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2016 Sumner Canary Memorial Lecture: Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia

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OF LIONS AND BEARS, JUDGES AND LEGISLATORS, AND THE LEGACY OF JUSTICE SCALIA*

Honorable Neil M. Gorsuch†

If you were looking for a talk tonight about the maddening maze of our civil justice system—its exuberant procedures that price so many out of court and force those in it to wade wearily through years and fortunes to win a judgment—you came to the right place. Almost.

When Professor Adler kindly asked me to share a few words with you tonight, that was my intended topic. I'd just finished penning opinions in two cases. One was older than my law clerks and had outlived many of the plaintiffs. The other had bounced up and down the federal court system for so long it was nearly as ancient as Cleveland's championship drought. You know you're in trouble when the Roman numeral you use to distinguish your opinion from all the others of the same name draws closer to X than I. Needless to say, I was eager to talk about civil justice reform.

But that was then and this is now. Since Professor Adler extended his invitation, the legal world suffered a shock with the loss of Justice Scalia. A few weeks ago, I was taking a breather in the middle of a ski run with little on my mind but the next mogul field when my phone rang with the news. I immediately lost what breath I had left, and I am not embarrassed to admit that I couldn't see the rest of the way down the mountain for the tears. From that moment it seemed clear to me there was no way I could give a speech about the law at this time without reference to that news.

So tonight I want to say something about Justice Scalia's legacy. Sometimes people are described as lions of their profession and I have difficulty understanding exactly what that's supposed to mean. Not so with Justice Scalia. He really was a lion of the law: docile in private life but a ferocious fighter when at work, with a roar that could echo for miles. Volumes rightly will be written about his contributions to American law, on the bench and off. Indeed, I have a hard time thinking of another Justice who has penned so many influential articles and books about the law even while busy deciding cases. Books like *A Matter of*

* The following is adapted from the 2016 Summer Canary Lecture, delivered on April 7, 2016, at Case Western Reserve University School of Law.

† Judge, United States Court of Appeals, Tenth Circuit. I am deeply grateful to my outstanding current clerks, Alex Harris, Stefan Hasselblad, Jordan Moran, and Allison Turbiville, and to so many of my former clerks for their insightful comments on prior drafts.

*Interpretation*¹ and *Reading Law*² that are sure to find wide audiences for years to come.

But tonight I want to touch on a more thematic point and suggest that perhaps the great project of Justice Scalia's career was to remind us of the differences between judges and legislators. To remind us that legislators may appeal to their own moral convictions and to claims about social utility to reshape the law as they think it should be in the future. But that judges should do none of these things in a democratic society. That judges should instead strive (if humanly and so imperfectly) to apply the law as it is, focusing backward, not forward, and looking to text, structure, and history to decide what a reasonable reader at the time of the events in question would have understood the law to be—not to decide cases based on their own moral convictions or the policy consequences they believe might serve society best. As Justice Scalia put it, “[i]f you’re going to be a good and faithful judge, you have to resign yourself to the fact that you’re not always going to like the conclusions you reach. If you like them all the time, you’re probably doing something wrong.”³

It seems to me there can be little doubt about the success of this great project. We live in an age when the job of the federal judge is not so much to expound upon the common law as it is to interpret texts—whether constitutional, statutory, regulatory, or contractual.⁴ And as Justice Kagan acknowledged in her Scalia Lecture at Harvard Law School last year, “we’re all textualists now.”⁵ Capturing the spirit of law school back when she and I attended, Justice Kagan went on to relate how professors and students often used to approach reading a statute with the question “[G]osh, what should this statute be,” rather than “[W]hat do the words on the paper say?”⁶—in the process wholly conflating the role of the judge with the role of the legislator. Happily, that much has changed, giving way to a return to a much more traditional view of the judicial function, one in which judges seek to interpret texts as reasonable affected parties might have done rather than rewrite texts to suit their own policy preferences. And, as Justice Kagan said, “Justice Scalia had more to do with this [change] than anybody”

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1. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997).
 2. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).
 3. Justice Antonin Scalia, Madison Lecture at the Chapman University School of Law (Aug. 29, 2005).
 4. See SCALIA, *supra* note 1, at 13.
 5. Justice Elena Kagan, The Scalia Lecture at Harvard Law School (Nov. 18, 2015).
 6. *Id.*

because he “taught” (or really reminded) “everybody how to do statutory interpretation differently.”⁷ And one might add: correctly.

I don’t think there is any better illustration of Justice Kagan’s point than the very first opinion the Supreme Court issued after Justice Scalia’s passing. That case—*Lockhart v. United States*⁸—involved the question how best to interpret a statute imposing heightened penalties for three types of offenses—“[1] aggravated sexual abuse, [2] sexual abuse,” and “[3] abusive sexual conduct involving a minor or ward.”⁹ The majority opinion by Justice Sotomayor relied on the rule of the last antecedent and held that the phrase at the end of the sentence—“involving a minor or ward”—modifies only the last offense listed. So that the statute’s penalties apply whenever there is aggravated sexual abuse, or sexual abuse, or whenever there is abusive sexual conduct involving a minor or ward.¹⁰ In dissent, Justice Kagan noted that, in “ordinary” English usage, the rule of the last antecedent bears exceptions and that sometimes a modifying phrase at the end of a sentence reaches further back to earlier antecedents too.¹¹ And, in Justice Kagan’s estimation, an ordinary and average reader of the language at issue here would have thought the phrase “involving a minor or ward” does just that, modifying not just its immediate but all three of its antecedents. So for the statutory penalties to apply, Justice Kagan argued, the government must always prove some kind of sexual abuse involving a minor.¹² In support of her suggestion that an exception rather than the rule should apply to this particular statutory language, Justice Kagan offered this gem of an analogy: “Imagine a friend told you that she hoped to meet ‘an actor, director, or producer involved with the new Star Wars movie.’ You would know immediately that she wanted to meet an actor from the Star Wars cast—not an actor in, for example, the latest Zoolander.”¹³ So too here, the Justice reasoned.

As you can see, the two sides in *Lockhart* disagreed pretty avidly and even colorfully. But notice, too, neither appealed to its views of optimal social policy or what the statute “should be.” Their dispute focused instead on grammar, language, and statutory structure and on what a reasonable reader in the past would have taken the statute to

7. *Id.*

8. 136 S. Ct. 958 (2016).

9. *Id.* at 961 (quoting 18 U.S.C. § 2252(b)(2)).

10. *Id.* at 963.

11. *Id.* at 969 (Kagan, J., dissenting). For another example of what I thought was an interesting encounter with the rule of last antecedent, its exceptions, and a misplaced modifier, see *Payless Shoesource, Inc. v. Travelers Cos.*, 585 F.3d 1366, 1369–73 (10th Cir. 2009).

12. *Lockhart*, 136 S. Ct. at 969 (Kagan, J., dissenting).

13. *Id.*

mean—on what “the words on the paper say.” In fact, I have no doubt several Justices found themselves voting for an outcome they would have rejected as legislators. Now, one thing we know about Justice Scalia is that he loved a good fight—and it might be that he loved best of all a fight like this one, over the grammatical effect of a participial phrase. If the Justices were in the business of offering homages instead of judgments, it would be hard to imagine a more fitting tribute to their colleague than this. Surely when the Court handed down its dueling textualist opinions the Justice sat smiling from some happy place.

But of course every worthwhile endeavor attracts its critics. And Justice Scalia’s project is no exception. The critics come from different directions and with different agendas. Professor Ronald Dworkin, for example, once called the idea that judges should faithfully apply the law as written an “empty statement” because many legal documents like the Constitution cannot be applied “without making controversial judgments of political morality in the light of [the judge’s] own political principles.”¹⁴ My admirable colleague, Judge Richard Posner, has also proven a skeptic. He has said it’s “naive” to think judges actually believe everything they say in their own opinions; for they often deny the legislative dimension of their work, yet the truth is judges must and should consult their own moral convictions or consequentialist assessments when resolving hard cases.¹⁵ Immediately after Justice Scalia’s death, too, it seemed so many more added their voices to the choir. Professor Laurence Tribe, for one, wrote admiringly of the Justice’s contributions to the law.¹⁶ But he tempered his admiration by seemingly chastising the Justice for having focused too much on the means by which judicial decisions should be made and not enough on results, writing that “interpretive methods” don’t “determine, much less eclipse, outcome[s].”¹⁷

Well, I’m afraid you’ll have to mark me down as naive, a believer that empty statements can bear content, and an adherent to the view that outcomes (ends) do not justify methods (means). Respectfully, it

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14. Ronald Dworkin, *Justice Sotomayor: The Unjust Hearings*, N.Y. REV. BOOKS, Sept. 24, 2009, at 37.
 15. Richard A. Posner, *The Spirit Killeth, but the Letter Giveth Life*, NEW REPUBLIC, Sept. 13, 2012 (reviewing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012)). See generally RICHARD A. POSNER, *REFLECTIONS ON JUDGING* (2013); RICHARD A. POSNER, *HOW JUDGES THINK* (2008); Richard A. Posner, *The Meaning of Judicial Self-Restraint*, 59 IND. L.J. 1 (1983); Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983).
 16. Laurence H. Tribe, *The Scalia Myth*, N.Y. REV. BOOKS DAILY (Feb. 27, 2016, 11:01 AM), <http://www.nybooks.com/daily/2016/02/27/the-scalia-myth/> [<https://perma.cc/3VYM-DLAN>].
 17. *Id.*

seems to me an assiduous focus on text, structure, and history is essential to the proper exercise of the judicial function. That, yes, judges should be in the business of declaring what the law is using the traditional tools of interpretation, rather than pronouncing the law as they might wish it to be in light of their own political views, always with an eye on the outcome, and engaged perhaps in some Benthamite calculation of pleasures and pains along the way. Though the critics are loud and the temptations to join them may be many, mark me down too as a believer that the traditional account of the judicial role Justice Scalia defended will endure. Let me offer you tonight three reasons for my faith on this score.

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First, consider the Constitution. Judges, after all, must do more than merely consider it. They take an oath to uphold it. So any theory of judging (in this country at least) must be measured against that foundational duty. Yet it seems to me those who would have judges behave like legislators, imposing their moral convictions and utility calculi on others, face an uphill battle when it comes to reconciling their judicial philosophy with our founding document.

Consider what happened at the constitutional convention. There the framers expressly debated a proposal that would have incorporated the judiciary into a “council of revision” with sweeping powers to review and veto congressional legislation. A proposal that would have afforded judges the very sorts of legislative powers that some of Justice Scalia’s critics would have them assume now. But that proposal went down to defeat at the hands of those who took the traditional view that judges should expound upon the law only as it comes before them, free from the bias of having participated in its creation and from the burden of having to decide “the policy of public measures.”¹⁸ In place of a system that mixed legislative and judicial powers, the framers quite deliberately chose one that carefully separated them.

The Constitution itself reflects this choice in its very design, devoting distinct articles to the “legislative Power[]”¹⁹ and the “judicial Power,”²⁰ creating separate institutions for each, and treating those powers in contradistinction. Neither were these separate categories empty ones to the founding generation. Informed by a hard earned intellectual inheritance—one perhaps equal parts English common law experience and Enlightenment philosophy—the founders understood the legislative power as the power to prescribe new rules of general applicability for the future. A power properly guided by the will of the

18. See RICHARD H. FALLON, JR. ET AL., HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 10–11 (7th ed. 2015).

19. See U.S. CONST. art. I.

20. See *id.* art. III.

people acting through their representatives, a task avowedly political in nature, and one unbound by the past except to the extent that any piece of legislation must of course conform to the higher law of the Constitution itself.²¹

Meanwhile, the founders understood the judicial power as a very different kind of power. Not a forward-looking but a backward-looking authority. Not a way for making new rules of general applicability but a means for resolving disputes about what existing law is and how it applies to discrete cases and controversies. A necessary incident to civil society to be sure but a distinct one.²² One that calls for neutral arbiters, not elected representatives. One that employs not utility calculi but analogies to past precedents to resolve current disputes.²³ And a power constrained by its dependence on the adversarial system to identify the issues and arguments for decision—a feature of the judicial power that generally means the scope of any rule of decision will be informed and bounded by the parties’ presentations rather than only by the outer limits of the judicial imagination.²⁴ As the founders understood it, the task of the judge is to interpret and apply the law as a reasonable and reasonably well-informed citizen might have done when engaged in the activity underlying the case or controversy—not to amend or revise the law in some novel way.²⁵ As Blackstone explained, the job of the judge in a government of separated powers is not to “make” or “new-model” the law.²⁶ Or as Hamilton later echoed, it is for the judiciary to exercise

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21. *See generally* THE FEDERALIST NO. 44 (James Madison); THE FEDERALIST NOS. 78, 81 (Alexander Hamilton).
 22. *See* *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 221–24 (1995); THE FEDERALIST NO. 81 (Alexander Hamilton).
 23. *Cf.* *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (“When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles”); THE FEDERALIST NO. 78 (Alexander Hamilton) (“To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents”).
 24. *See* THE FEDERALIST NO. 10 (James Madison); THE FEDERALIST NO. 78 (Alexander Hamilton).
 25. *See* John Finnis, *Judicial Power: Past, Present and Future*, Address Before the Policy Exchange (Oct. 20, 2015), <http://judicialpowerproject.org.uk/john-finnis-judicial-power-past-present-and-future/> [<https://perma.cc/R9P3-SLSV>]; Michael H. McGinley, Note, *Textualism as Fair Notice*, 123 HARV. L. REV. 542 (2009).
 26. 3 WILLIAM BLACKSTONE, COMMENTARIES *327.

“neither FORCE nor WILL, but merely judgment.”²⁷ Or again, as Marshall put it, it is for the judiciary to say (only) “what the law is.”²⁸

So many specific features of the Constitution confirm what its larger structure suggests. For example, if the founders really thought legislators free to judge and judges free to legislate, why would they have gone to such trouble to limit the sweep of legislative authority—to insist that it pass through the arduous process of bicameralism and presentment—only to entrust judges to perform the same essential function without similar safeguards? And why would they have insisted on legislators responsive to the people but then allowed judges to act as legislators without similar accountability? Why, too, would they have devised a system that permits equally unrepresentative litigants to define the scope of debate over new legislation based on their narrow self-interest? And if judges were free to legislate new rules of general applicability for the future, why would the founders have considered precedent as among the primary tools of the judicial trade rather than more forward-looking instruments like empirical data? And why would they have entrusted such decisions to a single judge, or even a few judges, aided only by the latest crop of evanescent law clerks, rather than to a larger body with more collective expertise?

In response to observations like these, Judge Posner has replied that “American appellate courts are councils of wise elders and it is not *completely insane* to entrust them with responsibility for deciding cases in a way that will produce the best results” for society.²⁹ But, respectfully, even that’s not exactly a ringing endorsement of judges as social utility optimizers, is it? I can think of a lot of things that aren’t *completely* insane but still distinctly ill-advised (or so I try to convince my teenage daughters). And, respectfully too, wouldn’t we have to be at least a little crazy to recognize the Constitution’s separation of judicial and legislative powers, and the duty of judges to uphold it, but then applaud when judges ignore all that to pursue what they have divined to be the best policy outcomes? And crazy not to worry that if judges consider themselves free to disregard the Constitution’s separation of powers they might soon find other bothersome parts of the Constitution equally unworthy of their fidelity?

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This first point leads to a second. It seems to me that the separation of legislative and judicial powers isn’t just a formality dictated by the Constitution. Neither is it just about ensuring that two institutions with basically identical functions are balanced one against the other.

27. THE FEDERALIST NO. 78 (Alexander Hamilton).

28. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

29. Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 11–12 (1996) (emphasis added).

To the founders, the legislative and judicial powers were distinct by nature and their separation was among the most important liberty-protecting devices of the constitutional design, an independent right of the people essential to the preservation of all other rights later enumerated in the Constitution and its amendments.³⁰ Though much could be said on this subject, tonight permit me to suggest a few reasons why recognizing, defending, and yes policing, the legislative-judicial divide is critical to preserving other constitutional values like due process, equal protection, and the guarantee of a republican form of government.

Consider if we allowed the legislator to judge. If legislatures were free to act as courts and impose their decisions retroactively, they would be free to punish individuals for completed conduct they're unable to alter. And to do so without affording affected individuals any of the procedural protections that normally attend the judicial process. Raising along the way serious due process questions: after all, how would a citizen ever have fair notice of the law or be able to order his or her affairs around it if the lawmaker could go back in time and outlaw retroactively what was reasonably thought lawful at the time?³¹ With due process concerns like these would come equal protection problems, too. If legislators could routinely act retroactively, what would happen to disfavored groups and individuals? With their past actions known and unalterable, they would seem easy targets for discrimination. No doubt worries like these are exactly why the founders were so emphatic that legislation should generally bear only prospective effect—proscribing bills of attainder and ex post facto laws criminalizing completed conduct³²—and why baked into the “legislative Power” there’s a presumption as old as the common law that *all* legislation, whether criminal or civil, touches only future, not past, conduct.³³

30. See THE FEDERALIST NO. 47 (James Madison); THE FEDERALIST NOS. 79, 81 (Alexander Hamilton); Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 990–91, 1031–34 (2006); Kevin Mooney, *Supreme Court Justice Scalia: Constitution, Not Bill of Rights, Makes Us Free*, THE DAILY SIGNAL (May 11, 2015), <http://dailysignal.com/2015/05/11/supreme-court-justice-scalia-constitution-not-bill-of-rights-makes-us-free/> [<https://perma.cc/UN6Q-LNVS>] (“‘Every tin horn dictator in the world today, every president for life, has a Bill of Rights,’ said Scalia ‘That’s not what makes us free; if it did, you would rather live in Zimbabwe. But you wouldn’t want to live in most countries in the world that have a Bill of Rights. What has made us free is our Constitution. Think of the word ‘constitution;’ it means structure.’ . . . ‘The genius of the American constitutional system is the dispersal of power,’ he said. ‘Once power is centralized in one person, or one part [of government], a Bill of Rights is just words on paper.’”).

31. See Barkow, *supra* note 30, at 1033.

32. U.S. CONST. art. I, § 9, cl. 3; *id.* § 10, cl. 1; see also Barkow, *supra* note 30, at 1012–14; THE FEDERALIST NO. 84 (Alexander Hamilton).

33. See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) (“[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and

Now consider the converse situation, if we allowed the judge to act like a legislator. Unconstrained by the bicameralism and presentment hurdles of Article I, the judge would need only his own vote, or those of just a few colleagues, to revise the law willy-nilly in accordance with his preferences and the task of legislating would become a relatively simple thing.³⁴ Notice, too, how hard it would be to revise this so-easily-made judicial legislation to account for changes in the world or to fix mistakes. Unable to throw judges out of office in regular elections, you'd have to wait for them to die before you'd have any chance of change. And even then you'd find change difficult, for courts cannot so easily undo their errors given the weight they afford precedent.³⁵ Notice finally how little voice the people would be left in a government where life-appointed judges are free to legislate alongside elected representatives. The very idea of self-government would seem to wither to the point of pointlessness. Indeed, it seems that for reasons just like these Hamilton explained that “liberty can have nothing to fear from the judiciary alone,” but that it “ha[s] every thing to fear from [the] union” of the judicial and legislative powers.³⁶ Blackstone painted an even grimmer

embodies a legal doctrine centuries older than our Republic.”); *De Niz Robles v. Lynch*, 803 F.3d 1165, 1169–70 (10th Cir. 2015); *see also* 3 HENRY DE BRACON, *DE LEGIBUS ET CONSUECUDINIBUS ANGLIAE* 530–31 (Travers Twiss ed. & trans., 1880) (1257); 1 WILLIAM BLACKSTONE, *COMMENTARIES* *46 (“All laws should be therefore made to commence in futuro, and be notified before their commencement.”); 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1398 (Melville M. Bigelow ed., 1994) (1833) (“[R]etrospective laws . . . neither accord with sound legislation nor with the fundamental principles of the social compact.”); Adrian Vermeule, *Essay, Veil of Ignorance Rules in Constitutional Law*, 111 *YALE L.J.* 399, 408 (2001).

34. *See generally* John F. Manning, *Lawmaking Made Easy*, 10 *GREEN BAG* 2D 191 (2007).
35. *See, e.g.*, *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356, 357 (1953) (per curiam) (declining to overrule *Fed. Baseball Club of Baltimore v. Nat'l League of Prof'l Base Ball Clubs*, 259 U.S. 200 (1922), due to the reliance interests built up around that decision); *see also Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129, 1149–51 (10th Cir. 2016) (Gorsuch, J., concurring); BRYAN A. GARNER ET AL., *THE LAW OF JUDICIAL PRECEDENT* (forthcoming).
36. *THE FEDERALIST* NO. 78 (Alexander Hamilton); *see also id.* (“It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove any thing, would prove that there ought to be no judges distinct from that body.”).

picture of a world in which judges were free to legislate, suggesting that there “men would be[come] slaves to their magistrates.”³⁷

In case you think the founders’ faith in the liberty-protecting qualities of the separation of powers is too ancient to be taken seriously, let me share with you the story of Alfonzo De Niz Robles.³⁸ Mr. De Niz Robles is a Mexican citizen, married to a U.S. citizen, and the father of four U.S. citizens. In 1999, he agreed to depart the country after being apprehended by immigration authorities. For two years his wife tried without luck to secure him a spousal visa. At that point, Mr. De Niz Robles decided to return to the United States and try his own luck at applying for lawful residency. In doing so, though, he faced two competing statutory provisions that confused his path. One appeared to require him to stay outside the country for at least a decade before applying for admission because of his previous unlawful entry.³⁹ Another seemed to suggest the Attorney General could overlook this past transgression and adjust his residency status immediately.⁴⁰ In 2005, my colleagues took up the question how to reconcile these two apparently competing directions. In the end, the Tenth Circuit held that the latter provision controlled and the Attorney General’s adjustment authority remained intact.⁴¹ And it was precisely in reliance on this favorable judicial interpretation that Mr. De Niz Robles filed his application for relief.

But then a curious thing happened. The Board of Immigration Appeals (BIA) issued a ruling that purported to disagree with and maybe even overrule our 2005 decision, one holding that immigrants like Mr. De Niz Robles cannot apply for an immediate adjustment of status and must instead always satisfy the ten-year waiting period.⁴² In support of its view on this score, the BIA argued that the statutory scheme was ambiguous, that under *Chevron* step 2 it enjoyed the right to

37. 4 WILLIAM BLACKSTONE, COMMENTARIES *371; *see also* 1 CHARLES DE SECONDAT BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 174 (Thomas Nugent trans., M. D’Alembert rev. ed. 1873) (1748) (“Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator.”).

38. *See generally De Niz Robles*, 803 F.3d 1165. For another encounter with similar issues but along the executive-legislative rather than the legislative-judicial divide, *see United States v. Nichols*, 784 F.3d 666, 667–77 (10th Cir. 2015) (Gorsuch, J., dissenting from the denial of rehearing en banc).

39. 8 U.S.C. § 1182(a)(9)(C).

40. *Id.* § 1255(i)(2)(A).

41. *Padilla-Caldera v. Gonzales*, 426 F.3d 1294, 1300–01 (10th Cir. 2005), *amended and superseded on reh’g*, 453 F.3d 1237, 1244 (10th Cir. 2005), *disapproved by Padilla-Caldera v. Holder*, 637 F.3d 1140, 1153 (10th Cir. 2011).

42. *In re Briones*, 24 I. & N. Dec. 355, 370–71 (B.I.A. 2007).

exercise its own “delegated legislative judgment,” that as a matter of policy it preferred a different approach, and that it could enforce its new policy retroactively to individuals like Mr. De Niz Robles.⁴³ So that, quite literally, an *executive* agency acting in a *faux-judicial* proceeding and exercising delegated *legislative* authority purported to overrule an existing *judicial* declaration about the meaning of existing law and apply its new *legislative* rule retroactively to already completed conduct. Just describing what happened here might be enough to make James Madison’s head spin.

What did all this mixing of what should be separated powers mean for due process and equal protection values? After our decision in 2005, Mr. De Niz Robles thought the law gave him a choice: begin a ten-year waiting period outside the country or apply for relief immediately. In reliance on a judicial declaration of the law as it was, he unsurprisingly chose the latter option. Then when it turned to his case in 2014, the BIA ruled that that option was no option at all.⁴⁴ Telling him, in essence, that he’d have to start the decade-long clock now—even though if he’d known back in 2005 that this was his only option, his wait would be almost over. So it is that, after a man relied on a judicial declaration of what the law was, an agency in an adjudicatory proceeding sought to make a legislative policy decision with retroactive effect, in full view of and able to single out winners and losers, penalizing an individual for conduct he couldn’t alter, and denying him any chance to conform his conduct to a legal rule knowable in advance.

What does this story suggest? That combining what are by design supposed to be separate and distinct legislative and judicial powers poses a grave threat to our values of personal liberty, fair notice, and equal protection. And that the problem isn’t just one of King George’s time but one that persists even today, during the reign of King James (Lebron, that is).⁴⁵

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At this point I can imagine the critic replying this way. Sure, judges should look to the traditional tools of text, structure, history, and precedent. But in hard cases those materials will prove indeterminate. So *some* tiebreaker is needed, and that’s where the judge’s political convictions, a consequentialist calculus, or something else must and should come into play.

Respectfully, though, I’d suggest to you the critics’ conclusion doesn’t follow from their premise. If anything, replies along these lines

43. See *Padilla-Caldera v. Holder*, 637 F.3d at 1147–52.

44. See *In re De Niz Robles*, No. A074 577 772, 2014 WL 3889484, at *4 (B.I.A. July 11, 2014).

45. Jamie Jackson, *Court of King James*, THE GUARDIAN (Apr. 19, 2008, 8:01 PM), <http://www.theguardian.com/sport/2008/apr/20/ussport.news> [https://perma.cc/WB87-Z26V].

seem to me to wind up supplying a third and independent reason for embracing the traditional view of judging: it compares favorably to the offered alternatives.

Now, I do not mean to suggest that traditional legal tools will yield a single definitive right answer in every case. Of course Ronald Dworkin famously thought otherwise, contending that a Herculean judge could always land on the right answer.⁴⁶ But at least in my experience most of us judges don't much resemble Hercules—there's a reason we wear loose-fitting robes—and I accept the possibility that some hard cases won't lend themselves to a clear right answer.

At the same time, though, I'd suggest to you that the amount of indeterminacy in the law is often (wildly) exaggerated. Law students are fed a steady diet of hard cases in overlarge and overcostly casebooks stuffed with the most vexing and difficult appellate opinions ever issued. Hard cases are, as well, the daily bread of the professoriate and a source of riches for the more perfumed advocates in our profession.⁴⁷ But I wonder: somewhere along the way did anyone ever share with you the fact that only 5.6% of federal lawsuits make it all the way to decision in an appellate court?⁴⁸ Or that, even among the small sliver of cases that make it so far, over 95% are resolved unanimously by the courts of appeals?⁴⁹ Or that, even when it comes to the very hardest cases that remain, the cases where circuit judges do disagree and the Supreme Court grants certiorari, all nine Justices are able to resolve them unanimously about 40% of the time?⁵⁰ The fact is, over 360,000 cases are filed every year in our federal courts.⁵¹ Yet in the Supreme Court,

46. See generally RONALD DWORKIN, *LAW'S EMPIRE* (1986); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978).

47. "First year law students understand within a month that many areas of the law are open textured and indeterminate—that the legal material frequently (actually, I would say always) must be supplemented by contestable presuppositions, empirical assumptions, and moral judgments." *The Sotomayor Nomination, Part II*, The Federalist Soc'y Online Debate Series (July 13, 2009) (remarks of Professor Louis M. Seidman), <http://www.fed-soc.org/publications/detail/the-sotomayor-nomination-part-ii> [<https://perma.cc/B245-DBXS>].

48. Theodore Eisenberg, *Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes*, 1 J. EMPIRICAL LEGAL STUD. 659, 664 tbl.1 (2004).

49. JONATHAN M. COHEN, *INSIDE APPELLATE COURTS* 102 (2002).

50. Cass R. Sunstein, *Unanimity and Disagreement on the Supreme Court*, 100 CORNELL L. REV. 769, 817 & fig.A-1 (2015).

51. United States Courts, *Federal Judicial Caseload Statistics 2015* (last visited May 20, 2015), <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2015> [<https://perma.cc/F3D9-YDKP>].

a Justice voices dissent in only about 50 cases per year.⁵² My law clerks reliably inform me that's about 0.014% of all cases. Focusing on the hard cases may be fun, but doesn't it risk missing the forest for the trees?

And doesn't it also risk missing the *reason* why such a remarkable percentage of cases *are* determined by existing legal rules? The truth is that the traditional tools of legal analysis do a remarkable job of eliminating or reducing indeterminacy. Yes, lawyers and judges may sometimes disagree about which canons of construction are most helpful in the art of ascertaining Congress's meaning in a complicated statute. We may sometimes disagree over the order of priority we should assign to competing canons. And sometimes we may even disagree over the results they yield in particular cases. But when judges pull from the same toolbox and look to the same materials to answer the same narrow question—what might a reasonable person have thought the law was at the time—we confine the range of possible outcomes and provide a remarkably stable and predictable set of rules people are able to follow. And even when a hard case does arise, once it's decided it takes on the force of precedent, becomes an easy case in the future, and contributes further to the determinacy of our law. Truly the system is a wonder and it is little wonder so many throughout the world seek to emulate it.⁵³

Besides, it seems to me that even accepting some hard cases remain—maybe something like that 0.014%—it just doesn't follow that we must or should resort to our own political convictions, consequentialist calculi, or any other extra-legal rule of decision to resolve them. Just as Justices Sotomayor and Kagan did in *Lockhart*, we can make our decisions based on a comparative assessment of the various legal clues—choosing whether the rule of the last antecedent or one of its exceptions best fits the case in light of the particular language at hand. At the end of the day, we may not be able to claim confidence that there's a certain and single right answer to every case, but there's no reason why we cannot make our best judgment depending on (and only on) conventional legal materials, relying on a sort of closed record if you will, without peeking to outside evidence. No reason, too, why we cannot conclude for ourselves that one side has the better of it, even if by a nose, and even while admitting that a disagreeing colleague could see it the other way. As Justice Scalia once explained, “[e]very canon is

52. Ryan J. Owens & David A. Simon, *Explaining the Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1225 (2012) (noting the Court now decides an average of 80 cases per Term); Sunstein, *supra* note 50, at 780 (noting dissents now appear in approximately 60.5% of the Court's decisions).

53. See generally SCALIA, *supra* note 1, at 45–46; David F. Levi, *Autocrat of the Armchair*, 58 DUKE L.J. 1791, 1800–01 (2009) (reviewing RICHARD A. POSNER, *HOW JUDGES THINK* (2008)).

simply *one indication* of meaning; and if there are more contrary indications (perhaps supported by other canons), it must yield. But that does not render the entire enterprise a fraud—not, at least, unless the judge wishes to make it so.”⁵⁴

Neither do I see the critics as offering a better alternative. Consider a story Justice Scalia loved to tell. Imagine two men walking in the woods who happen upon an angry bear. They start running for their lives. But the bear is quickly gaining on them. One man yells to the other, “We’ll never be able to outrun this bear!” The other replies calmly, “I don’t have to outrun the bear, I just have to outrun you.”⁵⁵ As Justice Scalia explained, just because the traditional view of judging may not yield a single right answer in all hard cases doesn’t mean we should or must abandon it. The real question is whether the critics can offer anything better.

About that, I have my doubts. Take the model of the judge as pragmatic social-welfare maximizer. In that model, judges purport to weigh the costs and benefits associated with the various possible outcomes of the case at hand and pick the outcome best calculated to maximize our collective social welfare. But in hard cases don’t *both* sides usually have a pretty persuasive story about how deciding in their favor would advance the social good? In criminal cases, for example, we often hear arguments from the government that its view would promote public security or finality. Meanwhile, the defense often tells us that its view would promote personal liberty or procedural fairness. How is a judge supposed to weigh or rank these radically different social goods? The fact is the pragmatic model of judging offers us no *value* or *rule* for determining which costs and benefits are to be preferred and we are left only with a radically underdetermined choice to make. It’s sort of like being asked to decide which is better, the arrival of Hue Jackson or the return of LeBron James? Both may seem like pretty good things to the Cleveland sports fan, but they are incommensurate goods, and unless you introduce some special rule or metric there’s no way to say for certain which is to be preferred.⁵⁶ In just this way, it seems to me that

54. SCALIA, *supra* note 1, at 27; *see also* Interview with James Boyd White, 105 MICH. L. REV. 1403, 1418 (2007) (“[A]s every law student learns, one finds in a very wide range of cases indeed, that arguments—rational, persuasive, decent arguments—can be made on both sides of the question. The law thus requires real choices from both judges and lawyers, but it informs those choices, which should not be merely a matter of preference or calculation, but should rather express the result of the mind’s engagement with the materials of the law . . .”).

55. *See* Charles Fried, *On Judgment*, 15 LEWIS & CLARK L. REV. 1025, 1034 & n.59 (2011).

56. *See generally* JOHN FINNIS, NATURAL LAW & NATURAL RIGHTS 111–18, 422–23 (2d ed. 2011) (discussing the incommensurability of social goods); JOSEPH RAZ, THE MORALITY OF FREEDOM 321–66 (1986) (same).

at the end of the day the critics who would have us trade in the traditional account of judging for one that focuses on social utility optimization would only have us trade in one sort of indeterminacy problem for another. And the indeterminacy problem invited by the critics may well be a good deal more problematic given the challenges of trying to square their model of judging with our constitutional design and its underlying values. So before we throw overboard our traditional views about the separation of the judicial and legislative roles, it seems to me we might all do well to remember The Bear.⁵⁷

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With the three points I've briefly sketched here tonight, I hope I've given you some sense why I believe Justice Scalia's vision of the "good and faithful judge" is a worthy one. But so far I've discussed mostly principle, not experience. And I run the risk of an objection from those who might suggest that there's more in heaven and earth than is dreamt of in my philosophy.⁵⁸ So, as I close, I want to make plain that the traditional account of law and judging not only makes the most sense to me as an intellectual matter, it also makes the most sense of my own lived experience in the law.

My days and years in our shared professional trenches have taught me that the law bears its own distinctive structure, language, coherence, and integrity. When I was a lawyer and my young daughter asked me what lawyers do, the best I could come up with was to say that lawyers help people solve their problems. As simple as it is, I still think that's about right. Lawyers take on their clients' problems as their own; they worry and lose sleep over them; they struggle mightily to solve them. They do so with a respect for and in light of the law as it is, seeking to make judgments about the future based on a set of reasonably stable existing rules. That is not politics by another name: that is the ancient and honorable practice of law.

Now as I judge I see too that donning a black robe means something—and not just that I can hide the coffee stains on my shirts. We wear robes—honest, unadorned, black polyester robes that we (yes) are expected to buy for ourselves at the local uniform supply store—as a reminder of what's expected of us when we go about our business: what

57. And isn't it easier, too, to assess whether a judge does or doesn't offer a persuasive textualist analysis—whether Justice Kagan or Justice Sotomayor have the better account of the statutory language in *Lockhart*—than to assess a judge's success using some ends-based or efficiency-based methodology, when those methods often rest on contested political or moral convictions or disputed social science data?

58. WILLIAM SHAKESPEARE, *HAMLET* act 1, sc. 5.

Burke called the “cold neutrality of an impartial judge.”⁵⁹ Throughout my decade on the bench, I have watched my colleagues strive day in and day out to do just as Socrates said we should—to hear courteously, answer wisely, consider soberly, and decide impartially. Men and women who do not thrust themselves into the limelight but who tend patiently and usually quite obscurely to the great promise of our legal system—the promise that all litigants, rich or poor, mighty or meek, will receive equal protection under the law and due process for their grievances.⁶⁰ Judges who assiduously seek to avoid the temptation to secure results they prefer. And who do, in fact, regularly issue judgments with which they disagree as a matter of policy—all because they think that’s what the law fairly demands.

Justice Scalia’s defense of this traditional understanding of our professional calling is a legacy every person in this room has now inherited. And it is one you students will be asked to carry on and pass down soon enough. I remember as if it were yesterday sitting in a law school audience like this one. Listening to a newly-minted Justice Scalia offer his Oliver Wendell Holmes lecture titled “The Rule of Law as a Law of Rules.”⁶¹ He offered that particular salvo in his defense of the traditional view of judging and the law almost thirty years ago now. It all comes so quickly. But it was and remains, I think, a most worthy way to spend a life.

May he rest in peace.

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59. Edmund Burke, *Preface to the Address of M. Brissot to His Constituents*, in 8 THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 381, 381 (London, F. & C. Rivington 1801).
60. See 28 U.S.C. § 453 (“Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: ‘I, _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ under the Constitution and laws of the United States. So help me God.’”).
61. Antonin Scalia, Essay, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).