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Constitutional Camouflage: How Constitutional Methodologies Act as Smoke Screens for Supreme Court Justices

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CONSTITUTIONAL CAMOUFLAGE: HOW CONSTITUTIONAL METHODOLOGIES ACT AS SMOKE SCREENS FOR SUPREME COURT JUSTICES

by

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Abstract

The Supreme Court Justices of the United States sit on the highest court of the land. The justices have the ultimate say as to the meaning of the Constitution, and their role could aptly be summarized as interpreters of the Constitution. They decide what the words of the nation's founding document mean and therefore help to determine the rule of law for the social, political, and economic areas of society. To help them analyze the text of the Constitution and decide what it means and subsequently apply it to cases, justices use constitutional methodologies. Constitutional methodologies are algorithms or ways of thinking about provisions of the Constitution that guide a justice's reasoning and application of the Constitution to cases. These different structured methods of analysis seem to be fair and objective ways of interpreting the Constitution and deciding cases, yet this thesis argues the opposite.

The argument expounded in this thesis is that constitutional methodologies instead act as smoke screens, a sort of constitutional camouflage, that allow a justice to decide a constitutional question not according to some objective standard but rather by however they feel it should be decided according to their beliefs and values. These methodologies use their theories, arguments, and philosophies to legitimize interpreting the Constitution a certain way, but this thesis shows that they inevitably lead a justice down a camouflaged path towards a single subjective decision. Multiple justices using the same constitutional methodology to analyze the same constitutional issue could come to different conclusions based on the values they hold and how they utilize the methodology. This subjective decision hides behind the structured methods of analysis purported by constitutional methodologies, and ultimately makes them more akin to smoke screens rather than objective mechanisms for interpreting and applying the Constitution.

Table of Contents

Introduction

The United States was founded through a document that was just over 4,000 words, and that document still guides and controls society today. The Constitution delineates what the three different branches of the federal government can and cannot do, what the states can and cannot do, and defines the structure for the above and much more. This document is over two centuries old and remains the foundation upon which the United States is built. The Constitution still controls the government and guides society, and it does this through the justices who sit on the highest court in the land, the Supreme Court of the United States. The nine Supreme Court Justices have the privilege to be the ultimate say with regards to the meaning of the Constitution. The justices could more aptly be described as interpreters, rather than judges, as instead of judgements they provide interpretations about how the nation's founding document would decide the case. To make these interpretations, justices all have algorithms for analyzing and deciding constitutional issues. Some algorithms, more aptly described as methodologies, might not be as pronounced or as structured as others but every justice has a certain method for how they view the Constitution and how they rule on it. These are called constitutional methodologies: ways of figuring out a particular meaning of a provision in the Constitution and how it applies in the instant case.

At first glance, these methodologies seem to be vastly different from one another and seem to be concrete and structured methods of analysis that tell a justice what to do in certain cases; however, this thesis argues the opposite. Constitutional methodologies are instead used as a sort of smoke screen: justices adhere to the principles of their preferred methodology which makes their ultimate decision seem as if it comes from an objective place when in reality the

methodology gives the justice the opportunity to impart their own beliefs to make their decisions. Although certain methodologies may tend towards different sides of the political spectrum, they all are quite similar in that they all provide the justice a cloak to decide the case according to their own beliefs: each methodology leads the justice to a single subjective decision that then provides them the opportunity to impart their own opinions into the case instead of legal expertise. The justices can decide what the Constitution means, and therefore can rule the country in a manner more akin to monarchs than judges of a democratic nation.

I do not introduce this argument in an effort to suggest that the nine justices who sit on the Supreme Court at any one time are dictators of some sort; my intention is not that dramatic. I am not arguing that justices actively attempt to impart their own will when deciding cases using methodologies, nor do I assert that justices make poor decisions when applying methodologies. Instead, my argument is that the methodologies they use conceal the fact that the methodologies lead justices to a single subjective decision, and that justices are able to (or even that they must) utilize their own personal ideals and values to make that decision. Justices are required to interpret problems and interpret and apply the Constitution to those problems. Their opinions ultimately shape how they make those interpretations as well as what a suitable or correct interpretation might look like.

As with anything requiring interpretation, there are different viewpoints to the many conflicts that arise regarding the Constitution and its meaning. Therefore, there is much theory on many different sides, which attempts to explain the multiple ways of interpreting the Constitution. This constitutional theory breeds various constitutional methodologies. The major and most prominent of these methodologies discussed and dissected in this thesis are:

Originalism, Living Constitutionalism, Political Process Theory, Pragmatism, and Moralism. These methodologies all have their strengths and their flaws, and all could be considered contradictory to all the others. J. Harvie Wilkinson put it best in his review of constitutional methodologies entitled *COSMIC CONSTITUTIONAL THEORY* when he said, "One might be tempted to remark that a gathering of constitutional theorists resembles nothing so much as a circular firing squad."[1] All of the theories are able to discredit and poke holes into other fellow theories. With this being true, it follows that all these theories are therefore fallible. And because these theories are being used by some of the most important individuals in the country to make some of the most important decisions in the country, it would be reasonable to argue that there is no room for fallibility.

It should be noted that the different ideas about jurisprudence and methods of applying those ideas emerged long before the official creation and promotion of the methodologies discussed in this thesis. While the focus here is on constitutional methodologies and how they act as smoke screens in their application, the historical moorings of the theories these methodologies are based on were present long before the inception of those methodologies.

The tenet of Originalism that justices should make their decisions based on the original meaning of the text of the Constitution or the original intent of those who wrote it is as old as American jurisprudence itself, as justices have been interpreting the Constitution's text since the Supreme Court was created. The idea in Living Constitutionalism that the Constitution should act as a "living document" is one that can be seen as far back as the Marshall Court in the early nineteenth century. Chief Justice John Marshall established judicial review, the power of the

[1] J. Harvie Wilkinson, COSMIC CONSTITUTIONAL THEORY 9 (2012).

Court to decide on the constitutionality of laws and statutes and subsequently strike them down, in *Marbury v. Madison*[2] and this was not an explicit provision in the Constitution. Marshall even describes in 1819 in *McCulloch v. Maryland*[3] how the Constitution was created "to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."[4] Political Process Theory was first championed by Professor John Hart Ely, but even before this justices were making decisions based on the workings of political processes. This will be evidenced later in the discussion of a Supreme Court case *Trop v. Dulles*[5] which employs the theories put forth by Political Process Theory before the official inception of the methodology. Pragmatism and Moralism are no different; justices have long focused on the future effect their rulings will have as precedent (as proposed by Pragmatists), as well as focused on the moral principles of the Constitution when interpreting it (as proposed by moralists). The focus in this thesis is on the five constitutional methodologies described above, the most prominent figures who create and promote them, and how these methodologies ultimately act as smoke screens to camouflage the innate subjective decisions present in justices' interpretations when using those methodologies, but it is important to note that many of the ideas behind the theories promoted by these methodologies had their emergence long before the rise of the methodologies.

Constitutional theory, and the methodologies it creates (which then influence the justices of the Supreme Court), is incredibly important and has significant real-world effects. The Supreme Court's decisions determine how the citizens of the country live: whether women can

[2] *Marbury v. Madison*, 5 U.S. 137 (1803).
[3] *McCulloch v. Maryland*, 17 U.S. 316 (1819).
[4] *Id.* at 415.
[5] *Trop v. Dulles*, 356 U.S. 86 (1958).

get abortions,[6] whether a private business can refuse service based on a customer's sexual orientation,[7] or whether it is constitutional to segregate black and white children in schools.[8] These decisions determine the rights of the people as well as the laws by which people live, which emphasizes the importance of the theories and methodologies that affect those decisions. The study and analysis of constitutional methodologies is so important because it gives an insight into the most prominent ways of interpreting the Constitution, and how a justice might decide a case.

Besides the importance of understanding the derivation of a justice's ruling, and the actual effects of said ruling, the study and analysis of constitutional methodologies is also important in the search for the best (or most fair) ways of interpreting the Constitution. The Constitution is in no way an easy document to understand, despite its short word count. Different words and phrases mean different things to different interpreters, and this is evidenced by the existence of multiple constitutional methodologies. Although theorists will always search, there is no "correct" way of interpreting the Constitution. While one may favor a certain methodology over another, and while one may *believe* that the methodology they favor is the correct one, the methods are in fact all subjective. Whether a justice realizes it or not, their values and beliefs direct them towards the methodology that best suits them. No matter what lies on the surface of judicial decision-making at the highest level, whether it be claims to judicial restraint, a need to protect the rights of the people from government intrusion, or something in between, underneath it all lies a single subjective decision.

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[6] *Roe v. Wade*, 410 U.S. 113 (1973).
[7] *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).
[8] *Brown v. Bd. of Educ*., 347 U.S. 483 (1954).

Important terms to define for the purposes of this thesis include "Founding Fathers" and "Framers." These terms will be used throughout in discussions of intent and interpretation of the Constitution. They will be used according to an all-encompassing definition. It is hard to delineate whom to include when discussing the Founding Fathers or the Framers of the Constitution. Does one include only those delegates to the Constitutional Convention, who physically drafted and wrote the Constitution? Or should one also include delegates to the state ratification conventions, and other prominent figures at the time who affected the writing and ratification of the Constitution? In this thesis, the terms Founding Father and Framer are used in a general sense to refer to those who not only wrote the text of the Constitution but those prominent thinkers at the time who inspired it, as well as those who inspired and argued for its ratification. Further, the concepts of the "Founding Fathers" and "Framers" have changed over time. Not only do they encompass a general scope of historical figures, but they evolve and include different figures as time passes. These concepts can refer to those who originally drafted the Constitution, as well as to those who drafted amendments that came many years later. A discussion of the Fourteenth Amendment and the Due Process Clause may make reference to "Framers", but this would refer to the Framers of the amendment and not to the original Framers of the Constitution, as they were no longer alive at the inception of the Fourteenth Amendment. Discussion of Framers or Founding Fathers and their ideas or intent is historically contextualized to account for the evolution of these groups over time.

This thesis argues that although the methodologies discussed have merit, they all essentially act as a smoke screen allowing the justice to decide the case in favor of their own personal guiding beliefs. This is not to say that every justice is actively using a methodology to

impart their influence through each case for their own benefit. Rather, the argument in this thesis is centered around the idea that all justices are *able* to do this, because the methodology they utilize when deciding a case provides a sort of cover for them to decide each case how they want to. These methodologies do not provide an objective algorithm for analyzing and deciding complex legal issues, but instead lead the justice on a camouflaged path towards a single subjective decision that lets the justice impart their own ideals into the case. This decision could be whether the Constitution protects a certain right, whether it permits the Court to act, or whether a certain word in the text means one thing or another. No matter what this decision is, the justice can always answer whichever way they prefer using the methodology they support. This single decision is different depending on the justice and their chosen method of interpretation, but behind it all remains that one decision. So while different methodologies purport to value certain things over others, whether it is judicial restraint in Originalism or flexibility in Living Constitutionalism, they all lead the justice to a question which ultimately allows the justice to decide whatever they want. No matter how structured a methodology is, the justice is still led to this decision that is subjective based on the values of the justice and the methodology they utilize.

Originalism

Preface to Originalism

Originalism is one of the most prominent constitutional methodologies. The method of constitutional analysis offered by Originalism is that justices should not interpret the Constitution themselves, but rather should look to the past to see what the Constitution meant when it was written and when it was ratified. It argues that "the meaning of a constitutional provision was fixed at the time it was enacted."[9]

There are two main forms of Originalism that help define it further: original intent and original meaning. "Original intent asserts that [the object of interpretation] is the intended meaning of the Constitution's enactors."[10] Proponents of original intent argue that any interpretation should be based on what the authors of the Constitution intended it to mean; the focus is on the Founding Fathers and their intents for what certain provisions would mean while they were writing them. By focusing on how the Founding Fathers intended for the Constitution to be interpreted and understood, it makes the task of simplifying the text of the Constitution much more straightforward. It also helps create more of a standard when it comes to analyzing a provision and applying it to a case. When using a different methodology, one could come to multiple conclusions about one provision given the circumstances of the instant case and how the

[9] John O. McGinnis and Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 Nw. U. L. Rev. 1371, 1373 (2019).
[10] John O. McGinnis and Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 Nw. U. L. Rev. 1371, 1373 (2019).

provision is being understood and applied. But when the only thing that matters for the interpretation of that provision is what is meant by those who wrote it, the meaning can become clearer and the application and use of it becomes more consistent throughout the years.

The other form of Originalism, original meaning, is similar to original intent in that they both look to the past to see how the Constitution was understood and interpreted when it was written. The difference between the two is who originalists look to in order to answer their constitutional questions. Supporters of original intent look to what the Founding Fathers intended the words to mean, but supporters of original meaning look to the people of the time as a whole and how they understood the Constitution as they were ratifying it. Put simply by famed originalist Robert Bork, "The judge must stick close to the text and the history, and their fair implications, and not construct new rights."[11] This focus is a little more general, in the sense that the emphasis is on the general meaning of the words employed to construct the Constitution rather than the intent of the Founding Fathers. "Original…meaning posits that the object of interpretation is the text as reasonably understood by a well-informed reader at the time of the provision's enactment."[12] An originalist who supports a reading of the Constitution based on original meaning will use the basic understanding of the people of the time to construct their analysis of a Constitutional provision. For example, if analyzing the First Amendment a justice utilizing this methodology would look to what the people who ratified the Constitution thought freedom of speech meant. What would the average citizen at that time think was meant by "freedom of speech?" What did "freedom of speech" mean back then, what did those words

[11] Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 8 (1971).
[12] John O. McGinnis and Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 Nw. U. L. Rev. 1371, 1371 (2019).

mean and how did people understand them? These are the sort of questions that an originalist might ask when trying to decipher the meaning of the text. This school of thought is very similar to textualism, which is a facet of Originalism that advocates for using only the meaning of the text when analyzing. The focus in this school of thought is that the literal definition of the words in the text is the only thing that should be considered; not the intention of those wrote them or ratified them but just what the words mean to those present today.

The proposed benefits of this school of thought are apparent: when comparing passages of text to the intent of those who wrote them or the understanding of the text at the time, it can provide an objective standard for interpretation. This also leads to one of the most highlighted aspects of Originalism which is judicial restraint. Judicial restraint "is the notion that judges ought to base their decisions on a source of authority that is outside of themselves and their notions of the just."[13] Judicial restraint isn't advocated anywhere stronger than in Originalism, where the job of the justice is merely to discern what the words used to mean and not what they should mean or what they or others want them to mean.

Originalism as Camouflage

The discussion of restraint is where the problems begin for Originalism and where the argument that it is merely a smoke screen is derived. Wilkinson refers to Originalism as "activism masquerading as restraint"[14] and this is a very succinct description of the downfall of

[13] Daniel Suhr, *Does "Judicial Activist" Mean Something?* (2008).
[14] J. Harvie Wilkinson, COSMIC CONSTITUTIONAL THEORY 33 (2012).

this methodology. Originalism asks justices to do too much and to make too many subjective decisions; it forces a justice to take on much responsibility that they might not want or likely shouldn't be attributed to them. Not only do the justices need to be outstanding legal scholars and have a deep understanding of the Constitution and its application over the years, but utilizing Originalism they must also analyze history that took place over 200 years ago to help make their decisions. Originalism asks a justice to also be a historian, a political scientist, an etymologist, and a sociologist in order to predict and understand what the citizens of the country meant over 200 years ago when the document was written. Justice Scalia admits as much in his musing on Originalism: "But what is true is that it is often exceedingly difficult to plumb the original understanding of an ancient text. Properly done, the task requires the consideration of an enormous mass of material… Even beyond that, it requires an evaluation of the reliability of that material… And further still, it requires immersing oneself in the political and intellectual atmosphere of the time…It is, in short, a task sometimes better suited to the historian than the lawyer."[15]

Because Originalism requires a justice to do so much, there is a great deal of room to maneuver when applying the methodology. A justice can pick and choose which historical evidence from which historical figures to look at it and apply it to how they believe the case should be decided, according not to how the Framers may have chosen to decide it but instead how the justice wants it decided. As articulated by William Brennan, "our distance [from the Framers who wrote the Constitution and those who ratified it] of two centuries cannot but work

[15] Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 856-857 (1989).

as a prism refracting all that we see."[16] This is where the subjective decision the justice must make comes in. While it seems as though originalists are restraining themselves, they still must make a decision that allows them to introduce their own beliefs into the analysis. A justice must decide what historical context to look in, which Founding Father to listen to, or which definition of a word from the 1700's to adhere to. This is the "camouflaged path" that the methodology provides. In his article on original intent, Derek H. Davis asserts that "the [F]ramers' intentions are not always easy to identify."[17] He goes on to describe the varying views and opinions of the Framers of the Constitution, describing how "it has never been clear to what extent the [F]ramers' intentions are relevant to the task of establishing constitutional norms."[18] Some Framers thought the Constitution should be interpreted based on the text and others thought it should be on the intentions of those who ratified the Constitution.[19] Still to this day the intentions of the Framers are subject of controversy, so how could one expect an originalist justice to discern an objective answer to a constitutional question when there isn't an objective intent to base that answer on?

Not only that, but how does one reconcile the differences between different courts as the years go by? Many decisions that seem to be objective and seem to uphold the intentions of the Framers of the Constitution contradict each other. In *Plessy v. Ferguson*[20] the Court upheld the separate but equal doctrine, but years later it was reversed by *Brown v. Board of Education*.[21] Even originalists will agree that *Plessy v. Ferguson* was decided erroneously, but how does an

[16] William J. Brennan, *The Constitution of the United States: Contemporary Ratification*, 4 (1985).
[17] Derek H. Davis, *Original Intent* (2009).
[18] Derek H. Davis, *Original Intent* (2009).
[19] Derek H. Davis, *Original Intent* (2009).
[20] *Plessy v. Ferguson*, 163 U.S. 537 (1896).
[21] *Brown v. Bd. of Educ., 347 U.S. 483 (1954).*

originalist reconcile that? They cannot. The United States was built with slavery being a major facet of its construction, literally and ideologically. If the Fourteenth Amendment was established in the time of the original Founding Fathers, they would likely not agree with its application in *Brown v. Board of Education*. So how could an originalist rationalize the reversing of that decision? Steven Calabresi attests in his essay *On Originalism in Constitutional Interpretation* that originalists believe segregation was erroneously upheld in *Plessy v. Ferguson* and that they believe "race discrimination will always be unconstitutional unless the Fourteenth Amendment is repealed."[22] But, the decision in *Plessy v. Ferguson* would have been consistent with a majority of the Founding Fathers at the time of the Constitution's inception, as well as with the majority of the public. If both cases can be looked at from an originalist point of view and come to different answers, then clearly it does not provide an objective answer that is based on the intentions of those from the eighteenth century.

The Constitution is around 4,000 words which is incredibly brief for a document meant to guide a country for years to come. This brevity is likely because the Framers could not possibly include answers and solutions to every single constitutional question and problem that may arise over hundreds of years. Therefore, originalist justices are left with the task of deciding what the Framers intended. Going back to the example of freedom of speech guaranteed by the First Amendment can provide myriad problematic questions that a justice would have to answer. What sort of acts are guaranteed free speech? Are there certain acts that should never be considered under free speech? Are there certain circumstances that could result in free speech being taken away? Does free speech refer to just words being spoken, or can it include written words and

[22] Steven G. Calabresi, *On Originalism in Constitutional Interpretation*.

nonverbal acts of communication? These sorts of questions do not have easy answers, and while the justice has precedent on which to rely, precedent only goes so far and only helps so much. The justice must then decide how they think the Framers would have decided an issue or what they would have thought. There is only so much historical evidence that chronicles the arguments and beliefs of the Framers at that time, which means the justice must fill in the gaps with their own opinions on how someone like James Madison or Thomas Jefferson would interpret a constitutional clause.

Potentially without even realizing it, an originalist justice will impart their own beliefs and values when deciding how to interpret what a framer might think or how they might believe something should be applied. A justice's views on free speech would affect how they might interpret the Framers' views on free speech. People's personal values and ideologies provide a filter for viewing the world: different people see different things as good or bad, helpful or harmful, proper or improper. Everyone has different life experiences which help form their personalities, beliefs, and who they are as a person. Everyone is at least a little different, which means that two people could look at the same piece of historical evidence and interpret it differently. Therefore, a justice will view a constitutional question their own way and subsequently view historical evidence and the views of the Framers or original citizens of the country their own way. Richard Posner aptly describes this in stating how "Originalism…is not an analytic, but a rhetoric that can be used to support any result the judge wants to reach."[23] The "rhetoric" of the methodology allows a path that acts as a smoke screen. This path leads to the originalist justice being able to advance their own beliefs into what they claim is a practice of

[23] Richard A. Posner, *Bork and Beethoven*, 42 Stan. L. Rev. 1365, 1378 (1990).

judicial restraint, and this path is camouflaged by the values and methods professed by Originalism.

Originalism in Action

An excellent example of Originalism in action can be found in *District of Columbia v. Heller*.[24] This landmark Supreme Court case involved a D.C. law that restricted the licensing of handguns and compelled those who had licensed handguns in their home to keep the handguns nonfunctional. Written by Justice Scalia, the majority opinion declared the law unconstitutional on the grounds that it violated the Second Amendment. The opinion is an accurate representation of the method of constitutional analysis proposed by Originalism. It begins with a focus on the clauses of the amendment and the specific words being used, and discusses their definitions and meanings. The opinion then turns to a commentary on the various interpretations of the amendment by "founding-era legal scholars"[25] as well as case law from before and after the civil war, focusing on the understanding of the amendment from those time periods. Then the opinion turns to the case at hand and applies its previous analysis of history.

Not only does this case accurately represent an originalist way of analyzing and applying a provision of the Constitution, but it also displays how Originalism acts as a smokescreen to hide the subjective decisions of justices. The opinion works to stick close to the text of the Constitution and to the history of its understanding and application. Scalia discusses meanings of words, their use in forming sentences, and what those sentences ultimately mean. One section of

[24] *District of Columbia v. Heller*, 554 U.S. 570 (2008).
[25] *Id.* at 605.

the opinion starts out with "Before addressing the verbs 'keep' and 'bear,' we interpret their object: 'Arms.,'[26] which show a commitment to the text itself and the meaning of the words. Twenty-nine of the first pages of the opinion are devoted almost entirely to the analysis of sentence structure and the understanding and application of the Second Amendment throughout history.[27] However, even with this supposed commitment to the past, the decision requires the justices to make a subjective decision in how to apply past meanings. While the opinion used considerable historical evidence to establish that "the inherent right of self-defense has been central to the Second Amendment right,"[28] the use of Originalism still requires Scalia and the other joining justices to make a subjective decision on how history should be applied in the case. The methodology continues to act as a smoke screen by hiding the subjective decisions of how the past should be reconciled with the future behind claims to judicial restraint and adherence to the text.

[26] *Id.* at 581.
[27] *Id.* at 576-604.
[28] *Id.* at 628.

Living Constitutionalism

Preface to Living Constitutionalism

Originalism is one of the two largest-looming constitutional methodologies, and the second is Living Constitutionalism. Perhaps because it is essentially the exact opposite of Originalism, it also been quite influential in the judicial history of the nation. This is exemplified by the era of the Warren Court. As described by Morton Horwitz, "from 1953, when Earl Warren became Chief Justice, to 1969, when Earl Warren stepped down as Chief Justice, a constitutional revolution occurred."[29] This revolution led to not only many landmark Supreme Court cases, but also the emergence of new accepted ways of interpreting the Constitution, and this was thanks to "the idea of a living constitution: a constitution that evolves according to changing values and circumstances."[30]

The basic principle behind Living Constitutionalism can be ascertained from the name of the methodology itself: it claims the Constitution should be a "living document." Proponents of this methodology believe that the Constitution should be flexible enough so that it can grow and evolve with society. One such proponent was Justice William Brennan, who when describing the Constitution said that "[l]ike every text worth reading, it is not crystalline. The phrasing is broad and the limitations of its provisions are not clearly marked. Its majestic generalities and ennobling pronouncements are both luminous and obscure. This ambiguity of course calls forth

[29] Morton J. Horwitz, *The Warren Court and The Pursuit of Justice*, 50 Wash. & Lee L. Rev. 5, 5 (1993).
[30] Morton J. Horwitz, *The Warren Court and The Pursuit of Justice*, 50 Wash. & Lee L. Rev. 5, 5 (1993).

interpretation, the interaction of reader and text."[31] While Originalism asks what the words of the Constitution meant back when it was written, Living Constitutionalism asks, "what do the words of the text mean in our time?"[32] This establishes an inherent flexibility in the text for living constitutionalists. This flexibility is manifested in new interpretations and understanding of provisions of the Constitution, which are introduced via judgements of the Supreme Court.

As society grows and changes, so do the attitudes and beliefs of people, as well as what is acceptable and not acceptable. Slavery is an excellent example of this. Slavery was common practice in the early nineteenth century up until the civil war and the ratification of the Thirteenth and Fourteenth Amendments. After that slavery became a thing of the past, but segregation was still a very prevalent practice and racist attitudes were common (if not expected). In the second half of the twentieth century the emergence of the Civil Rights movement led to the end of widespread segregation and led to increased equality for people of color who had long been disenfranchised and looked down upon. However, even then racist attitudes and practices were still common everywhere from the government to businesses, schools, and public places. Fortunately, today's society is at a place where things are more equal than ever, and these racist attitudes and practices are less prevalent than they have ever been (although they undoubtedly are still present in certain forms). What was acceptable and typical at one time can become unacceptable and rare in another, and this is evidence of societal conventions changing.

Along with the changes in attitudes, beliefs, and practices, meanings also change over time. Definitions, rationales, and interpretations all change with society. The concept of equality

[31] William J. Brennan, *The Constitution of the United States: Contemporary Ratification*, 1 (1985).
[32] William J. Brennan, *The Constitution of the United States: Contemporary Ratification*, 7 (1985).

is a great example of this. As demonstrated in the above example of slavery, equality, what it means, and how it is implemented in society has clearly had drastic changes since the foundation of the country. When the Constitution was being written equality referred mainly to equality between white men and still excluded all others, whereas today equality is closer to encapsulating all people everywhere. So, not only do attitudes and beliefs change but also the meaning of certain ideals and concepts change with society, and this leads supporters of Living Constitutionalism to advocate for a living document.

As mentioned in the previous section on Originalism, the Constitution is not a very long document, and it also is quite general. Instead of going into detail on the certain rights guaranteed to American citizens and the different abilities and responsibilities of different governmental institutions, the nation's founding document instead provides a broad outline and structure for the government. The detail of the text is important, but what is equally important is the framework it sets up for the future. This is perhaps best emphasized by David Strauss in *THE LIVING CONSTITUTION* when he issues readers the challenge to look at any random case opinion from the Supreme Court and analyze the reasoning of how the justices came to their decision. He argues that "the text of the Constitution will play, at most, a ceremonial role" and that "most of the real work will be done by the Court's analysis of its previous decisions." He then goes on to explain that "[w]here the precedents leave off, or are unclear or ambiguous, the opinion will make arguments about fairness or good policy: why one result makes more sense than another, why a different ruling would be harmful to some important social interest."[33] This explanation of how the text of the Constitution is not enough points out that justices need to and will use current

[33] David A. Strauss, THE LIVING CONSTITUTION 33 (2010).

beliefs and understandings to make their argument and further explain their reasoning behind citing a passage of the Constitution.

Living Constitutionalism as Camouflage

The virtues of this methodology are readily apparent: under this theory the Constitution can change with society. No longer would people be chained to the past by a document that is over 200 years old, but rather they can use that same document and its underlying principles as a guide even while applications change over time. However, with these benefits come even greater problems that could potentially be detrimental to the balance between different governmental institutions and the role of justices on the Supreme Court. While greater flexibility is favorable because flexibility allows justices to better apply the Constitution as society changes and evolves, it also inevitably provides them with too much room to inflict their own beliefs in a way that changes the Constitution itself. The ability for living constitutionalists to "change" the Constitution enables them to essentially create the law instead of interpreting it. As Strauss describes it, "a living constitution is, surely, a manipulable constitution. If the Constitution is not constant—if it changes from time to time—then someone is changing it. And that someone is changing it according to his or her own ideas about what the Constitution should look like."[34] By allowing for such broad interpretation of the text, justices can argue for increasing or decreasing the reach of certain rights or even create new ones altogether.

[34] David A. Strauss, THE LIVING CONSTITUTION 2 (2010).

This is perhaps best exemplified in substantive due process cases such as *Roe v. Wade*.[35] Arguably one of the most famous Supreme Court cases, *Roe v. Wade* helped establish an official right to abortion and provided abortion regulations. This decision has been very controversial and is still debated today, both politically by people advocating for or against abortion and legally by legal scholars. The reasoning of the Court in *Roe v. Wade* was based on a newfound "right to privacy." This right to privacy had its original inception in *Griswold v. Connecticut*.[36] This case dealt with a married couple's right to use contraception and receive counseling on contraception from medical professionals, and whether the Constitution protected their marital privacy. The Court decided the Constitution did protect this right. It reasoned that "specific guarantees in the Bill of Rights have penumbras,"[37] and that these penumbras create "zones of privacy."[38] The case was the basis for the foundation of the right to privacy, and the Court in *Roe v. Wade* used the case to confirm that this right to privacy exists and subsequently apply it to the contested right to abortion.

This right to privacy was not an explicitly stated right in the Bill of Rights, nor was it well-established through precedent and consistent interpretation of a provision of the Constitution. Instead, the Court fashioned this right from the penumbras of other rights guaranteed by other provisions of the Constitutions, namely the Fourth and Fifth Amendments. Regardless of one's stance on abortion, from a legal and constitutional point of view this fashioning of a new right is not a good thing. Not only is the Court interpreting the Constitution

[35] *Roe v. Wade*, 410 U.S. 113 (1973).
[36] *Griswold v. Connecticut*, 381 U.S. 479 (1965).
[37] *Id.* at 484.
[38] *Id.* at 484.

very broadly in *Griswold v. Connecticut* and *Roe v. Wade*, but the justices go on to create a new right that was not present before based simply off stretched logic regarding other established rights. The Court even went on in *Roe v. Wade* to establish guidelines for different trimesters of a woman's pregnancy.[39] While it is not abnormal for courts to set forth guidelines for future situations and cases, these were not so much legal standards as they were new laws. The Court essentially turned its written opinion into a statute; they abandoned their role as interpreters and went further to take the place of legislators.

This case is just one example of how Living Constitutionalism leads justices down a camouflaged path towards judicial activism. Judicial activism is often mentioned as the major weakness of Living Constitutionalism. The opposite of judicial restraint, judicial activism is what a justice partakes in when they allow their own beliefs to affect their decision-making and move closer towards creating law rather than interpreting it. Citing *Black's Law Dictionary* in his article *Judicial Activism: A Tempest or a Tempest in a Teapot?*, Mark Franek defines judicial activism as "a philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent."[40] Most methodologies and judges in general tend to avoid judicial activism, and appearing to stray too far from their seat on the bench and into a legislator's seat. The phrase "activist judge" comes with a negative connotation, and a judge may consider it an insult since it means that a judge is overstepping their role and their given jurisdiction. Judicial activism is

[39] *Roe v. Wade*, 410 U.S. 113, 163-166 (1973).
[40] Mark Franek, *Judicial Activism: A Tempest or a Tempest in a Teapot*, 40 (2014).

normally something a justice should avoid, and if Living Constitutionalism as a methodology can be thought of as a body then judicial activism is the cancer that plagues it.

The opportunity for a justice to stray from a form of objective and passive interpretation is much clearer in Living Constitutionalism than in Originalism: judicial activism allows justices to make subjective decisions according to their own beliefs and then transform those beliefs virtually into law. Living constitutionalists make subjective decisions all the time, and these decisions are camouflaged by Living Constitutionalism's advocacy for a living document. The methodology purports that the Constitution needs to change and evolve with society, but ultimately it is not society that is determining this change in the Constitution, but rather it is the living constitutionalist justices who determine that change. Their decisions are camouflaged by Living Constitutionalism's argument that the Constitution should be malleable. Through subscribing to and using this methodology, living constitutionalist justices are able to make decisions that ultimately end with them fashioning or removing rights, protections, or responsibilities in a manner more akin to a legislator. In this way, Living Constitutionalism acts as the smoke screen for these decisions to be made, and these decisions are, therefore, always subjective and appear to be made according to what that justice believes to be right and the values that they hold.

Living Constitutionalism in Action

An example of Living Constitutionalism in action is present within *Lochner v. New York*.[41] This case from the start of the twentieth century dealt with a New York statute which put limits on how many hours a week bakers could work. The Court reasoned that the statute was unconstitutional as it violated a "liberty of contract"[42] which they found was protected by the Due Process Clause of the Fourteenth Amendment. The majority opinion stated that "the general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution."[43] This prime example of Living Constitutionalism highlights how justices are able to fashion or declare new rights out of different provisions of the Constitution as they see fit to meet the evolving standards of society.

This case is also a prime example of the way in which Living Constitutionalism can act as a smoke screen to allow justices to decide a case based on their own personal opinions or values. By treating the Constitution as a living document, the justice is able to declare what the words of the Constitution mean in our time and how they should be interpreted to fit what the justice believes to be how society views the issue at hand. In this case, the majority expanded the Due Process Clause of the Fourteenth Amendment to include a right to contract which is not explicitly mentioned in the Constitution, nor was it explicitly established through multiple applications in precedent. This trend followed the Court throughout the twentieth century, as the underlying philosophy of *Lochner v. New York* can be seen in cases that helped to establish the "right to privacy" such as *Griswold v. Connecticut*[44] and *Roe v. Wade*.[45] All three of these cases

[41] *Lochner v. New York*, 198 U.S. 45 (1905).
[42] *Id.* at 53.
[43] *Id.* at 53.
[44] *Griswold v. Connecticut*, 381 U.S. 479 (1965).
[45] *Roe v. Wade*, 410 U.S. 113 (1973).

are examples of Living Constitutionalism providing justices camouflage to discover rights out of provisions of the Constitution that were not previously there, and this camouflage hides the subjective decisions the justices make to ultimately fashion those rights.

Political Process Theory

Preface to Political Process Theory

An alternative to Originalism and Living Constitutionalism, Political Process Theory is a different type of constitutional methodology that focuses on political processes rather than substantive rights. In *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW*, Professor John Hart Ely introduces this alternative theory for interpreting the Constitution. He asserts that "the original Constitution was principally… dedicated to concerns of process and structure and not to the identification and preservation of specific substantive values."[46] In introducing this methodology, his focus is on the processes by which the government functions and not the rights others so often focus on when thinking of the Constitution. In comparing political theory to economic markets, Ely highlights how antitrust and regulatory economic orientations intervene when the market fails or "dictate substantive results" respectively, and how in the case of politics and constitutional theory justices should adhere more to the "antitrust" practices and intervene only when the "political market…is systematically malfunctioning."[47]

Political Process Theory argues that the courts should only intervene and act when the "process" is interrupted. With this methodology the question the justice is asking should not be what they should decide, but rather if they may decide.[48] Ely alleges "judges should simply stop scrutinizing the substantive outcomes of the legislative process and instead focus solely on the

[46] John Hart Ely, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 92 (1980).
[47] John Hart Ely, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 102-103 (1980).
[48] J. Harvie Wilkinson, COSMIC CONSTITUTIONAL THEORY 61 (2012).

process itself, invalidating laws that clog the arteries of political change or discriminate against minorities without enough political clout to make their voices heard."[49]

The example of *Roe v. Wade*[50] can be used once again in the discussion of Political Process Theory. A proponent of Political Process Theory would likely come to an opposite conclusion than the one the Court did in that case. While that decision was an example of Living Constitutionalism at work, if the theories of Political Process Theory were instead substituted, likely no "right to privacy" would be found to legitimate a right to abortion. A justice utilizing Political Process Theory would likely come to the decision that because no right to abortion exists, the "process" is not broken and there is no right being infringed upon. The justice using Political Process Theory would not create this right and subsequently apply the right, as the Court originally did in *Roe v. Wade*, but rather would recognize that creating rights is the job of the legislature through statutes or the public through amendments, and until that happens there is no right that could cause the political process to be broken suggesting that the Court should intervene.

John Hart Ely speaks further on this matter in *The Wages of Crying Wolf: A Comment on Roe v. Wade*.[51] He expresses how "the interests to which the Court can responsibly give extraordinary constitutional protection include not only those expressed in the Constitution but also those that are unlikely to receive adequate consideration in the political process, specifically the interests of 'discrete and insular minorities' unable to form effective political alliances."[52]

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[49] J. Harvie Wilkinson, COSMIC CONSTITUTIONAL THEORY 68 (2012).
[50] *Roe v. Wade*, 410 U.S. 113 (1973).
[51] John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920 (1973).
[52] John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 933 (1973).

This concept of discrete and insular minorities comes from the famed "Footnote Four" of *United States v. Carolene Products Company*,[53] in which the Court discusses prejudice against discrete and insular minorities and how this can affect the Court's process in making decisions on constitutionality. This footnote is where Ely derives his conception and application of "discrete and insular minority." This was the foundation for Ely's application of this concept in his thoughts on *Roe v. Wade* described above, as well as the foundation for some of the standards and theory proposed by Political Process Theory. Footnote Four indicated how the Court would "continue to apply a form of heightened scrutiny in situations in which a law or statute conflicts with Bill of Rights protections, where the political process has closed or is malfunctioning, and when regulations adversely affect discrete and insular minorities."[54]

This fitting description of the type of judicial action stressed by Political Process Theory supports Ely's claim that *Roe v. Wade* "is not an appropriate case" for the delineation and protection of any discrete and insular minorities.[55] Ely goes further to describe how Political Process Theory argues that the Court should use their influence to assist "a minority demanding in court more than it was able to achieve politically", and that unborn fetuses in the context of *Roe v. Wade* have never constituted a discrete and insular minority in need of protection from a broken political process.[56]

Political Process Theory is another constitutional methodology that advocates judicial restraint. Wilkinson articulates the "seductive promise" of Political Process Theory as

[53] *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).
[54] David Schultz, *Carolene Products Footnote Four* (2009).
[55] John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 933 (1973).
[56] John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 934-935 (1973).

introducing a "theory of constitutional interpretation that is equally a theory of judicial restraint."[57] Similar to the way originalists believe a justice's role is not to create law and that they should only step in to interpret unclear laws and answer constitutional questions, supporters of Political Process Theory believe that a justice should only be involved if the processes by which democracy flows are malfunctioning. These supporters argue that justices should not create or clarify the rights that are already present in the Constitution, but rather should only step in when those rights are being infringed upon: when the system that guarantees and protects them is no longer working to do that. On the topic of judicial restraint from the point of view of Political Process Theory, Wilkinson states that "[j]udges, like all citizens, are entitled to their beliefs, but when they freely substitute those beliefs for the will of the people, they endanger the central tenets of our democracy."[58]

Political Process Theory as Camouflage

Political Process Theory still falls victim to the need for a justice to make a subjective decision and inevitably acts as a smoke screen to camouflage that decision using judicial restraint. This decision is not what the text of the Constitution would mean in the past, or how it should be read in the present, but rather whether the process is broken. Although it seems to provide a clear answer for when to intervene, what constitutes a broken process is a difficult question to answer. A justice still must use their own discretion, informed by their own beliefs

[57] J. Harvie Wilkinson, COSMIC CONSTITUTIONAL THEORY 68 (2012).
[58] J. Harvie Wilkinson, COSMIC CONSTITUTIONAL THEORY 68 (2012).

and values, to make a subjective decision as to whether the process is broken and intervention is needed. Similar, what constitutes a "discrete and insular minority"[59] is a question that justices could potentially have different opinions on given their own personal beliefs. In judging political processes, political attitudes are bound to intervene.

Further, only intervening when the process is broken assumes that most of the time the process is not broken. One could argue that throughout history the process has never *not* been broken. The political processes created in the Constitution and by the Founding Fathers were created for straight white men, by straight white men. The process never accounted for many minority groups, and allowed the discrimination of them and the denial of their inalienable rights. Even today the political processes of the nation do not work for everyone and are still tailored to serve certain people more than others. So, who is to say when the process is broken? How could Political Process Theory be rationalized when the process is always broken?

No political processes will be perfect and there will always be some sort of malfunction, but the decision as to whether the process is broken is a subjective one based on the notions of the justice. By promoting judicial restraint and a focus on process rather than substantive rights, Political Process Theory camouflages this path to a subjective decision that ultimately puts the state of a political process in the hands of a justice, and as previously argued they will make that decision according to the ideals, beliefs, and values they hold that affect how they see the world.

Political Process Theory in Action

[59] John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 933 (1973).

Trop v. Dulles[60] is an excellent example of Political Process Theory being applied. Although this case took place before John Hart Ely's conception of Political Process Theory, it is an example of how a justice might focus on a political process and whether it is not functioning properly when they are tasked with deciding a case. This case involved a United States Army private who was put in confinement following a disciplinary violation, from which he escaped. He then turned himself back in and decided to return, but was later still convicted of desertion and was dishonorably discharged. Years later he applied for a passport but was denied on the grounds that "he had lost his citizenship by reason of his conviction and dishonorable discharge for wartime desertion."[61] The Court then decided that his forceful expatriation was considered cruel and unusual punishment under the Eighth Amendment, and deemed it unconstitutional.

In *Trop v. Dulles*, the Court focused on the process of expatriation. Expatriation is the process of losing one's citizenship, and the Court found that the way this process took place in that case was malfunctioning. The process in which Trop lost his citizenship was broken in the eyes of the Court, but this is another example of how constitutional methodologies act as smoke screens. The justices themselves had to decide whether this process of expatriation was broken, and this was inevitably affected by the lens in which they view the world (and therefore the cases which come before them). Focusing on process when deciding a case, in the way Political Process Theory argues one should, hides the ability of the justice to actually decide the case according to their own values. A justice focusing on process could define the process in whichever way they need to fit their beliefs, and could then determine whether they think the

[60] *Trop v. Dulles*, 356 U.S. 86 (1958).
[61] *Id.* at 88.

process is functioning properly according to how they personally believe it should function, all under the guise of Political Process Theory.

Pragmatism

Preface to Pragmatism

One other alternative to the constitutional arguments of Originalism and Living Constitutionalism is Pragmatism. While Originalism looks to the past and Living Constitutionalism looks to the present, Pragmatism instead looks to the future. The main ideal behind this methodology is that justices should consider the effect that their ruling will have. Pragmatism furthers that these effects should guide the rulings themselves. One of the most prominent supporters of Pragmatism, Richard Posner, describes this theory as one that focuses on the "task of exploring the operation and consequences of constitutionalism."[62] He describes how a pragmatic decision to a case contains a "consideration of systemic and not just case-specific consequences."[63] This methodology takes a more realistic rather than theoretical look at the cases the Supreme Court decides; rather than focusing solely on constitutional theory and interpreting the text, pragmatists instead look to see what effects their rulings would have in the real world.

In Brandon Murrill's essay *Modes of Constitutional Interpretation*, he offers another definition: "pragmatist approaches often involve the Court weighing or balancing the probable practical consequences of one interpretation of the Constitution against other interpretations."[64]

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[62] Richard A. Posner, *Against Constitutional Theory*, 73 New York University Law Review 1, 11 (1998).
[63] Richard A. Posner, LAW, PRAGMATISM, AND DEMOCRACY 59 (2003).
[64] Brandon J. Murrill, *Modes of Constitutional Interpretation*, 15-16 (2018)

The *Roe v. Wade*[65] example can again be used to further explain the meaning and the tenets of Pragmatism. That case started with the right of "Jane Roe" to have an abortion, but it was about much more. Instead, it became about the right to privacy and the right to abortion. A pragmatist's approach will not focus solely on the text of the Constitution, or the political process involved with getting an abortion, but rather will analyze those interpretations and more to then determine and compare future consequences. So, if a pragmatist was deciding *Roe v. Wade,* they would look at potential implications that enforcing or not enforcing a right to privacy and a right to abortion would have for all women in the present and the future, as well as the implications that acknowledging such a right would have on future cases. If a pragmatist decided the case following the establishment of the right to privacy, they would have taken into account the ramifications that finding a right to privacy would have on future cases as a precedent: not only how the right to privacy would be used in future but also how future justices might use the creation of that right to justify creating others in the future.

Wilkinson provides another succinct description when he characterizes Pragmatism as "activism through antitheory."[66] Pragmatism is characterized by judicial activism in the same way that Living Constitutionalism is. However, Pragmatism operates from an anti-theory perspective. Instead of advocating for one theory or another, this methodology outright dismisses them and encourages justices to focus on the effects that their decisions have. "Legal pragmatism is hostile to the idea of using abstract moral and political theory to guide judicial decision making."[67] Instead, pragmatists prefer to bring their judicial decision making outside the realm

[65] *Roe v. Wade*, 410 U.S. 113 (1973).
[66] J. Harvie Wilkinson, COSMIC CONSTITUTIONAL THEORY 80 (2012).
[67] Richard A. Posner, LAW, PRAGMATISM, AND DEMOCRACY 60 (2003).

of theory and into the real world, where its application can be studied and its effects for the future determined. "Legal pragmatism is forward-looking, regarding adherence to past decisions as a (qualified) necessity rather than as an ethical duty."[68] Pragmatists do not emphasize the importance of the Constitution in making decisions as much as originalists might; they instead claim that looking to the future and the effects their rulings would have is better. The rigidity of the Constitution can be considered a restriction that may leave society with no suitable solutions for the future; pragmatists seek to avoid the "pitfalls of rigidity."[69]

Pragmatism as Camouflage

Even though pragmatists admit they are not necessarily adhering to the Constitution or any particular constitutional theory, their chosen methodology still acts as a camouflage to disguise their decisions. While pragmatists claim to make rulings based on the impacts the decisions will have in the future, a subjective decision still needs to be made as to what effect that ruling will have in the future. A justice still must decide how their ruling will impact the future and what they should do about it, and what effects resulting from those impacts are preferable. Wilkinson describes how "Pragmatism itself does not supply the metric for determining which results are the best results—the individual judge does…"[70] A justice's attitudes towards the constitutional situation will still affect how they view it, and consequently will affect how they interpret that situation and how it will play out in the future. As previously

[68] Richard A. Posner, LAW, PRAGMATISM, AND DEMOCRACY 60 (2003).
[69] J. Harvie Wilkinson, COSMIC CONSTITUTIONAL THEORY 84 (2012).
[70] J. Harvie Wilkinson, COSMIC CONSTITUTIONAL THEORY 82 (2012).

mentioned, people's views and ideals shape the way they analyze the world around them, and this filter is unavoidable. Therefore, a justice's personal views and ideals will still be present in any pragmatic decision, and the idea that a pragmatist is merely focusing on the future to help guide their rulings just acts as camouflage for that fact.

Pragmatism in Action

NLRB v. Canning[71] is a great example of Pragmatism in action. This case started with Noel Canning and its employee labor union coming to an agreement which Noel Canning argued was not binding. The union alleged these actions amounted to unfair labor practices and filed a complaint with the National Labor Relations Board. The NLRB decided in favor of the union which led Noel Canning to appeal the decision on the grounds that two of the three members of the panel who decided the case were not confirmed by the Senate and were only appointed by President Obama. However, the Recess Appointments Clause gives the president the power to make appointments to fill vacancies which occur while Congress is in recess. The Court in this case had to decide whether Congress was officially in recess when those appointments were made, as well as if the Recess Appointments Clause only gives the president power to fill those vacancies which occur during an official recess of Congress.

Seeing as this case deals with the power of the president to make official appointments, the Court took a pragmatic approach to deciding this case. Clearly, such a case would have lasting effects on the appointment powers of the president, so the Court focused on those effects

[71] *NLRB v. Canning*, 573 U.S. 513 (2014).

and on the future. The opinion stated that "the Court…must hesitate to upset the compromises and working arrangements that the elected branches of Government themselves have reached."[72] The Court focused on the effects that their decision would have in an attempt to preserve the checks and balances on the president's power. The justices determined that the clause of the Recess Appointments Clause "should be interpreted as granting the President the power to make appointments during a recess but not offering the President the authority routinely to avoid the need for Senate confirmation."[73] The Court made clear what exactly the powers of the president are, without affording the president any additional powers in order to preserve the checks and balances in place.

This case is an example of how Pragmatism can act as a smoke screen for justices using this methodology to make their constitutional decisions. The justice has the opportunity to decide for themselves the effects their decision will have in the future, and whether those effects are preferable. In this case the justices had to determine whether their decision would give the president the power to avoid the need for Senate confirmation of appointees. Pragmatism as a methodology provides camouflage for a justice to make these subjective decisions about the future and subsequently decide the case at hand based on those subjective decisions, which are inevitably informed by the justice's personal opinions on the situation and how it should be handled.

[72] *Id.* at 514.
[73] *Id.* at 513-514.

Moralism

Preface to Moralism

Moralism, also sometimes called the moral reading,[74] is a constitutional methodology which focuses on morality when analyzing the Constitution. Moralism suggests that justices should focus on the moral aspect of constitutional principles and ideals. It argues that many constitutional provisions recognize or utilize a moral principle in their construction, and that when deciding a case that brings such a provision into question or under analysis a justice must decide what said moral principle includes and permits. Ronald Dworkin describes the methodology by saying: "[t]he moral reading proposes that we…interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice."[75]

Daniel Lambright, through a discussion on moral philosophy, natural theory, and "the incorporation of these philosophical insights on morality and human nature into the United States Constitution,"[76] argues that morality and moral philosophy are engrained throughout the Constitution. A moralist would then prefer to analyze the Constitution and deal with constitutional questions not based strictly on the text or on abstract legal theory, but rather on moral philosophy and principles. The First Amendment is based on the moral idea that people should be free to speak their mind and express their beliefs, the Fourth Amendment is based on

[74] Ronald Dworkin, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 2 (1997).
[75] Ronald Dworkin, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 2 (1997).
[76] Daniel Lambright, *Man, Morality, and the United States Constitution*, 17:5 J. Const. Law 1487, 1487 (2015)

the moral belief that people's privacy cannot be invaded without proper and official legal cause, and multiple amendments involve the moral concept that one should be tried in court in a fair trial by one's peers. Much of the Constitution and the rights it guarantees come from the moral ideals the original American colonists had that were kept from them by the British crown before the Revolutionary War. Morality is engrained throughout the Constitution, so it is reasonable to focus on the morality of certain provisions when making decisions about them.

Moralism as Camouflage

Although Moralism attempts to focus on the morals of society and the nation, it instead provides a justice the cover to only apply their own moral beliefs and understandings. Perhaps more than any other concept discussed so far, morality is subjective. Some people interpret and understand morality and moral principles differently than others. One person could believe an action is right while another could believe it is wrong. This is exemplified by controversial topics such as the right to abortion. This right is founded on the moral idea that a woman should have control of her body and have the right to choose how to handle her pregnancy. Yet, abortion is a heavily debated and contentious political topic of the day, and a moral reading of a constitutional question involving abortion will not lead any justice to a simple or objective answer. And, in using that moral reading, the justice will inevitably involve personal beliefs and values concerning the moral topic at hand. They will have reached a conclusion about the moral principle in question based in part on their own morality, whether they are aware of it or not. The camouflage that Moralism as a constitutional methodology provides is therefore quite apparent.

Those who support a moral reading champion a focus on the morality of the Constitution and the rights and principles it encapsulates. However, this approach to analyzing the Constitution merely veils the subjective decisions that a justice must make based on their own moral code. By hiding behind Moralism's emphasis on virtue and morality, moralists are able to impose their own ideals into the constitutional question at hand and ultimately into the ruling itself.

Moralism in Action

While not explicitly stated to be an opinion based on Moralism, it can be argued that *Brown v. Board of Education*[77] utilized a moral reading of the Constitution and the case at hand. The decision in this landmark case was based on the moral principle of equality. The unanimous decision stated that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[78] While the ultimate decision in the case is founded on the Fourteenth Amendment, the opinion itself puts great focus on equality, more pointedly the inequality that African-American children were facing in public education. The decision in this case was based on equality as a moral issue and used the Fourteenth Amendment to affirm that decision.

The way in which Moralism acts as a smoke screen for the justices who use it can be seen even in *Brown v. Board of Education*. Using moral concepts as a guide for making decisions requires a justice to understand those moral concepts, which will vary from person to person, as

[77] *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).
[78] *Id.* at 495.

morality is a subjective concept. Different people view morality in different ways, and the lens in which a justice views a case and views the world will invariably have an impact on how they understand and make decisions based on moral concepts. Moralism, therefore, informs the subjective decisions made regarding moral concepts, what is right and what is wrong, and related applications. Whether inequality is present is a subjective decision in that every justice could arrive at a different definition and understanding of inequality, and equality is a moral concept that is inherently subjective. These are the subjective decisions that Moralism acts as a smoke screen to hide.

Conclusion

In *COSMIC CONSTITUTIONAL THEORY*, Wilkinson paraphrases Winston Churchill expressing that "Originalism is the worst constitutional theory except for all the others."[79] He also describes how Justice Scalia refers to Originalism as "the lesser evil."[80] The hopelessness present in the search for the correct constitutional methodology is not lost on the justices who utilize these methodologies and the scholars who study them. The purpose and argument of this thesis has not been to claim that every justice using a constitutional methodology is erroneous in their application, nor that every decision in a case is a mistake. Rather, this thesis offers an argument to demonstrate how the various constitutional methodologies utilized by Supreme Court justices act as smoke screens for the subjective decisions being made underneath. This thesis has not argued for one constitutional methodology over another, but instead has argued that these methodologies all act as camouflage for the subjective decisions that justices must make when analyzing and applying them to the Constitution.

Certainly, no correct or perfect constitutional methodology exists, despite how intently constitutional theorists search, because the interpretation of the Constitution is always subjective. Interpretation in and of itself is subjective due to the varying lenses used to view the world, which are constructed by people's personal values and experiences. Because of this, justices should become more aware of the related flaws within their chosen methodologies, and the ways in which these methodologies act as smoke screens. Justices should take a step back and analyze how their subjective opinions and ideals are influencing their decisions. Perhaps, trying a new

[79] J. Harvie Wilkinson, COSMIC CONSTITUTIONAL THEORY 41 (2012).
[80] J. Harvie Wilkinson, COSMIC CONSTITUTIONAL THEORY 41 (2012).

way of interpreting the Constitution or ceasing to use methodologies altogether is advisable. Perhaps the absence of a methodology, which hides the real driving forces behind a justice's decision, would allow the justice's subjective ideals regarding the question at hand to come to the forefront and be properly dealt with. This would allow the justice to be completely aware of introducing their personal views into the case and could help lessen the dangers of decisions based solely on personal views.

It is somewhat dissatisfying to be unable to produce a solution to all the issues and flaws of the constitutional methodologies. While the argument throughout this thesis has been that these constitutional methodologies all act as smoke screens camouflaging the subjective decisions that justices make when applying them, there presently seems to be no better option than this. There is no alternative theory or process of interpretation that I can offer. The best way to combat the myriad constitutional issues that come with attempting to interpret the Constitution is to be aware of the flaws of the methodologies one employs and do the best one can to act objectively and show restraint when possible while also being aware of the subjective decisions they will inevitably need to make, or even to eliminate the use of these methodologies all together. To paraphrase the words echoed by Wilkinson, justices are employing the best of the worst constitutional theories available, which presently is the best that can be accomplished.

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