

# The Defense of Legal Pragmatism for Interpreting Constitutional and Statutory Laws in Virtue of Technology

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## Abstract

This thesis discusses the interpretation of constitutional and statutory laws, with emphasis on those laws that protect the rights of individuals in the U.S. My concern is that today technology is created and innovated at a fast pace and on a large scale; it has great impact on society, with the problematic aspect that it can infringe upon individuals' rights. Laws can be written to help with this problem, but when a case that has to do with technology that has not yet been accounted for in legal texts is taken to court, judges are left with a challenge. They have to interpret existing laws in regard to technology, and depending on the method they use these judges may seemingly create laws. This is against the idea that in democracy and the separation of powers, judges are not included in the branch that legislates. Still, judges cannot leave the problem of interpretation for the sake of technology alone, and they must alter the legal texts in some way. In this thesis I wish to answer this question: is it defensible for the judicial branch to expand the meaning of the words written in legal texts through their interpretations while still upholding democracy? My answer is yes, it is defensible when using the method of legal pragmatism, because it allows for modern circumstances to be accommodated while still keeping faith to the original legal texts written by legislators.

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## Introduction

In contemporary jurisprudence, one of its more debated aspects is how judges should interpret written laws, both constitutional and statutory. There are several theories about what is the proper method to use for this task: some argue that it is best to have judges change the meaning of the words in order for the texts to reflect modern society; others argue that laws should be interpreted according to the moral perceptions that are current with society at the time; some believe that the only correct way to interpret a legal text is in terms of plain meaning, or with respect to the intentions the framers had when they had written the texts. These opinions do not satisfy the problem of accounting for technology that comes into existence after the laws have already been written. Technology is a problem because it can infringe on the rights of individuals in terms of trespassing, stealing property, etc. When these problems are taken to courts, judges have to solve them by including technology within the meaning of the words in legal texts, while making sure they are not making undemocratic decisions by creating new laws. The question then arises: is it defensible for the judicial branch to expand the meaning of the words written in legal texts through their interpretations while still upholding democracy?

The unforeseen circumstances that occur after laws are written are not simple problems to solve. There is no definite method to do this, but there are many theories about which may be the best option. Some theorists believe they do know the correct way to handle this problem, such as Antonin Scalia who advocates different types of originalism, or Ronald Dworkin who argues for constructivism. The advancements in technology could not be predicted at the times the laws were enacted. This would not be a concern if technology was not capable of violating the rights of individuals, but it does have this capability and it has often been used to do this. The impact

that technology has on the law is usually discovered as problems arise; in other words, the issue is made known when it comes up in court by someone who feels his or her rights have been infringed upon by another person's use of technology. At this point is it too late for the problem to be solved through the legislative process where laws are amended or created. Instead, the judges have to interpret the laws that already exist, and apply these interpretations to the cases before them.

When the American government was established, it set out to protect its citizens' rights to life, liberty, and the pursuit of happiness. For the government to maintain its validity, it has to uphold the democratic ideals that it had set up for itself: it will respect the Constitution as a legal authority, and maintain the separation of powers of elected and appointed officials to ensure that no one gained control over another. Since then people have been allowed to enjoy their unalienable rights from the government and from other people. Though the success of this goal has been and continues to be disputed throughout the history of the nation, it still provides a basic principle of the purpose of law: that it is to protect the rights of individuals, and work toward ensuring a fair, safe, and well-functioning society in which individuals have been integrated into. The Constitution and statutes are written laws that list out what individual's rights are, as well as what limitations there are to prevent the infringement upon the rights of others. People who are found guilty of breaking laws are punished according to how severe their acts are.

Technology today has been capable of doing things that make people feel their rights are being violated. This is true even though some rules or limitations of using technology have not been established within the law. This is due to the fact that today technology is created or innovated at a highly increased rate, especially compared to the rate technology used to increase

at the time the nation was founded. Currently there are cases where people have used technology to “steal” digital information, but it has to be determined just how much of this information is truly private property. There are cases where thermal detection devices, computer programs, etc. have gained access inside a person’s home, but can it be said that privacy is being violated since something non-physical is being used to gain the access? Questions such as this are now being asked by the courts when they interpret legal texts.

There are some legal theories that allow for definitions in the law to absorb new items that develop over time. Still, there are some theorists who say that if the laws are so flexible and easy to modify at any given time, then there really is no law at all. It is understandable that people should be wary of allowing the meanings of laws to change, because at some point individuals may feel inclined to take advantage of them, or not find them to hold any authority over the governed. If laws are not changed by the courts, but merely expanded within reason, then perhaps judges could help solve the problems that technology brings into their courts and still maintain the democratic ideals in which the nation was founded upon.

This thesis will work toward justifying that it is defensible for the judicial branch to expand the meanings of the words in legal texts. Judges cannot outright change the words, or create its own legislation because that would be undemocratic. But, judges need to be able to expand the meanings of the words so that they can make good decisions for their court cases. A legal theory that discusses this kind of method is legal pragmatism. It claims that since there is no correct answer for any decision a judge makes, the best answer still needs to be found. Judges need to use discretion in order to find the best answer, while making sure not to ignore what is written in the legal texts, as well as maintaining the former meanings of the texts even when these meanings are not so obvious. There are other legal theories that are more popular with both

theorists and judges, which include originalism, legal positivism, and constructivism. The following will examine the components of these theories, as well as those of legal pragmatism, in order to argue that legal pragmatism is the best interpretive method for judges to use.

Before discussing the legal theories that have been chosen to be represented in this thesis, it should be made clear that the only concern that exists in this section of the project is how the theories establish their methods for legal interpretation. Some of the theories, such as legal positivism, express ideas such as where laws are derived from, what the purpose of law is, who has the authority to legislate, and who should execute laws and in what manner. Although these are all important aspects of jurisprudence that deserve to be discussed, especially since new laws can be written to alleviate the problems that technology poses, these aspects will not be discussed here. The focus is simply to see how each of these theories decides how legal texts ought to be interpreted by judges in order to accommodate the issue of technology when they are faced with it in their courtrooms.

## 1. Originalism

### *1.1 Introduction to originalism*

One of the more conservative, if not the most conservative, methods for legal interpretation is Originalism. Originalism can be divided into three subcategories: original intent, original meaning, and textualism. Original intent interprets the Constitution according to the intentions of the founders who had written it, whether these intentions are explicit in the text or not. Intentions are determined by using the Constitution itself along with any sources that have been left over from when the text was drafted. This form of originalism is not going to be a topic of discussion though, since the originalist who is focused on in this section rejects this particular

subcategory. The other two subcategories, textualism and original meaning, are considered together in this discussion because, although they are not identical, they share characteristics and in theory they can both be practiced by a judge without conflicting with one another. This is true only if each subcategory is applied to a certain type of legal text. This view is both prominently argued for and put into practice by U.S. Supreme Court Justice Antonin Scalia, for he is a textualist when interpreting statutory laws and argues for original meaning when interpreting the Constitution.<sup>1</sup> In this section textualism and originalism will be discussed in general, after which focus will be placed on Scalia's reasoning for advocating these methods of interpretation for statutory and constitutional law. Scalia is a well-respected court justice, and although he is not the only one to propose either one of these theories as the best option for interpretation, he is one of the few who puts both into practice.

## *1.2 Textualism*

Textualism is a straightforward theory of legal interpretation, where the law is understood in terms of plain meaning, so semantically there is no question about what the words used in the law's composition mean. Another way to consider it is this: "It is possible to put down marks so self-sufficiently perspicuous that they repel interpretation; it is the thesis that one can write sentences of such precision and simplicity that their meanings leap off the page in a way no one—no matter what his or her situation or point of view—can ignore" (Fish 161). Though the idea of interpretation is employed in the process of this method, what should actually be occurring is the reception of the words, which as Fish points out is the same reception for anyone because the words do not have to undergo transformation in order to be understood. The judge acts upon this received information of the law and makes a ruling according to it in his court

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<sup>1</sup> Hereinafter "originalism" will refer to original meaning in this paper, and "originalist" will mean one who advocates and/or practices original meaning.



case. The text of the statute itself governs, and not the intention of the lawmakers who wrote the statute or the historical background that was involved in creating it. Staying true to the textualist method, no court justice should have the opportunity to interpret laws to suit his own taste, or that of the collective judicial branch. In theory the judicial branch would not be creating laws, which in a true democratic system is a job meant for the legislative body.

### *1.3 Original Meaning*

Originalism involves similar rules to that of textualism, but its overall method is more complex. Just as in the textualist method, the originalist method of original intent takes the literal meaning of the text, but in addition it also considers the intent of those who wrote it (Ely 1). It should be noted that this additional characteristic of originalism is not argued by all originalists; for some, rather than caring at all about legislative intent, the meanings of the words are what matters *at the time they were drafted* in the legal text (Scalia 38). This is the original meaning theory. In this sense, if at any moment the meanings of the words that are in the laws have changed in time, the laws themselves are in no threat of change based on their reading, no matter when they are read. The only way the laws can change is through the amendment process, which has nothing to do with the interpretation process of judges. The idea is that the law itself is the authority, not the people who read its words.

### *1.4 Antonin Scalia's position*

In 1997, Justice Antonin Scalia published an essay entitled "Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws". In it he advocates textualism for interpreting statutory laws and originalism (original meaning) for interpreting the Constitution, both of which he believes are the proper methods if one is to be respectful to and consistent with practicing democratic values. The published work

*A Matter of Interpretation: Federal Courts and the Law* includes the essay, as well as responses to Scalia's argument by various scholars, and Scalia's final address in response to these scholars. The following will discuss Scalia's reasoning for promoting these methods and the criticism he received for it, after which a critical analysis will be made for how textualism and originalism cannot accommodate issues brought about by technology.

Scalia begins his essay by describing English common-law courts and how their practices involve "devising, out of brilliance of one's own mind, those laws that ought to govern mankind" (7). When practicing the common-law method of making a judicial decision, the judge takes into consideration what decisions were made for former cases, and applies them to current cases that are similar. The term applied to this process is *stare decisis*, which is letting the decision of past precedents stand. When they do this, they are not upholding statutory laws, but rather accepting the decisions of previous courts to be the law. Common-law judges have a further practice of "distinguishing" cases. This is when a judge compares the facts of a current case to those of former cases, but finds these facts to contrast with one another more than they relate. Thus he can devise ways to adjust the interpretation of the law that he deems to be the "'best' legal rule" (7). To put it bluntly, this system of legal interpretation, Scalia warns, allows these judicial opinions to "invent" the law (4). American law students study this old common-law method, and, as Scalia admits, they end up embracing a system that appears to reach the goal of doing "good law" and, when they become judges, they continue to uphold this tradition (9).

There are two ways to consider the common-law method of judgment: though it may not lead to perfect results, it can lead to the best results possible; or, as Scalia explains, this judge-made system of law goes against democracy by ignoring the purpose of the separation of powers, no matter how positive the court decisions turn out to be. Before Scalia explains how his ideas of

interpretation are the proper and democratic alternative to common-law lawmaking, he discusses how others share the sentiment about judge-made law. From *The Federalist* No. 47 he quotes Madison who said, “Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul, for *the judge* would then be *the legislator*” (10). He also quotes Robert Rantoul, who in an address proclaimed, “Judge-made law is ex post facto law, and therefore unjust,” and also “The judge makes law, by extorting from precedents something which they do not contain” (11). These criticisms offer support for Scalia’s idea that scholars need to get away from trying to “devise the *best* rules” and work toward finding out if there are any “good or bad rules for statutory interpretation” (14). A good rule is one where the judge objectively interprets a statute to apply to a law, and while doing so he does not in turn *make* a law. He certainly means this for interpreting the Constitution as well. Scalia sees other issues though when it comes to statutory interpretation, one which is that judges try to understand laws through the “intent of the legislature” at the time a particular statute was created (16). This means that instead of focusing on the words themselves, they look at what the legislature intended the words to mean. This could include a possible hidden message, or it could be assumed the legislature left the document to be abstract for the purpose of interpreting it as it is needed to be. This is not a just manner of treating the law for Scalia. He also has a problem that it has become popular for judges to research the history of the legislature when creating a certain law. This is the methodology of original intent: judges look into notes, memos and drafts written by the lawmakers, as well as find out what occurred during committee meetings and floor debates in relation to the particular law in question. This information for research also includes items that were taken out of the law before it was approved and ratified, or any words that were misspoken or irrelevant at the time of the future law’s discussion. The purpose of looking into

the history of the legislature is to gain a better understanding of the law itself, but it is obvious how this can be problematic, especially when this historical information is given an amount of authority. Scalia opposes the practice of using legislative intent and history for two reasons: the first, which he classifies as a “theoretical threat”, is that the courts are going against the “American ideal” that the law itself is supposed to govern and not the people (17). The second, “practical”, and more problematic threat that concerns Scalia goes back to the problems of common-law judges- there is room to include their own thoughts and desires into the statutory interpretation and in conclusion these judges will be making laws themselves (18).

Scalia argues that textualism is the correct method to use when interpreting statutes because, beyond using up a great deal of time, it is not up to judges to decide what the laws are. Once a statute goes into effect, even the legislative body cannot explain what was written in such a way that the words of the law would change. This can only be done through a formal amendment process. Scalia advocates textualism because it is the direct opposite approach to using what he considers the undemocratic practice of using the intent of the legislature, and it prevents judges from unjustly creating laws in the process of interpretation.

Scalia does not give a formal definition of textualism, but he does make his idea of it clear when he says that a good textualist “need only hold the belief that judges have no authority to pursue those broader purposes or write those new laws” (23). He defends his position by discussing that laws do not have to be viewed strictly in a complete literal sense, as some would think the interpretation method requires, but rather they should be viewed reasonably. He uses the example of a case his court once faced where a firearm was involved in a drug trafficking crime. The law says that if a firearm is used in such a crime, the punishment is to be more severe than if the firearm was not used. In the particular case Scalia mentions, a firearm was used, but

as a bartering tool and not as a weapon. Scalia says that the court took the strict meaning of the law and decided the punishment should be more severe, but Scalia thought this was an unreasonable decision, even by a textualist. He found it unreasonable because “the use of a firearm” implies that it is used as a tool for threat within the drug trafficking situation and thus the person who uses the firearm deserves a harsher punishment. When the firearm is used as a bartering tool, it replaces money or another object to barter with, so no additional threat was involved.

What Scalia also uses to defend his position on textualism is that it does not allow for there to be a “judicial power grab” when a law seems to be ambiguous and difficult to determine. When there is ambiguity, the practice has been to allow for a certain amount of leniency to a certain entity involved in the case. Scalia rejects this practice, saying that giving leniency to any side in a case is not staying true to the law, but rather using an artificial rule to serve some other purpose (29).

Scalia moves on to his idea of how the Constitution is to be interpreted, and he does so by arguing that the alternative to his position is wrong. With the Constitution, he finds that the same issues for interpreting statutes hold, but in addition the Constitution has a distinctive problem, and because of this it cannot be interpreted in the exact same way as statutes. Scalia makes this important statement:

In textual interpretation, context is everything, and the context of the Constitution tells us not to expect nit-picking detail, and to give words and phrases an expansive rather than narrow interpretation- though not an interpretation that the language will not bear (37).

Scalia's quote points out that the Constitution does have an amount of abstract detail to it, so that just reading the words alone will not provide for the best interpretation. What needs to be done then is to employ the interpretive method of original meaning to the document. As a reminder, Scalia does not wish to allow for legislative intent to play a role in the interpretation as other kinds of originalists allow. He still looks for the meaning of the words, but he goes further and wants to know the *original* meaning of the words, as in what the words meant to those who drafted the Constitution at the time it was drafted. This way, because the document is expansive and seemingly abstract, words included in it that have changed due to social circumstances or for other reasons will not be changed in the document itself. "Current meaning" is nothing to worry about in Scalia's case because it is original meaning that is important (38).

"Current meaning" does play a legitimate role for many who interpret the Constitution however, for they think it is important that the words of the document have to reflect a current social situation. This is something Scalia focuses most of his originalist argument on. He rejects the popular idea of a "Living Constitution", something which many people believe is the true way to interpret the document since it is meant to be the law for an evolving society, and it can be read as vague in some instances which should certainly support the idea that the document is "living". This could suggest that the meaning of the Constitution is supposed to change. Scalia argues against this, saying that nothing suggests that it can be changed in the actual document and one of the purposes of this document is to prevent itself from being changed. He also states that the idea of needing an evolving constitution in order to accommodate a changing society would actually give "constraints" or "new inflexibilities" on political action (41). The government will face new restrictions upon itself rather than getting rid of old ones. To Scalia,

since the government represents society, in turn these restrictions prevent social change rather than support it.

Finally, one other important aspect to Scalia's argument that a Living Constitution should be rejected is that, if it was interpreted as living it becomes a document of what it "ought" to mean rather than what it does mean, which happens when the courts interpret it the way that either it or the majority wants it to change, making it a meaningless document that does not govern the people (47).

### *1.5 Remarks and criticism of Scalia's originalism*

Scalia has gained a great amount of criticism for the views he wrote in his essay. Gordon Wood claims that there is a long history where the duties of the legislative branch apparently merge with the judicial branch (60). One can assume Wood is mentioning this because as it has been a practice continually carried out, it must be what the people want. Scalia brings up the point, and seems right to do so, that even though it has happened for a long time, it does not mean that it is the correct thing to do (131). Laurence Tribe claims that what Scalia is doing with the Constitution is trying to find out what the drafters were trying to do explicitly and not what they were intending to say implicitly, a criticism borrowed from Dworkin on how Scalia is looking at the wrong set of intentions. (67). It can be assumed that the drafters did have implicit intentions because it is a part of human nature to have these kinds of feelings, even back when the Constitution was created. Tribe also makes an interesting argument, saying that whenever a new amendment is added to the Constitution, since the Constitution is a whole document and not just made up of parts, the addition does end up changing the original meaning of the Constitution (86). This means that even to look at the document from an originalist point of view, the original document does not remain the same anyway.

Dworkin claims that Scalia is inconsistent with his arguments. He states that there is a "crucial distinction between what some officials intended to *say* in enacting the language they used, and what they intended—or expected or hoped—would be the *consequence* of their saying it" (116). The idea is that “what they expected or hoped” would be something they imply in the words, without outright saying them, and hoping that people would interpret the words in how they wanted them to mean without having to specifically write them in that way. From Scalia’s essay Dworkin finds that he is describing two different types of originalism- “semantic” and expectation”- and he fails to interpret according to only one type throughout his piece even though Scalia makes no distinction. After all this criticism Scalia maintains his views, and today he still practices originalism when he makes his court judgments. Still, his critics pose doubts that his methods of interpretation are the best methods, and what he is fighting against—allowing for change in law in any moment of the process of legal interpretation—may not be so undemocratic after all.

An interesting observation made by Richard Posner, not specifically in regard to Scalia’s essay but for interpretation in general, is that a word only gains meaning when “ linguistic and cultural understandings and experiences are brought to bear on the text” (Posner 1990: 296). Words mean nothing on their own, so often in courts the use of precedents is necessary. He says that “we cannot ring up the framers” in order to see if the words they wrote are being read properly, so using their original meaning is never a guarantee that law is interpreted properly. Basically there are moments when a court justice will need support for the reasoning of his decisions, and an originalist would be left on his own if he remains strict on his conservative practice.



One thing is for certain though which Scalia is right to argue, and that is that judges should not create laws. Laws should not reflect their personal preferences or moral values, especially since they are non-elected members of the government who are not in the law-making position that is granted to a separate power. However, it is a good idea to allow for at least words to expand in their meaning while they are a part of constitutional laws and in some instances of statutory laws as well. If the judicial branch took liberty with doing this, it should be done in such a way as to reflect the *need* of the nation, and not the *want* of the judicial court, a group of people, or even the whole nation. The point is that there could be a moment (this is a hypothetical example with a hypothetical rule) when a technological innovation is created, and it can be used to take the place of an individual who instead of using his own body to trespass onto someone else's property, since this hypothetical law prohibits bodies from trespassing, he uses his technology to do so. When the person with the property takes this situation to a court, although he knows his rights were violated, there is nothing in the law saying so since it was not done by the physical body of the accused. In this situation the word "body" ought to be extended to include "anything used in place of a body, physical or otherwise."

Scalia did mention that sometimes the law does not always accommodate unforeseen circumstances when it is written, and he specifically brought up the point that "the exercise of judgment" is needed in situations such as what to do when the First Amendment, which guarantees free speech, is faced with new technologies that at one time did not exist (45). This is the exact point which goes against what Scalia is arguing throughout his essay- judgment is needed when the original meaning of the text is not adequate for certain situations. What is troubling is that Scalia, instead of addressing a further solution to this problem, called this type of issue "negligible compared with the difficulties and uncertainties" of allowing for the

Constitution to change (45). He also admits that the originalist “does not have all the answers, [but] has many of them” (46). In this section he fails to not only provide an answer for how to obtain the rest of the answers, but before this he does not seem to recognize that the entire world is affected by technology, that it will not always be (and probably has not been) as “negligible” as he wants to believe. The rest of the answers that the originalist does not have, is likely to be in the possession of one who has a different method of legal interpretation, and who can handle the circumstance of technology posing a real problem upon legal texts.

## 2. Legal Positivism

### *2.1 Introduction to legal positivism*

In jurisprudence, legal positivism is a modern legal ideology that primarily focuses on what law is, and based on this it seeks to answer legal questions related to its focus, such as how legal texts should be interpreted. Legal positivism advocates law as a socially constructed entity, that law’s nature is derived from rules and principles that are specifically enacted by the government. It follows the idea that there is no necessary connection between law and morality. Even if there are instances in written laws that are compatible with ideas of morality, this is just out of coincidence, because laws are created by human beings for the purpose of developing and maintaining a successful social structure.

A legal positivist does not base legal judgments with justice as the focus, and typically it is not important for the theorist to be concerned about society’s obedience to law or finding a way to give ethical justifications for what rules there are. Legal positivism leaves room for lawmakers to make adjustments in the law for the sake of correcting or protecting the social

structure, and it is assumed that this will have to be a continuous process as society constantly changes. As society changes, according to a legal positivist, there leaves open possible gaps in the law, or in other words if a legal case is brought up, there may not be a rule that exists in the law to solve it. This coincides well with the idea that technology also creates gaps in the law, for not only is technology a product of society, but technology affects or alters it as well. One who is popular in this school of jurisprudence is the late British legal positivist H.L.A. Hart. He offers an idea for how to alleviate the problem of these gaps in the law that arise and when legislators perhaps will not or cannot create a new law or alter a current one at a time when it is needed. Hart's ideas relate to this project's interest in legal interpretation because it focuses on judges interpreting laws as a first step, before they finally make their seemingly profound decisions on the law. To an extent Hart's arguments may help solve the problems technology imposes on the law whenever new innovations come into existence. At the same time this is problematic because the method goes against democratic ideals since it gives the judicial branch a great amount of power than what it was intended to have when it came into being, which overlap into the powers of the legislative branch.

## *2.2 H.L.A. Hart's position on legal positivism and legal interpretation*

Though it is pointing to the obvious, all legal positivists believe that law is posited, or established, by society rather than it being derived from nature. Not all legal positivists agree on how this is done though. Hart makes his arguments about how law is posited after criticizing the ideas of John Austin, another well-known English legal scholar, as incorrect. Austin argues for what is known as the command theory of law, which is the idea that courts should only recognize the legal authority in the commands of the sovereign. The sovereign is the entity that society obeys habitually, as there is a threat of punishment if it is not obeyed (Austin 166). Austin's

theory could not work in a democratic society since it is elected officials who make the laws, so the lawmakers serve the public rather than the other way around. Hart's issue with the theory is that it is not complete. Austin only focuses on one type of rule, which is one that makes people "do or abstain from certain actions, whether they wish to or not" (Hart 81). Discussed shortly will be Hart's ideas of primary and secondary rules, and what Austin argues for is what Hart considers a primary rule. Also, Austin only describes one type of primary rule, which is the type that restricts freedom. He leaves out the kind that allows citizens to contribute to the structure of society, such as through the creation of contracts that bind them to do certain things. Hart believes Austin needs to include other primary rules as well as secondary rules in order to have a complete legal theory.

Hart views law as a combination of primary rules, which are the rules of obligation, and secondary rules, which are the rules of recognition, change, and adjudication. As a reminder both primary and secondary rules are not intended to reflect a moral perspective. The rules of obligation are what govern conduct by the members of society, such as through contracts as previously mentioned, or as another example, through criminal laws that prohibit certain acts and provide punishments for when these acts are committed. Secondary rules are empowering, meaning they allow for laws to be created, changed, or taken away. They also provide the means to evaluate primary rules. As contracts are examples of primary rules, contract law would be an example of a secondary rule since it decides how contracts are to be made. As Hart explains, secondary rules *are about* primary rules, that "[t]hey specify the way in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined" (Hart 92). Secondary rules permit the interpretation of primary rules, which are used by both legislators and judges. Both can make alterations to legal rules according

to legal positivism, which is a unique status given to judges since they are not of the branch that was meant to legislate.

There are not enough laws to cover all cases, which would not be true if society never evolved. However, since it does, Hart believes these gaps in law exist, and judges often encounter them in their courtrooms. It is a problem when there is not a legal rule to guide a judge's decision for a particular case in court. An originalist would be at a standstill in this situation. When these situations arise, at no point can judges wait for legislators to take care of them by making new laws. Hart's solution is to allow for judges to alleviate the problem on their own: "[Judges] should act as deputies to the appropriate legislature, enacting the law that they suppose the legislature would enact if seized of the problem" (Dworkin 1980: 82)<sup>2</sup>.

Returning to secondary rules, there is one that is important for this task: the rule of recognition. This rule "specif[ies] some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts" (Hart 92). Basically it is a social practice that determines the validity of rules, and in the U.S. this is conducted by legal officials. Legal scholar Joseph Raz, who often discusses the ideology of Hart, makes the observation in *Between Authority and Interpretation* that people who follow Hart's ideas view the Constitution as a rule of recognition, and that:

Since the rule of recognition exists as a practice of the legal officials, it is, as it were, a living rule, a rule sustained by *current attitudes and conduct*, and not by what happened at the point it came into being. Hence, since the constitution is the

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<sup>2</sup> Dworkin does not advocate this view; rather he describes this scenario that occurs in practice when solving hard cases—cases with no settled rules—which Hart does advocate.

rule of recognition, the constitution's authority derives from the current practice of the officials and not from the authority of its makers (333).

If rules of recognition are “living”, or that they always change and grow in meaning, then the Constitution does this as well. As noted in this excerpt from Raz, authority is not bound to the framers of the Constitution; instead those who determine its validity and make changes have the authority. Since judges have to use the Constitution (as well as other legal texts depending on the situation) to make legal decisions, they have authority to change it when they deem it as incapable of solving some legal disputes. In other words, judges themselves can create the law.

Hart's theory resembles a method of constitutional interpretation which is known as the Living Constitution Theory. This theory was strongly advocated by Justice William J. Brennan, who explained that the Constitution is “a living document subject to contemporary ratification” and that it is up to judges to interpret the document “to promote human dignity in light of society's changing values and needs” (Adams 1319). Attempting to remain true to the intentions of the framers of the Constitution has no effect for contemporary issues, since society itself is continually changing. Theorists such as Brennan feel that the Constitution is meant to be read in this light, and that any changes that occur to the document is not limited to the process of formal amendment. This means that judges can take it upon themselves to make changes if in fact it works for society's current situation, whatever that might be at any given time. This theory differs from Hart's in the sense that it does not consider the same rules and categories as support for the Constitution to be able to change that Hart's theory uses. Even still, the Living Constitution theory attempts to achieve the same results as Hart's theory, but it also faces the same problems as Hart's in regard to upholding a democratic system.

### 2.3 *Remarks and criticism of Hart's legal theory*

A positive aspect of the flexibility in lawmaking that legal positivism permits is that, by filling in the gaps in law, it could potentially solve disputes at a faster rate than how they would be solved if other legal theories were practiced. Recall in the first section when Scalia recognized but then quickly dismissed the problem that technology poses on the law when it is not accounted for in legal texts. By allowing judges to not only interpret laws, but to alter them as well, technology would not pose the burden of surprising the courts with questions they can find no answers to. The courts can take the legal texts into consideration, but they may also pay attention to where society stands at that moment in time, and make their decisions based on where and how society has developed. This system seems as though it would be the most ideal for solving legal issues, but this would only be true if the society that sanctioned it also permitted democracy to be compromised.

Even though this theory would accommodate advancements in technology whenever they arise in court, it does not set any boundaries for judges. While other branches of the government have boundaries, as well as those who are governed, it would be undemocratic to not expect the same limits for judges. But once again, this theory does not have much concern for reason or justification; rather it is concerned with keeping the society's structure intact and so boundaries and limits, for the most part, are ignored.

The separation of powers exists in the United States for the purpose of not allowing one body of government to have too much power. In Article I Section 1 of the Constitution, it states "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Congress is the only branch that is

meant to legislate, and according to the nondelegation doctrine, Congress cannot delegate that anyone else or any other branch can create laws. Therefore a judge cannot create laws or interpret laws in a way that goes against what the legislative branch has created.

Using the Constitution as a means to argue that this theory within legal positivism is undemocratic has its obvious setbacks—one can claim that under a special and necessary circumstance the Constitution can be changed for the purpose of allowing other branches to legislate. This does not satisfy the need to remain democratic. Society has expectations, and as long as it wants to be democratic, certain rules do have to be obeyed. Democracy should not be compromised for the purpose of convenience, and so the answer for what to do about the problem of technology has to be sought through the method of a different legal theory.

### 3. Constructivism and Law as Integrity

#### *3.1 Ronald Dworkin's position*

Ronald Dworkin has touched upon and argued for nearly every aspect of law for over the last thirty years. His jurisprudence provides a unique method of legal interpretation, so it is his ideas that will be the focus in this section. He has several ideas that relate to the interpretation of law, especially since he finds that law would not exist if it was not interpreted (Dickson). The importance here is how Dworkin believes laws should be interpreted, which is that of a constructivist method based on society's evolving perspective of morality. This method, he argues, upholds "law as integrity," which involves legal claims that are "interpretive judgments and therefore combine backward- and forward-looking elements" (1986: 225). The backward-looking elements are what the actual written words are, and the forward-looking ones are the



reinterpretation of the text that continually occurs. His arguments may seem to work appropriately in the modern age, since society has shown to continually change and unlike an originalist Dworkin finds this needs to be reflected upon not just in lawmaking but especially in legal interpretation. However there are instances of contradictions within his arguments, and like Scalia's arguments previously Dworkin's ignores the problem of what to do about technology when it bears on legal texts. Instead he focuses on making arguments from morality, which are difficult to defend because people have never shown to share a universal moral standing. The following sections will discuss Dworkin's opinions on legal interpretation, which do not read as consistently as he claims. They also do not solve the problem of how to accommodate new technology that could be problematic by infringing on individual's rights.

Dworkin advocates a method of legal interpretation called Constructivism, which is an ideal method that combines an evolving moral reading of the law with the notion that the law also has settled and unchanging aspects. This dynamic in interpretation, according to Dworkin, is what leads judges to a full explanation of the law that can be applied to any case brought before them. When practicing this method, the key conception for a constructivist is to consider "law as integrity" (1986: 225). Law as integrity upholds the idea that laws are created and sanctioned by society, and these laws need to be interpreted in respect to this. Interpretations also have to be consistent with the judicial decisions made in the past, which should be based on the intentions of those who wrote the laws. Further, for a law to be a *true* law, it has to be based on "coherent principles of fairness, justice, and procedural due process" (1986: 177). Keeping this in mind will lead judges, in theory, to the best interpretation that will give equal consideration to everyone involved in particular court cases.

To begin the process of interpretation, judges have to assume that lawmakers uphold law as integrity as well, and continue to make laws that are coherent and that each law honors the will of society. The interpretive process then involves judges identifying rules and justifying them, making sure that, while taking into account the will of modern society, the interpretation remains true to the words of the text. Unlike in legal positivism, as Dworkin will point out, laws cannot change on a judge's or on society's whim; the laws can only adjust in their meaning according to new perspectives on morality.

Though judges cannot change laws outright, they should also not interpret a legal text so rigidly that it would not provide room for further improvements to interpretations if society's notion of morality continues to change, which it inevitably will. Dworkin demonstrates his point on this by giving the example of "the chain novel" in *Law's Empire*. In this scenario, a group of writers work on a novel together, with each author writing his own chapter. "Each has the job of writing his chapter so as to make the novel being constructed the best it can be" (229). The author currently writing his chapter has to interpret the previous author's chapter, and write his own elaboration based on the interpretation he has made. Not only that, but the author also has to make his chapter coherent for the next author to be able to understand what is occurring. The next author has to do the same. The idea is that the novel will include the varying ideas of each new author based on how the novel began, but it will maintain continuity and will read as if it was written by a single author and not several throughout time. This is exactly how laws should be written, interpreted, and maintained according to Dworkin.

Since Dworkin believes there are no gaps in the laws when they are interpreted in the proper constructive method, meaning that he believes there are enough laws to cover any case that could possibly be brought to court, he finds that judges are capable of determining the "one

right answer” for any legal question that will arise (1986: ix). This one right answer will treat members of society with fairness and justice, and because it is the right answer it ought to be sanctioned by a majority if not everyone. It should be noted though that Dworkin does not base his arguments on a utilitarian outcome—a legal answer may be best even if more people claim to not prefer it than those who do. It seems that this idea would work in regard to obligating judges to reach a goal rather than allowing them to do with the laws what they will. This idea gives respect to maintaining law as integrity, and it would be ideal if decisions truly are the best if they are morally-based.

When law as integrity requires judges to understand that laws were all created by society and that it expresses society’s ideas of justice, for Dworkin it is understood only through morality. Dworkin emphasizes that the Constitution must be read with a moral eye, meaning that when it is interpreted it should be done so through the perspective of where society’s morals lie at that moment. To demonstrate this idea, one should consider how ideas of “cruel and unusual punishment” in the Eighth Amendment have changed over the years since the amendment came into existence. At one time it was morally permissible to punish someone via shackling throughout the criminal’s entire incarceration, or through the different methods of lynching that often resulted in death. Over time these punishments and several others have changed from being standard to becoming cruel and unusual, all due to the changing moral perspectives of society. In this sense Dworkin is correct to argue that interpretation in laws should reflect this. However, an improved moral reading does not work in every instance where the law needs to be interpreted, which is a topic that will be fully discussed after the summary of Dworkin’s views are presented.

Though Dworkin admits that a moral reading of the Constitution is “often dismissed as an extreme view” and that “mainstream constitutional theory...wholly rejects that reading,” he finds

that other interpretive theories are flawed because they do not recognize the moral basis involved during the drafting of the Constitution (1996: 46). He often criticizes the legal theories of other scholars, especially in how they argue legal texts should be interpreted. He is against Scalia's version of originalism because of its inconsistencies and inability to reflect society's changing point of view of morality. Dworkin finds problems with legal positivism, specifically in regard to Hart, saying that Hart's theory is incomplete because it does not appeal to anything more than rules, and there needs to be more in a well-developed legal theory, such as combining the new moral standards with previous interpretations. Without doing so, there would be gaps left in the law, which do not exist unless someone uses an improper method of interpretation.

Dworkin justifies the moral reading of the Constitution by examining what is written in the First Amendment—it is a moral principle that people have the right against the government censoring what they say. Dworkin adds in his argument that the Constitution must be read abstractly because it was written that way on purpose: “These principles are understood to be both fundamental to the Founders' intentions and the primary focus of correct constitutional interpretation faithful to those intentions” (Whittington 197). This means that the founders had a variety of intentions if they had put so much importance on being abstract rather than concrete in their language. *Free speech* is an abstract moral principle according to Dworkin because in particular the meaning of the word ‘speech’ is abstract. If speech is meant only to be utterances a person physically makes, then it is not abstract. But those who interpret the Constitution have included speech to also mean, as just a few examples, protests, rallies, ‘messages’ written on or implied by garments, and even ‘vows of silence’. Anything that can express a person's thought is now considered a form of speech.

### 3.2 Remarks and criticism of Dworkin's constructivist theory

Although there are parts of Dworkin's theory that may work for some legal cases, there are some apparent conflicts within his arguments. For one, lawmakers must make laws coherent, and in turn judges should see these laws as coherent. Judges are *assuming* lawmakers are making laws that are coherent, fair, and are according to the will of society. They do not actually know if this is the case though, and they could make an interpretation that goes against the actual intentions of the lawmakers. Part of adhering to law as integrity is that judges are supposed to always consider legislative intent in addition to everything else involved in the constructivist method. When Dworkin is criticizing others and states, for example, "You will understand my concern about Scalia's consistency," one would expect Dworkin to be concerned about his own consistency as well (Scalia 121). Further in his criticism of Scalia's essay in *A Matter of Interpretation*, Dworkin explains, "...some of what I have written might strike Scalia as saying that the Constitution itself changes, though I meant the opposite" (122). For Dworkin, judges then must keep the "faith with past decisions". But then when a topic comes up, such as when judges at one time decided that the rule *separate but equal* was at one time legal but eventually decided it was unconstitutional and therefore illegal to separate people based on their skin color, this new interpretation does not uphold any prior judicial decision.

Another problem with Dworkin's argument is that morality is not universal because society is diverse in regard to its members, and so there are disagreements about what is right and wrong. Judges cannot make a ruling that satisfies society's current moral perspective. There is no such thing. Instead a judge would most likely base his judgment on his own moral views or those of the members of his political party. Even if it was possible to have universal moral principles that differed nowhere in the world, that does not solve the problem for technology.

“[N]othing but confusion of thought can result from assuming that the rights of man in a moral sense are equally rights in the sense of the Constitution and the law” (Holmes 167). Critics find that Dworkin fails to show how to actually establish a connection between moral rights and the Constitution, or that they do not understand his reasoning for combining the two since it seems that moral laws are different than the laws that are needed to set up a proper functioning society. When Dworkin is arguing for his position, he makes everything sound as if it belongs in a moral realm—technology does not necessarily have anything to do with morality. A popular example is the “No vehicles in the park” rule. Over time vehicles have changed and have become more refined. At one time a vehicle was only a person’s feet or his horse, and then as time continued eventually carts, wagons, and bicycles were invented, long before there was anything such as an automobile or an all-terrain vehicle. Now in the modern day skateboards, man-powered scooters, and roller blades are often used as vehicles as well as for recreation—are all of these prohibited from the park, or just the vehicles that existed at the time of the law’s enactment? If someone was being pulled in a Red Flyer wagon, is he not permitted in the park? These examples have no relation to morality. The rule for no vehicles in the park is probably just to ensure safety and comfort within its boundaries. The interpretation has to take what really matters into consideration, which in this case is safety, so if at the time the law was enacted no such thing as a Harley Davidson motorcycle existed, it would automatically be included in the rule’s definition of “vehicle” without having to make a new rule or without having to consider what the moral implications are.

It would be helpful to make a distinction in order to clarify when Dworkin’s theories might work for interpreting the law and when they may not. Dworkin focuses on rights themselves, which are important, but he does not include what to do when someone or something

infringes on these rights. Constitutional and statutory laws include both what rights there are and how these rights are protected, so they both need to be accounted for. In some cases when a decision is made that reflects the majority's will on a subject, such as when women and African Americans were given the equal right to vote, then considering this a morally-based decision is acceptable. But when something occurs that some people feel infringes on rights, such as when digital property is freely distributed via the Internet or when radiation detectors are used to collect data from inside a person's home without anyone physically entering the site, new interpretations of the law have so somehow reflect these innovations even though there is no moral basis to any of it.

When there is a legal question, it is curious how one is to arrive at the "one right answer" when interpreting the Constitution since, as Dworkin claims, it is an abstract text. If it were a concrete text, then this opinion would be different and it would be easier to justify Dworkin's one right answer thesis. When making his argument about upholding law as integrity, Dworkin argues that the legal texts are abstract so that there is some flexibility for interpretation by judges in the future. However, if these laws are abstract and flexible, they can have a number of answers that may work depending on whose opinion is being sought.

Also, it seems that Dworkin, though he states there is one right answer, he does not explain how to overcome opinions of the law and morality being so different and incommensurable within society. It would be more beneficial to save effort into trying to find what is potentially impossible as a correct answer and find a good answer that works well for the given situation.

## 4. Legal Pragmatism

### *4.1 Introduction to legal pragmatism*

The previous sections describe how the most popular traditional and classical legal theories are all inadequate interpretive methods for the task of interpreting constitutional and statutory texts, particularly in the modern age. Problems arise when these texts are faced with unforeseen circumstances—the focus here is technology. As seen with legal positivism, judges have difficulties upholding democratic ideals which the government is relied upon doing. If the legal texts were difficult to interpret in the past, they are even more so now because technology is changing at an exponential rate each day, much faster than laws are made to protect people from these advancements. In effect people are experiencing major legal issues, typically because they feel their rights are being violated by either the government, or third-party individuals who, for example, find ways to electronically search personal data. Judges who interpret legal texts in traditional ways, whether they adhere to only the text of the document, or seek assistance from the precedents of previous cases, find they are stumped on what to do when the laws do not address these technologies in any way, but at the same time they are forced to make a decision because they cannot wait for lawmakers to eventually write laws to cover new issues. Before these issues with technology can be solved by the legislative process, they have been and will probably continue to be taken to court by people who feel that other people or the government has used technology to violate their rights.

A solution has been offered for the problem of interpreting legal texts in the modern technological age, one that is the best option for an otherwise impossible task. The methodological theory is known as legal pragmatism. It directly criticizes the traditional views of legal interpretation, claiming they are “overly legalistic, naively rationalistic and based upon



misunderstandings of legal institutions” (Butler). Pragmatists understand the law as having diverse aims, so there cannot be only one strict way of understanding it. As described by Brian Butler, legal pragmatism “emphasizes the need to include a more diverse set of data and claims that law is best thought of as a practice that is rooted in the specific context at hand, without secure foundations, instrumental, and always attached to a perspective.” Several people argue for this theory and consider themselves to be legal pragmatists, such as scholars Daniel Farber, Margaret Radin, and Thomas Grey. One person who is best known for arguing for the pragmatic position is legal scholar and judge Richard Posner, who has written numerous books on the issue and practices the method in his court. Posner’s approach for arguing his position is to negatively describe other legal positions, and to address the problems of interpretation in general.

The following will discuss the issues of interpretation that Posner frequently addresses, showing why he rejects the more traditional methods of interpretation. Afterward the theory of legal pragmatism will be explored as the better alternative for interpreting legal texts, specifically since technology now plays a larger role in the everyday lives of individuals and often causes legal issues for them. Based on Posner’s political arguments and the theory of legal pragmatism in general, it is possible to make room for technology in current legal texts through interpretation by judges.

#### *4.2 Richard Posner’s position*

Posner argues that there are many problems in interpreting legal texts that are either ignored or are not realized by those who practice the non-pragmatic methods previously discussed. In his writings he focuses on the importance of communication, which involves the processes of understanding and imagination, as well as the role of a community that cannot be avoided. He also points out how there is no perfect or solid method of interpretation in existence,

and that often judges will argue for a particular method and give it a special name, when really this categorization is only a disguise for their personal feelings or morals toward certain issues. Not taking these problems into account when interpreting can result in undesirable outcomes: first, judges will not provide the proper benefit to those involved in a court ruling; second, judges will maintain this trend in the future, which would be a continual disservice to the public. Posner typically discusses modern developments of law in his lectures, interviews and books, and he criticizes the way that current judges interpret the law when they put their effort into determining a moral or original meaning of a text instead of being more diligent about finding the best outcome, which is most important for all the people involved in a court case.

In his book *The Problems of Jurisprudence*, Posner points out what he believes are unavoidable aspects in communication. Communication is important for the topic of interpretation because lawmakers are involved in a form of communication when they compose legal texts; they are telling judges, lawyers, citizens, other lawmakers, etc. what the laws are. Posner says that in order for there to be communication, two important processes occur: the process of understanding, and the process of imagination. “[Understanding] is thus not a logical process, although lawyers and judges often pretend it is, but a matter of understanding people, practices, and the living environment—forms of understanding that depend on sharing the same basic life experiences” (1990: 101). Understanding is a process that is used in all forms of communication. Going back to how originalists want to interpret texts, they will argue that sharing the “same basic life experiences” has nothing to do with interpretation, and that understanding is simply obtaining the information the texts present, no matter what the circumstances are. It is more likely that Posner’s claims on understanding are true though because judges now are unable to fully understand the founders of the Constitution *because* they

live in an entirely different time period with an environment that is also different. This is true not only physically, but now virtually as well. This means the texts are not clear in themselves as originalists want to believe. Thus, extra steps need to be taken to make up for this obstacle in order to decide what to do with the law. Imagination and the “forward-thinking” of pragmatism, which will be discussed shortly, are the necessary tools for this task.

Originalists want to deny that any imagination on the part of the interpreter should be allowed to occur in the process of interpretation, meaning they cannot devise their own meanings for the words. What they do not realize though is the process of imagination needs to occur for there to be success in communication, which is important for interpretation. Posner offers an example of the reader of his book being an owner of a house, and this person is told by his neighbor that the house is burning down. “We imagine that we are seeing a house burn and telling the owner about it, and the congruence between the speaker’s intentions and our imaginative reconstruction is what enables the communication to succeed” (1990: 101). Basically, one has to imagine himself “in the shoes of the speaker” in order to realize the seriousness and overall intention of the speaker and to understand what the speaker is trying to communicate. The reason why someone would deny the importance of imagination is they believe its use could be abused by misconstruing the speaker’s message. Never mind that imagination is a natural process humans are subjected to when they are communicating, but originalists want to actively ignore this. They would have to in order to be successful with their interpretive methods. It is true that misunderstanding a legal text can occur in this process, but it is something that would have to be worked with rather than ignored.

To continue, Posner also addresses the importance of community; not just a physical community such as a municipality or people in an enclosed region, but mainly a group that

shares a language, a basic understanding of a time period, the current social structure, etc. Take for instance the modern era: the Internet has come into being and is used in the everyday lives of most people throughout the world. However, there are still people, generally in the older generations, who will claim they are unsure how to turn on a computer, let alone browse the Internet. This is a clear idea that there are two different communities of people who have the ability and who do not have the ability to use the Internet, and even from there several sub-communities can exist based on how much knowledge of the technology people have. Posner brings up the idea of community because he feels people need to share basic experiences or have a similar understanding to make legal decisions. It would be easier to interpret laws in the traditional ways that Posner argues against if people were in the same community all the time. However, “the modern judge has little in common with the draftsman of the Constitution” and this is a problem because “we haven’t a clue to how [the draftsmen] would have fitted our experiences to their values” (1990: 104). Without being able to participate in the same community as those who drafted or will someday draft legal documents, Scalia’s method of interpretation will not work, and Dworkin’s will also not work because people do not participate in what would be considered as the same ‘moral community’. This goes into the next topic, that there is no perfect interpretive method, but at this point there needs to be a way to work around this problem, and to make decisions about the legal texts that are best for the present moment.

Further in *The Problems of Jurisprudence*, Posner accuses Dworkin of arguing that right legal answers exist, no matter how “difficult and controversial” the questions are (197). But with the evidence that lawmakers are purposively inconsistent, and indeed controversial, in how they write laws, especially since different lawmakers are writing these texts over hundreds of years,

one can conclude that answers for even the same single legal question can vary depending on who is being asked.

When legal texts are drafted, lawmakers have to make a choice: they can be specific “and thereby doom their work to rapid obsolescence” or they can be general, which would give “substantial discretion to the authoritative interpreters” which is a job for the judges (1995: 233). The Constitution was drafted in both general and specific terms, for a number of reasons which can be guessed but not actually known. The parts that are general are helpful for when it is necessary for the document to be flexible, but there is the risk that it can be completely misinterpreted and therefore abused. Given this information, it can be seen that there is no solid interpretive method that would work for every legal situation. If taking a textualist perspective works in some cases, it does not work in all cases. Take for instance the Fourth Amendment, which states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

At the end of the 18<sup>th</sup> century when these words were written, wiretapping did not exist. When this form of electronic eavesdropping did come into existence, no part of the amendment forbade the taking of voice evidence to obtain a warrant for search and seizure. Should electronic eavesdropping be of no concern then when interpreting the law? Then there is the First Amendment, where the freedom of the press cannot be infringed upon. At the time the

amendment was drafted, there was no such thing as a television or Internet web logs (or “blogs” as they are commonly referred to). Should these types of media be excluded from current laws, and therefore be subjected to censorship by the government, because they were never a part of the original language in the constitutional texts? They could be, if a true textualist argues and wins his position. But that would not seem correct or fair in these modern days, especially since technological innovations like these are created more frequently and resemble certain items included in laws but are not exactly the same.

Without having a definite answer as to how laws should be interpreted, the best approach is to see which methods, assuming the judges who argue for certain theories are practicing them as well, have produced the most positive results. This is exactly what legal pragmatism is: it uses a method of inference known as abduction, where the best explanation for a problem is decided based on given results (1990: 105). It may seem to be an abstract idea, but it is a method that works in reality, and not just in theory, because one is using real results to see how to get to the most desirable outcomes. For those who worry that judges could take advantage of the apparent liberty that pragmatism allows, one needs to take into consideration that this theory is not like the legal positivist theory which does allow for judges to interject their subjective feelings into their rulings. Legal pragmatism finds the best method to follow for each particular case, whether it is to adhere mostly to what words of the text are, to maintain what the intentions of the lawmakers were, or whether definitions can be seen as flexible to allow for new items to be included within them. This is discovered through careful reasoning and through a dialogue with peers; a judge cannot make a subjective decision based on personal feelings, and if that does happen, then she is not participating in legal pragmatism.

It should be made clear that under no circumstances should a constitutional or statutory text be ignored when a judge is making a court ruling. If there is no question about what the text says, means, and how it applies to a case, in other words if imaginative reconstruction by the judge is possible, then that should be the option to choose. But when the words within a text are unclear, or if they do not explicitly include something, then obviously more work has to be done in order to make a *good* court ruling.

#### *4.3 Remarks and criticism of Posner's legal pragmatism*

Legal pragmatism has a more realistic rather than an idealistic view of the government, which is important for those who do more than just theorize about it and truly partake in its practical aspect. The theory avoids formalism. This is because formalism is “backward-looking” and puts complete emphasis on the past and gives no power to the present. Legal pragmatism is “forward-looking” in the sense that a pragmatist “values continuity with past enactments and decisions, but because such continuity is indeed a social value, not because he feels a sense of duty to the past” (2003: 71). The pragmatist is skeptical about how the past is connected to the present by those who practice the non-pragmatic theories of interpretation, to where the links could be falsely imagined. Posner is skeptical about how the traditional approach could be adequate in a world that progresses forward (2003: 72). Interpretation of constitutional and statutory texts ought to reflect how the world itself operates, for people may find it is more natural and easier to think along these terms.

Although technology is not usually addressed by pragmatists when they make their arguments for interpreting the law, the theory completely accommodates technological advancements that were never foreseen in the past. Even though it seems that legal positivism can do this as well, it does not uphold democratic ideals due to its leniency of letting judges

make subjective decisions. Legal pragmatism avoids this problem, so it has a better chance of upholding the ideals as well as allowing for the best possible judgments to be made.

The problems that technology poses on the law cannot be escaped, because there will always be people who will seek out ways to do things that would normally seem unlawful. If they can create ways to do so without actually breaking the law, they will take advantage of this liberty. An example is when people found ways to avoid copyright laws by sharing digital property of companies or individuals in small pieces that the computers can put together, rather than sharing entire files which has been deemed as illegal. People can partake in this sort of activity until lawmakers update legislation to make the new acts illegal. Until then though people's rights are being violated, and it is up to the judges to find out how to determine this when the issues are brought into their courts. In another example, if there is yet a new way to electronically spy on someone, though not physically, it should be included in violating someone's personal property or be counted as an illegal search; it depends on who is using the technology and for what purpose. A further example is the third-party law. People who hand over documents to a third party give full rights to that party to do with the documents what it pleases. This happens electronically all the time when information is passed online, for information is never between just the customer and the service provider (who are the first and second party members) because a server or digital data storage facility is involved as well, which is the third party. People do not realize this though, and they believe that since they are not *physically* handing over their documents, such as banking paperwork, medical records, etc. to a third party, they do not realize they are so easily giving away their privacy. If an incident like this occurs where a person feels his privacy is violated, when he takes the issue to court it is up to the judge to decide if the third party did indeed violate the person's privacy, even though they



were not handed physical documents. These types of issues were not foreseen in the past when the laws were written, but they will continue to occur. Until new laws are written specifically for these kinds of issues, it is beneficial to society for judges to make decisions that would yield the best possible results, without having to worry about the legal texts not being specific to each particular technological item. Besides, if the legislature disapproves of the court's decision on a particular item, they can reject the interpretation by creating a constitutional amendment, and perhaps the process to do so would be accelerated (190: 302).

## 5. Case Studies

The following section provides three court cases which all involve new technology bearing upon written laws. These will demonstrate the seriousness of the problem of technology when it is not already accounted for in legal texts, and show that it is important that judges have the ability to expand the meanings within the texts in order to provide for this kind of circumstance whenever it occurs.

### 5.1 Case Study 1: *Charles Katz v. United States*, 389 U.S. 347 (1967)<sup>3</sup>

Charles Katz made a regular habit of using a public telephone booth in Los Angeles, California. The FBI was suspicious that Katz was involved in illegal gambling, and after frequently witnessing him leaving his apartment to use the public phone, investigators decided to record his conversations by setting up microphones outside the phone booth. Whenever Katz

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<sup>3</sup> All facts of the case, background information, and court decisions were found at the University of Minnesota's website on technology and the Fourth Amendment, where PDFs of court briefs, news articles, and transcripts are compiled. See "Burt Johnson" under references.

would use the phone inside the booth, the FBI would switch on the microphones and record his half of the conversation. By using this method of electronic eavesdropping, the FBI recognized Katz using gambling terms with whom he was speaking to, and it was determined that he was placing bets. With this recorded information, the FBI obtained a search warrant for Katz's apartment, and once inside they found gambling records of interstate wagering, which is against federal law.

Based on the records found in Katz's apartment as well as the voice recordings obtained by the FBI, Katz was convicted of making illegal wagers over state lines. Katz challenged his conviction, telling the Court of Appeals that the FBI violated his Fourth Amendment rights. He expected privacy while he was inside the phone booth, and this expectation was not respected due to the electronic eavesdropping that occurred. The Court of Appeals rejected Katz's argument, saying that since the FBI did not physically invade upon Katz and that since he was in a public facility, the evidence obtained against him was rightfully used in the first trial. His conviction was upheld.

Katz then took his case to the U.S. Supreme Court. The court sided with Katz, and reversed the decision made by the previous courts. Stated in the opinion by Justice Potter Stewart, someone who closes the door of a phone booth and pays the fee for making a call should indeed expect privacy. In the concurring opinion written by Justice John Harlan, which reflected the majority's opinion of the case, he also notes that Katz was right to expect his privacy, but he states something that had once been denied by the Supreme Court, which is that the electronic intrusion of someone's privacy violates the Fourth Amendment just as much as a physical intrusion. Without a search warrant, electronic eavesdropping is unconstitutional.

## Discussion

This court case proves to be a big turning point in constitutional interpretation. For one, the justices took the idea of privacy and expanded it to mean something that at least one member of society, meaning Charles Katz, expected it to mean. Before the courts would deem a person's privacy to be respected only when he is on his own property. The idea that a person would be granted his right to privacy while in a public facility was not a reality before. In this case though the courts have decided that when a person makes an effort to protect his privacy, such as when he closes the door while inside a phone booth, his privacy should be respected.

The second point that contributed to the Supreme Court's decision as being a major turning point for constitutional interpretation is that the court expanded the "unreasonable search and seizure" clause. As a result the court overturned previous court decisions. It had taken into consideration the decision made in *Olmstead v. United States*, which claimed that wiretapping a telephone was not a true violation of a person's privacy. This is because an electronic search is not a physical search, and only a physical search is in need of a warrant before it is conducted. For the Katz case the court decided that the old tradition of *Olmstead* was no longer an adequate decision to base current court decisions on, for electronic eavesdropping is being used more frequently and will probably only become refined as time continues. A physical intrusion is no longer the only way to conduct a search. From this point on the government must obtain a search warrant if it plans to use electronic eavesdropping as a means of search.

The way the Supreme Court made its decision for the case adheres to legal pragmatism's method of interpretation. The decision is faithful to the Constitution, for it did not change any of the meanings of the words, but it did expand the meanings to include new technological resources as items that search, so now when these are to be used to search in an investigation, a

warrant must first be obtained. This kind of technology for electronic monitoring did exist for a long while, but by the time Katz's case happened the technology was used less for experimental purposes and used more frequently and with confidence as a method to accurately record information. The court realized this and made its decision to best suit the situation in this modern day, which meant rejecting precedents in order to formulate a new perspective of what it meant to "search" someone's private environment.

If the Supreme Court had been committed to the interpretive methods of other legal theories, the results would have been different. A legal positivist would not make a judgment based on Katz's insistence that his privacy was violated since he was in a public space—this would change for the legal positivist though if society as a whole felt it would be better off if it was given this right. Dworkin's constructivism would not have been able to provide an answer for what to do when technology complicates this kind of situation. A constructivist would have something to say in regard to privacy, since the idea of privacy is thought to be a product of moral thought in this legal theory, and would say Katz was right to expect his privacy. With the issue of using electronic eavesdropping in this case though, the constructivist would probably uphold the decisions made in previous cases. The reason being is that the method of search itself, electronic eavesdropping, has no moral value, and it does not pose a threat to morality more than previous means of eavesdropping or physical search. For this theory, when the law is interpreted by a judge, change or expansion to the laws should only occur for moral reasons.

In regard to originalism, this was shown to be the preferred method of the justice who dissented. Justice Black wrote that "Eavesdropping was a practice known to, but not forbidden by the Framers of the Constitution." He argued that if the Framers intended to restrict any kind of eavesdropping, they would have indicated this explicitly in the Constitution when it was drafted.

He also notes that “[b]ringing the Constitution ‘up to date’ distorts the meaning of the Fourth Amendment.” Clearly he is an originalist, and if his views had decided the outcome of the case, it would have meant that electronic eavesdropping would have no restrictions and could be used in similar future situations.

## 5.2 Case Study 2: *Danny Lee Kyllo v. United States*, 533 U.S. 27 (2001)<sup>4</sup>

Danny Kyllo was suspected of growing and selling marijuana from his home in Oregon. An agent from the Department of the Interior associated Kyllo with a woman who was under investigation for distributing the drug along with her father. This woman was the roommate of Kyllo’s sister, and the three of them all lived in the same triplex. Other factors contributed to the suspicion that Kyllo was involved with the activity, for it was discovered that his ex-wife had at one time been arrested for selling marijuana, and the agent obtained fourth-hand information that Kyllo sold it as well. Finally, before the investigation of Kyllo’s house took place, the agent obtained Kyllo’s utility records to see what his consumption rate of electricity was. A high amount of energy would need to be provided for the lights that are used for indoor plants to photosynthesize. The agent read the records as being remarkably high, although it was discovered later that he actually read the records incorrectly and the consumption of Kyllo’s house was not any higher than other houses of the same size. Still, the agent decided to use a thermal imager outside Kyllo’s house to see if there were any high concentrations of energy being released in any particular area. These high concentrations were indeed found, located at the garage and emanating through the roof.

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<sup>4</sup> As with Case Study 1, all facts of the case, background information, and court decisions were found at the University of Minnesota’s website on technology and the Fourth Amendment, where PDFs of court briefs, news articles, and transcripts are compiled. See “Burt Johnson” under references.

How this type of thermal imaging device works is it detects infrared radiation that cannot otherwise be seen by a human without assistance. It can detect different heat concentrations, and other imaging devices have the ability to provide a picture of activity through walls, such as when people, who give off high amounts of heat, move around. The type of device used in this case cannot detect this kind of activity though, so all that was recorded was heat that was emanating outside the house. No activity inside the house was known, but it was inferred that since so much energy was being released from one part of the house, it was probable that it was due to lights being used to grow marijuana plants.

The evidence from the thermal imager, as well as the suspicions of Kyllo's association with marijuana distributors, allowed for the Department of the Interior's agent to obtain a search warrant to Kyllo's house. Inside 100 marijuana plants were found, and Kyllo was arrested.

In court, Kyllo argued that his privacy was violated, stating that the government had trespassed into his home through the use of new technology. The government argued against this, saying that the technology did not trespass inside his home because it could only detect what was outside of it. Kyllo was convicted, and he later appealed. The Court of Appeals denied his motion to have the evidence from the thermal imager suppressed. After another failed appeal, Kyllo's case went to the Supreme Court.

The Supreme Court ruled that Kyllo's privacy was violated and the decision for his conviction was reversed. As stated by Justice Scalia in the opinion, "Technology may not be used to defeat the protections of the Fourth Amendment."

## *Discussion*

The Supreme Court decided that a thermal imaging device counts as a method of “search” as indicated in the Fourth Amendment. This means that if this device is used in the future to gather evidence from someone’s home, it is required that a warrant must first be obtained. What is interesting about this decision is that it was determined that a search warrant needs to be obtained for items to be investigated outside the home which do not give information of specific activity inside the home. It seems as though this would mean that when someone discards waste, such as in trash bins set out on the sidewalk, whatever is inside the bin is no longer subject to a person’s right to privacy. However, as stated by Scalia in the opinion, the majority of the court finds that “a search need not consist of a physical intrusion into a home.”

This decision does not seem to be entirely compatible with the originalist view that Scalia normally argues for, since the right to privacy is even more protected now than it was before, so this means the meaning of privacy was expanded by the court. It is not that this is a negative aspect for individuals, in fact the ruling gives a sense that the government has to be less invasive to people they are suspicious of when they have not yet obtained a warrant to use a special type of technology that is not readily available to the public. The ruling actually leans toward the attitude a legal positivist would take. However, it does not mean that all forms of search outside the home are unconstitutional, only those forms that are not readily available to the public. This thermal imager was in fact the property of the military, so the information it provided could not otherwise be known to the general public unless someone entered inside the person’s house. This means that a person’s discarded waste is still not protected as private. The justices made their ruling for the purpose that they are protecting someone’s rights against a specific technology,

which was the type used against *Kyllo*, as well as any future surveillance technology that is more refined than this particular thermal imager.

### 5.3 Case Study 3: *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (2001)<sup>5</sup>

Napster, Inc. was a peer-to-peer file sharing internet service, where users could download music files onto their computers from the computer of another user. Napster used an indexing system where all the computers of the users would be combined onto a server, permitting the server to easily search all the computers whenever a file request was made by someone.

Basically Napster enabled individuals to receive and give away music for free, rather than having to purchase it. Record companies were losing sales, and artists were not receiving royalties since their music was not being purchased, even though it still reached a large audience. “Close to 30 million American adults have downloaded music files over the Internet and it has been one of the fastest growing Internet activities in the past half-year” (Graziano). This quote is taken from an article written in 2001, and at that time an astronomical amount of music was being distributed but not paid for. Another problem with this is that some music was being distributed among users before it was ever officially released by record companies, which meant that at no time was this music originally purchased.

This particular incident occurred and it sparked two lawsuits. Artists Metallica and Dr. Dre separately sued Napster for making their music available to a large audience before it was officially released. Eventually record companies came together and filed their own lawsuit against Napster.

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<sup>5</sup> A PDF of this court brief can be found at <http://www.copyright.gov/docs/napsteramicus.pdf>



A&M Records, as well as many others, including Sony Music Entertainment and MCA Records, sued Napster for liability of copyright infringement under the U.S. Digital Millennium Act, claiming that Napster's users were directly infringing copyrights, that Napster was responsible for contributing to this, and that the company also sought to gain from the act financially. Napster argued that its users were not violating copyright law, because they are protected under the Audio Home Recording Act, where individuals can record music they had previously purchased into other formats, such as onto blank cassettes or compact discs. Napster claimed that users were only distributing recorded digital formats of music, not actual copyrighted music. The company also argued that in the event the users were committing copyright infringement, there is no reason to believe that Napster was planning on making any financial gains from it.

Napster lost the case in both the District Court and the Court of Appeals. The company had been ordered to monitor its users to ensure no further copyright infringement occurred. It failed to do this, so the company was forced to shut down. After it lost its appeal, Napster settled its previous lawsuits with the individual artists, and as a result it went bankrupt.

### *Discussion*

In this case, all the different interpretive theories put into practice probably would have come to the same conclusion as what actually occurred. This is due to the fact that Napster did not have a good defense against the solid evidence and accusations brought against the company. The point of including this case study was mostly to demonstrate how big of an impact technology has on individuals, which spreads throughout an entire nation and could spread to the entire world. Take the social networking site Facebook for example- it used to only be available

to university students in select universities in the U.S., and then to university students nationwide. Now it is available for any person to use anywhere in the world, as long as this person can prove he or she is over the age of 13.

*A&M v. Napster* was the first major case that courts had to address the issue of copyright laws to this kind of technology. Since then computer programmers have been working to develop different ways to share files that do not infringe upon copyright laws, or at least make the act undetectable. Methods that have been explored include getting rid of the centralized server that Napster used and instead having users connect to each other on their own. This takes away the “contributing for infringement” factor that Napster was held liable for. Another new technological innovation that has recently become popular is torrents. A torrent is a file, either a song, game, movie, or computer application, that is composed of bits. A bit is a small piece of the full file. Each bit comes from a source, and once all of them are obtained through downloads from several servers, they are pieced together to make a full file. A file is never made up from entirely one source, since this kind of sharing has been determined to be illegal through the Napster case.

These examples show that technology of peer-to-peer sharing was expanded as a direct result of the Napster court case that had caused the shutdown of the original company.

## Conclusion

File-sharing technology did not halt after the Napster case, rather it had only increased. If in the future someone finds a way to take companies or individuals involved in torrents to courts and won, it is likely even newer and better technologies will be innovated in order to continue the act of sharing files. This type of attitude carries in other technological areas as well, so it is safe to say that judges need to be able to have the resources and the sanction of the government and society to make pragmatic decisions to try to keep up with new technology as best as they can.

Returning the previous sections before the case studies, at the end of the section on logical positivism, it may be concluded that since it is a theory that does not work based on how undemocratic it is, the direction to turn would be to claim that originalism is the only other option, since it remains true to the what is written in the legal texts and, for certain types of originalism, what the words meant at the time the legal texts were written. This could not be the case though since originalism does nothing to account for new technology; for this theory and others that are similar would have to wait for laws to be written by legislatures for anything to be done about new circumstances.

Sometimes Dworkin's moral reading is necessary and appropriate for a given situation. Other times it is not. If it were at all possible for everyone in a community or nation to develop the same moral views and never have any disputes about them, then his plan for interpreting legal texts according to morality would be easier to defend. However, it still cannot account for technology and the law when they have no moral aspects whatsoever, no matter if moral feelings were universal or not.

If technology went at a standstill, meaning it will no longer develop in the future, it does not mean that legal pragmatism would no longer be the best option for legal interpretation. Technology is a useful example to show that legal pragmatism is the best option out of all the popular theories for legal interpretation, for it shows that when it bears on the law within a courtroom, judges have a way to take care of the issue. What is good about legal pragmatism is it takes all forms of interpretation into account in order to make the best decision, and if it needed to it could borrow certain aspects of these methods. With judges taking this theory of legal pragmatism into practice, they have a guide for making the best decision that is possible given the circumstances and resources available to them, which are the legal texts in which they must adhere to. Judges would not have to worry about disrespecting the separation of powers because they would not be making legislative decisions, but rather they would be using the decisions of the true legislatures as guidelines to decide their court cases. Expanding the meaning of laws must be done in order to accommodate new technology, and at this point legal pragmatism has the best method for doing so.

## References

- Adams, Arlin M. "Justice Brennan and the Religious Clauses: The Concept of a 'Living Constitution'." *University of Pennsylvania Law Review*. May 1991: 1319-1331.
- Austin, John. *The Province of Jurisprudence Determined*. Cambridge: Cambridge University Press, 1995.
- Butler, Brian E. "Legal Pragmatism." Internet Encyclopedia of Philosophy. 28 June 2005 Web. 14 May 2011.
- Dickson, Julie. "Interpretation and Coherence in Legal Reasoning." *The Stanford Encyclopedia of Philosophy*. Ed. Edward N. Zalta. 2010. Web. 20 May 2011.
- Dworkin, Ronald. "The Moral Reading of the Constitution." *New York Review of Books*. 21 Mar 1996: 46-50.
- Dworkin, Ronald. *Law's Empire*. Cambridge: Harvard University Press, 1986.
- Dworkin, Ronald. *Taking Rights Seriously*. Cambridge: Harvard University Press, 1980.
- Ely, John Hart. *Democracy and Distrust: A Theory of Judicial Review*. Cambridge: Harvard University Press, 1980.
- Fish, Stanley, "The Law Wishes to Have a Formal Existence." *The Fate of the Law*. Austin Sarat and Thomas Kearns (eds.). Ann Arbor: University of Michigan Press, 1991.
- Graziano, Mike, Lee Rainie. "The Music Downloading Deluge." *The Pew Internet Project*. 24 April 2001. Web. 5 May 2011.
- Hart, H.L.A. *The Concept of Law*. Oxford: Oxford University Press, 1994.
- Holmes, Oliver Wendell. "The Path of the Law." *Collected Legal Papers*. Harcourt: Brace, 1920.
- Johnson, Burt. *Technology, the Supreme Court, and the Fourth Amendment: Balancing Government Power and Individual Privacy*. Web. 26 Apr 2011.
- Posner, Richard A. *Law, Pragmatism, and Democracy*. Cambridge: Harvard University Press, 2003.
- Posner, Richard A. "What Am I? A Potted Plant?" *Overcoming Law*. Cambridge: Harvard University Press, 1995.
- Posner, Richard A. *The Problems of Jurisprudence*. Cambridge: Harvard University Press, 1990.

Raz, Joseph. *Between Authority and Interpretation: On the Theory of Law and Practical Reason*. Oxford: Oxford University Press, 2009.

Scalia, Antonin. *A Matter of Interpretation: Federal Courts and the Law*. Princeton: Princeton University Press, 1997.

Whittington, Keith E. "Dworkin's 'Originalism': The Role of Intentions in Constitutional Interpretation." *The Review of Politics*. 2000: 197-229.