Lawmaking and Interpretation: The Role of a Federal Judge in Our Constitutional Framework

The Honorable Diarmuid F. O'Scannlain, Judge of the United States Court of Appeals for the Ninth Circuit, visited campus last academic year as the Law School's Hallows Judicial Fellow. Judge O'Scannlain delivered the annual Hallows Lecture, which was subsequently published in the *Marquette Law Review* and appears here as well.

Introduction by Dean Joseph D. Kearney

It is my privilege to welcome you to our annual E. Harold Hallows Lecture. On an annual basis a distinguished jurist spends a day or two within the Law School community. This is our Hallows Judicial Fellow, and the highlight of the visit is this Hallows Lecture.

It is appropriate to begin by recalling briefly the individual in whose memory this lecture stands. E. Harold Hallows was a member of the Wisconsin Supreme Court from 1958 to 1974 and was Chief Justice during the last six of those years. This service during a time of significant changes in legal doctrine itself merits remembrance. For an even longer time, though, Justice Hallows was Professor Hallows at Marquette University Law School—indeed, for 28 years before his appointment to the Wisconsin Supreme Court. Year after year, Professor Hallows taught Equity and Equity II to future Marquette lawyers; he made time for this undertaking even in the midst of his practice in Milwaukee and his extensive public service.

This year's Hallows Lecturer is the Honorable Diarmuid F. O'Scannlain, Judge of the United States Court of Appeals for the Ninth Circuit. Judge O'Scannlain is a native of New York and attended St. John's University there for college and Harvard for law school. After a two-year stint as a tax attorney on his native East Coast, Judge O'Scannlain moved across the country to Portland, Oregon. There he alternated between private practice and government service, the latter including positions as Oregon's public utility commissioner and director of the state's department of environmental quality. In 1986, he was nominated to his current position on the United States Court of Appeals for the Ninth Circuit by President Ronald Reagan and in short order confirmed to that post by the United States Senate. I wish to make sure that I note, given Chief Justice Hallows's connection with

the Law School (as I have described), that Judge O'Scannlain makes time every year to teach a semester-long course at Lewis & Clark's law school in Portland.

Over the past couple of decades, Judge O'Scannlain has emerged as a leader on the Ninth Circuit. This includes the court's most important work, its cases, where Judge O'Scannlain plays an unusually important role not only in his own docket but also in the court's en-banc process. An O'Scannlain dissent from denial of en-banc rehearing frequently gets some attention across the country—in Washington, D.C. He is also otherwise engaged with the court, having been for many years the leading proponent, perhaps, and certainly within the court, of disaggregating the Ninth Circuit into two or more smaller circuits. He is willing to disagree with prevailing wisdom without being disagreeable—to my mind one of the most important attributes that a judge (or lawyer) can possess. It is also a valuable attribute for a young lawyer—say, a law clerk—to be able to observe early in his career.

Please join me in welcoming to Marquette Law School this year's Hallows Lecturer, the Honorable Diarmuid F. O'Scannlain.

Hallows Lecture by Diarmuid F. O'Scannlain

Thank you for inviting me to speak with you this afternoon. It is a pleasure to visit this distinguished law school, especially since it is under the superb leadership of my former law clerk, Dean Joseph Kearney, whom I thank for his warm introduction and for his very kind invitation to be with you for these days.

As I have learned, the Hallows Lecture is always delivered by a jurist. As a consequence, I would like to take this opportunity to explore with you the proper role of a federal judge in our constitutional framework. All of us who have observed the increasingly combative judicial confirmation hearings in the U.S. Senate in recent years are quite aware that it has become popular for Americans of all political persuasions to applaud the values of "judicial restraint" while criticizing so-called "activist judges." But what, precisely, do we mean by "judicial restraint" and "judicial activism," and why is the former to be preferred? More importantly, is the definition of a judicial activist simply a matter of political taste, or is there a principled basis upon which we can distinguish those jurists who faithfully exercise their constitutional function from those who succumb to the ever-present temptation to legislate from the bench?

I believe such a principled basis does exist, and I suggest that judicial restraint, properly understood, reserves for judges only those responsibilities inherent

in the judicial branch of a tripartite system of separated powers. As all students of American government are aware, the legislative, executive, and judicial branches perform different functions and thus require different skills of their members. I would argue that some of the qualities that make the very best legislators—ingenuity, the willingness to take risks, and a creative approach to problem solving—are exceedingly dangerous in the hands of judges, yet lamentably common.

Before going further, I must emphasize that I speak only for myself, and not for the United States Court of Appeals for the Ninth Circuit, the court of which I am a member. In addition, I must also stress that these thoughts should not be construed as opining on the outcome of any matter that may come before me. Rather, my goal is to demonstrate how different philosophies judges bring to their job of deciding cases can advance or undermine the principle of separation of powers, as illustrated by several important cases in our history.

I will begin this discussion with the role of the federal judge as envisioned by the Framers of our Constitution. Next, I will suggest which theoretical approach is more consistent with that vision by examining cases in which federal judges have employed different approaches to constitutional and statutory interpretation. At the conclusion of that endeavor, I hope to demonstrate that a judicial philosophy that relies on text, structure, and history is not only consistent with what the Framers envisioned, and therefore possessed of historical legitimacy, but, more importantly, that such a philosophy is essential to the maintenance of a vibrant democracy, in which the people shape the policy that determines their future, rather than a robed elite ruling from the federal bench.

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I.

It might be said that the primary responsibility of a judge is to decipher legal text in a case or controversy that comes before him or her. Every day, we are presented with statutes and asked to answer two important questions. First, we are asked to determine whether the substance of the contested legislation conflicts with superseding provisions of the United States Constitution. Second, and far more often, we are asked to interpret the meaning of a legal text the parties dispute.

The approach a federal judge brings to this task has critical implications for our system of separated powers. Article I, Section 1 of the United States Constitution makes clear that "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Correspondingly, Article III extends the judicial power to specific "cases" and "controversies."[1] Thus, the Constitution places the power to legislate—to create law—in the people's elected representatives. The judicial power, on the other hand, is merely a power of interpretation—the power to discern how a particular law applies to a specific set of facts. The Constitution entrusts this power to an unelected, life-tenured federal

judiciary and, in my view, does so with good reason. The power to interpret requires judgment, careful study, and most importantly, independence, qualities best cultivated in public servants at least one step removed from the political sphere.

The success of this system of government, however, hinges on the judge's ability to apply the judicial power as it is, a power to *interpret*—to determine how a law applies to the facts of a particular case, not to speculate as to how that legal text *should* apply, or how the legislators who crafted it *would have wanted* it to apply in the case before the judge. The former exercise applies law, the latter creates it, and the power to legislate is wholly absent from the judicial powers set forth in Article III.

The Framers' writings illustrate why a judiciary confined to the task of interpretation is essential to a structure of separated powers. The system of government we enjoy today was influenced to an underappreciated degree by the French political philosopher Baron de Montesquieu, an Enlightenment thinker who first articulated the theory of a tripartite system of government.[2] Montesquieu described the concentration of executive, legislative, and judicial power in the same hands as the definition of tyranny itself, and the American states took up his arguments with enthusiasm after securing their independence, crafting state constitutions that separated the judicial and legislative powers distinctly.[3]

Quoting Montesquieu explicitly, Alexander Hamilton's *Federalist Paper No. 78* described the judiciary as the weakest branch in the new government, but quickly cautioned that the stability of this arrangement, and thus the "general liberty of the people," was contingent upon the judiciary remaining "truly distinct" from both the legislative and executive branches, for while "liberty can have nothing to fear from the judiciary alone," he wrote, "[it] would have every thing to fear from its union with either of the other departments."[4]

Acting on the same insights, the delegates to the Constitutional Convention rejected three separate proposals which would have given the Supreme Court an integral role in the legislative process. First, the delegates rejected a plan to establish a Council of Revision—a committee composed of federal judges and executive branch officials which would have been empowered to review and to amend legislative bills.[5] Second, the delegates declined the suggestion to create a Privy Council composed of various executive department heads along with the Chief Justice of the Supreme Court, which would have produced written opinions on legal issues and provided other assistance upon the President's order.[6] Finally, the Convention refused to adopt proposed language that would have authorized executive departments to obtain advisory opinions from the Supreme Court.[7]

This history demonstrates that in the system of government envisioned by the Framers and later ratified into our Constitution, the role of the judge is simply to judge—to interpret legislation rather than taking any active role in the creation of law itself.

Few, if any, students of the law would dispute this characterization of the judicial power. But, dissension soon erupts when the question becomes how a judge is faithfully to apply this power. Keeping in mind such definition of the judicial role in our constitutional framework, let us turn to this important debate.

II.

As I noted earlier, a federal judge regularly deals with legal text in cases before him. And, while issues of constitutional interpretation may grab the most headlines, the overwhelming majority of a judge's workload is consumed with construing federal statutes.[8] In examining judges' approaches to this task, scholars have divided the various theories of interpretation into two broad categories. The first uses the text of the provision at issue as the point of departure and considers that text in light of structure and history in order to derive its meaning.

The second theory focuses instead on the purpose the enacting legislature had in mind when it drafted the provision and attempts to derive an interpretation consistent with it. Thus, perhaps not surprisingly, scholars have labeled these theories as "textualism" and "purposivism," respectively.[9] Both theories are designed with the same goal in mind—to equip judges with the tools necessary to interpret the law in the manner most consistent with the enacting legislature's will, and thus preserve our lawmaking process as one controlled by elected representatives rather than the courts. Yet as I hope to demonstrate, only one of these theories is capable of achieving this goal, while the other, I suggest, directly undermines it.

A.

Although judges have relied on text for as long as there have been courts, "textual*ism*" as a theory is of relatively new vintage. It is traceable to a backlash by a group of intellectuals against what they perceived to be the liberal and activist advances of the Warren Court.[10] Supreme Court Justice Antonin Scalia, the most well-known proponent of the theory, outlined its foundational principles in his famous Tanner Lectures at Princeton.[11] Justice Scalia suggests that in order to reserve the task of lawmaking to the people's representatives, judges must limit themselves to objective sources of meaning, such as text, structure, and history.[12] Thus, while judges following this approach may consider what Congress intended a particular word or phrase to mean, they only search for this intent in an objective sense. A hypothetical person guides this analysis. As Justice Scalia explained, the goal of the judge should be to discern "the intent that a *reasonable person* would gather from the text of the law, placed alongside the remainder of the *corpus juris*."[13] In other words, the judge does not ask what the statute's words mean to him or her alone, but what they would mean to "'a skilled, objectively reasonable user of words'" alive at the time of the statute's enactment.[14]

In practice, this means that the judge first examines the language of the statutory provision at issue, followed by the context of the entire statute, relying, if necessary, upon so-called linguistic canons to elucidate the meaning of ambiguous terms. Finally, the judge will consider history—the manner in which the statute's terms have been used in other laws, or the contemporary meaning ascribed to those terms at the time the statute was passed, as dictionaries and other sources may reveal.[15]

On the other hand, judges who aim to interpret a statute consistently with Congress's *purpose* begin from a very different starting point. While a judge focused on text asks what a reasonable person would understand the language of a statute to say, a judge focused on purpose asks what Congress *meant* to accomplish.[16] The sources such judges rely on are myriad. For example, while they consider all the same sources as textualists—plain meaning, statutory context, and linguistic canons—they also include many others, such as the evolution of the statutory scheme, new practices and norms, and especially legislative history.[17] By expanding the universe of relevant sources, these judges greatly increase their discretion and, in my view, allow themselves to encroach upon the power the Constitution reserves to the political branches.

Perhaps the best-articulated justification of the purposivist approach is Supreme Court Justice Stephen Breyer's recent book, *Active Liberty*,[18] which sets forth his philosophy and criticizes what he perceives to be the weaknesses of over-reliance on text.[19] Justice Breyer's theory conceives of judging as a search for congressional intent and, like the textualists, encourages judges to allow a hypothetical person to guide their inquiry.[20] This hypothetical person, however, is not a "reasonable user of words," but a "reasonable member of Congress."[21] Further, this hypothetical congressperson does not require the judge to determine how an ordinary citizen would interpret a statute, but how a reasonable member of the enacting Congress *"would have wanted"* the court to interpret it.[22]

Both hypothetical figures unquestionably afford judges some discretion. Yet the discretion permitted by a text-based approach is cabined by important restraints—the plain meaning of language, statutory structure, canons of construction, and history. The hypothetical reasonable member of Congress, however, invites judges to embark on a far more creative endeavor. Indeed, if one merely asks what a reasonable member of Congress was trying to say, there is little to distinguish this inquiry from asking the judge what he thinks the statute *should* say—in other words, legislating from the bench.[23]

To contrast these two theories, let us turn to a concrete example.

B.

Three terms ago, the Supreme Court considered the case of Gary Small, a defendant convicted and sentenced to five years in prison by a Japanese court for attempting to smuggle firearms into that country.[24] Shortly after his release, Small returned to the United States, where he promptly purchased a handgun.[25] After that, he was charged with and convicted of violating a federal statute that prohibited the possession of firearms by "any person . . . who has been convicted in *any court* of a crime punishable by imprisonment for a term exceeding one year."[26] On appeal, he argued that the statute did not apply to him because Congress only meant for the term "any court" to prohibit the possession of firearms by defendants convicted in American courts. A 5–3 majority (Chief Justice Rehnquist did not participate) agreed with Small that "any court" was limited to this narrower definition. Writing for the majority, Justice Breyer noted that the plain language of the statute did not explicitly "mention foreign convictions" or implicate a subject matter such as immigration or terrorism, in which foreign convictions would be "especially relevant."[27] Critical to his analysis was his insight that the natural reading of "any court" would create "anomalies" that, at least in the majority's view, produced unfair or inequitable results. Specifically, Justice Breyer worried that such a reading would permit individuals convicted in foreign courts of conduct that our country embraces (such as free speech) to be prosecuted under the statute, even though those who engaged in the same conduct on American soil would be immune.[28]

"The success of this system of government, however, hinges on the judge's ability to apply the judicial power as it is, a power to interpret—to determine how a law applies to the facts of a particular case, not to speculate as to how that legal text should apply, or how the legislators who crafted it would have wanted it to apply in the case before the judge."

The dissenters, led by Justice Thomas, were unmoved. Limiting themselves to the "plain terms" of the statute, they reasoned that the natural reading of the word "any" has "an expansive meaning."[29] Consequently, they would have held that Small's foreign conviction was within the scope of the statute.[30]

What accounts for these divergent readings of this relatively simple phrase? The majority made clear that the "anomalies" the term "any court" would permit caused it to reject that reading. That is, they concluded that because the statute's plain text would punish a person even if he was convicted in a foreign court for "conduct that domestic laws would permit," no reasonable member of Congress could have meant "any court" to mean what it most naturally suggests.[31]

In my view, the majority presents some persuasive policy reasons as to why a law that treats defendants convicted in foreign and domestic courts identically

may be undesirable. But I believe strongly that such considerations are inappropriate for a judge faithfully exercising his constitutional role. First, as the dissent aptly pointed out, the majority's reading created its own anomalies. By limiting the definition of "any court" to only domestic courts, the majority's interpretation permits individuals convicted in foreign courts of violent crimes such as rape and murder freely to possess firearms in the United States, even though those convicted in domestic courts of entirely nonviolent crimes may not.[32]

Thus, for me, the *Small* case exemplifies how the search for Congress's supposed purpose exceeds judicial competence, and, I suggest, judicial power. The Court in *Small* was forced to choose between two readings of a statute, each of which would create anomalies.[33] Determining which anomalies are tolerable and which are not is a project perfectly tailored to a legislative body vested with factfinding expertise and accountability to the people. Yet courts have no such expertise or accountability. The result reached by the majority in *Small* may have been socially desirable. But the reality remains that as judges, except when the most natural reading leads to unconstitutional or (in a narrow set of cases) absurd results, our responsibility is to apply the text as Congress wrote it, not to correct the anomalies Congress failed to foresee.

C.

Judges who emphasize text are often criticized as "wooden," or tone-deaf to practical consequences.[34] My first response is that such claim is overly simplistic, as textualism is not to be confused with literalism. Rather, we should interpret words according to their most reasonable meaning. Reasonableness presumes a limited range of meanings, no interpretation outside of which is permitted.[35] In *Small*, the dissenters focused on the plain text to reach a reasonable result. But as textualists readily emphasize, sometimes "the most literal interpretation of a phrase is not always the most natural and reasonable one."[36] A principled textualist cannot read statutory language in isolation.[37] Sometimes, context renders the literal interpretation *un*reasonable, and points the way to the most natural meaning, the textualist's ultimate goal.

"By expanding the universe of relevant sources, these judges greatly increase their discretion and, in my view, allow themselves to encroach upon the power the Constitution reserves to the political branches."

My second response to the criticism is that what some see as wooden, I would characterize as predictable. And, unlike the traits that make an effective legislature, predictability is among the greatest virtues of a court of law.

In some ways, judicial interpretation can be seen as a conversation between the courts and Congress.[38] When courts interpret legislation, they attach significance to Congress's linguistic habits. For instance, if Congress uses the same phrase multiple times, courts are likely to conclude that Congress's intended meaning was consistent. Similarly, Congress responds to judicial decisions. If courts interpret a phrase differently than Congress intended, Congress will amend the statute and clarify its meaning. Or, if courts interpret a phrase as Congress hoped, Congress is likely to employ that phrase again, knowing that the two branches now understand each other.

Such "conversation" comports with our governmental structure, but it does require a common language if the two branches are to understand each other. There are over 150 federal appellate judges and over 750 federal trial judges. They come from all sorts of different backgrounds and each of them, I would argue, has a slightly different concept of what a reasonable member of

Congress would think. But when judges limit themselves to objective sources of Congress's intent such as text, predictability is appreciably enhanced. While discretion is not entirely foreclosed, I believe such approach enables judges to bring consistency to statutory interpretation, in case after case, regardless of the facts or the political values at stake.

In addition, judges who rely on text acknowledge that the "purpose" behind most laws is far from singular. For a bill to become a law, a majority of the 435 congressmen, a majority of the 100 senators, and the President must all authorize its passage. Each player usually has his or her own reasons for doing so. He or she might support the legislation on its own merits, or because it brings resources to constituents, or because strategists have tied its passage to the success of one of their own pet projects. The legislative process is full of these compromises, for better or worse. Indeed, as Otto von Bismarck once famously said, legislation is like sausage: while both can be enjoyable products, the process of making them is better left unseen.[39]

Beyond the fact that legislative purpose is not singular, there is no objective source which captures such purposes *except* the law itself. While congressional committees issue reports and legislators make comments from the House and Senate floor, these isolated statements cannot reliably capture the "purpose" of the hundreds of individuals necessary to a statute's enactment. As judges, the only such indicator we have is statutory text.

Of course, some respond, with lamentable accuracy, that many members of Congress are not acutely aware of the linguistic niceties of the great volumes of federal legislation.[40] Moreover, they point out that many statutes are drafted by congressional staffers rather than elected representatives themselves. Thus, they argue that legislative history can be just as useful as text when discerning Congress's intent.

But whether or not these critics accurately describe Congress's habits, the ever-increasing volume of federal legislation does not authorize judges to fill gaps they believe Congress was too busy or too distracted to close.[41] Indeed, to the extent some believe Congress is overworked or simply incapable of carefully crafting each word that becomes law, perhaps this indicates that our law has become overly federalized, and that a robust central government, despite its benefits, has important costs as well. Whatever the connection, the important point is that the expansion of federal law does not authorize judges to lend Congress a helping hand in legislating.

Our Constitution separates the legislative and judicial powers to ensure that the people make the ultimate decisions. As a consequence, on all questions, especially the close and difficult ones, it follows that the judgments of our elected officials should prevail over the judgments of our unelected judges, no matter how wise we are (or might think ourselves to be).

III.

While judges are most frequently called upon to interpret statutory text, the exercise of judicial power is never more highly scrutinized than when the Supreme Court rules on the merits of a constitutional case. This is to be expected, as the stakes are particularly high—while the Court's interpretation of a federal statute can be overturned by a bare majority of Congress with the consent of the President, a constitutional decision by the Supreme Court can only be overturned through the rather extraordinary remedy of a constitutional amendment. Yet there, where the dangers of a judge-turned-lawmaker are particularly great, the judge's temptation to reach beyond objective sources for the Constitution's "purpose" or the socially desirable result is often greater still. Thus, as the rivers of ink spilled over the Court's most controversial decisions, such as *Roe v. Wade*,[42] *Lawrence v. Texas*,[43] and *Lochner v. New York*,[44] can attest, constitutional cases render the need for a principled judicial philosophy all the more essential.

A.

I believe one decision that receives comparatively little attention (although I am sure you are all familiar with it) illustrates particularly well the undesirable consequences of a judicial approach that strays from text, structure, and history. As all followers of television police dramas are aware, the Court in *Miranda v. Arizona*[45] held that the government may not introduce into evidence at a defendant's trial any statement he made to police during a custodial interrogation unless the suspect was advised of the four now-famous *Miranda* warnings: "You have the right to remain silent, any statement you make may be used against you, you have the right to an attorney," and so on.[46] What those television viewers may not be aware of, however, is that the Court's decision in that case was truly unexpected.

In the decades before *Miranda* was heard, the Supreme Court had applied a rule that a suspect's confession would be admissible at trial so long as it was "voluntary," that is, not coerced by violence or threats of violence by the police.[47] The Court reasoned that the prohibition against involuntary confessions was required by the Due Process Clause of the Fourteenth Amendment, which "assur[es] appropriate procedure before liberty is curtailed or life is taken."[48] Increasingly, however, some Justices became concerned with the subtler pressures that arise from police questioning and came to the view that police interrogation can be "inherently coercive" even where the police never use or even threaten violence. Thus, by the time the *Miranda* case reached the Court, the majority of Justices had become quite skeptical of the constitutionality of post-arrest confessions.[49] This was consistent with the prevailing jurisprudence of the Court which, led by Chief Justice Earl Warren, has been labeled by historians as the most aggressive in its use of the judicial power to advance social progress, at least as the majority of the Court defined that term. And, as a result, those awaiting the decision in *Miranda* wondered aloud whether the Warren Court would interpret the Constitution to prohibit the use of *all* post-arrest confessions.

In a split decision, the Court in *Miranda* said *yes*: The Constitution does prohibit the prosecution from using a suspect's confession against him at trial *unless* the suspect was advised of four specific warnings which it then proceeded to make up, for the first time, in *this* case. To the surprise of all, including the litigants,[50] the Court did not hold the warnings to be required by the Due Process Clause, but by the Self-Incrimination Clause of the Fifth Amendment (as applied to the states through the Fourteenth). That Clause states that "[n]o person . . . shall be compelled in any criminal case to be a *witness* against himself."[51] And, prior to *Miranda*, few had read its text as vesting suspects with any rights *before* formal criminal proceedings began.[52]

The majority, however, confidently proclaimed that the warnings were compelled by "the constitutional foundation underlying the privilege [against self-incrimination]," because, in the Court's words, that Clause requires government to "accord to the dignity and integrity of its citizens," and "to respect the inviolability of the human personality."[53] In other words, the police must produce evidence "by its own independent labors, rather than by the cruel, simple expedient of compelling it from [the suspect's] own mouth."[54]

Appealing to constitutional values at a very broad level of generality (as courts often do when they wish to extend the Constitution's text into uncharted waters), the Court emphasized the policy value of the warnings in support of its novel holding. Chief Justice Warren noted that when suspects confess during police interrogations, only police are present. Even where there is no evidence that police employed coercive tactics, he argued, such interrogations are cloaked in "secrecy," which prevents the courts and the public from knowing what actually

occurs in the interrogation room.[55] As such, he concluded that the Constitution required police to advise suspects of their rights before the interrogation begins.

The dissenters vehemently disagreed, finding nothing in the text of the Constitution, its history, and nearly 200 years of precedent to portend the right newly discovered by the majority. As Justice White explained, the text of the Self-Incrimination Clause says what it says—"no person 'shall be compelled in any criminal case to be a witness against himself'"[56]—and, when considered in light of "grammar and the dictionary," appears to state nothing more than that no person shall be compelled to testify against himself in open court.[57]

Moreover, the dissenters viewed the social value of the Court's decision as far less certain and worried that its reasoning would handcuff law enforcement in fulfilling its duties. At a minimum, they believed the Court's prior rule, that confessions could be admitted at trial if "voluntary," provided adequate safeguards against police coercion and that the Court's discovery of a new right in the Self-Incrimination Clause was not supported by traditional tools of constitutional interpretation.[58]

On balance, I find myself in agreement with the dissenters' reasoning and, more importantly, in its interpretive approach. In my view, it is difficult to understand the majority's decision in *Miranda* as anything more than a policy choice. Faced with a real and documented threat of coercive police practices, the Court created a solution—it tore away the cloak of secrecy it perceived as wrapped around the station house and imposed a bright-line rule requiring police to inform a suspect expressly of four enumerated and previously unarticulated rights (and to obtain the suspect's affirmative waiver of those rights) before questioning. Depending on one's view, this might have been a reasonable solution to the temptations of police interrogation. Yet judges, as envisioned by Montesquieu and the Founders, are not responsible for creating solutions to social problems, however great. Instead, they are only asked to determine what our Constitution explicitly requires.

B.

Now that more than four decades have passed since *Miranda* was decided, let's examine the consequences of the Court's decision and its implications for the separation of powers. Subsequent to *Miranda*, the Burger and Rehnquist Courts scaled back the scope of that decision without explicitly overturning its holding. For example, the Court held that while a suspect's unwarned confession could not be admitted as direct evidence against him, it could still be used for impeachment if he testified.[59] Later, the Court held that police confronting a public safety emergency could

question a suspect without reading him his rights and still use his confession at trial.[60] In these and several other decisions, the Court characterized the *Miranda* warnings as a "prophylactic" protection for the right against self-incrimination which were "not themselves rights protected by the Constitution."[61]

So, if the warnings were not constitutionally required, why couldn't Congress reject their use through legislation? Well, Congress sought to do precisely that in enacting 18 U.S.C. § 3501, which restored the voluntariness test and removed the requirement that warnings be given to defendants charged with federal crimes. Section 3501 was enacted only two years after *Miranda*, but the Justice Department declined to enforce it until 1999, when the United States Court of Appeals for the Fourth Circuit held that the statute indeed overruled *Miranda*.[62]

The Supreme Court quickly granted certiorari, and was prepared finally to confront Congress's determination to overrule *Miranda* in the case of *Dickerson v. United States*.[63] In a 7–2 decision, the Court concluded that even though the *Miranda* warnings were not constitutionally required, *Miranda* was nevertheless a "constitutional rule" with "constitutional underpinnings" which Congress could not overturn by statute.[64]

Now that decision was quite unusual. Indeed, the concept of a constitutional rule with constitutional underpinnings was rather unprecedented, and some suggested that *Dickerson* was the product of a Court that had determined that even though the warnings were not constitutionally required, they had become too embedded in our social fabric to undo.

Whether or not these observers accurately described the Court's thinking, the lesson *Dickerson* teaches is that policy choices by judges are enduring. The *Miranda* Court's policy decision was precedent for 44 years and *Dickerson* has now affirmed that only the extraordinary remedy of a constitutional amendment could displace it as governing law. Even a Court that had long questioned the constitutional necessity of *Miranda*'s holding was unwilling to overrule its own act of judicial legislation—possibly because stare decisis and our national familiarity with the warnings made the stakes too high.[65]

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Perhaps the *Miranda* Court made the wisest policy choice possible. But in a government of separated powers, social policy should be irrelevant. The important result of *Miranda* is that voters and legislators no longer need to concern themselves with police interrogation because *the courts* have solved that problem for them. I submit that there are certain fundamental rights, clearly defined in our Constitution's text, which that document requires the courts to protect in such manner. But as for the remainder, a government of separated powers entrusts the people to devise the rules by which they will be governed. As my colleague Judge Andrew Kleinfeld so eloquently wrote, "That a question is important does not imply that it is constitutional. The Founding Fathers did not establish the United States as a democratic republic so that elected officials would decide trivia, while all great questions would be decided by the judiciary."[66]

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IV.

In conclusion, let me emphasize that, in our system of government, the people govern. Through their representatives, they make decisions that become law. Our Constitution entrusts judges to *interpret* these laws, and to refrain from correcting Congress's missteps where necessary (or where the judges believe it to be).

In my view, judges who approach this task by focusing on text and other objective sources are most faithful to this responsibility. On the other hand, judges who instead interpret a law in search of its purpose or the "best" social result morph themselves into legislators and encroach upon the role of Congress.

We federal judges are appointed for life. We are neither directly chosen nor directly accountable to the people. And for good reason. The Founders believed that our democracy required a judiciary that would fairly and accurately apply the law. They also believed it necessary to insulate judges from the political pressures that face elected representatives. Yet these very same pressures enhance the performance of legislators. If legislators wish to be reelected, they must be attentive to their constituents' concerns, and accountability is thereby assured. But when judges deviate from text to make law, the people cannot hold them similarly accountable, short of the cumbersome process of impeachment.

Even further, such judges relieve the people's elected representatives of their own responsibilities. When judges interpret law by searching for its purpose, courts become the fora in which our national policy is made. Knowing this, Congress can wait for the Supreme Court to bail it out of tough, or simply unpopular, decisions and congressmen and congresswomen can focus instead on posturing for reelection rather than rolling up their sleeves to legislate on the questions that truly matter.

In such an environment, it should be no surprise that the battles over the confirmation of judges have become so fierce. After all, when judges are viewed as policymakers, the confirmation process is no longer an effort to validate the credentials and temperament of the potential jurist but becomes an exercise to test the legislative policy instincts of the nominee who, if he cannot be trusted to implement the prevailing views of a Senate majority, can be rejected on such grounds alone. Overshadowing the multitude of important questions facing the nation, the question of whom we nominate to the federal bench, especially to the Supreme Court, becomes a political debate of the highest consequence, as judges, rather than elected representatives, become the authors of our nation's laws.

Our Constitution, however, creates a government of separated powers. It reserves to the people the power to create the laws under which we live, and it entrusts the judiciary with the far more limited task of interpreting them. Our Constitution leaves the responsibility of making law to "we, the people," through an elected Congress, and I believe it is indeed "we, the people," not "we, the judges," who must fully exercise it. •

1. U.S. Const. art. III, § 2.

2. Baron de Montesquieu, The Spirit of the Laws (1748).

3. *See, e.g.*, N.C. Const. of 1776, Declaration of Rights, art. IV; Md. Const. of 1776, Declaration of Rights, art. VI; Va. Const. of 1776, Declaration of Rights, § 5; Mass. Const. of 1780, Declaration of Rights, art. XXX; *see also* Carolyn Dineen King, *Challenges to Judicial Independence and the Rule of Law: A Perspective from the Circuit Courts*, 90 Marq. L. Rev. 765, 768 (2007) (describing the influence of Montesquieu on the formation of state constitutions).

4. The Federalist No. 78, at 523 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

5. The Federalist No. 73 (Alexander Hamilton), *supra* note 4, at 499; *see also* The Federalist No. 81 (Alexander Hamilton), *supra* note 4, at 543–44.

6. 2 Max Farrand, The Records of the Federal Convention 328–29, 342–44 (1911).

7. *Id.* at 334 (the proposal would have provided that "[e]ach Branch of the Legislature, as well as the supreme Executive shall have authority to require the opinions of the supreme Judicial Court upon important questions of law, and upon solemn occasions").

8. The common law—the process by which judges essentially create law in the absence of a statute or other controlling authority—still governs a substantial body of state law. Yet in the federal courts (with one very limited exception) the common law does not exist. That exception is known as "federal common law." In *Erie Railroad Co. v. Tompkins*, the Supreme Court famously announced that "[t]here is no federal general common law." 304 U.S. 64, 78 (1938). Still, the Court has also explained that "federal common law"—federal rules of decision whose content is not derived from specific federal statutes or constitutional provisions—governs several small pockets of a federal court's jurisdiction. *See* Richard H. Fallon, Jr. et al., Hart & Wechsler's The Federal Courts and the Federal System 685 (5th ed. 2003). These pockets include cases involving the rights and obligations of the United States, *see* Clearfield Trust Co. v. United States, 318 U.S. 363 (1943), disputes between states, *see, e.g.*, Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657 (1838), cases that implicate international relations, *see, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), and admiralty, *see, e.g.*, Nw. Airlines v. Transp. Workers Union, 451 U.S. 77, 95–96 (1981). Importantly, federal common law is not a body of law that applies in federal courts but not state courts. Rather, the established theory suggests that federal common law preempts contrary state law by virtue of the Supremacy Clause. *See* U.S. Const. art. VI, § 1, cl. 2. For an overview of the competing modern definitions of federal common law, and the tensions between them, see Jay Tidmarsh and Brian J. Murray, *A Theory of Federal Common Law*, 100 Nw. U. L. Rev. 585 (2006).

9. *See, e.g.*, Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 Colum. L. Rev. 1, 3 (2006); Caleb Nelson, *What Is Textualism?*, 91 Va. L. Rev. 347, 348 (2005). Of course, the labels of "textualism" and "purposivism" are highly simplistic, but for the purposes of discussion, let us allow ourselves to remain at this level of generality. Consistent with what has become modern practice, I use the term "purposivism" as a synonym for intentionalism. However, some have distinguished the two approaches to interpretation. *See* William N. Eskridge, Jr., Dynamic Statutory Interpretation 25–26 (1994).

10. *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. Rev. 621, 641–50 (1990); Molot, *supra* note 9, at 24–25.

11. Justice Scalia's lectures, delivered in 1995, were later collected and published in Antonin Scalia, A Matter of Interpretation (Amy Gutmann ed., 1997).

12. *Id.* at 17.

13. *Id.* (emphasis added).

14. John F. Manning, *Textualism and Legislative Intent*, 91 Va. L. Rev. 419, 434 (2005) (emphasis omitted) (quoting Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 Harv. J.L. & Pub. Pol'y 59, 61 (1988)).

15. A brief glance at the Supreme Court's most recent decisions revals the great assistance dictionaries can offer in interpreting a statute. *See* Watson v. Phillip Morris Cos., 127 S. Ct. 2301, 2307 (2007); Microsoft Corp. v. AT&T Corp., 127 S. Ct. 1746, 1755 n.11 (2007); James v. United States, 127 S. Ct. 1586, 1597 n.5 (2007).

16. *See* John F. Manning, *What Divides Textualists from Purposivists?*, 106 Colum. L. Rev. 70, 85–91 (2006).

17. William N. Eskridge, Jr., *No Frills Textualism*, 119 Harv. L. Rev. 2041, 2042–43 (2006).

18. Stephen Breyer, Active Liberty (2005).

19. Justice Breyer's theory of "active liberty" is built on three principles: (1) judicial restraint, (2) interpretation of text "as driven by purposes," and (3) likely consequences. *Id.* at 17–18 (emphasis omitted). He explains that this theory of interpretation aims to increase the attention courts pay to "modern liberty"—defined as the individual's freedom to pursue his own interests, free of unnecessary government interference. *Id.* at 3–5 (citing Benjamin Constant, *The Liberty of the Ancients Compared with That of the Moderns* (1819), *in* Political Writings 309, 309–28 (Biancamaria Fontana trans. & ed., 1988)).

In extolling judicial restraint, Justice Breyer reminds us that "even if a judge knows 'what the just result should be,' that judge 'is not to substitute even his juster will' for that of 'the people.'" *Id.* at 17. Yet Justice Breyer also suggests that the judge should interpret statutes in light of their "underlying purpose" and interpret the Constitution in light of the "great purposes" which that document was intended to achieve. *Id.* at 17–18. He then concludes that "judges, in applying a text in light of its purpose, should look to *consequences*, including 'contemporary conditions, social, industrial, and political, of the community to be affected.'" *Id.* at 18.

Like Justice Breyer, I believe restraint is critical to a principled judicial philosophy. Yet, in what follows, I suggest that an approach which allows judges to focus on purpose at the expense of text vitiates such restraint and leaves judges to become lawmakers themselves.

20. *Id.* at 8.

21. *Id.* at 88.

22. *Id.* at 88–91.

23. *See* Scalia, *supra* note 11; Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism*, 119 Harv. L. Rev. 2387, 2405 (2006) (reviewing Breyer, *supra* note 18 (2005)).

24. Small v. United States, 544 U.S. 385, 395 (2005).

25. *Id.* at 387, 396.

26. 18 U.S.C. § 922(g)(1) (2000) (emphasis added).

27. *Small*, 544 U.S. at 391. Justice Breyer further noted that other sections of the statute explicitly referred to "federal" and "state" convictions, and that, as such, Congress must have meant "any court" to refer only to those two types of convictions, not "any" convictions as its natural reading would suggest. *Id.* at 391–93 (quoting 18 U.S.C. § 921(a)(33)(A) (2000)).

28. *Id.* at 391–92.

29. *Id.* at 396 (Thomas, J., dissenting) (explaining that the word "any" has "an expansive meaning, that is 'one or some indiscriminately of whatever kind'" (quoting United States v. Gonzales, 520 U.S. 1, 5 (1997) (quoting Webster's Third New International Dictionary 97 (1976))).

30. Further, the dissent viewed the statute's structure differently than the majority, concluding that the specific mention of "state" and "federal" convictions in other sections *confirmed* the view that the term "any court" should be interpreted without qualification, because Congress's explicit use of such term elsewhere demonstrated that it knew how to specify such restrictions when it wanted to. *Id.* at 398.

31. *Id.* at 389–90.

32. *Id.* at 405.

33. As an aside, I note that these anomalies fall far short of absurdity (judges have a special tool to deal with these sorts of situations, such as when Congress commits an obvious scrivener's error in drafting a statute). *See* Scalia, *supra* note 11, at 23–25.

34. Breyer, *supra* note 18, at 19 (quoting Learned Hand, The Spirit of Liberty 109 (3d ed., 1960)).

35. Scalia, *supra* note 11, at 24.

36. Campbell v. Allied Van Lines, Inc., 410 F.3d 618, 623 (9th Cir. 2005) (O'Scannlain, J., dissenting); *see also* Smith v. United States, 508 U.S. 223, 242 (1993) (Scalia, J., dissenting) ("When someone asks, 'Do you use a cane?,' he is not inquiring whether you have your grandfather's silver-handled walking stick on display in the hall."); Scalia, *supra* note 11, at 24 ("[T]he good textualist is not a literalist . . . .").

A case which actually came before me illustrated this reality. In *Campbell v. Allied Van Lines, Inc.*, a family who contracted with a moving company to ship its household goods sued the moving company when the goods arrived damaged. 410 F.3d at 619. A jury ruled in the shippers' favor, and the trial judge granted them attorney's fees, which thereupon gave rise to another dispute. *Id.*

The shippers had sued the moving company under a federal statute, the Carmack Amendment to the Interstate Commerce Act, which Congress enacted to preempt state law claims against carriers and to facilitate the use of arbitration to resolve such claims. The statute required carriers to offer shippers arbitration as a means of settlement, although it did not require shippers to accept. 49 U.S.C. § 14708(a) (2000). The statute further allowed shippers to collect attorney's fees from the carrier if three conditions were met: (1) the shipper prevailed in court, (2) the shipper submitted a timely claim, and (3) "a decision resolving the dispute was not rendered through arbitration" within the time allotted by the statute. *Id.* § 14708(d)(3)(A).

In the case before our panel, the shippers declined arbitration, went straight to court, and won a damage award. They argued that the statute still entitled them to attorney's fees, and the majority agreed. It read the third provision of the statute literally and held that because the text did not *explicitly* require shippers to arbitrate, shippers who proceeded to court could still collect attorney's fees. *Campbell*, 410 F.3d at 621.

I dissented. While I believed one *could* read the statute as the majority had, I believed its literal reading was not the most natural or reasonable one. *Id.* at 623 (O'Scannlain, J., dissenting). In my view, the majority's literalism ignored the statutory context. *Id.* The statute plainly indicated its design to promote and to facilitate arbitration. The attorney's fees provision was located in a section entitled, "Dispute settlement program for household goods carriers." 49 U.S.C. § 14708. Subsection (a) was entitled "offering shippers arbitration," subsection (b) listed "arbitration requirements," subsection (c) detailed the limitations on the use of arbitration documents, and subsection (d) provided the contested attorney's fees provision. *Id.* § 14708(b)(5).

I must emphasize that I was not concerned with how Congress *would have wanted* our court to interpret the statute. Instead, I believed my interpretation was compelled by what Congress *actually said* in the surrounding statutory provisions.

37. *See* Verizon Commc'ns, Inc. v. FCC, 535 U.S. 467, 499–500 (2002) (rejecting a "plain-meaning argument [that] ignores the statutory setting"); Bailey v. United States, 516 U.S. 137, 145 (1995) ("'[T]he meaning of statutory language, plain or not, depends on context.'" (quoting Brown v. Gardner, 513 U.S. 115, 118 (1994))).

38. *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 Harv. L. Rev. 26, 62–65 (1994) (explaining how judicial interpretation of statutes responds to signaling from the legislature, even after the enactment of the provision in question).

39. *See, e.g.*, Peter L. Strauss, *The Courts and the Congress: Should Judges Disdain Political History?*, 98 Colum. L. Rev. 242, 265 n.92 (1998) (crediting von Bismarck with the observation).

40. For example, the majority in *Small*, which held that Congress intended "any court" to mean domestic courts only, noted the fact that the statute's "lengthy legislative history" suggested Congress's ignorance of the implications of using such term as support for the majority's decision to "correct" Congress's omission with its own solution. 544 U.S. at 393.

Of course, that construction of the legislative history was contested (as construction of this ever-malleable source often is), as the majority conceded that a Conference Committee explicitly rejected language that would have defined predicate crimes in terms of state and federal offenses. *Id.* (citing S. Rep. No. 1501, at 31 (1968)).

41. Indeed, as the dissent in *Small* replied, Congress's failure to consider the consequences of using a particular word does not provide courts with license to disregard a statute's "unambiguous meaning." *Id.* at 405 (Thomas, J., dissenting) (quoting Beecham v. United States, 511 U.S. 368, 374 (1994)).

42. 410 U.S. 113 (1973).

43. 539 U.S. 558 (2003).

44. 198 U.S. 45 (1905).

45. 384 U.S. 436 (1966).

46. *Id.* at 467–69. Specifically, the Court held that unless some "other fully effective means are devised" by the police, any suspect subject to police interrogation must be advised of the following four warnings prior to questioning: (1) "that he has a right to remain silent"; (2) "that any statement he does make may be used as evidence against him"; (3) that "he has a right to the presence of an attorney"; and (4) that such attorney will be appointed if he cannot afford to retain one. *Id.* at 444.

47. Watts v. Indiana, 338 U.S. 49, 55 (1949); *see also* Brown v. Mississippi, 297 U.S. 278 (1936) (reversing defendant's conviction under the Due Process Clause of the Fourteenth Amendment because the defendant's confession was obtained by police coercion); Ashcraft v. Tennessee, 322 U.S. 143 (1944) (same).

48. *Watts*, 338 U.S. at 55.

49. This was perhaps best evidenced by *Escobedo v. Illinois*, 378 U.S. 478 (1964), in which the Court made a profound shift away from reliance on the Due Process Clause. In *Escobedo*, the Court held that state police violated a suspect's Sixth Amendment right to counsel when they refused to allow his attorney to meet with him until they concluded a station house interrogation of the suspect. The Sixth Amendment provides that "[i]n all criminal *prosecutions*, the accused shall enjoy, [among other rights], . . . the Assistance of Counsel for his defence." U.S. Const. amend. VI (emphasis added). Thus, the Court's reasoning, if not its result, was surprising, as never before had it been suggested that the Amendment's protection attached to a suspect who was not yet indicted and thus not subject to "formal, meaningful judicial proceedings," as the term "prosecutions" would suggest. *Escobedo*, 378 U.S. at 493 (Stewart, J., dissenting). To date, the question of when formal judicial proceedings begin has still not been fully resolved. Indeed, the Supreme Court has granted a petition for certiorari from the Fifth Circuit's decision in *Rothgery v. Gillespie* to consider precisely this question. *See* 491 F.3d 293 (5th Cir. 2007) (holding that a defendant's Sixth Amendment rights had not yet attached when he was brought before a magistrate judge because no prosecutor was involved in his arrest or his appearance before the magistrate).

50. The Self-Incrimination Clause was referred to only tangentially in multiple briefs filed in the Court, which all focused almost exclusively on the Sixth Amendment right to counsel instead. *See, e.g.*, Brief for Petitioner, 384 U.S. 436 (1966) (No. 759), 1966 WL 87732.

51. U.S. Const. amend V (emphasis added).

52. The Court did tip its hand, at least in some ways, in *Malloy v. Hogan*, 378 U.S. 1 (1964), decided just shortly before *Miranda*. In the course of incorporating the Fifth Amendment's Self-Incrimination Clause against the states, Justice Brennan's opinion for the Court suggested that "wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'" *Id.* at 7. Whether the innovation was born in this phrase in *Malloy* or two years later in *Miranda* is of little moment, however, as it was an innovation nonetheless—in its numerous decisions implicating the admissibility of confessions in state and federal courts in the thirty years before *Miranda*, the Court never considered the possibility that the Self-Incrimination Clause had a role to play in the analysis.

53. *Miranda*, 384 U.S. at 460.

54. *Id.*

55. *Id.* at 448.

56. *Id.* at 526 (White, J., dissenting) (emphasis added).

57. *Id.* at 526–27. Moreover, Justice White found "very little in the surrounding circumstances" of the Constitution's adoption or historical practice "which would give the . . . provision any broader meaning," *id.* at 527, and further noted that "literally thousands" of convictions upheld under the Court's voluntariness test would fail under its new rule, *id.* at 529–31.

58. As Justice Stewart lamented, "'This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added.'" *Id.* at 526 (Stewart, J., dissenting) (quoting Douglas v. City of Jeannette, 319 U.S. 157, 181 (1943)).

59. Michigan v. Tucker, 417 U.S. 433 (1974).

60. New York v. Quarles, 467 U.S. 649 (1984).

61. *Tucker*, 417 U.S. at 444.

62. United States v. Dickerson, 166 F.3d 667 (4th Cir. 1999).

63. 530 U.S. 428 (2000).

64. *Id.* at 439, 440 n.5.

65. *See, e.g.*, Missouri v. Seibert, 542 U.S. 600 (2004) (successive interrogations); United States v. Patane, 542 U.S. 630 (2004) (admissibility of derivative evidence obtained as a result of a *Miranda* violation); United States v. Rodriguez-Preciado, 399 F.3d 1118 (9th Cir. 2005) (special safeguards for foreign defendants); United States v. Garibay, 143 F.3d 534 (9th Cir. 1998) (same).

66. Compassion in Dying v. Washington, 79 F.3d 790, 858 (9th Cir. 1996) (en banc) (Kleinfeld, J., dissenting).