SPEECH AND STRIFE

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> But no one can make his way into a strong man's house and plunder his property unless he has first tied up the strong man.[1]

I
INTRODUCTION

The anthropologist Clifford Geertz once observed that "[a]t the political center of any complexly organized society . . . there is both a governing elite and set of symbolic forms expressing the fact that it is in truth governing."[2] In the spirit of Geertz's remark, I endeavor to capture the subtle, inventive, and self-retrenching ways in which the Supreme Court employs language to signal how we ought to think about its authority. Now that the Rehnquist Court has reshaped the constitutional topography in earnest, we would do well to examine its rhetorical legacy as scrupulously as its substantive record.

At this stage, the project I sketch is more archaeological than medical, its principal task one of excavation rather than diagnosis. As legal semioticians and language philosophers have documented, the art of argumentation consists of making accepted moves and countermoves, in addition to invoking recurring "categories of social perception"[3] or "frames of understanding."[4] Among the many language compositions that are found in the law, I contend that there are

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This essay grew out of remarks I gave at the Fourth Annual Public Law Conference, which took place at the Duke University School of Law in Durham, North Carolina. It represents the first installment of a larger project exploring the interactions of constitutional language, culture, and human understanding.

I am grateful to Christopher Schroeder for organizing a first-rate conference. For the many lively conversations I have enjoyed on constitutional law and language, I wish to thank Garrett Epps, Carl Bjerre, Mark Weiner, Bruce Ackerman, Keith Aoki, Bill Rubenstein, Jim O'Fallon, Del Dickson, Ethan Cochrane, Margareth Etienne, and Dom Vetri. Indispensable research assistance was provided by Michael Walker, Nikole Schick, and Thomas Warren.

1. Mark 3:27, THE NEW JERUSALEM BIBLE (1985).

2. CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 124 (1983).

3. J. M. Balkin, *The Promise of Legal Semiotics*, 69 TEX. L. REV. 1831, 1845 (1991). Embracing a conception of language that is situated within culture rather than as an autonomous phenomenon, Balkin states that "the purpose of semiotic study is to understand the system of signs which creates meaning within a culture." *Id.* *See also* Richard Delgado, *Shadowboxing: An Essay on Power*, 77 CORNELL L. REV. 813, 818 (observing that we construct a social world through "stories, narratives, myths, and symbols—by using tools that create images, categories, and pictures").

4. *See* Charles J. Fillmore, *An Alternative to Checklist Theories of Meaning*, PROCEEDINGS OF THE FIRST ANNUAL MEETING OF THE BERKELEY LINGUISTICS SOC'Y, FEB. 15-17, 1975, at 123, 126-127.

uniquely effective *frames of judicial power*, with associated *scripts*, *performative roles*, and *idealized cognitive models.* These basic linguistic building blocks not only construct the meaning of an interpretive act, but they also initiate special cultural conversations about juridical prerogative and the contours of our constitutional order.

Recent pronouncements on First Amendment law provide an opportunity to observe these language devices in their element. These decisions, as much as the oft-discussed federalism and separation-of-powers rulings, reveal a great deal about the Court's modern self-conception. As the Judiciary has wrestled with other branches of government for primacy, it has proven itself to be remarkably assertive and imaginative in employing First Amendment rhetoric and symbols to carve out and sustain its sphere of influence.

Nevertheless, observers often extol the Supreme Court's commitment to rights preservation, noticing broad doctrinal consistencies while overlooking the nuances of linguistic style.[5] It is a mistake to be so inattentive to the trends, drifts, and breaks in constitutional language. Words, in beautiful arrangements as in unpleasing ones, have consequences. The tracks they leave can be traced not only upon the surface of the law, but also in how generations of jurists, government officials, and average citizens perceive and react to judicial utterances.

Free speech patois in the last two decades has been far-reaching, entrenching the Court as the protector of the full scope of human function. Opinions flash anger and frustration, defensiveness and derision. The Justices' individual urges to be heard are so overwhelming that they often speak in fractured voices, seemingly to different cultural constituencies at once.

Though I merely scratch the surface in this essay, one particular rhetorical strategy merits extended discussion: the Rehnquist Court's frequent and dramatic invocation of the image of institutional conflict. Surprisingly, this device appears not only in separation-of-powers or federalism cases, but also in First Amendment decisions such as *Boy Scouts of America v. Dale*[6] and *Legal Services Corporation v. Velazquez*.[7] Each ruling featured the Court activating an interpretive frame of institutional discord to promote its stature. In both instances, the Court employed a conversational script about judicial power and engaged in vivid role-playing, casting itself and other parties in familiar parts. In *Dale*, it was the state supreme court that imperiled liberty if the Boy Scouts could not have their way in expelling a gay Scout leader; in *Velazquez*, Congress posed the fearsome psychological threat to equal justice by preventing lawyers for the poor from challenging "existing law."

5. In laudatory terms, Burt Neuborne contends that "[t]he Rehnquist Court has broken little new doctrinal ground in the area of free expression," but it has "embraced, deepened, and enlarged" the primacy of free speech as a social value. Burt Neuborne, *Free Expression and the Rehnquist Court*, *in* THE REHNQUIST COURT 15, 16 (Martin H. Belsky ed., 2002).

6. 530 U.S. 640 (2000).

7. 531 U.S. 533 (2001).

By resorting to such techniques, the Court as an institution conveys the need for and the ultimate meaning of its interpretative acts. These language devices resonate with us because of pre-existing cognitive ideals that shape how we see, feel, and speak about constitutional law and state authority. The language compositions cause us to sense disruption and uncertainty, to desire stability and harmony, and to demand psychological relief. Even when they do not form an explicit component of legal argumentation, warring incandescent conceptions of the interpretive process propel the persuasive endeavor just below the surface of constitutional discourse.

II

FREE EXPRESSION AND ITS RELATIONSHIP TO INSTITUTIONAL STATURE

A. Cultural Consensus

A great deal of critical commentary has emerged on the Supreme Court's steady advancement of the new federalism agenda.[8] Of the Court's recent rulings implementing this program, Cass Sunstein has described the Justices as "far too sure they are right, [and] . . . too free [in] reject[ing] the judgment of other branches of government."[9] Yet we often miss these traits when they manifest in the arena of free speech. A more exacting evaluation is warranted.

One reason to pore over these decisions anew is because free expression says something about *us* as scholars and citizens. Cultural acceptance of protective speech norms has fed tolerance of legal language that would be deemed troubling in other areas of the law.

Popular support for freedom of speech remains high, even though Americans might disagree about its application in discrete situations and notwithstanding fluctuations due to persistent controversies as well as sudden exigencies. In a recent study on public perception of the First Amendment, 75% of

8. Some of the most dramatic alterations of the legal landscape have involved expansion of the Commerce Clause and the doctrine of sovereign immunity and a corresponding narrowing of Congress' Section Five power to enforce the Fourteenth Amendment by enacting appropriate legislation and a similar narrowing of citizens' ability to enforce constitutional norms through Section 1983. *See* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); United States v. Morrison, 529 U.S. 598 (2000); McMillan v. Monroe County, 520 U.S. 781 (1997); City of Boerne v. Flores, 521 U.S. 507 (1997). For thoughtful criticism of these areas of jurisprudence, see Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court's* Lopez *and* Seminole Tribe *Decisions*, 96 COLUM. L. REV. 2213 (1996); Henry Paul Monaghan, *The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102 (1996); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003).

9. Cass R. Sunstein, *Does the Constitution Enact the Republican Party Platform? Beyond* Bush v. Gore, *in* BUSH V. GORE: THE QUESTION OF LEGITIMACY 177, 178 (Bruce Ackerman ed., 2002). Sunstein observes that the Rehnquist Court has struck down more federal laws per year than any other Court in American history. *See id.* at 182. *See also* Suzanna Sherry, *Irresponsibility Breeds Contempt*, 6 GREEN BAG 2D 47 (2002) (attributing the Court's skepticism of Congress to legislative failure to follow precedent); Cass Sunstein, *Order Without Law*, 68 U. CHI. L. REV. 737, 757 (2000) (noting that "in a number of cases" the Rehnquist Court has been "extremely aggressive" in advancing its constitutional vision).

respondents considered the ability to speak freely as "essential," while 94% supported the right to express unpopular opinions.[10] The right to free speech remains the most cherished and recognizable right, with six in ten Americans correctly locating the speech right in the First Amendment. No other constitutional right is identified by more than one in every five people surveyed. Little wonder, then, that jurists are tempted to turn to the First Amendment to enhance the stature of the institution to which they belong. It is a patois spoken by most Americans, and decisionmakers can afford to be assertive in their writings on speech without provoking a sustained outcry.

Dominant scholarly accounts have indirectly exacerbated our collective sufferance of loose free speech language. Leading theories of constitutional process are drawn from a narrow class of equal protection and substantive due process cases in the canon; the First Amendment rarely if ever enters the narrative.[11] Instead, the First Amendment is left to its own realm and to its own caretakers.[12] Besides John Hart Ely and Cass Sunstein,[13] few legal thinkers have bothered with projects of integration.

Academic separation and sub-specialization thus have had the perverse effect of tempering deep reconsideration of First Amendment foundations and cultural trends, while impoverishing constitutional meta-theory. Does a theory of constitutional law have sufficient explanatory power if it fails to engage the developments in this ever burgeoning area?

What is more, because modern theorists focus on constitutional decision-*making* rather than law-*explaining*, they tend to elevate doctrine or ideology over rhetorical technique and institutional personality.[14] But creeping legal rhetoric—whether a product of clever arrangement or careless opinion-writing—should always be of concern.

B. Doctrinal Expansiveness

Another cause for a rigorous reappraisal is that the other dimensions of constitutional life have become islands in a veritable sea of First Amendment law. The sheer amount of judicial activity in the law of free expression is simply breathtaking. Indeed, it would be no exaggeration to say that the Supreme

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10.First Amendment Center *State of the First Amendment 2002*, *available at* http://www.firstamendmentcenter.org/sofa_reports/index.aspx <last visited Jan. 5, 2004>.

11. *See, e.g.*, BRUCE ACKERMAN, 1 WE THE PEOPLE: FOUNDATIONS 63-66, 142-59 (1991); RONALD DWORKIN, LAW'S EMPIRE 118-19, 379-92 (1986).

12. *See* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993); C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989); THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970).

13. CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 232-56 (1993); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 75-77 (1980).

14. *See, e.g.,* Erwin Chemerinsky, *Getting Beyond Formalism in Constitutional Law: Constitutional Theory Matters*, 54 OKLA. L. REV. 1, 2 (2001) ("[T]he values of the judges making the decision largely determines all law, and particularly constitutional law."); Ruth Colker & Kevin M. Scott, *Dissing States?: Invalidation of State Action During the Rehnquist Era*, 88 VA. L. REV. 1301 (2002) (examining decisions in which the Court invalidated state action from 1986 through 2000 and concluding that conservative ideology played a significant role in decisionmaking).

Court's linguistic record in this arena is more reflective of its modern self-conception than its federalism decisions. It is easy to forget that even as the Court has struck down a handful of congressional enactments on the basis of federalism principles (path-breaking decisions in their own right), it has invoked the First Amendment in an even more sustained and vigorous manner to regulate social boundaries. Between the years 1986 and 2002, the Court decided approximately 108 free expression cases.[15]

And the influence of free speech culture extends well beyond the cases in which laws actually are invalidated: each spring, the Court methodically fills its docket with headline-generating speech controversies, thereby building suspense with its national audience before taking center stage in the fall. Thus, there are unexplored connections between a strong cultural support for free speech and the institution's broader agenda.

In demonstrating an unshakable commitment to "uninhibited, robust, and wide-open" debate,[16] the Justices have fashioned a legal regime in which nearly everything is speech and nearly all speech is fully protected—with the Judiciary poised at the fulcrum of cultural power.[17] This process, which began in earnest after World War II, generated considerable momentum during the final decades of the Twentieth Century. Even Chief Justice William Rehnquist in recent years has "surprised observers by concurring in expansive free speech opinions in areas where he had once dissented."[18] The results are undeniable: Local ordinances, state laws, and federal statutes now routinely fall once they encounter the modern Speech Clause.[19]

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15. Alan J. Howard, *Continuity on the Court: The Rehnquist Court's Free Speech Cases*, 47 U. ST. LOUIS L.J. 835, 845 (2003). *See also* Cornell Clayton, *Law, Politics, and the Rehnquist Court: Structural Influences on Supreme Court Decision Making*, in THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS 151, 169 (Howard Gillman & Cornell Clayton eds., 1999) (arguing that "free expression is the area perhaps least affected by judicial fragmentation and the collapse in consensual constitutional norms").

16. Federal Elec. Comm'n v. National Conservative Party, 470 U.S. 480, 493 (1985); New York Times v. Sullivan, 376 U.S. 254, 269 (1964).

17. Prominent examples include the treatment of cross-burning as presumptively expressive rather than harassing conduct, *Virginia v. Black*, 538 U.S. 343 (2003); *RAV v. City of St. Paul*, 505 U.S. 377 (1992), and of monetary donations and expenditures related to the electoral process as political speech, *Buckley v. Valeo*, 424 U.S. 1 (1976), as well as the current trend toward according commercial expression greater protection by narrowing the definition of commercial speech or by applying the *Central Hudson* test more rigorously, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173 (1999).

18. Neuborne, *supra* note 5, at 29 n.5; *see also* id. at n.2 (collecting cases). Judicial conservatives have utilized speech principles to expand constitutional safeguards for economic-related activity and religious expression. *See generally* J. M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 384-87 (1990) (arguing that judicial conservatives are motivated to safeguard speech because of desire to protect business interests and conservative social causes).

19. *See, e.g.*, Republican Party v. White, 536 U.S. 765 (2002); Watchtower Bible and Tract Soc'y v. Vill. of Stratton, 536 U.S. 150, 166 (2002); Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000); City of Chicago v. Morales, 527 U.S. 41 (1999); Reno v. ACLU, 521 U.S. 844 (1997); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995); City of Ladue v. Gilleo, 512 U.S. 43 (1994).

We do not merely expect this to occur; we enthusiastically accept this state of affairs. Never mind whether the courts alone can guarantee liberty over time or whether a juricentric ethos might disable other institutions and foster cultural complacency. It is a truism of contemporary American life that vigorous affirmation of the First Amendment is a basic condition of freedom.

It is often the case, though not invariably so, that doctrinal breadth and rhetorical innovation go hand in hand. For this reason, the area promises to be fertile ground for the study of legal language.

Of course, to criticize contemporary methods of argumentation is not to suggest that a robust Speech Clause is not vital to our constitutional order. Rather, the point is simply that the Justices are intensely aware that the First Amendment represents one of their richest stores of cultural capital, and they go to some lengths to ensure that the cupboard is never bare.

III

LANGUAGE, MOTIVATION, AND COGNITION

A. The Forms of Constitutional Discourse

The richness of First Amendment law presents opportunities to consider the Court's resourceful use of language to promote both cultural acceptance of its decisions and its ability to navigate social domains. Cognitive theory sharpens our sense of how judicial actors manipulate language to make interpretive authority comprehensible.[20] A better appreciation of these linguistic innovations also helps us to see why the Court as an institution—a social organization with its own deeply ingrained practices—resorts to certain rhetorical strategies.

As linguists and psychologists have explained, human beings instinctively sort perceptual and experiential data into useful clusters of information to make sense of the world.[21] On this view, categorization is a natural phenomenon, and legal categorization is a highly developed, ritualized subset of this process. We are, in a word, "hunter-categorizers."[22]

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20. Except for the work of Steve Winter, and Anthony Amsterdam and Jerome Bruner, STEVEN L. WINTER, A CLEARING IN THE FOREST: LAW, LIFE AND MIND 11 (2001); ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW (2000), applications of cognitive theory to constitutional law have been mostly tentative yet full of promise. *See, e.g.,* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1623 (1986) (looking to emerging research on psychological mind-set that makes receptivity to state authority possible); Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 622 (2001) (arguing that the approach of "categorical federalism" "mirrors contemporary research about categorization in cognitive psychology").

21. Modern linguistics builds upon empirical studies in psychology and language acquisition. The findings of these disciplines have undermined an earlier understanding of the communicative process, which was framed in rote stimuli-response terms and sought to measure the objective veracity of utterances. *See* WINTER, supra note 19, at 11, 32-41; *see also* GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 3-8 (2003); Fillmore, *supra* note 4, at 222-24.

22. This clever phrase, for which I thank Keith Aoki, captures this synthesis of the unavoidable nature and the artificial quality of categorization.

"Frames of understanding" are the mental constructs we use to organize our experience, knowledge, perceptions, and sensations. They are what give legal terms color and bite. Ideas have significance for us—they have a hold on us—because of what is conjured in our collective minds. Although frames operate on the instinctive level, orators can purposefully employ language and visual cues to trigger preferred frames of understanding.

These general observations about ordinary language require some refinement when it comes to constitutional language. First, as a quasi-political actor, the Court actively tends to the boundaries of its own sphere and from time to time presumes to speak for the entire constitutional order. Thus, the Court constantly characterizes the constitutional process and defends its role within it. This bureaucratic imperative to engage in self-preservation or expansion, doctrinal tinkering or ideological advancement, infuses not only case selection and adjudication, but also language tactics.[23]

Second, in employing language instrumentally, the Supreme Court perpetuates conceptions of social life—not only building and populating our world, but also influencing how we should think and feel about our experiences. These constitutive and emotive qualities of constitutional language shape how we appreciate state authority. In this respect, judicial power, like the evanescent nature of political influence, is made concrete through cycles of rhetorical assertion, reinforcement, and acceptance or resistance.

Third, law privileges existing rhetorical forms—the older, the better. The moves made during one controversy create templates for future moves. Whether they are used to reinforce existing doctrine or to strike out in new directions, these conversational modalities promise a degree of continuity and intelligibility.

B. Conversational Tools

The judicial toolkit is comprised of (1) explicit or formal modes of persuasion, such as propositional argumentation and storytelling, as well as (2) shortcuts that invoke often less rigid structures of meaning, such as recurring frames of understanding, scripts, metaphors, roles, and idealized cognitive models of social reality. Therefore, every legal contest unfolds in two arenas simultaneously, manifesting in doctrinal in-fighting and warring symbolic systems.

23. This emphasis on organization and cognition dovetails with the work of a number of scholars working within the "new institutionalist" tradition. As Howard Gillman and Cornell Clayton explain, this approach "tends to focus on modes and forms of justification and legitimization as a driving force behind judicial activity. In this sense, legitimization is viewed as an organizational imperative for courts, serving both as a source of judicial inertia and a requirement for justification of particular judicial decisions and practices. Justification in turn compels courts to be highly sensitive and adaptive" toward their tasks. GILLMAN & CLAYTON, *supra* note 15, at 4.

Just as we can identify the set of accepted legal arguments (Philip Bobbitt has ably provided this service),[24] we can classify these other instruments of meaning and discern their primary characteristics:

	FORMAL	***INFORMAL***
RHETORICAL DEVICE	Legal Analysis[25] Narrative Legal Party Doctrine Precedent	Frame/Gestalt Script Role Metaphor Symbolic Ruling
CHARACTERISTIC	*Rule-bound* *Coherent* *Linear* *Time-intensive*	*Flexible* *Incomplete* *Imaginative* *Instantaneous*

A handful of interpretive frames are particularly effective in maintaining the social legitimacy of the Supreme Court. I call these institution-building language compositions *frames of judicial power*. When activated by a potent metaphor, lyrical phrase, or well-timed reference to a seminal decision, a given frame of judicial power organizes the relevant experiential details and invites us to envision the exercise of interpretive power through the proffered lens. But this type of vehicle does something more than provide an ordinary frame of un-

24. Philip Bobbitt classifies constitutional arguments into six modalities, which are also characterized by their relationship to a particular source of law: historical, textual, structural, doctrinal, ethical, and prudential. PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12-13 (1991). Some methods of argumentation such as a "political argument *per se* will never do." *Id*. at 41. Other scholars who have categorized legal argumentation into strategic moves and counter-moves include PIERRE SCHLAG & DAVID SKOVER, TACTICS OF LEGAL REASONING (1986); Jack Balkin, *The Crystalline Structure of Legal Thought*, 39 RUTGERS L. REV. 1 (1986); James Boyle, *The Anatomy of a Torts Class*, 34 AM. U. L. REV. 1003 (1985); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976). On the emergence of legal semiotics as a discipline, see generally Jeremy Paul, *The Politics of Legal Semiotics*, 69 TEX. L. REV. 1779 (1991).

25. Legal analysis is a specialized type of propositional argumentation. It flows from premise to conclusion in building-block fashion (*for example*, if A, then B). Argumentation is expected to involve transparent analysis, follow the rules of logic, remain susceptible to criticism, and consist of turn-taking. Persuasiveness is measured by fidelity to the facts as we know them and to the accepted sources of law.

derstanding: it urges us to *internalize* the Judiciary's interpretive prerogative, sometimes subtly, at other times with great urgency.

For the psychologist or cognitive linguist, a script is another kind of language tool, a "structure that describes appropriate sequences of events in a particular context."[26] It, too, is a mechanism that allows citizens to process events through shortcuts. When a script is initiated by a constitutional speaker, a listener immediately visualizes the details of a recurring social phenomenon, along with a chronology and a set of roles that each party customarily plays,[27] even if none of these facts is mentioned by the speaker. A wide range of scripts runs through legal decisions, helping us to make sense of constitutional law and, by extension, the socio-legal world that we inhabit. Some scripts are innocuous and essential; others have taken on a pathological quality.[28]

Each formal method of persuasion might be said to have an informal analogue. Legal arguments and *frames* alike impose form upon experience in order to generate meaning. Whereas doctrine and precedent roam the surface of the legal realm, symbols and metaphors frolic in the constitutional demi-monde. Narrative consists of the personal details of a specific controversy set upon, or conforming to, the skeleton of a culturally available *script*, though both concepts imply a chronological dimension to their design. And whereas an official narrative treats participants to the lawsuit as legal parties, a script prescribes other kinds of *performative roles* to be filled by constitutional actors as the interpretive act is translated from mind to mind.

Once engaged, informal language structures operate at a level different than logic or even storytelling. The devices are purposeful and systemized in that the writer or speaker intentionally selects the triggers, or "script headers," and has some indication as to the cognitive reactions these devices might produce.[29] But these rhetorical moves engage the mind in a different manner than their more explicit cousins. While explicit modalities are coherent, rational, and time-intensive, these devices are incomplete, imaginative, and instantaneous. Whereas doctrinal analysis and narrative generally strive for transparency and

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26. ROGER C. SCHANK & ROBERT P. ABELSON, SCRIPTS, PLANS, GOALS AND UNDERSTANDING: AN INQUIRY INTO HUMAN KNOWLEDGE STRUCTURES 41 (1977).

27. A number of scholars—including those previously ensconced in the law and literature movement—have turned to "ritual theory" and its related drama tropes to explain knowledge transmission and meaning construction. *See, e.g.*, J.M. BALKIN & SANFORD LEVINSON, *Law as Performance*, *in* 2 LAW AND LITERATURE 729 (Michael Freeman & Andrew D.E. Lewis, eds., 1999); GEERTZ, *supra* note 2 at 28.

28. It might be said that judicial decisions involving clashes between assertions of individual right and military necessity have a pathological structure. These decisions almost always begin with a ringing endorsement of liberty, give the sense that the stakes have been carefully calibrated, but predictably result in near-total victory for the government's substantive position. *See* Goldman v. Weinberger, 475 U.S. 503 (1986); Korematsu v. United States, 323 U.S. 214 (1944). *See generally* HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 117-49 (1990) (describing pathology in foreign policy law characterized by executive initiative, congressional acquiescence, and judicial tolerance).

29. These triggering words or actions are sometimes referred to as "script headers," which call scripts into play. *See* SCHANK & ABELSON, *supra* note 26 at 46.

incrementalism, framing, scripting, and casting facilitate more concealed and free-wheeling forms of discourse.

Indeed, the symbolic forms of communicating state authority go beyond the formal, external trappings that students of culture and legal grammarians have identified, and they are more highly adaptive than many believe.[30] The "stories, ceremonies, insignia, formalities, and appurtenances" that permeate constitutional language certainly drink deeply from ancient cultural wellsprings, but the modalities themselves take root, often developing new shape and momentum, like a legend with each fresh telling.[31]

Despite differences in the form and properties of these language devices, when they are deployed we instantly grasp why an institution acts and we are moved to accept the exercise of legalized force over our lives. There is nothing, of course, deterministic about this—we can reject the meaning held out to us just as surely as we can allow it to infuse our very thoughts and actions. Whatever the long-term outcome, the basic point remains: The frames of judicial authority are undeniably powerful engines for creating and reinforcing conceptions of bureaucratic influence.[32]

IV

TIĀN-DÌ:[33] THE LANGUAGE OF CULTURAL LEGITIMACY

A. Recent Trends

What follows is not an exhaustive accounting of Rehnquist-era speech decisions, but an outline of rhetorical trends. One of the most dominant patterns is the Supreme Court's tendency to reach for First Amendment vernacular, rationales, and icons to enhance its cultural stature. The pace has only increased in the last few years, as liberal and conservative justices have joined forces unabashedly to assert their place "to say what the law is."[34]

Time and again, the Supreme Court has secured its cultural position by sounding a mix of patriotic and democratic themes, often in vivid ways and novel settings.[35] Invalidating a municipal ordinance that required registration for door-to-door canvassing, the Court in *Watchtower Bible & Tract Society v. Village of Stratton* rose up and cloaked itself in the full anti-totalitarian glory of

30. Emphasizing deep structure, Geertz wrote that the symbolics of power were invented in "revolutionary situations," but were otherwise culturally inherited and maintained. GEERTZ, *supra* note 2, at 124.

31. *See* GEERTZ, *supra* note 2, at 124.

32. *See* LAKOFF & JOHNSON, *supra* note 20, at 156-57 (stating that metaphors create realities and can lead to self-fulfilling prophecies).

33. "Tiān-Dì" is pin-yin for the Chinese phrase "heaven and earth," which, roughly translated, means "everything under the sun" or the "entire universe."

34. *See, e.g.*, Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 545 (2001).

35. *See, e.g.,* Watchtower Bible and Tract Soc'y v. Vill. of Stratton, 536 U.S. 150, 166 (2002) (proclaiming that permit regime for canvassing on private property was antithetical to "very notion of a free society").

the greatest generation: "The value judgment that then motivated a united democratic people fighting to defend those very freedoms from totalitarian attack [in the World War II era] is unchanged. It motivates our decision today."[36] How does one fight the ghosts of soldiers past and a love of country that lives on?

Still, the most surprising aspect of this passage is not the soaring nature of the words—uplifting, nationalistic language has been a periodic feature of free expression decisions—but that it occurred in a garden variety case. Though the language is reminiscent of patriotic themes sounded in cases like *West Virginia v. Barnette*[37] and *Texas v. Johnson*,[38] unwanted solicitation is hardly of the same gravity as burning the American flag or refusing to recite the Pledge of Alligence, behavior that has divided the country to this very day.

And who could miss Sandra Day O'Connor's reference to Gerald Gunther's memory of Nazi Germany's suppression of hateful ideas just last Term in *Virginia v. Black*, in the course of announcing that some cross-burnings would remain protected speech?[39]

A more remarkable development is that cries to rally around the First Amendment are no longer the exclusive province of judicial liberals. The very jurists who promote strict adherence to text or to the Framers' original intentions have not quietly followed; they have often led the charge.

The *Free Speech Coalition* case,[40] yet another that disintegrated into multiple opinions,[41] represents one such instance. In the course of invalidating a federal law prohibiting the possession or distribution of virtual child pornography,[42] the Justices endorsed a startlingly broad rationale: "The right to think is the beginning of freedom, and speech must be protected from the government *because speech is the beginning of thought*."[43]

At first blush, one might mistake these words for the rather uncontroversial point that language acquisition and thought formation are interlaced, but a moment's reflection enables us to realize that the High Court is after much bigger game. Working backward from the end state of "freedom," Anthony Ken-

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36. *Id*. at 169.

37. 319 U.S. 624, 642 (1943).

38. 491 U.S. 397, 415 (1989).

39. 538 U.S. 343, 366-67 (2003).

40. Ashcroft v. The Free Speech Coalition, 535 U.S. 234 (2002).

41. I offer a sampling of free speech decisions rendered during the Rehnquist era that have exploded in a cacophony of concurring opinions clamoring to be heard. *See, e.g.,* Nike v. Kasky, No. 539 U.S. 654 (2003) (dismissing cert. as improvidently granted); United States v. American Library Assoc., Inc., 539 U.S. 194 (2003); Federal Election Comm'n v. Beaumont, 539 U.S. 146 (2003); Virginia v. Hicks, 539 U.S. 113 (2003); Watchtower Bible and Tract Soc'y of New York, Inc. v. Vill. of Stratton, 536 U.S. 150 (2002); Ashcroft v. American Civil Liberties Union, 535 U.S. 564 (2002); Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002); Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001); City of Chicago v. Morales, 527 U.S. 41 (1999); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995).

42. 18 U.S.C. § 2256(8)(B) bans images that "appear to be . . . of a minor engaging in sexually explicit conduct."

43. *Free Speech Coalition*, 535 U.S. at 253 (emphasis added).

nedy's opinion maps the legal, political, and cognitive dimensions of liberty onto a single causal chain. In this teleological narrative, the right of free speech is described as the original source of the American way of life (speech → thought → freedom). Meanwhile, the Court has squarely interposed itself as the "protect[or]" of not simply governmental arrangements but the entirety of human activity: thought, emotion, utterance, and interaction.

Like every effort to trace the genesis of a social phenomenon, the passage enlists respect for tradition and lineage in its cause. There is even a biblical ring to this story of origins—the Court begets speech, which begets thought, which begets liberty.[44] Quite simply, the Court has become adept at calling upon a cultural image of itself as the defender of the full range of human possibilities.

A careful reader might recognize this passage as a riff on the well-turned principle that the First Amendment protects the sanctity of "thought and expression."[45] But its incarnation here actually shares more with the privacy-based language in the plurality opinion in *Casey*,[46] which proclaimed that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[47] These words prefigure the Court's inspiring and—if at all possible—its more expansive formulation of liberty in *Lawrence v. Texas*:[48] "Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions."[49] The rhetoric of the modern Court, like its self-image, knows few bounds.

Equally conspicuous, the Court that rendered *Free Speech Coalition* warned that blockbuster movies such as *Traffic* and *American Beauty* could be outlawed because they contained images of underage teens appearing to engage in sexual activity.[50] The opinion's reference to two hit films is noteworthy because it represented an appeal to popular culture as a way of deflecting accusations that the Court was trying to shield child pornographers.[51] This stands in marked contrast

44. For an illuminating account as to the legitimating and regenerative effect of stories about origins, see Milner S. Ball, *Legal Storytelling: Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280 (1989).

45. Harper & Row Publishers, Inc. v. Nation Ents., 471 U.S. 524, 559 (1985). "Liberty of thought," Justice Holmes wrote in his famous dissent in *Dennis v. United States*, 341 U.S. 494, 550 (1951), "soon shrivels without freedom of expression." Or again in Justice Kennedy's updated formulation: "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." Turner v. Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 641 (1994).

46. Planned Parenthood v. Casey, 505 U.S. 833 (1992). Kennedy was the sole or co-author of *Casey* and *Lawrence*.

47. *Id*. at 851.

48. Lawrence v. Texas, 539 U.S. 558 (2003).

49. *Id*.

50. Both Kennedy's opinion for the Court and O'Connor's concurring opinion referred to these popular films. *See* Free Speech Coalition, 535 U.S. at 247, 263.

51. Interestingly, in this respect, the *Free Speech Coalition* opinion closely resembles *Jenkins v. Georgia*, 418 U.S. 153 (1974), an obscenity decision authored by Justice Rehnquist. There, as here, the Court went out of its way to tout the "critically acclaimed" nature of the film *Carnal Knowledge* by

with earlier decisions like *Miller v. California*[52] and *Stanley v. Georgia*,[53] which invalidated obscenity convictions in mostly workmanlike fashion. In engaging the people directly in an effort to prevent erosion of public support on a rather routine matter, the *Free Speech Coalition* Court behaved much like a representative institution.[54]

The Justices' broad language was especially striking because they eschewed an equally satisfactory alternative to striking down the challenged law. Interpreting the statute narrowly so as to exclude all artistic renderings except those which are "virtually indistinguishable from real children"[55] would have dramatically reduced the potential for mischief.[56] The Justices blithely rejected this minimalist solution to avoiding the unnecessary resolution of constitutional questions.

If the *Free Speech Coalition* decision emitted a low-level pulse of disrespect toward Congress, disdain blossomed into full-blown antipathy in *Legal Services Corporation v. Velazquez*, where the Court invalidated advocacy restrictions on publicly funded legal services lawyers.[57] In that case, the Justices ruled that the law that prevented lawyers for the poor from lodging constitutional challenges to existing welfare laws was not a proper funding restriction but crossed the line into viewpoint discrimination.[58]

However one feels about the decision on the merits,[59] it is impossible to miss the fervor with which the Court assailed the actions of a co-equal institution. Writing for the 5-4 majority, Justice Kennedy excoriated Congress for invading "the sphere of its authority to resolve a case or controversy."[60] His words posi-

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mentioning its favorable reviews and appearance on lists of the "Ten Best" films of 1971. *See id.* at 158 n.5. *See also* Virginia v. Black, 538 U.S. at 366 (referring to "Mississippi Burning" as an example of protected expression).

52. 413 U.S. 15 (1973).

53. 394 U.S. 557 (1969).

54. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) is a famous example of the Court speaking self-consciously to the American people where the entire world was watching to see whether the Court would eviscerate *Roe v. Wade*, 410 U.S. 959 (1973). In this sense, *Brown v. Board of Education*, 347 U.S. 483 (1954) and *Dickerson v. United States*, 530 U.S. 428 (2000) can be counted as similar sociolinguistic moments in which the cultural stakes were high and the anticipation in the air palpable.

55. The legislative history indicates that the law was intended to target this particular group of sexual images. *See* S. Rep. No. 104-358, pt. I, p.7 (1996).

56. This interpretation would have excluded matters involving youthful looking adults engaged in sexually explicit conduct (the *Traffic*, *American Beauty* or *Romeo & Juliet* scenario), as well as cartoons and other images that do not look like real children. Any remaining gray areas could have been addressed should any as-applied challenges actually materialize. All but one of the lower courts had adopted this reading of the law. On this day, only O'Connor, Rehnquist, and Scalia would have done the same. *See Free Speech Coalition*, 535 U.S. at 263.

57. 531 U.S. 533 (2001).

58. *Id.* at 544.

59. I have elsewhere written favorably about the substantive dimension of the ruling, defending the decision as an essential component of a more coherent right of court access. Robert L. Tsai, *Conceptualizing Constitutional Litigation as Anti-Government Expression: A Speech-Centered Theory of Court Access*, 51 AM. U. L. REV. 835 (2002). I confine my criticism of the ruling in this essay to rhetorical form and judicial outlook.

60. *Velazquez*, 531 U.S. at 545.

tively dripping with contempt, the opinion accused Congress of attempting to "wrest the law from the Constitution which is its source."[61]

At worst, this bordered on an *ad hominem* attack on a co-equal institution. At best, it amounted to an ungenerous characterization of Congress' motives, given that *Rust v. Sullivan*[62] provided legislators with a plausible basis for believing they had great latitude in drawing the contours of funding programs, even if doing so inhibited some measure of expression.

The Rehnquist Court's propensity to castigate another branch of government was again on full display in *Dale*.[63] This time, the highest court in the State of New Jersey served as the Court's ceremonial whipping boy. Substantively, the Court held that the Boy Scouts enjoyed a right of expressive association to exclude James Dale, a gay Scoutmaster.[64] And yet the most astonishing feature of the ruling was not so much its broadening of the right of expressive association,[65] but the palpable scorn directed at the New Jersey Supreme Court for daring to apply a civil rights law to the Boy Scouts in the first place.[66] Authored by the Chief Justice, the opinion called the statute "extremely broad" and blasted the state high court for applying the law "to a private entity without even attempting to tie the term 'place' to a physical location" and for extending the notion of public accommodations from "clearly commercial entities" to membership organizations.[67]

In short, the Court painted a mental picture of a state high court gone wild. To be sure, some amount of disagreement is necessary to give rise to a legal question in the first place, but the level of hostility exhibited in this decision was both extraordinary and unnecessary. Because the Justices were required to defer to the state court's conclusion that the Boy Scouts were covered by state law, there was no need to waste a single moment on this point. Moreover, it

61. *Id.*

62. 500 U.S. 173 (1991). In *Rust*, the Supreme Court affirmed federal restrictions on abortion-related speech between doctors and patients in clinics that received Title X funds.

63. 530 U.S. 640 (2000).

64. 530 U.S. 640 (2000)

65. A number of commentators have argued that the Court was insufficiently skeptical of the Boy Scouts' assertion that they had an expressive interest in expelling gay scoutmasters. *See, e.g.*, Erwin Chemerinsky & Catherine Fisk, *The Expressive Interest of Associations,* 9 WM. & MARY BILL RTS. J. 595, 600 (2001); Andrew Koppelman, *Signs of the Times:* Dale v. Boy Scouts of America *and the Changing Meaning of Nondiscrimination*, 23 CARDOZO L. REV. 1819, 1822 (2002); David McGowan, *Making Sense of* Dale, 18 CONST. COMMENT. 121, 122-23 (2001). Others have criticized the *Dale* decision on the grounds that the law was a general law of applicability targeting conduct, not speech. *See* Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 808-09 (2001). *But see* John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485, 489-90 (2002) (contending that the *Dale* decision reflects the Rehnquist Court's commitment to civic republicanism).

66. 530 U.S. 640 (2000).

67. *Dale*, 530 U.S. at 657.

was entirely irrelevant to the constitutional question before the Court how other state courts had construed their public accommodation statutes.[68]

This verbal mistreatment of the state institution that authoritatively interpreted state law foreshadowed the appearance of similarly contemptuous language in *Bush v. Gore*,[69] decided the very next term. There, the High Court impugned the motives of the Florida Supreme Court, declaring that its recount decisions "ratified the uneven treatment"[70] of ballots and failed to provide even "rudimentary requirements of equal protection and fundamental fairness."[71] Three of the Justices—Rehnquist, Scalia, and Thomas—were convinced that the Florida Supreme Court's ruling was so "beyond what a fair reading"[72] of state law provided that they wrote separately to say that the state court usurped the role of state legislatures in prescribing how presidential electors are to be selected.[73]

Now contrast this inflammatory language in these two cases with the deferential words of an earlier era: "[T]his court will always feel itself bound to respect the decisions of the State courts, and from the time they are made will regard them as conclusive in all cases upon the construction of their own constitution and laws."[74]

Again, in a decision the Supreme Court rendered as recently as 1981 the Justices stated: "This Court will defer to the interpretation of state law announced by the highest court of a State even where a more reasonable interpretation is apparent, a contrary construction might save a state statute from constitutional invalidity, or it appears that the state court has attributed an unusually inflexible command to its legislature."[75] Suffice it to say that *Dale*, like so many other opinions in the speech context, is reflective of the contemporary Court's character: The Court behaves as if it is all-knowing and all-seeing; and it not only rules, it freely *rebukes*.

On one level, this institutional personality is pronounced, even alarming. On another, this verbal daring underscores the ancient linkage between bureaucratic motivation and language strategy. The Court has always made use of whatever devices were at its disposal to safeguard its sphere of influence. Brevity and obscurity, for example, have been fixtures of the Court's rhetorical tradition for as long as clarity and cogency.[76] What we are seeing today is an insti-

68. As William Eskridge and Nan Hunter point out, "[m]ost of the statutes and ordinances [that include sexual orientation] define 'public accommodation' broadly." WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER AND THE LAW 162 (Supp. 2001).

69. 531 U.S. 98 (2000).

70. *Id*. at 107.

71. *Id*. at 109.

72. *Id*. at 115.

73. *Id*. at 115-17.

74. Rowan & Harris v. Runnels, 46 U.S. 134 (1847).

75. Minnesota v. Clover Leaf Creamery Co. 449 U.S. 456, 485 n.9 (1981) (internal citations omitted).

76. The Court's deliberations and final opinions in the desegregation decisions were famously characterized by unanimity and economy. *E.g*. Cooper v. Aaron, 358 U.S. 1 (1958); Brown v. Bd. of

tution that has grown comfortable in reaching deep into its rhetorical arsenal to accomplish its objectives.

Two recent cases—one on cross-burning, the other on campaign finance reform—strike a decidedly deferential tone even as they signal a shift in substance. But it remains to be seen whether these rulings augur a sustained shift in attitude or instead represent isolated nods to collegiality on two highly controversial subjects.[77]

B. The Frame of Institutional Discord

There exist a number of less formal language techniques forceful in sending cognitive signals about the cultural role of the Supreme Court. Chief among them is the frame of institutional discord. This is a trans-substantive language composition, crossing over doctrinal lines and subject matter boundaries. Lately, it has become a favored conversational tool of a Court that is intensely occupied with redrawing existing lines of constitutional authority.

Recall the *Dale* opinion. On the surface, the Court argued that the Boy Scouts' right of expressive association had been impaired by the state law requiring Dale to remain in their midst, citing helpful case law like *Hurley*[78] and distinguishing seemingly contrary decisions.[79] At the level of the explicit, we are confronted by cogent factual narrative, defensible doctrinal analysis, and an aesthetically attractive configuration of precedent. Whether one is inclined to embrace or to repudiate the outcome, there can be little doubt that the decision adhered to the customary rules of engagement.

Now consider anew the Court's move to enlist an image of the state supreme court run amok. This was not simply a colorful flourish, but the purposeful invocation of a frame of judicial power through the use of a metaphor with exceptionally powerful institutional significance. The opinion writers initiated a conversation about bureaucratic prerogative in which institutional friction is raised as a way of legitimizing, and even expanding, the Court's sphere of influence. In this popular form, social disharmony appears as the frightening image of organizational disarray or warring judicial power sources threatening to rend the very fabric of self-government.

But conflict-filled imagery is more than just a one-for-one representation of reality; it is more than a way of understanding one concept by reference to an-

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Educ., 349 U.S. 294 (1955) ("*Brown II*"); Brown v. Bd. of Educ., 347 U.S. 483, (1954). At the Dec. 12, 1953, conference on *Brown*, Justice Frankfurter reportedly said, "We must not be self-righteous and 'God Almighty' when writing this." DEL DICKSON, THE SUPREME COURT IN CONFERENCE 657 (2001). Justice Clark concurred: "There must be no fiat, or look like a fiat that has to be done promptly." *Id*. at 659. Similarly, at the Apr. 16, 1955, conference after the case was reargued, Justice Black exclaimed, "I would write a decree and quit. The less we say, the better off we are." *Id*. at 665.

77. *See* Virginia v. Black, 538 U.S. 434 (2003); McConnell v. Federal Elec. Comm'n, 540 U.S. 93 (2003).

78. Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995).

79. *Id*. at 657-58.

other. It also serves as a method of promoting acceptance of judicial authority by constructing psychological tension and promptly restoring well-being.[80]

In raising the terrible image of irreconcilable conflict between state law and federal constitutional authority in *Dale*, as they later did in *Bush v. Gore*,[81] the Justices laid the groundwork for their intervention to restore equilibrium. Through this technique, blame for the exercise of judicial review was laid instantly at the foot of the state supreme institution rather than the High Court. *The wayward state court forced our hand*, the Court signaled, sidestepping the fact that state legislators wrote the law and for this reason might be owed some measure of respect. Thus, the order-disorder theme played out in the ruling had a one-two punch: It unsettled the actions of another constitutional actor while it simultaneously affirmed the legal-cultural role of the Supreme Court.

Expansiveness of state law, not constitutional innovation, became the touchstone. As used in this decision, the frame of judicial power deflected attention from the ever-extending nature of the First Amendment and the gloss put on earlier cases that had set crucial limits on the right of expressive association when other important interests were at stake.[82] These boundaries are essential not for their own sake, but because they encourage the political branches at all levels of government to experiment in rights creation and to take their constitutional roles seriously. In *Dale*, however, the lines were problematically redrawn, and these incentives diminished.[83]

Through a dialectic of order-disorder, the Court thus communicates a desired conception of judicial authority. Creating a facsimile of conflict is effective because we instinctively worry more that the apparent crisis is resolved than about who takes care of the mess. We want the fire put out now, our mental tension ameliorated, and any questions to be asked later. Occasionally, the fire-danger link is made explicit, as in *Reno v. ACLU*,[84] where the Court explained that the Communications Decency Act "threaten[ed] to torch a large segment of the Internet community."[85] When this frame is engaged, we fear the

80. This technique reappears in *City of Boerne v. Flores*, 521 U.S. 507, 529 (1997). Robert Post and Reva Siegel have insightfully identified the "specter of constitutional anarchy and collapse" raised by the Rehnquist Court in rejecting the notion that Congress has independent authority to interpret the Fourteenth Amendment. Post & Siegel, *supra* note 7, at 180.

81. In the equal protection context, Richard Pildes has suggested that this technique obscured the plausible substantive alternatives that faced the Court in the presidential election decision. *See* Richard Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695, 712 (2001).

82. *See* Board of Dirs. of Rotary Club Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987); Roberts v. United States Jaycees, 468 U.S. 609 (1984).

83. In sweeping language, the Court concluded that "associations do not have to associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that could be impaired in order to be entitled to protection." *Dale*, 530 U.S. at 655.

84. 521 U.S. 844 (1997).

85. *Id.* at 882. For a systematic examination of fire-based metaphors and other sub-propositional tropes in free speech culture, see Robert L. Tsai, *Fire, Metaphor, & Constitutional Myth-Making*, 93 GEO. L.J. (2004) (forthcoming).

imagined destruction of our social and political institutions. Indeed, they dissolve before our very eyes.

Crisis, moreover, demands and justifies an equal measure of imagined legalized force to meet the psychological danger. Hence, this frame of understanding, or "experiential gestalt,"[86] triggered by the opinion writers accomplishes two objectives. It conveys the meaning of judicial authority by appealing to historically driven concerns of social disarray, and it frequently does so by subordinating other pressing questions, including those of institutional competence.

Notice the subterranean script at work: the constitutional status-quo is disturbed, a hostile force must then be put down, the Supreme Court rises up to meet the challenge, and the interpretive act eventually restores psychic calm.[87] The narrative details vary depending on the circumstances and legal questions at issue, but the underlying script structure remains the same. It can be mapped in the following manner:

> *Institutional Incursion → Unraveling of Law/ Social Institution Threatened → Judicial Intervention Dispensed → Psychological Tension Ameliorated*

The conversational structure takes as its baseline the conventional wisdom that the interpretive act is intrusive, and thus must be justified by extraordinary circumstances. Indeed, it works precisely because these entrenched assumptions exist. The stock script soothes us by bolstering both the need for and the effectiveness of the assertion of institutional influence.

A similar conversation about judicial power was operationalized in the *Velazquez* decision, which upbraided Congress for encroaching on the Court's arena of influence. The Justices conjured up the titanic image of clashing federal institutions, which threatened the harmonious mental picture of tripartite balance and the comforting ideal of evenhanded justice.[88]

Observe, too, the roles into which each constitutional actor was cast. In *Dale*, the Justices cast the state supreme court in the role of the illegitimate aggressor whose expansion of "traditional" anti-discrimination law disturbed the

86. The preferred terminology of Lakoff and Johnson differs from Fillmore's concept of linguistic "frames", but they all view "gestalts" or "frames" as ways of "organizing experiences into structured wholes." LAKOFF & JOHNSON, *supra* note 20, at 81. They identify six features of these multidimensional language structures: (1) participants; (2) parts; (3) stages; (4) a linear sequence; (5) causation; and (6) purpose. *See id* at 82.

87. Steven Winter describes this process as invoking the "Balance" and "Source-Path-Goal" image-schemas, by which the reader is taken from an initial state of harmony, through conflict and transformation, to a final state of restoration. *See* WINTER, *supra* note 19, at 109-10. This structure builds on the extended metaphor that "An Argument Is A Journey." LAKOFF & JOHNSON, *supra* note 20, at 89-96. This skeletal structure makes possible language techniques like legal argumentation, storytelling, and myth-making. I have adapted Winter's general script structure of legal opinions to account for the unique rhythm of the frame of institutional conflict that we see over and over again in the constitutional domain.

88. Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 545 (2001).

constitutional order and threatened the liberty of us all.[89] The state court dared to act out of step with other, wiser courts by refusing a location-specific understanding of the term "public accommodation." In *Velazquez*, the twist was that Congress presented an omnipresent threat to our sense of equilibrium by distorting the usual functioning of the legal system and unraveling the concept of equal treatment before the law.[90]

Judicial reinvention plays an essential feature of this psychic drama, for "the judge in American culture plays a charismatic role in that she appeals to first principles and equity, raises up the oppressed, and restores the just and natural order of things."[91] The Court in each case assumed a fictive identity to fulfill this performative aspect of judging. In *Dale*, it assumed the persona of the defender of "political and cultural diversity"[92] and "reason" itself,[93] called into action to remedy the "severe intrusion" into our collective liberty.[94] Somewhat surprisingly, the "oppressed" was not the gay scout, but the Boy Scouts of America, a vast, wealthy, and influential organization!

The *Velazquez* Court inhabited a closely related role, galloping to the rescue of the indigent. In our mind's eye, we see the Court as the reluctant warrior, the defender of the realm.[95] Once the rebellion is put down or the fire extinguished, the heroic Court sheds its alter-ego, blends back into the background, and returns to its less fearsome, pre-crisis state.

C. Binding the Strong Man

Informal rhetorical practices, like their more formal counterparts, are efficacious because they revolve around enduring archetypes, what linguists describe as "idealized cognitive models."[96] According to George Lakoff, idealized models "involve oversimplifications, and often, metaphorical understandings and theories of reality."[97] Concepts radiate outward in every direction from a cognitive ideal; all we must do is follow the lines back to uncover the hidden

89. The opinion appeals to a fixed, "traditional" ideal of public accommodation law by suggesting that the state supreme court's interpretation departs from state public accommodations laws that "were originally enacted to prevent discrimination in traditional places of public accommodation—like inns and trains." *Boy Scouts of America v. Dale*, 530 U.S. 640, 656 (2000).

90. *Velazquez*, 531 U.S. at 534.

91. DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE SIECLE 3 (1997).

92. *Dale*, 530 U.S. at 648.

93. *Id*. at 660.

94. *Id.* at 659.

95. For another example from the First Amendment area, see *Watchtower Bible and Tract Soc'y*, 536 U.S. 150, in which the Court took on the persona of defender of the "little people," in striking down a municipal ordinance that prevented door-to-door advocacy. *Id*. at 163.

96. *See, e.g.*, George Lakoff, *Categories: An Essay in Cognitive Linguistics*, *in* LINGUISTICS IN THE MORNING CALM 139, 164-65 (Linguistic Soc'y of Korea ed., 1982). Lakoff, building upon the work of his colleague Charles Fillmore, uses the example of the word "bachelor," which has social meaning only against the backdrop of a "human society with (typically monogamous) marriage, and a typical marriageable age." *Id*. This idealized model excludes priests who are not permitted to marry and individuals committed to long-term relationships who cannot or choose not to enter into marriage.

97. *Id*. at 164.

ideal exerting a gravitational pull on our legal language, along with its supporting conversational latticework.[98]

Take an image that is abundant in our expert and popular understandings of the Judiciary, one that colors much of our thinking about the proper role of the Court. On the ideal form of government, Montesquieu famously opined that "of the three powers above mentioned, the judiciary is next to nothing."[99] In the throes of political mobilization over the ratification of the Constitution, Alexander Hamilton seized upon this image and forever planted the concept of the hopelessly weak judiciary into our constitutional lexicon.[100] In proper working form, the citizenry was told, the Court is "steady, upright, and impartial."[101] It exhibits neither passion nor will but judgment, resolves legal disputes, not political controversies,[102] and enforces self-evident rules derived from the Constitution.[103] We have been grappling with this burning image of the Supreme Court ever since.

Efforts to constrain the Justices' work through a medley of complicated customs, procedures, and interpretive theories reflect not only the view that judicial review is a potentially anti-democratic feature, but also the overpowering sense that a tied Court is a more perfect institution.[104] The Justices sometimes chafe against this ideal, more of the time they play to it, but always they must contend with its existence.

The frame of institutional strife invoked by the Court as a persuasive, organizing device in cases such as *Dale* and *Velazquez* revolves around the notion that Law is Order as surely as other features of our legal system.[105] Because the

98. *See Id*. at 173.

99. M. DE SECONDAT BARON DE MONTESQUIEU, 1 SPIRIT OF LAWS 626 (Thomas Nugent trans., 1914).

100. The Federalist No. 78 (Alexander Hamilton).

101. *Id*.

102. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

103. This ideal of constitutional interpretation as rule-bound and mechanistic has been potent. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (positing rules in opposition to discretion); James Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893) (advocating exercise of judicial review only "when those who have the right to make laws have not merely made a mistake, but have made a very clear one—so clear that it is not open to rational question").

104. Cognitive models have tremendous communicative power in framing, and sometimes distorting, legal decision-making and scholarly discourse. Most of us praise the virtues of a restrained, cautious Court; others criticize these virtues as unrealistic or reflective of excessive concern for institutional preservation. Either way, we all feel the need to speak in favor of or against this ideal. *See, e.g.,* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 116 (1962) (arguing that "countermajoritarian difficulty" frames legitimize the role of the Supreme Court); Jeffrey Rosen, *Stephen Breyer Restrains Himself. Modest Proposal*, THE NEW REPUBLIC, Jan. 14, 2002 at 21 (arguing that Justice Breyer's jurisprudence exhibits cherished attributes of transparency, pragmatism, and above all, judicial modesty).

105. There is a counter-ideal, of course, which is that the Constitution is an organic document that should be interpreted to accommodate unforeseen developments and to fulfill more perfect values. The judicial philosophy commonly associated with Earl Warren or William Brennan captures this cognitive model. *See* William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977). The idealized conception itself, though, is of older vintage. *See,*

myth of judicial frailty is so fixed in the public consciousness, the archetype is readily manipulated by constitutional conversationalists. Deviations from the cognitive ideal of the bound judiciary are viewed as just that: aberrations. Like the New Testament God who has receded from daily life, in so many ways the Justices foster an image of the High Court as standing apart from human affairs, "intervening" in the social world only when it "must" do so.[106] This lasting image helps to make possible the role of the reluctant law-giver taken on by the Judiciary in pursuing social acceptance of its rulings.

We are surrounded by everyday incarnations of the bound authority figure—the term-limited President, the agrarian-soldier, the part-time local official. These historical and literary icons in our daily experiences, as much as the legal traditions directly bearing on American law, compose the background against which jurists cultivate popular perception of judicial duty, order, and care.

There are other idealized models, of course, running rampant through the case reporters, available to serve a constitutional actor on a moment's notice. The "one person, one vote"[107] ideal has driven much of voting rights law, even as it tells us nothing in particular about where a constitutional line should be drawn. Likewise, the mythic "sovereignty of the people" has been invoked in constitutional discourse since time immemorial by leading figures—from Publius to Brutus, from John Marshall to Robert Bork.[108]

Though our instinct may be to deny it, symbols, images, archetypes, and shortcuts are endemic to how constitutional law is explained by tribunals and understood by a diverse citizenry. As one might expect, there is cause for both optimism and concern. Informal linguistic practices can, and have been, turned back upon existing institutions by the members of the public as they remake the lines of authority in each generation. At the same time, playing to cultural ideals about the Court can obscure the difficult substantive choices that are made,

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BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 83 (1921) (arguing that the Constitution lays down "principles for an expanding future").

106. Decisionmakers frequently appeal to the ideal of the bound court by describing the very exercise of interpretation as "judicial intervention." Washington v. Glucksberg, 521 U.S. 702, 768 (1997) (Souter, J., concurring); *see also* Poe v. Ullman, 367 U.S. 497, 539 (1961) (Harlan, J., dissenting) (describing review as "judicial interference in [the] sovereign operations of the State" that must be clearly warranted).

107. The courts have never literally meant that each person's vote must be accorded equal weight, or that election procedures must be the same from jurisdiction to jurisdiction, or even that the Constitution guarantees that every vote will actually be counted. *See, e.g.*, Bush v. Gore, 531 U.S. 98 (2000) (invoking this cognitive model as justification for ruling that Florida's "intent of voter" test invited standardless recounts); Allen v. State Bd. of Elections, 393 U.S. 544, 569 (1969) (holding that the "one person, one vote" principle could be violated through vote dilution).

108. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 403-04 (1819) ("The government proceeds directly from the people; is 'ordained and established,' in the name of the people.'"); The Federalist No. 78 (Alexander Hamilton) (arguing that judicial review does not imply "a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both."); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 2 (1971) (arguing that judicial legitimacy derives from popular consent); *Essay of Brutus to the Citizens of New York*, Nov. 1, 1787, *in* 2 THE COMPLETE ANTI-FEDERALIST 372-73 (Herbert Storing ed., 1981) ("[T]he people of America . . . hold this truth as self-evident, that all men are by nature free.").

the counter-ideals suppressed—momentarily or for a longer spell—and the interpretive paths not taken.

V

CONCLUSION

Awareness of bureaucratic dynamics and cognitive processes aids us in discerning the ways in which the Supreme Court behaves as a cultural institution. While the Rehnquist Court has demonstrated its skill with language in a number of ways, one recurring composition stands out from the crowd. The frame of institutional strife, examined here in recent free speech decisions, is an especially efficacious, though troubling, language device. Imaginatively invoking cultural ideals of restraint and order, this move creates psychic tension, identifies a culprit, repairs the breach, and in the process enhances the legitimacy of the Court. Order is ritually reestablished through the force and rhythm of the Justices' words, and through their engagement with memories of past conflict and the sensations of fear and uncertainty, comfort and stability.

There is much more work to be done in this vein. In an important sense, then, the turn toward the cognitive sciences is not an attempt to offer a programmatic vision of law's content, but a work in progress toward a descriptive methodology, one that exhibits a keen sensitivity to the intricate relationships between language, cognition, and state authority. If we isolate the rhetorics of power employed by our governing institutions, we can appreciate the full spectrum of legal language and experience its creative and vibrant qualities. One might even discover new patterns of judicial behavior. Linguistic tendencies provide clues about institutional motivations, doctrinal development, and the extent to which American culture influences legal thought.

In the final analysis, we should take care not to train our eyes so intently upon the explicit forms of argumentation in judicial writings that we discount seemingly nonessential language as decorous arrangements. Routine turns of phrase could play a critical mental "cuing" function. A potent metaphor or catchy saying might constitute, in the memorable words of Justice Robert Jackson, an "effective . . . shortcut from mind to mind" bringing to life the full force of legal authority.[109]

109. West Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943).