A FISH OUT OF WATER?:

HOW LITERARY THEORY CAN BENEFIT

LEGAL INTERPRETATION

by

Russell Fraley

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To my children, Zach, Alex, and Katie, whose unyielding support allowed me to accomplish this goal.

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by

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Russell Fraley, PhD
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The correct theory of legal interpretation courts should apply to the cases and controversies before them has been the subject of long and often heated debate. Such argument has not progressed to any conclusion in over 200 years. This dissertation proposes to apply literary critical theory to the analysis of various legal interpretive approaches in order to: (1) understand why the debate is futile; and (2) propose the method of legal interpretation that presents the best opportunity for the courts to make transparent and comprehensible decisions based on a combination of text, history, technical, and social development, as well as what is best for the public and for the cultural or ethnic group whose rights are at stake.

In order to accomplish this task, this work examines sample U.S. Supreme Court cases of social, legal, or political significance over the last six decades. In doing so, this dissertation analyzes the interpretive legal theory the author of the majority opinion claims to apply to the decision in order to determine whether the claimed theory and the opinion coincide. This investigation suggests a frequent disconnect between the theory claimed and the holding of the opinion.

Literary theory is then applied in an effort to explain this disconnect. On the basis of this audit, this dissertation proposes the legal interpretive method that appears most consistent, transparent, and ethical, and argues for the routine application of that methodology by the courts.

The research reviewed suggests that literary critical theory proves extremely helpful in explaining the apparent disconnect between theory and result in Supreme Court opinions. The work of scholars such as Stanley Fish, Steven Knapp, and Walter Benn Michaels suggests that each of us thinks through a filter of our personal experience, education, religious beliefs, ethnic and cultural group/status, political views, and expectations. Because we interpret events through this filter, it is impossible for any justice or judge to impartially apply a theory that exists independently of their system of beliefs. This conclusion is based largely on the literary reader-response theory – developed by scholars like Hans Robert Jauss, Stanley Fish, and others – which posits that each reader finds meaning in a work based not only on the text but also on the basis of his history, experiences, expectations, knowledge, and beliefs.

Having examined a wide variety of opinions based on different interpretive approaches, this work advances the legal interpretive method that seems not only to work most consistently in its analysis, but also results in decisions that are most often transparent, ethical, just, and in the current best interests of the public and its various ethnic and social minorities. That approach – which I refer to as "ethicism," but is also known as "living constitutionalism" – allows the court the flexibility to consider not only the words and historical meaning of a text, but also changes over time in society, its values, and technology that can impact the outcome. Although this

methodology is criticized as offering the Supreme Court excess authority and the ability to usurp the powers of the legislative and executive branches, this work argues that such authority is already vested in the Court by the Constitution and precedent.

This dissertation concludes that the endless debate over legal interpretive theories is largely futile because justices and judges are largely unable to apply them neutrally and without prejudice. It argues that a better approach is recommended by literary theory: ethicism, as informed by reader response theory. Furthermore, the increasing politicization of the Court has eroded public trust in the institution as fair and impartial. This fact threatens the Court with changes by the legislature or executive in the form, makeup, or selection process of the Court. Ethical decision making could help restore that trust.

There could be important potential social consequences were the Court to adopt of a consistent ethicist method of deciding cases. This work argues that oppressed minorities and opposition groups could benefit from a fairer, more objective approach by the Court, as demonstrated by the Black Lives Matter and MeToo movements and critical cases such as the upcoming review of *Roe v. Wade.* Society is harmed by the inconsistency and obvious prejudices of the Court, and adoption of ethicist methodology could ameliorate that harm.

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CHAPTER 1

INTRODUCTION AND THESIS

I. The Project of This Dissertation.

This dissertation attempts to apply work from the field of literary theory to the process of legal interpretation, to evaluate what, if any, contribution the former can make to our understanding of the latter. Based on a rich history of scholarship in the field of law and literature, I analyze various approaches to legal interpretation and consider what assistance literary theory may make to this enterprise. My research and review of sample U.S. Supreme Court decisions over a long history of courts and chief justices indicates the justices are inconsistent in applying whatever theory of legal interpretation they claim to use, and in fact, some other process is occurring. This disconnect is explained, I argue, by work in the field of literary interpretation – particularly that of Professor Stanley Fish[1] and similar scholars such as Robert Stecker,[2] Gary A. Olson,[3] Wolfgang Iser, and others. This scholarship suggests that a court – such as the U.S. Supreme Court -- is always engaged in an unintentionally futile process of overlaying a patina of personal belief with the dressings of legal interpretation theory. Further, the court does not realize (probably) that it is doing so and, importantly, we are all similarly bound to act within the "bubble" of our personal value systems in making such judgments. What this means is that each of us interprets a text – whether legal or literary – through a filter of our

[1] The "Fish" of the title, currently the Floersheimer Distinguished Visiting Professor of Law at Yeshiva University's Benjamin N. Cardozo School of Law in New York City.
[2] Robert Stecker, "Fish's Argument for the Relativity of Interpretive Truth," *Journal of Aesthetic and Art Criticism* 48, no. 3 (Summer 1990): 223-30.
[3] Gary A. Olson, *Justifying Belief: Stanley Fish and the Work of Rhetoric* (New York: SUNY Press, 2012), 178.

knowledge, experience, education, politics, cultural and social group, religion, and values. We can never apply any interpretational theory in an unbiased manner.

This dissertation also argues that theories of literary interpretation -- especially "reader response" theory developed by Hans-Georg Gadamer, Hans Robert Jauss, Wolfgang Iser, Stanley Fish, and others – prove useful in choosing among approaches to legal interpretation and applying them. Reader response theory examines literary interpretation from the viewpoint of the reader or audience, not the author. In this context, intent is not contained solely within the text but is constantly created by the reader as he reviews the text through his own knowledge, experience, education, and the like. In the context of this dissertation, I propose to show that an approach to legal interpretation similar to reader-response theory[4] allows a court or judge to consider the text through the needs, desires, experiences, and values of the affected community. This specific approach is derived from the version of reader-response theory developed by Fish, in which the "reader" or "audience" is not an individual, but a member of a social or cultural group.[5] This methodology allows the interpreter to consider historical, cultural, and technological changes over time, social development, and current community standards in the context of the text and its history.

II. Existing Law and Literature Scholarship and My Contribution to It.

As discussed in more detail below, this project draws upon an existing foundation of scholarship on the roles that literature can play in the law, a field developed by James Boyd White and further expanded by Judge Richard Posner, Professor Richard Weisberg,

[4] I describe this as "ethicism," but it is also known as "living constitutionalism."
[5] *See* p. 12.

Professor Stanley Fish, and Professor Richard C. Post, among many others. Their seminal work delves into the relationship, overlap, and uses of literature *and* law, as well as literature *in* law. Post's work, in particular, to some extent anticipates my own in that he discusses theories of legal interpretation in literary terms. Although my work makes some use of Post's analysis of legal interpretational theories, this project goes much further to apply literary theory to an examination of the result of specific legal cases in order to determine whether the courts apply legal interpretational theories consistently and impartially.

Among those scholars who have specifically examined the possible role of literary criticism in legal interpretation is Ronald Dworkin. Dworkin examines legal interpretation from an aesthetic standpoint, much as one might approach a work of literature.[6] Dworkin argues that both the author's intention and, inevitably, the politics of the reader affect the reader's view of any work. Dworkin does not, however, apply his analysis to specific cases or to the interpretational method used in them.

This dissertation is both part of the ongoing scholarly conversation in law and literature and a unique contribution to it in that it engages in a case-by-case legal-interpretational survey of landmark U.S. Supreme Court cases. It then applies literary theory to explain the consistent disconnect between the theory of legal interpretation a Justice claims to employ and their actual analysis in each case. The project further attempts the distinctive work of employing reader-response theory to identify the particular method of legal interpretation that allows the Court to be most transparent and consistent. No other scholar of law and literature, according to the results of my research, has undertaken this challenge.

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[6] Ronald Dworkin, "Law as Interpretation" *Critical Inquiry* 9, no.1 (Sep. 1982): 179-200.

III. The Problem and a Proposed Solution.

What is a court – in particular, the U.S. Supreme Court – doing when it decides a case? The Court typically claims to be engaged in a rigorous review of statutory, precedential, or Constitutional language to reach its result. This dissertation examines this contention by analyzing sample Supreme Court cases to determine the argument's relative veracity. Is the Court doing what it says it is doing (or intends to do), or is some other process taking place? Is the Court, in fact, even able to do what it claims it is doing? This research examines sample cases of historical significance from multiple Supreme Courts over the last 60 years to attempt to answer this question. Some of the cases I consider include *Obergefell v. Hodges* (gay marriage); *Citizens United v. FEC* (corporate political contributions); *Miller v. California* (obscenity); *District of Columbia v. Heller* (gun control); *Brown v. Board of Education* (separate but equal education); and *U.S. v. Nixon* (executive privilege). Each of the cases examined in this dissertation have in common that they are of historical/political significance and that the legal analysis applied either appears inconsistent from that claimed or employs an analysis similar to reader-response theory.[7]

What is at stake here is the credibility of the U.S. Supreme Court and the public's willingness to accept its decisions. Although the Court theoretically derives its authority from the Constitution and prior case decisions, the confidence of the public in the impartiality of the Court is equally important. Should the Court lose that confidence (as it is beginning to), it may suffer

[7] Note that the selection process attempts to include at least two sample cases from each Chief Justice's tenure over the last six decades. The cases chosen were selected for their notoriety, historical and societal significance, and interest to the reader. The analysis and the results, however, apply to cases of any size or significance.

consequences that include Legislative or Executive changes in the Court's makeup or selection process. As Peter Goodrich puts it:

> The issues raised and the interests threatened are ponderous and vast; many of the dogmatic articles of legal faith are at stake and it should not be viewed as surprising if the debates as to the substantive implications of different forms of interpretation appear at times extreme and the positions adopted seem labored or untenable. The issues raised are intrinsically political: a direct challenge is presented to the traditionally established motive and characteristics of legal method, the humanistic tenets of legal philology are denied, and the liberal ideology of the rule of law itself is again placed in question. In such a context the current jurisprudential debates have an uncharacteristic urgency, for it is not simply the legal educational apparatus that is asked to change its course but, more dramatically, it is substantive legal practice and the corresponding professional status or standing of the law that are placed in balance.[8]

I propose a "solution" of sorts to the dilemma of legal interpretation, although admittedly an imperfect one: the application of the literary analytical approach of so-called "ethicism" or "responsive interpretation," also known as "living constitutionalism" – derived from reader-response theory. This approach to Constitutional and statutory interpretation considers the historical development of our society and technology, the desires of the affected cultural group(s), and their experiences, knowledge, history, education, ethnicity, and the like. Although this approach to legal interpretation is oft-criticized as allowing unelected justices to make key policy decisions (*see* below), the theory has the benefit of relative transparency, recency, relevance, and flexibility; the Court can do what it claims to be doing.

IV. Background.

Former U.S. Supreme Court Justice Antonin Scalia (deceased) and writer Bryan A. Garner have opined that "theories of legal interpretation have been discussed

[8] *See* Peter Goodrich, "Historical Aspects of Legal Interpretation," *Indiana Law Journal* 61, no. 3, art. 2 (Summer 1986): 331 (providing a history of the ongoing debate over legal interpretation methods).

interminably, and often so obscurely as to leave even the most intelligent readers – or perhaps especially the most intelligent readers – befuddled."[9] This view by Scalia and Garner is one on which many other legal scholars agree[10] – that such "theories" have proved of little effect in resolving the debate about legal interpretation. Doubtless, legal interpretation continues to be ensnared in the same arguments made for the last 230 years without substantial progress.[11] Suggested interpretational approaches have included originalism (the meaning of the words at the time they were written or adopted), textualism (the meaning of the words in context), precedent (meaning as applied in prior case law), purposivism (interpretation based on the intent behind the document or text), pragmatism (what outcome makes sense given the facts and consequences), and moral reasoning (interpretation based on moral values). Why are the courts unable to agree on an interpretive approach? Why does the debate over the "correct theory of interpretation" never make progress? As shown in detail below, I suggest that this debate is likely doomed to continue, because the very theoretical foundations of that debate are flawed.

Nevertheless, Scalia and Garner propose "starting over" by adopting their preferred method of legal interpretation, "textualism," which involves examining the meaning of the words

[9] Antonin Scalia and Bryan A. Garner, *Reading Law* (Thompson/West, 2013-15), *citing* Learned Hand, *Commemoration of Fifty Years of Federal Judicial Service*. (New York Publishing, 1959) ("[M]any sages. . . have spoken on [statutory construction], and I do not know that it has gotten us very much further.").
[10] *See, e.g.*, Robert Dworkin, "Law as Interpretation" *Critical Inquiry* 9, no. 1 (1982): 179-200, http://www.jstor.org/stable/1343279; David O. Brink, "Legal Theory, Legal Interpretation, and Judicial Review" *Philosophy & Public Affairs* 17, no. 2 (1988): 105-48, http://www.jstor.org/stable/2265179; William D. Popkin, "An 'Internal' Critique of Justice Scalia's Theory of Statutory Interpretation" (1992): 668, http://www.repository.law.indiana.edu/facpub/668. Dworkin, in particular, has written about issues in legal interpretation and the role of literary theory in addressing them.
[11] *See* Goodrich, *Historical Aspects*, at 331.

in the text at the time of their adoption in the context in which they apply.[12] Scalia and Garner offer judges a step-by-step guide for the application of textualism to legal documents.[13]

V. What is Literary Critical Theory and What Does It Have to Do with the Law?

As a preliminary matter, "literary critical theory" or "literary interpretation" refers to those propositions by literary scholars regarding the meaning of literary or artistic works, while "legal critical theory and methodology" identifies the postulates put forth by legal scholars, judges, and lawyers as to how best to interpret a statute, case, regulation, or constitution. Some of the immediate differences and commonalities are obvious. Literary critical interpretation generally refers to the analysis of poetry, novels, other forms of fiction or non-fiction, art, and the like.[14] Legal criticism, on the other hand, applies to non-fiction texts such as statutes, contracts, and case precedents. That said, there are similarities and crossovers among the respective approaches.

Several literary theorists have explicitly addressed the relationship between literary interpretation and legal interpretation, including James Boyd White, Richard Weisberg, Jack Balkin, Ian Ward, Ronald Dworkin, and many others. One of the first to do so was White, who is frequently given credit for being the father of the "law and literature" movement (although his work applies that of a handful of European scholars).[15] White engaged in a career-long project of applying the techniques and forms of literature and literary analysis to the

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[12] James Maxeiner, "Scalia & Garner's Reading Law: A Civil Law for the Age of Statutes?" *J. Civ. L. Stud.* 6 (2013): 2-3.
[13] Maxeiner, "Scalia & Garner's Reading," 2-3.
[14] Although primarily applied to written material, literary theories are equally applicable to music, art, the spoken word, and other forms of expression.
[15] *See* James Boyd White, *The Legal Imagination* (The University of Chicago Press, 1973), and other works, up to and including James Boyd White, *Living Speech: Resisting the Empire of Force* (University of Princeton Press, 2006).

understanding of law.[16] He wanted to humanize the law, its application, and its results.[17] White believed that the application of literary forms, techniques, and analysis to the law, to its rules, and to its results enhanced the pursuit of that goal.[18] For White, this process involved "the translation of the imagination into reality by the power of language."[19] Thus, literary theory, according to proponents of its application to the law and legal interpretation, brings aspects of the humanities such as rhetoric, narrative, structure, story, and the like in a way that enhances, personalizes, and sensitizes the law, which can be rigid, formalistic, and cruel in its application.

In "Forty-five years of law and literature: reflections on James Boyd White's *The Legal Imagination* and its Impact on Law and Humanities Scholarship,"[20] numerous authors explore Whites' massive contribution to the new field of law and literature by his analysis of interpretation, legal theory, and legal techniques in comparison with those of literature. White argued thereby that literature had a close relation to the law and that its ideas, works, forms, and techniques had much to offer the law. White's work has impacted legal education and the practice of law by "re-imagining of legal education, scholarship and practice, and one that seeks to make good a deficit in these practices by effecting a reconnection between them and some basic values and principles."[21] White addressed good writing, persuasive speaking, and appropriate judgment and the interrelation of these topics to literary techniques. White promotes,

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[16] James Boyd White, "Interview with James Boyd White," *Mich. L. Rev.* 105, no. 7 (May 2007): 1403, https://repository.law.umich.edu/mlr/vol105/iss7/5
[17] White, "Interview," 1403.
[18] White, "Interview," 1403.
[19] White, "Interview," 1404.
[20] David Gurnham, Elizabeth Mertz, Robert P. Burns, Matthew Anderson, Jack L. Sammons, Thomas D. Eisele, Linda L. Berger and Linda Ross Meyer, "Forty-five years of law and literature: reflections on James Boyd White's *The Legal Imagination* and its impact on law and humanities scholarship," *Law and Humanities* 13, no. 1 (2019): 95-141. DOI: 10.1080/17521483.2019.1607026.
[21] Gurnham, et al., "Forty-five years," 5.

according to Mertz, a sense of "ethics and humanity"[22] in the practice of law and legal education that often is missing.

Eisele suggests that White offered lawyers and law students a way to see the world and law's place in it as a model for human behavior.[23] Berger suggests we view legal opinions as "poems" in the sense of forming new views from the familiar and speaking meaningfully about our existence. Finally, Meyer urges that White encouraged lawyers (as do I) to adopt a more humane approach to what constitutes justice and fairness in the law.[24]

Stanley Fish, the noted scholar and critic of literary interpretation, discussed the meaning of "intent" and the use of prior case history by judges ("*stare decisis*") to decide subsequent cases in his article "Working on the Chain Gang: Interpretation in the Law and in Literary Criticism."[25] In that article, Fish noted that:

> [I]t is neither the case that interpretation is constrained by what is obviously and unproblematically "there," nor the case that interpreters, in the absence of such constraints, are free to read into a text whatever they like…. Interpreters are constrained by their tacit awareness of what is possible and not possible to do and what is a reasonable and what is not a reasonable thing to say….[26]

This difference, according to Fish, is the difference between explaining a text and changing it, and this contrast applies both in law and in literature. In his view, some interpretations are reasonable, some are not.[27] The point is that literary critical theory has something to "teach" the

[22] Gurnham, et al., "Forty-five years," 6.
[23] Gurnham, et al., "Forty-five years," 6.
[24] Gurnham, et al., "Forty-five years," 6.
[25] Stanley Fish, "Working on the Chain Gang: Interpretation in the Law and in Literary Criticism," *Critical Inquiry* 9, no 1 (1982): 201-216.
[26] Fish, "Working on the Chain Gang," 211.
[27] Fish, "Working on the Chain Gang," 211.

law and those who practice it: a new way of looking at what judges do when they decide a case that can provide both intellectual honesty and more coherent analysis to legal interpretation.

Lisa Sirganian's recent work *Modernism and the Meaning of Corporate Personhood*,[28] examines the relationship between the legal system and modern literature and how the adoption of the rule that "corporations are persons" in *Citizens United v. FEC* has a basis in literary works and impacts both the legal and literary worlds. Sirganian examines the consequences of the meaning of "person" historically and legally and the interaction between the two disciplines in often unexpected ways.

Stephen Elsky, in *Custom, Common Law, and the Constitution of English Renaissance*,[29] suggests that custom, in the form of the English common law, was a driving force behind the evolution of literary forms during the Renaissance and gave rise to new and novel techniques in literature that derived from those of the common law. The perception that the English common law had an inevitable continuity to it suggested to artists of the English Renaissance that the law was a force that persisted through cultural shocks and revolutions and provided literature itself with continuity, even as its forms and methods changed over time. This belief freed writers to experiment with new techniques while feeling confident they were part of a long tradition grounded in the common law.

Matthew Birhold's *Characters Before Copyright*[30] is an interesting take on the relationship between literature and the law. His book examines fan fiction as a force behind the development of copyright and intellectual property law in Eighteenth Century Germany. His

[28] Lisa Sirganian, *Modernism and the Meaning of Corporate Personhood* (Oxford University Press, 2021).
[29] Stephen Elsky, *Custom, Common Law, and the Constitution of English Renaissance* (Harvard University Press, 2020).
[30] Matthew Birhold, *Characters Before Copyright* (Harvard University Press, 2019).

work suggests that German literature and fan fiction of the time revealed an unwritten set of rules regarding use and adoption of literary characters, and that from that unspoken understanding German copyright law evolved. Fan fiction of the time, such as prequels, sequels, and spinoffs, evoked a great deal of debate about ownership of literary works and what non-authorial use was appropriate. Birhold's work suggests that literature of the time was much more of a collaborative enterprise under a free exchange of characters and ideas.

Julie J.A. Shaw's work *Law and the Literary Imagination: The Continuing Relevance of Literature to Modern Legal Scholarship*,[31] argues that literature enlightens the law by its use of language and social and moral values. Both explore similar topics: authority, rights, justice, freedom, and equality. Because of their close relationship to these common topics, literary works and devices can enhance and improve the law and its practice by incorporating ideas of philosophy, justice, equality, social revolution and evolution, character, narrative, and the like. Shaw highlights the close interrelation of literary and legal ideas, topics, and theories.

Other modern scholars continue to explore the contributions to the law that literature can make. For example, Elizabeth S. Anker and Bernadette Meyler in their book *New Directions in Law and Literature*,[32] discuss the many new applications and interconnections of law and literature, such as globalization, queer theory, performance, imagery, copyright, new approaches to marriage, and many others. Their work demonstrates the breadth and continuing relevance of literature to law.

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[31] Julie J.A. Shaw, "Law and the Literary Imagination: The Continuing Relevance of Literature to Modern Legal Scholarship." In *The Palgrave Handbook of Philosophy and Literature*, eds. B. Stocker, M. Mack (Palgrave Macmillan, London, 2018).

[32] Elizabeth S. Anker and Bernadette Meyler, *New Directions in Law and Literature* (Oxford Scholarship Online, 2017): https://global.oup.com/academic/product/new-directions-in-law-and-literature-9780190456368?cc=us&lang.

VI. Reader-Response Theory.

Fish argues that meaning is not imparted from the text to the reader, but rather that the process of interpretation involves the reader constantly analyzing the work based on their experiences, beliefs, expectations, background, social status, ethnicity, and the like.[33] Thus, the meaning is not somehow encoded in the text to be discovered by the reader, but is encountered in the process of a series of decisions by the reader – always based on the reader's background, knowledge, and experience – as to the intent of the author.[34] Further, this realization does not, Fish argues, lead to endless relativism because the number of possible legitimate interpretations are constrained both by the text itself and by the "interpretive community" to which the reader belongs, members of which share strategies for understanding texts.[35]

Moreover, the context in which the reader hears or reads the words always contributes to their meaning.[36] Fish offers the example of a student inquiring of a professor before the first day of a course, "Is there a text in this class?" The professor understands the question as regarding required reading, whereas the student intended to ask whether the course applied textualist theory, which whether such a thing as a "text" even exists. Each came to the question from a different direction, but both meanings were valid understandings.[37]

This "reader-response" theory, I suggest, has equal application to constitutional interpretation. The argument that readers' interpretation is based on their background, history,

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[33] Stanley Fish, "Literature in the Reader: Affective Stylistics," *The Journal of Aesthetics and Art Criticism* 2, no. 1, A Symposium on Literary History (Autumn 1970): 123-162.
[34] Nasrullah Mambrol, "Key Theories of Stanley Fish," *Literary Theory and Criticism* (February 13, 2018): https://literariness.org/2018/02/13/key-theories-of-stanley-fish/.
[35] Mambrol, "Key Theories."
[36] Mambrol, "Key Theories."
[37] Mambrol, "Key Theories."

education, and anticipations parallels the methodology of those jurists who find meaning in statutes and cases based not on the intent of the framer or drafter, but rather on the reasonable expectations of the current public and the prudential wisdom of the court regarding appropriate outcomes given the needs of current society. Constitutional scholar Philip Bobbitt in his text *Constitutional Fate: Theory of the Constitution*,[38] suggests that such prudential analysis – which I refer to throughout as "ethos theory" or "ethicism," but is also called "living constitutionalism – is one of five possible approaches to the interpretation of the Constitution.[39]

VII. Ethicism.

Yale scholar Robert C. Post refers to this analytical approach to decision-making as "responsive interpretation" or interpretation based on ethos.[40] This theory, as described by Oliver Wendell Holmes (as quoted by Post), holds that "the Constitution is not exhausted in a single creative act of consent, but continues to inhere in the national 'being' that the Constitution has 'called into life.'" This authority is not laid down in precedent or bound up in original intent; rather, it flows from the "whole experience of nationhood."[41] In this context, the U.S. Constitution, for example, is not a fixed text; rather, it represents a "working Constitution," the content of which may be characterized as "extra-documentary."[42] Another way to put this is that the Constitution becomes a "living document" whose import adapts to the needs of a changing society. This view requires judges to see the Constitution "as a form of what Phillipe Nonet and

[38] Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (Oxford University Press, 1982).
[39] According to Bobbitt and others, some argue there are many more such methods and theories.
[40] Robert C. Post, "Theories of Constitutional Interpretation," *Faculty Scholarship Series* 209 (1990): 23-24.
[41] Post, "Constitutional Interpretation," 22-24.
[42] Post, "Constitutional Interpretation," 24.

Phillip Selznik have called 'responsive law,' law that submits to 'the sovereignty of purpose' by functioning 'as a facilitator of response to social needs and aspirations.'"[43]

Post's work is limited to explaining the workings and theory of different approaches to legal interpretation and how each compares to the others. My work differs from and builds on Post's by applying Post's various possible interpretational methods to the analysis of specific cases of historical and political significance in order to evaluate whether an approach like responsive interpretation or "ethos" can contribute to an understanding of the Court's reasoning and to selection of a method of legal interpretation that solves many, if not all, of the problems I highlight. Whereas Post's work focuses only on judicial philosophy related to the Constitution and how that philosophy offers a guiding precept in legal decision making, this paper, using a case study approach, examines the shortcomings and failings of those philosophies.

By analyzing the decisions in specific cases in relation to a judge's legal philosophy, a new approach to legal interpretation emerges. I refer to this approach to legal interpretation as "ethos" or "ethicism" because I understand the goal of this method of legal interpretation to be to determine the current needs and desires of the public, the racial, ethnic, or social group directly affected by the outcome. To put it another way, the goal is to do "good" within the bounds of Constitutional intent and the Founding Documents based on the historical development and goals of society. I would argue that ethicism is not so much a "theory of interpretation" as it is a way of looking at the law through the eyes of the nation or the affected group in order to understand

[43] Post, "Theories of Constitutional," 32-33, citing Philip Selznick, "The Idea of a Communitarian Morality," California Law Review 75 (1987): 451.

its needs and desires. In this sense, it is the court is interpreting through the minds of their Justices the current requirements and experiences of society or particular segments of it.

According to Post, [44] responsive interpretation ("ethicism") constitutes a broad variety of differing approaches to interpreting the Constitution under a single umbrella. In that context, it is neither liberal nor conservative, but is applied by both left and right. As such, the courts are tasked with determining "the fundamental character and objectives of the nation."

One obvious question that arises in this context is why the courts – which in the case of federal justices are not democratically elected – should be assigned such responsibility. What qualifies them to carry out this program? They have no investigative powers, as a rule, unlike the legislature, which can convene committees, subpoena witnesses, and gather evidence. Indeed, judges would appear to be the least likely candidates to carry the weight of determining the goals and aspirations of a nation.

In other words, some argue that responsive interpretation places the Court in the uncomfortable position of "speculating" about the current attitudes, morals, judgments, feelings, intentions, and goals of the American populace. Unlike Congress, the Court lacks any fact-finding or research mechanism that would enable it to make a factual evaluation of these attitudes. The Court has only the facts in the record before it. In effect, responsive interpretation, some critics claim, allows the Court to usurp the rightful role of Congress and the Executive to represent the desires and will of the populace, engaging the Court in a dangerous guessing-game.[45] I will respond to these criticisms in Chapter 4.

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[44] Post, "Constitutional Interpretation," 25.

[45] I will argue that this process is always what the Court is doing anyway, so this claim does not undercut the merits of ethical interpretation.

Further, as Post points out, reader-response theorists such as Hans-Georg Gadamer suggest that "all interpretation involves a conversation between a reader and a text, and so effects a merger between a text and a reader's own purposes and perspectives."[46] Put another way, a judge's own biases, prejudices, and points of view are inevitably intertwined with their interpretation of the text of the Constitution in any given scenario. It would thus seem impossible for responsive theory to give rise to an unbiased interpretation independent from the feelings and beliefs of the individual judges making the decision. I do not dispute Post's conclusion; I think Fish explains why we all must do so.

Paul Lund examines the various "ethicist" alternatives, which he characterizes as: (1) living constitutionalism – replacing the written Constitution with the political will of judges (discussed in detail in Chapter 4); (2) judicial deferentialism – refusing to strike down a statue unless it is clearly inconsistent with the Constitution; (3) living originalism – reading vague provisions as warrants for broad principles of justice and convenience; and (4) conscientious originalism – relying on text and history except where they provide no useful guidance.[47] As Rory Little points out, there are a wide variety of other and variant approaches.[48]

VIII. The Filter of Belief.

This result – that responsive interpretation is, at the end of the day, an avenue for implementation of judges' beliefs – is entirely consistent with the prior work of literary critics such as Steven Knapp and Walter Benn Michaels in the 1980s and Stanley Fish more recently. Knapp and Michaels, in their seminal and controversial essay "Against Theory," posited that it is

[46] Post, "Constitutional Interpretation," 25.
[47] Paul Lund, "The Second Amendment, Heller, and Originalist Jurisprudence," *U.C.L.A. L. Rev.* 56 (2009): 1371-72.
[48] Rory Little, "Heller and Constitutional Interpretation: Originalism's Last Gasp," *Hastings L. J.* 60 (2009): 1413.

impossible to create a theory that is outside the constraints of its own theoretical practice.[49] In other words, one cannot invent an interpretational "theory of theory" or step out of a theory or interpretation to discuss its truth value. Any application of theory presupposes beliefs and experiences that will color its application.

Likewise, it is impossible, according to Knapp and Michaels, to achieve intentionless meaning. Meaning inherently implies intent. The two are inseparable.[50] If Knapp and Michaels are correct in this conclusion, and I would argue that they are, then any attempt to find the "meaning" of the Constitution or in a precedent is tied up with the beliefs of the interpreter regarding both that meaning and the nature of the situation. To have a belief about meaning is to assume the truth value of that meaning. Knapp and Michaels take the position that there is no neutral ground on which to stand in making an interpretation. We cannot simply go get a theory and neutrally or impartially apply it. Neutral application of any theory is beyond us, because our beliefs color the meaning we find in the text.

Stanley Fish's work supports this view as well. In *Is There a Text in This Class?*, Fish explains that when one interpretation prevails over another, "it is not because the first has been shown to be in accordance with the facts but because it is from the perspective of its assumptions that the facts are now being specified."[51] In other words, the interpreter chooses to emphasize the facts that support the belief the interpreter holds.[52] As Nasrullah Mambrol explains it:

[49] Knapp and Benn Michaels, "Against Theory," 723-742.
[50] Knapp and Benn Michaels, "Against Theory," 726-727.
[51] Stanley Fish, *Is There a Text in This Class?* (Harvard University Press, 1980), 340.
[52] Fish, *Is There a Text,* 5-6.

Fish argues that:

> [I]t is impossible even to think of a sentence independently of its context,"[53] and that our making sense of an utterance and our identifying of its context occur simultaneously: we do not, as M. H. Abrams and E. D. Hirsch imply, first scrutinize an utterance and then give it meaning.[54] We hear an utterance as already embedded within, not prior to determining, a knowledge of its purposes and interests.[55]

What Fish concludes is that meaning is always embedded in context. That context includes one's own prejudices, beliefs, experiences, and knowledge. In a sense, we read in a text what our beliefs suggest to us is there, not some authorial intent revealed independent of ourselves.

All this is but to say that in any system of Constitutional interpretation, what we are dealing with is not any specific theory that is coherent, credible, distinct, logical, and explicable from without. Instead, we are merely faced with a post-facto methodology for describing the theory of legal interpretation the justice chooses to apply to his preexisting belief system. What Fish tells us is that most prior attempts at legal interpretation have failed because they assume there is some neutral ground from which to make the interpretation. Scholars like Fish demonstrate that this endeavor is futile. No judge or justice is capable of making a truly unbiased legal interpretation. Legal interpretation has always been stuck in debates about methodology because the proponents of the various theories have always tried to find some neutral theoretical ground from which to interpret legal texts. There is simply nowhere to go to adjudicate an interpretive disagreement because the argument assumes one theory, or another is more neutral or more "true." Fish, Knapp, and Michaels demonstrate this effort is futile. Responsive

[53] Fish, *Is There a Text*, 5-6.
[54] Fish, *Is There a Text*, 313.
[55] Fish, *Is There a Text*, 310.

interpretation or ethicism, as described above, does not eliminate or solve this problem; it is insoluble – it is merely a way to be transparent about what the justice or judge is *always* doing when interpreting the Constitution or any other legal text.

The methodology I chose to analyze and illustrate both the underlying theoretical issue and my proposed "solution" is to look at legal interpretational theory as applied by the U.S. Supreme Court in selected cases from the past several decades and courts, while attempting to understand, from a theoretical viewpoint, both what the Court claims to be doing and what, I argue, is really happening. In most cases, I argue, this analysis suggests that the Court is engaging in a post-facto theoretical discussion to explain a decision it has already unconsciously made. Scholars like Fish, Knapp, Michaels, and others argue that this disconnect is inevitable. In other words, we are all engaged in a similar process as we interpret events in our daily lives. But the issue is not merely one of being honest with ourselves. For the Court, the significance of this realization could impact Senate approval of nominees, Court alignment, and public understanding of, and belief in the neutrality of, Court decisions, as well as how courts decide cases.

In this context, I will examine cases of legal or historical significance from U.S. Supreme Courts over the past 60 years in an effort to determine the approach to legal interpretation the majority or the author of its opinion claims to adopt. I will then examine the factual and legal analysis applied and how that analysis led to the result reached. Finally, I will compare the methodology the Court claims to have used in the analysis and result to see if the justice or Court was consistent in employing the claimed legal theory. It is noteworthy that I have selected cases that were controversial or politically charged, not because the process described only occurs in

such cases (the problem is universal, regardless of case importance), but because those cases chosen best illustrate the problem of trying to achieve intentionless interpretation. Obviously, this survey is not and cannot be comprehensive. It is intended to be illustrative. As I suggest in my conclusion, the work of a more thorough case review I leave to others.

The results of my analysis of the selected cases suggests that in virtually every case examined, the justice or Court was unable consistently to apply the theory of interpretation it claimed to use. Instead, what appears to be happening in the majority of cases is that the author or Court adopts a theory to support the result it has already reached, perhaps unconsciously so. The explanation for this behavior is provided by the work of Knapp, Benn Michaels, Fish, and others who theorize that it is simply not possible for any of us to make a decision applying a "metatheory" that comes from without. Instead, we are forever constrained to act based on our internal belief system as developed over time by our experiences, education, religious beliefs, and political persuasion.

If my evaluation of these seminal decisions is accurate, then I propose that instead of arguing about which legal theory we *should* use, we simply adopt the method that most accurately describes the actual process taking place. I argue that of the available, historically employed approaches to legal interpretation, ethicism or living constitutionalism best allows the Court to be most transparent and clear about its true decision-making process. Whether this approach really qualifies as "interpretation" is subject to debate. But as I argue, the cases applying an approach like this succeed in analyzing the words, history, and precedent of a constitutional provision or statute while considering current public or social/ethnic group values

and desires, as well as historical, social, and technological changes. Such analysis is key to reaching a result consistent with the language utilized.

Of course, as I point out at length in the concluding chapter of this dissertation, ethicism suffers from the same flaws as any metatheory of interpretation. The difference, I will argue, is that with ethicism, the Court is at least somewhat lucid about its real decision-making process. I have discussed in brief other criticisms above, and I will save my detailed reply to critics of my approach in Chapter 4.

IX. Some Introductory Case Examples.

A. *Obergefell v. Hodges.*

Just to take a single recent sample case, let us examine the U.S. Supreme Court's opinion on the issue of gay marriage in *Obergefell*,[56] in which the majority of the Court (under Chief Justice John Roberts) held that the 14th Amendment requires states to allow gay marriage. In *Obergefell*, several same-sex couples sued state agencies in Ohio, Michigan, Kentucky, and Tennessee to challenge state bans on same-sex marriage or refusal to recognize legal same-sex marriages in other states. Plaintiffs argued that the bans violated their due process right under the Due Process Clause and the Equal Protection Clause of the 14th Amendment.

Marriage between two persons of the same sex was not an issue when the Constitution was drafted and ratified. The matter is not specifically addressed in the Constitution, nor was it debated at the Constitutional Convention or during the adoption of the 14th Amendment.

[56] *Obergefell v. Hodges*, 576 U.S. 644 (2015). For criticism and analysis of the *Obergefell* decision, *see, e.g.*, Greg Strauss, "What's Wrong with Obergefell?" *Cardozo L. Rev.* 40, no. 2, (December 2018): 631-686; Louis Michael Seidman, "The Triumph of Gay Marriage and the Failure of Constitutional Law" *Georgetown Univ. L. Ctr.* 2015, no. 4 (2015): 1-36; Megan M. Walls, "Obergefell v. Hodges: Right Idea, Wrong Analysis," *Gonz. L. Rev.* 52, no. 133 (2016-2017).

The very idea of gay marriage was not extant or public when these documents were drafted and adopted. Therefore, an examination of the text of the Amendment or the context in which it arose would not be of use to the Court.

Instead, the five to four majority opinion by Justice Anthony M. Kennedy focused on the underlying historical meaning to society and to individuals of the right to marry. The majority opinion describes "the transcendent importance of marriage" and its "centrality to the human condition." Justice Kennedy outlines the desire of Plaintiffs to honor the commitment to the principles and responsibilities of marriage. Further, Kennedy's opinion analyzes the changes in the meaning of marriage and its practice in society over time, finding that that meaning has changed as society and its practices have evolved. He points out that "The nature of injustice is that we may not always see it in our own times," suggesting that our point of view on what is just evolves. Thus, Kennedy concludes that the values ascribed to marriage in the context of its role in current society compels the Court to permit same-sex marriage.

The Court's decision could not have been based either on the text of the Amendment itself or the intent of its drafters (as Justices Scalia and former Chief Justice John Roberts insist it must be), but instead must be concerned with the internal belief system(s) of the majority, the effect on the populace or social group affected, the reception of the public, the culture of the time of the decision, and social changes in the interim. I will argue the decision reflects an analytical mode somewhat like, but not explicitly mirroring the literary critical theory reader-response theory, discussed below, which could more transparently be labeled "ethicism."

B. *Citizens United v. FEC.*

One problem in performing an analysis of sample cases is that the Court is inconsistent in its application of interpretational approaches, choosing one for this case, another for that one. The same Court, under Chief Justice Roberts, that decided *Obergefell*, also considered *Citizens United*,[57] which purportedly applies a literalist approach to Constitutional interpretation to determine that a corporation is a "person" for purposes of federal election funding.[58] Again, it will be helpful to examine this sample opinions in the context of my argument.

Citizens United[59] concerned an injunction against the Federal Election Commission sought by Citizens United (a corporate entity created to promote conservative causes and candidates) against application of the Bipartisan Campaign Reform Act (BCRA) to its film *Hillary: The Movie*. The movie was a negative portrayal of presidential candidate Hillary Rodham Clinton. The BCRA restricted campaign funding by corporate entities in Section 203. Citizens United argued that the Act violated the 1st Amendment as applied to the film. Although the Court's precedent *McConnell v. FEC*[60] had held that such contributions by corporations could be banned, the five to four majority opinion in *Citizens United* (split along ideological lines) held that such communications cannot be banned under the 1st Amendment because political speech is essential in a democracy and because the government has an interest in an educated electorate.

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[57] *Citizens United v. Federal Election Commission,* 540 U.S. 93 (2003). *See, e.g.*, Anne Tucker, "Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in Citizens United," *Case W. Res. L. Rev.* 61 (2010-2011): 497; Richard L. Hasen, "Citizens United and the Illusion of Coherence," *Michigan L. Rev.* 109, no. 4 (February 2011): 581-623, https://repository.law.umich.edu/mlr/vol109/iss4/3; Justin Levitt, "Confronting the Impact of Citizens United," *Yale L. & Pol'y Rev.* 29 (2010-2011): 217.
[58] *Obergefell*, 135 S. Ct. at 23-27.
[59] *Citizens United*, 558 U.S. at 310.
[60] *McConnell v. FEC*, 540 U.S. 93 (2003).

Justice Kennedy's majority opinion held in part that:

> Section 441b's prohibition on corporate independent expenditures is … a ban on speech. As a "restriction on the amount of money a person or group can spend on political communication during a campaign," that statute "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Buckley* v. *Valeo*, 424 U. S. 1, 19 (1976) *(per curiam)*. Were the Court to uphold these restrictions, the Government could repress speech by silencing certain voices at any of the various points in the speech process. See *McConnell*, *supra*, at 251 (opinion of Scalia, J.) (Government could repress speech by "attacking all levels of the production and dissemination of ideas," for "effective public communication requires the speaker to make use of the services of others"). If §441b applied to individuals, no one would believe that it is merely a time, place, or manner restriction on speech. Its purpose and effect are to silence entities whose voices the Government deems to be suspect.
>
> Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. See *Buckley*, *supra*, at 14–15 ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential"). The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment "'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu* v. *San Francisco County Democratic Central Comm.*, 489 U. S. 214, 223 (1989) (quoting *Monitor Patriot Co.* v. *Roy*, 401 U. S. 265, 272 (1971)); see *Buckley*, *supra*, at 14 ("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution").

Based on this reasoning, the majority in *Citizens United* held that corporate expressions of political opinion or their monetary contributions to such expressions cannot be regulated by the FEC.

In effect, *Citizens United* recognized corporations as "persons" on the theory that such business entities are "associations of persons," and as such should be entitled to the same rights

as the individuals themselves.[61] Criticism of the opinion was immediate and included the likes of President Barack Obama, Senator Russ Feingold, media, activists, and the public.[62] After *Citizens United*, artificial entities – profit-driven and frequently politically motivated – have rights as great as or greater than individuals to control campaign spending.[63] They can hide their true partisan nature and affiliation under a more palatable corporate name. Something like "People for a More Just Society" could be a front for a foreign corporation working against the best interests of the country or favoring a more "flexible" candidate.

It is difficult to characterize the *Citizens United* opinion as anything other than a belief-oriented approach to the interpretation of a statute. Kennedy and Scalia, for example, apparently argued that the injunction violated freedom of speech mainly because of their conservative leanings and their opposition to Hilary Clinton as a political candidate, although Kennedy's opinion purports to rely on the 1st Amendment and Scalia on a historical analysis.[64] The result was not only unprecedented, but directly in conflict with statutory language, intent, and prior

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[61] Atiba R. Ellis, "Citizens United and Tiered Personhood," *John Marshall L. Rev.* 44 (November 3, 2011): 717. SSRN: https://ssrn.com/abstract=1984899

[62] Ellis, "Tiered Personhood," 718. For example, President Obama, in his State of the Union speech on July 26, 2010, criticized the opinion as "allow[ing] corporate and special interest takeovers of our elections" and damaging to democracy. He said earlier that:

> [Corporations] can buy millions of dollars' worth of TV ads –- and worst of all, they don't even have to reveal who's actually paying for the ads. Instead, a group can hide behind a name like "Citizens for a Better Future," even if a more accurate name would be "Companies for Weaker Oversight." These shadow groups are already forming and building war chests of tens of millions of dollars to influence the fall elections.
>
> Now, imagine the power this will give special interests over politicians. Corporate lobbyists will be able to tell members of Congress if they don't vote the right way, they will face an onslaught of negative ads in their next campaign. And all too often, no one will actually know who's really behind those ads.

[63] Ellis, "Tiered Personhood," 743.

[64] *See* Scalia, concurring, *Citizens United*, 540 U.S. at 386.

case law.[65] In other words, it was not a "literalist" or "textualist" decision, although it purports to be so. Furthermore, the Court did not stop with simply invalidating the relevant portions of the Act, but rather granted broad Constitutional rights to corporate entities when it could have reached a more limited result.[66]

The dissent, by Justice Stevens, noted the risk of corporations distorting the political process, and he found corporations fundamentally different from natural persons.[67] In effect, Stevens writes:

> The basic premise underlying the Court's ruling is its iteration, and constant reiteration, of the proposition that the First Amendment bars regulatory distinctions based on a speaker's identity, including its "identity" as a corporation. While that glittering generality has rhetorical appeal, it is not a correct statement of the law. Nor does it tell us when a corporation may engage in electioneering that some of its shareholders oppose. It does not even resolve the specific question whether Citizens United may be required to finance some of its messages with the money in its PAC. The conceit that corporations must be treated identically to natural persons in the political sphere is not only inaccurate but also inadequate to justify the Court's disposition of this case.
>
> In the context of election to public office, the distinction between corporate and human speakers is significant. Although they make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office. Because they may be managed and controlled by nonresidents, their interests may conflict in fundamental respects with the interests of eligible voters. The financial resources, legal structure, and instrumental orientation of corporations raise legitimate concerns about their role in the electoral process. Our lawmakers have a compelling constitutional basis, if not also a democratic duty, to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races.[68]

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[65] *See* Justice Stevens, concurring in part and dissenting in part, *Citizens United*, 540 U.S. at 393.
[66] The Court overruled its prior, contrary opinion in *Austin* v. *Michigan Chamber of Commerce*, 494 U. S. 652 (1990). It also invalidated §441 of the Act, finding it a prior restraint on free speech.
[67] Ellis, "Tiered Personhood," 744-45; Hasen, "Illusion of Coherence," 585-673.
[68] Stevens, concurring and dissenting, *Citizens United*, 540 U.S. at 394.

In effect, as Ellis notes, corporations can now effectively "buy and sell candidates."[69] It makes no sense (and the majority cite no authority to support its conclusion) under the originalist approach advocated by Roberts and Scalia – looking to the intent of the Founders – to suggest that the drafters and ratifiers of the Constitution equated corporations with people. Instead, the Court majority appears to have selected a method of interpretation to achieve a result consistent with its preexisting beliefs. I suggest that this is the Court's usual methodology, and that this approach is disingenuous, at best, even if inevitable, for reasons we shall examine.

Richard Hasen, writing in the *Michigan Law Review*,[70] notes that the broad language used in *Citizens United* will demand the Court agree that there are *no* limits on campaign financing, including spending by foreign nationals and governments.[71] He points out the marked inconsistencies among the Court's contribution and expenditure rulings.[72] Indeed, Hasen gets to the very heart of the problem: the Court's decisions appear to be politically motivated.[73] He points out the differences among the Court's decisions regarding foreign and domestic contributions. The only limit to the Court's willingness to abandon valid interpretational reasoning for outcome-oriented decisions appears to be the limits of public opinion. It is significant, as Hasen points out, that the Court's decisions in such cases have always swung from left to right.[74]

I suggest that cases like *Citizens United* reflect a fundamental underlying theoretical problem unrecognized by the justices: they are *constrained* to act within their inherent belief

[69] Ellis, "Tiered Personhood," 746.
[70] Hasen, "Illusion of Coherence," 583.
[71] Hasen, "Illusion of Coherence," 583.
[72] Hasen, "Illusion of Coherence," 584.
[73] Hasen, "Illusion of Coherence," 585.
[74] Hasen, "Illusion of Coherence," 585.

systems and values as derived from their experience, education, history, upbringing, reading, social status, ethnicity, political views, and expectations. In *Citizens*, the majority opinion demonstrates that the justices did just that. My argument is based on the work of Fish, Knapp, Benn Michaels, and others who make the case that it is impossible to apply a theory that is independent of the individual purporting to implement it because we can only examine the theory and its application through the lens of our beliefs, values, experiences, education, religion, social and ethnic group, and similar factors. Each of us is held hostage to these beliefs and values, and although they may evolve over time as our experiences change, at any particular point they are fixed, and we are prisoners of them.

C. *District of Columbia v. Heller.*

The third illustrative case is *District of Columbia v. Heller*.[75] *Heller*, also a five to four decision, struck down a D.C. regulation that prohibited the possession of a handgun in operable condition. The majority opinion, by Justice Scalia, is notable for its facial claim to be an "originalist" interpretation of the 2nd Amendment. The interpretational theory of original meaning as advanced by Scalia, Roberts, and others purports to find meaning in the intent of the drafters and more specifically the meaning that "*the words and phrases had at the time the provision was framed and ratified*."[76] It is notable that at the time of *Heller*, no controlling precedent restrained the Court.[77]

As the history of originalism is laid out by Lawrence B. Solum, the approach first appeared in the 1970s with Robert Bork and William Rehnquist. Other originalist scholars

[75] *District of Columbia v. Heller*, 554 U.S. 570 (2008).
[76] *Heller*, 554 U.S. at 576-77, Scalia majority opinion.
[77] Lawrence B. Solum, "District of Columbia v. Heller and Originalism," *Nw. U. L. Rev*. 103 (2009): 923-981.

followed, including Raoul Berger and Edwin Meese.[78] In 1980, Paul Brest wrote on several criticisms of the originalist approach, including: (1) the difficulty of discerning the intent of a multi-member body or bodies; (2) more specifically, the problem of identifying the intent of the Framers versus the various ratifying states; (3) the generality or specificity of the Framers' intent; (4) the problem of inferring intent from a written document; and (5) the difficulty in applying fixed intent as circumstances change over time.[79] I concur with these criticisms of the approach, but posit that it does not matter what label the Court applies, *it is always applying the inherent belief system(s) of the majority of justices.*

Let us assume, for example, a city council passes an ordinance forbidding sunbathing in a public park. Of the seven-member council, one member intended to prohibit all sunbathing, one member voted "yes' for political reasons, one member intended only to prohibit sunbathing while scantily clad, one member simply did not care, one member was opposed to the ordinance but went along because he owed the chair a favor, and one member intended only to prohibit sunbathing in the nude. The statute was a compromise that satisfied no one on the council. What, then, was the council's intent? It is difficult to know and speculation to guess. This sort of ambiguity is one of the major problems with originalism.

Brest argues that the Framers intended the Constitution to be interpreted based on its language as written, not their intentions. In other words, they meant that their intentions be

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[78] Solum, *District of Columbia*, 926-928; *see also* Douglas H. Ginsburg, "Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making," *Harv. J. L. & Pub. Pol'y* 33 (2010): 217; Victoria Nourse, "Reclaiming the Constitutional Text from Originalism: The Case of Executive Power," *Calif. L. Rev.* 106 (2018): 1; Randy E. Barnett, "An Originalism for Nonoriginalists," *Loy. L. Rev.* 45 (1999): 611.

[79] *See* Solum, *District of Columbia*, 928-929; of course, Knapp and Benn Michaels would say this is a non-issue, because intent cannot be ascertained and, therefore, must come from the reader's interpretation.

disregarded.[80] Further, there are so many versions of "originalism" that one cannot know which to apply; indeed, they appear, Brest argues, to be chosen based on the beliefs of the author.[81] Others like Stephen Griffin argue that originalism is non-normative, and therefore inherently flawed.[82] Indeed, Scalia himself appears to allow departure from originalism based on: (1) precedent; (2) justiciability; and (3) historical practice.[83] I will argue that in fact, he must act based on his own history, experience, beliefs, values, and ideals.

The really telling fact of the *Heller* opinion, however, is that Scalia could not consistently apply originalist theory even in an opinion purporting to adhere the process. While he begins with what appears to be a straightforward analysis of the meaning at the time of adoption of the Constitution of the words "people," "keep," "bear," and "arms," he resorts to supposition, supposed facts not in the record, and assumptions about modern-day D.C. that are wholly unsupported by text.[84] Most tellingly, at the end of his opinion, Scalia resorts to pure *obiter dicta* (naked, unsupported statements), writing that, "[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill . . . ." and so on.[85] But these prohibitions date back to only 1968; they are not discussed in the Constitution. Likewise, Scalia writes that there is no reason the State cannot prohibit gun-free zones in "sensitive" places like schools and government buildings,[86] but the term "sensitive" is neither defined nor analyzed historically. Furthermore, he purports to allow regulation of

[80] Paul Brest, "The Misconceived Quest for Original Understanding" *Bost U. L. Rev.* 60 (1980): 929.
[81] Brest, "The Misconceived Quest," 935.
[82] Stephen M. Griffin, "Rebooting Originalism," *Ill. U. L. Rev.* 2008, no. 4 (2008): 1185, 1187.
[83] Brest, "The Misconceived Quest," 938.
[84] Lund, "The Second Amendment," 1353.
[85] Lund, "The Second Amendment," 1356.
[86] Lund, "The Second Amendment," 1373.

commercial sale of guns and concealed carry, again with no historical support.[87] Lund characterized this approach as "half-hearted originalism."[88] I proposed that the theoretical dilemma Scalia faces goes much deeper.

Rory Little argues that Scalia's opinion in *Heller* is so inconsistent and so disingenuous as to more closely approach living constitutionalism than originalism.[89] To put it another way, Scalia – consciously or not – chose the result his beliefs warranted, then applied an interpretation to achieve it:[90]

> What the Framers said, envisioned, or meant cannot plausibly continue as the specific and exclusive meaning given to general words and phrases in the Constitution, as we grow farther and farther away from the culture, realities, and understandings that underlay the Framers' words. (1429).

This argument means that as society changes, what the Framers intended grows increasingly outdated, vague, inapplicable, and distant. Little, in other words, suggests that as the U.S. progresses as a nation and further away from the 18th-century ideologues who authored the Constitution, the intent of that document will become increasingly difficult to deduce. That inability to determine "Framer's intent" directly relates to an Enlightenment-era language and culture that will continue to become more and more arcane over time.

Finally, as Geoffrey Stone suggests, Roberts and Samuel Alito, who claim to be strict believers in the rule of precedent, more often abandon it in the name of a desired result.[91] As Stone puts it, "[t]he sad truth is that Roberts and Alito seem to have been driven by nothing more

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[87] Lund, "The Second Amendment," 1359.
[88] Lund, "The Second Amendment," 1358.
[89] Lund, "The Second Amendment," 1416.
[90] *See* the discussion of Fish's theory of belief in Chapter 3.
[91] As quoted in Lund, "The Second Amendment," 1543.

than their own desire to reach results they personally prefer…"[92] Further, he argues, "[t]he crabbed, frightened originalism of Clarence Thomas and Antonin Scalia would have seemed absurd to the Framers … it not only invites manipulative and result-oriented history, but it also … denies the true original understanding of the Framers of our Constitution."[93] What Stone is saying is that on some level, originalists like Scalia and Thomas appear to fear changes in society's values and clutch for any straw that might help them hold on to the "America" of old. In doing so, they are using originalism as a crutch to oppose values that much of the country is moving away from .

This argument by Stone and others begs the question: what is really going on? We can best understand the reality of judicial interpretation by applying literary theory to how the interpretive process works – indeed, how it must work. I argue that the work of Fish, Knapp, Benn Michaels, and other literary theorists suggests that justices and judges always do what they cannot avoid, which is to decide based on principles derived from their personal belief systems. The best interpretive approach considering that reality is what Post refers to as "ethos interpretation," often called "living constitutionalism." As is discussed below in greater detail below, "ethicism," or deciding cases based on the Court's analysis of the public's needs, wants, social growth, and historical progress does not do away with the problem of finding intent not influenced by belief. What this approach does accomplish, I suggest, is a more transparent and honest description of the decision-making process involved in ethicism and greater clarity of the reasons for the result. This method would allow, for example, healthy skepticism about Court

[92] Lund, "The Second Amendment," 1547.
[93] Lund, "The Second Amendment," 1557.

nominees' claims of complete impartiality in deciding cases, regardless of their background, writings, and political affiliation. This approach would help the public evaluate the real basis for the Court's decisions and could improve the Court's credibility.

D. What is "ethicism/responsive interpretation"?

Stone proposes, as will I, that if there is some process of belief-oriented decision-making going on behind the scenes, the theoretical "remedy" is honest judicial activism that embraces the responsibility the Framers placed on the judiciary while exercising judgment, restraint, humility, curiosity, wisdom, and courage.[94] In other words, if judges are bound by their own experiences and beliefs, let us admit that and do so intentionally and actively, with an eye to the results and effects, but always within the bounds of the reasonable meaning of the text itself. Moreover, such an approach stands the potential to make judicial analysis more transparent, more understandable, more relevant, and more explicable. But because, as Fish suggests, every interpretation of a text is not necessarily a "reasonable" interpretation, the text always provides a guide stone for meaning. There is an argument to be made that this method does not really constitute "interpreting the text." I would argue that this approach is text-based, but considers changes in societal values, in technology, and in what is considered "just."

As discussed in greater detail herein, "ethicism" or "responsive interpretation" (which gives a nod to its literary roots) refers to the idea that judges should treat the Constitution, statute, or rule in question as a "living document," one that they can effectively apply in the context of the society, societal values, cultural and technological changes, political views, and issues that exist at the time of their decision, as well as in light of their own values and beliefs.

[94] Lund, "The Second Amendment," 1558.

This idea, with its roots in literary theory, holds that although in some cases the Court has in fact applied this approach, in others it claims explicitly to be doing something else. This "something else," I argue, consists of implementing their own beliefs and values. A couple of sample cases illustrate this point.

1. *Texas v. Johnson.*

In *Texas v. Johnson*,[95] the U.S. Supreme Court considered the constitutionality of the conviction of a defendant for publicly burning an American flag. The State of Texas convicted Gregory Lee Johnson of violation of Tex. Penal Code Ann. § 42.09(a)(3) (1989) for desecration of a venerated object by burning an American flag during a public protest of the Reagan administration's nuclear policies and those of several Dallas-based corporations.[96] After a march by demonstrators through Dallas, chanting slogans and staging "die-ins," accompanied by minor vandalism, Johnson took a flag on the steps of Dallas City Hall, doused it with kerosene, and set fire to it.[97] No one was injured, but several witnesses were "seriously offended."[98] He was charged with violating a Texas statute that prevented the desecration of a venerated object if such action were likely to incite anger in others. Johnson was tried and convicted in Texas court, but he appealed, arguing that his actions were "symbolic speech" protected by the 1st Amendment.

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[95] *Texas v. Johnson*, 491 U.S. 397 (1989); *see also* William W. Van Alstyne, "Freedom of Speech and the Flag Anti-Desecration Amendment: Antinomies of Constitutional Choice," *Faculty Publications* 1622 (1991): https://scholarship.law.wm.edu/facpubs/1622; Paul F. Campos, "Advocacy and Scholarship" *Cal. L. Rev.* 81, no. 4 (1993); Robert Justin Goldstein, *Flag Burning and Free Speech: The Case of Texas v. Johnson* (Lawrence, Kan., University Press of Kansas, 2000).
[96] *Johnson*, 491 U.S. at 399.
[97] *Johnson*, 491 U.S. at 399.
[98] *Johnson*, 491 U.S. at 399.

The Texas Fifth Court of Appeals upheld the conviction, but the Texas Court of Criminal Appeals reversed,[99] finding a violation of Johnson's 1st Amendment's rights.

Johnson makes an interesting case study of the interpretive issues under examination. In *Johnson*, the Court claims to be relying on precedential interpretation of the commands of the 1st Amendment to the U.S. Constitution.[100] As we shall see, although clothed in language of precedential review, the Court appears to be actually engaged in the interpretive approach I describe as "ethicism" or "responsive interpretation." Although some argue that this methodology usurps the legislative role of Congress and places the Court in a decision-making role for which it possesses no effective methodology, I suggest the approach simply describes what the Court is really doing in such cases.

In analyzing the *Johnson* case, the majority of Justices, with William J. Brennan, Jr. authoring the opinion, first considered whether the burning of the flag under the circumstances constituted expressive speech. The Court noted that conduct may be "sufficiently imbued with elements of communication to fall within the scope of the 1st and 14th Amendments."[101] In that context, the Court had previously recognized as speech such actions as attaching a peace symbol to a flag and refusing to salute the flag.[102] The Court explicitly recognized that the flag's purpose is expressive: "to serve as a symbol of our county."[103] Indeed, the State of Texas conceded, and the Court concurred, that burning the flag under the circumstances was expressive conduct. The

[99] *Johnson v. State*,755 S.W.2d 92 (1988).
[100] "Congress shall make no law … abridging the freedom of speech …."
[101] *Spence v. Washington*, 418 U.S. 405, 409 (1974). This is a crucial point, for I will argue that Scalia could do nothing else.
[102] *Johnson*, 491 U.S. at 404.
[103] *Johnson*, 491 U.S. at 405.

act was the culmination of a political protest, and its expressive and overtly political nature was clear.[104]

The next issue was whether the government of Texas was free to restrict that expressive conduct. Although political entities generally have more freedom to restrict expressive conduct than they do the written or spoken word,[105] "a law directed at the communicative nature of conduct must … be justified by the substantial showing of need that the 1st Amendment requires."[106] On the other hand, where speech and non-speech aspects combine in a single course of conduct, a more lenient standard applies allowing restriction if the government demonstrates "a sufficiently important governmental interest in regulating the nonspeech element."[107] This looser *O'Brien* standard only applies, however, if the governmental interest is unrelated to the suppression of free expression.[108]

In this case, the interests offered by the State of Texas to justify the statute are related to the prevention of breaches of the peace and preserving the flag as a symbol of national unity.[109] The majority found the former interest irrelevant to the case and the latter to be related to the suppression of expression. Further, the Court found the restriction to be content-based, *as it depended on the meaning and impact of the message Johnson conveyed*.[110] Thus, a strict-scrutiny standard applied, meaning the Court must determine, for example, Johnson's intended meaning and whether his actions might have incited physical harm to any individual or group. "Strict

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[104] *Johnson*, 491 U.S. at 406.
[105] *See United States v. O'Brien*, 391 U.S. 367, 391 (1968).
[106] *Community for Creative Non-Violence v. Watt*, 703 F.2d 586, 622-23 (1983).
[107] *Johnson*, 491 U.S. at 407, citing *O'Brien, supra.*
[108] *Johnson*, 491 U.S. at 407.
[109] *Johnson*, 491 U.S. at 407.
[110] *Johnson*, 491 U.S. at 412.

scrutiny" is the highest bar to government action in that it requires the government to show a compelling state interest in prohibiting the speech in question. Lower standards, such as "substantial government interest," require only that the government's concern be more than legitimate, but less than compelling.

The Court also relied on the "bedrock principle" that "the government may not prohibit expression of an idea simply because society finds the idea itself to be offensive or disagreeable."[111] Put another way, "the government may not prohibit expression simply because it disagrees with its message, and is not dependent on the particular mode in which one chooses to express an idea."[112] On these grounds, the Court affirmed the holding of the Texas Court of Criminal Appeals reversing Johnson's conviction. The Court found that Johnson's expressive act of burning the flag was protected speech and that the State's purported reasons for prosecuting Johnson did not survive strict scrutiny under the 1st Amendment. Johnson's actions fell under the category of "free expression" according to the 1st Amendment as political speech that he did not intend to incite harm against others.

Brennan's opinion pointed out that the State's asserted interest went to the very heart of Johnson's expressive conduct. The Court found – *citing no precedent, evidence, or specific authority* – that the State's concern was that conduct such as Johnson's would "lead other people to believe either that the flag does not stand for nationhood and national unity, but instead reflects other, less positive concepts, or that the concepts reflected in the flag do not exist, that is, that we do not enjoy unity as a Nation."[113] Thus, the State could only be attempting to suppress

[111] *Johnson*, 491 U.S. at 414.
[112] *Johnson*, 491 U.S. at 416.
[113] *Johnson*, 491 U.S. at 411.

the free expression of ideas it found offensive.[114] The Court found, however, that "it is a bedrock principle underlying the 1st Amendment [that] the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[115] The prior decisions of the Court hold that the government may not prevent the expression of an idea merely because it disagrees with its content.[116]

The *Johnson* opinion, then, on its face appears to be a straightforward interpretation of the word "speech" in the 1st Amendment as defined by previous Supreme Court precedent. One could certainly make a cogent argument that Brennan's opinion is exactly such a precedential analysis. The problem comes, however, in the key decision points in the case, points for which there is neither direct evidence, precedent, or specific Constitutional language on which to rely. Specifically, what did the State of Texas really "intend" to accomplish by its criminal statute, and how was that interest threatened by Johnson's action? In that context, Brennan found that the State's purported interest in preserving the U.S. flag as a symbol of national unity was related to suppression of expression because the Court determined the State's concern was that conduct such as Johnson's would "lead other people to believe either that the flag does not stand for nationhood and national unity, but instead reflects other, less positive concepts, or that the concepts reflected in the flag do not exist, that is, that we do not enjoy unity as a Nation."[117] Likewise, the Court determined that Johnson's intent was expressive: to protest the nuclear policies of the Nixon administration and various corporations. On these conclusions the opinion turns.

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[114] *Johnson*, 491 U.S. at 411.
[115] *Johnson*, 491 U.S. at 415.
[116] *Johnson*, 491 U.S. at 417.
[117] *Johnson*, 491 U.S. at 411.

In effect, Brennan is engaged in determining the "true" – as opposed to stated – intent of the State; the intention behind Johnson's actions in the context of the moral situation in which Johnson found himself and the national meaning of the U.S. flag. His analysis revolves around the values underlying the State's stated motivation. Brennan is interested not in what the briefs say is at stake, but what he understands to be the unstated fears expressed by the State's position: that if people like Johnson were allowed to use the flag in such protest, the flag's value as a symbol that unites the nation would be eroded. At the statute's core, then, was a desire to suppress expression and dissent, which the 1st Amendment forbids.

The latter, key issue is highlighted by the dissent authored by Chief Justice Rehnquist and joined by Justices White and O'Connor, as summarized by James R. Dyer in his article *Texas v. Johnson: Symbolic Speech and Flag Desecration Under the First Amendment*.[118] According to Dyer, the dissent did not agree with Brennan that the Texas statute was intended to enforce a particular view of the flag.[119] Rather, to the dissenting Justices, the flag "transcended political ideology" and was largely ceremonial, not a "trademark of the government."[120] The flag's inherent meaning was intangible, an "*embodiment of the national ethos*." (Emphasis added).[121] The respect for the flag is historical, not a function of government command. The dissent also pointed out that all but two states at the time had statutes prohibiting flag-burning, suggesting a national consensus.[122]

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[118] James R. Dyer, "Texas v. Johnson: Symbolic Speech and Flag Desecration Under the First Amendment" *N.E. Law Rev.* 25, no. 3 (1991): 895.
[119] Dyer, "Symbolic Speech," 916.
[120] Dyer, "Symbolic Speech," 916.
[121] Dyer, "Symbolic Speech," 916.
[122] Dyer, "Symbolic Speech," 916.

Thus, we see a dispute between the justices here not about the interpretation of words in the Constitution or of the meaning of precedent, but rather about what value the American public places on the flag, about a matter of national *ethos*. *Johnson* is, at its core, an ethicist opinion; one whose result depends on an analysis of what the Court believes the people currently think and desire regarding the meaning of the American flag. As pointed out above, one can argue whether this approach constitutes "interpretation" per se. I argue that it is, in fact, a responsive interpretation based on something like reader-response theory. This technique does not ignore the text in question, it merely considers that text from a different perspective than does originalism, textualism, or any other approach to legal interpretation.

What, then, are we to make of the *Johnson* decision's theoretical approach to constitutional interpretation? As noted above, the opinion itself purports to rely on precedential interpretation of the 1st Amendment. I would argue, on the other hand, that Brennan's opinion is instead an example of what Robert C. Post, *supra*, calls "responsive interpretation" or "ethicism." In this sense, the decision turns not on legal history or statutory or Constitutional language, but on the majority's view of the national ethos, the values of the populace.

Other scholars have noted the difficulty of making sense of the *Johnson* opinion on its face. For example, a Note by Deborah Tully Eversole in the *Florida State University Law Review* points out that scholars continued after *Johnson* to debate whether and how a state might write a flag-burning statute to circumvent the opinion.[123] In addition, the opinion left open the possibility that the government could prosecute dissenters under other circumstances.[124] Indeed,

[123] D. Eversole, "Texas v. Johnson" *Flor. State. Univ. Law Rev.* 17 (1989): 869.
[124] Eversole, "Texas v. Johnson," 896.

shortly after the *Johnson* opinion, Congress passed a flag-burning statute applicable on the national level, which the Court then struck down. Opponents of such conduct continue to seek a constitutional ban on such protest.[125] Nicholas Barber argues that the *Johnson* court got it right based on the attitudes reflected in the Declaration of Independence and the United States Constitution.[126] This continuing argument reflects the shaky theoretical foundation on which the *Johnson* opinion is built.

2. *Barnes v. Glen Theatre, Inc.*

To further demonstrate the concept of ethicist decision-making, let us compare *Texas v. Johnson* with another U.S. Supreme Court case involving the 1st Amendment, *Barnes v. Glen Theatre, Inc.*[127] In *Barnes*, the theatre in question desired to present totally nude dancing, but an Indiana statute mandated that the dancers wear "pasties" and a "G-String" when dancing.[128] The theatre sued in the Northern District Court of Illinois to enjoin enforcement of the statute, asserting that it violated the 1st Amendment. The District Court granted the injunction, but the Seventh Circuit reversed and remanded on the 1st Amendment claim. On remand, the District Court determined that the dancing in question was not "expressive activity" protected by the 1st Amendment. The Seventh Circuit, sitting *en banc* (the entire panel), held that the performances were expressive activity and that the statute did infringe on the 1st Amendment rights of the theatre and its dancers. The U.S. Supreme Court then took up the case.[129]

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[125] Eversole, "Texas v. Johnson," 891; the Flag Protection Act of 1989.
[126] Nicolas Barber, "The Constitutionality of Flag Burning: Hate or Free Speech -- An Analysis of Texas v. Johnson," *Hincley Journal of Politics* 3 (Feb. 2017).
[127] *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).
[128] *Barnes*, 501 U.S. at 563.
[129] *Barnes*, 501 U.S. at 565.

Chief Justice Rehnquist, writing for the majority, noted that several precedents recognized that nude dancing might involve expressive conduct protected by the 1st Amendment.[130] As in *Johnson*, Rehnquist began by evaluating whether the less-stringent standard under *O'Brien* applied. O'Brien was convicted of publicly burning his draft card in violation of a statute prohibiting such acts. He claimed his act was "expressive conduct" protected by the 1st Amendment. The Court applied a four-part test: (1) was the regulation within the constitutional powers of the government; (2) did it further an important or substantial government interest; (3) was the interest unrelated to suppression of free expression; and (4) was the restriction no greater than essential to further that interest.[131]

Applying the *O'Brien* test, the Court found that the Indiana statute was clearly within the constitutional powers of the State. Moreover, it furthered *a substantial public interest* in limiting public indecency to protect the moral order. In this context, the Court made an interesting move: it relied not on public prohibitions of nude dancing per se (which clearly are related to suppression of free expression), but on laws prohibiting public nudity in general, and it found they suggested "moral disapproval of people appearing in the nude among strangers in public places."[132] The Court then relied on the general police power of the State to protect morals and the public order.[133] The Court further determined this interest, because it was a broad-based one, to be unrelated to suppression of free expression.[134] The opinion went to some lengths to make clear that whether the conduct is prohibited depends not on the erotic content of the dancing, but

[130] *Barnes*, 501 U.S. at 565.
[131] *O'Brien*, 391 U.S. at 376-377.
[132] *Barnes*, 501 U.S. at 568.
[133] *Barnes*, 501 U.S. at 569.
[134] *Barnes*, 501 U.S. at 570.

the perceived evil of public nudity in general, thereby ignoring completely the inherent message of the dancing itself. Finally, the Court found the restriction no greater than necessary to further the governmental interest.[135]

The application in *Johnson* of strict scrutiny to a flag-burning case as compared to the insistence on using the much less stringent *O'Brien* standard for nude dancing reflects, in my mind, nothing more than the belief system of the majority of the Court. The right to political protest is a long-hallowed right in this country, as *Johnson* points out.[136] The right to publicly dance completely naked is less so. The inherent flexibility of the responsive theory of Constitutional interpretation comes into play here. The analytical approach allows the Justices explicitly to evaluate public values. That flexibility, even more than with most methods of interpretation, allows the Court to consider public values, morals, and beliefs in applying the Constitution and its Amendments.

As Fish points out, in such instances, one cannot appeal merely to the text (or the evidence) because "the text as it is variously characterized is a *consequence* of the interpretation for which it is supposedly evidence…. Nor can the question be settled by turning to the context…for that too will only be a context for an already assumed interpretation."[137] This thorny theoretical problem is discussed in more detail in Chapter 3. I think Fish would argue that *Johnson* and *Glen Theatre* are exemplars not so much of the responsive/ethos method of constitutional interpretation, but of the fact that any approach to constitutional interpretation is, at the end of the day, merely a methodology for the expression of judges' beliefs. Because none

[135] *Barnes*, 501 U.S. at 571.
[136] *See Johnson*, 491 U.S. at 413-414.
[137] Fish, *Is There a Text,* 340.

of us can interpret a text or the author's intent from a completely neutral ground, the Court is inevitably trying to explain a decision it has already made, unconsciously or intentionally. As Knapp, Benn Michaels, Fish, and other scholars suggest, application of theory independent of belief is not possible.[138] The ethos approach to legal interpretation does not avoid this problem; it recognizes it and attempts to provide clarity to the process.

I suggest the realization that judges base decisions on their existing belief systems is not a matter for fear and trembling (although I suspect many lawyers and judges would chafe at the idea). We all engage in belief-based choices. We cannot, Fish contends, do otherwise, for we can never step outside our belief systems to make interpretations of texts, situations, and the like that are not informed by those beliefs.[139] For this reason, literary theory – specifically reader-response theory as described by Fish recommends the adoption of ethicism/living constitutionalism as the most honest approach to legal interpretation. This approach allows the Court to do what it did in *Johnson*: consider the societal values underlying the text and apply those values to the facts at least at hand. If this process more closely describes what is already being done by the Court, it has the value of transparency and coherence.

In summary, the thesis of this dissertation is that because the selected cases suggest that the Court's decision-making process often does not match its stated theory of legal interpretation, the literary theory reader response seems to support an ethicist approach to deciding cases. Reader-response theory helps more accurately explain these decisions in a contextualized, as opposed to decontextualized, way by recognizing the reality that justices make choices consistent

[138] *See* p. 16-18, *supra.*
[139] *See* Chapter 3, *infra.*

with their individual belief systems. Those belief systems evolve through several factors such as education, experience, religion, social and cultural background, ethnicity, social status, and value system. U.S. Supreme Court justices, simply put, do not enter a vacuum or cocoon themselves when hearing cases, pledging untainted loyalty to a particular philosophy. Justice Scalia, despite his allegiance to constitutional originalism, did not consistently base his decisions on his understanding of "Framer's intent." His social and political philosophies played a major role in deciding cases decisions. A reader response and ethicist approach to evaluating the justices' decisions enables legal scholars to grapple with the nuances – the messiness – of these decisions.

The remainder of the dissertation will be organized in the following way. Chapter 2 will explore "Community Values and Responsive Interpretation" by presenting case studies that relate how "community values" influence judicial decision making. Chapter 3 will address the benefits of adopting a responsive interpretive approach based on reader-response theory to legal interpretation. Chapter 4 addresses criticisms leveled at an ethos or living constitutionalism approach to Constitutional interpretation and my responses to those critiques. Chapter 5 concludes the dissertation.

The next chapter (Chapter 2) examines ethos decision-making in practice and why it is preferable to alternative legal interpretational theories. It considers sample Supreme Court cases that apply a version of this approach to legal interpretation, the analysis they follow, and why the results are imminently reasonable from an ethos or reader-response standpoint.

CHAPTER 2

COMMUNITY VALUES AND RESPONSIVE INTERPRETATION

I. Responsive Interpretation.

There appears to be an issue in at least selected cases with the U.S. Supreme Court's inability to apply consistent interpretational standards to the cases it must decide. As in *Citizens United* and *Heller*, the significant disconnect between the interpretational approaches the Justices adopt and those they apparently employ urges further investigation. It seems as if, in at least some cases, the Court or Justice says it is doing one thing (from an interpretational viewpoint) but reaching results the chosen methodology cannot explain. What is going on, why, and is there a solution, in light of the issues addressed in Chapter 1? The misjoinder between what seems to the Justices claim to be doing from a legal interpretation standpoint and be going on behind the scenes begs explanation. If the Court is truly bound by its Justices' knowledge, beliefs, experiences, and history, then questions arise. Is it possible for the members of the Court to make decisions that, while colored by the point of view of the various Justices, is clear about the goals of their decisions? What is a more transparent a method that gives the Court the ability to consider the experiences, history, development, interests, and values of the public or the affected group, and to say explicitly that is what the Court is attempting to do?

One possible answer comes from a version of literary critical theory as I apply it to legal interpretation. There is a more straightforward and transparent approach to legal interpretation, and it arises from the broader literary theory of reader-response and its application in "responsive interpretation" or "ethicism" as described by Post and inherited from literary scholars such as Gadamer and Fish.

According to some literary theorists,[140] it is inevitable that any reader brings to his reading of a text his own history, values, beliefs, expectations, social status, ethnicity, cultural associations, and experiences. This fact results in a reading that reflects the interests and beliefs of the social group whose interests are at stake. The approach I recommend is colored by those aspects of the "audience," in this case, the public. Legal interpretation (if that term even applies) under a "responsive interpretation" or "ethicist" approach is slightly different in that the "audience" is not merely the judge or Court applying the text, but the public or group whose lives are to be affected by the decision. Their values, history, culture, ethnic group, expectations, and beliefs form part of the basis for decision-making.

In such a theory, the question is not the interpretation of the words of the Constitution or a statute according to the intent of the drafters or the accepted meaning at the time the Constitution or law was ratified, but rather what meaning the law *should be* given considering the text in question and the goals, desires, needs, beliefs, experiences, character, and collective wisdom of the community at the time of application. The issue for the Court is not so much what the drafters intended, but what are the constitutional principles expressed as applied to the issues at hand, and how will their application impact the American or interest group public today?

I will approach this analysis by reference to two significant obscenity decisions by the Court: *Miller v. California*[141] and *Jenkins v. Georgia.*[142] These two cases apply an ethicist approach to legal interpretation in that they consider not so much the content of the material at

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[140] There are many approaches to literary interpretation; that of Fish, Knapp, Michaels, and Gadamer is only one. Others include historicism, Derridaen deconstruction, New Historicism, Marxist theory, and feminist theory. *See* K.M. Newton, in *Literary Theory and Criticism: An Oxford Guide*, ed. Patricia Waugh (Oxford University Press, 2006).
[141] *Miller v. California,* 413 U.S. 15 (1973).
[142] *Jenkins v. Georgia*, 418 U.S. 153 (1974).

issue (although that content is, of course, relevant), but what is offensive to the public and how the Court should define obscenity to protect the public from exposure to "offensive" material. Unquestionably, this issue involves an analysis by the Court of public attitudes toward prurient content, which may vary from one location to the next. Thus, the question for the Court is whether the material is "offensive" to the consumer (i.e., the "reader") or the public exposed to it.

A. *Miller v. California.*

Working from the point of view that the proper question is what meaning the law *should be* given considering the text in question and the goals, desires, needs, beliefs, experiences, character, and collective wisdom of the community or affected group at the time of decision, I continue the examination of judicial belief as interpretation. In order to do so, I evaluate and compare cases that are thematically similar and that help illuminate the issues, starting with *Miller v. California*,[143] a 1972 obscenity case from the notably conservative Warren Burger court. In *Miller*, Defendant/Appellant Miller ran a mass-mailing campaign for so-called "adult" material. Specifically, he sent five unsolicited brochures by mail to, among others, a restaurant in Newport Beach, California. Advertised in the brochures were four books: "Intercourse," "Man-Woman," "Sex Orgies Illustrated," and "An Illustrated History of Pornography," as well as a film entitled "Marital Intercourse." In the main, the materials included pictures and drawings "very explicitly depicting men and women in groups of two or more engaging in a variety of sexual activities, with genitals often prominently displayed."[144] At issue was the application of

[143] *Miller v. California,* 413 U.S. 15 (1973).
[144] *Miller,* 413 U.S. at 18.

California's obscenity statute, California Penal Code § 311.2(a), which had adopted the obscenity test from *Memoirs v. Massachusetts*[145] (plurality opinion). *Memoirs* had developed a new standard for obscenity:

> "[A]s elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material, taken as a whole, appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."[146]

In *Miller,* a five to four decision, the Court held that the 1st Amendment does not protect obscene materials. The majority opinion by Chief Justice Burger was joined by Justices White, Blackmun, Powell, and Rehnquist. Justices Douglas, Brennan, Stewart, and Marshall (the Court's so-called "liberal" wing) dissented. Justice Burger's opinion noted that "the Court had previously recognized the States' legitimate interest in prohibiting the dissemination or exhibition of 'obscene material' when the mode of dissemination carried with it a significant danger of offending the sensibilities of unwilling recipients or exposure to juveniles."[147] The question put to the Court, then, was the very definition of "obscenity." As we shall see the Court had struggled over the years to agree to a workable definition of what is "obscene." The appliable definitions evolved over time as different courts faced different facts.

The Court found the *Memoirs* definition of "utterly without redeeming social value" was effectively impossible to apply in practice and difficult to understand.[148] Having found the

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[145] *Memoirs v. Massachusetts,* 383 U.S. 413 (1966).
[146] *Memoirs*, 383 U.S. at 418.
[147] *Miller,* 413 U.S at 18-19, citing *Stanley* v. *Georgia,* 394 U. S. 557, 567 (1969); *Ginsberg v. New York*, 390 U. S. 629, 637-643 (1968), and other similar cases.
[148] *Miller,* 413 U.S. at 22.

Memoirs test unworkable, the Court struggled to find a new standard to apply. The Court noted that obscene material is unprotected by the 1st Amendment.[149]

The *Miller,* the Court reviewed the somewhat "tortured history"[150] of prior obscenity cases, including *Roth v. United States,*[151] in which the Court held that obscene materials are not protected by the 1st Amendment because such material is "utterly without redeeming social importance." Likewise, *Chaplinsky v. New Hampshire*[152] held of the lewd and obscene that, "It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to the truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[153]

Nine years later, in a plurality opinion in *Memoirs v. Massachusetts,* the Court established a three-part test for obscenity: (1) the dominant theme, taken as a whole, must appeal to a prurient interest in sex; (2) the material is patently offensive because it affronts the contemporary community standards relating to sexual matters; and (3) the material is utterly without redeeming social value.

At the time of the opinion in *Miller*, the Justices could not agree on an application of *Memoirs* to the case. They had previously held that the 1st Amendment provided no protection for obscenity, and that statutes designed to limit or regulate obscene material had to be carefully crafted. The Court limited the application of any such statute to conduct specifically described by statue, as written or construed.[154] The statute also had to be limited to material which "taken as a

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[149] *Miller,* 413 U.S. at 23.
[150] *Miller,* 413 U.S. at 20.
[151] *Roth v. United States,* 354 U.S. 476 (1957).
[152] *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1957).
[153] *Kois v. Wisconsin,* 408 U. S. 229 (1972); *United States v. Reidel,* 402 U. S. 354 (1971); *Roth,* 354 U.S. at 354.
[154] *Miller,* 413 U.S. at 23-24.

whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which taken as a whole, do[es] not have serious literary, artistic, political, or scientific value." The Court rejected, however, the "utterly without redeeming social value" test of *Memoirs.*[155]

Justice Burger went on to explain that the state statute could regulate:

(a) "patently offensive representations or descriptions of ultimate sex acts, normal or perverted, actual or simulated.

(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."

Further, "[s]ex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex or nudity can."[156]

Finally, and importantly, the Court also held that, "[a]t a minimum, prurient, patently offensive depiction or description of sexual conduct must have *serious literary, artistic, political, or scientific value to merit First Amendment protection*."[157] In other words, the concern of the Court was the value of the speech to the public and the extent to which its prurient aspects outweighed that value. For example, a medical text may contain explicit representations of the human body, but these are not intended to appeal to prurient interests. The Court explained that, "[i]n resolving the inevitably sensitive questions of fact and law, we must continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence, and other protective features provide, as we do with rape, murder, and a host of other

[155] *Miller,* 413 U.S. at 24.
[156] *Miller,* 413 U.S. at 25.
[157] *Miller,* 413 U.S. at 26.

offenses against society and its individual members."[158] As the Court explained in *Jenkins v. Georgia, infra*:

> *Miller* held that it was constitutionally permissible to permit juries to rely on the understanding of the community from which they came as to contemporary community standards, and the States have considerable latitude in framing statutes under this element of the *Miller* decision. A State may choose to define an obscenity offense in terms of "contemporary community standards" as defined in *Miller* without further specification, as was done here, or it may choose to define the standards in more precise geographic terms, as was done by California in *Miller.*[159]

Thus, the Court examined *the meaning and value of the material to the public*. This approach closely resembles a reader-response analysis, with the public as the "reader" or "audience." *Miller*, then, is an example of the application of an ethicist approach to legal interpretation that focuses not on the content of the text (the applicable statute and the 1st Amendment) but the meaning placed on it by the public and its various social and cultural communities. This approach to legal interpretation closely resembles Fish's description of the literary theory of meaning as determined by reader-response. Here the majority openly analyzes the impact its decision will have on society, given public values and mores at the time. I propose that this methodology most nearly approaches a transparent and lucid method of legal analysis.

Suffice it to say, these standards are hardly precise or easily recognized and applied, as Justice Douglas pointed out in his dissent.[160] But the majority did not stop there. The Court noted that while the limitations themselves (in other words, the standards announced) do not vary "from community to community,"[161] these issues are questions of fact that jurors would be asked

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[158] *Miller,* 413 U.S. at 26.
[159] *Jenkins,* 418 U.S. at 157.
[160] *Miller,* 413 U.S. at 39.
[161] *Miller,* 413 U.S. at 30.

to determine by '*whether the average person, applying contemporary community standards*' would consider the material prurient." (Emphasis added). The Court thus remanded the case to the trial court for further proceeding in conformity with the opinion.

I applaud the Court – one of the most conservative in history – for its honesty in admitting there is no specific text or statute to look to determine what is obscene, and that it must rather look to *community standards of the day* in order to decide what is Constitutional. This is the very essence of an ethical, value-based interpretational approach as articulated by Post. At no point in its discussion of the issue does the majority make more than passing reference to the Constitution in the form of the 1st Amendment. Rather, the majority relied on concepts such as "redeeming social importance," "slight social value as a step to the truth," "social interest in order and morality," "patently offensive because it affronts the contemporary community standards," and "utterly without redeeming social value." These are not quoting from the language of the Constitution. They are statements of what the majority saw as the controlling interests governing their decision: those of the public and society.

A frequent, and valid, criticism of the difficulties presented by an ethos-based or responsive interpretation approach is the difficulty in applying such standards consistently. How does a judge or Justice know what values, beliefs, experiences, cultural groups, and interests to consider? An example of why this criticism is both valid and irrelevant follows in the discussion of another obscenity case from the Supreme Court, *Jenkins v. Georgia.*

B. *Jenkins v. Georgia.*

In *Jenkins v. Georgia*,[162] the defendant had been convicted of violation of Georgia's obscenity statute prior to the decision in *Miller*. The basis of the conviction was the showing of the film "Carnal Knowledge" in a theatre. The jury instructions were based on the Court's earlier decision in *Memoirs v. Massachusetts.* The Georgia Supreme Court upheld the conviction. The U.S. Supreme Court's opinion, authored by Justice Rehnquist, began with a recitation of the Georgia obscenity statute, which closely mirrored the *Memoirs* standards prior to *Miller:*

> Material is obscene if, considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value, and if, in addition, it goes substantially beyond customary limits of candor n describing or representing such matters.

Ga. Code. Ann. § 2201(b) (1972). The Court had held previously on the same day that defendants convicted under the standards in place prior to *Miller* whose cases were on appeal should receive *Miller* review.

In *Jenkins*, however, the defendant was the manager of the theatre showing the movie *Carnal Knowledge* when the film was seized by law enforcement. He was charged under the Georgia obscenity statute, Ga. Code Ann. § 2201(b) (1972), which applied the standard for obscenity from *Memoirs*,[163] with distributing obscene material. Although other theatres were showing the film, Georgia took particular pains to prevent the showing of material that it believed the Georgia populace would deem offensive. The jury, following trial, returned a verdict of guilty. The defendant appealed to the Georgia Supreme Court, which affirmed his

[162] *Jenkins,* 418 U.S. at 153.
[163] *Memoirs*, 383 U. S. at 418.

conviction by a divided vote. Interestingly, the Georgia Court noted that the obscenity statute was "considerably more restrictive" than the *Miller* test recently announced. The dissent in the U.S. Supreme Court thought the film was entitled to 1st and 14th Amendment protection. The Court explained that:

> Not only did we say [in *Miller*] that:
>
> > "[T]he First Amendment values applicable to the States through the Fourteenth Amendment are adequately because (1) it constituted protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary,"
>
> *Miller*, 413 U.S. at 25, but we made it plain that, under that holding,
>
> > "no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct. . .."
>
> *Miller,* 413 U. S. at 27.[164]

Jenkins conviction under the Georgia statute was on appeal at the time *Miller* was decided. Therefore, he was entitled to any benefit available under the new *Miller* standards in his appeal to the U.S. Supreme Court.[165] Although other theatres were showing the film) and some were under prosecution under various states' obscenity statutes, the timing of Johnson's appeal coincided with the decision in *Miller.* Thus, his was the case the Court took up in first applying *Miller*.

Justice Rehnquist's opinion in *Jenkins* first noted that the Constitution does not mandate that juries in obscenity cases be instructed on hypothetical state-wide community standards, although the *Miller* case allows their use. What *Miller* does forbid, however, is that state juries

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[164] *Jenkins*, 418 U.S. at 160.
[165] *See Hamling v. United States,* 418 U.S. 87 (1974).

be instructed on national standards. It is acceptable, according to the majority in *Miller*, for the trial court to instruct based on "community standards" *without specifying the community in question*.[166] The jury may apply the contemporary standards of the *community from which they come*.[167] States have considerable leeway in designing this element of the instruction. This fact alone allows for a wide variety of local application in specific cases, depending on the jurisdiction and the values of the populace, as well as their experiences and expectations.

Note here the similarity of this approach to that of reader-response theory as outlined by Fish, for whom the "reader" was not an individual, but a group with shared experiences, interests, goals, and desires. *Jenkins* is an example of the application of what resembles an ethicist approach to legal interpretation, one informed by the literary reader-response theory developed by Gadamer, Fish, and others. In particular, the question the Court chose to address was how to protect the interests of different communities (i.e., groups of readers with similar experiences and values) with various viewpoints on what is "obscene." For example, an audience in California, known to represent a rather liberal population, may vary a great deal from the reaction to the material in rural Georgia, which is likely to be more politically and religiously conservative. Ethicism allows the Court to consider the effect of its decision on the public as defined by the affected social, racial, and local communities of "audiences." This approach, I propose, is preferable to those that force the Court to make a decision based on its members' personal values and beliefs, which are then overlain with a patina of legal theory.

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[166] *Jenkins*, 418 U.S. at 157.
[167] It is worth observing that Rehnquist himself discusses the holding of *Miller* in terms of the language of responsive interpretation.

The Court's opinion in *Jenkins* went on to describe the film, its content, and the critical reaction. In general, the film is the story of two young, male college roommates whose lives are preoccupied with sex. The film featured a star cast and met critical approval. The Court then held that the question of whether the film appeals to the "prurient interest" is a question of fact for the factfinder. Yet, Rehnquist continued, juries do not have "unbridled discretion"[168] to determine what is "patently offensive." The *Miller* standard only prohibits the exhibition of "hard core" sexual conduct.[169] Further, the opinion in *Miller* set forth examples of what the state could define as patently offensive, including "representations or depictions of ultimate sexual acts, normal or perverted, actual or simulated," and "representations or descriptions of masturbation, excretory function, and lewd exhibition of the genitals."[170]

The Court then examined the film "Carnal Knowledge" and pointed out that nothing in the film met the "patently offensive" standard, nor did the film contain scenes that depicted the "ultimate sexual acts" or focused on the bodies of the actors in those scenes.[171] In summary, the Court found that the movie, although involving nudity, was not obscene under the *Miller* standard. There was nothing in the film involving "the public portrayal of hard-core sexual conduct for its own sake, and for the ensuing commercial gain" found impermissible in *Miller.*[172] Therefore, the Court reversed Jenkins' conviction.

What is interesting about *Jenkins* is the effort required of the Court to apply the *Miller* standards. As discussed above, this difficulty in application is one of the drawbacks to the

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[168] *Jenkins,* 418 U.S. at 160.
[169] *Jenkins,* 418 U.S. at 160.
[170] *Miller,* 413 U.S. at 25.
[171] *Jenkins,* 413 U.S. at 161.
[172] *Jenkins,* 413 U.S. at 161.

responsive-interpretation method. How is the determination made what the community wants, needs, and desires? And how does the Court in *Jenkins* solve this problem? It does so by *refining the standards based on the facts before it.* This approach is nothing more than the application of precedent to fact, which is done every day in every court in every venue in the country. Juries are instructed in the applicable law, which they apply based on their view of the factual evidence. Judges also know how to do this. Applying precedent to fact is the essence of being a jurist. Properly examined and applied, then, this supposed conundrum evaporates in practice, because judges and juries are simply doing what they already know how to do: taking broad principles and applying them to facts to reach a conclusion.

C. The application of responsive interpretation to legal meaning.

Miller and *Jenkins* suggest that it is possible, desirable, and in some cases necessary to formulate a theory and application of Constitutional interpretation based on "responsive interpretation" or ethos. What is different about *Miller* and *Jenkins* is that in both the Court explicitly does exactly that. In this way, these cases show that in using such an approach, what the Court is saying and really doing are the same. Responsive interpretation, like its sister literary approach "responsive reading," suggests that one consider the values, experience, community, mores, and knowledge of the "audience" – in these cases, the relevant populace – in making the interpretation.

In *Miller*, the Court, I contend, did not examine the text of the 1st Amendment and attempt to apply some history-based inquiry into the meaning of its words at the time the Amendment was drafted. Rather, the Court – properly, I would argue – recognized that such standards evolve over time. The Court established an obscenity standard flexible enough to give

juries the ability to decide fact questions on an individual basis *using community standards*. In other words, the jury may consider its own community's interests, experiences, history, knowledge, and values in making its application of the law. In this way, the Court did not impose 200-year-old meanings on modern-day issues, and California or New York values are not forced on conservative southern juries. Flexibility and local realities are the watchwords of this approach. Fish would approve.

So, yes, in some instances the Court appears to practice some form of responsive interpretational approach. The problem, nevertheless, is threefold. First, the Court is inconsistent in its methods and frequently claims to be applying some other approach. For example, in *Heller,* Justice Scalia purported to employ a strictly literalist approach to interpretation of the 2nd Amendment. In fact, my analysis of his opinion suggests that he was incapable of doing so consistently, and in fact defaulted to his own beliefs as to what the law should do regarding the right to own and bear guns.

Second, the literary methodology of "reader-response," although discussed by literary/legal scholars, has no history in the written thought or opinions of the Court. No case, Court, or Justice explicitly applies reader-response theory to legal interpretation, even when I argue they seem to do so. If the Justices do not know that they are applying a form of legal interpretation informed by literary theory, they are unlikely to adopt this approach as they are distrustful of any method that comes from a discipline other than law. Lawyers in general, and judges in particular, are skeptical (in my experience) that any other discipline of study – except perhaps history as it applies to the Constitution, Amendments, Declaration of Independence, and case precedent – has anything to offer the law. For example, Richard Posner a former federal

appellate judge on the U.S. Court of Appeals for the Seventh Circuit and now a senior lecturer at the University of Chicago Law School, in his book *Law and Literature: A Misunderstood Relationship*, takes the position that literature has nothing to contribute to the law, which is about subject matter, not technique.[173] Lawyers in general, in my experience, believe in the law as a unique form of thought, rules, and practice to which other disciples are generally irrelevant.

Third, the Justices are being naïve at best when purporting to apply some belief-neutral methodology. As is discussed further herein, the members of the Court are always bound, as Fish argues we all are, by their individual values and beliefs. No approach to legal interpretation, including an ethicist methodology, can change this truth. The more important question, I would argue, is which method of legal interpretation permits the Court most openly to do what it appears to always be doing, which is to consider society's current needs and values, always filtered through the lens of the justice's own values. Ethicism or living constitutionalism have at least the benefit of lucidity and clarity.

Were the members of the Court to engage in a theoretical evaluation of the literary underpinnings of the "ethos-based" approach to legal interpretation, they would be better able to explicate not only their thought process in reaching decisions about community desires and needs, but they would have a better understanding of how to go about evaluating them. Let us imagine, for example, that in *Heller* Justice Scalia had written that upon evaluating the current needs, interests, desires, goals, and history of the D.C. community, that community did not want the mentally ill to own guns. Would this approach change anything? Not the outcome. But at a minimum, the transparency of this approach shows what Scalia is really doing. Better still, the

[173] Richard A. Posner, *Law and Literature: A Misunderstood Relationship* (Harvard U. Press, 2009).

public would be better able to make sense of the decision and feel that the Court is acting in the public interest, even if that evaluation is inevitably the result, at least in part, of Scalia's own views.

Some will also criticize responsive interpretation for the supposed lack of a single, consistently applied, uniform rule of law. I would respond that the *rule of interpretation* is consistent, as is demonstrated in *Jenkins*; only its *application* is fact-based, which is the case with every criminal or tort law, as it should be. The crime of rape, for example, is defined by statute, but a jury or judge applies a fact-based evaluation of the allegations and evidence. Such is the nature of the practice of law. Responsive interpretation allows the courts to interpret and apply the law in a more just and humane way. When the legal professional considers a totality of factors that influence legal decisions, including current public values, changes in society over time, evolution in technology, and the effect on society and its social, cultural, economic, and ethnic groups, their decisions may be fairer, more just, and more fitting with the meaning of the text at issue.

Brown v. Board of Education,[174] is a perfect example. *Brown* considered the evolution of social views on segregation in education and its impact on the affected cultural, ethnic, and economic group. By doing so, the *Brown* Court was able to determine that "separate but equal" no longer made social or ethical sense. The Court overruled prior precedent, and the result was more humane, less rigid, less harsh, and fairer. By adopting this approach, Justices can acknowledge all of those factors, without an appearance of deceit about their true motives.

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[174] *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

It is true, as Stanley Fish points out in his book *The Trouble with Principle,*[175] that principle-based rules such as those applied in *Memoirs* are never truly neutral; they necessarily assume a political point of view, often conservative. Fish writes, "Deferring to a higher order impartiality is not to constrain or bracket "'your own beliefs' . . . but to enact them; it is to testify to the truth, *as you see it*. The so-called higher order impartiality is anything but impartial…. It is our notion of the good, as contestable as any other."[176] (Emphasis added). In other words, Fish argues that even when we purport to act on community or social group values, the choices we make are determined by our existing beliefs and experiences. This fact explains why even in cases like *Jenkins* or *Miller or Heller*, a conservative Justice like Scalia would not agree on the relevant community values with a more liberal Justice like Sotomayor. One simply cannot step out of one's own inherent system of values and beliefs and apply some neutral, theoretical standard. It is an illusion that we think we can do so. We vote, affiliate, and practice religion, if at all, and live in a "bubble of belief" – the sum total of our own values, experiences, history, education, social and economic class, religious beliefs, training, community and its values, and political beliefs – out of which there is no exit. We each act out our value system. Fish suggests that this result is inevitable, even if one is aware of it. Even responsive interpretation suffers this problem.

This is not to say that everyone agrees with Fish's personal and situational view of meaning. He has both his supporters and detractors among scholars of literary criticism and meaning. Even his critics, however, tend to argue that there is merit in the ideas that underlie

[175] Stanley Fish, *The Trouble with Principle* (Harvard U. Press, 1999), 182.
[176] Fish, *The Trouble,* 182.

Fish's theories, although his arguments, they claim, do not always satisfactorily support his conclusions.[177]

Fish's argument suggests that bias-neutral decision-making is impossible. Few jurists would want to accept this suggestion, because they are trained to believe in an independent and unbiased judiciary. As the Court becomes more politically divided, the falsity of this claim is becoming apparent even to the public. Nevertheless, the fiction of an unbiased decision-maker continues to hold great importance to the bench and its credibility.[178, 179] Indeed each of us insists on the truth value of our decisions and beliefs; they are not random, but we consider them true regardless of some third-party's opinion.

Ethos-based interpretation, however, asks a different question: not the interpretation of the Constitution or a statutory text according to the intent of the drafters or the accepted meaning at the time of adoption or creation, but rather what the law *should be today* given both the text in question and the goals, desires, needs, beliefs, character, and collective wisdom of the affected community at the time of application. No overarching "principle" handed down from above need apply. Yes, the decision maker will make his interpretation of public needs and desires through a filter of his beliefs; nevertheless, the goal is an achievable one – to determine how best to express Constitutional principles considering current social values.

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[177] *See*, e.g., Robert Stecker, "Fish's Argument for the Relativity of Truth," *The Journal of Aesthetics and Art Criticism* 48, No. 3 (Summer, 1990): 223-230.
[178] *See* fn. 211, *infra,* regarding Justice Amy Coney Barrett and her upcoming book.
[179] Harper Neidig, "Watchdog Group calls for Supreme Court Reforms," *The Hill* (July 8, 2010): https://thehill.com/regulation/562028-watchdog-groups-calls-for-supreme-court-reforms. Bipartisan panel of former judges calls for reforms to depoliticize the Court and its confirmation process and restore public confidence in the independence and non-partisanship of the Court.

D. Literary hermeneutics and responsive interpretation.

Legal scholar John Denvir describes approaches like ethos-based interpretation as one form of literary "hermeneutics."[180] He attributes this approach to literary/legal Professors Owen Fiss and Ronald Dworkin. According to Denvir, "Professor Fiss argues that interpretation is neither 'a wholly discretionary or wholly mechanical activity,' but rather a 'dynamic interaction between reader and text and meaning of the product of that interaction.'"[181] Professor Dworkin asserts that a judge's interpretation of a text "will include both structural features, elaborating the general requirement that an interpretation must fit doctrinal history, and substantive claims about social goals and principles of justice. Any judge's opinion about the best interpretation will therefore be the consequence of beliefs other judges need not share."[182]

The greatest benefit of responsive interpretation, I would suggest, is that it implies an element of judicial "transparency;" the long-needed recognition that approaches such as textualism, originalism, and the like are wolves-in-sheep's-clothing, giving the appearance of neutrality and impartiality while providing little to none. Ethos or responsive interpretation, on the other hand, recognizes that interpretational standards should satisfy three criteria: (1) be relevant to today's society; (2) allow for legal rules that reflect current American values and culture (which differ from locale to locale); and (3) allow justices to admit what they are really doing, which is to apply the Constitution in a way that reflects (1) and (2). Further, this approach implements an analytical framework with a rich history of scholarship in literary criticism from which judges can draw in coming to their decisions.

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[180] John Denvir, "Justice Rehnquist and Constitutional Interpretation," *Hastings L. J.* 34 (1983): 1015-16.
[181] Denvir, "Justice Rehnquist," 1015, quoting Owen M. Fiss, "Objectivity and Interpretation," *Stan. L. Rev.* 34 (1982): 739.
[182] Denvir, "Justice Rehnquist," 1015, quoting Dworkin, "Law as Interpretation," 196.

In *Heller*, instead of a tortured opinion purporting to apply a textualist/originalist approach, what if Scalia had simply said, "You know what, Americans value the right of self-defense in their own homes, but Americans really don't want felons and the mentally ill to have guns." That is not an originalist argument; it is an ethos argument about what makes sense considering American values and beliefs. And yes, it is relevant that Americans have always felt that way, but that fact is not necessarily controlling. Would such a transparent approach not be refreshing? And just plain *honest*? The very credibility and standing of the Court are at stake in this debate. The public is already increasingly aware that the members of the Court frequently split along party or ideological lines. The realization that they must always take positions consistent with their belief systems would be refreshing, at a minimum. Moreover, were the Court to explicitly attempt to act according to its understanding of the values of the affected community, its credibility might increase in the eyes of the public.

Note that ethicism is more than the Court admitting that it is really applying its own values to the case; ethicism is an approach that attempts to interpret the text in question considering the current state of American society. Of course, in a politically divided country like that today, it is unavoidable that even that effort will be colored by the Justices' political views. But I would argue that this fact is neither novel nor confined to the present day. It has always been the case because the Court cannot act otherwise.

Critics may argue that this strategy for deciding cases is pure judicial relativism, or worse, judicial activism.[183] (*Gasp!)* And my response is, "So what?" Is not judicial activism exactly what takes place now, simply clothed in the high-minded language of legal interpretational

[183] *See* discussion of "judicial activism" and its critics, *infra*.

theory? And does it not constitute relativism to recognize, as in *Heller*, that even under the 2nd Amendment we do not want felons to have guns? And activism to hold that the standard for what is pornography changes with the times and the locale? In other words, we are already there. Cannot the Justices just be honest about what is going on at the Supreme Court? Society would be better off with more transparency and less pretense, but more importantly, more cogent and understandable opinions.

E. "Judicial Activism" and *Miranda v. Arizona.*

Justice Oliver Wendell Holmes is credited as the originator of the ideas behind so-called "living constitutionalism." In *Missouri v. Holland*,[184] Holmes wrote:

> When we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation.[185]

Following in Holmes' footsteps, the almost 16-year tenure of Earl Warren as Chief Justice of the U.S. Supreme Court from 1952 to 1969 was known for its alleged "judicial activism," a supposedly lawless, whim-based approach to deciding cases that relied on broad Constitutional principles rather than precedent or specific language.[186] The Warren Court's approach to the law modeled that advocated earlier by Justice Holmes, and before him Montesquieu and Blackstone.[187] Under the critical reading of the Warren Court's opinions, justices ran rampant

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[184] *Missouri v. Holland,* 252 U.S. 416 (1920).
[185] *Missouri,* 252 U.S. at 433.
[186] David Luban, "The Warren Court and the Concept of a Right," *Harv. C.R.-C.L. L. Rev.* 34 (1999): 7.
[187] Paul O. Carrese, "The Cloaking of Power: Montesquieu, Blackstone, and the Rise of Judicial Activism," *Chicago Scholarship Online* (March 2013): DOI:10.7208/Chicago/9780226094830.003.0011. Holmes shared a view that promoted a "cosmopolitan, historicist humanism that survived its outdated efforts as a science of politics."

with decisions made without precedent based on thinly-supported concepts and on justices' individual beliefs. Instead, I believe the Warren Court was a shining example of the appropriate application of the responsive interpretation approach to legal meaning. To support this claim, let us examine one of the famous (or infamous) opinions from that Court, *Miranda v. Arizona*.[188]

Ernesto Miranda, the defendant in the principal case (one of four decided that day), had been convicted of kidnapping and rape based on a police-obtained confession. At no time was Miranda informed of his right to remain silent, to have an attorney, or that any confession could be used against him in a court case.[189] At trial, Miranda denied his confession was made knowingly and willingly. Miranda appealed his conviction to the Arizona Supreme Court, which found no violation of Miranda's constitutional rights.[190]

In a majority opinion authored by Chief Justice Warren and joined by Justices Black, Douglas, Brennan, and Fortas, the Court held that the Bill of Rights' 5th Amendment right against self-incrimination and 6th Amendment right to an attorney require the police to warn a suspect of his right to remain silent and to an attorney before any interrogation, and that such rights can be waived only in a voluntary and knowing way. Absent the police having done so, any confession obtained was inadmissible at trial. Justice Clark concurred in part and dissented in part, and Justices Harlan, Stewart, and White dissented.[191]

The facts of each of the cases were similar:

> In each, the defendant was questioned by police … in a room which cut him off from the outside world. In none of these cases was the defendant given a full and effective warning of his rights at the outset of the interrogation process. In all the

[188] *Miranda v. Arizona,* 384 U.S. 436 (1966).
[189] *Miranda,* 384 U.S. at 491-92.
[190] *Miranda,* 384 U.S. at 492.
[191] *Miranda,* 384 U.S. at 486.

> cases, the questioning elicited oral admissions, and in three of them, signed statements as well which were admitted at trial.[192]

In his dissent from the majority opinion, Justice Harlan accused the majority of "a strained reading of history and precedent and a disregard of the very pragmatic concerns that alone or on occasion justify such strains."[193] This lack of reliance on precedent is an oft cited disingenuous criticism of an ethicist approach to legal interpretation. In fact, Justice Warren was at some pains to cite extensive precedent, in addition to constitutional principle, in authoring the majority opinion. As he stated at the outset, "our holding is not an innovation in our jurisprudence but is an application of principles long recognized and applied in other settings."[194]

Warren began his opinion with a recitation of the history of abusive interrogation under English rule, as discussed in the case *Brown v. Walker*.[195] And in a beautiful statement of the principles of ethos-based interpretation, Warren cited the following passage from *Weems v. United States*:[196]

> … our contemplation cannot be only of what has been, but of what may be. Under any other rule, a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.

The majority also relied heavily on the precedent *Escobedo v Illinois*, 378 U.S. 478 (1964), in which the Court held that a confession obtained after a four-hour standing interrogation in an isolated room while the defendant was handcuffed, and while the police denied the defendant his request for an attorney, was inadmissible. The Court also cited a long

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[192] *Miranda,* 384 U.S. at 445.
[193] *Miranda,* 384 U.S. at 505.
[194] *Miranda,* 384 U.S. at 442.
[195] *Brown v. Walker*, 161 U.S. 591 (1896).
[196] *Weems v. United States,* 217 U.S. 349, 373 (1910)

line of cases supporting the rights of the accused, from *Silverthorn Lumber Co. v. United States*[197] to *People v. Portelli*.[198]

For example, the Court had held in *Chambers v. Florida*[199] that mental or physical coercion was the hallmark of unconstitutional interrogation. The Court further emphasized the isolation and incapacity of the defendants in an unfamiliar, intimidating setting and the aggressive nature of the questioning as factors indicating the potential for coercion.[200] Other techniques used by the police included fake line-ups in which the accused was "identified" by several planted witnesses as a subversive means of obtaining confessions, and interrogations involving physical abuse.[201] The majority pointed out that all four defendants suffered from mental or social disabilities that may have led them to believe their conviction was inevitable.

The Warren opinion in *Miranda* also looked to the Federal Bureau of Investigation's own manual for interrogation, which includes protections for the accused similar to those chosen by the Court. Finally, and most importantly, the majority relied on the stated rights asserted in the 5th and 6th Amendments to the Constitution. All of which is to say that far from being the product of judicial activism, the *Miranda* opinion is grounded solidly in precedent and principle.

Justice Harlan, ironically, relying not on precedent but on his recitation of the requirements and concerns of society, voiced the anxiety in his dissent that the majority opinion ignored the needs of society for protection from violent criminals.[202] Although he cited numerous precedents that express his same concerns, these are not legal principles arising from the text of

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[197] *Silverthorn Lumber Co. v. United States,* 254 U.S. 385 (1920)
[198] *People v. Portelli*, 15 N.Y.2d 235 (1965)
[199] *Chambers v. Florida,* 309 U.S. 227 (1940).
[200] *Miranda,* 384 U.S. at 449-450.
[201] *Miranda,* 384 U.S. at 453-456.
[202] *Miranda,* 384 U.S. at 504-526

the Constitution but are instead expressions of the needs and desires of the American public. As discussed above, such is the essence of an ethos-based, responsive interpretational approach to legal meaning. Indeed, as Harlan himself introduced his dissent, "To incorporate [the notion of voluntariness] into the Constitution requires a strained reading of history and precedent and *a disregard of the very pragmatic concerns that alone on occasion may justify such strains.*"[203] (Emphasis added). Such "pragmatic concerns" have no place in a history-based, text-based approach to reading the Constitution Harlan advocates. He went on to note that "in practice, and from time to time, in principle, the Court has given ample recognition to society's interest in suspect questioning as an instrument of law enforcement."[204] What is "society's interest" other than Harlan's interpretation of the will of the people?

Yet scholars such as David Luban continue to criticize the Warren Court for its "judicial activism" and regard it as an aberration,[205] while justices like Harlan are considered sterling examples as champions of precedent and of the separation of powers. Such thinking is hypocrisy of the highest order. Judicial activism is characterized merely as "pragmatism" and "society's interest" when Scalia or Harlan engages in it, but for Warren it is an abuse of the power of the Court.

The more honest reality is that some courts already engage in responsive interpretation – crafting opinions based on their own understanding of the needs and wants of the society or the affected group at the time of the opinion – even when they advocate text-based or history-based interpretation. The Warren Court, to its credit, was simply more consistent and more honest in

[203] *Miranda,* 384 U.S. at 505.
[204] *Miranda,* 384 U.S. at 509.
[205] Luban, "The Warren Court," 7.

doing so. Such a choice is not a bad thing; rather, it is a recognition of how legal interpretation should work in practice.

Another common criticism of the Warren Court, and one made by Harlan in his dissent, is that such policy decisions are best left to the representative branches of the government – Congress and the President. Those entities have the power to do research, survey the public, hear testimony, conduct investigations, as well as other means of measuring the public pulse. The Court, however, is not without the ability to perform investigation of its own. One obvious example is the *Miranda* majority's reliance on scholarly material and on the Wickersham Commission Report on criminal investigations.[206] The Court also quoted Lord Sanskey, the Lord Chancellor of England, for the proposition that "[i]t is not admissible to do a great right by doing a little wrong…. It is not sufficient to do justice by obtaining a proper result by irregular or improper means."[207] Reliance on the great principles of justice that are the foundation of the Revolution and the Constitution cannot be a bad source of precedent for judicial decision-making.

F. Summary.

In this chapter, we have discussed the merits of ethos-based responsive interpretation as an approach to judicial interpretation. That approach involves looking not only to precedent and language, but also to the interests, needs, will, goals, history, character, values, and ethics of the national or local community. The method relies on broad statements of the bedrock principles that underlie our founding documents. Responsive legal interpretation gets its theoretical

[206] *Miranda,* 384 U.S.at 447.
[207] *Miranda,* 384 U.S. at 447.

underpinning from responsive reading theory championed by those such as Jauss, Gadamer, Fish, Dworkin, and others in which the interpretation of a work is bound up with the experiences, beliefs, history, values, community, experiences, and knowledge of the reader, interpreter, or audience.

In responsive legal interpretation, the judge or court applies broad legal principles to problems based on the issues at hand, guided always by their understanding of the needs, wants, values, and interests of the public, as expressed in scholarship, studies, precedent, history, and the founding documents. Such interpretation is not, I would argue, unbounded judicial activism, or willy-nilly judicial decision making, or precedent-less legal standards. Although its principles may be difficult to apply to specific facts, such work is at the heart of what judges do.

Miller, *Jenkins*, and *Miranda* are all examples of the application of responsive interpretation. Although the court or justice may not realize that it is engaged in this process, the reality is that belief-based decision-making occurs even when justices purport to be applying a theory of legal interpretation other than an ethos-based one. Responsive interpretation is here, for good or ill. Society should embrace its benefits and implement it uniformly.

CHAPTER 3

THE FILTER OF BELIEF

I. The Benefits of Ethos/Responsive Interpretation.

The "accepted" theories of constitutional interpretation, such as textualism (examining the words of the Constitution or statute in the context of their meaning at the time of adoption) or originalism (looking to the intent of the document as expressed by the meaning of the words when drafted) suffer severe disabilities in terms of the ability of courts to apply them consistently. This is true because often the meaning of a Constitutional provision or statute has changed over time, involves a situation not extant at the time of adoption, or the evidence is scant and inconsistent. This chapter will provide examples of where such theories would also have negative and anti-progressive consequences for society. All theories, however, as argued above, suffer from the same disability: they ignore the fact that any interpreter can only act through the filter of her own beliefs and values.

I do not mean to suggest that any justice or court is necessarily being disingenuous in claiming to apply a chosen theory of legal interpretation, nor would I support that accusation. What I am arguing instead is that this process is both subconscious and unavoidable. Justices do not always implement their individual belief systems because they have chosen to do so (at least I hope that is true); rather, the members of the Court, like each of us, are incapable of applying any theory from a neutral ground not informed by his or her belief system.

In this chapter, I discuss famous cases *U.S. v. Nixon*, involving President Richard Nixon's claim of executive privilege for tapes of conversations with his staff in order to avoid the use of those tapes in a criminal prosecution against him, and *Brown v. Board of Education of Topeka,*

Kansas, the well-known case overturning the "separate but equal" doctrine that *Plessy v. Ferguson*[208] applied to justify segregated schooling by race. These cases represent clear applications of an approach to legal interpretation that closely resembles an ethos methodology of deciding a case based on public values and expectations at the time. By using these sample cases to demonstrate the usefulness of the ethicist process of legal decision-making, I will argue that they demonstrate the method's practicality and usefulness, but also its potential misuse.

I argue we should adopt the approach to Constitutional interpretation that best expresses the inherent values stated in the founding documents through the lens of the current and future wants, needs, desires, values, and experiences of the populace. That theory – which comes from literary critical theory – is responsive interpretation or ethos. It has also been called "living Constitutionalism," discussed in the next chapter." Under that approach, the Court looks not to vague and inconsistent history or the meaning of words 250 years ago, but rather the needs of current society or social group and its circumstances. This is the process in which the Court is already most often engaged, although usually in the guise of sophisticated theoretical language.

Stanley Fish, writing of the work of constitutional scholar Steven Smith, puts it this way:

> But if, as Smith has himself argued, there is no such thing as a 'good' theory – because any theory will either be an empty abstraction incapable of application or a formulation already inflected in a particular direction – then there is no such thing as a 'bad' theory, a category whose intelligibility would depend on the possible existence of its opposite. A bad theory would be one that didn't do its job, but it is Smith's contention that theory has no job of its own and is always an extension of whatever job is being done (or attempted) by those who have appropriated its vocabulary.[209]

[208] *Plessy v. Ferguson*, 163 U.S. 537 (1896)
[209] Fish, *The Trouble with Principle*, 231.

What Fish is saying here suggests that responsive interpretation or ethicism is not a *theory*; it is a *method*, what the Court always is already doing. Ethicism is not so much a theory as a description of how our thinking works. As Fish points out, "Being prudential is not a good or bad thing to do; it is the only thing to do, and the only question is in what direction to do it in, and that question … is itself political."[210]

The concept of "ethos," or doing that which is good, goes back to Plato and the Socratic dialogues. In them, Plato claims that the good is that which produces value and usefulness. In that context, to be "political" is not necessarily to be oriented to the right or left of the political spectrum, but rather to have adopted a particular view of what things are good for society and tend to enhance the lives of its citizens. In this way, Fish is claiming that any choice made in the context of any theory is colored by the view of the interpreter as to that which is good.

The confirmation hearings of Trump appointee Amy Coney Barrett as a Supreme Court Justice provide a glimpse of what this concept means in practice. It is well known that Barrett is a conservative who is both Catholic and opposes abortion. Yet she testified that she will not consider her faith or her beliefs if faced with a reconsideration of the precedent *Roe v. Wade*, which found that women in the U.S. have a constitutional right to abortion. Was she being truthful? I do not doubt her sincerity; rather I question her ability to execute this intent. No doubt she really believes she can be impartial and simply apply her preferred interpretational theory of literalism to interpretation of the Bill of Rights, but in fact her interpretation of the precedent and the text of the Constitution will be inevitably tainted by her personal point of view, a lens

[210] Fish, *The Trouble with Principle*, 231.

through which she cannot help but look. In the same way, each of us views the world through our own filter of what is "good."[211]

This example illustrates what Fish and other theorists are saying when they argue that any "theory of theory" is inherently flawed by our own inability to escape our personal value filter. One simply cannot adopt a content-neutral theory, because, although the theory itself may be (some argue) content neutral, its application can never be. The application of theory – any theory – is bound up with one's own meaning, beliefs, experiences, and values. Thus, Coney Barrett could no more forget she is an anti-abortion Catholic than step out of her own body; it simply cannot be done.

If Coney Barrett were a liberal who was known to support the right to abortion, then she would be equally constrained to adopt an interpretation to support that right, *regardless of her theoretical point of view.* Take a moment and let that point soak in because it is central to my thesis. If we apply Fish's thinking about the meaning of theory to the process of legal interpretation, the inevitable result is that any decision-maker on the Supreme Court (or any court for that matter) is knowingly (unlikely) or unwittingly (probably) bound by the circumference of their own beliefs, regardless of the interpretational theory they choose to apply. Each of the cases in this dissertation provides an example of this principle. One will do what one's values and beliefs compel one to do under the circumstances.

So why is an ethos-based theory of interpretation better than any other? Does it not suffer from the same disability as the rest? Of course, it must, but the point is that ethicism, or choosing

[211] Ironically, Barrett just signed a $2 million book deal for a work on how judges are not supposed to bring their personal feelings into their rulings. Joseph Choi, "Amy Coney Barrett Receives $2 Million Advance for Book Deal," *The Hill,* April 19, 2021, https://thehill.com/homenews/media/549062-amy-coney-barrett-received-2-million-advance-for-book-deal-report.

to do that which the decision-maker believes is best for the populace or interest group, is the only theory that allows the interpreter to say and do what he or she can only and always will do: express their views about the political good through the filter of their own beliefs. In that sense, it is more honest, open, transparent, and understandable than say, originalism or literalism.

II. *United States v. Nixon* and Ethical Decision-Making.

To continue the examination of cases illustrating my thesis, let us examine two society-changing opinions from the U.S. Supreme Court, *United States v. Nixon*[212] and *Brown v. Board of Education of Topeka*.[213] Each of these cases had a huge societal impact, for very different reasons, but both, though clothed to varying degrees in language of Constitutional theory and originalism, represent practical decisions regarding the reasonable needs of a healthy, functioning democratic society and its people based on broad principles expressed in the founding documents.

Nixon was a decision by the Earl Warren court, a court that reflected a gradual drift by the Court to the right of the political continuum. The Court's opinions, generally reflecting the values of its Chief Justice and majority, expressed a more conservative political point of view. The *Nixon* case was a departure from that conservative trend. The Court in *Nixon* did not permit its conservative leanings to preclude it from finding against the alleged perpetrators of Watergate.

The primary issue in *Nixon* (leaving aside some important procedural questions) was whether the President of the United States could shield his communications with staff and

[212] *United States v. Nixon*, 418 U.S. 683 (1974)
[213] *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954)

supporters from a criminal prosecutor under a claim of Executive Privilege. The case was part of the Watergate scandal, featuring a burglary of the Democratic headquarters at the Watergate complex during the 1972 presidential election. The prosecutor in a related criminal trial, Leon Jaworski – himself a representative of the Executive – sought to subpoena certain tapes and notes of conversations between President Nixon and his staff and operatives. President Nixon claimed the tapes were protected under general Presidential executive privilege and cited the importance of his ability to communicate freely in meetings and calls with such persons. A unanimous Supreme Court, in an opinion authored by Chief Justice Earl Warren, held that Article III executive privilege is not absolute and must yield to the needs of the criminal judicial system and demands of due process where only a generalized interest in confidentiality is asserted.

The Court began its analysis with the seminal case on separation of powers, *Marbury v. Madison*.[214] That case held that, "It is emphatically the province and duty of the judicial department to say what the law is."[215] Thus, the Court held that it follows that the judiciary has authority to interpret the powers of each governmental branch, as derived from enumerated Constitutional powers. This court-held power, the opinion noted, cannot be shared with the Executive, any more than the veto can be shared by the Executive with the courts. To put it another way, both the Executive and Legislative branches must defer to the Court's decisions on the law.

President Nixon's lawyers argued that the need for confidential communications and the independence of the Executive Branch justified quashing the subpoenas. Here, looking not at the

[214] *Marbury v. Madison*, 5 U.S. 137 (1803)
[215] *Marbury*, 5 U.S. at 177.

words of the Constitution per se but its import, the Court noted that while those claims were entitled to due deference, they must yield to *other values*, specifically the needs of the criminal court system.[216] While this opinion has its grounding in constitutional law, and specifically in Article I, at its heart it has to do with a balance by the Court of the competing interests of society in confidential presidential communications versus a those of a criminal system that effectively provides due process, even to the Chief Executive. Faced with such a conflict in the context of a general claim of secrecy unrelated to military, diplomatic, or national security interests, the Court refused to sacrifice the requirements of due process to the claim of absolute executive privilege. More specifically, the Court wrote that such absolute privilege "would upset the constitutional balance of a 'workable government' and gravely impair the role of the courts under Art. III."[217] The Court pointed to the "ends of criminal justice" and the fact that the public "has the right to every man's evidence."[218] These are practical societal needs, not matters of high constitutional theory or literalist language.

Scholar William W. Van Alstyne describes the Court's dilemma in *Nixon* in these terms:

> Essentially, acceptance of the executive claim at that stage would have been tantamount to the abdication of judicial review since the court was asked to uphold the claim of privilege without opportunity to review the material itself. The refusal to acknowledge any large role for the judiciary was pressed in these nearly absolute terms, moreover, even though it was not alleged that interests of national security or of foreign relations were in any way involved.[219]

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[216] *Jenkins,*418 U.S. at 706.
[217] *Jenkins,*418 U.S. at 707.
[218] *Jenkins,*418 U.S. at 709.
[219] William W. Van Alstyne, "A Political and Constitutional Review of U.S. v. Nixon," *UCLA L. Rev.* 22 (1974): 122.

Thus *Nixon,* like other cases discussed herein, is at its heart an ethicist opinion clothed in language of constitutional principles and theory. The Court again demonstrates a commitment to "doing the right thing," as opposed to engaging in a purely theoretical analysis, to considering the consequences to society should an Executive be empowered to undermine his own criminal prosecution. *Nixon*, like many other cases applying an ethicist approach, was essential to the health and welfare of the democracy. The decision prevented a criminal president from engaging in lawless behavior against his political opponents.

Van Alstyne also suggests that *Nixon* was a unanimous decision –despite significant differences among the justices on the specifics – for political reasons: "[T]here was a very compelling reason to forego individual expressions of marginal difference in the common interest of sustaining the Supreme Court itself as an institution and to minimize the risk of noncompliance with its decision"[220] *Nixon* thus was crucial for preserving the Court's role as a last line of defense to the excesses of the executive and legislature. This view supports the argument that *Nixon* is yet another belief-based decision, although clothed in language of Constitutional review.

It is also worth noting the extraordinarily high stakes of this case. The Court could not have been ignorant of the fact that President Nixon was charged with the highest of crimes. It could not have escaped their consideration that a decision that gutted the evidence against him would potentially allow a criminal president to remain in office, unfettered by criminal law. Instead, following publication of the decision, President Nixon resigned. Cases are about consequences, not theory.

[220] Van Alstyne, "Political and Constitutional Review," 122.

What I mean by "cases are about consequences, not theory" is key to understanding my thesis: whatever justices may say or even think they are doing in deciding a case, or in choosing a theory of interpretation to apply, in practice they can only exercise their inherent belief systems about what is best or correct under the circumstances. This eventuality is unavoidable. What is doable is to engage in an open debate about the process that is really going on to allow application of a more transparent approach – ethos or responsive interpretation – to the Court's decision-making process. Let us remove the pretense of some scholarly exercise obscure to most people and replace it with an honest debate about what is politically and socially desirable according to Constitutional principles.

Fish's work implies, and I argue, that a Justice's decision-making occurs in a bubble of belief, a dearly-held world-view that produces a decision about what is best for the populace and for the country and what gives rise to the most favorable consequences, not through some machinery of complex legal theory. Instead, belief is merely colored, albeit unintentionally, in the patina of legal theory, as it was in *Nixon.* I propose this happen in the open, rather that behind the curtain of obscure interpretational language.

As I discuss in more detail in Chapter 5, critics will argue that the effect of ethos interpretation or living constitutionalism is to give legislative and executive power to nine unelected life members of a judicial body not answerable to the public. This is not a criticism without some weight to it, but this argument ignores the fact that the U.S. Supreme Court is tasked both by the Constitution and by precedent with the power to interpret and apply the law created by the executive and legislative branches. It is true that the Court has no ability to call witnesses, subpoena persons to testify, hold hearings, or feel the wrath of voters. But the Court is

not without information on which to make its decisions. These resources include the witness testimony and other evidence developed in the trial court (which may include research, surveys, expert opinion, eye-witness testimony, and the like), as well as the briefs, arguments, and appendices in all levels of the judicial system in the case.

Legal proceedings, including constitutional ones, are battles between parties and their legal advocates. Each party has its respective burden of proof. If the plaintiff cannot make a prima-facia case, the Supreme Court will not consider their appeal. Further, the jurisdiction of the Court is limited to cases that will make law not just for the parties, but for all similarly situated individuals. The Court is therefore tasked with making consequent decisions and is given the power by the Constitution and by precedent to do so. The many critics who would argue that the effect of the ethicist approach is to transfer legislative/executive power to the courts and that doing so tilts the constitutional balance of power in favor of the courts, ignore both the constitutional role assigned to the courts and the long-standing precedent[221] establishing the role of the courts as to review the actions of the other two branches of government, and to correct them when those actions exceed constitutional limits.

III. *Brown v. Board of Education* and Ethos Interpretation.

A second significant case from the Warren Court is the seminal racial equality decision, *Brown v. Board of Education of Topeka*.[222] The facts in *Brown* are straightforward. The Board of Education in Topeka, Kansas segregated its elementary schools and high schools by race. The NAACP challenged this policy. *Brown* was consolidated with four other similar cases. All but

[221] *See Marbury v. Madison*, 5 U.S. 137 (1803).
[222] *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

one had been decided for defendants based on the Supreme Court precedent *Plessy*, which adopted a policy that separate but equal schools were constitutionally acceptable. The opinion, written by Chief Justice Warren, was unanimous and is notable for its reliance not on theory or constitutional language but on social science and social justice principles.

In this way, the decision in *Brown* harkens back to the judicial philosophy of Oliver Wendell Holmes. Holmes was a realist; he rejected any overarching theoretical scheme one could apply to understand the world. What was good was what worked, what made sense to do about the problem of the moment. Harold R. McKinnon describes Holmes as "agnostic, materialistic, hopeless of the attainment of any ultimate truth…."[223] To put it another way, Holmes made decisions about the necessary, not the theoretical. The *Brown* Court appears to have done the same; it recognized that separate-but-equal was unsustainable as American society evolved, and it changed the law to adapt to this new reality.

It is significant in this context that each of the schools in the five school districts at issue in *Brown* had been "equalized" by supplying similar facilities, curricula, qualifications and salaries of teachers, and other tangible factors. Nevertheless, the Court chose to look not to these factors, but to "the effect of segregation on society itself."[224] Interestingly, the opinion notes that it would not examine the adoption of the controlling 14th Amendment (originalism) or look back to the time of the *Plessy* decision (precedent). Instead, the Court chose to look to "public education in the light of its full development and *its present place in American life throughout the Nation*."[225] Thus, the decision states on its face that an ethicist evaluation governs the

[223] Harold R. McKinnon, *The Secret of Mr. Justice Holmes*, The Gillick (January 1, 1950), 14.
[224] *Brown*, 347 U.S. at 492.
[225] *Brown*, 347 U.S. at 492.

outcome; the Court relied on its view of what was good for American society of the day, not what some theory of legal interpretation said the law should be. *Brown* is Holmesian and ethicist decision-making at its most transparent. The Warren Court explicitly rejected any legal theory of interpretation in favor of an explicit assessment of what was the right thing to do for the good of the public.[226]

The Court went on to hold that education "is perhaps the most important function of state and local government."[227] The opinion states the fundamental question and its answer in just two sentences: "Does segregation on the basis of race, even though the physical facilities and other tangible factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe it does." The Court noted studies and precedent that found that segregation led to feelings of inferiority on the part of the minority children that affected their motivation to learn and thus their development. Therefore, such separation deprives the minority children of some of the benefits of a racially integrated school system. In the end, the Court overturned *Plessy* and concluded that "in the field of public education, the doctrine of 'separate but equal' has no place."[228]

Brown also highlights the inherent hollowness of literalism or originalism. During the Congressional debate over the appointment of Robert Bork to the U.S. Supreme Court, Bork's opponents argued that his chosen theory of interpretation – originalism – would have resulted in the opposite result in *Brown*: *Plessy* and separate but equal would have been affirmed as the law

[226] I recognize, of course, the paradoxical nature of my claim; ethicism is itself a legal theory, as is any means of approaching making a legal decision. My point is that it what ethicism claims to do is exactly what is really going on in any event: the Court is making a political decision about what is "good" for society.
[227] *Brown*, 347 U.S. at 492.
[228] *Brown*, 347 U.S. at 495.

of the land. Noted scholars including Alexander Bickel, Lawrence Tribe, Richard Posner, Mark Tushnet, and Ronald Dworkin agree on this point.[229] In this case, what was acceptable behavior at the time of the adoption of the 14th Amendment was no longer thinkable, given that the Court concluded that "separate but equal" inevitably led to a feeling of inferiority among persons of color. Bork likely would have been belief-bound as well as theory-driven to support *Plessy* had he decided *Brown*. As I said, cases have consequences, and the Court must be free to consider them openly and transparently. Although scholar Michael W. McConnell of the University of Chicago Law School argues that *Brown* can be reconciled with originalism, his argument depends not on debate that occurred when the Amendment was passed but on *subsequent* historical treatment of the Amendment.[230] This approach, although novel, has received little academic support.

IV. *Dred Scott v. Sandford*: The Death-Knell of Originalism.

In 1856, the U.S. Supreme Court faced what seemed to be an impossible dilemma: how to reconcile the South's history of slavery with the Northern states' increasing liberalization and provision of freedom and citizenship to former slaves. The issue came to a head in the Court's most infamous decision: *Dred Scott v. Sandford*.[231, 232] The facts and procedural issues are complex, and I will only summarize them here. Scott, born a slave in Virginia, was purchased by

[229] Michael W. McConnell, "The Originalist Case for Brown v. Board of Education," *Harvard Journal of Law and Public Policy* 19 (1995): 457.
[230] McConnell, "The Originalist Case," 457.
[231] *Dred Scott v. Sandford*, 60 U.S. 393 (1856).
[232] The party's name is spelled "Sandford;" the official reports list his last name as "Sanford." For sample scholarship on the case, s*ee, e.g.,* Mark A. Graber, "Desperately Ducking Slavery: Dred Scott and Contemporary Constitutional Theory," *Constitutional Commentary* (1997): 686. https://scholarship.law.umn.edu/concomm/686; Jamal Greene, "The Anticanon," *Harv. L. Rev.* 125 (2011): 359; Paul Finkelman, "Slavery in the United States: Persons or Property?" in *The Legal Understanding of Slavery: From the Historical to the Contemporary,* ed. Jean Allain (2012): 105-134. https://scholarship.law.columbia.edu/faculty_scholarship/667.

a man in Missouri, who then moved to Illinois, then Wisconsin. Both of those states prohibited slavery. Scott's owner died in Iowa, and his widow inherited Scott. After a failed attempt to buy his freedom, Scott sought help from the courts, arguing that his residence in the free territories had made him a free man.

The case was originally filed in Missouri but was transferred to federal court on diversity grounds when Sandford moved to New York. It eventually made its way to the U.S. Supreme Court. The Court, in what can only be described as a classic originalist opinion, held that former slaves were not entitled to U.S. citizenship, even in a free state. The majority opinion, authored by Justice Roger Brooke Taney, concluded based on a historical analysis of the intent of the drafters and the circumstances in which they lived, that the Framers of the Constitution viewed African Americans as inferior to and the property of white citizens, indeed as non-persons, and that, therefore, the Framers could not have intended to extend citizenship to members of the slave race. Taney wrote:

> What the construction was at that time we think can hardly admit of doubt. We have the language of the Declaration of Independence and of the Articles of Confederation, in addition to the plain words of the Constitution itself; we have the legislation of the different States, before, about the time, and since the Constitution was adopted; we have the legislation of Congress, from the time of its adoption to a recent period; and we have the constant and uniform action of the Executive Department, all concurring together, and leading to the same result. And if anything in relation to the construction of the Constitution can be regarded as settled, it is that which we now give to the word "citizen" and the word "people."

Dred Scott, 60 U.S. at 426. Taney relied in part on the fact that many of the Founders were slave owners themselves, that as "property" the government could not deprive the slave owners of their property rights in slaves and that the laws at issue did not violate Scott's rights under the 13th and 14th Amendments. Moreover – and unnecessarily, since the case turned on

procedural/jurisdictional grounds – the Court went on to rule on the merits, effectively invalidating the Missouri Compromise, which had allowed slavery in the Southern states and freedom in the North.

Critics describe the case variously as "an abomination," "a ghastly error," and "judicial review at its worst."[233] The decision enraged anti-slavery advocates in the North and encouraged proponents of slavery in the South. It was a factor both in Lincoln's election and in provoking the Civil War. Even conservative modern justices such as Justice Stephen Breyer view the case with a jaundiced eye.[234] It is widely viewed as the Court's worst decision.

A more originalist opinion than Taney's is difficult to imagine. Yet many originalists refuse to accept *Dred Scott* as a part of the legacy of their brand of judicial interpretation. Breyer for example, is at pains to characterize the case as not truly originalist but rather a failed attempt to apply the doctrine correctly.[235] Justice Scalia – who characterized the case as judicial activism in disguise – went so far as to compare *Dred Scott* to *Roe v. Wade*[236] as an example of "judicial activism" gone awry. As Professor Jamin B. Raskin writes:

> Justice Scalia's comparison of *Roe* and *Dred Scott*, however, is as fallacious a claim about American constitutional doctrine and method as the comparison between slavery and abortion is an insidious perversion of American history. In fact, while the methodology of the Supreme Court's decision in Dred Scott bears almost nothing in common with *Roe*, it turns out to be nearly identical to Justice Scalia's own elaborated method of constitutional analysis: originalism based on strict textual analysis and a study of relevant social tradition.[237]

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[233] Justice Stephen Breyer, "Guardian of the Constitution: The Counter Example of *Dred Scott.*" (2009) https.www.supremecourt.gov.publicinfo/speeches/sp_06-01-09.html.
[234] Breyer, "Guardian."
[235] Breyer, "Guardian."
[236] *Roe v. Wade,* 410 U.S. 113 (1973).
[237] Jamin B. Raskin, "*Roe v. Wade* and the *Dred Scott* Decision: Justice Scalia's Peculiar Analysis in *Planned Parenthood v. Casey," The American University Journal of Gender, Social Policy & the Law* 1, no.1 (1992): 61-84. http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1201&context=jgspl

Rankin is, in fact, quite correct in his analysis. *Dred Scott* and decisions with equally unjust and amoral consequences are the inevitable result of true originalism to the extent those like Scalia have practiced it.

Justice Taney's own words prove Raskin's point that the decision was a true expression of the originalist doctrine's hostility to consequences. Taney writes in *Dred Scott*:

> No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning, and delegates the same powers to the Government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court and make it the mere reflex of the popular opinion or passion of the day. This court was not created by the Constitution for such purposes. Higher and graver trusts have been confided to it, and it must not falter in the path of duty.[238]

Taney perfectly describes as abhorrent the doctrine the Court should have applied to reach a humane and just result: ethicism or living constitutionalism. I would argue that *had* the Court in *Dred Scott* applied an ethos-based model of interpretation, the Court's holding that African Americans are mere property would never have resulted. The Court ignored the increasing anti-slavery feelings on display in the North and overseas during the antebellum period. Indeed, Abraham Lincoln himself criticized the decision because it "corroded moral

[238] *Dred Scott,* 60 U.S. at 426.

principles implicit in the Constitution and explicit in the Declaration of Independence."[239] Lincoln believed that slavery was abhorred by a large portion of Americans of the day, and that it had been equally distasteful to the Framers.[240]

Unfortunately, a true originalist cannot but accept that *Dred Scott* is powerful evidence that the doctrine can blind its followers to accept, even encourage, rank injustice. It is, as Professor Christopher L. Eisgruber of Princeton observes, "a lesson that the Right Wing should heed…in addition to the obvious one that originalism can lead the nation into a train wreck."[241] This is an essential reason that an ethos-based approach, grounded in the literary theory of reader-response as applied by Fish, is more flexible and better suited to serve the essential lessons of the founding documents. And as discussed above, an originalist is only a true originalist when doing so supports her beliefs. As Judge Wachtler observes:

> Even if we wanted to interpret the Constitution literally, we could not do it...It is amusing that those hard-core originalists who revel in ridiculing the "living, breathing document" view of the Constitution somehow manage to find some functioning air sacs in those petrified Constitutional lungs when it serves their purpose.

This is the fundamental problem for those among the bench who claim to abhor "living constitutionalism." Their own belief systems bind them so strongly that they will fool themselves, and inadvertently mislead others, that they are consistent in the application of their favored theory, even when they cannot be so. The results can bring societal disaster.

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[239] Christopher L. Eisgruber, "*Dred* Again: Originalism's Forgotten Past," *Constitutional Commentary* 10 (1993): 61.
[240] Eisgruber, "*Dred* Again," 61.
[241] Eisgruber, "*Dred* Again," 61; *see also*, Honorable Sol. Wachtler, "*Dred Scott*: A Nightmare for the Originalists," *Touro Law Review* 22, no. 3 (2014): 575-611, 599.

This case illustrates the importance of legal opinions that are both transparent and lucid in their reasoning. The Court risks not only losing credibility with the public, the true source of its power, but also invites threats to the makeup and number of members in the Court from the other two political branches. Today, for example, it is common to hear reports of President Biden and the Democratic Party in Congress threatening to expand or "pack" the Court to ameliorate its apparent politicization and conservatism. Thus, the apparent lack of transparency in what the Court is doing is not without peril.

We can see, then, that ethicism has multiple potential benefits: not only would it create transparency as to what the Court is attempting to do and why, but it would free the Court from the shackles of prior decisions with socially adverse consequences and enhance the constitutional role of the Court as a bulwark against the excesses of the executive and the legislative branches. This is the Court's constitutional duty, not to be bound by the beliefs of white slave owners 250 years ago, but to make decisions both consistent with the Constitution and in the best interests of the public, in protection of minority social and racial groups, and directed to preservation of the democracy.

V. Conclusion.

What *Nixon* and *Brown* demonstrate is that the Court sometimes admits that it is acting on its view of the public interest rather than high-minded theoretical concerns. This honesty is refreshing, because knowingly or not, the Court is always engaged in just that analysis, clothed though it may be in theoretical language. Rarely does the Court admit that it is acting contrary to the public good just because it believes the Constitution requires it to do so. Thus, the Court, like each of us, is a prisoner of its experiences and beliefs. Theory is no escape from this prison; it is

rather to put a bird in a gilded cage. Yet *Nixon* and *Brown* also show the positive social consequences that can follow from an ethical approach to Constitutional interpretation. Whether the Court is in the best position to make such decisions is, in my view, largely irrelevant. The system places such dilemmas before the Court, and it must decide them. The question is how is it to do so?

Dred Scott is one of very few opinions in which the Court admittedly ignored the consequences of its decision to apply originalist theory. The Court's insistence on following its own view of the history and intent of the Framers is almost universally acknowledged as leading to a disastrous and amoral decision that had horrific consequences. The case should be a warning to those who would insist on their own prized formalistic approach to legal review and disdain "living Constitutionalism" as legislating from the bench.

This chapter, then, has allowed us a brief view of what ethicism looks like in practice. Yes, ethos or responsive interpretation is just another theoretical approach, the exercise of which will be governed by the decider's own belief system. But as *Nixon* and *Brown* demonstrate, the Court is capable of being honest about what it really is doing when it decides any case. My point is not that Scalia would have reached a different result on gun control in *Heller* if he had written an ethicist opinion (although he might have done so), only that: (1) his opinion would more closely reflect the reality of judicial thought process; and (2) the public would be in a better position to evaluate his reasoning and the bases for his decision.

This idea is not just refreshingly honest, it could have serious consequences for how judges are evaluated for selection. If ethicist judicial decision-making were the norm and not the exception, we could have an honest appraisal in the confirmation hearing of a Supreme Court

nominee of their political and religious views, rather than a mere assessment of how well that Supreme Court nominee has been trained to parrot the empty phrase "I will not consider my personal beliefs in deciding cases." In which case, the fact that Coney Barret was raised in an extremely conservative and secretive Catholic sect would not be taboo; it would be front-and-center, as I believe it should be. The American public deserves to know what a potential justice's view of what is societally "good." If such values are indeed driving decision-making, then we certainly ought to know what those values are, as should our elected representatives. In this way, ethicism as a legal method basis for the Supreme Court's choices could have a significant impact on the transparency not just of judicial decisions, but also judicial selection.

In the next chapter, we will examine the criticisms of ethos interpretation or "living constitutionalism" as it is most often called, as well as the further perils of originalism. As we shall see both approaches have their critics and proponents, and we will evaluate the relative merits of each.

CHAPTER 4

LIVING CONSTITUTIONALISM AND ITS CRITICS

I. Criticisms of Living Constitutionalism.

The U.S. Supreme Court occasionally has applied an approach similar to ethics-based constitutional interpretation by as demonstrated by *Nixon* and *Brown*, but the Court is woefully inconsistent in selecting its method of interpretation. Other than those by the Warren Court, such ethicist opinions are few and far between. Of course, it is possible to simply argue for doing what the Court did in such cases more consistently. The benefit of examining the approach through the optics of literary criticism is that the latter provides, in the form of reader-response theory, theoretical and methodological underpinnings for application of the method, a "how-to" guide, so to speak.

Unfortunately, ethicism is frequently and vehemently criticized by scholars, jurists, and attorneys. The term "living constitutionalism" is often applied to this ethics-based approach to legal interpretation. Scholars Frank B. Cross and Stefanie A. Lindquist examine the most oft-occurring denunciations of the technique in their article "The Scientific Study of Judicial Activism."[242] According to Cross and Lindquist, criticism of judicial activism intensified significantly during the Warren Court era, discussed *supra*, known for its "liberal" decisions on defendants' rights and social issues. Unlike conservative justices like Scalia, who believe that the

[242] Frank B. Cross and Stephanie A. Lindquist, "The Scientific Study of Judicial Activism," *Minn. Law Rev.* 91 (2007): 1752. Cross is a Professor of Law at the University of Texas Law School. Lindquist is Associate Professor of Political Science and Vanderbilt Law School.

Court's role is solely to interpret the words of the Constitution in their historical context, "activist" jurists hold that the Court can play a positive role in promoting social betterment.[243]

Critics of judicial activism argue that the theory allows justices to impose their own political views of what is best for society based on their political whims and personal beliefs without reference to any guiding document. The argument suggests that such judges, acting in a non-elected capacity, act in some sort of quasi-legislative role without accountability to any governmental body or to the public.[244] Such decisions, the argument goes, are best left to the legislature, made up of elected representatives, or the executive elected to make policy decisions.[245] Advocates of "judicial restraint," common among today's Supreme Court nominees, argue that "when liberal Courts overturn democratically enacted laws in favor of liberal, activist constitutionalism, they destroy[] citizens' rights to democratic participation and self-government."[246] The inevitable result of such consistent criticisms is that the term "judicial activism" is now firmly connected to "liberalism" in the minds of many.[247] Notables such as former President George W. Bush have decried the perils of "liberal judicial activism."[248]

One specific metric for evaluating judicial activism is the extent to which courts tend to overturn legislative actions. Judge Richard A. Posner, a noted scholar of law and its interpretation and a critic of "judicial activism," describes the doctrine as a court's willingness

[243] Cross and Lindquist, "The Scientific Study," 1753.
[244] Cross and Lindquist, "The Scientific Study," 1753.
[245] Cross and Lindquist note that the meaning of the term "judicial activism" has evolved over time to become a catch-all for many different points of view. Cross and Lindquist, "The Scientific Study," 1755. The definition adopted herein is that described above, the most typical view of the approach.
[246] Robert M. Howard and Jeffrey A. Segal, "A Preference for Deference? The Supreme Court and Judicial Review," *Pol. Res. Q.* 57 (2004): 131, 132
[247] Cross and Lindquist, "The Scientific Study," 1757.
[248] Cross and Lindquist, "The Scientific Study," 1757.

"to act contrary to the other branches of government."[249] I disagree with Posner on this point: activism could also permit a court to act consistently with the Court's express constitutional role as a check on the excessive decisions of the other two branches of the federal government. Other scholars agree that making decisions by the Court that are in opposition to the actions of other branches of government is well within the Court's jurisdiction, as well as its duty to act as a check on other branches. Therefore, doing so is not in and of itself "activist."[250]

Scholar Bradley C. Canon attempted a more refined definition of judicial activism, breaking the approach into six attributes:

1. Majoritarianism: the degree to which policies adopted through democratic processes are judicially abrogated;

2. Interpretive Stability: the degree to which earlier court decisions, doctrines, or interpretations are altered;

3. Interpretive Fidelity: the degree to which constitutional provisions are interpreted contrary to the clear intentions of the language used;

4. Substance/Democratic Process Distinction: the to which judicial decisions make substantive policy rather than affect the preservation of judicial processes;

5. Specificity of Policy: the degree to which a judicial decision establishes policy itself as opposed to leaving discretion to other [government actors]; and

6. Availability of an Alternative Policymaker: the degree to which a judicial decision supersedes serious consideration of the same problem by other [political actors].[251]

[249] Richard A. Posner, *The Federal Courts: Challenge and Reform.* (Harvard University Press, 1996), 320.
[250] *See* Cross and Lindquist, "The Scientific Study," 1760.
[251] Bradley C. Canon, "Defining the Dimensions of Judicial Activism," *Judicature* 66 (1983): 236, 239

Canon's interpretation of "judicial activism" is cynical and slanted. *Dred Scott* is the perfect example of the necessity of an activist approach in some situations to judicial decision-making. It permits the Court to correct previous societal wrongs. Had the 14th Amendment not been adopted, a subsequent court would have undoubtedly overturned the much-despised *Dred Scott* decision. Yet doing so, according to Canon, would have been: (1) anti-majoritarian, in that at the time of the original decision, proponents of slavery were in the majority; (2) anti-precedential; (3) contrary to extant statutory language; (4) regarding substantive policy; (5) establishing new policy; and (6) superseding the ability of other government actors to change the law. Such a decision would have been both right and necessary, yet Canon would appear to oppose that result if he followed his own definition of "activism."

Another definition of judicial activism has been suggested by Ernest A. Young:[252]

1. Second-guessing the federal political branches or state governments;
2. Departing from text and/or history;
3. Departing from judicial precedent;
4. Issuing broad or "maximalist" holdings rather than narrow or "minimalist" ones;
5. Exercising broad remedial powers; and
6. Deciding cases according to the partisan political preferences of the judges.

A classic living-constitutionalist opinion, *Brown v. Board of Education*, offers an opportunity for examining these critiques through a specific example of "living

[252] *See* Ernest A. Young, "Judicial Activism and Conservative Politics," *U. Colo. L. Rev.* 73 (2002): 1139, 1144.

constitutionalism."[253] In *Brown*, the High Court reversed the prior decision of the Court in *Plessy v. Ferguson*, which had held that schools that were segregated by race, but that were "separate but equal," were constitutionally acceptable. *Brown* found that, in fact, schools that were racially segregated were harmful to blacks emotionally, socially, economically, and educationally. Did the decision "second-guess the federal political branches or state governments?" Clearly it did: the elected school boards of Topeka, Kansas and other cities had created the segregated schools. Did it depart from text and/or history? Clearly the *Brown* decision was a departure from the history of school segregation law and prior applications of the 14th Amendment. Was the opinion broad or maximalist in its holding? Arguably yes, in that it applied the result nationally, not only to the districts party to the case. Did the Court exercise broad remedial powers? Obviously, in that *Brown* overruled *Plessy* and held in a way that made sweeping changes to school administration. Finally, was the case decided according to the partisan political preferences of the judges? Absolutely, since by its own terms it is based on social science and policymaking, not precedent, which it overruled.

The real issue, however, is not whether *Brown* was a "living constitutionalist" opinion, but whether its result is correct and supportable by constitutional principles. The Court in *Brown* did rely on one of the founding documents – the Declaration of Independence – as well as the 14th Amendment. Moreover, the choice was between following judicial precedent and state law by upholding the "separate but equal" doctrine, thereby affirming its racially negative results, or acting in the best interests of society and reversing a long-standing wrong. Originalists, on the other hand, likely would have been obligated to uphold *Plessy*, as argued in Chapter 3. The Court

[253] *See* Chapter 3, *supra.*

has a duty to protect the interests of minorities from the tyranny of the majority. Living constitutionalism, or ethicism, allows for this flexibility. Originalism, like its cousin textualism, does not.

In contrast, recall that the *Dred Scott*[254] decision upheld the states' right to permit enslavement of the black race. Recall further that the decision in *Dred Scott* is a classic example of originalist interpretation that is almost universally abhorred as erroneous and immoral. Originalists prefer to ignore *Dred Scott*, to pretend it applied originalism incorrectly, or that it really is an activist opinion. These scholars are grasping at straws to avoid the inevitable consequences of their theoretical beliefs.

The fourth item of Young's definitional list is a frequent part of what is described as "judicial activism": writing an opinion that may be justifiable, but that exceeds necessary relief or decides issues not necessary to the holding. Contrarily, "judicial restraint" often includes issuing only the holdings and remedies necessary to the limited issues presented to the Court. At judicial confirmation hearings, the legislature frequently questions judicial candidates on both sides of this ideological coin, and depending on the answers, votes to affirm or deny confirmation. *Brown* certainly went beyond the remedy necessary to the case by applying the result to all schools and districts, not just those before the Court. Does that fact make the *Brown* decision any less proper? I would argue not.

Perhaps the most damning – and certainly most well-written – condemnations of living constitutionalism came from former Justice Antonin Scalia, who was famous (or infamous) for

[254] *See* Chapter 3*, supra.*

his scathing criticisms of the doctrine.[255] Scalia described "originalism" as a philosophy based on "a government of laws and not of men."[256] He advocated that the Constitution must be interpreted according to its original meaning and believed that a "living Constitution" is "not law but rather clay in the hands of Justices who shape it to mean whatever they believe it *ought* to mean."[257] Although Scalia recognized the difficulty of originalism in terms of determining the original understanding of an ancient text, he thought that this task simply required hard work and serious research.[258] More on the topic later in the chapter.

Conversely, Scalia argued that the concept of a Living Constitution was fatally flawed due to its "total reliance on the subjective moral and philosophical preferences of nine unelected lawyers."[259] Another noted originalist, Judge Robert Bork, claimed that "[t]he truth is that the judge who looks outside the Constitution always looks inside himself and nowhere else."[260] These criticisms are addressed in more detail later in this chapter.

A classic example of an opinion based on "Living Constitutional" principles that is often criticized by originalists and other conservative jurists is *Roe v. Wade*.[261] In a seven to two majority opinion authored by Justice Harry Blackmun, the Court held in *Roe* that a woman has a right of privacy, subsumed within the concepts of liberty and limitations on state action embedded in the 14th Amendment, as well as the 9th Amendment's reservation of rights to the people. This right prohibits a state from interfering with a woman's right to terminate her

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[255] *See* Richard F. Duncan, "Justice Scalia and the Rule of Law: Originalism vs. The Living Constitutionalism," *Regent L. Rev.* 29 (2016): 9-34.
[256] Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press, 1977), 25.
[257] Scalia, *A Matter of Interpretation,* 39.
[258] Scalia, *A Matter of Interpretation,* 862.
[259] Scalia, *A Matter of Interpretation,* 852.
[260] Robert Bork, "The Struggle Over the Role of the Court," *Nat'l Rev.* (Sept. 17, 1982): 1138.
[261] *Roe v. Wade,* 410 U.S. 113 (1973).

pregnancy in the first trimester, and with limitations in the second and third trimesters, duly considering the state's right to protect the life of the fetus and the mother. Originalists roundly dismiss *Roe* as an example of a judiciary run rampant, deciding cases without regard to the intent or the text of the Constitution. They decry the opinion as an extreme expansion of the understanding of the 14th Amendment. Most damningly, they compare the decision to *Dred Scott*, of all cases, suggesting that in both cases, the Court acted with total disregard of the actual meaning and intent of the Constitution. The argument goes something like this: both cases are decided on extra-constitutional principles, and the results of both cases turn on a holding of non-personhood; in *Dred Scott* that of a slave, and in *Roe* that of an unborn child.

To say that such a view is a perversion of both *Dred Scott* and *Roe* is an understatement. *Dred Scott* was an originalist opinion at its finest, based entirely on statutory language and historical precedent. *Roe* was, indeed, an ethicist opinion, but it was grounded in an understanding of the right of privacy grounded in the 14th and 9th Amendments, as well as a historical analysis of societal attitudes toward abortion. The comparison between *Roe* and *Dred Scott* provides a glimpse of the lengths to which supporters of originalist or literalist interpretation will go to attack the living constitutional approach.

Even more egregious examples of the panic induced in originalists by the "horror" of living constitutionalism are the dissents by Justices Scalia and Roberts in *Obergefell v. Hodges.*[262] Recall that *Obergefell* held that same-sex couples have a fundamental right to marry under the Due Process clause of the 14th Amendment. Justice Scalia variously described the majority opinion in his dissent as "a judicial Putsch" lacking "even a thin veneer of law" that

[262] *See* Chapter 2.

amounted to "a naked claim to legislative … power … fundamentally at odds with our system of government."[263] Further, Scalia argued that the 10th Amendment provided that the power to define and regulate marriage is "reserved to the States respectively, or to the people."[264]

Chief Justice Roberts, in a separate dissent, opined that "we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean."[265] Duncan argues that there was never a time in American history when three-fourths of the States would have ratified a constitutional amendment to redefine marriage as was done in *Obergefell*.[266] Duncan's argument, as well as Scalia's and Roberts', miss the point: there is equally no evidence that same-gender marriage was an issue at the time of the founding or that it was ever considered or addressed at the Constitutional Convention. It is an issue unique to our day.

Living constitutionalism is both necessary and appropriate for cases exactly like *Obergefell* in which the issue would have been novel to the Founders and never even a subject of debate among them. Such cases demonstrate the necessity of the ability of the Court to act flexibly to consider the advancement of society beyond that of the Founders' days. If the Constitution cannot grow and expand as American society does, then it is an outdated and increasingly useless guide to deciding cases. And as in the example of *Dred Scott*, originalism and deference to statutory law easily can result in the tyranny of the majority. It is an appropriate role for the Court to act as a balance on state legislatures, Congress, or the Executive when their

[263] *Obergefell*, 135 S. Ct. at 2628-29 (Scalia dissenting); as quoted in Duncan, "Justice Scalia," 9-34.
[264] *Obergefell*, 135 S. Ct. at 2628-29.
[265] *Obergefell*, 133 S. Ct. 2675, 2617 (Roberts dissenting).
[266] Duncan, "Justice Scalia," 32.

dictates are inherently discriminatory or inconsistent with the principles that motivated the Founding documents.

A. Criticism of Originalism.

Professor Jack M. Balkin of Yale Law School (among other scholars)[267] analyzes originalism and living constitutionalism in his article "Framework Originalism and the Living Constitution."[268] Balkin writes that "original meaning" can refer to at least five different applications: (1) semantic content [i.e., the meaning of the word in English]; (2) practical applications ("what does this mean in practice"); (3) purposes or functions ("the meaning of life"); (4) specific intentions ("I didn't mean to hurt you"); or (5) associations ("what does America mean to me?"). Balkin claims that "originalism" only refers to the first meaning, the semantic content of the word as it existed at the time of founding.[269] Nevertheless, Balkin accepts that the other meanings may be relevant evidence of semantic content. In particular, he accepts that original meaning does not require that we interpret a provision the same way the Founders would have understood it. The real question is, what concepts were encompassed within the document? The choice of language, Balkin claims, makes little sense "if the purpose of constitutionalism is to strongly constrain future decision-making."[270] Thus, Balkin's version

[267] *See, e.g.,* Mitchell N. Berman, "Originalism is Bunk," *N.Y. Univ. L. Rev.* 84 (April 2009): 1; William A. Blake, "A Positivist, Baseball-Centric Critique of Originalism" *University of Maryland, Baltimore County* (June 4, 2020): SSRN: https://ssrn.com/abstract=3619166 or http://dx.doi.org/10.2139/ssrn.3619166; William Baude, "Is Originalism Our Law?" *Columbia L. Rev.* 115 (2015): 2349.
[268] Jack M. Balkin, "Framework Originalism and the Living Constitution," *Northwestern Univ. School of Law* 103, no. 2 (2009): 549-614.
[269] Balkin, "Framework Originalism," 552.
[270] Balkin, "Framework Originalism," 554.

of "originalism" uses the original meaning of the words in the Constitution only as a starting point for interpretation, not the endpoint, unlike Scalia and Garner, for example.

Likewise, Balkin suggests we need to rethink our conception of living constitutionalism. He views the approach as "interpretation-as-construction," which requires building a system that works in practice. Therefore, in Balkin's view, originalism and living constitutionalism are not in conflict, but instead work together to achieve a coherent meaning applicable to the present day yet with fidelity to the words used and their context.[271]

Balkin's approach is consistent with the concept of ethos interpretation discussed throughout this paper both because any interpretation is not divorced from the language of the Constitution and because it allows the Court to address the changing needs and circumstances of society. I would argue that cases like *Brown*, *Nixon*, and *Roe* do exactly that. They are grounded in statute or constitutional provisions, however broadly interpreted, in a way to allow the Court to perform its proper Constitutional function as a check on the other two branches of government. Without this ability, the Court is reduced to a school-teacher role, grading the papers of the Congress and Executive in terms of how well they know their history. The Constitution did not intend such a limited role for the Court.

Balkin also makes the excellent point that courts frequently reflect the will of political elites in power at the time.[272] One example would be the Warren Court and its close association with Presidents Truman and Franklin Roosevelt. That Court approved the expansive New Deal legislation pushed through by President Roosevelt. Importantly, courts also act as "conservators

[271] Balkin, "Framework Originalism," 560.
[272] Balkin, "Framework Originalism," 565.

of past constitutional values"[273] and slow change until those powers are sustained over time. In effect, the federal judiciary acts as an "enforcer of national values in a federal republic."[274] The result is that these institutional features, although helping shape the views of the members of the Court, constrain judicial construction. Therefore, according to Balkin, living constitutionalism does not extend complete freedom of decision to the federal bench.[275]

I agree with Balkin that contrary to the claims of its critics, living constitutionalism/ethicism is not a slippery slope to tyranny by a panel of nine unelected justices. As the cases cited herein as examples of the doctrine demonstrate, it is both possible and desirable to begin with a textual analysis, or a historical one, yet reach a reasonable conclusion that the spirit of the founding documents permits meaning to change according to the needs of society, within the bounds set by the legal and governmental process and its actors. Thus, in the sense of maintaining constitutional commitments while policing the actions of the other branches of government, all considering changing circumstances, living constitutionalism is a justifiable approach to interpretation.[276] Of course, courts can adapt to changing societal circumstances in many ways, and this choice will of necessity reflect the belief system of the deciding judges. But, as Balkin points out, this freedom must be exercised in a way that preserves the values of constitutionalism, the rule of law, and the authority of democratic processes and institutions.[277]

The oft-noted divide between originalism and living constitutionalism is largely a fantasy based on a misunderstanding of each theory and how it is applied in practice. Balkin, in his

[273] Balkin, "Framework Originalism," 565.
[274] Balkin, "Framework Originalism," 565.
[275] Balkin, "Framework Originalism," 565.
[276] Balkin, "Framework Originalism," 606.
[277] Balkin, "Framework Originalism," 606.

article *"Abortion and Original Meaning,"*[278] describes this false dichotomy. Using *Roe* as an example, Balkin points out that it is not true that "there is no constitutional basis for abortion rights or for a right of 'privacy'; [that] the right is completely made up out of whole cloth and … adrift from the Constitution's text, history, and structure."[279] On the contrary, he argues that *Roe* is in fact based on the text of the 14th Amendment and the long-standing principle of equal citizenship and its prohibition against class subordination.[280]

Instead of its characterization as the "Judiciary Gone Wild," Balkin points out that any form of constitutionalism requires fidelity both to the text and original meaning, if any, and to the principles that underlie it. It is the latter requirement that most often supports the application of living constitutionalism/ethicism. The theory is both faithful to the content of the law and its application to current circumstances. Let us take *Miller*[281] as an example. The opinion evaluated the meaning of "obscenity" in precedent and found the existing definitions unworkable in practice for judges, prosecutors, and juries. The Court evaluated the purpose of prohibiting distribution of "obscene" material to the public. In doing so, it considered the value to society of preventing exposure to unwanted or shocking sexual displays. The Court then attempted to craft a definition that allowed each community to decide what was obscene based on its own local values, within the bounds of the Court's decision, state statute, and the trial court's instructions. Thus, the Court considered precedent, the meaning of the 1st Amendment, and that public views on what is obscene vary from location to location. Ethicism allows a court to craft a ruling that accounts for all those considerations. Such an argument is similar to the position of Fish that

[278] Jack M. Balkin, "Abortion and Original Meaning," *U. Minn. Law Rev.* 24 (2007): 291.
[279] Balkin, "Abortion," 291.
[280] Balkin, "Abortion," 292.
[281] *Miller,* 413 U.S. at 40-45.

reader-response is not permission for free-for-all interpretation; the text in question always acts a boundary for possible interpretations.

This description of living constitutionalism is as consistent with Scalia's decision in *Heller* as the Court's decision in *Roe*. Though both are oft-described as at opposite ends of the interpretational spectrum, in fact, they are more similar than different. Scalia begins in *Heller* with the language and application of the 2nd Amendment and proceeds to decide matters that are extra-constitutional but necessary to today's society. *Roe* likewise begins with 14th Amendment language and history and ends up examining the needs of the pubic in the present. The actual differences between the theories, in practice, are small.

Why might this be so? Because, as Fish explains, the decision-maker(s) are always and inevitably bound up in their own system of beliefs and world view. The method applied to achieve the result thus dictated is then cast in terms of whatever theory seems to be most applicable or consistent. This process, I contend, is entirely unconscious; it is how our minds work.

Balkin describes his approach as follows:

> [C]onstitutional interpretation requires fidelity to the original meaning of the Constitution and to the principles that underlie the text. The task of interpretation is to look to the original meaning and underlying principle and decide how best to apply them in the present circumstance. I call this the method of *text and principle.*[282]

This methodology mirrors what I refer to as "ethos interpretation." The approach does not ignore or abandon fidelity to the text; it simply applies the text in the context of present societal circumstances and expectations. Examples include *Brown, Nixon,* and *Roe,* all of which employ

[282] Balkin, "Abortion," 293.

this methodology. Ethos interpretation allows for the application of the language and meaning of the words in question considering the needs of society or the social minority whose interests are affected.

Professor James E. Fleming of Boston University School of Law interprets and discusses Balkin's application of his hybrid version of living constitutionalism in his article "Living Originalism and Living Constitutionalism as Moral Readings of the American Constitution."[283] Fleming suggests that Balkin's approach to both originalism and living constitutionalism combines the benefits of both, while avoiding their weaknesses.[284] Balkin, he says, sees the Constitution as reflecting not just rules but abstract principles. [285] The interpretation of these principles necessitates political and moral decisions on both commitments, as well as powers that require a moral reading of the founding documents.[286] Balkin's version of living constitutionalism also embodies societal aspirations based on the concept that principles "are not merely a historical deposit to be preserved but are moral commitments that we aspire to realize more fully over time."[287] Fleming characterizes this principle as "commitment to a Constitutional-perfecting theory"[288]

Fleming's reading of Balkin comports perfectly with a reader-response-based ethos theory of constitutional interpretation that seeks to apply constitutional language and principle to the needs of society as a whole or of certain groups within it. In this way, literary interpretational

[283] James E. Fleming, "Living Originalism and Living Constitutionalism as Moral Readings of the American Constitution," *Boston Univ. L. Rev.* 92 (2012): 1171.
[284] Fleming, "Living Originalism," 1175.
[285] Fleming, "Living Originalism," 1176.
[286] Fleming, "Living Originalism," 1176.
[287] Fleming, "Living Originalism," 1176.
[288] Fleming, "Living Originalism," 1176.

theory can contribute to establishing the legitimacy of an ethos-based living constitutionalism. Those who question living constitutionalism are challenged to explain how it is not consistent with an accepted methodology of intent-based meaning.

As Fish argues in his article "Literature in the Reader: Affective Stylistics,"[289] reader-response takes an argument about a sentence as an utterance and turns it into something that happens to, and with the participation of, the reader.[290] In other words, the reader (or interpreter) is an active participant in the interpretive process. The reader's understanding of a text is bound up with their experiences, expectations, beliefs, group values, culture, and vocabulary. Reader-response theory as applied to literary interpretation is equally applicable to constitutional readings: what the interpreter believes, as well as their education, training, social and economic group, race, knowledge, and experience is reflected in the interpretation, regardless of the methodology applied.

Critics of living constitutionalism like Scalia argue that it ignores the words used at the time of their writing.[291] These critics proclaim that the only "true" and "consistent" interpretive method is originalism, or its cousin, textualism. These methodologies are themselves, however, subject to valid criticism. Scholar Mitchell N. Berman in his article "Originalism is Bunk,"[292] discusses a number of these critiques. One such criticism of originalism is that the subject matter of the search for a base text is often confusing or fruitless.[293] Another common criticism is that

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[289] Stanley Fish, "Literature in the Reader: Affective Stylistics" *New Literary History* 2, no. 1, *A Symposium on Literary History* (Autumn, 1970): 123-162.
[290] Fleming, "Living Originalism," 1176.
[291] *See* p. 16-17, *supra*.
[292] Mitchell N. Berman, "Originalism is Bunk," *N.Y.U. L. Rev*. 84, no. 1 (2009): 1478. https://scholarship.law.upenn.edu/faculty_scholarship/1478.
[293] Berman, "Originalism is Bunk," 2.

there was strong disagreement at the time of drafting or ratification as to the text's scope or meaning. Others argue that the drafters never intended the Constitution to be analyzed in an originalist manner. Yet others point to decisions such as *Dred Scott* to suggest that originalism is a path to bad outcomes.[294] Berman's most damning argument against originalism is that "it is not merely false but pernicious as well… because of its tendency to be deployed in the public square—on the campaign trail, on talk radio, in Senate confirmation hearings, even in Supreme Court opinions—to bolster the popular fable that constitutional adjudication can be practiced in something close to an objective and mechanical fashion."[295] That this assertion is false is clear from the Coney Barret confirmation hearings.

As shown throughout this paper by the examination of a variety of cases, including opinions that are self-characterized as originalist, the theory is never really applied objectively. Nor can it be, as Fish argues. The opinions examined reflect the values and beliefs of the authors and majority members of the Court, just as in reader-response theory the reader's values, ethnicity, tribal association, internal beliefs, prior experiences, and expectations all play a part in how a reader reacts to and what they take from a work of literature.

Further, there are different forms or flavors of originalism. "Hard originalists" believe that Constitutional interpretation is *bound by* the original text, intent, or understanding. "Soft originalism," on the other hand, requires only that the Justices take the original intent or understanding seriously, as a guide to interpretation, not the answer to it.[296] Strong originalists suggest that "what distinguishes originalism from non-originalism is the claim 'that the original

[294] Berman, "Originalism is Bunk," 7.
[295] Berman, "Originalism is Bunk," 9.
[296] Berman, "Originalism is Bunk," 6.

understanding of the constitutional text always trumps any contrary understanding of that text in succeeding generations.'"[297]

From a literary interpretive standpoint, originalists generally believe that interpretation of a text – whether it be legal or a poem, book, work of art, or musical score – starts and ends with the intent assigned by the author.[298] As Steven Knapp and Walter Benn Michaels put it, "the meaning of a text is simply identical to the author's intended meaning."[299] Even Stanley Fish agrees that interpretation must begin with authorial intent: "[i]nterpretation is the act of trying to figure out what the author, not the dictionary, meant by his or her (or their) words."[300] The difference between Fish and the originalists is that for the former, authorial intent is merely the starting point; for the latter it is both beginning and end.

Critics of Knapp and Benn Michaels, like those of originalism, are many and varied.[301] Objections to the "intent equals meaning" approach variously argue that: (1) the approach privileges a status quo against fundamental questioning; (2) it promotes a formalist methodology of interpretation; and finally, (3) that "it take[s] away from students the means necessary to do any criticism at all."[302] Knapp and Benn Michaels are at some pains to respond to these criticisms in their subsequent article "A Reply to Our Critics."[278] they argue that:

> The only epistemological claim in "Against Theory" is that true belief and knowledge are the same. What follows from this claim, we argued, is that the

[297] Berman, "Originalism is Bunk," 18, fn. 39, quoting Lawrence B. Solum, "Semantic Originalism." *Ill. Pub. Law & Legal Theory* 11, fn. 31 (April 16, 2008)
[298] Berman, "Originalism is Bunk," 40.
[299] Steven Knapp and Walter Benn Michaels, "Against Theory," *Critical Inquiry* 8 (1982): 723, 724.
[300] Stanley Fish, "Intention Is All There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law," *Cardozo L. Rev.* 29 (2008): 1109, 1127.
[301] *See, e.g.*, John R. Searle, "Literary Theory and Its Discontents," *New Literary Theory* 25 (1994): 637; Dennis M. Patterson, "Authorial Intent and Hermeneutics," *Can. J. L. & Jurisprudence* 2 (1989): 79; Mahdi Javidshad and Alireza Nikouei, "Antitheory and Neopragmatism in Steven Knapp and Walter Benn Michaels' Ideas," *Tarbiat Modares Univ. Press* 12 (2019): 46.
[302] Steven Knapp and Walter Benn Michaels, "A Reply to Our Critics," Critical Inquiry 9, no. 4 (1983): 790-800.

> traditional project of justifying beliefs by appealing to sources of knowledge independent of belief (e.g., sense data) is incoherent.[303]

Thus, Knapp and Benn Michaels argue that no historical source is useful as a guide to authorial intent because our reading is governed by belief that our interpretation is the true one.

Other critics argue that as it applies to intent, Knapp and Benn Michaels render it meaningless. Knapp and Benn Michaels respond that because interpretation of intent is simply to have a belief that your understanding of the author's intent is true, intent is not meaningless but is useless as a guide to meaning.[304]

For example, according to Knapp and Benn Michaels in "Against Theory,"[305] is that encouraging a "defensive adherence to the procedures and values of the guild," not only promotes "business as usual" but amounts to a "petty theodicy of the guild."[306]. Knapp and Benn Michaels respond that "our argument against theory is compatible with (and indifferent to) all modes of critical practice, [and] it is also compatible with and indifferent to all ways of organizing that practice."[307] As Knapp and Benn Michaels teach us, the discussions of originalism and of the cases purporting to apply that theory demonstrate the dangers of the "intent is meaning" school of thought. The originalist opinions analyzed tend to suggest a rigid formalism, refusal to appreciate the practical challenges of determining intent, and the back-turning to consequences the approach can mandate.

The determination of authorial intent itself is fraught with challenges. Let us take the famous example of a poem that appears carved into the sand of a beach. Who is the "author"? On

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[303] Knapp and Benn Michaels, "A Reply," 791.
[304] Knapp and Benn Michaels, "A Reply," 791-93.
[305] Knapp and Benn Michaels, "Against Theory," 740-42.
[306] Knapp and Benn Michaels, "Against Theory," 753, 755
[307] Knapp and Benn Michaels, "A Reply," 800.

what information do we rely in determining his or her intent? How is the author's intent to be gleaned from the words of the text alone without some knowledge of the history and provenance of the author, their cultural background, when they wrote the text, and what were the circumstances? Surely, we can look the words up in the dictionary, assuming they are familiar to us. But how do we know the author assigned the same intent to them, or even that there is an author? This question is especially problematic if the work is intended as art, and the meaning of the words in context may not be that usually assigned them.

The situation with originalism is only slightly better. We may know the time and culture within which the words were written, but often the authors were multiple and themselves disagreed about the intent of the words used or even whether they should be chosen or adopted. Their meaning may be radically different from our current usage and understanding, and the authors may not have foreseen a certain circumstance in which the words would require interpretation. What then, originalists? Oh well, you work hard and do your best, Scalia responds. I question whether "trying your best" is a valid methodology.

B. Reader-Response Theory and Ethical Interpretation.

I would argue that ethos interpretation or living constitutionalism grounded in reader-response theory is a better alternative. This interpretive method does not ignore authorial intent (if indeed it is determinable at all), it simply is not slave to it. Ethos interpretation provides a means of examining issues unknown to or unforeseen by the Founders, grounded in the text but considering present circumstances and interim societal changes. It uses whatever information may be available, if any, about intent as a guide or jumping-off point for an ethical examination of what the nation or the group in question needs at the time, whether it be an end to race-based

school segregation, providing for women's reproductive rights, or instituting fair labor standards, when the Legislature and Executive fail to do so. These actions are all, I suggest, encompassed within the constitutional authority of the Court and a part of its intended function.

It is thus true that literary interpretive theory has a role to play in the law. The literary interpretive debate has been ongoing far longer than the debate over proper methods of legal interpretation. There is a well-developed body of scholarship in the field of literary interpretation, although it is true not all of that scholarship supports the theories of Knapp, Benn Michaels, and Fish. Moreover, as discussed above, the similarities among the issues that arise in both fields bear a striking resemblance. Originalism and textualism are grounded in the intent-as-meaning school of thought. Living constitutionalism, on the other hand, finds a basis in reader-response theory and the objections to intent-as-meaning. Both schools of legal interpretation are informed by the literary debates related to them.

How does Fish reconcile his asserted belief in "intent as meaning" with his promotion of reader-response theory? Fish himself addresses this question in his comment in the Yale Law Journal, "Don't Know Much About the Middle Ages: Posner on Law and Literature."[308] Fish cites noted judge and legal scholar Richard Posner's *Law and Literature: A Relation Reargued,*[309] in which Posner argues that the study of literature is very different than the interpretation of laws and that one has "little to contribute" to the other.[310] Posner argues that legal texts require a determination of the intent of the author(s), whereas literary works require

[308] Stanley Fish, "Don't Know Much About the Middle Ages: Posner on Law and Literature," *Yale L. Rev.* 97 (1987): 777.
[309] Richard Posner, "Law and Literature, A Relation Reargued," *Va. L. Rev.* 72 (1986): 1351.
[310] Fish, "Don't Know Much," 777.

the interpreter only to "assign some coherent and satisfying meaning" to the work, regardless of the intent of the author(s).[311] For Fish, this picture is incomprehensible. He writes:

> Words are intelligible only within the assumption of some context of intentional production, some already in-place pre-decision as to what kind of person, with what kind of purposes in relation to what specific goals in a specific situation, is speaking or writing.[312]

Further, Fish posits that because one cannot "read back' from the words to the intention, that intention must come from the interpreter, who will then claim it as the meaning he discovers in the text.[313] This statement is the essence of reader response. Because one cannot truly "know" the meaning assigned by the author, it must come from the reader's own experience, native language, knowledge, history, education, social group, ethnicity, expectations, and the like. For example, Blake's poem *The Tyger*[314] likely would have a very different meaning to me as an attorney relying on billable hours for my income versus a manual laborer who is the descendant of slaves.

Note that I recognize that reader-response theory as applied in the legal setting in the process of judicial interpretation is an unusual hybrid reflection of the reaction of the Justice(s) to the text or issue at hand and their extrapolation of the needs, and desires of the citizenry, the social group whose rights are at issue, and the society. This fact fairly exposes this approach to the common criticism that judges have no authority, nor are they qualified, to know or decide such matters. On the other hand, who is to say that an elected representative beholden to the corporate interests that got them elected is in any better position to decide such matters? At least

[311] Fish, "Don't Know Much," 777.
[312] Fish, "Don't Know Much," 778.
[313] Fish, "Don't Know Much," 779.
[314] William Blake, "The Tyger," *Songs of Experience* (1794).

the executive is entirely popularly elected, but what if society is split on the major issues of the day, as it is at the time of this writing? Those branches of the government, I submit, are less familiar with the law, less schooled in precedent, and no more knowledgeable of society's true needs and desires than an appointed justice.

Of course, Scalia would argue that "ethos interpretation" amounts to a takeover of the government by nine unelected judges, singularly unqualified, much less authorized, to decide the country's policy on the critical issues of the day. That position, I would reply, ignores the reality of how judicial interpretation is practiced, how it is limited by the belief systems of the justices (whether they realize it or not), and how inconsistently other methodologies such as originalism and textualism are practiced. The cases reviewed in this paper demonstrate as much. If Scalia himself, the staunchest of strong originalists, could not apply the method consistently, perhaps the problem is the method, not the interpreter. Moreover, it is well within the Court's purview, when a proper case is presented to them, to decide the issue before them, especially if the Legislature and Executive cannot or will not act or have done so in an extra-constitutional manner.

In sum, while there are legitimate criticisms to be made to living constitutionalism, I would argue that the flaws inherent in the alternative interpretive theories – primarily originalism and textualism – far outweigh those of ethos-based constitutional construction. It is frequently difficult to locate or reach agreement about the original meaning of a text or its use in historical context (assuming that project has any meaning). Often the drafters or ratifying state legislatures disagreed about the meaning to be assigned to a provision or about its adoption. There is little evidence to suggest the drafters intended a "dead-hand," unchanging Constitution.

And as evidenced by cases like *Plessy* and *Dred Scott*, originalism can have terrible consequence and is self-limiting in terms of its ability to change originalist precedents.

Living constitutionalism, on the other hand, is flexible, responsive to the needs of the day, grounded in a basis of textualism, and subject to being overruled by the Legislature if the Court oversteps or clearly errs. The theory has a solid basis in literary theory and has proven its value in use. While conservatives love to criticize the methodology of living constitutionalism, what they really object to is its progressive results. Those critics would see the country frozen in time in the 1800s, never advancing as society and technology progress. Such is not only impractical, but also theoretically indefensible. It is past time we did away with originalism, as it has long since lost any relevance or coherence.

CHAPTER 5

CONCLUSION

I. Thesis and Methodology

The problem addressed by this dissertation is the apparent lack of coherence in the application of legal interpretational theory and whether literary theory can contribute to resolution of this problem. The analysis of the cases and scholarship reviewed suggests that literary theory can make a significant contribution to the field of legal interpretation, both in understanding and application. More specifically, the scholarship of Jauss, Iser, Fish, and others regarding reader-response theory and the work of Knapp, Benn Michaels, and Fish concerning the meaning and application of that methodology contribute to what I argue is a literary solution to an ongoing legal dilemma: the disconnect between legal interpretational theory and the actual practices of the courts. This dissertation applies those literary methods to an analysis of sample U.S. Supreme Court cases to test whether the claimed legal theory of interpretations is used consistently. My research suggests that in most cases, the Court is engaged in another process than the one asserted by the majority opinion. The explanation for this behavior also comes from literary theory: our inability to apply any metatheory outside the ground of our own beliefs and intentions. Therefore, I consider this dissertation a success.

This dissertation seeks to investigate whether literary interpretational theory can contribute in a meaningful way to legal interpretation. Based on an analysis of sample U.S. Supreme Court decisions, one can conclude that literary theory – specifically reader-response theory as outlined by scholar Stanley Fish and his predecessors – is especially useful as a means of both justifying and clarifying the application of an "ethos" or living constitutional approach to

legal interpretation. The sample cases reviewed suggest that, in general, justices who claim to be applying some specific theory of interpretation, such as originalism, cannot and do not do so consistently. Living constitutionalism, on the other hand, as informed by reader-response theory, allows a court transparently to consider present circumstances, historical trends, and the current needs, desires, social categories, and experiences of society and the parties involved in making its decisions. A convergence of living constitutionalism and reader-response theory, therefore, brings about not only a new understanding of Supreme Court decisions and how those decisions reside in both an immediate context, but also in broader circumstances.

Selecting sample cases of historical significance by different Supreme Courts and Justices has allowed for a broad overview of interpretational practices of different courts and how they implemented legal interpretation. As explained herein, the cases chosen were both demonstrative of the legal problem and its literary solution but are also of historical and social significance. My approach is subject to the criticism of selectivity at the expense of breadth. Nevertheless, the methodology employed successfully applies the theoretical work of Fish and others regarding the limitations of legal theory in terms of the strength of personal bias, belief, and experience. Reader response theory and responsive interpretation employ an ethicist (or ethical) approach that goes beyond the limitations of legal theory by engaging the values of networks of communities and by embracing the biases of individual justices. Granted, additional broad case study and more research would even further expand an understanding of how scholars could apply this approach.

Scholars, however, have already provided the frameworks for these methods that seek to bridge the theories of both law and literary criticism. Fish's work on literary interpretation

follows on that of Gadamer and others in adopting reader response theory. Fish's take on that interpretational approach argues that the reader's interpretation of and reaction to a text and its meaning is colored by the experiences of the cultural group occupied by the reader. Such experience includes not just the general point of view of that group, but the reader's own knowledge, beliefs, social standing, economic status, education, and expectations. In other words, the meaning gleaned from a text by a reader is partially formed based on that reader's cultural norms, political beliefs, and personal history.[315] The research also suggests that the most transparent and flexible approach to legal decision-making is ethicism. In this respect, this dissertation accomplishes its goals.

Applying Fish's version of reader-response theory to judicial interpretation suggests that a justice's personal experience and beliefs color the meaning he or she attributes to a statue, a founding document, the Constitution, a prior case, or other text. Indeed, Fish argues that not only Justices but each of us is bound by a filter of personal belief from which we cannot escape.[316] According to Fish and other scholars, no theory of interpretation or methodology can free us from the confines of belief. One's textual interpretation is *always* founded in a deeply held personal point of view. If Fish is correct, this truth would tend to explain the common instances cited herein of Justices who purport to apply some rigorous theory while in fact exercising their personal principles. The cases chosen, of course, are limited to a manageable sample size; further study would be required to implement a broader based conclusion.

[315] *See* Chapter 1.
[316] *See* Chapter 3.

II. Remaining Work and Further Scholarship.

That said, further investigation is needed of what occurs when a Court or Justice claims to apply a particular theory of legal interpretation but does not, what the results of that analysis mean for judicial interpretation, and whether reader response theory or other literary interpretational method would contribute meaningfully to better understanding of and improving of the process of deciding cases. Further work on these issues might include, for example, a qualitative analysis of all, or a substantial portion of, those Supreme Court opinions that claim to apply a specific theory of legal interpretation, as well as cases that are more "mundane" or of less significance societally.

What this dissertation proposes in Chapters 2 and 3 is an approach to legal interpretation closest to reader-response theory, that of an "ethos" approach, also known as "living constitutionalism." This method of legal interpretation posits that the Founders realized that the language of the Constitution would have to be flexible, to adapt to future changes in society and technology that were impossible to predict. The theory proposes to interpret the language of the Constitution considering the present circumstances, social needs, economic, technological, and social changes, and the desires and experiences of the public and its cultural groups. An ethos approach to legal interpretation allows the Court to fulfill its Constitutional role as a check against tyranny of the majority toward oppressed groups. In that way, the approach facilitates "doing good" in the Platonic sense of serving society's best interests considering the principles and text of the Constitution and founding documents, which sometimes are not reflected in the will of the majority.[317]

[317] *See* Chapter 4.

My work suggests that often what a particular Court majority or Justice claims to be doing in terms of applying a rigorous method of legal interpretation is not supported by a close examination of their opinions. This disconnect begs an explanation, and this dissertation suggests that Fish has found it in his theory of belief-bound decision making. The application of Fish's work to legal interpretation is a subject for further academic review.

Many critics of ethos interpretation argue that it permits an unelected, life-appointed group of nine justices to impose their views on the people, ignoring the decisions and mandates of the Legislative and Executive branches. I argue, to the contrary, that the approach allows the Court to fulfill its broad Constitutional mandate as the arbiter of the law and a check against extra-Constitutional actions by the Executive or Legislature. Another significant issue for further study is the practical impact of adopting an ethos approach to legal interpretation. Critics claim that unlike the Legislature or Executive, which can hold hearings, hire experts, appoint committees, and the like, the Court only has limited facts before it in deciding any case. For example, one might ask whether general application of living constitutionalism would likely lead to majoritarianism on the Court, in which either the "conservative" Justices or the "liberal" ones hold most of the seats and have the power to control case decisions. My research suggests that this "tyranny of the Court majority" is already occurring, although leavened to some degree by those Justices who are less partisan. Examples of such courts include the Warren court, where liberal Justices held sway, the Rehnquist court, on which the majority of Justices were conservative, and the current court, which is also majority conservative. In other words, because the Justices are bound by their beliefs, as Fish argues, we are already there.[318]

[318] *See* Chapter 4.

Finally, an important subject for more in-depth analysis is Fish's theory of belief. If indeed we are each entrapped in our own body of beliefs and experiences, as discussed above and herein, the theory again posits that each of the Justices (and each of us) is bound by his or her beliefs, prejudices, politics, and experiences in making a decision on a set of facts. If true, that fact would have substantial implications for both understanding the work of the Supreme Court and selection and approval of its Justices. If, for example, as discussed in Chapter 3, a judicial nominee testifies that he or she will not allow personal prejudice or political beliefs to affect their decisions – that they will decide the case impartially based on the law – that claim must be viewed with a skeptical eye. One might conclude that, given the way the respective parties already approach judicial approval hearings with partisan argument over the nominees' background and prior work, there exists an implicit recognition of (or belief in) this fact already. In any event, the proposal warrants further analysis.

III. Summary of Work and Findings.

My work begins with situating my research in the field of law and literature as adopted and explained by James Boyd White and others. It then evaluates various approaches to literary interpretation, focusing on reader response theory as posited by Gadamer, Fish, and other scholars. Next, this dissertation discussed typical approaches to legal interpretation, such as originalism, textualism, and living constitutionalism. The work then examined a wide variety of decisions by the U.S. Supreme court going back to the 1960s. The selected cases were those in which the author of the Court's majority opinion claimed to be applying a particular theory of legal interpretation. The research performed found a common disconnect in most cases between the theory purported to be applied and the actual decision.

One potential explanation for this disconnect comes from Stanley Fish and others who have investigated whether it is possible to apply any metatheory independent of one's body of beliefs. That research suggests and each of us is bound to apply our experiences, ideals, and beliefs to our decisions, whether we realize it or not. The next area of investigation was whether literary interpretational theory can contribute in a meaningful way to legal interpretation. The conclusion suggests (contrary to the arguments of Posner and others) that the literary reader response approach – especially that outlined by Fish that emphasizes the experiences, ethnicity, class status, beliefs, needs, and desires of the group whose rights are at issue – informs the Court's analysis in a very useful way. The work by the Warren Court and others applying an ethos approach to interpretation indicate that such a methodology is consistent with the application of living constitutionalism to interpretation by the Court and recommends its general adoption for its ability to recognize social needs and to result in clarity of opinions, as well as just and fair results.

For these reasons, this dissertation demonstrates the need for and usefulness of the application of literary interpretational method to legal interpretation. In this context, the project establishes the existence of a legal-theoretical problem which could benefit from the future application of a version of reader-response theory applied to legal interpretation in the form of ethos interpretation. The need for further study is outlined above. In addition to that work, it would behoove legal scholars to undertake serious study of the implications of literary theory for the understanding and application of legal interpretation. Such a project would also benefit literary studies in that it would expand the scope of the field of law and literature into practical and theoretical aspects of court decision-making.

IV. Implications.

Of course, as is discussed herein, such a project is not without consequences for courts, judges, and justices, as well as legal institutions. Application of literary theory to legal interpretation requires a change in existing attitudes about what a theory of legal interpretation can do, how courts decide cases that come before them, even how law students are taught. As such, this dissertation is an extension of the project begun by White and other scholars of law and literature to bring a sense of humanism to the law, to soften its consequences, and make it less rigid and formalist. I certainly believe that were judges to adopt an ethicist approach to deciding cases, the implementation of these ideas across the Court's docket would result in an improved legal system, one that encouraged all lawyers to take a view of the law that is not rigid and stultified, but rather is more humane, socially conscious, transparent, less rigid, fairer, and more just.[319]

It is certainly worth examining further topics such as:

(1) How the U.S. Supreme Court became so radically politicized;

(2) What are the implications for democracy and society of the public losing confidence in the independence and impartiality of the Court;

(3) How might the Legislative and Executive branches respond to the Court's apparent and divisive partisanship; and

(4) What might be done to depoliticize the Court, its selection and nomination process and its members qualifications?

[319] *Cf, Brown v. Board of Education of Topeka,* 347 U.S. 483 (1954) and *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

It is possible (although by no means certain) that should the Court consistently apply an ethicist standard by considering the issues before it by evaluating a decision's impact on the social, ethnic, economic, and community impact of its choices, the Court *might* become less politicized, polarized, partial, and political. It is clear from the sources cited herein that public trust in the U.S. Supreme Court is at an all-time low. The Court is perceived as partisan, politically motivated, and partial. The selection and confirmation processes have become radically politicized and have been reduced to political theatre. Proposals are already under consideration to change the makeup and method of selection of the Court's Justices. If we are to restore public trust in the Court, its decisions, and its members, these facts must change. I suggest that literary theory can promote that change.

Why apply literary theory to the law in the first place? What does it have to do with the law? As White, Dworkin, Fish, and many other scholars demonstrate, literary theory and techniques offer the law new approaches to its methods, its teachings, its principles, and its practice. Literary theory can humanize the law, enhance and broaden our ways of thinking about what law is, can be, should be, and can soften the often-harsh consequences of a rigid and mummified legal practice. These are goals worth pursuing, and literary theory supplies an avenue to their achievement.

In the current social environment, the adoption of an ethicist approach by the courts could possibly give rise, over time, to a more lenient and sympathetic view of social protest movements like "Black Lives Matter," "Me Too," and protests for more effective gun control. The current U.S. Supreme Court and the lower courts have failed to reign in a host of recent excesses by local legislatures, such a permitting driving into protests, making it increasingly

difficult for racial and economic minorities to vote, and allowing ownership of weapons of war such as bump stocks and large magazines for semi-automatic rifles. Such inhuman, antidemocratic, and discriminatory legislative practices will proceed with vigor in the current socio-political environment unless the Court takes a leadership role in applying the 1st, 2nd, and 14th Amendments with equal robustness to respond with an eye to the significant adverse social consequences of permitting these legislative excesses. The failure of the courts to protect the public and its lives and rights is reminiscent of the uncaring, stuffy, and stultified views expressed in *Plessy v. Ferguson* and *Dred Scott.* I believe this attitude must change, and that adopting an ethicist approach to legal decision-making is a good first step.

V. An Example of How Ethicism Might Apply in a Real Case: *Roe v. Wade*.

The obvious question arises how ethical decision-making would work in practice. In order to demonstrate how I believe it would apply (or has applied), let us examine the controversial Supreme Court opinion in *Roe v. Wade*.[320] *Roe* is a landmark and highly controversial seven-to-two decision authored by Justice Harry Blackmun. The case established that women have a fundamental right to privacy that allows them to choose to have an abortion without excessive government restriction. It struck down a Texas statute that permitted abortions only to save the life of the mother.

The facts of the case are summarized as follows: Roe, a pseudonym to protect the identity of the Petitioner Norma McCorvey, became pregnant with her third child. When she returned to Texas, she discovered an abortion would be illegal, and Roe hired attorneys Sarah Weddington and Linda Coffee, who filed suit in the Federal District Court for the Northern District of Texas

[320] *Roe v. Wade,* 410 U.S. 113 (1973).

against Dallas District Attorney Henry Wade. A three-judge panel of the Norther District Court held that the Texas law violated Roe's right to privacy under the 9th Amendment as incorporated by the 14th Amendment.[321]

The case reached the U.S. Supreme Court under Chief Justice Warren Burger. Justice Blackmun's opinion first surveyed the history of abortion in the law and in society and the developments in medical technology relevant to birth and abortion. In this context, Justice Blackmun, while claiming to rely on precedent and the test of relevant Constitutional Amendments, also sought to test public attitudes and their development:

> Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection. We seek earnestly to do this, and, because we do, we have inquired into, and in this opinion place some emphasis upon, medical and medical-legal history and what that history reveals about man's attitudes toward the abortion procedure over the centuries. We bear in mind, too, Mr. Justice Holmes' admonition in his now-vindicated dissent in *Lochner v. New York*, 198 U. S. 45, 76 (1905):
>
> "[The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."[322]

In this way, the *Roe* opinion is somewhat ethicist in that it relied, in part, on changes over time in both public attitudes and technology. The Court considered, among other information, ancient attitudes toward abortion, the Hippocratic Oath, the common law, Christian theology, English statutory law, American law, the position of the American Medical Association, the view of the American Public Health Association, and that of the American Bar Association.[323]

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[321] *Roe,* 410 U.S. at 122.
[322] *Roe*, 410 U.S. at 116-17, citing Justice Oliver Wendell Holmes.
[323] *Roe*, 410 U.S. at 430-70.

The Court also considered the justifications by the State of Texas for its restrictive abortion law. In particular, Texas argued that it had a legitimate state interest in protecting the life and health of the mother. In response, Blackmun's opinion noted that at least in the first trimester of pregnancy, the procedure was shown to be medically safe for the mother due to advances in antiseptic and medical techniques. The Court thus found that the State had a legitimate interest in regulating the time, circumstances, and medical care were adequate to provide reasonable protection to the mother's health.[324]

The most difficult argument posed to the Court by the State of Texas was that its law was necessary to protect the life of the unborn child. Texas asserted that "life begins at conception," but the Court held that though the parties' views on that issue were in controversy, the key was that the State has some legitimate interest in the life of the unborn child, independent of its views on when that life began.[325] The history of such statutes suggested, however, that their primary rationale lay in the protection of the life of the mother, which was lessened in the first trimester, at least, by medical advances over time.

In a vague and frequently criticized decision, the Court found that Roe had a constitutional right of privacy suggested in earlier cases, *Meyer v. Nebraska*[326] and *Pierce v. Society of Sisters*,[327] along with the concept of reproductive autonomy established in *Griswold v. Connecticut*.[328] The Court extended that privacy right to the decision to undergo an abortion,

[324] *Roe,* 410 U.S. at 149-50.
[325] *Roe,* 410 U.S. at 150.
[326] *Meyer v. Nebraska*, 262 U.S. 390 (1923).
[327] *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).
[328] *Griswold v. Connecticut*, 381 U.S. 479 (1965).

without significant discussion of the constitutional basis for the right, other than a general reference to two Amendments:

> The Constitution does not explicitly mention any right of privacy…the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, *Stanley v. Georgia*, 394 U. S. 557, 564 (1969); in the Fourth and Fifth Amendments, *Terry v. Ohio*, 392 U. S. 1, 8-9 (1968), *Katz v. United States*, 389 U. S. 347, 350 (1967), *Boyd v. United States*, 116 U. S. 616 (1886), *see Olmstead v. United States*, 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting); in the penumbras of the Bill of Rights, *Griswold v. Connecticut*, 381 U.S. at 484-485; in the Ninth Amendment, *id.* at 486 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, *see Meyer v. Nebraska*, 262 U. S. 390, 399 (1923). These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U. S. 319, 325 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, *Loving v. Virginia*, 388 U. S. 1, 12 (1967); procreation, *Skinner v. Oklahoma*, 316 U. S. 535, 541-542 (1942); contraception, *Eisenstadt v. Baird*, 405 U.S. at 453-454; *id.* at 460, 463-465 (White, J., concurring in result); family relationships, *Prince v. Massachusetts*, 321 U. S. 158, 166 (1944); and childrearing and education, *Pierce v. Society of Sisters*, 268 U. S. 510, 535 (1925), *Meyer v. Nebraska, supra.*[329]….
>
> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or ... in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[330]

The Court went on to note that where fundamental constitutional rights are concerned, the state must demonstrate that regulation of those rights must be supported by a "compelling state interest."[331] It thus held that:

[329] *Roe,* 410 U.S.at 152-53.
[330] *Roe,* 410 U.S. at 153.
[331] *Roe,* 410 U.S. at 155.

> We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified, and must be considered against important state interests in regulation.[332]

After a review of relevant state and federal opinions on similar statutes, the Court found that the majority of those opinions supported its views that there is a fundamental right of privacy that includes abortion, but that the state's legitimate interests must also be considered.[333]

A crucial point (and one that I expect to be significant when the Court reconsiders *Roe* next term) is the argument by the State and several *amici* that the fetus is a "person" whose life is therefore protected by the 14th Amendment. The Court reviewed the numerous places in the Constitution and Amendments mentioning "person." The Court found that in none of these instances was a prenatal fetus the subject. The Court therefore held that:

> All this, together with our observation, *supra*, that, throughout the major portion of the 19th century, prevailing legal abortion practices were far freer than they are today, persuades us that the word "person," as used in the Fourteenth Amendment, does not include the unborn.[334]

Blackmun's opinion reviews the various positions on the beginning of life held by different faiths, organizations, and the criminal law and notes the wide and vehement disagreement on the issue. The Court avoided addressing the question of when life begins by finding that:

> In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake. We repeat, however, that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, whether she be a resident of the State or a nonresident who seeks medical consultation and treatment there, and that it has still *another* important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in

[332] *Roe,* 410 U.S. at 154.
[333] *Roe,* 410 U.S. at 154-55.
[334] *Roe,* 410 U.S. at 158.

> substantiality as the woman approaches term and, at a point during pregnancy, each becomes "compelling."[335]

The majority determined that the point at which the state's interest in the life of the fetus became compelling is after the first trimester.

> With respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical fact, referred to above at 149, that, until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health.[336]

The Court thus held that:

> With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.[337]

In summary, the *Roe* majority opinion held that (1) the mother has a fundamental right to privacy that exists in the "penumbra" of rights under the 9th and 14th Amendments; (2) the state has a legitimate interest both in protecting the life and health of the mother and in the life of the fetus at the point of viability; and (3) until the end of the first trimester of pregnancy, the state may not regulate abortion except as is necessary to protect the mother's life and health.

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[335] *Roe,* 410 U.S. at 162-63.
[336] *Roe,* 410 U.S. at 163.
[337] *Roe,* 410 U.S. at 163-64.

A. Criticism of *Roe v. Wade.*

The criticisms of the *Roe* opinion are many and vehement. For some, the decision is a sign of decline in American culture, institutions, and values.[338] Lawyer Susan E. Will, writing in the Catholic publication for the United States Conference of Bishops Respect Life Program, lists ten reasons to overturn *Roe*:

1. The opinion was not grounded in Constitution law and exceeded the Court's authority. She quotes Justice Sandra Day O'Conner, quoting Justice Warren Burger, as follows:

> *Irrespective of what we may believe is wise or prudent policy in this difficult area, "the Constitution does not constitute us as 'Platonic Guardians' nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, 'wisdom,' or 'common sense.'"* [339]

Note the direct attack on ethicist decision-making implicit here.[340]

2. The Court misrepresents the history of abortion practice and attitudes toward abortion, especially that of the Hippocratic Oath. The Oath originally included the language: "I will not give to a woman a pessary to produce abortion." The World Medical Association version of the Oath through 1968 included "I will maintain the utmost respect for human life, from the time of conception."[322]

3. The opinion mischaracterizes English common law. Wills cites William Blackstone's Commentaries on the Laws of England (1765-1769) for the proposition that "Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as the infant is able to stir in the mother's womb."

4. The Court distorts the purpose and weight of state abortion statues.

5. A privacy right to decide to have an abortion has no foundation in the text or history of the Constitution.

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[338] Susan E. Wills, "Ten Legal Reasons to Reject *Roe*," *United States Conference of Bishops, Respect Life Program* (2003).
[339] Wills, "Ten Legal Reasons," citations omitted.
[340] Wills, "Ten Legal Reasons," citations omitted.

This is the most common objection to the *Roe* opinion. Wills argues that the opinion does not even pretend to examine the history and purpose of the 14th Amendment. She claims it was intended to secure existing rights in the Constitution to freed slaves, not to create new rights out of whole cloth.[341]

Wills also argues that:

> The liberty interest to be protected from state regulation is never really defined in *Roe*. Instead, the Court describes at some length the hardships some women face, *not from pregnancy*, but from raising children:
>
> *Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by childcare. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.*[325]

Wills here references one of the interests supporting a right to abortion that is seldom mentioned by its opponents: the negative impact on economic and racial minority mothers who often have been abandoned by the child's father. This is a racial issue that involves obvious discrimination against black women and immigrants frequently made by those who oppose expansion of their rights and protection of their interests, both before and after birth.

6. The Court adopts a very narrow interpretation of "person" in the context of the Fourteenth Amendment.

7. The Court acted as a legislative body in imposing the trimester framework.

8. *Roe* is inconsistent in terms of the state's legitimate interest in a woman's "health" with the much broader definition of the state's interest in *Doe v. Bolton*,[342] decided the same day. *Doe* held that "health" included "all factors — physical, emotional, psychological, familial, and the woman's age — relevant to the wellbeing of the patient." *Roe*'s more narrow

[341] Wills, "Ten Legal Reasons," citations omitted.
[342] *Doe v. Bolton*, 410 U.S. 179 (1973).

definition ignored the fact that these factors may be an issue for the mother from the time of conception.

9. *Roe* describes the right of privacy (and therefore to an abortion) as "fundamental."

Wills' take is that:

> The *Roe* Court claims abortion is fundamental on the ground that it is lurking in the penumbras and emanations of the Bill of Rights or the 14th Amendment, along with privacy rights like contraceptive use. It's ludicrous to claim abortion is deeply rooted in American history or traditions or that our governmental system of "ordered liberty" implicitly demands the rights to destroy one's child."[343]

While I appreciate the sincerity of Wills' argument, there are legitimate disagreements as to the nature and source of the right to privacy discussed in *Roe*. As discussed below, the primary reason for these disagreements is the fact that Blackmun's opinion is widely regarded as poorly written and difficult to understand.

10. The *Roe* opinion gives little useful guidance to the states as to what is an acceptable regulatory framework.

Again, this is both a valid criticism and an understandable shortcoming in the majority opinion in *Roe.* While the Court only provides the trimester framework to work with, it grants the states great flexibility in regulating abortions within the framework of the Court's opinion. This fact is as it should be. It is not the Court's role to tell the states how to implement the law, but to proscribe the boundaries of the laws they may put in place.

B. *Roe* as an Ethicist Opinion.

The majority opinion reviews the legal history of abortion, analyzes advances in medical safety and methods, and considers current public views on the issue. The opinion also takes into

[343] Wills, "Ten Legal Reasons," citations omitted.

account significant state and federal precedent on a woman's right to privacy. This right arises from the 9th Amendment, the 14th Amendment, and the "penumbra of rights" guaranteed by these Amendments.

The problem with the *Roe* decision is not that it is wrong or that the approach Blackmun took was erroneous, but that the opinion fails to clearly identify the source of the rights in question. Former Justice Ruth Bader Ginsburg (deceased), in a discussion at the University of Chicago Law School in May 2013, said that:

> My criticism of *Roe* is that it seemed to have stopped the momentum on the side of change," Ginsburg said. She would've preferred that abortion rights be secured more gradually, in a process that included state legislatures and the courts, she added. Ginsburg also was troubled that the focus on *Roe* was on a right to privacy, rather than women's rights.
>
> *Roe* isn't really about the woman's choice, is it?" Ginsburg said. "It's about the doctor's freedom to practice…it wasn't woman-centered, it was physician-centered.[344]

Many critics have pointed out that Blackmun's application of the right of privacy could have been better centered in the 9th Amendment or in the 14th Amendment's protections against discriminatory laws. Again, I see this as a problem of analysis, not result.

If I were asked to review or redecide the *Roe* case, my approach under ethicist interpretation would be very much like that of Justice Blackmun. I think he considered the proper factors, which include not only the statutory language and precedent, but also changes over time in technology and public attitudes as they apply to abortion. Rather than trying to decide when

[344] Ruth Bader Ginsberg, as reported by Meredith Haegney, "Justice Ruth Bader Ginsburg Offers Critique of Roe v. Wade During Law School Visit," *University of Chicago The Law School* (May 15, 2013), https://www.law.uchicago.edu/news/justice-ruth-bader-ginsburg-offers-critique-roe-v-wade-during-law-school-visit.

life begins, the Court focused on the much narrower issue of viability as the point at which state interests in protecting the fetus become compelling.

The fact that Blackmun focused on this issue, however, could prove problematic on review, as technology related to detection of fetal heartbeat and surviving life outside the womb preterm continue to change at a rapid pace. The current Court has a conservative majority. I fully expect that they will find a basis to overturn the *Roe* precedent. Unfortunately, the sad truth is that their doing so will be driven not by the law, but more likely by their belief system as it has developed due to their education, training, experience, religion, ethnicity, social status, and cultural group. But as Fish would say, we all must find ourselves in that same predicament, for we cannot escape it.

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BIOGRAPHICAL SKETCH

R. Scott Fraley was born in Sweetwater, Texas. After his graduation as Valedictorian from Sweetwater High School in 1976, he attended The University of Texas at Austin in Austin, Texas. He graduated from UT Austin in 1982 with a BA with Honors from the Plan II Honors Program, with the equivalent of a major in philosophy and minors in computer science and English. During the following four years, he attended The University of Texas School of Law, where he was a member of the Texas Law Review. He graduated with a JD with Honors in 1985. He then went to work as an Associate for the Austin litigation firm Scott, Douglas and Luton (now Scott, Douglas and McConnico), becoming a Partner in that firm in 1988. In 1991, he moved to Dallas to assist in opening the Dallas office of that firm.

In 1995, with his then wife Elizabeth M. Fraley, he opened the law offices of Fraley & Fraley, LLP, in Dallas, which primarily practiced medical-malpractice defense. After twenty-five years as Managing Partner and Partner at Fraley & Fraley, during which time he was an Adjunct Professor of Insurance Law at both The University of Texas School of Law and Baylor Law School, he left practice for academia as Director of Legal Writing at Baylor Law School. After four years at Baylor Law, Mr. Fraley accepted a position as Senior Counsel at Chamberlain ◊ McHaney in Austin, Texas, where he completed his practice of law in July 2021.

CURRICULUM VITAE

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EDUCATION

University of Texas at Dallas
MA 2013, History of Ideas
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University of Texas School of Law
JD 1985, with Honors
Member, *Texas Law Review*, 1984-85

University of Texas
BA 1982, Plan II with Honors
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EMPLOYMENT

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Director of Legal Writing
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Fraley & Fraley, L.L.P. - Dallas, Texas
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Scott, Douglass & McConnico, L.L.P. - Dallas and Austin, Texas
1989-1994 - Partner
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PROFESSIONAL EXPERIENCE

Legal:

Construction litigation; appeals; UM/UIM motorists claims; personal injury defense; professional malpractice; insurance coverage and bad faith.

TEACHING EXPERIENCE

Director of Legal Writing
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Adjunct Professor, Insurance Law
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1993-2000

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RESEARCH INTERESTS

Modern European Philosophy
Law and Literature

SAMPLE PUBLICATIONS

"Law and Belief: The Reality of Judicial Interpretation," *Law and Imagination in Troubled Times* (Routledge 2020).

"A Primer on Essential Classical Rhetoric for Practicing Attorneys," 15 Legal Communication & Rhetoric: JALWD (Fall 2017), pp. 99-117.

A Practical Guide to Litigation Drafting: The Art and Craft, Cognella Publishing, Fall 2017.

SAMPLE CONFERENCE PRESENTATIONS

"Digital Justice: Shining Future or Illusory Chimera?" at the International Conference on Digital Ontology and Epistemology: Between Law, Literature, and the Visual Arts, Verona, Italy, November 14-16, 2018.

Multiple Continuing Legal Education Presentations on a Variety of Topics

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Co-chair, AALS LWRR Program Committee for the 2019 AALS Conference in New Orleans
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