SCHOOL OF LAW

Case Western Reserve Law Review

-*2+$ 7 002$

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

Honorable Neil M. Gorsuch

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 wo

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

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

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

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

"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

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 conduct[32]—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*,

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. LCnre1(gal d)-o1in a govst ll9–7.ei•

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]

*

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.

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 *ruf /F3 1 -.ds]TJ -w/F3.5teTD .0016cw7(e.a(usu t*

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.

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).