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n119 Taney also relied upon the idea that the Constitution could not intend inconsistency and the definition of admiralty in the Judiciary Act of 1789. Id. at 458-60.

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C. Conclusion: The Scientific Narrative in Classical Overrulings

As Part I of this Article illustrates, the style of the Supreme Court's nineteenth century overrulings was quintessentially classical. Even on the rare occasions that the Court contradicted itself, these contradictions were harmonized to retain for constitutional law the "certainty which makes it seem like mathematics." n120 The totalizing, assertedly scientific nature of classical legal thought could not be more clear than in these overrulings because the high Court relentlessly represented even its few self-contradictions as compelled and wholly derivable from the very legal fabric that these decisions deformed. n121

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n120 Oliver Wendell Holmes, Jr., Privilege, Malice, and Intent, 8 HARV. L. REV. 1, 7 (1894); see also HORWITZ, supra note 5, at 199 (citing Holmes' aphorism from this underappreciated article as a proper exemplar of classical legal thought).

n121 Analyzing classical legal science, Professor Grey argued that "the heart of classical theory was its aspiration that the legal system be made complete through universal formality"--that the law provide a correct answer in all cases. Grey, supra note 4, at 11. While completeness is a goal of legal systems generally, Grey argued that it was particularly central to classical consciousness. Under Grey's theory of classical orthodoxy, the Supreme Court should seldom overrule itself, because overruling is a tacit admission that the law cannot obtain correct results in all cases. Id. at 26 (noting the tension between stare decisis, or adherence to arguably "wrong" decisions, and classical orthodoxy). The nineteenth century Court's behavior bore out Grey's argument by overruling itself a mere 23 times. See Albert P. Blaustein & Andrew H. Field, "Overruling" Opinions in the Supreme Court, 57 MICH. L. REV. 151, 184-93 (1958).

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The tools employed by the nineteenth century Court in its overrulings exemplify the classical, scientific narrative of law. First, in avoiding the unseemingly appearance of contradiction, the voice-throwing Court showed the high value it placed on doctrinal coherence, a vital support to any assertedly scientific system of law. In cases such as Brenham v. German American Bank, n122 the Court found holdings in prior cases that were flatly irreconcilable with the actual holdings of those cases. This artifice showed the Court's classical nature, representing adjudication as compulsion even where doctrinal revision suggested judicial agency. n123 Second, in mapping out power relations and [*1141] making decisions as obedience to those rules, the Court showed the classics' architecture of a system that sought to explain all cases and all power relationships. County of Cass v. Johnston n124 showed again that the classicists prized these forms enough to turn precedents on their heads in service to these compelling abstractions by constructing an elaborate and dubious edifice of state law to which they could "submit." The Court preserved

its cherished structural analysis, and the formal completeness of classical thought, even as the Court reversed its interpretation of Missouri law and arguably made new Missouri law. Third, constitutional text, as starkly shown in the Legal Tender Cases, n125 was a source for abstract principles that were self-implementing. With this device as well, the Court showed the power of classical legal thought. Even when it reversed its prior interpretations of constitutional provisions, the Court performed these reversals as imminent in the text. All of these examples, drawn from the unlikeliest of vehicles--overrulings, where judicial agency is at its zenith--show the extent to which the Court performed its overrulings as compelled and necessary. Using these three devices, the Supreme Court signified that law was determined by a series of self-implementing rules and that it was, thus, scientific.

-Footnotes-

n122 144 U.S. 173 (1892).

n123 See supra note 18.

n124 95 U.S. 360 (1877).

n125 79 U.S. (12 Wall.) 457 (1872).

-End Footnotes-

In these overrulings, the Court abstracted all subjectivity and judicial agency from adjudication and approached the Langdellian scientific ideal of law. French philosopher Jean-Francois Lyotard has called the narrative of scientific discovery, growing out of the Enlightenment, one of the grand narratives of nineteenth century Western civilization. n126 In his analysis of contemporary knowledge, Lyotard argued that nineteenth century knowledge was connected by such grand narratives, so that all knowing was subsumed beneath them. The sciences were united by philosophy, and the spirit animating the nineteenth century university was a sense of totalization, of a grand unity of knowledge. n127 By analogy, scientism was the "metanarrative" binding nineteenth century adjudication. Courts conveyed this Enlightenment narrative in their performances, which configured law as the triumph of reason over incoherence. Like Lyotard's university, Langdellian legal science provided a totalizing unity to legal discourse. As the Court's overrulings forcefully illustrate, even the most problematic decisions [*1142] could be forced into the nineteenth century's rigid schema of scientism, in which--even at the rough edges marked by overrulings--law possessed true completeness, formal order, and necessity.

-Footnotes-

n126 JEAN-FRANCOIS LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE xxiii-vi (Geoff Bennington & Brian Massumi trans., 1984) (discussing "the Enlightenment narrative, in which the hero of knowledge works toward a good ethico-politico end"); see also id. at 38 (discussing "narratives of speculation and emancipation").

n127 Id. at 33-34.

-End Footnotes-

This scientific metanarrative, of which necessity was one vital constitutive element, would fly apart in our postrealist world. Just as Lyotard has argued that contemporary knowledge has become local, as the sciences become autonomous and disunified n128 and modes of knowing n129 proliferate, so would scientism in law collapse. Under these postmodern conditions, Justices can no longer generate the legitimating effect of necessity in overrulings. Part II tries to explain the nature of constitutional thought after compulsion. Part II argues that contemporary Supreme Court overrulings reflect the Court's acute consciousness of the realist critique that legal reasoning is indeterminate. This postmodern Court of splintered subjectivities increasingly performs n130 its overrulings as politically contingent or exercises of fiat, so that law appears to be made, not found, and the legitimating effect of necessity is absent. This is the postmodern dilemma and the crisis of legitimation that confronts our contemporary Court.

-Footnotes-

n128 Id. at 60 (arguing that "postmodern science . . . is theorizing its own evolution as discontinuous, catastrophic, nonrectifiable, and paradoxical").

n129 Lyotard argued that the computer age has brought with it fragmentation in methods of learning and knowing. Id. at 4. It is this transformation that Professor J.M. Balkin keyed in on in his recent article about legal postmodernism. See Balkin, supra note 8, at 1976-83 (arguing that the primary relevance of postmodernism to constitutional law is in the transformation of legal thought wrought by recent technological advances). This Article respectfully disagrees with Professor Balkin's thesis that technological change, rather than jurisprudential fragmentation, is the primary relevance of postmodernism to our study of constitutional law. While technological change is one element in the story of contemporary legal thought and its evolution, the proliferation of philosophical or jurisprudential allegiances is the primary source of the fragmented postmodern experience of contemporary legal thought.

n130 The term "performance" describes the adjudicative act, following the use of the term by Professors Levinson and Balkin. See Levinson & Balkin, supra note 9, at 1609; cf. West, supra note 11, at 207 (arguing that adjudication is not primarily interpretive, having the character of literature, but instead is best understood as an imperative act or an exercise in power).

-End Footnotes-

II. OVERRULINGS BY THE POSTMODERN SUPREME COURT: AFTER COMPULSION

Part II of this Article argues that the compelled overrulings of the nineteenth century have given way to overrulings that are experienced as uncompelled and that are distinctly postmodern cultural products. This argument demonstrates the differences between the nineteenth and twentieth centuries' legal thought and tracks the transition in legal discourse from modern rationalism and determinism to a postmodern discourse of fragmentation and indeterminacy. With the change de- [*1143] scribed in Part II comes a crisis of legitimation in contemporary overrulings, for which the Conclusion of this Article tentatively suggests a solution. Before showing that contemporary

overrulings are postmodern cultural products, however, it is first necessary briefly to discuss postmodernism.

A. What is Postmodernism? n131

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n131 "Everyone begins the discussion of postmodernism by asking what the word could possibly mean." JOHN MCGOWAN, POSTMODERNISM AND ITS CRITICS ix (1991).

-End Footnotes-

1. The Claims of Postmodernism

As one commentator recently stated, "postmodernism is all the rage." n132 Indeed, the use of the label "postmodern" has grown so in the last ten years that it is difficult to know what authors mean when they describe an event or a cultural form as postmodern. n133 Postmodernism is a fashionable description of an array of cultural phenomena ranging from architecture n134 to art n135 to science. n136 Indeed, the scholarship of postmodernism is varied and, by its own admission, contains divergent postmodernisms. n137

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n132 Francis J. Mootz III, Is the Rule of Law Possible in a Postmodern World?, 68 WASH. L. REV. 250 (1993). Indeed, postmodernism has become fashionable in legal circles. Balkin, supra note 8, at 1977 n.25 (listing recent examples of postmodern legal scholarship).

n133 "If postmodernism is anything at all, it comes in more than thirty-one flavors." Dale Jamieson, The Poverty of Postmodernist Theory, 62 U. COLO. L. REV. 577 (1991).

n134 FREDERIC JAMESON, POSTMODERNISM, OR THE CULTURAL LOGIC OF LATE CAPITALISM 97-129 (1991) (characterizing contemporary architecture as postmodern because of its incongruous juxtaposition of different period styles); see also HEINRICH KLOTZ, THE HISTORY OF POSTMODERN ARCHITECTURE (Radka Donnell trans., 1988) (noting the playfulness and paradox in contemporary architecture).

n135 E.g., BRIAN MCHALE, POSTMODERNIST FICTION (1987); Charles Jencks, The PostAvant-Garde, in THE POST-AVANT-GARDE: PAINTING IN THE EIGHTIES 5 (Andreas C. Papadakis ed., 1987), reprinted in THE POST-MODERN READER 215-24 (Charles Jencks ed., 1992) [hereinafter POST-MODERN READER]; William S. Wilson, "And/Or: One or the Other, or Both," in SEQUENCE (CON)SEQUENCE: (SUB)VERSIONS OF PHOTOGRAPHY IN THE '80'S 1131 (Julia Ballerini ed., 1989).

n136 See, e.g., Tito Arcchi, Chaos and Complexity, LIBER, Oct. 1989, at 16-17 (magazine supplement to TIMES LITERARY SUPPLEMENT (London), Oct. 6-12, 1989, and to several other major European newspapers), reprinted in POST-MODERN READER, supra note 135, at 350-53; THE REENCHANTMENT OF SCIENCE: POSTMODERN PROPOSALS (David R. Griffin ed., 1988).

n137 Constructing Postmodernism "proposes multiple, overlapping and intersecting inventories and multiple corpora; not a construction of postmodernism, but a plurality of constructions; constructions that, while not necessarily mutually contradictory, are not fully integrated, or perhaps even integrable, either." BRIAN MCHALE, CONSTRUCTING POSTMODERNISM 3 (1992); cf. DICK HEBDIGE, HIDING IN THE LIGHT: ON IMAGES AND THINGS (1988). Hebdige noted:

It becomes more and more difficult as the 1980s wear on to specify exactly what it is that "postmodernism" is supposed to refer to as the term gets stretched in all directions across different debates, different disciplinary and discursive boundaries, as different factions seek to make it their own, using it to designate a plethora of incommensurable objects, tendencies, emergencies.

MARGARET ROSE, Defining the Post-Modern, THE POSTMODERN AND THE POST-INDUSTRIAL: A CRITICAL ANALYSIS 119 (1991) (citing HEBDIGE, supra, at 181), reprinted in POSTMODERN READER, supra note 135, at 196.

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[*1144]

Nonetheless, theorists share certain understandings of postmodernism. While modernism frequently denotes a philosophy of rationalism and progress--"the Enlightenment project"--postmodernism attacks the foundationalism of modernism, or the modernist belief that knowledge rests on some ultimately verifiable truths. n138 Postmodern culture is diffuse, pluralistic, fragmented, and constantly changing. n139 Postmodern theorists generally agree that ways of knowing have changed from the modern, rationalist period of the nineteenth and early twentieth centuries to the pluralistic present, in which political and cultural subjectivities proliferate. In sum, postmodernism is a set of claims about the world in which we live--how we generate culture, and what are some common characteristics of the cultural artifacts that we create.

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n138 STEVEN BEST & DOUGLAS KELLNER, POSTMODERN THEORY: CRITICAL INTERROGATIONS 206-07, 230-31 (1991) (asserting that postmodernism rejects foundationalism); ROSE, supra note 137, at 119 (citing various theorists, including Lyotard, for the proposition that postmodernism is the absence of a dominant specularity and is an age of indeterminacy in philosophy).

n139 E.g., Balkin, supra note 8, at 1968-69 ("By the time that we understand postmodernism, postmodernism itself will already have been transformed into something quite different."); Andrew M. Jacobs, The Right to Die Movement in Washington: Rhetoric and the Creation of Rights, 36 HOW. L.J. 185, 213 n.122 (describing the "acceleration of claims" as a characteristic of contemporary politics as an increasing number of self-identified groups in society assert claims to group rights).

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Perhaps the most widely respected text in the body of postmodernism, n140 and certainly one of the most relevant to an analysis of postmodernism in contemporary legal thought, is Jean Francois Lyotard's Postmodern Condition: A Report of Knowledge, which attempts an explanation of the structure, or lack of structure, in postmodern ways of knowing. n141 Lyotard identified two grand narratives in nineteenth century thought--the narrative of political emancipation and the Enlightenment narrative of rational, scientific progress. n142 Lyotard argued that as these totalizing explanations of knowledge broke down, domains of knowledge became "local," like a [*1145] series of shrinking points in three-dimensional space, defined less by their connectedness than by the distance separating them. In this condition of knowing, postmodern sciences describe themselves as containing paradox and discontinuity. n143 Grand unities disappear. Lyotard summarized this postmodernity as "an incredulity toward metanarratives." n144

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n140 It is certainly paradoxical to discuss Lyotard's work as canonical in a "field" that rejects the notions of both "field" and "canon." Nonetheless, erudite students of postmodernism have made the assertion. BEST & KELLNER, supra note 138, at 146 ("In many circles, Lyotard is celebrated as the postmodern theorist par excellence.").

n141 See generally LYOTARD, supra note 126.

n142 Id. at 31.

n143 Id. at 60.

n144 Id. at xxiv.

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2. The Relevance of Postmodernism to Contemporary Supreme Court Overrulings

Lyotard's "incredulity toward metanarratives" is enacted in the Court's contemporary overrulings in at least two ways. First, the grand narrative of scientism and logical compulsion, along with its concomitant effect of necessity, has vanished in the Court's contemporary overrulings. n145 The metanarrative of reason as compelling results can only occur in a condition of clear, prior specification of doctrine in a substantive area of the law that dictates the outcome of the instant case. n146 Yet, in the Court's contemporary overrulings, there is no consensually accepted corpus of prior doctrine in any substantive area to compel later holdings. Instead, the connectedness of doctrine, inextricably linked to compulsion, has given way to the particularity of individual cases before the Court standing for radically narrow propositions. n147

[*1146] Returning to Lyotard's apt metaphor of knowledge as spatial, the Court's prior opinions are not compelling three-dimensional areas on which later points are merely mapped. Instead, prior opinions are mere points, entailing no particular subsequent result, chosen by the Court like the instant opinion, but not dictated by the compulsion of a unifying theory of a particular substantive area. In this postmodern consciousness, the Court's overrulings are frankly (or transparently) chosen and not compelled. The legitimating power of reason

fades.

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n145 There can be little doubt that the scientism of the law qualifies as a Lyotardian "grand narrative." To the classicists, after all, law was the paradigmatic metanarrative. The Langdellian ideal of law was a system of reason with universal power of explanation, subsuming all cases within its rules without contradiction. Grey, supra note 4, at 32 (describing classicism as holding the "promise of determinate geometric order"). In this sense, Langdellian, or classical, thought was paradigmatically modern and rational; it was the very claim that law was rational and reducible to a series of propositions that, when applied objectively, would explain all cases. Thus, attempting to show incredulity toward (or the collapse of) metanarratives in contemporary Supreme Court opinions is an apparently daunting task from the vantage of Langdellian thought.

n146 Coherent accounts of particular substantive areas of the law are also large narratives. See, e.g., Cover, Nomos, supra note 25. A Supreme Court opinion, like any other authoritative statement of the law, is by definition metanarrative--an exposition of the law upon which lower courts, and the Supreme Court itself, are to base later interpretations of statutes or constitutional provisions.

n147 Examples of the radical particularity of the Court's contemporary jurisprudence abound. E.g., Mertens v. Hewitt Assocs., 113 S. Ct. 2063, 2067 (1993) (holding that section 502(a)(3) of ERISA, authorizing "other equitable relief" against fiduciaries, does not provide a cause of action permitting money damages against nonfiduciaries for knowing participation in fiduciary breaches, but declining to explain whether ERISA's fiduciary provisions bar all causes of action against money damages); Reves v. Ernst & Young, 113 S. Ct. 1163, 1171 (1993) (holding that section 1962(c), one of the four subsections of RICO creating civil liability, requires "management or control" for liability, but without intimating whether the other three subsections contain this extratextual requirement). Through these remarkably pinched and narrow holdings, law becomes "local" and "particular," as does postmodern knowledge. LYOTARD, supra note 126, at xxiv (describing contemporary knowledge as dominated by "local determinism").

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The collapse of connected knowing pointed out by Lyotard is enacted in the contemporary Court's overrulings in a second way. As grand narratives break down in postmodern knowledge, they are replaced by a sense of indeterminacy n148 and fragmented discourse. n149 Lyotard's sense of modern science's conceiving itself as paradoxical, incomplete, and indeterminate is highly redolent of the realist assault on classical legal thought and the suggestion by Critical Legal Studies (CLS) scholars that legal reasoning is indeterminate or, at least, not entirely constrained by text or precedent. n150 Likewise, the postmodern experience of fragmented thought in many other aesthetic and intellectual domains n151 is reproduced in legal knowledge in the many interpretive communities on the Court, as Justices adhere to a multitude of potentially inconsistent jurisprudential views: the declaratory theory of [*1147] the law v. positivism, originalism v. evolving standards, loose v. strict views of the force to be accorded to precedent, and so forth. This fragmentation is paradigmatically postmodern.

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n148 E.g., LYOTARD, supra note 126, at 60; ROSE, supra note 137, at 119 (citing various theorists, including Lyotard, for the proposition that postmodernism is the absence of a dominant specularly and an age of indeterminacy in philosophy).

n149 E.g., IHAB HASSAN, Pluralism in Postmodern Prospective, in THE POSTMODERN TURN: ESSAYS IN POSTMODERN THEORY AND CULTURE (1987) (asserting that indeterminacy is a postmodern phenomenon), reprinted in POST-MODERN READER, supra note 135, at 196; Susan R. Suleiman, Feminism and Postmodernism: A Question of Politics, in POST-MODERN READER, supra note 135, at 318 (discussing postmodernism as a tendency toward "dissent and heterogeneity"). For discussions of the fragmented consciousness of the legal academy, see Margaret J. Radin & Frank Michelman, Pragmatist and Poststructuralist Critical Legal Practice, 139 U. PA. L. REV. 1019, 1028 n.47 (1991). Radin and Michelman listed 14 different normative jurisprudences: autonomous doctrinal elaboration, instrumentalist economics, rights and principles, dialogism, poststructuralism, pragmatism, feminism, critical race theory, public choice theory, legal realism, law-and-society, civic republicanism, postmodernism, and law-andliterature. Id.; see also Balkin, supra note 8, at 1985 (describing new genres of scholarship defined, not by traditional practice areas such as contracts and torts, but by theoretical allegiances, including law and economics and feminist legal theory).

n150 See, e.g., Roberto M. Unger, The Critical Legal Studies Movement, 96 HARV. L. REV. 561, 564-70 (1983) (arguing that formalism and objectivism, two pillars of the traditional notion of law, are myths).

n151 E.g., DAVID HARVEY, THE CONDITION OF POSTMODERNITY (1989) (mapping the postmodern in domains ranging from philosophy and feminism to art and popular culture).

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To be sure, classical legal consciousness and its claims of compulsion and objectivity still exist in the contemporary Court, largely in the voice of Antonin Scalia. n152 Paradoxically, the classical voice (the absence of subject) exists, not only as an agent or subject by virtue of juxtaposition with other subjects claiming agency (positivists), but also as a subjective stance as embattled classicists like Scalia subjectively experience their objectivity as one point of reference. n153 Aside from these few embattled classicists, the classical vision of law is instantiated inconsistently, incongruously, and unconvincingly. The Court's splintered consciousness leads its members to talk past each other, further reducing the possibility of coherent, logically compelled results.

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n152 This does not make the Court any less "postmodern"; indeed, the juxtaposition of various period styles epitomizes postmodernism. E.g., JAMESON, supra note 134, at 100-01 (explaining that postmodern architecture contains the incongruous juxtaposition of different period styles); Balkin, supra note 8, at 1966 (juxtaposing Justice Scalia with progressive legal thinkers of the academy as evidence of our postmodern constitutionalism).

n153 For a discussion of James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439 (1991), see infra notes 169-84 and accompanying text.

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This Article's argument that the primary relevance of postmodernism to the Court is in the incoherence of the Court's pronouncements of new law stands in contrast to that of Professor J.M. Balkin, who recently asked and answered the question, "What is a Postmodern Constitutionalism?" n154 Professor Balkin argued that the primary relevance of postmodernism to constitutionalism is not doctrinal, but is in the effect that postmodernism in society, particularly the dawning information age, will have on how the polity and the Court understand the Constitution. n155 Indeed, Professor Balkin was properly concerned with the broad social effects of postmodernism, such as the "mediation" of American culture. n156 Nonetheless, Lyotard's analysis of the state of knowledge in postmodernity took as its subject the production of knowledge by cultural elites, as does any study of the Supreme Court. Moreover, any postmodern constitutional analysis would be incomplete if it did not look to the Court's constantly changing "language games" of legitimation, n157 which are central to postmodernity. Such an analysis furnishes an intimate view of the crisis of legitimation at the heart of the Court's recent overruling, doctrine-shifting opinions. Thus, while the issues pointed up by Balkin are significant, the primary significance of postmodernism in constitutional study is in highlighting incoherence, a natural extension of the realist and CLS project, and in asking where jurisprudence goes from here.

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n154 Balkin, supra note 8.

n155 Id. at 1976-77 ("Constitutional lawyers need to understand postmodernism because they need to understand the cultural changes that have taken place around them in art, politics, technology, and economics.").

n156 Professor Balkin desires to emphasize the difference between using the idea of postmodernism as a descriptor and using it as a normative goal. See id. at 1966-67 (cautioning against the idealistic yearning among some theorists for "a grand new postmodern day," which would replace current conservative jurisprudence). But see LYOTARD, supra note 126, at xxv (endorsing the heterogeneity of language games); Mootz, supra note 8, at 524 (arguing that postmodern legal thought is intrinsically normative). "Postmodernism" is a useful descriptor, and this Article refers to these opinions as "postmodern" without exalting or disparaging them.

n157 The phrase is Lyotard's, borrowed from Wittgenstein. See LYOTARD, supra note 126, at 10. The phrase "language games" does not belittle the means by which the Court describes and attempts to legitimate changes in the law. Instead, this phrase describes the fluidity and malleability of the Court's explanations and suggests their lack of any claim on objectivity or permanence.

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B. Overrulings and Stare Decisis in the Contemporary Supreme Court: Postmodernism and the Antithesis of Classical Legal Thought

This Section argues that the Court's current overruling performance no longer convincingly achieves the effect of necessity created by nineteenth century Supreme Court overrulings. By failing to create the effect of necessity, the Court's overruling rhetoric suggests that the overrulings are acts of judicial fiat, as opposed to acts of obedience to constitutional or statutory mandates, evoking legal realism's critique of the indeterminacy of legal reasoning. This change in the Court's selfunderstanding and performance can be explained with reference to two key analytic concepts of postmodernism. First, the failure of metanarratives, or the increasing "localization" of knowledge, is evident in the breakdown of narratives of substantive areas of the law. In other words, there is no longer an Eighth Amendment, but instead a proliferation of inconsistent views of the Court's Eighth Amendment caselaw. Second, the "fragmentation" and dissension that theorists see in postmodern culture are clear in the increasingly splintered discourses underlying the Court's overrulings, as Justices divide along countless jurisprudential lines and speak in a cacophony of different voices.

In both important respects, the Court's opinions that make new law are postmodern cultural products. More importantly, these concepts point up a central change in the Court's adjudicative performance, one responsible for the lack of necessity in the Court's current announcements of new law. Each of the following subsections traces this analysis through a different substantive area of law. In each of these areas, the lack of a consensually accepted and coherent account of the law and the dispute over modes of constitutional analysis prevent a convincing overruling performance in which results seem to be compelled.

1. Competing Metanarratives and Fragmented Discourse in Civil Retroactivity: From Chevron Oil to Harper v. Virginia Department of Taxation

The Supreme Court's recent trilogy of decisions revising its jurisprudence of civil retroactivity strongly supports this Article's thesis that necessity has broken down in the Court's recent overrulings and has given way to a postmodern performance of collapsing metanarratives and fragmentation. In no changing area of the law has the Court so clearly failed to produce a coherent whole, much less to present its holdings as compelled by prior decisional law, as in its recent cases deciding whether the Court's decisions announcing new rules of civil law should be applied retroactively. As Justice O'Connor frankly observed in Harper v. Virginia Department of Taxation, the Court's most recent foray into civil retroactivity, "this Court's retroactivity jurisprudence has become somewhat chaotic in recent years." n158 This subsection argues that the Court's lack of any agreement as to the prior state of the law of civil retroactivity illustrates a breakdown in global knowing (or metanarrative) and that this breakdown rests on a corresponding fragmentation in the Court's internal discourse about the nature of law and in the Justices' subjective experiences of judging.

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n158 113 S. Ct. 2510, 2526 (1993) (O'Connor, J., dissenting).

-End Footnotes-

a. American Trucking Ass'ns v. Smith

The Court began its recent revision of its doctrine of civil retroactivity in American Trucking Ass'ns v. Smith, n159 which failed to produce a majority opinion. In Smith, the Court considered whether its decision in American Trucking Ass'ns v. Scheiner n160 --that unapportioned flat taxes on trucks using state highways unconstitutionally burdened outof-state truckers who paid the same tax for less use--could be applied retroactively. The Justices' disagreement about the meaning of prior law in Smith illustrates the breakdown of metanarratives in adjudication. [*1150] To the four Justices in the Smith plurality n161 who held that Scheiner applied only prospectively, Chevron Oil was the leading case in the field of civil retroactivity. These Justices saw Chevron Oil as providing a prophylactic formula of general application that would determine whether civil decisions of the Court should be applied only prospectively or should have retroactive application. n162

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n159 496 U.S. 167 (1990).

n160 483 U.S. 266, 296 (1987) (holding that the unapportioned flat taxes on trucks using state highways unconstitutionally burdened the out-of-state truckers who paid the same tax for less use).

n161 496 U.S. at 167 (plurality consisting of O'Connor, White, and Kennedy, JJ., and Rehnquist, C.J.).

n162 Id. at 178 (citing Griffith v. Kentucky, 479 U.S. 314, 328 (1987)).

-End Footnotes-

To the four dissenters in Smith, n163 a wholly different set of cases constituted the law of civil retroactivity. These dissenters cited two twenty-year-old cases for the general proposition that the Court applies new rules retroactively, notwithstanding reliance interests of litigants and lawmakers that are thwarted by the retroactive application of an apparently new rule. n164 The dissenting Justices conceded that the Court had declined to apply some of its decisions retroactively, but distinguished those cases, including Chevron Oil, as uniformly applying new rules retroactively while softening the impact of these new rules on reliance interests by allowing federal courts to act equitably in fashioning ameliorative remedies. n165 Under their reasoning, Chevron Oil merely "established a remedial principle for the exercise of equitable discretion by federal courts and not . . . a choice of law principle applicable to all cases on direct review." n166 To these Justices, Chevron Oil was a point in the field of the law of civil retroactivity, a kind of exceptional subdoctrine, but it did not establish any principle of broad application. To the plurality, however, this reading was "little more than a proposal that we sub silentio overrule Chevron Oil." n167

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n163 Id. at 205 (Stevens, J., dissenting). Justice Stevens was joined by Justices Brennan, Marshall, and Blackmun. Id. (Stevens, J., dissenting).

n164 Id. at 216-17 (Stevens, J., dissenting) (citing Phoenix v. Kolodziejcki, 399 U.S. 204 (1970); Cipriano v. City of Houma, 395 U.S. 701 (1969)).

n165 Id. at 223-24 (Stevens, J., dissenting).

n166 Id. at 219-20 (Stevens, J., dissenting).

n167 Id. at 190.

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The opinion in Smith was rendered incoherent by the fact that no one opinion commanded a majority, an increasingly common source of doctrinal confusion in Supreme Court decisions. n168 The larger picture [*1151] of civil retroactivity law was rendered obscure by the separate opinion of Justice Scalia, who concurred in the judgment that Scheiner should not apply retroactively, but on the rationale (consistent with neither the plurality nor the dissent) that Scheiner was incorrect as an original matter. n169 With four Justices reading the law of civil retroactivity to apply Chevron's three-part test, and four other Justices reading the body of law to mandate uniform application of new rules to all cases on direct review, the story of civil retroactivity was fractured into two irreconcilable narratives. The Court's failure to agree on a shared premise--the meaning of its corpus of cases about civil retroactivity--precluded compulsion. Smith was the antithesis of a classical lawmaking opinion because, without shared premises, nothing led inevitably from the precedent of Chevron Oil; the Court could not agree about what Chevron Oil decided and meant. Moreover, the division resulted in no majority, so the opinion did not create a new large narrative of civil retroactivity from which lower courts could reason. Justice Scalia's concurrence also foreshadowed an emerging philosophical division within the Court that would split wide open in the next civil retroactivity opinion.

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n168 E.g., Arizona v. Fulminante, 499 U.S. 279, 281 (1991), cited in Burke Marshall, A Foreword to JOSEPH GOLDSTEIN, THE INTELLIGIBLE CONSTITUTION xi, xi (1992).

WHITE, J., delivered an opinion, Parts I, II, and IV of which are for the Court, and filed a dissenting opinion in Part III. MARSHALL, BLACKMUN, and STEVENS, JJ., joined Parts I, II, III, and IV of that opinion; SCALIA, J., joined Parts I and II; and KENNEDY, J., joined Parts I and IV. REHNQUIST, C.J., delivered an opinion, Part II of which is for the Court, and filed a dissenting opinion in Parts I and III. O'CONNOR, J., joined Parts I, II, and III of that opinion; KENNEDY and SOUTER, JJ., joined Parts I and II; and SCALIA, J., joined PARTS II and III. KENNEDY, J., filed an opinion concurring in the judgment.

499 U.S. at 281 (citations omitted).

n169 Smith, 496 U.S. at 200-05 (Scalia, J., concurring in the judgment).

- - - - -End Footnotes- - - - -

b. James B. Beam Distilling Co. v. Georgia

The Court's remarkably incoherent set of opinions in James B. Beam Distilling Co. v. Georgia n170 reprised and deepened the doctrinal confusion that the Court created in Smith. Most significantly, the Justices authored five opinions, no one of which commanded more than three votes. Justice Souter's "opinion of the Court" commanded a mere two votes. Souter's opinion purported to decide only an extremely narrow element of the larger civil retroactivity question, announcing that a new rule, once applied to the parties before whom the Court announces the rule, must be applied to all other parties. Souter took no position on the question of whether prospective decision-making, or the application of new rules only to later-arising cases, was proper. While six members of the Court shared Justice Souter's conclusion on this vary narrow issue, n171 the Court was hopelessly fractured as to the [*1152] larger issue of what type of prospectivity, if any, was appropriate or whether all decisions creating new rules should be applied retroactively.

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n170 501 U.S. 529 (1991).

n171 Justice Souter emphasized the narrowness of his holding in an apparent attempt at winning over missing votes by stating that "the grounds for our decision today are narrow."

Id. at 544.

- - - - -End Footnotes- - - - -

Although concurring, Justice White wrote separately to argue that Justice Souter's holding was virtually meaningless because there was no precedent for applying a proposition to one set of litigants but not to later litigants. n172 Instead, White argued that new rules could be applied in a purely prospective fashion, to suits arising after the newly announced rule but not to litigants of prior-filed cases or the case in which the new rule is announced. n173 Justice Blackmun, joined by Justices Marshall and Scalia, wrote separately to argue for a rule of retroactive application of all new rules. n174 Justice Scalia, joined by Justices Marshall and Blackmun, wrote separately that the Constitution's grant of judicial power does not include the power to decide cases announcing rules of purely prospective application. n175

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n172 Id. at 544-45 (White, J., concurring in the judgment).

n173 Id. (White, J., concurring in the judgment).

n174 Id. at 547-48 (Blackmun, J., concurring in the judgment).

n175 Id. at 548-49 (Scalia, J., concurring in the judgment).

-End Footnotes-

The Court split into four groups. Justices Souter and Stevens sidestepped the primary question of whether and to what extent the Constitution requires prospective decision-making. At the same time, these Justices, while purporting not to overrule Chevron Oil, declined to apply Chevron Oil 's three-part test to determine whether a novel constitutional decision should receive only prospective effect. Justices Souter and Stevens explained that Chevron Oil could support the purely prospective application of a new rule (in some unspecified "rare" circumstances), but that it could not support the selective application of a rule to litigants, which Souter and Stevens contended would be the result in Jim Beam if they declined to apply Bacchus Imports, Ltd. v. Dias n176 retroactively. In their view, the Bacchus Court had retroactively applied its new rule to its litigants.

-Footnotes-

n176 468 U.S. 263 (1984) (prohibiting states from imposing higher excise taxes on imported alcoholic beverages than on locally produced alcoholic beverages).

-End Footnotes-

Justice White offered an alternative position in support of Chevron Oil. He agreed with Justices Souter and Stevens that Bacchus had applied its rule retroactively, making Chevron Oil irrelevant to this case. Nonetheless, he affirmed Chevron Oil 's rationale, arguing that "even if retroactivity depended upon consideration of the Chevron Oil factors, the Court may have thought that retroactive application was proper." n177 Justice White maintained that the Court had long endorsed pure prospectivity--the application of new rules to all cases arising out of conduct occurring after the announcement of the new rule. n178 Justices Blackmun, Marshall, and Scalia argued that all decisions creating new rules must be applied to the case announcing the rule and to all cases still on review. Without mentioning Chevron Oil, these Justices implicitly called for its overruling. Justices O'Connor and Kennedy and Chief Justice Rehnquist dissented, arguing that Chevron Oil should control and that some decisions should be applied only prospectively because of the reliance interests of particular litigants.

-Footnotes-

n177 501 U.S. at 545-47 (White, J., concurring in the judgment).

n178 Id. (White, J., concurring in the judgment).

-End Footnotes-

Jim Beam left three Justices against any form of prospectivity, four in favor of some form of prospectivity, and two mute. Because no five Justices agreed on Chevron Oil, there was no clear statement in Jim Beam as to whether Chevron Oil was the controlling precedent discerned by the Smith plurality or a limited rule headed for obsolescence. The field of civil retroactivity law had become a disconnected series of points, rendering Holmes' "prophecies of the law" n179 wholly obscure.

-Footnotes-

n179 Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

-End Footnotes-

Beneath the substantive ambiguity of the splintered opinions in *Smith* and *Jim Beam* ran a postmodern jumble of reasoning styles and theories of law. Justice Scalia's concurrence in *Smith* sounded the first note of this discord as he wrote that prospective application of precedents "presupposes a view of our decisions as creating the law, as opposed to declaring what the law already is." n180 Justice Scalia's declaratory theory of the law entailed retrospective application of precedents, because the fact that any new rule already was the law meant that the Court must apply that rule even to cases filed before the rule was formally announced. Justice Scalia was unmistakably classical in his denial of judicial agency and explicit submission to text.

-Footnotes-

n180 *American Trucking Ass'ns v. Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., concurring in the judgment).

-End Footnotes-

While the plurality in *Smith* did not respond to Scalia's argument about the Court's purpose, Justices O'Connor and White returned fire in *Jim Beam*. Advocating selective prospectivity, Justice O'Connor starkly asserted that "when the Court changes its mind, the law changes with it." n181 O'Connor's positivism, diametrically opposed to Scalia's declaratory view of the law, led her to conclude that prospective overruling was proper. Her positivist emphasis on judicial agency in adjudication shows postmodern character, as the unity of the classi- [*1154] cal voice gives way to a postmodern pastiche of jurisprudential styles. n182

-Footnotes-

n181 *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 550 (1991) (O'Connor, J., dissenting).

n182 See Balkin, *supra* note 8, at 1970 (describing the style of "pastiche and fragmentation" as paradigmatically postmodern).

-End Footnotes-

One particularly postmodern aspect of the many concurrences in *Jim Beam* was the incongruous reduction of Justice Scalia's classical objectivity to a mere subjective voice as it was besieged by external critique and made one performance among many. Justices O'Connor and White launched separate attacks on Justice Scalia's textual objectivism. Justice O'Connor relied upon the same text from which Scalia derived his declaratory theory--Marshall's famous injunction that the province of the judiciary is to "declare what the law is"--to reach the positivist conclusion that the law changes when the Court changes it. n183 O'Connor here not only argues that Scalia's deduction is incorrect, but also tweaks his textualism by evoking the realist critique that legal reasoning is

indeterminate by reaching the opposite conclusion from the same text. Justice White mocked as naive Scalia's image of the law as found by deductive, textualist Justices:

-Footnotes-

n183 Jim Beam, 501 U.S. at 550 (1991) (O'Connor, J., dissenting) ("I reiterate, however, that precisely because this Court has 'the power "to say what the law is," ' when the Court changes its mind, the law changes with it." (citation omitted) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803))).

-End Footnotes-

Even though the Justice is not naive enough (nor does he think the Framers were naive enough) to be unaware that judges in a real sense "make" law, he suggests that judges (in an unreal sense, I suppose) should never concede that they do and must claim that they do no more than discover it, hence suggesting that there are citizens who are naive enough to believe them. n184

-Footnotes-

n184 Id. at 546 (White, J., concurring in the judgment).

-End Footnotes-

Justice Scalia's defensive and painfully subjective response to these critiques reduced his classical voice from a claim to the mantle of objectivity to a mere performance:

I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense "make" law. But they make it as judges make it, which is to say as though they were "finding" it--discerning what the law is, rather than decreeing what it is today changed to, or what it will tomorrow be. n185

-Footnotes-

n185 Id. at 549 (Scalia, J., concurring in the judgment).

-End Footnotes-

In Jim Beam, Scalia is reduced to experiencing the classical claim to objectivity as a performance: Judges do not find the law, but discuss their holdings as if law is found, because that is what judges are supposed to do. In essence, beset by external critiques, Scalia has exposed the circularity at the heart of the classical paradigm of adjudication: [*1155] The classical judge is correct or infallible not because he actually is deriving his holding from the talisman of general principle, text, or source, but instead because he speaks in the classical voice. This is an obvious paradox, because the classical voice's claim to objectivity derives from the claim to discover law in the text or general principle, not from the fact of the classical performance. n186 In this ironic turn, Scalia's classicism is unmade by its self-referential, postmodern situation.

-Footnotes-

n186 In this postmodern period, Justice Scalia is not alone in his experience of the objective as a subjective point of reference. In the Federalist Society's 1988 symposium at the Cornell Law School, Professor Charles Fried, conservative jurisprude and Solicitor General under President Bush, acknowledged the impact of the realist and CLS attacks on "definiteness, certainty, and discipline" in legal reasoning, calling for a return to the classical values of "discipline, order, and limitation." Charles Fried, Responses to Legal Realism, 73 CORNELL L. REV. 331, 333 (1988).

-End Footnotes-

c. Harper v. Virginia Department of Taxation

Having twice attempted to clarify the law of civil retroactivity, its collective voice splintered into jumbled incoherence, the Court attempted to create clear, new civil retroactivity law a third time in Harper v. Virginia Department of Taxation. n187 In Harper, the Court faced and finally resolved the doctrinal muddle created in Smith and Jim Beam. Harper presented the question whether the Court should retroactively apply its holding in Davis v. Michigan Department of Treasury n188 that states may not differentially tax the retirement benefits of federal and state employees. That Harper was before the Court at all bespoke the incoherence of the Court's prior holdings in this area. The Supreme Court of Virginia first relied on Smith's discussion of Chevron Oil to apply Davis only prospectively. The Supreme Court granted certiorari, vacating the judgment and remanding for reconsideration in light of Jim Beam. n189 On remand, the Supreme Court of Virginia again applied the rule of Davis only prospectively and upheld the differential taxation of federal and state employee retirement benefits for a second time. n190 The Harper petitioners' second visit to the Supreme Court thus bore witness to the Court's muddled civil retroactivity.

-Footnotes-

n187 113 S. Ct. 2510 (1993).

n188 489 U.S. 803 (1990).

n189 501 U.S. 1247 (1991).

n190 Harper v. Virginia Dep't of Taxation, 410 S.E.2d 629 (Va. 1991).

-End Footnotes-

The Harper Court acknowledged the doctrinal confusion wrought by the Court's previous civil retroactivity decisions. Justice Thomas' [*1156] majority opinion noted the confusion engendered by Smith and Jim Beam, conceding that "several other state courts have refused to accord full retroactive effect to Davis as a controlling statement of federal law." n191 Justice Thomas noted, even more pointedly, that "two of the courts refusing to apply Davis retroactively have done so after this Court remanded for reconsideration in light of Beam." n192 This admission, coming at the outset of the Harper opinion, was especially pointed in light of Thomas' use of Beam as a determinant in the outcome of Harper. After a lengthy discussion of the

Court's pre-Beam retroactivity jurisprudence, Justice Thomas stated: "Griffith and Smith thus left unresolved the precise extent to which the presumptively retroactive effect of this Court's decisions may be altered in civil cases."
n193

-Footnotes-

n191 Harper, 113 S. Ct. at 2515.

n192 Id.

n193 Id. at 2517.

-End Footnotes-

Harper was much more influenced by O'Connor's positivism than by Scalia's declaratory theory of the law as found. Harper made no pretense that the Court's civil retroactivity jurisprudence was clear or that it foretold the outcome of this case in any plain sense. Thus, Justice Thomas was not obeying or even following Beam, but was constructing a rule consistent with Jim Beam: "Beam controls this case, and we accordingly adopt a rule that fairly reflects the position of a majority of Justices in Beam." n194 There is little doubt that, in Harper, Justice Thomas was making a new rule instead of applying precedent: "This rule [announced in Harper] extends Griffith's ban against 'selective application of new rules.'" n195 "Therefore, under Griffith, Beam, and the retroactivity approach we adopt today, the Supreme Court of Virginia must apply Davis in petitioners' refund action." n196 In Harper, compulsion and necessity gave way to judicial agency because only a positivist voice announcing rules can achieve clarity beneath the otherwise crushing weight of textual indeterminacy and the breakdown of larger narratives.

-Footnotes-

n194 Id.

n195 Id. (quoting Griffith v. Kentucky, 479 U.S. 314, 323 (1987)).

n196 Id. at 2518.

-End Footnotes-

As the five Justices in the Harper majority achieved doctrinal clarity by promulgating a new rule of civil retroactivity, Justice Scalia (concurring separately) and the four dissenters continued to voice their still irreconcilable views of jurisprudence. Justice O'Connor renewed her argument that prospective decision-making accords with the Court's purpose of announcing what the law shall be, which was driven by her [*1157] view of legal reasoning as indeterminate and, therefore, not a science of deduction: "We should not indulge in the fiction that the law now announced has always been the law It is much more conducive to law's self-respect to recognize candidly the considerations that give prospective content to a new rule of law." n197 To realist O'Connor, the law now announced is not always the law because the law is indeterminate. Commenting on the majority's interpretation of one passage in Davis, Justice O'Connor pointedly commented: "Ironically, respondent and its amici draw precisely the opposite conclusion

from the same sentence . . . but the debate is as meaningless as it is indeterminate." n198 Sounding more and more like Jerome Frank, Justice O'Connor argued that Davis was novel and should not be applied retroactively under Chevron Oil: "Few decisions are so novel that there is no precedent to which they may be moored." n199

-Footnotes-

n197 Id. at 2528 (O'Connor, J., dissenting).

n198 Id. at 2529 (O'Connor, J., dissenting).

n199 Id. at 2529 (O'Connor, J., dissenting). See generally JEROME FRANK, LAW AND THE MODERN MIND 158 (1930) ("On the continent there is a movement in favor of free legal decision which emphasizes the subjective sense of justice inherent in the judge. The question is not whether we shall adopt free legal decision, but whether we shall admit that we already have it." (internal quotation marks, citation omitted)).

-End Footnotes-

Justice Scalia again evoked the classical ideal of law as submission to text, arguing that O'Connor's positivism "would have struck John Marshall as an extraordinary assertion of raw power." n200 Scalia invoked Blackstone's Commentaries for the admonition that judges are " 'not delegated power to pronounce a new law, but to maintain and expound the old one.' " n201 Justice Scalia's pretensions to the objective classical voice were to no avail. By the time the Harper Court attempted to reconstruct some coherent holding from the shards of Jim Beam by adopting a rule that reflected the position of a majority of the Court in Beam, it was too late for the creation of necessity. Although declaratory theorist Scalia was in the majority, Harper was nothing more than the creation of a clear rule to govern a concededly "chaotic" n202 area of the law.

-Footnotes-

n200 Harper, 113 S. Ct. at 2523 (Scalia, J., concurring).

n201 Id. (Scalia, J., concurring) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *65).

n202 Id. at 2526 (O'Connor, J., dissenting) (describing retroactivity jurisprudence as "chaotic"); see also id. at 2515 (Justice Thomas delivering the opinion of the Court and conceding the unintelligibility of Smith and Beam for lower courts).

-End Footnotes-

[*1158]

2. Competing Metanarratives and Fragmented Discourse in Abortion: A Failed Attempt at Making New Law

The contemporary Court's most widely noted attempt at creating new law is, of course, the Court's abortion jurisprudence. The explicit attempt by certain

Justices to overrule Roe v. Wade consisted of the following trilogy of cases: Thornburgh v. American College of Obstetricians; n203 Webster v. Reproductive Health Services; n204 and the case in which this attempt ultimately failed, Planned Parenthood v. Casey. n205 Like the Court's recent civil retroactivity cases, these abortion decisions show a breakdown of necessity that flows from the same postmodern dilemma. The abortion cases acutely lack a coherent metanarrative; all three contain two completely irreconcilable grand narratives. For this reason alone, the Court's nascent attempt to overrule Roe lacked even the semblance of necessity. The lack of necessity was underscored and compounded by inconsistent discourses about stare decisis and the question of what legitimates overrulings. These discursive schisms in the Court's abortion jurisprudence showed that necessity yielded to a postmodern performance of fragmentation and collapsed metanarratives. This subsection demonstrates how the Justices disagreed on the prior state of the law of abortion (or its metanarrative) and shows that this breakdown tracks a corresponding fragmentation in the Court's internal discourse about the nature of law and in the Justices' subjective experiences of judging.

- - - - -Footnotes- - - - -

- n203 476 U.S. 747 (1986).
- n204 492 U.S. 490 (1989).
- n205 112 S. Ct. 2791 (1992).

- - - - -End Footnotes- - - - -

a. Thornburgh v. American College of Obstetricians

In Thornburgh, the five-Justice majority calmly set about creating the effect of necessity. The Court stated: "Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government." n206 The majority deployed the line of cases holding that individuals have protected liberty interests in decisions affecting reproduction and familial association. n207 The majority attempted to create [*1159] necessity in a number of ways: by presenting its holding as a general principle, by locating that principle in the talisman of the Constitution, and by string-citing sixty years of cases dealing with procreative and familial rights. n208 Because these cases could only support the majority's conclusion, the Court concluded that a failure to uphold the abortion right in this case "would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all." n209 The majority's performance also suggested that the abortion right was compelled and necessary by offering no special justification beyond its string-cite. While the dissent offered a permissive theory of stare decisis to justify its proposed overruling of Roe, n210 the majority did not counter with a theory of stare decisis to prohibit such an overruling. Unlike Justices who would later support Roe, those in the Thornburgh majority offered no special theory of how the relationship of the judiciary to the political process compelled the Court to support abortion rights.

- - - - -Footnotes- - - - -

n206 476 U.S. at 772.

n207 Id. The Court cited Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (holding a state ban on the sale of nonmedical contraceptives unconstitutional); Moore v. City of E. Cleveland, 431 U.S. 494 (1977) (holding a single-family zoning ordinance that prevented a grandmother from living with her two nonsibling grandchildren unconstitutional); Eisenstadt v. Baird, 405 U.S. 438 (1972) (invalidating a regulation that made contraceptives less readily available to unmarried persons than to married couples); Griswold v. Connecticut, 381 U.S. 479 (1965) (finding an unenumerated general right to privacy in the First, Fourth, Fifth, Sixth, Ninth, and Fourteenth Amendments and holding a Connecticut statute that barred contraceptive use unconstitutional); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (holding that the Constitution bars the states from preventing parents' sending their children to private schools); and Meyer v. Nebraska, 262 U.S. 390 (1923) (holding that the Constitution does not permit a state to bar parents from teaching a foreign language to their children). 476 U.S. at 772.

n208 476 U.S. at 772. The cases are cited with "See, e.g.," the lawyer's conceit that a proposition is so obvious and well-accepted that citation to no further authority is necessary. Cf. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 22 (15th ed. 1991) ("Other authorities also state the proposition, but citation to them would not be helpful or is not necessary."). That e.g.s can be mounted in support of seemingly contradictory propositions is testimony to both the character of the lawyer's art as performance, see Levinson & Balkin, supra note 9, at 1599, and the indeterminacy of legal discourse, see Unger, supra note 149, at 566-70.

n209 Thornburgh, 476 U.S. at 772.

n210 Id. at 788 (White, J., dissenting).

- - - - -End Footnotes- - - - -

The dissent in Thornburgh joined the rhetorical battle over Roe that would escalate in Webster and culminate in Casey. The dissent recounted a narrative of abortion law that differed entirely from that fashioned by the majority. The dissent first offered its view that Roe was not compelled by the cases listed in the majority's string-cite. n211 Justices White and Rehnquist argued that each of the cases in the string-cite stood for a particular right (such as childrearing or marital privacy) and that none of these fairly implied the abortion right. Because Roe did not flow ineluctably from these holdings, it was "sui generis"--an anomalous point, not a space created by the triangulation of existing cases guaranteeing privacy rights. n212 The dissent's incompatible narrative also placed great emphasis on the cases applying Roe [*1160] to uphold particular restrictions on abortion. n213 Justices White and Rehnquist emphasized this contrary tradition of limitation: "We have recognized that the states may legitimately adopt a policy of encouraging normal childbirth rather than abortion so long as the measures through which that policy is implemented do not amount to direct compulsion of the women's choice regarding abortion." n214 To these Justices, the field of abortion law was the limiting tradition.

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n211 Id. at 791-92 (White, J., dissenting).

n212 Id. at 792 (White, J., dissenting).

n213 Id. at 797-98 (White, J., dissenting).

n214 Id. at 798 (White, J., dissenting) (citing Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977); Beul v. Doe, 432 U.S. 438 (1977)).

- - - - -End Footnotes- - - - -

As in the civil retroactivity cases, the dissenters' competing narrative was driven by a host of themes that were entirely incompatible with those of the majority, although the Justices in the Thornburgh majority would not answer these arguments until the Webster decisions. The dissenters first argued for originalism, asserting that the values in Roe were not enacted by the people at the time of the ratification of the Constitution, the Bill of Rights, or the Fourteenth Amendment. n215 The dissenters then argued for textualism, claiming that "liberties and interests are most clearly present when the Constitution provides specific textual recognition of their existence and importance." n216 To the dissenters, in forays beyond the text (as in Griswold), "the Court has done nothing more than impose its own controversial choices of value upon the people." n217 Justice White's dissent also noted that the abortion right was not rooted in the history or tradition of the American polity and, therefore, was not part of the Constitution. n218 The dissenters' world view also included a permissive theory of stare decisis, under which the Court should freely overrule those decisions determined to be "wrong." From all of these premises, at odds with those shared by abortion rights jurisprudents, the dissenters concluded: "The time has come to recognize that Roe v. Wade, no less than the cases overruled by the Court in [earlier eras], 'departs from a proper understanding' of the Constitution and to overrule it." n219

- - - - -Footnotes- - - - -

n215 Id. at 797 (White, J., dissenting).

n216 Id. at 790 (White, J., dissenting).

n217 Id. (White, J., dissenting); cf. Bowers v. Hardwick, 478 U.S. 186, 196-97 (1986) (Burger, C.J., concurring) (arguing that the Constitution permits states to proscribe homosexual practices because of the "ancient roots" of such proscriptions, "Judeo-Christian moral and ethical standards," and "millenia of moral teaching").

n218 Thornburgh, 476 U.S. at 793 (White, J., dissenting).

n219 Id. at 788 (White, J., dissenting).

- - - - -End Footnotes- - - - -

[*1161]

b. Webster v. Reproductive Health Services

The Court's many opinions in Webster reprised and deepened the stark dualism of Thornburgh. Entirely aside from the vitriol that characterized the Webster opinions, those opinions rested on entirely incompatible premises about privacy jurisprudence, stare decisis, textualism, and the relationship of constitutional adjudication to the political process. Unlike Thornburgh, Webster--through a majority consisting of Chief Justice Rehnquist and Justices White, Kennedy, O'Connor, and Scalia--upheld restrictions on abortion. Justices Blackmun, Stevens, Marshall, and Brennan dissented vigorously in Webster.

The Webster dissent, like the Thornburgh majority, centered its analysis around the line of cases supporting the right to privacy. n220 The dissenters, of course, could not create the effect of necessity because they were left to contend in vain that their cases should have determined the outcome of Webster. n221 Thus, instead of using Thornburgh's glibly brief string-cite, the Webster dissenters offered a more elaborate theory of the right to privacy. The dissent framed the issue of Webster broadly as "whether the Constitution includes an 'unenumerated' general right to privacy . . . and more specifically, whether, and to what extent, such a right to privacy extends to matters of childbearing and family life, including abortion." n222 The Webster plurality, like the Thornburgh dissent, constructed a narrative of the contrary tradition within abortion law: the Maher-Poelker-McRae line of cases upholding restrictions on abortion as constitutional. n223 The Webster plu- [*1162] rality also built this contrary tradition by drawing on prior dissents' criticisms of Roe v. Wade's trimester framework and holding that viability is the point at which the state's interest in fetal life becomes compelling. n224

-Footnotes-

n220 Webster v. Reproductive Health Servs., 492 U.S. 490, 547 (1989) (Blackmun, J., dissenting) (citing Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); Pierce v. Society of Sisters, 268 U.S. 510 (1925)). Eisenstadt, Griswold, and Pierce are three of the six cases from the Thornburgh majority's string-cite. Compare Webster, 492 U.S. at 547 (Blackmun, J., dissenting) with Thornburgh, 476 U.S. at 772. Of the six, Justice Blackmun omitted to cite Carey v. Population Servs. Int'l, 431 U.S. 678 (1977), and Moore v. City of E. Cleveland, 431 U.S. 494 (1977). 492 U.S. at 547 (Blackmun, J., dissenting). Justice Blackmun added two cases to the privacy-rights string-cite: Loving v. Virginia, 388 U.S. 1, 2 (1967) (holding a Virginia law against interracial marriage unconstitutional), and Skinner v. Oklahoma, 316 U.S. 535, 538 (1942) (holding an Oklahoma statute that punished repeat felons by sterilization unconstitutional). 492 U.S. at 547 (Blackmun, J., dissenting).

n221 492 U.S. at 547 (Blackmun, J., dissenting). Justice Blackmun, speaking of privacy rights, stated that "on these grounds, abandoned by the plurality, the Court should decide this case." Id. (Blackmun, J., dissenting).

n222 Id. at 546-47 (Blackmun, J., dissenting).

n223 Id. at 507-11 (citing Harris v. McRae, 448 U.S. 297, 317 (1980) (holding that the Constitution does not require public funding of abortions); Poelker v. Doe, 432 U.S. 519, 521 (1977) (holding that the Constitution does not require municipal hospitals to provide nontherapeutic abortions, even where a hospital is the only facility accessible to many women); Maher v. Roe, 432 U.S. 464, 474 (1977) (holding that the Constitution does not require the government to fund

abortions and that the state may use funds to subsidize its preference for childbirth over abortion)).

n224 Id. at 518-19.

- - - - -End Footnotes- - - - -

As in Thornburgh, these contrary narratives of abortion law rested on conflicting views of jurisprudence. The Webster plurality offered a theory of stare decisis that called for overruling whenever a prior decision was unsound or unworkable. In support of this view, the plurality cited the Court's 1985 decision in Garcia v. San Antonio Metropolitan Transit Authority, n225 in which the Court overruled a decision of only nine terms earlier, National League of Cities v. Usery. n226 The dissent did not support its view with any contrary view of stare decisis. The plurality argued that there is no constitutional right to abortion because neither the trimester framework nor Roe's holding that the state's interest in fetal life becomes compelling at viability appears in the Constitution. n227 The dissent utterly rejected the plurality's textualism, arguing that "the 'critical elements' of countless constitutional doctrines appear nowhere in the Constitution's text." n228 Thus, though not found in the Constitution's text, the trimester framework was valid as a "judge-made method[] for evaluating and measuring the strength and scope of constitutional rights," like the standards of intermediate and strict scrutiny or the Court's standard for determining when speech is obscene. n229

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n225 469 U.S. 528, 537-47 (1985), overruling National League of Cities v. Usery, 426 U.S. 833 (1976) (deciding the issue on the ground that the Constitution does not make states' "traditional government functions" immune from federal regulation).

n226 426 U.S. 833, 852 (1976) (invalidating the federal regulation of state and municipal employees' minimum wage on the ground that the "traditional government functions" of the state are exempt from federal regulation under the Constitution), overruled by Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

n227 Webster, 492 U.S at 518.

n228 Id. at 548 (Blackmun, J., dissenting).

n229 Id. (Blackmun, J., dissenting).

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Again, the two sides amplified their contrary views of the relationship of constitutional adjudication to the political process. According to Justice Scalia, a member of the antiabortion plurality, the Court should abstain from deciding intrinsically "political" questions, which should be deferred to legislatures. n230 Justice Scalia further argued that, to preserve the credibility of the Supreme Court, the Court should defer deciding these "political" questions. n231 Chief Justice Rehnquist [*1163] wrote that the task of the Court is not to remove divisive issues from the political process. n232 Both Chief Justice Rehnquist and Justice Scalia

emphasized that contentious social issues are not best determined by constitutional adjudication, but by political contention. Justice Blackmun countered by stating his much more generous view of judicial competence and by arguing that the Court functions as a bulwark of individual liberties against "the power of a transient majority." n233 This jurisprudential fissure, deeper in Webster than in Thornburgh, would become a canyon in Casey.

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n230 Id. at 532 (Scalia, J., concurring in part and concurring in the judgment).

n231 Id. at 535 (Scalia, J., concurring in part and concurring in the judgment).

n232 Id. at 521.

n233 Id. at 556 n.11 (Blackmun, J., dissenting); see also Thornburgh v. American College of Obstetricians, 476 U.S. 747, 782 n.12 (1986) (Stevens, J., concurring) (to same effect). Justice Blackmun even depicted Justice Scalia's attempt to return the abortion issue to the "political" process as Scalia's caving in to political pressure. Webster, 492 U.S. at 559 (Blackmun, J., dissenting).

-End Footnotes-

c. Planned Parenthood v. Casey

Planned Parenthood v. Casey, one of the Court's most widely publicized decisions in recent years, was also the culmination of the contradictory strains that made the Court's abortion jurisprudence so incoherent. Emboldened by the additions of Justices Souter and Thomas, Chief Justice Rehnquist and Justice Scalia mounted what they must have anticipated to be their final assault on the judicial "Potemkin Village" of Roe v. Wade. n234 The two sides honed their irreconcilable narratives of the law of privacy. Yet, as in Thornburgh and Webster, the inability of the majority to represent its outcome as compelled and necessary was the function of a host of deepening philosophical conflicts concerning textualism, the relationship between the political process and adjudication, and stare decisis.

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n234 This derisive, spiteful phrase (describing Roe as sui generis) is uncharacteristic of its author, Chief Justice Rehnquist. See Planned Parenthood v. Casey, 112 S. Ct. 2791, 2866 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). But it would have qualified as a subtle understatement in Justice Scalia's scorching dissent. See id. at 2863-85 (Scalia, J., concurring in the judgment in part and dissenting in part).

-End Footnotes-

The Casey majority declined to rest its reaffirmance of Roe entirely on Griswold and its progeny and subtly retreated from Thornburgh's holding that Griswold and its progeny created a generalized constitutional right of

privacy. Instead, the majority offered *Rochin v. California*, n235 *Cruzan v. Director, Missouri Department of Health*, n236 and [*1164] *Washington v. Harper* n237 as exemplars of a right to "bodily integrity." n238 The majority argued that "in whichever doctrinal category one reads the case," privacy or bodily integrity, "the result for present purposes will be the same." n239 The result was a peculiarly un compelled holding because the majority argued in the alternative, and thus inconsistently with *Thornburgh*, as if anticipating that readers would find *Griswold* insufficient to support the abortion right.

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n235 342 U.S. 165, 172 (1952) (holding that persons have a right to freedom from certain physical intrusions that "shock the judicial conscience").

n236 497 U.S. 261, 279 (1990) (assuming for purposes of the case before it that a competent patient has a liberty interest in refusing unwanted medical treatment).

n237 494 U.S. 210, 221 (1990) (holding that a prisoner has a liberty interest in refusing the unwanted administration of a psychotropic drug).

n238 *Casey*, 112 S. Ct. at 2810.

n239 *Id.* at 2810 (emphasis added).

-End Footnotes-

Casey's reaffirmance of *Roe* was quintessentially un compelled because the majority expressed uncertainty about what line of precedent had led to the abortion right in *Roe*. Remarkably, the majority affirmatively conceded that *Roe* might be incorrect: "*Roe*, however, may be seen not only as an exemplar of *Griswold* liberty but as a rule (whether or not mistaken) of personal autonomy and bodily integrity" n240 Chief Justice *Rehnquist*, joined by all four dissenters, did not suffer from the same lack of certitude as he expressly repudiated the right to privacy in *Griswold*: "A reading of [*Griswold*, *Skinner*, *Pierce*, and *Meyer*] makes clear that they do not endorse any all encompassing 'right of privacy.'" n241 Without a shared narrative of the law preceding *Roe*, neither the majority's view nor the dissent's view of *Roe* could be represented as a function of logical compulsion; the grand narrative of privacy jurisprudence, which still cohered in *Thornburgh*, n242 had broken down completely.

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n240 *Id.*

n241 *Id.* at 2859 (*Rehnquist*, C.J., concurring in the judgment in part and dissenting in part).

n242 *Thornburgh v. American College of Obstetricians*, 476 U.S. 747, 792 n.2 (1986) (*White*, J., dissenting) (stating that, while *Griswold* and other cases have found individual liberties to be fundamental "under the rubric of personal or family privacy and autonomy," that authority is inapposite in the abortion context where, as *Roe* recognized, a pregnant woman "is not 'isolated in her

privacy' ").

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Instead, the majority reaffirmed Roe because of "principles of institutional integrity, and the rule of stare decisis." n243 Yet, even on the secondary battlefield of stare decisis, the Casey majority and dissent shared no common premises. To the majority, stare decisis demanded the reaffirmation of a decision that remained workable and that did not rest on out-of-date facts, so that the Court should not overrule out of "the mere belief that a prior case was wrongly decided." n244 To the [*1165] dissenters, who had long propounded a looser view of stare decisis, the matter was quite different: "When it becomes clear that a prior constitutional interpretation is unsound we are obliged to reexamine the question." n245 Because the dissent argued that overruling was proper where a prior result was "simply wrong," while the majority argued for continuity in law, the two sides again shared no common ground.

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n243 Casey, 112 S. Ct. at 2804.

n244 Id. at 2814 (citing Mitchell v. W.T. Grant, 416 U.S. 600, 636 (1974) (Stewart, J., dissenting)).

n245 Id. at 2861 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

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Another vital theoretical dispute tracked the disagreement between the Casey majority and dissenters. The Casey dissenters forcefully argued for textualism, as they had in Thornburgh and Webster. The Chief Justice found the "sort of constitutionally imposed abortion code" that he saw in Roe to be inconsistent "with the notion of a Constitution cast in general terms . . . and usually speaking in general principles." n246 Justice Scalia echoed the Chief Justice, finding abortion constitutionally proscribable because American legal tradition so holds and because "the Constitution says absolutely nothing about it." n247 The majority forcefully rejected Justice Scalia's mode of analysis: "Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects." n248

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n246 Id. at 2860 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (quoting Webster v. Reproductive Health Servs., 492 U.S. 490, 518 (1989)).

n247 Id. at 2874 (Scalia, J., concurring in the judgment in part and dissenting in part).

n248 Id. at 2805. Ironically, the Court cited constitutional text--the much maligned Ninth Amendment--in support of its view that the Constitution's text does not delimit constitutional rights. Id. For a recent argument on the

relevance of the Ninth Amendment in constitutional adjudication, see LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 54-55 (1991). For an article panning Tribe and Dorf's claim that the Ninth Amendment has doctrinal significance, see Harry N. Scheiber, What the Framers Didn't Say, N.Y. TIMES, Mar. 17, 1991, section 7 (Book Review), at 13, 14.

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Yet another fault line tracked the Court's split over abortion. The two sides exhibited contrasting views of the relationship of constitutional adjudication to the political process. To the dissenters, abortion was an intrinsically "political" issue and, therefore, one the Court should leave to the legislative process. Justice Scalia closed his blistering dissent: "We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining." n249 Justice Scalia elaborated a vision of electoral politics as the proper venue for state-by-state resolution of abortion--permitting compromise--and of judicial protection of an abortion right as an "im- [*1166] perial" resolution "rendering compromise impossible for the future." n250 Justice Scalia's view of abortion as political smacked of a classical conception of the law-politics distinction as complete and airtight. n251

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n249 Casey, 112 S. Ct. at 2885 (Scalia, J., concurring in the judgment in part and dissenting in part).

n250 Id. at 2882 (Scalia, J., concurring in the judgment in part and dissenting in part).

n251 E.g., HORWITZ, supra note 5, at 10-11.

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The majority propounded a very different view of the Court's relationship to the political process, one grounded in the legal realist insight that the choice not to act is just as political as the choice to act. According to Justices O'Connor, Souter, and Kennedy, the clock could not be turned back to 1972; thus, the Court necessarily played a vital role in the abortion issue. This understanding led them to attempt to "call[] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution." n252 To perform its chosen role as the generator of social consensus on critical issues, the Court must preserve its legitimacy by adhering to central decisions of prior eras. These Justices believed that "to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question." n253 Thus, the majority saw the concededly "political" nature of the abortion issue as a reason to remain in what Justice Scalia called the "abortion-umpiring" business. The majority considered the alternative--of appearing to abrogate its responsibilities--and found that such a choice would likely erode respect for the Court, its precedents, and the law itself. n254

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n252 Casey, 112 S. Ct. at 2815.

n253 Id.

n254 Id. at 2816 ("If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals. The Court's concern with legitimacy is not for the sake of the Court but for the sake of the Nation to which it is responsible.").

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These competing notions of the Court's relation closely tracked similarly irreconcilable views of judicial competence. To the majority, there was no question that the determinations made in Roe and Casey were within the judicial province: "While Roe has, of course, required judicial assessment of state laws . . . and although the need for such review will remain as a consequence of today's decision, the required determinations fall within judicial competence." n255 Nothing could be further from the views held by the Casey dissenters, who characterized the Court's abortion decisions as a usurpation of the legislative role n256

[*1167] in order to justify their view that the Court should overrule Roe and thus abstain from further decisions protecting abortion rights under the Fourteenth Amendment.

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n255 Id. at 2809.

n256 Id. at 2860 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (characterizing Roe and its progeny as a "constitutionally imposed abortion code"); Id. at 2885 (Scalia, J., concurring in the judgment in part and dissenting in part) (characterizing Casey and Roe as enactment of "value judgments" that lawyers are peculiarly unsuited to make and that should be reserved to legislatures).

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For many reasons, the failed attempt to overrule Roe shows how deeply the Court's overruling rhetoric has changed. As in the Court's civil retroactivity jurisprudence, the Justices could not agree on a metanarrative of the substantive law of the Fourteenth Amendment. Indeed, whatever meager consensus on Roe's antecedents haunted the pages of Thornburgh had disappeared by Casey, in which Chief Justice Rehnquist repudiated the proposition that Griswold v. Connecticut had properly held that the Fourteenth Amendment and others created a constitutional right to privacy. n257 In the Casey opinion, the Court divided along so many philosophical axes--the relationship between the Court and the political process, judicial competence, the force to be accorded stare decisis, and the merit of textualism--that adjudication became a radically particular enterprise. The Justices' fragmented experiences of adjudication bore little in common with Langdellian architecture of a unified law. What Jerome Frank once derisively called "the heaven of legal concepts" gave way to an unsettling postmodern limbo of fractured discourse.

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n257 Id. at 2859 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). Rehnquist stated: "A reading of [Griswold and its antecedents] makes clear that they do not endorse any all-encompassing 'right to privacy.' " Id. (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); see also BORK, supra note 6, at 95-100 (arguing that Griswold was wrongly decided because the Constitution contains no general right to privacy).

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3. The Eighth Amendment: Historical Analysis, Stare Decisis, and the Court's Fractured Voice

The Court's Eighth Amendment jurisprudence provides another illustration of the breakdown of necessity that pervades the Court's recent overrulings. An examination of the recent overrulings in Harmelin v. Michigan n258 and Payne v. Tennessee n259 reveals again the appearance of fiat and indeterminacy in the Court's contemporary performance, as well as the same postmodern babel of jurisprudential paradigms evident in the Court's abortion opinions. In these overrulings, characterized by fiat and inconsistent narratives, the narrative of the Eighth Amendment is hopelessly fractured.

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n258 501 U.S. 957 (1991).

n259 501 U.S. 808 (1991).

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[*1168]

a. Harmelin v. Michigan

In Harmelin, the Court upheld the constitutionality of Michigan's sentencing convicted cocaine dealer Ronald Harmelin to life imprisonment without the possibility of parole. n260 The central question in Harmelin was whether the Eighth Amendment contains a guarantee that punishments will be proportional to crimes. Holding that there is no proportionality guarantee in the Constitution, n261 the Harmelin Court overruled Solem v. Helm, which found a "general principal of proportionality" in the Eighth Amendment. n262 Harmelin's overruling of Solem, like Jim Beam's overruling of Chevron Oil, was quintessentially anticlassical and uncompelled. As in Jim Beam, the Justices did away with a precedent and replaced it with an inconsistently reasoned jumble of doctrine. Section IV of Justice Scalia's opinion, joined by four other Justices, n263 conceded that capital sentencing cases have applied a proportionality principle, but argued that proportionality should not be further generalized. n264 The rest of Justice Scalia's opinion, joined only by Chief Justice Rehnquist, relied primarily upon historical analysis. n265 The other Justices who joined Section IV repudiated Scalia's historical analysis. n266 Thus, the actual holding--that Harmelin's sentence was constitutional--rested on two inconsistent theories.

-Footnotes-

n260 Harmelin, 501 U.S. at 996.

n261 Id. at 994.

n262 Solem v. Helm, 463 U.S. 277, 288 (1983), overruled by Harmelin v. Michigan, 501 U.S. 957 (1991).

n263 Harmelin, 501 U.S. at 994-95 (Section IV of Scalia's opinion was joined by Rehnquist, C.J., and O'Connor, Kennedy, and Souter, J.J.).

n264 Id. at 996.

n265 See id. at 961-94 (The remainder of Scalia's opinion was joined only by Rehnquist, C.J.).

n266 Id. at 996 (Kennedy, J., concurring in part and in the judgment).

-End Footnotes-

Justice Scalia's opinion rested heavily on originalism and historical analysis to suggest that the Court's 1983 decision in Solem v. Helm should be overruled. Justice Scalia argued that "the English Declaration of Rights [of 1689] is the antecedent of our constitutional text" and, thus, that the meaning of the Cruel and Unusual Punishments Clause in the English Declaration bears on the Eighth Amendment Framers' meaning in prohibiting cruel and unusual punishments. n267

[*1169] Noting a split among historians on what inspired the clause in the English Declaration, Justice Scalia concluded that it was the arbitrariness, not the extremity, of the punishments of Lord Jeffreys' infamous Bloody Assizes. n268 Because the clause was a reaction against arbitrary sentencing power, Justice Scalia found it "most unlikely that the English Cruel and Unusual Punishments Clause was meant to forbid 'disproportionate' punishments." n269 Continuing his historical analysis, Justice Scalia argued further that the Framers had understood the Eighth Amendment not to outlaw particular modes of punishment, which led Justice Scalia to consider state cases from the early nineteenth century in determining what punishments were usual or permissible. n270

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n267 Id. at 966. Justice Scalia does not claim to know whether "the Americans of 1791 understood the Declaration's language precisely as the Englishmen of 1689 did . . . or whether perhaps the colonists meant to incorporate the content of that antecedent by reference, whatever the content might have been." Id. (emphasis added). Undaunted by the need for such speculation, Justice Scalia confidently presumed the relevance of this bit of "original" meaning. This, of course, begs one of the critiques of originalism--that it is indeterminate because of the question to whose original meaning or to what indices of original meaning an originalist judge should look. See, e.g., Brest, supra note 55, at 204; William N. Eskridge, The New Textualism, 37 UCLA L. REV. 621 (1990).

n268 Harmelin, 501 U.S. at 967-68.

n269 Id. at 974.

n270 See id. at 982-85.

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Justices Kennedy, O'Connor, and Souter offered a contrasting view of the Eighth Amendment, a view derived from a mode of analysis wholly different from that used by Justice Scalia and Chief Justice Rehnquist. Like Justice Scalia, they did not follow Solem. Unlike Justice Scalia, however, these Justices did not draw their understanding of the Eighth Amendment from historical analysis; in fact, they expressly declined to engage in Scalia's historical debate: "Regardless of whether Justice Scalia or the dissent has the best of the historical argument, stare decisis counsels our adherence to the narrow proportionality principle that has existed in our Eighth Amendment jurisprudence for 80 years." n271

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n271 Id. at 996-97 (Kennedy, J., concurring in part and in the judgment) (citations omitted).

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The trio's narrow proportionality principle rested upon a synthesis of Solem, the most recent case discussing the Eighth Amendment's guarantee of proportionality, and the earlier cases of Rummel v. Estelle n272 and Hutto v. Davis, n273 which the concurring Justices viewed as being in tension with Solem. n274 Thus, they attempted to unify these disparate cases by suggesting four key principles that guide proportionality analysis--primacy of state legislatures, tolerance of different penological schemes, federalism, and objectivism--which led the trio to their conclusion that "the Eighth Amendment . . . forbids only extreme sentences that are 'grossly disproportionate' to the crime." n275 Applying this analysis, the three concurring Justices, like Scalia and Rehnquist, concluded that Harmelin's sentence was constitutional because it was not "grossly disproportionate." n276 These three Justices, relying entirely on twentieth century caselaw in determining the meaning of the Eighth Amendment, reasoned within a fundamentally different paradigm from Scalia's historicism.

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n272 445 U.S. 263, 271-74 (1980) (acknowledging proportionality in both capital and noncapital cases, but refusing to strike as unconstitutional a sentence of life imprisonment for recidivism based on three prior felonies).

n273 454 U.S. 370, 374 (1982) (recognizing that proportionality review is appropriate in some cases, but declining to apply such review to a 40-year sentence for possession of nine ounces of marijuana with intent to distribute).

n274 Harmelin, 501 U.S. at 997-98 (Kennedy, J., concurring in part and in the judgment).

n275 Id. at 996-1001 (Kennedy, J., concurring in part and in the judgment) (quoting Solem v. Helm, 463 U.S. 277, 288 (1983), overruled by Harmelin v. Michigan, 501 U.S. 957 (1991)).

n276 Id. at 1008-09 (Kennedy, J., concurring in part and in the judgment).

-End Footnotes-

In dissent, Justice White, joined by Justices Blackmun and Stevens, would have reaffirmed Solem's multifactor test and would also have held Harmelin's sentence to be unconstitutionally disproportionate. n277 The dissenting Justices flatly rejected Justice Scalia's argument for historical analysis, which they argued was necessarily indeterminate. n278 Going further than the trio of concurring Justices, who sidestepped Scalia's historicism, the dissenters argued that the Court had "long understood the limitations of a purely historical analysis" in construing the Eighth Amendment. n279 They noted that " 'this Court has "not confined the prohibition embodied in the Eighth Amendment to 'barbarous' methods that were generally outlawed in the 18th century," but instead has interpreted the Amendment "in a flexible and dynamic manner." ' " n280

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n277 Id. at 1027 (White, J., dissenting).

n278 Id. at 1011-12 (White, J., dissenting).

n279 Id. at 1014 (White, J., dissenting).

n280 Id. at 1014-15 (White, J., dissenting) (quoting Stanford v. Kentucky, 492 U.S. 361, 369 (1989) (quoting Gregg v. Georgia, 428 U.S. 153, 171 (1976) (plurality opinion))).

-End Footnotes-

In the place of Justice Scalia's historicism, the Harmelin dissenters espoused what they described as a "flexible and dynamic" mode of constitutional interpretation n281 resting on " 'evolving standards of decency that mark the progress of a maturing society.' " n282 Consistent with their focus on change in law and society, these positivist, nonoriginalist dissenters constructed the Eighth Amendment by parsing recent proportionality cases. n283 They argued that, "in any event, the Amendment as ratified contained the words 'cruel and unusual,' and [*1171] there can be no doubt that prior decisions of this Court have construed these words to include a proportionality principle." n284 Because Solem's holding that the Eighth Amendment guaranteed proportional punishments was consistent with the Court's prior holdings in Rummel v. Estelle n285 and Weems v. United States, n286 the dissenters would have retained all of Solem, including its tripartite "objective" analysis. n287

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n281 Id. at 1015 (White, J., dissenting).

n282 Id. (White, J., dissenting) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)).

n283 Id. at 1012-15 (White, J., dissenting).

n284 Id. at 1012 (White, J., dissenting).

n285 445 U.S. 263 (1980) (holding that it is cruel and unusual to punish overtime parking with life imprisonment).

n286 217 U.S. 349 (1910) (holding a Phillippine sentence to cadena temporal unconstitutional, in part on the basis of its disproportionality to the offense).

n287 Harmelin, 501 U.S. at 1010-16 (White, J., dissenting).

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The dissenters' argument begs the question whether Scalia or the dissenters employed the "correct" paradigm. Their positivism is not an argument, but a premise, as is Scalia's positivism; these two approaches contradict, but do not refute each other. After all, if originalism is the proper lens through which to view the constitutional prohibition of "cruel and unusual punishments," then why should subsequent judicial disregard for historicism justify rejecting a proper understanding of the Eighth Amendment? Justice White's very rejection of originalism rests on an allegiance to positivism--a suggestion that because judges, as oracles of the Constitution, have not done what Justice Scalia attempted to do in Harmelin, Scalia's historicism must not be the correct way to understand the law. Again, the gap in paradigms that separates the factions on the Court produces deep splits, making it impossible to produce the long-absent effect of necessity. Each of these paradigm clashes seems to rest upon irreconcilable philosophical allegiances--"jurisprudential faiths," to borrow from Sanford Levinson. n288 The greater the number of these paired philosophical oppositions, the less necessity the Court can produce. As jurisprudential conflicts increase exponentially in our postmodern era, n289 the Court becomes, in like measure, less able to create necessity in its decisions. [*1172] Agreement or disagreement becomes an exercise in affinity, not logic.

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n288 SANFORD LEVINSON, CONSTITUTIONAL FAITH 36-37 (1988). Levinson argued that interpretive allegiances are less like arguments, susceptible to persuasion, and are more like normative convictions, having more in common with religious faiths. Id. He stated that "whatever the process by which understandings of concepts like 'the Constitution' emerge, it is doubtful that logical argumentation plays a crucial role." Id.

n289 The accelerating pace of such conflicts is suggested by the exponentially increasing rate of overrulings. See DAVID M. O'BRIEN, SUPREME COURT WATCH--1993, at 13 (1993). O'Brien's work showed that from 1801 to 1930, the Court overruled itself 39 times--roughly once every four terms, while from 1969 to 1993, the Court overruled itself 75 times--three times each term. Id. Indeed, the Court now takes fewer cases, but the frequency with which it reverses itself increases. Id. at 21 Specifically, "the justices . . . granted just over 100 cases plenary consideration, down from 125 in 1990, 144 in 1989, and 170 cases in 1988. In its 1992 term, the Court gave plenary consideration to only 107 cases . . . [the fewest] since the 1970 term." Id.

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An example from Harmelin serves to illustrate the way in which adherents to these different paradigms talk past, not to, each other. Justice Scalia argued that the history of the English Declaration of Rights of 1689 was relevant because it influenced the Framers' understanding of what modes of punishment they meant to proscribe. n290 The dissent argued in response that "the term 'unusual' [could not] mean 'contrary to custom,' for until Congress passed the first penal law, there were no 'customary' federal punishments either." n291 Having assumed the irrelevance of the English common law, the dissent ignored the obvious response that "customary" modes of punishments would be those historically permitted by the common law--which was, in fact, the thrust of Justice Scalia's argument. The point here is not that Justice Scalia is "correct" because his argument does not clash with Justice Kennedy's riposte; n292 instead, the example illustrates the extent to which differing paradigms of adjudication eliminate the possibility of consensual overrulings that rest upon shared understandings of starting premises.

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n290 Harmelin, 501 U.S at 966.

n291 Id. at 1017 (White, J., dissenting).

n292 Indeed, Justice Scalia's logic symmetrically failed to rebut the "evolving standards" paradigm, but assumed its incorrectness.

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b. Payne v. Tennessee

No contemporary decision of the Court has underscored the lack of necessity in current overrulings more than Payne v. Tennessee. n293 This overruling was remarkable because the Court had considered the question of whether the Eighth Amendment bars states from introducing victim impact statements in capital sentencing hearings twice in the preceding four terms, in Booth v. Maryland n294 and South Carolina v. Gathers. n295 In each case, the Court held by a five-to-four margin that the Eighth Amendment barred victim impact statements. n296 Chief Justice Rehnquist's majority opinion in Payne elevated the Booth and Gathers dissents to the law of the land: the Eighth Amendment now permits states to introduce victim impact statements at capital sentencing hearings. There was nothing in the Payne opinion that was not in the Booth and Gathers dissents; there was no attempt to derive the [*1173] new holding from the majority opinions in those cases, nor was there an attempt to distinguish the facts of Payne from those of Booth and Gathers. Instead, the Chief Justice announced: "We are now of the view that a State may properly" place victim impact statements before a jury at capital sentencing hearings. n297 Each Justice in Payne voted as he or she had in Booth or Gathers, with only a change in personnel and Chief Justice Rehnquist's permissive theory of stare decisis justifying the outcome. Payne's overruling of Booth and Gathers was quintessentially uncompelled because the majority opinion, more than any other opinion in recent terms, exuded fiat. It was also uncompelled because the majority and the dissent presented entirely inconsistent theories of stare decisis and the proper sources of judicial legitimacy.

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n293 501 U.S. 808 (1991).

n294 Booth v. Maryland, 482 U.S. 496 (1987), overruled by Payne v. Tennessee, 501 U.S. 808 (1991).

n295 490 U.S. 805 (1989).

n296 Gathers, 490 U.S. at 805; Booth, 482 U.S. at 496.

n297 Payne, 501 U.S. at 824.

-End Footnotes-

The Court's deep split over stare decisis was the first of two jurisprudential fissures that robbed Payne of any semblance of compulsion. Given that Booth and Gathers were the Court's construction of the Eighth Amendment prior to Payne, Chief Justice Rehnquist sought to justify overruling these precedents with a permissive theory of stare decisis. To this end, the Chief Justice listed thirty-three overrulings during the Court's preceding twenty terms to show that stare decisis is "not an inexorable command." n298 The Chief Justice then argued that Booth and Gathers particularly deserved overruling because they had been "decided by the narrowest of margins, over spirited dissents challenging the basis underpinnings of those decisions." n299 Given this loose view of the force of precedent, Chief Justice Rehnquist then concluded that Booth and Gathers should be overruled.

-Footnotes-

n298 Id. at 828, 829-30 n.1.

n299 Id. at 828-29.

-End Footnotes-

The Payne dissent disputed vigorously what it called "this radical new exception to the doctrine of stare decisis." n300 Justice Marshall opined:

-Footnotes-

n300 Id. at 845 (Marshall, J., dissenting).

-End Footnotes-

It takes little real detective work to discern just what has changed since this Court decided Booth and Gathers: this Court's own personnel. Indeed, the majority candidly explains why this particular contingency, which until now has been almost universally understood not to be sufficient to warrant overruling a precedent is sufficient to justify overruling Booth and Gathers. n301

-Footnotes-

n301 Id. at 850 (Marshall, J., dissenting) (citations omitted).

-End Footnotes-

Justice Marshall also rejected forcefully Chief Justice Rehnquist's argument that stare decisis applies only in commercial contexts, where businesses or private persons place economic reliance upon decisions. [*1174] Instead, he viewed stare decisis as being "more critical in adjudication involving constitutional liberties." n302 These irreconcilable views of stare decisis underscored the fact that no compelled overruling of Booth and Gathers was possible.

-Footnotes-

n302 Id. at 852 (Marshall, J., dissenting).

-End Footnotes-

Payne also contained a second, less widely noted philosophical conflict concerning the legitimate sources of adjudication. Justice Scalia rested his approval of victim impact statements on a source of legitimation: Booth had been wrongly decided partly for its "conflict[] with a public sense of justice keen enough that it . . . found voice in a nationwide 'victims' rights' movement." n303 Justice Scalia's expansive view of state sovereignty led him to observe that the Eighth Amendment "permits the People to decide (within the limits of other constitutional guarantees) what is a crime and what constitutes aggravation and mitigation of a crime." n304 Justice Scalia's self-evidently circular formulation--that the Eighth Amendment permits what it does not forbid--shows his attraction to popular legitimation in Payne. Justice Scalia also displayed this attraction in Booth:

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n303 Id. at 834 (Scalia, J., concurring).

n304 Id. at 833 (Scalia, J., concurring).

-End Footnotes-

Recent years have seen an outpouring of popular concern for what has come to be known as "victims' rights"--a phrase that describes what its proponents feel is the failure of courts of justice to take into account in their sentencing decisions not only the factors mitigating the defendant's moral guilt, but also the amount of harm he has caused to innocent members of society. Many citizens have found one-sided and hence unjust the criminal trial in which a parade of witnesses comes forth to testify to the pressures beyond normal human experience that drove the defendant to commit his crime, with no one to lay before the sentencing authority the full reality of human suffering the defendant has produced n305

-Footnotes-

n305 Booth v. Maryland, 482 U.S. 496, 520 (1987) (Scalia, J., dissenting) (emphasis added), overruled by Payne v. Tennessee, 501 U.S. 808 (1991).

-End Footnotes-

The dissent forcefully rejected Justice Scalia's use of public opinion to legitimize the Payne Court's overruling of Booth and Gathers. Justice Stevens opined: "Today's majority has obviously been moved by an argument that has strong political appeal but no proper place in a reasoned judicial opinion." n306 The dissent also stressed the Court's countermajoritarian role: "Enforcement of the Bill of Rights and the Fourteenth Amendment frequently requires this Court to rein in the forces of democratic politics" n307 This philosophical opposition, [*1175] like the fault lines evident in Harmelin, Casey, and Harper, rendered impossible the appearance of logical compulsion.

-Footnotes-

n306 Payne, 501 U.S. at 859 (Stevens, J., dissenting).

n307 Id. at 853 (Marshall, J., dissenting). For a classic (although not classical) discussion of the Court's place as a countermajoritarian bulwark in the Constitution's division of powers, see generally JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

-End Footnotes-

Justice Scalia's populism is particularly ironic in light of Planned Parenthood v. Casey, in which Justice Scalia scorned the majority's arguments that the Court could look to social movements in fashioning constitutional rules. n308 In Casey, the majority, upholding the abortion right and declining to overrule Roe, legitimized its choice with reference to the pro-choice and antiabortion movements and the pressure they had brought to bear on the Court. Justice Scalia's inconsistency illustrates the apparent irrelevance of ancillary arguments to the actual judicial decision and the failure of past statements of principle to predict later outcomes. These failures of consistency bespeak a loss of coherence in the Court's decisions and, thus, of necessity as well. The result is the enactment of the realist critique of legal reasoning as indeterminate and the evident failure of any attempt at generating necessity.

-Footnotes-

n308 Compare Payne, 501 U.S. at 834 (Scalia, J., concurring) with Planned Parenthood v. Casey, 112 S. Ct. 2791, 2884 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part). In Casey, Scalia stated:

Instead of engaging in the hopeless task of predicting public perception--a job not for lawyers but for political campaign managers--the Justices should do what is legally right by asking two questions: (1) was Roe correctly decided? (2) Has Roe succeeded in producing a settled body of law? If the answer to both questions is no, Roe should undoubtedly be overruled.

Id. (Scalia, J., concurring in the judgment in part and dissenting in part).

-End Footnotes-

When Justice Marshall stated that "power, and not reason" is the currency of the Court's decision-making, he was entirely correct, although the point arguably applies to Justice Marshall's opinions as a member of the Warren and Burger Courts, in which he advocated a permissive theory of stare decisis. n309 As neither side in Payne could call upon a common tradition to produce a result that was singularly compelled by either the substantive law of the constitutional provision at issue or the consistent application of ancillary principles of jurisprudence, both were reduced to pointing out inconsistencies in the logic of the other. As in the Court's civil retroactivity and abortion cases, the conflicting Justices talked past each other, unable to share a premise. These effects flow from the deconstructive turn in contemporary legal reasoning, and they are what separates our postmodern Court from the classical Court.

-Footnotes-

n309 Justice Scalia gleefully made this point in his Payne concurrence. 501 U.S. at 834 (Scalia, J., concurring).

-End Footnotes-

[*1176]

III. CONCLUSION: ON CONFRONTING THE PARADOX OF FRAGMENTATION IN LAW

A. The Postmodern Dilemma in Adjudication Defined

Part II of this Article has situated contemporary Supreme Court opinions as postmodern cultural products, fragmented by myriad jurisprudential disagreements and lacking coherent narratives of particular substantive areas of the law. The accelerating uncertainty of the postmodern Court is also evident in its exponentially increasing reversals of itself. While the Court reversed itself only twenty-eight times during the nineteenth century, n310 it overruled itself 140 times during the period from 1953 to 1993. n311 This acceleration reached an apex of sorts in Payne, in which the Court reversed its holdings of both one and three terms earlier that the Eighth Amendment proscribed victim impact statements.

-Footnotes-

n310 See Blaustein & Field, supra note 121, at 184-93.

n311 O'BRIEN, supra note 289, at 13.

-End Footnotes-

Trapped in this postmodern stance, the Court has become increasingly self-conscious of the indeterminacy n312 and contingency n313 of its reasoning. The Court's postmodern situation becomes acutely clear when these late twentieth century overrulings are viewed alongside their nineteenth century counterparts, which assembled compulsion and coherence where the twentieth century mind would see irreconcilable contradiction and indeterminacy. n314 Lyotard captured the contrast between the structural coherence and order of nineteenth century legal thought and the legal thought of our contemporary Court in his description of the effect of postmodernity on the physical sciences: "Postmodern science--by

concerning itself with such things as undecidables, the limits of precise control, conflicts characterized by incomplete information, 'fracta', catastrophes, and pragmatic paradoxes--is theorizing its own evolution as discontinuous, catastrophic, [*1177] nonrectifiable, and paradoxical." n315 Likewise, the postmodern Court's reasoning, concerned with indeterminacy, limits on the constraints upon judges, conflicts of incommensurable values, and irreconcilable views of different substantive areas of the law, is also a discontinuous and fragmented theoretical mass. The parallel could not be clearer.

-Footnotes-

n312 E.g., Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510, 2529 (1993) (O'Connor, J., dissenting). O'Connor stated that "respondent and its amici draw precisely the opposite conclusion from the same sentence . . . but the debate is as meaningless as it is indeterminate." Id. (O'Connor, J., dissenting). Justice O'Connor further stated that "few decisions are so novel that there is no precedent to which they may be moored." Id. (O'Connor, J., dissenting).

n313 E.g., Planned Parenthood v. Casey, 112 S. Ct. 2791, 2817 (1992). The Court refused to state that Roe had been correctly decided as an original matter, id. at 2817, constructed an elaborate theory of stare decisis to uphold elements of Roe, id. at 2812-16, and found its decision to affirm Roe contingent on the existence of a national controversy on the issue, id. at 2814-16.

n314 E.g., Brenham v. German Am. Bank, 144 U.S. 173 (1892); County of Cass v. Johnston, 95 U.S. 360 (1877). For a discussion of Brenham and County of Cass, see supra notes 4349 and accompanying text.

n315 LYOTARD, supra note 126, at 60.

-End Footnotes-

This discontinuity in the Court's thought, as it splinters into a host of interpretive communities, results in the loss of the effect of necessity. In this postmodern climate, both sides in a given dispute perceive the opposing position as an illicit function of judicial fiat. Examples of this phenomenon abound. Witness Justice Blackmun's intensely personal defense of the abortion right against Chief Justice Rehnquist's assault on it in both Webster n316 and Casey. n317 Witness Justice Scalia's wholesale rejection of Warren Court judicial activism in Harper. n318 Standing on either side of a deep fissure, neither disputant can claim that his or her position is legal "Truth." Instead, each side is content to undermine through critique and irony the position of its foes, thereby foster- [*1178] ing further jurisprudential incoherence. n319 Thus, Justice Scalia in Payne did not draw his position from any premise he shared with Justice Marshall, but was instead content to point out that Justice Marshall's result was undermined by his previously stated views of constitutional stare decisis. n320 As overrulings rest on the shards of unique concurrences and their splintered rationales, and as the announcement of new law degenerates from affirmative statement to the self-referential critiques of Payne and Casey, the Court's voice loses its clarity and force. This is the Court's postmodern crisis of legitimation, borne of the deconstructive turn in twentieth century legal thought. The question is whether there is any way to control this deconstructive tendency to restore lost coherence.

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n316 Webster v. Reproductive Health Servs., 492 U.S. 490, 538 (1989) (Blackmun, J., dissenting). In Webster, Justice Blackmun stated:

Never in my memory has a plurality announced a judgment of this Court that so foments disregard for the law and for our standing decisions. Nor in my memory has a plurality gone about its business in such a deceptive fashion. At every level of its review, from its effort to read the real meaning out of the Missouri statute, to its intended evisceration of precedents and its deafening silence about the constitutional protections that it would jettison, the plurality obscures the portent of its analysis.

Id. (Blackmun, J., dissenting).

n317 Casey, 112 S. Ct. at 2853, 2855 (Blackmun, J., concurring in the judgment in part and dissenting in part). In Casey, Justice Blackmun stated:

At long last, the Chief Justice and those who have joined him admit it. Gone are the contentions that the issue need not be (or has not been) considered. There, on the first page, for all to see, is what was expected: "We believe that Roe was wrongly decided, and that it can and should be overruled consistently with our traditional approach to stare decisis in constitutional cases."

Id. at 2855 (Blackmun, J., concurring in the judgment in part and dissenting in part) (citation omitted). Justice Blackmun further stated: "The Chief Justice's criticism of Roe follows from his stunted conception of individual liberty." Id. at 2855 (Blackmun, J., concurring in the judgment in part and dissenting in part).

n318 Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510, 2524 (1993) (Scalia, J., concurring). In Harper, Justice Scalia stated:

Whether cause or effect, there is no doubt that the era which gave birth to the prospectivity principle was marked by a newfound disregard for stare decisis. . . . It was an era when this Court case overboard numerous settled decisions, and indeed even whole areas of law, with an unceremonious "heave-ho."

Id. at 2524 (Scalia, J., concurring). Justice Scalia sarcastically added: "I do not know the basis for the dissent's contention that I find the jurisprudence of the era that produced the doctrine of prospectivity 'distasteful.' Much of it is quite appetizing." Id. (Scalia, J., concurring).

n319 For example, rather than defending the affirmative position of Roe--that the state has no interest in fetal life before viability--Justice Stevens criticized as "theological" the position that life begins at conception, as if abortion rights could be inferred by negative implication from the Free Exercise Clause. Thornburgh v. American College of Obstetricians, 476 U.S. 747, 795 n.4 (1986) (White, J., dissenting).

n320 Justice Scalia's permissive view of stare decisis in Payne, if it is to be taken seriously, is in deep tension with his professed distaste for Warren Court activism, his view of law as found, and his apparently classical view that law creates one correct answer. E.g., South Carolina v. Gathers, 490 U.S. 805 (1989). From each of these premises, each of which reflects a strong concern for consistency and continuity in the law, one would infer that Justice Scalia should view stare decisis as a forceful constitutional command. Instead, his jibes in Payne leave the next judicial generation just as free to dismantle Rehnquist Court precedents as Scalia felt to aid in dismantling the edifice of the Warren Court.

- - - - -End Footnotes- - - - -

B. Fables of the Reconstruction? n321

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n321 Without the question mark, this is the title of the third album by the Georgia quartet R.E.M. R.E.M., FABLES OF THE RECONSTRUCTION (IRS 1985). The album's title is scripted so that the reader is uncertain whether it reads Fables of the Reconstruction or Reconstruction of the Fables. In this way, R.E.M. seemed to suggest that the attempt at reconstructing the stories of the past is itself no more real than a "fable." As explained in this Section, this author views the conservative attempt at reconstructing classical necessity as just such a fable.

- - - - -End Footnotes- - - - -

Just as significant as the postmodern dilemma presented by the incoherence of the Court's recent overrulings is the question of what "solution" the Court and its reference group of elite scholars might plausibly undertake. There are two potential solutions to this particular problem, which can be described as follows: (1) imperial reconstruction, or the approach of the three monkeys ("see no deconstruction, hear no deconstruction, speak no deconstruction"); and (2) interfaith dialogue. The first of these, while seriously proposed by some commentators, is demonstrably unrealistic. The second, while only a partial response to the dilemma of the Court's subjective experiences of indeterminacy, is attainable and desirable. [*1179]

Imperial reconstruction is the solution advanced by Professors Charles Fried and Leslie Friedman Goldstein. Professor Fried argued in 1988 that "the great harm . . . done by Legal Realism and its child . . . Critical Legal Studies is to have put abroad the notion that it is not possible to procure definiteness, certainty, discipline, by virtue of rules." n322 To return to "the kind of discipline and order and limitation which he hankered after," Professor Fried proposed "a return to rules, rather than to vague standards" and concluded

that "we should see far fewer citations in law reviews to Derrida and Foucault." n323 Professor Goldstein echoed this argument in her recent argument for textualism, stating that "the more legal scholars argue for the indeterminacy of law, the more indeterminate the Constitution will become." n324 Professors Fried and Goldstein have essentially proposed that after some final refutation of the realist insight that law is indeterminate, law might return to an ordered state in which results are accepted as compelled and necessary.

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n322 Fried, supra note 186, at 333.

n323 Id. at 333-34.

n324 LESLIE F. GOLDSTEIN, IN DEFENSE OF THE TEXT 181 (1991).

-End Footnotes-

There are at least two major problems with this "see no deconstruction, hear no deconstruction" approach. First, Professor Fried's argument blames the doctor for the disease. It is no pathology of legal studies that our law reviews cite leading figures of deconstructionism when Fried's critique of the authors citing Derrida and Foucault suggests that legal practice has failed to achieve the rigor, discipline, and explanatory force that Fried would have it possess. Fried's argument only makes sense if one presupposes that postmodern critiques can corrode the ability of judges to make law effectively. n325 Moreover, Fried's argument ironically denies the "true" explanatory power of law. If legal reasoning is only rigorous without an external critical perspective, what is this illusion of rigor and certainty worth if attained "on the cheap"? Fried's argument begs the very question--how to construct a truly coherent and rigorous legal system--that it seeks to answer. In short, the Fried-Goldstein solution that realism should simply desist is no solution to the problem of felt indeterminacy at all, but is rather a plea for an unlikely classical hegemony.

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n325 Professor Fried's argument contradicts the critique of esoteric legal scholarship as irrelevant. E.g., Balkin, supra note 8, at 1985 ("As the judiciary becomes increasingly conservative, we witness increasing self-absorption within the legal academy and its increasing isolation from legal practice."); Pierre Schlag, Clerks in the Maze, 91 MICH. L. REV. 2053, 2069 (1993) (arguing that progressive legal scholarship confuses polemics with action and with fostering political change). The irrelevance of esoteric legal scholarship is one of the only points on which Professors Fried, Schlag, and Balkin would agree wholeheartedly.

-End Footnotes-

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Second, the Fried-Goldstein solution erroneously presumes a hegemony of neoclassical jurists, which is not imminent in our current legal zeitgeist. The failings of imperial reconstruction were clear in Justice Scalia's widely discussed opinion in R.A.V. v. City of St. Paul, the Court's most recent notable attempt at constructing a grand, unifying theory in any

substantive area of constitutional law. n326 The R.A.V. Court reviewed the constitutionality of a St. Paul, Minnesota, ordinance that criminalized cross-burning as a bias crime. n327 In holding that the ordinance was unconstitutional on its face, the Court, through Justice Scalia, revisited its last half-century of First Amendment doctrine and attempted to build a comprehensive map of First Amendment law. Without attempting a detailed explanation of R.A.V., n328 Justice Scalia introduced the "limited categorical approach" n329 to the First Amendment, under which certain categories of expression are generally unprotected, but are nonetheless entitled to protection against content-based discrimination. Justice Scalia's opinion drew only the minimum five votes and was strongly contested by the four dissenters, who offered two competing theories of the First Amendment, both of which were inconsistent with Justice Scalia's position. n330 Justices White, Blackmun, and O'Connor, although concurring in the result, vigorously disputed what they perceived to be a "break with precedent" n331 and argued for "a categorical approach" under which any expression falling into an unprotected category would not be subject to First Amendment restrictions on content-based discrimination. n332 Justice Stevens rejected the categorical approach for what he called "a more complex and subtle analysis, one that considers the content and context of the regulated speech, and the nature and scope of the restriction on [*1181] speech." n333 No matter how self-evidently correct Justice Scalia's view of the First Amendment was to him, his view captured only a bare majority of the Court and was beset by critique. R.A.V. shows the bankruptcy of imperial reconstruction in practice: It presumes a manifestly lacking hegemony of classically minded judges who also agree on the prior content of a substantive area of the law.

-Footnotes-

n326 112 S. Ct. 2538 (1991). This opinion has been the subject of a host of law review articles assessing its impact on First Amendment law. E.g., Akhil R. Amar, *The Supreme Court, 1991 Term--Comment: The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124 (1992); Elena Kagan, *Regulation of Hate Speech and Pornography After R.A.V.*, 60 U. CHI. L. REV. 873 (1993). The arguably unnecessarily wideranging character of R.A.V. suggests that the Justices, just like law students and professors, prefer writing law review articles about First Amendment topics to other pursuits.

n327 R.A.V., 112 S. Ct. at 2541.

n328 For two representative examples, see, e.g., Amar, *supra* note 326, and Kagan, *supra* note 326.

n329 R.A.V., 112 S. Ct. at 2543.

n330 Ironically, under *Payne v. Tennessee*, Justice Scalia's opinion in R.A.V. is entitled to less precedential weight upon reconsideration than other decisions of the Court, precisely because the majority prevailed by a narrow six-to-three margin and met a vigorous dissent. *Payne v. Tennessee*, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting); *id.* at 856 (Stevens, J., dissenting).

n331 R.A.V., 112 S. Ct. at 2554 (White, J., concurring).

n332 Id. at 2552 (White, J., concurring).

n333 Id. at 2567 (Stevens, J., concurring).

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Interfaith dialogue is a more realistic solution to the problem of coherence. Professor Sanford Levinson has eloquently argued that one's views concerning the proper modes of constitutional interpretation have a character of faith and are more or less fixed and not open to persuasive discourse. n334 Superficially, Levinson's argument bodes ill for any attempt at the reconstruction of necessity, for shared premises, in adjudication. After all, this Article shows that the current Court is in a state of profound and increasing discursive fragmentation and breakdown. "Interpretive communities," or new constitutional sects, proliferate within it, and each sect charges the other with heresy. Nonetheless, the Court can mend at least some of the discursive fences that divide it by engaging in the jurisprudential equivalent of a constructive interfaith dialogue. Levinson's operative metaphor is the division between Catholics and Protestants. n335 Just as these diverse religious communities may engage in constructive dialogue, so may members of these and other constitutional sects.

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n334 See generally LEVINSON, supra note 288, at 9-53, 122-53 (arguing that the Constitution, as the "sacred" text of the American republic, is subject to the same dangers of interpretive pluralism that have plagued the sacred texts of such religions as Judaism, Christianity, and Islam).

n335 Professor Levinson divided constitutional "Catholics" from "Protestants" along two axes. Id. at 29. On the question of the ultimate source of constitutional law, constitutional Catholics are those who view the text combined with unwritten tradition as authoritative, while Protestants are those who view the text alone as the only valid source of authority. Id. On the question of who may appropriately interpret the Constitution, the Catholic view is that the Supreme Court alone may dispense such interpretation, while the Protestant view is that individual (or communal) interpretations of the Constitution are also valid. Id. Moreover, the two axes are separate; those adhering to the Catholic view on the source of constitutional law may adopt the Protestant view of the appropriate interpreter, and vice versa. Thus, four distinct viewpoints, or "constitutional faiths," are possible. Id.

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While Justice Blackmun and Chief Justice Rehnquist may not see eye to eye on most major jurisprudential issues of our day, coherence in the law would be served if these Justices would adopt the dual prescription of privileging consensus where possible and according greater respect for precedent under a reinvigoration of stare decisis. The first half of this prescription--to preserve the greatest extent of doctrinal coherence possible by emphasizing possible points of agreement and [*1182] seeking consensus--seems to be the approach taken by newly elevated Justice Ruth Bader Ginsburg. During her confirmation hearings, Justice Ginsburg stated that a Justice who might disagree with her colleagues would be well-advised to ask herself, " 'Is this a case where it really doesn't matter

which way the law goes as long as it's clear?' " n336 Justice Ginsburg's early opinions seem to support her desire for consensus building. In her first opinion, Justice Ginsburg induced Chief Justice Rehnquist and Justice Scalia to join her generous construction of ERISA, n337 in flat contradiction to that duo's restrictive interpretation of ERISA in Massachusetts Mutual Life Insurance Co. v. Russell n338 and Mertens v. Hewitt Associates. n339 These cases suggest the possibility that consensualism, built around Justice Ginsburg's privileging of clarity, could help the Court to reclaim some of the elements of compulsion and doctrinal coherence n340 so clearly lacking in many of its recent opinions.

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n336 Neil A. Lewis, The Supreme Court; Ginsburg Affirms Right of a Woman to Have Abortion, N.Y. TIMES, July 22, 1993, at A1, A21.

n337 John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 114 S. Ct. 517, 524 (1993) (referring to ERISA's broadly remedial purposes and construing ERISA broadly so that its fiduciary provisions apply to companies providing certain insurance products to ERISA plans).

n338 473 U.S. 134, 140-44 (1985) (terming ERISA "a comprehensive and reticulated statute" that should be construed narrowly, so that the Court should not read into it any remedy not expressly provided therein).

n339 113 S. Ct. 2063, 2067, 2068 n.5 (1993) (construing ERISA narrowly, holding that there is no cause of action against nonfiduciaries under the provision of ERISA permitting plan participants to obtain "other appropriate equitable relief " against plan fiduciaries, and stating that "the issue is whether the statute affirmatively authorizes such a suit").

n340 See RONALD DWORKIN, LAW'S EMPIRE 176-275 (1986) (terming doctrinal coherence within and across substantive areas of the law "integrity" and arguing that integrity is a desirable and achievable goal of our legal system).

-End Footnotes-

In addition to a self-conscious attempt to minimize substantive and interpretive chasms separating the Court's members, an increased role for stare decisis in the Court would also enhance the Dworkinian value of integrity in law. If frequency of overruling is any indication, the Court has less respect for its precedents than it once did. Justices O'Connor, Kennedy, and Souter succinctly stated in Casey that "there is a limit to the amount of error that can plausibly be imputed to prior Courts." n341 This Article intimates no view as to what that amount is or whether it was not yet met or long since exceeded in Casey. Nonetheless, the Casey trio must be correct in concluding that every dissent's tendency to claim that the latest constitutional decision is simply "wrong" on many levels drives a deeper and deeper wedge between the Court's decisions and the Constitution from which the [*1183] Court claims to derive that decision.

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n341 Planned Parenthood v. Casey, 112 S. Ct. 2791, 2815 (1992).

-End Footnotes-

On one level, the greater role for stare decisis suggested here merely institutionalizes compromises of the past. n342 Yet it also gives the Court a chance to bridge interpretive chasms--to arrive, for example, at a collective vision of the ERISA statute, so that the Court can transcend the radical particularity of its recent decisions n343 and give the lower courts clearer and more authoritative guidance. A greater role for stare decisis would allow more liberal members of the Court to protect cherished Warren Court decisions protecting personal liberties n344 and would allow more conservative members of the Court to protect business expectations, which they see as the primary function of that doctrine. n345 Such a Court could also avoid the confusion of decisions like Jim Beam and R.A.V., which do little more than muddle vital areas of constitutional law.

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n342 Discussing Ruth Bader Ginsburg's confirmation hearings, the New York Times noted that anonymous detractors of Ginsburg disapproved of "her tendency to elevate collegiality to a substantive issue." Lewis, supra note 336, at A21.

n343 E.g., Mertens, 113 S. Ct. at 2067 (holding that the subsection of ERISA authorizing "other appropriate equitable relief" against fiduciaries does not provide a cause of action permitting money damages against nonfiduciaries for knowing participation in fiduciary breaches, but declining to explain whether ERISA's fiduciary provisions bar all causes of action against nonfiduciaries or whether "other equitable relief" may ever include money damages); Reves v. Ernst & Young, 113 S. Ct. 1163, 1171 (1993) (holding that section 1962(c), one of the four subsections of RICO creating civil liability, requires "management or control" for liability, without intimating whether the other three subsections contain this extratextual requirement). Through these remarkably pinched and narrow holdings, law becomes "local" and "particular," as does postmodern knowledge. LYOTARD, supra note 126, at xxiv (describing contemporary knowledge as dominated by "local determinism").

n344 Payne v. Tennessee, 501 U.S. 808, 852 n.2 (1991) (Blackmun, J., dissenting) (arguing that after Payne, a host of five-to-four decisions protecting personal liberties were imperiled, and listing "endangered precedents").

n345 E.g., Casey, 112 S. Ct. at 2861 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

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Postmodern philosopher Jean-Francois Lyotard opined: "Is legitimacy to be found in consensus obtained through discussion, as Jurgen Habermas thinks? Such consensus does violence to the heterogeneity of language games." n346 The nineteenth century Court, which prized doctrinal coherence over Lyotard's prized variegation, produced legitimacy through the effect of necessity, legitimacy now lacking in the Court's radically heterogeneous performances. As the Court's contemporary overrulings show, heterogeneity does violence to legitimacy. With the cat of heterogeneity out of the bag (notwithstanding the wishful thinking of Fried and Goldstein), there is hope, not for the ultimate reconstruction of necessity, but for understanding based on an awareness that law is judge-made

and a concern for shared understandings of text
[*1184] and paradigm. If the Court can bridge these gaps and engage its many
interpretive communities in constructive dialogue, then the Court might not only
restore coherence in its decisions, but might also bridge more effectively the
cultural gaps that separate people in this heterogeneous, postmodern society.

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n346 LYOTARD, *supra* note 126, at xxv.

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LENGTH: 13531 words

ARTICLE: FREE SPEECH BY THE LIGHT OF A BURNING CROSS

JEROME O'CALLAGHAN n1

-----Footnotes-----

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-----End Footnotes-----

SUMMARY:

... When the Supreme Court decided unanimously in 1992 that a St. Paul "hate speech" ordinance ran afoul of the First Amendment in R.A.V. v. City of St. Paul, it revealed an important fissure in the logic that has permeated free speech decisions over the last 50 years. ... Beauharnais appears twice in the majority opinion. ... Much of the content of democratic debate, of public policy making, and of political life in general is about the specific application of ideals of order and morality. ... Even if one concludes that commercial speech in general is a lower priority than expressive conduct, one must ask whether it matters what the content is, or what the topic is in expressive conduct. So, for example, would it make sense to say that commercial speech (as in, say, a billboard) is ranked beneath expressive conduct the topic of which is a commercial transaction and the content of which is essentially an advertisement? ... Justice Scalia's judgment in effect tells the legislature that it can advance a social interest in order and morality with fighting-word laws only when those laws are neutral. ...

TEXT:

[*215] I. INTRODUCTION

[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought -- not free thought for those who agree with us but freedom for the thought that we hate. n2

-----Footnotes-----

n2 United States v. Schwimmer, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting), overruled on other grounds by, Grovard v. United States, 328 U.S. 61 (1946).

-----End Footnotes-----

The most frightening and disturbing depictions [on a wall in a school's playing field] . . . were those that threatened violence against one of our senior black students. He was drawn, in cartoon figure, identified by his name, and his initials, and by the name of his mother. Directly to the right of his head was a bullet, and farther to the right was a gun with its barrel directed toward the head. Under the drawing of the student, three Ku Klux Klansmen were depicted, one of whom was saying that the student "dies." Next to the gun was a drawing of a burning cross under which was written "Kill the Tarbaby." n3

-Footnotes-

n3 Charles Lawrence III, If He Hollers Let Him Go: Regulating Racist Speech On Campus, 1990 DUKE L. J. 431, 460 (describing one act of hate speech in a letter dated May 17, 1988, from Dulany O. Bennett to parents, alumni and friends of the Wilmington Friends School).

-End Footnotes-

When the Supreme Court decided unanimously in 1992 that a St. Paul "hate speech" ordinance ran afoul of the First Amendment in R.A.V. v. City of St. Paul, n4 [*216] it revealed an important fissure in the logic that has permeated free speech decisions over the last 50 years. The stark contrast between Justice Antonin Scalia's majority opinion and the concurrences n5 of Justices Byron White, Sandra Day O'Connor, John Paul Stevens and Harry Blackmun indicates that no one theory of the application of the free speech guarantee yet commands widespread support. n6 Indeed the R.A.V. decision, aside from being riddled with ironies, is a classic example of a court united in judgment and divided in understanding.

-Footnotes-

n4 112 S. Ct. 2538 (1992). The ordinance prohibited placing on "public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." Id. at 2541 (quoting MINN. STAT. @ 292.02 (1990)).

n5 Justices Blackmun and O'Connor joined in Justice White's concurring opinion, with Justice Stevens joining in Part I(A) of Justice White's concurrence. Justice Blackmun wrote an additional separate concurring judgment. Justice Stevens wrote a separate concurrence with whom Justices White and Blackmun joined as to Part I.

n6 As one scholar put it: "There is near universal agreement now, as there was not in 1919 or 1954, that political dissent may not be subject to the coercive power of the state. But beyond that core commitment, the consensus dissipates." Kathleen M. Sullivan, The First Amendment Wars, THE NEW REPUBLIC, Sept. 28, 1992, at 36.

-End Footnotes-

For scholars of the First Amendment this case is an excellent example of the dilemmas posed by many of the doctrines created by the Court. While Justice Scalia proposes an elaborate and novel understanding of the limits of free

speech regulation, Justice White responds with an assertion that Scalia's reasoning is "transparently wrong," n7 and that his opinion is a "radical revision of First Amendment law." n8 According to Justice Stevens, the majority opinion is no more than "an adventure in a doctrinal wonderland." n9 Part II of this paper examines the attacks made by Justices White and Stevens against the majority opinion. Part III.A demonstrates a critical weakness in the majority opinion, one that reveals a perverse use of precedent by Justice Scalia. Part III.B demonstrates another weakness of the majority opinion: How fighting words are apparently more deserving of government protection than commercial speech. The fourth and fifth parts of the paper analyze the fundamental issues raised in the preceding discussion with a particular focus on the unpredictable standards used by Justice Scalia in free speech cases. The conclusion explains why the categorical approach to the First Amendment taken by the Supreme Court in R.A.V. is untenable.

- - - - -Footnotes- - - - -

n7 R.A.V., 112 S. Ct. at 2551.

n8 Id. at 2556.

n9 Id. at 2562.

- - - - -End Footnotes- - - - -

II. CONCURRING CRITIQUES

The concurrences in R.A.V. deserve close consideration for at least two reasons. The first is that Justice Scalia's analysis became the majority opinion by a 5-4 margin. If the Court should change course on this issue in the near future, the reasoning espoused by the concurring Justices will likely lead the [*217] way. Second, the significance of the divided opinion is that the concurring Justices leave open the possibility that a hate speech law could pass First Amendment analysis. Treating overbreadth as the key problem in the city's ordinance, Justices White, Stevens, O'Connor and Blackmun leave open to legislators the option of a more narrowly tailored prohibition of hate speech. In contrast, Justice Scalia's majority opinion leaves legislators no options at all.

The first concurrence, from Justice White, attacks Justice Scalia's opinion on three grounds. The first is a procedural issue of little significance. n10 Second, it is argued that Justice Scalia's judgment has the effect of undermining the categorical approach that has measured the reach of the free speech guarantee. n11 The categorical approach dates back (at least) to the claims made in Chaplinsky v. New Hampshire n12 that "certain well-defined and narrowly limited classes of speech" are simply not covered by the free speech guarantee. n13 These classes include: defamation, obscenity, and fighting words. n14 Justice White's point in this attack is that Justice Scalia's reshaping/manipulation of Chaplinsky leads to the ironic result that fighting words are protected by the First Amendment when the government is too selective in its prohibition. In contrast, Justice White's interpretation of Chaplinsky is that R.A.V.'s expression has no First Amendment protection whatsoever. n15

- - - - -Footnotes- - - - -

n10 Justice White, joined by Justices Blackmun, O'Connor and Stevens, thought that the majority was deprived of the power to decide the case as it did. Id. at 2551 n.2 ("[P]etitioner did not present to this Court or the Minnesota Supreme Court anything approximating the novel theory the majority adopts today.").

n11 Id. at 2551-53.

n12 315 U.S. 568 (1942).

n13 Id. at 571-72.

n14 R.A.V., 112 S. Ct. at 2552.

n15 Id. at 2553.

- - - - -End Footnotes- - - - -

Third, Justice Scalia's opinion has the effect of eviscerating strict scrutiny review. n16 Again the irony is that Justice Scalia had agreed that St. Paul had a compelling interest in preventing cross burning and that the ordinance promoted that interest. n17 Yet the regulation remained unconstitutional in the majority's view. Justice White can only conclude that, in Justice Scalia's scheme, far-reaching bans of speech have a better chance of survival than narrowly drawn prohibitions. n18 Such a result is a perversion of traditional free speech doctrine.

- - - - -Footnotes- - - - -

n16 Id. at 2554.

n17 Id. at 2549.

n18 Id. at 2554.

- - - - -End Footnotes- - - - -

This part of the critique deserves closer attention as it appears that Justice Scalia's argument is dangerously close to self-destruction. The majority [*218] suggests that while fighting words are proscribable, there is a danger in isolating one subset of fighting words for prohibition. n19 More precisely, Justice Scalia's point is that the greater power to punish fighting words does not include the lesser power to punish certain subcategories of fighting words. n20 The danger lies in the viewpoint discrimination that is virtually inevitable when government selects the subcategories. n21 Thus Justice Scalia finds in the St. Paul ordinance government interference with the marketplace of ideas. n22 As explained by Justice Scalia, "The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects." n23 For Justice Scalia government prohibition of some hate speech becomes analogous to prohibition of flag burning; the government has no business banning expression simply because it is offensive. n24

- - - - -Footnotes- - - - -

n19 R.A.V., 112 S. Ct. at 2545.

n20 Id. at 2545-47. One is tempted to say that no subcategory may be punished, but Scalia argues that some selectivity is left open to government, as long as viewpoint discrimination is not involved. Id. To illustrate this point he presents an example that is so fantastic as to be entirely inconsequential, stating, "We cannot think of any First Amendment interest that would stand in the way of a State's prohibiting only those obscene motion pictures with blue-eyed actresses." Id. at 2547.

n21 Id. at 2546.

n22 Id. at 2547.

n23 Id.

n24 It is surprising that Justice Scalia did not underscore this point by reference to the classic version of a liberal view of the First Amendment, Justice Robert Jackson's eloquent defense of dissent in West Virginia v. Barnette, 319 U.S. 624 (1943).

- - - - -End Footnotes- - - - -

However at this point Justice Scalia is confronted with a dilemma; if the government is forbidden from proscribing subsets of categorically unprotected speech, won't laws against threatening government officials fail constitutional muster? Justice Scalia finds a solution to this problem in a "special force" argument: The reasons why threats of violence are outside the First Amendment "have special force when applied to the person of the President." n25 Thus, threats against the President may legitimately be subject to special prohibition.

- - - - -Footnotes- - - - -

n25 R.A.V., 112 S. Ct. at 2546.

- - - - -End Footnotes- - - - -

Now another difficulty arises, one which Justice Scalia never addresses directly. The special force argument can readily be adopted by St. Paul to justify its ordinance. The argument would be that while all fighting words are bad, when they are directed against groups that have long suffered discrimination in this society, they bring extra harm. The groups that most need protection from fighting words are those who are (and have been) disadvantaged in society. Thus the reasons why fighting words are bad in general, are more valid (have "special force") when that speech is directed against "insular [*219] minorities." n26 As Justice White put it: "The exception swallows the majority's rule." n27

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n26 This term is borrowed from the famous comment of Justice Harlan Stone in United States v. Carolene Products, 304 U.S. 144, 152-53 n.4 (1938).

n27 R.A.V., 112 S. Ct. at 2556 (White, J., concurring).

-End Footnotes-

Justice Scalia does not see "special force" as a double-edged sword. Instead he prefers to characterize the city's law as selective in a way that "creates the possibility that the city is seeking to handicap the expression of particular ideas." n28 Nevertheless, it takes little stretch of the imagination to see that laws against verbal threatening of the President could also be termed as 'seeking to handicap the expression of particular ideas.'

-Footnotes-

n28 Id. at 2549.

-End Footnotes-

Leaving aside, for a moment, Justice White's concurrence, the possibility that all categories of unprotected speech are in essence efforts to 'handicap the expression of particular ideas' should be considered. At least in the cases of obscenity, and that class of speech which falls under the clear and present danger rule, n29 it would appear that government prohibitions are as much based on the ideas presented as on the risk of consequential harm. This issue reappears in Justice Stevens's concurrence and will be examined more closely in the third part of this paper.

-Footnotes-

n29 Currently governed by Brandenburg v. Ohio, 395 U.S. 444 (1969).

-End Footnotes-

The core of Justice White's critique is well summarized by Justice Blackmun in a separate concurrence, "[B]y deciding that a State cannot regulate speech that causes great harm unless it also regulates speech that does not (setting law and logic on their heads) the Court seems to abandon the categorical approach, and inevitably to relax the level of scrutiny applicable to content-based laws." n30

-Footnotes-

n30 R.A.V., 112 S. Ct. at 2560.

-End Footnotes-

Two more critiques appear in Justice Stevens's concurrence. His first attack brings attention to Justice Scalia's disdain for content-based restrictions on speech. This disdain is clearly at odds with the history of First Amendment interpretation, "[O]ur decisions demonstrate that content-based distinctions, far from being presumptively invalid, are an inevitable and indispensable aspect of a coherent understanding of the First Amendment." n31 Indeed the entire categorical approach, which Justice Scalia claims to respect, is built on government interest in the content of communications.

-Footnotes-

n31 Id. at 2563.

- - - - -End Footnotes- - - - -

The final attack addresses Justice Scalia's belief that the ordinance regulates expression based on viewpoint. Justice Stevens disagrees, pointing out in one example that both Muslims and Catholics are forbidden from using fighting words based on the religion of the other. The ordinance is essentially "even handed." n32 St. Paul expressed no preference regarding particular religious, [*220] racial or gender points of view; instead it prohibited personal attacks based on an individual's race, gender, etc.

- - - - -Footnotes- - - - -

n32 Id. at 2571.

- - - - -End Footnotes- - - - -

The two concurrences examined here reveal critical weaknesses in the majority's opinion. Other lines of attack also warrant close consideration. In the next section I will examine two arguments: one based on the relevance of *Beauharnais v. Illinois*, n33 another based on the implications of *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*. n34

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n33 343 U.S. 250 (1952).

n34 478 U.S. 328 (1986).

- - - - -End Footnotes- - - - -

III. JUSTICE SCALIA'S MAJORITY OPINION

A. The *Beauharnais*/Chaplinsky Dilemma

One of the many ironies of Justice Scalia's opinion is his approval of, and apparent reliance on, *Beauharnais v. Illinois* as precedent. *Beauharnais* appears twice in the majority opinion. n35 The first instance is in support of the contention that defamation is a "traditional limitation" on free speech. n36 The second is in relation to the idea that some categories of speech are not constitutionally protected. n37 Justice Scalia argues that the scope of the defamation exception (for which *Beauharnais* is most frequently cited n38) has been narrowed by subsequent decisions, particularly *New York Times Co. v. Sullivan*. n39 As a result, "the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government." n40 Ironically, the speech at fault in *Beauharnais*, which was held unprotected, directly addressed government, n41 while in *R.A.V.* the expressive conduct, which St. Paul was not allowed to regulate, neither addressed nor concerned government. n42

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n35 R.A.V., 112 S. Ct. at 2543.

n36 Id.

n37 Id.

n38 See Jerome O'Callaghan, Pornography and Group Libel: How to Solve the Hudnut Problem, 27 NEW ENG. L. REV. 363, 367 (1992).

n39 376 U.S. 254 (1964). Justice Scalia's evaluation of Beauharnais is more positive than that of most scholars; many believe Beauharnais to have been completely eviscerated by subsequent decisions. See Calvin Massey, Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression, 40 U.C.L.A. L. REV. 103, 141, 166 (1992); Nicholas Wolfson, Free Speech Theory and Hateful Words, 60 U. CIN. L. REV. 1, 25 n.103 (1991).

n40 R.A.V., 112 S. Ct. at 2543.

n41 Beauharnais circulated a petition demanding action from the Mayor and City Council of Chicago. Beauharnais, 343 U.S. at 252. Compared to cross burning, Beauharnais's expression was quite mild; he accused the black population of being responsible for various unspecified "rapes, [and] robberies." Id.

n42 R.A.V., 112 S. Ct. at 2541.

- - - - -End Footnotes- - - - -

Even with the New York Times qualification, Justice Scalia's reliance on Beauharnais makes little sense in R.A.V. As in many majority opinions that have paid passing homage to Beauharnais, n43 this judgment avoids any detailed consideration of what Beauharnais reveals about the limits of free speech. Thus Justice Scalia, while rejecting on constitutional grounds an ordinance that prohibited expressive attacks based on an individual's "race, color, creed, religion or gender," n44 cites in his argument an opinion that upheld a state law prohibiting libels based on "race, color, creed or religion." n45

- - - - -Footnotes- - - - -

n43 See O'Callaghan, supra note 38, at 366-67.

n44 R.A.V., 112 S. Ct. at 2541 (quoting MINN. STAT. @ 292.02).

n45 Beauharnais, 343 U.S. at 251. The Illinois Criminal Code section implicated in Beauharnais stated:

It shall be unlawful for any person, firm or corporation to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots....
Id.

- - - - -End Footnotes- - - - -

The group libel statute upheld by Justice Felix Frankfurter's n46 opinion in Beauharnais is remarkably similar in content and purpose to the St. Paul ordinance rejected in R.A.V. If Justice Scalia believes Beauharnais is no longer good law (as several scholars have argued n47) he certainly fails to make that clear in R.A.V. On the contrary, his comments support the validity of Beauharnais, qualified only by the demands of the New York Times. n48

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n46 Justice Scalia is said to have been deeply influenced by Justice Felix Frankfurter. See Richard A. Brisbin, Jr., *The Conservatism of Antonin Scalia*, 105 POL. SCI. Q. 1 (1990).

n47 Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy and the First Amendment*, 76 CAL. L. REV. 297, 330 (1988); see also THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 396 (1970); Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 WM & MARY L. REV. 211, 219 (1991); Jeffrey M. Ganso, *Sex Discrimination and the First Amendment: Pornography and Free Speech*, 17 TEX. TECH L. REV. 1577, 1598 (1986); William E. Brigman, *Pornography as Group Libel: The Indianapolis Sex Discrimination Ordinance*, 18 IND. L. REV. 479, 484-485 (1985). But see O'Callaghan, *supra* note 38, at 367; Rhonda G. Hartman, *Revitalizing Group Defamation as a Remedy for Hate Speech on Campus*, 71 OR. L. REV. 855 (1992); Kenneth Lasson, *Racial Defamation as Free Speech: Abusing the First Amendment*, 17 COLUM. HUM. RTS. L. REV. 11 (1985); Note, *A Communitarian Defense of Group Libel Laws*, 101 HARV. L. REV. 682 (1988).

n48 This qualification presumably requires a strict level of review in libel cases when the alleged victim is a government official or other public figure.

- - - - -End Footnotes- - - - -

[*222] It is already apparent that neither the fighting words exception, nor the group libel exception, has been overruled. The resilience of Beauharnais and Chaplinsky, and the dilemma that they pose in current doctrinal developments, deserve serious attention. At heart, the Beauharnais opinion rests on the same fundamental assertion made in Chaplinsky, that some speech is "of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality." n49 The only curtailment of these doctrines occurs through the ramifications of *New York Times*. Yet the *New York Times* opinion restricts the reach of Beauharnais only in those cases where a libel (group or otherwise) addresses public officials. n50 This point was made clear by the Supreme Court in *Ferber v. New York*, n51 when it stated, "Leaving aside the special considerations when public officials are the target, *New York Times Co. v. Sullivan* . . . a libelous publication is not protected by the Constitution. *Beauharnais v. Illinois* . . ." n52

- - - - -Footnotes- - - - -

n49 *Chaplinsky*, 315 U.S. at 572.

n50 New York Times v. Sullivan, 376 U.S. 254, 282-83 (1964).

n51 458 U.S. 747 (1982).

n52 Id. at 763 (citations omitted).

- - - - -End Footnotes- - - - -

Nevertheless, First Amendment commentators have been quick to rule Chaplinsky, and particularly Beauharnais, irrelevant. n53 As the prior discussion illustrates, the Supreme Court has not followed that lead. n54 This divergence of opinion may be explained by a misunderstanding of a seminal work on First Amendment doctrine. Writing in 1964, Professor Harry Kalven, Jr., argued, "[T]he special logic of Chaplinsky, Beauharnais and Roth may well disappear now that the Times opinion is on the books." n55 Others have followed that route. n56 The result has been an assumption that, in effect, New York Times overruled sub silentio Beauharnais (and to some extent Chaplinsky). n57

- - - - -Footnotes- - - - -

n53 See supra note 47. Some prominent constitutional law texts pay scant, or no attention to these cases. For example, neither case appears in CRAIG DUCAT & HAROLD CHASE, CONSTITUTIONAL INTERPRETATION (5th ed. 1992). Another version of the imagined demise of Beauharnais holds that Ashton v. Kentucky, 384 U.S. 195 (1966), made all criminal libel law unconstitutional. See DAVID O'BRIEN, 2 CONSTITUTIONAL LAW AND POLITICS 447 (1991).

n54 Only Justices Hugo Black and William O. Douglas have explicitly favored overruling Beauharnais, see A Quantity of Books v. Kansas, 378 U.S. 205, 214 (1964).

n55 Harry Kalven, Jr., The New York Times Case: A Note On The "Central Meaning Of The First Amendment", 1964 SUP. CT. REV. 191, 218.

n56 See supra note 47.

n57 Some commentators argue that Chaplinsky has been so crippled that its interment is long overdue. See Note, The Demise of the Chaplinsky Fighting Words Doctrine, 106 HARV. L. REV. 1129, 1130 (1993). Others believe modification of Chaplinsky can ensure its vitality. See Michael J. Mannheim, The Fighting Words Doctrine, 93 COLUM. L. REV. 1527, 1529, 1571 (1993).

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[*223] A closer reading of Professor Kalven indicates that such a conclusion is not justified. By "special logic," Professor Kalven referred to an approach, evident in Justice Frank Murphy's Chaplinsky reasoning, that dichotomized all speech for First Amendment purposes. n58 On the one hand were categories of speech that the guarantee protected (political, religious, etc.), and on the other hand were categories that were not protected. n59 The latter could not even be called speech for First Amendment purposes; they included defamation, obscenity, and fighting words. n60 Because these were not within "the freedom" guaranteed by the First Amendment, no First Amendment test (e.g., clear and present danger) need be applied to legislation proscribing them. n61 That logic, as Professor Kalven predicted, n62 is undeniably absent from First

Amendment decisions after New York Times. However, Professor Kalven does not believe that the outcome in Chaplinsky, Beauharnais, and Roth must now be doubted. n63 Using obscenity as an example, he states, "Had the Times case preceded Roth, for example, Roth could not have been written the way it was, although the decision might have been the same." n64 Thus the impact of New York Times Co. v. Sullivan is significant in terms of the premises used by the Supreme Court when addressing a First Amendment claim. New York Times does not per se claim that defamation, fighting words and obscenity are presumably protected by the First Amendment. The New York Times decision clearly allows government the power, albeit carefully circumscribed power, to attack libels and fighting words. n65

-Footnotes-

n58 See Kalven, supra note 55, at 217.

n59 Id.

n60 See Chaplinsky, 315 U.S. at 571.

n61 Kalven, supra note 55, at 217.

n62 Id. at 218.

n63 Id.

n64 Id.

n65 New York Times v. Sullivan, 376 U.S. 254, 269-71 (1964).

-End Footnotes-

Justice Scalia in R.A.V. concedes this point, stating "[O]ur decisions since the 1960's have narrowed the scope of the traditional categorical exceptions for defamation." n66 He then acknowledges that Chaplinsky and Beauharnais cannot be ignored because "a limited categorical approach has remained an important part of our First Amendment jurisprudence." n67 At least on its surface the majority opinion supports the fighting words exception, just as decisions of the [*224] 1980s have supported other exceptions through explicit reference to Beauharnais. n68

-Footnotes-

n66 R.A.V., 112 S. Ct. at 2543.

n67 Id.

n68 See Bose v. Consumer's Union, 466 U.S. 485, 594 (1984) (libel); New York v. Ferber, 458 U.S. 747, 763 (1982) (child pornography); Central Hudson v. Public Serv. Comm'n 447 U.S. 557, 592 (1980) (commercial speech).

-End Footnotes-

Beauharnais and Chaplinsky have survived the doctrinal shifts of the last three decades for at least two reasons. First, the ease of application of a

categorical approach is especially attractive to a Supreme Court prone to standardized tests. Second, the fundamental dilemma that permeates all free speech cases is captured precisely in Justice Murphy's claim that the benefits of some speech are so few that they are easily outweighed by more significant social interests. n69 This assertion rejects the absolutism that most agree would make First Amendment adjudication, not to mention democracy itself, impossible. n70 At the same time it promotes the intuitively attractive idea that only significant social interests can justify suppression of speech. 'Order and morality' remain perennial concerns in the business of government. Much of the content of democratic debate, of public policy making, and of political life in general is about the specific application of ideals of order and morality. In this light it is of little surprise that the contours of the First Amendment should be curtailed by the same criteria. n71 While labels, doctrines, paradigms and methodologies vary in First Amendment jurisprudence over time, the essence of all those shifts involves a determination of which order, which morality, will measure the reach of a free speech claim.

-Footnotes-

n69 Justice Frank Murphy wrote that fighting words are unprotected because they are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Chaplinsky, 315 U.S. at 572.

n70 See Jerome O'Callaghan, Free Speech: Dimensions and Limits in LAW AND POLITICS: UNANSWERED QUESTIONS 226 (ed. David Schultz 1994); JOHN BRIGHAM, CIVIL LIBERTIES AND AMERICAN DEMOCRACY 40 (1984).

n71 From a comparative perspective it is worth noting that under the Constitution of the Republic of Ireland the "right of citizens to express freely their convictions and opinions" is guaranteed, "subject to public order and morality." IRE. CONST. art. 40.6.1.i. I expect many other nations attach similar caveats.

-End Footnotes-

This is not to say that Chaplinsky is the better, or best, way of handling First Amendment claims. It obviously raises a troublesome specter of judges either,

- a) applying their own elite vision of order and morality, or
- b) deferring to a popular majority's vision of order and morality.

.Nevertheless, what Chaplinsky reflects so well is that the First Amendment makes such dangers inevitable. A First Amendment jurisprudence independent of contemporary understanding of order and morality is ultimately a contradiction in terms.

Thus Justice Robert Jackson's famous claim that no official "can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion" -- makes for a fine, even romantic, ideal, while at the same it [*225] substantially misses the point. n72 The Schenck v. United States n73 / Brandenburg v. Ohio n74 clear and present danger test, n75 and the obscenity test from Miller v. California, n76 both reveal and support the power of

government officials to determine the orthodox.

-Footnotes-

n72 West Virginia v. Barnette, 319 U.S. 624, 642 (1943).

n73 249 U.S. 47 (1919).

n74 395 U.S. 444 (1969).

n75 249 U.S. at 52; 395 U.S. at 447-48.

n76 413 U.S. 15 (1973).

-End Footnotes-

Ultimately Beauharnais and Chaplinsky remain significant developments in the Supreme Court's understanding of the First Amendment. They create an unmistakable tension when placed next to more liberal interpretations of free speech such as West Virginia v. Barnette n77 and Texas v. Johnson. n78 One of the ironies of the R.A.V. opinion is that it supports, at least nominally, Beauharnais and Chaplinsky while achieving a result more ideologically in keeping with Barnette and Johnson. In sum, it is a perversion of Beauharnais to use it to help defeat the St. Paul ordinance. Similarly it is a perverse use of Chaplinsky n79 that results in government's inability to punish cross burning for its hate speech elements.

-Footnotes-

n77 Id.

n78 491 U.S. 397 (1989).

n79 Recall that Chaplinsky developed this test for the reach of the First Amendment, that unprotected speech is speech that is of "such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality." Chaplinsky, 315 U.S. at 572.

-End Footnotes-

B. The Posadas Argument

In Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, n80 the Supreme Court upheld the power of government to restrict advertising for some forms of gambling on the island of Puerto Rico. n81 The majority's focus was on

a) the nature of the speech involved (commercial) and

b) the power of a local legislature to protect the welfare of its citizens.

n82 The Posadas decision supports government creation of two double standards: the first gave Puerto Ricans less access to information than citizens on the mainland; the second put advertisements for casino gambling beneath advertisements for other forms of gambling. n83

-Footnotes-

n80 478 U.S. 328 (1986).

n81 Id. at 348.

n82 Id. at 340-42.

n83 Id.

-End Footnotes-

[*226] Posadas is mentioned only once in Scalia's majority opinion. n84 However even this reference is ironic, as Posadas certainly strengthens the hand of government in the regulation of speech. Just as the Puerto Rican double standards were based on legislative concern for general welfare, n85 so too was St. Paul's double standard (i.e., some, not all, fighting words were singled out for punishment). n86 On Justice Scalia's side, however, is the fact that commercial speech has consistently been viewed as a unique category for First Amendment purposes. n87 In general the Supreme Court has tolerated more government power over commercial speech than over other forms of speech. n88

-Footnotes-

n84 R.A.V., 112 S. Ct. at 2542.

n85 Posadas, 478 U.S. at 341.

n86 See R.A.V., 112 S. Ct. at 2541-42.

n87 See MALCOM FEELEY & SAMUEL KRISLOV, CONSTITUTIONAL LAW 474 (2d ed. 1990).

n88 See O'Brien, supra note 53, at 482-484.

-End Footnotes-

A comparison of Posadas and R.A.V. raises some curious problems. This is not an instance of comparing 'pure speech' to some lesser form of communication. Recall that R.A.V. engaged in expressive conduct. n89 If R.A.V. had made a racist speech, the issue would have been substantially different in that the St. Paul ordinance would not even apply. n90 Thus we have expressive conduct compared to commercial speech -- which of the two should rank higher in a hierarchy of protectable speech is not immediately clear. The question becomes more intriguing when one looks to the particulars. Should casino advertisements be less deserving of First Amendment protection than a cross-burning n91 on the property of a black family in the dead of night?

-Footnotes-

n89 See R.A.V., 112 S. Ct. at 2541.

n90 For the text of the ordinance see supra note 4.

n91 The incident that brought R.A.V. to court was in fact part of a more widespread pattern of harassment and intimidation of a black family newly

arrived in a white neighborhood. They endured tire slashing, racial epithets hurled at their nine year-old son and a vandalized car window. Charles R. Lawrence III, Crossburning and the Sound of Silence: Antisubordination Theory & the First Amendment, 37 VILL. L. REV. 787, 787 (1992).

- - - - -End Footnotes- - - - -

Even if one concludes that commercial speech in general is a lower priority than expressive conduct, one must ask whether it matters what the content is, or what the topic is in expressive conduct. So, for example, would it make sense to say that commercial speech (as in, say, a billboard) is ranked beneath expressive conduct the topic of which is a commercial transaction and the content of which is essentially an advertisement? n92

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n92 This hypothetical may appear bizarre, but compares well to Justice Scalia's hypothetical of a government prohibition of only those obscene movies that feature blue-eyed actresses. R.A.V., 112 S. Ct. at 2547.

- - - - -End Footnotes- - - - -

[*227] To determine the appropriate place of a particular instance of expressive conduct in a hierarchy n93 of First Amendment speech, one should examine its topic and content. n94 It should come as no surprise that the best known examples of protected expressive conduct, Tinker v. Des Moines n95 and Texas v. Johnson, n96 both involved a political topic and overt political content. n97 Likewise a prominent example of expressive conduct that fared poorly with the Court involved a message of eroticism. n98 Thus the topic and content of R.A.V.'s expressive conduct need examination.

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n93 The very existence of separate standards for commercial speech regulation presupposes such a hierarchy.

n94 A hierarchy of First Amendment speech categories will inevitably depend on topic/content classifications, see, e.g., WILLIAM VAN ALSTYNE, INTERPRETATION OF THE FIRST AMENDMENT 41-42 (1984).

n95 393 U.S. 503 (1969) (wearing of black arm bands as a protest of U.S. policy in Vietnam).

n96 491 U.S. 397 (1989) (burning of an American flag as a protest of Reagan Administration policies).

n97 See 393 U.S. at 504-05; 491 U.S. at 399-400.

n98 Barnes v. Glen Theatre, Inc., 501 U.S. 560, 562-65 (1991) (nude dancing as conduct expressive of erotism and sexuality).

- - - - -End Footnotes- - - - -

Put it in a light most favorable to the defendant, the topic was race relations. (In another light, it was hate.) The content surely was the

equivalent of a verbal threat. It is difficult, if not impossible, to interpret the burning cross without using the word intimidation. As explained by one scholar, "Remarks whose dominant object is to hurt and humiliate, not to assert facts or values, have very limited expressive value." n99 Given that threats against the life, liberty or property of another are often prohibited by state or local law, it is difficult to see how R.A.V.'s expressive conduct must necessarily rank above commercial speech in degree of First Amendment protection. If anything the result should be the opposite; advertisements for legitimate commercial transactions are deserving of greater First Amendment protection than threats based on racial animus.

-Footnotes-

n99 Kent Greenawalt, *Insults and Epithets: Are They Protected Speech?*, 42 RUTGERS L. REV. 287, 298 (1990).

-End Footnotes-

In sum, the argument that no comparison can be made between expressive conduct and commercial speech is fundamentally flawed and serves only to avoid another measure by which the R.A.V. reasoning appears truly perverse. The St. Paul ordinance is, like the regulation upheld in *Posadas*, an effort to promote the "health, safety and welfare" of its residents and the city's interest is certainly "substantial." n100 R.A.V. does not satisfactorily explain why government has less power to prohibit physical threats than it has to ban the distribution of truthful information in the form of an advertisement.

-Footnotes-

n100 *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 341 (1986).

-End Footnotes-

[*228] IV. FUNDAMENTAL FLAWS

Justice Scalia's most prominent theme in *R.A.V.* is the accusation that the government has chosen to display favoritism in the realm of speech, that "The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects. In its practical operation, moreover, the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination." n101 Because fighting words that do not involve race, creed, etc. are ignored by the law, Justice Scalia concludes that the viewpoints of some are given an unfair advantage, licensing "one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules." n102

-Footnotes-

n101 112 S. Ct. at 2547 (citations omitted).

n102 *Id.* at 2548.

-End Footnotes-

This line of thinking raises two immediate questions: i) whether the ordinance actually punishes one side of a debate, and ii) whether punishing one side (i.e. violating a neutrality command) is at odds with First Amendment doctrine?

To answer the first question one must look at, and beyond, the facts of R.A.V. It is obvious that no "debate" was occurring on the front lawn of that suburban home in the "predawn hours." n103 Even if R.A.V. had engaged in direct speech, it strains reason to call it a "debate" when one side is either expected, or known, to be asleep. Thus the particular application of the ordinance infringed on no debate.

-Footnotes-

n103 The cross burning incident was one in an ongoing series of efforts to intimidate a solitary black family in a predominantly white neighborhood. See supra note 91.

-End Footnotes-

In other circumstances the ordinance might be applied where two or more sides do face off in debate. Even then, however, the ordinance indicates a government preference only when it comes to non-verbal expression of hate. n104 A debate the point of which is the non-verbal expression of hate between the participants, can hardly be counted as a "debate" in any meaningful sense. A debate the point of which is something more substantial is surely at a point of derailment when non-verbal expressions of hate are vented.

-Footnotes-

n104 Recall the specific language of the then ordinance: "'Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.'" R.A.V., 112 S. Ct. at 2541 (quoting MINN. STAT. @ 292.02 (1990)).

-End Footnotes-

Consider this dialogue:

Attorney 1: And don't be telling other lawyers to shut up. That isn't your goddamned job, fat boy.

Attorney 2: Well that's not your job, Mr. Hairpiece.

Witness: As I said before, you have an incipient --

[*229] Attorney 1: What do you want to do about it asshole?

Attorney 2: You're not going to bully this guy.

Attorney 1: Oh you big tub of shit, sit down. n105

-Footnotes-

n105 Bar Wars, HARPER'S MAGAZINE, Jan. 1993, at 32 (excerpted from the transcript of a deposition).

-End Footnotes-

If that exchange counts as part of a deposition in any real sense, then perhaps R.A.V.'s expression counts as a contribution to some debate. In both cases it takes an enormous leap of the imagination to suggest that something other than simple intimidation is involved. As Justice White phrases it in his concurrence, "[B]y characterizing fighting words as a form of 'debate' . . . the majority legitimates hate speech as a form of public discussion." n106

-Footnotes-

n106 R.A.V., 112 S. Ct. at 2553-54 (White, J., concurring).

-End Footnotes-

Here lies another important error in Justice Scalia's opinion. He sees viewpoint discrimination as the effect of the ordinance. In fact, the ordinance is, on its face, concerned with the topic of "debate", not the point of view of the speaker. So at least at first glance the ordinance involves not viewpoint favoritism, but content favoritism. Professor Kagan, in a perceptive analysis of R.A.V., reaches the same conclusion; n107 however, she also concludes that the practical effect of the ordinance will be viewpoint discrimination:

-Footnotes-

n107 Elena Kagan, The Changing Faces of First Amendment Neutrality: R.A.V. v. St. Paul, Rust v. Sullivan, and the Problem of Content-Based Underinclusion, 1992 SSUP. CT. REV. 29, 68-69.

-End Footnotes-

The St. Paul ordinance, it is true, handicaps both sides (and therefore neither side) when Jews and Catholics, whites and blacks scream slurs based on religion or race at each other. But surely race-based fighting words occur (indeed, surely they usually occur) in something other than this double-barrelled context. In most instances, race-based fighting words will be all on one side, because only racists use race-based fighting words, and racists usually do not assail only each other. When the dispute is of this kind, the government effectively favors a side in barring only race-based fighting words. To put the point another way, if a law prohibiting the display of swastikas takes a side, no less does a law that punishes as well the burning of crosses. n108

-Footnotes-

n108 Id. at 70-71.

-End Footnotes-

On this basis, Professor Elena Kagan concludes that Justice Scalia, though he tends to confuse viewpoint neutrality with content neutrality, could fairly assail the ordinance for its viewpoint favoritism. n109 Yet this analysis is far from convincing. To begin, no empirical data on the actual application of the law has been marshaled to show which viewpoints were favored and which were not. Second, if it is true that most racial insults will all be on one side (presumably pro-white) that only means that there are more speakers on one side of the [*230] "debate" than on the other. The fact that white racists can intimidate through numbers hardly indicates that the government only opposes pro-white racial slurs. Third, if it is true that most racial insults will all be on one side, and that the other side relies on non-racial fighting words (can this really be a likely occurrence?), then what favoritism has been demonstrated?

-Footnotes-

n109 Id. at 70.

-End Footnotes-

Consider a management-union dispute in which one side is prone to using racial slurs and the other is not. St. Paul would punish the racists, but would it thereby reveal a preference on the labor issue? Even if all of one side were racists, would the government thereby have favored one side on the labor issue or altered the labor dispute itself? Why should it matter at all to St. Paul which side relied on racial slurs? Fourth, it is certainly plausible that an anti-swastika law shows viewpoint as well as content preference. But recall that the St. Paul ordinance banned all symbols including "but not limited to" n110 swastikas and burning crosses when they were used to arouse anger or alarm "on the basis of race, color, creed, religion or gender." n111 The broad sweep of the ordinance undermines the claim that some viewpoints would necessarily fare better than others.

-Footnotes-

n110 See supra note 104 (quoting MINN. STAT. @ 292.02).

n111 Id.

-End Footnotes-

To state the obvious, a social interest in order and morality is furthered by minimizing incidents where debates degenerate into 'hate-fests'. Justice Stevens' evaluation agrees:

In a battle between advocates of tolerance and advocates of intolerance the ordinance does not prevent either side from hurling fighting words at the other on the basis of their conflicting ideas, but it does bar both sides from hurling such words on the basis of the target's "race, color, creed, religion or gender." n112

-Footnotes-

n112 R.A.V., 112 S. Ct. at 2571.

- - - - -End Footnotes- - - - -

Just as it is hard to believe that R.A.V.'s acts actually contributed, or even were intended to contribute, to a debate, it is equally difficult to swallow the peculiar notion that the St. Paul ordinance somehow could impoverish debate. Thus Justice Scalia's concern about viewpoints driven from the marketplace seems profoundly beside the point. Only the truly naive could describe this decision as one that "reaffirmed a rule against government orthodoxy." n113

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n113 Kathleen M. Sullivan, The Supreme Court -- Foreword: The Justices of Rules and Standards, 106 HARV. L. REV. 22, 44 (1992).

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V. JUSTICE SCALIA'S ERRATIC STANDARDS

One of the stranger aspects of R.A.V. is that Justice Scalia's concern for political debate, in this case, causes him to ponder, with alarm, the "specter that the Government may effectively drive certain ideas or viewpoints from the [*231] marketplace." n114 Even if R.A.V. had raised this specter, there remain serious issues relating to the marketplace theory that Justice Scalia must surely want to avoid. As put by one commentator:

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n114 112 S. Ct. at 2545 (quoting Simon & Schuster v. New York Crime Victims Board, 502 U.S. 105 (1992)).

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The marketplace of ideas! Do we appreciate enough the revolutionary daring of that conception? At one bold stroke it identifies the deliberative and the bargaining arts, turns the scientist into a businessman, the sage into the salesman. This is the most significant triumph of a business civilization. Or it would be, if it did not ensure disaster. For, unfortunately, we need the product of deliberation, and, however difficult it may be for us to recapture the sense of difference, deliberating and bargaining are not the same, neither in process nor in result. n115

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n115 JOSEPH TUSSMAN, OBLIGATION AND THE BODY POLITIC 104 (1960).

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Justice Scalia's faith in a marketplace of ideas is also ironic, as his position in other First Amendment cases indicates skepticism about free trade for speech. n116 It has already been observed that he has found several values that outweigh free speech rights, including "the preservation of the special status of government employment, the protection of communities from pandering, the maintenance of the electoral process, the protection of captive audiences from unwanted speech, and the fostering of education." n117 For reasons not yet explained by Justice Scalia, the protection of individuals from harassment and

intimidation (based on their race, creed, etc.) has not made that list. n118

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n116 Analysis of Justice Scalia's record in the D.C. Circuit and on the Supreme Court (through the 1991 term) reveals a voting pattern dominated by votes against free speech claims.

Of all areas of the First Amendment, Justice Scalia has been most sympathetic toward free speech claims. He has voted to uphold free speech claims in eleven of twenty-nine (37.9%) cases. However, his support for free speech claims has not been spread uniformly across all speech categories. In the area of pure speech, he opposed free speech claims 75% of the time, and he opposed all First Amendment claims in the area of obscenity. Yet he only opposed free speech claims involving expressive conduct 28.6% of the time. David Schultz, Justice Antonin Scalia's First Amendment Jurisprudence: Free Speech, Press and Association Decisions, 9 J.L. & POL. 515, 526 (1993).

n117 David Schultz, Justice Antonin Scalia's First Amendment Jurisprudence: Free Speech, Press and Association Decisions, 9 J. L. & POL. 515, 545 (1993).

n118 A similar point is evident in the contrast between Justice Scalia's approach in R.A.V. and his approach in Employment Div. Dept. of Human Resources v. Smith, 494 U.S. 872 (1990):

[I]n providing such strong protection for the First Amendment [in R.A.V.], Justice Scalia seemed to ignore many of the pillars of his own jurisprudence. Take for example his professed belief in the political process. . . . [In Smith] Justice Scalia rejected a First Amendment challenge to a state's right to prohibit Native Americans from using peyote in their worship. . . . Despite the First Amendment, he stated at that time "values that are protected against government interference through enshrinement in the Bill of Rights are not thereby vanished from the political process. . . . It may fairly be said that leaving accommodation to political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs." Such deference to the political process is notably absent [sic] in R.A.V. Wendy E. Parmet & Judith Olans Brown, Scalia and Free Speech, NAT'L L.J., July 27, 1992, at 18.

-----End Footnotes-----

[*232] Another irony lies in Justice Scalia's willingness to see expression of some value, expression worth protection, in R.A.V.'s actions, while five years earlier he found a speaker's verbal assertion of support for a hypothetical assassination of the President to be completely unprotected. n119 This contrast stands out in the record of one who has written, "The only checks on the arbitrariness of federal judges are the insistence upon consistency and the application of the teachings of the mother of consistency, logic." n120

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n119 See Rankin v. McPherson, 483 U.S. 378, 397 (1987); see also Schultz, supra note 118, at 532.

n120 Antonin Scalia, Assorted Canards of Contemporary Legal Analysis, 40 CASE W. RES. L. REV. 581, 588 (1989).

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One final irony evident in this case concerns the equality arguments that are frequently used by proponents of government restriction of hate speech. n121 Typically they assert that true equality, the kind that is denied by acts of intimidation, is a prerequisite to real freedom of speech. n122 However, Justice Scalia, by requiring that all fighting words be treated alike, uses an equality argument to defeat the St. Paul ordinance.

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n121 See, e.g., Massaro, supra note 47, at 230.

n122 Id.

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At its most fundamental level R.A.V. raises the question whether punishing one side of a debate n123 violates First Amendment principles. The most that can be said in response is that established First Amendment principles are notoriously ambivalent. On one hand we find decisions in the Barnette-Johnson vein that espouse a government disinterested in the extreme. n124 On the other hand, the very existence of categories of unprotected speech (a fact that Justice Scalia does not dispute n125) indicates that evenhandedness is not the utmost [*233] priority. The debate, discussion, consideration, and examination by the body politic of what is obscene has been hampered by Miller v. California. n126 Consideration of radical alternatives to our democratic structures has been restricted by decisions such as Schenck v. United States n127 and its progeny. n128 The categorical approach itself informs us that government can and will create barriers around the marketplace of ideas.

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n123 Assuming, arguendo, that debates were subject to the ordinance.

n124 See, e.g., Cohen v. California, 403 U.S. 15, 24 (1971); Stanley v. Georgia, 394 U.S. 557, 563-64 (1968).

n125 "[O]ur decisions since the 1960's have narrowed the scope of the traditional categorical exceptions for defamation." R.A.V., 112 S. Ct. at 2543.

n126 To the extent that Miller allows government restriction of obscenity, the public is denied an opportunity to decide for itself the value of obscene material.

n127 249 U.S. 47 (1919).

n128 Schenck was quickly followed by a decision which upheld the imprisonment of one of the most prominent Socialist Party leaders of the day. See Debs v.

United States, 249 U.S. 211 (1919). In effect part of the Socialist Party platform had been declared illegal. Similarly, the court's decision to uphold convictions in Dennis v. United States, 341 U.S. 494 (1951), discouraged advocacy that lies at the core of the Communist movement.

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Even defamation law, it can be argued, reveals a government that discriminates against content. The argument n129 suggests that in defamation cases the government obviously discriminates against some speech on the basis of content. Further, some viewpoints are preferred over others, such as false unflattering (injurious) comments which are punished, unlike false flattering (non-injurious) comments which are not punished. The difference between the two depends in part on viewpoint and content. Finally, the very act of allowing a jury or judge to determine what is a false unflattering comment will inevitably lead to content discrimination. One can only conclude that First Amendment principles do not consistently favor neutrality n130 toward purveyors in the market, nor do they show indifference to the content of debate, as stated by Professor Kagan:

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n129 I am indebted to Professor Steven Shiffrin of Cornell Law School for the development of this argument.

n130 According to one First Amendment scholar, "No principle has been articulated more consistently in First Amendment law than the doctrine that legislation affecting speech may not be based on disapproval of its content." Floyd Abrams, Hate Speech: The Present Implications of a Historical Dilemma, 37 VILL. L. REV. 743, 749 (1992). If that proposition were true, no obscenity statute could withstand constitutional scrutiny. In contrast, the Supreme Court has expended a great deal of energy explaining how obscenity statutes need not offend the Bill of Rights.

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Exceptions to the rule [of viewpoint neutrality] exist, although the Court rarely has seen fit to acknowledge them as such; in a number of areas of First Amendment law (and especially when so called low-value speech is implicated), the Court breezily has ignored both more and less obvious forms of viewpoint preference. n131

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n131 Elena Kagan, Regulation of Hate Speech and Pornography after R.A.V., 60 U. CHI. L. REV. 873, 876 (1993).

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R.A.V. is a particularly interesting decision for many reasons, not the least of which is the fact that it is the only majority opinion authored by Justice Scalia [*234] that upholds a free speech claim. n132 Indeed analysis of Justice Scalia's record shows a pronounced antagonism toward free speech claims in general:

-Footnotes-

n132 This remained true as of Spring, 1993. See Schultz, supra note 118, at 537.

-End Footnotes-

[W]hile Scalia's participation in certain high profile decisions striking down flag burning or cross burning laws as unconstitutional have given him the reputation as a defender of free speech, press and association, he is not. In the forty-six identified cases involving these freedoms, he has voted against them thirty-three times . . . and he has voted against the press in ten of eleven decisions. n133

-Footnotes-

n133 Id. at 519.

-End Footnotes-

Justice Scalia has already been criticized for his sporadic use of principle to suit his preferred causes. n134 "When the methodology has to give in order for the merits to go as Justice Scalia wants, it gives." n135 He has been criticized for his "rigid formalism" n136 and his deference to the powers established in the status quo. n137 "Justice Scalia's 'neutral principles' are no more neutral than anyone else's . . . [they] often result in a lack of judicial protection for the poor, the powerless and the unpopular." n138 With regard to R.A.V. in particular, it has also been argued that he is blind to the unique relevance of other Constitutional guarantees. As Professor Akhil Amar has commented, burning crosses may "cease to be part of the freedom of speech protected by the First and Fourteenth Amendments, and instead constitute badges of servitude that may be prohibited under the Thirteenth and Fourteenth Amendments." n139

-Footnotes-

n134 Jeffrey Rosen, The Leader of the Opposition, THE NEW REPUBLIC, Jan. 18, 1993, at 20-21.

n135 Peter Edelman, Justice Scalia's Jurisprudence and the Good Society Shades of Justice Frankfurter and the Harvard Hit Parade of the 1950's, 12 CARDOZO L. REV. 1799, 1800 (1991).

n136 Larry Kramer, Judicial Asceticism, 12 CARDOZO L. REV. 1789, 1798 (1991) ("[T]he central theme of Justice Scalia's jurisprudence is that justice is not his business. His business is to enforce objective rules. If these are unjust, it is up to others -- Congress, the states, We the People -- to change them.").

n137 "Justice Scalia's devaluation of the past . . . follows from the root principle of his jurisprudence -- that the strong are entitled to rule. All of us should remember, however, the fate prophesied for those who live by the sword." Robert A. Burt, Precedent and Authority in Antonin Scalia's Jurisprudence, 12 CARDOZO L. REV. 1685, 1697 (1991).

n138 Edelman, supra note 136, at 1801.

n139 Akhil R. Amar, The Case of the Missing Amendments, R.A.V. v. St. Paul, 106 HARV. L. REV. 124, 126 (1992). That argument raises intriguing questions about the portions of the ordinance that were aimed at hate speech based on gender and religion.

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VI. CONCLUSION: SCHIZOPHRENIA

The essence of the problem raised in many recent First Amendment cases, and most apparent in R.A.V., lies in a two-track First Amendment doctrine. [*235] These tracks n140 were laid at least 50 years ago; they reveal a "tension between robust protection of the offensive expression and protection of the dignity and physical integrity of potential victims of such expression." n141 The first approach emphasizes the anti-majoritarian nature of the free speech guarantee, the minimal role of government in any public debate, and the courts' duty to ensure that government meets the highest standard before a restriction of speech/expression will be allowed. n142 This is not just anti-censorship, it is anti-chilling effect and fundamentally anti-government. Given the liberalism of the Warren Court (and to a lesser extent the Burger Court), it is not surprising that this approach was dominant in the 1960s and 1970s. n143

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n140 For a full examination of the philosophical underpinnings of this dichotomy, see Massaro, supra note 47.

n141 Massaro, supra note 47, at 212.

n142 Devotees of this approach are inclined, like their counterparts, to see it as the only free speech tradition. See Amar, supra note 140, at 133.

n143 See, e.g., Texas v. Johnson, 491 U.S. 397, 414-15 (1989); Cohen v. California, 430 U.S. 15, 24 (1971); Tinker v. Des Moines, 393 U.S. 503, 513 (1969); Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969); Stanley v. Georgia, 394 U.S. 557, 563-64 (1968); New York Times Co. v. Sullivan, 376 U.S. 254, 269-70 (1964); West Virginia v. Barnette, 319 U.S. 624, 641-42 (1943).

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The second approach emphasizes the purposes of the text, the limited reach of the term "speech" itself, and the countervailing interests in order, morality and security. n144 The victories of this approach may be fewer but they remain significant. n145 Obviously Chaplinsky and Beauharnais are prime examples. n146

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n144 See JOHN BRIGHAM, CIVIL LIBERTIES AND AMERICAN DEMOCRACY 40-76 (1984).

n145 Others that would be included in this category include, Osborne v. Ohio, 495 U.S. 103 (1990); Hazelwood v. Kuhlmeier, 484 U.S. 260 (1988); Bethel v. Fraser, 478 U.S. 675 (1986); New York v. Ferber, 458 U.S. 747, 763 (1982);

United States v. O'Brien, 391 U.S. 367 (1968).

n146 From this perspective it appears that supporters of the flag-burning opinion cannot consistently criticize R.A.V.

-End Footnotes-

What Justice Scalia's majority opinion attempts in R.A.V. is an integration of both tracks, which explains why the reasoning is so convoluted, if not perverse. n147 His effort to integrate both strands of divergent analyses is ultimately unconvincing. As one scholar put it, "Doctrine . . . yields no clear answer to whether the first amendment protects speech that is as confrontational and potentially destructive of human dignity and social solidarity as is hate speech." n148 Justice Scalia's judgment in effect tells the legislature that it can advance a social interest in order and morality with fighting-word laws only when those laws are neutral. If Justice Scalia's concern is content-neutrality, that position is ultimately nonsensical. Fighting-words [*236] laws must always discriminate on the basis of content. If his concern is viewpoint-neutrality, it is misplaced. The St. Paul ordinance attacked content, irrespective of viewpoint. The boundary that Justice Scalia wants to set for the fighting words exception is at odds with the very foundation of the exception itself: The government's legitimate interest in order and morality.

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n147 It has been suggested that Scalia's opinion relies heavily on a brief submitted by the "libertarian Center for Individual Rights." Rosen, supra note 135, at 27.

n148 Massaro, supra note 47, at 221.

-End Footnotes-

To suggest, as did Justice White, that Justice Scalia's analysis is "transparently wrong" is not to argue that the St. Paul ordinance will be an effective tool against hate speech or its harms. It may well be the case that the ordinance will be used most often to harass groups that in Justice White's words, "have historically been subjected to discrimination," n149 as well as hate speech. n150 In any case, effectiveness does not guarantee constitutionality, nor vice-versa.

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n149 R.A.V., 112 S. Ct. at 334.

n150 "Bans on hate speech may have perverse effects: they may replicate the very marginalization that they are meant to subvert, carrying a subtext that the victims cannot talk back for themselves." Sullivan, supra note 6, at 40; see also Nadine Strossen, Regulating Racist Speech on Campus: A Modest Proposal? 1990 DUKE L. J. 484, 556; Massaro, supra note 47, at 226.

-End Footnotes-

The categorical approach that is the source of the one true debate in R.A.V. also has its weaknesses. One problem is that ultimately it begs the question,

where is the containment principle? At what point do we know that the list is complete? What is to prevent the Supreme Court from creating a simple ad hoc list of disfavored expression at random? Indeed the Court's willingness to find good reasons for restricting freedom of speech brings to mind the criticism once leveled at the clear and present danger test by Alexander Meiklejohn, that "The court has interpreted the dictum that Congress shall not abridge freedom of speech by defining the conditions under which such abridging is allowable. Congress, we are now told, is forbidden to destroy our freedom except when it finds it advisable to do so." n151

-Footnotes-

n151 ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT 29 (1948).

-End Footnotes-

To a cynic, the restrictions that have been placed on the First Amendment reveal the essential force of political expediency. The victims of the clear and present danger test n152 were the Socialist and Communist parties. A Supreme Court sensitive to the wishes of the majority created a child pornography exception that bore little or no relation to established First Amendment doctrine. n153 In sum, it can be argued that the categorical approach, though intuitively coherent (especially from an original intent perspective), in practice has been an excuse for the creation of an ad hoc blacklist reflecting majoritarian pressures.

-Footnotes-

n152 Included in this category are the subsequent mutations of the test, up to and including the Brandenburg decision.

n153 See the critique of Justice White's opinion in The Supreme Court, 1981 Term, 96 HARV. L. REV. 62, 145 (1982).

-End Footnotes-

[*237] This article began with a quote from Justice Oliver Wendell Holmes, Jr. It is fitting that it should end with a comment that describes his approach to free speech cases. This comment captures well the conundrum that hate speech cases present in First Amendment doctrine:

What matters for a legal system is what words do, not what they say, and, therefore, the law should only direct its attention to the use of words which do something illegal, not their use to say something. Looking at the words alone, instead of at what difference they make in the full set of circumstances in which they are uttered, is simply insufficient to determine their significance for a legal system generally, or for first amendment adjudication, in particular. n154

-Footnotes-

n154 Edward J. Bloustein, Holmes: His First Amendment Theory and His Pragmatist Bent, 40 RUTGERS L. REV. 283, 299 (1988).

-----End Footnotes-----

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CONSERVATIVE FREE SPEECH AND THE UNEASY CASE FOR JUDICIAL REVIEW

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-Footnotes-

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-End Footnotes-

SUMMARY:

... The case for binding judicial review in a democracy is tenuous. ... It seems quite likely that binding judicial review has made it difficult to work out any new consensus on either abortion or equality between the sexes. ... Even if we could know that the Court's initial decision in Roe v. Wade was a mistake, we still could not know whether the elimination of binding judicial review in this area today would be good for women. ... And the standard they, with only partial success, urged on the Court serves their interests better than the interests of many ordinary and minority women, women who are less likely to be similarly situated to men. ... Third, this is a small and manageable area in which to assess the effects of judicial review, one in which it is possible to reach firm conclusions (in contrast to areas as broad as abortion, sex equality, and free speech in general). ... There is a second problem with binding judicial review when considered in light of the Supreme Court's recent embrace of a viewpoint regulation approach to speech cases: the viewpoint fallacy. ... I have considered binding judicial review in three general areas: free speech, sex equality, and abortion. ...

TEXT:
[*975]

The case for binding judicial review n1 in a democracy is tenuous. Why should a small elite group of lawyers, who are not politically accountable, be able to block legislation desired by a majority of the citizens in a democracy? n2 The