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"Eventually [the judiciary] . . . will catch up with the breathtaking developments we now discuss under the name of 'postmodern' jurisprudence."[1]

I. INTRODUCTION

One day at lunch in the faculty lounge, we fell to discussing postmodernism. The focus quickly narrowed to deconstruction. "Deconstruction" is one of the most formidable words in the postmodern lexicon. Its use leads one to expect great things to follow, but too often it is used merely as a simile for "analysis."[2] At least as attributed to French philosopher and philosophical guru Jacques Derrida,[3] it has to be more than that. There was a jurisprude present—one who keeps up with serious intellectual developments. "What," we asked him, "is 'deconstruction'?" The jurisprude answered: "Deconstruction promises to take any text and by using it show that it means the opposite of what it seems to say."[4]

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1. J.M. Balkin, *What Is a Postmodern Constitutionalism?*, 90 MICH. L. REV. 1966, 1966 (1992).

2. For example, "I am not using 'deconstruction' in the technical sense used by critical scholars influenced by Jacques Derrida . . . but in the emerging popular sense of deconstructing a social phenomenon into its component parts." Joan C. Williams, *Deconstructing Gender*, 97 MICH. L. REV. 797, 845 (1989).

3. *See, e.g.*, JACQUES DERRIDA, OF GRAMMATOLOGY (Gayatri Chakravorty Spivak trans., Johns Hopkins Univ. Press 1st Am. Ed. 1976) (1967). The introductory essay by Chakravorty Spivak is often said to be one of the best and clearest enunciations of Derrida's ideas.

4. This is in line with popular definitions in the literature. For example, Schanck writes that "deconstruction involves a rigorous analysis of a given work or body of work for the purpose of demonstrating that the argument supporting the apparent thesis, a par-

"But that just tells us the input and the output," said another colleague. "How does one do it? Show us the trick!" If, as Yale Professor J.M. Balkin says, postmodernism—and its centerpiece, deconstruction—really is a breathtaking new development, we should all learn its mode of argumentation.[5]

In fact, as many I'm sure have discovered, it is not easy to pin down what deconstruction is.[6] Thus, it was with eager anticipation that I lo-

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ticular proposition within the work, or a meaning usually attributed to it can also support contrary or alternative theses, propositions, or meanings." Peter C. Schanck, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505, 2524 (1992). Jonathan Culler, in a standard introduction widely praised for its clarity, writes similarly: "[T]o deconstruct a discourse is to show how it undermines the philosophy it asserts, or the hierarchical oppositions on which it relies, by identifying in the text the rhetorical operations that produce the supposed ground of argument, the key concept or premise." JONATHAN CULLER, ON DECONSTRUCTION 86 (1982).

5. Proponents of deconstruction are, it seems, aware of the revolutionary importance of their work. For example, notice the comparisons in the following: "Legal deconstruction has generated its fair share of alarmist opposition, but so did Copernicus's suggestion that the Earth was not the center of the universe, Pasteur's belief that invisible germs caused disease, and Columbus's insistence that the Earth was round." Girardeau A. Spann, *Deconstructing the Legislative Veto*, 68 MINN. L. REV. 473, 540 (1984).

6. *See, e.g.*, CHRISTOPHER NORRIS, DECONSTRUCTION: THEORY AND PRACTICE (1982) ("Derrida brilliantly inverts . . ." and the like, but not how it is done); GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END (1995). Professor Dennis Arrow, in a wonderful hoot of an "article"—a dictionary of postmodern jargon—gives the following:

> *deconstruction, postmodern process:* "our" "concealed" attempt to "displace" reason (not "reason") with horror, fear, and pity; "concealment" by "Pomobabble" and "displacement" by "critique," "rhetoric," "discourse," "epistemology," and "mysticism" of the meanings (not "meanings") of words (oops! "signs") representing facts (*gasp!*) and ideas "we" don't like; an attempt to obfuscate genuine dualities and binary opposites— but only, of course, the ones "we" don't like; see generally "consistency," "pragmatism," "postmodernism," "natural law."

Dennis W. Arrow, *Pomobabble: Postmodern Newspeak and Constitutional "Meaning,"* 96 MICH. L. REV. 461, 483-84 (1998) (footnotes omitted). In the text "deconstruction" is printed with a line through it, *i.e.*, "placed under erasure," another of the mysterious

cated no fewer than six texts claiming to deconstruct the presidential age limitation:[7] "No person . . . shall be eligible to the office of president . . . who shall not have attained to the Age of thirty five years . . . ."[8] They said they would show how this Constitutional text could be used to prevent a thirty-eight-year-old from becoming president yet permit an eighteen-year-old. Could they provide an entry point through which an outsider might gain access to the mysteries and techniques of deconstruction? This article is about these six texts and their methods of deconstruction.

I shall examine the five main argument forms that are called "deconstruction" by the six authors of the six example texts deconstructing the presidential age limitation. Organization by author did not prove feasible: there is too much overlapping of argumentation both within and between these texts. So I have separated the arguments as clearly as I can, organizing them by their different forms, even though many of their ingredients occur in more than one. Part II[9] is captioned "Argument from Extreme Examples" (primarily Anthony D'Amato and Mark V. Tushnet); Part III[10] is "Substitution of Intent" (Stanley Fish, Gary Peller, Peter C.

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processes by which postmoderns displace meanings with, we are given to understand, devastating effect to our cosily secure empistemological hegemony.

7. *See generally* Anthony D'Amato, *Aspects of Deconstruction: The "Easy Case" of the Under-Aged President*, 84 NW. U. L. REV. 250 (1989); STANLEY FISH, *Still Wrong After All These Years*, *in* DOING WHAT COMES NATURALLY, 356, 358-59 (1989); Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151 (1985); Schanck, *supra* note 4; Spann, *supra* note 5; Mark V. Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683 (1985).

8. U.S. CONST. art. II, § 1, cl. 5. The whole of the clause reads:

> No Person except a natural born Citizen, or a citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office, who shall not have attained to the Age of thirty five years, and been fourteen years a resident within the United States.

Id.

9. *See infra* text accompanying notes 14-64.

10. *See infra* text accompanying notes 65-82.

Schanck, and Girardeau A. Spann); Part IV[11] is "Polarity Argument"(Schanck and Spann); Part V[12] is "Verbal Tricks and High Redefinitions" (Fish, Peller, and Spann); and Part VI[13] is "Inverting Hierarchies and Decentering Meanings" (primarily Schank).

II. ARGUMENT FROM EXTREME EXAMPLES

Anthony D'Amato calls himself an "[e]xtreme-radical deconstructionist,"[14] so we might look to him for some clear insight into the nature of the game. "Deconstruction," as the postmodern argumentation employed by D'Amato and Mark V. Tushnet,[15] is a process of reasoning by extreme hypotheticals: If one can find a counter-example to a claimed general rule, one has thereby proven it a non-rule. The argument may be presented with style and wit, albeit laced with more than a little sophistry, but it does not offer anything new in argumentative technique not even real conviction. D'Amato's is the more extensively presented version, so I shall concentrate on it.

To be fair, we should pay attention to the context of D'Amato's argument, since, as he soon points out, context is very important to his style of deconstruction. D'Amato constructs such contexts in order to refute the claim that there can be easy cases. Others have made the claim that there are no easy cases,[16] and met in exemplary response the twenty-nine-year-old or nineteen-year-old candidate for the Presidency of the

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11. *See infra* text accompanying notes 83-125.

12. *See infra* text accompanying notes 126-195.

13. *See infra* text accompanying notes 196-268.

14. D'Amato, *supra* note 7, at 252 n.13 ("Extreme-radical deconstructionists, such as myself. . . .")

15. *See* D'Amato, *supra* note 7; Tushnet, *supra* note 7.

16. *See, e.g.*, Michael Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 271 (1981). "[T]here cannot even be an easy application of a rule to the facts (and, *a fortiori*, there can be no easy cases)." *Id.* at 272. To avoid triviality we should take "case" in the sense of "possible case," and not limit it to those that someone is, or plausibly might be, willing to finance. But D'Amato's argument would allow us to drop even this restriction, treating plausibility as a question of imagination.

United States.[17] D'Amato's aim is only to show that these might not be easy cases at all, and he does so by making what he claims to be "a 'good' constitutional argument—that is, an argument that can be made on the merits—for permitting an under-aged President."[18] But that limited, particular goal is good enough for our purposes, for the arguments are, he says, deconstructionist.

D'Amato begins by trying to clear the playing field of some sophistic clutter he sees as unfair. His target is Professor Hegland's argument: "Resources and imagination can always create arguments; they cannot always create *good* arguments and therefore cannot always produce doctrinal uncertainty."[19] In the face of the constitutional limitation, one is inclined to outrage at the suggestion of the eighteen- or nineteen-year-old presidential candidate. D'Amato replies:

> [O]n closer examination, we find that Professor Hegland has assumed a heads-I-win-tails-you-lose position. If one fails to articulate a rationale for allowing the eighteen-year-old to hold the office of President, then Hegland wins; if one does assert a rationale, the rationale itself is labeled per se bad or outrageous, and Hegland also wins.[20]
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> In fact, it seems that every writer who poses a self-proclaimed outrageously "easy" case uses this ploy.[21]

Is that right?

It is a commonplace of philosophy of science that through any set of

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17. *See, e.g.*, Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 414 (1985) (twenty-nine-year-old); Kenney Hegland, *Goodbye to Deconstruction*, 58 S. CAL. L. REV. 1203, 1208 (1985) (eighteen-year-old).

18. D'Amato, *supra* note 7, at 254. Does his use of the expression "under-age" undermine his argument at the outset? After all, if his argument is indeed "good," then the nineteen-year-old is not under-age, is she?

19. Hegland, *supra* note 17, at 1208.

20. D'Amato, *supra* note 7, at 251.

21. *Id.* at 251 n.11.

data one can draw an infinite number of explanations[22]—and that means an infinite number that are consistent with the data and internally consistent, not just "an infinite set of sentences mentioning those data." Argument and explanation being different characterizations of the same phenomenon,[23] there are likewise an infinite number of arguments for any position/decision/hypothetical set of data. But most of these explanations or arguments are simply uninteresting, unconvincing, unproductive, boring, useless, numerical variants on each other. Take the examples given in a simple proof of the infinitude of explanations: of any set of data, at most one of the explanatory propositions "it is not *n* unicorns" (for any *n* a natural number) is false; but how valuable are these infinite, true, explanatory propositions? Hegland's point is that we must impose criteria of quality or value on arguments and explanations. Treating all explanations or arguments as equal is common in postmodernism.[24] John M. Ellis summarizes the ploy: "[I]f a point is not so obvious that *any* two persons can agree, then it is impossible to choose between two conflicting opinions and assign them different weight. Unless there is total unanimity, every opinion is equally valid."[25] But it is merely a rhetorical ploy; just because an argument is possible does not mean that it is good. So we must try to see not just whether D'Amato and Tushnet make an argument, but whether they make *a good argument.*

D'Amato's opening statements are on target. "[W]hat seems "outrageous" necessarily depends upon its context.... Deconstructionists say

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22. *See, e.g.*, CLARK GLYMOUR, THEORY AND EVIDENCE 10 (1980); Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 932 (1996) (reiterating a simple proof). Notice that working scientists have not taken this to mean that they should waste time with any but very a few of those hypotheses.

23. One *argues for* a position if it is yet to be taken; one *explains* a position after it has been adopted. The words of the argument or explanation are equivalent; the difference is only that the argument is temporally *ex ante* or logically *a priori*, the explanation temporally *ex post* or logically *a posteriori.*

24. After all, isn't a criterion of excellence in arguments itself just another argument subject to deconstruction?

25. JOHN M. ELLIS, AGAINST DECONSTRUCTION 124 (1989)

that all interpretation depends on context."[26] For the most part, so do we all; so this is unexceptionable. It is a good exercise, especially in studying common law, to take any verbal formulation purporting to statute-like generality—such as one finds in study aids from Gilbert or the Black Letter Series—not as true but as a challenge. This laudable attitude motivates argument by counter-example.[27] "Radical deconstructionists add that, because contexts can change, there can be no such thing as a single interpretation of any text that is absolute and unchanging for all time."[28] It's seductive, isn't it? This looks like the ball in this argument, so keep your eye on it.

We are going to be looking for contexts in which the outrageous becomes the preferred. D'Amato first attempts to soften us up with the case of 1968 Republican presidential contender George Romney[29] and the Constitution's "natural born Citizen" requirement.[30] But the only con-

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26. D'Amato, *supra* note 7, at 252. Mark Tushnet makes the same point, commenting on Frederick Schauer, *Easy Cases*, *supra* note 17: "Schauer's error here is the one he repeatedly commits in attempting to demonstrate that words alone limit what can be done in interpreting them: he assumes that words have meanings significantly independent of the social context within which they are interpreted." Tushnet, *supra* note 7, at 688 n.24.

27. It is a standard procedure in the experimental sciences, so much so that it has been used as a criterion for their demarcation. *See* KARL R. POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY 34-39, 86-92, 313-14 (1959).

28. D'Amato, *supra* note 7, at 252.

29. Romney, a three-term governor of Michigan, was born in a Mormon colony in Mexico; his parents were United States citizens. *See, e.g.*, 23 ENCYCLOPEDIA AMERICANA 757 (1998); David E. Rosenbaum, *George Romney Dies at 88: A Leading G.O.P Figure*, N.Y. TIMES, July 27, 1995, § D, at 22.

30. "No Person except a natural born Citizen . . . shall be eligible to the Office of President . . . ." U.S. CONST. art. II, § 1, cl. 5. Oddly, D'Amato ignores the obvious interpretive strategy of focusing on the modifier "natural" of "born." In this era in which "natural childbirth" is distinguished from "childbirth," it should be rather easy to argue that this provision precludes those born by Caesarean section. The word "natural" makes this an easier case than it was for Shakespeare to interpret "none of woman born / Shall harm Macbeth," WILLIAM SHAKESPEARE, MACBETH act 4, sc. 1, 80 (Alfred Harbage ed., Penguin Books 1984), as allowing Macduff, who "was from his mother's womb / Untimely ripped[,]" to lop off Macbeth's head. *Id.* act 5, sc.8. The point is not that this would be a wise or reasonable or even plausible interpretation, just that it is possible.

texts he comes up with are those in which nobody would have had standing to challenge Romney's credentials as president had he been nominated and elected.[31] One had hoped for a story of substance, not just this procedural elision.[32] Tushnet also warms up with a simple example: a world in crisis, both houses of Congress and the presidency controlled by the same party, with that party lacking a winning candidate for the upcoming presidential election; would a statute allowing the president a third term, for appearances allowed to become law without signature by the president,[33] be automatically invalidated by the courts?[34] Tushnet's answer is pallid and toothless: "I am not confident that a Court as deferential to claims of national security as the one that decided *Dames & Moore v. Regan*[35] and *Haig v. Agee*[36] would invalidate the statute."[37]

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31. *See* D'Amato, *supra* note 7, at 253 (relying on Frothingham v. Mellon, 262 U.S. 447 (1923) ("[T]he legal position of a plaintiff challenging the constitutional acceptability of an elected President would be indistinguishable from that of any other citizen of the United States."). However, this generality is just the sort of "easy case" proposition all radical deconstructionists promise to expose by change of context; *ergo*, what about a person prosecuted under a law ratified by the hypothetical president.

32. D'Amato concedes as much with the excuse that "the Romney example was only an aid to understanding the relativity of contexts in construing texts. . . . I have simply avoided making a substantive legal argument." D'Amato, *supra* note 7, at 254.

33. *See* Tushnet, *supra* note 7, at 687 n.19. (citing U.S. CONST. art. I, § 7, cl. 2 (a bill not returned to Congress by the President within ten days is deemed approved)).

34. *See* Tushnet, *supra* note 7, at 687.

> One party . . . gains control of both houses of Congress and the Presidency. Three years into the President's second term, the controlling party realizes that it has no attractive candidate to replace the President. Congress holds extensive hearings culminating in a series of statutory findings that the domestic and international situation would be exacerbated by the turmoil of a presidential election. It therefore enacts a statute extending the the President's term. With an eye to appearances, the President lets the statute go into effect without signing it.

Id.

35. 453 U.S. 654 (1981).

36. 453 U.S. 280 (1981).

37. Tushnet, *supra* note 7, at 687 (footnotes added).

Both authors thankfully provide better arguments on the principal challenge, the thirty-four- or nineteen-year-old president.

D'Amato does not disappoint.[38]

> I think there is a "good" constitutional argument—that is, an argument that can be made on the merits—for permitting an underaged President. [It is to] imagine and supply a suitable context in which an eighteen-year-old candidate is elected President. Only by imagining a plausible context *in which the posited case arises* can we then evaluate the reasonableness of supporting arguments.[39]

He comes up with two contexts.

> Perhaps a student-led revolt leads to demands for new leadership and the students and their supporters put forth their eighteen-year-old leader against the incumbent President. Or, as in science-fiction, an unstoppable virus causes the death of all persons over twenty-years-old—leaving the eighteen-year-old candidate as one of the oldest available![40]

Given such a context "in which it is reasonable to imagine an eighteen-year-old presidential nominee,"[41] the only option remaining is to prop it

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38. But he makes a slippery start: The 34 year old would be 35 by the time the case got to the Supreme Court. "[A] court would probably hold the case moot on the ground that the President, by the time the lawsuit was filed and litigated, had turned thirty-five." D'Amato, *supra* note 7, at 253.

39. *Id.* at 254 (emphasis added). D'Amato quotes Professor Tushnet on the use of "weird cases": "[T]he cases are weird until someone finds it worthwhile to pursue them. Then we see that what we thought of as constraints built into the language were only constraints built into our accepted ways of doing things." Tushnet, *supra* note 7, at 688 n.24.

40. D'Amato, *supra* note 7, at 254-55.

41. *Id.* at 255.

up with an argument. D'Amato uses age discrimination.[42]

What does all this do? Not much. The age discrimination prop is rather small beer: If the presidential age limitation is unconstitutional age discrimination in the hypothesized context, it is unconstitutional age discrimination now, there being nothing in those contexts to change anything but judicial motivation. But by the same token there would be nothing except judicial motivation standing between the Twenty-Sixth Amendment[43] and allowing a ten-year-old to vote or preventing a twenty-six-year-old from voting because of age. So that brings us back to the contexts, and judicial motivation, especially in the second hypothesized context. We must suppose the Constitution remains unamended and Supreme Court justices who—like everyone else—are also aged twenty or younger. Would such a Court allow the eighteen-year-old to remain in office, or would it require an administration without a head?

The question should be rhetorical. But to that extent it is misleading. In the first example there has been a student *revolt*—as in *revolution*—so the Constitution for that reason would probably no longer be in force. In the second example, the age-discriminatory virus would surely have created a state of emergency suspending or nullifying those parts of the Constitution impossible to effectuate. For the following, on the principle of charity,[44] let us assume that these are mere accidents of expression.

Professor Tushnet follows a similar strategy:

> [I]f the President of the Senate directed that votes cast for a sixteen-year-old guru be counted, "everybody" would know that the

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42. *See id.* (the constitutional age limitation is "based on an irrational age limit, and is therefore a nullity").

43. "The right of citizens of the United States, who are eighteen years or older, to vote shall not be denied or abridged by the United States or by any State on account of age." U.S. CONST. amend. XXVI.

44. Always choose the interpretation most likely to make the argument correct or the example serve its purpose. This is not a postmodern principle, but it is the principle that will give the interpreter the greatest value from the text.

Constitution had been violated.[45]

. . . .

> . . . Suppose that the guru's supporters sincerely claim that their religion includes among its tenets a belief in reincarnation. Even on the narrowest definition of "age" they say, their guru is well over thirty-five years old even though the guru emerged from the latest womb sixteen years ago. Further, it would have been an establishment of religion for the President of the Senate to reject their definition of "age," and it would violate their rights under the free exercise clause, not to mention their rights grounded in democratic theory to choose those who will govern them, for the courts to overturn the decision made by the political branches.[46]

That's all! One might have expected some examination of the problems in such a position—for example, the practical problem of allowing infants to vote or drive,[47] the theoretical problem of there no longer being such a thing as a person's age,[48] or the legal problem of responsibility for crimes committed in prior incarnations[49]—but there is none. One might have expected an argument to preclude the straightforward interpretation of "the age of thirty-five years" as "thirty-five years since one's most recent birth," but there is none. We are offered just this statement, take it

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45. Tushnet, *supra* note 7, at 686 (citation omitted).

46. *Id.* at 687-88 (citing Powell v. McCormack, 395 U.S. 486, 547 (1969)).

47. And would they be just the infant followers of the guru? Or just the infant children of the followers? Or would equal protection generalize it?

48. If one counts years in a prior incarnation one also must count all prior incarnations; we are all indefinitely old. How does one determine? Not just by "what the guru says," for what the guru says is neither confirmable nor deniable nor contestable with similar pronouncements of others; it is just an arbitrary dictate, made on strictly private data, if any, no better than what you or I would say, should we choose to.

49. As in the Indigo Girls' song about reincarnation, *Galileo*: "Now I'm serving time for mistakes made by another in another lifetime." INDIGO GIRLS, RITES OF PASSAGE (Epic Records May 12, 1992).

or leave it. But again the principle of charity suggests we not fight the hypothetical but work with it to see how far it can take us.

Taken most charitably, what have these three exemplary context arguments shown us about deconstruction? D'Amato says, "The relativity of contexts assures, for the deconstructionist, the relativity of texts."[50] While he may have demonstrated something to the deconstructionist, D'Amato has not demonstrated much to me, at least not by this argument. These are lovely, custom-imagined contexts, but do they show any relativity of the text? Do they, that is, require an interpretation of "who has not attained the age of thirty-five years" that permits an eighteen-year-old? Surely not; why should counting years change just because the maximum for humans at the time is twenty? Why should counting years change because some religious group wants to add on years spent in prior incarnations? It may not be easy, but D'Amato's second context at most requires only a decision in the face of the Constitution (if the Constitution had not been nullified in the ensuing panic). The Constitutional language would remain as clear and unequivocal and of the same meaning as it has today.

Most charitably construed, D'Amato and Tushnet may have shown that not all cases under this constitutional language are easy, but only because violating the Constitution would not be easy, at least for Supreme Court Justices. They have not shown relativity of text, relativity of meaning, indeterminacy or even underdeterminacy of the language "who has not attained the age of thirty-five years."[51] This is not an accident of the examples they have chosen; it is a more general problem of the mode

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50. D'Amato, *supra* note 7, at 255.

51. What would relativity of text to context look like? Here's a clear example. Think of the traffic rule that governs two vehicles approaching an intersection from opposite directions. Both drivers want to turn up the same road. The vehicle turning right has right of way over the vehicle turning left. For example, on a road going east-west, a west-bound driver wants to turn north and an east-bound driver also wants to turn north. The west-bound driver has the right to go first. In New Zealand the rule is *exactly the same*; the words are the same, the description is the same, the examples are the same. So it's the same rule, right? In New Zealand they drive on the left-hand side of the road, so it is not the same rule, it's the exact opposite!

of argument.

Suppose that D'Amato's best argument by example *had* shown relativity of text to context, a change in meaning of the constitutional language in the straightening circumstances of the age-discriminatory virus. Would he have shown that the case of the eighteen-year-old president is not an easy one? Three feet is an easy high jump, but not on Jupiter, and not for a one-year-old baby. Seven feet is a hard high jump, but not on the moon, and not for Xavier Sotomayor. Do the "but not" propositions change the truth of the initial propositions? D'Amato's strategy appears to be to take "easy," as in "easy case," to mean "not possibly otherwise," or "same outcome in all possible worlds." In fact he states his high redefinition of "easy case" quite overtly: ". . . a single interpretation of any text that is absolute and unchanging for all time."[52] As I said, this was the focus of his theory, because he then shows "there can be no such thing . . . ."[53] Of course.

If that counts as good constitutional argument, our only limitation is imagination; and three feet is not an easy high jump and seven feet is not hard. But this is not a good argument; it is the fallacy of *ignoratio elenchi*, knocking down straw-men that were never set up.[54] At this D'Amato may legitimately ask for some explanation or criterion of goodness in argument: What are the bounds that make his hypothetical context out of bounds? We are not here working with a mathematical or harder empirical science where universality matters;[55] in categorizing, speaking of, or governing human social behavior there may not be precisely demarcated boundary conditions or clear black-white divisions. In law, as everywhere in the social world, "shades matter." So, then, how do we draw the shades?

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52. D'Amato, *supra* note 7, at 252.

53. *Id.*

54. The fallacy is common in academic writing. *See, e.g.*, DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW 15 (1997) ("In scholarship, as in politics, one of the most common sins is to mischaracterize an opponent's position in order to attack it.").

55. *See* POPPER, *supra* note 27, at 37.

Any explanation (and, commensurately, any argument) should not be merely a description of a possible context: it should, rather, help us understand related phenomena, how things might have turned out in somewhat different circumstances. It is a process involving the evaluation of counter-factuals. "[T]o grasp the actual is to understand it in the light of the particular possibilities which it suggests, or which closely comparable instances suggest for it, and not to subsume it in a generality . . . ."[56] So one says, "If this particular fact had been different, then . . . ." This, the counterfactual nature of explanation, is exactly as contemplated by D'Amato. One evaluates what would happen in another context, another possible world differing in some respect from the facts under scrutiny. To be useful in enhancing understanding, that other possible world must not be just any other possible world: it must be *plausible* relative to this one. "[T]he departure from the actual present should not require us to alter so much else in the [actual] present itself as to make it a quite different place."[57] The alternative possibilities considered "should not require us to unwind the past or appropriate the future";[58] they should be plausible relative to present reality.[59] The more plausible—the more the alternative possible world resembles ours of the present, the fewer the changes needed—the better the explanation.[60]

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56. GEOFFREY HAWTHORN, PLAUSIBLE WORLDS: POSSIBILITY AND UNDERSTANDING IN HISTORY AND THE SOCIAL SCIENCES 164 (1991). Professor Eskridge makes the same point in his important book on statutory interpretation. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 23 (1994).

57. HAWTHORN, *supra* note 56, at 165.

58. *Id.* at 164.

59. An example of failure in this plausibility requirement might be a part of Chief Judge Posner's discussion of sex, sexuality, and sexual relations. *See generally* RICHARD POSNER, SEX AND REASON (1992). Posner hypothesizes a world in which sexual relations are stripped of the psychological, social, and mythic baggage with which they are presently encumbered, and then calculates on his rational economic basis how they would be organized. Such a possible world is so far removed from ours or any known social world as to make it of little relevance or explanatory value.

60. Hence Hawthorn's title: "Plausible Worlds." HAWTHORN, *supra* note 56. Hawthorn's is a tempting analysis to law professors as it is precisely our basic teaching method, the "Socratic method." It is familiar to logicians, especially those who do "possible worlds" semantics. The simple truth-table account of counterfactuals has always

Of course there is no general, universal criterion of plausibility—of similarity in context or possible world. Plausibility will always depend on some set of general theoretical propositions, and in law they will often include the cultural propositions we call "normative," "economic," "political," and the like. We "draw the shades" differently for different purposes.[61] But if to make a point one needs a context of such a difference as to be "science fiction,"[62] one is not in a very plausible world; one may make the point logically but not plausibly or with much explanatory value. Notice how very familiar all this is. We accord great respect to judicial decisions, at least in part because judges face real, not hypothetical, issues, with real consequences to real parties whose interests are at stake. But we confine the precedential power of those decisions to factual

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been inadequate. Consider proposition A, "If I jump off the top of the Empire State Building then I'll fly," and proposition B, "If I jump off the top of the Empire State Building then I'll die." Given that I am not going to make such a jump, on truth tables both come out true. The possibleworlds analysis says go to the nearest accessible possible world in which the antecedent is true and re-evaluate the propositions. On that analysis, A is false and B is true. But the trick lies in the criterion of nearness, the chosen trans-world accessibility condition. In this example we maintain the presently accepted laws of physics—a set of propositions, a theory. If you allow anything whatever to change in the possible world chosen, then you can get anything you like: consider evaluating A and B at a world just like ours except that it has negative gravity. Hawthorn is aware of possible-world semantics, but only in the form advanced by David Lewis. *See generally* DAVID K. LEWIS, COUNTERFACTUALS (1973); David K. Lewis, *Counterpart Theory and Quantified Modal Logic*, 65 J. PHIL. 113 (1968). Lewis's form involves admitting possible worlds as entities in one's ontology. If all possible worlds are entities, they have, in a sense, the same ontological status and are equally accessible. Hawthorn, with his plausibility constraint, puts in accessibility conditions, and hence general theoretical propositions. The development of accessibility conditions by Saul Kripke was the breakthrough that gave the semantics of modal logic its great explanatory power. *See* Saul Kripke, *Semantical Considerations on Modal Logic*, *in* 16 ACTA PHILOSOPHICA FENNICA 83 (1963); *see also* M.J. CRESSWELL, LOGICS AND LANGUAGES ch. 1 (1973). One of the problems that recurs in postmodern argumentation is its complete disregard of the relevance and importance of accessibility conditions.

61. In anthropologists' jargon, the prevailing social myths determine plausibility as much as "hard" facts. "Men do not have with myth a relationship based on truth but on use: they depoliticize according to their needs." ROLAND BARTHES, MYTHOLOGIES 144 (Annette Lavers trans., Jonathan Cape Ltd. 1972) (1957).

62. *See* D'Amato, *supra* note 7, at 255.

situations demonstrably similar, not to distant or implausible—even if possible—contexts.[63]

Thus, even with the most charitable interpretation, D'Amato and Tushnet have not, with their hypotheticals, shown the "easy case" of the nineteen- or thirty-four-year-old president to be hard. They may have shown decisions under the constitutional language not to be "absolute and unchanging for all time,"[64] but such an innocuous thesis hardly needs support from contexts so removed from present conditions as to be of little explanatory interest. More important for the purposes of this article, if that is deconstruction, it looks neither new nor of special interest to jurisprudence.

III. SUBSTITUTION OF INTENT

The most popular ploy among the six deconstructors is simply to take the Constitution's words "the age of thirty-five years" and substitute some expression of the intent of the Framers. Peller, for example:

> It is possible the age thirty-five signified to the Framers a certain level of maturity rather than some intrinsically significant number of years. If so, it is open to argument whether the translation in our social universe of the clause still means thirty-five years of age. It may be that a younger age should be used since children today, through mass media, are more worldly at an earlier age. Or it may be an older age should be used since children are

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63. The Socratic method also so illustrates. We take hypothetical variations on facts and discuss how the case would have come out under an hypothetical general proposition, an accessibility (plausibility) condition which constrains how we draw out the consequences. We take hypothetical general propositions and draw out the consequences for the case and variations on it. The ultimate idea is that the students will somehow realize what is the "correct" (i.e., our chosen) general proposition to be drawn from the case, and its limitations. Notice that this is no different from abstracting on the set of particulars comprising the case, and testing those abstractions against other cases. We use "slippery slopes" to make students reject the abstractions that we don't like.

64. D'Amato, *supra* note 7, at 252.

> actually given less social responsibility than in revolutionary times.[65]

Or Spann: "If the governing principle is that Presidents should possess a minimum degree of maturity and experience, that principle may best be advanced by ignoring the rule in the case of a particularly precocious thirty-four year old."[66]

These arguments say only that perhaps a maturity test "should" be used or would "best advance" the purpose of the provision. But the language of the Constitution, a specific number of years, would appear to preclude such a substitution. Peller argues that it does not:

> I have simply substituted a functionalist standard (maturity) for a particular signifier (thirty-five years of age) to demonstrate that interpretation required that a position be taken that cannot be gleaned from the text itself. The text does not dictate whether a functionalist approach or some other approach should be adopted. Even after we have made that decision, we can arrive at exactly the opposite answers when the attribute function is

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65. Peller, *supra* note 7, at 1174.

66. Spann, *supra* note 5, at 532-33. Schanck, similarly, says to the suggestion that the age limitation is quite certain: "[A]vid deconstructionists would respond by pointing out the purpose of the provision, [*viz.*] to make reasonably sure that the President is sufficiently mature and experienced to deal effectively with the arduous, demanding, and important responsibilities of the position." Schanck, *supra* note 4, at 2530-31. Fish, with padding and plumage, would make it an argument about meaning:

> What did the writers mean by thirty-five years of age? The commonsensical answer is that by thirty-five years of age they meant thirty-five years of age; but thirty-five is a point on a scale, and a scale is a scale of something; in this case a scale of *maturity* as determined in relation to such matters as life expectancy, the course of education, the balance between vigor and wisdom, etc.

FISH, *supra* note 7, at 358-59.

"translated" to our social context.[67]

Really? That seems just a bit too bald, especially as most would say that the text itself *does* dictate the approach, and it is to count years, not substitute some hypostatized function for which that counting is a supposed surrogate.

This is not a very interesting sort of argument. In statutory interpretation, it is very ordinary: the goal is the implementation of legislative intent and *if* that is unclear in the language of the statute we resort to extrinsic sources such as legislative history to ascertain it.[68] But, to repeat, it is a method that is used when the statutory language itself is unclear or ambiguous or in some other way underdeterminate. Ronald Dworkin puts it clearly: "History is therefore plainly relevant. But only in a particular way. We turn to history to answer the question of what they intended to *say*, not the different question of what *other* intentions they had."[69] Or, most famously: "We do not inquire what the legislature meant; we ask only what the statute means."[70] Only in the rarest of cases, such as palpable drafting error,[71] is legislative history used to substitute for a clear

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67. Peller, *supra* note 7, at 1174 n.36. The text continues: "The choice between the 'literal' and 'functional' interpretation is indeterminate, as is the application of the abstract choice in the terms of a particular social field." *Id.* at 1174.

68. *See, e.g.*, Osburn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 866 (1824) (the aim is to "giv[e] effect to the will of the Legislature"); NBD Bank v. Bennett, 67 F.3d 629, 633 (7th Cir. 1995); Stephen Breyer, *The Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 848 (1992); Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 215 (1983); Patricia Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 280 (1990).

69. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE CONSTITUTION 10 (1996).

70. Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899), *reprinted in* OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 207 (1920).

71. *See, e.g.*, Johnson v. United States Gypsum Co., 229 S.W.2d 671, 673 (Ark. 1950).

text.[72]

The "functionalist approach"[73] should be used only when the literal fails; this is what it means to have a *text*, a *written* constitution, that stands as the supreme law of the land. The point, however, is not merely that the regular practice of statutory and constitutional interpretation does not include substituting some generalized language of intent for specific, unambiguous language. If that were the case it would be open to argument that regular practice could and maybe should be changed. The difficulty with substituting hypothetical intent for the language of the Constitution (or statute) is that doing so shifts governing power from the Framers (or, in case of a statute, the legislature) to the courts.[74] If the language to be applied is unclear, ambiguous, or underdeterminate in any way, then of course the court must make an interpretive decision; in such a case extrinsic indicia of intent aids interpretation of authoritative lan-

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72. Surprisingly, none of the six deconstructionists here made an attempt to show that "the age of thirty-five years" is not clear. It is not inconceivable that "the age of thirty-five" should mean something other than it does to us (and one should exclude mere notational variants). For example, before we had the concept of zero, a person started counting his or her age at one. Age thirty-five in such times would be the same as age thirty-four today. But we got the zero towards the end of the first millennium. Boyer puts it in India in A.D. 876. *See* CARL B. BOYER, A HISTORY OF MATHEMATICS 213 (2d ed. 1991).

Seventh Circuit Judge Frank Easterbrook, no fellow-traveler of postmoderns—in fact rather the opposite—did an imaginative if wildly implausible job of it:

> When the Constitution says that the President must be thirty-five years old, we cannot be certain whether it means thirty-five as the number of revolutions of the world around the sun, as a percentage of average life expectancy (so that the Constitution now has age fifty as a minimum), or as a minimum number of years after puberty (so the minimum is now thirty or so). Each of these treatments has some rational set of reasons, goals, values, and the like to recommend it.

Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 536 (1983).

73. This is what Peller calls the approach. *See* Peller, *supra* note 7, at 1171.

74. Just such a devolution of power is seen by both Spann and Tushnet as the primary evil to be guarded against. *See* Spann, *supra* note 5, at 516-17; *see also* Tushnet, *supra* note 7, at 684; *infra* note 81 and accompanying text.

guage. Arguably, that occurs in almost any case worth litigating on such grounds. Spann even recites the stock truism: "It is this process of moving from the abstract to the specific that breeds uncertainty."[75] But in this argument the deconstructionists move in the opposite direction. Their argument is simply to substitute a more abstract and general formulation of intent for the more specific constitutional language, and to do so automatically, without any showing of underdeterminacy. Were it acceptable, this would greatly diminish the power of the Constitution. If it were a legitimate direction of reasoning, the Constitution, "and the Laws of the United States which shall be made in pursuance thereof," could no longer "be the supreme Law of the Land," nor would "the Judges in every State . . . be bound thereby."[76]

If one can move from the language of the Constitution to the Framers' intent—or in other cases from the language of the statute to the legislature's intent—then there is another argument form available: the infinite regress. The "author's 'intention' . . . constitute[s] another text"[77] which in turn requires reference to another text if it is to be understood. Naturally, the next step is to reiterate the first step, then to repeat that process, so easily generating an infinite regression: without an infinite set of interpretive contexts, no interpretation is possible.[78] Such arguments founder on the rock of ordinary language: language is intrinsically public and shared within the speech community; the presentation of the argument against this fact itself presupposes it. Accordingly, free substitution of intent founders on the same rock.

There is more that can be said against "substitution of intent" as a mode of argument, but it is also relevant to the much more interesting method of polarity argument. As that is the subject of the next section,

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75. Spann, *supra* note 5, at 528.

76. U.S. CONST. art.VI, cl. 2.

77. Anthony D'Amato, *Can Legislatures Constrain Judicial Interpretation of Statutes?*, 75 VA. L. REV. 561, 561 (1989).

78. D'Amato makes exactly such an argument about theories of interpretation: you can't use a theory of interpretation unless you use an infinite number of them; therefore there are no usable theories of interpretation. *See id.* at 562-63.

we shall leave it thereto.[79]

One final point: as we shall see in Part V, Giradeau A. Spann, Gary Peller, and Stanley Fish all tout the variability of the social universe of any speaker or reader and, in consequence, the indefinite diversity of meanings given any text.[80] Thus, for example, Spann writes that "any text . . . has as many different meanings as it has readers who bring to it their own sets of subjective values and assumptions."[81] Yet as we have just seen, all three simply assume they can provide the intent, purpose, and motive of the Framers in the presidential age limitation.[82] Their very comfort with and confidence in this "interpretation" or "translation" belies the indeterminacy they so confidently proclaim infects all language.

IV. POLARITY ARGUMENTS

Among the six, Spann[83] is the principal exponent of the polarity argument as a method of deconstructing the presidential age limitation. It is a standard postmodern argument form. John M. Ellis (describing Fish's method) explains how it is done: "[F]ind a pair of opposed concepts; show that one pole is not completely distinct from the other; pronounce the opposition an illusion; then conclude that they are really both the same and that there are no important differences between things that originally seemed distinct."[84] Fish turns the trick on the distinction between brute force and the rule of law to the remarkable conclusion that "the force of the law is always and already indistinguishable from the

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79. *See infra* text accompanying notes 83-125.

80. *See infra* text accompanying notes 126-195.

81. Spann, *supra* note 5, at 537; *see also* Peller, *supra* note 7, at 1173-4; FISH, *supra* note 7, at 358.

82. In an interpretive leap, Spann says "introduc[es] doctrinal uncertainty." Spann, *supra* note 5, at 532.

83. *See generally* Spann, *supra* note 5. Peter C. Schanck also makes use of the polarity argument. *See generally* Schanck, *supra* note 4.

84. JOHN M. ELLIS, LITERATURE LOST: SOCIAL AGENDAS AND THE CORRUPTION OF THE HUMANITIES 174-75 (1997).

forces it would oppose."[85] The obvious differences have disappeared and become irrelevant. In this section I shall focus on Spann's use of a polarity argument in deconstructing the presidential age limitation.

As his title—"Deconstructing the Legislative Veto"—suggests, Spann's article is really about the legislative veto and its constitutionality. The deconstruction of the presidential age limitation is used only by way of illustration. Spann's principal objective is to show that neither the decision of the Supreme Court majority in *INS v. Chadha*,[86] nor the dissent, nor any other argument, is adequately grounded in the Constitution. The first fifty-five pages[87] provide as detailed and instructive an examination of the legislative veto and arguments surrounding it as one might wish to find. But from his analysis of these arguments, Spann derives more general principles of reasoning, which he says show the indeterminacy of any legal text. It is this reasoning and specifically its use on the presidential age limitation that concern us here.

Spann builds his presidential age limitation argument around the following moves. First, he relies on the distinction between a rule and a principle, a standard piece of taxonomy: "[A] 'principle' is a general proposition reflecting an aspirational objective, such as the proposition that people should drive safely . . . 'rules' . . . are specific directives and are easier than principles to apply, such as the directive that people should not drive faster than fifty-five miles per hour."[88] The presidential

85. FISH, *supra* note 7, at 520.

86. 462 U.S. 919 (1983).

87. *See* Spann, *supra* note 5, at 473-527.

88. *Id.* at 516-17. The distinction was introduced into mid-century jurisprudence by Hart and Sacks under the rubric "rule—standard." *See* HENRY M. HART JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 138-41 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (a rule "may be defined as a legal direction which requires for its application nothing more than a determination of the happening or non-happening of physical or mental events—that is, determinations of *fact*"). By contrast, standards require judgments, evaluations, a qualitative appraisal. *See id.* at 140. That we now use "principle" instead of "standard" is probably due to the influence of Ronald Dworkin's reintroduction of the distinction in 1967. *See* Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 22-29 (1967).

age limitation "may well be a rule rather than a doctrinal principle."[89] Paradigmatic rules, as contrasted with principles, are statutes with numbers, like speed limits, age limits, and statutes of limitations.

> Because doctrinal principles are designed to insulate us from subjective preferences, rules are useful only to the extent that they advance doctrinal objectives. . . . We rarely treat rules as the starting point of legal analysis. Rather, a rule is used as a means of implementing a doctrinal policy. As a result, all the uncertainties attendant to any doctrinal analysis accompany efforts to apply the rule.[90]

That is the set-up; next Spann deals with its application.

There are two steps to the argument that follows. Step one closely resembles the "substitution of intent" argument of the preceding section; Spann writes that "proper application of the [presidential age limitation] provision would require . . . specification of the governing principle"; step two requires a "determination of what outcome would best serve that principle."[91] Both steps are insecure and indeterminate.

The "governing principle" of the presidential age limitation means its purpose. We cannot be absolutely, determinatively certain what that is, even though none of these writers seems to disagree that it is "that Presidents should possess a minimum degree of maturity and experience . . . ."[92] Supposing that is the reason the Framers gave us the constitutional age limitation, Spann then argues "[that] principle may best be

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89. Spann, *supra* note 5, at 532.

90. *Id.*

91. *Id.* at 532-33. Spann prefixes this step: "[A]ssuming that the minimum-age provision of article II is not itself a mere subjective preference of the Framers but is, instead, a subsidiary rule designed to advance some unarticulated principle . . . ." *Id.* at 532. Why that assumption? What difference would it make if it were merely a subjective preference? Nothing in what follows would change.

92. *Id. See also* Schanck, *supra* note 4, at 2530 (explaining the reason as "to make reasonably sure that the President is sufficiently mature and experienced to deal effectively with the arduous, demanding, and important responsibilities of the position.").

advanced by ignoring the rule in the case of a particularly precocious thirty-four year old."[93] This is merely a substitution of the Framers' supposed intent for the actual language. But Spann also has an alternative—one that looks more like a genuine argument. Within the Constitution there is a clash of principles: "The Constitution also incorporates the democratic principle that the voters should be able to select the President of their choice. The manner in which the conflict between that principle and the minimum-age rule should be resolved is far from certain."[94] This argument is not so easily dismissed and accordingly we shall return to it.

Spann's argument can be summarized as follows: first, distinguish rules from principles; second, show that a rule functionally depends on a principle; and third, apply the principle instead of the rule as the instrument of governance. The formal fallacy is clear: he ignores the very difference on which he himself distinguished rules from principles, arguing that the two are so nearly the same as to justify substitution. This mistake, endemic to polarity arguments, is called "the fallacy of the undistributed middle"; paradigm example, "Dogs have four legs; cats have four legs; therefore dogs are cats." Many other properties distinguishing dogs and cats—"middle terms" like barking and meowing—are ignored or lumped together as irrelevant rather than distributed between the two conflated categories. But Spann's version of the argument comes very well dressed up, decorated, with the underlying fallacy in deep disguise.[95]

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93. Spann, *supra* note 5, at 533.

94. *Id.*

95. Spann showed his awareness of both the argument form and its fallacy earlier in the article. En passant, he gave an example of a polarity argument and its error. "The principles themselves are actually only subjective preferences, unless one believes in natural truths." *Id.* at 517. In other words, if all that distinguished rules from principles lay in the former's ability to express subjective preferences, then principles are no better than rules, for there is no foundation to them either. This is familiar in another guise: "The objective is merely the sum of the subjective"—thus eliminating one or other pole of that dichotomy. Wrong. *Common acceptance* is a middle term that has been ignored; and it is a middle term the distribution of which matters, as Spann recognizes in the very next sentence: "But that observation is relatively unimportant as long as the principles are commonly-accepted." *Id.*

Spann's two pages on the presidential age limitation are intended merely as an illustration of a general method shown in his analysis of *INS v. Chadha*.[96] We need to look at that general method being illustrated to understand the specifics of the argument in Spann's own terms. Let's start with what he calls "Analytic Spin," since his subsection of that name begins with key stipulative definitions.[97]

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96. 462 U.S. 919 (1983).

97. Spann, *supra* note 5, at 516. "Analytical spin is the doctrinal paralysis that results when a principle acquires meaning only by feeding on itself." *Id.* at 520. But Spann never comes up with a convincing case. The central point of the article is that it is exemplified by the Supreme Court's decision that the legislative veto is unconstitutional.

> [T]he Supreme Court held the legislative veto to be unconstitutional because it was inconsistent with separation of powers principles. Why was the legislative veto inconsistent with separation of powers principles? Because it was not approved by the judiciary, whose approval is necessary for a reliable indication of consent. Why was it not approved by the [j]udiciary? Because it was inconsistent with separation of powers principles. And around and around.

Id. This is a mistake, a category mistake. The Supreme Court (called "the judiciary" in the third and fourth sentences) is charged with making a decision, and justifying it. The justification includes reasons—answers to questions like "Why was the legislative veto inconsistent with separation of powers principles?" But those reasons cannot be simply the conclusion ("[b]ecause it was not approved by the judiciary," *id.*), the outcome those reasons are required to support. That is why Spann's is a category mistake: it is a change of level, from the justification of a constitutional decision to a report of that decision, a slip from object-language to meta-language. Outside the Court we might say thus-and-so is the law because the Supreme Court said so, but within the Court, "Because that is what we decide" is not a reason, not a justification. *Marbury v. Madison* told us that the Constitution gave the Court final interpretive power, but that finality was not based on an infallibility invokable without more. *See* 5 U.S. (1 Cranch) 137, 173-79 (1803). As Justice Jackson most quotably wrote, "We are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result). There were reasons, as Spann explained in the first part of the article, and those reasons were (and still are) contestable. *Chadha* was a hard case; the aggregate of prior legal resources did not determine an unavoidable outcome. Hard cases—cases the outcomes of which are not determined by the aggregate of prior legal resources—are a major reason why we have appellate courts. Spann does a better job of creating a circle in the Court's reasoning. *See* Spann, *supra* note 5, at 521.

Spann defines "rule" and "principle," as noted above, in a fairly commonplace manner on the basis of the former's specificity and the latter's generality. Moreover, he makes an effort to distinguish between principle and subjective preference, a distinction he views as crucial. He then makes a key assertion: "Principles are useful only to the extent that they are generally agreed-upon. Rules are useful only to the extent that they can successfully be shown to follow from some principle."[98] This cries out for substantiation as it is, among other things, the basis of the first critical step in Spann's deconstruction of the presidential age limitation.[99] But the only justification given is a claimed reductio consequence of it being otherwise: "A rule that is not adequately traceable to an underlying principle is merely a subjective preference."[100] The main evil to be guarded against in all legal analysis is law-making by subjective preference, governance of men, not of laws.[101]

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98. Spann, *supra* note 5, at 517.

99. "Because doctrinal principles are designed to insulate us from subjective preferences, rules are useful only to the extent that they advance doctrinal objectives." *Id.* at 532.

100. *Id.* at 517.

101. "The object of doctrinal legal analysis is to arrive at resolutions that are rooted in principle rather than subjective preference." *Id.* at 516. "Legal doctrine is the collection of principles and rules on which we rely to avoid making arbitrary legal decisions—decisions based on nothing more than the subjective preferences of the decision makers." *Id.* at 517. Professor Tushnet makes much the same point:

> I have explained elsewhere that constitutional theory must authorize judges to invalidate some laws that legislatures enact, while at the same time it must sufficiently constrain judges' ability to invalidate such laws so that we cannot characterize invalidations as mere exercises of individual will.... The aim of constitutional theory is to limit legislators and judges so that their self-interest will not degenerate into either the tyranny of the majority or the tyranny of the judges.

Tushnet, *supra* note 7, at 684 (citing Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 783-84 (1983)). Fish deconstructs the "principle/preference" dichotomy with a straightforward—and straightforwardly fallacious—polarity argument:

The most obvious problem with this argument is that any given rule may have several independent principles underlying it, not just one.[102] As Professor Eskridge has pointed out, criminal laws typically have at least three independently grounded principles behind them.[103] Furthermore, a rule may also have support from principles of quite different orders. The regularity of behavior it generates may be as important as the content.[104] It may not matter much which rule we choose so long as we choose one. For example, think of neutral norms and their paradigm example: that we all drive on one side of the road. Maybe some principle governed the choice initially,[105] but any such justification has long since been sub-

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> Indeed, there is no such thing as a "mere preference" . . . all preferences are principled, that is, they are intelligible and doable only by the same token all principles are preferences, because every principle is an extension of a particular and *contestable* articulation of the world and none proceeds from a universal perspective (a contradiction in terms).

FISH, *supra* note 7, at 11.

102. A problem with much of Spann's reasoning is that he seems never to allow for more than one principle to correlate with a rule. He keeps writing in the singular, not only in these general claims, but specifically too. For example: "Principled analysis of the legislative veto starts with specification of *the* governing principle. . . . [C]ases that discuss constitutionality of the legislative veto treat separation of powers as *the* governing principle." Spann, *supra* note 5, at 517-18 (emphasis added).

103. *See* William N. Eskridge, Jr., *The Case of the Speluncean Explorers: Twentieth-Century Statutory Interpretation in a Nutshell*, 61 GEO. WASH. L. REV. 1731, 1744 (1993) (stating the three principles as deterrence, retribution, and rehabilitation).

104. Think of social conventions having constitutive and social identificatory value, such as H.L.A. Hart's somewhat ironic example of taking off one's hat in church. *See* H.L.A. HART, THE CONCEPT OF LAW 54 (2d ed. 1994). It may even be that a rule utterly devoid of support by any accepted principle is merely subjective preference. Yet, if properly enacted, such a statute would still be law. As Justice Frankfurter pointed out: "Congress, on the other hand [contrasting courts], may yield to sentiment and be capricious, subject only to due process." United States v. International Boxing Club of New York, Inc., 348 U.S. 236, 249 (1955) (Frankfurter, J., dissenting).

105. For example, the maritime rule for approaching vessels (United States and Europe: drive on the right), or the convenient rule for handling horses (Great Britain and Japan: drive on the left).

merged in the simple principle governing neutral norms: certainty.[106]

Spann's corollary contention—that "[b]ecause doctrinal principles are designed to insulate us from subjective preferences, rules are useful only to the extent that they advance doctrinal objectives"[107]—also warrants scrutiny on similar ground. Spann advocates deconstruction of the rule/principle dichotomy as a means of elucidating this point.[108] His paradigm illustration of the dichotomy is the clear rules of highway speed limits and the principles they serve.[109] The rule is the numerical speed limit; the underlying principle is society's need for safety on highways, or that people should drive safely. Spann argues that this principle can be served without costly strict adherence to a numerical limit.[110] Let us start with an even simpler example. The swimming pool in which I swim recently instituted an absolute rule: Everyone must wear a bathing cap. "But why should I?" said a chap I swim with whose pate is shiny and clean. "You have much more hair on your chin than I have on my head and you don't have to cover that." No doubt he is right; the principle of hygiene behind the rule is not served by his wearing, nor harmed by his not wearing, a cap. Think, though, of the poor lifeguards who have to keep order, ensure safety, and settle rows in overcrowded lanes, and with very tenuous authority. It would be quite unfair to force on them a burden of judgment as to permissible hair density *sans* cap.[111] The cer-

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106. As Lord Mansfield said: "In all mercantile transactions, the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators in trade then know what ground to go upon." *Valejo v. Wheeler*, 98 Eng. Rep. 1012, 1017 (K.B. 1774).

107. Spann, *supra* note 5, at 532.

108. *See generally* Spann, *supra* note 5. In addition, so does Schanck. *See* Schanck, *supra* note 4, at 2530.

109. Both Schanck and Spann follow Hart and Sacks in this choice of illustration. *See* HART & SACKS, *supra* note 88, at 138-41.

110. And "we permit it to be violated by fire trucks and ambulances"—and as we all know, a reasonable leeway in good conditions. Spann, *supra* note 5, at 533.

111. It is a high school pool: Think of those grubby and obnoxious teenagers of wildly varying hair length creating all sorts of problems for a poor guard charged with policing a rule of reason.

tainty of a rule, its very determinacy, is essential to the effective implementation of the reasonable policy. This is a simple and rather obvious, but nevertheless ubiquitous, example of how rules can have utility beyond the propagation of particular supporting principles.

Much the same holds for speed limits. It is true that in administration the traffic police treat the numerical limit as a more or less permeable standard—i.e., treat the rule as a principle. But this surely means no more nor less than that the police are permitted some sensible discretion. To allow this argument to convert a paradigmatic rule into its underlying principle is simply to change the meanings of "rule" and "standard" (or "principle"): having defined the terms, to abrogate one's own definition. As a control, "fifty-five miles per hour" is of a different kind from "reckless" or "generally fair and equitable"—a difference usefully captured in the "rule/principle" dichotomy.[112] Like all polarity arguments, Spann's deconstruction supposes that shades do not matter, that only absolutely exclusive, impermeable boundaries are semantically valid. A lot of the world's richness is lost in that sort of argument. Worse, in the case of the fifty-five miles-per-hour speed limit, collapsing the difference (converting rule into standard) means shifting the discretionary power of those charged with enforcing rules to the rule itself, making their authority less secure, and also making people driving within the limit less secure.

The manner in which the Framers or legislature choose to implement governing choices is usually significant.[113] Compare statutes of limitation with the common law concept of laches. Legislators and constitutional framers must decide not only what social policies should be instituted, but also the manner of their institution. The contrast between Articles 2 and 3 of the Uniform Commercial Code also illustrates. Article 2 is full of words like "reasonably" and "good faith" and background standards like "usage of trade."[114] Under Article 2, power to set standards is devolved downwards, toward the governed. By comparison, Article 3 is

112. *See* HART & SACKS, *supra* note 88, at 140.

113. *See generally* Michael B.W. Sinclair, *Plugs, Holes, Filters, and Goals: An Analysis of Legislative Attitudes*, 41 N.Y.L. SCH. L. REV. 237 (1996).

114. *E.g.*, U.C.C. §§ 2-706(1), (2); 2-202(a).

full of specialized jargon and precise definitions;[115] power over behavioral standards is kept with the law-makers. The same type of choice faced the Framers of Article II of the Constitution. Certainly it is reasonable to think that the Framers wanted to guarantee a level of maturity and experience in a president; but did they want those highly judgmental qualities to be contestable at every election? For purposes of clarity, certainty, and non-contestability, they chose a determinate method to implement their policy decision: they chose a *rule*. The Spann/Schanck deconstruction of the Constitution's presidential age limitation turns a question of counting into a difficult factual judgment (maturity), the resolution of which would be a question of constitutional law. This argument's failure is to take account of the principled selection of a *rule* for its defining characteristic, determinacy.[116]

Thus Spann's first key step—"Because doctrinal principles are designed to insulate us from subjective preferences, rules are useful only to the extent that they advance doctrinal objectives"[117]—does not support his argument. The general objectives of certainty and non-contestability are also served by the rule's being a rule. These were the qualities—the cat's meow, the dog's bark—that the polarity argument failed to distrib-

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115. *See, e.g.*, U.C.C. § 3-104 (articulating the eight requirements for an instrument to be deemed negotiable); *id.* § 3-201 (defining negotiation as a voluntary or involuntary transfer of possession of an instrument by a person other than the issuer to a person who thereby becomes its holder).

116. The following, then, is simply incorrect:

> [R]ules that do not purport to emanate from a principle, but rather serve as a starting point for analysis, are themselves nothing more than subjective preferences. Their formulation is arbitrary [true enough of neutral norms] and little can be said to justify their existence [quite false of neutral norms, and, e.g., the constitutive rules of conventional communication]. Therefore, the fact that rules might appear to be determinate could hardly be less consequential.

Spann, *supra* note 5, at 532.

117. *Id.*

ute, and in this case they matter.[118]

Similar considerations show the fallacy in the next key step in Spann's argument: "We rarely treat rules as the starting point of legal analysis. Rather, a rule is used as a means of implementing a doctrinal policy. As a result, all the uncertainties attendant to any doctrinal analysis accompany efforts to apply the rule."[119] The uncertainties of a background principle cannot properly devolve downwards to the application of the rule. The very quality of greater determinacy that distinguishes a rule (at least on Spann's definition) prevents exactly that. To conflate the indeterminacy of the principle with the rule itself is simply to ignore—to fail to distribute—the primary differentia of the rule/principle dichotomy.

The first sentence in the sequence—"We rarely treat rules as the starting point of legal analysis"—is also mistaken. By their nature, rules need canonical form. Common law principles do not give us the certainty or determinacy that is an important characteristic of a rule. Again, compare statutes of limitation and laches. Thus we find *legal* rules, in this defined sense of "rule," only in constitutions and statutes. Where there is such a rule, it *is* the starting point of legal analysis—and in most instances also the ending point. Most law-governed behavior is clearly within such rules. The Framers succeeded with the presidential age limitation, didn't they?

In light of this discussion, Spann's second downside, the potential

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118. Spann seems to realize this, almost to grasp it, but immediately lets it slip away:

> If the principle is that literal adherence to certain rules will advance the long-term interests of the nation more than case-by-case determinations will, application of the minimum-age provision will be complicated by the uncertainties involved in ascertaining whether the rule really falls within the scope of that principle, or whether it is more like a speed limit that we permit to be violated by fire trucks and ambulances.

Id. at 533. Certainty and the allocation of control that it permits matter in both cases. Framers and legislators wave big flags to that effect when they choose numerical values. *See* Sinclair, *supra* note 113, at 252-62.

119. Spann, *supra* note 5, at 532.

conflict between the presidential age limitation and a hypothetical popular preference for a candidate younger than thirty-five,[120] is also suspect. "The manner in which the conflict between that principle and the minimum-age rule should be resolved," writes Spann, "is far from certain."[121] This is only if one refuses to acknowledge the nature of the rule. The democratic process of presidential election underpins the second through fourth paragraphs of Section 1 of Article II of the Constitution. But the limitation on candidates among whom voters may choose is expressed in the foreground, not the background, of the fifth paragraph. Perhaps the Framers were concerned about potentially divided loyalties, perhaps something else, but they included the restriction, constitutive of the United States, that any candidate be a natural born citizen.[122] Similarly they included, as a constitutive rule of the United States, that to be eligible a candidate must "have attained to the age of 35 years."[123] There is no mistaking which prevails—this express rule or a principle underlying another provision. Spann writes that "[i]f enough is at stake to warrant the effort, doctrinal uncertainties can always be found."[124] The Framers also provided a solution "if enough is at stake": an amendment to the Constitution.[125] And they must surely have been aware of the alternative solution, revolution.

Spann's article contains a good deal of interest besides his deconstruction of the presidential age limitation, but nothing that bears directly on it. Polarity arguments in general, and Spann's in particular, suffer from a failure to take into account all but a small part of the meaning of a word. To be sure we give meanings to words in part by distinguishing among them, and in some circumstances we conflate such distinctions. But it does not follow that the collapsing of one distinction collapses all

120. "The Constitution also incorporates the democratic principle that the voters should be able to select the President of their choice." *Id.* at 533.

121. *Id.*

122. *See* U.S. CONST. art. II, § 1, cl. 5 ("No person except a natural born citizen . . . shall be eligible for the office of president.").

123. *Id.*

124. Spann, *supra* note 5, at 532.

125. *See* U.S. CONST. art. V (articulating the process to amend the Constitution).

distinctions. Just because on occasion a rule may depend upon one or more supporting principles for its application does not mean that on all occasions those principles may substitute for it. In this particular example of the deconstruction of the Constitution's presidential age limitation by polarity argument, at no point were we shown why in *this case* we *must* or even *should* make such a substitution. Many reasons suggest that the thirty-five-year age limitation's rule-like quality of certainty and determinacy is both valuable and deliberate.

V. VERBAL TRICKS AND HIGH REDEFINITIONS

We have just seen that the deconstruction of the presidential age limitation by collapsing the distinction between rule and principle fails on its own terms. But why should we accept those terms? They amount to no more than a stipulated taxonomy, a means of classification that Spann then repudiates. Verbal sleight of hand can produce wonderful effects in conversation or seminars, and, if suitably disguised, can be effective in written work. It still does not make good argument.[126]

A writer is entitled to define terms for the purposes of his argument, but that does not mean that anything of consequence will flow from those definitions. Where the argument exploits those stipulatively defined meanings, as do the polarity arguments of both Spann and Schanck, one has to suspect it is merely verbal, and only accidentally engaged with serious jurisprudential issues, if engaged at all.[127] Would Spann's argu-

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126. Perhaps it does to a suitably star-struck devotee: "The signified content of representational practice has no positive existence apart from this practice. The 'being' of things that are supposed to 'exist' out there is inscribed with the 'nothingness' of the trace of differentiation pointing away from the 'thing' to social practices." Peller, *supra* note 7, at 1169. That is, "*[t]here is nothing outside the text.*" DERRIDA, *supra* note 3, at 158.

127. A clear indication of a purely verbal game is a definition so refined that nothing in real life fits it. The word has been defined out of use, thus given a meaning different from common usage. Spann admits such a ploy in his definition of "rule": "Of course, nothing really fits this definition of a rule." Spann, *supra* note 5, at 532. Hart and Sacks concede, like any traditional rule skeptic, that "it is probably a flat impossibility to frame a legal rule applying to any considerable mass of transactions without leaving these un-

ment work with the key words—"rule," "principle," "standard"—defined by current usage rather than stipulatively defined?

"Current usage" would require a claim of privileged access or an empirical study; instead, let us look at the easier question of a popular and influential set of definitions. Larry Alexander and Ken Kress summarize Ronald Dworkin's account of rules and principles: "On Dworkin's account, legal principles are distinguishable from legal rules in three respects: legal principles are not posited; they have no canonical formulation; and they have the characteristic of (finite) weight."[128] In contrast, legal *rules* are posited in canonical form, and they apply in all-or-nothing fashion; that is, in action their weight is infinite. Principles, on this account, may often be inconsistent, and in a given decision may pull in different directions;[129] rules, at least ideally, should be consistent.[130] It will not always follow from these distinctions that rules will be more specific than principles, as Spann's definition requires—one need only think of the open-textured rules in Article 2 of the Uniform Commercial Code—although one would expect such a tendency.[131] Will any of Spann's deconstruction argument flow on this rule/principle dichotomy? On any more richly drawn? If not, then these arguments are merely verbal—a by-product of stipulative definitions of their subject terms. Nonetheless, these merely verbal arguments are the basis of an attempt, in our example, to substitute an indefinite principle for a countable number of years, a significant change in the nature of constitutional governance.

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certainties." HART & SACKS, *supra* note 88, at 139. Yet to them, that did not mean that there can be no rules, that the distinction is empty; there are those rules applicable to a very small variety of cases and specifiable in critical part by well-defined terms. Thus Hart and Sacks' paradigm rule is a numerical speed limit. *See id.* Statutes of limitations are other sources of examples.

128. Larry Alexander & Ken Kress, *Against Legal Principles*, 82 IOWA L. REV. 739, 747 (1997).

129. *See generally* Dworkin, *supra* note 88.

130. The aggregate body of statutes in the United States is now too great for any guarantee of consistency.

131. It is reasonable to assume that Framers and legislatures understand this distinction, but not necessarily as stipulatively defined by any particular writer.

This sort of semantic argument paves the way to two more standard ploys of postmodern argumentation: first, the insinuating high redefinition; second, the more insidious radical indeterminacy of language. Both of these, recurrent in the six deconstruction texts under review, warrant close scrutiny.

A. *High Redefinition*

One of the ways of redefining words to suit the author's purpose is *high redefinition*: placing an impossibly stringent criterion of propriety on the use of a word. While none of the six authors being discussed here uses this technique directly on the presidential age limitation, it underlies many of their arguments. Thus when D'Amato writes "[n]o one can ever know *with certainty* what any author's intention or strategy was,"[132] he is setting a very high standard on "certainty," a standard something like "infallibly correct, not possibly wrong." To take a common example, when I ascribe toothache to you (as in ". . . has a toothache"), I may use criteria of ascription different from those you use to ascribe it to yourself, and my ascription may be fallible in ways that yours is not; but these possibilities do not mean that I do not have logically adequate criteria for saying that you have a toothache. This is simply what it means for language to be public. Furthermore, this commonality of language is a prerequisite to the possibility of arguing about the author's intention. If D'Amato's point were valid, we would not argue; we would simply say "[a]nything or nothing as the mood takes you."[133]

This verbal mode of argument is not explicit in the pages on the presidential age limitation, but is endemic to Spann's article, underlying his generalizations about constitutional judgments. With a detailed analysis of the *Chadha* opinions in place,[134] Spann's next step is to generalize the subjectivity of constitutional judgements.

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132. D'Amato, *supra* note 77, at 576 (emphasis added).

133. And without any confidence in what that meant or whether it could be understood. *See supra* notes 50-51 and accompanying text.

134. *See* Spann, *supra* note 5, at 473-527.

> [B]ecause one's position on the constitutionality of the veto tends to correlate with one's position on its policy desirability, only the most stubborn formalists will refuse to entertain seriously the suggestion that resolution of the constitutional issues is ultimately based on subjective preferences about the proper structure and operation of government.[135]

Does the Constitution not in any way constrain one's "subjective preferences about the proper structure and operation of government"? Does that wonderful collection of words mean anything or nothing as your mood, or *weltenschaung*, takes you? Could it support a hereditary dictatorship? If Spann is correct, our foundational ideals are in serious trouble.

The force of this argument, however, rests on a high redefinition of "subjective." It looks like "whatever is your whim and fancy," and as such is the source of the argument's rhetorical force. But for Spann, to be non-subjective, a decision would have to be mandated no matter what a person's preference, something like the decision as to the sum of two plus two. That is not how we ordinarily use the word "subjective." Different people can in good faith take different positions; Justice White's dissent in *Chadha* was not based on mere peccadillo. Spann has imported into the argument a definition of "subjective," a *high redefinition*, that makes any decision not entirely compelled by logic a matter of subjective preference. On his definition, Spann's argument says very little more than that differing opinions are possible (without offering any means of differentiating those opinions). On the usual understanding of the word "subjective," it *looks* like a serious problem in our government of laws not men.

Spann writes: "Assuming that *Chadha* is a case in which subjective

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135. *Id.* at 528. Even this is undermined later: "Ultimately"? One's ultimate subjective preferences are really the product of one's socialization, or social indoctrination, and as such could be changed by further indoctrination; thus they too are indeterminate. *See id.* at 533-34. Notice what an extremely refined notion of determinacy this is. Could it be a notion of any usefulness in ordinary discourse or serious legal debate?

factors rather than principle governed the outcome . . . ."[136] One ought not to assume this without some sort of proof. *Chadha* was a hard case; the Constitution itself, together with the aggregate of prior legal resources, did not determine the outcome. The most that Spann has shown is that in the resolution of competing principles, different people can in good faith come out differently. If that is what he means by "ultimately based on subjective preferences" and that "subjective factors rather than principle governed the outcome," nobody would seriously dissent, at least not about serious judicial decisions. But it is a very innocuous notion of subjectivity, and of very little utility.

Subjectivity and indeterminacy are close companions in Spann's deconstruction. He tells us that "[t]he process of demonstrating indeterminacy is sometimes referred to as 'deconstruction.'"[137] This deconstruction, in one application, yields, "[P]rinciples themselves are actually only subjective preferences . . . ."[138] We have already discussed Spann's use of the word "subjective"; how does this infect "determinacy"?

On Spann's reasoning, indeterminacy can rest on subjectivity; if a decision under the Constitution depends on subjective preference, then surely the Constitution itself is indeterminate:

> For those willing to accept the view that doctrinal analysis of the legislative veto is indeterminate—that there is no nonsubjective way of resolving the constitutionality of the veto—the challenge is to ascertain the scope of doctrinal indeterminacy in general. There are reasons to believe that such indeterminacy is all-encompassing.[139]

On the usual understanding of "indeterminate" and "subjective" this

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136. *Id.* at 528.

137. *Id.* at 536.

138. *Id.* at 517.

139. *Id.* at 528. Supporting this belief is a motivation for showing the indeterminacy of even the presidential age limitation. As we've seen, Spann simply fails to pull that one off. On his account, then, doctrinal indeterminacy is not quite all-encompassing.

would be a heavy thesis. But do Spann's "reasons to believe" this thesis support it on those usual understandings? What are those reasons?

Spann's argument continues: "Accordingly, if doctrine is nevertheless to be viewed as determinate, the body of precedent and subsidiary rules that builds around the doctrinal principle must be shown to constrain judicial discretion and immunize decisions from subjective preferences. However, that is a showing that cannot be made."[140] On this definition of "determinate," this conclusion undoubtedly holds for cases that come before courts on questions of law. The definition together with the high redefinition of "subjective" guarantees it: If to be determinate a decision must be free from subjective preference, then determinacy requires an outcome from which no judge could in good faith dissent. That is, determinacy requires a decision that is indisputable, compelled as a matter of logical necessity. But such a case would never come before a court as a question of law; it would be a non-question.[141] Thus, by definition, all cases are indeterminate.

Spann follows this with an argument that *stare decisis* fails to determine any present decision.[142] Except in cases of *res judicata*, there is always some difference between any two sets of facts. Whether that difference is of significance depends on the criterion of similarity being used.[143] The same holds for a case presently before a court and a large class of cases historically held similar: between the present case and the

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140. *Id.* at 529.

141. If, on the other hand, we are including factual situations that do not come before courts, then he is simply wrong, as my failure to injure somebody last time I drove my car to the shops shows. Consider the suit brought against me in tort by Agnes Appleby for injuring her on that very trip to the shops, even though she was not within two streets of any street on which I drove. What judge in good faith will find a question resting on subjective preference there? Not even, I submit, Agnes' uncle and godfather.

142. *See* Spann, *supra* note 5, at 529-32. This is now so familiar it might be called "the standard model" of the doctrine of precedent. *See, e.g.*, EDWARD H, LEVI, AN INTRODUCTION TO LEGAL REASONING 7-18 (1948); *see generally* MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW 58-61 (1988); Michael B. W. Sinclair, *The Semantics of Common Law Predicates*, 61 IND. L.J. 373, 390-95 (1985-86).

143. For example, the two cases might be similar in not involving a moose, or dissimilar in involving cars of different color.

precedent set there is always some criterion on which they can be distinguished, something that is true of this case and not of all the others.[144] Accordingly, a judge in any new case must make a choice (necessarily, according to Spann, a subjective choice) as to what counts as a good criterion of similarity or difference. Spann puts it thus: "All subsequent cases are subject to characterization as cases of first impression . . . ."[145] This is all absolutely correct *if* "determinate" means "compelled by logical necessity." Then, indeed, as no two cases are exactly alike,[146] all cases are indeterminate, and *stare decisis* fails as a legal resource.

However, this is not how the general English speaking public, as well as initiates to the law, understand "determinate" and "indeterminate." Rather, we use "determinate," as of a common law decision, to mean something like "*most* if not all reasonable judges acting in good faith would agree." Under our common definition, most factual scenarios and even most cases are *not*, in their legal aspects, *in*determinate.

Spann's argument is thus based on a high redefinition of the word "determinate" (with rhetorical energy garnered from the companion high redefinition of "subjective"). This high redefinition, however, is not merely a clever trick; it rests on a common postmodern misconception already seen in Section II. Through any set of data we can draw indefinitely many explanations; this much is stock wisdom.[147] Spann's underlying mistake in his indeterminacy thesis is to take all of these possible explanations as equally valid. They are not. Most of the principles—criteria of similarity—on which cases *could be* distinguished or reconciled,[148] no judge in good faith would entertain. By including this infinity of alternate principles as marks of indeterminacy, Spann draws a

144. For example, facts of a case that occurred in January, 1999, will differ from all precedent cases because they were set in prior years.

145. Spann, *supra* note 5, at 529. How could I disagree? I once attempted to demonstrate this quite formally. *See* M.B.W. Sinclair, *Notes Toward a Formal Model of Common Law*, 62 IND. L.J. 355 (1986-87).

146. Except, again, cases of *res judicata*—which might thus be seen as the limiting case of *stare decisis*: alike on *any and all* criteria.

147. *See generally* Brewer, *supra* note 22.

148. Such as that neither is 12 unicorns. *Cf.* Brewer, *supra* note 22, at 932 n.19.

superficially convincing, rhetorically seductive, but nevertheless incorrect conclusion.

Spann's arguments fare no better when applied to the presidential age limitation. However, even if they did—even if we were prepared to accept his high redefinition of determinacy as logical necessity—counting to thirty-five is about as close to determinacy as one is likely to come in rules governing social behavior. One might find factual disputes as to date of birth; a thousand or so years ago, without a concept of zero, "35" might have looked pretty much like our "34"; we might even generate some dispute in a close case about what time of day one "attains to" an age. But only on a quite implausibly high redefinition of "indeterminate" will anyone find Article II's presidential age limitation indeterminate.

B. *Linguistic Indeterminacy*

These verbal arguments, and their failure, are interesting in and of themselves when made in law. High redefinition arguments, however, have a far more profound and devastating effect when applied to language in general. The idea of "linguistic indeterminacy" or "the radical indeterminacy of meanings" has been espoused by postmoderns in all fields, and may well be the cornerstone of their ideology. Since the six authors being discussed here rely on linguistic indeterminacy as a means of deconstructing the presidential age limit, this subsection will try to come to grips with it.

Nearly fifty years ago, philosopher Willard Van Orman Quine gave us a pioneering and revolutionary argument about language and meaning. In the seminal "*Two Dogmas of Empiricism,*"[149] he wrote: "[T]he primary business of [a] theory of meaning [is] simply the synonymy of linguistic forms and the analyticity of statements; meanings themselves, as obscure intermediary entities, may well be abandoned."[150] That "busi-

149. *See generally* WILLARD VAN ORMAN QUINE, FROM A LOGICAL POINT OF VIEW 20 (1953).

150. *Id.* at 22.

ness" looks empirical, a matter of observing linguistic behavior; but ten years later,[151] Quine argued that observable behavior is not an adequate basis for determining meanings. Meanings, he argued, are always underdetermined by all the behavioral evidence; incompatible hypotheses that are in accord with all the available behavioral evidence will always be available. This is called "Indeterminacy of Translation Thesis," or, in the words of an Italian proverb, "traduttore, tradittore," that is, the translator is a betrayer. As an example, Quine takes a hypothetical linguist purporting to translate the word "gavagai" as "rabbit": "For, consider 'gavagai'. Who knows but what the objects to which this term applies are not rabbits after all, but mere stages, or brief temporal segments, of rabbits?"[152] "Or perhaps the objects to which 'gavagai' applies are all and sundry undetached parts of rabbits. . . . A further alternative . . . is to take 'gavagai' as a singular term naming the fusion . . . of all rabbits: that single though discontinuous portion of the spatiotemporal world that consists of rabbits."[153] The idea should now be clear: "The indeterminacy that I mean is more radical. It is that rival systems of analytical hypotheses can conform to all speech dispositions within each of the languages concerned and yet dictate, in countless cases, utterly disparate translations."[154] This Indeterminacy of Translation Thesis has come back to haunt us in these postmodern deconstructions.

Spann tells us that deconstruction is the process of bringing out the assumptions implicit in any thesis and showing that different assumptions can lead to different theses.[155] We humans are faced with a bewildering array of data; to make these data intelligible, to make it possible to live with and use them, we organize them by categorizing and giving

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151. *See* WILLARD VAN ORMAN QUINE, WORD AND OBJECT (1960).

152. *See id.* at 51.

153. *Id.* at 52. Ostension doesn't help: "Point to a rabbit and you have pointed to a stage of a rabbit, to an integral part of a rabbit, to the rabbit fusion, and to where rabbithood is manifested . . . ." *Id.* at 52-53.

154. *Id.* at 73.

155. *See* Spann, *supra* note 5, at 536 (elaborating on the reportive definition "[t]he process of demonstrating indeterminacy is sometimes referred to as 'deconstruction'").

prominence to some over others, we create conceptual schema.[156] The choices underlying one's conceptual scheme are the implicit assumptions behind language's "representational conventions."[157] Between the Framers and ourselves, the postmodern argues, lies such a gulf that interpreting the Constitution is like translating a foreign language.

> Since the social universe was conceived by the Framers according to representational conventions different from our own, the attempt to determine the meaning of the Constitution requires a reconstruction of the Framers' conceptual universe and then a translation into the terms of our conceptual universe. Such a reconstruction and translation seems indeterminate for the same reasons that it is impossible to translate exactly some concepts from one language to another.[158]

Thus downloading the Constitution onto a present legal problem requires translating our language as used by the Framers into our own, present-day language. It requires us first to find the Framers' meanings in their context and then to "decide how to correlate those meanings with present terms."[159] In Quinean terms: We must discover whether the words of the Framers are synonymous with those same words—"collocations of ink spots" (or compression/rarefactions sequences in the air)—as used to-

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156. English philospher John Wisdom expressed the potential variety and inaccessibility of our underlying conceptual schema nicely forty-five years ago: "As we all know, but won't remember, any classificatory system is a net spread on the blessed manifold of the individual and blinding us not to all but to too many of its varieties and continuities." JOHN WISDOM, PHILOSOPHY AND PSYCHOANALYSIS 119 (1953).

157. *See* Peller, *supra* note 7, at 1170. Tushnet adds: "[The] error here is . . . in attempting to demonstrate that words alone limit what can be done in interpreting them: he assumes that words have meanings significantly independent of the social context within which they are interpreted." Tushnet, *supra* note 7, at 688 n.24 (attributing this mistake to Frederick Schauer, *supra* note 17).

158. Peller, *supra* note 7, at 1173-74.

159. *Id.* at 1174.

day.[160]

Fish makes the same argument in linguistic terms. He claims it is impossible for authoritative language to have "explicit or literal meanings" or "direct or uncontroversial application" because any particular speech act depends for its meaning on the context in which it occurs.[161] We are all aware of the context dependence of propositions containing personal or deictic pronouns; "I like that" varies in meaning according to who is saying it, when, and of what. But Fish, like Peller, means something richer: "Meanings only become perspicuous against a background of interpretive assumptions in the absence of which reading and understanding would be impossible."[162] The meaning of a text depends on the author's social and psychological background, his culture, or form of life.[163] Given a different social background, "different assumptions," "a

160. Quine later recognized that his argument read onto the situation of two speakers of the same language ("same"? how could one possibly tell?): "[T]he resort to a remote language was not really essential. On deeper reflection, radical translation begins at home. Must we equate our neighbour's English words with the same strings of phonemes in our own mouths? Certainly not; for sometimes we do not thus equate them." WILLARD VAN ORMAN QUINE, ONTOLOGICAL RELATIVITY AND OTHER ESSAYS 46 (1969). *But see* QUINE, WORD AND OBJECT, *supra* note 151, at 78 (calling the suggestion "perverse and ingenious" and an "impractical joke").

161. FISH, *supra* note 7, at 358. The argument that meanings depend on context, and even a simple mistake often made using it, is so common that it has found its way into popular fiction: "The man makes his claims public. 'Meanings extractable from a given linguistic configuration may be neither convergent, bounded, nor recursively enumerable.' Or some such rubbish. He seems to think that because 'context' is infinitely extensible, there can be no neurological calculus of interpretation." RICHARD POWERS, GALATEA 2.2, 112 (1995).

162. FISH, *supra* note 7, at 358. Fish continues: "A meaning that seems to leap off the page, propelled by its own self-sufficiency, is a meaning that flows from interpretive assumptions so deeply embedded that they have become invisible." *Id.* You don't even know you're doing it! This bit of *ad hominem* irrefutability helps disguise a serious mistake, *viz.*, the claim that all readings are interpretations.

163. The term "form of life" has its roots in the later works of Ludwig Wittgenstein. "'So you are saying that human agreement decides what is true and what is false?'—It is what human beings *say* that is true and false; and they agree in the *language* they use. That is not agreement in opinions but in form of life." LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, § 241 (G.E.M. Anscombe, trans., 1953). Language and

quite other meaning 'leaps off the page.'"[164]

The Constitution's presidential age limit is a useful illustration of this linguistic indeterminacy precisely because it is supposed to exemplify clarity, "explicit and precise language."[165] But "[w]hat did the writers mean by thirty-five years of age?"[166]

> When the framers chose to specify thirty-five as the minimal age of the president they did so against a background of concerns and cultural conditions within which "thirty-five" had a certain meaning; and one could argue (should there for some reason be an effort to "relax" the requirement in either direction) that since those conditions have changed—life expectancy is much higher, the period of vigor much longer, the course of education much extended—the meaning of thirty-five has changed too, and "thirty-five" now means "fifty."[167]

Nor does this argument require special or extraordinary circumstances,

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forms of life are conceptually inextricable: "To imagine a language means to imagine a form of life." *Id.* at § 19. Fish, in an earlier work, explicitly followed this Wittgensteinian usage:

> If what follows is communication or understanding, it will not be because he and I share a language, in the sense of knowing the meanings of individual words and the rules for combining them, but because a way of thinking, a form of life, shares us, and implicates us in a world of already-in-place objects, purposes, goals, procedures, values, and so on . . . .

STANLEY FISH, IS THERE A TEXT IN THIS CLASS? 303-04 (1980). By 1989, Fish had fallen back into the very fallacies that much of Wittgenstein's argument in the PHILOSOPHICAL INVESTIGATIONS was designed to dissolve. *See* FISH, *supra* note 7.

164. FISH, *supra* note 7, at 358.

165. *Id.*

166. *Id.* We should forgive and ignore the apparent originalist surrender to writers' meaning, as accidental, of no relevance to this particular argument, and certainly out of character for Fish.

167. *Id.* at 359.

such as in the arguments from extreme example.

> [T]he circumstances within which the framers wrote and understood thirty-five were no less special; and therefore the literal meaning thirty-five had for them was no less contextually produced than the literal meaning thirty-five might now have for those who hear it within the assumption of contemporary political and social conditions.[168]

One might now expect some historical analysis based upon facts about word usage in the speech community of the Framers,[169] but none is forthcoming.[170] Other than contentious speculations about longevity, vigor and education,[171] Fish offers nothing empirical about the socialization or culture of the Framers, or their political and social conditions, to suggest any difference in the meanings of "age" or "year" or counting.[172] Fish's

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168. *Id.*

169. We are, at this stage of the argument, still dealing with speech communities in which members share common meanings—the "homophonic hypothesis" that Quine says is "fundamental to the very acquisition and use of one's mother tongue." QUINE, WORD AND OBJECT, *supra* note 151, at 59. For example, Tushnet: "The text constrains all of us, including judges, because we find ourselves, as a matter of contingent but unavoidable fact, located in a specific community with its own history from which we cannot completely escape." Tushnet, *supra* note 7, at 692. Fish specifically adopted the notion of "interpretive communities" in FISH, IS THERE A TEXT IN THIS CLASS?, *supra* note 163, at 303.

170. What is needed is some showing that either counting or the length of years has changed since the late eighteenth century. But "the age of thirty-five years," earth years that is, counted since the birth (or the most recent birth) of the person in question, has the same meaning now as then.

171. *See* FISH, *supra* note 7, at 359. "[L]ife expectancy is much higher, the period of vigor much longer, the course of education much extended." *Id.* He is probably wrong about the first two. Life expectancy for persons over thirty has hardly changed at all in the last 200 years; the big change has been in infant mortality. There is little evidence that vigor has changed its distribution over age. He is almost certainly wrong about education *for the social class of the Framers.*

172. Peller offers little more and also only speculation: "It may be that a younger age should be used since children today, through mass media, are more worldly at an earlier age. Or it may be an older age should be used since children are actually given less

argument, like Quine's, is entirely speculative, entirely within the realm of *possibility*, not supported by any actual reason.

So we cannot be absolutely secure in our belief that the words used by the Framers meant the same to them as they now mean to us. Given the absence of some ground for insecurity, however, why *not* take meanings to be stable, the same then as now? Not only do Fish, Peller, and Spann all fail to provide any real grounds for insecurity with their examples of *possibilities*, but they also appear to ignore very real examples of grounds for such insecurity. For instance, the word "science" as used in the Constitution[173] had a different meaning to the Framers than to us. In the eighteenth century it was used in the sense of the Latin "*scire*" meaning "knowledge"; it was not until the 1830s that the word "scientist" was first used in its present sense.[174] Many of us have observed the change of meaning of the word "paradigm," from "a typical, or central example, or instance of a theory" to "a general theoretical position." These examples show that we can observe changes in meaning, that we do know the kind of information to look for to find them, and correspondingly, we do know the kind of information that would make us less confident that "thirty-five" meant the same to the Framers as it does to us.

Of course it is open to a proponent of the Spann/Fish/Peller argument to reply that our knowledge of these examples of change is equally insecure: finding an alternative explanatory hypothesis is merely an exercise in imagination. But this is just a high redefinition of certainty with regard to the synonymy of meanings, an argument form we have been through

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social responsibility than in revolutionary times." Peller, *supra* note 7, at 1174. It is hard to take seriously the assertion that since the late eighteenth century, the meaning of "thirty-five" has changed, and that "thirty-five" now means "fifty." At most the argument would support a conclusion like "[t]he age that would presently serve the function that thirty-five served for the framers is fifty." Peller made the game rather more explicit: "I have simply substituted a functionalist standard (maturity) for a particular signifier (thirty-five years of age) to demonstrate that interpretation required that a position be taken that cannot be gleaned from the text itself." Peller, *supra* note 7, at 1174 n.36.

173. *See* U.S. CONST. art. I, § 8, cl. 8 ("To promote the progress of science and the useful arts . . . .").

174. *See* MARTIN J.S. RUDWICK, THE GREAT DEVONIAN CONTROVERSY 32 (1985).

before. Not all hypotheses are equal, even if indistinguishable as to truth.[175] The mere *possibility* of an alternative—especially an alternative as far-fetched as some of those we have seen—is not sufficient grounds for rejecting the most sensible, the most workable, in fact the only reasonable understanding.[176] Our knowledge of word meanings has proven very stable over a very long period of time. That we can enjoy and use the works of Shakespeare, Eliot, Dickens, Bacon, Coke *et al* and that we have grounds for seriously disputing their meanings in some cases, not only demonstrates but also depends on that very public and enduring stability.

Given the shakiness of the so-called indeterminacy of language, Fish's argument looks like no more than a recasting of the "substitution of intent" argument discussed in Part III. On this indeterminacy argument, then, the deconstructionists are unconvincing. But in passing we should note that many postmoderns do show genuine differences in meanings. They form the branch of postmodernism known as "viewpoint epistemology."[177] Despite the fact that these deconstructive techniques have serious logical (and humanitarian) problems,[178] they continue to

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175. Quine pointed this out in *Two Dogmas*: "The myth of physical objects is epistemologically superior to most in that it has proved more efficacious than other myths as a device for working a manageable structure into the flux of experience." QUINE, WORD AND OBJECT, *supra* note 151, at 44.

176. An explanation or theory that accounts for its data as extraordinary, special, improbable or remarkable, is not as useful as one that accounts for it as a natural consequence of phenomena in which we have great confidence, that is, as ordinary. That is a problem for postmoderns, because their explanations tend to shew that interpersonal communication and congruence of word meanings is mere happenstance—*ergo* everything whose existence depends on them is also mere happenstance. But those things, like mutual intelligibility, culture, nations, courts, social institutions, etc., are common, frequent and ubiquitous.

177. Peller writes: "Here the origin of interpretation is said to be found in the given community that interprets or in the 'competent' readers of texts. However, the same kinds of mediation characterizing historical interpretation also occur in contemporaneous searches for meaning." Peller, *supra* note 7, at 1174.

178. *See* FARBER & SHERRY, *supra* note 54, at 15-33. It is a superbly reasoned survey of these positions, their underpinnings, and social consequences. *See also* ELLIS,

permeate contemporary jurisprudence.

C. *Viewpoint Epistemology*

"Viewpoint epistemology" takes the insight that things look different from different points of view and builds it into a radically variable and uncertain epistemology. According to this theory, there is no universal reality; there are only interpretations—"texts," "discourses," "multiple layers of consciousness," "multivalent ways of seeing"—varying from person to person, group to group. This epistemological pluralism infects texts, not only literary texts but even those of physical sciences,[179] with radical indeterminacy: Words may have meanings, but they are radically indeterminate, wholly dependant upon the reader for their very existence as discursive entities. Meaning, and its adjuncts "truth" and "falsity," vary with the viewpoint of the reader.

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supra note 84 (pointing out the divisive, anti-enlightenment, anti-equalitarian consequences of the program).

179. The argument on empirical science is described clearly by philosopher Susan Haack: "The basic strategy is to shift attention from the normative notion of *warrant* (of how good the evidence is for this or that scientific claim) onto the descriptive notion of *acceptance* (the standing of a claim in the eyes of the relevant community)." Susan Haack, *Puzzling Out Science, in* 8 ACAD. QUESTIONS, Spr. 1995, at 20, 21-22. This is known as "the strong program" in the sociology of scientific knowledge. *See generally* STEVE FULLER, SOCIAL EPISTEMOLOGY (1988); BRUNO LATOUR, WE HAVE NEVER BEEN MODERN (1993); TREVOR PINCH, CONFRONTING NATURE: THE SOCIOLOGY OF SOLAR NEUTRINO DETECTION (1986). Haack continues:

> More interestingly, many New Cynics disdain the notions of evidence and warrant because, as they are at pains to point out, what has passed for warranted theory, relevant evidence, known fact, objective truth, has often enough turned out to be no such thing. This is true; but the conclusion that the notions of warrant, evidence, truth, fact, reality, knowledge, are ideological humbug, manifestly does not follow. So ubiquitous has this manifestly invalid form of inference become of late, however, that it deserves a name; I call it "the 'passes for' fallacy."

Haack, *supra*, at 22. So too, for law.

Viewpoint epistemologists in law, such as critical feminist theorists[180] and critical race theorists,[181] argue that meanings are different in important ways in their different interpretive communities. Because law, like language, is socially constructed—exists as institutional fact rather than brute fact—the argument for variability with viewpoint finds an easy grip, and legal decision-making becomes a "struggle over which version of reality will secure power . . . imposed as if universal."[182]

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180. *See, e.g.*, Ann C. Scales, *The Emergence of Feminist Jurisprudence*, 95 YALE L.J. 1373, 1378 (1986) ("Feminist analysis begins with the principle that objective reality is a myth."). For other examples of critical feminist legal theory, see Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617 (1990) (demonstrating the "necessity of making a feminist evaluation of our jurisprudence"); Ann C. Scales, *Towards a Feminist Jurisprudence*, 56 IND. L.J. 375 (1981) ("Feminism takes gender as a central category of analysis while the core texts of critical legal studies do not."); Linda J. Lacey, *Introducing Feminist Jurisprudence: An Analysis of Oklahoma's Seduction Statute*, 25 TULSA L.J. 775 (1990); Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990); Naomi R. Cahn, *The Case of the Speluncean Explorers: Contemporary Proceedings*, 61 GEO. WASH. L. REV. 1755 (1993); Mary I. Coombs, *The Case of the Speluncean Explorers: Contemporary Proceedings*, 61 GEO. WASH. L. REV. 1785 (1993); *see also* MINDA, *supra* note 6, at 128-48.

181. *See, e.g.*, John O. Calmore, *The Case of the Speluncean Explorers: Contemporary Proceedings*, 61 GEO. WASH. L. REV. 1764, 1764 (1993); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Dwight L. Greene, *The Case of the Speluncean Explorers: Contemporary Proceedings*, 61 GEO. WASH. L. REV. 1790 (1993); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R-C.L. L. REV. 323 (1987); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987); *see also* MINDA, *supra* note 6, at 167-85.

182. MARTHA MINNOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 389 (1990). Farber and Sherry write:

> If the modern era begins with the European Enlightenment, the postmodern era that captivates the radical multiculturalists begins with its rejection . . . . Reason is just another code word for the views of the privileged. The Enlightenment itself merely replaced one socially constructed view of reality with another, mistaking power for knowledge. There is naught but power.

Our law is the product of a history of decision-making by white, Anglo-Saxon men—indeed by straight, rich, white, Anglo-Saxon men. One does not have to attribute any venality to our past lawmakers to see that they made law to incorporate their own values, their own social world view; that was the only world view they had. It is not surprising that such law should play out differently to women and various ethnic and racial minorities. So, for example, critical feminists take the classic work of Carol Gilligan[183] to show that moral concepts and correspondingly the meanings of moral vocabulary are substantially different for women and men. They argue that, given social acceptance justifies law that applies to all, one self-selecting elite should not have hegemonic power over its meanings and underlying values. Their reasoning is devastatingly critiqued by Farber and Sherry[184] and Ellis,[185] on both its logical fragility and its social and moral consequences. Here we shall only explore a problem it shares with determined deconstruction, the problem aptly called "*nouveau* solipsism."[186]

FARBER & SHERRY, *supra* note 54, at 33. Stanley Fish writes that because the judge is merely exercising the power of the privileged, "the force of the law is always and already indistinguishable from the forces it would oppose." FISH, *supra* note 7, at 520.

183. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

184. *See generally* FARBER & SHERRY, *supra* note 54.

185. *See generally* ELLIS, *supra* note 84.

186. The eminent historian Gertrude Himmelfarb explains that:

> The most recent interdisciplinary trend is subjectivism, or the "*nouveau* solipsism," as it has been called. (Among French historians it is known as "*égo-histoire.*") In this country, it has been adopted mainly by feminists who have made it part of their methodology. It does not merely "engender" scholarship; it personalizes it. . . . The approach to any subject is insistently personal, dwelling upon the feelings, emotions, beliefs, and personal experiences of the scholar.

Gertrude Himmelfarb, *Beyond Method*, *in* WHAT'S HAPPENED TO THE HUMANITIES? 143, 155 (Alvin Kernan ed., 1997). The name "nouveau solipsism" is attributable to Dorothy Patai. *See* Dorothy Patai, *Sick and Tired of Scholar's Noveau Solipsism*, CHRON. HIGHER EDUC., FEB. 23, 1994, at A52. As literary critic Michiko Kakutani says, "I speak, there-

A child approaching the data from which she derives her mother tongue faces the problem of choosing among indefinitely many correct hypotheses. She suffers the same indeterminacy as the anthropological linguist translating "gavagai," and, *ex hypothesi*, lacks a sufficient range of sentences in the language to eliminate extraneous stimuli or irrelevant explanations.[187] This leads to a rather startling conclusion. Just as we could not be certain of synonymy between historical and present meanings, or between two present interpretive communities, we cannot be sure of mutual intelligibility between any two persons, for exactly the same reasons. There can be no guarantee of commonality of conceptual schema, or identity of representational convention between any two speakers of a language, or between the author of any text and its reader. For any given text, different readers bringing different assumptions can yield different, even inconsistent readings. Spann takes this next step.

> [T]he charm of deconstruction lies in its relentless availability to expose the subjective foundation of any seemingly objective assertion . . . . Because any text can be deconstructed, the meaning of a text is indeterminate; it has as many different meanings as it has readers who bring to it their own sets of subjective values and assumptions.[188]

Mutual intelligibility lacks secure ground, is hypothetical at best.

Surely there is something wrong with this conclusion. Judge Easterbrook pointed out that there must be something wrong "unless the community . . . is to engage in ceaseless (and thus pointless) babble—and unless, moreover, the community is willing to extend almost boundless

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fore it's true (well, maybe true)." Michiko Kakutani, *Howard Stern and the Highbrows,* N.Y. TIMES, Jan. 28, 1996, § 6 (Magazine), at 22.

187. *See* WITTGENSTEIN, *supra* note 163, §§ 27-29; *see also* Noam Chomsky, *Quine's Empirical Assumptions, in* WORDS AND OBJECTIONS: ESSAYS ON THE WORK OF W.V. QUINE 53-67 (Donald Davidson and Jaako Hintikka eds., 1969).

188. Spann, *supra* note 5, at 537.

discretion to judges."[189] But if we take this deconstruction at its word, the situation is even more dismal.[190] We have already seen that we cannot be sure of learning the same language, even though we learn and use the same words: their meanings may be systemically and indefinitely variable.[191] The concepts of acting, lying, disagreement all lose their point, as do veracity, agreement, and so on.[192] Even worse: just as much as there is

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189. Easterbrook, *supra* note 72, at 536. Tushnet's two specific replies miss the point.

> First, critics of unsophisticated textualism claim that radical indeterminacy of meaning is, within a liberal community, inevitable. It is no answer to that criticism to say that indeterminacy gives boundless discretion to judges. . . . Second, the "babble" that Easterbrook fears need be neither ceaseless nor pointless. Easterbrook assumes that the community of readers is well defined. But those who offer alternative resolutions of indeterminacy of meaning—the President, the guru's followers—are claiming either that they are not part of the community of readers in which their interpretations are rejected or, what amounts to the same thing, that they are attempting to reconstitute the community quite literally on their terms. Easterbrook thus falls into the trap that has awaited all conservatives since the emergence of bourgeois society: he must assume that the community of readers exists, when critics of liberalism claim that the community is continually being recreated by acts of will and can be reconstituted by (only!) choosing differently. If the community were reconstituted the "babble" would cease, which is precisely its point.

Tushnet, *supra* note 7, at 691. These answers would have some point if there were interpretive communities; but the point of the radical indeterminacy argument is that they suffer as much and the same mutual unintelligibility internally, among their members, as they do between communities.

190. The following arguments can be found in WITTGENSTEIN, *supra* note 163, §§ 243-261. I do not claim that Wittgenstein makes these arguments—Wittgensteinian exegesis is too hazardous an enterprise for me to make such a claim. I merely note that this is where I found them.

191. Unless, of course, one is prepared to accept culturally and linguistically variable innate ideas.

192. On its own terms, one cannot misrepresent a deconstructionist argument of this kind. As Ellis says, "A charge of inaccuracy . . . presupposes a possible correction of the inaccuracy." ELLIS, *supra* note 25, at 12. If there is no authoritative interpretation, if there really is nothing to choose between interpretations, how can one misinterpret? To

no guarantee of mutual intelligibility between persons A and B, even though they *appear* to be speaking the *same language*, there is no guarantee of synonymy for A alone in her meaning for a word from one day to the next; memory is not infallible, a court of no appeal.[193]

For the determined deconstructive indeterminist, even these may not count as sufficient absurdities for *reductio ad absurdum* on his argument. If so, then he must ask: if he is right, how could we tell? Isn't the argument just like the undetectable fairies in the bottom of the garden? There are and can be no discriminating indicia; their presence, like the correctness of radical deconstruction, by its own terms cannot matter in any way. The deconstructionist's extreme indeterminism does not even leave a way to tell us about it. As Fish wrote (in 1980): "Miller, Derrida, and the others write books and essays, and engage in symposia and debates, and in so doing use the standard language in order to deconstruct the standard language. The very presumption that they are understood is an argument against the position they urge."[194] In other words, if it is correct, the deconstructive indeterminist thesis is inexpressible; if expressi-

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say that one has misinterpreted, misrepresented, or misunderstood the deconstructionist position is to concede that there is something which is not misrepresenting, etc., something which counts, if not as getting it *right*, then at least at doing it *better*. In other words, I must have interpreted this argument as well as anyone else; for if not, there is some criterion of quality of interpretation, and so the argument is invalid. *See id.* at 11-14.

193. *See* WITTGENSTEIN, *supra* note 163, § 265; *see generally* W. Haas, *The Theory of Translation*, 37 PHIL. 208 (1962).

194. FISH, IS THERE A TEXT IN THIS CLASS?, *supra* note 163, at 303. This form of argument is familiar in philosophy under the name "transcendental":

> I characterise a transcendental argument as one to the conclusion that the truth of some principle is necessary to the possibility of the successful employment of a specified sphere of discourse. Its use will be to show the necessity either of accepting the principle on the part of anyone who claims seriously to employ locutions of the relevant sphere of discourse, or of abandoning such a claim.

A. Philips Griffiths, *Transcendental Arguments*, Supp. Vol. XLIII THE ARISTOTELIAN SOCIETY 167 (1969). The principle in play here is the negation of the deconstructionist's thesis.

ble, it is incorrect. For law, for any engagement with the real world, it is irrelevant.[195]

VI. INVERTING HIERARCHIES AND DECENTERING MEANINGS

The last deconstruction techniques I shall address in this article are the inverting of hierarchies and the decentering of meanings. These techniques infect several of the authors' arguments, from Schanck's inversion of the rule/standard "hierarchy" to Tushnet's decentering of our concept of age. Although these arguments purport to prove the dangerously subjective nature of legal decision making, in their own terms they only succeed in heightening that same subjectivity by removing any possibility of objectivity or constraint.

In order to navigate these treacherous waters of hierarchies, decenterings, and inversions, we need to consider what these words signify to postmoderns. For this purpose we need to see how they relate to one of the modernist schools that is among their central targets of attack, namely, structuralism.

A. *Inverting Hierarchies*

Structuralists—of whom Claude Levi-Strauss is probably the best

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195. Scottish skeptic David Hume, in a famous passage, wrote much the same:

> Most fortunately it happens, that since reason is incapable of dispelling these clouds, nature herself suffices to that purpose, and cures me of this philosophical melancholy and delirium, either by relaxing this bent of mind, or by some avocation, and lively impression of my senses, which obliterate all these chimeras. I dine, I play a game of back-gammon, I converse, and am merry with my friends; and when after three or four hours' amusement. I wou'd return to these speculations, they appear so cold, and strain'd, and ridiculous, that I cannot find in my heart to enter them further.

DAVID HUME, TREATISE ON HUMAN NATURE, Book 1, Part IV, § VII (1739).

known[196]—analyzed linguistic and societal elements by the use of binary oppositions: word pairs. All human societies have to deal with certain basic phenomena like birth, life, and death, so oppositions like unborn/born, live/dead, and male/female provide a useful basis for understanding societies otherwise apparently quite different. Language itself rests on classifications which can be organized as binary oppositions.[197]

How does one pick the pairs, the binary oppositions? I don't know, and I've never seen or heard an articulated method.[198] As a native speaker of the English language I can often see distinctions, but I find it hard to do so in other languages without relying on some translation. I had always thought this was merely what it means to be a native speaker, and to that extent locked into one language's—really, one dialect's—world view. Nevertheless I find reason to disagree with the pair choices made in some deconstructive arguments. Schanck says the opposition "speech/writing" is "fundamental to philosophy."[199] Why?[200] French guru Jacques Derrida is renowned for deconstructing this particular dichotomy.[201] By doing so he claims, *inter alia*, to "demonstrate the futility of the Western belief that knowledge and meaning can ever be present to

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196. *See, e.g.*, CLAUDE LEVI-STRAUSS, STRUCTURAL ANTHROPOLOGY (Claire Jacobson & Brooke Grundfest Schoepf trans., 1967).

197. Nouns, intransitive verbs, and adjectives all pick out some things and not others in the extra-linguistic world.

198. It looks like intuition, but is based on experience in what is productive as explanation (i.e., what works to unify and make comprehensible otherwise disparate data).

199. Schanck, *supra* note 4, at 2527.

200. Walter Benn Michaels constructs a rhetorical edifice on the binary opposition *reading/writing*. *See* Walter Benn Michaels, *Response to Perry and Simon*, 58 S. CAL. L. REV. 673, 678-80 (1985). Why that pair any more than *speaking/writing* or *writing/drawing*? As Professor Tushnet comments: "Plainly, however, Michaels' idiosyncratic loadings on 'reading' and 'writing' need not be accepted." Tushnet, *supra* note 7, at 685 n.10.

201. Derrida is, perhaps, most famous for his reversal of the traditional priority of writing over speech. *See* DERRIDA, *supra* note 3, at 4. Anyone who would rely on Derrida as authority should at least respond to Ellis's devastation of his argument. *See* ELLIS, *supra* note 25, at 18-25.

us."[202] The validity of this claim is questionable.[203] Other such pairs—"dichotomies underlying language and texts"[204]—include "sensible/intelligible, intuition/signification, nature/culture,"[205] "state/society, public/private, individual/group, right/power, objective/subjective, reason/fiat, freedom/coercion, and form/substance."[206] Schanck says, "[s]tructuralism is essentially a modern, rather than postmodern, conceptualization because it conceives of the underlying structures as fundamentally real—maintaining some sort of objective status, independent of the perspective of any given practitioner of the method."[207] Post-structuralism, he says, "denies structuralism's claim to grasp the true nature of things,"[208] and deconstruction is a method of justifying that denial.

The postmoderns' next move is to claim that these texts depend not just on binary oppositions, but on one member of the two being given primacy, and the other being regarded as derivative, or secondary.[209] In

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202. Schanck, *supra* note 4, at 2527. This notion of "presence," as in this passage, is quite common in postmodern writing; I return to it below. *See infra* text accompanying notes 215-222.

203. Not only is it hard to see why "speech/writing" should be a dichotomy of any great significance, it is a little difficult to see why it is of any generality. In many contexts the appropriate dichotomy is speaking/hearing, not speaking/writing. One wit said that the opposite of "speaking" is not "listening" but "waiting." (Why is that *perceptive*?) I should have thought the case for writing's primacy in philosophy rather an easy one to make, but of little consequence.

204. Schanck, *supra* note 4, at 2527.

205. JACQUES DERRIDA, POSITIONS 9 (Alan Bass trans., 1981).

206. *See* Schanck, *supra* note 4, at 2527, here citing, inter alia, Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1000 (1985).

207. *Id.* at 2521-22. *Query*: The independent reality of the world does not seem clearly to follow from the analysis of (culturally variable) conceptual schema in terms of sets of binary oppositions. Certainly structural anthropologists would not agree with Schanck's assertion.

208. Schanck, *supra* note 4, at 2522. (Again, this denies a claim that is not made by any structuralist I know—but perhaps I don't know enough?).

209. Derrida explains that "[i]n a traditional philosophical opposition we have not a peaceful coexistence of facing terms but a violent hierarchy. One of the terms dominates the other (axiologically, logically, etc.), occupies the commanding position."

the jargon, one member of the pair is *privileged*, hence the pair defines an hierarchy. The thesis of a text depends on this hierarchy.[210] Professor Eskridge explains:

> Modernist reasoning rests on various hierarchical relationships and their consequences: one thing precedes another and therefore causes it; one person has authority over another and directs her behavior; an institution is expert in a matter, and other institutions defer to its expertise. The cause, the authority, the expert are all privileged in modernist theory, with the effect, the obedient person, and the deferring institutions being subordinated.[211]

The hierarchical nature of the modernist universe is one of the prime targets of postmoderns, and their favorite pejorative, apparently the universal *reductio* characterization, "*privilege*."

How do you pick which is the privileged member of the binary opposition or hierarchy?[212] Schanck illustrates:

> [T]hroughout Western history, any discussion of people in a text has assumed that men were the subject under consideration, and any discussion of perspectives has assumed a male perspective, unless women were specifically designated. And when the female perspective has been designated, it is nonetheless assumed

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DERRIDA, *supra* note 205, at 56-57. It sounds so dramatic, doesn't it? Without an "up" we could have no "down" so one of the pair "up/down" dominates the other, with logical and axiological violence! Indeed!

210. *See* Schanck, *supra* note 4, at 2525.

211. ESKRIDGE, *supra* note 56, at 193-94. It is characteristic of postmoderns to take the most naive of exemplars to attack. *See also* ELLIS, *supra* note 25, at 144. Eskridge's representation of causality here—"one thing precedes another and therefore causes it"—is an example, a notion of cause that would not earn a C grade in Philosophy 101. But Culler's sleight of hand in demonstrating how to invert a "cause/effect" priority is scarcely better. *See* CULLER, *supra* note 4, at 86-87 (a book justifiably renowned for its lucidity in a very opaque field).

212. Like the choice of binary pair, one suspects that it is contextually variable, or, in argument, outcome-driven.

> to be subordinate. Hence, there is an underlying binary opposition of men/women, with men as the dominant pole.[213]

This particular hierarchical ordering is historically true for law, but is it generally so in other contexts? Does this example show how to pick the privileged member in other word pairs? In the list of binary opposite pairs above,[214] which is the privileged member? Why? Everywhere? At all times? In all circumstances? Does the illustration of man's primacy in the man/woman dichotomy help you to figure it out? But to continue: what does it mean to be the primary element of the binary opposition pair? "In each case one pole is privileged over the other and is assumed to be 'present,' to be more real, while the other pole is marginal, subordinate, and dependent on the superior term for its existence or nature."[215] Postmoderns depend on the hierarchy of privilege to extract the underlying presumptions on which the text depends. The privilege ordering is, therefore, a critical choice.[216]

Deconstruction works on this privilege ordering; it "is a method of reconfiguring and reconstructing a dichotomy."[217] "To deconstruct the opposition is above all, at a particular moment, to reverse the hierarchy."[218] So deconstruction shows that the presumed un-privileged ("*de*-privileged"?) member is as privileged as, or more privileged than, the privileged. "[D]econstruction 'flips' hierarchical oppositions, showing that the privileged term depends on the subordinate term, thereby revers-

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213. Schanck, *supra* note 4, at 2525.

214. *See supra* text accompanying notes 204-206.

215. Schanck, *supra* note 4, at 2527.

216. It is, nevertheless, still a function of language which is believed to be founded in a world view—most especially in the hegemonic discourse of the white Anglo-Saxon male.

217. Schanck, *supra* note 4, at 2527.

218. DERRIDA, *supra* note 205, at 56-57. Similarly: "As a postmodern strategy, deconstruction rejects the essentialism of the structuralist's accounts of law by reversing the hierarchies embedded within structural analysis." MINDA, *supra* note 6, at 120.

ing the hierarchy."[219] *Thereby*? How is this? By showing that a cause could not be a cause if there were no effect,[220] that a master would not be a master if there were no slave, the effect becomes privileged and the cause subordinate, the slave becomes privileged and the master subordinate? Tell that to the slave. But that is surely what it means to "flip" or "invert" a hierarchy.[221]

This has dramatic consequences. Deconstruction of the speaking/reading dichotomy, for example, shows that "knowledge and meaning can [n]ever be present."[222] This is an argument procedure that, it is commonly said, can be used to demonstrate that *any* text means the op-

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219. ESKRIDGE, *supra* note 56, at 194. Similarly: "Deconstruction argues that hierarchical opposites can always be flipped, usually by identifying hidden similarities and mutual dependencies in the terms." *Id.* At the mention of "identifying hidden similarities," one's antennae should be on the alert for a fallacious polarity argument.

220. The example is used by Culler as an introductory illustration. *See* CULLER, *supra* note 4, at 86-87.

221. As an illustration of the extremes to which this can be taken, consider the following, a program blurb for a panel at an academic conference.

> *Deprivileging Gutenberg: The Fate of Literacy at the Fin du Siecle*
>
> Postmodernist deconstructionism has been extended to the widely-employed pedagogical principle of writing across the curriculum. According to this critique, the requirement that all college students achieve standard level of competency in reading and writing skills "privileges" literacy, thus reflecting an ethnocentric philosophy of education, aimed at reproducing the political dominance of certain groups whose members are especially adept at reading and writing. By analyzing an approach to basic skills which purports to broaden interdisciplinary integration, but which may also encourage intellectual marginalization, this panel will engage the audience in the investigation of issues central to the current debate over education.

(On file with author.)

222. Schanck, *supra* note 4, at 2527. Jonathon Culler argues for the primacy of speech over writing on the ground that meanings are more present with the spoken word. *See* CULLER, *supra* note 4, at 92. By this he means little more than that deixis is possible in ordinary speech in a way that it is not in ordinary writing. If that is all, it is very small beer.

posite of what you thought it meant. Or, in the jargon, that it contains "both a thesis and its antithesis."[223]

Using social class concepts—"privilege," "subordinate," "hierarchy"—provides rhetorical impact, but it logically achieves very little. In fact, this choice of words brings up the question of why these hierarchies, these polar pairs, should have so much non-rhetorical significance to postmoderns. On closer examination one can see that their whole theory of meaning rests on these dichotomies.

The argument about meaning goes something like this: A very naive theory of meaning is that a word means a thing or things in the world, its referent. It is a theory that has been known to be inadequate at least since "Russell's Paradox," discovered at the beginning of this century.[224] One does not need such sophistication to see the weakness: If it were true that meanings were only things in the world, no one could know the meaning of "green" for no one can observe all green things. Or, to take one of the classical problems, it would require that the statement "the morning star is the evening star" be not only true but mean no more than "the morning star is the morning star," and that the truth of the former is known to all who know the truth of the latter. If you attribute this theory of meaning to the modernist, then you can say it requires the referent to be "metaphysically present" if any use of the word is to have meaning.[225] Of

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223. Schanck, *supra* note 4, at 2527. Deconstructionists typically claim no privileged immunity and apply the same reasoning to their own arguments. They are thoroughly nihilistic.

224. Russell's Paradox showed the contradiction in the axiom of extensionality, which identified a class with its members. *See* Letter from Bertrand Russell to Gottlob Frege (June 16, 1902), in 1 THE SELECTED LETTERS OF BERTRAND RUSSELL 244, 244-46 (Beverly Woodward trans., Nicholas Griffin ed., 1992).

225. Distinguished historian Gertrude Himmelfarb writes:

> From Jacques Derrida postmodernism has borrowed the vocabulary and basic concepts of deconstruction: the "aporia" of discourse, the indeterminacy and contrariness of language, the fictive and duplicitous nature of signs and symbols, the nonreferential character of words and their dissociation from any presumed reality, the "problematization" of all subjects, events and texts.

course this is simply *ignoratio elenchi*, for it would be very hard to find a serious modernist (or anyone else) who subscribed to a purely referential theory of meaning.[226] But this re-tooled referential theory of meaning serves a postmodern purpose. As Ellis says, "[t]o reject the reference theory might seem too obviously commonplace; to attack 'the metaphysics of presence' is to attack at least a new set of words, if not ideas."[227] But, in characteristic deconstruction fashion, the rejecting of the metaphysics of presence requires the exclusive adoption of a purely intensional theory, namely, that meanings of symbols are other symbols. Words, then, mean only other words. We could have no meaning for "hot" if there were no "cold," no meaning for "up" if there were no "down";[228] thus, the meaning of "hot" includes its opposite, "cold," and so on. There is nothing beyond the text.

This last step is a serious logical mistake, directly related to the mistakes made in "inverting" hierarchies. Of course words depend for their meaning on the words for distinguished or contrasted meanings (just as their use depends also on things in the world). That is very old hat.[229] But dependency on other words for meaning and significance does not make words—or propositions in which they occur —*mean* those other words. Schanck is a little more cautious; he only says explicitly that deconstruction demonstrates "that a text *can be read* to assert a different thesis or convey a different meaning from those it had been commonly assumed to

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Himmelfarb, *supra* note 186, at 143-44.

226. This is not to say that there are no problems concerning the theory of meaning, or that for some kinds of words—"logically proper names"—the best theory may be that the meaning is a thing in the extra-linguistic world. For an interesting and persuasive argument to that effect, see generally HOWARD K. WETTSTEIN, HAS SEMANTICS RESTED ON A MISTAKE? AND OTHER ESSAYS 109-77 (1991).

227. ELLIS, *supra* note 25, at 142.

228. *See* David L. Shapiro, *The Death of the Up Down Distinction*, 36 STAN. L. REV. 465 (1986).

229. *See, e.g*, WITTGENSTEIN, *supra* note 163, § 251; GOTTLOB FREGE, *On Sense and Reference*, *in* TRANSLATIONS FROM THE PHILOSOPHICAL WRITINGS OF GOTTLOB FREGE 56-78 (Peter Geach & Max Black eds., 1970). Frege wrote at the end of the 19th through the beginning of the 20th centuries.

assert or convey."[230]

Schanck tries to work this deconstructive magic on the Constitution's age limitation for presidents. He starts with a story about an hypothetical popular candidate who is thirty-six and a Republican. The candidacy is blocked by "determined deconstructionist" Democratic lawyers who "would not surrender, even in the face of such overwhelming consensus."[231] Schanck first finds a binary opposition, a hierarchy to invert. "In our legal system, laws are classified into two types, forming a classical binary opposition. A law is either in the nature of a rule or a standard."[232] As we have seen, rules are more precise, standards are more flexible.[233] "Rule," in Schanck's analysis, is the privileged element.[234] "We conceive of standard as a derivative of rule, as a less perfect, contaminated version of a law."[235] But rules often operate as standards.

> In this respect, one could view standards as supplements to rules, necessary in order to make the legal system complete. It is then easy to go a step further and reverse the order. The standard will be seen as one in which the legal requirements are more general, and therefore more basic, and the rule will be seen as a more specific variety of standard, as a supplement to the standard's more fundamental role.[236]

How do we do this with the constitutional provision limiting the age of a president? Having a number in it, it looks like a rule. But the "avid deconstructionists respond by pointing out the purpose of the provision,"[237]

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230. Schanck, *supra* note 4, at 2527.

231. *Id.* at 2530.

232. *Id.*

233. *See supra* text accompanying notes 83-125.

234. Notice that Spann took "principle" to be the privileged member, not "rule." For example, "rules are useful only to the extent that they advance doctrinal objectives." Spann, *supra* note 5, at 532.

235. Schanck, *supra* note 4, at 2530.

236. *Id.* at 2531.

237. *Id.*

which is "to make reasonably sure that the President is sufficiently mature and experienced to deal effectively with the arduous, demanding, and important responsibilities of the position."[238] Schanck's story then elaborates a picture of the popular candidate's being a rock star and playboy who "values good fellowship and cheer (assisted by alcohol)" and skiing over "professional and public responsibility."[239] So he or she obviously lacks the maturity that "attaining to the age of thirty five years" was intended to ensure. Thus, treating Article 1, Section 1, Clause 5 as a standard, surely we could say this thirty-six-year-old candidate had not "attained to the age of thirty five years."

This is merely the "substitution of intent" argument we saw in Part III.[240] The only differences in Schanck's argument are the insertion of a rule/standard dichotomy, picking the rule as privileged and then inverting the hierarchy.[241] The same difficulties as discussed in Part III then plague the argument.

Interestingly, Schanck does not claim this argument to be correct or winning, for that itself would be to claim for it the privileged position and set it up for deconstructing too. "The effect of deconstruction is not *ultimately* to reverse the hierarchy of concepts—although that is a crucial step in the process."[242] This is acknowledged by deconstructionists: a reversed hierarchy can be re-reversed; the allocation of privilege must oscillate. That oscillation is said "to demonstrate the instability of language and to dismantle the assumption of fixed meanings, or 'presence,' in texts."[243] How? It demonstrates the instability of a privilege assigned by the deconstructer; but how does that show *meaning* to be unstable? Less fixed? Not present?

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238. *Id.* at 2530.

239. *Id.*

240. *See supra* text accompanying notes 65-82.

241. Thus turning the hierarchy into the same one chosen by Spann as basic.

242. Schanck, *supra* note 4, at 2532 (emphasis in original).

243. *Id.*

B. *Decentering Meanings*

The stability of meaning and the certainty of the presidential age limitation do not appear to have been shaken by the "hierarchy inversion" argument. But let us return to the earlier point, that deconstruction demonstrates "that a text can be read to assert a different thesis or convey a different meaning from those it had been commonly assumed to assert or convey."[244] What this means, if anything, hangs rather heavily on the meaning of "can be read" and the criterion of *difference* among theses.

A favored strategy among deconstructionists is to take elements of a position thought peripheral or marginal and place them at the center, displacing the hitherto central elements.[245] Deconstructionists associate established viewpoints, readings, or interpretations with power and privilege;[246] thus the process of "decentering," or "dislocating," settled or hegemonic modes of thought and interpretation can take on a socially reformatory gloss. But the point is not to take something marginal and turn it into a new center. Rather it is to show that there really is and can be no center at all, to subvert the idea that any element is central, to un-

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244. Schanck, *supra* note 4, at 2527; *see supra* text accompanying note 4.

245. *See* ELLIS, *supra* note 25, at 92 *et seq.* The argument strategy has been posited as definitional of "postmodern":

> [T]he postmodernist turn in philosophy and "theory"—the rejection of hierarchies of value; the devaluation of "center" in favor of "periphery"; the emphasis on the active production (or "construction") of meaning; the search for "local knowledges" as opposed to universal truth; the insistence on self-challenging reflexivity.

Todd Gitlin, *The Anti-Political Populism of Cultural Studies*, DISSENT, Spr. 1997, at 78.

246. Gertrude Himmelfarb writes:

> From Michel Foucault [postmodernism] has adopted the idea of power: the power structure immanent not only in language—the words and ideas that "privilege" the "hegemonic" groups in society—but in the very nature of knowledge, which is itself an instrument and product of power. Thus traditional discourse and learning are impugned as "logocentric," "phallocentric," and "totalizing."

Himmelfarb, *supra* note 186, at 144.

dermine essentialism. What made anything central was a privileged morality, a hegemonic socio-political discourse; this deconstructive process courageously and unselfishly challenges the entrenched power structure, without claiming any privilege to itself.

Jane Schacter claims normative and democratic virtues for recognizing decentering of interpretation:

> It is normative because it becomes a core justification for using interpretation as a vehicle for promoting democracy. On this view democracy means creating "a polity of truly equal readers" and aspiring to a cultural pluralism premised on the idea that the "voices to which power responds must be those it can hear." Democracy thus requires judges to "stretch their imaginations to identify and understand the perspective of others," and to abandon methods of interpretation that cannot "accommodate irreconcilable cultural perspectives." Judicial interpreters of statutes are, in other words, self-consciously to make texts available to "more democratic appropriation" by infusing their enterprise with the "perspectives of the oppressed." Interpretation is newly linked to democracy as a route to cultural pluralism and, ultimately, as a weapon in the war against chronic social subordination.[247]

Schacter uses a good example: the determination of the meaning of "family" that had to be made in *Braschi v. Stahl Associates*.[248] Did the surviving partner of a gay couple who had shared an apartment for eleven years count as family of the tenant for purposes of New York's rent-control statute?[249] New York's Court of Appeals decided that he did,[250] a decision most of us applaud. On the above argument, Schacter

247. Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 624-25 (1995) (internal citations omitted).

248. 543 N.E.2d 49 (N.Y. 1989).

249. *See* N.Y. UNCONSOL. LAW § 8581 (McKinney 1987).

250. *See Braschi*, 543 N.E.2d at 55.

says that decision would be required because, from the point of view of the gay couple, they were clearly family—a *de facto* marriage.[251]

This argument can easily be applied to the presidential age limitation. Take, for example, Tushnet's story of the followers of a sixteen-year-old guru's candidacy. From the viewpoint of her sect, "[e]ven on the narrowest definition of 'age,' they say, their guru is well over thirty-five years old even though the guru emerged from the latest womb sixteen years ago."[252] On their meanings, then, the guru qualifies. Why should we privilege the meaning given by the privileged elite, counting only from one's most recent birth? To allow that would be to allow "judges . . . to deploy theories of constitutional interpretation to advance their own ends."[253]

The argument is seductively expressed. After all, what justifies the privileging of rich-straight-white-male discourse?[254] But it overlooks a serious problem. We might have approved the *Braschi* decision, but is it justifiable to ground it on a choice of one of the many multivalent ways of seeing the world? If there are many viewpoints—and surely there are different preferences for who should count as family—what justifies giving preferential treatment to ("privileging") that of one of the parties to a particular litigation? Schacter answers this last question with an appealing argument: Judges should take the viewpoint of the party least able to influence the legislature.[255] But—especially in a democracy—

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251. *See* Schacter, *supra* note 247, at 623.

252. Tushnet, *supra* note 7, at 687-88.

253. *Id.* at 690. But allowing radical indeterminacy to take sway in constitutional interpretation would allow the judge to claim the right to answer exactly as she would choose were she dictator.

254. Fish writes that "no reading, however outlandish it might appear, is inherently an impossible one." STANLEY FISH, IS THERE A TEXT IN THIS CLASS? 347 (1980).

255. A similar view was advanced in 1964 by Martin Shapiro. *See generally* MARTIN SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT: NEW APPROACHES TO POLITICAL JURISPRUDENCE (1964). He argued that the Supreme Court is the agent of interest groups that are not adequately represented in the legislative and administrative systems.

why?[256] And how does one find out which party is the least influential?[257] As Professor Shep Melnick points out, "influence in the American polity is not . . . constant, predictable, or clear-cut . . . [but] shifts and moves from one policy arena to another."[258] So what is a judge to do?

> Lacking any consistent method for identifying winners and losers, judges . . . are likely to do what the rest of us do—assume that their friends are weak and that their enemies are strong. This provides a ready rationale for helping groups one likes and hurting those one dislikes—not exactly a model for impartial justice.[259]

In other words, epistemological pluralism with its multivalent perceptions facilitates exactly the downside Tushnet and Spann feared and Schacter claimed moral and democratic virtue in avoiding: granting the legal decision-maker unfettered power to decide on the basis of personal

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256. Shapiro was criticized on this ground: "[H]is conception of law leaves unexplained why it is that the Supreme Court, viewed as a political organ, should be systematically responsive to the *least* politically influential segments of the society." William M. Landes and Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 876 (1975).

257. Eskridge answers that with a *quasi*-empirical analysis of who has greatest lobbying power with legislatures (to override the decision). At the top of his list, having greatest access is the United States government (especially the Justice Department), followed by state and local governments, organized labor and middle-class and professional women; at the bottom, with little access, come criminal defendants and suspects, lesbians and gay men, and the poor, especially people of color. *See* ESKRIDGE, *supra* note 56, at 153. Professor Melnick comments: "Does this mean, therefore, that judges should favor small business over labor? Big business over middle-class women? Educational institutions over non-citizens and the disabled? If both racial minorities and blue collar white workers are disadvantaged, how should a judge decide a Title VII affirmative action case?" R. Shep Melnick, *Statutory Reconstruction: The Politics of Eskridge's Interpretation*, 84 GEO. L.J. 91, 114 (1995).

258. Melnick, *supra* note 257, at 114. Melnick goes on to point out how strange can be the group alliances backing legislation, and how the apparently powerful can fail to get their wishes.

259. *Id.* at 115.

preference.

If all postmodernism means is that we should always scrutinize entrenched moral and political positions with a skeptical eye, that is good advice. We should always be alert to the possibility that our black letter wisdom is no longer in accord with or optimally adapted to societal needs. This advice, however, is hardly revolutionary, nor even new enough to warrant a fancy new moniker. The stronger deconstruction thesis, that there is and can be no central, received, or essential meaning, does not show the old established meaning to be wrong, inopportune, or the self-serving product of an intellectual power elite; nor does it establish the opposite position, or even a different position. Rather, it says that there can be no differentiation among any of an infinite number of positions; all interpretations, all meanings, are equal. We are not, as the entrenched elite would have it, faced with a choice among a small range of positions about which there is some ground for dispute and selection; rather, we face a choice among an infinite number of positions with no justifiable (that is, privileged) criteria of selection.[260]

We have seen this argument before, and the problem with it: we can and must discriminate among this infinite number of possible explanations. At bottom, the problem with this rhetorically splendid mode of discourse is that it begs the very questions that are central to legal analysis. "[T]he problem of judgments of relevance and centrality is a profoundly important one to any inquiry."[261] It is precisely the ability to draw distinctions based on criteria of importance and relevance to society that is required of the judiciary.[262] Furthermore, these criteria have to be accessible, reportable, and debatable, and it must be possible to limit the choice by constitution, statute, or precedent. Were the postmoderns to succeed in their campaign to "decenter meanings," they would remove

260. Fish says that because there is no justifiable better or worse, all decisions are simply a matter of power. *See* FISH, *supra* note 7, at 242-43.

261. ELLIS, *supra* note 25, at 93.

262. Without justifiable criteria of centrality and marginality, judging would not even reach the intellectual sophistication of Judge Bridlegoose's "very small pair of dice." FRANCOIS RABELAIS, THE FIVE BOOKS OF GARGANTUA AND PANTAGRUEL Book 3, Ch. 39 (Jacques LeClercq trans., Random House 1936) (1546).

all reliability associated with our sources of law, leaving us with a truly subjective government of men, not laws.

VII. CONCLUSION

It did not amount to much, did it? If that is all there is to deconstruction, then postmodernism, if it amounts to anything, must do so on analyses different from these. Deconstructionists are not slow to proclaim the insightful and revolutionary nature of their thinking. But, as Ellis has written,[263] identifying wherein lies the insight or the revolution is quite another matter. Of course there may be more—given the ballyhoo, one is inclined to say there *must* be more—but how long should we of the unavant garde go on looking for it? If these six insiders on a clear promise come up with so little, the marginal utility of further pursuit of this apparently elusive game looks a bit too slim, doesn't it?

We began with Yale Professor Balkin's 1992 claim that although the judiciary presently lags behind, "[e]ventually . . .[it] will catch up with the breathtaking developments we now discuss under the name of 'postmodern' jurisprudence."[264] Thus, he wrote, we may look forward to better: "The current climate of the federal judiciary is an aberration, a mistake which hinders the progress of a grand new postmodern day."[265]

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263. Ellis writes:

> But if we ask how deconstruction is revolutionary, we shall get an answer such as it stands received opinions on their heads. And that is no more than a restatement of the question . . . . What is well known, because deconstructionists say it so often, is that it wishes to be a revolutionary new movement. But it is safe to say that what is much less well known, because its advocates find difficulty in explaining the point, is what it is that is revolutionary about it.

ELLIS, *supra* note 25, at 87-88.

264. Balkin, *supra* note 1, at 1966.

265. *Id.* at 1967. Somewhat in the same vein, Spann writes: "Traditional legal analysis is a 'normal science,' and deconstruction may well be the harbinger of a 'deviant science' that will shortly replace it." Spann, *supra* note 5, at 542 (citing—and giving me,

Mercifully, that "grand new postmodern day" has not appeared, and, in fact, looks more remote today than it may have in 1992.

Frank Kermode has pointed out that the spread of postmodernism has brought a disruption in intellectual intercourse between the professoriate and the educated public, and "a reciprocal decline of interest on the part of that lay audience which no longer looks to professors for wisdom . . . ."[266] Kermode was writing about literary criticism, but the point holds perhaps more strongly in law, and not only with the educated laity: bench and bar alike are thoroughly ignoring deconstructionists. That seems right to me; after all I've seen so far, I remain unregenerately a modern. As New York State Court of Appeals Chief Judge Judith Kaye said in commenting on arguments in a cutting edge, postmodern academic paper, "[T]hey indeed have a certain ring. They just don't ring true."[267] This seems to be the prevalent attitude of legal decision-makers. Now that the gloss of the new jargon has worn thin, any discussion of postmodern reasoning's effect on the judiciary would seem, to borrow a pretty turn from Sheldon Glashow, like beating a dead oxymoron.[268]

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at last, the opportunity to cite, if only at second hand—that obligatory postmodern source, T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962)).

266. Frank Kermode, *Changing Epochs*, *in* WHAT'S HAPPENED TO THE HUMANITIES? 168 (Alvin Kernan ed., 1997).

267. Judith S. Kaye, *Comments on Professor Spann's Paper*, *in* 1988 ANNUAL SURVEY OF AMERICAN LAW 259, 267 (1988).

268. Nobel prize winning physicist Sheldon Glashow famously likened the relevance to science of philosophy of science to "beating a dead oxymoron." Sheldon Lee Glashow, *The Death of Science!?*, *in* THE END OF SCIENCE 25 (Richard Q. Elvee ed., 1992).

Far from being a breathtaking development, postmodernism is rather like the *tinea vulgaris* of legal academe. Years ago, athlete's foot was the scourge of involuntary but unselfish institutions: the military, the penitentiary. Now, one catches it by spending time in gyms, one variety of the many contemporary palaces of self-indulgence. It is not life threatening, nor even likely to affect the host's performance in crucial functions such as aerobics or weight training for the self-absorbed, education or legal decision-making for academics. It remains an annoying itch, isolated to the extremities, occasionally discomforting, not seriously harmful, but not likely to go away either.