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9-1-2021

## Postmodernity, Chance, and Judicial Interpretation

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### Recommended Citation

Love, Tanner (2021) "Postmodernity, Chance, and Judicial Interpretation," *Compass: An Undergraduate Journal of American Political Ideas*: Vol. 5: Iss. 2, Article 1.

Available at: <https://digitalcommons.jsu.edu/compass/vol5/iss2/1>

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Title: Postmodernity, Chance, and Judicial Interpretation

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Abstract: This essay is about postmodern thought's view of chance as compared to ancient and modern thought, and how this view turns judicial interpretation into a game of force.

Throughout the history of the West, political philosophers have debated the role that chance plays in political life. Ancient philosophers thought that the emergence of the best regime depended on chance. The law was understood to be a tool for human progress, but man could never *overcome* chance to bring about the best regime. Modern philosophers rejected this claim. The moderns *attempted* to conquer chance through the use of reason so that man could build the best regime. In turn, the success of the modern project depends on the rational creation, careful interpretation, and steady enforcement of the law. With the rise of postmodernity, we are left to wonder: how does this new system of thought confront chance? Furthermore, how will this new understanding of chance impact our modern system of laws?

To begin, we must understand what postmodern political thought is. The chief difficulty with defining this thought is that it is not and should not “be understood as a unified or coherent doctrine” (Bronner 2006, 397). Postmodern thought is fragmented, varied, and non-cohesive: “even among the advocates of post-modernity there is little unanimity on what post-modernity in theoretical and practical terms actually entails” (Avbelj 2016, 411). Despite these difficulties, one can identify a few broad themes that emerge from postmodern thought and note some of their practical consequences.

One of the most important features of postmodern thought is its “incredulity toward metanarratives” (Lyotard 2006, 399). Postmodern thought doubts that there are any universal principles or truths that are correct at all times, in all places, and for all people. One cannot claim divine law or natural law rules over all people according to the postmodern. This understanding of human life casts a shadow of doubt on the truth and goodness of any convention or man-made law. Second, postmodernity features an “affirmation of differences” (Avbelj 2016, 413). This means that postmodernity rejects uniformity in favor of dissimilarity. However, the presence of numerous interpretations of fundamental principles seems like it would inevitably lead to conflict. For example, what if everyone acts on their own view of free speech or the right to keep and bear arms? Dissimilarity on issues like these undermines the cohesiveness of a stable society.

Third, postmodern thought requires one to deconstruct the world in order to understand it (Avbelj 2016, 413). Postmodern thought breaks down traditional understandings and creates an environment where nothing can be permanently constructed—everything is open. Theories and cultural systems are torn down. Deconstruction can be even more impactful when it involves the judicial system. For example, the idea of deconstruction is opposed to the doctrine of *stare decisis*—the legal doctrine of allowing precedent to rule in future cases. Under this theory, eliminating the pressure of precedent would give society the freedom to decide each case in isolation. This makes it possible for judicial decision making to become an arbitrary process.

This openness leads to a fourth common feature of postmodernity: “Nothing ever has a set, stable, or unchanging meaning” (Zuckert 1995, 90). Postmodern thought contends that all human language is subjective. This understanding of language makes interpretation an act of creation. How can the United States Supreme Court interpret the true meaning of the 2<sup>nd</sup> Amendment when there is no true, inherent meaning?

To sum up, postmodernity can be characterized by its open-endedness. For the postmodern, there is no objective “best.” This infinite openness is non-progressive and leaves one with no unified, ultimate goal like virtue, utopia, or even progress. This view is inconsistent with the modern system of interpretation. Modernity sees legal interpretation as determining the true meaning or intent behind laws. Postmodernity rejects this modern view in favor of permanent flux. How does a system of thought with no ultimate direction contend with chance?

Postmodern thought simply ignores chance, and it is able to accomplish this because of its ambiguous ambitions. Chance is not required to achieve *nothing*. Postmodernity does not have any overarching goal to achieve and, since it has no ultimate goal, chance cannot be said to hinder or forward a postmodern society. Instead of contending with chance, postmodernity displays an attitude of “indifferent playfulness” (Smith 1995, 99). Whereas modernity accepts chance as something to be overcome, postmodernity reduces it to a non-variable, for variables only matter if an experiment is seeking an answer. The bar has been lowered to the point that everything is equally valid. Postmodernity defeats chance by passively stepping back.

How might postmodernity’s theoretical commitments and indifference to chance impact the lawmaking process and legal interpretation in the United States?

The postmodernist believes that the lawmaking process is really an unstable combat of wills. An open indifference to chance reduces stability and makes the government “endless transition without terminus” (Smith 1995, 99). The direction of the country would change as often as chance wills. With instability combined with subjective openness, “postmodernism threatens, therefore, to ensure the unlimited politics of the will to power” (Smith 1995, 99). With no objectively correct direction, everyone is encouraged to fight for their subjective opinion. Law-making, and any discussion of political ideas, becomes “a contest of nonmetaphysical one-upmanship” (Smith 1995, 99). Politics and law become a battle of will. A winner is determined solely by the force of the victor.

Post modernity’s features of openness and interpretation as an act of creation suggests obvious problems for the American system of law. A modern system is premised on one being able to seek objective truth by using the light of human reason. Postmodernity is incompatible with the modern system: “If we understand the interpretive process as a creative action that must necessarily assert subjective values, there is a degree of unease surrounding the state sanctioned authority of the judicial perspective.”(Hooper 2018, 47). As such, no single interpretation of the law can claim to capture the true meaning of a statute. Not even all nine of the U.S. Supreme Court Justices can agree on the meaning of many important constitutional provisions.

As recently as 2008, the Court could not unanimously agree on an interpretation of the Second Amendment. The five Justice majority stated, “There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms” (*DC v. Heller*). The four Justice dissent takes a different view. Justice Stevens wrote, “the Amendment is most naturally read to secure to the people a right to use and possess arms in conjunction with service in a well-regulated militia” (*DC v. Heller*). Even though the majority interpretation obtained the force of law, the postmodern thinker would see this as merely an imposition of will. A postmodern interpretation of this decision would recognize that one side is

using their power (i.e. a majority of Justices), to force a view or policy onto the nation, because this decision is backed by the force of the federal government. Under American or modern thought, reason is understood to be a reliable guide that can bring one to a correct interpretation. The modern legal interpreter is in the process of logical discovery—like a scientist uncovering natural phenomenon. Postmodernity would have a significantly different approach. Neither language nor reason can serve as interpretive guide. Given this significant hurdle, does legal interpretation have a place in postmodernity?

Postmodernity relies on physical force to establish compliance to a legal interpretation. There have been attempts to maintain the modern system, while using a postmodern interpretation. “Notes Toward a Postmodern Principle” presents a postmodern form of judicial interpretation that acknowledges that “each successive reader builds on the creativity of interpretation” (Hooper 2018, 60). I think this compromising process fails to fully abandon the principles of modernity. This process relies on everyone agreeing to a single interpretation—an unlikely event for postmodern thought. Furthermore, it seems to not consider the open, conflicting nature of postmodernity. Why should one creative interpretation be considered ruling? A postmodern judicial interpretation cannot rely on consent, reason, or morality, for they are all metanarratives.

For America, this would look like slim majorities interpreting law and using the government’s power to enforce it. Consider the previously mentioned case of *DC v. Heller*. Is it possible to convince the American public of the majorities’ interpretation of the Second Amendment? Compliance and uniformity are guaranteed by brute force. One Justice would have tipped the scale in the other direction. The minority’s view could have easily been the majority and imposed on the country. The only difference between which view gets imposed is who is in power. Chance chooses who gets the power: “your strength is just an accident arising from the weakness of others” (Conrad and Martin 2008, 41). Chance does not impact the overall project of postmodernity, but it still interacts with the pursuits of individuals and groups in society.

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