal thought, while continuing to espouse the basic premises of legal realism,²⁸ have attempted to produce normative legal argument.²⁹ Current schools, accordingly, have extended and reformed legal realism.³⁰

efficiency." *Id.*

The legal realists also criticized the classical thinkers' conception of a self-regulating market system and their separation of private and public spheres. Singer, *supra* note 2, at 482. According to the realists, all market systems distribute power and wealth and thus constitute regulatory systems. *See id.* The state, by failing to intervene in "private" transactions, reinforces the existing distribution of wealth and thus privileges the interests of one party over the interests of the other. *Id.*

²⁵ *See* Cohen, *supra* note 17, at 841. According to the legal realists, classical definitions of law were inadequate since they confused "what is" with "what ought to be." *See id.* at 836. The realists believed that every case presents a moral dilemma to the judge, which the classical conception of law effectively hid. *See id.* at 840. The deductive approach was inadequate; two opposing general principles could always be formulated, each embodying a different set of interests with which to decide a case. Oliphant & Hewitt, *supra* note 13. Therefore, underlying the purported logical deductions of the classical judges were value judgments, often unarticulated and even unconscious, as to the relative worth and importance of competing interests. *See* Holmes, *supra* note 19, at 466. The result was the perpetuation of class prejudices and uncritical moral assumptions. *Id.*

²⁶ Cohen, *supra* note 17, at 838.

²⁷ *See* Singer, *supra* note 2, at 467-68. "Realists did relatively little to formulate new criteria by which substantive legal outcomes could be evaluated." Ackerman, Book Review, 103 DAEDALUS 119, 122 (1974) (footnote omitted) (reviewing J. FRANK, *supra* note 12). According to Professor Singer, the approach espoused by the realists was flawed in terms of its assumptions that judicial adjudication could be free of political underpinnings, that there existed a commonly shared view of what constitutes the "public interest," and that controversial legal problems could be resolved through an uncontroversial balancing process. *See* Singer, *supra* note 2, at 502-03.

²⁸ *See* Singer, *supra* note 2, at 503. For example, all the current schools reject the notion that specific legal rules can be deduced from general abstract principles. *See id.* In addition, almost all approaches employ the realists' metaphor of balancing competing policies and interests. *See id.*

²⁹ *Id.* at 504.

³⁰ *See id.* at 503-04. "All major current schools of thought are, in significant ways, products of legal realism." *Id.* at 467.

C. Contemporary Legal Theory

Professor Singer has categorized contemporary legal theory into six schools.³¹ He further divided these schools into two categories: "liberal" and "critical."³² Liberal theories,³³ while adhering to legal realism's basic tenets, recreate aspects of formalism in their attempt to construct normative legal argument.³⁴ By appealing to impartial substantive criteria for judgment or to neutral decision-

³¹ See *id.* at 504; see also *infra* notes 33 & 39 and accompanying text (for discussion of several of Professor Singer's schools of contemporary legal theory).

³² See *id.* As would be expected, the politics of the two camps tend to differ. See Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 2 (1986). Professor Singer identifies the "liberal" movement with the right and the "critical" theories' movement with the left. See *id.* Yet, both movements developed as a reaction to the jurisprudence of the sixties, which saw "adjudication as the process for interpreting and nurturing a public morality." *Id.*

³³ See Singer, *supra* note 2, at 504. Professor Singer includes the schools of legal process, rights theory, and law and economics in his liberal theories category. See *id.*

The legal process school emphasizes not substantive legal rules, but the process by which legal institutions operate. *Id.* at 505. The basic premise is that legal rules are justified if they are generated through appropriate procedures "by legitimate institutions keeping within their proper roles." *Id.* According to legal process thinkers, the role of the courts is limited to making decisions that can be based on general principles or standards both reconcilable with past precedent and applicable to future cases. *Id.* at 505-07. Matters which implicate policy choices typically involve political compromise or majority rule, and as such, are best suited for, and therefore should be left to, the legislature. *Id.* Representative legal process theorists include Henry Hart, Albert Sacks and Lou Fuller. *Id.* at 505-06.

The basic goal of the rights theorists is to identify legal rules to which all people would consent if they thought about the problem of justice rationally. *Id.* at 509. This approach distinguishes between principles of justice, about which people can agree, and principles of morality, about which it is expected that people will not agree. *Id.* Legal rights, therefore, are to be based on principles of justice which should be acceptable to all. *Id.* at 510. As to the methodology for generating principles of justice, some legal rights theorists try to formulate a decision-making procedure for filtering community values. *Id.* Other theorists join reasoned elaboration of community values, as embodied in existing practice and belief, with an appeal to the judge's intuitive judgment about justice. *Id.* Representative rights theorists include John Rawls, Ronald Dworkin, Robert Nozick, Richard Epstein, and Bruce Ackerman. See *id.* at 508-09.

The focus of the law and economics theorists is the maximization of social welfare through economic cost/benefit analysis. *Id.* at 513-14. The social welfare is enhanced through the concepts of "wealth maximization" or "efficiency." *Id.* at 513. Law and economics theorists strive to compare the costs and benefits of alternative allocations of entitlements, and to identify legal rules that will maximize social welfare. *Id.* at 514. Costs and benefits are valued according to how much one is willing and able to pay for an entitlement given the pre-existing allocation of wealth. *Id.* Those willing to pay the highest prices for entitlements are presumed to value them the most and are therefore believed to reap the greatest social utility from such entitlements. *Id.* Representative law and economics scholars include Richard Posner, Richard Coase, and Mark Kelman. See *id.* at 513-16 and accompanying footnotes.

³⁴ *Id.* at 516.

making procedures,³⁵ liberal theorists attempt to construct an objective standpoint from which judges can decide cases in a neutral manner.³⁶ Thus, liberal theorists assume that there are objectively "correct" answers, ascertainable by reference to such impartial criteria or procedures.³⁷ Such reasoning closely mirrors the formalistic thinking rejected by legal realism.³⁸

In contrast, critical theories³⁹ have their basis in normative legal argument without the reintroduction of formalistic elements.⁴⁰ Critical theorists reject the idea that answers to legal questions can be derived from a noncontroversial, universally shared point of view.⁴¹ Rather, schools such as critical legal studies recognize that there are competing social visions or perspectives that cannot simply be dismissed,⁴² but which must be incorporated into normative argument.⁴³ It is suggested by some legal commentators that baseline analysis accomplishes this objective.⁴⁴

II. BASELINE ANALYSIS

A. *As a Descriptive Tool*

Every attorney, judge, and layperson approaches any given legal problem with a certain perspective or social vision.⁴⁵ Such per-

³⁵ *Id.* For example, law and economics theorists employ purportedly neutral criteria such as efficiency and wealth maximization. *See id.* at 513-16. Legal process and rights theorists attempt to employ impartial decision-making procedures based on community values. *See id.* at 507-13.

³⁶ *Id.* at 516-17.

³⁷ *See id.*

³⁸ *Id.* at 516. The approach of the "liberal" theories assumes that everyone would reach the same answer to a problem if they thought about it rationally. *Id.* at 517. This necessarily implies that proper reasoning will lead to the "correct" answer. *Id.* Moreover, so that everyone might agree, the principles or decision-making procedures must be stated in sufficiently abstract terms. *See id.*

³⁹ *Id.* at 504. Within this category, Professor Singer includes critical legal studies, feminist legal theory, and law and society. *Id.*

⁴⁰ *Id.* at 533.

⁴¹ *Id.*

⁴² *Id.* Different social visions exist precisely because people disagree as to what constitutes a just or good society. *Id.*

⁴³ *Id.* at 536-37. Professor Singer declares that true consensus arises from recognizing competing perspectives, rather than from insisting upon a common viewpoint. *Id.* at 533. "Contradiction all the way down is the route to a responsible, moral formulation of social justice." *Id.* at 537.

⁴⁴ *See* Beermann & Singer, *supra* note 2, at 914-15.

⁴⁵ *Id.* at 913.

spectives or visions vary based on experiences, values, gender, sexual orientation, religion, race, and socioeconomic status.⁴⁶ Because one can never completely transcend her own experiences and biases, an objective perspective is unattainable.⁴⁷ For this reason, "no one can see fully from another's point of view."⁴⁸ Thus, the existence of multiple perspectives eliminates the possibility of objectivity in the law⁴⁹ as well as the possibility of a universally "correct" answer to legal problems.

Furthermore, the existence of multiple perspectives helps to explain why reasonable arguments can always be made on either side of an issue⁵⁰ and why law is, in essence, a matter of persuasion.⁵¹ Since there is always more than one "correct" answer to a

⁴⁶ See *id.*; see also Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 521 (1986) (discussing effect of judge's life experiences on predisposition to cases); Minow, *supra* note 1, at 46 ("what interests us, given who we are and where we stand, affects our ability to perceive"). Professor Kennedy, adopting a judge's personam, made the following observation: "I already have, as part of my life as I've lived it up to this moment, a set of intentions, a life-project as a judge, that will orient me among the many possible attitudes I could take to this work." Kennedy, *supra*.

⁴⁷ Minow, *supra* note 1, at 48. "[N]o one is free from perspective. . . ." *Id.* at 32.

⁴⁸ *Id.* at 32. Total understanding of another is impossible due to "the social learning and cultural baggage" every person carries. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1580 (1987).

Concededly, recognition and adoption of another's perspective requires effort. See *id.* at 1651; Minow, *supra* note 1, at 14. "The commitment to seek out and to appreciate a perspective other than one's own . . . is a difficult commitment to make and to fulfill. Aspects of language, social structure, and political culture steer in the opposite direction: toward assertions of absolute categories transcending human choice or perspective." *Id.* However, these difficulties do not excuse the decision-maker from attempting to take on others' perspectives. See Henderson, *supra*, at 1651.

⁴⁹ Minow, *supra* note 1, at 14. What initially appears to be an objective position appears biased from another point of view. *Id.*

⁵⁰ See Singer, *Persuasion*, 87 MICH. L. REV. 2442, 2443 (1989). Each party to a legal dispute views the matter from a completely different—usually opposite—perspective. *Id.*; see also Case Law, *supra* note 23, at 992 ("almost every case on appeal to a court of last resort could be decided just as easily, legally speaking, for the plaintiff as for the defendant").

The existence of multiple perspectives also accounts for concurring and dissenting opinions in judicial decisions. *Id.* at 997 n.2. According to Karl Llewellyn, separate opinions have value in that they each approach the case from a different "vantage point," each embodying a new perspective, thus "lend[ing] . . . a depth dimension to decisions." *Id.*

⁵¹ See Singer, *supra* note 50, at 2442. Lawyers devote much of their time to persuasion; they try to persuade the judge to rule in favor of their clients. *Id.* Law professors spend time teaching their students how to persuade. *Id.* Judges, in their opinions, try to persuade others that their ruling on a case is legally valid. *Id.* Lawyering requires problem-solving which involves "trying to persuade others to act in ways that will change the world into something closer to what we desire." Lopez, *Law Lawyering*, 32 UCLA L. REV. 1, 2 (1984); see White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52

legal problem, and because a purely objective answer is unascertainable through logical reasoning,⁵² persuasion will dictate the choice from among several possible answers. Understanding the perspective of another is a "precondition to persuasion."⁵³ While persuasion does not convince others to change their values,⁵⁴ it does force others to become aware of values they already have; values that they did not initially consider relevant to the matter at hand.⁵⁵ By adopting a different perspective, such values become apparent and relevant to the observer.⁵⁶

Perspectives are manifested in "baselines"⁵⁷ or "vantage

U. CHI. L. REV. 684, 684 (1985) ("law is most usefully seen not . . . as a system of rules, but as a branch of rhetoric").

⁵² See *supra* notes 23-25 and accompanying text.

⁵³ Singer, *supra* note 50, at 2457.

⁵⁴ *Id.* at 2456.

⁵⁵ *Id.*

⁵⁶ *Id.* at 2457-58. Professor Singer employed a horse and rider illustration to demonstrate the process of persuasion:

Perhaps, then, persuasion starts by creating a relationship between oneself and others. Such a relationship does not connect people who were unconnected; it makes them aware of the connections they already have. The relationship changes who one is. In so doing, it clarifies what one really thinks . . . Persuasion begins when the rider notices the horse, and the fact that the horse cannot speak. The rider can never know what the horse knows. To get even a glimpse of what the horse is thinking, the rider must look the horse in the eye. But to do that, the rider must get down off the horse and walk a little way. Persuasion is what happens when the rider turns around.

Id. at 2458.

⁵⁷ See Beermann & Singer, *supra* note 2, at 914. Professors Beermann and Singer attribute the use of the term "baseline" to the work of Jeremy Paul, Cass Sunstein, and Duncan Kennedy. *Id.* Professor Paul explored the operation of baselines in the regulatory takings doctrine. See Paul, *Searching for the Status Quo*, 7 CARDOZO L. REV. 743 (1986). Paul demonstrated that the takings doctrine depends on one's starting point (*i.e.*, baseline). See *id.* at 750.

Professor Kennedy has applied baseline analysis to economic analysis. See Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 428-29 (1981). Specifically, Kennedy argued that cost-benefit analysis of entitlements is impossible without an "entitlement background," *i.e.*, a baseline against which to measure a proposed change in entitlements. See *id.* Choice of baseline implicates a value choice, effectively rebutting the notion of objectivity and neutrality in efficiency analysis. See *id.* at 389.

Professor Sunstein has analyzed baselines within the context of constitutional law. See Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 *passim* (1987). He argued that many current constitutional doctrines proceed from a common-law baseline from which the concepts of neutrality and state inaction may be measured. See *id.* at 875.

Professors Beermann and Singer applied baseline analysis to the issue of job security. See Beermann & Singer, *supra* note 2, *passim*. They argued that judges are reluctant to recognize workers' claims for job security because they proceed from baselines which create a "presumption against job security. . . ." See *id.* at 919.

points,"⁵⁸ *i.e.*, starting points from which analysis begins.⁵⁹ The choice of a baseline, whether explicit or implicit, affects the resolution of legal issues.⁶⁰ A baseline, the embodiment of a particular moral or political value,⁶¹ affects the way in which a legal issue is conceptualized and stated, which in turn affects the nature of the argument.⁶² In essence, baselines determine what is central or important and what is peripheral or unimportant in any legal problem.⁶³ By skewing the analysis, choice of baseline essentially creates a presumption, thereby allocating the burden of proof in favor of the party whose position is founded on the value underlying the baseline.⁶⁴

Prevailing baselines tend to privilege the status quo⁶⁵ because existing societal and economic arrangements are assumed to be neutral.⁶⁶ Since the status quo is viewed as good, natural and freely chosen,⁶⁷ these assumptions are rarely questioned or even expressly recognized.⁶⁸

Although baselines and their underlying values invariably in-

⁵⁸ See Minow, *supra* note 1, at 13-14. Professor Minow applied baseline analysis, which she referred to as "vantage point," to the legal treatment of difference, specifically addressing the differences among people in terms of gender, race, ethnicity and religion. *Id.* According to Minow, the concept of difference is relative, *i.e.*, it is only meaningful in terms of a comparison. *Id.* at 13. This point of comparison, or reference point, reflects a point of view. See *id.* at 14. By recognizing points of comparison and viewpoints, problems of difference become linked to questions of "vantage point." *Id.* By applying baseline analysis, "what initially appears to be a fixed and objective difference may seem from another viewpoint like the subordination or exclusion of some people by others." *Id.*

⁵⁹ Beermann & Singer, *supra* note 2, at 915.

⁶⁰ *Id.* at 914-15. Professors Beermann and Singer noted the prevailing tendency of courts to reject workers' claims to job security and cite existing baselines that favor the employer as a primary reason for this trend. *Id.* at 915.

⁶¹ *Id.* at 916.

⁶² See *id.* at 915. Different perspectives lead to different arguments. *Id.* at 925.

⁶³ *Id.* at 937; see *Case Law, supra* note 23, at 997-98. "This is what one looks for . . . [and] what one has a tendency to emphasize, *overlooking* elements in themselves no less important." *Id.* at 998 (emphasis in original).

⁶⁴ Beermann and Singer, *supra* note 2, at 937.

⁶⁵ *Id.* at 919. Specifically, baselines favor the existing distribution of power and wealth in the marketplace. *Id.* Regarding the issue of job security, managerial power appears natural and inevitable, whereas worker security is viewed as an unwarranted interference with the free market. *Id.* In the area of economic analysis, the baseline used in cost-benefit analysis of entitlements is the existing distribution of income and entitlements. See Kennedy, *supra* note 57, at 389-90. In constitutional law analysis, the status quo is used as the baseline from which to measure state action. See Sunstein, *supra* note 57, at 882.

⁶⁶ Minow, *supra* note 1, at 54.

⁶⁷ *Id.* at 55. For example, common-law categories are deemed to be prepolitical and a part of nature, rather than a social or legal construct. Sunstein, *supra* note 57, at 879.

⁶⁸ See Minow, *supra* note 1, at 55.

fluence the analysis and outcome of a legal problem, judges generally fail to acknowledge their existence and operation.⁶⁹ This may be because the baseline is so powerful and well-entrenched that it may be overlooked.⁷⁰ Even judges who are aware of their perspective may simply assume that it is universal, superior to that of others,⁷¹ irrelevant, or unimportant.⁷² As a result, the political and moral values that are embodied in baselines are hidden within legal discourse under the guise of objectivity and neutrality.⁷³ Because baselines serve as starting points and are not explicitly recognized, they tend to suppress any discussion of the moral and

⁶⁹ See Beermann & Singer, *supra* note 2, at 919; Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 49 (1989). Speaking of the Rehnquist Court, Professor Chemerinsky stated “the Justices never acknowledge . . . value choices nor discuss permissible types of value judgments.” *Id.*

⁷⁰ See Minow, *supra* note 1, at 39. Baselines may be so well established and powerful that even theorists and commentators who argue for adopting the perspective of another may fall prey to their power. *See id.* at 60. When criticizing existing legal doctrine, commentators and dissenting judges often proceed from the same unstated baseline. *See* Beermann & Singer, *supra* note 2, at 922. “[T]hey often repeat in new contexts new versions of the old assumptions they set out to challenge.” Minow, *supra* note 1, at 61. This has the unfortunate effect of perpetuating the existing baseline. *See id.* at 40.

⁷¹ *See* Minow, *supra* note 1, at 54.

⁷² *Id.* at 51. This often occurs through the use of stereotypes. *Id.* Stereotypical thinking, *i.e.*, the failure to acknowledge the individuality of people, results from the failure to notice the perspective of another. *Id.* at 51 n.201.

⁷³ *See* Beermann and Singer, *supra* note 2, at 916. Professor Chemerinsky has characterized the Rehnquist Court’s jurisprudence as a “search for judicial neutrality.” Chemerinsky, *supra* note 69, at 48 (footnote omitted). For examples of the Rehnquist Court’s rhetoric on neutrality and avoidance of value imposition, *see id.* at 89 n.202; *see also* Minow, *supra* note 1, at 44-45 (“[u]nstated [baselines] lie hidden in legal discourse, which is full of the language of abstract universalism”).

A judge knows the outcome of a case before he drafts the opinion. *Case Law, supra* note 23, at 992; *see* Holmes, *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1 (1870), reprinted in 44 HARV. L. REV. 725, 725 (1931) (“[i]t is the merit of the common law that it decides the case first and determines the principles afterwards”). A judge then writes an opinion in order to justify and legitimize his decision. *See Case Law, supra* note 23, at 992.

There are several reasons why a judge wishes to justify or “legalize” his decision. *See* Kennedy, *supra* note 46, at 527-28. First, the judge has a commitment to the public to decide cases “according to the law” and must therefore persuade the public that he has upheld this commitment. *Id.* at 527. Second, if the ruling is without any legal basis whatsoever, the judge will be subject to the disapproval of his colleagues for having stepped beyond the bounds of his authority. *Id.* Third, the more persuasive the legal argument, the less likely the judge will be reversed. *Id.* Fourth, by writing a persuasive opinion, the judge may be able to influence the outcomes of subsequent cases or even affect popular consciousness. *Id.* at 527-28. Fifth, a persuasive opinion will enhance the judge’s credibility and reputation, thus affecting what the judge can do in subsequent cases. *Id.* at 528.

political choices that orient an analysis.⁷⁴ In this way, baselines tend to mask "the political underpinnings of legal rules."⁷⁵

The nonrecognition of perspectives is dangerous in that it leads to the failure to acknowledge minority and dissenting perspectives.⁷⁶ "[A] judicial stance that treats its own perspective as unproblematic makes other perspectives invisible and puts them beyond discussion."⁷⁷ As a result, the views of the majority or of those in power may prevail, and may be confused with reason⁷⁸ or with reality itself.⁷⁹

B. *As a Normative Argument*

Baseline analysis does not yield a specific answer to a legal problem⁸⁰ in and of itself. Eventually, an answer must be reached. Inevitably, one baseline must be chosen from among several competing ones. By necessity, this involves choosing one value over another.⁸¹ This potentially leads back to the central dilemma confronting legal realists and liberal theorists: determining which value should dictate, or more specifically, which baseline should control, when no single baseline is acceptable to all. Since one value must be chosen, elements of formalistic thinking are poten-

⁷⁴ Beermann and Singer, *supra* note 2, at 915-16.

⁷⁵ *Id.* at 916. Professor Chemerinsky has written that with regard to constitutional law cases, the Supreme Court's quest for neutrality results in inconsistent approaches to constitutional interpretation. See Chemerinsky, *supra* note 69, at 51. According to Chemerinsky, in its effort to avoid value imposition, the Supreme Court failed to develop a coherent theory of constitutional interpretation. *Id.* "[T]he Rehnquist Court insists on principles external to the Justices' values, but offers no guidance as to what constitutes such principles or how they are to be determined." *Id.*

⁷⁶ See Beermann and Singer, *supra* note 2, at 913. Failure to recognize perspectives leads to the assumption that one can see and understand everything. *Id.*

⁷⁷ Minow, *supra* note 1, at 53 (footnote omitted).

⁷⁸ See Beermann & Singer, *supra* note 2, at 913. By failing to recognize the significance of perspective and the political nature of law, the power holder can claim that his view is a general one and that the rule or policy he is implementing is the one that any rational person would accept. See Singer, *supra* note 2, at 540-41.

⁷⁹ See Minow, *supra* note 1, at 66-67. The viewpoint of the power holder may acquire the "earmarks of factuality." *Id.* at 67. Moreover, the prevailing conception of reality may convince even those injured by it of its actuality. *Id.* "[P]olitical and cultural success itself submerges the fact that conceptions of reality represent a perspective of some groups, not a picture of reality free from any perspective." *Id.* (footnote omitted).

⁸⁰ See *id.* at 75.

⁸¹ *Id.* The view that is ultimately used to resolve a conflict is only a partial view. *Id.* Although a competing perspective may inform the discourse and challenge the prevailing perspective, it is at best a "corrective lens, another partial view, not absolute truth." *Id.* at 75-76 (footnote omitted).

tially reintroduced into the analysis.

Although it does not eliminate the necessity of having to choose one value or policy over another, the use of baseline analysis in adjudication renders that choice more informed and therefore, it is hoped, more just.⁸² Addressing more perspectives will lead to a more informed discourse and analysis.⁸³ Consequently, a decision-maker may see all the complexities involved⁸⁴ and may notice an injury she had previously overlooked or take more seriously a harm she had simply disregarded in the past.⁸⁵ Also, she may realize that her outlook is not necessarily the only one or the "right" one⁸⁶ and may even decide that the status quo is neither "inevitable [n]or ideal."⁸⁷ Ideally, baseline analysis will enable a decision-maker to examine all possible perspectives and possibly lead to the substitution of the prevailing baseline with a more appropriate one. In sum, examining the perspective of others may "lead to revolutions in habitual legal thinking and transformation of legal problems."⁸⁸ By initially focusing on several baselines and treating them as equally meritorious, formalistic reasoning is avoided in the analytic process. "Justice, in this view, is not abstract, universal, or neutral. Instead, justice is a quality of human engagement with multiple perspectives."⁸⁹

Moreover, by making baseline analysis an express element of the adjudicative process, the decision-maker would be compelled to recognize and justify explicitly her value or baseline choice in her written opinions.⁹⁰ Legal opinions would arguably be written more candidly and justly.⁹¹ If this view were adopted, judges, com-

⁸² See Henderson, *supra* note 48, at 1576.

⁸³ See Beermann & Singer, *supra* note 2, at 914. By attempting to understand the situation and experience of another, more meanings become available to legal discourse. See Henderson, *supra* note 48, at 1577. Professor Henderson stated that "empathy" is often achieved by imagining oneself to be in the position of the other. *Id.* at 1580-81.

⁸⁴ See Chemerinsky, *supra* note 69, at 102.

⁸⁵ See Minow, *supra* note 1, at 72; Henderson, *supra* note 48, at 1653.

⁸⁶ See Minow, *supra* note 1, at 60; Henderson, *supra* note 48, at 1653.

⁸⁷ See Minow, *supra* note 1, at 16.

⁸⁸ See Henderson, *supra* note 48, at 1577.

⁸⁹ Minow, *supra* note 1, at 60; see also Kaye, *The Human Dimension in Appellate Judging: A Brief Reflection on a Timeless Concern*, 73 CORNELL L. REV. 1004, 1006 (1988) (appellate court must "bring the full measure of every human capacity to bear in resolving" cases).

⁹⁰ See Beermann and Singer, *supra* note 2, at 915; Chemerinsky, *supra* note 69, at 61.

⁹¹ See Chemerinsky, *supra* note 69, at 60. A rejection of the Supreme Court's rhetoric of neutrality "will force the Court to explain and defend its value choices more openly." *Id.* This, in turn, may lead to a greater public awareness and understanding of the issues in-

pelled to discuss the value judgments and policy choices implicated in each case, would be precluded from relying upon formalistic reasoning to justify their written opinions. Baseline analysis would, in effect, serve as a check on the decision-making process.⁹²

More significantly, where one's perspective was premised upon an empirical assumption about the world, baseline analysis could prove the empirical assumption erroneous.⁹³ If the empirical assumption is inaccurate, it follows that the entire analysis predicated on that assumption is flawed. Under such circumstances, the substitution of such a baseline for one based upon accurate empirical conceptions of the world would eliminate the necessity of making a value choice and lessen the likelihood of formalistic reasoning.

C. Application

The United States Supreme Court's decision in *DeShaney v. Winnebago County Department of Social Services*⁹⁴ illustrates the potential influence of baselines upon the outcome of a case. In *DeShaney*, the plaintiffs, a mother and her child who had been severely beaten by his father, brought a section 1983 claim against social workers and other local officials⁹⁵ alleging deprivation of liberty in violation of the fourteenth amendment's due process clause.⁹⁶ The action was premised on the ground that the state,

volved. *Id.* at 102.

⁹² See Minow, *supra* note 1, at 94. "Judicial power is least accountable when judges leave unstated—and treat as given—the perspective they select." *Id.*

Professor Minow formulated two exercises to aid the decision maker in recognizing the perspectives of others. See *id.* at 79-82. The first exercise calls for an examination of one's own attitude toward the stereotyping of people deemed to be different, as well as one's method of categorizing the world. *Id.* at 79-80. The second entails a search for and celebration of differences and similarities in an effort to establish new bases for connection. *Id.* at 80-81. One way to do this is by simply trying to understand how the other person understands. *Id.*

Professor Minow cautioned against responding to the existence of multiple perspectives with passivity. See *id.* at 82. Such a response is not neutral; rather, it favors the status quo. *Id.* at 82-83.

⁹³ See Beermann and Singer, *supra* note 2, at 920. For example, these empirical assumptions may be based upon subjective ideological premises reflecting the judge's social class, experiences, and education, rather than upon objective fact. See *id.* at 931-33. The decision maker then evaluates competing empirical claims based upon the ideological assumptions embodied in the baseline. *Id.* at 933.

⁹⁴ 489 U.S. 189 (1989).

⁹⁵ See *id.* at 191. The action was brought under 42 U.S.C. § 1983. *Id.*

⁹⁶ See *id.* at 191.

through its affirmative actions and words, undertook to protect the child, thereby acquiring an affirmative duty to do so in a reasonably competent manner.⁹⁷ In response, the Court concluded that the state had no constitutional duty to protect the child from his father's repeated violence.⁹⁸

Justice Rehnquist, writing for the majority, employed a baseline that the Constitution contains no positive rights.⁹⁹ Under such a view, any claim seemingly dependent upon such rights was automatically rendered suspect.¹⁰⁰ Based on this premise, the Court focused on the state's general lack of an affirmative duty to provide protective services, rather than the specific acts undertaken by the state, which, in and of themselves, may have given rise to a duty of reasonable care.¹⁰¹

The majority's baseline, reflected throughout the entire opinion, first appeared in the Court's statement of the issue: whether the state has an affirmative duty to protect its citizens.¹⁰² From the outset, the majority rejected the notion that a state has an affirmative obligation to provide services to its citizens.¹⁰³ Since the claim was viewed as one concerning inaction on the part of the state,¹⁰⁴ it was "logical" for the Court to hold that the "[S]tate's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."¹⁰⁵ Given its initial

⁹⁷ See *id.* at 197. The state's affirmative actions, allegedly giving rise to its duty to protect the child include: taking temporary custody of the child, returning him to his father's custody and periodic visits by a caseworker. *Id.* at 192-94.

⁹⁸ *Id.* at 196-97. The due process "[c]lause is . . . a limitation on the state's power to act, not . . . a guarantee of certain minimum levels of safety and security." *Id.*

⁹⁹ *Id.* at 204 (Brennan, J., dissenting).

¹⁰⁰ *Id.* (Brennan, J., dissenting).

¹⁰¹ See *id.* (Brennan, J., dissenting).

¹⁰² See *id.* at 194. The Court viewed the issue as: "[W]hen, if ever, the failure of a state or local governmental entity or its agents to provide an individual with adequate protective services constitutes a violation of the individual's due process rights." *Id.* The court's bias is also reflected in the manner in which it described the petitioners' claim: "Petitioners contend that the State deprived [the child] of his liberty interest . . . by failing to provide him with adequate protection against his father's violence." *Id.* at 197 (footnote and citation omitted).

¹⁰³ See *id.* at 195. The Court began its analysis with a discussion of the due process clause "as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security." *Id.*

¹⁰⁴ See *id.* at 204 (Brennan, J., dissenting). The Court stated that "[t]he most that can be said of the state functionaries in this case, . . . is that they stood by *and did nothing* when suspicious circumstances dictated a more active role. . . ." *Id.* at 203 (emphasis added).

¹⁰⁵ See *id.* at 197. The Court maintained that because the state is not required to pro-

baseline, the Court summarily dismissed the petitioners' argument that the particular actions taken by the state gave rise to an affirmative duty to protect the child,¹⁰⁶ narrowly construing prior case law which recognized such an affirmative duty.¹⁰⁷ Thus, the Court held that the plaintiffs' claim did not fall within the limited exception embraced by these prior cases.¹⁰⁸

Justice Brennan, dissenting, approached the issue from a different perspective.¹⁰⁹ His baseline recognized that under certain circumstances, state action may indeed impose positive duties.¹¹⁰ According to Justice Brennan, the majority misstated the issue.¹¹¹ Justice Brennan would focus on the acts that the state *had* taken, rather than on those it failed to take and would, therefore, frame the issue as whether the state's action conferred an affirmative duty to protect the child.¹¹² Given this baseline, Justice Brennan construed prior cases broadly, thereby including the plaintiffs' claim within their scope.¹¹³ In his analysis, Justice Brennan focused on the specific acts of the state that could have given rise to

vide protective services, it cannot be held liable for injuries that could have been avoided had it chosen to provide such services. *Id.*

¹⁰⁶ *Id.* at 198-99. The petitioners argued that the state's actions created a "special relationship" with respect to the child, giving rise to an affirmative duty to protect him in a reasonably competent manner. *Id.* at 197.

¹⁰⁷ *See id.* at 198-200. The Court read these cases as standing for the proposition that an affirmative duty arises only when the state takes a person into its custody, either through incarceration or institutionalization, thereby depriving him of his freedom to act on his own behalf. *Id.* at 199-200.

¹⁰⁸ *See id.* at 201.

¹⁰⁹ *See id.* at 203-12 (Brennan, J., dissenting). Justice Brennan explicitly recognized the importance of perspective in his dissenting opinion: "This is more than a quibble over dicta; it is a point about perspective, having substantive ramifications." *Id.* at 204 (Brennan, J., dissenting).

¹¹⁰ *See id.* at 211-12 (Brennan, J., dissenting).

¹¹¹ *See id.* at 205 (Brennan, J., dissenting). Justice Brennan asserted that the issue as the majority perceived it was not even raised in the case—it was never raised in the complaint or on appeal, nor was it addressed in the briefs. *See id.* (Brennan, J., dissenting).

¹¹² *See id.* (Brennan, J., dissenting).

¹¹³ *See id.* at 206-10 (Brennan, J., dissenting). Justice Brennan read the prior cases as standing for the general proposition that an affirmative duty to protect an individual arises where a state, through its acts, cuts off private sources of aid. *See id.* at 207 (Brennan, J., dissenting). According to Justice Brennan, the majority incorrectly decided that it was the state's act of physically restraining the individual that amounted to the deprivation of liberty. *See id.* at 205-06 (Brennan, J., dissenting). For Justice Brennan, it was the fact that the state denied the individual access to other sources of aid that constituted the deprivation, not the fact of physical restraint. *See id.* at 206 (Brennan, J., dissenting). Therefore, where the state's knowledge and expression of interest in protecting an individual effectively cut off other sources of aid, the state acquires a positive duty. *See id.* (Brennan, J., dissenting).

an affirmative duty¹¹⁴ and criticized the majority's formalistic attempt to draw a sharp line between state action and inaction.¹¹⁵ Justice Brennan placed great weight on the existence of a state child-welfare system "specifically designed to help children like Joshua [DeShaney]"¹¹⁶ and described in detail the acts taken by the Department of Social Services in *DeShaney*.¹¹⁷ Justice Brennan concluded that the existence of an active child-welfare program effectively discouraged other citizens from taking additional steps to protect a child once they had notified the Department of Social Services of the suspected abuse.¹¹⁸

In *DeShaney*, the Court could have come out either way while remaining within the confines of existing legal doctrine.¹¹⁹ The Court reached its result because of the initial baseline that it selected.¹²⁰ The different baselines articulated and applied by the majority and dissent demonstrate the different perspectives from which they viewed the plaintiffs' claim.¹²¹ Specifically, they reflect competing visions as to what constitutes ordinary and desirable government activity.¹²²

For Justice Rehnquist, the preferred norm was government

¹¹⁴ See *id.* at 208-10 (Brennan, J., dissenting). Justice Brennan's baseline led him to scrutinize the facts in greater detail than the majority. See *id.* (Brennan, J., dissenting). Therefore, the facts became the focal point of his analysis. See *id.* (Brennan, J., dissenting). Indeed, Justice Brennan cited facts that are not even mentioned by the majority. See *id.* (Brennan, J., dissenting). Justice Brennan was thus led to the conclusion that there was an affirmative duty imposed upon the state. See *id.* at 211-12 (Brennan, J., dissenting).

¹¹⁵ See *id.* at 206-07 (Brennan, J., dissenting); see also *id.* at 212-13 (Blackmun, J., dissenting).

¹¹⁶ See *id.* at 204 (Brennan, J., dissenting). Justice Brennan described in detail the function and duties of the Department of Social Services and the control it had over the decision whether or not to provide a child with protection from alleged abuse. See *id.* at 208-10 (Brennan, J., dissenting). These factors were ignored by the majority. See *id.* at 191-203.

¹¹⁷ See *id.* at 208-10 (Brennan, J., dissenting). For example, Justice Brennan considered it significant that a social worker periodically visited the DeShaney home, recorded her observations of apparent child abuse and then failed to do anything about it. See *id.* at 209 (Brennan, J., dissenting). This fact was summarily dismissed by the majority. See *id.* at 202.

¹¹⁸ See *id.* at 210 (Brennan, J., dissenting). Justice Brennan recognized that children may be better off without the existence of such a program. *Id.* (Brennan, J., dissenting).

¹¹⁹ See *supra* note 50 and accompanying text.

¹²⁰ See *DeShaney*, 489 U.S. at 204 (Brennan, J., dissenting).

¹²¹ See *id.* (Brennan, J., dissenting).

¹²² See Sunstein, *supra* note 57, at 886-88. "Such a decision [that adequate child protection should not be a constitutional entitlement] reflects deeply engrained views about the degree of governmental obligations and the social context in which they apply—a decision that is, by its very nature, political." *The Supreme Court—Leading Cases*, 103 HARV. L. REV. 137, 175 (1989) [hereinafter *Leading Cases*].

neutrality and inaction.¹²³ However, this political judgment was hidden by his formalistic conception of state "action" versus "inaction."¹²⁴ To distinguish between "action" and "inaction," Justice Rehnquist adopted a version of the status quo baseline, specifically, the distribution of entitlements as they existed at common law.¹²⁵ Under this approach, any deviation from the common law would be deemed an impermissible violation of the principle of neutrality.¹²⁶ Relying on the intent of the framers,¹²⁷ Justice Rehnquist determined that at common law the state had no affirmative duty to provide protective services.¹²⁸ Given this baseline, he inevitably concluded that the state's inaction did not violate the plaintiff child's constitutional rights.¹²⁹

It is possible that Justice Rehnquist reached this conclusion because he failed to examine the perspectives of the child and his mother in assessing the state's obligation. He may have failed to appreciate truly the pain and injury suffered by the child, as well as the pain and frustration suffered by his mother.¹³⁰ Had he done

¹²³ See *DeShaney*, 489 U.S. at 203.

¹²⁴ See *Leading Cases*, *supra* note 122, at 168. Using formalistic discourse, the Court portrayed itself as adhering obediently to the rule of law. *See id.* ("Court took refuge in a silence resonating with unspoken premises and unstated values").

¹²⁵ See Sunstein, *supra* note 57, at 875.

¹²⁶ See *id.* at 879. In essence, "the state action inquiry is not a search for whether the state has 'acted,' but instead an examination of whether it has deviated from functions that are perceived as normal and desirable" under the common law. *Id.* at 887.

¹²⁷ See *DeShaney*, 489 U.S. at 196. "The Framers were content to leave the extent of governmental obligation [to protect its citizens] . . . to the democratic political processes." *Id.*

¹²⁸ See *id.* The Court stated that the "cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid." *Id.*

The United States Constitution has consistently been interpreted as failing to impose upon the states an affirmative duty to ensure the welfare of its citizenry. *See Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982) ("Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services"), *cert. denied*, 465 U.S. 1049 (1984). In *Bowers*, the court held that the state has no constitutional duty to protect the public from dangerous madmen. *See id.* at 619; *see also Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (fourteenth amendment for protection against governmental oppression, not for provision of governmental services), *cert. denied*, 465 U.S. 1049 (1984). The description of the Constitution as a charter of negative rights implies that there is no constitutional right to any welfare benefits. *See Currie, Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 864 (1986). This interpretation is supported by the language of the due process clause, which is phrased as a proscription, *i.e.*, "nor shall any State," rather than an affirmative mandate. *Id.* at 864-65. Moreover, the state cannot "deprive" its citizens of certain rights. *Id.* at 865. This suggests a prohibition against aggressive state action rather than a denial of protections. *Id.*

¹²⁹ See *DeShaney*, 489 U.S. at 202.

¹³⁰ See Soifer, *Moral Ambition, Formalism, and the "Free World" of DeShaney*, 57

so, perhaps he would have found, as did the dissent, that the state's "inaction" as to the child was indeed action.¹³¹

The dissent recognized that the common law is not always the appropriate baseline for constitutional analysis¹³² in that the common-law conception of the role of the state was largely repudiated with the New Deal.¹³³ In modern times, a "positive" state has emerged,¹³⁴ and the distinction between "action" and "inaction" has become increasingly blurred.¹³⁵ It has also become apparent that in some instances the common law is neither natural nor neutral.¹³⁶ Rather, the common law has been recognized as a way of embodying a particular social theory serving some interests at the expense of others.¹³⁷ Consequently, blind adherence to the common-law baseline itself may constitute "action."¹³⁸ It would therefore seem more appropriate, in certain instances, to substitute for the common-law baseline one independent of the common law: one that embraces the principles of social justice that have been adopted since the New Deal.¹³⁹ Accordingly, Justice Brennan's per-

GEO. WASH. L. REV. 1513, 1514 (1989) (Justice Rehnquist's opinion "demonstrates moral insensitivity").

¹³¹ See *DeShaney*, 489 U.S. at 210 (Brennan, J., dissenting).

¹³² Sunstein, *supra* note 57, at 903-04.

¹³³ *Id.* at 904. Specifically, *Lochner*-like premises of neutrality and inaction have been rejected by the New Deal, *id.* at 903, and have been replaced with the view that aggressive governmental action is necessary, *id.* at 902.

¹³⁴ See Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1294 (1984). The reach of appropriate state action "has extended far into areas previously reserved to the family, market and church." *Id.* at 1326. Moreover, as Chief Judge Patricia M. Wald has pointed out, "[t]he neediest of our citizens are most conspicuously dependent on government largesse for the satisfaction of their most basic needs. But even those of us who are comparatively self-sufficient could hardly function in the modern world without relying on services and institutions provided by government." Wald, *Government Benefits: A New Look at an Old Gifthouse*, 65 N.Y.U. L. REV. 247, 263 (1990).

¹³⁵ See Kreimer, *supra* note 134, at 1325. "In a positive state, all rights are to some extent positive, for the government is often in a position to deal mortal blows to the exercise of rights by simply ceasing to intervene." *Id.* at 1326. As the government becomes increasingly involved in the lives of its citizens by providing various services, the denial of such services cannot be deemed to be of no constitutional significance. See Wald, *supra* note 134, at 250. To do otherwise would give government "almost infinite power to control and manipulate every aspect of our daily lives." *Id.*

¹³⁶ See Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 423 (1987).

¹³⁷ *Id.*

¹³⁸ *Id.* at 502.

¹³⁹ See Sunstein, *supra* note 57, at 907. Professor Sunstein suggested that a new baseline could be generated "through some theory of justice, to be derived from the language and animating purposes of the text [of the Constitution] and based to a greater or lesser

spective placed more responsibility on the state and imposed an affirmative duty upon it under a greater range of circumstances.¹⁴⁰ Justice Brennan, therefore, interpreted the Constitution broadly,¹⁴¹ determining that under certain circumstances, "inaction" may have constitutional significance.¹⁴² To the *DeShaney* majority, inaction was "neutral,"¹⁴³ to the dissent, "inaction [could] be every bit as abusive . . . as action."¹⁴⁴

The dissent assessed the state's conduct from the perspective of the child and his mother. From this baseline, the dissent recognized that the state had affirmatively extended its protection to the child and turned its back on him when he was most vulnerable, even though it was in a position to help him.¹⁴⁵

Thus it is evident that the Court's perspective in *DeShaney* profoundly influenced the nature of its discourse and reasoning. Since the analysis of the majority was arguably skewed, it created an additional hurdle for the child and his mother to overcome in order to recover against the state. As explicitly recognized by Justice Brennan, the Court virtually "preordain[ed]" the result.¹⁴⁶

Similarly, *Bowers v. Hardwick*¹⁴⁷ illustrates how baselines, and the perspectives they embody, influence the outcome of a deci-

degree on existing interpretations." *Id.*

¹⁴⁰ See *supra* note 113 and accompanying text; see also Soifer, *supra* note 130, at 1515 ("dissenters' worldview involves a complex continuum rather than a world that can be run with a simple on/off switch").

¹⁴¹ See *DeShaney*, 489 U.S. at 212 (Brennan, J., dissenting). "I cannot agree that our Constitution is indifferent to such indifference [on the part of the state toward the child]." *Id.* (Brennan, J. dissenting). Justice Blackmun would interpret the Constitution and constitutional precedents in light of "the dictates of fundamental justice." *Id.* at 213 (Blackmun, J., dissenting).

¹⁴² See *id.* at 210 (Brennan, J., dissenting). The dissent thus recognized that under the facts of *DeShaney*, failure to provide a service constituted action. See *id.* "It simply belies reality, therefore, to contend that the State 'stood by and did nothing' with respect to [the child]." *Id.* (Brennan, J., dissenting). As Chief Judge Wald observed, "[t]he Court could conclude that this was a case of inaction only by focusing on a narrowly defined slice of time—the moment at which [the child's] father struck the crippling blows—and by ignoring the broader context produced by the sum of the state's actions." Wald, *supra* note 134, at 262.

¹⁴³ See *supra* note 104 and accompanying text.

¹⁴⁴ *DeShaney*, 489 U.S. at 212 (Brennan, J., dissenting); see also Wald, *supra* note 134, at 262-63 ("[g]overnment inaction vis-a-vis a particular individual may be highly unneutral").

¹⁴⁵ See *id.* at 211 (Brennan, J. dissenting). The State had the opportunity and the means to aid Joshua because it had knowledge of the child's predicament as well as the authority to remove him from his father's custody. *Id.* (Brennan, J., dissenting).

¹⁴⁶ *Id.* (Brennan J., dissenting).

¹⁴⁷ 478 U.S. 186 (1986).

sion.¹⁴⁸ In *Bowers*, Mr. Hardwick, a homosexual, brought suit to challenge the constitutionality of a state statute criminalizing consensual sodomy,¹⁴⁹ applicable to heterosexuals as well as homosexuals.¹⁵⁰ Upon review of this issue, the Court upheld the constitutionality of the statute.¹⁵¹

The baseline of Justice White, writing for the majority, was that there is no constitutional right for homosexuals to engage in sodomy.¹⁵² Because of this initial baseline, the Court's analysis focused exclusively on homosexual conduct, notwithstanding the fact that the statute applied equally to heterosexuals.¹⁵³

The Court's baseline was reflected in its statement of the issue: "[w]hether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time."¹⁵⁴ In analyzing this issue, the Court determined that there was no fundamental right to engage in homosexual sodomy based on the proposition that "[p]roscriptions against that conduct have ancient roots."¹⁵⁵ Further, the Court construed prior precedent narrowly in order to find that the right to privacy did not extend to homosexual conduct.¹⁵⁶

¹⁴⁸ It is important to note that the approach advocated by baseline analysis can be applied to almost any case with controversial elements. See, e.g., *Texas v. Johnson*, 109 S. Ct. 2533, 2538-39 (1989) (state perspective of preserving national symbol versus defendant's perspective of free speech); *Plyler v. Doe*, 457 U.S. 202, 205 (1982) (state perspective of curbing illegal immigration versus plaintiffs' perspective of education for their children); *University of California Regents v. Bakke*, 438 U.S. 265, 269-70 (1978) (university perspective of racial and cultural diversity versus plaintiff's perspective of equal access to education); *Wisconsin v. Yoder*, 406 U.S. 205, 208 (1972) (state perspective of compulsory education versus Amish perspective of preservation of traditional religious lifestyle).

¹⁴⁹ *Bowers*, 478 U.S. at 188.

¹⁵⁰ See *id.* at 188 n.1.

¹⁵¹ *Id.* at 196.

¹⁵² *Id.* at 192.

¹⁵³ See *id.* at 190-96.

¹⁵⁴ See *id.* at 190.

¹⁵⁵ *Id.* at 192. To justify its conclusion, the majority embarked on an analysis of the purported historical treatment of homosexuals by the state. See *id.* at 192-94; see also *id.* at 196 (Burger, C.J., concurring) ("[c]ondemnation of [homosexual] . . . practices is firmly rooted in Judeo-Christian [sic] moral and ethical standards"). The Court characterized fundamental rights as those "liberties that are 'deeply rooted in this Nation's history and tradition.'" *Id.* at 192 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)). Based on its historical analysis, the Court concluded that the right of homosexuals to engage in sodomy could not be deemed a fundamental right. *Id.*

¹⁵⁶ See *id.* at 190-91. According to the Court, the right to privacy extends to the spheres of family, marriage, and procreation, with which homosexual activity has no connection. *Id.* at 191.

The Court's baseline also enabled it to quickly dismiss the respondent's argument that there was no rational basis for the statute, concluding that "majority sentiments about the morality of homosexuality" were adequate to validate the statute.¹⁵⁷

The analysis of the dissent, authored by Justice Blackmun, proceeded from the baseline that the right to privacy extended to the right of intimate association, whether homosexual or heterosexual.¹⁵⁸ According to Justice Blackmun, the majority misstated the issue¹⁵⁹ by failing to view it as implicating the right to decide how to conduct one's intimate relationships.¹⁶⁰ Therefore, the analysis of the dissent focused on sexual intimacy in general, rather than on homosexual sodomy exclusively.¹⁶¹ Additionally, the dissent construed prior precedent broadly so as to include all forms of sexual activity within the right of privacy.¹⁶² Further, the dissent rejected the majority's historical justification for upholding the constitutionality of the statute,¹⁶³ as well as its assertion that the statute could be validated under the rational basis test by reference to ma-

¹⁵⁷ *Id.* at 196.

¹⁵⁸ *See id.* at 199 (Blackmun, J., dissenting).

¹⁵⁹ *See id.* (Blackmun, J., dissenting). "A fair reading of the statute and of the complaint clearly reveals that the majority has distorted the question this case presents." *Id.* at 200 (Blackmun, J., dissenting).

¹⁶⁰ *See id.* (Blackmun, J., dissenting). According to Justice Blackmun, the case involves "the most comprehensive of rights and the right most valued by civilized men, namely, 'the right to be let alone.'" *Id.* at 199 (Blackmun, J., dissenting) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). "The Court's failure to comprehend the magnitude of the liberty interests at stake in this case leads it to slight the question whether . . . the State . . . has justified [its] . . . infringement on these interests." *Id.* at 208 (Blackmun, J., dissenting).

¹⁶¹ *See id.* at 199-214 (Blackmun, J., dissenting); *id.* at 214-20 (Stevens, J., dissenting).

¹⁶² *See id.* at 203-08 (Blackmun, J., dissenting). The dissent focused on the reasons certain rights are protected under the due process clause, namely, because such rights "form so central a part of an individual's life," not because they contribute to the general public welfare. *Id.* at 204 (Blackmun, J., dissenting). The dissent recognized that sexual intimacy forms a central part of an individual's life and of his self-definition. *See id.* at 205 (Blackmun, J., dissenting). Therefore, the dissent found that there is a fundamental right to control the nature of one's intimate associations with others, *id.* at 206 (Blackmun, J., dissenting), as well as a right to conduct intimate relationships in the privacy of one's own home. *Id.* at 208 (Blackmun, J., dissenting).

¹⁶³ *See id.* at 199 (Blackmun, J., dissenting). Justice Blackmun, quoting Justice Holmes, stated:

[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Id. (Blackmun, J., dissenting) (quoting Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).

majority viewpoints of morality.¹⁶⁴

The majority and dissenting opinions in *Bowers* can be explained in terms of the perspective from which Mr. Hardwick's activity was viewed. These perspectives, as embodied in competing baselines, reflect both political and moral value judgments.

Underlying the majority's baseline was a political value embodied within the status quo, *i.e.*, the preservation of society in its existing form.¹⁶⁵ The right to privacy, therefore, was perceived as protecting only "traditional" forms of relationships.¹⁶⁶ The majority's baseline encompassed a moral viewpoint as well, *i.e.*, that homosexual activity is immoral and therefore properly punishable.¹⁶⁷ These value judgments were hidden within the Court's discourse, which focused on the historical treatment of homosexuals.¹⁶⁸

It is possible that the majority proceeded with its baseline premise that there is no constitutional right to engage in homosexual sodomy because it failed to recognize the perspective of Mr. Hardwick.¹⁶⁹ Instead, it viewed the activity at issue solely from its own perspective. It can be argued that the majority neglected to

¹⁶⁴ See *id.* at 210 (Blackmun, J., dissenting). "[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." *Id.* at 216 (Stevens, J., dissenting); see also *id.* at 211 (Blackmun, J., dissenting) (quoting Brief for Petitioner 20) ("[t]he assertion that 'traditional Judeo-Christian values proscribe' the conduct involved . . . cannot provide an adequate justification for [the statute]").

¹⁶⁵ See Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L.J. 1073, 1099 (1988). Professor Goldstein has labeled this underlying political philosophy "classical conservatism." See *id.* at 1091.

¹⁶⁶ See *id.* at 1101.

¹⁶⁷ See Comment, *Constitutional Law - An Imposition of the Justices' Own Moral Choices - Bowers v. Hardwick*, 9 WHITTIER L. REV. 115, 116 (1987).

¹⁶⁸ See Goldstein, *supra* note 165, at 1102. The majority imposed its own values on the states "under a cloak of historical intervention." *Id.*

The Court's portrayal of the historical treatment of homosexuality was largely misleading in that its analysis applied to heterosexual as well as homosexual activity. *Id.* at 1081-86. For example, heterosexual and homosexual sodomy were equally condemned at common law. *Bowers*, 478 U.S. at 214-15 (Stevens, J., dissenting). Moreover, the histories of the statutes referred to by the Court, as well as the history of the Georgia statute, reveal traditional prohibitions against heterosexual and homosexual sodomy alike. *Id.* at 215-16. (Stevens, J., dissenting). "[T]he majority's depiction of eighteenth and nineteenth-century views of sodomy is too flawed to guide constitutional interpretation." Goldstein, *supra* note 165, at 1082.

¹⁶⁹ See Henderson, *supra* note 48, at 1577. According to Professor Henderson, "*Bowers v. Hardwick* [is] an example of the complete failure of empathy in a decision." *Id.*; see also Black, "One Nation Indivisible": *Unnamed Human Rights in the States*, 65 ST. JOHN'S L. REV. 17, 54 n.58 (1991) (analyzing *Bowers* in light of Declaration of Independence's commitment to "the pursuit of happiness").

consider that to Mr. Hardwick, the activity in which he was engaging was sexual intimacy, not something perverse or abnormal.¹⁷⁰

The underlying political value reflected in the dissent's baseline is the autonomy of the individual.¹⁷¹ Accordingly, the right to privacy was interpreted as encompassing the right of autonomy¹⁷² or, as articulated by Justice Blackmun, the right to choose how to conduct one's intimate associations.¹⁷³ The dissent's baseline also reflected a different vision of sexual morality, that is, the view that "there may be many 'right' ways of conducting" intimate relationships.¹⁷⁴ The dissent thus asserted that the statute could not be upheld based on majority notions of morality.¹⁷⁵

It is likely the dissent embraced the perspective of Mr. Hardwick, recognizing that his conduct was quite normal to him.¹⁷⁶ Based on such a perspective, the dissent was able to conclude that both heterosexual and homosexual activity constitute normal forms of "intimate associations," falling within the protected sphere of the right to privacy.¹⁷⁷

¹⁷⁰ See *Bowers*, 478 U.S. at 205 (Blackmun, J., dissenting) (noting that there are "many 'right' ways of conducting [intimate sexual] relationships").

¹⁷¹ See Goldstein, *supra* note 165, at 1099; see also Henderson, *supra* note 48, at 1649. ("Blackmun was speaking for humans and for the positive values of a liberal state—respect for human freedom from oppression and tyranny"). According to this view, the individual's freedom to behave as he chooses cannot be limited, except to prevent harm to others. Goldstein, *supra* note 165, at 1092. The dissent, therefore, feared government enforcement of majority values on the minority and the resulting limitation on individual autonomy. *Id.* at 1100.

¹⁷² See Goldstein, *supra* note 165, at 1100.

¹⁷³ *Bowers*, 478 U.S. at 206 (Blackmun, J., dissenting).

¹⁷⁴ *Id.* at 205 (Blackmun, J., dissenting). "[A] necessary corollary of giving individuals freedom to choose how to conduct their lives is acceptance of the fact that different individuals will make different choices." *Id.* at 205-06 (Blackmun, J., dissenting). The dissent recognized that not all religious groups condemn homosexual activity. See *id.* at 211 (Blackmun, J., dissenting).

¹⁷⁵ See *supra* note 164. The Supreme Court has acknowledged that strict scrutiny may be warranted in the case of legislation that reflects "prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities. . . ." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938). As pointed out by Professor Conkle, "[t]he interests of homosexuals as a group clearly stand at a serious disadvantage in American politics. Because homosexuals are regarded by many as moral deviants and social misfits, their arguments in the political process are likely to be discounted, if not entirely ignored." Conkle, *The Second Death of Substantive Due Process*, 62 *IND. L.J.* 215, 225 (1987); see also *Watkins v. United States Army*, 837 F.2d 1428, 1457 (9th Cir. 1988) (Reinhardt, J., dissenting) (hateful discrimination against particular group nonjusticiable on basis that society disapproves).

¹⁷⁶ See Henderson, *supra* note 48, at 1647. "The dissenters saw the human issues." *Id.*

¹⁷⁷ See *supra* note 162 and accompanying text.

It is possible that if the majority failed to recognize the perspective of Mr. Hardwick, it reached its decision solely based on its own moral and ethical values. Indeed, given the Court's baseline, it is likely that, from the outset, Mr. Hardwick had little chance of prevailing.

Had the Justices viewed the claims in *DeShaney* and *Bowers* from all possible perspectives, perhaps both cases would have been decided differently. However, even if the same conclusions were reached, the mere express recognition of the various relevant perspectives may have resulted in a more "meaningful debate on the merits"¹⁷⁸ and more candid decisions.

III. CONCLUSION

Perspectives, as embodied in baselines, critically impact the judicial decision-making process and affect the outcome of cases through the medium of legal discourse. This Note has asserted that judges should expressly recognize the existence and operation of their own perspectives, as well as the perspectives of others in their decisions. Clearly, the more viewpoints incorporated into any analysis, the more informed the discourse. It follows that the more enlightened the discourse, the more just the resolution. Justice, after all, depends on engaging multiple, competing visions.

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¹⁷⁸ *Leading Cases*, *supra* note 122, at 176. Abandoning the quest for neutrality may lead to "meaningful discussions as to . . . what values deserve constitutional protection under what circumstances." Chemerinsky, *supra* note 69, at 99.

