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## Complexity, Judgment, and Restraint

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## *MADISON LECTURE*

### COMPLEXITY, JUDGMENT, AND RESTRAINT

GERARD E. LYNCH\*

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#### INTRODUCTION

I am honored to have been asked to give this year's James Madison Lecture. I hesitate to single out any of my extraordinary predecessors at this podium—there are too many great judges to list, and too much risk of slighting any. So I will note only that the list includes both judges for whom I clerked more than forty years ago, Justice William J. Brennan, Jr., and Chief Judge Wilfred Feinberg, of the court on which I now serve. That long-ago law clerk could not have dreamed of being someday in a position once occupied by those two giants of my current profession: the art and craft of judging.

That profession, that art, is under considerable pressure today. In the legal academy, there has long been a body of thought that sees the

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work of judges as a mere mask for the exercise of raw power. Increasingly, our political leaders act as if to reinforce the message of critical theorists, and their actions may help to turn that message from a theory to a reality. The press cannot seem to report the decision of a federal court on a matter of political significance without identifying the judges who made it by the political party of the President who appointed them. The general public, which has tended to rate the judiciary highest among the three branches of our government, seems increasingly skeptical. And indeed, whenever I speak to nonlawyers about what judges do, their questions often seem to assume that when confronted with questions that touch on controversial issues of public policy, the role of the judge is simply to decide what is the best rule—by which of course the questioner means “to reach the outcome that [the questioner thinks] is [ideologically or politically] correct.”

If politicians, editorialists, and law students seem to expect judges to decide cases based on their political preferences, judges speaking out in defense of judicial independence often take an opposite, but equally simplistic, tack: resorting to metaphors that seem to strip judges of judgment, as if judges could be replaced by something like the “K-zone” computer that television baseball commentators use to critique the performance of umpires. Other judges retreat to a set of formalistic rules that (an informed but cynical citizen might observe) produce, with suspicious regularity, results that correspond to the policy preferences of one political party. It is not a good time for nuance and complexity, but nuance and complexity is what, for good or ill, I have to offer this evening.

I want to speak about a jurisprudential question that was a hot academic topic when I was a young lawyer: whether there are correct answers to difficult questions of law. I caution that I am not a professional philosopher of law, and so I approach this topic not from deep theoretical premises but from the experience of many years of trying to make sense of concrete legal problems, as a practicing lawyer and judge, as well as a legal academic. The answers I will propose, I am afraid, are somewhat personal, and are rooted not in jurisprudential first principles, but in what it feels like, at least for me, to act as a judge.

The debate over right answers was often formulated, in the era of my youth, as one aspect of a debate between two formidable legal philosophers, the then-established eminence H.L.A. Hart and the then-upstart Ronald Dworkin, later to grace the faculty of this law school. Hart had contended that the system of rules created by legislation and precedent left a considerable number of questions open to judicial lawmaking, where the judge must exercise judgment and dis-

cretion. As he put it, “at the margin of rules and in the fields left open by the theory of precedents, the courts perform a rule-producing function . . . very like the exercise of delegated rule-making powers by an administrative body.”<sup>1</sup> In contrast, Dworkin argued that this theory was inadequate, and proposed what he contended was a “better theory”: “that even when no settled rule disposes of the case, one party may nevertheless have a right to win.”<sup>2</sup> That disagreement was part of a much broader jurisprudential debate, which long pre-dates Hart and Dworkin, and has continued in the decades since I encountered it in Dworkin’s book, concerning the relationship between law and morality. As I’ve noted, I am not qualified to enter that broader debate. I want to address only the humbler question of how a working judge struggles with the many questions that confront him or her in deciding actual cases.

In doing so, I want to suggest three propositions: First, that while most legal disputes can be resolved by identifying answers that are clearly correct under ordinary rules of legal reasoning, Hart is right that a significant number of important cases, including many that are politically salient, do not have answers that can be classified as “right” simply by applying those rules. Second, that one important reason for this conclusion is that the principles of reasoning that are sufficient to resolve most legal questions have exceptions and qualifications that frequently require the exercise of judicial judgment. And third, that the recognition that judgment is required in such cases is important to validating the principle of judicial restraint, a critical value that can only have real bite in a world in which judges are acknowledged to be exercising judgment in selecting an answer from among several more or less equally viable lines of reasoning, while the effort to resolve cases by more mechanical rules can point to unrestrained judicial interventions in the political process.

## I RIGHT ANSWERS

To start with, I suppose I need to define my terms. What do we even mean by a right answer? That is a fair question, though it is not one that unduly vexes the counselor at law in her office facing a question from a client. My working, purely functional, definition of a right answer is by and large the one that a lawyer answering a client’s question has implicitly in mind. What I mean is simply that the answer to a legal question is right when a lawyer asking the question can answer it

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<sup>1</sup> H.L.A. HART, *THE CONCEPT OF LAW* 135 (3d ed. 2012).

<sup>2</sup> RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 81 (1977).

with a solid conviction that a substantial majority of competent lawyers and judges would give the same answer and would find that answer essentially uncontroversial. Such an answer is the one the lawyer would regard as right.

It can be objected that this definition prejudices Dworkin in the philosophical debate or begs the question he wants to answer. While he contends that the judge's duty is to decide "what the rights of the parties *are*, not to invent new rights retrospectively," he quickly qualifies that by adding that it is "no part of [his] theory that any mechanical procedure exists for demonstrating what the rights of parties are in hard cases," and that "reasonable lawyers and judges will often disagree about legal rights."<sup>3</sup> I don't purport to argue that my definition answers some ontological question about what law is or what answers are right in some absolute or abstract sense. My definition, however, is the one I expect most lawyers would give, because it is born of the work of explaining law to actual clients and arguing points of law to judges, both from the advocate's podium as a lawyer and in conference rooms as a judge.

In those very practical contexts, it seems to me that if I do not have an argument—not necessarily a purely "mechanical" one, but one solidly rooted in traditional lawyerly methodology—that will persuade a substantial majority of judges, regardless of their political persuasion, their jurisprudential assumptions, or the political party responsible for their election or appointment, then I do not have a legal answer that is clearly right. It doesn't matter to my client, who wants to know whether she can deduct the expense from gross income or whether he will incur liability if he takes a certain action, what a legal philosopher would conclude is ontologically the "correct" legal answer, or even whether the philosopher believes there is such a thing. If I cannot answer the client's question with some degree of certainty, there is, in the only sense that matters to the client, no right answer; there is at best an answer that comes with some degree of risk of turning out to be wrong.

The same is true when I confront a question posed in appellate briefs by capable and conscientious lawyers. As I assess the case, if the lawyers are indeed competent, there will often be at least some more or less plausible arguments made by each side. As I try to work my way to an answer, I am often thinking about whether the answer that seems most persuasive to me will likely be persuasive to the other judges assigned to the panel that will decide the case, judges who may have different political values and jurisprudential approaches than I

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<sup>3</sup> *Id.* (emphasis added).

do. In a great many cases, the answer is clearly yes—that my interpretation of the governing statutory or contractual language, or my conclusion as to whether a cited precedent is controlling or distinguishable, is sufficiently solid that it will likely appeal to the others, regardless of whether they are “Obama judges” or “Trump judges,” “Clinton judges” or “Bush judges.” The answer is comfortably, if not unequivocally, *right*. I am not always correct in my prediction; sometimes one of us may just have overlooked some argument that renders the case more problematic, and sometimes one of us may be blinded by an unrecognized ideological presupposition that makes something seem very clear to the person holding that belief, but that someone with a different set of political or jurisprudential principles may see quite differently. But when I am confident of what the views of the panel will likely be, I am usually correct, and the result winds up being unanimous regardless of the composition of the panel.<sup>4</sup>

But there are other cases where the legal materials seem, to me, open to divergent views. The lawyers on both sides present persuasive arguments, and even if I have a fairly strong view that one side has the *better* argument, I expect that the case may produce different answers from different judges, sometimes for reasons that the general public or the editorial page of the *New York Times* would classify in political terms, but sometimes just because the materials simply point in divergent directions, and I cannot be sure that they will be assembled in the same way even by a colleague with whom I generally share political or jurisprudential values.

From my vantage as a judge sitting on a court that operates collegially, it doesn't matter very much, any more than it matters to the lawyer counseling a client, whether I decide, with Dworkin, that my answer is “right” in some larger moral, political, or jurisprudential sense, or consider that the question is one on which the court has “discretion” to act, to which a colleague's projected answer is more or less equally valid to mine. Each of us on the panel has to decide for himself or herself which set of arguments is more persuasive, and if we aren't unanimous about that, whichever side gets two votes wins.

Moreover, in a system of precedent, that result becomes, in my functional sense, the *law* (at least, the law in our circuit, at least until and unless the Supreme Court or our court sitting en banc overrules the decision). Once the case has been decided, a lawyer advising her

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<sup>4</sup> That doesn't mean the lawyer on the losing side of the argument was not competent. That lawyer may have honestly advised her client that their legal argument was precarious, and indeed that the judges almost certainly wouldn't buy it, but that there was at least a colorable argument that, in light of the stakes of the case, was worth the perhaps modest additional cost of an appeal.

client in a closely similar situation can now give a definitive “right” answer to the legal question. That is what we mean when we say that the court has adopted a rule or decided that a given legal proposition is correct. If my panel is struggling with a difficult legal question and we know that the same question is pending in a case that was argued before the Supreme Court earlier in the Term, we are likely to hold the case pending the Supreme Court’s decision because it is very likely that, once that decision is released, our question will become an easy one. I may shake my head and say that the Court got the answer “wrong”—meaning that I would have balanced differently the divergent factors and arguments that made the case difficult—but there is no longer a doubt about the correct legal answer.

Perhaps my description will seem simplistic to the philosophically sophisticated. But that is the way law works, and all practicing lawyers and judges know it.

## II

### EASY CASES

In terms of my definition, as the above discussion illustrates, it follows that there are indeed right answers to most legal questions. That proposition too will surprise no practicing lawyer, though it may surprise some first-year law students. Their surprise may stem partly from a theoretical commitment to some version of legal realism or critical legal theory, but it probably stems more from the quite reasonable preoccupation of legal education, particularly at the most highly regarded schools, with teaching students how to argue difficult legal issues. No one is going to pay lawyers top dollar to answer questions that any reasonably literate person can answer simply by reading the words of a statute or rule. It is better for our students to develop a facility for understanding how to decipher more problematic rules or cases and how to argue for the client’s preferred result in a case that is subject to considerable doubt. But that focus tends to give students the impression that virtually any legal proposition can be argued for or against with equal plausibility.

The vast majority of legal questions that arise in most people’s day-to-day lives, however, are easy ones. And that is a good and indeed necessary thing. People should be, for the most part, free to go about their business with some confidence that their common-sense, socially mediated judgments of how a person should act will accord with the society’s laws. We don’t want people to need an expensive consultation with counsel before acting in ways most people would find unproblematic. And even when questions require a legal consul-

tation, because they depend on rules that are more specialized or technical and are not simply reflections of common moral judgments, the answers will often be readily accessible to a trained professional. Most legal questions are, in practice, answered not by the Supreme Court, or by any other court, but by lawyers sitting in their offices. “What do I have to do to make an enforceable will?” “If I get a divorce, how will my and my spouse’s property be divided?” “Am I likely to be civilly liable to someone if I do this?” Our society would be in terrible shape if such questions could not, most often, be answered with some certainty, or if a lawyer could say only that it depends on whether you get an “Obama judge” or a “Trump judge.”

Whatever shape you think the country is in, its problems do not include that one. Lawyers are typically able to answer the questions their clients put to them with a fair measure of certainty, perhaps not off the top of their heads but after carefully debriefing the client about all the facts and circumstances of the client’s particular situation and doing research into statutes, regulations, and precedents. Even when no definitive answer is possible, the lawyer can usually give a sufficiently definite answer to solve the client’s problem: “If you do it that way, there’s a pretty good chance you can get this tax benefit, but if you structure the transaction in this alternative way, you will definitely get the benefit at only a modest additional cost, so it’s worth the trouble and expense to do it that way instead.” Or: “There is a sufficiently high risk that what you proposed will be construed as fraud that you simply don’t want to take the risk.”

That is hardly an original or controversial point, but it’s worth making because an overbroad cynicism about law is sometimes expressed by members of the public or even sophisticated legal commentators. Language is imperfect at conveying meaning, but it is not infinitely open-ended. Legal materials may be open to interpretation, but they are not infinitely malleable.

But of course, even the cynics don’t really mean that *all* law is open to political manipulation; they mean only a certain category of legal decisions, usually by the Supreme Court, usually in constitutional matters. That is, what the cynics really mean is that the subset of constitutional cases that reach the Supreme Court and that involve questions that are of great political interest and on which society is deeply divided, are not easily decided by reference to conventional legal materials. So it is of some importance to realize that the basic bedrock of the law is not a matter of politics but of reasonably clear rules that



are capable of neutral application and are routinely so applied.<sup>5</sup> The questions that can be answered in this way are many in number, and they are hardly trivial, especially considered in the aggregate. The skeptical attitude of the press, the public, and our students tends to overlook this body of real, everyday law, as it operates in law offices and in most of our courts most of the time, to focus intense attention on a relatively small number of cases that are most likely to present difficult questions to which the answers are inherently controversial.

It's also worth considering what a lawyer does to answer these easy questions. For the most part, the answer is indeed to follow certain formal—one could almost say mechanistic—rules. Close reading of texts, the use of internal and extrinsic evidence to understand what their authors most likely intended to accomplish, and adherence to precedent using the common-law tools of *stare decisis* and the careful distinction of cases based on their distinct facts, will produce reliable answers to most matters that come to the attention of lawyers and will lead to reliable predictions of how a court is likely to decide even most questions that somebody thought were worth litigating.

### III HARDER CASES

That said, many cases that find themselves before courts—particularly appellate courts and especially the Supreme Court—are harder. But even there, it is many, not most. There are economic and structural reasons why many cases even in the federal courts of appeals are one-sided.<sup>6</sup> But for the most part lawsuits are filed, and appeals pur-

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<sup>5</sup> I don't mean to question the insight that legal rules generally reflect the interests and viewpoints of the dominant forces or classes in society. What would it even mean to characterize a group as dominant if it did not control the content of legal rules? Whether that dominant force is taken to be "a democratic majority" or "the aristocracy" or "the bourgeoisie" or "bicoastal elites," the test of its dominance is its ability to have its preferences adopted as law. Presumably, the law against theft represents the interests of owners of property (and perhaps of all those who aspire one day to be in that category). I am not attempting to assess whether our legal rules are just or our institutions democratic, but rather to answer the more banal questions of whether there is a law against theft and what it covers. There is, and a lawyer can pretty readily tell you how it can be expected to be applied in the vast majority of situations.

<sup>6</sup> For example, the stakes in criminal cases are high enough for defendants that if a client has means, even a small chance of success may be worth pursuing, and defendants without means are provided with free appellate counsel, who are ethically required to pursue any appeal that is not entirely frivolous. A strikingly high percentage of civil appeals are brought by pro se litigants, and while some of these raise serious questions, most are brought by people who, understandably, have limited understanding of the legal system, and so make arguments that are easily resolved by reference to "clearly established law." From a different corner of the legal universe, cases where hundreds of millions of dollars are at stake will sometimes make it worth a client's while to pursue an appeal that

sued, for economically rational reasons. Cases fail to settle, and are pursued to higher levels, when each party perceives a reasonable chance of winning. Sometimes one side is wrong in its calculations. But a great many questions that come before the courts are there because there are reasonable arguments on both sides.<sup>7</sup>

How does a judge approach these cases? I would say, very much the way the lawyer in her office would if a client asked her to answer the same question. We do indeed first look for a simple, mechanical answer. Read the governing rule or statute. Consult the relevant precedents. Hope—sometimes against hope—that a clear answer will emerge. I must tell you that most judges, and certainly this one, are very happy when it does. I don't sit in my office waiting for a chance to impose my policy views on the world. First of all, I don't even *have* policy views on most of the cases that come before me. Any judge has to pass on huge numbers of cases in which she lacks specific legal, let alone policy, expertise. On other issues, I may have policy views that are good enough to serve me in the voting booth, where, like any citizen, I have to make decisions about which candidate will better serve the country based on the best information available to me and the best analysis I can manage in the time I can devote to understanding salient public debates. But I know full well that such casually or even strongly held views are not sufficiently certain to tempt me to impose them when my job is to decide, as best I can, what the law provides. And the volume of cases to be decided is such that judges will generally not have the time or energy to plumb potentially interesting questions to their depths; if the statutory language or a clear-cut precedent leads to an easy answer, I am quite content to take it, whether or not I think I would give the same answer if given absolute legislative power.

So I'm quite comfortable, as I am sure most judges I have worked with are, with the fact that I have to apply the law even if, as a voter, I would not have supported the adoption of that law. My main problem, in getting through the cases that the luck of the wheel sends before me, is just to figure out what the law is. In a great many cases, how-

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may cost a few hundred thousand dollars, even if the chances of winning are quite low. And of course, some litigants pursue matters regardless of the chances of winning, out of grudge or principle.

<sup>7</sup> Those questions may not involve the ultimate merits of grand competing claims about politically salient issues of law. By the time an appeal is taken, the losing side may well be pursuing a procedural or evidentiary point that can produce a do-over that will give the formerly losing side a chance to fight again, or at a minimum raises the costs and risks for the other side sufficiently to create a settlement more favorable than the result in the trial court. Thus, even if the appellant's case is ultimately weak, the issue actually being contested on appeal may be an arcane one that is far more complicated or disputable.

ever, that is a demanding task because neither statutes nor precedents give consistently clear answers to the litigated questions before me.

What is so difficult about them? Why don't statutes and case law give clear answers?

#### IV TEXTUALISM

Let's begin with texts. Although we still train law students to assess the weight of precedents in a common-law methodology, the bulk of legal rules today are to be found in statutes. While American lawyers might still research the questions their clients ask in some part by doing case research, the ultimate source of authority for most legal questions is going to be found in federal or state statutes. And for the most part, the answer will be textual and based on something that a lawyer would likely call "plain meaning." Again, this isn't or shouldn't be surprising. The law is made up of words; law can be described as an effort to control people's future behavior by means of words. Some laws are addressed to the public, some to specialized segments thereof, and some in effect only to judges and public officials.<sup>8</sup> A law-giver (in our society, usually a legislature or an executive agency exercising power delegated by the legislature) makes a rule to govern some anticipated or recurrent situation—a rule that tells people what to do the next time that situation arises. For the most part, the statute is going to tell us what to do, hopefully rather clearly. The legislative goal is usually (though not always) to state a rule clearly enough that a lawyer (and indeed the general public) will understand that conduct that was lawful yesterday is now prohibited, or vice versa, and that goal is frequently accomplished tolerably well. The text of the statute—or in some cases of another controlling document, such as a contract—is always the first resort, and often the last.

But the text does not always offer a definitive answer. We all, I think, owe a debt to the late Justice Scalia for recalling us to an insistence on the text as the first and most important source of statutory meaning. Surely, the effort to control behavior by written laws is hopeless if courts will ignore or resist what legislators have conscientiously tried to make clear. But the text is not always clear. Words can be slippery, as we well know, and not every law is competently drafted even to address its core concerns, let alone unanticipated variations.

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<sup>8</sup> See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 630–31 (1984) (describing the set of rules directed toward the general public as conduct rules and the set of rules directed at officials as decision rules).

Moreover, as any lawyer who has ever drafted a contract can attest, no one has perfect foresight of all contingencies that can arise. A text may be drafted effectively to give a clear answer to the question that provoked its adoption, but the chosen language may turn out to be quite ambiguous as to its effect on unanticipated situations.

Even when the law is not, strictly speaking, *ambiguous*, the text may give an answer that a reader may have considerable doubt was intended by the legislature. Sometimes the legislative history may give us a pretty good indication of what *was* intended by the language that was adopted. Again, we owe a debt to Justice Scalia for pointing out that legislative history must be used with some care; sometimes statements are inserted into the congressional record that were never actually spoken on the floor of the House or Senate,<sup>9</sup> and even if they were spoken, there may have been no one present to hear and be influenced by them, and the words may have been crafted strategically by the member, her staff, or lobbyists for the precise purpose of influencing a future court to adopt a reading that could not have survived a vote if language more clearly requiring that reading had been proposed as an amendment. All of that is true. But it is not the only, or even the dominant, truth.

As Chief Judge Katzmman has reminded us in his powerful insider's account of how Congress actually works, the claim that the words of a statute are sacred because those words are what the legislators actually voted on is an oversimplification.<sup>10</sup> In many instances, to the contrary, the legislators and even their staffs may have relied heavily, in deciding how to vote, on committee reports describing the content of bills, rather than on the dense and sometimes technical language of the bills themselves.<sup>11</sup> Legislative history can thus be illuminating as to the intended meaning even of texts that may seem to point fairly emphatically in only one direction.

Even in the absence of legislative history, moreover, even relatively clear texts sometimes seem to point to answers that are highly questionable, both as a matter of policy, and as an understanding of what the legislature was really trying to accomplish. And by that I do not mean simply cases in which the result is, to use the favored formulation of plain meaning adherents, "absurd." Whatever the rhetoric of politicians, editorialists, and judges at confirmation hearings, courts with some frequency confront texts that, taken literally, will lead to

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<sup>9</sup> *Blanchard v. Bergeron*, 489 U.S. 87, 98 (1989) (Scalia, J., concurring).

<sup>10</sup> See ROBERT A. KATZMANN, *JUDGING STATUTES* 18, 21–22 (2014) (describing the impossibility of legislators reading every word contained in bills and the important role of legislative history in facilitating the process of legislating).

<sup>11</sup> *Id.* at 19–20.

results that seem unlikely to have been intended by a legislative majority. And when you look at cases as they are actually decided, rather than at political rhetoric, that truth is not really a matter that divides “liberals” and “conservatives.”

Consider, for example, *United States v. X-Citement Video, Inc.*,<sup>12</sup> which was decided by the Supreme Court in 1994. The case represents a good example of something courts are often called upon to do: make sense of a statute that probably did not anticipate all possible applications.

The statute in question was the Protection of Children Against Sexual Exploitation Act of 1977.<sup>13</sup> As the name suggests, this is a statute whose basic purpose enjoys universal support. But universal acceptance of a policy goal may lead legislators to overlook certain nuances of application. The specific issue in the case was whether the provision of the statute prohibiting the distribution in interstate commerce of visual depictions of minors engaged in sexual conduct required that the defendant *knew* that the films or photos he transported contained child pornography—that is, that they depicted actual minors engaged in sexual activity.

The language of the statute, read in light of ordinary English grammar, quite clearly does not require such knowledge. The word “knowingly” does appear in the statute, but it appears in an entirely separate clause from the one referring to the involvement of minors—and indeed, the somewhat awkward structure of the provision appears to avoid a more straightforward statement that would have made it easy to read the knowledge requirement into the statute. The statute might have said “whoever knowingly transports a visual depiction of a minor engaged in sexually explicit behavior”—in which case it would be a very natural, though not entirely grammatically conclusive, reading to say that the word “knowingly” modified the entire predicate—not just the verb—such that to be guilty, one would need to know (a) that one was transporting something in interstate commerce, (b) that that something was a depiction of sexually explicit behavior, and (c) that one of the persons engaged in that behavior was a minor. But instead it punished any person who “knowingly transports . . . in interstate . . . commerce . . . any visual depiction, *if* [the depiction is of a minor engaged in sexual activity and] the producing of such . . . depiction involves the use of a minor.”<sup>14</sup> The location of the minor in

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<sup>12</sup> 513 U.S. 64 (1994).

<sup>13</sup> Protection of Children Against Sexual Exploitation Act of 1977, ch. 110, 92 Stat. 7 (1978) (codified as amended at 18 U.S.C. §§ 2251–2253, 2423 (2012)).

<sup>14</sup> *X-Citement Video, Inc.*, 513 U.S. at 68 (emphasis added) (quoting 18 U.S.C. § 2252(a)(1), (b) (1988)).

the “if” clause isolates it from the verb “knowingly.” In ordinary English writing, the word “knowingly” cannot apply to the presence of the minor.

And that is exactly what Justice Scalia argued.<sup>15</sup> But he lost, and the loss was not close. The vote was 7-2, and the opinion was written by Chief Justice Rehnquist, certainly not a “judicial activist” or “liberal.” Why? The core of the majority’s reasoning was that to read the statute according to what the Chief Justice acknowledged was “[t]he most natural grammatical reading” of the statute would require the conclusion that Congress chose to punish criminally someone who knowingly transported a particular package of film whose contents were unknown to him, but which turned out to include images of child pornography.<sup>16</sup> The Chief Justice and six colleagues thought that was a troubling result, noting that it would criminalize, among other essentially innocent people, “a retail druggist who returns an uninspected roll of developed film to a customer . . . if it were later discovered that the [film] contained images of children engaged in sexually explicit conduct” because the druggist knew that he was transporting a “visual depiction.”<sup>17</sup>

Now, I’m certainly not here to disagree with that result or to argue that it lacked a firm basis in legal reasoning. Chief Justice Rehnquist identified three principles of statutory interpretation that enabled him to escape from a literal reading of the statute: the principle that statutes should not be read to require “absurd” results, the presumption that criminal statutes contain mens rea or scienter requirements—Latin phrases meaning, essentially, wrongful intent—and the principle that statutes should be interpreted to avoid constitutional questions.<sup>18</sup> That is all quite conventional legal reasoning.

But note that, as Justice Scalia’s refusal to join the opinion tells you, they are not strictly “textualist” reasons, they are not independent of the majority’s policy preferences, and they do not involve a simple matter of “calling balls and strikes.” As for avoiding absurd results, absurdity is in the eye of the beholder, depending on a wavering line between results that are merely odd or undesirable and ones that are truly indefensible. Moreover, that line rests on judgments of policy or principle drawn from substantive values. The principle that criminal punishment ordinarily depends on a guilty mind is a commonplace for criminal law scholars, and is second nature to lawyers, but legislators who have not been exposed to those principles

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<sup>15</sup> *Id.* at 81–82 (Scalia, J., dissenting).

<sup>16</sup> *Id.* at 68–69 (majority opinion).

<sup>17</sup> *Id.* at 69.

<sup>18</sup> *Id.* at 70–78.

may well prefer, where they believe it is important to achieve strong deterrence of certain conduct, the idea of strict liability: If you are going to transport pictures in interstate commerce, you are responsible for avoiding child pornography, at your peril. Such statutes have been consciously created by legislators, and upheld, under various circumstances, by courts. To pin the label “absurd” on the consequences of strict liability is mostly to say that the court thinks that the legislators in this instance should have (and perhaps would have if they had thought more deeply about the matter) decided that the benefits of imposing strict liability are not worth the costs.

The presumption against reading at least the more stringent types of criminal statutes to impose strict liability is well established in our law. But it is not ancient, and it is not a very good guide to deducing what the legislators who voted for it actually meant. It was devised by the great Justice Robert Jackson in *Morissette v. United States* in 1952,<sup>19</sup> putting a brake on a run of cases in which the Court had read various “modern” or “regulatory” criminal statutes as creating strict liability. Justice Jackson, in one of the great feats of judicial sleight of hand, read a statute punishing conversion of government property as including the classic common-law mens rea of larceny—an intent to deprive another permanently of his property—even though the statute did not explicitly incorporate that mens rea, on the ground that Congress had probably failed to include such an element only because it was so familiar to lawyers that it went without saying.<sup>20</sup>

But if Jackson’s rule was a well-established precedent in 1994, he pretty much made it up when he adopted it, for a unanimous court, in 1952. He certainly wasn’t calling balls and strikes or reading the plain text of the controlling statute. And if we say that the Court in *X-Citement Video* was relying on a precedent about how to read statutes, the very existence of precedent as a complicating factor tends to undermine strict textualism. “Read it for the plain meaning” is, at least in some cases, a rule that will produce a predictable “balls and strikes” outcome, albeit one that in this case would have come out badly for defendants. But “read it for plain meaning unless precedent counsels otherwise” is much less predictable, given that precedents are even slipperier than texts themselves.

Jackson’s case, in fact, did not require him to rule that *all* criminal statutes necessarily should be read to include a mens rea element, and he didn’t say that they should. He distinguished statutes that codified long-standing common-law crimes, had severe penalties, and

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<sup>19</sup> 342 U.S. 246 (1952).

<sup>20</sup> *Id.* at 272–73.

addressed conduct that was wrong in itself—for which mens rea would be presumed to be required—from innovative statutes that had low-ish penalties and prohibited conduct on the basis of regulatory policy rather than basic morality.<sup>21</sup> The child pornography statute had heavy penalties and aimed to control conduct most people would consider immoral. But it was not a traditional common-law crime, and a law prohibiting the mere *transportation* of pornographic images might be seen as a regulation of the mails and the internet rather than the equivalent of traditional statutory rape laws that would penalize *producing* such images by coercing children into sex and filming the result. Under these circumstances, is the presumption of mens rea triggered? That is manifestly a judgment call.

As for the doctrine of constitutional avoidance, Justice Scalia reminds us that this has been described by the Court as a way to interpret ambiguous statutes, not a way to avoid striking down clear but unconstitutional ones.<sup>22</sup> But the statute in question could not fairly be called “ambiguous”—its literal meaning can only be read one way. And the constitutional question avoided was perhaps not such a demanding one; the Supreme Court has never actually written a mens rea requirement into the Constitution, a step that would itself require a bold interpretation of a document that has no explicit provision incorporating traditional aspects of the substantive common law of crimes.

At the heart of the *X-Citement Video* case is a violation by Congress (and perhaps an inadvertent one) of what to judges is a strong principle. Again, I have no quarrel with the principle or its application to this case. I would have voted with the majority. I agree with the principle, and I expect that most people, if they thought about it, would agree both with the general presumption and with the fact that the statute here should have complied with it. My point, rather, is twofold: First, that this is a *policy* judgment, and one that—quite as much as a belief that people should be allowed to marry someone of the same sex if they choose—relies on a principle more commonly understood and believed in by elite judges than by the lay public; and second, that even “conservative” judges will commonly exercise *judgment* based on such policy conclusions, even in the face of apparently clear language.

If I had time, I could cite many similar cases. I’ll just briefly mention one: last Term’s *United States v. Davis*.<sup>23</sup> The facts and legal ques-

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<sup>21</sup> *Id.* at 252–56.

<sup>22</sup> *X-Citement Video, Inc.*, 513 U.S. at 86 (Scalia, J., dissenting).

<sup>23</sup> 139 S. Ct. 2319 (2019).



tion in that case, which concerned the meaning and constitutionality of a federal statute defining “crimes of violence” for purposes of enhancing the penalties applicable to such crimes when a defendant carried a firearm during and in relation to that crime, are far too convoluted for me to address in detail. But the short of it is that the Court needed to decide whether the definition of a violent crime was to be applied “categorically,” meaning, in effect, either the crime is violent in every instance that comes within the scope of its definition, or only according to whether violence was used in the particular offense in question.<sup>24</sup> The majority went with the text, finding that the plain

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<sup>24</sup> *Davis* involved a convoluted criminal law problem, specific to federal criminal law. The relevant statute imposed severe mandatory sentences on persons who carried a gun while committing a crime of violence. 18 U.S.C. § 924(c) (2012). The definition of crime of violence encompasses two classes of crimes: (1) the so-called elements clause covers crimes that have “as an element the use, attempted use, or threatened use of physical force against the person or property of another,” and (2) the so-called residual or risk clause covers offenses that “by [their] nature, involve[ ] a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” *Id.* § 924(c)(3).

In prior cases involving similar sentence enhancements for defendants whose prior record includes convictions for crimes of violence, the Court has insisted that a crime must “categorically” satisfy the definition of a violent crime, meaning that a court does not apply the penalty simply because the *conduct that resulted in the conviction* was violent. Rather, the conviction must be for a crime that *intrinsically* satisfies the definition; unless the least serious conduct that could produce a conviction under the statutory definition would satisfy the definition of a violent crime, it isn’t one. In *Davis*, for example, the crime in question was conspiracy to rob, and a conspiracy can be committed simply by two people sitting at a dinner table who agree to commit a robbery; the actual use of force or violence is not part of the elements of the crime. This is not the place to debate the reasons for or the merits of this somewhat counterintuitive rule, which exempts from the intended punishment criminals who have indisputably engaged in violent acts—or for that matter to debate the reasonableness of the severe penalties involved. At any rate, that’s the rule.

The risk clause involves further problems. One might think that a conspiracy to commit a violent crime *inherently* involves a risk of violence, and thus is “categorically” a violent crime. But the Supreme Court has held that clause unconstitutionally vague, at least as applied to recidivist sentences using the definition in § 16(b) because the Court found it impossible to decide with any clarity when a crime by its nature, in the abstract, poses a substantial risk that physical force will be used, and thus that the risk clause is too vague to be constitutionally applied. *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1215–16 (2018) (finding that the clause requires the sort of abstraction that leads to unpredictability and arbitrariness, which is a violation of due process). Once again, that conclusion seems counterintuitive; one might think that at least some crimes clearly enough involve such a risk, and that it would be sufficient to hold that any crime that does not falls outside the risk clause. But that’s not how the Supreme Court went.

That set the stage for *Davis*. The Supreme Court had acknowledged that many criminal statutes are defined in terms of substantial risks but concluded that in those instances, juries were tasked with assessing not whether a crime in the abstract posed a risk, but whether the risk was occasioned by the defendant’s particular conduct. *Johnson v. United States*, 135 S. Ct. 2551, 2561 (2015) (distinguishing statutes that require risk assessment in the context of a particular act from those statutes requiring risk assessment in reference to an idealized act). Some courts of appeals, picking up on this distinction,

meaning of the statute was clear: It applied when the offense posed a risk of violence “by its nature.”<sup>25</sup> Under existing Supreme Court precedent, that entailed a dramatic consequence: Such an interpretation would render the statute unconstitutionally vague and would invalidate a severe mandatory sentence that had been routinely applied in a wide variety of cases for decades.

Nevertheless, the “plain” textualist reading prevailed—but did so by a bare 5-4 majority. The four justices in dissent were Chief Justice Roberts and Justices Thomas, Alito, and Kavanaugh, who wrote the dissenting opinion. The dissenting justices would all, I am sure, embrace in general terms some version of textualism and plain meaning; it was Chief Justice Roberts for example, who famously voiced the “balls and strikes” metaphor at his confirmation hearing, and Justice Thomas joined Justice Scalia’s rigidly textualist dissenting opinion in *X-Citement Video*. Justice Gorsuch, writing for a majority that included the Court’s four “liberal” members, derided the dissent, in Scalian terms, for relying on “intuition” about how ordinary citizens might read the statute to conclude that the majority’s reading was “unnatural.”<sup>26</sup> I don’t know that the majority’s reading of the statute in *Davis* was quite as unambiguously correct on pure textualist grounds as Justice Scalia’s in *X-Citement Video*, but I submit that you will find that argument pretty decisively the better interpretation of the letter of the law. But one might well question, as the dissenters do, whether the Congress likely foresaw, intended, or would have approved the majority’s reading of the statute—which in this case led, by another complicated twist of legal reasoning, to finding the statute unconstitutional.

My point is not to snipe at various justices for any perceived inconsistencies of approach, though it may strike you as odd to see “liberal” justices endorsing Scalian jurisprudence and “conservatives” reaching for a sound policy outcome by rejecting the most natural plain meaning of a statute. My point, rather, is that there is more to

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noted that under § 924(c), the sentencing consequence for possession of a firearm was attached not to a prior criminal record but to the commission of the particular offense being tried by the jury. *See, e.g., United States v. Barrett*, 903 F.3d 166, 178 (2d Cir. 2018), *vacated*, 139 S. Ct. 2774 (2019), *abrogated by United States v. Davis*, 139 S. Ct. 2319 (2019). Why wouldn’t it be possible to save the constitutionality of Congress’s definition by simply not applying the categorical approach in these cases? The jury could be told to decide whether there was a conspiracy *in a particular case*, in which the planning may have culminated in conduct that came very close to the actual consummation of a violent crime. The Supreme Court rejected that view by a 5-4 vote, with the majority finding that the statute’s language clearly forbade such a case-by-case assessment. *Davis*, 139 S. Ct. at 2330. The “risk” clause was thus unconstitutional. *Id.* at 2336.

<sup>25</sup> 18 U.S.C. § 924(c)(3)(B).

<sup>26</sup> *Davis*, 139 S. Ct. at 2334.

judging than a mechanical formula can capture. In both of these cases, as in so many others, a substantial number of justices (a lopsided majority in *X-Citement Video* and a near-majority in *Davis*)—in each case including justices who have been touted, in some cases by themselves, as strict constructionists—rejected the most literal grammatical meaning of a clear statutory text. In my view, the “intuition” that Justice Gorsuch criticized is in fact the exercise of judgment. The cases were genuinely close, notwithstanding the literal texts, because in each case there were strong arguments that the consequences of following the literal meaning gave significant pause about whether doing so would be undesirable as a matter of policy—at least in the eyes of the judges—and because there were legitimate, albeit not strictly textualist, arguments available in the legal tradition that give judges a role in determining whether in some cases the legislature might not really have intended those results. In each case, what was called for was a weighing of those arguments and not simply a mechanical application of a slogan.

It should not be surprising that deciding such a case can easily divide nine reasonable people, committed to pursuing correct legal outcomes, not strictly along “party” or even “ideological” lines, about the best answer. At the same time, the exercise of judgment necessarily draws to some degree on a judge’s principles and life experience. I don’t think it’s an accident that the textual argument in *Davis*—strong, if not as strong as the textual argument in *X-Citement Video*—prevailed with justices who are skeptical of incarceration (the four supposedly more liberal justices and Justice Gorsuch, a supposed conservative who shows signs of a libertarian streak that is skeptical of the expansive reach of federal law enforcement), or that adopting a literal reading that would render unconstitutional a statute designed to lock up violent criminals with guns would be unappealing to a group including three former Justice Department lawyers, two of them experienced prosecutors.

Professor Dworkin recognized that different judges with different backgrounds and philosophies would reach different conclusions about the right outcomes in legal cases, even if they all applied the complex methodology that he proposed in place of any mechanical approach. But with all due respect to him, I think it is a very special gloss on the word “right” to contend that there is an answer that is “right”—as a matter of law, and not just ideology or political value—where the answer that individual judges decide is right is ultimately dictated by their individual balancing of factors that include policy judgments and that could not be predicted in advance based on the application of purely methodological rules.

## V

## STARE DECISIS AND ORIGINALISM

In the limited time available to me for this Lecture, I can't go on to give similar detailed examples of why other vaunted techniques for reaching right answers, which work well in many cases and form the grist of ordinary legal analysis, will not always point to a clear answer. But I can at least sketch some of the problems. Take, for example, the principle of stare decisis—more Latin, this time meaning that a court's precedents must be followed by the same court or by those directly inferior to it in the judicial hierarchy. As a result, we have “case law.” Case law is trickier than statutory law because there is no canonical text to be read; the judge must follow the same principles laid down in prior cases not because the words of an earlier judge's prior opinion are authoritative, but simply in order to ensure that like cases are decided alike. Attention will be paid to what the prior court *said* about why it was deciding the case before it, but the words are less important than the facts of the case, and later courts can reconcile a decision that might depart from an earlier formulation of a legal rule by distinguishing the next case, that is, by explaining why the decision now being rendered is fully consistent with the actual resolution of the prior case.

As I've already said, many legal rules are authoritatively “settled,” at least for the present, by the decision of an appellate court. It is not unusual for the news media, or even more specialized legal publications, to tell us something along the lines of, “In a closely watched case, the Supreme Court today settled a question that has divided courts and patent lawyers . . . .” Before the Court decided the case, the question was unsettled: By my definition, a lawyer could not have told a client with any certainty what the right answer was, but as of today, she can. There is now a right answer, in my functional sense. The parameters of the new rule may still leave some or many applications uncertain, but ordinarily the decision will not only settle the *precise* question before the Court but will give sufficiently clear guidance on how a range of related questions are likely to be decided.

But I don't think I need to analyze examples to convince an audience of lawyers that the process of applying precedent is highly malleable. Arguments about whether a precedent can be distinguished are the grist of “thinking like a lawyer” from the first day of law school to the last or most important case of any litigator's career. That doesn't mean that any outcome can be squared with any precedent. Indeed, lawyers will very often agree that a given precedent *can't* be squared with one side's position in a case. But it seems to me that that conclu-

sion is almost always based on general acceptance, even by those who might like to see change, that the political or social value judgment that lies behind the precedent represents the prevailing conventional wisdom of the political classes of society. Perhaps at some future point the precedent may be chipped away by distinctions and exceptions to the point that there is a respectable, and perhaps even a winning, argument that it should be sharply confined or even overruled. And in some number of cases, there will be a strong but still contestable argument that the situation before the court is just distinguishable because the case presents different facts and different policy considerations than those that produced the precedent.

While *stare decisis* counsels strongly against overruling precedents, courts remain free to do so, and whether to do so is almost always a question of judgment. Just as “time has upset many fighting faiths,” as Justice Holmes reminded us,<sup>27</sup> time has upset many well-established precedents. Indeed, sometimes it doesn’t take much time: *Jones v. Opelika*,<sup>28</sup> a decision upholding against First Amendment challenge the application of a tax on door-to-door soliciting to Jehovah’s Witnesses, was overruled by the Supreme Court less than a year later in *Murdock v. Pennsylvania*,<sup>29</sup> in time for the judgment in the original case to be vacated on reargument.<sup>30</sup> Today, it seems that every case in which a Supreme Court precedent is called into the slightest question, both the Justices and the commentators engage in some fencing about the weight to be accorded to precedent, a debate that many view as preliminary skirmishing over whether *Roe v. Wade* will be overruled.<sup>31</sup> But a glance at the cases in which the Court has overruled precedent, or has conspicuously decided *not* to overrule a precedent, makes clear that an exercise in judgment is involved.<sup>32</sup>

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<sup>27</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>28</sup> 316 U.S. 584, 598–600 (1942).

<sup>29</sup> 319 U.S. 105, 117 (1943).

<sup>30</sup> *Jones v. Opelika*, 319 U.S. 103 (1943).

<sup>31</sup> See, e.g., Stephen Wermiel, *SCOTUS for Law Students: Supreme Court Precedent*, SCOTUSBLOG (Oct. 2, 2019, 9:54 AM), <https://www.scotusblog.com/2019/10/scotus-for-law-students-supreme-court-precedent> (describing a recent Supreme Court case dealing with the question of overruling constitutional precedent as “a proxy for what lies ahead” for *Roe v. Wade*).

<sup>32</sup> Readers interested in examining the standard arguments for overruling and not overruling precedents could do worse than to look at four cases, decided within six weeks of each other last Term, in which the Supreme Court faced explicit arguments that established precedents should be overruled: *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408–09 (2019); *Knick v. Township of Scott*, 139 S. Ct. 2162, 2169 (2019); *Gamble v. United States*, 139 S. Ct. 1960, 1963–64 (2019); *Franchise Tax Board of California v. Hyatt*, 139 S. Ct. 1485, 1490–91 (2019). *Stare decisis* prevailed (though in one case only narrowly) in two of four cases. Fun fact: Justice Gorsuch was the only member of the Court to vote to overrule all four challenged precedents.

Even when Justices believe that a prior decision was wrong, the pull of precedent will most often lead to its being left in place, and the decision to overrule balances some conclusion about just *how* wrong the prior decision was with a host of discretionary factors, including the extent to which, as Chief Justice Rehnquist put it in declining to overrule *Miranda v. Arizona*,<sup>33</sup> the decision “has become embedded in routine police practice[s].”<sup>34</sup> One may strongly believe that overruling *Roe* would be the wrong thing to do in any number of senses of the word wrong, but I don’t think that there is any simple or mechanical test that would allow one to decide that overruling *any* particular precedent is clearly right or wrong as a matter of the law of stare decisis.

I don’t need to say much about originalism in constitutional interpretation either, in part because the principal things I would have to say about it were said beautifully and persuasively by my Columbia colleague Henry Monaghan. In a 1988 law review article, Professor Monaghan pointed to a paradox about originalism.<sup>35</sup> While originalism, like textualism, attempts to provide a methodology that is objective and independent of policy preferences, the fact is that the courts have departed significantly from originalism, not just in a few minor or aberrational cases, but in cases such as *Brown v. Board of Education*<sup>36</sup> that are not only accepted parts of the fabric of our law and society but are regarded as vital decisions that helped keep the country on a viable path.<sup>37</sup>

*Brown* is not going to be overruled, as Professor Monaghan pointed out.<sup>38</sup> Not only that, but the current constitutional debate about issues like affirmative action is played out not with reference to what the drafters or ratifiers of the Fourteenth Amendment might have thought about those issues, but with reference to which vision of equal protection of the laws is more consistent with the principles of *Brown*. Professor Monaghan’s article derives its power not by articulating arguments for or against originalism as a principle of interpretation based on first principles of legitimacy, but from a recognition that, even for a defender of a strong role for original intent in constitutional theory, the practice of stare decisis, not simply as a tool of legal analysis but as a fundamental fact about the evolution of a legal

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<sup>33</sup> 384 U.S. 436 (1966).

<sup>34</sup> *Dickerson v. United States*, 530 U.S. 428, 443 (2000).

<sup>35</sup> Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 723–24 (1988).

<sup>36</sup> 347 U.S. 483 (1954).

<sup>37</sup> See Monaghan, *supra* note 35, at 723.

<sup>38</sup> *Id.*

system and a society, requires courts to stand by settled law.<sup>39</sup> That practice serves purposes similar to those served by originalism itself as a constraint on judicial decisionmaking and a foundation of a stable society under law. Uprooting expectations and conceptions of justice derived from *Brown* would be an unthinkable disaster, not only because its principle is just, and not only because it represents a commitment to racial justice that is in a deep sense a part of the bedrock meaning of equal protection of the law, but also because it is *there*, and we have staked our society on it. In short, courts have often departed, with good consequences, from originally intended meanings of texts, and stare decisis will often require adherence to such decisions as precedents, even when the consequences of the prior decision are less incontrovertibly beneficial than those of *Brown*.<sup>40</sup>

I would add only two thoughts on this subject. One is that there is an inherent tension between the discipline of history and stare decisis as a legal principle. The problem is that history, as a field of scholarship, is constantly in flux, open to new interpretations based on new evidence and new paradigms of thought. It's not just that lawyers and judges aren't trained to be good historians or that the kind of histories on which we draw to interpret the Second Amendment or the Equal Protection Clause are often tendentious arguments crafted to support a preconceived legal position—although in my view, both of those things are true. It's that good history is always up for grabs, while for the most part, law requires that the conclusions we draw today will be settled law indefinitely into the future. Of course, it is possible for precedents to be overruled. But that will happen when the precedent no longer fits social needs and won't (and shouldn't) happen simply because a young historian just wrote a Bancroft-prize winning book that challenges the previously accepted historical consensus. In the years since the earlier precedent was decided, a superstructure of law may have been built upon it; tearing that structure down is unlikely to be desirable even if a novel historical analysis reveals that the originalist foundation of the structure was flawed.

The second point is that, as Professor Monaghan recognized, once it is established that a decision like *Brown* departed from the original intent of its framers and ratifiers and that we are profoundly

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<sup>39</sup> *Id.* at 739.

<sup>40</sup> For an example of a deeply imbedded principle of constitutional law that is likely not consistent with original intent and is not as universally admired as *Brown*, consider the jurisprudence of the Eleventh Amendment. See, for example, William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983), and the rich academic literature it has spanned.

grateful that it did, the foundation of originalism must be shaken.<sup>41</sup> We might, with Professor Monaghan, want to establish a kind of presumption that courts should not readily depart from original intent, at least as to the broad concept or principle behind the words, and at least where that intent is discernible. But if there are exceptions, a judge must ask herself, how do we know whether the current case is one of them? Perhaps judges will be too quick to mistake their own fallible policy preferences for the kind of basic principle that, a half century and more hereafter, will look incontestable, and make the judge a hero of history for having recognized the occasion. That fear counsels that exceptions be rare. But there is also the danger that judges will miss the occasion and will hew too closely to original intent when the moment for another *Brown* is upon us. Into which category do we place *Roe v. Wade*,<sup>42</sup> *Furman v. Georgia*,<sup>43</sup> *Obergefell v. Hodges*,<sup>44</sup> and *District of Columbia v. Heller*?<sup>45</sup> And once those cases have been decided, the same questions arise with respect to whether any of them should be overruled, whether because our understanding of “original intent” has changed or because a majority of the Justices have become originalists? More relevant to the question of judicial judgment, into which category would a judge have placed any of these decisions, or for that matter *Brown* itself, *ex ante*, as the judge is faced with arguments that the “original intent” of the framers points one way, and the lessons of history since the framing to the current needs of society point another?

## VI

### JUDGMENT AND DISCRETION

Let me return to Hart and Dworkin. As I’ve already suggested, it seems to me that Hart has the better of the argument, insofar as he recognizes that the role of the judge is not confined to identifying a correct legal answer. At least in the sense that matters to lawyers and judges, legal methodology does not point to a clear right answer dictated by legal methodology in the most controversial cases. Legal methodology is too diffuse. Original intent jostles with *stare decisis*, textualism with respect for the purposes of the legislature. Sometimes all or most of the relevant factors line up to point in the same direction, and we can be confident that the law dictates a particular answer, even where the judge, were she appointed as the ultimate lawgiver,

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<sup>41</sup> *Id.* at 723.

<sup>42</sup> 410 U.S. 113 (1973).

<sup>43</sup> 408 U.S. 238 (1972).

<sup>44</sup> 135 S. Ct. 2584 (2015).

<sup>45</sup> 554 U.S. 570 (2008).



would have adopted a different rule. But cases are litigated, and hard cases are hard, precisely because the jostling methodologies sometimes don't point in the same direction. Judges must still decide those cases.

But Dworkin too had an important insight. It is not enough to say that judges have “discretion” to fill the gaps in the law with their decisions. Judges can't just say, “well, there's no clear answer here, so I will answer the question according to what I think would be a good rule.” That is not to say that the judge's policy views are irrelevant. A judge should certainly hesitate, where legal source materials yield no clear answer, to adopt what she is confident is a *bad* rule. But we want a judge to do more than vote for her preferred policy.

Dworkin argued that the judge must construct a conception of the legal order that is coherent and just, and then decide individual hard cases in a way that best advances that conception. There is some truth, and some value, to that formulation. A judge is always looking to root her answers to hard cases somewhere in the legal tradition, somewhere external to her own policy views.

But it is far from clear that there is a single overarching set of principles that genuinely drive our legal order. The legal order is a hodgepodge of decisions made at different times for different historical reasons, by different actors facing different problems in different eras, applying different ideologies. How can we make unified sense of the compromises and shifts of direction that mark our history? In the early 19th century, some abolitionists, like William Lloyd Garrison, believed that the United States Constitution was not merely flawed but was inherently “a covenant with death and an agreement with hell” because it enshrined slavery, which had to be entirely rejected by persons of good conscience;<sup>46</sup> others argued even then, and the historian Sean Wilentz has recently contended, that the original Constitution actually did as much as could be done politically at the time to undermine slavery.<sup>47</sup> And whatever the Constitution of 1787 had to say about racial justice, between then and now we have had a Civil War leading to the abolition of slavery and to what many reformers, then and now, thought was the birth of a new, more just republic embodied in the Fourteenth and Fifteenth Amendments—followed by a retreat from that vision, with the end of Reconstruction, the Supreme Court's retreat from civil rights in cases like *Plessy v.*

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<sup>46</sup> ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* 9 (2019).

<sup>47</sup> *See* SEAN WILENTZ, *NO PROPERTY IN MAN: SLAVERY AND ANTI-SLAVERY AT THE NATION'S FOUNDING* 22 (2018).

*Ferguson*,<sup>48</sup> the onset of terrorism and lynch law in the South, and nearly a century of Jim Crow and racial subjugation—followed in turn by a revival in the mid-20th century, led by thinkers and activists like Martin Luther King, of the vision of equality argued in the mid-19th by Frederick Douglass. Is there really one vision on which we can agree as representing the meaning of such a contested and convoluted history?

And in the absence of plausible agreement, as Dworkin effectively recognizes, any given judge's construction of the overall path of the law will be only that judge's own view. Except in the unusual case where the historical evidence overwhelmingly points in a single direction, and where the judge recognizes that her own philosophy is somehow at odds with the overall sense of justice immanent in our history, each judge's views on the right answer to a legal dispute will almost certainly correlate consistently with the judge's own policy preference—as Dworkin's own arguments about concrete legal issues pretty well did with his.

But a more modest version of Dworkin's approach does offer some guidance to the judge in search of answers. If legal materials point in different directions, there may well still be at least a persuasive argument, in a particular case, that the weight of some materials is greater than that of others. Similarly, if the arguments for textualism and *stare decisis* don't generate a formula as simple and authoritative as senators seem to want judicial nominees to pretend exists, that doesn't mean they lack all value. What is called for is an exercise of judgment about the specific weight to be given to particular pieces of evidence in particular cases. The text is the starting point, but I don't think we have to wait for cases in which the text yields an answer that can convincingly be called "absurd" to decide that we are pretty sure that the legislators who drafted and supported a statute or constitutional provision did not intend a particular result—not simply that it did not *anticipate* a particular result, but that it, and the public who voted for the law, would never have adopted the general principle for which a litigant contends that the text stands. On the other hand, over time a law's particular language may come to seem absurd if read according to an anachronistic conception, especially where that language purports to reflect a general principle rather than a limited specialized policy preference. If judges are not free to weigh and balance such arguments, the resulting jurisprudence will be mechanical and cold, producing results that appear silly or unjust, and will not command understanding and respect. If they do have that freedom, there

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<sup>48</sup> 163 U.S. 537, 548 (1896).

is a corresponding risk that the law in important and controversial cases will seem to reflect nothing more than the judge's own policy wishes. The attempt to identify larger themes in the law, or principles that can fairly be viewed as part of the tradition, rather than simply part of an individual judge's own philosophy, is a valuable tool in trying to navigate between these conflicting dangers.

I started with the fear that my thoughts on these issues might seem philosophically naive. I end with the fear that my practical focus may not be terribly practical. To say that careful judgment is called for is not very helpful in deciding how actual cases should come out. But the recognition that the exercise of judicial judgment yields contingent answers, rather than answers that are simply "correct," has two valuable results. First, it gives a more realistic understanding of the nature of judging and of the role of the judiciary in cases that deeply divide the public and elected officials. And second, it softens a certain judicial arrogance that comes with the belief that one's own conclusions about a case, however derived or however one purports to derive them, are emphatically *right*, to the exclusion of other answers.

## VII

### JUDGMENT AND RESTRAINT

Those two results are important, and they are intertwined. *First*: Just as it is important to understand the limits of what Chief Justice Roberts could possibly mean by saying that a judge's role is just to call balls and strikes, it is important to understand the limits of what he can possibly mean by saying that there are no "Trump judges" or "Obama judges." As I've already made clear, I think that judges in all cases are looking for objectively correct answers, and in a great many cases, we can find them. In cases where there are reasonably clear right answers, litigants can be quite confident that neither their nor the judge's political convictions or former party affiliations will make a difference to the outcome. Moreover, I hope it is true, and my experience of watching judges at work, both as a lawyer appearing before them and as a colleague and participant-observer, suggests that it is, that judges are not influenced by whether a particular result will advantage a particular politician or political party.

But when it is recognized that the answers to a fairly large number of significant legal questions are not dictated by some simple methodology and that good arguments can be made for both sides, not simply because lawyers are clever sophists but because in some matters the legal materials are indeterminate and the decision calls for an exercise of judgment, it becomes clear that the judge's overall phi-

losophy can make a great deal of difference. And by a judge's philosophy, I don't mean whether the judge voices a belief in "strict constructionism" or a "living Constitution," or any such slogan. I mean that a judge's sense of justice and political principle will matter.

This is true even at a very mundane level. In ordinary civil cases, of the kind that will rarely if ever get the attention of the Supreme Court, and that are indeed decided by "settled law," there is still considerable room for the exercise of judgment. In the majority of civil cases, judges are called upon to decide whether a complaint states a claim for relief, and at a later stage of the case, whether there are genuine issues of material fact for a jury to decide. The drafters of the Federal Rules of Civil Procedure in the 1930s saw a very limited role for these procedural mechanisms—the motion to dismiss under Rule 12(b)(6) for failure to state a claim, and the Rule 56 motion for summary judgment. The former was intended for cases that presented only an issue of law because the facts were essentially agreed upon, and the latter for cases in which, after wide ranging discovery, one side could identify no evidence that would permit a jury to decide the case its way. But the pressure of expanding caseloads led the Supreme Court to expand the role first of summary judgment, in the *Celotex* cases of the 1980s,<sup>49</sup> and then a generation later of the motion to dismiss for failure to state a claim, in *Twombly*<sup>50</sup> and *Iqbal*.<sup>51</sup> Today deciding these motions too is a matter of judgment and discretion. Deciding whether a complaint contains "sufficient factual allegations to be plausible" is very different than deciding merely whether a complaint alleges in general terms a legal claim. Deciding whether a reasonable jury can make a fact finding on a particular cold record is very different from deciding whether there is simply no evidence to support one acknowledged element of a plaintiff's claim. These are now judgment calls, and where there is judgment to be applied, reasonable people can more easily disagree.

On such questions, judges who are generally skeptical of whether the value of litigation exceed its costs will surely apply the standard differently in particular cases than judges who believe that litigants should generally have their "day in court." Thus, more open-ended standards for deciding pretrial dispositive motions are likely to generate different outcomes depending on whether the judges are appointed by Democrats or Republicans. And what is true in these

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<sup>49</sup> See *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 244, 257 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 595 (1986).

<sup>50</sup> See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

<sup>51</sup> See *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009).

mundane applications is true in deciding large and controversial questions of statutory interpretation or constitutional law.

That is not a terrible thing. Nor is it terrible that judges with different substantive political philosophies are likely to see close judgment calls about the meanings of statutes and constitutional provisions differently. That is a feature of the system, not a bug. It is what makes Alexander Bickel's famed "[c]ounter-[m]ajoritarian difficulty"<sup>52</sup> less of a bogey than it was painted: Because judges are appointed through a political process that vets their ideas and principles as well as their lawyerly skills, over time the public will have its way, and a Supreme Court that is consistently at odds with the values of the people will change, over time, with the results of democratic elections. If there were no such thing as "Reagan judges" or "Roosevelt judges," the body of Supreme Court case law would look decidedly different than it does.

*Second:* A recognition that the appointment of judges has, and is intended to have, political effects, and that the open texture of at least an important subset of legal rules opens the door to varying interpretations of texts and precedents, should temper the views of both politicians and judges. That understanding might help the public, the press, and the politicians to learn that judicial decisionmaking is not a matter of one side following a legitimate judicial philosophy and the other being unscrupulous or hypocritical. It's simply that differences over the proper construction of legal materials are inevitable and that the "judges' own values," in some sense of that phrase, will play a role in deciding hard cases. In this area as in many others, damping down the rhetoric would be healthy.

That recognition should also lead to a measure of what has been called judicial restraint. As Professor Bickel taught, the openness of legal reasoning suggests that the proper exercise of judicial judgment calls for judges to be cautious about their use of the Constitution—and I would add, about their interpretation of statutes, and their application of legal standards calling for the exercise of discretion as well.<sup>53</sup> I can hear skeptics saying, "aha, liberal judges, politicians, and editorialists have discovered the virtues of judicial restraint now that they do not have a majority on the Supreme Court." There is no doubt some truth to this, just as there is truth to the reciprocal charge that former advocates of judicial restraint seem perfectly happy to have

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<sup>52</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–17 (1962) (describing judicial review as "a counter-majoritarian force in our system" because judges constitute an unrepresentative minority).

<sup>53</sup> *Id.* at 73–75, 96 (criticizing judicial review when judges view their roles as "find[ing] law" from a "self-applying Constitution" as opposed to making law).

judges overrule longstanding precedents and strike down acts of Congress based on vague constitutional texts once the judges' interpretations of those texts correspond to their political preferences. I ruefully acknowledge that over the long ascendancy of a more politically conservative Supreme Court, I have sometimes felt that I now understand what lawyers and judges educated in the 1920s must have felt as they read decisions of the Supreme Court in the 1950s into the 1970s.

But other experiences have educated me in that direction as well. As a law student, I was not much persuaded by my teachers' questioning of the ability of judges to manage institutions such as prisons through injunctive relief resulting from law-reform litigation. I must say that the experience of presiding over prison-conditions litigation pretty quickly led me to understand what my professors had been talking about years before. And dealing with both the practical problems of such cases, and the daily grind of deciding other difficult cases, particularly in collaboration with judges of strong intelligence and legal skill, but very different political and jurisprudential assumptions and premises from my own, has given me a different perspective on legal issues that can seem very clear to those who do not have to grapple with actual records of discovery and trial, and actual textual material, day after day, across a wide variety of legal specialties. The recognition that there is not a method that will always yield unanimous answers, or for that matter that will yield consistently just outcomes, is humbling—and humility is a cardinal virtue for judges. A belief that one is simply pursuing a strict and objective methodology can lead to a willingness to overturn the judgments of one's predecessors just as much as a belief that one is entitled to pursue one's own vision of justice from the bench.

The title of this lecture is "Complexity, Judgment, and Restraint." I was asked by the organizers to put a colon after that title, to be followed by a more descriptive subtitle describing what the lecture was intended to be about. But I like the title, because it summarizes my thesis. The law is complex. Navigating complexity leaves room for discretion, and thus requires the exercise of judgment. The power to exercise one's own judgment, however, in matters affecting the governance of a democracy, in turn entails some sense of caution and restraint. And with that, I thank you for your attention.