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Rich, Textured, and Nuanced: Constitutional Scholarship and Constitutional Messianism at the Millennium

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Commentary

“Rich,” “Textured,” and “Nuanced”: Constitutional “Scholarship” and Constitutional Messianism at the Millennium

Dennis W. Arrow*

*The Pharaoh in his tomb . . . is an objet d'art, . . . and the images of the gods and goddesses that surround him, . . . having no longer any power, are not much more than a genial superstition. Even in Phara[oi]nic times they had their legend of a dying god—a god who has no worshipers any more. . . . It is the same with the hieroglyphics: after a time one does not look at them for the message they contain, . . . but simply as decorations on the wall*¹

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[Actually (and for reasons that will become apparent), none of them provided any, but “truth” is subjective, *n'est-ce pas*? See, e.g., ANDREW BOYD, *LIFE'S LITTLE DECONSTRUCTION BOOK: SELF-HELP FOR THE POST-HIP* (1998) [hereinafter *Rules for Postmodernists*] (Number 102: “Remember: there are no facts, only interpretations.”). But cf. LUDWIG WITTGENSTEIN, *TRACTATUS LOGICO-PHILISOPHICUS* 6 (D.F. Pears & B.F. McGuinness trans., Routledge & Kegan Paul Ltd. 1961) (1921) (“*Die Welt ist alles, was der Fall ist.*”). Besides, I thought that invoking the names of lots of famous law professors (and quoting Wittgenstein—in German!) in Footnote Asterisk might improve my chances of placing this essay in a prestigious review. Cf. *Rules for Postmodernists*, *supra* (Number 117: “Milk celebrity.”); *id.* (Number 130: “Package community.”); *infra* note 94 (contemplating vetting); Ronald J. Krotoszynski, Jr., *Legal Scholarship at the Crossroads: On Farce, Tragedy, and Redemption*, 77 TEXAS L. REV. 321, 329-30 (1998) (perhaps speculating on whether I, like any good postmodernist, take my Meaning solely from my perception of my perception in the eyes of others [Others?]); *Rules for Postmodernists*, *supra* (Number 118: “Lose the center.”). But cf. Krotoszynski, *supra*, at 330 n.28 (mischaracterizing my subtle and witty reference to Thomas Mann's *Doctor Faustus* in the self-identifying footnote of Dennis W. Arrow, *Pomobabble: Postmodern Newspeak and Constitutional “Meaning” for the Uninitiated*, 96 MICH. L. REV. 461, 461 n.2 (1997), as an “admission” that that unvetted work was unlikely to be published by a prominent review).]

1. ALAN MOREHEAD, *THE BLUE NILE* 111 (1962); cf. PETER IRONS, *BRENNAN VS. REHNQUIST* 20 (1994) (“To paraphrase General Clausewitz, constitutional litigation is politics by other means.”); CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999)

I. Introduction

Disappointed with the tendency of late twentieth century constitutional scholarship to degenerate into cheerleading for the platform planks of the left wing of the Democratic Party, and especially dismayed about an analytically thin but aggressively flatulent² strain of that genre known commonly as "legal postmodernism" (to the initiated, "legal pomo"), I decided to respond. But how?

Faced with an ocean of "scholarship"³ arguing that the United States Constitution compels—well, just about everything consistent with The Agenda that's opposed by electoral majorities, I knew I didn't have enough lifetimes for a point-by-point reply. So like all theorists (and "theorists"⁴) everywhere, I confronted the eternal question: *What Is to Be Done?*⁵

(arguing—quite convincingly—that being absolutely unprincipled often has instrumental utility); Mark Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411, 424 (1981) (suggesting that he would decide cases by making "an explicitly political judgment: which result is . . . likely to advance the cause of socialism? Having decided that, I would write an opinion in some currently favored version of Grand Theory"); Jean Baudrillard, *Game With Vestiges*, 5 ON BEACH 19, 24-25 (1984) ("Playing with the pieces—that is post-modern. . . . One plays . . . with things that one doesn't believe in anymore."). *But cf.* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 130 (1991) ("I am inclined to think the public cares very much about how a judge reaches a decision, as we would discover if a judge rendered a decision saying that his astrologer told him to decide a certain way, or . . . that he had been paid by one of the parties to decide as he did."). *But cf.* Steve France, *Opinions With Style*, ABA JOURNAL, Sept. 1999, at 38, 39 (noting Cass Sunstein's suggestion that judges simply lie about the actual bases for their decisions to facilitate public acquiescence in the imposition of The Agenda).

2. See SAUL D. ALINSKY, RULES FOR RADICALS 126 (1971) ("[I]f your organization is small in numbers . . . conceal the members in the dark but raise a din and clamor that will make the listener believe that your organization numbers many more than it does. . . . [I]f your organization is too tiny even for noise, stink up the place."). While the Pomo Corps is ubiquitous in academia, it's not even a blip on the real [gasp!] world's radar screen.

3. I learned the "scare quotes" trick from the postmodernists. See *Rules for Postmodernists*, *supra* note * (Number 267: "Put everything in quotes."). *But cf.* Arrow, *supra* note * *passim* (demonstrating that favorite postmodern adjectives such as "complex," "rich," "textured," "nuanced," and "democratic" in Pomospeak mean the opposite of what they mean in English—as does the moniker "postmodernism" itself).

4. See generally Arrow, *supra* note *, at 659 (distinguishing theory from "theory").

5. See generally NIKOLAI CHERNYSHEVSKY, WHAT IS TO BE DONE? (N. Dole & S.S. Skidelsky trans., Ardis Publishers 1986) (1863) (proffering socialism as the answer to the problems of Nineteenth Century Russia); VLADIMIR I. LENIN, WHAT IS TO BE DONE? BURNING QUESTIONS OF OUR MOVEMENT (Victor J. Jerome ed., Joe Fineburg & George Hanna trans., N.Y. Int'l Publishers 1969) (1902) (endorsing Chernyshevsky's answer); Richard Pevear, *Foreword* to FYODOR DOSTOEVSKY, NOTES FROM UNDERGROUND vii, xiii (Richard Pevear & Larissa Volokhonsky trans., Alfred A. Knopf 1993) (1864) (noting that Vladimir Lenin claimed that it was Chernyshevsky's book that made him a confirmed revolutionary); Arrow, *supra* note * *passim* (suggesting that Chernyshevsky may be the unacknowledged founding father of the [post]modern law-and-literature movement).

Since "naming" is all the rage nowadays,⁶ and since perception is power (and power is everything) in the postmodern world,⁷ I considered naming legal postmodernism "oligarchy," "totalitarianism," "Frenchified [French-Fried?] CLS,"⁸ or "Oceania,"⁹ and letting it go at that. But while that initially seemed like a good technique,¹⁰ postmodernists deny that postmodernism *has* an essence,¹¹ principles, or a perverse Twelve-Step Program,¹² and some, perhaps taking a lesson from the Mafia (or Alberich?¹³), deny that it *exists*.¹⁴ ["Float like a butterfly, sting like a bee; you can't hit what you can't see."]

Given those problems, I heeded Aristotle's admonition that "a man investigating principles cannot *argue* with one who denies their

6. See *Rules for Postmodernists*, *supra* note * (Number 99: "Name the ruling metaphor."); cf. Frank Lentricchia, *Last Will and Testament of an Ex-Literary Critic*, LINGUA FRANCA, Sept.-Oct. 1996, at 59, 64 (naming [gasp!] the essence of postmodernism's literature-department form: "All of literature is x and nothing but x, and literary study is the naming (exposure) of x. For x, read imperialism, sexism, homophobia, and so on."); CATHARINE A. MACKINNON, ONLY WORDS 28-29 (1993) (naming just about everything she doesn't like "rape").

7. See, e.g., Nancy Ehrenreich, *The Colonization of the Womb*, 43 DUKE L.J. 492, 506 (1993) ("[T]he power to define others—to affect how they are *perceived*—is the *power* to *control* them." (emphasis added)).

8. Much as Critical Legal Studies was a romanticized, radicalized, Sixtiesized version of Legal Realism, see, e.g., Louis B. Schwartz, *With Gun and Camera Through Darkest CLS-Land*, 36 STAN. L. REV. 413, 415-19 (1984), legal postmodernism preserves the extreme leftist, antirational, and anti-democratic features of CLS, but heavily intersperses it with a revised jargon, cf. *id.* at 414 (noting the centrality of neo-Marxist jargon to CLS), grounded [gasp!] in a pervasive dollop of Michel Foucault, Jacques Derrida, and other bad French "philosophers." Cf. LEO TOLSTOY, WHAT IS ART? 36 (Aylmer Maude trans., Liberal Arts Press, Inc. 1960) (1896) ("[H]owever cloudy the Germans may be, the French, once they absorb the theories of the Germans and take to imitating them, far surpass them in uniting heterogeneous conceptions into one expression and putting forward one meaning or another indiscriminately."); Cynthia Cotts, *Columbia University to Become a Mecca for Legal Philosophers*, NAT'L L.J., Nov. 17, 1997, at A18, A18 (quoting Jules Coleman supporting my "bad French philosophy" characterization); Arrow, *supra* note *, at 608 (defining "philosophy," in Pomoland).

9. See generally GEORGE ORWELL, NINETEEN EIGHTY-FOUR (Harcourt, Brace & World 1949) (contemplating life [?] in Oceania).

10. See *Rules for Postmodernists*, *supra* note * (Number 147: "Name what names you."); *id.* (Number 71: "Play the game."); cf. Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1387 (1997) (recapturing the lead in the "naming" game: "Some call this positivism. Others call it formalism. We call it law.").

11. See Arrow, *supra* note *, at 485 n.22, 510 n.29. But cf. EMMANUEL LEVINAS, *Substitution*, reprinted in THE LEVINAS READER 88, 90 (Seán Hand ed. & Alfonso Lingis trans., Basil Blackwell Publishers 1989) ("[W]hat is essential [gasp!] is a refusal to allow oneself to be tamed or domesticated by a theme.").

12. But cf. *supra* notes *, 6-11 and accompanying text (naming [gasp!] the components); *infra* text accompanying notes 30-36 (same).

13. See RICHARD WAGNER, DAS RHEINGOLD sc. 3 (noting the utility of Alberich's invisibility to the perpetuation of his reign of terror).

14. See, e.g., Richard Rorty, *Knowledge and Acquaintance*, NEW REPUBLIC, Dec. 2, 1996, at 46, 46 ("I have no idea what 'postmodernism' means . . ."). But cf. STEVEN BEST & DOUGLAS KELLNER, POSTMODERN THEORY: CRITICAL INTERPRETATIONS 1 (1991) (naming Rorty a postmodernist); Arrow, *supra* note *, at 629-37 n.46 (suggesting that Rorty is dissembling).

existence,"¹⁵ and, reasoning¹⁶ that its bubble might be more easily burst from within,¹⁷ decided to undertake a manned mission to the heart of Pomoland.¹⁸ So in late 1997, I published an article in the *Michigan Law Review* entitled *Pomobabble: Postmodern Newspeak and Constitutional "Meaning" for the Uninitiated*.¹⁹ In part, the abstract of that article reads as follows:

In what must surely be the most rich, textured, nuanced, and transgressive example of subversive postmodern narrative yet published in an American law review, Professor Arrow engages in what he apparently characterizes as a semiotic, cultural, and psychoanalytic study of postmodernism and its "theorizing" of American constitutional law. Perhaps deploying a number of variations on postmodern analytical style, Professor Arrow's narrative also appears to draw from the law-and-literature tradition, perhaps finding insights into the postmodern psyche, inter alia, in Thomas Pynchon's Blicero, Fyodor Dostoevsky's Pyotr, Joseph Conrad's Kurtz, and the real-life [?] adventures of medieval mystics Heinrich Suso, Nathan of Gaza, Sigmund Freud, and William James. Coming to grips with the insights of contemporary French [depressive] "philosophy," he may definitively establish the positions of Michel Foucault and Jacques Derrida in the cannon. He also makes a number of interesting observations about feet.

. . . .
Perhaps the article is a satire; perhaps not. It should go without saying that given the indeterminacy of language and the fluidity of meanings, any attempt to resolve that issue could only be quixotic.²⁰

In a recent issue of the *Texas Law Review*, Professor Ronald Krotoszynski wrote what is essentially a book review of my article (which may have been justified in view of its length), and though saying lots of nice things about it in passing,²¹ Krotoszynski is at least mildly critical of

15. ARISTOTLE, *Physics*, in THE COMPLETE WORKS OF ARISTOTLE I.2.185a3-185a4, at 315, 316 (Bollingen Series No. 71, Jonathan Barnes ed., 1984) (Revised Oxford Translation) (emphasis added).

16. *But cf. Rules for Postmodernists*, *supra* note * (Number 74: "Treat rationality as just another tradition.").

17. See ALINSKY, *supra* note 2, at 128 ("Make the enemy live up to their own book of rules.").

18. The reader will soon discover that like Joseph Conrad, I found Kurtz. See JOSEPH CONRAD, *HEART OF DARKNESS* (Robert Kimbrough ed., Norton & Co. 3rd ed. 1988) (1899); see also Schwartz, *supra* note 8 *passim* (doing the same—in CLS-Land).

19. See Arrow, *supra* note *.

20. Abstract (visited Aug. 14, 1999) <http://www.law.umich.edu/pubs/journals/mlr/issue96_3.htm> (brackets in original).

21. See, e.g., Krotoszynski, *supra* note *, at 323 n.12 (praising what he characterizes as my "amusing" MEZZATEXT—questions interpositioned between the text and the footnotes on each page); *id.* at 324 (acknowledging that "some legal scholarship has devolved so far into deconstructionist or

that work. (I drew the "at least mildly critical" conclusion after reading assessments such as "a war crime" in the "ongoing *Kulturkampf*,"²² and sentences such as: "[I]magine a law review article by Hunter S. Thompson after a really bad trip."²³) The purpose of this essay is both to explain how Professor Krotoszynski's criticism is misguided (though I sometimes revert to confession and avoidance), and to advance the critique that *Pomobabble* began.

II. The Retort

A. Subpart "A"²⁴

The reader who has come this far will have already had a glimpse²⁵ of both the thrust and the style of *Pomobabble*. It is (now it can be told!) both satire and parody, and packs a healthy dose of critical (if not "critical"²⁶) bite. Though its targets are not democratic institutions but

postmodernist jargon as to no longer be coherent"); *id.* ("Moreover, legal academics from a variety of ideological backgrounds are falling prey to the siren song of 'postmodern newspeak.'"); *id.* at 324 n.14 ("Professor Arrow's point is, at least arguably, on the mark."); *id.* at 324 n.15 ("I particularly liked Professor Arrow's citation to *You Are Special*, written by Fred Rogers (aka "Mr. Rogers"). Coming in a close second was Arrow's reference to the Oklahoma City telephone book." (citation omitted)); *id.* at 325 (characterizing *Pomobabble* as "very clever" and a "magnum opus"); *id.* at 328 ("Make no mistake, *Pomobabble* represents a major undertaking It roams across a vast expanse of knowledge, from main-line legal scholarship, to pop culture, to relatively complex theories of language and epistemology. There is some method to his madness"); *id.* at 326-27 ("Given that the emperor has no clothes, Arrow, like the young boy in the children's tale, should be lauded for stating openly what we all secretly know to be true."); *id.* at 328 ("Professor Arrow's work is a powerful, but sad, statement about the contemporary legal academy and the value of its scholarship.").

22. *Id.* at 322.

23. *Id.* at 323-24.

24. In defiance of Mort Horwitz. See Morton J. Horwitz, *The Supreme Court 1992 Term—Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 98-99 (1993) (characterizing organizational "[p]arts and subparts" as "medieval" "technicality" and "methodological obsession"). But cf. THOMAS MANN, DOCTOR FAUSTUS 175 (H.T. Lowe-Porter trans., Vintage Books 1948) (1947) ("Asterisks too are a refreshment for the eye and mind of the reader. One does not always need the greater articulation of a Roman numeral").

25. Postmodernists apparently get glimpses of things only after lots of gazing. Compare, e.g., Horwitz, *supra* note 24, at 117 (proffering a "glimpse[]" of a "model" for a "theory" of a morphing constitution), with MICHEL FOUCAULT, THE BIRTH OF THE CLINIC 195 (A.M. Sheridan Smith trans., Pantheon Books 1973) (contemplating gazing), and Joan C. Williams, *Rorty, Radicalism, Romanticism: The Politics of the Gaze*, 1992 WIS. L. REV. 131 (same). But cf. CONRAD, *supra* note 18, at 34 ("As for me, I seemed to see Kurtz for the first time. It was a distinct glimpse"); *id.* at 30 ("[W]hen one comes out here . . . it is not to gaze at the moon.").

26. As the reader will no doubt be aware, while the English word critical means critical, "critical" in both CLS-Speak and *Pomobabble* is often deployed to convey affinity with neo-Marxist and/or other class-warfare-oriented rhetoric. Cf. Arrow, *supra* note *, at 483 (defining "critique," in Pomoland: "white noise (buzzzzzzing); 'decentering' 'doublethink' 'discourse'; (alt): the Scream; (obsol.): unorderable cognitive chaos").

the postmodern constitutional messiahs, *Pomobabble* is as iconoclastic and irreverent as Duncan Kennedy at his best (worst?).²⁷

Like postmodern (and CLS) constitutional "scholarship," its intent is subversive—though the status quo it seeks to subvert is not structured constitutional interpretation²⁸ but the unvarying drumbeat of leftist constitutional "theory" emanating largely (though not exclusively) from elite law school faculties (and judicial reliance on the conclusions of such "scholarship"). Like other postmodern praxes,²⁹ *Pomobabble* experiments

27. You think Duncan Kennedy's stuff was edgy? Imagine an article that visualizes Kennedy morphing into Joseph Conrad's "harlequin" (or is it Jacques Derrida?), while providing commentary by Richard Farina, Mary Hopkin, and Gertrude Stein on the process, *see* Arrow, *supra* note *, at 618 n.45; that contemplates the dynamic possibilities of a *Bell Bottom Blues* duet between Kennedy and Eric Clapton, *see id.* at 596 n.42; that analogizes Cornel West's self-positioning techniques to those of the leaf butterfly, *see id.* at 577 n.39; that compares Cass Sunstein to Frank Norris's bearer of a gilded canary cage, but in this instance one confining women who reject Sunstein's brand of feminism, *see id.* at 518-20 n.29, 591 n.39; that dares to suggest that it may be *Sunstein's* expressed axiological preferences that are "endogenous," *see id.* at 519-20 n.29; that visualizes Mort Horwitz departing low Earth orbit for Mars on a postmodern Rocket [like Thomas Pynchon's *V* and *Gravity's Rainbow*, *Pomobabble* employs Rocket-as-metaphor], *see id.* at 622-24 n.45; that characterizes Sandy Levinson's approach to conversion-by-casebook as brainwashing, *see id.* at 639 n.46; that takes no issue with Alfredo Miranda's characterization of Richard Delgado's fictional character Rodrigo as an unauthentic nerd, *see id.* at 524 n.29; that unfavorably compares the intelligence of postmodernists with that of chimpanzees, cetaceans, and basset hounds, *see id.* at 568-69 n.37; that prescribes Prozac for postmodernist icon Julia Kristeva's apparently interminable infatuation with depression, *see id.* at 584 n.39; that proffers an 11-step logical proof (in symbolic notation) of the nonexistence of Richard Rorty, *see id.* at 636 n.46, and that does it all in the context of a search for Joseph Conrad's (or is it Francis Ford Coppola's? or John L'Heureux's? Kurtz (or is it Svengali?), *see id.* at 681-82 n.67. *Compare* Arrow, *supra*, with Richard Delgado, *Legal Scholarship, Insiders, Outsiders*, 63 U. COLO. L. REV. 717, 717 (1992) (defending "[c]ritical ['critical'] bite"), and Richard Delgado, *When Is a Story Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95, 100 n.31 (1990) (defending "naming names" of law professors he criticizes), and Arrow, *supra* note *, at 635-36 n.46 ("The Crits' attack on traditional scholarship was labeled 'trashing.' Some of the attacks were severe, irreverent, and unabashed." (quoting Alfredo Miranda)). *See generally* Schwartz, *supra* note 8, at 418 (perhaps suggesting that at least in evaluating Duncan Kennedy, "best" and "worst" may be indistinguishable terms).

28. *Compare* Horwitz, *supra* note 24, at 33 ("Drawing on developments in both the *philosophy of language* and the *sociology of knowledge*, legal thinkers have . . . concluded that . . . the process of categorization . . . is a social creation *Constitutional law* has been especially susceptible to the crisis of legitimacy that follows . . . destabilization." (emphasis added)), and *id.* at 98 (characterizing the existence of regularized constitutional-law standards of review as "theological" and fundamentalist), and *id.* at 98-99 (characterizing the Supreme Court's "fine distinctions that produce . . . opinions designated in Parts, sub-parts, and sub-sub parts" as "methodological obsessions," and its attempts to "classify[] and categoriz[e]" as "medieval" "technicality"), with MICHAEL DEVITT, *REALISM AND TRUTH* vii (2d ed. 1991) ("There is no sign that the 'sociologists of knowledge' are anywhere near distinguishing epistemology from metaphysics."), and Arrow, *supra* note *, at 491-502 n.24 (contemplating the possible influence of medieval mysticism on arch-postmodernist language-destroyer Jacques Derrida and others), and *id.* at 625 n.45 (characterizing Horwitz's proffered "model" for constitutional interpretation as a "glimpse" [gaze?] into the *abyeme*). *But cf. id.* at 627 n.45 (quoting former NFL Commissioner Pete Rozelle on Oakland Raiders managing partner and former coach Al Davis: "Al says he's not for anarchy, and I'm sure he wants a stable league. *He just wants anarchy for himself.*" (emphasis added))).

29. In Pomoland, "praxis" means no more than "practice," *but cf.* Laura Secor, *Testaments Betrayed*, LINGUA FRANCA, Sept. 1999, at 26 (narrating some of the adventures of the Yugoslavian "Praxis" Marxists as tribalist coconspirators of Slobodan Milosevic), but obscure jargon is *de rigueur*

with varying typefaces throughout its text and footnotes,³⁰ employs the metaphor of shattered glass as a recurring *leitmotif* (though performing a “postmodern flip” in so doing),³¹ and in passing touches all the postmodern bases, from juvenile linguistic,³² ontological, and epistemological³³ agnosticism to depression, nineteenth century romanticism, unfulfilled and undifferentiated emotional yearnings, water symbolism, Death-obsession, mysticism, reliance on untethered rhetoric, rejection of nature, putative self-abnegation, distortion of history, rejection of morality (while laying claim to it), claiming the mantle of pragmatism (while falling heels over head into the *abyss* of what John Dewey condemned as “sentimental gush”³⁴), obliviousness to secondary

(as is the use of French and German phrases) in its domain. Besides, if the writing is sufficiently obscure, the marks might conclude that the reasoning *must* be profound, skip over it, and be more likely to trust the *conclusions*. Subtle, eh? See Arrow, *supra* note *, at 479 (defining “complex,” in Pomoland: “the way *everything* looks to those lacking both knowledge and reason; see also ‘rich,’ ‘textured,’ ‘nuanced’; but in ‘context,’ it’s really quite simple . . .”). See generally *State of the Art Bad Taste*, CANBERRA TIMES, May 22, 1999, at 2, available in LEXIS, News Library, Canber File (“The idea is to fool the reader into thinking [that] some profound thoughts are there, just beyond his/her comprehension.”).

30. See, e.g., JACQUES DERRIDA, GLAS (John P. Levy, Jr. & Richard Rand trans., Univ. of Neb. Press 1986) (1974).

31. While the postmodernists find their “fun,” see Arrow, *supra* note *, at 563 (defining “fun,” in Pomoland: “social construct: see ‘enthusiasm’ ‘hollowness,’ ‘sterility’ ‘chains’; all variants obsolete”), in the shattering, see *Rules for Postmodernists*, *supra* note * (Number 285: “Find beauty in the breakdown.”), I take pleasure in the reconstruction:

[W]hen I (not “I”), as in some of the footnotes, speak in some of my other voices (not “voices”), I engage in a (semi)semiotic experiment: to test my ability to convey determinate meaning (not “meaning”) *without actually saying anything at all*. Cf. SOUTHWESTERN BELL GREATER OKLAHOMA CITY YELLOW PAGES 498-508 (1996) (listing local facilities for repair of shattered glass); GEORGE L. KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS* (1996) (discussing some extrinsic benefits of same); Karleen Chinen, *Restoring Structures, Building Lives*, MĀLAMĀLAMA, Winter 1997, at 18, 18 (same).

Arrow, *supra* note *, at 471 n.10. In fact, the string-citation style found in most of *Pomobabble’s* footnotes is an illustration of how the fragments that the legal postmodernists think they have permanently deconstructed (and then some) may be pieced back together—to reveal a truth more enduring and complex (not “complex”) than they can even imagine.

32. See, e.g., Megan Rosenfeld, *Scandal’s Legacy: The Trite and the True*, WASH. POST, Feb. 6, 1999, at C1, available in 1999 WL 2197952 (quoting Bill Clinton, America’s first (and last) postmodern president: “It depends on what the meaning of the word ‘is’ is.”); cf. Janet Tassel, *The 30 Years’ War*, HARV. MAG., Sept.-Oct. 1999, at 56, 99 (“President Clinton would fit in wonderfully with the [Harvard] English Department . . .”) (quoting Harvard College junior Roman Martinez). See generally *Rules for Postmodernists*, *supra* note * (Number 20: “Dissolve truth into a patchwork of language games.”).

33. Do I exist? Do you? Are you *sure* you’re now reading the *Texas Law Review*? Cf., e.g., *Rules for Postmodernists*, *supra* note * (Number 95: “Open up an abyss of infinite analytical regress.”); Arrow, *supra* note *, at 684 (raising the intriguing question whether that article even exists); *id.* at 684-85 n.68 (contemplating the fascinating epistemological and ontological possibilities emanating from the existence [gasp!] of the number zero).

34. JOHN DEWEY, *HUMAN NATURE AND CONDUCT* 20 (Modern Library 1957) (1922). Compare MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960*, at 209-10 (criticizing

consequences, and professed abhorrence of Manichean dualities (while applying dualistic thinking to condemn everything the postmodernists don't like), and from wordplays and morphing to pop culture and TV. To get a handle on this "rich," "textured," and "nuanced" bouillabaisse, *Pomobabble* "updates" *The Bluebook*, adding *watch*, *hear*, *taste*, and *grok deeply* as signals. (It's the "new semiotics," don'cha know?). And as a bonus, it's even a *narrative*.

As its syllabus indicates, *Pomobabble* is laden with literary references, the significance of which (beyond their obvious allusion to the trendy and ponio-related law and literature movement) will be revealed later in this essay. [Speaking of revelations, postmodern mystics will be delighted to learn that *Pomobabble*'s footnote numbering, number of footnotes, number of subparts within each footnote, and even the number of dots separating the subparts have numerological significance.] And some very bright readers have confirmed to me that its underlying tone of paranoia ("there's a vast conspiracy out there thinking about little other than marginalizing us"³⁵) and schizophrenia ("it's all surfaces; there's no depth, anywhere"³⁶) fits the postmodern style to a T. Except for its expressed preference for self-government [*gasp!*], *Pomobabble*, even structurally, is a postmodern text that presses the postmodern style to its logical (or whatever) conclusion, and one-ups it at every turn along the way.³⁷ "[I]magine Hunter S. Thompson as a professor of constitutional law. [?] Now imagine a law review article by Hunter S. Thompson after a really bad trip. [?]"³⁸ *Precisely!*³⁹

"constructive mode" legal realism for subordinating "passion" to social science expertise), with DEWEY, *supra*, at 231-33 (suggesting—as Dewey does so well—that the road to hell is often paved with "good" intentions), and Hillary Putnam, *Afterword to Symposium on the Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1911, 1914 (1990) (noting Charles Peirce's self-designation as a "fallibilist," but suggesting that the "new" pragmatism may not be much concerned about consequences).

35. See, e.g., Arrow, *supra* note *, at 599-607 & n.43 (expanding further the "paranoia" theme); William Bywater, *The Paranoia of Postmodernism*, 14 PHIL. & LITERATURE 79 (1990) (comparing the symptoms of postmodernism with those of paranoia); Francis J. Mootz, *The Paranoid Style in Contemporary Legal Scholarship*, 31 HOUS. L. REV. 873, 879 (1994) (suggesting that Pierre Schlag's idealized postmodern critic exhibits a paranoid "style of functioning").

36. See, e.g., *Rules for Postmodernists*, *supra* note * (Number 318: "Dabble in schizophrenia."); *id.* (Number 6: "Expose depth as another surface."); Arrow, *supra* note *, at 484-85 n.21 (quoting Thomas Pynchon on postmodern schizophrenia); Robert Post, *Postmodern Temptations*, 4 YALE J.L. & HUMAN. 391, 392-94 (1992) (noting the postmodernists' loss of time, depth, and nature as sensory and intellectual inputs, and the consequential tendency of writings of postmodern academics to degenerate into "schizophrenic nominalism").

37. See generally *Rules for Postmodernists*, *supra* note * (Number 198: "Leave the *avant garde* behind."); *infra* note 87 and accompanying text (contemplating the significance of one-upmanship in playing the "scholarship" game).

38. Krotoszynski, *supra* note *, at 323-24.

39. Though Professor Krotoszynski may be forgiven for having apparently failed to notice it, Dr. Thompson is quoted a number of times throughout *Pomobabble*. Compare *supra* text accompanying

B. Krotoszynski's Three Critiques

Apart from the Hunter Thompson line (which he apparently but mistakenly views as criticism), Professor Krotoszynski apparently has three fundamental problems with *Pomobabble*. First (as he evaluates my work⁴⁰), I don't take "narratives" seriously as legal scholarship.⁴¹ Second, insofar as *Pomobabble* questions the postmodernists' (and other would-be constitutional messiahs') motivations, it's *ad hominem*.⁴² Third, it's too long: as Krotoszynski puts it, "[a] reader who undertakes twenty pages of *Pomobabble* . . . is apt to reap as much comic or satiric value from the 'article' as someone who reads 228 pages of *Pomobabble*."⁴³ Before moving on, let's briefly explore those critiques.

1. "Narrative" as Drivel.—For the benefit of those readers who wisely avoided plodding through any of the "narrative" stuff that was *très chic* from the mid-80s to the mid-90s,⁴⁴ here's how it worked. First, pick

note 38 (quoting Krotoszynski on Dr. Thompson and your humble narrator), with Arrow, *supra* note *, at 485 n.21 (quoting David Luban: "Roll Over Beethoven . . . a dialogue between 'Peter' and 'Duncan' . . . often sounds like a pair of old acid-heads chewing over a passage in Sartre."), and *id.* (quoting William James on nitrous oxide).

40. Professor Krotoszynski implicitly corroborates at least one of *Pomobabble*'s underlying themes: that at least for the portion of the Earth's population that does not consist of postmodern deconstructionists, *cf. supra* note 27 (extending the premise to chimpanzees, cetaceans, and basset hounds), it is possible to extract determinate meaning from text. And if that principle extends to law review articles in which the author says almost nothing at all, *see supra* note 31 (commenting on the method by which *Pomobabble* works its magic); *cf. Arrow, supra* note *, at 469 n.10 (quoting Leo Strauss further explicating same), who knows how far it might extend? Perhaps even [*gasp!*] to the *United States Constitution*? *Cf. Edward L. Rubin, The New Legal Process, The Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1401 (1996) (noting that the crits' and postmodernists' "indeterminacy" argument ultimately undermines their own axiological preferences—at least for those who care about such banalities as consistency and legitimacy: "[T]he critical legal studies claim . . . called into question the interpretive theory that served as the basis for an activist judiciary [I]f the [constitutional] text is indeterminate, then the judiciary's power rests on mere political will."). But if it's all power and one doesn't care about legitimacy, *see, e.g., SUNSTEIN, supra* note 1 *passim*, then (since the American people still have the *ultimate* structural power) Justice Scalia has identified the solution:

[I]f in reality our process of constitutional adjudication consists primarily of making *value judgments* . . . [,] confirmation hearings for new Justices *should* deteriorate into question-and-answer sessions in which Senators go through a list of their constituents' most favored and most disfavored alleged constitutional rights, and seek the nominee's commitment to support or oppose them.

Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 1000-01 (Scalia J., dissenting); *see also* LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT* (1985) (approving the practice of confirming or rejecting Supreme Court nominees based on their personal views and philosophies).

Poof!

41. *See* Krotoszynski, *supra* note *, at 321-22.

42. *See id.* at 322.

43. *Id.* at 324-25.

44. *Cf. Arrow, supra* note *, at 550 (defining "fashion" as "that which becomes unfashionable").

a result (any result) from among those endorsed by the political Left. Then, write a sophomoric, leaden, and preachy story (preferably a one-dimensional one, with one-dimensional characters) getting you to the desired political outcome in fifteen to twenty-five pages. (You can even tell the story as if it were true; if it's later revealed to be false, you can rely on the "subjectivity of truth" presupposition⁴⁵ to argue that truth doesn't matter.⁴⁶) While you're working on your third "narrative,"⁴⁷ apply for tenure, ever-prepared to invoke Richard Delgado's argument (supported by a chorus of politically like-minded cheerleaders,⁴⁸ and others hoping to ride the "narrative" bandwagon to tenure or a more prestigious faculty appointment) that since there are no objective criteria for "merit" in legal scholarship, everything's pretty much all the same.⁴⁹

45. See, e.g., *supra* note * (quoting *Rules for Postmodernists*, Number 102); *supra* note 32 (quoting same, Number 20).

46. Having initially (and subsequently) presented her famous discrimination-at-the-Benetton-store story as if it were true (as "true" is generally thought of on this planet), see PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 44-50 (1991), Patricia Williams and her defenders later argued that even if the story were false (assuming there can be falsity in Pomoland), the falsity wouldn't matter. See, e.g., Richard Delgado, *On Telling Stories In School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665, 675 (1993); cf. Chris Hutton, *Flashpoints in Legal Scholarship: Postmodern Theory, Race and Narrative*, 43 S.D. L. REV. 739, 741 (1998) (book review) (characterizing the resultant attitude as an "almost-casual rejection by some of the radical multiculturalists of the need to distinguish between fact and fiction in storytelling"). Williams even extends the principle beyond law review "narratives" to the real [gasp!] world, arguing with respect to the infamous Tawana Brawley hoax that Brawley "has been the victim of some unspeakable crime. . . . No matter who did it to her—and even if she did it to herself." See WILLIAMS, *supra*, at 169-70. [If she did it to herself, then that, like everything else, is pretty much the fault of straight white guys, see? See generally Lentricchia, *supra* note 6, at 64 ("For x, read imperialism, sexism, homophobia, and so on.")]. Fortunately, few outside the la-la-land of left-wing academia take such nonsense seriously. Compare Larry Rohter, *Nobel Winner Finds Her Story Challenged*, N.Y. TIMES, Dec. 15, 1998, at A1, available in LEXIS, News Library, NYT File (independently verifying anthropologist David Stoll's allegation that left-wing Mary figure Rigoberta Menchú's purported autobiography is a fraud), and Footnotes, CHRON. HIGHER EDUC., Feb. 26, 1999, at A12, available in LEXIS, News Library, Cheduc File ("In the two months since her popular autobiography was labeled a fraud, Rigoberta Menchú has moved closer to acknowledging that at least some of the accusations are [gasp!] true."), and Robert Holland, *Every Day Is April Foolish for Academe's PC Loonish*, RICHMOND TIMES-DISPATCH, Apr. 7, 1999, at A13, available in 1999 WL 4352333 (noting the earning of a "Polly" award by the entire Ivy league for attempting to canonize Menchú's fraud), with Hal Cohen, *The Unmaking of Rigoberta Menchú*, LINGUA FRANCA, Jul.-Aug. 1999, at 48, 52 ("The defense is . . . to question why [we] grant more credibility to . . . [an] anthropologist who is male, white, tall, and gringo, than to a Nobel laureate with a proven record . . . in the defense of the oppressed. . . ." (quoting Arturo Arias) (first bracket in original)), and Robin Wilson, *A Challenge to the Veracity of a Multicultural Icon*, CHRON. HIGHER EDUC., Jan. 15, 1999, at A14, available in LEXIS, News Library, Cheduc File (quoting Wellesley's Marjorie Agosin on Menchú's memoir: "Whether her book is true or not, I don't care."). See generally *Rules for Postmodernists*, *supra* note * (Number 47: "Stake all on the charisma of the storytellers.").

47. See generally YEVGENY ZAMYATIN, WE 17 (Clarence Brown trans., Penguin Books 1993) (1924) ("Simply by turning this handle, any one of you can produce up to three sonatas per hour.").

48. See generally Arrow, *supra* note *, at 646 (defining "repetitive and cumulative incantation," in Pomoland).

49. See Delgado, *supra* note 46, at 673-75.

Voila! Law-school faculty tenure, without ever having to demonstrate a capacity for doing anything else.

To take just one example, here's how an early "narrative" begins:

REBECCA: Dad, I am so happy. I just learned that I am pregnant. . . .

. . . .

ROBERT: . . . [A]re you going to be able to manage? . . .

REBECCA: I'll be fine. . . . I'll only miss three months of work [at the bank]

. . . .

ROBERT: . . . It seems to me that the bank may say your job may be guaranteed when you come back, . . . but may not do it in practice.⁵⁰

Any wagers on what the message turns out to be, eighteen pages later? But people still get tenured (and appointed to more prestigious faculties) for such stuff.⁵¹

Having 'fessed up in the preceding two paragraphs, there's no sense in denying it now. The "agony tales"⁵² are not serious legal scholarship (except in Pomoland, where *anything* far to the Left qualifies), and *Pomobabble* (which strongly implies that they might be more appropriately "published" on *Oprah!*⁵³ or the Women's Misery Channel⁵⁴) makes no bones about it, either. But in holding those views (if not in expressing them publicly), I'm solidly in the center of mainstream legal academia.⁵⁵

50. Richard Delgado & Helen Leskovac, *The Politics of Workplace Reforms: Recent Works on Parental Leave and a Father-Daughter Dialogue*, 40 RUTGERS L. REV. 1031, 1040 (1988).

51. See Delgado, *supra* note 46, at 676 ("[M]ost of the voices have tenure."); *id.* at 672 (noting the not-infrequent placement of "narratives" in top-tier journals (at least as of 1993)). But see Arthur Austin, *The Alchemy of Promotion and Tenure*, 75 DENV. U. L. REV. 1 (1997) (presenting a counter-narrative suggesting that the principle may be limited to the tenuring and advancement of professors whose "narratives" are consistent with The Agenda).

52. See Delgado, *supra* note 46, at 670 (so naming a common critical (though not "critical") characterization of "narratives").

53. See Arrow, *supra* note *, at 595 (defining "narrative," in Pomoland: "'democratic history'; (alt.): watch *Oprah!*; see generally 'avoidance behavior,' 'self(?)-indulgence,' 'narcissism,' 'voice,' 'interesting'; all variants obsolete."). But see *id.* at 546-47 n.30 (quoting *Prozac Nation* author Elizabeth Wurtzel on her reasons for deciding not to appear on *Oprah!*). But cf. *Rules for Postmodernists*, *supra* note * (Number 13: "Publicize your privates.").

54. For non-cable-TV fans, it's *The Lifetime Network*.

55. Even Richard Delgado characterizes the response of the "mainstream scholars" as "guarded," see Delgado, *supra* note 46, at 672 n.51, and if further proof of the accuracy of my "mainstream" self-characterization were needed, the reliably Left-wing hierarchy of the Association of American Law Schools, see, e.g., Dennis W. Arrow, *Rhode Attacks Academic Freedom From Within*, NAT'L L.J., Mar. 1, 1999, at A21, apparently believes it necessary to mandate that the "narrative" stuff be taken seriously in promotion and tenure decisions. See *Report of the AALS Special Committee on Tenure and the Tenuring Process*, 42 J. LEGAL EDUC. 477, 505 (1992) (establishing the Party line).

For other works publicly critical of the "narrative" movement, see, for example, DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN*

Apart from my confession, however, I also tender an avoidance. Even assuming, perhaps counterfactually,⁵⁶ that the intent of the "agony tales" is to affect courts and not legislatures (where almost anything goes) or others, few if any judges have been so foolish as to rely on such "scholarship," even for reasons extrinsic to the possibility of its ultimate empirical [*gasp!*] disverification.⁵⁷ That being the case, criticism of the "narratives" occupies a minuscule portion of *Pomobabble's* attention. That work, in short, has bigger fish (sorry, Stan) to fry.

2. *Motives as Fair Game.*—Perhaps unaware that the Legal Realists made careers out of second-guessing the motives of judges⁵⁸ (which

AMERICAN LAW (1997); Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993); Randall L. Kennedy, *Minority Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989) and Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251 (1992). Sadly (and as most sentient law professors will acknowledge upon reflection), in the current academic climate (and even without AALS mandate), there's not even the slightest tension between my proposition that most law professors don't take the "agony tales" seriously as legal scholarship and my proposition that people get tenured and occupationally advanced for such stuff.

56. See Delgado, *supra* note 46, at 671 (suggesting that the audience may be the group whose purported "agony" is being ventilated, or politically like-minded law professors); cf. Mark V. Tushnet, *The Left Critique of Normativity: A Comment*, 90 MICH. L. REV. 2325, 2346 (1992) (suggesting that some non-"narrative" left-wing legal writing may be "aimed at shoring up confidence among left legal academics at a time when their project seems unpromising in the arena of politics and unsustainable in the arena of intellectual discourse"); Walter Benjamin, *One-Way Street*, in ONE-WAY STREET AND OTHER WRITINGS 444, 460 (Marcus Bullock & Michael W. Jennings eds., 1996) ("For the critic, his colleagues are the higher authority. Not the public. Still less, posterity.").

57. At least in non-postmodern, logically- and/or empirically-based epistemologies. See Kathryn Abrams, *How to Have a Culture War*, 65 U. CHI. L. REV. 1091, 1107 n.34 (1998) (book review) (contrasting the epistemologies of Patricia Williams and John Stuart Mill); *supra* note 46 (describing and commenting on the postmodern approach to (avoidance of?) truth). On one point, however, Professor Delgado and I would agree: assuming that Williams's Benetton store story, see *supra* note 46, is empirically [*gasp!*] false, its publication would indeed lead to a "deeper truth." See Delgado, *supra* note 46, at 675. We would disagree, however, on what that "deeper truth" is. Cf. Daniel Mendelsohn, *The Stand*, LINGUA FRANCA, Sept.-Oct. 1996, at 34, 34-35 (describing allegations that the lower-court decisions that led to *Romer v. Evans*, 517 U.S. 620 (1996), were based on perjured testimony by Martha Nussbaum); Richard Harwood, *How Lies See the Light of Day*, WASH. POST, July 13, 1998, at A21 (endorsing John Stuart Mill's epistemology in journalism, but eschewing commentary about legal scholarship). Harwood also comments, inter alia, on Janet Cooke's infamous seven-year-old-heroin-addict "story":

Journalism also has attracted its share of zealots who set out to prove a thesis regardless of the evidence

. . . .

Part of [the problem] is the 'New Journalism,' . . . [which] endowed lesser reporters and writers with literary room to employ fictional techniques in the service of 'realism,' 'meaning,' and 'truth,' blurring the definition and function of journalism itself.

Id.

58. See, e.g., Rubin, *supra* note 40, at 1395 ("[T]he realists maintained that general legal principles do not exist: law is always the creation of some specific lawmaker, whether legislator . . . or judge, and it usually reflects the policy predilections of that lawmaker.").

invariably turned out to be the oppression of the marginalized), that the CLSers were also addicted to "shallow psychologizing,"⁵⁹ and that postmodern hermeneutics⁶⁰ deems it mandatory to inquire into speakers' (and writers') motivations to gain "insights" into the "unsaid side of the discourse,"⁶¹ Professor Krotoszynski seeks to put the *postmodernists'* motivations off-limits.⁶² But apart from the obvious retort (that *Pomobabble* is a parody), Krotoszynski's residual but unstated premise (that would-be constitutional hijackers get to dish it out without having to take it) is but a subset of doublethink.⁶³

Since doublethinking is no problem for postmodernists, however, that hasn't prevented them from attempting Orwellian "crimestop,"⁶⁴ a technique by no means limited to attempted self-immunization from motivation-oriented inquiries. To take just two examples, when William Ewald so systematically debunked CLS "Christ figure"⁶⁵ Roberto Unger's so carefully-crafted pseudo-profundity some years ago,⁶⁶ Cornel West's response—that Ewald's work was a "mean-spirited academic putdown"⁶⁷—was predictable (if non-responsive). And more recently, Richard Delgado and Jean Stefancic have even attempted to insulate the

59. See, e.g., Schwartz, *supra* note 8, at 414 (explaining how the CLSers achieved a "high moral tone" by using "jargon, shallow psychologizing [and] moralistic preachiness").

60. See Arrow, *supra* note *, at 465 n.10 ("Hermeneutics is the 'theory or art of explication, of interpretation.'" (quoting Sanford Levinson and Steven Mailloux quoting Hans-Georg Gadamer)); *id.* ("Hermeneutics strives to understand what is said by going back to its *motivations*, or its *context*" (quoting Jean Grondin)); *cf. id.* at 564 (defining "Hermes," in Pomoland: "the possessor (are you following me?) of the greatest lyre of them all").

61. *Id.* at 465 n.10 (quoting Jean Grondin).

62. See Krotoszynski, *supra* note *, at 322.

63. See ORWELL, *supra* note 9, at 36. Orwell's protagonist struggles with the concept: Winston[s] . . . mind slipped away into the labyrinthine world of doublethink. To know and not to know, to be conscious of complete truthfulness while telling carefully constructed lies, to hold simultaneously two opinions which canceled out, knowing them to be contradictory and believing in both of them, to use logic against logic, to repudiate morality while laying claim to it, to believe that democracy was impossible and that the Party was the guardian of democracy, to forget whatever it was necessary to forget, then to draw it back into memory again at the moment when it was needed, and then promptly to forget it again

Id.

64. See *id.* at 258 (quoting O'Brien: "It is intolerable to us that an erroneous thought should exist anywhere in the world, however secret and powerless it may be. . . . The command of the old despotisms was 'Thou shalt not.' The command of the totalitarians was 'Thou shalt.' Our command is 'Thou art.'"); *cf. id.* at 213-14 (discussing the sublime relationship between "crimestop" and "doublethink").

65. Schwartz, *supra* note 8, at 416.

66. See William Ewald, *Unger's Philosophy: A Critical Legal Study*, 97 YALE L.J. 665 (1988). As Fate would have it, the same issue of the *Yale Law Journal* contained an article by Alan Watson systematically debunking Duncan Kennedy's assessment of Blackstone. See Alan Watson, *The Structure of Blackstone's Commentaries*, 97 YALE L.J. 795 (1988).

67. Cornel West, *CLS and a Liberal Critic*, 97 YALE L.J. 757, 758 (1988).

crits' (and postmodernists') projects from *laughter*.⁶⁸ But despite those self-insulating taboos, which if honored would abandon the field of published constitutional "scholarship" solely to the Left (and that's, of course, the objective), *Pomobabble* both consciously and wilfully dishes out to the crits and postmodernists precisely what they've been dishing out for a generation.⁶⁹ With relish.

3. *It's Too Long*.—Two hundred and twenty-eight pages long, to be exact, with the pages (except for the *real* definitions of postmodern jargon and the *MEZZATEXT*⁷⁰) consisting almost exclusively of *Pomobabble*'s sixty-nine footnotes (one of which must set some kind of record at thirty-one pages in length⁷¹). Professor Krotoszynski's problems with that length are twofold: (1) you'll get just as much comic or satiric value from reading twenty pages of it as you will from reading the whole thing;⁷² and (2) the pages it consumed in the *Michigan Law Review* might otherwise have been devoted to really important stuff (or at least stuff from young professors on the make).⁷³ Lest I fall victim to Krotoszynski's criticism in this essay,⁷⁴ a few responsive comments should suffice.

68. See Richard Delgado & Jean Stefancic, *Scorn*, 35 WM. & MARY L. REV. 1061 (1994) (helpfully instructing us on what is Authorized to be perceived as funny in the '90s, and why). But see Arrow, *supra* note *, at 655-56 n.50 (either rejecting the proscription or performing yet another "postmodern flip"). See generally Jacques Derrida, *Living On • Border Lines* (James Hulbert trans.), in *DECONSTRUCTION AND CRITICISM* 75, 152 (Harold Bloom & William Golding eds. 1979) ("Shall we leave this text on its own power?").

69. See, e.g., Arrow, *supra* note *, at 491-502 n.24 (contemplating mystical redemption, dualism, and "holy sinners"); *id.* at 553-63 n.33 (contemplating, inter alia, the Ford fruit, the Guggenheim vine, and feet); *id.* at 573-92 n.39 (contemplating "love"); *id.* at 610-27 n.45 (contemplating power); *id.* at 521-39 n.29 (contemplating many things).

I almost hesitate to note (for Professor Krotoszynski's sake) that having criticized *Pomobabble* for having dared to question the postmodernists' motivations, Professor Krotoszynski proceeds to question mine for having written it. See Krotoszynski, *supra* note *, at 328. Having noted in passing that "[a]s it happens, Professor Arrow teaches at the Oklahoma City University School of Law," *id.* at 330, you can hear him wondering whether I'm trying to write my way up the food chain as you peruse the three-and-a-half pages in which he contemplates my motivations. Too good. Cf. JOHN L'HEUREUX, *THE HANDMAID OF DESIRE* 29 (1996) ("This was what the Turks could never understand about [the 'fools']: they were content.").

70. See *supra* note 21 (describing *MEZZATEXT*).

71. See Arrow, *supra* note *, at 508-39 n.29.

72. See *supra* text accompanying note 43 (quoting Krotoszynski).

73. See Krotoszynski, *supra* note *, at 325-26. Here, Professor Krotoszynski treats us to a bit of an "agony tale" himself:

As winter ebbs and spring flows, younger (read: untenured) faculty across the United States race to complete works in the hopes of presenting their wares to the new editorial boards just assuming their year-long stewardship of the nation's law reviews. Many law professors work long hours and weekends, trying to complete works before the crush of examinations

Id. at 325-26.

74. Professor Krotoszynski wisely reminds us that a picture may be worth a thousand words, see Krotoszynski, *supra* note *, at 325 n.18, and in an attempt to keep *Pomobabble* from going over

First, *Pomobabble* is a parody. Read Derrida lately?⁷⁵

Second, while I (and based on the letters I received, many of *Pomobabble*'s readers) disagree with Krotoszynski's observation that you'll get as much comic or satiric value from reading a snippet as from reading it all, let's concede his proposition for the sake of argument.⁷⁶ But since the *project* of *Pomobabble*'s targets isn't really very funny (at least to aficionados of self-government),⁷⁷ its ultimate objective isn't humor but counterrevolution. The smile-per-page and belly-laugh-every-three that it hopefully provides (except to crits and postmodernists, who almost never laugh,⁷⁸ and certainly not at themselves⁷⁹) are intended, *inter alia*,⁸⁰ to

200,000 words, I did reproduce René Magritte's *The Submissive Reader* at the conclusion of that work. See Arrow, *supra* note *, at 689. To demonstrate that my endorsement of Krotoszynski's proposition isn't halfhearted, with the help of a talented Oklahoma artist, I created a work of art (a takeoff of Dali's *Santiago el Grande*) especially to accompany this essay. See *infra* "text" accompanying note 119.

75. See *infra* note 81 (commenting on same); cf. M.D.A. FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE 952 (6th ed. 1994). Freeman explains:

Fighting, as they saw it, fire with fire, the Crits responded to long articles in elite law journals with longer articles in elite law journals. . . . [F]rom the C.L.S. point of view, . . . they were matching a local discourse of power and constraint . . . with a discourse of resistance. It is a modest form of political action simply to try to reduce the authority of those people who control the local situation

Id.

76. "The task of discerning what is . . . humorous from what is not is inherently subjective. This observation is provided by standpoint epistemology, or, as it is also known, situational comedy." J.T. Knight, Comment, *Humor and the Law*, 1993 WIS. L. REV. 897, 899 n.16.

77. In an embarrassingly complimentary letter to your humble narrator from America's greatest living historian, Bernard Bailyn concludes: "Great fun, but the target is not funny, alas." Letter from Bernard Bailyn, Adams University Professor, Emeritus, Harvard University, to the author (June 23, 1998) (on file with the *Texas Law Review*). [Unlike Janet Cooke, who was forced to relinquish her Pulitzer Prize in the interests of [gasp!] truth, see *supra* note 57 (describing Cooke's infamous "story"), Bailyn's gotten to keep both of his.] See generally BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (enlarged ed. 1990) (suggesting that self-government may not be such a bad thing); Arrow, *supra* note *, at 674 n.67 (suggesting the same (and quoting Winston Churchill)).

78. See Arrow, *supra* note *, at 650-56 n.50 (exploring the mal humor phenomenon); P. Shammi & D.T. Stuss, *Humour Appreciation: A Role of the Right Frontal Lobe*, 122 *BRAIN* 657 (1999) (studying the impact of cognitive processes and brain damage on humor appreciation); cf. JULIA KRISTEVA, *BLACK SUN* 33 (Leon S. Roudiez trans., Columbia Univ. Press 1989) (1987) (speculating that it may all pretty much be about chemicals).

79. But cf. Pevear, *supra* note 5, at ix (noting that "laughter creates the distance that allows for recognition").

80. See Knight, *supra* note 76, at 897 ("[H]umor may help expose ideology in articles where opinion is disguised as neutrality . . ."); see also UMBERTO ECO, *THE NAME OF THE ROSE* 575-77 (William Weaver trans., HBJ, Inc. 1983) (1980). Eco synthesizes the sublime relationship between theology (deistic and otherwise), humor, and subversion:

"But now tell me," William was saying, "why? Why did you want to shield this book more than so many others? . . . There are many other books that speak of comedy, many others that praise laughter. Why did this one fill you with such fear?"

"Because it was by the Philosopher. . . ."

. . . .

"But what frightened you in this discussion of laughter? You cannot eliminate laughter by eliminating the book."

help the reader wade through what is often (and being a parody, purposefully) dense text.⁸¹

Third, *Pomobabble*'s footnotes consist of a tightly-woven series of mini-essays (and not-so-mini essays) on topics from the article's structure and project (to help orient the reader)⁸² to the postmodernists' attempted use of music, resistance to clarity, hypocritical attacks on dualities, politicized history, and mystic influences, and from education to epistemology, "critical" feminism, and empiricism.⁸³ Just for starters. And *Pomobabble* is indeed a type of novel, synthesizing and applying the timeless observations of Virgil, Dostoevsky, Conrad, and Mann (inter alios) about the human condition, and culminating with Kurtz's Moment of [*gasp!*] Truth in footnote 67 (or is it 68? or 69?).

Finally, what's more important than naming (and [*gasp!*] deconstructing) an attempt to hijack American self-government under the banner of "constitutional law"?

III. The Millennium

A. Reform?

In a sentence, it's not going to happen soon (reform, not the millennium). Given the ideological litmus tests now imposed by many elite (and other) law faculties in their non-commercial law (broadly defined) hiring decisions,⁸⁴ the consequential capture by the Left of the AALS apparatus,⁸⁵ and the necessity for untenured professors to impress the

. . . "[T]he church can deal with the heresy of the simple But this book could teach *learned* men the . . . illustrious artifices that could legitimize the reversal."

Id. (emphasis added).

81. See, e.g., Dan Brown & Jennings Bryant, *Humor in the Mass Media*, in 2 HANDBOOK OF HUMOUR RESEARCH 143, 165 (Paul E. McGhee & Jeffrey H. Goldstein eds., 1983) (concluding that humor may assist in holding readers' attention). [I provided this cite for the benefit of postmodernists who have waded through 354 pages of Derrida for the purpose of gaining the "postmodernist insight" that "can" can be either a noun or a verb and has more than one meaning as each, see JACQUES DERRIDA, OF GRAMMATOLOGY (Gayatri Chakravorty Spivak trans., Johns Hopkins Univ. Press 1976) (1967), and who might otherwise question my underlying premise.]

82. See Arrow, *supra* note *, at 464-72 n.10.

83. See *id.* at 474-75 n.14 (music); *id.* at 477-78 n.16 (clarity); *id.* at 484-85 n.21 (dualities); *id.* at 487-91 n.23 (history); *id.* at 491-502 n.24 (mysticism); *id.* at 505-07 n.27 (education); *id.* at 508-13 n.29 (epistemology); *id.* at 513-21 n.29 (feminism); *id.* at 540-48 n.30 (empiricism).

84. Look around.

85. See, e.g., Arrow, *supra* note 55, at A21 (commenting on two manifestations of the phenomenon). If you're still not convinced, have a look [*gaze?*] at the topics discussed (and the presenters) in the noncommercial law sections at the last dozen years' AALS's Annual Meetings. Along these lines, Ron Rotunda was prescient in 1986: "There is a danger that a journal like the proposed AALS law review will someday be captured by a particular group, such as the Critical Legal Studies movement, which will impose its views as to what constitutes correct legal scholarship." Ronald D. Rotunda, *Law Reviews—The Extreme Centrist Position*, 62 IND. L.J. 1, 9 (1986). Compare

Powers that Be,⁸⁶ the leftist "constitutional law" drumbeat is unlikely to abate during this generation. The problem, in short, has now become inherent—and structural.

But the reader may be surprised to hear that though my own hiring and tenure decisions aren't ideologically driven, the purpose of this essay is not to condemn the crits and postmodernists whose decisions are. Believing as they do that it's all power, they really can't help themselves: they're just [*gasp!*] socially constructed that way. Besides, it's always easier to gain attention by advocating ever-more extreme positions,⁸⁷ and in any event, do you suppose *I'd* be the one to object to law-school *market forces*?

B. Hope?

Although a pervasive sense of hope is to postmodernists what most of their constitutional prescriptions are to the American system of self-government,⁸⁸ let me provide some for the benefit of non-postmodern

id., with Arrow, *supra* note 55, at A21 (demonstrating that though the AALS's law *journal* was stillborn, actuality proves possibility with respect to the broader proposition).

86. See, e.g., John S. Elson, *The Case Against Legal Scholarship or, If the Professor Must Publish, Must the Profession Perish?*, 39 J. LEGAL EDUC. 343, 362 (1989) ("[B]ecause technical legal problem solving generally has less social impact, draws less public attention, and is often not as highly esteemed among colleagues, legal scholars devote comparatively less time to it than to problem solving in areas in which controversial societal values are at issue."); cf. Arrow, *supra* note *, at 658 (defining "tenure," in Pomolaud: "see 'crimestop'").

87. See Rotunda, *supra* note 85, at 1; cf. D.A.F., *Gresham's Law of Legal Scholarship*, 3 CONST. COMMENTARY 310 (1986) ("In law . . . it is rare for a professor to attack a colleague's work in print. Such attacks, when they occur at all, are likely to be restrained and extremely polite."); *id.* at 311 ("Currently . . . a certifiably nutty idea can be repeated in major journals for years on end, before some brave soul ventures to suggest that 'although there is some validity to the insights of Professor Wacko's theory, some serious qualifications should be stressed to a greater extent than has been previously recognized.'"). But cf. FARBER & SHERRY, *supra* note 55, at 3 ("[I]t matters, it always matters, to name [*gasp!*] rubbish as rubbish . . . to do otherwise is to legitimize it." (quoting Salman Rushdie)). "Then suddenly, in the back rows, a lonely but loud voice was heard: 'Lord, what rubbish!'" FYODOR DOSTOEVSKY, DEMONS 479 (Richard Pevear & Larissa Volokhonsky trans., Alfred A. Knopf, Inc. 1994) (1872).

88. See, e.g., STANLEY ARONOWITZ, ROLL OVER BEETHOVEN: THE RETURN OF CULTURAL STRIFE 5 (1993). Aronowitz's hope for no-hope is apparently quite fervent:

Even if [defenders of the "old" faith] may take solace in the collapse of communism, . . . the decline in many of their cherished institutions such as universities [and] "serious" classical music . . .—indeed, many of the apparatuses of high, western culture—weakens the . . . thrust of those who would declare marginal the minions of post-modern culture

. . . While the idea of progress has been subject to severe intellectual ["intellectual"?] scrutiny since the end of the late nineteenth century, American popular culture was, until fairly recently, suffused with hope.

Id. (emphasis added); see also DOSTOEVSKY, *supra* note 87, at 387 ("Add some extra gloom, that's all, no need for anything else" (quoting Pyotr)); BELL HOOKS & CORNEL WEST, BREAKING BREAD 33 (1991) ("As a philosopher, I'm fundamentally concerned with how we confront [D]eath, dread, despair, disappointment, and disease" (quoting West)); *id.* at 52 ("[U]nfortunately, we

readers. First, judicial citations to law review articles are declining⁸⁹—precipitously⁹⁰—and perhaps especially in the area of constitutional law.⁹¹ That thundering silence speaks most eloquently, and represents a trend that, given the ideologized academic gestalt, can only be applauded.

Second, there continues to be broad support for retaining the current system of student selected and edited law review articles.⁹² Given the intellectual [*gasp!*] diversity of student editors (if not their professors⁹³), that phenomenon should help ameliorate the sameness-of-political-viewpoint result fostered by the ubiquitous practice of incestuous cross-vetting⁹⁴

do indeed have very, very strong expressions of *gospels* of wealth and health” (quoting West) (emphasis added)).

89. See, e.g., Ruth Bader Ginsburg, *On the Interdependence of Law Schools and Law Courts*, 83 VA. L. REV. 829, 833 (1997) (“[L]aw journal citations in Supreme Court opinions are less numerous in the 1980s and 1990s than they were in the 1970s”).

90. See Michael D. McClintock, *The Declining Use of Legal Scholarship by Courts: An Empirical Study*, 51 OKLA. L. REV. 659, 660 (1998) (finding a 47% decline in the citation of law review articles by courts over the past two decades, with the most notable reduction having occurred during the past ten years).

91. Given the limitations inherent in a late-April 1999 WESTLAW search looking for “L.J.” and “L. REV.” in its Supreme Court database (and brief ancillary browsing), it appears that opinions of the Court have cited 29 law review articles and one student note during the last two terms, with citations of law review articles in separate and dissenting opinions (where you might most expect them) even more infrequent. Of the 29 articles cited in majority opinions, 14 were written before the Age of Ideology began in earnest in the late 1970s. Of the remaining 15, four are about the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C. and 15 U.S.C.), see *AT&T Corp. v. Iowa Utilities Bd.*, 119 S. Ct. 721, 747, 752, 753 (1999), and two more are about antitrust issues, see *State Oil Co. v. Kahn*, 118 S. Ct. 275, 281 (1997). Of the remaining nine articles, one was written by Justice Scalia, see *United States v. Haggard Apparel Co.*, 119 S. Ct. 1392, 1399 (1999), one by my colleague Joe Weeks (a shameless but unsolicited plug), see *Allentown Mack Sales & Serv., Inc. v. NLRB*, 118 S. Ct. 818, 826 (1998), and precisely one was about constitutional law. In *United States v. Balsys*, 118 S. Ct. 2218 (1998), the Court cited Eben Moglen’s 1994 *Michigan Law Review* article on the self-incrimination clause for the following proposition: “[T]he legislative history of the Fifth Amendment adds little to our understanding of the history of the privilege.” *Balsys*, 118 S. Ct. at 2223 n.5.

92. See Max Stier et al., *Law Review Usage and Suggestions for Improvement: A Survey of Attorneys, Professors, and Judges*, 44 STAN. L. REV. 1467, 1468 (1992).

93. One need only imagine the vetters “thanked” in Footnote Asterisk refereeing *Pomobabble*—or this essay.

94. Cf. *Rules for Postmodernists*, *supra* note * (Number 143: “Gate your community.”); *id.* (Number 146: “Network.”). In fact, vetting has become something of an in-joke, and the practice of the tongue-in-cheek acknowledgment footnote traces back at least a decade. See Boris I. Bittker, *The Bicentennial of the Jurisprudence of Original Intent: The Recent Past*, 77 CAL. L. REV. 235, 235 n.1 (1989) (apologizing for publishing that unvetted article: “I entered academic life thinking that only farm animals could be vetted.”). But my acknowledgment footnote, *supra* note *, reveals that I’m still a rank amateur; in 1991, Neil Gotanda thanked 46 crits (and others)—apparently, in his case, seriously—and got Page 1 in the *Stanford Law Review*. See Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1, 1 n.* (1991). Compare *id.*, with Ronald K.L. Collins & David M. Skover, *Paratexts*, 44 STAN. L. REV. 509, 509 n.† (1991) (thanking 17 professors and judges, but stating further that the “acknowledgments were made *after* [the] article was accepted for publication”). [Professor Gotanda, then at Western State, is now at Villanova. “[V]etting is a serious industry that

(assuming that there will in the future be non-Leftists in legal academia to write articles that transgress).

Third, I can feel another stylistic morphing in legal academic fashion⁹⁵ coming on. It was probably inevitable that *real* Legal Process (you know, that Hart and Sacks “institutional competence” stuff⁹⁶) would be killed off in many law schools during the Age of Sixties-Influenced Messiahs, since it was pregnant with the possibility of assigning unelected courts—and thereby, unelected professors of constitutional law and their scholarship—decidedly nonheroic, nonmessianic roles.⁹⁷ At least with the benefit of [Hegelian?] hindsight, the supervening CLS “trashing”⁹⁸ and “Postmodern Constitutional Socialism” eras that emerged from the wreckage also take on aspects of inevitability.

But as each of its messianic sub-movements has run out of steam (or methane),⁹⁹ the Left has proved itself adept, if nothing else, at rhetorical morphing.¹⁰⁰ So while some one-trick ponies (apparently oblivious to the

can elevate a person's career, reputation, and salary.” Arthur D. Austin, *The “Custom of Vetting” as a Substitute for Peer Review*, 32 ARIZ. L. REV. 1, 2 (1990).]

95. See generally L'HEUREUX, *supra* note 69, at 254-55. L'Heureux skewers the postmodern academic “theory” quite nicely:

“I have a problem,” Maddy explained, and it turned out to be a moral problem. Was Concepcion *really* the best we could do? Yes, she was Chicana. Yes, she was lesbian. Yes, she knew her Barthes. But Barthes? Really? Wasn't he getting just a little passé? Wasn't there some danger that in the life and pursuit of theory, Roland Barthes—and with him, poor Concepcion, for whom she felt deep concern—was about to be left behind? Part of the fascination of literary discourse today, Maddy explained—turning toward the fools, who could not be expected to know this—was the short-lived nature of theory itself. Styles in theory were changing faster than styles in clothing. . . . Could Concepcion keep up? Or was she doomed to be merely a Barthes clone? . . .

One of the fools said that he thought fashion should be left for the clothing industry and that the concern of an English department should be something more enduring and dependable—like literature, for instance . . .

Id.

96. See generally, e.g., HENRY M. HART, JR. & ALBERT SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (tentative edition 1958).

97. See, e.g., Rubin, *supra* note 40, at 1396-97. Rubin observes that, according to legal process scholars,

[w]hen courts go beyond [their] role, they endanger their legitimacy as legal institutions—first, because they assert an unjustifiable claim to political superiority, and second, because they act beyond their area of competence This line of argument could readily generate an approach that resembles Kelsenian positivism, leaving courts with a delimited and decidedly nonheroic role.

Id.

98. See, e.g., Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984).

99. Cf. TERRY EAGLETON, *THE ILLUSIONS OF POSTMODERNISM* 1-2 (1996) (“Imagine a radical movement [that] had suffered an emphatic defeat What if the left were suddenly to find itself less overwhelmed or out-manoeuvred than simply washed up . . . ?”); *supra* note 2 and accompanying text (contemplating methane).

100. Cf. SVETLANA ALLILUYEVA, *ONLY ONE YEAR 141* (Paul Chavchavadze trans., Harper & Row 1969) (“*Gutta cavat lapidem, non vi sed saepe cadendo* (A drop furrows a stone not by force but by continually falling.)” This Latin saying we learned by heart at the university.”); ROBERT A. HEINLEIN, *STRANGER IN A STRANGE LAND* 377 (1961) (“We close down the Church of All Worlds

fact that postmodernism has become an academic joke even before the dawn of the millennium¹⁰¹) are likely to soldier on as if nothing has happened,¹⁰² others have searched for new sub-fields to politicize. For awhile, international and comparative law seemed ripe for the picking, latent as they were with the possibility of fertilizing American fields with European (and other) no-fault Socialism.¹⁰³ But applying that stuff to the

. . . . So we move and open the Congregation of the One Faith—and get kicked out again. Then we reopen elsewhere as the Temple of the Great Pyramid Patience is so much part of the discipline that it isn't patience; it's automatic.”).

101. See, e.g., Mark Leyner, *Geraldo, Eat Your Avant-Pop Heart Out*, N.Y. TIMES, Dec. 21, 1997, § 4, at 11, available in LEXIS, News Library, NYT File:

JENNY JONES: Boy, we have a show for you today!

Recently, the University of Virginia philosopher Richard Rorty made the stunning declaration that nobody has “the foggiest idea” what postmodernism means. . . .

. . . Thousands of authors, critics and graduate students who'd considered themselves postmodernists are outraged at the betrayal.

Today we have with us a writer—a recovering postmodernist—who believes that his literary career and personal life have been irreparably damaged by the theory, and who feels defrauded by the academics who promulgated it. He wishes to remain anonymous, so we'll call him “Alex.”

Alex, as an adolescent, before you began experimenting with postmodernism, you considered yourself—what?

Close shot of ALEX.

An electronic blob obscures his face. . . .

ALEX (*his voice electronically altered*): A high modernist. Y'know, Pound, Eliot, Georges Braque I had all of Schönberg's 78's.

JENNY JONES: And then you started reading people like Jean-François Lyotard and Jean Baudrillard—how did that change your feelings about your modernist heroes?

ALEX: I suddenly felt that they were, like, stifling and canonical.

. . . .

JENNY JONES: We have some pictures of young Alex. . . .

We see snapshots of 14-year-old ALEX reading Gilles Deleuze and Felix Guattari's “Anti-Oedipus: Capitalism and Schizophrenia.” The AUDIENCE oohs and ahs.

ALEX: We used to go to a friend's house after school . . . and we'd read, like, Paul Virilio and Julia Kristeva.

. . . .

JENNY JONES: Why?

ALEX: I guess—to be cool.

JENNY JONES: So, peer pressure?

ALEX: I guess.

JENNY JONES: And do you remember how you felt the very first time you entertained the notion that you and your universe are constituted by language—that reality is a cultural construct, a “text” whose meaning is determined by infinite associations with other “texts”?

ALEX: Uh, it felt, like, good. I wanted to do it again.

102. See, e.g., Stephen M. Feldman, *Playing with the Pieces: Postmodernism in the Lawyer's Toolbox*, 85 VA. L. REV. 151 (1999) (citing 10 of his prior works on the subject 30 times in a 30-page essay, and promising a future book on the subject); cf. *Rules for Postmodernists*, *supra* note * (Number 288: “Plagiarize yourself.”); *id.* (Number 233: “Rehash.”); *id.* (Number 234: “Rehash.”).

103. See *Rules for Postmodernists*, *supra* note * (Number 36: “Maneuver between pastiche and mishmash.”); Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 134 (1994) (“A . . . consequence of increased transjudicial communication should be an increased blurring of the lines between national and international law. . . . [T]he very notion of a

United States Constitution proved tricky,¹⁰⁴ and in any event, the technique is far-too-easily [*gasp!*] named for what it is.¹⁰⁵

So more promising may be the equally predictable attempt by the Left to name its newest incarnation "The New Legal Process," to capture some of the residual lustre that the *real* Legal Process never lost. But such an attempt, in which the class-warfare-oriented race, gender, and sexual-preference crowd may even make a run at capturing Law and Economics,¹⁰⁶ and which may generate a cataclysmic confrontation with the Law and Evolutionary Biology folks,¹⁰⁷ is at least likely (unlike Legal Postmodernism) to engage—and entertain.

C. *A Modest Proposal*

Meanwhile, back at the ranch, where many of us stubbornly adhere to the proposition that one of law's functions is to *hold off* the Apocalypse,¹⁰⁸ judges and practitioners are confronted with the problem (if they care about such banalities) of separating reliable legal scholarship from "scholarship." So in an attempt (as always) to be helpful, I've concocted a rather modest proposal for your consideration.

That proposal involves the creation of a numerical index to be included in Footnote Asterisk of each law professor's constitutionally related law review articles. The index would be known as the Messianism Exponent (or "ME Index"),¹⁰⁹ and would consist of an average of the ratings (on a 1 to 5 scale) assigned to the author's previously published

national versus an international legal system could begin to *dissolve*." (emphasis added)); *id.* at 136 ("The reinforcement of *courts* as autonomous [*oops!*] . . . actors is a step toward the disaggregation of state sovereignty into component executive, legislative, and judicial institutions that can interact independently across borders. . . . The fruits of such interaction . . . would emulate the form and substance of a world government" (emphasis added)); *cf.* ORWELL, *supra* note 9, at 270 ("[A]lways—do not forget this, Winston—always there will be the intoxication of power, constantly increasing and constantly growing subtler." (quoting O'Brien)).

104. *But cf.* HEINLEIN, *supra* note 100, at 73 ("The High Court *reversed* the United States Supreme Court . . ." (emphasis added)); David Weissbrodt, *Globalization of Constitutional Law and Civil Rights*, 43 J. LEGAL EDUC. 261, 262 (1993) ("My remarks are addressed to teachers who believe that the Constitution is a *living document* . . ." (emphasis added)).

105. *See, e.g.,* George P. Fletcher, *Comparative Law as a Subversive Discipline*, 46 AM. J. COMP. L. 683 (1998).

106. *See* Rubin, *supra* note 40, at 1401-02 (speculating about such a fusion, and noting that "economic analysis is not the exclusive instrument of the political right").

107. For an example of the application of evolutionary biology to law, see Kingsley R. Browne, *Sex and Temperament in Modern Society: A Darwinian View of the Glass Ceiling and the Gender Gap*, 37 ARIZ. L. REV. 971 (1995).

108. *See* Robert M. Cover, *Bringing the Messiah Through the Law: A Case Study*, in RELIGION, MORALITY, AND THE LAW 201, 209 (J. Roland Pennock & John W. Chapman eds., 1988) ("One of law's usual functions is to hold off the Messiah." (emphasis deleted)).

109. I originally considered naming the index the "Political Propaganda Index," but that phrase apparently conveys negative connotations to some non-postmodernists. *See* Meese v. Keene, 481 U.S. 465, 474 n.8 (1987) (discussing the prejudicial connotations of the term "political propaganda").

articles and books.¹¹⁰ "Ones" would be assigned to works advocating positions so far to the Left that the Democratic Party won't adopt them as platform planks, while "twos" would be assigned to positions congruent (or nearly so) with that platform. "Fives" and "fours" would be assigned to the Republican Party's mirror images, with "threes" assigned to positions somewhere in the middle. Since reasoning is irrelevant in the postmodern academic world (where only *conclusions* matter),¹¹¹ how your law review articles get to their conclusions would be necessarily and rightly ignored.

For those readers—especially judges—who find somewhat dubious the proposition that the United States Constitution, whatever it is (or isn't), consistently compels the nondemocratic enforcement of the agendas *du jour* of either of America's two major political parties, the Messianism Exponent would quickly facilitate separation of constitutional scholarship from "scholarship" by ideological authors whose conclusions consistently sweep competing political viewpoints to the floor.¹¹² And while the possibility of exposure might deter some judges from citing the messianic stuff, that never deterred Justice Brennan, who could always be counted on to drop cites to law review articles that reached just the "right" *conclusion*.¹¹³

III. Conclusion

The astute reader will by now have realized that the opening quotation in this essay¹¹⁴ may have two possible referents: the United States Constitution, or the messianic *fin de siècle* constitutional "scholarship" of unelected law professors barren of any "specialized competence"-based claim to moral Authority.¹¹⁵ At the millennium (and with only rare

110. For those professors who engage in real-[*gasp!*] world advocacy, an ancillary rating might also be created, to establish an ME Index for positions taken before courts.

111. See, e.g., Steven L. Winter, *The "Power" Thing*, 82 VA. L. REV. 721, 833 (1996) (recognizing the "unwritten rule that every scholarly venture must be preceded by a careful (if silent) calculus in which one gauges the . . . political consequences of one's intended analysis"); *supra* note 1 (citing Cass Sunstein on principles).

112. Cf. Ginsburg, *supra* note 89, at 832 ("Academic writers . . . aid us best . . . if they are honest and careful, and do not, as Learned Hand said of the lazy judge, attempt to 'win the game by sweeping [opposing chess pieces] off the table.'" (citation omitted)).

113. It's all about *power*, see? See Mark Tushnet, *Themes in Warren Court Biographies*, 70 N.Y.U. L. REV. 748, 763 (1995) (describing Brennan's practice of asking his new clerks to identify "the most important rule in constitutional law," and when they stumbled, holding up five fingers).

114. See *supra* text accompanying note 1.

115. Compare Robert Post, *Lani Guinier, Joseph Biden, and the Vocation of Legal Scholarship*, 11 CONST. COMMENTARY 185, 192 (1994) ("The community of legal academics seems to have turned *en masse* to higher lawmaking. There is an ever-growing predominance of utopian scholarship in the law reviews; within elite schools utopian accents have become almost *de rigueur*."), with Elson, *supra* note 86, at 361-62 (emphasis added):

Practical legal problems can usefully be envisioned on a continuum, with problems that do not implicate what are commonly considered to be conflicting social values on one extreme, and problems that can be solved only by choices between directly conflicting

exception¹¹⁶), the Supreme Court has chosen to apply that quotation solely to the latter. Postmodern (and "Continental") "theory" are taken less and less seriously as real philosophy.¹¹⁷ And "Pomobabble"—as both a descriptive and derisive term—is well along the road to becoming part of the English language.¹¹⁸ Millennia being what they are, that's not a bad place for America now to be.¹¹⁹

social values on the other. The first, "technical" type of question can be resolved through the . . . kinds of analytical thought processes in which legal scholars excel; the second, "value laden" type of question can only be resolved by choosing The farther the problem is along the technical side of the continuum, the stronger the case for the scholar's superior contribution. . . .

. . . .
 . . . [But b]ecause the *policy* choices of academics on value-laden issues cannot be separated from their roots in *personal preference*, they warrant no more privilege than the opinions of any other member of society.

, and Post, *supra*, at 192-93 ("The coin of utopian scholarship . . . has all too often come to seem merely political petulance masquerading as academic expertise.").

116. Noting the exotic nature of the Supreme Court's opinion in *Romer v. Evans*, 517 U.S. 620 (1996), Professor Seidman observes:

In tone, Justice Kennedy's opinion for the Court [in *Romer*] seems far out of place in current volumes of the U.S. Reports. . . . It contains not a single footnote, and a bare minimum of legal analysis. . . . In place of technical discussion of precedent and doctrine, Kennedy relies upon sweeping moral generalities—some might say bromides—concerning "transactions and endeavors that constitute ordinary civic life in a free society" and "our [?] constitutional tradition."

Louis Michael Seidman, *Romer's Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 SUP. CT. REV. 67, 69 (footnotes omitted).

117. See, e.g., Christopher Shea, *Leiter Fluid*, LINGUA FRANCA, July-Aug. 1999, at 7, 8 (noting Brian Leiter's advice that "[s]tudents interested in 'postmodernism' . . . would be better off applying to graduate programs in literary theory, since philosophers generally do not (for good reason) take this stuff seriously"); see also Cotts, *supra* note 8 (quoting Jules Coleman); cf. Mark Lilla, *The Politics of Jacques Derrida*, N.Y. REV., June 25, 1998, at 36, 40 ("Jacques Derrida risks giving bad faith a bad name."). But cf. James Boyle, *Anachronism of the Moral Sentiments? Integrity, Postmodernism, and Justice*, 51 STAN. L. REV. 493, 525-27 (1999) (attempting to defend the legal relevance of postmodern "theory" against critics who assert that such "theory" is "the kind of bullshit that gives bullshit a bad name").

118. See, e.g., John Leo, *Tower of Pomobabble*, U.S. NEWS & WORLD REP., Mar. 15, 1999, at 16.

119. *Saint Vlad(imir) and the Postmodern Priesthood of "Equality"*. (c) Dennis W. Arrow & John Roiney, 1000

