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Judicial Interpretation of Civil Rights and Civil Liberties: Beyond the Doctrine of *Stare Decisis*

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Judges are charged with creating justice by considering the civil rights and civil liberties guaranteed in the U.S. Constitution and Bill of Rights as well as the human rights inherent to all people, without discrimination. Judicial hermeneutics allows us to understand legal texts and other documents as interpretive material for judicial decision-making. First, I overview judicial hermeneutics and consider how interpretive discernment occurs in rendering judicial decisions. Second, I examine the differences between human rights, civil rights, and civil liberties, recognizing the relationship between these areas. Third, I draw upon the cases Browder v. Gayle *(1956) as well as* Searcy v. Strange *(2014, 2015) and* Strawser v. Strange *(2015a, 2015b) to illustrate the role of judicial hermeneutics in rulings related to civil rights and civil liberty. An understanding of judicial hermeneutics is important for sustaining the rhetorical credibility of court decisions beyond the doctrine of* stare decisis*.*

The United States is geographically expansive. Our nation has moved from being a primarily agrarian society, through the advancements of the industrial revolution, and into a technological age that allows instantaneous connectivity. As these changes have occurred, people have become aware of social differences and adapted their life-narratives more slowly or quickly in response to that awareness. When personal and group narratives come into conflict, people often turn to the court for an authoritative decision. Judges are charged with creating justice by considering the civil rights and civil liberties guaranteed in the U.S. Constitution and Bill of Rights as well as the human rights inherent to all people, without discrimination.

Our democracy is shaped by arguments examining issues of race and class, political and economic empowerment, violence and nonviolence, and American constitutional rights and international human rights, among other matters.[1] In writing about legal and constitutional interpretation, Lee Strang notes, "one of the most contentious issues in jurisprudence" is the issue of the determinacy or indeterminacy of legal texts and relevant materials, which may include "statutes, case law, legal principles and rules, and the theoretical justification for an area of the law guiding judicial rulings."[2] Judicial hermeneutics allows us to understand legal texts and other documents as interpretive material for judicial decision making.

In this essay, I first address judicial hermeneutics and consider how interpretive discernment occurs in rendering judicial decisions. Second, I examine the differences between

human rights, civil rights, and civil liberties, recognizing the relationship between these areas. Third, I draw upon the cases *Browder v. Gayle* (1956) as well as *Searcy v. Strange* (2014, 2015) and *Strawser v. Strange* (2015a, 2015b)[3] to illustrate the role of judicial hermeneutics in rulings related to civil rights and civil liberty. These cases emerged from federal courts in Alabama, one of the most conservative states in the union. In such an environment, an understanding of judicial hermeneutics becomes even more significant to sustain the rhetorical credibility of court decisions. This essay illustrates how American constitutional law works by augmenting the doctrine of *stare decisis* with other interpretive factors.

Judicial Hermeneutics

Jurisprudence has centered on the idea of justice in the context of human relationships since the time of Aristotle's *Nicomachean Ethics*.[4] Riccardo Dottori reminds us that the term *jurisprudentia* originates from a judge "being confronted with the problem of applying the general law to the individual case, which always deviates from the general law and poses the problem of correct application."[5] A correct application of the law is guided by *prudentia*, which "is supposed to determine the appropriateness of the law to the specific case in a just manner so that the subsequent judgment corresponds to the criterion of *equitas* (Aristotelean *epieikeia*), balance."[6] This section offers a brief explication of how hermeneutics works within jurisprudence.

Robin L. West explains that in the late twentieth century, attention in legal scholarship shifted toward understanding interpretation.[7] During the 1970s and throughout the 1980s and 1990s articles began to emerge on the subject of hermeneutics in law.[8] Writing in 1985 on "Hermeneutics in Law," Brad Sherman noted that many scholars "have seen and continue to see in hermeneutic philosophy a repudiation of methodical rationality. Many others misuse the term and that to which it refers . . . this is especially the case now that Hermeneutics has become fashionable and every interpretation wants to call itself 'hermeneutical.'"[9] Collectively, that body of legal literature represents what is often characterized as the hermeneutic turn in jurisprudence.

Hermeneutic theory addresses *how* a text is given meaning. In the act of interpretation, judges consider interpretive and reflexive relationships between the author (e.g., circumstances and deliberations of the original case, subsequent situations that reference the original case, conditions of the current case), text/context (e.g., the particular context of the original ruling, further instances of similar situations, the immediate context), and reader (e.g., the judge's interpretation in his or

her phenomenal field). A judge strives to cohere aspects of varying interpretations (e.g., attorneys, litigants, witnesses) with his or her own interpretation. Texts are incomplete representations; while they may resolve certain issues, other issues pertinent to a ruling will inevitably remain unsettled. And although meaning is stable, it is also inevitably underdetermined.

To guard against unwarranted shifts in meaning, hermeneutic rationality requires communicators to be vigilant.[10] When one's understanding is no longer appropriate for a given temporal moment—when a particular idea no longer coheres with one's interpretive experience—interpretation can signal that change is needed. For example, temporal shifts may reveal contradictions in a text that was previously understood to be coherent. As time passes, what was once seen as *normal* may become incomprehensible. When such disconnects occur, one must recognize and remain open to alternative possibilities within a text without arbitrarily privileging one aspect within the contradictory texts. One's interpretive horizon is imbued with an ethical dimension to which judges attend in reasoning about justice.

A judicial ruling is an act of *phronesis*. For Aristotle, *phronesis* refers to "right reason with respect to matters of conduct."[11] Gadamer understood a just application of the law to presuppose "not only a knowledge of the means by which virtue and justice are to be effected but also by a knowledge of the end."[12] Ethically, a judge interprets a case by considering the *good* within the present circumstances of a case as well as the historical situation in which the case is situated.[13]

Ethical knowledge is not a technique or tool; the elements involved in an ethical judgment may change in differing circumstances. Judges are not only concerned with law as it has always been, but also as it otherwise might be. In different historical moments, different issues move to the foreground. Issues that were once central and influential in a culture may become controversial or less significant. Elements within the tradition that are backgrounded (e.g., civil rights) can move to the foreground, while those that were foregrounded (e.g., economics) can move to the background, thus requiring a rehabilitation of the law.

Rehabilitation of the law requires rhetorical justification. Legal decision-making is an interpretive exercise that obliges one to recognize that the law is a rhetorical tradition of specialized arguments.[14] Rhetoric shapes social practices and constructs tradition, including a coherent system of jurisprudence. Coherence implies that words and texts are understood as supportively informing one another. A good argument is one that can convince someone who is vigilantly aware of the issues at hand.[15] There is nothing in place except one's own awareness to prevent a person from

giving in to sophistic arguments. There is always the possibility that sophistry will infiltrate an argument in places where it is least expected. Therefore, judicial discernment requires unfailing attentiveness to the rhetorical construction of claims.

Adjudication requires a judge to be immersed in the tradition of reasoned judgment and argumentation, negotiating past commitments and present concerns to arrive at a conclusion that will rhetorically influence behavioral change in society. National unity requires the consent of the governed, which is strengthened by a perceived coherence within and between legal texts. When coherence is not perceived, people may seek out the courts as an authority for reconciling discrepancies of individual rights.

Human Rights, Civil Rights, and Civil Liberties

Given the ubiquitous references to *human rights* and *civil rights* in society, one might perceive that there are clear, shared understandings about these terms. However, people often confuse the terms or assume them to be synonymous. An overview of human rights and civil rights clarifies the distinctions and overlap between these areas for judicial interpretation.

Two documents are primarily credited with shaping the discussion of human rights. These are the "Declaration of the Rights of Man and of the Citizen" approved by the France's National Assembly in 1789 (inspired by the ideals of the American Revolution) and the "Universal Declaration of Human Rights," which was adopted by the United Nations General Assembly in 1948. These documents have spurred a variety of understandings of human rights. From a philosophical perspective, the early work of Immanuel Kant is also instructive.

Kant's political and moral philosophy conceives a person to be an end in oneself, not a means to an end.[16] Politically, in his 1784 work "Idea for a Universal History with a Cosmopolitan Purpose"[17] Kant proposed that perpetual peace could be secured through universal democracy and international cooperation. Morally, he wrote, "the only original right belonging to every man by virtue of his humanity"[18] is the innate freedom we have as human beings. All other rights flow from this freedom. The aim of the state is to allow one to perfect oneself and one's development as a human being. Kant's thoughts provide intellectual ground for various definitions of human rights.

Writing on *The Sovereignty of Human Rights*, Patrick Macklem offers several human rights definitions. For John Tasioulas, human rights are "moral entitlements possessed by all simply in virtue of their humanity."[19] John Simmonds explains, "human rights are rights possessed

by all human beings (at all times and in all places), simply in virtue of their humanity."[20] Chris Brown notes that human rights "appear to rest on an account of the good life for human beings, which is cast in universal terms."[21] Human rights refer to the protection of essential characteristics that all humans share despite the various factors that uniquely shape people's lives and their relations with others. While the language of human rights understands all people to be equal by virtue of their shared humanity, the language of civil rights understands people to be made equal in community with others.

Discussions of civil rights are usually paired with a discussion of civil liberties. Civil liberties are also referred to as negative rights. Civil liberties are promises that the government will not do certain things. The U.S. Constitution's Article I, section 9 and 10 as well as the entire Bill of Rights clearly identify negative commands (e.g., "No title of nobility shall be granted," "Congress shall make no law," "No person shall be held to answer," etc.). These negative commands are balanced with certain affirmative obligations, known as civil rights.

Civil rights are also referred to as positive rights, which differ from civil liberties by requiring some type of action on the part of the state. Examples of civil rights include freedom of speech, press, and assembly; the right to vote; and the right to equality in public places. In civil rights the government affirms that it will protect citizens from coercion (discrimination) by private citizens or by the government. Discrimination occurs when the actions of an individual are denied or interfered with because of their membership in a particular group or class (e.g., race, sex, able-bodiedness, etc.). Civil rights are the converse of civil liberties. Both are granted to a citizen of a particular state or nation by the government. Together civil liberties and civil rights form one's individual rights as defined by a political state.

The political nation-state situates human rights within the language of individual rights, creating intersections between these ideas. In the United States, a right such as freedom of speech is both a human right and an individual right; freedom of speech is essential to human flourishing and to democratic functioning. When the government makes a negative promise (civil liberty) that it will not interfere with a person's free speech, they are also making an affirmative promise (civil right) to protect individuals who express their opinion, particularly if one is conveying a minority opinion.[22] These promises made by the state are given birth in the acknowledgement of the person (human right) as one who possesses a rational will and can decide things for oneself.

Human rights are granted to everyone, regardless of who they are or what they have done; individual rights address one's participation in civil society and define what one can and cannot do as a citizen of a state or nation. The U.S. Constitution specifies the judicial branch as one of three branches of government. This designation assures that judicial decisions emphasize individual rights. However, both individual rights and human rights are important in judicial reasoning.

Interpreting Rights and Declaring Law

Judges have long been involved in discerning and correcting violations of individual rights. Judicial rulings in Alabama have not only changed the state but also changed what it means to be a citizen of the United States. Cases heard in Alabama courts have been instrumental in both implementing and foreshadowing Supreme Court decisions related to discrimination. This section considers judicial discernment in two areas: racial equality (*Browder*) and marriage equality (*Searcy*, *Strawser*). In this section the facts of these cases are outlined and a discussion of each judge's interpretative discernment is offered.

Following the Supreme Court ruling in *Brown v. Board of Education*,[23] incentive was required to induce reluctant citizens to follow the Court's decision. *Browder*, heard in the United States District Court for the Middle District of Alabama by three Caucasian male judges, expanded the Supreme Court's ruling in *Brown* to address racial discrimination in public transportation. Sixty years later, the companion cases *Searcy* and *Strawser*, heard in the United States District Court for the Southern District of Alabama, contested the state's constitutional amendment banning same-sex marriage. A Caucasian female judge foreshadowed the Supreme Court's ruling in *Obergefell v. Hodges* (2015),[24] addressing the individual right of marriage equality. In rulings that relate to sedimented narratives that people are reluctant to change, a wide range of materials may be used to arrive at decisions that expand individual rights to members of marginalized groups.

Browder v. Gayle

Brown is a landmark Supreme Court decision recognizing racial equality. The Court made clear that this ruling was not limited to the educational context when on the same day they ruled on *Brown* they remanded *Muir v. Louisville Park Theatrical Association* (1954), a case involving the rights of African Americans to use the recreational facilities in city parks, "for consideration in the light of the Segregation Cases . . . and conditions that now prevail."[25] Although individual rights were gradually expanding across society, social divisiveness led to resistance and noncompliance

with the Court ruling throughout the south. Judges were tasked with interpreting how to change southern culture. The first step was hearing cases in district courts.

The civil disobedience of Rosa Parks in December 1955 ignited a protest against segregated seating on intrastate bus transportation. *Browder* was filed on behalf of four African American women (Aurelia S. Browder, Susie McDonald, Claudette Colvin, and Mary Louise Smith) who were allegedly mistreated on city buses. The case was brought under Fourteenth Amendment protections for equal treatment. The attorneys sought a declaratory judgment that Alabama state statutes and ordinances of the city of Montgomery providing for segregated seating were in violation of the rights of African Americans. Because *Browder* challenged the constitutionality of a state statute, the case was brought before a three-judge panel comprised of District Judges Seybourn Lynne and Frank M. Johnson, Jr., and Fifth Circuit Court of Appeals Judge Richard T. Rives. The court ruled that bus segregation was unconstitutional and prohibited the state of Alabama and city of Montgomery from continuing to operate segregated buses.

Rives, appointed to the Fifth Circuit Court by Democrat Harry Truman, wrote the decision on behalf of himself and Johnson. Judge Lynne filed the first dissenting opinion of his career on the bench. The state and city appealed the ruling, and the District Court's decision was affirmed by the United States Supreme Court on November 13, 1956. A motion for clarification and rehearing was denied on December 17, 1956, and the Montgomery bus protest was finally over.

As society changes, one's interpretations are also subject to change. Interpretive discretion is more than just a static repetition of past meanings. Events occurring in the executive and legislative branches of government cannot be disregarded by those in the judicial branch. While a judge must reflect upon one's personal biases related to a particular case, the reverberations of executive commissions and reports as well as federal legislation are important considerations in how circumstances are interpreted. The rhetorical acts of A. Philip Randolph and the federal changes implemented by Presidents Franklin Delano Roosevelt and Harry Truman undoubtedly influenced Rives's judicial opinion.

In the decision, Rives began the section titled "Validity of Separate But Equal Doctrine as Applied to Intrastate Transportation" asking whether racial segregation on buses in the City of Montgomery was unconstitutional and invalid. In the decision he noted, "In their private affairs, in the conduct of their private business, it is clear that the people themselves have the liberty to select their own associates and the persons with whom they will do business, unimpaired by the

Fourteenth Amendment." Rives continued, "There is, however, a difference, a constitutional difference, between voluntary adherence to custom and the perpetuation and enforcement of that custom by law."[26] In those sentences, Rives addressed the distinction between personal choices made in conducting one's private business affairs (e.g., freedom to choose what grocery store to frequent) and the legal requirements for running a business (e.g., owning a grocery store). He referenced custom in the social complex as a form of guiding rationality and referenced the Constitution, which offered additional interpretive guidance. Rives's attentiveness and sensitivity to regional custom and awareness of the law is present in his writing.

Rives cited numerous cases, explaining that legal "provisions do not interfere with the police power of the States so long as the state laws operate alike upon all persons and property similarly situated."[27] He noted that the Fourteenth Amendment "merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed."[28] Alluding to the overlap between human rights and individual rights, Rives recognized, "[t]he equal protection clause requires equality of treatment before the law for all persons without regard to race or color."[29] Rives acknowledged that the courts expressly repudiated the *separate but equal* doctrine and he identified rulings that broadly warranted application to the issue as well as those more narrowly related to the subject of desegregated passenger seating in public transportation. He cited previous cases related to seating on interstate buses,[30] interstate railroad regulations and practices,[31] and numerous other decisions relating to college education and public schools, recreational centers, municipal golf courses, and other social contexts that had been previously issued by the courts.

Addressing his personal stake in the decision, Rives concluded, "*We cannot in good conscience perform our duty* as judges by blindly following the precedent of *Plessy v. Ferguson*, supra, when our study leaves us [Rives and Johnson] in complete agreement . . . a separate but equal doctrine can no longer be safely followed as a correct statement of the law."[32] Rives's writing conveyed his awareness of the importance of his position and the necessity to exhibit an ethical standard as a public official. He expressed an awareness of the possible varying interpretations and repercussions of people in the community to the decision.

The interpretive influences of socio-political events, legal precedent, and judicial responsibility guided Rives's judicial discretion. In writing the decision, Rives attended to differing perceptions and recognized temporal shifts in understanding while also exhibiting long-sighted

ethical awareness. Rives's justification for the opinion presented a new interpretation of the law. He enacted *phronesis* in understanding that the spirit of democracy is always in flux and is larger than any individual part of which it is comprised. That decision was one of many later decisions that would desegregate the public sphere. *Strawser* would further expand the individual rights of citizens.

Strawser v. Strange

The sexual revolution of the 1960s altered established social and moral attitudes toward sex. Michel Foucault's 1978 work, *The History of Sexuality*, discussed sexuality and initiated academic work in queer theory. He analyzed the word *sexuality* and asserted that a fixation on sexuality emerged during the 17th century and created a discourse of sexuality. The dominant discourse of heterosexuality also resulted in an awareness of sexual minorities.[33]

The complex subject of sexuality considers one's sexual identification or dis-identification with certain others. One's sexual identity may be identified by thinking about a person (male or female) to whom one is romantically or sexually attracted. Public disagreement continues to exist regarding whether sexuality is a trait of one's humanness or a state that may shift with one's sociality. The companion cases *Searcy* and *Strawser* foreshadowed the Supreme Court ruling in *Obergefell v. Hodges* (2015). *Strawser* illustrates the influence that judicial interpretation can hold on higher court decisions.

Several influences shaped the social and political climate in Alabama at the time these cases were brought to the court. On August 29, 1996, Alabama Governor Fob James issued Executive Order 1996-24, which banned same-sex marriage and refused to recognize same-sex marriages performed in other states or countries. This perspective was reinforced in April 1998 when the Alabama legislature passed the Alabama Marriage Protection Act, a bill similar to the earlier executive order issued by Fob that was then signed into law. Further, on March 8, 2006, the Alabama State House voted in favor of adding the Alabama Sanctity of Marriage amendment to the Constitution of Alabama (Amendment 774). This amendment banned same-sex marriage as well as civil ceremonies between same-sex couples. Then on June 6, 2006, 81% of Alabama voters endorsed adding the amendment to the state's constitution. Within this cultural environment *Searcy* and *Strawser* were filed.

Searcy v. Strange (formerly *Searcy v. Bentley*) was filed May 7, 2014 by a Mobile couple, Cari Searcy and Kimberly McKeand, who married in California but whose marriage Alabama

refused to recognize. The non-biological mother wanted to use Alabama's stepparent adoption statutes to legally adopt their child, but the Alabama statute only allows spouses to adopt a stepchild. The couple and their minor child claimed civil rights violations of the equal protection and due processes clauses. A related case, *Strawser*, was filed several months later.

In July 2014 James Strawser and John Humphrey's application for a marriage license in Mobile County, Alabama was denied. On August 16, 2014 Strawser and Humphrey were married by Bishop David M. Carnrike, a minister of the United Gospel Holiness Church of America. Strawser faced significant health issues, requiring surgery that might put his life at risk. Despite having medical power of attorney, Humphrey was told by hospital administrators where Strawser was receiving medical treatment that the hospital would not honor the document because Humphrey was not a family member or spouse. Strawser and Humphrey filed suit on September 14, 2014 challenging the constitutionality of Alabama's Sanctity of Marriage Amendment and the Alabama Marriage Protection Act. Their case was collectively brought by four same-sex couples residing in Mobile, Alabama who were denied the right to a legal marriage under the laws of Alabama.[34] Meanwhile, similar lawsuits were filed across the nation and subsequently appealed to higher courts.

On October 6, 2014 the Supreme Court chose not to admit certiorari petitions from Virginia, Utah, Oklahoma, Wisconsin, and Indiana. Lower court decisions granting marriage equality for same-sex couples then became the law in the Fourth, Seventh, and Tenth Circuits.[35] However, a split decision in the Sixth Circuit Court of Appeals upheld a ban on same-sex marriage (*DeBoer v. Snyder*, certiorari granted sub nom *Obergefell v. Hodges*). The Supreme Court granted a writ of certiorari to hear *Obergefell* on January 16, 2015.[36] In *Obergefell* same-sex couples from Ohio, Michigan, Kentucky, and Tennessee challenged the constitutionality of state bans on same-sex marriage or the state's refusal to recognize same-sex marriages that occurred in jurisdictions that allow such marriages to be legal. Shortly thereafter Judge Callie V. S. Granade, appointed to the U.S. District Court of the Southern District of Alabama by Republican George W. Bush, issued decisions in *Searcy* and *Strawser* (January 23 and 26, 2015 respectively). Those rulings prohibited Alabama from enforcing its marriage ban and its non-recognition laws.[37] The Supreme Court denied the state's request to stay the federal injunction (*Strange v. Searcy*)[38] and Granade's order took effect on February 9, 2015.

In *Searcy* (January 23, 2015), Granade ruled that Alabama's Sanctity of Marriage Amendment violated the civil rights of Searcy, McKeand, and their minor child. The Alabama Marriage Protection Act and Amendment 774 to the Alabama Constitution, Article I, § 36.03 are identical. The text states: "(b) Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting this unique relationship in order to promote, among other goals, the stability and welfare of society and its children."[39] Granade noted a lack of coherence between this public policy and the case with regard to minor children. She wrote, "The Attorney General does not explain *how* allowing or recognizing same-sex marriage between two consenting adults will prevent heterosexual parents or other biological kin from caring for their biological children . . . In sum, the laws in question are an irrational way of promoting biological relationships in Alabama" (*Searcy*, emphasis added). Granade's interpretation of *care for children* does not require a biological component. The argument Strange's attorneys put forth trying to reconcile the differing texts in support of banning same-sex marriage was not perceived by Granade to be compelling. In fact, she found the law to be irrational.

Human rights and individual rights both informed her decision. Granade continued, "Those children currently being raised by same-sex parents in Alabama are just as worthy of protection and recognition by the State as are the children being raised by opposite-sex parents" (*Searcy*). Further, she found Alabama's Sanctity of Marriage Amendment replicates violations found in Section 3 of the Defense of Marriage Act (*United States v. Windsor*)[40] in that the law "humiliates thousands of children now being raised by same-sex couples . . . [making] it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives" (*Searcy*). The plaintiffs also reported feeling "demeaned and humiliated" by the state. The resources needed to determine *humiliation* require information that goes beyond what is available in legal precedent. A consideration of the socio-political sphere is necessary to conclude that a person has been disgraced and a civil rights violation has occurred.

The state of Alabama continues to wrestle with implementing individual rights with respect to racial equality and marriage equality. This review of *Browder* and *Strawser* reveals ways in which judicial interpretation shapes communities and is shaped by members of communities. Of

significance, the Supreme Court rejected appeals to reconsider the decision of the lower court in both *Browder* and *Strawser*, attesting to the quality of the decisions rendered in the lower courts.

Conclusion

The interpretive turn in legal theory and practice has altered the way that generalists and specialists understand courts, judges, the law, and legal infractions. This essay considered how judges augment the doctrine of *stare decisis* with other interpretive factors in rendering a decision. Judicial interpretation moves within and potentially beyond the strictures of our legal system.

Strang notes that a judge's choice of relevant texts to guide his or her interpretation is a contentious legal issue. The dispute centers on what influences are allowed to enter into consideration when determining an opinion. The above analysis of *Browder* and *Searcy* indicates that judges who rule in cases that address individual rights draw upon interpretive influences beyond legal texts and other credible, relevant materials. Without such information to amplify precedent, the role of a judge is limited to repetition of extant interpretations. Precedent is only one material that informs the construction of an argument. Judges honor their position by ethically considering all aspects of a case, including human rights and individual rights, when deciding cases that may influence the future direction of society.

Michael J. Klarman contends that in landmark cases, "Justices do not appear to be much influenced by" legal doctrine.[41] By this he means that Supreme Court Justices rely little on legal precedent because conventional doctrine provides little support for or against issues in the case. The same is true in lower court rulings such as *Browder* and *Searcy* with respect to charting new legal territory. Further, an important role of the courts is revealed in the appeals process—to inform members of the Supreme Court that opinions of the governed have shifted.

One byproduct of the rhetorical devices judges use in their decisions is cultural development. Rulings can either restrict or expand aspects of society. Cultural development requires a consideration of the common good. While the term *common good* does not appear in the Constitution, the term *general welfare* is used. In 1937, the Supreme Court ruled that Congress has the right to interpret the general welfare clause of the Constitution (*Helvering v. Davis*).[42] This congressional authority works with the support of the judiciary. Future challenges that inevitably face the legislative and judicial branches of government include issues of death with dignity,

abortion, transgender rights, and voting access. Judicial interpretations change as society changes; sometimes laws are overturned and other times they are reinforced within the legal system.

This work began with a discussion of judicial hermeneutics and interpretive discernment. A discussion of human rights, civil rights, and civil liberties revealed similarities and differences between human rights and individual rights. *Browder* and *Searcy* illustrated the importance of understanding judicial hermeneutics in states where conservative impulses challenge the rhetorical credibility of court decisions. The construction of law can only work by augmenting *stare decisis* with other interpretive factors.

Just as racial discrimination continues to linger following *Browder* and other racial equality cases, attitudes toward marital equality may not soon change following *Strawser* and *Obergefell*. Members of the courts continue to carefully consider differing perspectives that both confirm and deny their understanding, stand attentive to temporal shifts in meaning, and exercise judicial ethics. An active citizenry is equally as essential to the continued construction of our democracy.

Notes

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2 Lee J. Strang, "The Role of the Common Good in Legal and Constitutional Interpretation," *University of St. Thomas Law Journal* 3:1 (2005): 50.

3 *Browder v. Gayle*, 142 F. Supp. 707 (M.D. Ala. 1956). *Searcy v. Strange*, Civil Action No. 14-0208-CG-N (S.D. Ala. 2014, 2015), *Strawser v. Strange*, Civil Action No. 14-0424-CG-C (S.D. Ala. 2015), *Strawser v. Strange*, 44 F.Supp.3d 1206 (2015).

4 Aristotle, *Nicomachean Ethics,* trans. and ed. Sarah Brodie and Christopher Rowe (New York: Oxford University Press, 2002).

5 Hans-Georg Gadamer, *A Century of Philosophy: A Conversation with Riccardo Dottori* (New York: Continuum, 2006), 21.

6 Ibid.

7 Robin L. West, "Are There Nothing But Texts in This Class? Interpreting and Interpretive Turns in Legal Thought," *Chicago-Kent Law Review* 76 (2000): 1125-1164.

8 See e.g., Stephen M. Feldman, "The New Metaphysics: The Interpretive Turn in Jurisprudence," *Iowa Law Review* 76 (1991): 661-681; Donald H. J. Herman, "Phenomenology, Structuralism, Hermeneutics and Legal Study," *University of Miami Law Review* 36 (1982): 379-410; David Couzens Hoy, "Interpreting the Law," *Southern California Law Review* 58 (1985): 135-176; Simeon McIntosh, "Legal Hermeneutics: A Philosophical Critique," *Oklahoma Law Review* 35 (1982): 1-72.

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10 Jean Grondin, *The Philosophy of Gadamer*, trans. Kathryn Plant (Montreal, CA: McGill-Queen's UP, 2003), 142.

11 John E. Sisko, "Phronesis," in *Encyclopedia of Ethics: P-W*, 2nd ed., eds. Lawrence C. Becker and Charlotte I. Becker (New York: Routledge, 2001), 1314.

12 Gadamer, *A Century*, 21.

13 Georgia Warnke, *Gadamer: Hermeneutics, Tradition and Reason* (Stanford, CA: Stanford University Press, 1987), 92.

14 Allan C. Hutchinson, *Evolution and the Common Law* (New York: Cambridge University Press, 2005), 21. See also: Francis J. Mootz III, "The Hermeneutical and Rhetorical Nature of the Law," *Journal of Catholic Social*

Thought 8.2 (2011): 221-254; Francis J. Mootz III, "Law in Flux: Philosophical Hermeneutics, Legal Argumentation, and the Natural Law Tradition," *Yale Journal of Law and the Humanities* 11 (1999): 311-382; Francis J. Mootz III, "Rhetorical Knowledge in Legal Practice and Theory," *Southern California Interdisciplinary Law Journal* 6 (1998): 491-610; Francis J. Mootz III, *Rhetorical Knowledge in Legal Practice and Critical Legal Theory* (Tuscaloosa: University of Alabama Press, 2006).

15 Grondin, *Gadamer,* 141.

16 Immanuel Kant, *Fundamental Principles of the Metaphysics of Morals*, in *Kant's Theory of Ethics: Or Practical Philosophy* (1-84), trans. Thomas Kingsmill Abbott (New York: Bobbs-Merrill Company, 1949), 46.

17 Immanuel Kant, *Idea for a Universal History from a Cosmopolitan Point of View* [1784], in *Kant on History*, ed. and trans., Lewis White Beck (New York: Macmillan Library of Liberal Arts), VIII: 15-32.

18 Immanuel Kant, *The Metaphysical First Principles of the Doctrine of Right*, in *Practical Philosophy*, trans. Mary Gregor (Cambridge: Cambridge University Press, 1996), 393.

19 John Tasioulas, "The Moral Reality of Human Rights," in *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?*, ed. Thomas Pogge (New York: Oxford University Press, 2007), p. 76. Cited in Patrick Macklem, *The Sovereignty of Human Rights* (New York: Oxford University Press, 2015), 6.

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21 Chris Brown, "Human Rights and Human Nature," in *Human Rights: The Hard Questions*, eds. Cindy Holder and David Reidy (West Nyack, NY: Cambridge University Press, 2013), 23-24. Cited in Macklem, 6.

22 *The Civil Rights Movement* (2 vols.) (Pasadena, CA: Salem Press, 2000), 110-111.

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

24 *Obergefell v. Hodges*, 576 U.S. ___ (2015).

25 *Muir v. Louisville Park Theatrical Association*, 347 U.S. 971, 74 S.Ct. 783, 98 L.Ed. 1112 (1954).

26 *Browder* 142 F. Supp. 707.

27 *Barbier v. Connolly*, 113 U.S. 27, 31, 32, 5 S.Ct. 357, 28 L.Ed. 923 (1885).

28 *Marchant v. Pennsylvania Railroad Co.*, 153 U.S. 380, 390, 14 S.Ct. 894, 897, 38 L.Ed. 751 (1894).

29 See e.g., *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1879); *Buchanan v. Warley*, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149 (1917); *Gong Lum v. Rice*, 275 U.S. 78, 48 S.Ct. 91, 72 L.Ed. 172 (1927).

30 *Morgan v. Commonwealth of Virginia,* 328 U.S. 373, 66 S.Ct. 1050, 90 L.Ed. 1317 (1946).

31 *Henderson v. United States,* 339 U.S. 816, 70 S.Ct. 843, 94 L.Ed. 1302 (1950).

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33 Michel Foucault, *The History of Sexuality: Volume 1: An Introduction*, trans. Robert Hurley (New York: Vintage Books, 1978/1990); Michel Foucault, *The Use of Pleasure: Volume 2 of The History of Sexuality*, trans. Robert Hurley (New York: Vintage Books, 1985/1990); Michel Foucault, *The Care of the Self: Volume 3 of The History of Sexuality*, trans. Robert Hurley (New York: Vintage Books, 1986/1988).

34 "Transcript of Hearing on Preliminary Injunction: Case 1:14-cv-00424-CG-C Document 39, United States District Court, Southern District of Alabama," accessed December 20, 2015, http://www.scribd.com/doc/254625988/1-14-cv-00424-39-Transcript-of-Hearing; *Strawser, et al. v Strange and Davis*; 44 F.Supp.3d 1206 [2015]).

35 Diane M. Soubly, Seth B. Kennedy, Eric J. Meli, and Lindsey Orlando, "Do the Liberty and Equality Principles of the Fourteenth Amendment Embrace Same-Sex Marriage?," *Benefits Law Journal* 28:2 (2015): 30.

36 Ibid.

37 *Strawser v. Strange*, Civil Action No. 14-0424-CG-C (S.D. Ala., 2015), accessed December 20, 2015, http://www.freedomtomarry.org/page/-/files/pdfs/ORDER%20Strawser%20v.%20Strange.pdf.

38 *Strange v. Searcy*, 574 U.S. ___ (2015), accessed December 20, 2015, http://www.supremecourt.gov/opinions/14pdf/14a840_gol1.pdf.

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40 *United States v. Windsor*, 570 U.S. ___ (2013).

41 Michael J. Klarman, "*Windsor* and *Brown*: Marriage Equality and Racial Equality," *Harvard Law Review* 127:1 (2013): 138.

42 *Helvering v. Davis*, 301 U.S. 619 (1937).