The Supreme Court in a Postmodern World: A Flying Elephant

Stephen M. Feldman
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From there to here,
from here to there,
funny things
are everywhere.
Dr. Seuss

I. DUMBO, THE FLYING ELEPHANT: AN INTRODUCTION

Postmodern jurisprudents celebrate the multiplicity of textual meanings in legal documents. They relish the deconstruction of a previously accepted and supposedly authoritative textual interpretation. Supreme Court Justices, meanwhile, must decide cases. They autocratically declare the law, deny ambiguities, and proclaim univocal conclusions. How, then, do the Justices live in a postmodern world? The children’s story of Dumbo evokes one possible answer.

Dumbo, a baby circus elephant, is born with floppy ears so outlandishly enormous that they become entangled in his feet when he walks. The hapless Dumbo, defended only by his loving mother, suffers as the constant butt of cruel jokes. Condemned as inadequate by the other circus elephants and then even by the lowly clowns, poor Dumbo sinks into despair when his mother is chained inside a cage for attacking a boy who had

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1. DR. SEUSS, ONE FISH, TWO FISH, RED FISH, BLUE FISH 9 (1960).
2. DUMBO (Walt Disney 1941).
tormented her baby. Dumbo's fortunes begin to change, though, when he is befriended by the sympathetic Timothy Mouse, who realizes that Dumbo can use his ears as wings to fly. Timothy convinces the incredulous Dumbo, with much coaxing, to hold a supposedly magic feather in his trunk and to try flying. While Timothy sits on Dumbo's head, the little elephant launches himself from a high cliff, and after a few moments of uncertainty, he spreads his ears and soars high into the sky. The magic feather works! Or so Dumbo imagines—after all, he is flying.

Timothy then develops a plan for Dumbo to surprise everybody at the circus with his astounding ability to fly. As part of the plan, Dumbo climbs a high ladder inside the big top and hurls himself into the air. Unfortunately, the magic feather quickly slips from Dumbo's grasp. Convinced that he cannot fly without his feather, Dumbo plunges into a free-fall. Timothy, sitting on Dumbo's head, frantically struggles to persuade the panic-stricken elephant that the feather was not magical after all. As they near the ground, Dumbo finally spreads his ears and desperately begins to flap. To the astonishment of the crowd, the other performers, and himself, Dumbo sails up to the top of the circus tent. The jubilant Dumbo now realizes that the feather did nothing but assuage his doubts. All along, despite his disbelief, Dumbo had the ability to fly.

The story of Dumbo can be understood as an allegory for the movement from modernism to postmodernism in American law. In brief, what is modernism? Perhaps most important, modernists are epistemological foundationalists. They believe that knowledge ought to, and indeed must be, firmly grounded on some objective foundation. Unlike the premodernists, however, modernists claim to reject religious, mythological, and

other traditional footings and instead search for some alterna-
tive foundation or Archimedean point. Most commonly, mod-
ernists turn to abstract reason or sense experience as the os-
tensibly objective sources of knowledge. Empiricists assert, for
example, that sense experience directly accesses or at least
mirrors the external world and firmly grounds claims to knowl-
edge of that world. Thus, for more than a century of American
legal thought, modernist jurists have devoted them-
selves to a quest for the solid foundations of legal knowledge
that supposedly would support and constrain judicial decision-
making.\textsuperscript{4}

This commitment to foundationalism leads many modern-
ists to be simultaneously earnest and anxious. Because mod-
ernists truly believe in their foundations, they constantly and
most earnestly invoke those foundations to support the objec-
tivity of their sundry pronouncements. A modernist, moreover,
does not believe that objectivity is limited to knowledge solely
of the epistemological foundation itself; rather, the foundation
can be built upon. With the appropriate tools or instruments
modernists can construct elaborate and even elegant systems of
knowledge. We might say that with the right equipment—that
is, a firm foundation and well-honed tools—a modernist be-
lieves that just about anything can be constructed. In law,
modernist scholars and attorneys constantly fashion legal ar-
guments by earnestly invoking lawyerly equipment such as
stare decisis, logical consistency, and original intent. When
properly used, this equipment supposedly leads to objective
conclusions.\textsuperscript{5}

At the same time, though, modernists use their founda-
tions and tools with anxiety. Anxiety arises for two reasons.
First, objectivity is very important to modernists. From their
standpoint, if we do not have a firm foundation for knowledge,

\textsuperscript{4} For discussions of American legal modernism, see Stephen M. Feld-
man, \textit{From Modernism to Postmodernism in American Legal Thought: The
Significance of the Warren Court}, in \textit{The Warren Court: A Retrospective}
324 (Bernard Schwartz ed., 1996) [hereinafter Feldman, \textit{From Modernism}],
and Stephen M. Feldman, \textit{From Premodern to Modern American Jurispru-
dence: The Onset of Positivism}, 50 VAND. L. REV. 1387 (1997) [hereinafter
Feldman, \textit{The Onset}].

\textsuperscript{5} See Feldman, \textit{From Modernism}, supra note 4, at 329-44; Robert W.
Gordon, \textit{American Law Through English Eyes: A Century of Nightmares and
Noble Dreams}, 84 GEO. L.J. 2215, 2218 (1996) (reviewing \textit{Neil Duxbury,
Patterns of American Jurisprudence} (1995)). \textit{See generally} Pierre Schlag,
then we are doomed—and "doomed" is the precise word here. We are doomed to floating arbitrarily through the abyss, untethered to the reassuring terra firma. We are doomed to nihilism and relativism, the hobgoblins of modernist thought; doomed to knowing nothing and having no legitimate ethical values or, at best, having ethical values that are no better (or worse) than any others. There would be no way to judge; no way to know. Second, modernists earnestly believe in foundations and tools, but not without constantly doubting their efficacy. These foundations and tools might not deliver as promised—they might not bestow the much-desired objectivity. If they do not deliver, then modernists will be forced to face their worst fears of nihilism and relativism. Needless to say, all this can produce a bit of anxiety.\(^6\)

Nonetheless, from a postmodern frame of reference, the various epistemological foundations of the modernists are like Dumbo's magic feather.\(^7\) Modernists might feel good because they believe in such foundations. The supposed existence of foundations assuage modernist fears of their hobgoblins, but the epistemological foundations are no more substantial than the magic of Dumbo's feather. By contrast, postmodernists do not fear the hobgoblins. Postmodernists instead assert that the modernists' ostensible foundations give us nothing that we do not already have: we can understand, communicate, and have knowledge without the benefit of a firm foundation. We do it all the time, and we have always done so. Quite simply, our belief or disbelief in an epistemological foundation—a magic feather—does not determine our ability to fly.\(^8\)

\(^6\) See \textsc{Bernstein, supra} note 3, at 16-20 (discussing the "Cartesian Anxiety" in Western philosophy).

\(^7\) Some helpful sources focusing on postmodernism include the following: \textsc{Zygmunt Bauman, Intimations of Postmodernity} (1992); \textsc{Steven Connor, Postmodernist Culture} (1989); \textsc{Feminism/Postmodernism} (Linda J. Nicholson ed., 1990); \textsc{Nancy Fraser, Unruly Practices: Power, Discourse, and Gender in Contemporary Social Theory} (1989); \textsc{David Harvey, The Condition of Postmodernity} (1990); \textsc{Robert Hollinger, Postmodernism and the Social Sciences} (1994); \textsc{Fredric Jameson, Postmodernism, or, the Cultural Logic of Late Capitalism} (1991); \textsc{Barbara Kruger, Remote Control: Power, Cultures, and the World of Appearances} (1993); \textsc{Jean-François Lyotard, The Postmodern Condition: A Report on Knowledge} (Geoff Bennington & Brian Massumi trans., Univ. of Minn. Press 1984); \textsc{Christopher Norris, What's Wrong with Postmodernism} (1990); \textsc{Postmodernism and Society} (Roy Boyne & Ali Rattansi eds., 1990).

\(^8\) For discussions of postmodern legal scholarship, see generally \textsc{Stephen M. Feldman, Diagnosing Power: Postmodernism in Legal Scholarship}
Consequently, whereas modernists typically are earnest yet anxious, postmodernists are ironic and playful. For example, even though postmodern legal scholars are anti-foundationalists—repudiating the modernist quest for foundations—they nonetheless remain enmeshed within the structures of scholarly and lawyerly discourse, just like modernist scholars. Postmodern professors, that is, teach classes and publish articles and books. In doing so, postmodernists must construct narratives and arguments using the available rhetorical tools or modes of discourse. They must use both modernist and postmodernist concepts to present their views. But whereas modernist scholars use these tools earnestly, postmodernist scholars use them ironically, knowing that the tools cannot perform as promised. The modernist tools, most important, cannot deliver objectively grounded results. Yet for these postmodernists, no other options exist. There are no other rhetorical or discursive devices that can be grasped. In this sense,


9. I will discuss the relationships among premodern, modern, and postmodern legal thought more extensively in STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE (forthcoming Mar. 2000).

postmodern scholarship amounts to playing with the pieces, including those fallen pieces that remain from deconstructed modernist positions. Even so, while postmodernists might be said to be playing with scholarly tools or pieces, such play is not necessarily frivolous (though sometimes it can be); much postmodern scholarship is politically and morally charged.

In this Essay, I argue that the Supreme Court's recent jurisprudence manifests certain postmodern themes. The two Justices leading this postmodern movement resemble Timothy Mouse in the *Dumbo* story as he sat on Dumbo's head yelling, "You can fly without the feather! You can fly without the feather!" These two Justices are in the vanguard of postmodernism. They are the avant-garde, the radical postmodernists. Surprisingly, these two Justices are none other than those leading judicial and political conservatives, Chief Justice William Rehnquist and Associate Justice Antonin Scalia.

Now, I am not claiming that Rehnquist and Scalia are politically radical. To the contrary, they are true political conservatives. In fact, one Court observer has estimated that he could accurately predict Rehnquist's vote in approximately ninety percent of the cases by consulting "the platforms of the Republican Party" rather than the Court's own case precedents. As I will discuss, however, postmodernism is politically ambivalent, although it has potentially radical political implications. Hence, Rehnquist's and Scalia's political conservatism does not prevent them from being postmodernists, or at

11. See Feldman, *Playing*, supra note 8, at 151-52. Jean Baudrillard writes: "All that remains to be done is to play with the pieces. Playing with the pieces—that is post-modern." *Id.* at 151 (citing Jean Baudrillard, *Game With Vestiges*, 5 ON BEACH 19, 24 (1984)).

12. See, e.g., STEPHEN M. FELDMAN, PLEASE DON'T WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY OF THE SEPARATION OF CHURCH AND STATE (1997) (presenting a critical social narrative of the separation of church and state). It is worth noting, moreover, that different postmodernists often use the term "play" in different ways. See Feldman, *Politics*, supra note 8, at 185 & n.92 (distinguishing Gadamer's and Derrida's respective uses of the term "play").

least from endorsing or following certain postmodern themes. Basically, they are sitting on Dumbo's head—or sitting on the Supreme Court—and saying that the Court can continue deciding cases and proclaiming law, just as it has always done before. The Court can do so even though these Justices realize that all their traditional or modernist tools of judicial reasoning do not work as advertised. The tools do not deliver objective decisions any more than Dumbo's feather enabled him to fly.

In Part II of this Essay, I discuss how America went through a dramatic transformation during the 1960s and 1970s. During that time, the nation experienced a serious cultural, political, and social fragmentation that left the ostensibly consensus of the 1950s crumbled into debris. This loss of consensus changed the legal academy in many ways, one of which was to facilitate the hiring of an appreciable number of women and persons of color for the first time in the annals of American law schools. The changing demographic makeup of the law professoriate then transformed legal scholarship by contributing to the emergence of outsider jurisprudence and postmodern legal theory.

Part III explores how this loss of consensus and the development of postmodern culture has influenced Supreme Court jurisprudence, particularly under Chief Justice Rehnquist. I do not argue that the Justices have become avowed postmodernists, but rather that, like everyone else in America, they live within a postmodern culture. Consequently, postmodernism has, in a sense, infused their judicial practice.

I conclude in Part IV with a discussion of the relations between the Supreme Court's brand of postmodern jurisprudence and the Court's role as an authoritative pronouncer of law. To be sure, the Court's practice of deciding cases will continue regardless of the presence of certain postmodern themes in the Justices' opinions. The Court will decide case after case—issuing decision after decision after decision ad infinitum—even though the Justices may no longer believe that their decisions rest on some firm legal foundation. In other words, the Justices will continue to decide, even though the magic feather has fluttered from their grasp.

14. See infra notes 17-64 and accompanying text.
15. See infra notes 65-145 and accompanying text.
16. See infra notes 146-65 and accompanying text.
II. CONSENSUS LOST

A. AMERICA FRAGMENTS

The United States in the 1950s and early 1960s was a nation characterized by consensus and confidence. Many Americans, including most legal scholars and political theorists, believed throughout the 1950s that the nation was united in a celebration of democracy and the rule of law. Moreover, they were confident that because of American know-how, prosperity, and power, democracy and the rule of law not only could suffuse the lives of all Americans but also could beneficially shape the entire world. Yet, this period of consensus was, perhaps, "a fool's paradise... a time of false complacency and of hubristic and dangerous illusions." The early Civil Rights Movement suggested the flaws in the idea of consensus, but then widespread support for the Movement itself became part of the consensus—reflecting ostensibly the American commitments to liberty and equality. Moreover, the successes of the early Movement only fueled American confidence: many Americans believed that Southern racism could be defeated so that all citizens would have an equal chance to share in the American dream. This was indeed a time of "grand expectations." According to historian James T. Patterson, "[p]eople talked confidently about winning 'wars' against contemporary problems,

18. See, e.g., HODGSON, supra note 17, at 67.
19. See, e.g., id. at 68.
20. Id. at 16.
21. See id. at 157.
22. See id. at 157-58.
23. PATTERSON, supra note 17, at 451.
ranging from poverty to cancer to unrest in Vietnam." Ultimately, however, events from the early 1960s through the early 1970s would defeat these expectations, dramatically shattering American perceptions of harmony and success. The transformation of the Civil Rights Movement, the assassinations of President John F. Kennedy, his brother United States Senator Robert F. Kennedy, and the Reverend Martin Luther King, Jr., the Vietnam War and its concomitant protests, and the Watergate Affair left Americans shaken with self-doubt and "tore consensus to shreds."

I would like to focus on the loss of consensus, in particular, and its ramifications for legal thought. In terms of American society in general, the fate of the Civil Rights Movement perhaps best exemplifies the vanishing of consensus. For several years, starting on December 1, 1955, with the refusal of Rosa Parks to move to the back of the bus in Montgomery, Alabama, the key organization in the Movement was the Southern Christian Leadership Conference (SCLC), led by the Reverends Martin Luther King, Jr., Ralph Abernathy, and Fred Shuttlesworth. The writings of King, in particular, reveal the optimistic attitudes of the SCLC leaders, the sense that African-Americans could become successfully integrated into a cohesive and egalitarian American community. Even though King was, in his own words, "aware of the complexity of human motives" and cognizant of "the glaring reality of collective evil," his unwavering commitment to nonviolent resistance demonstrated his conviction in the potential for communal progress. "Our aim is to persuade," King proclaimed. "We adopt the means of nonviolence because our end is a community at peace with itself. ... We will always be willing to talk and seek fair

24. Id. at 452.
25. HODGSON, supra note 17, at 492.
26. See id. at 185.
compromise, but we are ready to suffer when necessary . . . to become witnesses to the truth as we see it.\textsuperscript{29}

By the early 1960s, the Student Nonviolent Coordinating Committee (SNCC) had emerged as another key organization in the evolving Civil Rights Movement. SNCC was constituted primarily of young people, including many college students, who initially had participated in sit-ins at lunch counters.\textsuperscript{30} Most SNCC members "began as believers in the liberal creed," yet they "ended up rejecting the system."\textsuperscript{31} As historian Godfrey Hodgson explains, SNCC leaders "started out convinced of the relevance of the Christian gospel, of the promise of America, and of the righteousness of the federal government. Fear, pain, disappointment and betrayal changed them. They became more pessimistic, more skeptical, more scoffing—and more separatist. They lost faith in the political paradise."\textsuperscript{32}

Ironically, by the time that King made his famed \textit{I Have A Dream} speech at the March on Washington in the summer of 1963, the dream already was fading. King spoke of "a dream deeply rooted in the American dream that one day this nation will rise up and live out the true meaning of its creed—we hold these truths to be self-evident, that all men are created equal."\textsuperscript{33} Malcolm X retorted with a very different vision: "I don’t see any American dream, I see an American nightmare."\textsuperscript{34} To him, the March on Washington should have been called "the farce on Washington" because, during the planning stages, the Kennedy Administration had clandestinely but successfully worked to de-radicalize it.\textsuperscript{35} Partly because of Administration pressure, the March focused on the enactment of civil rights legislation rather than more incendiary issues, such as economic injustice.\textsuperscript{36}

\textsuperscript{29} King, \textit{supra} note 28, at 103.
\textsuperscript{30} \textit{See} Hodgson, \textit{supra} note 17, at 186-87.
\textsuperscript{31} \textit{Id.} at 189.
\textsuperscript{32} \textit{Id.}
\textsuperscript{33} Martin Luther King, Jr., \textit{I Have A Dream}, in \textit{A TESTAMENT OF HOPE}, \textit{supra} note 27, at 219.
\textsuperscript{35} \textit{See} Hodgson, \textit{supra} note 17, at 200.
\textsuperscript{36} \textit{See} \textit{id.} (quoting Malcolm X). For a discussion of the Kennedy Administration's role in the March, see \textit{id.} at 157, 196-97; Patterson, \textit{supra} note 17, at 482-83; Zinn, \textit{supra} note 17, at 448-49.
In the two years after the March, the Civil Rights Movement was transformed "from a protest movement into a rebellion." 37 Starting in Watts, Los Angeles, in 1965, a series of violent race riots swept through American cities. 38 By the summer of 1966, King's integrationist proclamations of "We Shall Overcome" were increasingly drowned out by SNCC's Stokely Carmichael and others demanding "Black Power," which connoted, for some, the exclusion of whites from the Civil Rights Movement. 39 More and more African-Americans, instead of seeking merely equality of opportunity, now demanded an equality in substantive results that would have entailed real and extensive social and economic changes—changes that many white Americans were unwilling or unable (or both) to deliver. 40

In short, the transformation of the Civil Rights Movement combined with other factors, most prominently the Vietnam War, to sharply polarize Americans. Then, instead of Americans coming together and healing wounds, the polarization of the 1960s became fragmentation in the 1970s. A type of rights-consciousness had emerged, echoing the Civil Rights Movement, but now with more numerous and varied interest groups seeking to have rights vindicated and past wrongs remedied. When the National Organization for Women formed in 1966, the Women's Movement stepped to the forefront of the national scene. 41 Environmental organizations and other public interest groups also materialized. 42 Even the major league baseball players organized their own association. 43 In sum, American society appeared to have splintered irreparably into diverse and opposed groups (or perhaps, more precisely, many Americans first became aware of certain societal divisions that had long existed). These disjunctures then "dominated American life for decades after the 1960s." 44 Even within a rights-conscious society, the existence of so many groups simultaneously demanding justice for their causes meant that chances for

37. Hodgson, supra note 17, at 200.
38. See id. at 266.
39. See id. at 224.
40. See id. at 179. On the emergence of the Black Power movement, see Garrow, supra note 17, at 481-525, and Weisbrot, supra note 27, at 196-221.
41. See Patterson, supra note 17, at 452.
42. See id.
43. See id.
44. Id. at 453.
success in the form of real social change were minimal. American social structures resisted demands for rapid (and sometimes even incremental) changes, however legitimate such demands might have been; and quite often, the demands for rapid changes seemed eminently reasonable. Hope for social transformation thus typically was brief and rapidly gave way to frustration, pessimism, and cynicism.45

B. FRAGMENTATION OF THE LEGAL ACADEMY

The fragmentation of America eventually manifested itself as strongly in the legal academy as across the rest of the nation. In the words of Richard Posner, "[t]he spectrum of political opinion in law schools, which in 1960 occupied a narrow band between mild liberalism and mild conservatism, today runs from Marxism, feminism, and left-wing nihilism and anarchism on the left to economic and political libertarianism and Christian fundamentalism on the right."46 Even those legal scholars deemed somewhat centrist in their political beliefs often appear to be ideologically isolated from their colleagues.47

To a great extent, the breakdown of consensus among law professors resulted from the transformation of the demographic

45. See Hodgson, supra note 17, at 365, 492; Minda, supra note 17, at 66; Novick, supra note 17, at 415; Patterson, supra note 17, at 452-53; see also Mark Tushnet & Katya Lezin, What Really Happened in Brown v. Board of Education, 91 Colum. L. Rev. 1867, 1867 (1991) (discussing rights-consciousness).


47. See id. at 769; see also Kalman, supra note 17, at 239-40 (emphasizing a "collapse of consensus"). Compare Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? 110-56 (1991) (noting that Brown impeded the Civil Rights Movement by inflaming Southern racists, who were able to delay political changes) and Michael J. Klarman, Brown, Racial Change, and the Civil Rights Movement, 80 Va. L. Rev. 7, 150 (1994) (noting that Brown indirectly aided the Civil Rights Movement by generating violent Southern resistance which in turn aroused apathetic Northern whites to support political change), with Richard Kluger, Simple Justice 758-61 (1975) (arguing that although Brown alone did not change America, it was the central element in social change). Mark Tushnet argues that the Warren Court itself contributed to the dissolution of the Great Society agenda and thus undermined the Court's own legacy. See Mark Tushnet, The Warren Court as History: An Interpretation, in The Warren Court in Historical and Political Perspective 1, 19-21 (Mark Tushnet ed., 1993). For example, the Court's reapportionment decisions shifted political power from conservative rural areas to cities, where the larger populations initially resided. See id. Population growth then shifted to the more conservative and Republican suburbs, however. See id.
makeup of the legal academy. Because of the successes of the Civil Rights and Women's Movements, starting in the 1960s and 1970s (however limited those successes might in fact have been), an increasing number of women and persons of color entered not only the legal profession but also the legal professoriate during the latter twentieth century.\textsuperscript{48} This diversification of the legal academy was spurred by the boontown atmosphere prevalent in many law schools during the 1960s and 1970s. For example, during the 1973-1974 academic year, following in the wake of Watergate, "[o]ver 135,000 Law School Admission Tests were administered... nearly 14,000 more than the previous year and almost twice as many as those given in any year of the 1960s. The more than 125,000 enrolled law students in 1976 paid more than $275 million in tuition."\textsuperscript{49} With so many students and so much tuition flowing in, many law faculties expanded at a frenzied pace. Between 1967 and 1975, for example, "the number of tenure track law teachers at the nation's accredited law schools increased by 80 percent."\textsuperscript{50} During this halcyon era, law schools could hire members of previously excluded outgroups—primarily women and racial minorities—without threatening the security of white males. Indeed, as their faculties frantically expanded, the law schools could continue to hire substantial numbers of white males even as outgroup members were simultaneously joining the faculties. To illustrate, in 1960 only eleven out of 1,645 tenure track law faculty were women, but by 1979 the number had increased to 516, 10.5 percent of a total that had risen to almost 5,000 faculty.\textsuperscript{51}

The infusion of appreciable numbers of women and people of color to law faculties led to the emergence of a type of "outsider jurisprudence."\textsuperscript{52} The writings of outgroup or minority

\begin{itemize}
\item \textsuperscript{48} See Donna Fossum, Women Law Professors, 1980 AM. B. FOUND. RES. J. 903, 905-06; Grey, \textit{supra} note 17, at 505.
\item \textsuperscript{49} KALMAN, \textit{supra} note 17, at 61.
\item \textsuperscript{50} Fossum, \textit{supra} note 48, at 914.
\item \textsuperscript{51} See id. at 906 (giving statistics on the number of women law faculty members); \textit{see also} Bender, \textit{supra} note 17, at 4-5, 28-29 (discussing the changing demographics since World War II in university professoriates generally).
\end{itemize}
scholars often revealed a vision of the legal system that substantially differed from that of the more mainstream and modernist scholars. When mainstream scholars saw the neutral and objective application of legal rules—treating like cases alike—some women and minority writers saw something entirely different. The legal system, from the perspective of these outgroup scholars, did not deal equally with different societal groups. Rather, the manipulation of the rule of law itself was a means for propagating social, economic, and political inequities. In other words, mainstream and outgroup scholars both seemed to observe the same social and legal events, but each group respectively saw and experienced the events in strikingly different ways. Mainstream modernist scholars, when confronted with a significant legal event such as the decision in Brown v. Board of Education, typically believed that the event embodied an essential truth about the law—a truth with a stable and fixed core. Outgroup scholars, when confronted with the same event, were more likely to recognize the existence of multiple truths. For instance, an African-American constitutional scholar might recognize more readily than a white scholar that the Constitution is a tool of both oppression and liberation: the Constitution appeared to legitimate slavery and Jim Crow laws as legal institutions, yet supported the Civil Rights Movement and desegregation. Thus, a person who lives (or perhaps empathizes with) the truths of a minority or an outgroup stands poised to recognize that the modernist's claimed essential or core truth is merely the accepted truth of a dominant cultural majority.


For this reason, the emergence of outsider jurisprudence contributed to the development of postmodern legal thought.\textsuperscript{55} Outgroup jurisprudents have urged other scholars to hear a "different voice," and to acknowledge the legitimacy of an unusual or alternative view of the legal system.\textsuperscript{56} Indeed, when one recognizes the emergence of \textit{multiple} different voices—including at least feminist, critical race, and more recently, gay and lesbian theorists—then modernist claims to identify essential truths and ground knowledge on firm foundations become highly problematic. The multiple voices of outsider jurisprudents uncover multiple truths where before but one truth was evident. Outgroup scholars consequently have helped generate and justify the anti-foundationalism and concomitant anti-essentialism characteristic of postmodernism. Even the modernist meanings that appear most stable and fixed are disclosed to be unstable and shifting. In the words of the critical race and feminist scholar, Patricia J. Williams, "it really is possible to see things—even the most concrete things—simultaneously yet differently."\textsuperscript{57} In sum, the loss of consensus that broke

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\textsuperscript{55} I will offer a more comprehensive exploration of the factors contributing to the emergence of postmodern legal scholarship in a forthcoming book on the history of American legal thought. See \textsc{Feldman, supra} note 9; see also Feldman, \textit{From Modernism}, supra note 4, at 346-52 (focusing on the role of the Warren Court in pushing legal scholarship toward postmodernism).

\textsuperscript{56} See \textsc{Carol Gilligan, \textit{In A Different Voice: Psychological Theory and Women's Development}} 1-4 (1982) (using the term "different voice" to describe a feminine ethic).

\textsuperscript{57} Patricia J. Williams, \textit{Alchemical Notes: Reconstructing Ideals from Deconstructed Rights}, 22 HARV. C.R.-C.L. L. REV. 401, 410-11 (1987); see Alvin Kernan, \textit{Change in the Humanities and Higher Education, in What's Happened to the Humanities?} 3, 5-6 (Alvin Kernan ed., 1997) (arguing that a "paradigm shift in higher education" has occurred due to changes in university demographics). The use of narrative and storytelling is an important development of outsider jurisprudence that manifests and reinforces postmodern themes. See \textsc{Bell, supra} note 54 (emphasizing the role of storytelling); Richard Delgado, \textit{Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform}, 68 N.Y.U. L. REV. 639 (1993) (portraying fictitious conversations between a law professor and student as prototypical examples of storytelling); Richard Delgado, \textit{Storytelling for Oppositionists and Others: A Plea for Narrative}, 87 Mich. L. REV. 2411 (1989) (examining the use of storytelling in the struggle for racial reform); William N. Eskridge, Jr., \textit{Gay Legal Narratives}, 46 STAN. L. REV. 607, 607-08 (1994) (characterizing traditional modernist legal scholarship as a type of storytelling). Robert Cover was one of the first legal scholars to suggest that "law and narrative are inseparably related." \textsc{Robert M. Cover, \textit{Foreword: Nomos and Narrative}, 97 HARV. L. REV. 4,}
across America during the 1960s and 1970s eventually cut through the legal professoriate, leaving an acutely fragmented academy and contributing heavily to the emergence of various postmodern themes in legal scholarship.58

III. THE REHNQUIST COURT: LIVING IN A POSTMODERN WORLD

Unsurprisingly, this loss of consensus, experienced by Americans in so many different ways, has also affected the Supreme Court. In fact, as with legal scholarship, fragmentation has begun to usher certain postmodern themes into Rehnquist Court opinions.

A. FRAGMENTATION CHALLENGES NEUTRALITY

During most of the nineteenth and twentieth centuries—that is, during the modern and premodern periods of American legal thought—lawyers, judges, and law professors generally agreed that judicial decision-making could be firmly grounded on some solid foundation. Particularly in constitutional law, preexisting natural or neutral baselines served as the supposed foundations for judicial decisions. At certain points in American history, for instance, the common law rights of property and contract were widely understood to be aspects of natural law.59 The validity of constitutional claims could then be measured from those common law baselines. For example, Congress could regulate commerce, but could not go so far as to violate preexisting natural rights to property or contract.60

As the twentieth century wore on, the consensus concerning natural and neutral baselines for constitutional decision-making gradually dissolved. Over the last twenty-five years, the fragmentation of American society has transformed this


58. For a more extended discussion of postmodern themes in legal scholarship, see Feldman, Diagnosing Power, supra note 8, at 1084-1104.


60. See id. at 23 (emphasizing the importance of a "plausible nonconstitutional baseline of natural rights" during the pre-New Deal era); Cass R. Sunstein, The Partial Constitution 2-4 (1993) (arguing that the current status quo often is taken as a baseline); Feldman, The Onset, supra note 4, at 1394-1417 (discussing premodern legal science of the nineteenth century as characterized by a belief in natural law principles).
disagreement into disbelief. Until around the 1970s, many lawyers, judges, and law professors disagreed about the baselines for constitutional law—sometimes disagreeing vehemently—but they nonetheless retained a belief that somewhere, somehow, there was a baseline and, therefore, that objective constitutional decision-making was possible. During those years, lawyers might disagree, but they still had their modernist hope. Starting sometime during the 1970s, hope faded away.\textsuperscript{61}

As previously excluded or subjugated outgroups and minorities began to voice their rights and claims, the idea that a natural or neutral baseline or foundation truly existed began to look like a myth. In fact, it began to look like a dangerously misleading myth because it propagated cultural domination. From the perspective of many outgroup and minority scholars, the natural and neutral baselines of yesteryear were never truly natural or neutral at all. Rather, those baselines represented no more than the cultural preferences of a dominant majority in American society. From this vantage, competing normative claims in constitutional law began to represent no more than different cultural perspectives comprised of different voices and different truths.\textsuperscript{62}

Furthermore, these views did not remain solely the province of outgroup scholars and the growing cadre of postmodern theorists. Many mainstream scholars, lawyers, and judges eventually began to doubt the existence of objective foundations for constitutional decision-making when they confronted the cacophony of zealously voiced positions regarding abortion, the right of privacy, racial discrimination, reverse discrimination, the right to die, and so on. Perhaps if some constitutional scholar had successfully articulated a theory that objectively grounded constitutional decision-making, then this trend would have been halted. But from the 1960s onward, every proposed

\textsuperscript{61} See MINDA, supra note 17, at 189-246 (summarizing postmodern jurisprudence); Feldman, \textit{From Modernism}, supra note 4, at 346-52 (discussing the movement in legal thought from modernism to postmodernism).

theory was met with rebuke. Consensus was a thing of the past. Ultimately, the postmodern idea that there were multiple voices and multiple truths rippled outward through the legal culture. To be sure, most mainstream scholars, lawyers, and judges did not start to declare themselves to be out-and-out postmodernists; in fact, few did so. But nonetheless, some postmodern themes, particularly anti-foundationalism, began to creep into the arguments and opinions of even avowed modernists, including some Supreme Court Justices. Thus, in the words of Mark Tushnet, "constitutional law has been overtly politicized."

B. SUPREME COURT OPINIONS

The Justices of the Supreme Court were unable to stop this movement toward the postmodern. "The contemporary Supreme Court opinion," Paul F. Campos argues, "routinely displays all the persuasive power and aesthetic charm of a congressional subcommittee report." This weakness of Supreme Court opinions, moreover, is not due to the inabilities of the Justices, but rather follows from the current Court's position in a postmodern world. No Court, Campos continues, could stem "the incoming tide of skepticism which the fundamental conflict and stress of a heterogeneous, ideologically fractured nation generates, and which inevitably erodes the former certainties of a formalistic legal culture." In a postmodern world of multiple voices and multiple truths, the Supreme Court Justices have no resources for uniting the American people, no foundations to build on, and no judicial tools to produce objective con-


64. Tushnet, supra note 13, at 1328.


66. Id. at 856; see SEIDMAN & TUSHNET, supra note 59, at 23 ("[T]he impediments to good constitutional argument are structural rather than personal . . . ."); cf. id. at 90 (arguing that current constitutional argument "is almost always divisive").
clusions. Significantly, many of the Justices appear to recognize as much.

The joint opinion in Planned Parenthood v. Casey, authored by Justices O'Connor, Kennedy, and Souter, came close to announcing exactly that point. Casey reexamined the issue of whether the Constitution protects a woman's interest in choosing whether or not to have an abortion. Almost two decades earlier, of course, Roe v. Wade held that the constitutional right of privacy encompasses this interest. Justice Blackmun began the majority opinion in Roe by suggesting that, despite "the sensitive and emotional nature of the abortion controversy," the Court's decision would be legitimate because it would be objective. As Justice Blackmun phrased it, the Court would "earnestly" resolve the case "by constitutional measurement, free of emotion and of predilection." By the time that the Rehnquist Court decided Casey, after twenty years of post-Roe anti-abortion and pro-choice litigation, rhetoric, protests, and violence, the Justices did not even hint that the decision was objective. To the contrary, the Court claimed to decide in accordance with "reasoned judgment," which, the joint opinion explained, does not have boundaries "susceptible of expression as a simple rule." Justice Souter recently reiterated the value of "reasoned judgment," especially for substantive due process cases, where the Court must simultaneously attend to detail, understand history, retain flexibility, and maintain a critical eye.

In an important part of the Casey joint opinion, the Court extensively discussed the doctrine of stare decisis and the possibility of overruling Roe. Ultimately, the Casey Court reaffirmed Roe and its main holding that there is a constitutional

68. See id. at 844-53.
70. Id.
71. Casey, 505 U.S. at 849.
73. See Casey, 505 U.S. at 854-69.
right to choose whether to have an abortion before viability.\textsuperscript{74} Most interestingly, in the course of this discussion, the joint opinion self-reflexively pondered how overruling \textit{Roe} might undermine the Court's own legitimacy. Unlike in \textit{Roe}, the \textit{Casey} Court did not proclaim that its legitimacy was grounded on being objective. Instead, the \textit{Casey} Court suggested that its legitimacy arose from public perceptions of the Court and its decisions.\textsuperscript{75} For the Court to retain its power, the joint opinion reasoned, the American people must believe that the Court's decisions are based on constitutional principles.\textsuperscript{76} If the Court were to overrule \textit{Roe}, however, the \textit{Casey} decision would seem too political, injudicious, and unprincipled. The Court speculated that it could not even "pretend" to overrule \textit{Roe} on a principled basis.\textsuperscript{77} Therefore, the joint opinion concluded, a decision to overrule would seriously undermine the Court's power and legitimacy.

Now, why do I propose that the Rehnquist Court in \textit{Casey} manifested postmodernism, at least to some degree? For one thing, the Court's extended self-reflexive turn upon its own practices resonates with postmodernism. Postmodernists often turn toward their own social practices and make the cultural and theoretical awareness of those practices part of the practices themselves. In a sense, postmodernism transforms practices to include self-reflexive awareness.\textsuperscript{78} Beyond this point, and in clear opposition to the more modernist pretensions of \textit{Roe}, the \textit{Casey} Court did not claim that its decision was objective or based on some firm foundation. Yet, according to the Court, the lack of a foundation is not overly important because what really matters is not objectivity but rather, public percep-

\textsuperscript{74} See id. at 869-70.
\textsuperscript{75} See id. at 854-61.
\textsuperscript{76} See id.
\textsuperscript{77} Id. at 864 (emphasis added).
\textsuperscript{78} Steven Connor observes:

\begin{quote}
In trying to understand our contemporary selves in the moment of the present, there are no safely-detached observation-posts, not in "science," "religion," or even in "history." We are in and of the moment that we are attempting to analyse, in and of the structures we employ to analyse it. One might almost say that this terminal self-consciousness... is what characterizes our contemporary or "postmodern" moment.
\end{quote}

The Court's legitimacy depends on nothing deeper than perceptions and beliefs. In *Casey*, the Court seemed to acknowledge that it operates in a hall of mirrors. The Justices must therefore be concerned not to change directions too abruptly for fear that they might strike and shatter a mirror. If that were to happen, then all perceptions of legitimacy would go awry.

Paradoxically, though, the mere fact that the *Casey* Court turned to gaze upon itself and to contemplate its own practices self-reflexively suggests that traditional or modernist notions of legitimacy are no longer relevant. For, of course, if the Court's power were truly threatened, the Court would not save itself by expressly announcing that it was deciding a case for the benefit of public perceptions. The Court, if it were truly threatened, would not suggest that it might decide the instant case differently if only it could pretend to decide on a principled basis. To the contrary, a purely modernist Court, like the Court in *Roe v. Wade*, would briefly and forcefully assert that its conclusions were objectively grounded on a firm foundation. By openly examining its own legitimacy, the *Casey* Court instead suggests the possibility that, at least in most cases, it could actually say anything in an opinion because the Court's power and legitimacy no longer arise from or depend on its opinions. So few people still take the Court's opinions seriously that the Justices could, for instance, quote poetry in their opinions—and few people would notice, and even fewer would care.

In fact, that is exactly what Chief Justice Rehnquist has done—quoted poetry—at length. In the first flag desecration case, *Texas v. Johnson*, decided in 1989, the Court held that the burning of an American flag in political protest was symbolic conduct protected under the Free Speech Clause of the First Amendment. The Court's decision effectively invalidated statutes of forty-eight states and the federal government that had prohibited desecration of the flag. Chief Justice

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79. See *Casey*, 505 U.S. at 864-69. The *Casey* Court suggested that overruling *Roe v. Wade* would severely undermine its "legitimacy" in the eyes of the public. See id. at 865.
Rehnquist dissented, commencing his opinion by suggesting that American history constitutionally justified flag desecration statutes.\(^2\) He thus proceeded into a rendition of that history based primarily on poetry. He began with Ralph Waldo Emerson's *Concord Hymn*:

> By the rude bridge that arched the flood
> Their flag to April's breeze unfurled,
> Here once the embattled farmers stood
> And fired the shot heard round the world.\(^3\)

The Chief Justice then turned to the story of Francis Scott Key and the *Star-Spangled Banner*, from which Rehnquist quoted several lines.\(^4\) Finally, he turned to John Greenleaf Whittier's Civil War poem, *Barbara Frietchie*, which recounts a tale of a ninety-year-old woman flying the Union flag as Confederate troops, led by Stonewall Jackson, marched through her Maryland town.\(^5\) When Jackson first saw the flag, he had his men shoot it down. Barbara Frietchie, though, snatched up the flag and waved it back at the Confederate troops, challenging them to shoot again. Whittier wrote:

> "Shoot, if you must, this old gray head,
> But spare your country's flag," she said.
> A shade of sadness, a blush of shame,
> Over the face of the leader came;
> The nobler nature within him stirred
> To life at that woman's deed and word:
> "Who touches a hair of yon gray head
> Dies like a dog! March on!" he said.\(^6\)

In fact, Rehnquist did not merely quote a passage of the poem, he inserted the entire composition, all sixty lines.\(^7\)

Rehnquist's somewhat bohemian conception of authoritative sources in *Johnson* contrasts strikingly with another of his


\(^2\) *See Johnson*, 491 U.S. at 421-22 (Rehnquist, C.J., dissenting) (suggesting that the unique position of the flag as a symbol of our nation may justify its protection).

\(^3\) *Id.* at 422.

\(^4\) *See id.* at 423.

\(^5\) *See id.* at 424-25.

\(^6\) *Id.* Rehnquist has used unusual or bizarre references and quotations in other cases. *See, e.g.*, Church of Scientology v. IRS, 484 U.S. 9, 17-18 (1987) (referring to Sir Arthur Conan Doyle's "dog that didn't bark").

\(^7\) *See Johnson*, 491 U.S. at 424-25.
dissents, written fifteen years earlier in a case that also involved flag desecration. In Smith v. Goguen, decided in 1974, the Court held that a Massachusetts state flag desecration statute was unconstitutionally void for vagueness.\(^8\) Unsurprisingly, Rehnquist, then an Associate Justice, dissented. As in the later case of Johnson, Rehnquist referred to poems (and also songs) in his dissenting opinion.\(^9\) He even quoted the identical passage from Emerson.\(^9\) Beyond Emerson, though, Rehnquist quoted from none of the other poems or songs except for two words from Barbara Frietchie.\(^9\) His legal reasoning was far more conventional or modernist; his discussion of verse was brief and intended merely to underscore the importance of the flag in American life.\(^9\)

So despite the similarities between the cases of Johnson and Smith v. Goguen, Rehnquist changed during the interval of fifteen years and became, we might say, more avant garde. He is not alone in this group. In fact, his leading partner is probably Justice Scalia. An excellent example of the postmodern Scalia is in the recent case of County of Sacramento v. Lewis.\(^9\) Lewis involved a police officer who allegedly had been deliberately or recklessly indifferent to life during the apprehension of a suspected offender.\(^9\) The Court held that the officer, under the circumstances, had not violated the Fourteenth Amend-

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88. 415 U.S. 566, 582 (1974). Goguen had been convicted for violating the Massachusetts law when he “wore a small cloth version of the United States flag sewn to the seat of his trousers.” Id. at 568.

89. See id. at 602 (Rehnquist, J., dissenting). Rehnquist refers to the poetry of John Greenleaf Whittier and Ralph Waldo Emerson, and musical works by John Phillip Sousa, George M. Cohan, and Francis Scott Key. See id.; infra note 92.

90. See 415 U.S. at 601.

91. See id. at 602.

92. In Smith v. Goguen, after the quotation from Emerson, Rehnquist wrote:

Oliver Wendell Holmes, Senior, celebrated the flag that had flown on “Old Ironsides” during the War of 1812, and John Greenleaf Whittier made Barbara Frietchie’s devotion to the “silken scarf” in the teeth of Stonewall Jackson’s ominous threats the central theme of his familiar poem. John Philip Sousa’s “Stars and Stripes Forever” and George M. Cohan’s “It’s a Grand Old Flag” are musical celebrations of the flag familiar to adults and children alike. Francis Scott Key’s “Star Spangled Banner” is the country’s national anthem.

Id. at 602 (Rehnquist, J., dissenting).


94. See id. at 836-39.
ment's guarantee of substantive due process. Scalia agreed with the Court's conclusion but refused to join Justice Souter's majority opinion. In his concurrence, Scalia criticized Souter's standard for determining a violation of substantive due process. The Souter majority opinion pronounced that an executive action violates substantive due process only if it is so "arbitrary" that it "shocks the conscience." Scalia maintained that this standard not only was overly subjective but also had been rejected by the Court only a year earlier, in the case of Washington v. Glucksberg. According to Scalia, Souter's concurrence in Glucksberg had proposed a similar standard of arbitrariness, and the Glucksberg majority had repudiated it.

To make his point, Scalia relied on the famed songwriter (and now, perhaps, legal authority), Cole Porter. Specifically, Scalia paraphrased a passage from Porter's song, You're the Top, to suggest that Souter's substantive due process standard was the ultimate in subjectivity:

[If anything, today's opinion is even more of a throw-back to highly subjective substantive-due-process methodologies than [Souter's] concurrence in Glucksberg was. Whereas the latter said merely that substantive due process prevents "arbitrary impositions" and "purposeless restraints" (without any objective criterion as to what is arbitrary or purposeless), today's opinion resuscitates the ne plus ultra, the Napoleon Brandy, the Mahatma Ghandi, the Celophane of subjectivity, th' ol' "shocks-the-conscience" test.]

95. See id. at 854-55.
96. See id. at 860-65 (Scalia, J., concurring).
97. See id. at 860-62.
98. Id. at 846-49, 852-55.
100. See Lewis, 523 U.S. at 860-61 (Scalia, J., concurring).
101. Id. at 861 (paraphrasing Cole Porter, You're the Top (1934), reprinted in THE COMPLETE LYRICS OF COLE PORTER 169 (Robert Kimball ed., 1983)). In a footnote, Scalia added: "For those unfamiliar with classical music, I note that the exemplars of excellence in the text are borrowed from Cole Porter's 'You're the Top,' copyright 1934." Id. at 861 n.1 (Scalia, J., concurring). In Clinton v. City of New York, which held the Line Item Veto Act unconstitutional, Scalia's concurring and dissenting opinion referred to President Nixon as "the Mahatma Ghandi of all impounders." 524 U.S. 417, 468 (1998) (Scalia, J., concurring and dissenting). In light of Scalia's use of the same phrase, "the Mahatma Ghandi," in his Lewis concurrence—where he expressly paraphrased Cole Porter and connoted that something was the ultimate or the highest—Scalia apparently meant something similar in the line item veto case. That is, Scalia meant to suggest that Nixon was the ultimate or greatest impounder. For another unusual passage from Scalia, see United States v. Virginia, 518 U.S. 515, 601-03 (1996) (Scalia, J., dissenting) (providing a
How, then, do Rehnquist’s and Scalia’s invocations of poets and songwriters relate to postmodernism? Rehnquist and Scalia appear to suggest that they are not writing their opinions with the earnestness that had characterized more modernist Justices and times. By including in their opinions somewhat bizarre passages and references—bizarre, that is, from a modernist perspective—Rehnquist and Scalia implicitly allude to a form of postmodern irony. Their method for communicating that irony closely resembles a technique that, in overtly postmodern circles, is sometimes called pastiche: the juxtaposition in one text of different styles, sources, and traditions. Pastiche is intended in part to connote the contingency of each of the various styles, sources, and traditions. Pastiche, then, is a postmodernist’s means for communicating the idea of anti-foundationalism even while using sources and tools associated with modernist methods and goals. Put in a different way, an author’s use of unconventional and unexpected sources and styles can represent a wink or a nod to the reader. This wink or nod signifies postmodern irony: the reader is warned that even though the author might use ostensible modernist tools and sources, the author uses them with the self-reflexive awareness that they cannot deliver modernist objectivity.102

Pastiche also shows the postmodernist breaking through the boundaries or disciplinary fences of a particular practice, thus suggesting the contingency and plasticity of that practice and its ostensible truths. Modernists tend to think of practices, such as judicial decision-making, as reducible to a limited and identifiable quantity of methods, activities, norms, and rhetorical conventions. Philip Bobbitt, for instance, has argued that constitutional decision-making consists of precisely six different modes (or modalities) of argumentation, such as a focus on the constitutional text or on the history of the framing.103 The quotation or citation of poems and songs, to be certain, was not one of Bobbitt’s six modes.

When postmodernists breach the boundaries of a practice—by relying on unusual sources or by using an interdisciplinary

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approach—they call into question modernist notions of practice and truth, which suddenly seem no longer as rigid and stable as the modernist had hoped and proposed. Indeed, for similar reasons, postmodern deconstructionists who follow the French philosopher Jacques Derrida often insist “on using words in unorthodox ways, on writing in ways that attempt to break the circle of conventional” practices and logic. It is this purposeful unorthodoxy that often leads modernist critics to accuse Derridean deconstructionists of being muddled and bewildering. Rehnquist’s and Scalia’s pastiche-like use of sources seems to have had a similar effect on some readers. One commentator discussing Rehnquist’s *Johnson* dissent observed that “the historical and literary materials Rehnquist selects have a random quality that is dizzying . . . .”  

It is worth emphasizing, though, that the use of unorthodox or unconventional sources and arguments is not merely dizzying or confusing, but rather suggests a postmodern vantage. When the postmodernist, besides using the unconventional, also uses conventional or modernist sources and tools, the reader can surmise that the latter are being used ironically. By mixing the unconventional with the conventional, the postmodernist implies that even the modernist sources and tools cannot deliver objectively grounded results. Thus, when the postmodern scholar or the postmodern Supreme Court Justice continues to participate in their respective practices—whether it be legal scholarship or judicial decision-making—we know that they must, in effect, be playing with the pieces. Postmodernists use modernist sources and tools even though they no longer earnestly believe in their efficacy. Justices such as Rehnquist and Scalia might continue to use the modernist tools of constitutional adjudication, but they do so playfully and ironically, knowing that the tools cannot deliver objective conclusions.

This postmodern idea of playing with the pieces is illustrated most clearly in a series of habeas corpus cases decided

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by the Supreme Court. *Teague v. Lane*¹⁰⁶ and its progeny addressed the question of whether constitutional rules of criminal procedure should apply retroactively in habeas corpus cases. Writing for a plurality, Justice O'Connor articulated two important points in the *Teague* decision. First, she stated that the question of retroactivity should be the threshold issue in any case which might require the Court to announce or apply a new rule of constitutional law.¹⁰⁷ Second, O'Connor pronounced a general rule to determine retroactivity: with two narrow exceptions, new constitutional rules would not be applied or announced in habeas proceedings.¹⁰⁸ Hence, after *Teague*, the crux of any habeas case became the determination of whether it involved the application or articulation of a new rule. If a case involved a new rule, then the habeas court would need to decline to reach the merits of the claim and to deny the petition (unless one of the two exceptions applied). The problem was that, as even the *Teague* plurality acknowledged, to categorize a constitutional rule as either new or old might often present a formidable challenge.¹⁰⁹

In *Penry v. Lynaugh*, decided later in the same term as *Teague*, a majority of the Justices adopted the *Teague* approach to retroactivity in habeas cases.¹¹⁰ Surprisingly, however, the majority held that one of Penry's habeas claims did not seek the application or announcement of a new rule.¹¹¹ Consequently, the *Teague* rule against new rules in habeas cases did not bar consideration of the merits of Penry's claim.¹¹²

Justice Scalia vehemently dissented in *Penry*, arguing that the majority had construed the concept of a new rule far too

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¹⁰⁷. See id. at 300-05.
¹⁰⁸. See id. at 310 ("Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.").
¹⁰⁹. See id. at 301-02.
¹¹¹. See id. at 315, 330. The Court considered two claims. The first was whether a failure to instruct the jury as to mitigating evidence violated the Eighth Amendment. See id. at 307. The Court determined that this did not raise the issue of a new rule, but rather an application of an existing rule. See id. at 315. The second claim was whether "the Eighth Amendment categorically prohibits" execution of a person who is "mentally retarded." Id. at 307. The Court concluded that while it did implicate a new rule, *Penry* was still entitled to consideration because it fell within the first of the *Teague* exceptions. See id. at 330; see also *Teague*, 489 U.S. at 311.
¹¹². See *Penry*, 492 U.S. at 300, 315.
narrowly. In making his argument, Scalia appeared to cross the shadowy border separating modernism from postmodernism. In particular, Scalia self-reflexively turned to consider legal reasoning in constitutional cases: "In a system based on precedent and stare decisis, it is the tradition to find each decision 'inherent' in earlier cases (however well concealed its presence might have been), and rarely to replace a previously announced rule with a new one." In this postmodern self-reflexive moment, Scalia appeared to recognize that in judicial practice, all rulings can theoretically be deemed either old or new, that is, either as based on or as distinguishable from precedent. Elsewhere, Scalia made this point more lucidly. He suggested in James B. Beam Distilling Co. v. Georgia, which was unrelated to habeas corpus, that even if judges make law, they must pretend to discover it:

"[T]he judicial Power of the United States" conferred upon this Court . . . must be deemed to be the judicial power as understood by our common-law tradition. That is the power "to say what the law is," not the power to change it. I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense "make" law. But they make it as judges make it, which is to say as though they were "finding" it—discerning what the law is, rather than decreeing what it is today changed to, or what it will tomorrow be. In the context of habeas corpus, therefore, Scalia plainly was concerned that every institutional decision could be at least reasonably construed as arising from an old rule. Scalia therefore proposed in his Penry dissent an exceedingly broad conception of new rules in order to avoid "gutting" the Teague barrier to habeas relief. Significantly, despite the Penry holding, a majority of Justices largely accepted Scalia's arguments in Butler v. McKellar. In a state prosecution, Butler had been convicted of murder and sentenced to death. The Butler Court, with a majority opinion written by none other than Chief Justice Rehnquist, broadly interpreted the ambiguous Teague guide-

113. See id. at 352-53 (Scalia, J., concurring in part and dissenting in part).
114. Id. at 353.
115. 501 U.S. 529 (1991) (Scalia, J., concurring in the judgment). This case involved the retroactive application of a rule of constitutional law in the context of a state tax refund. See id. at 532-34.
116. Id. at 549 (citations omitted) (emphasis added and omitted).
117. See Penry, 492 U.S. at 353.
119. See id. at 408.
lines for the identification of new rules with the result that the writ of habeas corpus was practically eviscerated. Rehnquist wrote: "The 'new rule' principle ... validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions."\(^{120}\) In other words, so long as a state court's interpretation of precedent and denial of a defendant's constitutional claim was reasonable and in good faith, the defendant's claim in a habeas petition would be deemed a request for a new rule of constitutional law. Under Butler, therefore, unless a state court arbitrarily, recklessly, or deliberately ignored precedent, federal habeas relief would be barred.

Most important for the purposes of this Essay, Rehnquist's majority opinion suggested a dramatic and sustained embrace of postmodernism. Rehnquist began by echoing Scalia's moment of postmodern insight: "In the vast majority of cases ... [a] new decision is reached by an extension of the reasoning of previous cases."\(^{121}\) Thus, as with Scalia, Rehnquist self-reflexively turned to consider legal reasoning and discerned that, in judicial practice, every constitutional decision can be reasonably construed as arising from an old rule. Like Scalia, too, Rehnquist recognized that this possibility threatened to undermine the Teague barrier, and therefore he enunciated a broad definition of new rules. Even so, Rehnquist most clearly disclosed his postmodern inclinations when he applied his broad definition of new rules to the facts in the Butler case itself.

Butler based his habeas petition on Arizona v. Roberson,\(^{122}\) which the Court decided after his conviction became final.\(^{123}\) Butler maintained that Roberson vindicated his precise constitutional claim, which involved the Fifth Amendment.\(^{124}\) Moreover, Butler persuasively argued that Roberson itself did not announce a new rule of constitutional law.\(^{125}\) In particular, Butler contended that the Roberson Court merely had applied the rule from an earlier case, Edwards v. Arizona,\(^{126}\) "to a

\(^{120}\) Id. at 414 (emphasis added).
\(^{121}\) Id. at 412-13.
\(^{122}\) 486 U.S. 675 (1988).
\(^{123}\) See Butler, 494 U.S. at 410-11.
\(^{124}\) See id. at 408, 411, 414.
\(^{125}\) See id. at 414-15.
slightly different set of facts." Butler supported his contention by underscoring that the Roberson Court "had said that Roberson's case was directly controlled by Edwards," that Arizona, when arguing in Roberson, had requested the Court to create an "exception" to Edwards, and that the Roberson Court believed that case was "within the 'logical compass' of Edwards." In sum, Butler requested the Court to apply to his factual situation an old rule of constitutional law—a rule already articulated clearly in Edwards and then reaffirmed in Roberson.

Rehnquist responded to this strong argument with a postmodern twist:

[T]he fact that a court says that its decision is within the "logical compass" of an earlier decision, or indeed that it is "controlled" by a prior decision, is not conclusive for purposes of deciding whether the current decision is a "new rule" under Teague. Courts frequently view their decisions as being "controlled" or "governed" by prior opinions even when aware of reasonable contrary conclusions reached by other courts.

Ann Althouse has observed that Rehnquist, at this point, acted as a playwright who "wandered onto the stage and announced—essentially—'Of course, you must realize, this is only a play.'" To highlight the degree of Rehnquist's postmodern turn, I extend and transform this analogy. Instead of imagining Rehnquist as a playwright, imagine him as being in the movie, The Truman Show, which portrays a character, Truman Burbank, who unknowingly lives his entire life as the protagonist on a successful television show. In fact, let us call our movie The Rehnquist Show. What would The Rehnquist Show reveal about our principal character, William H. Rehnquist?

When Rehnquist wrote in Butler that "a court says that its decision is within the 'logical compass' of an earlier decision," he referred not to just any court. Rather, Rehnquist spoke of the Supreme Court and the relationship between its opinions in

128. Id. (emphasis added).
129. See id.
130. Id. at 415.
131. Id. (emphasis added).
133. THE TRUMAN SHOW (Paramount 1998).
134. Butler, 494 U.S. at 415 (emphasis added).
Roberson and Edwards. Rehnquist thus expressly turned his postmodern and self-reflexive focus on the Supreme Court's own specific use of legal reasoning. In an important sense, Rehnquist did not act as a playwright who wanders on stage to speak to the audience. A playwright does not commonly participate in the performance of a play and does not ordinarily speak directly to the audience. The playwright speaks indirectly by writing words for the characters in the play. But the Supreme Court Justices instead constantly and actively participate in the practices of law and judicial decision-making. And within those practices, the Justices always speak directly to their audience of readers. Hence, Rehnquist was not the distanced creator or outsider—the playwright—who wandered onto stage to comment on the illusions of the production. He was the actor, Bill Rehnquist, who suddenly stepped out of his character, as the Chief Justice on The Rehnquist Show, to say, "Hey, this is only a TV show!"

But even this metaphorical comparison does not adequately capture how much Rehnquist resembles Truman Burbank. For just like a playwright, an actor always knows it is only a TV show. Rehnquist and the other Justices, on the other hand, usually do not know it is only a show. Instead, they actively participate in the practices of law and judicial decision-making: they do not understand those practices as illusionary or somehow unreal. Rehnquist, for most of his life, then, was just like Truman Burbank. Rehnquist was a person who believed that he lived in the real world but suddenly realized that he was only a character in a TV show. Then he turned to the ever-present camera and proclaimed, "Hey, this is only a show! It's only a TV show."

Rehnquist's postmodernism does not stop there. The Rehnquist Show goes far beyond The Truman Show. After realizing that he is only a character in a television show, Rehnquist then recognized that, for him, there was no world other than his show. He is Bill Rehnquist, Chief Justice. Unlike Truman Burbank, Rehnquist cannot walk off the production set and exit the studio complex. No other or greater reality exists for Bill Rehnquist. 135 Life is no deeper—it has no firmer

135. Rehnquist, in a sense, therefore rejects what Pierre Schlag calls the "theater of the rational," which "is precisely the kind of theater that is grounded in the forgetting of its own theatricality. To play a part in this theater is to rule out the recognition that one is doing theater." Pierre Schlag, Normativity and the Politics of Form, 139 U. PA. L. REV. 801, 884 (1991).
foundation—than the flickering images of a show on a television screen. So what is a Supreme Court Chief Justice to do? Plunge paralyzed into a nightmare of nihilistic despair? Of course not! Our stalwart star, Bill Rehnquist, continues to perform as a Supreme Court Chief Justice always performs, only now with the arched eyebrow of postmodern irony. Hence, Rehnquist turned toward the ever-present camera and wrote:

In Roberson, for instance, the Court found Edwards controlling but acknowledged a significant difference of opinion on the part of several lower courts that had considered the question previously. . . . It would not have been an illogical or even a grudging application of Edwards to decide that it did not extend to the facts of Roberson.136

These lines can be fairly rephrased as follows: "Well, of course, the Roberson Court said it was applying an old rule, but we can always say that. And remember, we also can always say we are applying a new rule. We are, after all, no more nor less than characters on a TV show. We can ad-lib, change the script, or whatever, so long as we maintain our production revenues."137

Rehnquist then concluded with a wink and a nod: "We hold, therefore, that Roberson announced a 'new rule.'"138

Now, take a moment to recall exactly what was at stake in Butler. The case was not merely about the intricacies of habeas corpus doctrine. Butler had been convicted of a capital offense.139 The Supreme Court's denial of his habeas petition consequently meant almost certain death for Butler. Suddenly, Rehnquist's lines remind us of a different movie character, the Terminator, as Rehnquist almost taunts Butler with a signature sign-off: "Hasta la vista, baby."140

Rehnquist, instead, is in the theater of the postmodern.

136. Butler, 494 U.S. at 415 (emphasis added) (citations omitted).
137. Justice Brennan wrote in dissent in Butler:

The only conclusion discernible from the majority's discussion is that the majority would label "new" any rule of law favoring a state prisoner that can be distinguished from prior precedent on any conceivable basis, legal or factual. The converse of this conclusion is that, in the majority's view, adjudication according to "prevailing" law must consist solely of applying binding precedents to factual disputes that cannot be distinguished from prior cases in any imaginable way.

Id. at 421-22 (Brennan, J., dissenting).
138. Id. at 415.
139. See id. at 407.
140. THE TERMINATOR (Orion Pictures 1984). See generally STEVEN JOHNSON, INTERFACE CULTURE 74 (1997) (noting how teenagers playing online death and doom games, like Quake and Doom, accompany their bursts of death-dealing fire with "Schwarzenegger-style taunts ('Hasta la vista, baby!')"). Subsequently, Congress amended the habeas corpus statute to be
In sum, Rehnquist and Scalia are playing with the pieces. These two Justices most often still use the traditional modernist tools of judicial decision-making, such as the doctrine of stare decisis. They parse the supposedly precise meanings of various case precedents and weave elaborate webs of rationally consistent legal propositions. Rehnquist and Scalia know, however, that these types of legal arguments are just the tattered remnants of their modernist beliefs. They know that their decisions are not objective and do not rest on firm foundations. They know, in the words of Scalia, that "the Court is entitled to call a 'central holding' whatever it wants to call a 'central holding.'" They know better than anyone else that Supreme Court Justices rarely write the opinions that bear their names. Their clerks do most of the writing. Indeed, the clerks largely determine which cases the Court will decide. Yet the Justices also know that it all does not really matter. The structures of the Court's power are too well-entrenched in American society: the content of the Court's opinions thus neither legitimate nor undermine the Court's position and more consistent with the Teague line of cases. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1217-26 (see especially the codification at 28 U.S.C. § 2254(d) (Supp. III 1997)).

141. I paraphrase Louis Seidman and Mark Tushnet here. See SEIDMAN & TUSHNET, supra note 59, at 23.

142. Planned Parenthood v. Casey, 505 U.S. 833, 993-94 (1992) (Scalia, J., concurring and dissenting). Scalia's dissent in United States v. Virginia made a similar point in several places. For example, he refers to the Court's equal protection standards—rational basis, intermediate scrutiny, and strict scrutiny—as "made-up tests." United States v. Virginia, 518 U.S. 515, 570 (1996) (Scalia, J., dissenting). He added: "These tests are no more scientific than their names suggest, and a further element of randomness is added by the fact that it is largely up to us which test will be applied in each case." Id. at 567. Plus, he argued, with regard to the intermediate scrutiny test, the Justices "essentially apply it when it seems like a good idea to load the dice." Id. at 568.

143. See MARY ANN GLENDON, A NATION UNDER LAWYERS 146 (1994).

144. See id. at 146-48; BERNARD SCHWARTZ, DECISION: HOW THE SUPREME COURT DECIDES CASES 48-55, 256-62 (1996); Tushnet, supra note 13, at 1327. In the words of Jack Balkin, the Court applies in this postmodern era "quasi-industrial methods to the administration of justice." Balkin, supra note 10, at 1983. Rehnquist has admitted that his clerks write the first draft of almost all opinions issued in his name. See SCHWARTZ, supra, at 52. According to Mary Ann Glendon, only Scalia and Stevens supposedly take a "leading role" in writing opinions. See GLENDON, supra note 143, at 146. Bernard Schwartz adds that, contrary to the usual belief that oral argument substantively matters, "the principal purpose of the argument before the Justices is a public-relations one." SCHWARTZ, supra, at 16.
power. The Court will continue to decide cases, and the Justices will continue to write—or at least, to sign—their opinions. The Court will continue to deal life and death—for, to be sure, the Justices play seriously. That is their role in a postmodern world.

IV. CONCLUSION: DECIDING WITHOUT FOUNDATIONS

The Supreme Court Justices may live in a postmodern world, but they are not necessarily therefore overt or avowed postmodernists. If you were to ask Chief Justice Rehnquist whether he is a postmodernist I am confident that he either would say, "No," or laugh in your face. But that is not the point. According to Fredric Jameson, "we are within the culture of postmodernism to the point where its facile repudiation is as impossible as any equally facile celebration of it is complacent and corrupt." The point, then, is that the Supreme Court Justices live in a postmodern culture. As such, they are influenced occasionally to act in a postmodern way and to have a postmodern attitude—in short, to be postmodern Justices. And the Justices do so regardless of whether or not they would identify themselves as postmodernists.

145. See BAUMAN, supra note 7, at 97-101 (arguing that state domination no longer needs intellectually generated legitimation); Timothy R. Johnson & Andrew D. Martin, The Public's Conditional Response to Supreme Court Decisions, 92 AM. POL. SCI. REV. 299, 299 (1998) (emphasizing the public's acceptance of the Supreme Court as a legitimate institution by drawing on research showing that even individuals who know little about the Court hold it in high regard). But cf. JÜRGEN HABERMAS, LEGITIMATION CRISIS (Thomas McCarthy trans., Beacon Press 1975) (1973) (arguing that economic and political structures are not receiving the needed support of cultural legitimation).

146. JAMESON, supra note 7, at 62 (emphasis added and omitted).

147. It is worth noting that Robert Post, reviewing Fredric Jameson's book on postmodernism, argued that "[t]here is no postmodern law, although there are postmodern commentaries on law." Robert Post, Postmodern Temptations, 4 YALE J.L. & HUMAN. 391, 396 (1992) (reviewing JAMESON, supra note 7). Thus, from Post's viewpoint, Supreme Court Justices cannot evince postmodern themes: "We can thus expect a social practice to remain untouched by postmodernism if its participants retain a healthy respect for the authority of the relevant standards of the practice." Post, supra, at 396. My argument, in part, is that at least some of the Justices no longer "retain a healthy respect" for traditional modernist judicial tools or practices even though the Justices continue to use them.

Jack Balkin and Jay Mootz seem to disagree about the nature of postmodernism, or at least about the best way to understand postmodernism. Balkin emphasizes the material and cultural elements of postmodernity, while Mootz stresses postmodern theory and intellectual thought. Compare Balkin, supra note 10, with Mootz, supra note 10. To me, a postmodern attitude toward this
As is often the case with postmodernism, however, there is a paradox here. To be sure, postmodernism has infused Supreme Court decision-making, but Supreme Court postmodernism can materialize in strange ways. In particular, as already suggested, postmodern scholars or theorists tend to stress the instability of textual meanings. Many postmodern theorists seem to enjoy few things more than deconstructing a widely accepted and dominant reading of an important text, whether it be from literature, philosophy, law, or elsewhere. Such a deconstruction of a dominant reading inevitably discloses previously suppressed alternative meanings or truths for the text. These postmodern deconstructionists, then, are clearly hostile to any authoritative pronouncement of a single meaning for a text. Yet, such authoritative pronouncements routinely issue from the Supreme Court. After all, the role of the Supreme Court is, to a great extent, to proclaim the law so as to decide cases. Whereas many postmodern theorists celebrate the multiplicity of textual meanings and truths—the idea that “truth keeps happening”—the Supreme Court’s authoritative pronouncements effectively suppress or kill alternative meanings. Jacques Derrida might declare that a text’s meaning is undecidable, but the Supreme Court Justices must decide. Law professors can revel in textual ambiguities—in fact, such ambiguities helpfully generate a plethora of scholarly publications—but Supreme Court Justices must pronounce the law.

Hence, because of the Court’s position as an authoritative pronouncer of law, the Justices, at least in their roles as Justice
tices, are unlikely to become thoroughgoing postmodern theorists in the same way that law professors might. Instead of becoming avowed and overt postmodern theorists, the Justices are more apt to use postmodern insights, such as anti-foundationalism, as if they were modernist tools like stare decisis, to facilitate the satisfactory resolution of cases. To be sure, this instrumental use of postmodern insights can lead to accusations that the Justices are being merely disingenuous or inauthentic rather than truly postmodern. Scalia, for instance, certainly is open to this potential charge. On one hand, as I have emphasized, Scalia on numerous occasions has acknowledged the Court's power to use precedents selectively and manipulatively.\textsuperscript{153} On the other hand, he has also repeatedly proposed formalistic mechanisms that would supposedly vanquish judicial discretion.\textsuperscript{154} In other words, Scalia seeks mechanisms to defeat a judicial flexibility that he realizes is indefatigable.

More important, perhaps, one might further argue that there exists an inherent tension between postmodern theory and judicial decision-making. Since legal scholars can celebrate multiple textual meanings while Supreme Court Justices cannot, one might conclude that even if legal scholarship has become postmodern, the practices of law and judicial decision-making never can do so. Accordingly, there must be an insuperable limit to the idea of postmodern jurisprudence.\textsuperscript{155} To some extent this observation might partially explain the apparently growing gap between legal scholars and judges. In fact, if their respective structural roles in American society lead them in opposite directions, particularly in reaction to postmodern culture, then this gap is likely to become a long-lasting and unbridgeable abyss. Whereas modernist jurisprudents for decades tended to dwell on judicial opinions, postmodernist jurisprudents will continue to pay less and less attention to judges and their opinions. And judges, including Supreme Court Jus-

\begin{footnotes}
\item[153] See supra notes 113-17 and accompanying text.
\item[155] Cf. Post, supra note 147, at 396 ("There is no postmodern law, although there are postmodern commentaries on law.").
\end{footnotes}
tices, will react by continuing either to ignore or disdain the outpourings of legal scholars.\textsuperscript{156}

Nevertheless, one should not too readily dismiss a more postmodern understanding of the Supreme Court. If one views postmodernism at least partly as a matter of culture, then as I have argued, certain Supreme Court actions can be understood precisely as manifestations of postmodern culture in judicial practice. Supreme Court Justices, from this viewpoint, are no more disingenuous or inauthentic than they are overtly and intentionally postmodern; rather, they act as Justices enmeshed, for better or worse, within postmodern culture. Because they are apt to appropriate postmodern insights in an instrumental manner, as tools, however, the Justices will depict a rather odd picture of postmodernism. Few postmodern theorists would maintain that deconstruction implies a textual free-for-all where "anything goes."\textsuperscript{157} Deconstruction instead explicates how one comes to understand a text and how that process entails certain conditions or limits.\textsuperscript{158} Yet, from the Supreme Court's viewpoint, postmodernism might look precisely like a license for unconstrained textual interpretation.\textsuperscript{159}

This point becomes clearer when viewed in a political light. The manifestation of postmodern themes in the politically conservative jurisprudence of Rehnquist and Scalia suggests that postmodernism is, to a great degree, politically ambivalent. Many postmodern legal theorists stress, and rightly so, that postmodernism, especially deconstruction, has potentially radical political implications.\textsuperscript{160} This radical capacity is evident in

\textsuperscript{156} See KALMAN, supra note 17, at 64 (arguing that law professors and Justices became estranged in the mid-1970s); Balkin, supra note 10, at 1967 (emphasizing distance between Court and scholars); Harry T. Edwards, The Growing Disjunction Between Legal Education and the Legal Profession, 91 MICH. L. REV. 34 (1992) (emphasizing a disjunction between law professors and judges; written by a federal judge); Feldman, Diagnosing Power, supra note 8, at 1098-1102 (discussing different orientations of Justices and legal academics toward postmodernism). For examples of Supreme Court Justices denigrating the legal academy, see Romer v. Evans, 517 U.S. 620, 652-53 (1996) (Scalia, J., dissenting), and Seminole Tribe v. Florida, 517 U.S. 44, 68-69 (Rehnquist, C.J.).


\textsuperscript{158} See J.M. Balkin, Deconstructive Practice and Legal Theory, 96 YALE L.J. 743, 760-63 (1987); Feldman, Politics, supra note 8, at 185-92.

\textsuperscript{159} See Plasencia, supra note 157, at 246-47.

\textsuperscript{160} See, e.g., Jacques Derrida, Force of Law: The "Mystical Foundation of
the writings of outsider jurisprudents who emphasize that all
textual meanings are unstable and shifting—that there always
are multiple voices and multiple truths. Derrida goes so far as
to equate deconstruction with justice.\textsuperscript{161} Progressive or left-
leaning postmodern theorists thus often seek to intervene in es-
tablished social and cultural practices through deconstruction
by disturbing and shifting the accepted social structures and
cultural symbols.

At the same time, the Supreme Court's postmodernism il-
lustrates that despite its potentially radical political implica-
tions, postmodernism can be turned to conservative ends. From Rehnquist and Scalia's vantage, postmodern culture ap-
pears to mean, indeed, that anything goes. They recognize that
their judicial decisions cannot be objectively grounded on firm
foundations, yet they still must decide the cases. The lack of
foundations thus seems to do little more for Rehnquist and
Scalia than to justify following their conservative political in-
clinations. And what else should they do, they might ask, if
there are no modernist foundations—no legal constraints—
nothing ostensibly to force or at least to pressure them to go in
different political and legal directions? As Scalia laments: “[A]
rule of law that binds neither by text nor by any particular,
identifiable tradition is no rule of law at all.”\textsuperscript{162} Even so, unlike
their estranged associates in legal academe, the Justices cannot
celebrate the undecidability of textual meaning because, as the
Justices might sneer, they are just too busy deciding real
cases.\textsuperscript{163}

Yet, regardless of the specific political inclinations of the
Supreme Court Justices, and regardless of their unusual social
position vis-à-vis thoroughgoing postmodern theorists, the Jus-
tices' situation epitomizes the postmodern condition in at least
one important way. Postmodern cultural studies often describe
the postmodern subject or agent as somewhat like a modernist
self in hyperspeed. The culturally and socially constructed
postmodern subject is one who constantly makes inane deci-

\textsuperscript{161} See \textit{id.} at 945 (“Deconstruction is justice.”).
\textsuperscript{162} Michael H. v. Gerald D., 491 U.S. 110, 128 n.6 (1989), quoted in Se-
gall, \textit{supra} note 154, at 1015.
\textsuperscript{163} To be clear, if Supreme Court Justices were to become thoroughgoing
postmodern theorists—which, as I have discussed, is highly unlikely—they
would recognize more clearly that all textual interpretation is always con-
strained. For an explanation of the process of textual interpretation, see
Feldman, \textit{Politics, supra} note 8, at 169-84.
sions or choices without firm (modernist) reasons or foundations in a quest for individual distinction. Which brand of jeans should I wear? Which type of soda should I drink? Which television channel should I jump to next? And next, and next . . . ? Which store in the mall should I shop in next, and next, and next . . . ? Which microwavable dinner should I choose? Which breakfast cereal? Which cup of South American java? Bizarrely, in the postmodern era, one seeks personal uniqueness by relentlessly choosing from a variety of mass-produced and mass-advertised products that ostensibly cater to those who are radically different. The fragmentation of American culture has mixed with capitalist commercialism to commodify radicalism. The postmodern subject is, most succinctly, a hyperconsumer, for whom “spending is a duty—perhaps the most important of duties.”

From this perspective, Supreme Court Justices are prototypical postmodern subjects. The Justices (qua Justices) may not be hyperconsumers, but they are hyper-decision-makers. They must decide and decide and decide some more—their role in American society is to decide cases as well as deciding whether to grant certiorari for numerous other cases. The Court disposed of nearly seven thousand cases during the 1997 term. Yet they must make their decisions without the benefit of belief in a firm modernist foundation, without the reassuring comfort of objectivity.

And as with Dumbo the elephant, the Justices must and will continue to fly, though now they must do so without their magic feather.

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164. BAUMAN, supra note 7, at 50; see id. at 201-03 (discussing the postmodern agent or subject). With regard to the question of systemic structures of power, I follow feminists such as Rita Felski and Nancy Fraser who argue for understanding power from multiple perspectives or as operating on multiple axes. See FELSKI, supra note 3, at 32; FRASER, supra note 7, at 10.
