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## The Constitution in a Postmodern Age

Calvin Massey

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# The Constitution in a Postmodern Age

Calvin Massey\*

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\* Professor of Law, University of California, Hastings College of the Law.

### *I. Introduction*

In the postmodern world nothing can be known for certain, including that assertion. Although postmodernism is hardly universally accepted, its influence upon popular culture is considerable and growing. There is no reason to think that the American judiciary, or the Justices of the United States Supreme Court in particular, are exempt from the effects of the postmodernist thought that has seeped into our cultural understandings. My aim in this Article is to examine selected aspects of constitutional law in this first decade of the twenty-first century in order to appraise the extent to which postmodern insights are affecting its development. To do so, I will first define and describe postmodernism and indicate the particular aspects of postmodernist thought that are most germane to constitutional law. In succeeding sections, I will examine selected areas in which I believe that postmodernist thought has had a distinct effect on the development of contemporary constitutional law and offer some general conclusions about the likely shape of future constitutional doctrine in an increasingly postmodern age.

This is a broad topic; hence, a few disclaimers and caveats are in order. I do not contend that we are all postmodernists; indeed, there is ready evidence to suggest that a great many people are antagonistic to postmodernism. Indeed, a great deal of what is often labeled the "culture wars" is a divide between postmodern, modern, and pre-modern sensibilities. Thus, I contend only that postmodern thought has had profound influence on our culture's world view. I do not contend that constitutional law is in the thrall of postmodernism; I do contend that postmodernism has had a significant, if unacknowledged and sporadic, impact on constitutional law. Although the divide between postmodern skepticism about certainty and those who cling to the promise of certainty—whether they be Enlightenment rationalists, pre-modern fundamentalists, or optimistic modernists—can mimic ancient debates of constitutional interpretation, I do not wish to revisit old battlefields. Rather, I aim to identify some of the present effects of postmodern thought on constitutional doctrine and to hazard some views on the likely future effects on constitutional law of a growing postmodern consciousness.

### *II. Postmodernism and Modernism*

Postmodernism is a term much used and rarely defined. Most commonly, it is thought to be an attitude of extreme skepticism about meaning, reality, knowledge, and truth. According to Philosophy Professor Elizabeth Anderson, postmodernism:

[E]mbodies a skeptical sensibility that questions attempts to transcend our situatedness by appeal to such ideas as universality, necessity, objectivity, rationality, essence, unity, totality, foundations, and ultimate Truth and Reality. It stresses the locality, partiality, contingency, instability, uncertainty, ambiguity and essential contestability of any particular account of the world, the self, and the good.<sup>1</sup>

Postmodernism is a system of thought that asserts that our notion of "reality is 'discursively constructed,'"<sup>2</sup> meaning that "our minds grasp things not as they are 'in themselves' but only through concepts, signified by words."<sup>3</sup> On one level there is nothing new in this; nearly a century ago Justice Holmes declared that "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."<sup>4</sup> Postmodernists, however, take Justice Holmes's observation to a deeper level. For example:

[Linguistic] signs get their meaning not from their reference to external things but from their relations to all of the other signs in a system of discourse, [which] entails that the introduction of new signs (or elimination of old ones) will change the meanings of the signs that were already in use. Signs therefore do not have a fixed meaning over time.<sup>5</sup>

The consequences of this are radical and destabilizing:

There can be no complete, unified theory of the world that captures the whole truth about it. Any such theory will contain a definite set of terms. This entails that it cannot express all conceptual possibilities. For a discourse that contained different terms would contain meanings not available in the discursive field of the theory that claims completeness. Thus, the selection of any particular theory or narrative is an exercise of 'power'—to exclude certain possibilities from thought and to authorize others.<sup>6</sup>

Postmodernism is not just a linguistic theory; it also asserts that its ideas about language are generally applicable to "social practices" because:

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1. Elizabeth Anderson, *Feminist Epistemology and Philosophy of Science*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed. 2004), <http://plato.stanford.edu/archives/sum2004/entries/feminism-epistemology> (defining and documenting the developments in feminist epistemology) (last visited Oct. 20, 2006) (on file with the Washington and Lee Law Review).

2. *Id.*

3. *Id.*

4. *Towne v. Eisner*, 245 U.S. 418, 425 (1918) (concluding that a taxpayer's stock dividend was not income).

5. Anderson, *supra* note 1.

6. *Id.*

[A]ctions and practices are linguistic signs. . . . Just as words get their meaning from their relations to other words rather than from their relation to some external reality, so do actions get their meaning from their relations to other actions, rather than from their relation to some pre-linguistic realm of human nature or natural law.<sup>7</sup>

A baseball umpire commands authority by virtue of the deference the other participants display toward him, not because he possesses some underlying normative skill or authority.<sup>8</sup> Social practices extend even to our conceptions of self. Postmodernists contend that we apprehend who we are through the signs and actions that surround us:

There is no unified self [that lies outside the realm of linguistic signs and actions;] . . . the self is not free to make of these [signs] whatever it wants, but finds itself entangled in a web of meanings not of its own creation. Our identities are socially imposed, not autonomously created.<sup>9</sup>

Even then, we do not occupy a single identity. A person may be simultaneously a man, a law professor, a hunter of big game, an avid photographer, of African ancestry, a father, a widower, a Republican, an atheist, a recovering alcoholic, an Episcopalian, a Chicago Bears fan, and on and on until terminal identity fatigue sets in. In that sense, we can choose who we are, at least among the socially constructed identities open to our choice.

At its most extreme, postmodernists assert that even the natural world is socially constructed, but these claims:

[D]o not assert that the external world would disappear if people stopped talking about it. Rather, they assert a kind of nominalism: that the world does not dictate the categories we use to describe it, that innumerable incompatible ways of classifying the world are available to us, and therefore that the selection of any one theory is a choice that cannot be justified by appeal to "objective" truth or reality. Even the ways we draw our distinctions between mind and body, ideas and objects, discourse and reality, are contestable.<sup>10</sup>

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7. *Id.*

8. Indeed, the fact that football referees now routinely review their decisions on the field by resorting to recorded images of the action in question suggests how little underlying normatively objective authority they possess. Nevertheless, after they declare their final decision—rendered in accord with a standard of review of "indisputable visual evidence"—the conventions of deference descend again and cause a stadium of 50,000 people or more to acquiesce in the decision, however immediately vocal may be their disagreement.

9. Anderson, *supra* note 1.

10. *Id.*

Modernism, by contrast, may be seen as a way station between Enlightenment rationality and postmodernism. Indeed, modernism arguably begins with the Enlightenment and its rejection of pre-modern epistemology and sources of authority.<sup>11</sup> Pre-modern thought was characterized by a strong belief in ultimate, unchangeable truth that came from divine sources. Man's task was to understand God's revelation. Enlightenment thinkers did not so much dispute the idea of ultimate truth as to substitute reason, logic, and empirical observation as the sources for apprehending objective truth. Man's task was to understand the observable universe.<sup>12</sup> As humanity marched from the Renaissance to the cusp of the twentieth century, modernism acquired a new meaning. Though this latter-day modernism is often defined in terms "of experimental and avant-garde trends in the literature (and other arts) of the early 20th century . . . [that] disengaged from bourgeois values and disturbed their [audience] by adopting complex and difficult new forms and styles,"<sup>13</sup> it acquired a cultural sensibility well beyond the arts. Unlike the Enlightenment rationalists, who thought that everything could be understood with sufficient rational inquiry,<sup>14</sup> latter-day modernism recognized that the world is fragmentary, lacking any overarching pattern, and that we apprehend it in piecemeal fashion.<sup>15</sup> The modernist challenge was "to reestablish a coherence of meaning from fragmentary forms."<sup>16</sup>

Latter-day modernism shares with postmodernism "an emphasis on fragmented forms, discontinuous narratives, and random[ness]"<sup>17</sup> but postmodernism "differs from modernism in its attitude toward . . . these trends."<sup>18</sup> Although modernism regards "fragmentation as something tragic,

11. See CONCISE OXFORD DICTIONARY OF LITERARY TERMS 140 ("Modernist literature is characterized chiefly by the rejection of the 19th-century traditions and of their consensus between author and reader . . .").

12. See *id.* at 69 (defining "enlightenment"). The definition states:

[Enlightenment is] man's emancipation from his self-incurred immaturity. Enlightenment thinking encouraged rational scientific inquiry, humanitarian tolerance, and the idea of universal human rights. In religion, it usually involved the skeptical rejection of superstition, dogma, and revelation in favour of "Deism"—a belief confined to those universal doctrines supposed to be common to all religions . . . .

*Id.*

13. *Id.* at 140.

14. See *id.* at 69 (defining the Enlightenment).

15. See *id.* at 140 (defining modernism).

16. CONCISE OXFORD DICTIONARY OF LITERARY TERMS 140.

17. Mary Klages, *Postmodernism*, <http://www.colorado.edu/English/ENGL2012Klages/pomo.html> (last visited Oct. 20, 2006) (on file with the Washington and Lee Law Review).

18. *Id.*

something to be lamented and mourned as a loss . . . [p]ostmodernism . . . doesn't lament the idea of fragmentation, provisionality, or incoherence, but rather celebrates that. The world is meaningless? . . . [L]et's just play with nonsense."<sup>19</sup>

What should we expect to observe if a postmodern sensibility has taken root in our culture? Apart from unintelligible jargon,<sup>20</sup> the answer might depend on how broadly held is this point of view. If postmodern tenets are the province of a tiny band of intellectuals holding forth over espresso and Gauloises at *Le Deux Magots*, its effects may not be readily observable much outside of Paris's Sixth Arrondissement. But if these tenets are readily accepted by ordinary people—those who do not spend their days in contemplation of the deeper mysteries of epistemology—we might expect to see much more significant effects. In general, I think that the core of postmodernism—skepticism about truth, meaning, knowledge, morals, and even reality—is widely accepted with varying degrees of commitment by Western societies.<sup>21</sup> Because I do not pretend to be an expert in other cultures

19. *Id.*

20. See ALAN SOKAL & JEAN BRICMONT, *FASHIONABLE NONSENSE: POSTMODERN INTELLECTUALS' ABUSE OF SCIENCE* 4 (1998) (describing the aim of the book to show the repeated abuse of terminology in the sciences and to analyze the postmodern confusions); see also Richard Dawkins, *Postmodernism Disrobed*, 394 *NATURE* 141, 141 (July 9, 1998) (commenting on *Fashionable Nonsense*). Here is the opening portion of Dawkins' review of Sokal and Bricmont's book:

Suppose you are an intellectual impostor with nothing to say, but with strong ambitions to succeed in academic life, collect a coterie of reverent disciples and have students around the world anoint your pages with respectful yellow highlighter. What kind of literary style would you cultivate? Not a lucid one, surely, for clarity would expose your lack of content. The chances are that you would produce something like the following:

We can clearly see that there is no bi-univocal correspondence between linear signifying links or archi-writing, depending on the author, and this multireferential, multi-dimensional machinic catalysis. The symmetry of scale, the transversality, the pathic non-discursive character of their expansion: all these dimensions remove us from the logic of the excluded middle and reinforce us in our dismissal of the ontological binarism we criticised previously.

This is a quotation from the psychoanalyst Félix Guattari, one of many fashionable French "intellectuals" outed by Alan Sokal and Jean Bricmont [in *Fashionable Nonsense*].

*Id.*

21. On truth, see DOUGLAS V. PORPORA, *LANDSCAPES OF THE SOUL: THE LOSS OF MORAL MEANING IN AMERICAN LIFE* 2 (2001) (noting that this generation is postmodern and no longer believes in truth but rather is highly skeptical about moral truths); see also ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* 25 (1987) (noting the widely held belief that what is true is up to each individual); ERNEST HEMINGWAY, *TRUE AT FIRST LIGHT: A FICTIONAL MEMOIR* 189 (1999) ("[A]most nothing was true and especially not in Africa. In Africa a thing is true at first

(it is hard enough to understand American culture), I will confine my thoughts on this point to the United States. What follows is a brief overview of some salient aspects of postmodern sensibility on American society.

*A. Truth and Morality: From the Universal to the Unique*

A central postmodern claim is that there can be no such thing as objective truth or objective morality. Whatever is claimed to be true or moral is inescapably the product of the unique circumstances of the claimant. We see truth and morality through the deterministic lens of our culture, our socially constructed identity, and the accumulation of our unique life experiences. Postmodern theorists assert that it is manifest error to assume that our unique perspectives can be generalized and turned into universal and objective statements of truth and morality.<sup>22</sup>

Contemporary Americans appear to agree with the postmodern claim. A 2002 opinion poll revealed that only 22% of Americans, and 6% of teenagers, regard moral truth to be absolute and unchanging.<sup>23</sup> Sixty-four percent of adults and 83% of teenagers think moral truth depends on the situation.<sup>24</sup> The

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light and a lie by noon . . ."). On truth and morality, see Barna Research Group, *Americans Are Most Likely to Base Truth on Feelings* (Feb. 12, 2002), <http://www.barna.org/FlexPage.aspx?Page=BarnaUpdate&BarnaUpdateID=106> [hereinafter Barna, *Truth Poll*] (finding that 22% of Americans consider truth to be absolute and unchanging, a plurality of adults (30%) and teenagers (38%) base moral or ethical choices on "whatever feels right or comfortable in that situation") (last visited Oct. 20, 2006) (on file with the Washington and Lee Law Review). On reality, see The Harris Poll, *Perceptions of Risks: The Public Overestimates the Risks of Most Major Diseases and Types of Accidents—Breast and Prostate Cancer in Particular* (Jan. 27, 1999), [http://www.harrisinteractive.com/harris\\_poll/index.asp?PID=44](http://www.harrisinteractive.com/harris_poll/index.asp?PID=44) (revealing that the public wildly overestimates the risk of contracting breast or prostate cancer, the HIV/AIDS virus, being injured in an auto accident, contracting lung cancer or diabetes, suffering a stroke or heart attack, or being shot or hurt by a stranger) (last visited Oct. 20, 2006) (on file with the Washington and Lee Law Review).

22. Any discussion of a divide between believers in absolutely fixed moral standards and those who reject all possibility of any absolutes must acknowledge that there is some middle ground. Thoughtful adherents to the fixed standard position will readily concede the distinction between defeasible moral standards and nondefeasible standards. Only the latter represent truly fixed moral standards. A defeasible standard is one that can be defeated in order to advance a more important moral standard, as, for example, if I lie to save your life from murderous captors. One might argue about the composition of the set of nondefeasible standards, or even the existence of that category; for my purposes I am assuming that those who believe in absolutely fixed standards believe in the *existence* of nondefeasible standards.

23. Barna, *Truth Poll*, *supra* note 21.

24. *Id.*



remainder of the respondents do not know,<sup>25</sup> which can hardly be counted as a commitment to objective moral truth.<sup>26</sup>

A similar such poll conducted in 2005 showed that:

About half of all adults (54%) claim that they make their moral choices on the basis of specific principles or standards they believe in. Other common means of making moral choices include doing what feels right or comfortable (24%), doing whatever makes the most people happy or causes the least conflict (9%), and pursuing whatever produces the most positive outcomes for the person (7%).<sup>27</sup>

Because over half of these respondents based their moral choices upon "principles or standards they believe in" it might be thought that they are relying upon standards that they believe to be absolute and unchanging. This conclusion is unwarranted; it does not account for the possibility that the "principles and standards" in which the 2005 respondents believe are highly flexible and situational. The 2005 survey disclosed that a mere 16% of adults "claim they make their moral choices based on the content of the Bible,"<sup>28</sup> a source that for believers is likely to be regarded as providing fixed, absolute standards. Of course, some of the 54% who base moral choice upon principles in which they believe may be relying upon non-religious standards that they believe to be absolute, but there is no indication of this in the polling data. When the 2002 and 2005 surveys are considered together, we can only safely conclude that some number of Americans that is very likely less than a majority purport to rely upon fixed reference points in navigating the high seas of morality.

Further support for this tentative conclusion can be gleaned by considering the views of Americans who profess to be "born again" by virtue of their belief

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25. *Id.*

26. Other attitudes revealed by this poll include the following: Thirty percent of adults and 38% of teenagers polled agree with the notion that moral or ethical choices should be based on "whatever feels right or comfortable in that situation." Ten percent of adults and 16% of teenagers base such choices on "whatever will produce the most positive [personal] outcome." Another 14% of adults and 23% of teenagers ground moral and ethical choices on a combination of whatever produces the least conflict, makes others happy, is what family and friends expect of them, or is what they "believe most other people would do in that situation." Only 19% of adults and 9% of teenagers follow Biblical or religious standards in making moral and ethical choices, and another 15% of adults and 10% of teenagers follow parentally-derived standards for making such choices.

27. Barna Research Group, *Most Adults Feel Accepted by God, But Lack a Biblical Worldview* (Aug. 9, 2005) <http://www.barna.org/FlexPage.aspx?Page=BarnaUpdate&BarnaUpdateID=194> (last visited Oct. 20, 2006) (on file with the Washington and Lee Law Review).

28. *Id.*

in Jesus Christ as their savior from eternal damnation.<sup>29</sup> Born again believers would seem to be perhaps the best candidates for a rock-solid belief in absolute moral truth. Not so. According to one Barna report, "[o]nly a minority of born-again adults (44%) and a tiny proportion of born-again teenagers (9%) are certain that absolute moral truth exists."<sup>30</sup> The 2002 polling data summarized above reveals that only 34% of born-again adults and a mere 9% of born-again teens believe that moral truth is absolute and unchanging, while 54% of born-again adults and 76% of born-again teenagers believe that moral truth depends on the situation.<sup>31</sup> The remainder, of course, do not know.<sup>32</sup> Faith in God or reliance upon religious principles for moral truth is not the only indicator of belief or non-belief in objective moral truth; far more telling is the considerable majority of adult Americans who frankly aver that they rely upon an expedient foundation for their moral and ethical beliefs and choices.

Perhaps even more revealing are the attitudes of teenagers. A mere 9% rely upon traditional religious principles to find moral truth and only 19% rely on the combination of religious principles and parentally-instilled values.<sup>33</sup> Nor is there good reason to think that parentally-derived values consist of moral absolutes when only 22% of adults think that moral absolutes exist.<sup>34</sup> A homely but telling measure of the decline of objective moral truth in America is that 86% of American teenagers believe "that music piracy . . . either is morally acceptable or is not even a moral issue. Just 8% claim that such activities are morally wrong."<sup>35</sup>

Teens are just the leading edge of a larger world view. It does not seem particularly noteworthy any longer to note that college students do not believe

29. Barna, *Truth Poll*, *supra* note 21 (defining born-again Christian).

30. William Lobdell, *Pollster Prods Christian Conservatives*, L.A. TIMES, Sept. 14, 2002, at B22.

31. Barna, *Truth Poll*, *supra* note 21.

32. Of course, born-again Christians are not the only people who might be thought to be likely believers in absolute moral truth. I use born-again Christians because polling data is available and because a significant portion of American Christians, although a relatively small minority, are likely to fall into this category. See, e.g., Barry A. Kosmin, Egon Mayer & Ariela Keysar, The Graduate Ctr. of the City Univ. of N.Y., *American Religious Identification Survey* (2001), [http://www.gc.cuny.edu/faculty/research\\_studies/aris.pdf](http://www.gc.cuny.edu/faculty/research_studies/aris.pdf) (involving a sample size of about 50,000 people asked to self-identify their religious affiliation) (last visited Oct. 20, 2006) (on file with the Washington and Lee Law Review).

33. Barna, *Truth Poll*, *supra* note 21.

34. *Id.*

35. Barna Research Group, *Fewer Than 1 in 10 Teenagers Believe that Music Piracy is Morally Wrong* (Apr. 26, 2004), <http://www.barna.org/FlexPage.aspx?Page=BarnaUpdate&BarnaUpdateID=162> (last visited Oct. 20, 2006) (on file with the Washington and Lee Law Review).

in truth and are particularly skeptical about claims of moral truth.<sup>36</sup> The postmodern sensibility of American college students is mirrored by the attitudes of Americans both younger and older, and even seems to be shared to a surprising degree by those who profess to hold to the most traditional and fundamental form of Christian belief. Whether or not we know it, most of us are postmodern. We need not dally over espresso, croissants, and *Le Monde* at *Les Deux Magots*; we are thoroughly postmodern Millies as we sip our lattes, nibble our muffins, and read *USA Today* or *The New York Times* in Starbucks.

*B. The Paradox of Individualism: The Social Construction of Narcissism*

The postmodern contention is that there is no coherent self that lies outside the disparate social discourses that inevitably construct us. Others, such as prominent psychologist Robert Coles, maintain that the self is "the only or main form of (existential) reality."<sup>37</sup> These views may not be contradictory. A staple of the American experience has been the focus on the primacy of the individual, but simultaneously existing with that focus is a collectivist impulse that has manifested itself in such disparate ways as utopian communities<sup>38</sup> and the resolution of legal disputes pitting individual entitlement against the commonweal in favor of the community.<sup>39</sup> The paradox of our individualism may be that it is a product of our social environment—our individualism is

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36. PORPORA, *supra* note 21, at 2 (describing the postmodern college student).

37. Robert Coles, *Civility and Psychology*, 109 DAEDALUS, Summer 1980, at 137.

38. See, e.g., KARL J.R. ARNDT, GEORGE RAPP'S HARMONY SOCIETY: 1785–1847 (rev. ed. 1972) (exploring the Harmony Society in Pennsylvania); KARL J.R. ARNDT, GEORGE RAPP'S SUCCESSORS AND MATERIAL HEIRS: 1847–1916 (1971) (continuing the story of the Harmony Society); HUNTER JAMES, THE QUIET PEOPLE OF THE LAND: A STUDY OF THE NORTH CAROLINA MORAVIANS IN REVOLUTIONARY TIMES (1976) (studying the Moravians); JOHN MCKELVIE WHITWORTH, GOD'S BLUEPRINTS: A SOCIOLOGICAL STUDY OF THREE UTOPIAN SECTS (1975) (examining the Shakers, the Oneida community, and the Bruderhof community—the Society of Brothers); WILLIAM E. WILSON, THE ANGEL AND THE SERPENT: A STORY OF NEW HARMONY (1964) (documenting the story of New Harmony); MARGUERITE YOUNG, ANGEL IN THE FOREST (1945) (studying the society of New Harmony, Indiana).

39. See, e.g., *Stone v. Mississippi*, 101 U.S. 814, 817–21 (1880) (upholding the statute banning lotteries even though a private party had been granted the right to conduct a lottery; the "legislature cannot bargain away the police power"); Morton J. Horwitz, THE TRANSFORMATION OF AMERICAN LAW: 1780–1860, at 47–53 (1977) (discussing New England's Mill Acts and ensuing litigation); *Charles River Bridge v. Warren Bridge*, 36 U.S. 420, 423 (1837) (finding no violation of a state charter granting Charles River Bridge the right to erect a toll bridge by a later charter of a competing free bridge); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 447–48 (1934) (upholding a moratorium on enforcement of mortgages against a contract clause challenge).

socially constructed. At the same time, we live in constant tension between our impulse to seek isolation and our need to associate.

Much has been made in recent years of the increasing tendency of Americans to wall themselves off from the larger community, whether through gated private enclaves<sup>40</sup> or by virtue of a relentless quest for self-fulfillment.<sup>41</sup> As early as 1978 Christopher Lasch could contend that "Americans have retreated to purely personal preoccupations,"<sup>42</sup> and that to "live for the moment is the prevailing passion—to live for yourself."<sup>43</sup> In his 1976 essay, "The Me Decade and the Third Great Awakening," Tom Wolfe asserted that, until the latter part of the twentieth century, people "have *not* lived their lives as if thinking, 'I have only one life to live.' Instead they have lived as if they are living their ancestors' lives and their offsprings' lives . . ."<sup>44</sup> By the 1970s the human potential movement had changed all that. Whether rooted in Carl Jung's work on the process of individuation or any other source, the 1970s produced a wave of absorption with self-development, perhaps best captured by mythic scholar Joseph Campbell's injunction to "follow your bliss."<sup>45</sup>

40. See generally EDWARD J. BLAKELY & MARY GAIL SNYDER, *FORTRESS AMERICA: GATED COMMUNITIES IN THE UNITED STATES* (1997), Haya El Nasser, *Gated Communities More Popular, and Not Just for the Rich*, USA TODAY, Dec. 15, 2002, available at [http://www.usatoday.com/news/nation/2002-12-15-gated-usat\\_x.htm](http://www.usatoday.com/news/nation/2002-12-15-gated-usat_x.htm) ("The desire to lock out the outside world cuts across all income groups, according to the first Census Bureau survey to measure how many Americans live in walled or gated communities.").

41. See, e.g., Tom Wolfe, *The Me Decade and the Third Great Awakening*, in MAUVE GLOVES & MADMEN, CLUTTER & VINE 126 (1976) (describing the 1970s as the "Me Decade"). The 1970s were, of course, the Me Decade, although some contend that the preoccupation with self has continued since then. See, e.g., Victor J. Stenger, *The Me Decade Continues*, <http://www.colorado.edu/philosophy/vstenger/RelSci/Me.html> ("[T]he decade of the 1980s was characterized by an unprecedented level of individual self-absorption.") (last visited Oct. 20, 2006) (on file with the Washington and Lee Law Review). Stenger is a professor emeritus of physics and astronomy, University of Hawaii, and adjunct professor of philosophy at the University of Colorado. Stenger Biography, <http://www.colorado.edu/philosophy/vstenger/> (last visited Oct. 20, 2006) (on file with the Washington and Lee Law Review).

42. CHRISTOPHER LASCH, *THE CULTURE OF NARCISSISM: AMERICAN LIFE IN AN AGE OF DIMINISHING EXPECTATIONS* 4 (1978) (describing the dying culture of competitive individualism).

43. *Id.* at 5.

44. Wolfe, *supra* note 41, at 166.

45. See, e.g., JOSEPH CAMPBELL, *PATHWAYS TO BLISS: MYTHOLOGY AND PERSONAL TRANSFORMATION* (David Kudler, ed., 2004) (suggesting that the myth offered a framework for personal growth and would lead to a life in tune with one's nature to a pathway of bliss). An even better illustration of the degree to which Campbell's trademark statement has achieved iconic status is to note that Amazon.com will sell you "Follow Your Bliss: 52 Inspiration Cards," containing pithy nuggets of wisdom from Joseph Campbell. Amazon Follow Your Bliss Cards, see [http://www.amazon.com/gp/product/1577315162/qid=1137622002/sr=1-1/ref=sr\\_1\\_1/104-1020953-1050355?s=books&v=glance&n=283155](http://www.amazon.com/gp/product/1577315162/qid=1137622002/sr=1-1/ref=sr_1_1/104-1020953-1050355?s=books&v=glance&n=283155) (last visited Oct. 20, 2006) (on file

Exploration of this exciting new frontier of the self did not end with the 1970s. The "Me Decade" grinds on and on, piling one decade after another in a new age of endless self-discovery and self-fulfillment. In the 1980s the famous study *Habits of the Heart*<sup>46</sup> documented American self-absorption and the malaise created by social isolation resulting from the inward search for self-fulfillment. The authors of *Habits* assert that "[i]ndividualism lies at the very core of American culture,"<sup>47</sup> but identify American individualism as characterized by four distinct strands: "biblical individualism," "civic individualism," "utilitarian individualism," and "expressive individualism."<sup>48</sup> Both Biblical and civic individualism place "individual autonomy in a context of moral and religious obligation."<sup>49</sup> By contrast, both utilitarian and expressive individualism see the "individual [as] prior to society, which comes into existence only through the voluntary contract of individuals trying to maximize their self-interest."<sup>50</sup> Utilitarian individualism "takes as a given certain basic human appetites and fears . . . and sees human life as an effort by individuals to maximize their self-interest relative to these given ends. . . . Utilitarian individualism has an affinity to a basically economic understanding of human existence."<sup>51</sup> Expressive individualism "arose in opposition to utilitarian individualism [and] holds that each person has a unique core of feeling and intuition that should unfold or be expressed if individuality is to be realized. . . . [It] shows affinities with the culture of psychotherapy."<sup>52</sup>

*Habits of the Heart* chronicles "the growing strength of modern individualism at the expense of the civic and biblical traditions"<sup>53</sup> and raises the question of "whether an individualism in which the self has become the main form of reality can really be sustained."<sup>54</sup> The authors of *Habits* conclude that the "quest for purely private fulfillment is illusory: it often ends in emptiness instead."<sup>55</sup> Rather, they conclude that "private fulfillment and public

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with the Washington and Lee Law Review).

46. ROBERT N. BELLAH, RICHARD MADSEN, WILLIAM M. SULLIVAN, ANN SWIDLER, & STEPHEN M. TIPTON, *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (updated ed. 1996) (studying American values and ideas).

47. *Id.* at 142.

48. *Id.* (listing the four traditions of individualism and noting their similarities and differences).

49. *Id.* at 143.

50. *Id.*

51. BELLAH ET AL., *supra* note 46, at 336.

52. *Id.* at 333–34 (emphasis omitted).

53. *Id.* at 143.

54. *Id.*

55. *Id.* at 163.

involvement are not antithetical." The *Habits* authors endorse the view that "the private and the public are not mutually exclusive, not in competition, [but] are, instead, two halves of a whole . . . [which] work together . . . to create and nurture one another."<sup>56</sup> The quandary presented is that although "perhaps only the civic and biblical forms of individualism—forms that see the individual in relation to a larger whole, a community and a tradition—are capable of sustaining genuine individuality and nurturing both public and private life[,]"<sup>57</sup> those forms are no longer realistically available: "[A] return to traditional forms would be to return to intolerable discrimination and oppression."<sup>58</sup> The question posed by *Habits* "is whether the older civic and biblical traditions have the capacity to reformulate themselves while simultaneously remaining faithful to their own deepest insights."<sup>59</sup> They conclude "that though the [Enlightenment] processes of separation and individuation were necessary to free us from the tyrannical structures of the past, they must be balanced by a renewal of commitment and community if they are not to end in self-destruction or turn into their opposites."<sup>60</sup> *Habits of the Heart* documents the increasing tendency of Americans in the 1980s to define themselves in splendid isolation from others and warns of the psychic poverty of doing so. Left unanswered was the question of how it is, if the self is socially constructed, that this increasing self-absorption came about.

A partial answer arrived with the publication of Robert Putnam's *Bowling Alone: The Collapse and Revival of American Community*,<sup>61</sup> written at the turn of the millennium, which purported to document the erosion of America's social capital—"social networks and the associated norms of reciprocity"<sup>62</sup>—in the latter part of the twentieth century. Putnam notes that social capital can take many forms, from formal to informal,<sup>63</sup> benign or malign,<sup>64</sup> and, most

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56. BELLAH ET AL., *supra* note 46, at 163 (quoting PARKER J. PALMER, *THE COMPANY OF STRANGERS: CHRISTIANS AND THE RENEWAL OF AMERICA'S PUBLIC LIFE* 31 (1981)).

57. *Id.* at 143.

58. *Id.* at 144.

59. *Id.*

60. *Id.* at 277.

61. ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000) (arguing that America has undergone a collapse of social capital in the last few decades).

62. *Id.* at 21.

63. *See id.* at 22 (contrasting such formal ties as the PTA with "a pickup basketball game").

64. *See id.* (noting a Ku Klux Klan leader's declaration, "Really, we're just like the Lions or the Elks . . .").

importantly, bridging and bonding.<sup>65</sup> Bridging social capital is "outward looking" and links people "across diverse social cleavages" for common purposes such as religious faith, social service, political change, or simple networking.<sup>66</sup> Bonding social capital is "inward looking," calculated to "reinforce exclusive identities and homogeneous groups," and is manifested by such groups as "ethnic fraternal organizations [and] exclusive country clubs."<sup>67</sup> In either case, however, social capital is entirely the product of a conception of self that is socially constructed. *Bowling Alone* both traces the decline of American civic engagement and attendant social capital and attempts to identify the factors that have produced that decline.<sup>68</sup> The most significant factor, according to Putnam, is generational change, with the remaining factors being the impact of television and other isolating electronic entertainment, economic pressures, and suburban sprawl, in descending order.<sup>69</sup> Putnam attributes about two-thirds of the trend toward isolation to the combination of electronic entertainment (particularly television and computer media) and generational change.<sup>70</sup> Putnam contends that the relative withdrawal of younger people is not entirely attributable to electronic media and that such media may account for the withdrawal of some older Americans.<sup>71</sup> It is also clear, however, that the ubiquity of television and other electronic entertainment media is a defining aspect of contemporary American life and that those most facile with these media are the young.<sup>72</sup> All of these media, but particularly television, are characterized by rapid and disjunctive imagery, a fragmentation of experience that is characteristic of the postmodern world.<sup>73</sup>

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65. *See id.* ("Of all the dimensions along which forms of social capital vary, perhaps the most important is the distinction between *bridging* (inclusive) and *bonding* (or exclusive).").

66. *See* PUTNAM, *supra* note 61, at 22–23 (discussing inclusive social capital and its sources).

67. *See id.* (discussing exclusive social capital as a component of self).

68. *See id.* at 31–180 (examining four primary sources for the decline of social capital and subsequent social and cultural impacts).

69. *See id.* at 283–84 (ranking the factors contributing to the decline of social capital and subsequent social and cultural impacts).

70. *See id.* at 284 (providing general statistical estimates on the influence of the media on social isolation).

71. *See* PUTNAM, *supra* note 61, at 284 (stating that television has affected both younger and older generations' community involvement).

72. *See id.* at 257 (discussing the amount of exposure to media the average sixteen year old experiences).

73. JERRY MANDER, *FOUR ARGUMENTS FOR THE ELIMINATION OF TELEVISION* 157–64 (1978) (characterizing television and its effects on viewers).

Although it might appear that the trend toward isolation and social disengagement is at odds with the postmodern contention that the self is necessarily socially constructed, that appearance is deceptive. *Bowling Alone* identifies a host of societal factors that operate to construct a socially disengaged self.<sup>74</sup> Moreover, an incoherent, disconnected culture is likely to enhance social isolation. Postmodernism embraces the incoherence of existence and celebrates its lack of meaning, so it follows that socially constructed postmodern man should be comfortable with a world of nonsense. He is likely to revel in his ability to retreat into a walled, gated compound at the wheel of a sleek Mercedes-Benz, setting his own terms for interaction with others. He is comfortable with a thoroughly mediated relationship with the larger world. "If this is nonsense, make the most of it," he might say. If all is nonsense, why not seek fulfillment in material possessions?

That postmodern world is reflected back to us through such media as computer games. Consider *The Sims*, a game published by Maxis, in which the Sims are computer people living in a world in which "everything is an object that yields a measurable benefit when some action is performed upon it."<sup>75</sup> Another person is merely a:

[C]onversational object that . . . is more or less analogous to the couch he's sitting on. . . . The Sims live in a perfect consumer society where more stuff makes you happier, period. There's nothing else. So your goals in SimLife are purely material: . . . more money . . . more furniture, a bigger house and more toys. . . . Even relationships, ultimately, are a means to that end. . . . Reproduction is an important game strategy because you need children to socialize with the neighbors' children so you can socialize with their parents, and you need to socialize with neighborhood parents to get ahead professionally.<sup>76</sup>

Lest one think *The Sims* are just a figment of a computer programmer's imagination, consider that in 1998 three-quarters of incoming UCLA freshmen declared that financial success was a very important personal objective.<sup>77</sup> In

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74. See PUTNAM, *supra* note 61, at 283 (listing four major factors leading to social disengagement).

75. See J.C. Herz, *The Sims Who Die with the Most Toys Win*, N.Y. TIMES, Feb. 10, 2000, at G10, available at <http://partners.nytimes.com/library/tech/00/02/circuits/articles/10game.html> (discussing the goals and scenarios present in *The Sims* computer game) (last visited Feb. 22, 2007) (on file with the Washington and Lee Law Review); see also Wikipedia Entry on The Sims, [http://en.wikipedia.org/wiki/The\\_Sims](http://en.wikipedia.org/wiki/The_Sims) ("The Sims is a strategic life simulation computer game . . . [and] is a simulation of the day-to-day activities of one or more virtual people (dubbed 'Sims') in a suburban household.") (last visited Oct. 20, 2006) (on file with the Washington and Lee Law Review).

76. Herz, *supra* note 75, at G10.

77. See PUTNAM, *supra* note 61, at 260 (providing statistical comparisons of community



1996 about twice as many adults "aspired to a lot of money" than those who "aspired to contribute to society."<sup>78</sup>

Some postmodern academics living with milk crate bookcases may express doubt that there is much linkage between postmodern thought and crass "me-first" materialism, but that simply represents the chasm between the intellectual construct of postmodernism and its popular application. Though *The Sims* is a parody of our culture, it is "also disturbing in its accuracy, to the extent that . . . we treat each other as objects, as a means to an end."<sup>79</sup> And we do. Contemporary culture is characterized by a relentless commodification of nearly everything.<sup>80</sup> Postmodern literary critic Frederic Jameson, for example, argues that in the postmodern era all human activities are commodified, reduced to their exchange or consumption value.<sup>81</sup> The process is ubiquitous: marriage, once thought to be a commitment "for better or worse," is a commodity to be discarded when one's partner fails to deliver on the implicit bargain; cultural traditions, once a folklore legacy, are now appropriated into the exchange economy;<sup>82</sup> childhood, once thought to be an innocent haven from the hurly-burly adult world,<sup>83</sup> has become commodified through fashion,<sup>84</sup> child beauty pageants,<sup>85</sup> and a broad range of other commercial exploitations of

values among college freshman).

78. See *id.* at 273 (finding that 63% of American adults want a lot of money; while 32% desire to contribute to society).

79. Herz, *supra* note 75, at G10.

80. Commodification is the process of turning something into a commodity—an article of exchange value—that was previously not treated as susceptible to commercial exchange. See *Commodification*, <http://www.marxists.org/glossary/terms/c/o.htm> (last visited Oct. 10, 2006) (defining the term as "the transformation of relationships, formerly untainted by commerce, into commercial relationships, relationships of buying and selling") (on file with the Washington and Lee Law Review).

81. See FREDERIC JAMESON, *POSTMODERNISM, OR, THE CULTURAL LOGIC OF LATE CAPITALISM* 387, 398 (1991) (discussing the emergence of commodification as a type of ideology).

82. See, e.g., SUSAN SCAFIDI, *WHO OWNS CULTURE? APPROPRIATION AND AUTHENTICITY IN AMERICAN LAW* 5–12 (2005) (discussing the appropriations of cultural traditions and symbols into the mainstream economy). Consider, for example, the commercial popularity of recordings of Western monks intoning Gregorian chants or Buddhist monks chanting in prayer.

83. The loss of childhood innocence cannot be attributed to postmodernism, however. Only in late modernity, and then only in wealthy industrial societies, were families sufficiently free of economic pressure to grant children a reprieve from adult labors. See DANIEL THOMAS COOK, *THE COMMODIFICATION OF CHILDHOOD* (2004) (discussing the change in the economic value of children between 1870 and 1930). But the commodification of *childhood* itself, a distinct category, is a postmodern phenomenon. See *id.* at 10–11 (discussing the growth of children's consumer culture).

84. Consider the rise of such niche retailing as "Baby Gap" stores.

85. See, e.g., Universal Royalty Beauty Pageants, <http://www.universalroyalty.com> (last

childhood.<sup>86</sup> Postmodern guru Jürgen Habermas sums it up when he asserts that the world of commodified exchange appropriates articles previously immune from exchange<sup>87</sup> and, I add, does so relentlessly.

Although modernists and premodernists find this condition disquieting and hunger for some connection to others and to forces larger than themselves that lie outside the realm of commodities, postmodern man delights in the incoherence of it all. Why bother about social connections if they are as meaningless as everything else; unless, like *The Sims*, there is an instrumental self-regarding reward for such connections? The resulting irony is that postmodern culture tends to exacerbate trends toward an autonomous self, but that very autonomy is socially constructed and thus far more illusory than real. Perhaps this paradox, as well as the continuing divide between modern, premodern, and postmodern sensibilities, helps to explain why current trends in constitutional law appear simultaneously to rest on the notion of an autonomous self and a socially constructed identity.<sup>88</sup>

There are no doubt other aspects of postmodern theory that can be identified in our culture,<sup>89</sup> but I need not belabor the point. These salient

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visited Oct. 10, 2006) (providing general child pageant information) (on file with the Washington and Lee Law Review); Sunburst USA Model Search Contest, <http://www.pageantinfo.com> (last visited Oct. 10, 2006) (same) (on file with the Washington and Lee Law Review); see also William J. Cromie, *The Whys and Woes of Beauty Pageants*, HARV. UNIV. GAZETTE, June 8, 2000, available at <http://www.news.harvard.edu/gazette/2000/06.08/beauty.html> (last visited Oct. 24, 2006) (discussing the pressures and stereotypes prevalent at beauty pageants) (on file with the Washington and Lee Law Review); Kareen Nussbaum, *Children and Beauty Pageants*, available at <http://www.minorcon.org/pageants.html> (last visited Oct. 24, 2006) (discussing the history and evolution of beauty pageants and their effects on youth participants) (on file with the Washington and Lee Law Review).

86. See COOK, *supra* note 83, at 9 (discussing the rise of a commercial industry which provides goods exclusively for children).

87. JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION, VOLUME TWO: LIFEWORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON* 322 (Thomas McCarthy trans., 1987). Habermas notes:

The media of money and power can regulate the interchange relations between system and lifeworld only to the extent that the products of the lifeworld have been abstracted, in a manner suitable to the medium in question, into input factors for the corresponding subsystem, which can relate to its environment only through its own medium.

*Id.*

88. See *infra* notes 296–341 and accompanying text (discussing current trends in constitutional law).

89. Consider, for example, the familiar example of Frank Gehry's architecture, which appears to many observers to be a jumble of fragmented, unrelated pieces, as if some chaotic and random force might have deposited the structure. "After the Tornado Passed" might be a label for the genre. See also Nicolai Ouroussoff, *Art and Architecture, Together Again*, N.Y.

features of popular postmodernism, if you will, are sufficient to provide a foundation for consideration of the question of whether, and to what extent, constitutional law reflects the postmodern sensibility. A word of caution at the outset: I do not claim that the bits and pieces of constitutional law that are examined in the next section constitute a complete survey. My aim in this Article is to provide sufficient illustration of the thesis to provoke further commentary and reflection.

### *III. Postmodern Influences in Constitutional Law*

Our culture is not monolithically postmodern. Even if our culture has incorporated the fundamental tenets of postmodern thought, however, there are many possible reasons why constitutional law might not reflect that fact.<sup>90</sup> There is a long tradition of constitutional adjudication which reflects past cultural, doctrinal, or textual understandings.<sup>91</sup> Constitutional interpretation derives from standard modes of argument: textual, structural, precedential, historical, practical, and a sense of cultural values.<sup>92</sup> Although people may disagree about the relative importance of these factors, almost all serious constitutional arguments draw upon these sources.<sup>93</sup> Of these factors, only the last overtly invites cultural norms into the constitutional conversation.<sup>94</sup> Thus, if postmodern cultural sensibilities influence constitutional law, we should expect that influence to be felt in the way in which the Court employs these standard forms of argument. Text is often vague and elastic.<sup>95</sup> Structure may imply answers but is rarely dispositive.<sup>96</sup> History is, itself, a matter of

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TIMES, Jan. 19, 2006, at B1 (depicting a rendering of the new Bowery home of the New Museum of Contemporary Art, currently under construction, which "evokes a stack of mismatched boxes on the verge of toppling over.").

90. See PHILIP BOBBITT, CONSTITUTIONAL FATE 3–23 (1982) (discussing the various influences on the development of constitutional law and their impact on contemporary jurisprudence).

91. See *id.* (discussing the historical element present in the evolution of practically all constitutional jurisprudence).

92. See *id.* at 3–123 (presenting an analysis of the six primary modes of constitutional argument and interpretation).

93. See *id.* at 1–8 (discussing the general sources of constitutional argument and interpretation).

94. See *id.* at 93–97 (discussing the elements of an ethically-based constitutional argument).

95. BOBBITT, *supra* note 90, at 25–39 (discussing the application of a textual argument and its inherent problems).

96. See *id.* at 74–93 (discussing the application of structural arguments and their inherent

interpretation and informed conjecture and, in any case, leaves unresolved the question of whether it should bind us now.<sup>97</sup> Matters of practicality are matters of judgment, often informed but rarely controlled by current cultural and political trends.<sup>98</sup> *Stare decisis* is at its weakest in constitutional cases, where the Court's "mistakes cannot be corrected by Congress."<sup>99</sup> Indeed, the Supreme Court provides frequent and recent reminders of its willingness to depart from precedent.<sup>100</sup>

Thus, if postmodernism is affecting constitutional interpretation, its effect should be seen in the way the Court uses its traditional tools of adjudication. One measure of that phenomenon is a recent appraisal of the Court's work by Judge Richard Posner, who contends that the Supreme Court is a "political court"<sup>101</sup> in the sense that constitutional adjudication, its primary task, inherently involves the use and exercise of "discretionary power as capacious as a legislature's [discretion]."<sup>102</sup> Because most of the truly interesting and controversial constitutional "cases occupy a broad open area where the conventional legal materials of decision run out [they] can be decided only on the basis of a political judgment, and a political judgment cannot be called right or wrong by reference to legal norms."<sup>103</sup> Restraints upon the exercise of this judgment do exist, but they are not powerful. To Judge Posner, the principal implication from this state of affairs is that the Court (and individual Justices)

flaws).

97. *See id.* at 9–25 (discussing the rationale of the historical argument and its apparent strength).

98. *See id.* at 59–74 (discussing the volatility of a prudential approach and the effect of time on such arguments and decisions).

99. *Vieth v. Jubelirer*, 541 U.S. 267, 305 (2004) (holding that the Constitution provides equal protection only to persons and does not guarantee equal representation to political parties, therefore precluding the existence of alleged political gerrymandering from judicial intervention); *see also Payne v. Tennessee*, 501 U.S. 808, 828 (1991) ("*Stare decisis* is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.'" (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940))). "This is particularly true in constitutional cases, because in such cases 'correction through legislative action is practically impossible.'" *Id.* (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting)).

100. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 574 (2005) (holding that the execution of minors violates the Eighth Amendment's cruel and unusual punishments clause and overruling *Stanford v. Kentucky*, 492 U.S. 361 (1989)); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding that criminal punishment of homosexual sodomy offends the substantive component of due process and overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

101. Richard Posner, *The Supreme Court, 2004 Term, Foreword: A Political Court*, 119 HARV. L. REV. 31, 39 (2005).

102. *See id.* at 40 (discussing the discretion involved in deciding constitutional cases).

103. *Id.*

must choose either "to accept the political character of constitutional adjudication wholeheartedly" and to act as a legislator<sup>104</sup> or, "feeling bashful about being a politician in robes, to set . . . a very high threshold for voting to invalidate on constitutional grounds the action of another branch of government."<sup>105</sup> Judge Posner prefers judicial modesty, which he ultimately unites with pragmatic concerns to create a Posnerian judicial pragmatism that is reluctant to exercise the veto cudgel of judicial review.<sup>106</sup>

I have neither a quarrel with Judge Posner nor the desire to debate his prescription for the political nature of constitutional adjudication; rather, I prefer to rely upon his claim that political judgment is inherent in constitutional adjudication as a prelude to my examination of some areas of constitutional law that reflect the postmodern sensibility of our culture. When all is said and done, one might say, "Well, of course; it's just further proof that Posner is correct that constitutional law is political." That response would be superficial. My aim is to demonstrate that the exercise of the judicial discretion inherent in making constitutional law, whether of a robust legislative sort or a modest, pragmatic sort, is beginning to reflect the uncertainty, indeterminacy, and chaotic nature of postmodern thought.

#### A. *Lawrence v. Texas and the Illegitimacy of Morality*

When *Lawrence v. Texas*<sup>107</sup> overruled *Bowers v. Hardwick*<sup>108</sup> in the course of finding that Texas's ban on homosexual sexual behavior violated a liberty interest protected by the Fourteenth Amendment's due process clause, the Court's doctrinal mechanism for doing so was to apply minimal scrutiny and declare that the Texas statute was void because it "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."<sup>109</sup> Although the Court in *Lawrence* did not specify what interests Texas advanced in

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104. *Id.* at 54.

105. *Id.*

106. Posner, *supra* note 101, at 102 (advocating a judicial pragmatism that is restrained in the exercise of its power).

107. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding that criminal punishment of homosexual sodomy offends the substantive component of due process).

108. See *Bowers v. Hardwick*, 478 U.S. 186, 198 (1986) (upholding a Georgia statute criminalizing sodomy).

109. *Lawrence*, 539 U.S. at 578.

support of its statute, at oral argument counsel for Texas asserted that the state's interest in proclaiming and enforcing a majority vision of morality was sufficient,<sup>110</sup> as it was in *Bowers*.<sup>111</sup> The Court thus rejected promotion of morality as a legitimate state interest, at least when that interest is pitted against state "intrusion into the personal and private life of the individual."<sup>112</sup> Although *Lawrence* raises a variety of issues,<sup>113</sup> I wish to examine only the implications of *Lawrence* that bear upon the claim that the case illustrates the effect of postmodernism on constitutional law.

*Lawrence* implies that unadorned promotion of morality can never be asserted successfully as a legitimate state interest. If so, all laws that have *only* a moral foundation must be voided under minimal, or "rational-basis," scrutiny, the default level of review in American constitutional law. An early test of that premise was *United States v. Extreme Associates, Inc.*,<sup>114</sup> in which a federal district judge dismissed an indictment for violating federal obscenity laws on the ground that the only interest served by those laws, at least as applied to the defendants' claim that they and their customers had a liberty interest protected by substantive due process to buy and sell obscenity, was the promotion of morality.<sup>115</sup> The Third Circuit reversed, but in an opinion that merely emphasized the Supreme Court's reminder to lower courts that they should not "conclude our more recent cases have, by implication,

110. See *Justices Hear Oral Argument on Texas Homosexual Sodomy Law*, 71 U.S.L.Wk. 3617, 3618 (2003) (stating that counsel for the respondent asserted that "morality is the basis for the law"). In her concurring opinion, Justice O'Connor noted that Texas argued "that the statute satisfies rational basis review because it furthers the legitimate governmental interest of the promotion of morality." *Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring).

111. See *Bowers*, 478 U.S. 186, 196 (1986). The Court stated:

[T]he presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable . . . is said to be an inadequate rationale to support the law [but law] is constantly based on notions of morality . . . . We do not agree, and are unpersuaded that . . . sodomy laws should be invalidated on this basis . . . .

*Id.*

112. *Lawrence*, 539 U.S. at 578.

113. See, e.g., Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945, 946 (2004) (discussing the Supreme Court's adoption of the "form of tiered scrutiny but snubb[ing] its substance").

114. See *United States v. Extreme Assocs.*, 352 F. Supp. 2d 578, 595–96 (W.D. Pa. 2005) (dismissing an indictment based on an unconstitutional federal obscenity statute), *rev'd* *United States v. Extreme Assocs.*, 431 F. 3d 150 (3d Cir. 2005).

115. See *Extreme Assocs.*, 352 F. Supp 2d at 595–96 (dismissing an indictment based upon a federal obscenity statute which violated due process).

overruled an earlier precedent,<sup>116</sup> thus leaving the entire underlying issue for later resolution by the Supreme Court.<sup>117</sup>

Initially, obscenity was denied First Amendment protection because it was "utterly without redeeming social importance."<sup>118</sup> Although this may have been a tacit embrace of moral objections to obscenity, in time the Court explicitly recognized the "*social interest in order and morality*"<sup>119</sup> as the legitimate basis for excluding obscenity from the free expression guarantee.<sup>120</sup> Although *Extreme Associates* correctly observed that the Supreme Court has expressly concluded that neither free expression nor substantive due process protects the sale of obscenity to willing, adult purchasers,<sup>121</sup> the Court's decisions predate

116. *Agostini v. Felton*, 521 U.S. 203, 237 (1997); *see also* *Rodriguez de Quijas v. Shearson/Am. Express Inc.*, 490 U.S. 477, 484 (1989) ("[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

117. *See* *United States v. Extreme Assocs.*, 431 F.3d 150, 155–59 (3d Cir. 2005) (holding constitutional the statutes forming the basis for the dismissal of the indictment).

118. *Roth v. United States*, 354 U.S. 476, 484 (1957) (holding that federal and state codes governing the distribution of explicit material neither offend constitutional safeguards against convictions based upon material protected under the First Amendment, nor fail to give citizens inadequate notice of what is prohibited).

119. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61 (1973) (quoting *Roth v. United States*, 354 U.S. at 485) (holding that obscene materials do not acquire constitutional immunity from regulation simply because they are shown only to consenting adults) (emphasis added in *Roth*); *see also* *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting) (stating that obscenity may be banned because there is a "right of the Nation and of the States to maintain a decent society").

120. *See* *Miller v. California*, 413 U.S. 15, 24 (1973) (defining obscenity to include sexually explicit, prurient, and patently offensive material that, "taken as a whole, lacks *serious* literary, artistic, political, or scientific value") (emphasis added). As Justice Brennan pointed out in his dissent in *Paris Adult Theatre I*, the reason obscenity was denied constitutional protection in *Roth* was because it utterly lacked any redeeming social value. *Paris Adult Theatre I*, 413 U.S. at 97 (Brennan, J., dissenting). A necessary corollary to the Court's approach to obscenity in *Miller* was the creation of a new rationale for obscenity's devalued constitutional status. The majority in *Paris Adult Theatre I* offered several possibilities: some utilitarian, "the tone of commerce in the great city centers," *id.* at 58; some based on moral notions, "a legislature could legitimately act . . . to protect '*the social interest in order and morality*,'" *id.* at 61 (quoting *Roth*, 354 U.S. at 485 (emphasis added in *Roth*)); and some based on a combination of morals and utilitarianism, "commerce in obscene books, or public exhibitions of [obscenity], have a tendency to exert a corrupting and debasing impact leading to antisocial behavior." *Id.* at 63.

121. *See* *United States v. Extreme Assocs., Inc.*, 431 F.3d 150, 156–60 (3rd Cir. 2005) (discussing *United States v. Reidel*, 402 U.S. 351, 352–56 (1971) (finding that the Constitution does not protect distribution of obscene material to willing adult recipients and that First Amendment protection of private possession of obscenity does not extend to distribution); *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 376 (1973) (declaring that the right to private possession and receipt of obscenity does not create a right to distribute obscenity

*Lawrence's* repudiation of morality as a legitimate state objective. At some point the Supreme Court is likely to confront the issue raised in *Extreme Associates*. When it does so, it will be forced to decide whether morality alone may never constitute a legitimate state objective, is illegitimate only when advanced to infringe upon the "personal and private life of the individual"<sup>122</sup> (however bounded that may be), or is illegitimate only when used to support criminal prohibition of private intimate sexual behavior between consenting adults of the same sex that is but "one element in a personal bond that is more enduring."<sup>123</sup>

Nor is obscenity the only matter that is susceptible to challenge in the wake of *Lawrence*. In his *Lawrence* dissent, Justice Scalia asserted that the result of *Lawrence* would be to invalidate "[s]tate laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity."<sup>124</sup> This will be so if such laws are insupportable on any ground other than the promotion of morality and if the Court concludes that such an objective can never be legitimate. But it will not be so if the Court gives effect to the caveats it raised in *Lawrence*, which suggest that *Lawrence* ought not be invoked to void laws designed to address "public conduct or prostitution,"<sup>125</sup> to protect minors<sup>126</sup> or persons who are in relationships in which they are vulnerable or "might be . . . coerced,"<sup>127</sup> or to prevent "injury to a person"<sup>128</sup> or "abuse of an institution the law protects."<sup>129</sup> Of course, the focus on protection of minors, the vulnerable or coerced, and the prevention of injury indicates that these caveats are founded upon recognition of the legitimacy of utilitarian, rather than moral, reasons for regulation. Thus, laws prohibiting bigamy, adult incest, adultery, and fornication might all be valid, at least in some circumstances. In a similar utilitarian vein, laws banning

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or to import it from abroad); *United States v. 12 200-Ft. Reels of Super 8mm Film*, 413 U.S. 123, 128 (1973) (stating that Congress can bar the importation of obscenity even if it is imported for private use); *United States v. Orito*, 413 U.S. 139, 141–43 (1973) (denying substantive due process protection for the claimed right to transport or distribute obscenity); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66 (1973) (finding that past substantive due process cases do not include the right to watch obscene films in public within the right to privacy).

122. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

123. *Id.* at 567.

124. *Id.* at 590 (Scalia, J., dissenting).

125. *Id.* at 578.

126. *See id.* ("The present case does not involve minors.").

127. *Lawrence*, 539 U.S. at 578.

128. *Id.* at 567.

129. *Id.*



fornication, adultery, and bigamy might also be enforced on the ground that they prevent abuse of the institution of marriage, which is surely the principal "institution the law protects" that Justice Kennedy had in mind when he composed the majority opinion in *Lawrence*. Laws prohibiting bestiality might be supportable on the utilitarian ground that it is possible that venereal diseases may be transmitted from animals to humans. Perhaps prostitution may be banned on similar public health grounds.

Are any of the *Lawrence* caveats supportable on purely moral grounds? In the unlikely event that there are any laws banning masturbation, such laws would appear to be void unless the concept of preventing "injury to a person" is read to include injury to the actor and, even then, the only plausible injury is a moral one. That would seem to be an insufficient basis to invoke the "injury to persons" caveat, however, because the Court long ago in *Roth* expressly repudiated the rationale advanced in *Regina v. Hicklin*<sup>130</sup> for outlawing obscenity: "the tendency . . . to deprave and corrupt those whose minds are open to such immoral influences."<sup>131</sup> *Stanley v. Georgia*,<sup>132</sup> in which the Court held that persons have a right grounded in both privacy and free expression to possess obscene material in their own home, erased any lingering doubt about the sufficiency of the interest of preventing self-pollution.<sup>133</sup> Perhaps morality alone is enough to suppress obscene or indecent "public conduct."<sup>134</sup> If so, we must confront the spectacle conjured by Chief Justice Burger in *Paris Adult Theatre I v. Slaton*:<sup>135</sup> a couple "locked in a sexual embrace at high noon in Times Square."<sup>136</sup> Although there may be some utilitarian reasons to ban this behavior, (such as its distraction to passing motorists, with attendant enhanced

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130. *Regina v. Hicklin*, [1868] 3 L.R.Q.B. 360 (holding the test of obscenity to be whether the matter described: 1) tends to corrupt those open to immoral influence that may actually obtain the material, 2) is intended to corrupt public morals, and 3) the material is obscene).

131. *Id.* at 371; see *Roth v. United States*, 354 U.S. 476, 489 (1954) ("The *Hicklin* test . . . must be rejected as unconstitutionally restrictive of the freedoms of speech and press.").

132. *Stanley v. Georgia*, 394 U.S. 557 (1969).

133. See *Osborne v. Ohio*, 495 U.S. 103, 108 (1990) (holding that *Stanley* does not extend to private possession of child pornography). Note that the case does not undercut this conclusion because the Court's rationale for its decisions was the same utilitarian concerns that motivated its decision in *New York v. Ferber*, 458 U.S. 747 (1982). See *Ferber*, 458 U.S. at 764 (declaring that child pornography is expelled from the First Amendment in order to prevent the harm to children resulting from its production); *Osborne*, 495 U.S. at 109–11 (pointing out that the statute at issue did not seek to generally prohibit possession of obscene material in the home but instead sought to prevent the harm to children caused by the production of child pornography).

134. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

135. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

136. *Id.* at 67.

risk of traffic accidents), it is far more likely that the real objection to such public displays is to protect the moral and aesthetic sensibilities of the public.

Finally, lying wholly outside the *Lawrence* caveats are any number of laws that outlaw actions that primarily, if not exclusively, injure nobody other than those who consent to the prohibited behavior. Such laws include bans on duels, even absent physical injury to anyone,<sup>137</sup> and various animal spectacles such as bearbaiting, cockfighting, and dogfights,<sup>138</sup> which are "prohibited only in part out of compassion for the suffering animals; the main reason they were abolished was because it was felt that they debased and brutalized the citizenry who flocked to witness such spectacles."<sup>139</sup> Though one might imagine some utilitarian reasons for banning these activities, perhaps by analogy to the secondary effects doctrine in free speech, the principal reason for invoking criminal sanctions is to express moral disapproval.

The manner in which the Court deals with the issue of the legitimacy of state promotion of morality will furnish additional data by which to assess the influence of postmodern thought on its constitutional adjudication. A conclusion that the use of law to preserve the majority's sense of morality is illegitimate assumes that no moral perspective can be privileged. If no moral perspective is privileged, it must be the case that there is no moral perspective that is absolutely and universally true, or at least none that we can locate. That, of course, is a fundamental tenet of postmodern thought.

One may glean further evidence of the Court's susceptibility to postmodern thought from the way it deals with the intersection of its suggestion that morality may be sufficient to support regulations of public conduct and its holding that morality is insufficient to support intrusions on "the personal and private life of the individual."<sup>140</sup> To illustrate the problem, consider South Dakota's recent change of the elements of its crime of public indecency. Before July 1, 2006, a person in South Dakota committed the crime of public indecency if, "with an immoral purpose" he or she "exposes his or her anus or genitals in a public place where another may be present who will be offended or alarmed by the person's act,"<sup>141</sup> but after that date he or she will commit the

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137. See, e.g., MISS. CODE ANN. § 97-39-1 (2005) (imposing criminal penalties for engaging in a duel); OKLA. STAT. tit. 21, § 662 (2005) (same); R.I. GEN. LAWS § 11-12-1 (2006) (same).

138. See, e.g., NEB. REV. STAT. §§ 28-1004, 28-1005 (2005) (defining the activities of bearbaiting, cockfighting, and dogfighting, making it a misdemeanor to engage in or be present at these activities, and making it a felony if one violates the statute a second time).

139. *Paris Adult Theatre I*, 413 U.S. at 68 n.15 (quoting IRVING KRISTOL, ON THE DEMOCRATIC IDEA IN AMERICA 33 (1972)).

140. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

141. S.D. CODIFIED LAWS § 22-24-1.1 (2006).

crime only "if the person, under circumstances in which that person knows that his or her conduct is likely to annoy, offend, or alarm some other person, exposes his or her anus or genitals in a public place where another may be present who will be annoyed, offended, or alarmed by the person's act."<sup>142</sup> South Dakota's substitution of the actor's knowledge "that his or her conduct is likely to annoy, offend, or alarm some other person" for the actor's "immoral purpose" as an element of the offense, may suggest that the South Dakota legislature is skittish about the effect of *Lawrence* on its public indecency statute and thinks that the new term is sufficiently utilitarian to pass constitutional muster, or (which is much the same), that the new term is merely a restatement of immoral purpose in a utilitarian key. Whatever South Dakota's intentions may be, what is likely to be the Court's reaction to the application of this statute to a couple who have consensual oral sex in their top-down convertible on a warm July afternoon while cruising along Interstate 90? If the statute is validly applied, is it because South Dakota's purpose is sufficiently utilitarian, or is it because it is legitimate for South Dakota to promote the public's sense of morality in this instance? If the answer is that the law is now sufficiently utilitarian to be valid, what is the utile end sought to be accomplished by punishing conduct that annoys, offends, or alarms others? Is not deterrence of behavior that is likely to arouse such reactions grounded on promotion of the majority's moral sensibilities? Or would the Court conclude that the law may validly be applied because this involves public conduct?

If the Court were to conclude that promotion of morality is legitimate when applied to public conduct, it would simply have transposed Chief Justice Burger's couple from Times Square to the Dakota prairie. Such a move requires an explanation of why morality is adequate when invoked to curb conduct in public, but inadequate to punish the same conduct engaged in privately. Surely the moral injury is much the same to those who find such sexual conduct immoral; the difference must lie in the utilitarian concerns that attend public conduct and, as noted above, those utile objectives seem to be dubious.

If the Court were to conclude that the promotion of morality is illegitimate only when it invades "the personal and private life of the individual,"<sup>143</sup> it must necessarily determine when such invasion has occurred. If it elides confrontation with that issue by resort to the distinction between the individual's private life and public conduct, it will simply have retreated into utilitarian justifications. If the Court tackles the issue, it will be forced to

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142. *Id.* § 22-24-1.2.

143. *Lawrence*, 539 U.S. at 578.

conclude either that morality alone can never justify invasion into personal choices or to describe the conditions that validate morality-based incursions into private and personal choices. The former outcome has been discussed; the latter presents at least three possibilities.

First, the legitimacy of a moral justification may depend upon the purpose for which it is invoked,<sup>144</sup> but, if so, the Court will have subscribed to the view that moral claims lack universality. Some moral claims *are* better than others, but a rejection of some moral positions and acceptance of others based on expediency or simple preference not only lacks any objective foundation, it requires some principle by which to justify the selection of preferred moral claims. The criterion cannot be public sentiment or the Court in *Lawrence* would have upheld Texas's statute. I do not condemn such a process; I claim only that it is quite postmodern.

Second, the Court may decide that morality is always an inadequate justification and sort private and personal actions into those that are insufficiently private and those that are sufficiently personal and private to withstand regulation. Postmodern thought contends that the distinction between the public and private is illusory,<sup>145</sup> thus, this choice is unlikely if the Court is besotted with postmodernism. Nonetheless, in *Lawrence* the Court drew a distinction between public and private conduct, and this even-more-subtle distinction is not implausible. Some personal and private conduct may not be sufficiently personal and private. This outcome involves considerable sleight-of-hand shuffling of morality, utility, and the concepts of public and private conduct. That would render doctrine in this area even more uncertain and contingent than now, but unbounded contingency may be at the heart of the post-*Lawrence* world and unbounded contingency is central to postmodern thought.

The final possibility is that the Court would declare that the illegitimacy of governmental promotion of morality is confined to the facts of *Lawrence*. Were the Court to do so, it might be said that the Court simply made a moral judgment: hounding gays and lesbians through criminal prosecution is immoral and unjust. Of course, there would remain the problem of justifying the Court's moral judgment as its source of constitutional law<sup>146</sup> but putting that

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144. *See id.* at 571–78 (declaring that the state could not criminalize private acts of same sex sodomy).

145. *See, e.g.*, MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 103 (1987) (noting that critical legal studies commentators find mainstream notions of a public/private distinction to be meaningless because the public and private cannot be easily separated).

146. Ronald Dworkin is the leading advocate of this version of constitutional adjudication. This is a debate into which I need not enter for purposes of this paper.

aside, we would still be left with the problem of why that moral judgment did not compel a conclusion that such protected intimacies are a constitutionally fundamental right. Reading *Lawrence* as an exercise in moral judgment also requires the Court to distinguish between those moral judgments that trump democratic preferences and those that do not.<sup>147</sup> If *Lawrence* was a moral judgment it was an uncommonly tepid one, and if it was not a moral judgment but simply a conclusion that public morality has no legitimate role to play in these narrow circumstances, it is not clear why the promotion of public morality is so narrowly illegitimate. At bottom, then, no matter how these post-*Lawrence* possibilities are resolved, *Lawrence* leads to the conclusion that the Court surely does not envision moral principles as absolute and unchanging. Whether it is consciously celebrating a fragmented and chaotic moral landscape, or merely accepting it as a reality, is harder to answer. No matter which outcome results, the rationale employed necessarily is highly contingent, provisional, subjective, and fragmented. Just as all roads once led to Rome, so all the roads that head out from *Lawrence* seem to converge on the postmodern city.

### B. *The Incoherence of Tiered Scrutiny*

The recurring tropes of postmodernism are fragmentation, randomness, contingency, and provisionality. Postmodernism celebrates these qualities; modernism seeks their cure. In the rise and decline of tiered scrutiny, we can see a distinct progression from modernism to postmodernism.

During the twentieth century, constitutional law confronted "the problem of how to mediate the presumed validity of government action and the presumptive primacy of individual rights guaranteed by the Constitution."<sup>148</sup> The Court brought a modern sensibility to bear upon this issue and solved it by inventing tiered scrutiny, which "was held together by the idea that courts could detect which legislative or executive actions were presumptively void, and subject them to searching inquiry with the burden of justification placed squarely on the government."<sup>149</sup> The occasions for discharging that task

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147. For example, *Lawrence* thus becomes a moral judgment that governments may not prohibit private, adult, consensual sexual conduct between homosexual adults, but it is most improbable that the Court would make a similar moral judgment to protect private, adult, consensual use of tobacco products.

148. Massey, *supra* note 113, at 945.

149. *Id.*

became more frequent as government exercised its regulatory power ever more broadly. Thus, it is hardly surprising that:

[T]iered scrutiny assumed ever increasing complexity. Intermediate scrutiny joined strict scrutiny and the default level, minimal scrutiny. Debate ensued concerning whether courts should assess the legislature's hypothetical purposes, stated purposes, or engage in a judicial quest for its actual purposes. Rarefied discussion of the relative importance of governmental objectives became a staple of tiered scrutiny, as did fine distinctions concerning the closeness of the fit between the challenged means and the government's objectives. Inevitably, the discussion broadened to include the appropriate method for locating those liberties deemed so fundamental that their invasion by government ought to be treated as presumptively unlawful.<sup>150</sup>

That process was a quintessentially modern one. Method was imposed on a fractious reality, in order to bring doctrinal and theoretical order out of the apparent chaos of the multiple possibilities presented by the clash between presumptively valid regulation and an expanding sense of constitutionally protected liberties. But there may have been madness in the method, for the apparatus of tiered scrutiny has become creakier, possibly groaning from the stress of its own weight.

Tiered scrutiny assumed the existence of consistent and ready markers to identify governmental acts that were so strongly presumed to be void that they should be subject to strict scrutiny (call them "red flags"), and other such markers to identify governmental acts that were less strongly presumed to be void and thus subject to intermediate scrutiny ("yellow flags"). Everything else got a "green flag," the presumption of validity that could only be overcome by proof of either the lack of any legitimate government interest or that the action was not rationally related to the accomplishment of any legitimate purpose. As the modern sensibility strived to refine this taxonomy, it experienced a bit of color blindness. Some green flags began to assume a jaundiced hue,<sup>151</sup> and as those flags became ever more yellow some observers discerned a

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150. *Id.*

151. *See, e.g.,* *Reed v. Reed*, 404 U.S. 71, 76–77 (1971) (voiding Idaho's automatic preference for men as administrators of intestate estates as "arbitrary" and irrational); *Jimenez v. Weinberger*, 417 U.S. 628, 632–37 (1974) (employing minimal scrutiny to conclude that stricter eligibility requirements for illegitimate children to receive benefits as a result of their parent's disability violates equal protection).

very reddish tint to them,<sup>152</sup> but in the end they settled into the yellow band of the spectrum.<sup>153</sup>

Reliance on such markers was not sufficient to deal with the problems tiered scrutiny purported to solve. Over time, the category of presumptively valid regulations began to assume a kaleidoscopic quality. Some argued that a government's legitimate purpose for acting should be located by reference to the purposes stated by the legislature; others contended for the actual purposes of the legislation, and even more asserted that any conceivable purpose, however outlandish or hypothetical, would suffice.<sup>154</sup> These difficulties were compounded by the propensity of the Court to shift from one source of

152. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973) (Brennan, J.) (plurality opinion) (arguing that sex should constitute a suspect classification for equal protection purposes, thus triggering strict scrutiny); cf. *Mathews v. Lucas*, 427 U.S. 495, 518–19 (1976) (Stevens, J., dissenting). Stevens stated:

The Court recognizes "that the legal status of illegitimacy . . . is, like race or national origin, a characteristic determined by causes not within the control of the illegitimate individual [that] bears no relation to the individual's ability to participate in and contribute to society . . . [and that] imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing". . . . It seems rather plain to me that this premise demands a conclusion that the classification is invalid unless it is justified by a weightier governmental interest than merely "administrative convenience."

*Id.*

153. See *Craig v. Borden*, 429 U.S. 190, 197 (1976) (declaring that classifications based on sex are presumptively violative of the Equal Protection Clause, but that the government may justify such classifications by proving that they are substantially related to an important state interest); *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (noting that classifications based on legitimacy are presumptively violative of the Equal Protection Clause but that they may be justified by meeting the burden of intermediate scrutiny).

154. See *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (arguing that where there exist "plausible reasons" for legislative action, even if those reasons are not articulated anywhere in the legislative record, the search for a conceivable, hypothetical purpose is at an end); cf. *id.* at 180–81 (Stevens, J., concurring) (agreeing with Justice Brennan that simply looking for a conceivable or plausible reason for legislative action is an insufficient standard of judicial review and arguing for the requirement of "a correlation between the classification and either the actual purpose of the statute or a legitimate purpose that we may reasonably presume motivated an impartial legislature"); *id.* at 186 (Brennan, J., dissenting) (criticizing the opinion of the Court for declaring tautologically that the "'plain language of [the statute]' marks the beginning and the end of our inquiry"). The import of Rehnquist's tautology was simply that if plausible, conceivable (albeit hypothetical) purposes support a legislative classification, that minimal scrutiny is satisfied. Justice Brennan argued that courts should start with the legislatively stated purpose, not any conceivable purpose, and uphold classifications that rationally further such purposes. *Id.* at 188. But when challenged classifications are "either irrelevant to or counter to that purpose," Brennan contended that courts may uphold such classifications only if they are "rationally related to achievement of an *actual* legitimate governmental purpose." *Id.* at 188.

identifying governmental purpose to another, and the lack of any general principle for explaining when this shift should occur. Two classic examples are *United States Department of Agriculture v. Moreno*<sup>155</sup> and *Romer v. Evans*.<sup>156</sup> In *Moreno*, the Court dismissed arguments that the statutory ban on receipt of food stamps by households composed of unrelated persons was rationally related to the purpose of minimizing fraud by declaring that the ban was "clearly irrelevant to the stated purposes" of the food stamp program, which Congress had said was to alleviate hunger and malnutrition and strengthen the agricultural economy.<sup>157</sup> Because Congress's *stated* purpose was simply not served by the prohibition, the Court then searched for Congress's *actual* purpose—a purpose deduced from the legislative history to be "to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program."<sup>158</sup> That "actual" purpose, derived in part by reference to statutory text and in part by sleuthing through the legislative history, was then declared to be illegitimate: A "bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* government interest."<sup>159</sup>

In *Romer*, the Court voided a Colorado constitutional amendment that barred any unit of Colorado government from recognizing sexual orientation as a basis for asserting any "protected status or claim of discrimination."<sup>160</sup> Its method of doing so was first to declare that Colorado's hypothetical and conceivable purposes—preservation of associational freedom and conservation of scarce resources to combat more inimical forms of discrimination—were incredible given the breadth of the disability Colorado imposed on homosexuals—the loss "even of the protection of general laws and policies that prohibit arbitrary discrimination" that might be based on sexual orientation.<sup>161</sup> Freed of the constraints of hypothetical and conceivable purposes, the Court determined that the actual intent of the Colorado electorate was hostility toward

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155. *U. S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 532–33 (1973) (declaring a provision of the Food Stamp Act of 1964 denying benefits to households with unrelated persons to be in violation of the Equal Protection Clause because there was no rational relationship between the exclusion of unrelated persons from benefits and the prevention of fraud).

156. *Romer v. Evans*, 517 U.S. 620, 635 (1996) (declaring Amendment 2 to the Colorado Constitution invalid under the Equal Protection Clause).

157. *Moreno*, 413 U.S. at 534.

158. *Id.*

159. *Id.*

160. *Romer*, 517 U.S. at 624 (quoting COLO. CONST. art. II, amend. II, § 30b).

161. *See id.* at 630 (pointing out that the effect of Amendment 2 was to prevent any assertion of a claim that discrimination on the basis of sexual orientation might be arbitrary and, thus, lawless, and that putting aside the question of whether and in what contexts such discrimination might in fact be arbitrary).



homosexuals—the desire to "deem a class of persons a stranger to its laws."<sup>162</sup> Unlike *Moreno*, the Court in *Romer* divined the actual intent of millions of Colorado voters mostly by reasoning from the likely effect of the text of the constitutional amendment.<sup>163</sup>

Were that the only crenellation upon the battlement of minimal scrutiny, the modernist project might be tenable. But it is not. If we were to extract a general principle from *Moreno* and *Romer*, we might say that courts applying minimal scrutiny should accept any conceivable hypothetical purpose as legitimate except when either the regulation is irrelevant to its stated purpose or serves all the conceivable purposes exceedingly poorly. However, that cannot be correct because the Court does not adhere to any such principle. The clearest indication is the old chestnut of *Railway Express Agency, Inc. v. New York*,<sup>164</sup> in which the Court upheld the validity of a New York City law, supposedly enacted to enhance traffic safety, that barred common carriers from advertising others' wares on its delivery vans while permitting thousands of virtually identical delivery vans to advertise their owners' wares.<sup>165</sup> If *Romer*'s methodology governed, the Court would have concluded that the absurdly weak connection between the city's conceivable purpose and the effect of the law required a search for actual purpose. As we know, the Court did not do so; by its famous declaration that "[i]t is no requirement of equal protection that all evils of the same genus be eradicated or none at all,"<sup>166</sup> it was content to allow this ludicrous underinclusion to go unexamined.

Of course, *Railway Express* might state the general principle from which *Moreno* and *Romer* were aberrational departures. But that would require an explanation for *City of Cleburne v. Cleburne Living Center, Inc.*<sup>167</sup> and *Plyler*

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162. *Id.* at 635.

163. Perhaps it was because the Court reasoned that the probable effect of the provision revealed the electorate's actual purpose that the Court did not wade into the murky waters of explaining how one can detect the actual purpose of even a collective deliberative body, much less a mass of voters. *See, e.g.*, *Edwards v. Aguillard*, 482 U.S. 578, 636–40 (1987) (Scalia, J., dissenting) (analyzing the difficulties attendant to ascertaining the actual purposes of a legislature in enacting legislation).

164. *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 109–10 (1949) (deciding that, despite being somewhat underinclusive, a New York City traffic regulation prohibiting certain kinds of advertisements to be displayed on vehicles did not violate the Equal Protection Clause).

165. *Id.* at 110–11.

166. *Id.* at 110.

167. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446–47 (1985) (holding that rational basis review applied to an ordinance requiring a special use permit for a home for the mentally retarded but that the ordinance still violated the Equal Protection Clause under rational basis review).

v. *Doe*.<sup>168</sup> In *Cleburne*, the Court ruled that the city of Cleburne, Texas had violated equal protection by its refusal to permit a group home for the mentally retarded while allowing virtually every other type of group living facility.<sup>169</sup> Having rejected two of Cleburne's asserted interests as illegitimate,<sup>170</sup> the Court concluded that the city's prohibition was simply not rationally related to its legitimate objectives of limiting the size and number of occupants of the home and concern about its location within a flood plain.<sup>171</sup> This was so mostly because of the wildly underinclusive nature of the city's refusal: no other group living facility was subject to the same restrictions, a key fact that undergirded the Court's conclusion that the city's refusal "appears to us to rest on an irrational prejudice against the mentally retarded."<sup>172</sup>

*Plyler* might be explained as a departure from minimal scrutiny but, if so, the problem becomes why the Court applied an enhanced brand of minimal scrutiny and did not opt for either intermediate or strict scrutiny. Facially, the answer is clear: Texas's refusal to provide a free public education to unlawful resident children did not impinge on any recognized constitutionally fundamental right nor did it involve a suspect (or even quasi-suspect) classification.<sup>173</sup> But because "certain forms of legislative classification, while not facially invidious, nonetheless give rise to recurring constitutional difficulties . . . we have [inquired whether such classifications] may fairly be viewed as furthering a *substantial interest* of the State."<sup>174</sup> This move, coupled with shifting the burden of proof to Texas, enhanced minimal scrutiny to the point that it was something quite different; Texas simply could not prove that its interests were sufficiently substantial or, more akin to *Cleburne*, that its ban was adequately connected to its arguably substantial interests.<sup>175</sup>

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168. *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (holding that a statute prohibiting state funds from being used to educate illegal immigrant children and denying such children access to public schools violated the Equal Protection Clause).

169. *City of Cleburne*, 473 U.S. at 450.

170. *See id.* 473 U.S. at 448–50 (defining the two illegitimate objectives as unsupported "negative attitudes" of nearby property owners and "vague, undifferentiated fears" that middle school students would harass the retarded residents).

171. *See id.* at 449–50 (explaining that the statute at issue bore no rational connection to the goals of reducing population concentrations in residences and preventing harm from flooding as a result of the home being in a floodplain).

172. *Id.* at 450.

173. *See Plyler*, 457 U.S. at 220–21 (stating that education is not a fundamental right and that classifications based upon legal status are not subject to enhanced scrutiny).

174. *Id.* at 217–18 (emphasis added).

175. *See id.* at 223–30 (declaring that the state must demonstrate a rational basis for legislation and that the prohibition is "ludicrously ineffectual" to accomplishing the state's goal of protecting "itself from an influx of illegal immigrants").

This continual refinement of tiered scrutiny until it has lost coherence is not limited to minimal scrutiny; a similar tale may be told of strict scrutiny in equal protection cases. The origin of strict scrutiny with respect to racial classifications (the paradigm case for strict scrutiny based on suspect classifications) lies in the infamous case of *Korematsu v. United States*.<sup>176</sup> The Court began by declaring that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [and] courts must subject them to the most rigid scrutiny,"<sup>177</sup> adding that "[n]othing short of . . . the gravest imminent danger to the public safety can constitutionally justify [the exclusion]" of Japanese-ancestry Americans from their homes on the West Coast.<sup>178</sup> But having established the necessity of overcoming strict scrutiny, the Court proceeded to exhibit extraordinary deference to government decision makers: "[W]e cannot reject as unfounded the judgment of the military authorities and of Congress . . . ."<sup>179</sup> The fact that the exclusion was "a military imperative answers the contention that the exclusion was . . . based on antagonism to those of Japanese origin."<sup>180</sup> Because "the military authorities considered that the need for action was great, and time was short . . . [we] cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified."<sup>181</sup> Despite the result in *Korematsu*, strict scrutiny for racial classifications remained and hardened to the point that, by 1971, Gerald Gunther could declare that it was "strict in theory and fatal in fact."<sup>182</sup> It is no wonder that *Korematsu* is reviled<sup>183</sup> and Fred Korematsu's conviction was later vacated because the government

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176. *Korematsu v. United States*, 323 U.S. 214, 223 (1944) (holding that an executive order internig people of Japanese descent from the west coast in large camps was constitutional). *But see* Neil Gotanda, *The Story of Korematsu: The Japanese-American Cases*, in CONSTITUTIONAL LAW STORIES, 249, 271 (Michael Dorf ed., 2003) (claiming that *Korematsu* did not "apply heightened judicial review," much less strict scrutiny).

177. *Korematsu*, 323 U.S. at 216.

178. *Id.* at 218.

179. *Id.* (quoting *Hirabayashi v. United States*, 320 U.S. 81, 99 (1943)).

180. *Korematsu*, 323 U.S. at 219.

181. *Id.* at 223–24.

182. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (describing the practical effect of a strict scrutiny regime biased toward the government).

183. *But see* William H. Rehnquist, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME, 207–11 (1998) (defending *Korematsu*); Pamela Karlan & Richard Posner, *The Triumph of Expedience: How America Lost the Election to the Courts*, HARPER'S, May 2001, at 31, 37–39 (characterizing the *Korematsu* result as "defensible," in Posner's view, and "disastrous law," in Karlan's view).

misrepresented facts to the Court,<sup>184</sup> nevertheless, the *Korematsu* method lives on, applied most recently in *Grutter v. Bollinger*.<sup>185</sup>

In *Grutter*, the court applied strict scrutiny to the University of Michigan Law School's race-based admission policies that sought to enroll a critical mass of black, Hispanic, and indigenous Americans<sup>186</sup> but upheld the Law School's policies by concluding that its use of race was narrowly tailored to advance the Law School's compelling objective of "attaining a diverse student body."<sup>187</sup> To do so, the Court deferred to the "Law School's educational judgment that such diversity is essential to its educational mission"<sup>188</sup> and justified that deference by "our tradition of giving a degree of deference to a university's academic mission."<sup>189</sup> Indeed, so strong is that tradition and its correlative deference that "'good faith' on the part of a university is 'presumed' absent 'a showing to the contrary.'"<sup>190</sup> Scratch tweedy university administrators, substitute starched khaki military officers, and you have *Korematsu*: "Congress repos[ed] its confidence in this time of war in our military leaders—as inevitably it must—[and] determined they should have the power to [incarcerate Americans of Japanese ancestry]."<sup>191</sup> But, you say, we can't trust the military—the vacation of Fred Korematsu's conviction because of military deceit proves that, to say nothing of Vietnam—and we can trust academicians. Really? The former admissions director of the University of Michigan Law School "testified that faculty members were 'breath-takingly cynical' in deciding who would qualify as underrepresented minorities. An example he offered was faculty debate as to whether Cubans should be counted as Hispanics: one professor objected on the

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184. See *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984) (vacating the judgment); see also Peter Irons, *JUSTICE AT WAR* (1983) (compiling evidence of government misconduct).

185. See *Grutter v. Bollinger*, 539 U.S. 306, 343–44 (2003) (upholding the race-conscious admissions policy of a state university law school on the basis of a compelling state interest—diversity in the student body).

186. *Id.* at 326 ("[T]he Fourteenth Amendment 'protect[s] persons, not groups'" (quoting *Adarand Constructors v. Peña*, 515 U.S. 200, 227 (1995))); *Id.* at 327 ("[A]ll governmental uses of race are subject to strict scrutiny.").

187. *Id.* at 329.

188. *Id.* at 328.

189. *Id.*

190. *Id.* at 329 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 319 (1978) (plurality opinion)).

191. *Korematsu v. United States*, 323 U.S. 214, 223 (1944) (emphasis added).

grounds that Cubans were Republicans."<sup>192</sup> As one of Walt Kelly's *Pogo* characters might say, "Nuff said."<sup>193</sup>

In this vignette we can see how modernism's determination to impose order on a balky and fragmented world morphed over time into an unconscious acceptance, even celebration, of that chaotic discontinuity. Strict scrutiny that is fatal in fact is sometimes neither strict nor fatal. The presumption of constitutional invalidity that is the fulcrum of strict scrutiny ordinarily demands stern skepticism toward government justifications, but sometimes that skepticism melts into compliant deference. Such deference may be merited, but more likely it is not, as it surely turned out to not be merited in *Korematsu*. Whether or not the *Grutter* and *Korematsu* brand of strict scrutiny is a good idea, the larger point is that it embraces modernism's form but employs the happy anomie of postmodernism as its engine of analysis.<sup>194</sup> Nor is this confined to strict scrutiny.

The green flag of minimal scrutiny sometimes turns yellow or red, and the mechanism for the change is neither clear nor consistent. Sometimes it is underinclusion, as in *Cleburne*,<sup>195</sup> but sometimes underinclusion is not enough to turn the hue, as in *Railway Express*.<sup>196</sup> Sometimes the legislature's actual purpose, inferred from the measure's effects, is sufficient, as in *Romer*,<sup>197</sup> but sometimes actual purpose is inferred from legislative history or statutory disconnection from the legislature's stated purpose, as in *Moreno*.<sup>198</sup> Other times, as in *Plyler*,<sup>199</sup> it is simply the Court's gestalt, its sense of the presence of

192. *Grutter*, 539 U.S. at 393 (Kennedy, J., dissenting).

193. See generally Walt Kelly, *POGO* (1951) (engaging hot-button political issues with whimsical, ironic cartoons).

194. See Massey, *supra* note 113, at 945 (elaborating on the possible demise of the formal structure of tiered scrutiny).

195. See *supra* notes 169–72 and accompanying text (describing cases striking down the city of Cleburne's prohibition on a home for the mentally retarded because the city failed to subject other institutional housing to the same restrictions).

196. See *supra* notes 164–66 and accompanying text (describing how a court upheld a New York City law which prohibited advertising on commercial vehicles only if the advertising did not promote the vehicle owner's business).

197. See *supra* notes 160–62 and accompanying text (describing cases striking down an amendment to the Colorado Constitution which disqualified homosexuals as a group from legislative protection because the Court deduced hostility in the amendment's intent).

198. See *supra* notes 157–59 and accompanying text (explaining a case where labeling a restriction on food-stamp provisions to households composed of unrelated persons was irrelevant to the original purpose of the food-stamp program).

199. See *supra* notes 173–75 and accompanying text (describing how a court applied seemingly heightened level of scrutiny to a Texas statute denying public education to unlawfully resident children—a statute which did not explicitly impinge on a fundamental right or entail a suspect classification).

"recurring constitutional difficulties" that shifts the spectrum. The color of the flag is uncertain, contingent, subjective, and a bit random.<sup>200</sup> This is the Court's postmodernism; it is postmodernist in its sensibility but does not know that it is postmodernist. Unlike Kafka's Gregor Samsa, who at least realized that he had turned into an insect,<sup>201</sup> the Court does not know that it has slipped into postmodernism. But it has.

The idiosyncratic refinement of tiered scrutiny is not confined to equal protection; a similar pattern emerges from the due process cases. Although economic substantive due process was drummed out of the constitutional pantheon, its cousin privacy, or personal autonomy, was permitted to stay. Though decided in the era of economic substantive due process, *Meyer v. Nebraska*<sup>202</sup> and *Pierce v. Society of Sisters*<sup>203</sup> remained alive after the ghosts of their economic kin had departed. To be sure, *Griswold v. Connecticut*<sup>204</sup> purported to rest its decision voiding Connecticut's prohibition of the use of contraceptives as birth control devices on the shadowy emanations from various provisions of the Bill of Rights that protect personal privacy, but that rationale did not last. Eight years later, in *Roe v. Wade*,<sup>205</sup> the Court grounded the

200. For a metaphor for this process in the form of a children's story, see GERTRUDE CRAMPTON, *TOOTLE 1-24* (Little Golden Books, Simon & Schuster, 1945). The essence of the tale is that Tootle, the dreamy little locomotive, has ignored the principal rule of little locomotive school and jumped off the rails to wander through the grassy hills, smelling buttercups and the like. *Id.* at 12. To correct this misbehavior, kindly old Bill the Engineer enlisted the aid of dozens of villagers, all armed with red flags. *Id.* at 16-18. They hid behind all sorts of likely spots off the rails and when Tootle appeared, gaily seeking new pastures, out would pop a red flag, and Tootle would dutifully stop. *Id.* at 18-22. Frustrated to tears, Tootle finally spotted Bill, energetically waving a green flag over the tracks. *Id.* at 22. Tootle hopped back on the rails and gladly stayed there. *Id.* This is, of course, a modernist morality play, and a rather obvious one at that. But if the flags were in the hands of the Supreme Court, they would morph from green to yellow to red and back again without much reason for change. Tootle would, if modernist, be crying its headlamps out or, if postmodernist, gleefully celebrating the chaotic indeterminacy of the world. The Supreme flag waver would be celebrating the indeterminacy.

201. See generally FRANZ KAFKA, *THE METAMORPHOSIS* (1916) (relating the allegorical experience of a traveling salesman who wakes up one morning to find himself transformed into a monstrous bug).

202. See *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (reversing the conviction of a schoolteacher who, in violation of a Nebraska statute forbidding the teaching of foreign languages, taught a ten year old how to read German).

203. See *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925) (striking down an Oregon law compelling all children to attend public schools because of its unreasonable interference with the rights of parents and private educators).

204. See *Griswold v. Connecticut*, 381 U.S. 479, 482-83 (1965) (striking down a Connecticut law which criminalized the use of contraception because it unjustifiably intruded on the privacy rights of married couples).

205. See *Roe v. Wade*, 410 U.S. 113, 153 (recognizing a right to privacy which

constellation of privacy or autonomy rights squarely in "the Fourteenth Amendment's concept of personal liberty,"<sup>206</sup> and the Court then proceeded to assimilate these rights into tiered scrutiny by declaring them to be constitutionally fundamental, a characterization that triggered the presumption of invalidity for any government action invading this protected sphere of liberty.<sup>207</sup> As with equal protection, "regulation[s] limiting these rights may be justified only by a 'compelling state interest,' and . . . must be narrowly drawn to express only the legitimate state interests at stake."<sup>208</sup> From that point on, the modernist desire to create an orderly taxonomy began to produce ever more refinements, resulting (as with equal protection) in the creation of a disorderly taxonomy that now (as we shall see in a moment) has become just another roadside attraction on the postmodern highway.<sup>209</sup>

The Court's first refinement was to hedge its bets on the question of what constitutes a constitutionally fundamental right, the trigger to strict scrutiny. Marriage is a good example. *Loving v. Virginia*<sup>210</sup> recognized that marriage was a "fundamental freedom"<sup>211</sup> and that racial barriers to marriage offended equal protection.<sup>212</sup> In *Zablocki v. Redhail*,<sup>213</sup> the Court confirmed that "the right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause,"<sup>214</sup> but added that not "every state regulation which relates in any way to the . . . prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed."<sup>215</sup> This makes sense, but of course it undercuts the fundamental nature of the asserted right. Thus it should come

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encompasses first trimester abortions).

206. *Id.*

207. *See id.* at 154 (incorporating the newly recognized privacy right into the doctrine of fundamental rights).

208. *Id.* at 155 (internal citations omitted).

209. Apologies to TOM ROBBINS, *ANOTHER ROADSIDE ATTRACTION* (1971), to whom I owe this metaphor.

210. *See Loving v. Virginia*, 388 U.S. 1, 12 (1967) (vacating, on equal protection and due process grounds, the sentences of a couple convicted of violating Virginia's ban on interracial marriages).

211. *Id.*

212. *See id.* at 11–12 (finding no compelling state interest to justify a prohibition contrary to the central meaning of the Equal Protection clause).

213. *See Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (striking down a Wisconsin statute which prevents men obligated to pay child support from marrying without court approval).

214. *Id.*

215. *Id.* at 386.

as no surprise that although the Court assumes the existence of a fundamental right to die<sup>216</sup> it has never actually so held and has rejected attempts to establish a constitutionally fundamental right to enlist the aid of others in dying.<sup>217</sup>

Nor should it have been much of a surprise that the Court scrapped all but the facade of *Roe v. Wade*<sup>218</sup> in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>219</sup> *Roe* had treated abortion as a fundamental right and its trimester framework was designed to acknowledge the point at which various state interests became sufficiently compelling to overcome strict scrutiny. *Casey*, however, junked that analysis, preferring instead to rely upon two quite different standards to assess the validity of abortion restrictions imposed either before or after viability.<sup>220</sup> Restrictions imposed before fetal viability are valid if they do not impose an "undue burden"<sup>221</sup> on a woman's right to abort, and a burden is undue if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."<sup>222</sup> Post-viability abortions may be banned "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."<sup>223</sup> Strict scrutiny disappeared in the Court's adherence "to the essence of *Roe*'s original decision,"<sup>224</sup> and, if strict scrutiny disappeared, so did the constitutionally fundamental liberty interest that triggers strict scrutiny. But the abortion right did not disappear; it acquired a unique, judicially tailored suit designed to fit the right just perfectly, even if it is now a smidgen less fundamental. *Casey* is politically pragmatic even if it has not ushered in the "pax Roenana" that Justice Scalia ridiculed.<sup>225</sup> When taken together with the other shards of contemporary substantive due process, *Casey* employs a method

216. See, e.g., *Cruzan v. Dir., Miss. Dep't of Health*, 497 U.S. 261, 279 (1990) ("[W]e assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.").

217. See *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997) (upholding the validity of Washington's prohibition of assisted suicide as applied to terminally ill competent adults who wish to hasten their death by physician-prescribed medications).

218. See *Roe v. Wade*, 410 U.S. 113, 153 (recognizing a right to privacy which encompasses first trimester abortions).

219. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 837 (1992) (replacing *Roe*'s trimester framework with the undue burden test but reaffirming the essential holding that women have a right to an abortion prior to fetal viability).

220. See *id.* at 872–78 (outlining the standards by which the central holding of *Roe* will be preserved while explaining the courts reasons for rejecting a "rigid trimester framework").

221. *Id.* at 876.

222. *Id.* at 877.

223. *Id.* at 879.

224. *Casey*, 505 U.S. at 869.

225. *Id.* at 996 (Scalia, J., dissenting).



that skirts the divide between pragmatism and postmodernism, if there is indeed any identifiable frontier between the two.

The Court's other major refinement was to blur the significance of characterizing a claimed liberty as constitutionally fundamental. *Moore v. City of East Cleveland*<sup>226</sup> is a fine example. Although the Court struck down the city's zoning ordinance that prevented Mrs. Moore from living with her two grandsons (cousins, not brothers) and delivered a majestic ode to the extended family,<sup>227</sup> it did not hold that the right to live with extended family is a constitutionally fundamental right.<sup>228</sup> Rather, the Court characterized "family life [as] one of the liberties protected by the Due Process Clause,"<sup>229</sup> and noted that "when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."<sup>230</sup> The Court then proceeded to characterize the city's goals as "legitimate" but concluded that the zoning ordinance "serve[d] them marginally, at best."<sup>231</sup>

With *Moore* as background, it is far more understandable why the Court in *Casey* jettisoned the fundamental nature of the abortion right and substituted for strict scrutiny a wholly unrelated standard of review. At least *Casey* announced the standard; *Moore* left us guessing. If *Moore* was a broad hint that non-fundamental liberties might still fail minimal scrutiny, *Lawrence* certainly confirmed the point. The Court might have treated as fundamental the right to engage "in intimate [consensual, private sexual] conduct with another person [as] but one element in personal bond that is more enduring,"<sup>232</sup> but it did not. Instead, it treated this liberty interest as a garden-variety non-fundamental liberty interest, more or less the same as the right to smoke cigars

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226. See *Moore v. City of East Cleveland*, 431 U.S. 494, 505–06 (1977) (striking down, on due process grounds, an Ohio housing ordinance which limited those persons who could live in a single dwelling according to a narrow definition of what constitutes a family).

227. See *id.* at 504–05 ("The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition [as those of the nuclear family].").

228. See *id.* at 500–01 ("[U]nless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause, we cannot avoid applying the force and rationale of [precedents which engage fundamental rights] to the family choice involved in this case.").

229. *Id.* at 499.

230. *Id.*

231. *Moore*, 431 U.S. at 500.

232. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

or to eat meat.<sup>233</sup> If the liberty protected in *Lawrence* really is fundamental, despite the Court's denial, it is an uncommonly narrow fundamental liberty, for the Court fenced it in with numerous instances in which it would not apply. If it is not fundamental, as the Court contends, it is exceedingly difficult to detect why regulation of this ordinary liberty failed minimal scrutiny and regulation of meat-eaters and cigar-smokers would almost certainly survive that level of review. The obvious response is that the right to engage in private, consensual intimate sexual relations with your life partner is a lot more important than cigar smoking. Perhaps; but if so, why did the court in *Lawrence* fail to acknowledge that fact by declaring the right to be fundamental? The fact that it did not do so injected tremendous instability into the application of tiered scrutiny to substantive due process claims. As with *Casey*, *Lawrence* might be a pragmatic judgment, but even more than *Casey*, *Lawrence* veers deeply into the postmodern sensibility. Tiered review in modern substantive due process is extraordinarily contingent on facts, highly subjective in its application, even a bit random as to the triggering devices for heightened scrutiny. This is the postmodern sensibility: "[L]et's just play with nonsense."<sup>234</sup> Although I do not contend that the Court is conscious of its postmodern sensibility, in the sense that it openly celebrates indeterminacy and chaos, I do think that the Court is trapped in a postmodern world. It sees the indeterminacy, but it cannot impose the modern sensibility of bringing order out of chaos because it senses that such a move will not work. Without being fully conscious of the implications of its actions, the Court shifts into a postmodern mode while clinging to the form of the modern.

### C. *Gonzales v. Raich and the Commodification of Everything*

In *Gonzales v. Raich*,<sup>235</sup> the Court upheld the validity of the Controlled Substances Act<sup>236</sup> as applied to prohibit the purely intrastate cultivation, distribution, and possession of marijuana for medical purposes, an activity

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233. See *id.* ("The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.").

234. Klages, *supra* note 17.

235. See *Gonzales v. Raich*, 545 U.S. 1, 33 (2005) (denying the substantive due process and federalism claims of an intrastate grower of medical marijuana convicted of violating the Controlled Substances Act).

236. 21 U.S.C. §§ 801–24 (2000) (creating a classification hierarchy for pharmaceuticals, illicit narcotics, plant matter, etc. and restricting or prohibiting the manufacture, distribution, possession, and use of such substances).

permitted by twelve states.<sup>237</sup> In finding that the commerce power authorized Congress to ban traffic in medical marijuana, the Court relied on its conclusion that the banned activity was "quintessentially economic"<sup>238</sup> and thus distinguishable from the statutes struck down in *United States v. Lopez*<sup>239</sup> and *United States v. Morrison*.<sup>240</sup> Of interest here is the Court's conception of economic activity: Economics, said the Court, "refers to 'the production, distribution, and consumption of commodities.'"<sup>241</sup> Because the Controlled Substances Act "regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market," it followed that local traffic in medical marijuana was an economic activity and, thus, according to *Wickard v. Filburn*,<sup>242</sup> could be regulated as an activity exerting a substantial effect on interstate commerce. However, as Justice Thomas noted in dissent, there are other ways to define the term economic, such as that which relates "to the production, development, and management

237. See ALASKA STAT. §§ 11.71.090, 17.37.010–17.37.080 (Lexis 2004) (permitting physicians to prescribe marijuana for medical purposes); CAL. HEALTH & SAFETY CODE §§ 11362.5–9 (West 2005) (same); COLO. CONST., ART. XVIII, § 14, COLO. REV. STAT. § 18-18-406.3 (2004) (same); HAW. REV. STAT. §§ 329-121–329-128 (2004 Cum. Supp.) (same); ME. REV. STAT. ANN., Tit. 22, § 2383-B(5) (2004) (same); MONT. CODE ANN. §§ 50-46-101–50-46-210 (2004) (same); NEV. CONST., Art. 4, § 38, NEV. REV. STAT. §§ 453A.010–453A.810 (2003) (same); OR. REV. STAT. §§ 475.300–475.346 (2003) (same); R.I. GEN. LAWS §§ 21-28.6-1–21-28.6-11 (2006) (same); VT. STAT. ANN., Tit. 18, §§ 4472–4474(d) (Supp. 2004) (same); WASH. REV. CODE §§ 69.51.010–69.51.080 (2004) (same); see also ARIZ. REV. STAT. ANN. § 13-3412.01 (Supp. 2004) (permitting physicians to prescribe Schedule I substances for medical purposes). This voter initiative was purportedly repealed in 1997, but the repeal was rejected by voters in 1998.

238. *Gonzales v. Raich*, 545 U.S. 1, 25 (2005).

239. See *United States v. Lopez*, 514 U.S. 549, 561 (1995) (holding that the Gun-Free School Zones Act has nothing to do with commerce or any sort of economic enterprise, regardless of how broadly defined).

240. See *United States v. Morrison*, 529 U.S. 598, 609 (2000) (stating that gender-motivated violent crimes are not economic activity and striking down the Violence Against Women Act). The Court in *Raich* also relied on the fact that both *Lopez* and *Morrison* involved facial challenges to the statutes in question, while *Raich* raised an as-applied challenge:

Here, respondents ask us to excise individual applications of a concededly valid statutory scheme. In contrast, in both *Lopez* and *Morrison*, the parties asserted that a particular statute or provision fell outside Congress's commerce power in its entirety. This distinction is pivotal for we have often reiterated that "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class."

*Raich*, 545 U.S. at 3 (quoting *Perez v. United States*, 402 U.S. 146, 154 (1971)).

241. *Raich*, 545 U.S. at 25 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966)).

242. See *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) (holding that activity, even if it is local, may be regulated if it exerts a substantial economic effect on interstate commerce).

of *material wealth*."<sup>243</sup> Although Justice Thomas noted that the majority did not explain why it selected a "remarkably expansive"<sup>244</sup> definition, he hinted that the majority selected it "[t]o evade even [a] modest restriction on Federal power."<sup>245</sup>

The conclusion in *Raich* that the commerce power extends to "economic" activity, defined as the possession of anything that has potential exchange value,<sup>246</sup> represents an embrace of the notion that just about anything may be "commodified." The trend toward commodification is itself a result of the tendency to see no boundaries between a sphere of commerce—bargained-for exchange—and a sphere of gratuity and altruism—the world of love and compassion.<sup>247</sup> This, of course, is a central characteristic of the postmodern

243. *Raich*, 545 U.S. at 69 n.7 (Thomas, J., dissenting) (quoting THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 583 (3d ed. 1992)) (emphasis by Justice Thomas).

244. *Id.* (Thomas, J., dissenting).

245. *Id.* at 69 (Thomas, J., dissenting).

246. For example, see the Merriam-Webster Online Dictionary, which supplies a definition of commodity as something "that is subject to ready exchange or exploitation within a market." MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.m-w.com/dictionary/commodity> (last visited Oct. 22, 2006) (on file with the Washington and Lee Law Review); see also THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 372 (4th ed. 2000) (defining commodity as "something useful that can be turned to commercial or other advantage"); WEBSTER'S REVISED UNABRIDGED DICTIONARY 286 (1913) (defining commodity as "that which affords convenience, advantage, or profit, especially in commerce, including everything movable that is bought and sold"); COMPACT OXFORD ENGLISH DICTIONARY, [http://www.askoxford.com/concise\\_oed/commodity?view=uk](http://www.askoxford.com/concise_oed/commodity?view=uk) (last visited Oct. 22, 2006) (defining commodity as "a raw material or agricultural product that can be bought and sold [or] something useful or valuable") (on file with the Washington and Lee Law Review); CAMBRIDGE DICTIONARY OF AMERICAN ENGLISH, [http://dictionary.cambridge.org/define.asp?key=commodity\\*1+0&dict=A](http://dictionary.cambridge.org/define.asp?key=commodity*1+0&dict=A) (last visited Oct. 22, 2006) (defining commodity as "anything that can be bought and sold") (on file with the Washington and Lee Law Review); WEBSTER'S 1828 DICTIONARY, [http://65.66.134.201/cgi-bin/webster/webster.exe?search\\_for\\_texts\\_web1828=commodity](http://65.66.134.201/cgi-bin/webster/webster.exe?search_for_texts_web1828=commodity) (last visited Oct. 22, 2006) (defining commodity as "that which affords ease, convenience or advantage; any thing that is useful, but particularly in commerce, including every thing movable that is bought and sold") (on file with the Washington and Lee Law Review); MSN ENCARTA WORLD ENGLISH DICTIONARY, NORTH AMERICAN EDITION, <http://encarta.msn.com/encnet/features/dictionary/DictionaryResults.aspx?refid=1861598957> (last visited Oct. 22, 2006) (defining commodity as "an item that is bought and sold, [or] something that people value or find useful") (on file with the Washington and Lee Law Review); WIKIPEDIA, <http://en.wikipedia.org/wiki/Commodity> (last visited Oct. 22, 2006) (defining commodity) (on file with the Washington and Lee Law Review). Wikipedia states:

The word commodity is a term with distinct meanings in business and in Marxian political economy. For the former, it is a largely homogenous product, whereas for the latter, it refers generically to wares offered for exchange[;] a commodity is simply any good or service offered as a product for sale on the market.

*Id.*

247. See *supra* notes 75–78 and accompanying text (stating that in the postmodern era, all

world, a world in which every facet of existence is relentlessly commodified.<sup>248</sup> Postmodernism claims that the distinction between public and private is illusory; in *Raich*, the Court adopted the close cousin of this contention. The Court was not self-consciously postmodern but its mode of reasoning reflected the increasingly postmodern sensibility of the culture of which it is a part. Although it is not earthshaking to regard marijuana trafficking, whether for the purpose of alleviating pain or altering consciousness, as economic activity,<sup>249</sup> in the postmodern world the Court's embrace of commodification as the *sine qua non* of economic activity opens the door to regulation of absolutely anything.

Consider the following exchanges between counsel and the Court in *Raich*. Professor Randy Barnett, arguing for respondents Raich and Monson, stated that "[t]he government claims [that locally grown and consumed medical marijuana is] economic, we claim it's non-economic."<sup>250</sup> Justice Kennedy responded "that regular household chores . . . performed in an earlier time mostly by women [were] classically economic—washing dishes, making bread. And now you say growing marijuana isn't?"<sup>251</sup> Professor Barnett replied: "If you accept the government's definition of economic then every—then washing dishes, today, would be economic . . ."<sup>252</sup> But the Court did accept the government's premise, with the implication that everything from washing dishes to chalking hopscotch patterns on your driveway—in short, everything that can be commodified, which is everything—can be regulated under the commerce power.

Further proof of this can be glimpsed from the Court's reaction to Barnett's assertion that economic activity depends on:

[T]he nature of the activity involved, not necessarily its effect . . . [F]or example, prostitution is an economic activity. Marital relations is not an

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human relationships are reduced to their exchange or consumption value).

248. See generally FREDERIC JAMESON, POSTMODERNISM, OR, THE CULTURAL LOGIC OF LATE CAPITALISM (1991) (arguing that a major effect of postmodernism is that culture, including our history, has become a collection of empty styles or pastiches, which are then consumed as commodities). More specifically, Jameson quotes liberally from GARY BECKER, AN ECONOMIC APPROACH TO HUMAN BEHAVIOR (1976), in which Becker asserts that *all* human behavior can be reduced to economic terms—utility maximization—and Jameson adds that Becker's model is descriptively "impeccable" and "postmodern in its structure." JAMESON, at 269.

249. See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 21 n.31 (2005) (estimating "that in 2000 American users spent \$10.5 billion on the purchase of marijuana").

250. Transcript of Oral Argument at 33, *Gonzales v. Raich*, 545 U.S. 1 (2005) (No. 03-1454), available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/03-1454.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03-1454.pdf).

251. *Id.* at 34.

252. *Id.*

economic activity. . . . We could be talking about virtually the same act. . . . [We] don't say that because there is a market for prostitution, that, therefore, everything that is not in that market [but which is a substitute] is economic.<sup>253</sup>

Although no justice responded directly to this point, the Court rejected it as an apt analogue to the activity at issue in *Raich*. Of course, after *Raich* Congress might have commerce-based power to regulate marital sexual relations, but it would surely be stripped of the ability to exercise that power by the rights-bearing constitutional trump card of substantive due process. Even so, the topsy-turvy nature of due process renders this a prediction of the result which would probably be reached by a Court with a postmodern sensibility, rather than an extrapolation from modernist doctrinal precepts.<sup>254</sup>

The steady cultural march toward the commodification of everything may or may not be matched by a relentless extension of federal regulation to activities newly commodified, but congressional failure to do so will not be the product of constitutional roadblocks erected by the Court. Some commentators think that *Raich* signals the end of meaningful judicial review of the scope of the commerce power;<sup>255</sup> others argue that *Raich* limits but does not foreclose such judicial oversight;<sup>256</sup> still others contend that *Lopez* and *Morrison* were never all that significant and that the only meaningful judicially-imposed limits on the commerce power would derive from the commerce clause's text, history

253. *Id.* at 49.

254. Of course one can reason to the same end by employing doctrinal arguments, but as should be clear by now, I think the doctrine in this area—erected upon modernist precepts of rational analysis and description—is no longer the product of rational analysis, if it ever was, but reflects the postmodern contention that the postmodern world is characterized by "a reshuffling of canonical feelings and values" and creation of a new "structure of feeling" that involves "reworking and rewriting of an older system. . . . [T]his prodigious rewriting operation . . . has the additional result . . . that everything is grist for its mill." JAMESON, *supra* note 248, at xiv.

255. See, e.g., Jonathan H. Adler, *Is Morrison Dead? Assessing a Supreme Drug (Law) Overdose*, 9 LEWIS & CLARK L. REV. 751, 762–63 (2005) (arguing that *Raich* "hollow[s] out the core" of *Morrison*); Glenn H. Reynolds & Brannon P. Denning, *What Hath Raich Wrought? Five Takes*, 9 LEWIS & CLARK L. REV. 915, 933 (2005) (discussing the possibility that *Raich* signals a return to the days when the Bill of Rights was the only judicially-enforced limit on the federal government); cf. Thomas W. Merrill, *Rescuing Federalism After Raich: The Case for Clear Statement Rules*, 9 LEWIS & CLARK L. REV. 823, 838–51 (2005) (contending that *Lopez* was a mistake and that the commerce power should be controlled by clear statement rules rather than prohibitory rules).

256. See, e.g., Randy Barnett, *Limiting Raich*, 9 LEWIS & CLARK L. REV. 743, 744–50 (2005) (discussing ways that future courts can limit *Raich* and preserve aspects of *Lopez* and *Morrison*).

and early precedent.<sup>257</sup> Perhaps it was inevitable that the slender twigs of *Lopez* and *Morrison* would wither early, for the cultural climate of never-ceasing commodification is hardly one that can be expected to provide much nourishment to a plant that is rooted in at least the possibility of a firm distinction between commerce and a world in which mercenary values do not really exist, much less predominate. In the postmodern world, though, that distinction is chimerical, even risible.

#### D. *Totaling Up the Circumstances*

The last half of the twentieth century showed a persistent and increasing trend toward the use of some version of the "totality of the circumstances" test for constitutional validity. The resort to catch-all tests that make validity turn upon the totality of the circumstances is little more than a *de facto* recognition of hopeless indeterminacy, a dominant characteristic of postmodern thought. Of course, the Court does not say that it resorts to the totality of the circumstances because it is confronted with such indeterminacy; rather, it offers up a variety of doctrinal, practical, or historical reasons to do so.

The phrase is most prominently associated with determining reasonable suspicion sufficient to merit a stop-and-frisk search under the principles articulated in *Terry v. Ohio*,<sup>258</sup> but the essence of the "totality" approach can be found in a variety of other contexts. The totality approach pervades much of the law of separation of powers, including such specific matters as interbranch appointment of inferior federal officers,<sup>259</sup> limits on the President's power to remove executive officials,<sup>260</sup> and the non-delegation doctrine.<sup>261</sup> Indeed, separation of powers law is characterized by the Court's oscillation between

257. See, e.g., Robert J. Pushaw, Jr., *The Medical Marijuana Case: A Commerce Clause Counter-Revolution?*, 9 LEWIS & CLARK L. REV. 879, 909–13 (2005) (arguing that the Court should apply precise legal rules drawn from the Constitution rather than flexible standards created by case-by-case adjudication).

258. See *Terry v. Ohio*, 392 U.S. 1, 20–21 (1968) (stating that a police search must be justified at the outset and must be reasonably related in scope to the circumstances).

259. See, e.g., *Morrison v. Olson*, 487 U.S. 654, 675–76 (1988) (stating that inter-branch appointment of inferior officers is invalid if the "appointment [has] the potential to impair the constitutional functions assigned to one of the branches" or if there exists "some 'incongruity' between the functions normally performed by the [appointing branch] and the performance of their duty to appoint").

260. See, e.g., *id.* at 691 (stating that "the real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty").

261. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 412 (1989) (upholding the validity of mandatory sentencing guidelines created by the Sentencing Commission).

application of specific textual provisions<sup>262</sup> and general, thematic principles.<sup>263</sup> This oscillation is itself dependent upon the totality of the circumstances confronting the Court when it reaches into its quiver for the arrow of decision. A similar phenomenon may be observed in the law of regulatory takings, where a multi-factor balancing test that the Court admits is an ad hoc approach<sup>264</sup> vies with three categorical rules<sup>265</sup> to determine when a regulation is a taking.

Crafting doctrine to respond to the circumstances presented for decision is hardly noteworthy; what is noteworthy is the nature of the doctrine being crafted as the Court's function has gradually shifted from case-by-case error correction, "the patient, incremental method of the common law,"<sup>266</sup> to a model that is "basically legislative."<sup>267</sup> Because the common law method provides "very limited guidance to lower courts . . . the Court tries to use the few cases it agrees to hear as occasions for laying down rules or standards that will control a large number of future cases and thus allow the Court to turn its attention elsewhere."<sup>268</sup> When the Court combines a move to a more overtly legislative model of judging with an embrace of the totality of the circumstances as its doctrinal standard, there are several possible results. First, the Court may effectively cede to other actors the power to decide constitutional limits.<sup>269</sup>

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262. See, e.g., *INS v. Chadha*, 462 U.S. 919, 958 (1983) (relying on the requirements of bicameral action and presentment to the President to invalidate the one-house veto); *Clinton v. City of New York*, 524 U.S. 417, 448 (1998) (relying on the same requirements to invalidate the line item veto).

263. See, e.g., *Morrison*, 487 U.S. at 693 (upholding the Ethics in Government Act of 1978 because it did not "unduly interfer[e] with the Executive Branch"); *Mistretta*, 488 U.S. at 382 (upholding the validity of the Sentencing Commission because it neither constituted "encroachment" upon the powers of other branches nor "aggrandizement" of any single branch).

264. See *Penn Central Trans. Co. v. New York City*, 438 U.S. 104, 124 (1978) (stating that review of local zoning restrictions is essentially ad hoc and fact specific).

265. See *Lucas v. S. C. Coastal Council*, 505 U.S. 1003, 1015–16 (1992) (discussing the categorical rules that (1) permanent physical dispossession is a taking; (2) loss of all economically viable use is a taking, except when; (3) the regulation does no more than abate what would be a nuisance under preexisting, background principles of local law, in which case the regulation is not a taking).

266. Posner, *supra* note 101, at 35.

267. *Id.* at 37.

268. *Id.* The wisdom of this move is not of immediate interest to me; I am more interested in its effects.

269. The result of the totality of the circumstances approach with respect to *Terry* searches has been to dramatically increase the deference paid to police judgment. In separation of powers, it has increased deference to Congress and, to a lesser extent, the President. In regulatory takings, despite the rear-guard actions fought by those who desire categorical rules to govern, the ad hoc totality of the circumstances approach has increased deference to governmental regulators.



Second, to the extent the Court retains this power, its exercise is far more likely to be specific to the situation and far less likely to be predictable.<sup>270</sup> These results are not mutually exclusive. When combined, they increase the level of fragmentation and potential incoherence that may be injected into constitutional discourse. We might expect this from a postmodern constitutional discourse.

### *E. The Religion Clauses: Embracing Legislative Primacy Anew*

From the nation's beginning until the mid-twentieth century, the Court permitted legislatures to decide how much or little they wished to accommodate religion. This practice, which I have elsewhere termed legislative primacy,<sup>271</sup> was produced by cultural and political forces. Culturally, it was due to the de facto Protestant establishment that dominated America from 1833, when Massachusetts became the last state to disestablish religion, until roughly the end of World War II. Politically, it was as much the product of fear and loathing of Roman Catholicism as it was recognition of the de facto Protestant establishment. Thus, the Court stripped the free exercise guarantee of much force in *Reynolds v. United States*<sup>272</sup> and failed to do anything to enforce the establishment clause.<sup>273</sup>

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270. This is not altogether new. In 1944, Justice Owen Roberts complained that the Court's decision was akin to "a restricted railroad ticket, good for this day and train only." *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting). Nor was Justice Roberts alone; the fluidity with which the Court was altering the pre-1937 constitutional order led one commentator of that day to complain that it was all guesswork. See Frank W. Grinnell, *The New Guesspotism*, 30 A.B.A. J. 507, 509 (1944) (arguing that recent judicial decisions were undermining the stability of the law). In 1982, Chief Justice Burger griped that "by patching together bits and pieces" of dubious doctrine "the Court spins out a theory custom-tailored to the facts." *Plyler v. Doe*, 457 U.S. 202, 244 (1982) (Burger, C.J., dissenting).

271. See Calvin Massey, *The Political Marketplace of Religion*, 57 HASTINGS L.J. 1, 5 (2005) (elaborating on the Court's oscillation between judicial primacy and legislative primacy in the religion clauses). Many of the ideas in this section are distilled from that article.

272. See *Reynolds v. United States*, 98 U.S. 145, 165 (1878) (holding that free exercise was not offended by generally applicable laws that prohibit religious conduct).

273. The Blaine Amendment, proposed in 1875 but which failed to gain the two-thirds majority needed to submit it to the states, would have made the religion clauses of the First Amendment applicable to the states and barred government school aid to religion. See 4 CONG. REC. 205 (1875) (proposing to amend the Constitution to prevent state money from being placed "under the control of any religious sect"). A host of "little Blaine" amendments were adopted by states, and although they constituted the principal establishment clause bulwark of the era, their operation was distinctly asymmetrical. Though facially neutral, their purpose was to prevent state aid to Catholic schools and they did nothing to stop the commonplace practice of King James Bible readings and prayer in the public schools.

By the middle of the twentieth century this de facto Protestant establishment collapsed. In its wake a new coalition of religious and secular allies began to press for more stringent separation of government and religion. From a cultural perspective, this represented the belated triumph of modernity. A foundational principle of Enlightenment modernity was that rational inquiry would result in the discovery of truth as opposed to the medieval commitment to religious faith as the path to truth. Modernity thus posed a direct conflict between rationality and faith, a conflict that produced one of two responses by religion. The first, characteristic of mainstream Christian denominations, was to turn religion into a vehicle for explaining what rational inquiry could not—producing a God that was the "God of the gaps" in that inquiry. The second response, characteristic of fundamentalist Christians, was to retreat to the shadows of modern society, quietly practicing their faith and fighting rear-guard actions against modernity. Though it is puzzling why it took so long for modernity to influence the Court's doctrine of the religion clauses, the most plausible answer is that cognitive dissonance enabled modernity and the hegemony of cultural Protestantism to co-exist. This contradiction was stable only because American elites were overwhelmingly Protestant, and, for practical reasons, the growing Catholic presence contented itself with keeping its faith largely out of the public realm. But this was not viable after decades of massive immigration of Catholics and Jews, two world wars, a world-wide economic depression, and the raw scars of religious hatred in the form of Nazi genocide. Religious hegemony was exposed as inconsistent with modernity's values.

The belated ascendance of modernity produced a doctrine of judicial primacy in interpreting the religion clauses. Under this approach the Court vigorously enforced each of the establishment and free exercise clauses, restricting legislatures' discretion to accommodate religion. *Everson v. Board of Education*<sup>274</sup> ushered in the trope of a wall of separation of church and state, but it was not until the public school prayer and Bible reading cases<sup>275</sup> that the establishment clause bricks and mortar began to be laid up. *Sherbert v. Verner*<sup>276</sup> did the same for the free exercise portion of the wall of separation.

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274. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 17–18 (1947) (holding that the First Amendment requires the state to be neutral in its relations with religious groups and to neither favor nor disfavor them).

275. See *Engel v. Vitale*, 370 U.S. 421, 430–36 (1962) (invalidating a state policy recommending that a prayer be recited in public schools each day); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 225–27 (1963) (invalidating a Pennsylvania law which required each school day to begin with a reading from the Bible).

276. See *Sherbert v. Verner*, 374 U.S. 398, 409–10 (1963) (invalidating the application of a South Carolina law which prohibited state unemployment aid to a woman discharged for

By 1971 the three-part *Lemon* test<sup>277</sup> became the universal tool for divining forbidden religious establishments.

Modernity's ascendance produced judicial primacy because modernity placed a high value on tolerance and separation. On one hand, government and religion had to be cabined into separate compartments because they offered competing accounts of truth. Should government intrude upon religion, there was a danger that modernity would dictate its truth to the faithful. Should religion seize government there was a danger that religion would impose its truth on the rational secularists who eschewed answers bottomed on religious faith. From this perspective came the Court's view, expressed in *Engel v. Vitale*, "that a union of government and religion tends to destroy government and to degrade religion."<sup>278</sup> On the other hand, modernity's tolerance value demanded accommodation of religious minorities, a principle underscored by the revealed horrors of the Third Reich. Moreover, religious pluralism embodied by accommodation of minority religions posed no real danger to modernity's concern about keeping religion and government in separate spheres. There just were not enough Jehovah's Witnesses, Quakers, or Seventh-Day Adventists to capture the machinery of government. Thus did American modernity squeeze out of the constitutional system much room for legislative discretion to accommodate or burden religion, producing judicial primacy in mediating the inherent conflict between the two religion clauses.

The irony of this development, however, is that modernity's triumph came just as modernity was beginning to be overtaken by a postmodern consciousness. Although modernity had posed a conflict between two competing explanations of truth, postmodernism posits that no account can be known to be universally true. The paradoxical result is that postmodernism freed religion from the margins to which modernity had consigned it. As modernity matured, the number of adherents to mainline denominations declined. After all, the God-of-the-gaps of the mainline denominations answered less and less as modernity's rationality narrowed the gaps in which he operated, thus making him increasingly less relevant. Moreover, most of the mainline adherents were likely modernist in their sensibilities and a gradual disenchantment with God, in any form, was a predictable result. On the other hand, the decline of modernity and rise of postmodernism opened "space for

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failure to work on Saturday due to her religious beliefs).

277. See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (holding that, to be valid, a law must have a secular purpose, a "primary effect" that "neither advances nor inhibits religion," and must not foster an "excessive entanglement" between religion and government).

278. *Engel*, 370 U.S. at 431.

radical religious pluralism by denying the possibility of meta-narratives."<sup>279</sup> Evangelical Christians stepped out of the shadows in which they had lurked in modernity's reign and into this vacated space. The irony of postmodernism is that it freed the medieval account to return, in the form of fundamentalism of all kinds—any brand of religion that offers a single, universal, exclusive, and infallible account of existence. A postmodernist can choose which account he wishes to accept, but he cannot say that his chosen account is correct, in the sense of being universally true. Thus, the fundamentalist account of existence, even if rejected, cannot be labeled false by a postmodernist.

Moreover, much of traditional religion has been replaced by a distinctively postmodern spirituality, a preoccupation with self-understanding that borrows eclectically from many ways of apprehending transcendent reality, both religious and secular. Although fundamentalist religions insist that man's task is to understand and conform to God's will, postmodern spirituality sees man's task to be understanding oneself and finding enlightenment through a voyage of self-discovery. Because each such voyage is unique, the resulting religious pluralism has increased the pressure upon political actors to accommodate a vast variety of religions and, simultaneously, made imperative the need to avoid compelling governments to accommodate the limitless variety of conduct that may be the product of religious belief.

At the same time that the metaphysical landscape began to change, a fundamental political realignment occurred. Until the last quarter of the twentieth century, Protestants insisted on separation of church and state out of fear of creeping Catholicism in the public square. But now, while mainline Protestants continue to be separationist, evangelical Christians are considerably more accommodationist. This shift occurred because evangelicals have been gaining market share at the expense of the mainline churches, and evangelicals have formed a common cause with other sects in supporting aid to religious schools.<sup>280</sup>

The doctrinal result was the return of legislative primacy. *Employment Division v. Smith*<sup>281</sup> painted *Sherbert*<sup>282</sup> into a corner and essentially revived

279. Frederick Mark Gedicks, *Spirituality, Fundamentalism, Liberty: Religion at the End of Modernity*, 54 DEPAUL L. REV. 1197, 1207 (2005).

280. See John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 327–28 (2001) (describing the change in attitude among various Protestant sects toward funding religious schools); Massey, *supra* note 271, at 17–18 (arguing that post-modernist views have led to a rise in the number of evangelical adherents).

281. See *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990) (holding that the Free Exercise Clause did not prohibit the application of Oregon drug laws to the ceremonial ingestion of peyote).

282. See *Sherbert v. Verner*, 374 U.S. 398, 409–10 (1963) (invalidating the application of

*Reynolds*,<sup>283</sup> leaving accommodation in the name of free exercise largely up to legislative discretion. *Zelman v. Simmons-Harris*,<sup>284</sup> the school voucher case, is perhaps the best example of the relaxation of the zone of accommodations forbidden by the establishment clause, but it is not alone.<sup>285</sup> Although there are some contrary indications,<sup>286</sup> in the main, the well-developed trend is toward legislative primacy. *Locke v. Davey*<sup>287</sup> provides a thumbnail summation. In upholding Washington's ban on state aid for "religious worship, exercise or instruction,"<sup>288</sup> as applied to Washington's refusal to permit public scholarships to be used for theological instruction, the Court admitted that the ban was not "facially neutral with respect to religion,"<sup>289</sup> but upheld it because it was not the product of "hostility toward religion."<sup>290</sup> Washington was free to decide how

a South Carolina law which prohibited state unemployment aid to a woman discharged for failure to work on Saturday due to her religious beliefs).

283. See *Reynolds v. United States*, 98 U.S. 145, 162–67 (1878) (holding that the free exercise is not offended by generally applicable laws that prohibit religious conduct).

284. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 652–63 (2002) (5–4 decision) (holding that the voucher portion of an Ohio Pilot Scholarship Program did not violate the Establishment Clause even though the majority of participating students had enrolled in religiously affiliated schools).

285. See, e.g., *Cutter v. Wilkinson*, 544 U.S. 709, 726 (2005) (holding that a section of the Religious Land Use and Institutionalized Persons Act, increasing the level of protection of prisoners' and other incarcerated persons' religious rights, did not violate the Establishment Clause); *Van Orden v. Perry*, 125 S. Ct. 2854, 2863–64 (2005) (5–4 decision) (holding that the display of a monument inscribed with the Ten Commandments on the grounds of the Texas State Capitol did not violate the Establishment Clause of the First Amendment); *Mitchell v. Helms*, 530 U.S. 793, 835–36 (2000) (holding that legislation under which the federal government distributes funds to state and local governmental agencies, which in turn lend educational materials and equipment to public and private schools, does not violate the Establishment Clause); *Agostini v. Felton*, 521 U.S. 203, 233–35 (1997) (5–4 decision) (holding that a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis was not invalid under the Establishment Clause); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13 (1993) (holding that the Establishment Clause does not lay down an absolute barrier to the placement of a public employee in sectarian schools).

286. See, e.g., *McCreary County v. ACLU of Kentucky*, 125 S. Ct. 2722, 2745 (2005) (holding that a county's posting of the Ten Commandments at its courthouses, with the purpose of emphasizing and celebrating the Commandments' religious message, violates the Establishment Clause); *Lee v. Weisman*, 505 U.S. 577, 590–99 (1992) (5–4 decision) (holding that the Establishment Clause forbids the inclusion of clergy who offer prayer as part of an official public school graduation ceremony).

287. See *Locke v. Davey*, 540 U.S. 712, 725 (2004) (holding that the state of Washington did not violate the Free Exercise Clause by refusing to fund devotional theology instruction).

288. See WASH. CONST. art. I, § 11 (banning state aid for religious worship, exercise, or instruction).

289. *Locke*, 540 U.S. at 720.

290. See *id.* at 721 (stating that the fact that a state would deal differently with education

much or little to accommodate religion. This discretion is what the Court characterized as the considerable "play in the joints" between the religion clauses.<sup>291</sup>

Of course, this discretion is not unbounded. The judicially imposed limits—those that mark the outer boundary of legislative discretion—consist primarily of neutrality and equality.<sup>292</sup> Governments must not favor one religion over another, but neither may governments disfavor religion.<sup>293</sup> These principles suggest that it is not a forbidden establishment for government to assist religious institutions in achieving secular objectives. Thus, in *Zelman*, Ohio's secular objective was to provide school choice to improve the dismal educational prospects of Cleveland's schoolchildren, and the establishment clause was no barrier to inclusion of Catholic schools as one of the choices.<sup>294</sup>

The second coming of legislative primacy in religion clause jurisprudence owes its arrival to the advent of postmodernism. Although the Court has surely not so acted because it is self-consciously postmodern, its shift in doctrine may just as surely be traced to a variety of cultural and political phenomena that are rooted in the developing postmodern cultural consciousness. Moreover, because legislative primacy leaves so much room for legislative discretion to accommodate religion, it will likely invite significantly greater religious rent-seeking, in the form of either positive benefits to religion or facially neutral burdens imposed on rival rent-seekers. That phenomenon, in turn, will likely result in greater tension and animosity between sects and between religious and secular elements of the polity. The contingency and fragmentation of experience that postmodern thought posits will become ever more characteristic

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for the ministry than with education for other callings is "not evidence of hostility toward religion").

291. *See id.* at 718 (discussing the tension between the Establishment Clause and the Free Exercise Clause (quoting *Walz v. Tax Comm. of City of N.Y.*, 397 U.S. 664, 669 (1970))).

292. *See, e.g., Larson v. Valente*, 456 U.S. 228, 255 (1982) (voiding a law that exempted some religious organizations from regulation of charitable solicitations on the ground that the law was designed to apply only to the Unification Church, and was thus invalid "religious gerrymandering").

293. *See, e.g., Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 845–46 (1995) (holding that a religious student publication could not be denied funds made generally available to all other student publications); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393–94 (1993) (holding that a public school may not deny a religious group after-hours access to school facilities where such access is provided to secular groups).

294. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 652–53 (2002) (5–4 decision) (holding that the voucher portion of an Ohio Pilot Scholarship Program did not violate the Establishment Clause even though a large number of participating students enrolled in religiously affiliated schools).

of the interplay between religion and government, and this will be due in no small part to the doctrine that has invited it.<sup>295</sup>

*F. The Tug of Opposites: Autonomous Self v. Socially-Constructed Self*

Neither our culture nor the Court's doctrine is monolithically postmodern, but the influence of our increasingly postmodern cultural consciousness may be seen more clearly by noting the tensions that exist when doctrine is influenced both by conceptions of an autonomous self and a socially-constructed self. Equal protection rights have long been thought to be "guaranteed to the individual. The rights established are personal rights."<sup>296</sup> Yet the vindication of those rights sometimes focuses on groups rather than individuals, as with the remedial decree in *Brown v. Board of Education*,<sup>297</sup> and sometimes the doctrine itself pays more attention to group than individual attributes.<sup>298</sup> The Court's doctrine with respect to free expression is larded with paeans to individual expression,<sup>299</sup> but when it comes to expressing oneself politically via the expenditure of money to advertise a candidate or otherwise assist such electoral efforts, the Court is far more likely to base its doctrine on societal considerations.<sup>300</sup> The manner in which the Court mediates these tensions suggests that it is increasingly willing to see the individual as socially constructed.

A sampling of recent equal protection cases illustrates the tension. In *United States v. Virginia*<sup>301</sup> the Court struck down Virginia's maintenance of

295. For an extended treatment of the implications of legislative primacy, see Massey, *supra* note 271, at 44–57.

296. See *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) ("The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.").

297. See *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 300–01 (1955) (holding that racial discrimination in public education is unconstitutional and directing the lower courts to "enter such orders and decrees . . . as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases").

298. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (holding that the University of Michigan Law School had a compelling interest in obtaining the educational benefits that flow from a diverse student body).

299. See, e.g., *Cohen v. California*, 403 U.S. 15, 25 (1971) ("[O]ne man's vulgarity is another man's lyric.").

300. See, e.g., *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 138 (2003) (stating that although the Bipartisan Campaign Reform Act, popularly known as McCain-Feingold, is "complex, [it] does little more than regulate the ability of wealthy individuals, corporations, and unions, to . . . influence federal elections").

301. See *United States v. Virginia*, 518 U.S. 515, 558 (1996) (holding that Virginia failed

the Virginia Military Institute as a male-only institution in an opinion that stressed Virginia's constitutional obligation to provide VMI's educational opportunities to women, no matter how few women might possess the "will and capacity"<sup>302</sup> to undergo VMI's notoriously difficult "rat line."<sup>303</sup> By contrast, in *Grutter v. Bollinger*<sup>304</sup> the Court upheld the University of Michigan Law School's admission policy that was focused on assembling a critical mass of historically disadvantaged racial and ethnic minorities. Although the Court in *Grutter* did rely on the Law School's individualized attention to applications, it was the Law School's objective of achieving a critical mass of racial diversity in its classrooms that was compelling, and its practice of assembling that critical mass that was necessary to accomplish that goal.<sup>305</sup>

*Grutter* reflects the Court's attempt to mediate the tension between individual entitlement to equal protection on matters of race and breaking down socially constructed barriers of racial bigotry. On the one hand, "our Constitution is color blind."<sup>306</sup> On the other hand, the Constitution compels eradication of racial subordination. *Grutter* does so by applying strict scrutiny, a standard premised on the color-blindness principle, but finding that the objective of racial diversity is compelling and that a fairly Procrustean method of achieving diversity is necessary to the end.<sup>307</sup> *Grutter* has a Janus-like

to show an exceedingly persuasive justification for excluding women from the citizen-soldier program offered at the Virginia Military Institute in violation of the Equal Protection Clause).

302. See *id.* at 542 (noting that "[i]t may be assumed . . . that most women would not choose VMI's adversative method").

303. *Id.*

304. See *Grutter v. Bollinger*, 539 U.S. 306, 337–40 (2003) (addressing the University of Michigan Law School's admissions policy).

305. To be sure, there are limits. In *Gratz v. Bollinger*, the companion case to *Grutter*, the Court balked at approving a more wholesale approach to the goal of increasing racial diversity in higher education. See *Gratz v. Bollinger*, 539 U.S. 244, 275–76 (2003) (holding that the University of Michigan's freshman admissions policy of automatically distributing 20 points, or one-fifth of those needed to guarantee admission, to every single "underrepresented minority" applicant solely because of race violated the Equal Protection Clause).

306. See *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("[O]ur constitution is color-blind, and neither knows nor tolerates classes among citizens.").

307. See *Grutter*, 539 U.S. at 325 ("[S]tudent body diversity is a compelling state interest that can justify the use of race in university admissions."); *id.* at 326 (acknowledging that the proportion of racial minorities benefited by the admissions objective varied within a narrow band, although not a "quota"); *id.* at 379 (Rehnquist, C.J., dissenting) ("[T]he Law School's program is . . . a naked attempt to achieve racial balancing."); *id.* at 386 (Rehnquist, C.J., dissenting) ("[T]he Law School has managed its admissions program . . . to extend offers of admission to members of selected minority groups in proportion to their statistical representation in the applicant pool[;] . . . precisely the type of racial balancing that the Court itself calls 'patently unconstitutional.'").



quality with respect to the self: We are autonomous actors; we are socially constructed. Or, as Justice Ginsburg put it, quoting John Minor Wisdom:

[T]he Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination.<sup>308</sup>

This duality is characteristic of our time: We are simultaneously modern and postmodern; we live in a cultural cusp in which we hold conflicting world views. Is it any surprise that our fundamental law should reflect the same contradictions? Indeed, the embrace of this contradiction is a characteristic aspect of postmodernism. Nor should it surprise us that the Court's handling of the contradiction is simultaneously modern and postmodern—modernist in its use of the doctrinal category of strict scrutiny, postmodern in its deference to the government actors it is supposed to scrutinize strictly.

A tiny sample from free speech—that "Sargasso Sea of drifting and entangled values, theories, rules, exceptions, [and] predilections"<sup>309</sup>—illustrates the same tension. An ocean of free expression law emphasizes an individual right to expression,<sup>310</sup> but here and there emerge islands of doctrine founded on the socially-constructed self.<sup>311</sup> Among the myriad examples of judicial emphasis of individual expression are such chestnuts as *West Virginia State Board of Education v. Barnette*<sup>312</sup> and *Cohen v. California*.<sup>313</sup> In striking down

308. *Gratz*, 539 U.S. at 302 (Ginsburg, J., dissenting) (quoting *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 876 (5th Cir. 1966)).

309. Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 278 (1991) (discussing the values of the First Amendment and how "first amendment doctrine is neither clear nor logical").

310. Many commentators ground the free expression guarantee on an assumption of individual autonomy. See, e.g., C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 59 (1989) (stating that free speech is founded upon "respect for individual integrity and autonomy").

311. Credit goes to Stephen Macedo for the islands-in-oceans metaphor. See STEPHEN MACEDO, *THE NEW RIGHT V. THE CONSTITUTION* 97 (1987) (stating that the Constitution established islands of governmental power in a sea of individual rights, not islands of rights in a sea of governmental powers).

312. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (stating that "the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control").

313. See *Cohen v. California*, 403 U.S. 15, 26 (1971) (holding that a conviction resting solely upon "speech" could be justified under the First and Fourteenth Amendments only based

a mandatory flag salute, the *Barnette* Court noted that the free-speech guarantee "guards the individual's right to speak his own mind,"<sup>314</sup> and summed up the notion with its canonical declaration that the "fixed star in our constitutional constellation" is that no orthodoxy may be prescribed to which citizens may be forced "to confess by word or act their faith therein."<sup>315</sup> *Cohen* upheld the individual right to shock or offend onlookers by wearing a jacket that stridently declared "Fuck the Draft," and grounded its conclusion in part on the view that "the Constitution leaves matters of taste and style . . . largely to the individual."<sup>316</sup> Accordingly, "one man's vulgarity is another's lyric."<sup>317</sup>

Although this may be the dominant chord in the free expression score, the contrapuntal note is sounded by those cases, centered primarily on the subject of campaign finance, that reject the autonomous individual in favor of a socially constructed self as the basis for First Amendment analysis. Such cases as *Austin v. Michigan Chamber of Commerce*<sup>318</sup> and *Federal Election Commission v. National Right to Work Committee*<sup>319</sup> premised the restrictions they upheld on corporate political expenditures (*Austin*) and solicitations by corporate-controlled political action committees (*NRWC*) on the view that the political process was distorted by "immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation with the public's support for the corporation's political ideas."<sup>320</sup> This notion has reached its present apogee in *McConnell v. Federal Election Commission*,<sup>321</sup> in which, among other rulings, the Court upheld a broad ban on electioneering communications by corporations or unions. Although these

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upon the manner in which this freedom was exercised, and not upon the content of the message).

314. *Barnette*, 319 U.S. at 634.

315. *Id.* at 642.

316. *Cohen*, 403 U.S. at 25.

317. *Id.* The irony embedded in this famous observation is that it simultaneously embraces the autonomous self of Enlightenment modernity and the value-skepticism of postmodernism.

318. See *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 668–69 (1990) (holding that a Michigan statute prohibiting corporations from using corporate treasury funds for independent expenditures in support of or in opposition to candidates in elections for state office did not violate the Equal Protection Clause).

319. See *Fed. Election Comm'n v. Nat'l Right to Work Comm'n*, 459 U.S. 197, 205–06 (1982) (finding that the NRWC violated federal legislation by soliciting contributions on behalf of federal candidates from persons who were not its members).

320. *Austin*, 494 U.S. at 660.

321. See *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 245–46 (2003) (holding that restrictions on soft money contributions to political campaigns and on issue advertising did not facially violate the First Amendment and that recordkeeping requirements concerning political advertising also were valid).

decisions are ostensibly based on the need to avoid corruption of the democratic process, they are also implicitly based on a conception of the self that is at odds with the usual free speech conception of the individual. Most speakers and listeners are regarded as autonomous actors. As such, they must be free to speak or to remain silent, and the corollary proposition is that, generally, they must simply "avert[] their eyes"<sup>322</sup> when confronted with offensive speech. But collective speech—that which is amplified by the "immense aggregations of wealth"<sup>323</sup> of corporations or unions—is the product of a socially constructed and highly artificial self. Because everyone is constructed by their society, the "factors contributing to individual socialization must be subject to governmental control in order for the government adequately to protect every citizen's full participation in the society's social and political life."<sup>324</sup> And that is precisely the rationale for upholding the validity of ever stricter limits upon campaign speech and its "mother's milk"—money.<sup>325</sup>

At one time the Court could confidently declare that free speech "has its fullest and most urgent application precisely to the conduct of campaigns for political office,"<sup>326</sup> and that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."<sup>327</sup> But that time is past; now the Court thinks that the political process must be protected from the "distorting effects of immense aggregations of wealth."<sup>328</sup> Perhaps the political process is simply a particularly vivid example of a process of social construction, but if

322. *Cohen v. California*, 403 U.S. 15, 21 (1971).

323. *Austin*, 494 U.S. at 660.

324. Steven G. Gey, *The Case Against Postmodern Censorship Theory*, 145 U. PA. L. REV. 193, 198 (1996) (asserting the postmodern view).

325. Jesse Unruh, California's Treasurer from 1961 to 1968, famously declared that "money is the mother's milk of politics." See *Coming to Terms: A Money-in-Politics Glossary*, HOOVER INSTITUTION, PUBLIC POLICY INQUIRY, CAMPAIGN FINANCE, CURRENT STRUCTURE, <http://www.campaignfinancesite.org/structure/terms/m.html> (last visited Oct. 21, 2006) (defining "mother's milk") (on file with the Washington and Lee Law Review). Nobody has yet proven Unruh wrong. Indeed, the metaphors proliferate, as EMILY's List suggests: "Early Money Is Like Yeast." See *Who is EMILY?*, EMILY'S LIST, <http://www.emilyslist.org/about/who-is-emily.html> (last visited Oct. 21, 2006) (stating that EMILY is an acronym for "Early Money Is Like Yeast") (on file with the Washington and Lee Law Review).

326. See *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) (holding that the actual malice standard for defamation applies to statements concerning candidates for public office).

327. *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976).

328. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990); see also *McCConnell v. Fed. Election Comm'n*, 540 U.S. 93, 138 (2003) ("Complex as its provisions may be, [the core of the McCain-Feingold Act] does little more than regulate the ability of wealthy individuals, corporations, and unions to contribute large sums of money to influence federal elections, federal candidates, and federal officeholders.").

postmodern legal theory were to prevail fully in the Court we would see a far more dramatic restructuring of free speech,<sup>329</sup> one in which free speech would be curtailed more freely. If individuals are socially constructed, their behavior is the product of their social construction, and that construction is the product (in part) of the speech that surrounds them. Thus, racist or sexist behavior is the product of a social construction that is partly created by racist or sexist speech, or at least speech that accepts and fosters racist or sexist attitudes.<sup>330</sup> Similarly, explicit depictions of violence or sex are said to debase, desensitize, and construct us.<sup>331</sup> To address the perceived evil of such socially constructed identities, it becomes necessary to curb the speech that contributes to the social construction. After all, free speech is just one of several different, equally valid, constitutional narratives, and there is no reason to give primacy to any particular narrative.<sup>332</sup> That line of thought has not captured the Supreme Court, except when it comes to the "mother's milk of politics." But even in free expression, a bastion of modernity, a postmodern beachhead has been established. Postmodern theorists think this is an augury of the future,<sup>333</sup> perhaps they are correct.

Further indications of the postmodern beachhead may be seen in the Court's treatment of sexually explicit speech. Originally, obscenity was thought to lack any importance because the free expression guarantee "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people,"<sup>334</sup> and the Court thought

329. See generally Gey, *supra* note 324 (canvassing postmodern theories of free speech and objecting to the censorship values advocated by postmodern legal theorists).

330. See, e.g., Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 348–58 (1991) (discussing the enactment of antiracism student conduct rules in response to widespread racial tension on American college campuses); Richard Delgado, *First Amendment Formalism Is Giving Way to First Amendment Legal Realism*, 29 HARV. C.R.-C.L. L. REV. 169, 171–72 (1994) (discussing "the idea that language and expression can sometimes serve as instruments of positive harm"); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 440–44 (discussing the conduct/speech distinction); CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 148 (1987) (explaining that pornography produces a "social construction of male and female" that causes men to treat women as sexual objects).

331. For an extended discussion of this theme, see PATRICK M. GARRY, *REDISCOVERING A LOST FREEDOM: THE FIRST AMENDMENT RIGHT TO CENSOR UNWANTED SPEECH* (2006).

332. See Delgado, *Campus Antiracism Rules*, *supra* note 330, at 346–47 (discussing how one can frame free speech problems by "invok[ing] different narratives to rally support").

333. See Delgado, *First Amendment Formalism*, *supra* note 330, at 170 (stating that free speech law is being transformed into "a much more nuanced, skeptical, and realistic view . . . that looks to self and class interest, linguistic science, politics, and other tools of the realist approach to understand how expression functions in our political system").

334. *Roth v. United States*, 354 U.S. 476, 484 (1957).

that obscenity was simply not such an idea. The Court's shift of its rationale to the "'social interest in order and morality'"<sup>335</sup> as the reason for obscenity's banishment<sup>336</sup> was the product of greater recognition of the self as socially constructed. Obscenity implicates the social interest in order and morality only if it is conceded that obscenity can affect the individual who views it, and that the cumulation of those effects will produce a rippling of effects upon others. If individuals were truly autonomous, speech restrictions would be unnecessary, for autonomous actors may always *choose* and, thus, non-speech based restrictions on their behavior should be efficacious.

To similar effect is the Court's schizoid treatment of non-obscene sexually explicit speech. On one hand, as the secondary effects doctrine attests, pornography is low value speech that merits lesser protection.<sup>337</sup> This is because of such speech's social impact, though the Court is careful to say that if the social impact of speech is produced by its communicative impact, the validity of curbs upon such speech must be subjected to strict scrutiny.<sup>338</sup> Even so, the underlying rationale rests on recognition that speech, whether direct or

335. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61 (1973) (quoting *Roth*, 354 U.S. at 485 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (emphasis deleted))); *see also* *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting) (stating that obscenity may be banned because there is a "right of the Nation and of the States to maintain a decent society").

336. *See* *Miller v. California*, 413 U.S. 15, 25 (1973) (rejecting "utterly without redeeming social value" as a constitutional standard). In *Miller*, the Court redefined obscenity to include sexually explicit, prurient, and patently offensive materials that, "taken as a whole, do not have seriously literary, artistic, political, or scientific value." *Id.* at 24 (emphasis added). As Justice Brennan pointed out in his dissent to the companion case, *Paris Adult Theatre*, 413 U.S. 49, the reason obscenity was denied constitutional protection in *Roth* was because it utterly lacked any redeeming social value. *Id.* at 97 (Brennan, J., dissenting). A necessary corollary to the Court's approach to obscenity in *Miller* was the creation of a new rationale for obscenity's devalued constitutional status. The majority in *Paris Adult Theatre* offered several possibilities, some utilitarian ("the tone of commerce in the great city centers," 413 U.S. at 48); some based on moral notion ("a legislature could legitimately act . . . to protect 'the social interest in order and morality,'" *id.* at 61 (quoting *Roth*, 354 U.S. at 485 (quoting *Chaplinsky*, 315 U.S. at 572 (emphasis added in *Roth*))); and some based on a combination of morals and utilitarianism (a legislature may validly assume "that commerce in obscene books, or public exhibitions [of obscenity], have a tendency to exert a corrupting and debasing impact leading to antisocial behavior," *Paris Adult Theatre*, 413 U.S. at 63).

337. *See, e.g.,* *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) ("[S]ociety's interest in protecting [pornography] is . . . lesser . . . than the interest in untrammelled political debate . . ."); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-48 (1986) (treating as content-neutral zoning restrictions applicable only to purveyors of pornography because the restrictions were aimed at the non-speech induced secondary effects of such establishments).

338. *See* *Boos v. Barry*, 485 U.S. 312, 314 (1988) (stating that the reactions of listeners to speech are not "secondary effects" of the speech).

indirect, affects society because it affects behavior and alters our malleable selves. On the other hand, as in *United States v. Playboy Entertainment Group*,<sup>339</sup> pornography receives unqualified protection and can be the occasion for a spirited rhetorical defense of free speech doctrine rooted in the autonomous self. One might think that:

[O]ur free speech jurisprudence . . . is influenced by the philosophy that one idea is as good as any other, and that [there are no] objective standards of style, taste, decorum, beauty, [or] esthetics . . . [, but the] Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments . . . can be formed, tested, and expressed. What the Constitution says is that these judgments are for the individual to make, not for the Government to decree . . . .<sup>340</sup>

Doctrine in this area reflects the continuing tension between two conceptions of individuality. We are autonomous, free to choose our bliss; we are determined by that which surrounds us, and a welter of sexually explicit pornography constructs us.

Nor is this tension confined to free speech. The Court in *Lawrence* may wax poetic about the dignity due to homosexuals,<sup>341</sup> but it is unwilling to back that up by any heightened level of review of laws impinging upon that dignity. By its result and rhetoric *Lawrence* bows toward the modernist concern for privileging individual autonomy; by its refusal to apply heightened scrutiny the Court not only embraces postmodern indeterminacy but curtsseys to pre-modern objections to according equal dignity to the varieties of human sexuality. Ironically, these pre-modern fears exist because of a dim recognition that identities are socially constructed. Thus, the Court's implicit deference to these concerns amounts to an awkward and implicit recognition of the power of social construction of the individual.

The Court sometimes develops doctrine with a background assumption that individuals are autonomous, but sometimes it acts upon the assumption that our identities are socially constructed. There is little indication that it is aware of its inconsistency or even that it is very aware of the nature of the background assumption it is making. That said, it is true that the postmodern notion of a socially constructed self has had a discernible impact on constitutional doctrine, and that impact is increasing.

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339. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000).

340. *Id.* at 818.

341. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) ("[Consenting] adults who . . . engage[] in sexual practices common to a homosexual lifestyle . . . are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.").

#### IV. *The Consequences of Postmodern Constitutional Adjudication*

Any discussion of the consequences of postmodern constitutionalism is necessarily speculative. Accordingly, I shall keep these observations to a minimum, for I am not a seer. But one does not have to be Nostradamus to discern at least some likely consequences.

##### A. *"Just the Facts, Ma'am"*<sup>342</sup>

Although the early stages of modernity may have been characterized by an ebullient faith in rational inquiry, the later stages of modernity have been an age of anxiety. Modern Man is plagued by doubt and fear; the fragmentation and contingency of experience is cause for alarm. Postmodern Man, however, celebrates the chaos. Drink in the nonsense, laugh at the bizarre, enjoy the exhilaration of a Felliniesque existence. Transposed to the prosaic key of constitutional adjudication, this attitude, whether recognized or not, is apt to produce fewer grand doctrinal constructs. If the world is incoherent there is no point in trying to impose an artificial coherence upon it. If everything is contingent, sweeping pronouncements that cover vast constitutional territory are as likely to endure as snowflakes in Los Angeles. Constitutional opinions will be driven by their facts, and the doctrine that is derived from them is apt to be unstable, shifting, and good for that day only.

To be sure, this is a bit of an overstatement, made in part for dramatic effect. The Court will continue to fashion doctrine as best it can out of its factually-driven opinions, and the effort will be sincere. But the doctrinal loom is not likely to work very well, and the resulting pattern of the cloth that emerges is apt to look a bit chaotic. Texas's sodomy law is unconstitutional because Texas's desire to make a moral judgment is illegitimate, but that does not necessarily mean that all laws founded solely on moral judgments are void. Texas's criminal punishment of sexual intimacies between same-sex partners demeans their human dignity, but that does not necessarily mean that laws limiting marriage to opposite-sex couples are doomed. The University of Michigan's criteria for admission to its law school are narrowly tailored to accomplish a compelling educational objective because we assume the law school's good faith in assessing applicants individually, but its criteria for admission to its undergraduate school are not narrowly tailored

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342. This line, credited to Jack Webb's character Sgt. Joe Friday on the 1950s television show *Dragnet*, is in fact a corruption of what Webb's character actually said: "All we want are the facts, ma'am." Snopes.com, Just the Facts, <http://www.snopes.com/radiotv/tv/dragnet.htm> (last visited Oct. 17, 2006) (on file with the Washington and Lee Law Review). But this is the legendary line, the one that stuck. *Id.*

because we do not think the undergraduate admissions officers will apply such individual attention. But neither of these cases has much to say about similar criteria applied to public employment, government contracts, or other forms of governmental benefits.

Constitutional law has used the common law method—the patient accretion of law case-by-case—but there is a considerable difference between a succession of narrow holdings, each built upon the last, to produce some semblance of an orderly edifice, and a jumble of rulings each driven by a felt sense of justice in response to the facts presented. The former conception of the Court's methodology is classically modern; the latter conception is distinctly postmodern. In the modern method, doctrine responds to facts in an attempt to cohere the whole of the doctrinal field; in the postmodern method, facts become a powerful solvent of doctrinal coherence. And why not? In the postmodern world coherence is chimerical. The search for a unified, universal explanation is the search for a holy grail. Give it up; let's just play with nonsense. So it is that facts rule. Just the facts, ma'am; the law will take care of itself.

### *B. Legislators in Robes*

Richard Posner has persuasively argued that the "extraordinary growth in the ratio of lower court to Supreme Court decisions . . . has reached a point at which it is no longer feasible for the Court to control the lower courts by means of narrow, case-by-case determinations [but] must perforce act legislatively."<sup>343</sup> Several possible consequences flow from the fact that the flood of cases relative to the Court's almost finite docket demands that it abandon the common law method. The practical requirement that the Court must act legislatively could mean, most obviously, that the justices will be transformed into legislators, pronouncing policy preferences through the adjudicatory process. But justices could react to this practical reality by deciding that if the process is quintessentially legislative the legislature ought to be the one doing the legislating.<sup>344</sup> The latter possibility may be more imaginary than real, because it is contrary to human nature for those who have clambered into the cockpit of power to settle in without ever flicking a few switches and levers, much less taking a test flight or two.

Even so, there may be some exemplars of restraint who can steel themselves from the temptations of magisterial direction, and it may be that as

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343. Posner, *supra* note 101, at 35 (citations omitted).

344. *See id.* at 54–57 (discussing the "aggressive judge" approach to constitutional adjudication, and positing the "modest judge" approach to constitutional adjudication).



postmodern epistemological uncertainty becomes ever more pronounced the Justices will turn that uncertainty into restraint. But because postmodernism posits that the proper response to epistemological uncertainty is to revel in it, one might well expect the thoroughly postmodern Justice to embrace enthusiastically the legislative model of judging. If nobody knows anything, the postmodern Justice might as well issue his nonsense, for it is surely no worse or better than the legislature's nonsense.

There are other alternatives to the task of judging in a postmodern world. Judge Posner offers and debunks the Court as expert administrator,<sup>345</sup> constrained by its institutional surroundings,<sup>346</sup> moral guru,<sup>347</sup> or as cosmopolitan connoisseur of global norms.<sup>348</sup> His objections to these models differ from mine; I claim that none of these models are tenable in a postmodern climate. The expert administrator model is doomed in a postmodern world for it presumes that judges can decide on neutral principles, and the absence of universal principles (or even neutral ones) is the distinguishing characteristic of the postmodern age. The institutional setting of the Court—essentially the demand that its decisions cohere in some sense—is drastically weakened in a world that increasingly recognizes the absence of coherence. Nor can the Court be a moral guru in an age in which universal accounts of morality have been abandoned. Although it might be possible for a postmodern Court to be a cosmopolitan sampler of global incoherence, there is no coherent way in which it could pick and choose among those norms. The cosmopolitan Court is simply a bunch of legislative artists with a broader palette.

Judge Posner ultimately embraces a pragmatic approach<sup>349</sup>—at least he says it "is correct for me."<sup>350</sup> The qualification "correct for me" is itself a recognition that in this postmodern age there are no universal narratives of judging. Whatever works for each person is the apparent standard, a point of view encapsulated in at least one of the meanings of the ubiquitous contemporary expression, "whatever." To the extent that pragmatic considerations are urged to dominate judging in the postmodern age, we are entitled to wonder how such practical consequences are to be measured. Practicality requires some metric of the desirable, and if there is no universal, or even dominant, account of the "good," one wonders how successful will be the

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345. *Id.* at 60–75.

346. *Id.* at 75–81.

347. *Id.* at 81–84.

348. Posner, *supra* note 101, at 84–90.

349. *See id.* at 90–102 (arguing that judges should "focus on the practical consequences of their decisions").

350. *Id.* at 90.

venture into pragmatic adjudication. One man's practicality is another man's folly. Whatever.

We are left with the strong likelihood that postmodern constitutional adjudication will be legislation, but legislation with some differences from the usual sort. Legislatures may work with facts, but they are free to choose the facts with which they deal or invent them if they so please. Legislatures are free to do what they will with facts; most remedies are open to them. Legislating is a relatively unconstrained medium. Judges, however, even in a postmodern world, are not as free. Facts come to them in the gelatinous aspic of a cold record, and they must respond to them. In the modern world, judges responded to facts through the filter of doctrine, and the challenge was to refine doctrine into an ever more coherent whole. But the postmodern tendency is to respond to those facts without much concern for the coherence of doctrine. If anything, doctrine is somewhat bothersome, a fustian relic of a modern past. Thus, as with the legislature's brand of legislation, judicial legislation in the postmodern world is far more apt to change with each session.

### *C. All Politics, All the Time*

An almost inevitable byproduct of the changes wrought in adjudication by the postmodern age is the increased politicization of the Court and selection of its Justices. Although the commonplace observation is to attribute this phenomena to the issue of abortion, it is more accurate to attribute it to a much broader range of concerns, all of which cluster around recognition of the Court as a political actor. In one sense, this is nothing new; in 1954 Justice Robert Jackson prepared his never-delivered Godkin Lectures on the triple themes of the Supreme Court as a unit of government, law court, and political institution.<sup>351</sup> What is new is the emphasis on the last of Justice Jackson's themes. The nation has come to perceive that the Court's work is not so much lawyer's work—a term that implies some uniquely professional competence that sets it apart from the ordinary hurly-burly of politics—but unvarnished political judgment. Given what has been discussed before, this should hardly be a surprise. The postmodern age has pushed the Court (or it has jumped) into the dusty arena of politics. Postmodernism has brought the Justices from the

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351. See ROBERT H. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 1, 28, 53 (1955) (describing the Supreme Court as an equal yet dependant entity of the federal government charged not only with administering civil and criminal matters, but also with arbitrating the allocation of power between the two political branches, the states, and the citizens).

courthouse to the OK Corral; Wyatt Earp and his brothers may have been wearing the sheriff's star, but they were blazing away with the best of gunslingers. Because judicial decisions are "political judgment[s], and a political judgment cannot be called right or wrong by reference to legal norms," it is no longer possible to speak of a Court decision as "'correct' or 'incorrect,' . . . all one can actually mean is that one likes . . . or dislikes . . . it."<sup>352</sup> So it is that John Roberts and Samuel Alito were asked questions to probe their political views, not to gauge their legal acumen. Political conservatives were not so much aghast at Harriet Miers's legal credentials as they were terrified at the prospect that she might not be reliable in her political judgments. Justice O'Connor suddenly became the darling of Senate liberals because her political judgments on abortion and racially based preferences were congenial to their own political views, not because she is the legal sage of her era.

The trend will only become more distinct in the postmodern age. Indeed, although the Court's docket includes enough non-constitutional cases to merit the nomination of lawyers who will comprehend the issues, at least with respect to constitutional cases, there is no compelling reason why the Justices ought exclusively to be lawyers. However, as with architecture, form does not always follow function, or at least the progression is not immediate. But the function has changed; it is all politics now, all the time.

#### *V. Conclusion*

We live in a postmodern age. The effects of our postmodern culture upon constitutional law have only dimly been appreciated. Just as postmodern thought posits the absence of universal narratives and the embrace of indeterminacy, so has American constitutional law begun to lose its commitment to the goal of doctrinal coherence. If all is indeterminate, there is no good reason why doctrine must cohere into a universally applicable, fully determined methodology that will answer all our questions. This phenomenon may be particularly observed in equal protection, substantive due process, the religion clauses, and free expression, but is likely present across the entire spectrum of constitutional law. The effects of this phenomenon, or at least those that are presently observable, are an increased tendency to craft decisions around facts without much regard to constitutional doctrine; a shift from the common law method of adjudication—the accretion of doctrine case-by-case in

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352. Posner, *supra* note 101, at 40.

a long running attempt to weave a fine web of coherent principles—to a legislative model in which decisions are made but are not intended to be derived from exogenous principles; and a public recognition that constitutional adjudication is simply political judgment. These effects, which are likely to become more pronounced as our culture becomes ever more postmodern, will accentuate the Court's role as a political institution and will likely increase proposals to make the Court more politically accountable.

