

Exploring the Political Impact of Literature and Literary Studies

in American Government

by

Taylor Deredt

Thesis

Submitted to the Department of English Language and Literature

Eastern Michigan University

in partial fulfillment of the requirements

for the degree of

MASTER OF ARTS

in

Literature

Thesis Committee:

Elisabeth Däumer, Ph.D., Director

John Staunton, Ph.D., Reader

March 1, 2017

Ypsilanti, Michigan

ProQuest Number: 10266031

All rights reserved

INFORMATION TO ALL USERS

The quality of this reproduction is dependent upon the quality of the copy submitted.

In the unlikely event that the author did not send a complete manuscript and there are missing pages, these will be noted. Also, if material had to be removed, a note will indicate the deletion.



ProQuest 10266031

Published by ProQuest LLC (2017). Copyright of the Dissertation is held by the Author.

All rights reserved.

This work is protected against unauthorized copying under Title 17, United States Code  
Microform Edition © ProQuest LLC.

ProQuest LLC.  
789 East Eisenhower Parkway  
P.O. Box 1346  
Ann Arbor, MI 48106 – 1346

## Dedication

For the defenders of dignity who seek liberty and justice *for all*

## Acknowledgments

First and foremost, I would like to thank my thesis committee. Thank you to John Staunton for your insight, for steering me through this process, and for everything I learned in your American Literature course where I began to realize how literature can reflect a nation's values in fascinating and powerful ways. Thank you to Elisabeth Däumer for being the most unbelievably tireless advocate for my growth and success as a scholar. From my acceptance into the literature program to the completion of this master's thesis, you have gone above and beyond the call of duty to support me every step of the way. This thesis was born from your Literary Criticism course and could not exist without the freedom you gave me to fearlessly try out ideas that were unconventional and often messy. I would also like to thank all of my other teachers along the way—both professors and peers—who have allowed me the time and space to be quiet and think deeply, while inspiring me to speak up and write boldly.

I would like to thank my family. Thank you to my mom for teaching me to love fiction and how to write creatively and with conviction, and to my dad for giving me every encouragement and opportunity in the world to pursue the things I love. Finally, thank you to Andi, my greatest cheerleader in everything I do. Thank you for proofreading papers, keeping me company through long nights of writing, and being forever willing to hear what I have to say.

## Abstract

This thesis explores the role of literature and practices of literary study in American government. Specifically, it looks at how the President's Council on Bioethics (PCBE) and the Supreme Court have deliberately embraced the humanities to fulfill their respective responsibilities. I begin by examining the interpretive practices these groups employ, then turn to lists of recommended reading published by the PCBE and Justice Anthony Kennedy. I investigate how their endorsements of texts such as *Narrative of the Life of Frederick Douglass*, *My Antonia*, *Adventures of Huckleberry Finn*, and *To Kill a Mockingbird* promote certain constructions of traditional American values that are central to the choices these government organizations make. To close, I draw from the work of Martha Nussbaum to show how the lessons the PCBE and Justice Kennedy take from this fiction translate into executive orders, legislation, and legal opinions that shape public policy in America.

## Table of Contents

Dedication.....	ii
Acknowledgments.....	iii
Abstract.....	iv
Introduction.....	1
Chapter One: Assessing the Literary Court:	
The American Marriage of High Culture and High Law.....	5
Chapter Two: Is <i>Being Human Enough</i> ?	
The President's Council on Bioethics' Literary Construction of Dignity.....	22
Chapter Three: Applying Literature's Lessons.....	41
The President's Council on Bioethics.....	43
Justice Anthony Kennedy and the Supreme Court.....	48
Conclusion.....	53
Works Cited.....	54

## Introduction

As scholars in the humanities, it is hard to ignore the ever-growing pressure to defend what we do. Even though studies have found that people who regularly engage with literature exhibit a greater ability to empathize with others, think more critically, and are better at solving problems, other academic and professional fields continue to question the value of literary studies (Kidd 377; Djikic 153). Unlike running experiments in a research lab or learning to write computer code, the utility and societal impact of a literary education is not always immediately clear or easily measured. In a world where instant applicability and pragmatic utility are valued so highly, we see university English departments shrinking across the country, and there are fewer government and institutional funding sources for the humanities every year (Delany). As a result, some literary scholars have felt compelled to step forward and advocate for the applicability of their discipline within other fields of work and study.

The Law and Literature movement that emerged in the 1970s has provided new means of justifying academic English studies by illuminating the mutually influential relationships between literature, law, and specific spheres of political life. While Law and Literature is an important interdisciplinary field, it has been somewhat limited in its purview. Within the movement, studies typically take one of two central concerns: law *in* literature, i.e., literary representations of legal and judicial events, and law *as* literature, i.e., the range of textual and interpretive techniques that the legal and literary fields share. We can learn much about our own legal and political world by interrogating the ways it is portrayed in fiction or by examining how both law and fiction rely on narrative to create and disseminate meaning and to “establish or challenge values norms, and ideas of order” (Crane 767). These lines of academic exploration are

valuable, but limited by the movement's preference for literary courtrooms and its tendency to make connections between literature and law that are based exclusively upon theoretical arguments, for example, exploring corporate personhood in the work of Virginia Woolf or using genre analysis to argue the rhetorical qualities of patents (Farbman; Burk). The reality is that the impact of literature on law and politics is sometimes very visible and comes from works that employ a wide variety of settings, forms, and themes.

In the rare instances where scholars do look at the moments where literature and law clearly meet, exploration too often stops where public reaction to works of literature incites some kind of legal or government action. For instance, in the case of Upton Sinclair's *The Jungle*, scholarly inquiry stalls at the point where public outrage over Sinclair's portrayal of the meat packing industry inspired the creation of the Food and Drug Administration (Hopkins 30, 43). It ends where *The Picture of Dorian Gray* is considered permissible evidence in Oscar Wilde's trial for indecent behavior (Higgins 105-7). It gets tangled up in the questions of censorship and literary value, which were central to the obscenity charges brought against the publishers of Alan Ginsberg's *Howl* (Gornick 4-6). These historical moments are powerful, but making the argument that all literature possesses this potential to challenge the status quo of government policies and the law is not enough. Literature's value lies deeper than its ability to function as this kind of explosive social catalyst. Literary studies is a field in the human disciplines and is therefore a producer of human culture. As such, it has the power to shape society, government institutions, and public policy in widely unanticipated ways.

Although literature and politics have never had close ties in popular American discourse, the marriage of these two fields of thought has been severely undervalued. Literary critic Jay Clayton, advocating for the participation of literary scholars in government, once wrote, "the



interest for policy lies in what the genre shows about the historical contexts that produced it and in the cultural attitudes the genre reveals” (319). The benefit of considering literature within other fields—especially those that must make decisions and create the policies that impact an entire population—is essentially limitless. While some works of fiction tackle legal and ethical questions head-on, the entire world of literature has always wrestled with the issues that frame important political and scientific problems and deserves consideration. As America moved into the twenty-first century, several federal organizations attempted to do just that.

The following chapters will look at the Supreme Court of the United States and the President’s Council on Bioethics (PCBE), which served President George W. Bush. These two very different government entities do share some concerns. Both are tasked with tackling complicated problems that are deeply connected to a wide variety of moral and ethical concerns. The job the Constitution assigns to the Supreme Court has never been a purely legal endeavor. Similarly, the President’s Council on Bioethics engaged with issues which were not exclusively biological, technological, or ethical in nature. It is widely recognized that, throughout their histories, the work both these groups have done has been informed by political, economic, scientific, and religious considerations. These fields are representative of many aspects of life and often at the root of conflict in the medical problems bioethics commissions tackle and the diverse selection of legal cases that make it onto the Supreme Court docket every year. However, close study of the PCBE and the Supreme Court reveals that American culture has produced another silent player in American government’s sphere of influence—literature. The undeniable impact of Western fiction on the work of American government entities is one that has been largely overlooked.

Jay Clayton noted the unique nature of the Bush administration's PCBE as a government commission that turned to fiction as a tool to help produce scientific and technological recommendations for the president and to help the American public better understand the recommendations the commission made, but he failed to examine the wider effects of these anomalous practices (Clayton et al. 948). Similarly, scholars, while taking note of many of the ties between the United States Supreme Court and the literary world, have largely dismissed them as the personal quirks or trivial hobbies of individual justices. Upon closer inspection, it is clear something bigger is happening. The PCBE and the Supreme Court recognize that literary studies provide a means of understanding cultural constructions that are central to America's national identity and its democratic system of government. Indeed, as I shall show in the following chapters, the PCBE and the Supreme Court, in order to better fulfill their duties, have engaged with literature in ways that have had a discernable impact on the creation and interpretation of legal, scientific, and social policy in the twenty-first century.

## Chapter One

### Assessing the Literary Court:

#### The American Marriage of High Culture and High Law

The modern Supreme Court is made up of eight associate justices and one chief justice, all of whom are nominated by the president of the United States and approved by the Senate for lifelong terms. This highest court was established by the Constitution to have the ultimate judicial power over “all Cases, in Law and Equity, arising under this Constitution,” in addition to oversight of international, military, and interstate discrepancies and any case in which the United States is a party (US Const. art. III, sec. 2). As the American court system has developed and grown more complex, the Supreme Court’s jurisdiction has expanded, giving it the final decision in cases that have been appealed in lower federal courts, and its responsibilities have broadened to include a unique kind of interpretive power called judicial review (A Brief Overview of the Supreme Court).

The Supreme Court’s interpretative powers have been assigned to the judicial branch of the federal government by the Constitution, although not explicitly. It is noteworthy that the interpretative power of the Supreme Court was established by the Court through one of its earliest formal interpretive acts. The judicial review is a hermeneutical practice, which allows the court to examine the authority of laws and to rule them invalid if they contradict or deny any aspect of the United States Constitution. Although this power is not explicitly defined in the Constitution, it is implied by the relationship between two key passages. Article III, Section 2 of the Constitution empowers the Supreme Court to determine the applicability of the law with regard to the cases that come before it. Article VI of the Constitution contains the Supremacy Clause. This clause states, “This Constitution ... shall be the supreme Law of the Land; and the

Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding” (US Const. art. VI). This means that any law that exists in the United States is subject to the Constitution and must agree with it. If a law, statute, or state constitution is inconsistent with any part of the U.S. Constitution, it must be ruled unconstitutional. The power to decide the constitutionality of any legal text lies with the Supreme Court as a part of its duty to decide if and how a law should be applied. The Supreme Court’s interpretive power of judicial review was solidified forever when the precedent was established by *Marbury v. Madison* in 1803.

*Marbury v. Madison* was brought to the Supreme Court regarding an issue of government contracts. At the end of his term as president, John Adams had appointed William Marbury as a justice of the peace, but Marbury did not receive his contract before Thomas Jefferson took office. Jefferson’s administration put a stop to the deliverance of the commissions that Adams had approved and then considered the contracts void because they had not been delivered before they expired. Ultimately, the details surrounding this issue and the resulting decision in favor of Marbury’s right to his appointment are not what make this case significant. Marbury was able to bring his issue directly to the Supreme Court based on the Judiciary Act of 1789, which gave the Supreme Court the power to write mandatory judicial orders to any person holding office. The Court decided that this Act violated the federal Constitution by expanding the power of the Supreme Court in ways that did not align with what was originally designated to it by the Constitution. In this case, the Court created the precedent that it can examine any law against the United States Constitution and rule it unconstitutional if it violates this highest law of the land, i.e., the power of judicial review.

With these powers, it should come as no surprise that the Supreme Court has an enormously rich history. From the protection of freedom of speech in *Texas v. Johnson*, to the limitations on corporate political campaign contributions in *Citizens United v. the Federal Election Commission*, to validating a woman's right to terminate a pregnancy in *Roe v. Wade*, the Court is intimately connected to almost every aspect of public life through its work; however, its history is not a purely judicial one. The Supreme Court also has a surprisingly literary history. This is perhaps easiest to see in the personal histories and preferences of many individual justices. Justice Oliver Wendell Holmes, Jr., was the son of Oliver Wendell Holmes, Sr., a member of the Fireside Poets (*A Brief Guide to the Fireside Poets*). Before William H. Taft served as president and chief justice of the U.S. Supreme Court, he was a member of his school's literary society. In many interviews, current Justice Elena Kagan has talked about how she rereads *Pride and Prejudice* every year (Weiss).

Although the influence of literature has been pervasive in these amorphous ways since the Court's creation, we can more explicitly trace the Supreme Court's formal literary roots back to the early twentieth century. At that time, colleges and universities began to adopt the system of academic majors or concentrations that is standard and so familiar to the world of academia today; Harvard University first instituted this form of specialized study in 1910, and the other colleges and universities in the nation quickly followed its example (Karabel 40). This was the first time an education focused primarily on English language and literature was formally offered, and from its inception it attracted the attention of some of the nation's brightest scholars. The first two Supreme Court justices to graduate from college after the American university system embraced the academic major were Justice Frank Murphy and Justice William O. Douglas, both of whom earned Bachelors of Arts in literature before going on to study law

(History of the Court). This was simply the beginning of a tradition of literary scholars on the bench of the nation's highest court—a tradition that continues today.

Consequently, it should come as no surprise that literature and practices of literary study have emerged as natural companions to Supreme Court jurisprudence. Both fields rely on the interpretation of texts in order to create meaning that can be applied to answer questions, solve problems, and inform audiences. As Francois Ost asserts in “The Law as Mirrored in Literature,” the interaction and confrontation between the literary and legal worlds are endless (6). This is most apparent in how both fields attempt to find meaning in texts. In many respects, the Supreme Court's interpretive practices reflect those of English departments across the country. The Court exercises its powers and fulfills its duties through the disciplined and strategic use of very specific kinds of hermeneutical practices that, when understood alongside the justices' interests and training, reveal a decidedly academic influence.

When the Supreme Court is faced with a problem, the first thing it looks for is a legal precedent to guide its examination of the question at hand. The value the Court places on precedent is not an idea that is employed strictly by the judicial world. This practice shares principles and assumptions with the many literary theorists who consider the importance of tradition, or past readings of a work, when looking to extract meaning from a text. This concern with meanings determined from earlier readings is central to the literary philosophy of Hans-Georg Gadamer. As he describes it, “tradition is not simply a precondition into which we come, but we produce it ourselves, inasmuch as we understand, participate in the evolution of tradition and hence further determine it ourselves” (730). Legal precedent does not simply exist independently of the work of the Court, and the Supreme Court does not move forward and simply promote the constitutional interpretations of the past. The Court treats this precedent as

Gadamer approaches literary tradition; the justices consider past traditions of interpretation as they create new precedents or new traditions for the future.

While precedent is an important interpreting tool for the Supreme Court, what happens when a situation arises for which no precedent exists? When the highest court does not have a precedent to affirm or reject, it must create an interpretive guide for future cases. This is no straightforward matter, and in many ways, constitutional hermeneutics are as partisan as they are literary. As such, it is useful to look at how other government bodies, especially political ones, make meaning from texts in ways that recall traditional literary schools of thought.

The conservative end of the American political spectrum has developed a strong loyalty to originalism and strict constructionism—formalist theories of law that significantly limit any external influence when reading and interpreting texts like the Constitution. Legal formalist practices include any interpretive practice that relies solely on the actual text or on past interpretation of meaning and are associated most closely with the modern Republican Party. The originalist practice of understanding the Constitution of the United States seeks to ascertain the meaning of the text by looking at any of several important factors. One branch of originalism relies on the importance of the original intent of the Constitution. Original intent theorists believe the proper interpretation of a law should align with the meaning that was intended by the individuals who wrote and adopted the language (Natelson 1243). This kind of historical reading and interpretation relies heavily on looking at the motivations and principles of a community's most powerful people—government officials and representatives who are often the wealthiest and most educated of their time. The other major branch of originalist theory places more importance on original meaning. Original meaning theorists look closely at how the average person, living at the time the Constitution or amendment was written, would understand the

meaning of the law (Natelson 1243). Because of these differences, it is no surprise that even within the Republican Party, those who subscribe to originalist traditions can come to very different understandings of America's most fundamental governing document.

A smaller branch of the Republican Party practices strict constructionism, and an even smaller group publicly identifies with this school of thought. Strict constructionism is the practice of reading and applying a text exactly as it is written (Miller). According to this practice, once readers understand the language before them, no further consideration is necessary. Although nearly every republican president since Ronald Reagan's 1981 presidential campaign has promised to only nominate strict constructionists to all federal court positions, few judges exclusively practice this very narrow type of close reading (Rosen).

We can see that these legal formalist practices share many principles with what we are familiar with in the world of literary hermeneutics. Originalist consideration of the Constitution's original meaning and the framers' intent reflects the historical scholarship that dominated literary education until the early 1950s (Richter 755, 963). As Gadamer, a critic of historical scholarship, describes it, historicism demands that we "must set ourselves within the spirit of the age and think with its ideas and its thoughts" (732). This requires the adoption of an interpretive lens that looks backward in time and considers the situation of the author and the context of the world in which they lived. By this practice, both political originalists and literary historical scholars might say it is possible to come to a single "correct" understanding of a text, because these schools of interpretation consider factors from the past that are no longer subject to change.

When looking at strict constructionism, we can also see where legal and literary formalisms overlap. The strict constructionist way of reading the Constitution reflects an understanding of key New Critical principles, specifically W.K. Wimsatt and Monroe



Beardsley's Affective and Intentional Fallacies. According to Wimsatt and Beardsley, the Affective Fallacy denies the significance of a reader's response to a work. This premise asserts that any affect a text may have on a reader promotes a false sense of understanding and is simply a distraction from the meaning that the text is meant to convey (Wimsatt 31). The Intentional Fallacy declares that any suspected intent of the author should be cast aside when looking to understand a piece of literature and, as with the Affective Fallacy, failure to do so will lead to a false understanding of a text's true meaning (Wimsatt 477-8). Strict constructionists and New Critics share these assumptions, and as a result, both rely on practices of limited close reading and believe that a text's "[meaning is] to be found entirely within itself" when interpreting a written work (Richter 756). According to both of these interpretive practices, the legal text or literary work reveals its full meaning entirely within its language, which does not belong to one author but is inherently social. As New Critic Cleanth Brooks argues, a concern with the reader's reaction or the author's motivation and experiences turns the critic away from the work itself and toward other disciplines like history, biography, or psychology when the inherent value of a text, by definition, must be within the work's own language and form (Brooks 799). Strict constructionists also believe that the Constitution possesses the ability to transmit the full scope of its own meaning and that it is important to cast aside any extraneous perspectives which would undermine the Constitution's declaration of its status as the supreme law of the United States; as a result, constructionists focus the entirety of their efforts on interpreting the literal letter of the law that comes before them.

The liberal end of America's political spectrum has also developed its own distinct hermeneutic practices, which are generally connected to the Democratic Party. Contemporary Democrats embrace their reputation as the more progressive of the two dominant political parties

in the United States. This reputation is created in part by the interpretive practices the party employs—namely the belief in the Constitution as a living document.

A belief in the Living Constitution is an assumption that the Constitution is a document that possesses the necessary ability to change over time. This belief lends itself to the hermeneutic practice of judicial pragmatism. According to this philosophy, the reader must consider how the text fits into contemporary society and culture when looking at selections of a transmitted text that require interpretation. Judicial pragmatists approach the Constitution as a document that evolves over time in order to remain relevant. They believe it was purposely written by the founders of America using expansive language to reflect their understanding that society and technology would naturally change over time and the Constitution must possess this ability as well (Strauss). Here, the practices of the Democratic Party stand in opposition to the legal formalist perspective of the GOP by relying on a branch of legal realism, i.e., the belief that there is room in interpretation to allow for the consideration of public policy and the current social climate.

Liberal legal interpretive practices reject the conservative practice of originalism in very much the same way that Gadamer critiques the tenets of literary historicism. Consequently, it should come as no surprise that judicial pragmatist practices share a lot of ground with literary theorists and critics who are connected with the reader-response movement, especially with the phenomenologists. Gadamer believes “the real meaning of a text ... does not depend on the contingencies of the author and whom he originally wrote for” (731). In an effort to illuminate how some literary critics achieve a satisfactory understanding of a text, he coined the concept of the “horizon,” an interpretive lens that is an important part of the practices associated with today’s Democratic Party. Gadamer defines readers’ horizon as the limit of vision or

understanding which is imposed by their position in time. This horizon changes over time as a result of new information or new experiences that become available to a reader. Gadamer asserts “every age has to understand a transmitted text in its own way [and] the subsequent understanding is superior to the original production” (731). This is the very idea that supports the Democratic Party’s insistence that constitutional interpretation must be able to change over time in order to continually encompass the entirety of the document’s evolving meaning.

The belief that the framers of the Constitution purposely chose very general language to allow space for progressive interpretation parallels phenomenologist Wolfgang Iser’s ideas about how writers intentionally create gaps in narratives for the reader to fill for themselves. Like the Democratic Party, Iser considers moments of textual ambiguity a means for literary works to remain relevant regardless of the current horizon of any given reader. When looking at works of literature, he says “any ‘living event’ must, to a greater or lesser degree, remain open. In reading, this obliges the reader to seek continually for consistency” (1012). Iser’s “living event” echoes the idea of the Democrats’ “living Constitution” and the importance of pursuing an interpretation that is both consistent with past interpretations of the Constitution and in alignment with other laws, but also respectful of, and applicable to, the contemporary time.

Although the justices of the Supreme Court are not supposed to allow their personal political ideologies to influence their decisions, it was those individual ideologies that got them appointed to their positions. American presidents have a long history of nominating justices who have a judicial record that aligns, to a certain extent, with the beliefs and values of their own political parties. While justices swear to interpret and apply the laws of the United States “faithfully and impartially,” they still have the freedom to employ the hermeneutical methods of

the political wing with which they most identify, and this choice of interpretive practices effectively determines Supreme Court decisions (Text of the Oaths of Office).

The similarities between constitutional and literary hermeneutics point to one key way in which the practices of literary studies have influenced the Supreme Court's decisions, but the Court has more explicitly used literature as a tool in producing its written opinions. Supreme Court justices frequently cite sources from a wide variety of disciplines in support of their legal judgments. The world of literature is no exception; however, the longevity of this tradition and the frequency with which it is employed greatly depends on what we count as a literary citation. Scholars have taken dramatically different approaches to addressing this question. Some have looked for all references to a predetermined selection of authors, while others have limited their searches to a selection of specific works; many only count "high" literature, some have chosen to exclude poetry (Henderson 173; Dodson 430). Some scholars define a literary citation as any reference to a work of fiction which is deliberately included to bolster a legal argument, while others employ a broader definition that includes any reference to any work or writer of fiction, regardless of the intent or effect. In order to fully assess the way the Supreme Court utilizes the literary citation as a tool in its work, I find it most useful to employ this most expansive definition.

One of the earliest instances of literary citation in a Supreme Court opinion coincided with the emergence of the academic major around the turn of the twentieth century. In this opinion, the Court turned to the work of a canonical Western writer as a tool to fulfill its judicial duties. William Shakespeare made his first appearance in a Supreme Court opinion in 1893 (Skilton 4). At this time, Shakespeare's plays were not only widely known by the American public, but, as a result of various social and cultural developments, had also acquired an

undeniable air of authority (Levine 56). The playwright's reputation and the richness of his work presented an attractive means of framing formal legal opinions in a way that was accessible to the general public, while cementing the authority of the high court's judgments. The facts of the case, *Magone v. Heller*, are inconsequential. Justice Horace Gray seemed to inadvertently stumble across his Shakespearean reference in the dictionary while seeking to clarify the definition of the word, "expressly" as it is used in the Tariff Act of 1883. Justice Gray writes:

In Webster's Dictionary, for instance, the definition of 'expressly' is: 'In an express manner; in direct terms; with distinct purpose; particularly; as, a book written expressly for the young.' And the further illustration is added from Shakespeare: 'I am sent expressly to your lordship.' (*Magone v. Heller*)

Neither the dictionary nor Gray takes the time to connect this quotation with a specific character or play, making it a debatable point whether or not this really is an example of a literary citation. However, in this situation its literary context is not relevant to its use, but its cultural authority is. This early literary reference would prove to be widely representative of the way the Supreme Court employed these types of citations for centuries to come.

There is a respectably-sized body of scholarship that looks closely at the ways the Court cites literary texts. Over the last few decades, the advent and expansion of digital documentation and the internet have allowed scholars to effectively sift through hundreds of years of Supreme Court opinions to find those which cite literature in service of supporting judgments. These scholars use a wide variety of methodologies to achieve an even wider variety of goals. In 1999, Robert Peterson uncovered the fact that every single one of Shakespeare's thirty-seven plays has been cited in over eight hundred legal opinions from American state and federal courts since the establishment of America's judicial system (791). In 2008, M. Todd Henderson found that

Shakespeare has been cited a total of thirty-five times by the Supreme Court in its entire history (178). In 2015 Scott Dodson published a study which reveals that the members of the most recent full Supreme Court bench (to include the recently deceased Justice Scalia) have cited Shakespeare more than any other writer—a total of sixteen references from five different justices who span the entirety of the Court’s ideological spectrum (430). In spite of the many differences between these studies, there is a general consensus to their findings. More often than not, Supreme Court justices cite literature in their opinions based on a decontextualized understanding of a text, independent of its function and effect in the original source.

One notable example of this is the 1968 case *Levy v. State of Louisiana*. In it, the Court was required to decide whether or not a state statute that barred illegitimate children from pursuing a wrongful death lawsuit on behalf of a deceased, biological parent was constitutional. In the majority opinion that struck down this law, Justice William O. Douglas included the following footnote to support his position:

We can say with Shakespeare:

"Why bastard? wherefore base?

When my dimensions are as well compact,

My mind as generous, and my shape as true,

As honest madam's issue? Why brand they us

With base? with baseness? bastardy? base, base?"

King Lear, Act I, Scene 2.

(*Levy v. State of Louisiana*)

While these lines surely act as a means of supporting Justice Douglas’ own end, their inclusion is curious. A thoughtful reader must wonder if Douglas purposely attributed them to the author

who wrote them instead of the character who speaks them in order to instill a greater sense of moral authority. To understand these as Edmund's lines, within the greater context of his familial disloyalty and betrayal, one could just as easily read them as a caution against extending certain hereditary rights to offspring produced outside of wedlock. However, the meaning we can draw from the context of the quoted lines is (once again) secondary to the effect of the rhetoric, itself. When Robert Peterson calls Shakespeare an "arbiter of meaning" in the work of the American Supreme Court, he can only mean this on the most superficial level (Peterson 800). Here, the writer's name and masterful treatment of language are worth more than the rich stories he produces.

In light of the way these references fail to function based on thoughtful engagement with the external text, it may be more rewarding to move away from the legal citation as the decisive benchmark for literature's influence in the Court. Citations possess a very limited capability to prove influence. By the time a justice sits down to write an opinion on a case, it has already been decided. Whatever he or she publishes is simply a way of legitimizing and disseminating a judgment, and the inclusion of a literary reference most likely has no bearing on how the Court arrived at it. To measure the impact of the humanities on an American branch of government, we must be able to locate the power of literature at a deeper level. I argue that the work of current Supreme Court Justice Anthony Kennedy may offer the recourse this line of inquiry demands.

Although he has not earned a formal degree in literary studies, current Supreme Court Justice Anthony Kennedy's deep ties to the literary world make his influence on the bench worth studying. In 2013 Kennedy published a list of recommended reading titled "Understanding Freedom's Heritage: How to Keep and Defend Liberty." His own understanding of liberty has been central to his work on the bench, and this list of literature, historical documents, and films

represents one way he has cultivated a functional definition for this abstract idea over the course of his lifetime. With this list, Justice Kennedy does not so much offer his own description of liberty. Instead, he allows the fiction he has selected to speak for itself and to illustrate how the idea of liberty has been constructed over time by the nation's discourse and culture.

For one of his selections, Justice Kennedy points to a scene he calls "Huck's Moral Dilemma" from Mark Twain's *Adventures of Huckleberry Finn* as an excellent defense of liberty ("Understanding Freedom's Heritage"). *Huck Finn* was first published in the United States in 1885. It holds a prominent place in American culture as a novel that is widely included in high school English curricula and that has been endlessly challenged and banned by concerned parents, librarians, and school boards for its controversial themes and language. The story famously follows the journey of a young boy and an escaped slave down the Mississippi River. In the scene Justice Kennedy highlights, Huck has just written a letter to Jim's owner to turn him in. Huck says he feels "good and all washed clean of sin for the first time" because he has resolved to do what he believes is right according to the socially-constructed reality of his world (Twain 192). For a moment, it seems as if Huck has had some sort of religious breakthrough, but instead of turning to prayer as one might expect, he begins to think about the time he has spent with Jim since they began their trip down the Mississippi River. Huck recalls:

I'd see him standing my watch on top of his'n, stead of calling me, so I could go on sleeping; and see him how glad he was when I come back out of the fog; and when I come to him again in the swamp, up there where the feud was; and such-like times; and would always call me honey, and pet me, and do everything he could think of for me, and how good he always was; and at last I struck the time I saved him by telling the men we had smallpox aboard, and he was so grateful, and



said I was the best friend old Jim ever had in the world, and the *only* one he's got now' and then I happened to look around, and see that paper ...

I was a trembling, because I'd got to decide, forever, betwixt two things, and I knowed it. I studied a minute, sort of holding my breath, and then says to myself:

'All right, then, I'll *go* to hell'—and tore it up. (193)

In a novel where Jim is repeatedly referred to and treated as property, Huck's memories work in this scene to humanize the man in Huck's eyes and in the eyes of Twain's readers. Huck believes that if he turns Jim in to Miss Watson, he will be sold down the river, or worse. In spite of all the ways Jim is different from Huck, he is so clearly human in his affection and actions toward the boy and should be treated as such. When Huck considers everything he has been through with Jim, he cannot look at him as an object someone owns, lacking all individual agency, even though this is what Huck has been taught all his life. As a result, he rejects what he assumes is the "right" course of action in a flurry of excitement that easily rubs off on his audience. As long as Huck recognizes Jim's humanity, so must the reader, and this recognition leaves the boy's actions as the only truly right choice. Huck must defend the freedom and liberty of his friend, and modern readers feel compelled to applaud him for it. This passage is a powerful addition to Justice Kennedy's reading list. The way Huck's relationship with Jim opens his eyes to the humanity of the runaway slave and moves him to make choices to preserve Jim's life, illustrates the value of life as a central concern in matters of freedom and liberty.

From Huck's defense of liberty through the recognition and protection of human life, Justice Kennedy turns his readers to one of fiction's most famous courtrooms, in *To Kill a Mockingbird* by Harper Lee. Like *Huck Finn*, Lee's novel is a staple in high school English classes, and since its publication in 1960, it has been repeatedly challenged and banned for its

racially-charged language and content (Downs). The story follows the young Scout Finch as she grows up in small-town Alabama in the 1930s, but at the center of the story is a criminal trial that examines the alleged rape of Mayella Ewell, a white woman, by Tom Robinson, a black man. Scout's father, Atticus, a well-respected attorney, represents Robinson with the utmost effort and care in a case that is assumed to be a lost cause because of Robinson's race, and in spite of his innocence.

Justice Kennedy highlights Atticus's closing statement in this trial as another exemplary defense of liberty. In his final address to the jury, Atticus poignantly sums up his case:

[Mayella Ewell] has broken a rigid and time-honored code of our society ... [and] she must destroy the evidence of her offense. What was the evidence of her offense? Tom Robinson, a human being. She must put Tom Robinson away from her. Tom Robinson was her daily reminder of what she did. What did she do? She tempted a Negro ... No code mattered to her before she broke it, but it came crashing down on her afterwards ... There is circumstantial evidence to indicate that Mayella Ewell was beaten savagely by someone who led almost exclusively with his left ... Tom Robin now sits before you, having taken the oath with the only good hand he possesses—his right hand ... I am confident that you gentlemen will review without passion the evidence you have heard, come to a decision, and restore this defendant to his family. In the name of God, do your duty. (272-3, 5)

Atticus accomplishes so much in this excerpt. In some ways, he picks up where Huck leaves off. He establishes and highlights Tom Robinson's humanity, rejecting the idea that he can be discarded like an unwanted piece of property, but then Atticus also takes his defense of his

client's liberty one important step further. These lines illustrate a concept of liberty that is rooted, not only in one's ability to recognize the value of human life, but also in fulfilling an obligation to preserve it. Atticus illustrates this by using all of the tools at his disposal to persuade the jury in spite of the prejudices his fellow townsmen hold. Unlike Huck, Atticus is calm and calculated in the presentation of his argument, but like Twain's protagonist, Atticus still employs emotionally charged rhetoric in his attempt to move the jury, his audience. He insists that the jury has an obligation to his client; it is their duty to defend Robinson's liberty. Ultimately, not even these inspired lines move the men of Maycomb to impartially review the evidence and fairly assess Robinson's innocence. They find Robinson guilty of a crime the evidence proves he did not commit. However, the fact that Justice Kennedy marks this passage as one that can teach American readers about liberty suggests that here the attorney's example is more important than the narrative effect of his words within the story's plot. In matters of justice for liberty, Atticus inspires readers, among them Justice Kennedy, to pause and consider their duty more deeply.

Through these texts and the others Justice Kennedy includes in his list of recommended reading, we can begin to construct a way of understanding liberty within the context of the American consciousness. From the collection's title, it is clear that Kennedy believes this is a quality we must promote and defend. Huck and Atticus embody this, but they also give us some insight into exactly what it is that needs protecting and some of the ways to go about it. This instruction is invaluable, and its influence can be found in the votes he submits and the legal opinions Kennedy pens in his role as a member of the United States Supreme Court.

## Chapter Two

### Is *Being Human* Enough?

#### The President's Council on Bioethics' Literary Construction of Dignity

The twentieth century brought a new challenge to America and many other parts of the world. Technology and the sciences were advancing at an unprecedented rate. Medicine and the research that informed medical practices began to exceed their own previously conceived limits. This fast-paced progress prompted calls for some form of regulation that considered the wider impact of scientific and technological advances on both individuals and society as a whole. In 1974, in an attempt to respond to such urgent concerns, the United States Congress established a new kind of advisory group. The National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research was the first committee of its kind in America. It explored the best practices for using human volunteers in experimental research and ultimately produced the Belmont Report, a document that provided recommendations on this subject that would inform many future federal regulatory measures (History of Bioethics Commissions).

The progressive momentum that gave birth to these early government advisory groups continued into the twenty-first century. As a result, President George W. Bush acknowledged the tradition of his predecessors and created his own President's Council on Bioethics (PCBE). For the duration of his presidency, this commission of philosophers, ethicists, scientists, and doctors was tasked with "advising the President on bioethical issues that may emerge as a consequence of advances in biomedical science and technology" (Bush, Executive Order 13237). This rather broad charge is notably different from the clear goals and specific projects of the earlier commissions. According to this language, the PCBE was not only required to consider the past and present but also to look ahead in order to make recommendations for prospective standards

of ethics that would produce policies governing many areas of scientific research and practice. From 2001 until 2009, the PCBE was asked to work in a space of hypotheticals to produce concrete recommendations for the future advancement of American medicine and biotechnologies.

In several important ways, the creation and work of the PCBE was most reflective of its immediate predecessor, the National Bioethics Advisory Commission (NBAC), which served the Clinton administration. Breaking from the tradition of the Congress-initiated organization, President Clinton was the first to use an executive order to create a bioethics commission made up of members appointed directly by the president. In this regard, President Bush followed suit, establishing the PCBE and selecting its membership through his own presidential power. Consequently, this introduces a substantive potential for ideological and political bias in the Council's work that must be acknowledged.

When looking at a commission that begins and ends with the president of the United States, it is impossible to ignore how the organization may be flawed from its conception. In the establishment of the PCBE, President Bush took steps to suggest that the Council as a whole would be professionally diverse and non-partisan in their work. In his executive order, the president declared that "the Council shall be composed of not more than 18 members appointed by the President from among individuals who are not officers or employees of the Federal Government. The Council shall include members drawn from the fields of science and medicine, law and government, philosophy and theology, and other areas of the humanities and social sciences" (Executive Order 13237). In practice, it is unclear whether or not this intent was adequately honored. By the time he was selected to chair the Council, Dr. Leon Kass had already published work detailing his strong, conservative positions on many divisive bioethical issues. In

his article “For Richer or Poorer? Evaluating the President’s Council on Bioethics,” Ronald Green offers a compelling argument that the membership was generally chosen with Bush’s own agendas in mind, that Council discussions were organized to promote predetermined outcomes which too often favored Christian values, and that the PCBE’s approach to problem-solving consistently favored maintaining the status quo at the expense of honestly evaluating the potential societal impact of change (109-10). Possessing these kinds of biases would be a problematic quality of any group that aimed to explore ideologically divisive issues on behalf of a pluralistic society; however, in spite of the PCBE’s political predispositions, the Council pursued some unconventional goals and methods that warrant a closer look.

Its potentially problematic mode of creation is not the only lesson Bush and his PCBE took from Clinton and his bioethics commission. During the last half of the 1990s, Clinton’s National Bioethics Advisory Commission published many pointed reports and sent several clear recommendations to the White House addressing the most pressing bioethical problems of its time. This commission was well known for its narrow focus and pragmatic approach to crafting functional guidelines, but it also recognized that in some ways, these tactics left something to be desired. In its July 1997 report on “Cloning Human Beings,” the NBAC acknowledged:

We must continue to build our understanding of the widespread public concern that has been generated by these recent [technological] developments. Some of this concern can be explained by an inadequate understanding of the issues—sometimes even confusing science and science fiction. This matter, however, can be addressed over time through further public education. Other concerns, however, run much deeper and range from the implications for particular faith commitments, to views regarding the appropriate sphere for human action, to

concerns regarding the future of the family, to cumulative apprehensions about the real net benefit of a rapidly advancing technology that some believe is too aggressively pushing aside important social and moral values. As we move ahead to the next stage of our national discussion, these are among the many issues that need to be thoughtfully addressed. (Shapiro)

In this regard, President Bush's Council seemed to recognize where the NBAC fell short and made a conscious effort to pick up where its predecessor left off.

In the PCBE's very first meeting, Leon Kass addressed the importance of exploring the diverse social and moral philosophies that would act as the necessary foundation for the Council's "practical duty to shape a responsible public policy" for the White House (Welcome and Opening Remarks—Jan 17, 2002). While this approach was recommended by the previous government-sanctioned bioethics organization, recent national and world circumstances demanded it. The tragic events of September 11, 2001, and the months that followed had a profound impact on the American people, drastically shifting the common discourses and priorities of both the government and the public at large. The United States was forced to reevaluate many of the values that had always been central to its national identity (such as freedom, humanity, and dignity) while confronting new, terrifying realities born from previously untapped biological and technological progress (from aircraft hijackings to anthrax and other bioweaponry). In many ways, this atmosphere justified the work of a bioethics council that did things a little bit differently. Kass acknowledged this in his opening remarks:

If the aftermath of September 11 has hampered our getting started, paradoxically, it may assist us in performing the council's task. In numerous, if subtle, ways one feels a palpable increase in America's moral seriousness well beyond the

expected defense of our values and institutions so viciously under attack

(Welcome and Opening Remarks—Jan 17, 2002)

With this in mind, the PCBE dedicated time at many meetings to exploring the vital lessons offered by the humanities.

For the men and women who comprised the President’s Council on Bioethics, the majority of whom were trained and practiced in working with formulas and proven facts, the president’s order presented a new challenge and necessitated unfamiliar tools. As explained by Kass, the issues this council faced were not simply scientific or technological ones. They had greater concerns than simply establishing the safety of cloning cells or the efficacy of contraception. The members of the Council shared an understanding that, at a fundamental level, bioethical dilemmas are human dilemmas and bioethics is not an ethics of biology, but an “ethics in the service of bios,” or, of “a life lived humanly” (xx). To deal with questions of humanity, the Council recognized it was necessary to look to a field that had been engaging with these same questions for centuries. As a result, the PCBE turned to literature and periodically added to their meeting schedules sessions that looked at the academic humanities.

Over the course of its run, the PCBE dedicated seven sessions at Council meetings between 2002 and 2006 to what it called, “Toward a ‘Richer Bioethics.’” In these sessions, Council members would discuss previously selected works of literature, which had been chosen for the bioethical or technological questions they explored through their narratives. Kass and the rest of the Council believed this would help them gain a more complete understanding of the human experiences and concerns that were tied so closely to the problems the president had asked them to explore. In the first of these sessions, Kass explained:



It has been insufficiently observed that the President's decision [not to provide federal funding to embryonic stem cell research] established, or rather reestablished, the precedent that scientific research, being a human activity, is primarily a moral endeavor. One in which some human goods—the pursuit of cures for the sick, the inherent value of scientific freedom and curiosity—must be considered in light of other human goods—the inherent dignity of human life, attention to the unintended consequences of research and the use of technology, and the need for wisdom and realism about the meaning of human life, human procreation, and human mortality. (Welcome and Opening Remarks—Jan 17, 2002)

Literature, as a medium that has dealt with these same kinds of conflict between humans and human goods for centuries, offered the Council a practical and accessible way for considering these complicated ideas and relationships.

While it is notable that the PCBE chose to read literature to help it better fulfill its advisory role, it is also important to look closely at *how* the members read it. Scholars of literature widely recognize that the interpretive practices readers employ play an enormous part in creating the meaning they take away from a work. Unfortunately, even though literature was recognized by the Council as a valuable bioethical tool, there was no literary scholar or author among its membership who could offer the guidance and insight gained through their very unique education and training. In spite of this, PCBE meeting transcripts reveal that, in discussing the fiction they read, Council members often unknowingly and indiscriminately borrowed practices from a wide variety of literary hermeneutical traditions. We can see the

greatest variety of interpretive lenses at the July 12, 2002, meeting, during which the Council discussed Richard Selzer's short story "Wither Thou Goest."

In it, a young woman, mourning the sudden death of her husband, is notified that several of his organs, including his heart, have been transplanted into other patients. Several years later, the woman locates the man who received her husband's heart and writes him repeatedly, begging him to let her visit and listen to his heartbeat. Eventually, the man agrees to let her come, and the woman finds the closure she needs in hearing some part of her husband live on in a way that gives new life to another person. During the Council's discussion on this particular work, we do not see sophisticated and consistent systems of hermeneutical practices as we do in the Supreme Court's work. Instead, we see a group of men and women, unpracticed in working with narratives, who erratically try to create meaning by any means possible. One political scientist evokes the historicists and asks his peers to consider the author's intent. A professor of law submits a psychoanalytic argument that the young woman and the new owner of the heart are now fundamentally connected and that she recaptures some dimension of her lost marital relationship by resting her head against the stranger's bare chest in an arguably post-coital gesture. Chairman Kass, a bioethicist by profession, picks up on one possible Marxist reading in the heart recipient's loss of exclusive ownership over the body he inhabits and the language of commerce (Kass calls it prostitution) used to negotiate the deal in which his body is the commodity. In every session on literature, members repeatedly turned to various New Critical practices, specifically close readings of passages, only occasionally looking outside the text at hand to connect it to the Bible or other classic texts.

More often than any other interpretive practice, Council members seemed to derive meaning from the literature by reading and discussing it through frameworks that mirror the

reader-response movement in literary studies. At the first session in the “Toward a ‘Richer Bioethics’” series, the Council discussed Nathaniel Hawthorne’s “The Birth-Mark.” In it, a scientist named Aylmer marries a beautiful young woman named Georgiana. Aylmer is quickly overcome by his repulsion to a small, benign birthmark on his new wife’s face, and because of his obsessive desire to eliminate the mark, he develops a potion that succeeds in removing the imperfection, but also kills Georgiana. At the PCBE’s session on this text, Kass opened the floor by asking the group to “start conversing at this table not as scientists or humanists, but as fellow human beings, thoughtful about these matters and reacting responsively to the story” (Session 2—Jan 17, 2002). The members of the Council embraced this challenge whole-heartedly, repeatedly revealing how their own experiences helped shape how they understood and what they took away from the story. In literary studies, the German phenomenologists most accurately describe the kinds of reading that the members of the PCBE brought to these discussions. We can see this clearly in how the Council talks about Hawthorne’s protagonist:

DR. PAUL MCHUGH: Well, I had some very personal reactions to this story primarily because ... I read this story years ago when I was a teenager and it made me shudder. I mean, it was just awful ... And then the interesting thing to me, of course, is [now] I read this like a psychiatrist would read it ... Of course, a psychiatrist, you know, the contemporary era they--you know, you just understand it. Not only do we understand it but we have got words for it ... Her willingness to throw herself into this matter is called by the people in the psychoanalytic persuasion "identifying with the aggressor." So ... here I read this as an old chap and a psychiatrist, and I think the teenager was better. He saw this story more correctly and we could lose the shudder aspect of it as we begin to

know more—the more that human psychological science brings us—takes us away from the ability to really shudder at this awful thing that this man did and to some extent she was trapped into collaborating with.

CHAIRMAN KASS: That is very interesting. Jim Wilson?

DR. JAMES WILSON: I am a perpetual teenager on this subject. I do not know whether [Georgiana] identified with the aggressor or not. I am somewhat at a loss to explain her behavior but I find Hawthorne's story unsettling and in a degree appalling.

(Session 2—Jan 17, 2002)

In this exchange, literary critic Hans Robert Jauss' concern for how a reader's horizon impacts meaning and how that changes over time is apparent. As a reader, Dr. McHugh acknowledged the history of his own reception of this story. He considered his teenage horizon along with his professional psychiatric horizon as contributors to the meaning he arrived at for the story in his most current reader role as a member of a bioethics committee—one he shared and which became a part of the reading experiences of the rest of the Council.

Without purposeful and consistent methodological framework, it is difficult to evaluate the motivations and effects of the PCBE's conversations if we rely exclusively upon traditional literary tools; however, the work of scholars who study the wide range of theories and methods that govern fields of discourse analysis offer ways to approach this problem. The Council's sessions seeking a "Richer Bioethics" constitute what some scholars of discourse call literacy events. In New Literacy Studies, one school of discourse analysis, literacy events are defined as "any occasion in which a piece of writing is integral to the nature of the participants' interactions and their interpretive processes" (Heath 93). The PCBE's discussions on literary treatments of

important bioethical issues certainly fall into this category. Brian Street, a major voice in the New Literacy Studies movement, is especially interested in these types of events. In his article titled, “What’s ‘new’ in New Literacy Studies? Critical approaches to literacy in theory and practice,” Street asserts that “engaging with literacy is always a social act” because it is inextricably connected to the social conditions that produce a particular kind of knowledge or promote a particular way of obtaining that knowledge (77-8).

We can see how the Council’s meetings “On a Richer Bioethics” embodied the inherently social literacy events that Street describes. As in every other session, Chairman Kass would begin the meeting by announcing the topic at hand, in this case, the title and author of the work of literature, and then turn the discussion over to another member of the Council who had prepared some kind of more formal remarks on the work. These prepared remarks always offered a sweeping overview of the work at hand, highlighting key themes and gesturing toward clear literary devices (usually symbolism), before opening the floor to the entire Council for the discussion that would be managed by the chairman very much like a teacher in an English classroom. Leon Kass was a major participant in these discussions and also controlled the flow of conversation, calling on his peers as they volunteered to speak. Participants regularly responded to their peers, expanded upon others’ ideas, and shared personal anecdotes that seemed relevant to the story. Dissent was regularly acknowledged, but never rigorously explored. Instead, Kass and the other Council members were content as long as everyone had the opportunity to share their ideas. These discussions were collaborative efforts that never prioritized consensus; however, in spite of this, the PCBE’s discussions on literature were still productive in revealing the shared concerns of its members and constructing what those concerns mean in their respective fields of work.

Looking at the Council's "Toward a 'Richer Bioethics'" sessions as social, literacy events has enormous implications when examining the work of the PCBE through the philosophy of two scholars who had a substantial impact on many fields of discourse analysis. Peter L. Berger and Thomas Luckmann are best known for their book, *The Social Construction of Reality*, in which they argue that knowledge and behaviors that are perceived as the truth or the norm do not obtain that status objectively. Rather, they are constructed through social actions, like Street's inherently social literacy events, and through repetition over time, they become institutionalized as natural features of society. As a player in this process, the PCBE's literary conversations reveal and perpetuate prevalent, institutionalized concerns. Although the Council's discussions on literature dealt with diverse texts tied to a wide variety of bioethical issues, humanist concerns consistently bridged these differences, with dignity emerging as the most universal, dominating interest.

Surprisingly, the Council's body of work was not preoccupied with the impact of a controversial new procedure or the side effects of a new drug. Instead, the PCBE's transcripts show a clear and constant concern for the recognition and preservation of human dignity that starts with their pursuit of a "Richer Bioethics," or, bioethics informed by the humanities. The importance of dignity was a concept the members of the Council began to construct at their very first meeting, in the very first session, during which they discussed "The Birth-Mark." Dr. Robert George, a professor of jurisprudence, found a Kantian understanding of dignity to be central to his reading of the short story:

DR. GEORGE: I think that Aylmer has simply lost sight, if he ever had in grip, an understanding of Georgiana, perhaps people in general, as worthy intrinsically—as having an intrinsic dignity that was not dependent, that was not

conditional upon their specific attributes which may or may not, according to any particular standard, be rightly judged to be defective. So the message I take away from the story is you will really go off the rails, whether it is in the name of science or any other ideal... when you fail to understand human worth and dignity as an inherent and intrinsic thing and understand it in some other terms such that human beings become mere means to other ends. (Session 2—Jan 17, 2002)

Here we see how Dr. George ascribed to a definition of dignity that does not reject imperfection or disability. This stands in stark contrast to global and historical portrayals of dignity as closely associated with classical heroic figures embodying stoicism, strength, and sacrifice (Maclaren 40). George's reading of Aylmer's failure evoked a decidedly American dignity that is poignantly described by one of the nation's most recognizable symbols. The Statue of Liberty, inscribed with Emma Lazarus's poem, "The New Colossus," famously decries:

Give me your tired, your poor,  
Your huddled masses yearning to breathe free,  
The wretched refuse of your teeming shore.  
Send these, the homeless, tempest-tost to me (10-13)

In America, the dominant cultural discourse rejects the tradition that elevates the flawless ideal as a symbol of a life with worth. The PCBE's conversation reconfirmed this belief that dignity is found in all human lives. When Hawthorne's protagonist sees his wife as nothing more than her physical flaw and rejects her for it, Dr. George read this and Georgiana's ultimate death as a warning. Through this conversation, the Council recognized and upheld a definition of dignity that is not conditional and does not discriminate.

The PCBE developed this idea further during a session in which it discussed Richard Selzer's short story titled "The Atrium." Chairman Leon Kass began the meeting by summarizing the work. It is a semi-autobiographical story in which a retired surgeon meets a terminally ill boy, and the two characters connect when the younger asks the elder what he would do on his last day of life. The old man describes going to the forest and a painless, peaceful transition, as he simply becomes a part of the woods around him. The next day, the former doctor receives a letter from the boy. He had died that morning, but in his final hours had dictated a letter in which he thanks the old man for sharing his dream.

Kass opened up the conversation by asking if the former doctor's sharing was a "physicianly act ... [or] a deed of an old man himself close to the end" (Session 6—Sept 9, 2005). Dr. Ben Carson responded by asking the group to define what a physician is and offered his own vision of the doctor as a healer. Professor Diane Schaub rejected the importance of defining this profession and pointed to a moment in the text where the narrator says he is no longer a man of science, but is instead a man of intuition. Professor Rebecca Dresser found herself irritated by the narrator's romanticized fantasy of death, and Dr. Paul McHugh hated the story because he thought it sentimentalized physician-assisted death. The Council members bounced around ideas about the author's job to keep imagination alive in the face of the technology and science that seek to remove the mystery from the world and, similarly, to immortalize the young boy in this work of fiction, even though science could not save him on Earth. Kass attempted to reconcile these apparently competing ideas by reminding his peers that, historically, there was little distinction between doctor and priest.

Toward the end of this conversation, political philosopher Dr. Peter Lawler gestures toward another facet of dignity when he draws the Council's attention to a passage from the



“Explication” at the end of the story. Here, the author describes the shrunken, sickly teenager sitting alone in a hospital atrium, as “the only thing that gives the atrium any dignity” (Session 6—Sept 9, 2005). This image is juxtaposed dramatically with the narrator’s detailed description of the atrium itself. It is a jungle of plant life. A tangle of roots grows up into lush leaves and tropical flowers. A skylight welcomes the natural heat and brilliance of the sun. A fountain stands in the center of the atrium that looks like “a great ball of water in motion” (Selzer 244). The space is teeming with life, yet the narrator finds dignity only in a corpse-like boy who is bound to a wheelchair and tethered to an IV. Selzer leaves his readers to try to make sense of this, and Dr. Lawler’s attention to this moment reflects how the PCBE took up this challenge in the single, major publication that resulted from the Council’s literary work.

Even though the transcripts show the Council members agreed that dignity was an important quality that required protection in a world where science could manipulate biology in ever-changing ways, in their conversations, there was not a clear consensus as to what dignity was, where to find it, and how to shield it from the threat posed by progress. In order to more fully address these questions that were inconclusively explored in the PCBE’s meetings, the Council needed another tool. To this end, the PCBE published a literary companion titled *Being Human*. This book is an anthology of nearly 100 pieces of literature, curated by the PCBE to guide the American public in exploring the same moral questions its own meetings examined and better understand all of the Council’s recommendations to the president. At the January 16, 2004, meeting where the collection was unveiled, one guest speaker joked that he believed “the last time a government body produced an anthology of literature, it was under the orders of the Emperor Augustus” (Session 5—Jan 16, 2004). *Being Human* is certainly unique. It includes an impressive variety of texts that critically approach important bioethical questions and practices

from every angle. Most interestingly, the collection dedicates the final chapter to a concern that is not explicitly scientific at all—human dignity. With the publication of *Being Human*, the Council’s literary exploration of dignity evolved from a concern that the Council grappled with in its meetings into a functional understanding of a concept, which is intimately connected to the human and moral questions of bioethics.

In the introduction to “Chapter 10: Human Dignity,” Leon Kass introduces the concept of dignity and lays the groundwork for the various ways in which the readings that followed would interrogate the issue. Unfortunately, instead of simply providing a useful background, the introduction produces a context that shapes how readers entering into this literary event will read and interpret the texts. The title of the chapter immediately assigns the quality of dignity to humankind, ensuring that readers, regardless of their own horizons of understanding, will begin this journey from an anthropocentric position, one that views every other form of life as less valuable than human life. Lest the intention of the chapter’s title is too subtle, Kass’s introduction is sure to reiterate the point. He writes that dignity is “a power that sets us apart from everything else that lives” and that we “can see it expressed in the myriad ways we manifest our embodied humanity in living our individuated and finite lives” (567). This definition picks up on the same quality that sets the dying boy apart from the thriving foliage in “The Atrium.” Here, not all life is created equal, but all human life possesses an inherent value in its dignity.

This socially constructed way of understanding dignity is further supported by the Council’s inclusion of *Narrative of the Life of Frederick Douglass* in this chapter. The 1845 autobiography is a work with which many American readers are relatively familiar. It is widely taught in high schools across the country and depicts events that closely mirror common

perceptions of the United States' history of slavery. Kass calls the novel a "supreme [example] of human dignity at its finest" (568). As such, it is valuable to look directly at how Frederick Douglass thought about dignity in his work and in his own life. In his essay titled, "'The Essential Dignity of Man as Man': Frederick Douglass on Human Dignity," Nicholas Buccola attempts to do just that. Buccola finds that Douglass starts where the Council does, with an understanding of dignity as a uniquely human quality, but that Douglass develops this understanding further to find dignity based in uniquely human abilities, or capacities. Taking the content of Douglass' speeches and writings into account, Buccola distinguishes between four categories of human capacities: "the capacity to reason (the rational capacity), the capacity to comprehend morality (the moral capacity), the capacity to choose how to act (the volitional capacity), and the capacity to conceive of the self as a subject with a past, present and future (the temporal subjective capacity)" (229). In order to exhibit dignity, or show respect for the dignity of another person, Douglass believes that these capacities must be exercised or allowed to be exercised fully.

Turning back to *Being Human*, the Council endorses two key passages from Douglass's autobiography that illustrate his philosophy on dignity, both of which mark extraordinary turning points in the author's life. In the first excerpt from *Narrative of the Life of Frederick Douglass*, a young Frederick Douglass begins working in the home of the Auld family. He finds himself with a mistress who has never owned slaves before and has not yet learned the common, dehumanizing practices, which were widely used by slaveholders to control power dynamics and perpetuate the oppressive system of slavery. Instead, Mrs. Auld sees more in the boy than the unpaid labor he offers. She sees the young Douglass, a companion for her own son, with "the kindest heart and finest feelings," and treats him in ways that reveal her recognition for the value

of Douglass' life as a fellow human (622). Mrs. Auld does not simply see him as a means to accomplish some household task, and for a time, they share a relationship that is mutually beneficial in some important ways. Most significantly, she gives Douglass a gift that she gave her own child at a young age—Mrs. Auld teaches Frederick Douglass how to read and write. This event in Douglass's life is momentous because it effectively opens the door for his eventual emancipation, but it represents more than that. It is the first time in his life a white person recognizes and fosters his rational capacity in his ability to learn.

In the second excerpt that the PCBE endorses from *Frederick Douglass*, we find Douglass later in his life. He now works for a cruel master known for breaking slaves with brutal labor in the fields, terrible living conditions, and excessive methods of discipline for arbitrary indiscretions. In these ways, Mr. Covey treats his slaves no better than animals. Douglass writes that in his time there, he was “broken in body, soul, and spirit” (625). Covey asserts his power over his slaves by creating conditions in which it is impossible for the black men and women on his plantation to fulfill the capacities that realize their humanity. The PCBE zeroes in on this when Kass writes that the inclusion of *Frederick Douglass* is fitting because “it is a rich bioethics indeed that celebrates the birth into full humanity of such an individual” (568). As this glowing introduction suggests, Douglass finds a way to reclaim space to exercise the qualities that make him human, and to force his master to recognize them, as well. One day, after being beaten within an inch of losing his life, Douglass retaliates. He makes a conscious decision that he will not accept this treatment and fights back with so much ferocity that Covey fears for his own life. From this moment on, Douglass's “long-crushed spirit rose, cowardice departed, bold defiance took its place,” leaving behind a man who feels fully human and inspired to retain the respect and value that comes with this feeling (628).

The Council uses *Being Human* to further develop its understanding of dignity by highlighting several excerpts from *My Ántonia* written by Willa Cather. The novel was published in 1918 as the final book in Cather's "prairie trilogy." Unlike *Frederick Douglass*, *My Ántonia* is seldom taught in American secondary schools; however, in circles of higher education it is widely regarded as an important piece of the American literary canon and a faithful representation of western American life at the turn of the nineteenth century. The novel follows a young boy named Jim Burden, who moves from Virginia to Nebraska to live with his grandparents after he is orphaned. Jim soon meets his new neighbors, the Shimerdas—a Bohemian family who is not only new to farm life but also to American life. The PCBE seems to find something inherently dignified in the immigrant family's trials and tribulations, but perhaps most interestingly, the Council zeros in on the Shimerda family's greatest tragedy.

Ultimately, the challenges of life on the prairie prove to be too much for the Bohemian patriarch, and Mr. Shimerda commits suicide. *Being Human* includes the scene of his funeral. Kass argues that this moment shows how the Bohemian "retains his dignity despite taking his own life," in part through the prayer that Jim's grandfather, Josiah Burden, recites at Mr. Shimerda's graveside (Kass 568, 585). Josiah prays:

'Oh, great and just God, no man among us knows what the sleeper knows, nor is it for us to judge what lies between him and Thee.' He prayed that if any man there had been remiss toward the stranger come to a far country, God would forgive him and soften his heart. He recalled the promises to the widow and the fatherless, and asked God to smooth the way before this widow and her children, and to 'incline the hearts of men to deal justly with her.' In closing, he said we

were leaving Mr. Shimerda at ‘The judgment seat, which is also Thy mercy seat.’

(Cather 594)

The nature of Mr. Shimerda’s death agitates the community. The local graveyard will not accept his body and the neighbors attend the funeral on the Shimerdas’ own property without hiding their judgment that stems from the complicated relationship between the faith of the largely Christian community and the deceased’s suicide. When Jim’s grandfather speaks, he does so in a way that aims to mend this divide by highlighting the dignity of Mr. Shimerda and the family he leaves behind. With his prayer he reminds his neighbors of the dead Bohemian’s humanity and in asking God to forgive anyone who has lost sight of that, Josiah reminds his neighbors of their duty to show mercy and respect to the Shimerda family, regardless of their individual differences, personal circumstances, or religious beliefs.

Through these texts and the conversations that took place during the PCBE’s meetings, we can begin to construct a way of understanding dignity as it is treated in American bioethics. From the Council’s anthology chapter on dignity, it is clear that this government body believed this is a quality we must recognize and honor in our fellow humans. The experiences of Frederick Douglass and Josiah Burden embody this. Their examples are invaluable, and their influence can be found, not only in the work that the President’s Council on Bioethics produced as an advisory organization, but also in the actions that the president and Congress took based on the Council’s recommendations on pertinent bioethical issues, as I will explore in the following chapter.

## Chapter Three

### Applying Literature's Lessons

The President's Council on Bioethics and the Supreme Court of the United States are vastly different types of government bodies who work to solve drastically different types of problems. In spite of their differences, both groups have found value in fictional approaches to fundamental human questions and have engaged extensively with literature and literary practices in pursuit of their own respective goals. In the Supreme Court, we can see a long tradition of disciplined literary hermeneutics, with New Criticism rebranded as strict constructionism, literary historicism as originalism, and reader-response theories mirrored by the judicial pragmatist belief in the Living Constitution. As the most ideologically neutral member of the current Court, Justice Anthony Kennedy has drawn from all of these schools of thought in his work in addition to curating "Understanding Freedom's Heritage: How to Keep and Defend Liberty," a selection of historical and fictional works that have informed and reflect his own conception of liberty. The hermeneutical practices of the PCBE were untrained and lacked consistency, but by setting up their meetings as social literary events, the Council was still able to create meaning from the texts and construct a functional understanding of dignity—a concept that was further elevated in its literary anthology, *Being Human*, and that was fundamental in their bioethical advising.

How do we even begin to measure the influence of this uniquely academic work in these decidedly professional fields? While the PCBE's discussions on literature are well-documented and Supreme Court citations are easy to track, the complex, literary construction of fundamental American values produces an impact that is much more difficult to gauge.

I argue that one valid approach to answering this question is to look at whether or not the Court and the Council behave in ways that reflect this concern for the value of human life as it is illustrated by literature. If they do, we must then look at how this manifests in their judicial and bioethical work and how that impacts American society at large.

The literature the PCBE worked with and Justice Kennedy recommends not only helps define key American values, but it also provides a lesson in how ideas such as dignity and liberty should be treated by society. The examinations of human value that Huck Finn and Frederick Douglass undergo in their personal relationships provide a useful foundation; however, it is the excerpts these government entities highlight from *To Kill a Mockingbird* and *My Ántonia* that offer invaluable instruction to readers. Both Atticus Finch and Josiah Burden present defenses of human value that do not originate with the individual or within individual interactions. Both men are compelled to reach beyond themselves and entreat their peers to fulfill an obligation to their fellow men. Atticus directly reminds the members of the jury of their judicial duty to treat Tom Robinson as an equal. Josiah does so indirectly by evoking God's authority to remind his neighbors of their moral duty as Christians to show respect for the Shimerda family. These stories reflect worlds in which this duty is placed on people based upon their association with very specific types of communities.

Martha Nussbaum's work "Human Dignity and Bioethics" picks up on this connection between fundamental American values and the duty to defend them that we perceive in these classic American works of fiction. Nussbaum articulates this in a way that effectively bridges the gap between what we see in literature and what we see in American government. This essay was included in a 2008 PCBE publication and offers one perspective on the role and treatment of dignity and liberty in modern American culture. Nussbaum's philosophy ascribes to a capacity-



based approach to dignity that aligns very closely with the one illustrated in *Narrative of the Life of Frederick Douglass* and supported by Douglass's lifetime of work on the subject. In this essay, she echoes the same concern for the protection of dignity that is revealed in the PCBE's literary selections and Justice Kennedy's reading list. Nussbaum builds on the example provided by Atticus and Josiah and argues that respect for human dignity entails more than simply acknowledging the value of life; this concern must be addressed on an even larger scale. Josiah's religious community and Atticus's jury represent what Nussbaum calls some of the "most basic structures of society," and she contends that these structures must create or promote conditions that allow people to fulfill their most basic human capabilities through personal development and exercising choice (Nussbaum 360). When looking at modern American society, Nussbaum points to the government as the ultimate social structure that organizes the world in ways that affect every citizen, and she asserts it has an obligation to respect the dignity of its citizens by acting with this goal in mind (Nussbaum 360). As government bodies, the PCBE and the Supreme Court acknowledge and embrace this obligation. We can see this clearly in the work they do for the people they serve.

#### The President's Council on Bioethics

*Being Human's* final chapter, comprised of literary explorations of dignity, is significant because it takes up an issue which came up in nearly every session of each Council meeting and one that impacted every recommendation the Council sent to the White House. As a result, it was consistently a central concern for President George W. Bush in matters of public bioethics. Although we may not see Frederick Douglass quoted in federal reports or Willa Cather

referenced in the footnotes of an executive order, the contribution of these works to American culture should not be discounted. We can trace the previously established impact of literature and literary studies through the scientific recommendations that the PCBE sent to the White House to the laws and policies the federal government created in response to them.

In 2009, after President Bush's Council on Bioethics was dissolved by his successor, one Council member published an article seeking to assess the Bush administration's treatment of bioethical issues. "Public Bioethics and the Bush Presidency" by O. Carter Snead begins by outlining what he calls the administration's "grounding goods," or the ideas and values upon which the government based its philosophies and actions. Snead asserts that one of these grounding goods is the protection of human dignity. He highlights how dignity was a recurring, motivating concern in President Bush's rhetoric surrounding so many of the administration's domestic and global efforts from passing the United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, to justifying the War on Terror (871). However, in his article, Snead largely rejects the usage of the term "human dignity" to describe Bush's principal influence in favor of what he calls, the "fundamental equality of all human beings," because he believes the term is more widely and more fully understood (870). In Snead's article, these concepts are functionally one and the same, but his interest in clarity and his choice to use them interchangeably begins earlier in the Council's work.

We can locate the root of Snead's concern in one of the PCBE's major reports to the president. *Reproduction and Responsibility: The Regulation of New Biotechnologies*, published in 2004, provided a survey of the current state of bioethics in American law and emerging technologies and practices worldwide. It also supplied several unanimous recommendations for actions the federal government should take in this arena. Notably, it begins by outlining "some

unique aspects of American law that create the backdrop against which the current regulatory mechanisms exist” and which the Council members took into account in crafting their recommendations as to how the nation should progress into the future (Kass, *Reproduction and Responsibility* 8). Among these, the PCBE notes:

An ... element that informs the present inquiry is the absence of human dignity as an explicit concept in American law. Much of the legal discourse in this country employs operative terms such as liberty, equality, justice, and rights. Unlike some of our European counterparts, “human dignity” is not in our legal lexicon.<sup>1</sup> Thus, legislators and courts lack the language (and therefore the explicit authority) to fashion responses and remedies to conduct solely on the grounds that it threatens the dignity of the human person. (11)

This excerpt reveals the Council’s critical impression that the American legal record somehow falls short in its duty to consider and protect dignity. While Snead attempts to open up the conversation to encompass all concerns that could be tied to the value of human life as Americans understand it, *Reproduction and Responsibility* seeks to offer a bioethical source of authority for which the concept is imperative. In spite of this conflict, or perhaps because of it, we see the PCBE explicitly indicate how its drive to defend the dignity of Americans is central to the kinds of progress it endorses.

This same report was essential to efforts regulating research and best practices in reproductive sciences and technologies. In introducing its recommendations, the Council outlines the qualities and values that inform its decisions:

---

<sup>1</sup> This is not true. I will establish the presence and power of human dignity in American legal discourse preceding the PCBE’s publication in the following section.

Though we differ about certain fundamental ethical questions in this field, and especially about the moral standing of human embryos, we have nevertheless been able to agree on several policy suggestions that we believe should command not only the respect but also the assent of most people of common sense, good will, and a public-spirited concern for human freedom and dignity.

(Kass, *Reproduction* 207)

With this goal in mind, the Council submitted several unanimously chosen points of guidance for lawmakers. Among these was the recommendation “that human pregnancy should not be initiated using assisted reproductive technologies for any purpose other than to seek the birth of a child” (221). This suggestion, born from the utmost concern for the dignity of both mothers and the unborn, inspired many government actions that dramatically changed the landscape for stem cell use and research in the United States.

In direct response to this particular recommendation, President Bush wrote an executive order declaring that all actions the federal government takes involving this type of scientific work must affirm “the principle that no life should be used as a mere means for achieving the medical benefit of another” (Executive Order 13435). In service of this goal, the order called for expanded funding for research using human-induced pluripotent stem cells (adult cells that are reprogrammed to behave like embryonic stem cells), cut federal funding for any new lines of stem cells that were created after this order was signed, and directed the Secretary of Health and Human Services to examine the PCBE’s recommended techniques that allowed some current areas of research to continue on older stem lines, only as long as they were pursued in ways that prevented the destruction of human embryos (Executive Order 13435). Surprisingly, the Council’s report on reproductive practices and technologies also inspired President Bush to get

involved in the work of the federal government's legislative branch. He encouraged Congress to write and pass bills to regulate research and other activities that conflicted with the Council's recommendations and his own understanding of dignity. Snead points to the 2006 Fetus Farming Prohibition Act as one such law that the president championed directly in response to the PCBE's report on *Reproduction and Responsibility* (Snead 887). Once passed, this act made it illegal for anyone

to . . . solicit or knowingly acquire, receive, or accept a donation of human fetal tissue knowing that a human pregnancy was deliberately initiated to provide such tissue; or . . . knowingly acquire, receive, or accept tissue or cells obtained from a human embryo or fetus that was gestated in the uterus of a nonhuman animal.  
(Fetus Farming Prohibition Act)

Here we see another defense of the value of human life as a quality that is intrinsic to all of mankind and not dependent on the utility it possesses for others or for society as a whole.

This executive order and Congress' related legislation had an enormously controversial impact on the scientific landscape in America. As a result of its increased federal funding, published stem cell research using adult cells increased by approximately five times between 2008 and 2010. Some scholars argue that, by studying adult and embryonic cells together, scientists made some valuable progress in developing therapies to treat a wider variety of conditions resulting from damaged or diseased tissue than they could have if there had been no incentive to work extensively with pluripotent cells ("Social Scientists Study Impact"). On the other hand, Bush's critics point out how the United States' biological and health science communities had the potential to make even greater strides in the development of life-saving medicine if the federal government had not limited research and practices in all of the ways that

it did. In the three years after President Bush's executive order, 128 new embryonic stem cell lines were produced around the world, most of them uncontaminated by the animal products that had been necessary to produce the cell lines in the past, and many of them created from embryos that possessed certain genetic diseases and could therefore be used to study and treat these disorders more effectively (Daley 627). Bush's order effectively made these advancements in stem cell research off limits to scientists in the United States, which stunted progress in this field and drove some scientists to pursue their projects abroad.

The understanding of dignity that the PCBE constructed through its many discussions on literature played a central role in how its members crafted their formal reports. In them, it is easy to find Frederick Douglass' belief that dignity should be recognized in all people (here, including embryos as long as they are human) and the fulfillment of Josiah Burden's appeal to defend and protect that uniquely human quality. These reports had a massive impact on the science and technology fields for the first decade of the twenty-first century in America and the actions the federal government took in response to the Council's recommendations brought concerns for dignity into the national discourse surrounding biomedical questions. By many measures, this work and its highly debated effects are the domestic hallmark of Bush's presidency and continue to mold the world of health sciences today.

#### Justice Anthony Kennedy and the Supreme Court

Justice Kennedy's relationship with the fiction he recommends provides the foundation for his unique role on the bench. President Ronald Regan, the conservative standard bearer for the modern Republican Party, nominated Justice Kennedy for the Supreme Court. In light of this,

it is unsurprising that the majority of Kennedy's legal opinions reflect a preference for conservative judicial practices. However, what is surprising is that Kennedy shows a tendency to split from his conservative peers in cases that raise questions about individual liberty. As a result, Justice Kennedy has earned a reputation as the tie-breaking vote, giving his contributions to the Court's work a certain weight. In order to adequately assess the impact of Kennedy's deep ties to literature and literary studies, it seems most productive to start by looking at the way he has spoken and written about liberty in his work for the Supreme Court.

Kennedy's attraction to Huckleberry Finn and Atticus Finch reveals an understanding of liberty as intrinsically intertwined with a concern for what we see in the PCBE's conceptualization of dignity. Justice Kennedy recognizes the relationship between liberty and dignity earlier in his career at the 1987 Nomination Hearing for his appointment to the Supreme Court. During the customary questioning, Senator Gordon Humphrey of New Hampshire asked then-Judge Kennedy to describe his view of what determines the elements and ideas that the Constitution protects through its regard for the concept of liberty. Kennedy responded:

A very abbreviated list of the considerations are: the essentials of the right to human dignity, the injury to the person, the harm to the person, the anguish to the person, the inability of the person to manifest his or her own personality, the inability of a person to obtain his or her own self-fulfillment, the inability of a person to reach his or her own potential.

(Hearings on the Nomination of Anthony M. Kennedy 180)

Here, Kennedy asserts that individual freedom can only truly exist if it is recognized, respected, and fostered by others. Like Martha Nussbaum, Kennedy clearly ascribes to the philosophy that government has an obligation to protect and defend that freedom.

Over the course of his career on the Supreme Court, Kennedy has further detailed the relationship he sees between liberty and dignity. In her book, *The Tie Goes to Freedom: Justice Anthony M. Kennedy on Liberty*, law professor Helen Knowles points to a speech that Kennedy gave in 2003 at the American Bar Association annual meeting. Sixteen years after his nomination, Kennedy asserts that “liberty means the right to search for dignity” (44). Knowles interprets this definition of liberty as a reflection of Kennedy’s belief that it must be active. It cannot exist passively and is a right, protected by the Constitution, which can be preserved through the constant pursuit and defense of dignity. Ten years later Kennedy offers another way of illustrating this relationship for his fellow Americans through the literary examples we have explored from “Understanding Freedom's Heritage: How to Keep and Defend Liberty.” Looking at his nomination testimony and speeches, it is apparent that Kennedy recommends literature in which the active defense of dignity is a major theme and a force that has heavily influenced his own worldview.

To try to measure this influence, let us turn once more to Supreme Court opinions as a valuable tool. Since we have established a literary basis for Justice Kennedy’s treatment of liberty and dignity, we can examine the role that these concepts play in his jurisprudence. Many scholars define Justice Kennedy’s career (particularly the last twenty years) first and foremost as a defense of human dignity and the individual freedom that is liberty (Ewing). This manifests primarily in the majority opinions Kennedy pens as the Court’s swing vote on controversial social issues. Many political science scholars point to the majority opinions that he wrote on three landmark cases for LGBT rights. In each of them, Kennedy writes that the court needed to decide “whether the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the [Constitution]” (*US v. Windsor*).



In these cases, Kennedy recognized that he must fulfill the goals of his own recommended reading list; he must fully “understand freedom” and has an obligation to “keep and defend liberty.” His own conception of these intangible ideas allowed him to do that. In 2003, Justice Kennedy provided the deciding vote and wrote the majority opinion in a case that struck down a Texas state law criminalizing sodomy and effectively established the precedent of dignity’s protection under the Fourteenth Amendment in the American legal record. In it he wrote:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.

*(Lawrence v. Texas)*

Ten years later he developed this argument further when he again acted as a tie-breaking swing vote and wrote the opinion for the Court’s decision to dismantle the Defense of Marriage Act, effectively requiring the federal government to recognize same-sex unions. To support this decision, he wrote:

The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.

*(US v. Windsor)*

The *Windsor* case paved the way for another enormous step forward for the LGBT community. In 2015, Justice Kennedy once again voted with the Court’s liberal-leaning justices and wrote the opinion for a consolidated case that challenged the various bans on same-sex marriage in

Michigan, Ohio, Kentucky, and Tennessee. His response was the natural conclusion of the jurisprudential arc of his entire career:

They ask for equal dignity in the eyes of the law.

The Constitution grants them that right. (*Obergefell v. Hodges*)

Justice Kennedy's work on these cases validated same-sex relationships and ultimately gave LGBT Americans the right to marry in all fifty states.

## Conclusion

As the deciding vote in each of these cases, Justice Kennedy's understanding of liberty and dignity was critical to the dissolution of these unconstitutional state laws and state constitutional amendments. In his opinions we can see Huck's passionate defense of humanity and the responsibility Atticus feels to preserve it systematically and fairly, even if the outcome conflicts with public opinion or tradition. In so many ways, Justice Kennedy's deep concern for the value and freedom of the individual propelled American government and society forward on some of the most divisive social issues of our time.

Although the President's Council on Bioethics and the United States Supreme Court are vastly different government entities, the ground they share through their work with literature and literary practices reveals the immense value of this type of cultural engagement for those who create or influence public policy. As much as literature reflects the world in which we live, it also produces cultural atmospheres and attitudes as an often-silent player in these boardrooms and courtrooms. Even when politicians, scientists, or judges embrace the humanities as a legitimate tool in their non-academic fields, its influence often reaches farther than we can easily see. It would seem ridiculous for a leukemia patient to thank Frederick Douglass for a life-saving bone marrow transplant or for two married men to credit Huckleberry Finn with their legal right to jointly adopt a child. Yet the values that are so strongly acclaimed in these great works of fiction are entwined in the fabric of American society in ways that have helped to create medical and legal realities. Conversations about literature offer clear opportunities for certain types of learning. The President's Council on Bioethics and Supreme Court Justice Anthony Kennedy show how these lessons have the power to initiate the creation of new laws and the weight to inspire change in existing policies that impact nearly every aspect of human life in America.

## Works Cited

- “A Brief Guide to the Fireside Poets.” *Poets.org*, Academy of American Poets, 11 May 2004, [poets.org/poetsorg/text/brief-guide-fireside-poets](http://poets.org/poetsorg/text/brief-guide-fireside-poets). Accessed 8 Oct. 2016.
- “A Brief Overview of the Supreme Court.” *A Brief Overview of the Supreme Court*, Supreme Court of the United States, 11 Aug. 2016. [supremecourt.gov/about/briefoverview.aspx](http://supremecourt.gov/about/briefoverview.aspx). Accessed 11 Sept. 2016.
- Berger, Peter L., and Thomas Luckmann. *The Social Construction of Reality: A Treatise in the Sociology of Knowledge*. Garden City, NY, Doubleday, 1967.
- Brooks, Cleanth. "My Credo: Formalist Criticism." *The Critical Tradition: Classic Texts and Contemporary Trends*. Ed. David H. Richter. Third ed., St. Martin's Press, New York, NY, 1989, pp. 798-806.
- Buccola, Nicholas. “‘The Essential Dignity of Man as Man’: Frederick Douglass on Human Dignity.” *American Political Thought*, vol. 4, no. 2, 1 Mar. 2015, pp. 228–258. *JSTOR*, [jstor.org/stable/10.1086/680390?ref=search-gateway:804cb860b3ed5c39b90c0c7598d531c8](http://jstor.org/stable/10.1086/680390?ref=search-gateway:804cb860b3ed5c39b90c0c7598d531c8). Accessed 21 Aug. 2016.
- Burk, Dan L., and Jessica Reyman. “Patents as Genre: A Prospectus.” *Law & Literature*, vol. 26, no. 2, Apr. 2014, pp. 163–190., doi:10.1080/1535685x.2014.888193. Accessed 1 Mar. 2017.
- Bush, George W. "The President's Council on Bioethics: Executive Order 13237." *The President's Council on Bioethics: Executive Order 13237*. Bioethics Research Library at Georgetown University, 28 November 2001. [bioethicsarchive.georgetown.edu/pcbe/about/executive.html](http://bioethicsarchive.georgetown.edu/pcbe/about/executive.html). Accessed 17 Feb. 2015.

- Cather, Willa. "Excerpts from My Antonia." *Being Human: Core Readings in the Humanities*, Edited by Leon Kass, W. W. Norton, New York, NY, 2004, pp. 584–595.
- Clayton, Jay. "The Ridicule of Time: Science Fiction, Bioethics, and the Posthuman." *American Literary History* 25.2 (2013): 317-43. Oxford University Press. doi: 10.1093/alh/ajt005. Accessed 3 Mar. 2015.
- Clayton, Jay, Lennard J. Davis, Bernice L. Hausman, Jonathan M. Metz, and Priscilla Wald. "Forum: Conference Debates. Biocultures: An Emerging Paradigm." *PMLA* 124.3 (2009): pp. 947-56.
- Crane, Gregg. "Law and the American Novel." *The Cambridge History of the American Novel*, Edited by Leonard Cassuto et al., Cambridge University Press, Cambridge, 2011, pp. 767–780.
- Daley, George Q. "Missed Opportunities in Embryonic Stem-Cell Research." *New England Journal of Medicine*, vol. 351, no. 7, 2004, pp. 627–628. *ProQuest*. Accessed 1 Dec. 2016
- Delany, Ella. "Humanities Studies Under Strain Around the Globe." *The New York Times*, *The New York Times*, 1 Dec. 2013, [www.nytimes.com/2013/12/02/us/humanities-studies-under-strain-around-the-globe.html](http://www.nytimes.com/2013/12/02/us/humanities-studies-under-strain-around-the-globe.html). Accessed 1 Mar. 2017.
- Djikic, Maja et al. "Opening the Closed Mind: The Effect of Exposure to Literature on the Need for Closure." *Creativity Research Journal*, vol. 25, no. 2, 2013, pp. 149–154. doi:10.1080/10400419.2013.783735. Accessed 12 Oct. 2016.
- Dodson, Scott, and Ami Dodson. "Literary Justice." *The Green Bag: An Entertaining Journal of Law*, vol. 18, no. 4, 26 Aug. 2015, pp. 429–434. [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2650959](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2650959). Accessed 5 Mar. 2016.

- Douglass, Frederick. "Excerpts from Narrative of the Life of Frederick Douglass." *Being Human: Core Readings in the Humanities*, Edited by Leon Kass, W. W. Norton, New York, NY, 2004, pp. 622–628.
- Downs, Kenya. "'To Kill A Mockingbird' Remains among Top Banned Classical Novels." *PBS Newshour*, PBS, 19 Feb. 2016, [pbs.org/newshour/rundown/to-kill-a-mockingbird-remains-among-top-banned-classical-novels/](http://pbs.org/newshour/rundown/to-kill-a-mockingbird-remains-among-top-banned-classical-novels/). Accessed 3 Oct. 2016.
- Ewing, Connor. "The Sweet Mystery of Dignity." *Online Library of Law and Liberty*, Library of Law and Liberty, 16 June 2015, [libertylawsite.org/2015/06/16/the-sweet-mystery-of-dignity/](http://libertylawsite.org/2015/06/16/the-sweet-mystery-of-dignity/). Accessed 15 Apr. 2016.
- Executive Order. No. 13435, 2007, p. 34591.
- Farbman, Herschel. "Corporate Personhood and Modernist Impersonality: Woolf's Drama." *Law & Literature*, vol. 28, no. 3, 2016, pp. 379–402., doi:10.1080/1535685x.2016.1232919. Accessed 1 Mar. 2017.
- Gadamer, Hans-Georg. "The Elevation of the Historicity of Understanding." *The Critical Tradition: Classic Texts and Contemporary Trends*, Ed. David H. Richter, Third ed., St. Martin's Press, New York, NY, 1989, pp. 721–737.
- Gornick, Vivian. "From The Poem That Changed America: 'Howl' Fifty Years Later." *The American Poetry Review*, Edited by Jason Shinder, vol. 35, no. 2, 1 Mar. 2006, pp. 4–6. JSTOR, [www.jstor.org/stable/10.2307/20683131](http://www.jstor.org/stable/10.2307/20683131). Accessed 1 Mar. 2017.
- Green, Ronald M. "For Richer or Poorer? Evaluating the President's Council on Bioethics." *HEC Forum*, vol. 18, no. 2, Aug. 2006, pp. 108–124. *ProQuest*, doi:10.1007/s10730-006-9001-6. Accessed 5 Aug 2016

- Heath, Shirley. "Protean Shapes in Literacy Events: Ever-Shifting Oral and Literate Traditions." *Spoken and Written Language: Exploring Orality and Literacy*, Edited by Deborah Tannen, ALEX Pub. Corp., Norwood, NJ, 1982, pp. 91–117.
- Henderson, M. Todd. "Citing Fiction." *The Green Bag: An Entertaining Journal of Law*, vol. 11, no. 2, ser. 2, 2008, pp. 171–185. 2, [chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1057&context=public\\_law\\_and\\_legal\\_theory](http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1057&context=public_law_and_legal_theory). Accessed 5 Aug. 2015.
- Higgins, Lesley J. "A 'Complex, Multiform Creature' No More: Governmentality Getting Wilde." *College Literature*, vol. 35, no. 3, Law and Literature, 1 July 2008, pp. 96–119. *JSTOR*, [www.jstor.org/stable/10.2307/25115510](http://www.jstor.org/stable/10.2307/25115510). Accessed 1 Mar. 2017.
- "History of Bioethics Commissions." *Home Page*. The Presidential Commission for the Study of Bioethical Issues. <http://bioethics.gov/history>. Accessed 6 Sept. 2016.
- "History of the Court." Timeline of Justices. The Supreme Court Historical Society. [supremecourthistory.org/history\\_timeline.html](http://supremecourthistory.org/history_timeline.html). Accessed 16 Apr. 2016.
- Hopkins, James D. "The Development of Realism in Law and Literature During the Period 1883-1933: The Cultural Resemblance." *Pace Law Review*, vol. 4, no. 1, Sept. 1983, pp. 29-60. [digitalcommons.pace.edu/plr/vol4/iss1/3/](http://digitalcommons.pace.edu/plr/vol4/iss1/3/). Accessed 1 Mar. 2017.
- Iser, Wolfgang. "The Reading Process: A Phenomenological Approach." *The Critical Tradition: Classic Texts and Contemporary Trends*. Ed. David H. Richter. Third ed., St. Martin's Press, New York, NY, 1989, 1002-14.
- Karabel, Jerome. *The Chosen: The Hidden History of Admission and Exclusion at Harvard, Yale, and Princeton*. Boston: Houghton Mifflin Co., 2005, pp. 39-52.

- Kass, Leon, editor. *Being Human: Core Readings in the Humanities*. New York, NY, W. W. Norton & Company, Inc., 2004.
- Kass, Leon et al. *Reproduction and Responsibility: The Regulation of New Biotechnologies*. GPO, Washington, D.C., 2004, pp. 1–252.
- Kennedy, Anthony M. “Understanding Freedom’s Heritage: How to Keep and Defend Liberty.” Ninth Circuit Court, 25 June 2013, pp. 1–5.  
[cdn.ca9.uscourts.gov/datastore/library/2013/06/27/AMK\\_ReadingList\\_20130625.pdf](http://cdn.ca9.uscourts.gov/datastore/library/2013/06/27/AMK_ReadingList_20130625.pdf).  
 Accessed 18 Feb. 2016.
- Kidd, David Comer, and Emanuele Castano. “Reading Literary Fiction Improves Theory of Mind.” *Science*, vol. 342, no. 6156, 18 Oct. 2013, pp. 377–380.  
[doi:10.1126/science.1239918](https://doi.org/10.1126/science.1239918). Accessed 10 Oct. 2016.
- Knowles, Helen J. *The Tie Goes to Freedom: Justice Anthony M. Kennedy on Liberty*. Lanham, MD, Rowman & Littlefield, 2009.
- Lazarus, Emma. “The New Colossus.” 1883,  
[www.nps.gov/stli/learn/historyculture/colossus.htm](http://www.nps.gov/stli/learn/historyculture/colossus.htm). Accessed 4 Mar. 2017.
- Lee, Harper. *To Kill a Mockingbird*. New York, NY, Grand Central Publishing, 1982.
- Levine, Lawrence W. “William Shakespeare in America.” *Highbrow/Lowbrow: the Emergence of Cultural Hierarchy in America*, Harvard University Press, Cambridge, MA, 1988, pp. 13–81.
- Maclaren, Elizabeth A. “Dignity.” *Journal of Medical Ethics*, vol. 3, no. 1, Mar. 1977, pp. 40–41. *JSTOR*, [doi:10.1136/jme.3.1.40](https://doi.org/10.1136/jme.3.1.40). Accessed 1 Mar. 2017.
- Miller, D. “The Judiciary.” *The Judiciary*. New Hyde Park Memorial High School,  
[socialstudieshelp.com/APGOV\\_Judiciary.htm](http://socialstudieshelp.com/APGOV_Judiciary.htm). Accessed 21 Sept. 2016.



- Natelson, Robert. "The Founders' Hermeneutic: The Real Original Understanding of Original Intent." *Ohio State Law Journal*, vol. 68, no. 5, 1 Jan. 2007, pp. 1240–1305.
- Nussbaum, Martha. "Human Dignity and Political Entitlements." *Human Dignity and Bioethics: Essays Commissioned by the President's Council on Bioethics*, GPO, Washington, D.C., 2008, pp. 351–380.
- Ost, François. "The Law as Mirrored in Literature." *SubStance*, vol. 35, no. 1, Issue 109: Law and Literature, 1 Jan. 2006, pp. 3–19. *JSTOR*, [jstor.org/stable/3685633](http://jstor.org/stable/3685633). Accessed 18 Feb. 2016.
- Peterson, Robert. "The Bard and the Bench: An Opinion and Brief Writer's Guide to Shakespeare." *Santa Clara Law Review*, vol. 39, 1 Jan. 1999, pp. 789–807. [digitalcommons.law.scu.edu/facpubs/119](http://digitalcommons.law.scu.edu/facpubs/119). Accessed 15 Apr. 2016.
- Richter, David H., editor. *The Critical Tradition: Classic Texts and Contemporary Trends*. Third ed., New York, NY, St. Martin's Press, 1989.
- Rosen, Jeffrey. "Can Bush Deliver a Conservative Supreme Court?" *The New York Times*, The New York Times, 13 Nov. 2004, [nytimes.com/2004/11/14/weekinreview/14jeff.html?pagewanted=print&position=&\\_r=0](http://nytimes.com/2004/11/14/weekinreview/14jeff.html?pagewanted=print&position=&_r=0). Accessed 24 Sept. 2016.
- Selzer, Richard. "Atrium: October 2001." *The Whistler's Room: Stories and Essays*, Carroll & Graf, New York, 2007, pp. 244–255.
- "Session 2: Science and the Pursuit of Perfection." *Transcript--January 17, 2002*. Proc. of President's Council on Bioethics, Loews L'Enfant Plaza Hotel, Washington, D.C. Bioethics Research Library at Georgetown University, 19 Oct. 2009,

bioethicsarchive.georgetown.edu/pcbe/transcripts/jan02/jan17session2.html. Accessed 11 Sept. 2016.

"Session 5: Toward a 'Richer Bioethics' Council's Report to the President" *Transcript--January 16, 2004*. Proc. of President's Council on Bioethics, Wyndham City Center Hotel, Washington, D.C. Bioethics Research Library at Georgetown University, 19 Oct. 2009, bioethicsarchive.georgetown.edu/pcbe/transcripts/jan04/session5.html. Accessed 23 Feb. 2016.

"Session 6: The Medical Vocation, Then and Now." *Transcript--September 9, 2005*. Proc. of President's Council on Bioethics, Wyndham City Center Hotel, Washington, D.C. Bioethics Research Library at Georgetown University, 19 Oct. 2009, bioethicsarchive.georgetown.edu/pcbe/transcripts/sep05/session6.html. Accessed 8 Sept. 2016.

Shapiro, Harold T. *Cloning Human Beings: Report and Recommendations of the National Bioethics Advisory Commission*. Rockville, MD, 1997, pp. 1–110, Cloning Human Beings: Report and Recommendations of the National Bioethics Advisory Commission, bioethicsarchive.georgetown.edu/nbac/pubs.html. Accessed 3 Sept 2016.

Skilton, Robert H. "Shakespeare and the Supreme Court." *University of Wisconsin Law School Forum: Gargoyle*, vol. 21, no. 4, 1991, pp. 4–8. media.law.wisc.edu/m/yzkwm/. Accessed 3 Aug. 2016.

Snead, O. Carter. "Public Bioethics and the Bush Presidency." *Harvard Journal of Law & Public Policy*, vol. 32, no. 3, 2009, pp. 867–912.

- “Social Scientists Study Impact of Human Adult Stem Cell Research.” *News*, National Science Foundation, 9 June 2011, [nsf.gov/news/news\\_summ.jsp?cntn\\_id=119804](http://nsf.gov/news/news_summ.jsp?cntn_id=119804). Accessed 26 Oct. 2016.
- Strauss, David A. “The Living Constitution.” *Stay Connected : The Record*, 2010, [law.uchicago.edu/alumni/magazine/fall10/strauss](http://law.uchicago.edu/alumni/magazine/fall10/strauss). Accessed 5 Sept. 2016.
- Street, Brian. “What's ‘New’ in New Literacy Studies? Critical Approaches to Literacy in Theory and Practice.” *Current Issues in Comparative Education*, vol. 5, no. 2, 12 May 2003, pp. 77–91. [tc.columbia.edu/cice/pdf/25734\\_5\\_2\\_street.pdf](http://tc.columbia.edu/cice/pdf/25734_5_2_street.pdf). Accessed 12 Sept. 2016.
- Supreme Court of the United States. *Lawrence v. Texas*. no. 14-556, 26 June 2003, [supreme.justia.com/cases/federal/us/539/558/case.html](http://supreme.justia.com/cases/federal/us/539/558/case.html). Accessed 29 Oct. 2016.
- Supreme Court of the United States. *Levy v. State of Louisiana*. 20 May 1968, [caselaw.findlaw.com/us-supreme-court/391/68.html](http://caselaw.findlaw.com/us-supreme-court/391/68.html). Accessed 22 Sept. 2016.
- Supreme Court of the United States. *Magone v. Heller*. 30 Oct. 1893, [caselaw.findlaw.com/us-supreme-court/150/70.html](http://caselaw.findlaw.com/us-supreme-court/150/70.html). Accessed 22 Sept. 2016.
- Supreme Court of the United States. *Obergefell v. Hodges*. no. 02-102, 26 June 2015, [supremecourt.gov/opinions/14pdf/14-556\\_3204.pdf](http://supremecourt.gov/opinions/14pdf/14-556_3204.pdf). Accessed 29 Oct. 2016.
- Supreme Court of the United States. *United States v. Windsor*. no. 12-307, 26 June 2013, [supremecourt.gov/opinions/12pdf/12-307\\_6j37.pdf](http://supremecourt.gov/opinions/12pdf/12-307_6j37.pdf). Accessed 29 Oct. 2016.
- "Text of the Oaths of Office for Supreme Court Justices." *Text of the Oaths of Office for Supreme Court Justices*. The Supreme Court of the United States--Office of the Curator, 10 Aug. 2009, [supremecourt.gov/about/oath/textoftheoathsofoffice2009.pdf](http://supremecourt.gov/about/oath/textoftheoathsofoffice2009.pdf). Accessed 24 Sept. 2016.

Twain, Mark. *Adventures of Huckleberry Finn*. Edited by Emory Elliott, Oxford, Oxford University Press, 1999.

United States, Congress, Senate, Committee on the Judiciary. *Hearings on the Nomination of Anthony M. Kennedy to Be Associate Justice of the Supreme Court of the United States Dec. 14-16, 1987*, GPO, Washington, D.C., 1989, pp. 1–1119. 100th Congress, 1st session, serial no. J-100-67.

United States, Congress, Senate, “Fetus Farming Prohibition Act of 2006.” 109th Congress. 2nd session. Washington, D.C., 3 Jan. 2006.

*U.S. Constitution*. Article III, § 2.

*U.S. Constitution*. Article VI

Weiss, Debra Cassens. “An Intellectual Kagan Had Supreme Court Ambitions in High School, Classmate Says.” *ABA Journal*, American Bar Association, 10 May 2010, [abajournal.com/mobile/article/an\\_intellectual\\_kagan\\_had\\_supreme\\_court\\_ambitions\\_in\\_high\\_school\\_classmate\\_](http://abajournal.com/mobile/article/an_intellectual_kagan_had_supreme_court_ambitions_in_high_school_classmate_). Accessed 2 Apr. 2016.

“Welcome and Opening Remarks.” *Transcript--January 17, 2002*. Proc. of President's Council on Bioethics, Loews L'Enfant Plaza Hotel, Washington, D.C. Bioethics Research Library at Georgetown University, 19 Oct. 2009, [bioethicsarchive.georgetown.edu/pcbe/transcripts/jan02/jan17session1.html](http://bioethicsarchive.georgetown.edu/pcbe/transcripts/jan02/jan17session1.html). Accessed 11 Sept. 2016.

Wimsatt, W. K., and Monroe Beardsley. “The Affective Fallacy.” *The Sewanee Review*, vol. 57, no. 1, 1 Jan. 1949, pp. 31–55. *JSTOR*, [www.jstor.org/stable/10.2307/27537883](http://www.jstor.org/stable/10.2307/27537883). Accessed 1 Mar. 2017.

Wimsatt, W. K., and Monroe Beardsley. "The Intentional Fallacy." *The Sewanee Review*, vol. 54, no. 3, 1946, pp. 468–488. *JSTOR*. [www.jstor.org/stable/27537676](http://www.jstor.org/stable/27537676). Accessed 1 Mar. 2017.