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Shakespeare and The Supreme Court: How the Justices Reveal Their Ideologies by Referencing His Works

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I. Introduction

The works of William Shakespeare have been referenced and adapted countless times throughout history. Numerous books have been written to evaluate his life and work as a playwright. Shakespeare also impacted modern society in several ways, including his expansion of the English language and his commentary on political themes in his works. His focus on government regimes and tyrannical rulers in many of his texts continues to influence conversations on policies and practices within the law. As James Shapiro argues in *Shakespeare in a Divided America*, the use of Shakespeare's works can also illuminate political ideologies in the United States. Shapiro demonstrates that throughout history, people have used Shakespeare's plays to speak about their own beliefs and perspectives on the political climate they are living in. For example, at the beginning of his book, Shapiro describes a mock trial in which the late Justice Ruth Bader Ginsburg presides over the case of Shylock in Shakespeare's *The Merchant of Venice*. Though the trial was meant to be a fun exercise about the legal questions brought forth in Shakespeare's play, Shapiro's brief description of the mock appeal raises interesting points about Shakespeare's utilization outside of an academic context.

As Shapiro explains, Justice Ginsburg and her fellow judges on Shylock's case reached the verdict that Shylock should have his loan given back to him and that Portia, the female protagonist in the play, should go to law school. While this decision was founded in legal doctrine, Shapiro also notes that "it was hard to ignore the messages of gender equality and religious tolerance implicit in [Ginsburg's] rulings." Gender equality and religious tolerance are protected by law in the United States to an extent; however, Shapiro argues that Ginsburg infused her ideologies into her verdict. He states that, though Supreme Court justices are not meant to promote their own political views, he "saw how Shakespeare proved an effective way of doing so indirectly" (xv). In other words, Justice Ginsburg's verdict about Shylock's case was

not only founded on the law but also her perspective on politics. Furthermore, argues Shapiro, Shakespeare provided space for Justice Ginsburg to promote her ideologies indirectly. If Shapiro is correct, his observation raises multiple questions: What is it about Shakespeare's works that allow Supreme Court justices to indirectly promote their ideologies? As other justices besides Justice Ginsburg have referenced Shakespeare in their opinions, do they utilize his works in the same way Shapiro observed at the mock trial? Finally, is it only Shakespeare that allows for this treatment, or is it literature broadly speaking?

Through the evaluation of three different case opinions written by contemporary Supreme Court justices, this paper aims to answer these questions. The opinions being evaluated are not limited to only majority opinions, but also dissents and concurrences; however, they are limited to authoring justices who served on the Court with Justice Ginsburg. As such, I will be evaluating a dissenting case authored by Justice Sandra Day O'Connor, a majority opinion written by Justice Antonin Scalia, and a dissenting opinion from Justice Ginsburg. These justices served together from 1993 to 2006, when Justice O'Connor retired. Serving on the Court during these years is not the only similarity between these justices, as each of them also had a noticeable love for Shakespeare and was suspected of holding Oxfordian views about Shakespeare's authorship (Wildenthal). The Oxfordian theory, as discussed by Wildenthal, is that the true author of Shakespeare's works was Edward de Vere, the Seventeenth Earl of Oxford. This shared belief and love of Shakespeare between the three justices connects the opinions I will evaluate beyond the fact that they all reference Shakespeare and were written by justices who served together. Because of their shared beliefs about the topic of Shakespeare, it can be assumed that they use his references intentionally and find similar value in his works.

This project will put each use of Shakespeare within the chosen opinions in relation to its context within the play and the case opinion to answer the earlier questions. I will also discuss

the possible beliefs, or ideologies, of the justice in question and will compare the two findings to determine if there is a relationship between the context of the reference and the justices' ideology. I theorize that there will be a correlation between the interpretation of the Shakespearean reference within the opinion and the ideology of the justice. In examining these opinions, I expect that the aforementioned justices who reference Shakespeare do so to support their views on the case decision, as Shapiro finds Justice Ginsburg did in the mock trial.

II. Background on the Supreme Court

The Supreme Court of the United States is a highly influential institution of the United States government. Its authority is given to it through Article III, section I of the United States Constitution, which expresses that the Court has jurisdiction over the entire national judiciary. Despite the impactful nature of the Court's decisions on national policy, in 1788 Alexander Hamilton described the Supreme Court in *The Federalist Papers No. 78* as the "least dangerous" of the three branches of government because it will be "least in the capacity to annoy or injure" political rights in the Constitution. Its main purpose, as implied by the Constitution, is to ensure that the executive and legislative branches do not enact laws or policies restricting the fundamental rights guaranteed in the Constitution. The Court was not intended to create national policies. However, it has become clear, especially in the modern era, that the Supreme Court does have a massive influence over public policy and the rights held by Americans. Consider, for example, the 2015 Supreme Court case *Obergefell v. Hodges*, which decided that same-sex couples may exercise the right to marry. This case outlawed discrimination against same-sex couples and guaranteed them the right to be legally married, which had been restricted by states prior to this decision. Though this is not the first case in which the Court made such a monumental decision, it demonstrated that it is an institution that creates policy.

Considering the debate surrounding same-sex marriage, the power of the Court and its decisions become even more obvious. This was also apparent in their recent decision in *Dobbs v. Jackson Women's Health Organization* to overturn two monumental cases, *Roe v. Wade* and *Casey v. Planned Parenthood,* which granted women rights over their reproductive health. As a result of the *Dobbs* decision, many states have enacted laws banning abortion. The Court's decision altered the reproductive rights of many and will have a lasting impact on American politics (Kimport). Despite these examples, one still may question why discussing the authority of the Court is so important, as its power is lesser than the other branches of government. It must be remembered that the justices making these decisions are not directly elected by the American public. Instead, they are nominated by the president and confirmed by the Senate, two highly political actors. Thus, it can be argued that the Court has an inherently political nature, despite the illusion that it is nonpartisan. Even though the justices are not representative of political parties and are meant to "refrain from allowing their biases to manifest in their judicial opinions" (Sabando), there are ways in which the justices' political ideologies can be assumed. One can also identify their policy preferences and argue that their preferences do have a considerable influence over their decision-making, as Segal and Spaeth found.

One of the main ways to make inferences about a justice's political preferences is to look at the ideology of the president who nominated them. As Segal, Timpone, and Howard discuss, looking at the nominating president can reveal the political party the justice may align themselves with, as it is typical for presidents to nominate justices who hold similar views. This is intended to further the president's policy goals, as a justice holding the same views might vote on cases in ways that would impact policy. As found in their study, the concordance between a president's ideology and a justice's behavior is strongest earlier in the justice's career on the Court. Though the concordance does decline over time, it can still be helpful to look at the

nominating president's political stance when discussing the justice's ideology. Along with the nominating president's views, one can also evaluate a justice's career history, as there may have been decisions made by the justice that would imply their political ideologies. For example, if the justice has been a federal judge and decided liberally on many cases, there is a possibility that the justice holds a liberal ideology.

There are also different ways in which justices interpret the Constitution, which can suggest their ideologies. Multiple methods of judicial interpretation exist, the important ones for this paper being originalism, textualism, and pragmatism (Murrill 1). Originalists look to the Founders' intentions for the Constitution to find its meaning. Justices with this methodology, such as Justice Scalia, believe that the meaning of the Constitution is static and unchanging. Similarly, textualists look to the meaning of the words during the time Constitutional amendments were ratified to interpret them. Like originalism, this method of interpretation does not believe that the Constitution changes throughout time but remains constant. Another commonly used method by Supreme Court justices to interpret the Constitution is pragmatism. Unlike originalism and textualism, pragmatists allow for the interpretation to change with society. This method involves the justices "weighing and balancing the probable practical consequences of one interpretation of the Constitution against other interpretations" (13). In other words, they look at multiple interpretations and decide which one serves the needs of the case best. Each of these methods brings forth different interpretations that can give insight into the justices' preferences (2).

III. Literature Review

Prior literature establishes a clear relationship between the law and literature, which is crucial in understanding why Supreme Court justices would reference Shakespeare in their

opinions. As I will demonstrate in this section, there is scholarship about why justices might reference literature and Shakespeare in their opinions. However, there is a gap in scholarship about how exactly justices use these references and what they reveal about the justices themselves. Many jurisprudential scholars have made observations about the relationship between law and literature and what the two disciplines can reveal about each other (Freeman 1457). There is an obvious connection between literature that contains legal questions or deals with the judicial system, including novels such as *To Kill a Mockingbird* by Harper Lee and the works of John Grisham. While some literature may depict the law in unrealistic ways, it can also be nonfictional and reveal the views held by the public on legal issues (Posner 398). For example, *To Kill a Mockingbird* is a social commentary on racial injustice in the South. The novel uses the legal system to demonstrate the inadequacies of how trials treated people of color who were accused of crimes, especially when a white woman was the victim. Having been released at the peak of the Civil Rights Movement in 1960, Lee's novel reveals her personal beliefs about racial injustice and civil rights issues, as Posner suggests. Contemporary readers of the novel learn about the dangers of racial discrimination and the effects of such viewpoints on the legal system. They also become familiar with Lee's beliefs on segregation, which readers at the time of publication would have been aware of as well.

Beyond demonstrating public mood regarding legal issues, literature can also be impactful on the legal system itself. As Apolloni demonstrates, works of literature, specifically *The Merchant of Venice*, can influence "legal and public opinions of justice" (357). In other words, not only can literature reflect public opinion about certain topics, but it can also alter it. Apolloni's argument also focuses on the influence of *The Merchant of Venice* in the American legal system, claiming that the play has been used in many court opinions to "illustrate a tension between the strict letter of the law and a sense of mercy and morality in the justice system"

(359). The play demonstrates the tension between these factors so well that it can be applied to real cases. The themes within the play, as well as other pieces of literature, can help judges work through difficult subject matter and communicate "larger ideas" to juries and the public (359), such as the importance of ethical trials and following precedent. This does explain one reason Supreme Court justices would make literature references, as it would help them explain their reasoning beyond just referencing legal precedent. However, while Apolloni's article does focus on one of Shakespeare's works, it fails to explain why justices might reference Shakespeare specifically.

One possible explanation for why the justices reference Shakespeare so often is that his works bring their opinions cultural capital. Cultural capital, a concept introduced by Pierre Bourdieu, are cultural assets that a person possesses that benefits them in society like economic capital would benefit them. This concept can also be thought of as high culture, which is comprised of cultural objects that have an aesthetic value within society, such as theatre or music. As Shakespeare is perceived as high culture, knowledge of his work brings one "street credibility, broad intelligibility, and celebrity" (104) because of their high culture nature. In other words, if someone aptly references Shakespeare in a conversation, they are thought to be intelligent and have cultural authority. Therefore, the use of Shakespeare within Supreme Court opinions could be meant to bring the argument cultural capital. This could explain why the justices reference Shakespeare and other cultural objects, as it gives them authority beyond what legal precedent offers them.

There have been scholars who evaluated the use of Shakespeare by Supreme Court justices. As Skilton argues, quotations from the Bard's plays serve multiple purposes in judicial opinions. Sometimes they are "intended to contribute directly to the argument" (Skilton 5), other times they are used out of context and for seemingly little purpose (6). His works also have the

potential to bring actual legal knowledge to a judicial opinion, as Shakespeare's knowledge of the law has "received the endorsement of the Supreme Court of the United States" (7). Put differently, the Court has recognized that Shakespeare possessed an understanding of the law that can be seen in his plays. Skilton does not acknowledge the possibility that the justices use Shakespeare to support their own views on the subject matter, but I argue this is a factor influencing their decisions to use his works as support for their opinions as well.

Connecting each of these concepts provides a framework for why Supreme Court justices would want to reference Shakespeare in their opinions, which is necessary for understanding what their references reveal about them. First, there is a clear connection between law and literature that has been recognized by many scholars in both disciplines for multiple reasons. The main benefit of looking to literature for answers to legal questions is that it can reveal the public's opinion on the issue. Literature can also have an impact on the legal system over time and the way judges approach writing their court opinions. It makes sense, therefore, for Supreme Court justices to use literature to support their arguments. However, prior literature suggests they turn to Shakespeare specifically because he offers them cultural capital, his plays include concrete examples of legal issues they are facing and thus can contribute to their point, and Shakespeare possessed a deep understanding of the law, so his terminology and descriptions of legal practice are reliable.

IV. Case One: *BFI Inc. v. Kelco Disposal, Inc.*

The case of *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.* began in 1980 after Joseph Kelley, the form local district manager of BFI, left the company to open his own business, Kelco Disposal, Inc. Before Kelley opened Kelco, BFI was the sole provider of trash collection in the Burlington, Vermont area. However, Kelco quickly obtained nearly 43%

of the market by 1982, at which point BFI began attempting to "drive Kelco out of business" (Blackmun, 492 U.S. 257). Kelco responded with a letter to BFI's legal department, threatening to sue BFI if it did not cease the price-cutting practices it had been using. In 1984, Kelco brought an action against BFI for violating the Sherman Act, which prohibits any attempt to create a monopoly. The lower courts found BFI guilty of acting maliciously and disregarding Kelco's rights to form a business and awarded Kelco over 6 million dollars in damages, which BFI appealed to the United States Supreme Court for violating the Eighth Amendment prohibition of excessive fines as punishment. In the majority opinion, Justice Harry Blackmun held that the Excessive Fines Clause of the Eighth Amendment does not apply to punitive damages awarded in a civil trial and, as BFI did not bring forth questions about due process guaranteed by the Fourteenth Amendment, the Court did not consider how it might apply to the case.

In her partial concurrence with Justice John Paul Stevens, Justice Sandra Day O'Connor argued that no prior precedent or history is supporting the majority's claim that the Excessive Fines Clause of the Eighth Amendment places no limit on punitive damages awarded in a civil case. She agreed, however, that there were no due process claims presented in the case. In support of her argument, Justice O'Connor guided the reader through a history of excessive fine limitations, beginning with the Saxon legal system in pre-Norman England. The Saxon legal system was in place in the tenth century before the Norman Conquest, when France invaded England. Under the Saxon legal system, victims of crimes would accept financial compensation from their wrongdoers, like the operation of punitive damages in the American legal system. Justice O'Connor used this to enter a discussion about the Magna Carta, which was written in the thirteenth century and listed liberties agreed to by the king that were granted to English citizens. As Justice O'Connor explained, Chapter Twenty of the Magna Carta prohibited amercements that were disproportionate to the crime in question or would ruin the livelihood of the

wrongdoer. Therefore, the prohibition of excessive fines has been common since at least the thirteenth century.

After her discussion about the legal precedent surrounding excessive fines, Justice O'Connor turned to the meaning of the words "fine" and "amercement" in the seventeenth century. According to the Oxford English Dictionary, the word amercement is a noun historically meaning "a discretionary penalty or fine." As Justice O'Connor argues, an amercement is a fine by definition. The word fine is a noun describing "A sum of money offered or paid for exemption from punishment or by way of compensation for damage or loss caused" ('Fine'). Proving that the words amercement and fine can be used interchangeably, solidifying the concept that historical prohibitions on amercements apply to modern fines, Justice O'Connor referred to Shakespeare's *Romeo and Juliet,* published in 1597. In the first scene, Prince Escalus uses the word amerce to describe the act of punishing someone with a fine. The direct quote Justice O'Connor used comes from Act III, scene 1, in which Prince Escalus says, in warning the Montagues and Capulets to abstain from shedding more blood:

> I have an interest in your hate's proceeding
>
> My blood for your rude brawls doth lie a-bleeding
>
> But I'll amerce you with so strong a fine
>
> That you shall all repent the loss of mine (3.1.150-53)

In order to fully understand Justice O'Connor's argument, it is necessary to break down this excerpt from the play. Before Prince Escalus makes this threat to the families of Romeo and Juliet, his relative, Mercutio, was killed by one of Juliet's cousins, Tybalt, whom Romeo then murdered to avenge his friend. Upon discovery of Romeo's crime, Prince Escalus exiles him and threatens to fine both the Montagues and Capulets should more bloodshed occur. As Justice

O'Connor argued, Prince Escalus uses the word 'amerce' to describe the action of imposing a fine on someone, as he is saying he will charge them with a fine so large they will beg forgiveness for shedding his family's blood. Put simply, he uses the verb version of amercement, which is interchangeable with the word fine, to describe fining Romeo and Juliet's families. This is important to Justice O'Connor's opinion because, as she remarked, Shakespeare was "an astute observer of English law and politics" (290). Therefore, the fact that he does not distinguish between amercements and fines and uses them to describe each other suggests that they were not, as the majority opinion claims, distinguishable in the sixteenth century. This invalidates the majority's argument that amercement prohibitions are not applicable to punitive damages because the history of the word amercement, and the limits placed upon them by the Magna Carta, were aimed at limiting a king's power. Instead, it demonstrates that the prohibitions were meant to protect citizens from excessive fines.

While this citation from *Romeo and Juliet* certainly helped Justice O'Connor support her argument, it also gives insight into her overall position regarding punitive damages. *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.* is not the first case in which Justice O'Connor spoke against large punitive damages. For example, in *Pacific Mutual Life Insurance Company v. Haslip,* Justice O'Connor argued that punitive damages are a "powerful weapon" that allow juries to "target unpopular defendants" (42-43). She believed that juries would award higher punitive damages to defendants they disliked compared to the defendants they felt mercy towards. Put differently, Justice O'Connor recognized that the fines imposed by juries are not based on standards, but on the jurors' perspectives and beliefs. Furthermore, the lack of standardization of punitive damages, she argued, allows jurors to "redistribute wealth" (43), something she does not believe should be within the powers of juries. Because punitive damages are decided upon by the jury, they have the power to fine a wealthy defendant to strip them of

some of their money and give it to the potentially less fortunate petitioner. This connects with her dissenting opinion in *BFI Inc. v. Kelco Inc.* because this is one of the phenomena she believed the Magna Carta's prohibition on excessive amercements was trying to regulate.

Turning to the potential ideology of Justice O'Connor, one can argue that she was a relatively conservative member of the Court. During her tenure, she was often thought of as the "swing vote" (Lowenthal 212) because she tended to create the majority. This also suggests that her decision-making tendencies were both conservative and liberal, as she was open to finding compromises in decisions (214). This middle-ground ideology that Justice O'Connor had aligns with the ideology of the president who nominated her, Ronald Reagan. Former President Reagan identified as a Republican and behaved conservatively, however he was also characterized as being a "compassionate conservative" (Smith 40). Put differently, Reagan often showed a level of humility that other politicians did not. He was inclusive of all political parties and desired a more unified country, rather than one divided by beliefs. Furthermore, at the beginning of his political career, he identified as an "FDR Democrat" (39) and supported the New Deal before he shifted to the Republican Party. The decisions he made as President were, therefore, influenced by his prior views and were not entirely conservative. As previously stated, this middle-ground ideology is reflected in Sandra Day O'Connor's decision-making, as she was not wholly conservative in her decisions either. Therefore, it is clear to see how Justice O'Connor's political ideology followed former President Reagan's and that, while she was conservative, she also held moderate views.

In her opinion for *BFI Inc. v. Kelco Disposal, Inc.*, Sandra Day O'Connor referenced Shakespeare's *Romeo and Juliet* to further her point about excessive punitive damages. She did so under the rationalization that Shakespeare was knowledgeable about English law and his use of the words 'fine' and 'amerce' suggests that fines and amercements were not viewed as two

distinct concepts in the sixteenth century. However, her use of this reference also helped her demonstrate her own opinion on the topic. She argued that there is no difference between a fine and an amercement, which means that excessive punitive damages should be restricted in the way fines have been for centuries. As her ideology appears to be conservative, following her nominating president, her argument is unsurprising. Beyond supporting her argument about the historical nature of excessive punishment prohibitions and making her opinion more complex, Justice O'Connor's reference also brought her argument cultural capital. As discussed in my literature review, referencing Shakespeare brings one, as Lanier remarks, "authority, seriousness of purpose... and street credibility" (104). This is certainly an effect that Justice O'Connor was aiming for when referencing *Romeo and Juliet,* as it gave her argument a sense of authority. Therefore, for Justice O'Connor, Shakespeare's play allowed her to strongly support her argument in multiple ways against the majority opinion, which demonstrates the ability of Shakespeare's works to apply to modern legal questions. This case thus supports the argument that justices use references to Shakespeare to support their views on the subject matter, as Justice Ginsburg did in the mock *Merchant of Venice* trial.

V. Case Two: *Coy v. Iowa*

The second case I will evaluate is *Coy v. Iowa* (1988), which focuses on the extent of the right for criminal defendants to face their accusers during the trial, a right guaranteed by the Confrontation Clause of the Sixth Amendment of the Constitution. In the trial stage of the case, John Coy, the appellant, protested an Iowa statute that allowed witnesses to testify via television or behind a screen. Two of the witnesses in the case, both thirteen-year-old girls who alleged that Coy sexually assaulted them, wished to give their testimonies behind a screen so they could face their assailant without mental duress. Coy argued in both the trial and appeal stages of the case that the use of the screen "would make him appear guilty and thus erode the presumption of

innocence" (1015). The trial court rejected the argument that the screen would impede Coy's due process and that it deprived him of his right to a face-to-face confrontation with his accuser. The Iowa Supreme Court affirmed Coy's conviction on the grounds that cross-examination was not impaired by the screen, so his Sixth Amendment right was upheld, and that the use of the screen did not inherently imply guilt. In its majority opinion, written by Justice Antonin Scalia, the Supreme Court remanded the case to the lower courts because they found that the use of the screen to block witnesses from the defendant does violate the Confrontation Clause. Put differently, they ordered that the case be tried again without the use of the screen so that Coy had a fair trial with his Constitutional rights protected.

In Justice Scalia's majority opinion, he argued that the right of a defendant to face their accuser has been upheld for centuries and was even recognized by the Roman Empire. He gives an example from the Roman Governor Festus, who stated that no man should be put to death in Rome without having first met his accuser and defended himself against the charge (1016). This example demonstrates the history of the Sixth Amendment and the principle of allowing defendants to view their accusers. Justice Scalia then moved forward to explain the leading precedents of the case, all of which held that the right to confront one's accuser is a constitutional right. To further support his argument, he then broke down the meaning of the word 'confrontation' to demonstrate the literal purpose of the Confrontation Clause. Drawing on the Latin roots of the word, "contra" and "frons," Justice Scalia concluded that the word means "against-forehead" (1016). Therefore, the Confrontation Clause establishes the right for defendants to see their accusers face-to-face, as the word 'confrontation' means meeting someone face-to-face. He used these examples from the Roman Empire and the roots of the word 'confrontation' to demonstrate that the decision made by the Court is supported by historical

precedent. His discussion about the meaning of the word confrontation, as well as the examples from the Roman Empire, complemented the argument he made with his Shakespeare reference.

Justice Scalia then directly quoted from *Richard II*, as he argued that Shakespeare was describing the meaning of confrontation by having Richard demand that two men be, "[called] to our presence – face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak..." (Shakespeare 1.1.15). This scene takes place at the beginning of the play when Richard asks that Henry Bolingbroke and Thomas Mowbray, his cousin, be brought to him to sort out an argument between them. Bolingbroke then accuses Mowbray of treason and misusing military funds, as well as contributing to the death of the Duke of Gloucester. The discussion between the two is far from peaceful and ends with a plan to duel but resembles trial proceedings that one might imagine today. Richard then attempts to mediate between Bolingbroke and Mowbray to keep the discussion peaceful. He allows both men to make their case and encourages them to settle their dispute on their own, but when this is no longer an option, helps them arrange a duel with his guards watching.

This excerpt from *Richard II* perfectly demonstrates Justice Scalia's interpretation of the Confrontation Clause within his opinion. The clause states that "in all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him." Even though the scene from *Richard II* is not a trial in our traditional sense, the right to confront one's accuser was still guaranteed by Richard. He makes it clear that he wants both men to meet "face to face" (1.1.15) in the hopes they can work things out. Simply hearing one side and not granting Mowbray the opportunity to defend himself or view his accuser is not an option for Richard. As king, Richard's role is like that of a judge, as he is in the position to decide upon the punishment if one of the men is found guilty of a crime. Furthermore, Richard states that, regardless of his relationship with Mowbray, he will be "impartial" (1.1.115) in hearing the dispute. The fact that

Richard is taking such care within the scene to be a fair judge within the dispute demonstrates the importance of an accused person viewing their accuser, which is the point Scalia was making in his opinion. Arguably, this face-to-face meeting would matter very little if Richard was going to take the accusations of Bolingbroke lightly. Instead, he understands that the dispute is serious and is treating the situation as such.

Beyond allowing for a face-to-face confrontation between Mowbray and Bolingbroke, Shakespeare also included other elements in this scene that are now important in settling disputes in the American legal system. For example, Richard allows Bolingbroke to voice his accusations and his preferred method of settling the dispute, for which he asks the king's permission to allow his "right drawn sword" (1.1.46) to prove his claims. Put differently, he wants to duel Mowbray to punish him for his crimes. This is similar to how criminal trials proceed in America, as the prosecution, or accuser, is allowed to voice their accusations and their recommendation for the sentence if the defendant is found guilty. In *Richard II*, Bolingbroke's recommendation for punishment is the duel. After Bolingbroke explains his accusations, Mowbray defends himself as calmly and fairly as he can. He addresses Richard, saying, "the fair reverence of your highness curbs me / From giving reigns and spurs to my free speech" (1.1.54-55). Even though he has just been accused of being a traitor, Mowbray vows to keep himself composed and allow the discussion to continue without disruption. Again, this is similar to the expectations in an American criminal trial. Though disruptions do occur during trials, it is often denounced by the judge because it interferes with the process of a fair trial. This scene is therefore a good representation of a typical criminal trial in the United States. Justice Scalia's use of this scene thus makes sense and does help support his claim that the Confrontation Clause of the Sixth Amendment guarantees the right to literally see one's accuser in a criminal trial, as it also demonstrates other elements of an American criminal trial.

However, it is unclear whether this reference gives insight into Justice Scalia's political ideology. Like Justice O'Connor, Justice Scalia was appointed to the Supreme Court by former President Ronald Reagan. As has been established, President Reagan was a member of the Republican Party during the time he held office. Based on the findings by Segal, Timpone, and Howard that presidents tend to nominate justices to the Court who align with their own political ideologies, it can be inferred that Justice Scalia was also conservative. This is apparent when looking at votes he cast while on the Court that align with a conservative ideology, like his vote in the *District of Columbia v. Heller* case, which I will discuss in more detail later . The case of *Coy v. Iowa*, however, does not appear to be a decision based on political preferences, but rather on how the justices interpret the Constitution. This conclusion comes when looking at the voting pattern of the justices in the case. According to Oyez, which organizes the votes of the justices by their ideology, the most conservative justice at the time of this decision was Chief Justice William Rehnquist. The second most conservative was Justice Scalia, which would typically mean they would vote similarly on cases that were motivated by political issues. In *Coy*, however, Chief Justice Rehnquist voted with the minority, going against the other conservative members of the Court, including Justice Scalia and Justice O'Connor. This suggests that the justices' votes were motivated by their interpretation of the Constitution and the case in general.

For example, the interpretation of both the Sixth Amendment and *Richard II* in his majority opinion demonstrates Justice Scalia's approach to interpreting most literature, including the Constitution. As discussed by Schweitzer, Justice Scalia was both a textualist and a conservative originalist. This means that his jurisprudence was guided by the literal meaning of the Constitution and the original intent of the law (751). He did not believe that the Constitution was meant to change with society, but that it was concrete and could be interpreted through the Framers' intentions. Furthermore, when the Framers' intentions are unclear, originalists tend to

turn to the historical implications of the Constitutional amendment in question to determine what it was attempting to protect. Justice Scalia's textualism and originalism are seen, for example, in the case *District of Columbia v. Heller,* in which the Court struck down a D.C. statute restricting the possession of a firearm. In his majority opinion, Justice Scalia, "through a lengthy, scholarly marshaling of eighteenth century sources and authorities, based [his] holding on originalism" (763). The opinion of the *Heller* case was heavily reliant on the text of the Second Amendment, as well as historical precedent on the right to carry weapons. Though it does consider the fact that "the Second Amendment right is not unlimited" (*Heller* 54), it also discusses that the Amendment has long been interpreted to mean that weapons that are commonly used are protected. Justice Scalia is adamant in this opinion, and the others he authored during his tenure on the Court, that the Constitution should only be interpreted by the words of the Constitution itself and the original intent.

Understanding Justice Scalia's jurisprudence makes his reasoning behind the reference to *Richard II* even clearer. Beyond his love for Shakespeare (Wildenthal) and the cultural authority the reference brings to his argument, as it did for Justice O'Connor, the scene he draws from demonstrates his interpretation of the Confrontation Clause perfectly. His argument rests on the idea that confronting someone is necessary for a fair criminal trial and that the confrontation must be face-to-face. This concept is exactly what Shakespeare demonstrates in the first scene of *Richard II* when Richard acts as a judge for Bolingbroke and Mowbray's dispute and orders that the two men be brought to him. Richard could have heard Bolingbroke's accusations without Mowbray present, but he makes it clear that Mowbray must be able to face his accuser and defend himself. This reasoning is reflective of Justice Scalia's argument in *Coy v. Iowa* that allowing accusers to be hidden behind a screen does not allow the defendant to have a fair trial.

Though it does not reveal his political ideology, the reference to Shakespeare by Justice Scalia strengthens his argument and gives insight into his jurisprudence regarding *Coy*.

VI. Case Three: *Shelby County, Alabama v. Holder*

The final opinion I will evaluate was a dissenting opinion by Justice Ginsburg, as she is the justice Shapiro focused on in his discussion of the *Merchant of Venice* mock trial. This is to evaluate whether Justice Ginsburg herself utilizes Shakespeare in her opinions in the same way she did in the mock trial. In *Shelby County, Alabama v. Holder*, which was argued in the Supreme Court in 2013, the Court was faced with determining the constitutionality of two sections, Section 4 and Section 5, within the Voting Rights Act of 1965. Before describing these two sections, it is important to mention that Section 2 of the Act prohibited any voting practice that would prevent someone from voting based on their race or skin color. Section 4 of the Act then described certain jurisdictions, mainly States or localities, that required voters to pass tests before being allowed to vote and subsequently had low voter turnout or registration. Such tests were typically required in Southern states in the 1960s and 1970s and were called literacy tests. While they were administered to all voters under the guise that it was to ensure a literate voting pool, the tests were used to prevent minorities, especially Black Americans, from voting. Congress thus enacted Section 4 to prohibit the use of literacy tests to uphold the rights of all Americans to vote. Section 5 of the Act stated that the previously listed jurisdictions could not make any changes to their voting procedures until they were approved by federal authorities in Washington, D.C. and given preclearance.

Shelby County, Alabama challenged Section 4 and Section 5 on the grounds that the Act, which had been meant to expire but continued to get reauthorized by Congress without being altered, is facially unconstitutional. In other words, Alabama argues that the Act is

unconstitutional in an obvious, or facial, way. The majority opinion of the Court, written by Chief Justice Roberts, agreed with Shelby County, finding that Section 4 places a burden on states that is not proportional to "current conditions" (*Shelby* 24) of the country. Put differently, the restrictions placed on states by the jurisdictions defined in Section 4 are not necessarily based on the voting statistics from those regions. Being forced to abide by the section's requirements places a burden on the jurisdictions, as they are not allowed to adjust their voting procedures without authorization. Furthermore, because the section was intended to decrease racial discrimination regarding voting within certain jurisdictions and it appears to have been successful, the Court no longer finds the section necessary.

The majority's main issue with the section is that, as the voting restrictions impacting minorities in these certain jurisdictions have decreased since the Act was passed, Congress appears to have gone beyond the scope of its authority by renewing the section without altering the jurisdictions in question. Put simply, the Court believes that Congress should have altered the jurisdictions and removed the locations where voting restrictions are no longer an issue restricting minority voting rights. Continuing to place restrictions on these jurisdictions without reconsidering the need for them goes beyond the authority of Congress. Therefore, the Court reversed the decision of the Court of Appeals and struck down Section 4, meaning that "the formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance" (24). The Court's decision meant that Congress would have to use a different method to determine which locations needed to get preclearance for voting procedure alterations. This decision did not completely strike down the Voting Rights Act of 1965, but the majority opinion did suggest that there could be other sections of the Act that are also unconstitutional, based on the reasoning in their opinion.

Four of the justices disagreed with the decision to strike down Section 4, including Justice Ginsburg, who wrote the dissenting opinion. The dissent's biggest issue with the majority decision was that it undermined Congress without evidence that the Act violated the Constitution. As Justice Ginsburg discussed, the Thirteenth, Fourteenth, and Fifteenth Amendments give Congress the "power and authority to protect all persons within the Nation from violations of their rights by the States" (10). This authority is what allowed Congress to reauthorize the Voting Rights Act after lengthy discussions about its continued relevance. Justice Ginsburg also argued that the majority is overlooking the fact that Congress intends for the Act to continue making progress on ensuring voting rights for all citizens. She argued that the areas affected by Section 4 are still susceptible to racial discrimination, despite the voting records suggesting otherwise. It is here that she referenced Shakespeare's *The Tempest*, as she argued that the majority ignored the fact that "what's past is prologue" (19). Put differently, Justice Ginsburg argued that the history of racial discrimination in the jurisdictions covered by Section 4 continued to influence the present conditions. Therefore, the issues being improved by the Voting Rights Act were not solved and had the potential to resurface, which Congress recognized. The dissent believed that striking down any part of the Act would open the door for racial discrimination to deprive citizens of their voting rights once more.

Justice Ginsburg's reference to Shakespeare in her dissent comes from Act Two of his play, *The Tempest*. The play begins with the sinking of a ship during an intense storm, during which the crew and passengers, including a king and his advisor, are overcome with fear. Because of the storm created by an exiled duke, Prospero, most of the passengers from the ship become stranded on an island. While they are expressing their joy about being safe, as well as their sorrow about the wreck, Prospero's magical helper, Ariel, appears invisibly and lulls all the passengers except for two to sleep. The two alert passengers, Antonio and Sebastian, then begin

contemplating murdering the others. Antonio makes the point that one of the men, Alonso, is the current ruler of Naples and Sebastian, his brother, will become the new ruler if they killed Antonio. He then goes on to say that "what's past is prologue, what to come in yours and my discharge" (*The Tempest* 2.1.219-20), meaning that everything that had happened up to this point was setting the stage for him and Sebastian to create their own destinies. In other words, the shipwreck that stranded them on the island was leading up to this moment so they could take control of their fate.

It is easy to understand the meaning of Justice Ginsburg's reference to the play after learning the context it holds within *The Tempest*. However, the reference also connects to her jurisprudence and ideological stance on the law. Justice Ginsburg was a strong believer that "the United States Constitution speaks to gender equality and to enlarge the American promise of equal protection to all" (Gibson 61). Her goal throughout her career was to challenge discrimination and fight for equal protection for every citizen. Though Justice Ginsburg was known for her advocacy of gender quality, this also extended to her ideology about race. Her dissenting opinion in *Shelby County, Alabama v. Holder* demonstrates her desire for the Court's jurisprudence to be "fully informed by context, equipped to un-earth pretext, and committed to illuminating the discriminatory bias and the traditions of injustice that are often shielded by the rhetorical scripts of the law" (112). Put differently, Justice Ginsburg wanted the Court to use its decisions to undo historical traditions of discrimination within the law and keep the context of such laws in mind. This is certainly not what the majority did in the *Shelby* decision, as Justice Ginsburg argues they ignored the historical pattern of discrimination that Section 4 was protecting minorities from.

An interesting note about this reference from Justice Ginsburg is that she is quoting from a character that is the villain in the play while he plots the murder of his king. This is peculiar

when considering the subject matter of the case she is discussing, as Justice Ginsburg was attempting to protect the voting rights of minority groups. One may wonder if there is an underlying message behind the use of this reference, as Antonio in *The Tempest* is working to gain power through unjust means. Though Justice Ginsburg does not say this outright, it appears she is making a connection between Antonio's attempt to kill power and the attempts by the jurisdictions named in the Voting Rights Act to stifle the votes of minority groups. She explains that Congress found that "voting discrimination had evolved into subtler second-generation barriers, and that eliminating preclearance would risk loss of the gains that had been made" (*Shelby* 18). In other words, even with the Voting Rights Act of 1965 in place, there were still barriers being created for minority voters. These barriers are an attempt to prevent minority voices from being heard and are ways for the majority to gain power over others. Just as Antonio wanted to kill an unarmed, defenseless man to gain power, Justice Ginsburg is arguing that certain jurisdictions are taking power from minorities by stripping them of their ability to take part in the government.

In using the reference from *The Tempest*, Justice Ginsburg demonstrates her belief that history must be taken into consideration when deciding upon modern laws. Like Justice Scalia, Justice Ginsburg was claimed to be an originalist, though as Alexandra Shapiro discusses, some also classify her as a "gradualist." This means that Justice Ginsburg believed that the Court should make minor changes toward the equal justice that is guaranteed by the Constitution because these minor changes would last longer than a large, radical change would. However, this also means that the Court should avoid undoing progress that has already been made. To do this, history must be at the forefront of the justices' minds when deciding cases. They must remember the progress made, whether from their decisions or laws enacted by Congress, to continue providing equal protection for all under the Constitution. Therefore, in her argument that the

majority ignored "what's past is prologue" (*The Tempest* 2.1.219), she does more than admonish the Court for forgetting the history of voting discrimination; she reveals her belief that the Court should strive to make gradual changes towards equality by building on what has been previously accomplished. Justice Ginsburg, as Antonio argues in *The Tempest*, believes that the past has led the country to where it is now and should be considered by the Court when deciding cases that impact the country's fate.

Justice Ginsburg's reference to Shakespeare aids her argument in a few different ways. Like Justice O'Connor's use of a quotation from *Romeo and Juliet*, Justice Ginsburg uses Shakespeare to add complexity and support to her claims. As Skilton found, these justices used these references to contribute directly to their discussion (5). Justice Ginsburg also gained cultural capital from her use of Shakespeare, as did Justice O'Connor and Justice Scalia; however, this does not seem to be Justice Ginsburg's main goal in referencing *The Tempest*. Put differently, the reference she is making does connect to her argument and is not put out of context in a way that would suggest she was trying to sound authoritative. Furthermore, she is not relying on the legal knowledge that Shakespeare possessed, but rather the wisdom he held about history repeating itself and the unjust means some may take to gain power. Ultimately, it seems that Justice Ginsburg was using Shakespeare to strengthen her claims against the majority opinion and demonstrate her own beliefs about the topic.

VII. Conclusion

James Shapiro found that the works of William Shakespeare allowed Justice Ginsburg to infuse her own beliefs into her decision during the mock trial of *The Merchant of Venice.* This fun exercise regarding the legality of Shylock's actions within the play brought forth many questions about the use of Shakespeare by Supreme Court justices in their opinions. First, what is

it about Shakespeare that allows the justices to indirectly promote their ideologies? Through the evaluations of the three cases I discussed in this paper, the answer seems clear; Shakespeare's works have an authoritative quality about them that bring the justices cultural capital and reliable legal knowledge, while also subtly commentating on certain issues. As Justice O'Connor's dissent in *BFI Inc. v. Kelco Disposal, Inc.* demonstrated, Shakespeare had a solid understanding of the law in the sixteenth century that applies to modern legal questions. This was also seen in Justice Scalia's reference to *Richard II*, as the scene he quoted from was comparable to a criminal trial proceeding in the American legal system. Both justices were able to use these references to infuse their ideologies about the topic they are discussing because it also supports their point. A deeper evaluation of the reference and its context within the play, as well as the ideology of the justice, however, revealed the personal beliefs of the justice. This was demonstrated in both Justice O'Connor's dissent and Justice Ginsburg's dissent, as the references they made to Shakespeare not only supported their arguments but complemented their ideologies.

The second question brought forth by Shapiro's discussion of the mock trial is related to the first, as I wondered whether other Supreme Court justices utilize Shakespeare in the same way that Justice Ginsburg did during the mock trial. The answer to this question is more complicated than the first, based on my case evaluations. In the mock trial, Justice Ginsburg used Shakespeare to discuss her beliefs on gender equality and religious tolerance, even stating that Portia should attend law school. This is not an order that would be given by the Supreme Court in their decisions, as it is not founded on the law and would have little relevance in their cases. However, Justice O'Connor does use her reference to *Romeo and Juliet* to discuss the extent to which she believes punitive damages can be sentenced. While this does not reveal Justice O'Connor's ideologies as obviously as Justice Ginsburg's decision in the mock trial, it does still

imply her preference for the outcome of the case. The same can be said for Justice Ginsburg's reference to *The Tempest* in her dissent in *Shelby,* as she subtly infuses her political beliefs about racial discrimination and voting equality into her decision. However, the use of Shakespeare by Justice Scalia does not reveal his political ideology, but rather his approach to interpreting the Constitution. He does not, therefore, use Shakespeare like Justice Ginsburg did in the mock trial.

Finally, one may question whether it is just Shakespeare that allows the justices to subtly include their political ideologies in their opinions or if it is literature entirely. While my project did not focus on the use of other pieces of literature, my research suggests that it is not only the works of Shakespeare that can be utilized in this way. As was discussed in the literature review, there is a clear relationship between law and literature that has been recognized by many scholars. Shakespeare's works do lend themselves to be referenced in Court opinions due to their reliable legal nature and the authority they bring to the justice, as previously discussed. However, his are not the only works of literature that are informed by a solid understanding of the law that, when placed in their context, have a political undertone. For example, Justice Ginsburg's dissent in *Shelby* also includes a reference to *The Life of Reason* by George Santayana, from which she makes the point that forgetting or ignoring the past will cause one to repeat it. This reference to Santayana's work serves a similar purpose to Justice Ginsburg's quotation from *The Tempest.* Further research would be needed to evaluate whether other literature is as effective as Shakespeare's works in Court opinions and if it brings the justices the same amount of cultural capital.

In conclusion, the Supreme Court is highly influential on the legal system in the United States. Their decisions have incredible impacts on the lives of Americans and the way the law functions, so it is reasonable to expect that their decisions are founded on legal precedent and Constitutional principles. However, it must also be recognized that Supreme Court justices are

political actors with their own ideologies. Understanding the way these ideologies influence the Court's opinions can help one make sense of the decisions they make. The effect the justices' beliefs have on their decisions is not always obvious, as they support their decisions with prior decisions and historical precedent. Evaluating the elements of their opinions to understand how their ideas may have influenced their decision is therefore important in ensuring that the Court is making decisions that serve the interest of the country, not just their policy preferences. Such a highly influential institution on the rights of American citizens must have a check on its authority. This paper has demonstrated one method of evaluating the opinions of the justices and the effect their ideology had on their decision in certain cases. While this method is specific to justices employing literature to support their argument, it does give one the ability to make inferences about the legitimacy of a justices' opinion.

Works Cited

Apolloni, Jessica. “Law and Literature in Comparative Perspectives: Tracing Shylock’s Case from Italian Novelle to American Courtrooms.” *Forum Italicum*, vol. 53, no. 2, Aug. 2019, pp. 350–362, doi:10.1177/0014585819831608.

"Amercement, n." *OED Online*, Oxford University Press, Sept. 2022, www.oed.com/view/Entry/6334. Accessed 24 Nov. 2022.

Bourdieu, Pierre. "The Forms of Capital." *The Sociology of Economic Life*. Routledge, 2018. 78-92.

Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989).

Coy v. Iowa, 487 U.S. 1012, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988).

District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008).

"Fine, n.1." *OED Online*, Oxford University Press, Sept. 2022, www.oed.com/view/Entry/70359. Accessed 24 Nov. 2022.

Gibson, Katie L. “Ruth Bader Ginsburg’s Legacy of Dissent: Feminist Rhetoric and the Law”. University Alabama Press, 2018.

Hamilton, Alexander. "The Federalist Papers: No. 78." *The Judiciary Department, Erişim Tarihi* 15 (1788): 2019.

Kimport, Katrina. "Abortion after Dobbs: Defendants, denials, and delays." *Science Advances* 8.36 (2022): eade5327.

Lanier, Douglas. “Recent Shakespeare Adaptation and the Mutations of Cultural Capital.” *Shakespeare Studies*, vol. 38, Jan. 2010, pp. 104–13. *EBSCOhost*, https://search-

ebscohost-com.ezproxy.bgsu.edu/login.aspxdirect=true&db=hlh&AN=53920107&site=ehost-live&scope=site.

Levy, Robert A. "The Conservative Split on Punitive Damages: State Farm Mutual Automobile Insurance Co. v. Campbell." *Cato Sup. Ct. Rev.* (2002).

Lowenthal, Diane, and Barbara Palmer. "Justice Sandra Day O'Connor: The World's Most Powerful Jurist." *U. Md. LJ Race, Religion, Gender & Class* 4 (2004).

Murrill, Brandon J. "Modes of Constitutional Interpretation." *CRS Report for Congress*. Vol. 45129. 2018

Obergefell v. Hodges, 135 S. Ct. 2071, 576 U.S. 644, 191 L. Ed. 2d 953 (2015).

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991).

Posner, Richard A. *Law and Literature (3rd Edition)*. Harvard University Press, 2009.

Sabando, Joel. "The Illusion of Nonpartisanship in the Supreme Court." *Harvard Political Review*, 13 Nov. 2020, https://harvardpolitics.com/illusion-nonpartisanship-court/. Accessed 2 Nov. 2022.

Schweitzer, Thomas A. "Justice Scalia, Originalism and Textualism." *Touro Law Review*, vol. 33, no. 3, July 2017, pp. 749–68.

Segal, Jeffrey A., and Harold J. Spaeth. *The Supreme Court and the attitudinal model revisited*. Cambridge University Press, 2002.

Segal, Jeffrey A., Richard J. Timpone, and Robert M. Howard. "Buyer beware? Presidential success through Supreme Court appointments." *Political Research Quarterly* 53.3 (2000): 557-573.

Shapiro, Alexandra A.E. “Reflections on Justice Ruth Bader Ginsburg and Her Approach to Criminal Law and Procedure.” *Columbia Law Review*, 15 Apr. 2021, https://columbialawreview.org/content/reflections-on-justice-ruth-bader-ginsburg-and-her-approach-to-criminal-law-and-procedure. Accessed 14 Nov. 2022.

Shapiro, James. *Shakespeare in a Divided America: What His Plays Tell Us about Our Past and Future*. Penguin Books, 2021.

Shelby County, Ala. v. Holder, 570 U.S. 529, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013).

Skilton, Robert H. "Shakespeare and the Supreme Court." *University of Wisconsin Law School Forum: Gargoyle*. Vol. 21. No. 4. 1991.

Smith, Craig R. “Ronald Reagan’s Rhetorical Re-Invention of Conservatism.” *Quarterly Journal of Speech*, vol. 103, no. 1-2, 2016, pp. 33–65., https://doi.org/10.1080/00335630.2016.1231415.

Wildenthal, Bryan. “The Oxfordian Era on the Supreme Court.” *Shakespeare Oxford Fellowship*, 20 Aug. 2021, https://shakespeareoxfordfellowship.org/end-of-an-oxfordian-era-on-the-supreme-court/. Accessed 11 Nov. 2022.