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DIAGNOSING POWER: POSTMODERNISM IN LEGAL SCHOLARSHIP AND JUDICIAL PRACTICE (WITH AN EMPHASIS ON THE TEAGUE RULE AGAINST NEW RULES IN HABEAS CORPUS CASES)

Stephen M. Feldman*

We are within the culture of postmodernism to the point where its facile repudiation is as impossible as any equally facile celebration of it is complacent and corrupt.

—Fredric Jameson

To explore manifestations of postmodernism in judicial practice and legal scholarship, one presumably ought to begin by defining the central concept, postmodernism. But to define postmodernism at the outset,

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Connor initially attempts to distinguish postmodernism from postmodernity. A focus on postmodernism emphasizes culture, while a focus on postmodernity emphasizes social, political, and economic arrangements. CONNOR, supra, at 27; see Boyne & Rattansi, supra, at 9-13. Connor adds, however, that this distinction often collapses as cultural and social practices conjoin. See CONNOR, supra, at 44-51.

Jack Balkin argues that postmodernism is simultaneously a cultural era, a set of cultural products, and a set of theoretical and critical claims. These three aspects of postmodernism overlap and are integrally interrelated. J.M. Balkin, What is a Postmodern Constitutionalism?, 90 Mich. L. Rev. 1966, 1967-72 (1992). Balkin writes:

[Postmodernism is both a situation in which we find ourselves and a cultural response to that situation. Because the cultural response becomes part of the cultural situation, the two elements feed upon each other. Similarly, postmodernism is both a cultural situation and a set of claims about how that culture should be interpreted, altered and continued. Because such acts
one must disavow postmodernism: a definition would reduce postmodernism to some fundamental core or essence, which would be too foundationalist, too essentialist—too modernist. Postmodernism rejects the very possibility of essences, cores, or foundations that undergirds modernist definitions. Thus, to understand the themes of postmodernism, one must do postmodernism. And then one must do it some more, and some more still—one must think, see, and even live postmodern. And indeed, once one becomes postmodern, a return to modernism seems impossible. Postmodernism just keeps reproducing itself: the doing of postmodernism seems to occur again and again.

of interpretation, alteration and continuation stem from the culture, they share features in common with that culture.

Id. at 1972.

Fredric Jameson writes:

The concept [of postmodernism] is not merely contested, it is also internally conflicted and contradictory. I will argue that, for good or ill, we cannot not use it. But my argument should also be taken to imply that every time it is used, we are under the obligation to rehearse those inner contradictions and to stage those representational inconsistencies and dilemmas; we have to work all that through every time around. Postmodernism is not something we can settle once and for all and then use with a clear conscience. The concept, if there is one, has to come at the end, and not at the beginning, of our discussions of it. Those are the conditions . . . that prevent the mischief of premature clarification . . . .

JAMESON, supra note 1, at xxiii); cf. CONNOR, supra note 2, at 48-51 (if one attempts to describe postmodernism, one inevitably describes the difficulties of such a description); RICHARD J. BERNSTEIN, Introduction to THE NEW CONSTELLATION 1, 8, 11 (1991) [hereinafter BERNSTEIN, Introduction] (the modern/postmodern situation has multiple and disputed meanings and therefore cannot be reduced to an essential core); RICHARD J. BERNSTEIN, Serious Play: The Ethical-Political Horizon of Derrida, in THE NEW CONSTELLATION, supra, at 172, 186-87 [hereinafter BERNSTEIN, Serious Play] (deconstruction is not a set of discursive procedures; rather, it is a way of taking a position); Bryan S. Turner, Periodization and Politics in the Postmodern, in THEORIES OF MODERNITY AND POSTMODERNITY 1 (Bryan S. Turner ed., 1990) (difficult to define and date modernity and postmodernity).

The difficulty of defining postmodernism does not deter some commentators from attempting to delineate a definition. Of course, these commentators can be accused of slipping into modernism, but this criticism can be leveled against all postmodernists. See infra notes 237-46 and accompanying text. Peter Schanck recently offered a definition of postmodernism:

There is no single principle on which postmodernism is grounded or which comprises its essence. Instead, several interrelated concepts do so, each of which in a sense undergirds the others. Each depends on the others for its existence and each is a precondition of the others. These concepts may be summarized as follows: (1) The self is not, and cannot be, an autonomous, self-generating entity; it is purely a social, cultural, historical, and linguistic creation. (2) There are no foundational principles from which other assertions can be derived; hence, certainty as the result of either empirical verification or deductive reasoning is impossible. (3) There can be no such thing as knowledge of reality; what we think is knowledge is always belief and can apply only to the context within which it is asserted. (4) Because language is socially and culturally constituted, it is inherently incapable of representing or corresponding to reality; hence all propositions and all interpretations, even texts, are themselves social constructions.


Hence, postmodernism immediately presents a paradox. Postmodernism exists and even structures its own reproduction, yet postmodernism denies the possibility of its own definition. Indeed, this paradox illustrates one recurrent aspect or theme of postmodernism: the recognition, exploration, and even celebration of the existence of various paradoxes. For the most part, this and other postmodern themes emerge in this Article as I (with the reader) perform a series of postmodern flips. A postmodern flip is a gestalt switch or paradigm move that reverses our prior approach to a text (or an event or a concept) and, in so doing, reveals previously unrecognized features of that text. Whereas modernists constantly attempt to reduce the meanings of texts to an essential core or single truth, postmodernists are antifoundationalists and anti-essentialists. According to postmodernists, the meaning of a text is never grounded or stable, and therefore one can always find multiple meanings or truths. Thus, one performs a postmodern flip by taking a segment of a text, event, or concept that apparently has been reduced to a static meaning or truth and suggesting the possible existence of another (often radically different) meaning or truth. This alternative meaning or truth often emerges after one uncovers and disturbs the usually tacit assumptions underlying the original meaning. The postmodern flip then is completed by exploring how this new meaning or truth of the segment of the text, event, or concept might reorient one's understanding of the whole.

5 See infra text accompanying notes 177-81. I recognize that although initially I disclaim an intention to define postmodernism in this Introduction, I nonetheless proceed to offer several themes or aspects of the postmodern in the remainder of the Introduction. Two points emerge from this recognition. First, from one perspective, I am merely trapped in a postmodern paradox. To talk of postmodernism, I must offer some specification of its meaning, even while I struggle to avoid reducing it to some essence or core. Second, insofar as I am defining postmodernism, I admit that I lapse into the modern. Yet, as I argue later, postmodernism always contains vestiges of the modern. See infra notes 237-46 and accompanying text.

Parts I and II of this Article concentrate on judicial practice. In particular, Part I begins by describing the *Teague* rule against new rules in habeas corpus cases. In a series of recent decisions, beginning with *Teague v. Lane* in 1989 and continuing through *Graham v. Collins*, decided in early 1993, the Supreme Court has focused on the issue of whether constitutional rules should apply retroactively in habeas cases. These decisions conclude by severely restricting the scope of habeas corpus: the *Teague* rule against new rules prohibits, with two narrow exceptions, federal habeas courts from announcing or applying new rules of constitutional law. Hence, a state prisoner can gain relief only by showing that the state courts ignored or misapplied an old rule of law.

The *Teague* rule already has spurred an impressive outpouring of (modernist) legal scholarship that criticizes *Teague* from doctrinal and policy standpoints. For example, some critics maintain that the Court has denigrated an important purpose behind habeas corpus: to vindicate federal rights and thus to protect liberty. Many of the critics also recommend an alternative doctrinal approach to the habeas retroactivity issue, such as a return to the pre-*Teague* ad hoc particularistic standard. The purpose of this Article, however, is not to offer doctrinal alterna-

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7 See infra notes 26-66 and accompanying text.


13 See, e.g., Fallon & Meltzer, supra note 11, at 1796-97, 1813-20; Kinports, supra note 11, at 180-81.
tives; rather it is to exemplify and to explore the postmodern. 14

Consequently, Part I proceeds by performing a postmodern deconstruction of the *Teague* rule against new rules. 15 Postmodern insights gleaned from philosophical hermeneutics facilitate a deconstruction of the Court’s crucial distinction between old and new rules of constitutional law: any constitutional rule can be categorized as *both* old and new. When pressed, the distinction between old and new rules simply collapses, exposed as too unstable to offer sufficient practical guidance to habeas courts. The deconstruction of the *Teague* rule demonstrates, therefore, how a postmodern approach can disturb the assumptions and reveal the instabilities hidden within the Court’s modernist reasoning. Furthermore, this deconstruction concludes with a typical postmodern theme: a focus on the relation between power and language. 16 As the French postmodernist, Michel Foucault, might say, we “decipher” 17 or “diagnose” 18 the Court’s participation in and application of power. The deconstruction of *Teague* reveals, on the one hand, that the Court’s implementation of power is structural. Supreme Court Justices do not exercise power because of their ability (or inability) to articulate a principled distinction between new and old constitutional rules. Rather, they exercise power because of their relatively ongoing and embedded social positions and institutional roles within the complex social practice of judicial decisionmaking. On the other hand, the deconstruction of *Teague* reveals that the Court’s legal rhetoric implements power by triggering certain violent social practices (such as the death penalty). More broadly, we see that language itself represents a type of force or manifestation of power. Language constitutes the very shape of our being-in-the-world as it constrains and enables understanding, communication, and experience.

Part II performs the first postmodern flip of the Article. Whereas

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14 If I were to recommend an alternative doctrine, I would probably agree that the pre-*Teague* ad hoc balancing standard appears as the best approach.

15 See infra notes 67-139 and accompanying text.


Part I views the Supreme Court as a bastion of modernism, Part II seeks to explore how the Court's judicial practice itself manifests postmodernism. Part I explores and illustrates postmodern themes by performing a postmodern deconstruction of the Court's Teague rule, but Part II considers how the Court participates in postmodernity as it articulates the Teague rule. This postmodern flip uncovers several important themes of postmodernism and surprisingly reveals that the Court understands and even actively partakes in those themes.

Part III turns to manifestations of postmodernism in legal scholarship. Consequently, Part III performs another postmodern flip. This time, postmodern insights are self-reflexively turned onto postmodernism itself—in particular, onto postmodern legal scholarship. Postmodern legal scholars often seek to disturb modernists' unconscious assumptions and smug proclamations of truth, but postmodernists rarely consider their own assumptions (whether conscious or unconscious). Part III consequently first focuses on one of the leading postmodernists, Pierre Schlag, in order to describe how postmodern legal scholars express their commitment to the same postmodern themes that were uncovered in the Supreme Court's habeas jurisprudence. This initial treatment of

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19 See infra text accompanying notes 140-83.
20 See CONNOR, supra note 2, at 5 (argues that "self-reflexivity" is key to postmodernism).
postmodern legal scholarship, however, seems too descriptive, too essentialist, or in other words, too modernist. Thus, Part III continues with another postmodern flip by diagnosing how postmodern scholars themselves partake in and apply power, largely by producing commodities in the form of publications.\(^{23}\) While postmodernists usually dissociate their scholarship from the Supreme Court—disclaiming any pretense of advising or otherwise communicating with the Justices\(^{24}\)—the first two subsections in Part III reveal several unexpected and significant connections between the Court and postmodern legal scholars. Part III concludes by then performing yet another postmodern flip, suggesting that postmodern (and other) legal scholars do not merely produce publications; they also and perhaps primarily pursue truth.\(^{25}\) This flip highlights a difference between the practices of scholars and justices that illuminates some potentially important political ramifications for postmodernism.

I. A POSTMODERN DECONSTRUCTION OF THE TEAGUE RULE AGAINST NEW RULES

A. The Teague Rule

In *Linkletter v. Walker*,\(^ {26} \) decided in 1965, the Supreme Court first addressed the question of whether constitutional rules of criminal proce-

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\(^{23}\) See infra text accompanying notes 184-246.

\(^{24}\) Thus, Jack Balkin writes:

Postmodern constitutionalism is the constitutionalism of reactionary judges surrounded by a liberal academy that despises or disregards them, and which is despised and disregarded in turn; postmodern constitutional culture is the culture in which the control of constitutional lawmaking apparatus is in the hands of the most conservative forces in mainstream life, while constitutional law as practiced in the legal academy has cast itself adrift, whether out of desperation, disgust, or despair, and engaged itself in spinning gossamer webs of republicanism, deconstruction, dialogism, feminism, or what have you. Postmodern legal culture is the rout of progressive forces, the increasing insularity, self-absorption, and fragmentation of progressive academic writing, and the increasing irrelevance of that writing to the positive law of the U.S. Constitution.

Balkin, supra note 2, at 1967.

\(^{25}\) See infra text accompanying notes 247-71.

\(^{26}\) 381 U.S. 618 (1965). For a comprehensive history of habeas corpus in the federal courts, see Patchel, supra note 11. For an alternative view of the history of habeas, see Liebman, supra note 12, at 2055-94.
Postmodernism in Legal Scholarship

dure should apply retroactively. Reasoning that it "must weigh the merits and demerits in each case," the Court held that the rule of Mapp v. Ohio—applying the Fourth Amendment exclusionary rule to the states—should not govern a criminal conviction that had become final before the Mapp decision. In a subsequent case, the Court clarified the particularistic standard of Linkletter: "The criteria guiding resolution of the question implicates (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." This approach controlled the question of retroactivity regardless of whether a case arose on direct or collateral review.

While the Court followed the Linkletter standard for over fifteen years, Justice Harlan nonetheless advocated an alternative approach that, in his view, remained more consistent with the history and purposes of habeas corpus. The thrust of Harlan's alternative, articulated in two dissents, was that the question of retroactivity should turn in part on whether a case arose on direct as opposed to collateral review. Harlan concluded that in any case still subject to direct review, "all 'new' rules of constitutional law" should apply retroactively. In habeas cases, however, Harlan suggested that, with two exceptions, new rules of constitutional law should not apply retroactively. The first exception gave retrospective power to any new constitutional rule that placed "certain kinds of primary, private individual conduct beyond the power of the government's criminal law-making authority." The second exception provided that constitutional rights of procedure should apply retroactively if "implicit in the concept of ordered liberty."

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29 See Mackey v. United States, 401 U.S. 667, 675-702 (1971) (Harlan, J., concurring in part and dissenting in part); Desist v. United States, 394 U.S. 244, 256-69 (1969) (Harlan, J., dissenting). In developing his approach, Harlan emphasized that the scope of habeas had been historically quite narrow. In Desist, Harlan stated that until 1953, when the Court decided Brown v. Allen, 344 U.S. 443 (1953), "federal courts would never consider the merits of a constitutional claim if the habeas petitioner had a fair opportunity to raise his arguments in the original proceeding." Desist, 394 U.S. at 261 (Harlan, J., dissenting). Harlan then underscored that, in his view, Fay v. Noia, 372 U.S. 391 (1963), overruled by Keeney v. Tamayo-Reyes, 112 S. Ct. 1715 (1992), which allowed claims not raised in state court to be raised on habeas unless the petitioner had deliberately bypassed state procedures, was "an indefensible departure... from the historical principles which defined the scope of the 'Great Writ.'" Desist, 394 U.S. at 262 (Harlan, J., dissenting). Harlan then identified the two functions of habeas as protecting the innocent from wrongful convictions and deterring state courts from ignoring or otherwise not vindicating federal constitutional rights. Id. In Mackey, Harlan emphasized that habeas had not been "designed as a substitute for direct review." 401 U.S. at 683; see id. at 682-86.
30 Desist, 394 U.S. at 258 (Harlan, J., dissenting).
31 Mackey, 401 U.S. at 692 (Harlan, J., concurring in part and dissenting in part).
32 Id. at 693.
In the 1980s, the Court accepted Harlan’s recommendation to distinguish direct from collateral review. Abandoning the *Linkletter* standard for cases raising the question of retroactivity on direct review, the Court embraced Harlan’s suggested categorical rule. The Court held “that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final . . . .” The Court soon also scrapped *Linkletter* in habeas cases, adopting instead an approach that resembled but was not identical to Harlan’s recommendation.

*Teague v. Lane,* decided in 1989, arose from a state prosecution of an African-American defendant. The defendant, Teague, petitioned for habeas relief, arguing that the all-white jury which had convicted him did not represent a fair cross section of the community. In 1975, *Taylor v. Louisiana* had held that the Sixth Amendment required a jury venire to be drawn from a fair cross section, and Teague maintained that the Sixth Amendment should be held to require the same of a petit jury. In rejecting Teague's habeas petition, the Court held that it should not even reach the merits of his constitutional claim. Though Justice O'Connor wrote only a plurality opinion, a majority accepted her approach in subsequent cases.

The *Teague* plurality opinion articulated two important points. First, it stated that the question of retroactivity should be the threshold issue in any case which might require the Court to announce or apply a new rule of constitutional law. The plurality justified this approach by reasoning that “once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated.” Since the announcement of a new rule would lead, according to this reasoning, to the supposedly drastic consequence of retroactive application to anyone seeking either direct or habeas relief, the plurality insisted that the issue of retroactivity should be resolved first.

Second, the plurality, following Justice Harlan, pronounced a general rule: “[N]ew constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.” And like Harlan, the *Teague* plurality identified two exceptions to this general rule. First, “a new rule should be applied retroactively if it places 'certain kinds of primary, private individual con-

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34 *Griffith*, 479 U.S. at 328 (emphasis added).
37 *Id.* at 300-05.
38 *Id.* at 300.
39 *Id.* at 305-10.
40 *Id.* at 310.
duct beyond the power of the criminal law-making authority.' 41 Second, retroactive application should be allowed for new "watershed rules of criminal procedure," 42 or in other words, for "those new procedures without which the likelihood of an accurate conviction is seriously diminished." 43 While the Teague plurality and Harlan shared identical first exceptions, their second exceptions differed—the plurality's second exception was significantly narrower.

Teague effectively created a rule against new rules in habeas cases. As the plurality stated:

We therefore hold that, implicit in the retroactivity approach we adopt today, is the principle that habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to all defendants on collateral review through one of the two exceptions we have articulated. 44

After Teague, consequently, the crux of any habeas case is the determination of whether it involves the application or articulation of a new rule. 45 If a case involves a new rule, then the habeas court must decline to rule on the merits of the claim and deny the petition (unless one of the exceptions applies). The Teague plurality acknowledged that to identify a constitutional rule as new or old might often present a formidable challenge, but the plurality nonetheless attempted to offer some guidance:

It is admittedly often difficult to determine when a case announces a new rule, and we do not attempt to define the spectrum of what may or may not constitute a new rule for retroactivity purposes. In general, however, a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final. 46

Applying these ambiguous guidelines to Teague's petition—which claimed that petit juries should reflect a fair cross section of the community—the plurality concluded that Teague sought to have the Court announce a new rule of constitutional law. Since the case did not fall within one of the exceptions, the plurality refused to reach the merits of Teague's substantive claim.

In Penry v. Lynaugh, 47 decided later in the same term as Teague, a majority of the justices adopted the Teague approach to retroactivity in

41 Id. at 311 (quoting Mackey v. United States, 401 U.S. 667, 692 (Harlan, J., dissenting in part and concurring in part)).
42 Teague, 489 U.S. at 311.
43 Id. at 313.
44 Id. at 316.
45 The problem of new rules arises in contexts other than habeas petitions. See Fallon & Meltzer, supra note 11 (discusses qualified immunity in section 1983 actions and tax refund cases as well as habeas petitions).
46 Teague, 489 U.S. at 301 (citations omitted).
habeas cases. Penry, who was mentally retarded, had been convicted of murder and sentenced to death. In his habeas petition, he raised two issues: first, whether the Eighth Amendment prohibition against cruel and unusual punishment categorically bans the execution of mentally retarded defendants, and second, whether the trial judge had properly instructed the jury about its obligation to consider mitigating evidence when imposing the sentence. The Court held that the first issue required the consideration of a new rule of constitutional law but that the issue nonetheless fell within the first exception to the general rule against new rules.\textsuperscript{48} The Court reasoned that "a new rule placing a certain class of individuals beyond the State's power to punish by death is analogous to a new rule placing certain conduct beyond the State's power to punish at all."\textsuperscript{49} The Court, however, ruled against Penry on the merits, holding that the Eighth Amendment does not categorically prohibit capital punishment for mentally retarded defendants.

With regard to the second issue—whether the trial judge had properly instructed the jury about its obligation to consider mitigating evidence when imposing the sentence—the Court held that Penry was not seeking a new rule.\textsuperscript{50} The Court reasoned that when Penry's conviction became final, Supreme Court precedent established that the Eighth and Fourteenth Amendments required states to allow a sentencer to consider and give effect "to evidence relevant to the defendant's background or character or to the circumstances of the offense that mitigate against imposing the death penalty."\textsuperscript{51} Penry asked the Court to rule specifically that the jury instructions were insufficient to allow the jury to consider the mitigating evidence of his mental retardation (and abused childhood). The\textit{Penry} majority concluded that such a ruling was in fact "dictated by" precedent and would not create a new rule of constitutional law.\textsuperscript{52} The Court consequently remanded the case for resentencing because of improper jury instructions. Justice Scalia vehemently dissented, arguing that the majority had construed the concept of a new rule far too narrowly. To Scalia, the Court now had "adopted and gutted in the same Term"\textsuperscript{53} the\textit{Teague} rule against new rules in habeas cases.

Despite the\textit{Penry} holding, a majority of justices largely accepted Scalia's arguments in\textit{Butler v. McKellar},\textsuperscript{54} decided in 1990, and thus the Court interpreted broadly the ambiguous\textit{Teague} guidelines for the identification of new rules. In a state prosecution, Butler had been convicted of murder and sentenced to death. He had appealed to the highest state

\begin{itemize}
\item \textsuperscript{48} Id. at 328-30.
\item \textsuperscript{49} Id. at 330.
\item \textsuperscript{50} Id. at 314-19.
\item \textsuperscript{51} Id. at 318.
\item \textsuperscript{52} Id. at 319.
\item \textsuperscript{53} Id. at 353 (Scalia, J., concurring in part and dissenting in part).
\item \textsuperscript{54} 494 U.S. 407 (1990).
\end{itemize}
court and then had petitioned the United States Supreme Court for certiorari. When the Court denied certiorari, Butler's conviction became final. Butler subsequently filed a habeas petition in federal district court, claiming that he had been unconstitutionally questioned about the murder after retaining counsel for an unrelated charge of assault and battery. After Butler had filed his habeas petition, the Court decided a different case, Arizona v. Roberson, which "held . . . that the Fifth Amendment bars police-initiated interrogation following a suspect's request for counsel in the context of a separate investigation." Thus, Roberson effectively vindicated the exact constitutional claim that Butler raised in his habeas petition. Nonetheless, the Court held that to apply the Roberson holding to Butler would amount to the application of a new rule of constitutional law after Butler's conviction already had become final on direct review. Thus, following the Teague rule against new rules, the Court refused to reach the merits of Butler's habeas claim.

The Butler majority focused on the lingering and significant perplexity of Teague—the question of what constitutes a new rule. Beginning with the Teague guidelines for the identification of new rules, the Butler Court rephrased the Teague language:

[I]n general, a case announces a "new rule" when it breaks new ground or imposes a new obligation on the States or the Federal Government. Put differently, and, indeed, more meaningfully for the majority of cases, a decision announces a new rule "'if the result was not dictated by precedent existing at the time the defendant's conviction became final.'"58

This rephrasing of the Teague guidelines appears to focus the inquiry on whether precedent dictated a particular result in a petitioner's case: if earlier cases do not dictate a decision in the petitioner's favor, then the petitioner necessarily is seeking a new rule. The Butler Court, however, immediately acknowledged an inherent ambiguity in this approach: "A new decision that explicitly overrules an earlier holding obviously 'breaks new ground' or 'imposes a new obligation.' In the vast majority of cases, however, where the new decision is reached by an extension of the reasoning of previous cases, the inquiry will be more difficult."59 Consequently, the Court proceeded to formulate a clearer approach for the identification of new rules. Emphasizing that the primary function of habeas was to deter state courts from ignoring established federal constitutional standards, the Butler Court defined the concept of a new rule as expansively as possible: "The 'new rule' princi-

56 Butler, 494 U.S. at 411 (citing Roberson, 486 U.S. at 682).
57 The Court stated that "'in both capital and noncapital cases, 'new rules will not be applied or announced in cases on collateral review unless they fall into one of two exceptions.'" Id. at 412 (quoting Penry, 492 U.S. at 313) (citations omitted).
58 Id. (citations omitted) (quoting Penry, 492 U.S. at 314 (quoting Teague, 489 U.S. at 301)).
59 Id. at 412-13.
60 One can reasonably argue that an equally important purpose for habeas is to vindicate federal
ple . . . validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions. 61 Moreover, the Court has reiterated this expansive definition as recently as 1993. 62

This approach manifests a startling degree of deference to state courts. According to Butler, so long as a state court's interpretation of precedent and denial of a defendant's constitutional claim was reasonable and in good faith, then the defendant's claim in a habeas petition must amount to a request for a new rule of constitutional law. In other words, unless a state court arbitrarily, recklessly, or purposely ignored precedent, then a federal habeas court must defer to the state court judgment. If, instead, a habeas court were to overrule a state court's reasonable and good faith judgment on a petitioner's constitutional claim, then the habeas court would merely be substituting its judgment for that of the state court. And by substituting its judgment, the habeas court would not be fulfilling its primary purpose—to deter state courts from contravening constitutional standards—because the state court had acted reasonably in the first place.

As the Court apparently intended, the Teague rule against new rules, with its expansive definition of the concept of new rules, eviscerates the writ of habeas corpus. 63 In most instances, state courts at least act reasonably and in good faith. Consequently, according to the Teague

rights and protect liberty. See Hoffmann, New Vision, supra note 11, at 177-80; Kinports, supra note 11, at 116.

61 Butler, 494 U.S. at 414 (emphasis added). Justice Harlan had defined new rules more narrowly: "[I]t is proper for a habeas court to require 'conceptual faithfulness' to our opinions and 'not merely decisional obedience' to the rules they announce." Desist v. United States, 394 U.S. 244, 265-66 n.5 (Harlan, J., dissenting) (quoting id. at 277 (Fortas, J., dissenting)); see Hoffmann, Retroactivity, supra note 11, at 211 n.123.

62 Gilmore v. Taylor, 113 S. Ct. 2112, 2116 (1993); Graham v. Collins, 113 S. Ct. 892, 897-98 (1993); see also Wright v. West, 112 S. Ct. 2482 (1992); Stringer v. Black, 112 S. Ct. 1130 (1992); Sawyer v. Smith, 497 U.S. 227 (1990); Saffle v. Parks, 494 U.S. 484 (1990). In Saffle, the Court quoted the Butler language on reasonableness and good faith. The Court added: "Under this functional view of what constitutes a new rule, our task is to determine whether a state court considering [a petitioner's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [the petitioner] seeks was required by the Constitution." 494 U.S. at 488. Stringer v. Black clarified that the Teague rule against new rules can undermine a habeas petition in two different ways. First, a petitioner cannot successfully request a habeas court to apply the holding of another case if that case had been decided after the petitioner's conviction became final. Second, a petitioner cannot successfully request a habeas court to create or announce a new rule in his or her case itself. 112 S. Ct. at 1135. Wright v. West considered the question of whether habeas courts should defer to state courts on mixed questions of law and fact, but the case did not produce a majority opinion. For an extensive discussion of this issue of mixed questions of law and fact, see Liebman, supra note 12.

63 For example, in Sawyer v. Smith, the Court wrote:

The scope of the Teague exceptions must be consistent with the recognition that "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." Teague, 489 U.S. at 309. The "costs imposed upon the State[s] by retroactive application of
rule, most habeas petitions supposedly request the federal courts to apply or articulate a new rule, thus precluding the courts from granting relief regardless of the merits of the claims. Furthermore, because retroactivity must now be considered the threshold issue, Teague forestalls habeas courts from even discussing the merits of the substantive claims. Thus, in the end, since the vast majority of criminal cases are state prosecutions, Teague radically transforms the judicial dialogue in the field of constitutional jurisprudence. Before Teague, the lower federal courts, in ruling on the merits of habeas petitions, actively and frequently contributed to the evolution of constitutional standards in the criminal context. The Teague rule, however, greatly reduces the opportunities for the lower federal courts to develop constitutional law. Indeed, in the typical state criminal case, the Supreme Court emerges as the only federal court that might have an opportunity to rule on a federal constitutional claim—and then only if the Court accepts the case on direct review.

B. A Deconstruction of the Teague Rule

A postmodern deconstruction of the Teague rule against new rules in habeas cases reveals that Teague is so unstable as to be practically incoherent. While several different manifestations of postmodernism could be used to demonstrate the instability of the Teague rule, I shall use insights drawn primarily from philosophical hermeneutics. Other postmodern approaches, including Derridean deconstruction and certain types of Wittgensteinian pragmatism, share with philosophical hermeneutics its crucial commitment to antifoundationalism: the meaning of a text, such as a judicial opinion or a legal rule, never rests on a firm or
stable ground. Yet, because philosophical hermeneutics focuses so sharply on the role of tradition in the process of interpretation, it most readily reveals instabilities within the Supreme Court’s claim to distinguish old rules from new rules.

1. On Philosophical Hermeneutics.—Philosophical hermeneutics is most easily understood in opposition to foundationalist views of understanding and interpretation. Foundationalists hold that the meaning of a text rests on some firm ground or foundation—an object that is separate and independent from, yet somehow accessible to, a perceiving subject. To understand a text correctly, the subject implements a mechanical technique or method that either bridges the gap to the objective meaning of the text or, at least, mirrors in consciousness the content of the text. To take an example familiar to attorneys, some constitutional foundationalists maintain that a reader of the Constitution must somehow reconstruct in his or her own consciousness the intentions of the Framers, as memorialized in the constitutional text.

Philosophical hermeneutics, contrary to foundationalism, maintains that no matter what we do, we are always and already interpreting. All experience, perception, and understanding are interpretive. Thus, the text (or a text-analogue) is not an object in the foundationalist sense: no uninterpreted source of meaning stands outside of or prior to an interpretive act. And since the text does not exist in an independent

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69 Steven Connor suggests that postmodernism rejects the modernist notion of “self-sufficient form.” Connor, supra note 2, at 108.

70 Also, though much less important, I am more familiar with Hans-Georg Gadamer and his formulation of hermeneutics than with other forms of postmodernism. See, e.g., Feldman, New Metaphysics, supra note 4 (discusses and applies philosophical hermeneutics); Feldman, Republican Revival/Interpretive Turn, supra note 4 (same).

71 See Feldman, New Metaphysics, supra note 4, at 682.


73 Cf. Crook, supra note 2, at 51-52 (modernist social theories are subject to postmodern critique as foundationalist).

74 See Fish, supra note 22; Stanley Fish, Is There a Text in This Class? (1980); Hans-Georg Gadamer, Truth and Method (Joel Weinsheimer & Donald G. Marshall trans., 2d rev. ed. 1989); Richard J. Bernstein, From Hermeneutics to Praxis, in Philosophical Profiles 94, 96 (1986) (on the universality of hermeneutics). Connor writes: “It may be that experience is always, if not actually determined, then at least interpreted in advance by the various structures of understanding and interpretation which hold at particular moments in particular societies, and different regions of those societies.” Connor, supra note 2, at 3. The leading analyses of Gadamer’s work are Georgia Warnke, Gadamer: Hermeneutics, Tradition, and Reason (1987); Joel Weinsheimer, Gadamer’s Hermeneutics: A Reading of Truth and Method (1985).

75 A text-analogue is any meaningful thing, event, or action that can be understood or read as if it were a text. See Clifford Geertz, Deep Play: Notes on the Balinese Cockfight, in The Interpretation of Cultures 412, 448-49 (1973); Paul Ricoeur, The Model of the Text: Meaningful Action Considered as a Text, in Interpretive Social Science—A Reader 73, 81 (Paul Rabinow & William M. Sullivan eds., 1979).

76 Stanley Fish writes:

[T]here is no such thing as literal meaning, if by literal meaning one means a meaning that is
and uninterpreted state, its meaning cannot be derived through some mechanical technique or method. As Hans-Georg Gadamer, one of the foremost interpretivist philosophers, writes: "[O]ur perception is never a simple reflection of what is given to the senses." 77

Nonetheless, according to philosophical hermeneutics, this rejection of objectivity does not mean that understanding or interpretation is purely subjective or capricious. The reader (or interpreter) is never an independent and autonomous subject who freely or arbitrarily imposes meaning on a text (or text-analogue). To the contrary, the interpreter is always situated in a "tradition" 78 or, in Stanley Fish's words, in an "interpretive community," 79 from which we inherit prejudices and interests that constrain and direct our understandings of texts. 80 One's life within

77 GADAMER, supra note 74, at 90. My conception of philosophical hermeneutics is primarily (but not completely) Gadamerian. As one might expect, because of the richness of Gadamer's philosophical hermeneutics and the ambiguity of the term "postmodernism," whether Gadamer is characterized as being postmodern is controversial. Some suggest that Gadamer's antifoundationalism renders him postmodern, see CONNOR, supra note 2, at 134; G.B. MADISON, Beyond Seriousness and Frivolity: A Gadamerian Response to Deconstruction, in THE HERMENEUTICS OF POSTMODERNITY 106 (1988), while others argue that Gadamer's belief in truth (though antifoundational) and his emphasis on tradition render him modern, see JOHN D. CAPUTO, RADICAL HERMENEUTICS 5-6 (1987); RICHARD J. BERNESTEIN, What is the Difference that Makes a Difference? Gadamer, Habermas, and Rorty, in PHILOSOPHICAL PROFILES, supra note 74, at 58, 84.

78 Gadamer writes: "[W]e are always situated within traditions, and this is no objectifying process—i.e., we do not conceive of what tradition says as something other, something alien. It is always part of us, a model or exemplar . . . ." GADAMER, supra note 74, at 282. Gadamer adds: "Our historical consciousness is always filled with a variety of voices in which the echo of the past is heard. Only in the multifariousness of such voices does it exist: this constitutes the nature of the tradition in which we want to share and have a part." Id. at 284. In a similar vein, Derrida argues that we always borrow concepts "from the text of a heritage." DERRIDA, Structure, supra note 6, at 285.

79 Fish writes:

[Communication or understanding is possible not] because he and I share a language, in the sense of knowing the meanings of individual words and the rules for combining them, but because a way of thinking, a form of life, shares us, and implicates us in a world of already-inplace objects, purposes, goals, procedures, values, and so on; and it is to the features of that world that any words we utter will be heard as necessarily referring.


80 The concept of prejudices is from Gadamer, who writes: "[T]he historicity of our existence entails that prejudices, in the literal sense of the word, constitute the initial directedness of our whole ability to experience. Prejudices are biases of our openness to the world." Hans-Georg Gadamer, The Universality of the Hermeneutical Problem, in JOSEF BLEICHER, CONTEMPORARY HERMENEUTICS 128, 133 (1980). Jurgen Habermas, in his early theory, argued that knowledge is possible only because of human "interests." Habermas, however, delineated only three "knowledge-constitutive interests"—an interest in prediction and control, an interest in understanding of meaning, and an interest in emancipation. See JURGEN HABERMAS, KNOWLEDGE AND HUMAN INTERESTS (Jeremy J. Shapiro trans., 2d ed. 1971). I am, therefore, using the concept of human interests in a much
a community and its traditions necessarily limits one's range of vision—what one can possibly see or understand in a text. As Gadamer says, the traditions of one's community help to shape the interpreter's "horizon": "the range of vision that includes everything that can be seen from a particular vantage point." Furthermore, the notion of an interpretive community underscores that we are historical beings who live in tradition: "[W]e are always situated within traditions... [which are] always part of us..." Thus, tradition is not a thing of the past; rather it is something in which we constantly participate. As Gadamer notes: "Tradition is not simply a permanent precondition; rather, we produce it ourselves inasmuch as we understand, participate in the evolution of tradition, and hence further determine it ourselves."

A crucial element of philosophical hermeneutics is the recognition that although communal traditions and the concomitant prejudices constrain our possibilities for understanding, they simultaneously enable us to communicate and to understand. Our traditions, prejudices, and interests actually open us to meaning, understanding, and truth.

Gadamer writes:

This formulation certainly does not mean that we are enclosed within a wall of prejudices and only let through the narrow portals those things that can produce a pass saying, 'Nothing new will be said here.' Instead we welcome just that guest who promises something new to our curiosity. But how do we know the guest whom we admit is one who has something new to say to us? Is not our expectation and our readiness to hear the new also necessar-


Fish captures the notion of prejudices or interests as guiding human knowledge, though he uses neither term. He writes that "already-in-place interpretive constructs are a condition of consciousness." Stanley Fish, Dennis Martinez and the Uses of Theory, 96 YALE L.J. 1773, 1795 (1987); see Fish, supra note 79, at 424, 433.

81 GADAMER, supra note 74, at 302; see id. at 306. Connor writes:

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

CONNOR, supra note 2, at 5.

82 GADAMER, supra note 74, at 282.

83 Id. at 293.

84 Fish, supra note 80, at 1795; see Fish, supra note 79, at 424, 433; see also Gadamer, supra note 80, at 133.
ily determined by the old that has already taken possession of us? Hence, truth, knowledge, and understanding are possible only because we participate in the tradition of an interpretive community.

Because we always live within the traditions of interpretive communities, philosophical hermeneutics further holds that we never approach any text or text-analogue without some "fore-understanding" derived from our traditions and prejudices. One's fore-understanding, however, does not undermine the interpretive process by pre-determining meaning: rather, interpretation consists of a dialogical "play" between the interpreter and the text in which the meaning of the text dialectically comes into being. Interpretation requires one to question the text, to probe for its meaning, to ask new questions, to listen to the answers, and to continue in this dialogical process as if in a conversation. One's fore-understanding "is constantly revised in terms of what emerges as [the interpreter] penetrates into the meaning [of the text]." Thus, the dialogical process of understanding assures that one's answer often changes as meaning emerges even though one already expects a certain answer as soon as interpretation begins.

The metaphor of the hermeneutic circle illustrates the dialogical nature of interpretation. In its simplest form, the hermeneutic circle underscores the interrelationship between a text and its constituent parts: an interpreter can understand a whole text only by understanding its parts, yet an interpreter can understand the parts only by anticipating an understanding of the whole. Gadamer, however, elaborates the hermeneutic circle, bringing within its scope the complex interactions between interpreter, text, and tradition. According to Gadamer's conception of the circle, interpretation has two sides: on the one side, tradition limits the vision of the interpreter as he or she approaches the text, yet on the other side, tradition does not exist unless people constantly create and

85 Gadamer, supra note 80, at 133.
86 A Wittgensteinian perspective echoes philosophical hermeneutics on this point. Gene Anne Smith writes:

[L]anguage is a practice, a technique, that we learn. It depends upon a given community of understanding and established practices, to be sure. But this is required not in order to verify my judgments. It is required to give the context in which I can make meaningful judgments at all.

87 GADAMER, supra note 74, at 332.
88 See id. at 101-69; accord DERRIDA, OF GRAMMATOLOGY, supra note 6, at 48 (there is no foundation for the play or "coming into being" of signs).
89 See GADAMER, supra note 74, at 362-79.
90 Id. at 267.
recreate it through the interpretive process itself.92 The latter side emphasizes that tradition is created as an ever new meaning of the text comes into being:93 as we participate in tradition by interpreting texts, we transform and reconstruct that tradition. Most important, the two sides of interpretation are not separate and do not function independently; rather they are simultaneous and interrelated. They resonate together as meaning "comes into being"94 within the hermeneutic circle.95

Thus, Gadamer emphasizes that the hermeneutic act is "one unified process."96 Others have insisted that understanding, interpretation, and application are separate events: we understand the meaning of a text directly; we interpret a text only when we self-consciously reflect upon its meaning (for example, when we attempt to resolve a textual ambiguity); and we apply our understanding or interpretation of the meaning of the text when we attempt to transfer it to a new situation. Gadamer, however, maintains that understanding, interpretation, and application are not distinct events; rather they constitute the components of a unified hermeneutic act.97 We understand (or fore-understand) a text only insofar as we open to its meaning because of our prejudices derived from communal traditions; we develop prejudices only as we simultaneously accept and reconstruct—or interpret—communal traditions; and we understand and interpret texts as well as traditions only insofar as we apply them to practical problems within our current horizon. We cannot extract any one component of this hermeneutic process, such as an understanding of a text, and treat it as an uncontested, stable, or noncontingent starting point.98

Finally, according to Gadamer, the "medium" of tradition and un-

92 See Gadamer, supra note 74, at 281.
93 Gadamer writes: "Even the most genuine and pure tradition does not persist because of the inertia of what once existed. It needs to be affirmed, embraced, cultivated." Id.
94 Id. at 462; accord id. at 164-65 ("Understanding must be conceived as a part of the event in which meaning occurs, the event in which the meaning of all statements . . . is formed and actualized.").
95 Clifford Geertz writes: "Without men, no culture, certainly; but equally, and more significantly, without culture, no men." CLIFFORD GEERTZ, The Impact of the Concept of Culture on the Concept of Man, in THE INTERPRETATION OF CULTURES 49 (1973).
96 Gadamer, supra note 74, at 308.
97 See id. at 307-08, 340-41; Feldman, New Metaphysics, supra note 4, at 683-84.
98 This emphasis on the pragmatic quality of philosophical hermeneutics arguably distinguishes Gadamer from Derrida. In Gadamerian hermeneutics, the meaning of a text is inexhaustible yet determinate in concrete contexts, while arguably, in Derridian deconstruction, the meaning of a text is undecidable. See Madison, supra note 77, at 113-15. But see Fish, supra note 76, at 700-12 (interprets Derrida to be more consistent with Fish and Gadamer).

The emphasis on the unity of the hermeneutic act distinguishes Gadamerian hermeneutics from those followers of Wittgenstein who insist that understanding must be distinguished from interpretation. Understanding, according to these theorists, is unreflective, while interpretation always involves reflection. See, e.g., Hacker, supra note 68, at 168; Richard Shusterman, Beneath Interpretation: Against Hermeneutic Holism, 73 Monist 181, 183, 195-99 (1990); James Tully, Wittgenstein and Political Philosophy, 17 Pol. Theory 172, 193-96 (1989).
understanding is language. Tradition exists and is handed down to us in and through language, and therefore understanding, which is possible only because of tradition, must itself be linguistic in character.

To Gadamer, then, language is not simply a tool or a possession of humanity; rather one experiences the world linguistically. Each person, in short, "lives in a language." Gadamer writes: "Language is the fundamental mode of operation of our being-in-the-world and the all-embracing form of the constitution of the world."

In sum, philosophical hermeneutics rejects the foundationalist opposition of subject and object yet resurrects the possibility of truth and knowledge. An interpreter is never a radically free subject who arbitrarily imposes meaning on a text; we are always limited by the prejudices that we inherit from our interpretive community and its traditions. Furthermore, truth never exists as an object or brute datum that can be grasped or mirrored somehow in consciousness. Instead, truth is possible only because we live within communal traditions that open us to the possibility of understanding and knowledge.

2. Deconstructing the Teague Rule.—Postmodern insights from philosophical hermeneutics suggest that the Teague rule against new rules in habeas cases focuses upon a jurisprudential aporia—a legal blind-spot, a point where the tensions of the legal system usually lie hidden. Teague insists that the retroactivity of a constitutional rule should turn on whether that rule is new or old. Yet, philosophical hermeneutics reveals that we can characterize every rule as both new and old. Every rule is new because each time we apply it, we must interpret and thus reconstruct it (as well as tradition), yet simultaneously every rule is old because each rule emerges only from our already existing prejudices and traditions. Consequently, the Teague rule convulsively flaps in the political wind so plainly and viciously that it descends too tattered to be practically coherent.

99 See Gadamer, supra note 74, at 384, 389, 475; Gadamer, supra note 80, at 139.

100 Cf. Gadamer, supra note 74, at 441 ("unity between language and tradition").

101 See id. at 403, 443, 447, 457, 474; see also Peter L. Berger & Thomas Luckmann, The Social Construction of Reality 34-46 (1967).

102 Gadamer, supra note 74, at 401; accord Gadamer, supra note 80, at 139.

103 Gadamer, supra note 80, at 128; accord id. at 136-37. Because the hermeneutical experience of understanding through language "is the mode of the whole human experience of the world," id. at 138, hermeneutics is "universal." Id. at 134-36.

104 Christine Di Stefano writes that "an aporia [is) a recurring paradox, question, dead end, or blind spot to which we must repeatedly return." Christine Di Stefano, Dilemmas of Difference: Feminism, Modernity, and Postmodernism, in Feminism/Postmodernism, supra note 2, at 63, 78; see Christopher Norris, Derrida 19 (1987) (on the meaning of aporia); Madan Sarup, An Introductory Guide to Post-Structuralism and Postmodernism 60 (1989) (same).

105 For example, in Stringer v. Black, 112 S. Ct. 1130 (1992), the Court surprisingly reversed the Fifth Circuit's holding that Stringer was seeking to have the habeas court apply a new rule. The Court reasoned that the Fifth Circuit had "made a serious mistake." Id. at 1140. Nevertheless,
An opposition between the foundationalism of a modernist view of interpretation and the antifoundationalism of postmodern philosophical hermeneutics reveals that *Teague* manifests a form of foundationalist legal reasoning. A legal rule, from this modernist perspective, is a normative guide expressed in a text, such as a case precedent, that mandates or influences judicial action. *Teague* assumes that such a rule has a fixed and stable meaning that firmly grounds understanding. Thus, a court, at least sometimes, is able to implement some technique or method whereby it mechanically and objectively understands and applies the rule to a new case. Because the application is mechanical, the result issues forth clearly and uncontroversially.¹⁰⁶ When such mechanical application occurs, then according to *Teague*, the court applies the old rule, not a new one. The *Teague* Court¹⁰⁷ would insist, in other words, that precedent in this situation dictates the outcome. In other cases, however, a court cannot apply a rule in such a mechanical fashion to reach an uncontroversial result. The court, according to this foundationalist reasoning, must then interpret the disputed rule in order to resolve its revealed ambiguity. Precedent does not dictate the outcome, and thus the court must, in effect, create a new rule, one that is somehow different from the earlier rule.¹⁰⁸

Philosophical hermeneutics undermines the assumptions of this foundationalist form of legal reasoning. According to hermeneutics, a rule—like any other text (or text-analogue)—never exists as a stable object that can ground objective understanding. All experience, perception,

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¹⁰⁶ Margaret J. Radin writes: “[T]raditional formal realizability is a conception of rules that asserts that rules are analytically applicable to particulars insofar as they contain words with precise, determinate extensions.” Radin, supra note 68, at 798. Radin then adds:

The point of “the Rule of Law, not of individuals” is that the rules are supposed to rule. The easiest (most “natural”) way to achieve that in our historical and philosophical context is to assume that rules apply to particular cases in an analytical or self-applying way. “Individuals”—judges, police, administrators—are needed to make sure these self-evident applications are carried out, but these individuals are not supposed to rule. They are to be rule-bound, merely instrumental functionaries.

¹⁰⁷ When I refer to the “*Teague* Court,” I refer to the justices (a majority) who currently support and apply the *Teague* rule against new rules (even though the original *Teague* opinion was only a plurality opinion).

¹⁰⁸ The Court’s approach parallels Larry Alexander’s conception of following legal rules:

Under the rule model, the constrained court faces a binary choice: it can either follow the precedent rule in its canonical form or overrule it. All modifications of the rule, like subsequent amendments of a statute, amount to overruling the precedent rule and replacing it with a new rule. Any practice of precedential constraint that distinguishes between overruling a precedent and narrowing/modifying a precedent is not a practice of the rule model of precedent.

and understanding are interpretive, and thus no mechanical technique or method can directly access the meaning of a rule. Instead, the meaning of a legal rule comes into being only through a hermeneutic act.

Gadamer's emphasis that a hermeneutic act is "one unified process" underscores how the Teague Court erroneously conceived of the understanding and interpretation of legal rules. The Teague Court, in effect, sharply distinguishes understanding and interpretation. For Teague, we understand a legal rule only if we somehow directly access its stable meaning. We interpret a rule as soon as we begin to reflect self-consciously about its meaning. Understanding, in a sense, is unmediated and mechanical, while interpretation is mediated and creative. Gadamer, however, stresses the unity of the hermeneutic process: it cannot be reduced to isolated and independent actions. Legal rules, quite simply, do not have stable and fixed meanings that can be directly accessed through a mechanical process of understanding that stands radically distinct from interpretation and application. As with any text, the meaning of a legal rule emerges only through the simultaneous understanding, interpretation, and application of the hermeneutic process.

Moreover, the meaning of a legal rule comes into being only because communal traditions and our derived prejudices and interests open us to the truth or meaning of the rule. Tradition, prejudices, and interests simultaneously constrain yet enable us to communicate and to understand. Hence, every legal rule is, in an important sense, always old. Each time we apply a legal rule, we necessarily draw upon and extend our communal traditions. Every legal rule emerges as a manifestation of tradition, of what came before, of the old. Indeed, we can understand the very concept of a legal rule only because we live and participate in the legal tradition of a community that includes the practice of using legal rules.109

Simultaneously, however, every legal rule also is, in an important sense, always new. The meaning of a legal rule comes into being anew each time we understand, interpret, and apply it. No legal rule exists apart from the social practices that constantly create and recreate it. No matter how deeply a rule appears embedded in our legal tradition, the hermeneutic act of understanding necessarily reconstructs that tradition and consequently reconstitutes the rule. And each time we reconstitute a rule, we transform it since the hermeneutic process itself constantly shifts our horizons, prejudices, and traditions. A legal rule—or the meaning of a legal rule—simply does not exist as a stable and static object in some Platonic world of forms. Insofar as a rule exists, it does so only as its meaning emerges through our legal and hermeneutic practices.

Philosophical hermeneutics, in short, reveals that legal rules become

109 The belief that we progress (and attain the new) by breaking with history or tradition is typical of modernism. See Harvey, supra note 2, at 12.
meaningful as they swirl about within the hermeneutic circle. Any legal rule can be identified simultaneously as old and new because its meaning necessarily comes into being through the resonance of the two sides of the circle. On the one side, tradition—or the legal history of the rule—shapes the meaning of the rule, yet on the other side, the tradition—the rule itself—does not exist unless we constantly reconstruct it. Significantly, by focusing solely on either side of the hermeneutic circle, we can mistakenly characterize any rule as only old or only new. This potential error suggests why legal commentators from the Langdellian formalists to Ronald Dworkin reasonably maintain that judges discover the law, while commentators from Oliver Wendell Holmes, Jr., to some critical legal scholars reasonably argue that judges make the law.

If we were to focus on how tradition shapes legal meanings, then we would tend to emphasize how judges discover law. But if we were to focus on how a rule is constantly reconstituted, then we would tend to focus on how judges make the law.

Brown v. Board of Education, decided in 1954, illustrates the instability of the Teague Court’s claimed distinction between new and old rules of constitutional law. Brown, of course, is renowned for overturning the rule of Plessy v. Ferguson that “separate but equal” public facilities for whites and African-Americans were constitutional under the Equal Protection Clause of the Fourteenth Amendment. A unanimous Court in Brown wrote: “Separate educational facilities are inherently unequal.” Thus, many commentators would agree, Brown stands as a prototypical example of a case that announces a new rule of constitutional law. From this perspective, Brown initiated the collapse and eventual death of Jim Crow.

Some legal historians, however, have argued that Brown is best understood from a radically different perspective: instead of seeing Brown as beginning the death of Jim Crow, Brown should be understood as the culmination of a long social and legal crusade to destroy the “separate

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110 Steven Connor suggests that absolute originality is a myth of modernism. Connor, supra note 2, at 93.


113 163 U.S. 537 (1896).

114 U.S. Const. amend. XIV, § 1. The Brown Court did not expressly overrule Plessy, although the Court expressly overturned the Plessy rule that “separate but equal” public facilities were constitutional. Brown, 347 U.S. at 495.

115 347 U.S. at 495.

but equal" doctrine. Indeed, some have insisted that by 1954, the Brown
decision was nearly inevitable and thus quite unremarkable in
terms of legal doctrine. The NAACP orchestrated a sustained (though
perhaps unsystematic) campaign that built slowly but steadily on the al-
ready existing tradition of equal protection until the "separate but equal"
doctrine appeared facially indefensible. In particular, the NAACP ini-
tially accepted the existence of separate facilities, but challenged the in-
equalities between the black and white institutions. A series of cases
following this tactic eventually revealed the incoherence of the "separate
but equal" doctrine: separate facilities never could be fully equal.

The first important Supreme Court case, Missouri ex rel. Gaines v.
Canada, which was decided in 1938, clearly worked within the ex-
isting constraints of the Plessy doctrine. Lloyd Gaines had been denied
admission to the University of Missouri School of Law because he was
African-American. The State did not operate a law school for its black
citizens, but it nonetheless maintained that its offer to pay Gaines's tu-
it ion at an out-of-state law school satisfied its constitutional duty to pro-
vide an equal (though separate) education. The Court rejected this
argument, holding instead that the State's offer to send Gaines to an out-
of-state law school did not equal the opportunity to attend an in-state
school—an opportunity that the State extended to every educationally
qualified white citizen.

Sweatt v. Painter, decided in 1950, arose when the University of
Texas School of Law denied admission to Herman Marion Sweatt on the
basis of his race. After Sweatt initiated the litigation, the State quickly
created a black law school and thus claimed that the State's African-
American citizens had an equal though separate facility. The Supreme
Court held, however, that the recently created black law school did not
equal the University of Texas School of Law. Most important, the Court
concluded that the facilities were unequal because of tangible and intan-
gible factors. The Court first reasoned that tangible qualities, such as the
size of the libraries and the number of faculty at the respective institu-
tions, differentiated the two schools. Second, and even more significant,

117 See Derrick A. Bell, RACE, RACISM, AND AMERICAN LAW 375-77 (2d ed. 1980); Richard
Kluger, SIMPLE JUSTICE (1975). Derrick Bell and Mary Dudziak also have argued that
Brown resulted, at least in part, from the white majority's interest in improving the image of the
United States in foreign affairs. See Derrick A. Bell, Brown v. Board of Education and the Interest-
Convergence Dilemma, 93 Harv. L. Rev. 518 (1980); Mary L. Dudziak, Desegregation As a Cold
War Imperative, 41 Stan. L. Rev. 61 (1988).

118 See Mark V. Tushnet, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCA-
TION, 1925-50 (1987); cf. Jerome M. Culp, Jr., Toward a Black Legal Scholarship: Race and Original
Understanding, 1991 Duke L.J. 39, 55 & n.42 (arguing that the NAACP had a more consistent legal
strategy than acknowledged by Tushnet).

119 305 U.S. 337 (1938).

120 See also Sipuel v. Board of Regents, 332 U.S. 631 (1948) (reaffirming Gaines).

the Court reasoned that intangible factors, such as the reputation and prestige of the University of Texas, established it as the superior law school.

In *McLaurin v. Oklahoma State Regents*, decided the same day as *Sweatt*, the State admitted G.W. McLaurin to the previously all-white University of Oklahoma Department of Education. McLaurin, however, was forced during class to sit in a special seat designated for African-Americans, to eat apart from the white students, and to sit at a special table in the library. Holding in McLaurin's favor, the Court reasoned that "[s]uch restrictions impair and inhibit [McLaurin's] ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." In short, the facilities were unconstitutionally unequal because of intangible factors.

By the time *Brown* arose, one reasonably could conclude that the Supreme Court already had doomed the "separate but equal" doctrine. The Court's first important step was to question seriously whether separate state institutions were equal, and its second step was to consider intangible factors when determining equality. In the context of the pervasive racism of America, the reputation and prestige of separate black and white facilities never could be equal. Thus, even *Brown*—the prototype of a Supreme Court case announcing a new rule of constitutional law—can be fairly characterized as merely articulating or even rephrasing an obvious, already existing, or old rule. The point of this argument is not to show that *Brown* really is old (or new), but rather that it is both old and new. This conclusion, moreover, should not be surprising: it merely parallels the common observation that judges often are adept at drawing out the bits of precedent (or tradition) that support the further development of the law.

Finally, this conclusion seriously undermines the *Teague* rule against new rules. *Teague* claims to resolve habeas cases by categorizing constitutional claims as requiring the application (or announcement) of either an old or a new rule, but the deconstruction of the *Teague* rule reveals that this temporal distinction is too unstable to provide practical guidance. We consequently are able to gaze through the atypically transparent layers of discursive legitimation that more commonly obscure the operations of power within the legal system and society in general. The denial or acceptance of a habeas petition does not turn on any principled identification of constitutional rules as new or old; rather the denial or acceptance of a habeas claim represents an implementation of power through the discourse of the legal system. We see the law as operating to legitimate the direct imposition of physical force regardless of the insta-

123 Id. at 641.
124 For a classic discussion of this ability among judges, see Benjamin N. Cardozo, *The Nature of the Judicial Process* (1921).
bility or incoherence of the legal rhetoric.\textsuperscript{125} In a case of capital punishment, such as \textit{Butler}, the denial of a habeas petition because of the \textit{Teague} rule reduces to a stark, unjustified message from the Court to the state: "Throw the switch."\textsuperscript{126}

Ultimately, then, this postmodern deconstruction of \textit{Teague} concludes with an archetypal postmodern theme: a focus on the relation between power and language (or discourse). From one perspective, we see that language—legal discourse or rhetoric—floats or plays at a distance from the application of power. Rehnquist could have stated that Butler sought the application of a new rule or an old rule or even that the Court should return to the \textit{Linkletter} standard. The legal rhetoric did not mandate any one conclusion.\textsuperscript{127} From this perspective, then, we see that power frequently is structural.\textsuperscript{128} That is, power "exists in relationships—it has a primary location in the ongoing, habitual ways in which human beings relate to one another."\textsuperscript{129} Individuals often exercise power not because of expertise or knowledge but because they occupy certain relatively embedded (though contingent) social positions or institutional roles that endure within complex social practices.\textsuperscript{130} All social agents or

\begin{itemize}
\item \textsuperscript{125} The connection of law with state-sanctioned force is, of course, not original. \textit{See}, e.g., Oliver Wendell Holmes, Jr., \textit{The Path of the Law}, 10 HARV. L. REV. 457 (1897).
\item \textsuperscript{126} \textit{Cf.} MICHEL FOUCAULT, \textit{Right of Death and Power over Life}, in THE FOUCAULT READER, \textit{supra} note 16, at 258, 266 (constitutions make "an essentially normalizing power acceptable").
\item This deconstruction of the \textit{Teague} rule should not be read as suggesting that the concept of a legal rule is itself incoherent. \textit{See} Mootz, \textit{Rule of Law}, \textit{supra} note 22 (recasts the rule of law from a Gadamerian perspective); Radin, \textit{supra} note 68 (developing the concept of legal rules in the postmodern context of Wittgensteinian neopragmatism); \textit{see also} Frederick Schauer, \textit{Rules and the Rule-Following Argument}, in WITTGENSTEIN AND LEGAL THEORY, \textit{supra} note 86, at 225, 225 (Wittgenstein does not mean that rule-following is incoherent). Schauer writes: "A practice of following rules articulated in language is thus not rendered problematic by the difficulty of explaining why it is that language operates in the way in which it plainly does operate." FREDERICK SCHAUER, \textit{PLAYING BY THE RULES} 66 (1991).
\item \textsuperscript{127} \textit{Cf.} Douglas Hay, \textit{Property, Authority and the Criminal Law}, in ALBION'S FATAL TREE 17, 44-45 (Douglas Hay et al. eds., 1975) (in eighteenth-century England, the rule of law did not determine which criminal defendants were executed; more broadly, the rule of law did not control the exercise of power).
\item \textsuperscript{128} Margaret A. Coulson and Carol Riddell write:
\begin{quote}[A] watch is not just the sum of its parts, but the sum of its parts plus the way they are put together, related to each other, organized. In the same way, society is more than the sum of the people in it. It is not only the people, but also the way they are related to each other, organized—the social structure. If this is correct, what goes on in society can't be explained solely in terms of individuals, but only by understanding the way they are related to each other.
\end{quote}
\item \textsuperscript{129} WARTENBERG, \textit{supra} note 16, at 165 (emphasis omitted). This approach to power corresponds to what is sometimes referred to as a "realist" approach to power. \textit{See}, e.g., Jeffrey C. Isaac, \textit{Beyond the Three Faces of Power: A Realist Critique}, in RETHINKING POWER, \textit{supra} note 16, at 32, 44. Nonetheless, this approach is not unique to realists, and I do not consider my approach to be solely realist. \textit{See} Ball, \textit{supra} note 16, at 29 (aspects of realism in other approaches to power).
\item \textsuperscript{130} Wartenberg writes that "power . . . accrues to individuals when they occupy certain social roles." WARTENBERG, \textit{supra} note 16, at 157. He adds that an "expert may be an authority about
actors—including, for example, two individuals who are in a dyadic relation where one is dominant and the other subordinate—exist in a web of ongoing relations with other social agents who also exercise varying degrees of power. These other or peripheral social agents, moreover, may align their treatment of a subordinate individual around the position and actions of the dominant individual (thus, in part, constituting the latter as dominant). Consequently, William Rehnquist did not necessarily exercise his extraordinary power over Butler because of the former’s judicial expertise, his clever use of legal rhetoric, or his ability (or inability) to distinguish new from old rules. Rather, Rehnquist exercised power because he performed his role within judicial practice. That is, Rehnquist performed as Chief Justice of the Supreme Court, which is a relatively embedded and ongoing social position situated within an institutional framework and web of social relationships (which in part constitute the role of Chief Justice as a dominant position imbued with an exceptional amount of power). From another perspective, Butler nevertheless suggests an interweaving of language and power. When Rehnquist concludes that Butler had sought the application of a new rule, Rehnquist’s written words implement power. Butler lost and thus faces death. Rehnquist’s language associates with and even triggers certain coercive and violent social practices. Moreover, we can understand language itself to be a type of force or a manifestation of power. In Foucault’s words: “Discourse trans-
certain subject matters, [but] this authority is distinguishable from the authority she comes to have as a result of being situated as an empowered agent.” Id. at 154; see BARRY BARNES, THE NATURE OF POWER 61 (1988) (“The powerful agent possesses power in a sense, but the power he possesses resides in the social context and outside its possessor.”); cf. PETER L. BERGER, INVITATION TO SOCIOLOGY 86-98 (1963) (emphasizing how social institutions pattern human conduct as if individuals were playing various roles); Hay, supra note 127, at 52-53 (recurrent patterns of behavior manifest the structure of authority). One should not, however, overestimate the stability of social roles, which are always contingent. See infra text accompanying notes 169-72.

131 See WARTENBERG, supra note 16, at 160-61; Thomas E. Wartenberg, Situated Social Power, in RETHINKING POWER, supra note 16, at 79. In focusing on oppression, which is but one use or manifestation of power, Iris Young writes:

[Oppression] refers to systemic and structural phenomena that are not necessarily the result of the intentions of a tyrant. Oppression in the structural sense is part of the basic fabric of a society, not a function of a few people’s choice or policies. You won’t eliminate this structural oppression by getting rid of the rulers or making some new laws, because oppressions are systematically reproduced in major economic, political, and cultural institutions.

Iris M. Young, Five Faces of Oppression, in RETHINKING POWER, supra note 16, at 174, 176.


133 See Feldman, The Persistence of Power, supra note 4, at 2262-66. Connor writes: “[D]iscourse theory sees the forms and occasions of representations as in themselves power (rather than merely the reflection of power-relations that exist elsewhere).” CONNOR, supra note 2, at 224; see LYOTARD, supra note 2, at 60-66. Habermas, however, argues that domination or power is not a necessity. See RICHARD J. BERNSTEIN, The Rage Against Reason, in THE NEW CONSTELLATION, supra note 3, at 31, 47 [hereinafter BERNSTEIN, The Rage]; Feldman, The Persistence of Power, supra note
mits and produces power.” Linda Nicholson elaborates: “[C]onceptual distinctions, criteria of legitimation, cognitive procedural rules, and so forth are all political and therefore represent moves of power [though] they represent a different type of power than is exhibited in, for example, physical violence or the threat of force.” As Gadamer explains, language is the medium of tradition. Since tradition generates our prejudices and interests and thus produces our horizons, tradition and therefore language manifest power by constraining and enabling our communication and understanding. Language constitutes the shape of our very being-in-the-world. Postmodernists consequently generalize: not only does tradition constrain and enable communication, but more broadly, power simultaneously constrains and enables human action, thought, and experience. “[P]ower is everywhere and in everyone.”

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4; see, e.g., Jurgen Habermas, The Hermeneutic Claim to Universality, in CONTEMPORARY HERMENUTICS, supra note 80, at 181, 206 (on ideal speech situation).

134 FOUCAULT, HISTORY OF SEXUALITY, supra note 16, at 101. Foucault adds: “[Discourse] reinforces [power], but also undermines and exposes it, makes it possible to thwart it.” Id. Richard Bernstein writes: “[Foucault] is always showing us how discursive practices exclude, marginalize, and limit us.” RICHARD J. BERNSTEIN, Foucault: Critique as a Philosophic Ethos, in THE NEW CONSTELLATION, supra note 3, at 142, 160.

135 Linda J. Nicholson, Introduction to FEMINISM/POSTMODERNISM, supra note 2, at 1, 11.

Thomas Wartenberg writes:

[Power, in the form of discursive influence, can take] place at the most basic level of the constitution of a human being’s understanding of the world, it need not be limited to the restructuring of options already given to an agent. Such domination works by first making social agents aware of the options that they face as having a certain character. It is a use of power, since it affects an agent’s understanding of his action-environment; but it is not interventional, because it does not so much restructure an agent’s action-environment as constitute his awareness of it in the first place.

WARTENBERG, supra note 16, at 135.

136 See supra text accompanying notes 99-103 (Gadamer on language). I do not mean to suggest that all words or forms of language are equally constraining or coercive. Without suggesting that words have force totally apart from the context of their use, we can still recognize that different linguistic practices may be more coercive and violent than others. For example, hate speech is usually more violent and harmful than saying, “Hello.” See Richard Delgado, Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Mari J. Matsuda, Public Response to Racist Speech: Considering the Victim’s Story, 87 MICH. L. REV. 2320 (1989). But cf. R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) (holding unconstitutional ordinance punishing hate speech). Moreover, different linguistic practices are associated with different social practices, some of which also are more coercive and violent than others. The Supreme Court’s linguistic practices are associated with social practices—such as capital punishment—that are often of the more violent variety.

137 Foucault writes:

What makes power hold good, what makes it accepted, is simply the fact that it doesn’t only weigh on us as a force that says no, but that it traverses and produces things, it induces pleasure, forms knowledge, produces discourse. It needs to be considered as a productive network which runs through the whole social body, much more than as a negative instance whose function is repression.


Power, to be sure, can be manifested in violent domination, but power also can be transformative or productive.\textsuperscript{139}

II. THE POSTMODERNISM OF THE SUPREME COURT

The postmodern deconstruction of the \textit{Teague} rule against new rules in habeas cases reveals the speciosity of the Supreme Court's modernist form of legal reasoning. The Court, in typical modernist fashion, assumes that the understanding and application of legal rules rests on a firm foundation, but upon closer observation, the foundation dissolves into the shifting waters of postmodernism. But at this point, we have only begun to plumb the depths of postmodernism. To continue our exploration of the postmodern, we must further question and diagnose how the Court implements power in habeas cases and how the Court's use of doctrine relates to the application of power.

Consequently, consider the following possible postmodern flip or move: this most modernist Supreme Court—the Court of the \textit{Teague} rule against new rules—is itself postmodern. The Court, like everyone else, lives in a community and shares in its traditions, and hence the Court, we might imagine, lives within the current tradition of postmodernity. We can then consider how the Court itself participates in postmodernism by evincing postmodern arguments.\textsuperscript{140} The origin of this postmodern flip lies in the realization that the majority of the justices may have recognized and accepted the lines of the precise postmodern argument against the \textit{Teague} rule that I have just articulated. That is, the justices understood the instability of the \textit{Teague} rule, they understood that it ultimately provides little practical guidance to habeas courts, and they understood that it rather thinly veils the application of power through the legal system. Nevertheless, they articulated and continue to apply the \textit{Teague} rule against new rules.

Although the \textit{Teague} plurality itself acknowledged that the characterization of a constitutional rule as new or old is "often difficult," the Court's postmodernism began to unfold only in Justice Scalia's \textit{Penry}

\textsuperscript{139} See Foucault, \textit{History of Sexuality}, \textit{supra} note 16, at 81-91 (power is not merely negative); Fraser, \textit{supra} note 16, at 18 (according to Foucault, power is productive, capillary, and touches people through social practices); Wartenberg, \textit{supra} note 16, at 11-12.

One can argue that legal reasoning itself manifests power. Reason is not somehow purified and independent of power, rather it exists because and as a form of power. In discussing Levinas, Richard Bernstein offers one perspective on this postmodern theme linking reason and power:

[This postmodern theme] \textit{resists} the unrelenting tendency of the will to knowledge and truth where Reason—when unmasked—is understood as always seeking to appropriate, comprehend, control, master, contain, dominate, suppress, or repress what presents itself as "the Other" that it confronts. It is the theme of the violence of Reason's imperialistic welcoming embrace.

\textbf{Richard J. Bernstein, Incommensurability and Otherness Revisited, in The New Constellation,} \textit{supra} note 3, at 57, 71.

\textsuperscript{140} In other words, the culture or tradition of postmodernism produces certain practices and claims that are postmodern and that then become part of the culture or tradition of postmodernism. See Balkin, \textit{supra} note 2, at 1967-72.
dissent. In particular, Scalia appeared to cross (albeit momentarily) the nebulous shadow border between modernism and postmodernism when he self-reflexively turned to consider the Court’s legal reasoning in constitutional cases: “In a system based on precedent and stare decisis, it is the tradition to find each decision ‘inherent’ in earlier cases (however well concealed its presence might have been), and rarely to replace a previously announced rule with a new one.”

In this self-reflexive moment—characteristic of postmodernism—Scalia appeared to recognize that in legal and judicial practice all decisions can be at least arguably characterized as arising from precedent (or legal tradition). In other words, Scalia seemed to understand that every constitutional decision can be reasonably construed as arising from an old rule. Moreover, he was well aware of what this postmodern insight implied for the *Teague* rule against new rules: if every habeas petition merely requested the application of an old rule, then *Teague* would not bar relief to any petitioners.

Scalia’s glimpse of the postmodern seemed only to inflame his instinctual conservatism. He plainly feared the potential “gutting” of the *Teague* rule, and thus he insisted that the concept of a new rule should be interpreted broadly:

[A] “new rule,” for purposes of *Teague*, must include not only a new rule that replaces an old one, but a new rule that replaces palpable uncertainty as to what the rule might be. We acknowledged as much in *Teague* . . . when we said that “a case announces a new rule if the result was not dictated by precedent existing at the time the defendant’s conviction became final.”

Thus, to Scalia, a court announces a new rule whenever the outcome of the instant case is palpably uncertain. This approach would effectively eliminate habeas corpus relief since the outcome in almost every case

141 *Penry*, 492 U.S. at 353 (Scalia, J., dissenting).
142 Scalia does not suggest an awareness of the role that tradition plays generally in understanding and interpretation. Instead, he seems to restrict the significance of tradition (that is, precedent) to the law. Nonetheless, his however-limited awareness is sufficient to push his analysis of the concept of new rules away from its modernist moorings.

Moreover, Scalia has displayed an inclination for the postmodern in other contexts. In *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991), Scalia suggests that even if judges make law, they must pretend to discover it:

“[T]he judicial Power of the United States” conferred upon this Court and such inferior courts as Congress may establish, must be deemed to be the judicial power as understood by our common-law tradition. That is the power “to say what the law is,” not the power to change it. I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense “make” law. But they make it as judges make it, which is to say as though they were “finding” it—discerning what the law is, rather than decreeing what it is today changed to, or what it will tomorrow be.

*Id.* at 2450-51 (Scalia, J., concurring in the judgment) (citations omitted) (emphasis omitted).

143 *Penry*, 492 U.S. at 353 (Scalia, J., dissenting).
144 See *id.*
145 *Id.* at 352 (Scalia, J., dissenting) (quoting *Teague*, 489 U.S. at 301).
could be at least arguably characterized as uncertain. Indeed, in Penry, the petitioner was seeking little more than a judicial pronouncement that his particular jury instructions were improper. If, as Scalia maintained, even Penry's claim requested the announcement of a new rule, then one would be hard pressed to imagine any case that would not do the same.\textsuperscript{146}

Although Scalia dissented in Penry, he is joined in Butler by four other Justices to form a majority. Unlike Scalia in Penry, however, the Butler majority sustained a postmodern attitude throughout its opinion, though its conclusion paralleled Scalia's recommendation from Penry. Chief Justice Rehnquist, writing for the Butler majority, followed Scalia's initial postmodern venture by similarly displaying an unusual (for the Supreme Court) self-reflexive concern with the Court's use of legal rules and reasoning. Whereas Scalia, however, reacted with horror to his initial encounter with postmodernism, Rehnquist maintained a self-reflexive postmodern attitude, which manifested itself in an ironic use of modernist legal reasoning that Rehnquist no longer seemed to believe justified (in a foundationalist sense). That is, Rehnquist appeared to use modernist legal reasoning with the arched eyebrow that suggests postmodern irony.\textsuperscript{147}

Rehnquist began by echoing Scalia's moment of postmodern insight: "In the vast majority of cases, [a] new decision is reached by an extension of the reasoning of previous cases . . . ."\textsuperscript{148} Thus, as with Scalia, Rehnquist's postmodern self-reflexive turn on legal reasoning revealed that in legal and judicial practice all decisions can be at least arguably character-

\textsuperscript{146} One can possibly read Scalia's dissent as being more postmodern than I am suggesting in the text. According to this alternative reading, Scalia's postmodern sense might have suggested the existence of a paradox within the practice of legal reasoning. In particular, Scalia might have recognized that just as every decision can be considered to be based on an old rule, every decision can just as easily be considered to announce a new rule. Armed with this postmodern insight, he proceeded to suggest his broad definition of new rules in order to apply power consistently with his conservative political agenda. Scalia's concept of new rules, according to this interpretation, emerged only with an ironic arched eyebrow that signified Scalia's self-reflexive awareness of the postmodern paradox within legal reasoning. The weakness of this second (and postmodern) reading of Scalia is that it amounts to pure conjecture. After his initial and momentary self-reflexive turn on legal reasoning, nothing in the text of his dissent suggests any movement of his eyebrow (other than perhaps as he grimaced at the prospect of state prisoners being granted habeas relief).

\textsuperscript{147} Connor writes: "Postmodernist 'suspensive' irony is . . . the mark of an art grown out of modernist tantrums, which combines a tough-minded knowledge of the worst of incoherence and alienation with a benignly well-adjusted tolerance towards them . . . ." \textit{CONNOR, supra} note 2, at 115.

Levinson and Balkin write:

\begin{quote}
When tradition becomes instrumental, we embrace it with a wink and a nod. Everyone, including the interpreter, knows that the performance is, in some sense, inauthentic, and that the interpreter is playing a role. But this does not raise concern, as long as it serves the purposes (aesthetic or otherwise) of the interpreter. By forsaking modernist anxiety, the interpreter moves closer and closer towards post-modern irony.
\end{quote}

Levinson \& Balkin, \textit{supra} note 22, at 1639.

\textsuperscript{148} Butler, 494 U.S. at 412-13.
ized as arising from precedent (or legal tradition). Every constitutional
decision, that is, can be reasonably construed as arising from an old rule.
And again like Scalia, Rehnquist recognized the threat to the Teague rule
and therefore articulated a broad definition of new rules. Under Butler,
so long as a state court’s interpretation of precedent and denial of a de-
fendant’s constitutional claim was reasonable and in good faith, then the
defendant’s claim in a habeas petition must amount to a request for a new
rule of constitutional law. But whereas Scalia’s broad definition of
new rules erupted as an impulsive reaction to his glimpse of the
postmodern, Rehnquist’s definition seemed to emanate from a dramatic
and sustained embrace of postmodernism.

Butler had based his habeas petition on Arizona v. Roberson,\textsuperscript{149}
which the Court had decided after Butler’s conviction became final. But-
ler maintained that Roberson vindicated his precise constitutional claim:
the Fifth Amendment bars police questioning of a suspect without coun-
sel if the suspect already has requested an attorney in the context of a
different and unrelated investigation. Moreover, Butler persuasively ar-
gued that Roberson itself did not announce a new rule of constitutional
law. In particular, Butler contended that the Roberson Court merely had
applied the rule from an earlier case, Edwards v. Arizona,\textsuperscript{150} “to a slightly
different set of facts.”\textsuperscript{151} Butler supported his contention by underscor-
ing that the Roberson Court “had said that Roberson’s case was directly
controlled by Edwards,”\textsuperscript{152} that Arizona, when arguing in Roberson, had
requested the Court to create an “exception” to Edwards,\textsuperscript{153} and that the
Roberson Court believed that “case to be within the ‘logical compass’ of
Edwards.”\textsuperscript{154} In sum, Butler requested the Court to apply to his factual
situation an old rule of constitutional law—a rule already articulated
clearly in Edwards and then reaffirmed in Roberson.

Rehnquist responded to this strong argument with a postmodern
twist. He wrote:

\textit{[T]he fact that a court says that its decision is within the “logical compass”
of an earlier decision, or indeed that it is “controlled” by a prior decision, is
not conclusive for purposes of deciding whether the current decision is a
“new rule” under Teague. Courts frequently view their decisions as being
“controlled” or “governed” by prior opinions even when aware of reason-
able contrary conclusions reached by other courts.}\textsuperscript{155}

Thus, unlike Scalia in Penry, Rehnquist sustained his postmodern self-
reflexive focus on legal and judicial reasoning. As Ann Althouse has
provocatively argued, Rehnquist acted as a playwright who “wandered

\textsuperscript{149} 486 U.S. 675 (1988).
\textsuperscript{150} 451 U.S. 477 (1981).
\textsuperscript{151} Butler, 494 U.S. at 414.
\textsuperscript{152} Id. (emphasis added).
\textsuperscript{153} Id.
\textsuperscript{154} Id. at 415.
\textsuperscript{155} Id.
onto the stage and announced—essentially—'Of course, you must realize, this is only a play.'”

Althouse, however, failed to realize just how postmodern Rehnquist was. When Rehnquist wrote that “a court says that its decision is within the 'logical compass' of an earlier decision,” he referred not to just any court. Rehnquist spoke of the Supreme Court itself and the relationship between the Court's own opinions in Roberson and Edwards. In so doing, Rehnquist expressly turned his postmodern and self-reflexive focus on the Supreme Court's own use of legal reasoning. In an important sense, then, Rehnquist did not act as a playwright who wanders onto stage to speak to the audience. A playwright does not commonly participate in the performance of a play and thus does not ordinarily speak directly to the audience. The playwright speaks indirectly by writing words for the characters in the play. But the Supreme Court Justices, to the contrary, constantly and actively participate in the practices of law and judicial decisionmaking. And within those practices, the Justices always speak directly to their audience of readers. Hence, Rehnquist was not the distanced creator or outsider—the playwright—who wandered onto stage to comment on the illusions of the production; rather he was the actor who suddenly stepped out of character to say, “Hey, this is only a play!”

But even this metaphorical comparison does not capture how postmodern Rehnquist was. For just like a playwright, an actor always knows it's only a play. Rehnquist and the other Justices, on the other hand, usually do not know it's only a play. Instead, they actively participate in the practices of law and judicial decisionmaking: they do not understand those practices as illusionary or somehow unreal. Rehnquist therefore was so extraordinarily postmodern because he resembled the person who believes he lives in a real world but suddenly realizes that he is only a character in a play. Then he turns to whomever will listen and proclaims, “Hey, this is only a play! It's only a play.”

And Rehnquist's postmodernism does not stop even there. For after realizing that he is only a character in a play, he then recognized that, for him, there was no world other than the play. He cannot walk offstage

156 Althouse, supra note 11, at 965. Althouse, of course, is not the first commentator to analogize law and legal practice to the theater or drama. See, e.g., Thurman Arnold, Trial by Combat and the New Deal, 47 HARV. L. REV. 913, 920 (1934). This recognition underscores that Althouse quite reasonably places the analogy between law and theater in modernism, not postmodernism. See Althouse, supra note 11, at 964-66. See generally Levinson & Balkin, supra note 22, at 1639-40 (on modernism and postmodernism). Nonetheless, the analogy is also well placed within modernism. See, e.g., Schlag, Normativity, supra note 21, at 806-07 (law is not merely like theater, rather law is theater); cf. Bernstein, Introduction, supra note 3, at 8 (uses the term modern/postmodern); infra note 180 and accompanying text (postmodernism includes modernism, and modernism includes postmodernism).

157 Butler, 494 U.S. at 415 (emphasis added).
and exit the theater. No greater reality exists.\textsuperscript{158} So what is a Supreme Court Chief Justice to do? Plunge paralyzed into a nightmare of nihilistic despair? No!\textsuperscript{159} Rehnquist continues to perform as a Supreme Court Chief Justice always performs, only now with the arched eyebrow of postmodern irony. Hence, Rehnquist wrote:

In \textit{Roberson}, for instance, the Court found \textit{Edwards controlling} but acknowledged a significant difference of opinion on the part of several lower courts that had considered the question previously. That the outcome in \textit{Roberson} was susceptible to debate among reasonable minds is evidenced further by the differing positions taken by the judges of the Courts of Appeals for the Fourth and Seventh Circuits noted previously. It would not have been an illogical or even a grudging application of \textit{Edwards} to decide that it did not extend to the facts of \textit{Roberson}.\textsuperscript{160}

Rehnquist's message can be rephrased as follows: "Well, of course, the \textit{Roberson} Court said it was applying an old rule, and we can always say that. But remember, we also can always say we are applying a new rule. We are, after all, postmodern."\textsuperscript{161} Rehnquist then concluded with a wink and a smirk: "We hold, therefore, that \textit{Roberson} announced a 'new rule.'"\textsuperscript{162} That is, again rephrasing Rehnquist: "Throw the

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\item Rehnquist, in a sense, therefore rejects what Pierre Schlag calls the "theater of the rational," which "is precisely the kind of theater that is grounded in the forgetting of its own theatricality. To play a part in this theater is to rule out the recognition that one is doing theater." Schlag, \textit{Normativity, supra} note 21, at 884. Rehnquist, instead, is in the theater of the postmodern.
\item Despair would be too modernist. See Levinson & Balkin, \textit{supra} note 22, at 1639 (the modernist suffers anxiety, while the postmodernist becomes ironic). Boyne and Rattansi suggest that there are two sides to modernity: "A progressive union of scientific objectivity and politico-economic rationality somehow mirrored in disturbed visions of unalleviated existential despair." Boyne & Rattansi, \textit{supra} note 2, at 5.
\item \textit{Butler}, 494 U.S. at 415 (emphasis added) (citations omitted).
\item \textit{See generally} Robert Post, \textit{Postmodern Temptations}, 4 \textit{YALE J.L. & HUMAN.} 392, 396 (1992) (reviewing \textit{JAMESON, supra} note 1) (postmodernism touches a social practice if its participants no longer "retain a healthy respect for the authority of the relevant standards of the practice"). In \textit{Butler}, Justice Brennan wrote in dissent:
\begin{quote}
The only conclusion discernible from the majority's discussion is that the majority would label "new" any rule of law favoring a state prisoner that can be distinguished from prior precedent on any conceivable basis, legal or factual. The converse of this conclusion is that, in the majority's view, adjudication according to "prevailing" law must consist solely of applying binding precedents to factual disputes that cannot be distinguished from prior cases in any imaginable way.
\end{quote}
\textit{Butler}, 494 U.S. at 421-22 (Brennan, J., dissenting).
\item \textit{Butler}, 494 U.S. at 415. One can also argue that the \textit{Butler} Court's approach to identifying new rules—focusing on the reasonableness and good faith of the state court's judgment—underscores that the Court itself recognized the practical incoherence of distinguishing new rules from old rules. The \textit{Butler} approach does not seem actually to focus at all on whether the petitioner seeks a new or old rule; instead the approach focuses on the culpability of the state court. If the state court acted reasonably and in good faith, then there is no reason, according to the Court, to grant habeas relief. By focusing on culpability, the Court supposedly sought to deter state court violations of federal rights. Id. at 413-14. Thus, the \textit{Butler} Court's definition of new rules is somewhat analogous to the Court's treatment of Fourth Amendment claims on both direct and collateral review. See United States v. Leon, 468 U.S. 897 (1984) (good faith exception to Fourth Amendment exclusionary rule); Stone v. Powell, 428 U.S. 465 (1976) (Fourth Amendment claims barred on collateral
\end{enumerate}
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switch.”

This recognition of the Supreme Court’s postmodernism highlights six interrelated themes of postmodernism itself. First, postmodernism is antifoundationalist and anti-essentialist. Postmodernism is antifoundationalist because it accentuates that meaning always remains ungrounded. And it is anti-essentialist because ungrounded meanings are always unstable and shifting: meaning cannot be reduced to a static core or essence. In Derridean terms, meaning is never grounded on a stable signified, but rather there always is a play of signifiers. Hence, postmodernists easily recognize that any text or event has many potential meanings, many possible truths. As Joel Weinsheimer tersely declares: “[T]ruth keeps happening.” Thus, the postmodernist often invites the reader to perform gestalt flips or paradigm moves. Just when the reader seems to have settled on an essential meaning for the text, the postmodernist insists that the reader should flip, and the reader suddenly sees a totally different meaning. For example, the postmodernist says, “It may look like a duck now, but look again, and it’s a rabbit!”

review if petitioner had a full and fair opportunity for a hearing in state court). Moreover, the Court’s approach seems to focus attention on the ambiguous and unspecified meaning of “reasonableness.” In other words, just when does a state court act reasonably?

163 I do not mean to suggest that these six themes definitively fix or define postmodernism, that these themes exhaust the concept or content of postmodernism, or that any author, text, or thing not displaying one or more of these themes is necessarily not postmodern.

164 David Harvey writes:

[T]he most startling fact about postmodernism [is] its total acceptance of the ephemerality, fragmentation, discontinuity, and the chaotic.... [Postmodernism] does not try to transcend it, counteract it, or even to define the ‘eternal and immutable’ elements that might lie within it. Postmodernism swims, even wallows, in the fragmentary and the chaotic currents of change as if that is all there is.

HARVEY, supra note 2, at 44.

165 See DERRIDA, OF GRAMMATOLOGY, supra note 6, at 50, 73; JAMESON, supra note 1, at 96.

Derrida writes:

From the moment that there is meaning there are nothing but signs. We think only in signs. Which amounts to ruining the notion of the sign.... One could call play the absence of the transcendental signified as limitlessness of play, that is to say as the destruction of ontotheology and the metaphysics of presence.

DERRIDA, OF GRAMMATOLOGY, supra note 6, at 50; accord DERRIDA, POSITIONS, supra note 6, at 20.

The play of signifiers relates to Derrida’s concept of difféance:

[T]he signified concept is never present in and of itself, in a sufficient presence that would refer only to itself. Essentially and lawfully, every concept is inscribed in a chain or in a system within which it refers to the other, to other concepts, by means of the systematic play of differences. Such a play, difféance, is thus no longer simply a concept, but rather the possibility of conceptuality, of a conceptual process and system in general. For the same reason, difféance, which is not a concept, is not simply a word, that is, what is generally represented as the calm, present, and self-referential unity of concept and phonic material.

Derrida, Différence, supra note 6, at 11. See generally MADISON, supra note 77, at 113-14 (overlaps between Gadamerian hermeneutics and Derridean deconstruction).

166 WEINSHEIMER, supra note 74, at 9; accord id. at 200 (the truth of a text exceeds each understanding).

167 See WITTGENSTEIN, supra note 68, at 193-94.
wise, the Supreme Court, in effect, stated, "This constitutional rule may look old now, but look again, and it's new!"

Second, Rehnquist's majority opinion in *Butler* accentuates the postmodern concerns with language and power. Rehnquist, in effect, recognized the Derridean play of signifiers insofar as he understood that any constitutional rule is both new and old. Rehnquist realized that his legal rhetoric played at a distance from the application of power, yet he continued to perform his role as Chief Justice, though now with an arched eyebrow. In other words, as previously discussed, power is structural. Nonetheless, Rehnquist certainly knew also that his words implemented violent power. Quite simply, when Rehnquist wrote that Butler's habeas petition sought the application of a new rule, Butler lost his appeal and thus faced imminent death.\(^{168}\)

Third, postmodernism is self-reflexive or self-referential. Although power is structural insofar as social roles and practices are ongoing and embedded, those roles and practices—whether modern or postmodern—always remain inherently contingent. They can and do change. Just as Gadamer noted that traditions must be recreated continually and thus tend to transform over time,\(^ {169}\) social practices also must be reconstructed continually and thus tend to transform.\(^ {170}\) To be sure, many social practices reconstruct themselves partly through a type of inertia, through their dead weight,\(^ {171}\) yet they still must be reconstructed continually (or they will cease to exist). And within this process of reconstruction, the possibility of transformation always pulses.\(^ {172}\) Thus, for example, despite the significant similarities in the exercises of power by Chief Justices William Rehnquist and John Jay, the institutional and social roles of Rehnquist and Jay are unmistakably distinguishable. Among many other differences, Jay presided over a smaller Supreme Court and had the opportunity to decide fewer cases than Rehnquist.

Thus, all enduring social practices—whether modern or postmodern—tend to reconstruct (and transform) themselves, but a dis-

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168 See supra notes 127-39 and accompanying text.

169 See supra notes 91-95 and accompanying text (Gadamer's conception of the hermeneutic circle).

170 See Coulson & Riddell, supra note 128, at 17-18, 39, 46-47 (emphasizing that social roles or "positions" change). Coulson and Riddell write:

[A] person's behavior in a position depends on an interaction between his own learned expectations and the pressures put upon him by others with possibly different expectations . . . which also depend on the power they have over him, an interaction which will be in constant change as the power relationships change—in other words, a dialectical relationship.

*Id.* at 41.


172 For an explanation of change in the context of philosophical hermeneutics, see Feldman, *New Metaphysics*, supra note 4, at 686-87.
tinctive aspect of many postmodern practices is their reflexive (or reflective) self-production. That is, postmodernists realize that their (our) social practices are historically and culturally contingent and that those practices constantly reconstruct themselves through their (our) own words, thoughts, and actions. Postmodernists turn toward their own social practices and make the cultural and theoretical awareness of those practices part of the practices themselves. In a sense, then, postmodernism transforms practices to include self-reflexive awareness. Rehnquist, for instance, takes the postmodern self-reflexive turn on legal reasoning by recognizing that within judicial practice every constitutional decision can be construed reasonably as arising from both an old and a new rule.

Fourth, the postmodernist is ironic. Despite antifoundationalism and anti-essentialism, the postmodernist frequently uses modernist rhetorical devices and argumentative modes as if they were grounded and contained an essence. The postmodernist, however, uses these modernist methods self-reflexively, always understanding their antifoundational and anti-essential themes. To avoid being or appearing merely modernist, then, the postmodernist must somehow connote the irony of this use of modernist techniques—thus, the metaphorical raised eyebrow, wink, or grin. Rehnquist, for example, suggested that although the Court often states that it is controlled by precedent, such a judicial statement does not necessarily mean that the Justices actually believe they are bound.

Fifth, postmodernism revels in paradoxes. For instance, I claim now to be discussing the "themes" of postmodernism, and in the course of this discussion, I have argued that postmodernism is anti-essentialist.

173 See CONNOR, supra note 2, at 5 (self-reflexivity is key to postmodernism); Levinson & Balkin, supra note 22, at 1639 (postmodernism is self-referential insofar as the focus or subject of culture becomes the culture itself); cf. CONNOR, supra note 2, at 119 ("[T]he purpose of formal self-reflexivity in postmodern writing [is] to dislodge the reader."); Crook, supra note 2, at 66-68 (reflexivity as a necessary feature of postfoundational radicalism).

174 CONNOR writes that "the distinguishing postmodern problem is one of reflexivity, or of the involvement of the activity of theory in the very field which it is attempting to theorize." CONNOR, supra note 2, at 227.

175 See supra note 147. I should at least mention the irony in the Teague decision itself. One could reasonably argue that the Teague Court announced and applied a new rule in the Teague case itself—that new rule being the prohibition against the announcement and application of new rules in habeas cases. See Arkin, supra note 11, at 414; Friedman, supra note 11, at 810.

176 Mark Tushnet also has noted that Rehnquist sometimes seems to selectively use different rhetorical styles in a postmodern fashion. Mark Tushnet, Post-Modern Constitutional Law 11-12 (Nov. 1991) (unpublished manuscript presented at Georgetown Law School Discussion Group on Postmodern Constitutional Law) (focusing on Rehnquist's majority opinion in DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 (1989), and his dissenting opinion in Texas v. Johnson, 491 U.S. 397 (1989)).

177 See Jean-Jacques Lecercle, Postmodernism and Language, in POSTMODERNISM AND SOCIETY, supra note 2, at 76, 92; see, e.g., JAMESON, supra note 1, at 64-65, 68 (paradoxes of self-consciousness and language).
But the very concept of a "theme" seems at least to suggest the existence of an essence.\(^{178}\) Even my mere argument that postmodernism is anti-essentialist seems to infer an essence or core for postmodernism itself: for something to be postmodern, it must be anti-essentialist. By this account, postmodernism is not postmodern.\(^{179}\) Indeed, we might paradoxically say that postmodernism includes modernism, and modernism includes postmodernism.\(^{180}\) Thus, for example, the Supreme Court is persuasively criticized for its modernist legal reasoning, yet the Court appears simultaneously to be postmodern. And from a postmodern standpoint, this conclusion is unsurprising because modernism is the tradition that leads to postmodernism. Hence, within modernism, we find the seeds of the postmodern, and within postmodernism, we find vestiges of the modern.\(^{181}\)

Finally, the Court's postmodernism underscores the potential neo-conservatism of the postmodern.\(^{182}\) If any constitutional rule is both old and new, if meaning emerges from the play of signifiers, why is any meaning or any judicial decision better or worse than another? If there is no ground to stand upon, how can we evaluate others (or ourselves)? And if there is no way to evaluate or criticize, then why not just continue what we are doing?\(^{183}\) Thus, in Butler, we see Rehnquist emerging as the postmodern Chief Justice, but he reaches the same conclusion as Scalia

\(^{178}\) Wittgenstein suggests perhaps the most postmodern way to conceive of the themes of postmodernism. The identified themes can be understood as "family resemblances," with postmodernism being, in effect, a "form of life." See Wittgenstein, supra note 68, at 8, 32.

\(^{179}\) Cf. Crook, supra note 2, at 53-58 (postmodern projects ultimately are foundationalist); see also Cornell, Ethics, supra note 22, at 356 (characterizes Roberto Unger as both postmodern and not postmodern).

\(^{180}\) See Connors, supra note 2, at 109-11 (no clear break between modernism and postmodernism); cf. Harvey, supra note 2, at 179-88, 338-42 (argues to dissolve the categories of modernism and postmodernism). Derrida writes that "deconstruction always in a certain way falls prey to its own work." Derrida, Of Grammatology, supra note 6, at 24; accord Derrida, Cogito, supra note 6, at 35-36.

\(^{181}\) In deconstructing western metaphysics, Derrida describes the "paradox" of a deconstructive circle. Derrida, Structure, supra note 6, at 281. Derrida writes:

\[\text{[T]hese destructive discourses and all their analogues are trapped in a kind of circle. ... It describes the form of the relation between the history of metaphysics and the destruction of the history of metaphysics. There is no sense in doing without the concepts of metaphysics in order to shake metaphysics. We have no language—no syntax and no lexicon—which is foreign to this history; we can pronounce not a single destructive proposition which has not already had to slip into the form, the logic, and the implicit postulations of precisely what it seeks to contest.} \]

Id. at 280-81. Similarly, we cannot describe postmodernism and its supplanting of modernism without reinscribing or reconstruing the language of modernism itself. Cf. Connors, supra note 2, at 9-10, 18-19, 194 (on the paradoxes of postmodernism). Connors also emphasizes that postmodern theory, like modernist theory, develops "strategies of containment." Id. at 181. That is, postmodern theory, like all theory and language, constrains understanding and communication (but it is through postmodernism that this constraining can be examined).

\(^{182}\) See Harvey, supra note 2, at 116.

\(^{183}\) Stephen Crook writes: "The nihilism of postmodernism shows itself in two symptoms: an inability to specify possible mechanisms of change, and an inability to state why change is better than no change." Crook, supra note 2, at 59. Richard Bernstein argues that one can read Heidegger as
achieves in Penry with knee-jerk conservatism. Postmodernism, in this instance, certainly did not generate any radical political or social transformation. Instead, it served as a tool for justifying the application of power.

III. POSTMODERN LEGAL SCHOLARSHIP

Now that we have performed a postmodern deconstruction of the Supreme Court’s Teague rule against new rules and thus revealed the Court’s modernist errors; now that we have flipped our paradigm and revealed how the apparently modernist Supreme Court is also postmodern; now that we (seem to) have concluded our task by identifying several themes of postmodernism; now what should we do? Of course, we perform another postmodern flip! We turn our gaze onto postmodern scholarship itself, self-reflexively diagnosing how postmodern scholarship partakes of and applies power. At a time when legal scholarship (especially postmodern scholarship) appears increasingly distant from Supreme Court decisionmaking, and indeed at a time when postmodern scholars seem purposely to dissociate themselves from the Court, this postmodern diagnosis of postmodern scholarship reveals surprising connections between the practices of the Supreme Court and postmodern legal scholars.

A. Describing Postmodern Scholarship

Why are certain legal scholars considered postmodern? To facilitate this discussion, I focus on one of the most thoroughgoing postmodernists, Pierre Schlag. In The Problem of the Subject, Schlag diagnoses how American legal thought from Langdellian classical orthodoxy to critical legal studies to neopragmatism constantly reconstructs our (supposed) existence or being as relatively autonomous selves while simultaneously avoiding any investigation into the actual existence or functioning of these selves or subjects. As Schlag writes: “American legal thought has been conceptually, rhetorically, and socially constituted to avoid confronting the question of who or what thinks or produces law.” Schlag therefore continues to pursue one of
his favorite postmodern motifs: the critique of normative legal thought. Normative legal thought, to Schlag, is scholarship that recommends to the reader certain substantive value choices, thus assuming that the reader has the ability to make and implement such choices.\textsuperscript{188} Schlag insists, however, that this assumption is the problem—the problem of the subject.\textsuperscript{189}

Schlag thus emphasizes a recurrent theme of postmodernism that I have not yet mentioned—the social construction of the subject.\textsuperscript{190} Schlag though also evinces other postmodern themes (themes previously discussed in this Article). For example, Schlag’s style of writing often evokes irony. In The Problem of the Subject, he largely follows the strict decorum of formal legal writing (that is, normative legal thought), yet in the midst of underscoring the link between the form and content of modernist discourse, Schlag manages to poke fun at the rapid rigidity of formal writing by referring to Dean Langdell as "Chris."\textsuperscript{191} This playful mix of styles marks the metaphorical arched eyebrow, suggesting Schlag’s self-reflexive and ironic use of the more formal style. Schlag writes:

One can imagine, for instance, Chris Langdell waking up one day, forgetting to use the imperial declarative mode, and writing not, "The law is . . ." but instead, "I think the law is . . ." By writing that sentence, Chris might have recognized that he (the "I"), far from passively receiving the commands of law, was actively engaged in thinking (i.e., constructing) the law. Now, if that had happened, we might have had a precocious dialectical encounter between the transcendental subject and a nonconforming individual subject. We might have had the beginnings of an inquiry into the problem of the subject.\textsuperscript{192}

This example of Schlag’s postmodern irony leads to another

\textsuperscript{188} See Schlag, Normativity, supra note 21, at 841-52.

\textsuperscript{189} I do not mean to suggest that all postmodernists agree with Schlag’s position on normative legal thought, see Tushnet, supra note 22, but Schlag’s perspective is not unique. For example, Bernstein’s description of Foucault’s relation to modernist philosophy could easily be applied to Schlag’s relation to modernist legal scholarship. Bernstein writes:

Foucault seeks to break and disrupt the discourse that has preoccupied so much of modern philosophy, a discourse in which we have become obsessed with epistemological issues and questions of normative foundations. And he does this because he wants to show us that such a preoccupation distracts us and even blinds us from asking new kinds of questions about the genesis of social practices that are always shaping us and historically limiting what we are. Bernstein, supra note 134, at 153.

\textsuperscript{190} See, e.g., Foucault, Discipline and Punish, supra note 16 (focuses on how observation tends to generate the modern individual); Fraser, supra note 16, at 39, 48, 60 (on Foucault’s and Heidegger’s critiques of the subject); Jameson, supra note 1, at 14-15 (on the decentering of the subject). For example, Foucault writes: "In a disciplinary regime . . . individualization is ‘descending’: as power becomes more anonymous and more functional, those on whom it is exercised tend to be more strongly individualized; it is exercised by surveillance . . . ." Foucault, Discipline and Punish, supra note 16, at 193.


\textsuperscript{192} Schlag, The Problem, supra note 21, at 1649. In the next paragraph, Schlag emphasizes that
postmodern theme, which serves as the fulcrum for his approach in *The Problem of the Subject*. Schlag underscores the play of signifiers characteristic of postmodern antifoundationalism and anti-essentialism by performing a prototypical paradigm flip or move. Schlag began the article by approaching Langdellian classical orthodoxy in the usual manner, as a mode of thought that treated legal rules as transcendental objects mandating judicial outcomes. But Schlag then writes:

> For any enterprise as complex and sophisticated as a jurisprudence, objectivism and subjectivism are the same moment organized in two different ways. This means that we don’t have to follow the conventional American juristic way and understand Langdellian formalism as shaped by a transcendent order of the object. Instead, we could try to understand Langdellian formalism as shaped by the presupposition of a certain kind of subject, by a kind of transcendental subject strategy. With these recognitions, *we have just been invited to do a flip.*

Schlag here suggests, in part, that we should consider *how* the Langdellian (modernist) scholar was writing articles and treatises instead of considering (as is more typical) the substantive content of those publications. To a great extent, the remainder of *The Problem of the Subject* explores the ramifications generated by this postmodern flip or paradigm move.

Schlag’s diagnosis of the problem of the subject (and normative legal thought), facilitated by his postmodern flip, ultimately focuses on two more postmodern themes. First, Schlag clearly expresses his postmodernism by stressing a paradox, and second, this crucial paradox arises within the relationship between language and power. According to Schlag, normative legal thought fails to address this complex relationship: “What is missing in normative legal thought is any serious questioning, let alone tracing, of the relations that the practice, the rhetoric, the routine of normative legal thought have (or do not have) to the field of pain and death.”

Schlag’s postmodernism thus represents an effort to remedy this modernist failure of normative scholars. Schlag writes:

> Each and every social, legal, and political event is immediately represented as an event calling for a value-based choice. You are free to choose between

the form or style in which Langdell wrote simultaneously reflected and constructed the way or the structure of his thought, writing, and experience. Hence, Langdell almost certainly would not have written, “I think the law is . . . .” See id.

In another article, Schlag evokes irony by mixing media: he asks the reader to consider what role the renowned legal philosopher and writer, Ronald Dworkin, might play on the television show, *L.A. Law*. See Schlag, *Normativity*, supra note 21, at 864-65. Later in this article, Schlag insists that *L.A. Law* is more realistic than Dworkin’s book, *Law’s Empire*. Id. at 858-59; see *Dworkin*, supra note 111.

193 Schlag, *The Problem*, supra note 21, at 1644-45 (emphasis added). In *Cannibal Moves*, Schlag focuses on the instability entailed by the play of signifiers. He argues that legal reasoning splits into distinctions, which themselves split apart, and so on ad infinitum. Hence, legal reasoning is inherently unstable. Schlag, *Cannibal Moves*, supra note 21.

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this and that. But, of course, you are not free. You are not free because you are constantly required to reenact the motions of the prescripted, already organized configuration of the individual being as chooser. You have to, you already are constructed and channeled as a choosing being. Not only is this social construction of the self extraordinarily oppressive—but it often turns out to be absurd as well. Much of its absurdity can be seen in the normative visions that routinely issue from the legal academy urging us to adopt this utopian program or that one—as if somehow our choices (I like decentralized socialism, you like conservative pastoral politics, she likes liberal cultural pluralism) had any direct, self-identical effect on the construction of our social or political scene. The critical insistence on making political value choices is utterly captive to a conventional and nostalgic description of the political field—a description and definition of the field that is guaranteed to yield political disablement and disempowerment. To tell people that they are already empowered to make political value choices is, in effect, to bolster the dominant culture’s representation that we are free-choosing beings and to strengthen the forces that lead to our own repeated, compelled affirmation of (meaningless) choices.195

Thus, on the one hand, normative legal scholarship (discourse or language) unknowingly stands at a distance from the application of power through the legal system. Normative writers believe their recommendations influence legal and political decisionmakers as they implement power, but in reality, normative writing has little or no effect on decisionmakers.196 In particular, as Schlag and others have underscored, judges largely do not listen to or even care about what legal scholars write.197 On the other hand, normative language or discourse represents a manifestation of power itself. Normative discourse constantly reconstructs a vision or understanding of reality centered on the relatively

195 Schlag, The Problem, supra note 21, at 1700-01.
196 Schlag writes:

[Normative legal thought] becomes the mode of discourse by which bureaucratic institutions and practices re-present themselves as subject to the rational ethical-moral control of autonomous individuals (when indeed they are not), just as normative legal thought constructs us (you and me) to think and act as if we were at the center—in charge, so to speak—of our own normative legal thought (when indeed we are not). Normative legal thought can no longer be seen to govern, regulate or even describe human activity.

Schlag, Nowhere, supra note 21, at 185-86 (emphasis in original).

Edward Rubin offers a completely different vision and understanding of normative legal scholarship: Rubin recommends that scholars continue offering normative prescriptions to legal decisionmakers. But legal scholars, according to Rubin, should address decisionmakers other than judges and should develop their own discourse or terminology. Edward L. Rubin, The Practice and Discourse of Legal Scholarship, 86 Mich. L. Rev. 1835, 1900-04 (1988); see Edward L. Rubin, On Beyond Truth: A Theory for Evaluating Legal Scholarship, 80 Cal. L. Rev. 889, 911 (1992) (legal scholarship is a recommendation and a performance).

197 See Schlag, Writing, supra note 21, at 421; Schlag, The Problem, supra note 21, at 1738; Schlag, Normativity, supra note 21, at 871-72; Steven L. Winter, Indeterminacy and Incommensurability in Constitutional Law, 78 Cal. L. Rev. 1441, 1452-53 (1990). Sanford Levinson notes that an empirical study shows that the Supreme Court was less likely to cite law review articles in 1986 than twenty years earlier. Sanford Levinson, The Audience for Constitutional Meta-Theory (Or, Why, and To Whom, Do I Write the Things I Do?), 63 U. Colo. L. Rev. 389, 405 (1992).
autonomous self. By telling us that we must choose this or that path, normative discourse consistently and repetitively reminds us that we are free to choose whichever path is most appealing. Moreover, this insistent reconstruction of the autonomous self engenders political conservatism. Instead of generating, seeking, and pursuing paths of genuine political empowerment and transformation, we are duped into passivity, meekly pretending that we are relatively autonomous selves who freely discuss, choose, and change our worlds. In short, normative legal thought may not accomplish what it claims to do, but paradoxically, it nevertheless achieves a lot.

In sum, even though postmodern scholars such as Schlag renounce any pretense of communicating with the Supreme Court, Schlag's postmodern scholarship shares many themes in common with Chief Justice Rehnquist's postmodern opinion in Butler. Schlag and Rehnquist both underscore the play of signifiers characteristic of antifoundationalism and anti-essentialism, they both display postmodern irony, and they both express concern for the problematic relationship between language and power. Perhaps the best explanation for this mutual expression of postmodern themes lies in their sharing of postmodernism itself. That is, both Schlag and Rehnquist live and participate in the traditions of postmodernism (or at least a period of transition from modernism to postmodernism), and consequently their respective horizons both manifest certain postmodern prejudices.

B. Diagnosing Postmodern Scholarship

This connection between the Supreme Court and postmodern scholars suggests the possibility of yet another postmodern flip! Our analysis of Schlag's postmodern scholarship has been, to this point, just too—well—modern! We have come close to reducing postmodernism to a set of techniques (which I call themes), which we then managed to identify and describe in Schlag's scholarship. And of course, the identification and description of these themes in Schlag was rather easy since I selected him precisely because his scholarship is so postmodern. To sustain our pursuit of the postmodern, we must not merely describe how Schlag expresses his commitment to postmodern themes in his writing; rather we need to diagnose (in a postmodern sense) how Schlag lives within

198 Schlag writes: "Not only does the dominance of [the Langdellian] subject formation prevent the development and recognition of other subject formations, but it effectively colonizes and homogenizes otherwise interesting and potentially edifying intellectual approaches." Schlag, The Problem, supra note 21, at 1743; see id. at 1739.

199 Schlag writes: "[T]he claim is not that normative legal thought is without effect, but that the politics of normative legal thought are not what normative legal thought imagines them to be: its politics are in the process, the practice of its construction, and the form of its dissemination." Schlag, Normativity, supra note 21, at 909.

200 See supra note 140 and accompanying text. Levinson and Balkin write: "A culture embraces all who live within it." Levinson & Balkin, supra note 22, at 1645.

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Postmodern traditions. More specifically, we need a postmodern diagnosis of how Schlag and other postmodern scholars participate in the application of power.\textsuperscript{201}

In \textit{The Problem of the Subject}, Schlag launches against neopragmatism his standard postmodern critique of normative legal thought: he criticizes neopragmatist scholars for not asking how their own rhetoric and social construction enables or disables them from helping the poor and powerless. The weakness with Schlag's argument, at this point, is that it fails to appreciate the significance of the neopragmatists' role as scholars. Even if the neopragmatists asked different questions and wrote different answers in their essays, articles, and books, they would still be writing essays, articles, and books. That is, they would still be scholars. Scholars are not (usually) political activists, elected governmental officials, or even practicing attorneys; instead scholars devote their time predominantly to writing and teaching (occasionally performing some type of community service).\textsuperscript{202} Moreover, if the neopragmatists asked the different questions that Schlag recommends, they would no longer be neopragmatist scholars, they would be postmodern scholars (like Schlag).\textsuperscript{203} Most important, though, they would still be scholars. Now, the lines of a postmodern diagnosis of Schlag start to emerge. Power is, in part, structural: hence, a legal scholar partakes in power by performing the relatively ongoing and embedded social role of "legal scholar." We therefore must question and diagnose how legal scholars—and specifically postmodern legal scholars (like Schlag)—participate in the generation and application of power. This diagnosis may require us to focus on the questions and answers that postmodern scholars typically articulate, but the point is not to argue that they should ask different questions. Rather, we seek to explore how they, as scholars, partake in power.\textsuperscript{204}

Postmodern legal scholars share one thing in common with all other legal scholars: they are academics and hence earn money and exercise authority over students because of their position or role within the academy.\textsuperscript{205} To be sure, the relationship between scholars (as teachers) and

\textsuperscript{201} Connor writes: "Instead of asking, what is postmodernism?, we should ask, where, how and why does the discourse of postmodernism flourish?, what is at stake in its debates?, who do they address and how?" \textit{Connor, supra} note 2, at 10.

\textsuperscript{202} Of course, a legal scholar may also perform any of these other roles or even occasionally include one of those roles within his or her self-definition of being a scholar, but for the most part, scholars write and teach (and occasionally perform some type of community service, which may be no more than serving on a couple of law school or university committees).

\textsuperscript{203} To me, some neopragmatists can be characterized as postmodern already. \textit{See, e.g.,} \textit{Radin, supra} note 68.

\textsuperscript{204} \textit{See Connor, supra} note 2, at 11-16 (recommends considering the power-knowledge relations in academic institutions).

\textsuperscript{205} Jeffrey Isaac writes: "The structure of education, not teachers, causes students to act like students, just as it causes teachers to act like teachers. Teachers and students, given their social identities, would not otherwise do anything but what teachers and students regularly do." \textit{Isaac, supra} note 129, at 49; \textit{see Wartenberg, supra} note 16, at 142-46, 178-81 (on the teacher-student
students represents a rather bald connection between power and knowledge. The scholar controls to a great extent the distribution to students of passing (or better) grades and thus acts as one of the gatekeepers to jobs within the legal profession.\textsuperscript{206} A law student who fails enough courses cannot even take a bar exam. Moreover, other legal professionals often orient their behavior toward law students (and recent graduates) based on the students’ law school grades.\textsuperscript{207} Hence, the scholar can authoritatively dictate to between fifty and two hundred students every semester what they must know: each student must report what the scholar (as teacher) has identified (sometimes rather hazily) as important and interesting, or the student must risk not receiving the requisite mark of approval.\textsuperscript{208}

But how do attorneys generate and sustain their position of power within the \textit{university}? The commonly accepted historical narrative of legal academics in the United States begins in 1870 when Langdell, in effect, invented the full-time law teacher and scholar.\textsuperscript{209} As more law schools following the Langdellian model started to sprout within American universities, the apparently serious process of rationalizing the American legal system began in earnest.\textsuperscript{210} The clear function for Langdell’s followers was to reduce the law to a coherent, conceptually ordered, and logically consistent framework of legal principles and rules. For a brief period, legal academics enjoyed a definite purpose—rationalizing the law—that entrenched their position and power within the university.\textsuperscript{211} Unfortunately (for legal scholars), this process of rationalization was largely completed by World War I.\textsuperscript{212} The position and power of legal academics and, more broadly, law schools within the university suddenly seemed threatened as legal scholars groped for a worthwhile subject matter. Scholars tumbled into an amorphous dialectical relationship; Wartenberg, \textit{supra} note 131, at 81-85 (same); \textit{cf.} Tushnet, \textit{supra} note 22, at 2332-33 (left legal scholar-teacher exercises hierarchical authority over students but disguises it).

\textsuperscript{206} The state bar is another obvious gatekeeper to the legal profession.

\textsuperscript{207} \textit{Cf.} Wartenberg, \textit{supra} note 131, at 83-84 (other social actors contribute to a teacher’s power over students).

\textsuperscript{208} \textit{See} Duncan Kennedy, \textit{Legal Education As Training for Hierarchy, in The Politics of Law, supra} note 111, at 38.


\textsuperscript{211} I do not mean to overstate the general acceptance of law schools within universities. To some extent, the status and positions of law schools always remain tenuous because the law is a profession and not merely an academic discipline.

tic where they, on the one hand, continued to rationalize the law in a now mundane and repetitive fashion and, on the other hand, struggled to identify a new function for themselves within the academy.213

Legal scholars, however, do not work in isolation; like other academics, they participate in the intellectual movements and traditions of their respective times.214 Thus, trends outside of legal scholarship influenced the development of this legal dialectic. In particular, two critiques of rationality transformed legal scholarship by undermining the legitimacy of the legal scholars' original project, the rationalization of the law.215 First, in the 1920s and 1930s, the modernists themselves criticized the abstract rationality of formalism. In jurisprudence, the American legal realists rejected the elegant and supposedly objective legal systems formulated by Langdell's classical orthodoxy, yet ultimately the realists only reconceived the process of rationalizing the law. To the realists, legal scholars could study the legal system through the rational processes of the social sciences, which would reveal objective and predictable patterns of legal behavior.216 Second, in the latter half of the twentieth century, postmodern critiques of all forms of modernist rationality and objectivity began to blossom. In jurisprudence, the very possibility of continuing the original scholarly project of rationalizing the law came under attack.217

Through all these transitions in legal thought, one constant always remained steadfast: legal scholars were academics. Consequently, whatever the various scholars were writing, they always managed to legitimate (sometimes explicitly but often implicitly) their own position and power within the university community. Scholars would, in effect, write: "Whatever we might be saying about that other group of scholars,

213 John Henry Schlegel writes:

The legal academic is trapped. The species is committed to scholarship dominated by the notion of law as rule and yet at the same time such scholarship is both a largely completed task and an intellectual anachronism. Dispirited humans and episodic scholarship are the plausible, if not necessary, results of being placed in such a position.

Id. at 1532.

214 See Edward A. Purcell, Jr., The Crisis of Democratic Theory (1973); Morton White, Social Thought in America (1976); Feldman, Republican Revival/Interpretive Turn, supra note 4.


217 Robert Post argues that legal scholars traditionally viewed themselves as internal participants of the practice of law, while in the last fifteen years, some scholars have viewed themselves as outside legal practice. See Robert Post, Legal Scholarship and the Practice of Law, 63 U. Collo. L. Rev. 615, 618-20 (1992).
we (my group of scholars) clearly belong in the university so that we may continue to write our (valuable) scholarship (and therefore continue to earn money and exercise authority over students)." In other words, legal scholars never leave themselves with no scholarly function at all because then they would have justified their own elimination. Putting it crassly, legal scholars always need at least to appear to produce knowledge for consumption, and the commodity in which we package that knowledge is the publication, whether it be a book, an article, or an essay.

This understanding of legal scholarship throws new light on postmodern writers. Postmodernists accentuate how modernist legal rationality effectively deconstructs itself—undermining its own coherency—that eliminating the legal scholars' traditional function of rationalizing and rerationalizing the law. What then can postmodern legal scholars do? Do they gracefully excuse themselves from the academy? No, of course not—they instead continue to be legal scholars. Indeed, they entrench their (our) position and power by exploring and celebrating their (our) own irrelevance. Postmodernists explicitly detach themselves from the judiciary and dissociate themselves from the practical concerns of attorneys. Judges and practicing attorneys who

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218 See Harvey, supra note 2, at 159-60 (knowledge as a commodity).

219 This commodification of the publication is exemplified in the Chicago-Kent Law Review studies on the productivity of faculty at different law schools. See Janet M. Gumm, Chicago-Kent Law Review Faculty Scholarship Survey, 66 CHI.-KENT L. REV. 509 (1990). Jack Balkin writes:

In the academy, we can witness the increasing need to evaluate work in terms of discrete units of production. Thus, the equivalent of billable hours in the law firm are articles in the legal academy. Academic organizations are increasingly structured to reward persons who produce measurable units of production. Such a process elevates objective measurements of quantity over subjective measurements of quality, on the grounds that quantity is more easily measurable. This produces increasing pressure for academics to publish, not because it will increase the valuable knowledge of mankind, but as a symbol of scholarly production. The term "productive scholar" thus comes to mean the scholar who produces a continuous stream of units of production, rather than the scholar who produces meaningful work.

Balkin, supra note 2, at 1984.

220 See Feldman, supra note 210, at 226-29, 242-47 (increasing formal rationality inevitably leads to substantive irrationality).

221 Lyotard argues that in a postmodern world, what matters is not the gathering and organization of massive amounts of information (which becomes a mere application of computer technology), but rather the paradigm move that changes the rules of the game. Lyotard, supra note 2, at 52.

222 Connor writes:

[T]he academy has implicitly laid claim to a custodial or management function with regard to cultural experience which, at a time of threat, offered a way of enlarging its function and effectiveness. In this respect, the academy is not an anomaly in the field of contemporary culture, but its most representative form.

Connor, supra note 2, at 16; see supra note 164.

223 Balkin writes: "[The legal academy] has become increasingly distanced from the work of actual lawyers and judges." Balkin, supra note 2, at 1985. He adds:

[A] new class of academics [has arisen] who have little or no interest in practical political activity, practical law reform, or even practical restatement of the law. Thus, the postmodern period is marked by the creation of a species of legal scholarship known as "legal theory." As a result of the rise of interdisciplinary scholarship, genres of scholarship defined by traditional practice areas (e.g., contracts, torts) are replaced by scholarly genres defined by theoretical allegiances
read legal scholarship (and there may be few) primarily want normative arguments to apply instrumentally in their practices, but postmodernists explicitly renounce normative theory. At best, postmodern scholars write to an audience of other legal scholars. But few legal academics have the background, interest, or desire necessary to understand the rhetoric of Derrida, Gadamer, Wittgenstein, Foucault, Heidegger, Lyotard, Rorty, and others often relied upon by postmodern legal scholars. Postmodern scholars may claim to demystify the law by unmasking power, but in doing so, they often mystify legal scholarship with nearly impenetrable terminology. Consequently, very few scholars read and understand postmodern legal scholarship—for the most part, readers of postmodernism are those disaffected scholars already interested in postmodernism and critical theory.

So what do postmodern legal scholars actually do? As Schlag says about law in general, postmodernists "deliver the goods." And as is true for all scholars, the "goods" are publications. Postmodern scholars, like modernist scholars, crank out the scholarship to fill the law reviews, but postmodernists do so within the culture and traditions of postmodernism, not modernism. But if postmodern scholarly publications are commodities or goods, then who consumes them? First,

(e.g., law and economics, feminist legal theory), which may cut across traditional doctrinal areas or simply be irrelevant to them.

Id.; see supra note 24; cf. supra note 197 and accompanying text (judges do not listen to or care about what legal scholars write).


One can offer a postmodern justification for this different scholarly rhetoric. If postmodernists continue to use the terminology of the modernists, then they (the postmodernists) will reinscribe modernism itself. To move towards postmodernism, we must use the language and tradition of postmodernism itself.

Of course, the number of legal scholars who read postmodern scholarship will vary according to one's definition of postmodernism. That is, since postmodernism is itself a nebulous term, there is no certain and determinate number of readers of postmodern scholarship. Finally, my suggestion that few scholars read and understand postmodern legal scholarship should be understood as an educated general impression and is not based on any empirical study.

postmodern legal scholars write for other legal scholars. Yet, as just noted, very few scholars read and understand postmodern scholarship. The primary academic consumers of the postmodern scholar’s work therefore are probably those faculty who decide whether to hire and promote the postmodernist.\(^{229}\) Indeed, most scholars—postmodernist and modernist alike—realize that the number and quality of their publications likely affect their chances of achieving tenure, promotion, and prestige within the academic profession.\(^{230}\) In this limited regard, then, most scholars at least implicitly realize that they are producing goods for consumption.

Nonetheless, insofar as many postmodern scholars believe that they write for other scholars, they in part mistakenly identify the ultimate consumers of their goods (just as modernist writers mistakenly believe that they write for judges). Law students constitute a second important group of consumers, but not as anxious fledglings sitting at the feet of their mentors. Students are consumers because they pay the tuition that largely funds the scholars’ salaries. One of the items that students buy when they choose and attend a law school and pay its tuition is prestige,\(^{231}\) which to a great extent is generated by faculty publications.\(^{232}\) Hence, students effectively buy faculty publications through the medium of prestige and the process of attending a law school and paying its tuition. In sum, legal scholars are engaged in a social practice that enmeshes them in a complex web of social relationships. The structure of

\(^{229}\) I do not mean to suggest that these other faculty actually read the postmodernist scholar’s work. I imagine that decisions often are based on the number of publications, the place of publication, and the reputation (and personality) of the postmodernist.

\(^{230}\) Cf. David P. Bryden, Scholarship About Scholarship, 63 U. COLO. L. REV. 641, 642 (1992) ("[M]ost legal scholars are motivated primarily by the usual human desires for security, status, and income.").

Jameson writes the following about commodification in postmodernism: "[A]esthetic production today has become integrated into commodity production generally: the frantic economic urgency of producing fresh waves of ever more novel-seeming goods (from clothing to airplanes), at ever greater rates of turnover, now assigns an increasingly essential structural function and position to aesthetic innovation and experimentation." Jameson, supra note 1, at 4-5. We can easily substitute the term "scholarly" for "aesthetic" and the goods represented by "books, articles, and essays" for "clothing and airplanes" to get a perfectly reasonable statement about postmodern legal scholarship. It would read as follows: "[Scholarly] production today has become integrated into commodity production generally: the frantic economic urgency of producing fresh waves of ever more novel-seeming goods [from books to articles to essays], at ever greater rates of turnover, now assigns an increasingly essential structural function and position to [scholarly] innovation and experimentation." This recognition partly explains the proliferation of "law and" movements, such as law and literature, as ways of producing novel-seeming goods (books, articles, and essays).

\(^{231}\) Students also hope to acquire a post-law school job and perhaps an education. Getting a job and an education, of course, may both be related to the prestige of the student’s law school.

\(^{232}\) Prestige is generated by a variety of factors, of which faculty publications is but one—though a very important one. See Bryden, supra note 230, at 643. Other factors include the reputation of the students (largely based on the profiles of entering students) and the reputation of the general university (if the law school is part of a university).
those relationships insures that legal scholars do not only exercise power but are subject to power. In particular, to survive (as an academic), a legal scholar must (at some point in his or her career) produce goods (publications) that someone somehow consumes.

Since scholars—postmodern and modern scholars alike—produce commodities in the form of publications, then an academic might be especially fortunate to write within the culture and traditions of postmodernism. Postmodernism, in a sense, is structured perfectly to produce and reproduce the goods (publications) because many postmodern themes generate endless possibilities for publications. For example, because of the postmodern focus on antifoundationalism, anti-essentialism, and the play of signifiers, the postmodernist always can search for and identify an instability in a previous analysis and always can find a new meaning in a text. In other words, the postmodernist inevitably can deconstruct a previous analysis, and then deconstruct the deconstruction, and then deconstruct the deconstructed deconstruction, ad infinitum. From this perspective, postmodern scholarship represents a desperate but successful effort by legal scholars to reinscribe their (our) legitimacy within the academy after they (we) had demonstrated their (our) own irrelevance. Indeed, postmodernists seem to reinscribe their own legitimacy and stature within the academic community by suggesting that only they can understand the relevance of the impenetrable (to a modernist) rhetoric that declares the irrelevance of most other legal scholarship. Thus, postmodern legal scholars can safely continue to write, to earn money, and to exercise power over students.

In terms of generating scholarship, one of the most fruitful and interesting postmodern themes is the paradoxical relation between modernism and postmodernism: postmodernism includes modernism, and modernism includes postmodernism. Because of this paradoxical relationship, a postmodernist can unceasingly produce scholarship by turn-

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233 See generally WARTENBERG, supra note 16, at 160 (on being subjected to power); Wartenberg, supra note 131, at 100 (same).

234 Foucault argues that the common theme that sex should be repressed from discourse is itself an injunction that generates endless discourse about sex. Sex, that is, is a secret that we must constantly discuss. See FOUCAULT, HISTORY OF SEXUALITY, supra note 16, at 34-35. In law, we might say that postmodernists write about and thus capitalize on a set of interrelated secrets about law: legal rules do not mandate judicial outcomes, judges do not discover outcomes through an objective process of legal reasoning, and therefore normative legal theory can have little or no effect on decisionmaking.

235 See LYOTARD, supra note 2, at 60-61 (on the search for instabilities). Connor suggests that postmodernism can lead to a “compulsive desire to produce innovation for the sake of innovation.” CONNOR, supra note 2, at 194. He adds that “contemporary capitalist culture promotes or multiplies difference in the interests of maintaining its profit-structure.” Id. at 189.

236 Cf. Alex Callinicos, Reactionary Postmodernism?, in POSTMODERNISM AND SOCIETY, supra note 2, at 97, 109-16 (recommends explaining the emergence of postmodern discourse instead of examining postmodernism as developing because of discourse).

237 See supra text accompanying notes 177-81.
ning to the writing of another postmodernist (or would-be postmodernist) and finding the vestiges of modernism. The postmodernist can always declare: "Aha! I have found a modernist masquerading in postmodern clothing!" The postmodern scholar thus becomes the postmodern police, scanning the scholarly production of other postmodernists for the inevitable traces of modernism.\(^{238}\)

Schlag's writings illustrate this phenomenon of postmodern policing on two levels. First, Schlag himself polices other postmodernists. For example, Schlag criticizes Jack Balkin, another renowned postmodernist, for mistakenly transforming Derridean deconstruction into merely another "analytical tool" in the modernist lawyer's toolbox.\(^{239}\) Likewise, Schlag devotes an entire article to showing how Stanley Fish, another postmodernist, ultimately and unknowingly reinscribes the infamous relatively autonomous self of modernism.\(^{240}\)

Second, we can police Schlag for his own traces of modernism. Schlag's very effort to police other postmodernists reveals a trace of modernism in his scholarship (just as my policing of Schlag reveals a trace of modernism in my scholarship). Whenever a postmodernist scolds a would-be postmodernist for not being postmodern enough, the postmodernist acts as if postmodernism can be reduced to some core definition or essence. The postmodernist, in effect, states that if the would-be postmodernist does something that does not fit within that essence of postmodernism, then the would-be just does not qualify for membership in the "Postmodern Club." Of course, at this point, the postmodern police—Schlag policing Balkin, or myself policing Schlag—acts embarrassingly modern.\(^{241}\)

\(^{238}\) See, e.g., Schanck, supra note 3, at 2594-95. I like to refer to this inevitable trace of modernism as a "Cartesian echo" because it echoes or reflects the lingering traces of Cartesian subject/object metaphysics. Connor writes:

\[\text{[P]ostmodernist theory . . . names and correspondingly closes off the very world of cultural difference and plurality which it allegedly brings to visibility. What is striking is precisely the degree of consensus in postmodernist discourse that there is no longer any possibility of consensus, the authoritative announcements of the disappearance of final authority and the promotion and recirculation of a total and comprehensive narrative of a cultural condition in which totality is no longer thinkable. If postmodern theory insists on the irreducibility of the difference between different areas of cultural and critical practice, it is ironically the conceptual language of postmodern theory which flows into the trenches that it itself gouges between incommensurabilities and there becomes solid enough to bear the weight of an entirely new conceptual apparatus of comparative study.}\]

Connor, supra note 2, at 9-10.

\(^{239}\) Schlag, The Problem, supra note 21, at 1695 (quoting Balkin, Deconstructive Practice, supra note 22, at 786).

\(^{240}\) See Schlag, Fish v. Zapp, supra note 21.

\(^{241}\) In another instance, Schlag reveals his modernism when he stumbles over a postmodern paradox. Schlag writes: "Perhaps most significant is that this Langdellian subject formation [the relatively autonomous self] is deeply implicated in the reproduction of images of law, society, culture, and politics and their relations that are now seriously out of date and positively detrimental to the intellectual and social construction of our world." Schlag, The Problem, supra note 21, at 1743 (emphasis omitted and added). Schlag here seems to suggest that the relatively autonomous self
Modernism surfaces in additional ways in Schlag's work: Schlag occasionally even writes about a character who strangely resembles the modernist relatively autonomous self. Schlag, for instance, states: "[F]or the effective trial lawyer, truth, rationality, and moral values play a role but only in an instrumental sense—only insofar as they aid the lawyer in effectively manipulating the jury to reach the pre-determined desired outcomes."242 The trial lawyer, here, sounds suspiciously similar to a rational and autonomous (and hence modernist) self who selects and uses various tools, including normative legal theory, to gain power and win cases.243

Schlag might respond to this postmodern policing of his scholarship by claiming *postmodern immunity*: that is, his apparent lapses into modernism actually represent ironic and postmodern uses of modernist themes. We already noted that Schlag occasionally writes with the arched eyebrow of postmodern irony.244 Hence, Schlag might maintain that an occasional arched eyebrow immunizes an entire article from the accusations of the postmodern police. Indeed, *any* postmodernist who faces a charge of modernism has this ready immunity defense: the postmodernist can always insist that the postmodern police missed the arched eyebrow signifying the ironic (and hence postmodern) use of those otherwise modernist argumentative modes and rhetorical devices.

The postmodern police, however, can reply (of course) in several different ways. First, if the arched eyebrow of postmodern irony is not apparent to the reader, then regardless of the author's claimed *intentions*, the use of modernist styles and methods is simply modernism. After all, only a modernist would claim that the author's intentions determine the meaning of a text. Second, even if the author manages to communicate
an occasional arched eyebrow in the disputed writing, there is no reason to conclude that the entire piece is therefore immunized. Perhaps, the author used some modernist touches ironically but failed to recognize the traces of modernism that surfaced in other spots. Third, the postmodernist who attempts to defend against charges of modernism by claiming postmodern immunity betrays an inclination toward modernism merely by raising this defense. A more postmodern response (and perhaps the one that Schlag most likely would voice) would be the following: "Well, it's true that traces of modernism surface in my postmodernism, but that's always true of postmodernism."²⁴⁵ In fact, with the postmodern play of signifiers, any such dispute between a postmodernist and the postmodern police ultimately would be undecidable (or inexhaustible)²⁴⁶—the postmodernist's text generates far too many meanings, far too many truths, to determine conclusively whether a trace of modernism is postmodern irony or just plain modernism.

C. Keep Flipping! (On Politics and Postmodernism)

Earlier, we noted that a description of postmodern scholarship revealed a significant connection between the postmodern Supreme Court and postmodern scholars. Namely, the Supreme Court Justices and the scholars live and participate in the traditions of postmodernism and therefore they express many of the same postmodern themes. Now, the postmodern diagnosis of postmodern legal scholarship suggests two additional connections between the Justices and the scholars.²⁴⁷ First, in both judicial practice and legal scholarship, power is partly structural. When Rehnquist squarely faced the postmodern play of signifiers—when he self-reflexively understood that any rule of constitutional law is both new and old—he responded by arching his eyebrow and continuing to perform (and to implement power) as a Chief Justice always performs (and implements power). Consequently, the Court decided the case, and the Chief Justice wrote an opinion. Likewise, when the postmodern legal scholar self-reflexively turns to and diagnoses legal scholarship, the postmodernist responds by arching his or her eyebrow and continuing to perform (and to implement power) as a legal scholar always performs (and implements power). The postmodernist writes and publishes an article, essay, or book.

²⁴⁵ See Schlag, The Problem, supra note 21, at 1650 (postmodern analysis of the relationship between Steve Winter and Stanley Fish, two other postmodernists).
²⁴⁶ The Derridean deconstructionist is more likely to state that a text has multiple meanings which are undecidable, while the Gadamerian interpretivist is more likely to state that a text has an inexhaustible number of potential meanings but that its meaning is decidable within any concrete context. See MADISON, supra note 77, at 113-15.
²⁴⁷ Insofar as I emphasize here the connections or similarities between the Court and scholars, I depart from Jack Balkin's emphasis on their differences. See Balkin, supra note 2. In Part III.C., however, I highlight some differences between the Court and scholars. See infra text accompanying notes 247-71.
Thus, whether in judicial practice or legal scholarship, power continually appears in relatively ongoing and embedded social roles—Chief Justice and legal scholar—regardless of the words that occupants of those roles happen to speak in particular contexts. Postmodern Chief Justices and legal scholars are enmeshed largely in the same structures of social relationships as modern Chief Justices and legal scholars, respectively. That is, because power is structural, Chief Justices and legal scholars will continue to partake in power in somewhat predictable fashions regardless of whether the occupants of those roles are modern or postmodern, unless and until the practices of judicial decisionmaking and legal scholarship change.

Second, the Supreme Court and postmodern legal scholars now appear as mirror reflections of each other—their images match (or come close), but left is right, and right is left. The Justices, on one side of the mirror, initially seemed to be committed modernists, but we then recognized an emerging postmodernism in the development of the *Teague* rule against new rules. Postmodern scholars, on the other side of the mirror, initially seemed to be committed postmodernists, but we then recognized vestiges of modernism in their work. Our recognition of this mirroring phenomenon suggests that while postmodern scholars and Justices surprisingly behold horizons that overlap in postmodern traditions, the scholars and Justices predictably do not stand side by side. Instead, in a sense, they gaze into the horizon (and hence into postmodernism) from opposite directions. And this possibility suggests yet another potential postmodern flip!

Our postmodern diagnosis of postmodern scholars concluded that their primary function was to deliver the goods by publishing articles, essays, and books. This conclusion, however, is just too simple, too reductionist, too materialist, or in other words, too modernist. Legal scholars (like anybody else) should not be reduced to rational maximizers of material self-interest.248 In particular, many postmodern (and modern) legal scholars arguably believe that their primary function is to pursue truth and knowledge—not necessarily modernist truth and knowledge, but truth and knowledge nonetheless.249 Moreover, many scholars genuinely seek to communicate truth and knowledge to their students. Thus, another dimension of power is revealed in the practice of legal scholarship. As already discussed, scholars dominate students through the grading process, and scholars are subject to power because of their need to produce publications that are somehow consumed. Now we

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see that scholars also perform a transformative role in relation to students: scholars (as teachers) often exercise power over students in an effort to empower students with knowledge.250

Furthermore, we might order the functions of the legal scholar: from a phenomenological perspective, the first function of the scholar is to pursue (and communicate) truth, and the second function is to publish. Interestingly, this phenomenological ordering of the scholar’s functions arguably mirrors a Supreme Court Justice’s phenomenological understanding of his or her functions—again, the images match (or come close), but left is right, and right is left. A Justice undoubtedly believes that the Court should pursue the truth (or justice), yet ultimately, the Justices often primarily sense the practical urgency of deciding the cases. One way or the other, the cases must be resolved and disposed of, and truth (or justice) then becomes a secondary (albeit important) goal.251

These differing phenomenological understandings, together with the relatively enduring social roles of scholars and Justices, can have significant political consequences.252 From the perspective of the Supreme Court, postmodernism can become neoconservative. The Justices who confront postmodernism understand that any single text or event can generate many truths—for example, any constitutional rule is both new and old. The Justices, however, rarely can engage in an academic excursion on the multiple truths of a text or event; rather they must decide cases. Hence, regardless of their postmodern persuasions, the Justices in the end must choose a single truth and authoritatively pronounce it as the law. For the Court, then, postmodernism appears as a form of relativism, which to be sure, is a modernist concept typically conceived as the bogey opposed to foundationalism or objectivism. But for the Court,

250 A social practice of transformation, such as the student-teacher relation, is nonetheless hierarchical in that one actor has more power than the other. Yet, the purpose of the exercise of power is to empower the subordinate actor. See Nel Noddings, Caring 70-72 (1984); Virginia Held, Mothering Versus Contract, in Beyond Self-Interest, supra note 248, at 287, 300-03; Wartenberg, supra note 16, at 214.

251 Justice Scalia has explicitly stated that justice is not his primary concern when deciding cases. See Antonin Scalia, The Rule of Law As a Law of Rules, 56 U. Chi. L. Rev. 1175 (1989). In Linda Greenhouse's article in the New York Times on the opening of the 1992 term of the Supreme Court, she writes: “[T]he Court has a rhythm of its own, based on the imperatives of its calendar and of a relentless conveyor belt from the lower courts that deposits new appeals on the Supreme Court's doorstep at the rate of more than 100 a week.” Linda Greenhouse, High Court Begins Today with Focus on New Coalition, N.Y. Times, Oct. 5, 1992, at A1; cf. Bob Woodward & Scott Armstrong, The Brethren (1979) (chronicling the inner workings of the Court).

252 Boyne and Rattansi suggest that postmodernism is political because it raises questions about social relations, but it is not necessarily left or right. See Boyne & Rattansi, supra note 2, at 23, 28-29. Connor writes: “[T]he development of a postmodernist 'culture of resistance' depends to a large degree upon the willingness of cultural theory to acknowledge and explore its own role in the creation of that culture, for such a theory can produce a culture of indifference as well as bringing out productive differences.” Connor, supra note 2, at 181; cf. Jameson, supra note 1, at 46-47 (we should not conceive of postmodernism in terms of a moral judgment).
Postmodernism in Legal Scholarship

Postmodernism must dress in this modernist garb because the Court performs the (very) modernist function of autocratically proclaiming truth (or justice) and thus killing divergent truths. Postmodernism must dress in this modernist garb because the Court performs the (very) modernist function of autocratically proclaiming truth (or justice) and thus killing divergent truths. What else, after all, can the Supreme Court do? If the Court therefore must choose one truth from among multiple truths, the Justices' political inclinations may determine the choice and hence the judicial decision. With the strong conservative bias among the current Justices, the Court seems likely to generate conservative decisions regardless (or partially because) of its postmodernism. Thus, for example, the Court effectively wrote: "The rule can be called both old and new. We will, however, declare it to be new. Throw the switch!"

From the perspective of the legal scholar, though, postmodernism can have a "radical edge." Unlike the Supreme Court, postmodern legal scholars' ultimate goal arguably is to pursue truth (scholars certainly do not decide cases). Hence, again unlike Supreme Court Justices, postmodern scholars often engage in an academic excursus on how the play of signifiers generates multiple truths within a text or event. Postmodern scholars do not attempt to reduce the multiple truths to some authoritative core or essence, and indeed, some postmodernists might argue that any such reduction cannot be justified. Even further, the postmodernist might stress the play of signifiers, the paradoxical relation between language and power, or any other postmodern theme in an effort to disturb the modernist's unconscious assumptions—assumptions that typically lay embedded within the modernist's often smug moral prescriptions and authoritative pronouncements of truth.

254 This conclusion is reinforced if we recognize that the postmodern recognition of multiple truths might appear to justify judicial restraint. If there are multiple truths, then according to this view, the Court has no reason to interfere with the truths that emerge from other governmental entities. That is, the Court has no good reason to interfere with the status quo. This argument, of course, strongly resembles John Ely's theory of representation-reinforcement, which supports a limited judicial role in a democracy based on political pluralism (a relativist view of democracy). See JOHN H. ELY, DEMOCRACY AND DISTRUST (1980); PURCELL, supra note 214, at 197-266 (the development of a relativist theory of democracy); Feldman, Republican Revival/Interpretive Turn, supra note 4, at 682-701 (the relation of political pluralism to the recent civic republican revival in political and constitutional theory).

I do not mean to suggest, however, that postmodernism necessarily leads to conservative judicial decisionmaking. Indeed, I believe that insights from postmodernism could possibly lead some Justices to more radical or liberal views and decisions. See id.

255 See supra text accompanying notes 160-62.
256 HARVEY, supra note 2, at 113.
257 See CONNOR, supra note 2, at 79 (postmodernism is a "multiplication of differences"). Foucault's definition of his method of genealogy emphasizes that he is not searching for essences or universals, but instead is trying to show heterogeneity by disturbing and fragmenting what previously seemed consistent. See MICHEL FOUCAULT, Nietzsche, Genealogy, History, in THE FOUCAULT READER, supra note 16, at 76, 76-83.

258 See supra note 246 (distinguishes Derridean deconstruction from Gadamerian philosophical hermeneutics).
Once more, however, a parallel between the scholars and the Justices emerges. As is true of the Justices' decisions, the postmodern scholar's writings reflect his or her political inclinations. No single scholarly effort can exhaustively account for every potential truth or meaning within a text or event (since shifting horizons always generate new meanings, and the play of signifiers never ends), so the truths that each scholar emphasizes usually manifest his or her political views.

This recognition helps illuminate the burgeoning production of “different voice” scholarship—especially critical race theory and feminism—which highlights the previously oppressed voices or truths that emanate from the perspectives (or horizons) of historically oppressed racial, religious, and sexual minorities and outgroups. Different voice scholarship, from one view, can be understood as a manifestation of postmodernism. Because postmodernism is antifoundationalist and anti-essentialist, it justifies the expression of multiple truths and meanings and therefore explains how a minority or outgroup member can live multiple and often conflicting truths. The outgroup member frequently understands the dominant majority’s truth, but also understands (perhaps more deeply and vividly) the truth of the minority or outgroup. An African-American constitutional scholar, for instance, may recognize more readily than a white scholar that the Constitution is a tool of both oppression and liberation: the Constitution legitimated slavery and Jim Crow as legal institutions yet supported the Civil Rights Movement and desegregation. Thus, a person who lives (or perhaps empathizes with) the truths of a minority or an outgroup stands poised to recognize that the modernist's claimed essential or core truth is merely the socially accepted truth of a dominant majority. Postmodernism, in short, generates


260 See CONNOR, supra note 2, at 230 (describes feminism as a form of postmodern criticism); see, e.g., CAROL GILLIGAN, IN A DIFFERENT VOICE (1982) (feminist different voice writing); Suzanna Sherry, Civic Virtue and the Feminine Voice in Constitutional Adjudication, 72 VA. L. REV. 543 (1986) (feminist different voice jurisprudence).

261 See HARVEY, supra note 2, at 45-48 (linking postmodernism to different voice writing).

262 Mari Matsuda argues that minorities often adopt mainstream texts and beliefs, which have been tools of oppression, by recognizing the contradictions within those texts and beliefs and then transforming them to uncover their liberating elements. Matsuda, supra note 259, at 333-35; see Feldman, Whose Common Good, supra note 4, at 1857-58; see, e.g., DERRICK BELL, AND WE ARE NOT SAVED 251-54 (1987) (suggesting the possibility that the Constitution and American society can be transformed to eliminate economic oppression); Anthony E. Cook, Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr., 103 HARV. L. REV. 985, 1015-21 (1990) (religion both legitimated and delegitimated authority for African-American slaves). But cf. BELL, supra, at 22 (guarantees of racial equality get transformed into devices to perpetuate the racial status quo).
different voice scholarship by encouraging outgroup members to uncover previously suppressed truths and meanings.\textsuperscript{263} Different voice scholars, from this perspective, exemplify postmodernism; they are prototypical postmodernists.

Finally, let's do one more postmodern flip before collapsing from exhaustion. Although from one view, as just explained, different voice scholarship represents a manifestation or production of postmodernism, from a different view, the social and scholarly emergence of minorities and outgroup members has helped generate postmodernism. That is, postmodernism can be understood in part as a discourse that has emerged because of the multiple truths that different voice scholars uncover.\textsuperscript{264} By uncovering multiple truths where before but one appeared, different voice scholars have helped generate and justify the antifoundationalism and anti-essentialism characteristic of postmodernism. Different voice scholars repeatedly illustrate the Derridean play of signifiers by disclosing that seemingly stable modernist meanings are unstable and shifting. Different voice scholars, in short, provide the prototype for postmodernists.

Indeed, most cynically, postmodern "theory" can be perceived as an attempted colonization of the discourse of minorities and outgroup members. By categorizing different voice scholarship as postmodern, the postmodern theorist appropriates the message of the outgroup member. With an "imperialistic gesture," the postmodernist subsumes and conquers "the Other," transforming the uniqueness of different voice scholarship into more of "the Same," more of the postmodern.\textsuperscript{265} Moreover, this colonization threatens the politics of different voice scholarship. Christine Di Stefano, a feminist political theorist, rhetorically challenges the postmodernist: "Why is it, just at the moment in Western history when previously silenced populations have begun to speak for themselves and on behalf of their subjectivities, that the concept of the subject and the possibility of discovering/creating a liberating 'truth' become sus-

\textsuperscript{263} See generally Jameson, supra note 1, at 318 ("It is no less true that the 'micropolitics' that corresponds to the emergence of this whole range of small-group, nonclass political practices is a profoundly postmodern phenomenon.").

\textsuperscript{264} Connor underscores a paradox of this viewpoint:

In this account, allegedly dominant groups turn out to be somehow more alienated than those in the margins; being not only alienated in the first place (but how, and from what, if they are so mainstream and so dominant?) but alienated from their own alienation, in being so feebly tongue-tied about it.

Connor, supra note 2, at 189.

\textsuperscript{265} Bernstein, supra note 139, at 68-69. Jameson writes:

[M]icrogroups and 'minorities,' women as well as the internal Third World, and segments of the external one as well, frequently repudiate the very concept of a postmodernism as the universalizing cover story for what is essentially a much narrower class-cultural operation serving white and male-dominated elites in the advanced countries.

Jameson, supra note 1, at 318; see Connor, supra note 2, at 9-10.
Rephrasing this question, it can be posed expressly to Pierre Schlag: "Why do we question the ability of subjects to choose and pursue normative goals and values through the legal system just when historically oppressed and excluded subjects have gained sufficient social power and recognition so that they too might pursue their normative goals and values?" To Di Stefano, then, postmodernism represents an ideology that merely suits the needs of a particular and powerful societal group, "white, privileged men of the industrialized West." Postmodernists, in response to this attack, might insist that they neither colonize nor depoliticize different voice scholarship; rather (as already discussed) postmodern theory both builds upon and supports such scholarship. Indeed (possibly speaking for Schlag), one reason we now question the ability of subjects to choose and pursue normative goals is that different voice scholars have helped reveal that the very concept of the "choosing subject" represents a manifestation of a dominant majority's exercise of power. Of course, some critics of postmodernism, discounting such postmodern responses, might reply that the postmodern emphasis on the antifoundationalist and anti-essentialist play of signifiers inevitably leads to a "slippery slope of 'totalizing critique,'" which leaves no standard for criticizing oppression and domination. To be sure, the problem of justifying critique looms as a crucial difficulty for postmodernists, but postmodernism is not merely some grand theory that we can choose to reject because of some serious weakness. Postmodernism, at a minimum, is a cultural era or tradition that includes or manifests itself in certain types of theory. With this recognition, the problem of critique becomes a challenge that must be confronted, not a defect that somehow justifies the impossible (rejecting the postmodern).

266 Di Stefano, supra note 104, at 75 (citing Nancy Harstock, Rethinking Modernism: Minority v. Majority Theories, 7 CULTURAL CRITIQUE 187-206 (1987)).
267 Id. Critical race theorists echo similar suspicions of critical legal scholars, whose own status within postmodernism is somewhat unclear. For example, Kimberle Crenshaw emphasizes how oppressed minorities and outgroups often resist oppression by invoking rights, the hallmark of liberal individualism typically attacked by critical legal scholars. Kimberle Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 HARV. L. REV. 1331, 1350-63 (1988). Mari Matsuda suggests (contrary to Pierre Schlag) that those same "crits" should become more normative by drawing on the values of oppressed societal groups. Matsuda, supra note 259, at 323-26.
268 BERNSTEIN, supra note 134, at 151.
269 See BERNSTEIN, Serious Play, supra note 3, at 191; Patterson, supra note 22, at 305-16; supra note 183 and accompanying text.
270 See supra text accompanying note 1.
271 Some postmodernists argue that postmodernism includes an element of critique. See, e.g., CORNELL, LIMIT, supra note 22, at 62, 81-82; MICHEL FOUCAULT, The Ethic of Care for the Self As a Practice of Freedom (J. D. Gauthier trans.), in THE FINAL FOUCAULT 1 (James Bernauer & David Rasmussen eds., 1988). I too have attempted to develop critical standards from within postmodernism. See Feldman, The Persistence of Power, supra note 4, at 2276-90; Feldman, Republican Revival/Interpretive Turn, supra note 4, at 714-31.
IV. Conclusion

We now have explored manifestations of postmodernism in judicial practice and legal scholarship by performing several postmodern acts: we executed a postmodern deconstruction of the Supreme Court's Teague rule against new rules and thus revealed the Court's modernist errors; we flipped our paradigm and recognized how the apparently modernist Supreme Court reveals an understanding and commitment to certain postmodern themes; we again flipped our paradigm and described how the postmodern scholarship of Pierre Schlag expresses a commitment to similar postmodern themes; we again flipped our paradigm and diagnosed (from a postmodern perspective) how postmodern legal scholars partake in power by publishing to help reinscribe their positions within the university community; we again flipped our paradigm to show how postmodern scholars reveal certain lingering modernist themes; we again flipped our paradigm and realized that postmodern (and other) scholars, perhaps unlike Supreme Court Justices, primarily pursue truth and that this goal may have political consequences; and we again flipped our paradigm to realize that postmodernism not only helps generate different voice scholarship but that the social and scholarly emergence of minorities and outgroup members helps generate postmodernism itself.

Along the way, we have identified and discussed seven interrelated themes of postmodernism: first, antifoundationalism and anti-essentialism; second, a focus on the relation between language and power; third, self-reflexivity; fourth, irony; fifth, an emphasis on paradoxes; sixth, political ambivalence (insofar as postmodernism can be expressed as neo-conservative or radical); and seventh, a focus on the social construction of the subject. These seven themes might be understood as somehow defining postmodernism, but I do not wish to reduce postmodernism to any precise definition. Any attempt at a definition would be too modern, but I would prefer to remain thoroughly postmodern. But, of course, postmodernism includes vestiges of modernism, but preferably with touches of irony, but . . .

I conclude with a stanza from Stephen Sondheim:

Isn't it rich, isn't it queer,
Losing my timing this late in my career,
And where are the clowns,
Quick send in the clowns,
Don't bother, they're here.\(^\text{272}\)

\(^{272}\) Stephen Sondheim, *Send in the Clowns*, on *THE BROADWAY ALBUM* (Columbia Records 1985) (performed by Barbra Streisand).