



Complexity & Contradiction in American Law

BY GERARD E. LYNCH

My remarks this evening will make some very practical observations about the functioning of the federal courts. I hope that they will also shed some light on a more theoretical issue in jurisprudence: the prospects for a unified theory of judicial methodology, and the possible value of some amount of incoherence in the American legal system.

I. Why There Can Be No Grand Unified Theory

Ronald Dworkin's *Taking Rights Seriously*, published in 1977 but based on preceding articles, was one of the most influential books on jurisprudence of the latter 20th century. It certainly had a profound impact on my thinking, as a young lawyer, about how courts should decide hard cases.

In recent years, I have revisited my initial infatuation with Dworkin's theories in light of my experience over a long career as a law professor, lawyer, and judge. A few years ago, in the Madison Lecture at New York University, I questioned Dworkin's argument that there are objectively correct answers to even hard legal questions, concluding that H. L. A. Hart had the better of their disagreement and that some legal questions do not have clearly right answers and are left to judges to resolve based on their own best judgment. Today I want to begin by addressing a sub-issue in that thesis—questioning Dworkin's analysis of how judges should approach hard cases and reach right answers—as a springboard to introduce some thoughts about whether a certain degree of incoherence and inconsistency in law might actually be a good thing.

If you believe that there are definitive right answers to difficult legal questions, you have to provide a methodology for reaching those right answers. Dworkin's signature move in his early writings was the suggestion that the ideal judge, whom he dubbed "Hercules," should formulate a view as to the overall structure of the law, in order to "construct a scheme of abstract and concrete principles that provides a coherent justification for all common-law precedents and, so far as these



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This is a lightly edited version of the E. Harold Hallows Lecture delivered by Judge Lynch at Marquette University Law School on March 7, 2023. A version also will appear in the *Marquette Law Review* this coming winter.

are to be justified on principle, constitutional and statutory provisions as well.” The best answer to a hard question is the one that best fits that scheme. As many pointed out and as Dworkin conceded, that approach would not lead to predictable or objectively determinate answers. The number of data points necessary to construct such a grand theory of American law was sufficiently large and diverse that different judges, depending on their own policy or political preferences or values, would necessarily construct different grand structures. Dworkin also recognized, as was more or less conceded by naming his ideal judge Hercules, that the task of bringing together all of the breadth of American law was beyond the reach of a mere mortal. Most judges wouldn't be up to the job.

My argument is a more radical version of those concessions. It's not just that there are competing, shall we say, liberal and conservative (and no doubt any number of other) versions of the grand structure of American law, so that we won't all agree on what the structure really is, or that it will be hard work to devise one's own theory of that grand scheme. My contention instead is that, almost self-evidently, there just is no “there” there at all—that there isn't and can't be a single overall vision that fits together all of American law, even if we are allowed, as Dworkin allowed Hercules, to discard at least some data points as outliers.

How can I suggest that this is almost self-evidently true? The body of American law, both in general and in most specific categories of substantive and procedural law, is the product of both temporal and spatial divergence. The totality of American law consists of an accretion of rules and principles embedded in the law as it has evolved over time, through different theories and approaches to legal decision-making characteristic of legal thinking in different eras, and comprising divergent traditions that have evolved separately in different states or regions.

First, the temporal. It is clear from our history that law and legal philosophy change fairly dramatically over time. At various times in our history, judges, lawmakers, and legal philosophers faced different sorts of problems and had different background notions about how to solve problems, as well as different understandings of the world and of the law.

Our methods of legal education tend to obscure this truth. Casebooks serve up snippets of old

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Supreme Court opinions, selected to some degree based on contemporary understandings of what was important and lasting about the holdings of the selected cases, and including only reasoning that supports the part of the holding that remains relevant today. Few law students are assigned to read the entire text of all of the opinions of the justices in, say, the 1857 *Dred Scott* case. If you do read them, you will encounter a different legal landscape. It's not only that today's reader is shocked by the overtly racist assumptions that underlie the majority's ruling. Justice Benjamin Curtis's dissent calls out the majority on those assumptions in a way that resonates with present-day values as much as the majority opinion offends them.

But more fundamentally, none of the opinions reads like a contemporary Supreme Court opinion. Yes, the opinions address, in various ways, constitutional text, opinions attributed to the Framers, and prior judicial opinions. But consider the dearth of footnotes. That is superficially striking: the pages look different from those of today's U.S. Reports. Yet I think it is also symbolic of profound differences in method. The 19th-century Court was much more comfortable with *ipse dixit* and with discursive reasoning from commonly assumed truths about our history and that of England and even of ancient civilizations. The contemporary style of opinions drafted by law clerks trained in elite law schools (and edited and finalized by justices most of whom were once Supreme Court law clerks trained in such schools) is quite different. That difference of style indicates a difference in the basic assumptions about how a court should reach its results.

It would be interesting to track such changes of judicial reasoning systematically, from the time of John Marshall through the pre- and post-Civil War eras, to the heyday of *Lochner* in the Gilded Age, through the New Deal Court and its post-World War II fragmentation and reassembly in the time of Earl Warren, to the Scalian originalist/textualist formalism of the present. But the point is the familiar one that the past is another country—indeed, a series of different countries evolving into each other. We can't readily assume that the data points plucked from that sequence will arrange themselves into any coherent framework.

Another feature of the legal landscape contributes to this problem. The past, for a legal system that values consistency and looks to precedent, is never entirely past. We may have



overruled *Dred Scott* and forgotten a host of other precedents no longer deemed relevant, but each of the different waves of legal thinking has left its residue on the growing fields of law. To some extent, the cases from the 19th or 20th century that continue to be cited with any frequency today may be ones that have stood the test of time and continue to resonate with contemporary values. But that's not entirely so, especially when we recede from the major landmarks of constitutional law and consider more mundane topics of law. The law of property and of conflicts of laws, and the principles of substantive criminal law, to take just a few examples, are studded with specific rules that continue to be applied just because they are there, judges, lawyers, and even affected citizens are used to them, and they work well enough—even though they may not be the rules that would be dictated by contemporary frameworks of legal thinking. When new ideas or methods of legal analysis achieve widespread acceptance, those ideas may guide judges deciding the cases that come before them, but the case-by-case evolution of the law does not permit a wholesale revision of the entire body of law that has accumulated over the centuries. Many rules will survive, notwithstanding that they were and remain premised on earlier ways of thinking.

Take one example almost at random, familiar to all lawyers from their first-year course in Civil Procedure. The law of *in personam* jurisdiction got a major shake-up from the New Deal Court in 1945 in *International Shoe*, when the Court turned away from traditional rules grounding a court's jurisdiction to render judgments in "their de facto power over the defendant's person," given the defendant's presence within the territorial jurisdiction of the court, and toward a regime that asked whether the defendant had sufficient contacts with the forum state that a lawsuit there was consistent with "traditional notions of fair play and substantial justice." But even after

almost 50 years of cases applying the standards produced by that revolution in thinking, the Supreme Court in *Burnham v. Superior Court* (1990) adhered to the traditional rule permitting a state court to gain jurisdiction over a nonresident defendant by serving process on him while passing through that state, even where the claim had nothing to do with that state. That rule cannot easily be squared with the new philosophy, and derives from an earlier way of conceptualizing *in personam* jurisdiction. The rule may have been a dinosaur, ill adapted to the new environment, but it was still alive, too familiar to be discarded.

And for the last generation or so, as in *Daimler AG v. Bauman* (2014), the Court has taken up a newer way of thinking about the territorial limits of state jurisdiction to curtail the application of general jurisdiction, rejecting an analysis that law students of my generation were taught was a logical corollary of *International Shoe*. In 1972, a civil procedure student would have gotten an A for writing that, under *International Shoe*, a company that consistently did a high volume of business in a particular state would be subject to general jurisdiction there—but today that turns out not to be so.

The result is a set of rules that coexist but are hard to reconcile according to any single theory. They are best explained as rules that represent the residuum of at least three different legal philosophies that have prevailed at different times in our history.

When such a broad shift in philosophies occurs, some specific rules may be ripe for challenge, and the perception that we are doing something very wrong may well be a part of the impetus to rethinking how we analyze problems. But we don't typically bulldoze the structure of existing practice and rebuild according to the new approach; rather, we fix, on an ad hoc basis, the problems that seem most egregious. The rest of the ramshackle structure of the

law, inherited from earlier generations and their very different types of jurisprudence, continues to stand.

That is all the more true of statutory law. Title 18 of the U.S. Code is somewhat ironically called the federal criminal code. The irony is that it is not a code at all in the sense popularized in the 1960s by the American Law Institute's Model Penal Code: an integrated structure with a "general part" containing definitions and basic principles, which are then implemented in specific criminal prohibitions and penalties defined to address particular types of wrongdoing. Rather, Title 18 is a hodgepodge of criminal statutes, some of them dating all the way back to the earliest Congresses and others more modern in conception.

Again, you can see the differences right on the page. Pull a criminal statute from the early 21st century, and you see a pattern of complex subdivisions and carefully worded statutes that aim (not always successfully) to appeal to the textualist brain of modern judges. But then look at the older laws that define traditional crimes such as murder and assault (when committed within the various geographical and conceptual domains subject to federal legislative jurisdiction). Now you see something quite different: laws that cannot be parsed as clearly defining conduct in precise terms. Instead, they invoke broad concepts derived from the common law of crimes. It would not do to read them as if the specific words were designed to tell a naïve reader exactly what elements define the crime. Rather, the words evoke common-law concepts that require some familiarity with Blackstone or with judicially created definitions of crimes current before the United States existed. Yet both types of statutes coexist in the same "code," along with others drafted in eras with different expectations about how courts would read statutes.

There is a Whiggish way of reading this history that suggests a teleological development of the law, sometimes invoking Martin Luther King's famous

suggestion that the "arc of the moral universe is long, but it bends toward justice." It's worth remembering, though, that King was speaking from a specifically Christian teleology, which *ultimately* will resolve in God's just judgment. He did not mean, and it does not seem to be true, that the arc of *human* history bends inevitably in some particular direction. And contemporary Americans who all may believe, or hope, that history is bending toward justice can and do disagree radically about what a just world would look like.

Even if one might hope, or have faith, that the very long arc of history trends in a particular direction, that isn't a lesson that can be empirically validated over the shorter term of two and a half centuries of American law. More characteristic are cycles and eddies (even a consistent metaphor seems impossible). Movement that seems headed in a particular direction and then suddenly reverses seems more characteristic.

For example, the advance of human liberty that culminated in an end to slavery rapidly devolved into a period of reaction and inequality, featuring lynchings and Jim Crow laws in states that formerly authorized slavery. That regime was upheld by the Supreme Court, in the face of constitutional amendments and Reconstruction-era statutes, and lasted for the better (or more accurately worse) part of a century.

But the reign of Jim Crow was in turn followed by a long period of liberal political ascendancy and judicial creativity that has been characterized as a Second Reconstruction. That regime looked dominant and irreversible for a couple of generations, only to be followed by a period of stasis and retrenchment that now seems headed into a period of conservative activism pushing to uproot laws and practices designed to advance the interests of the descendants of slaves.

Reversal of that trend seems as unlikely now as the reversal of the progressive jurisprudence of the 1950s and 1960s might have seemed as late

as the 1970s. But whatever side of that pendulum seems to you to represent a proper idea of justice, history suggests that many more oscillations can be expected before, if ever, a just and stable result is achieved.

And of course that is just to look at the high-level constitutional jurisprudence of the Supreme Court, which preoccupies American legal philosophy as practiced by thinkers such as Dworkin. Even at that level, trends in separation of powers and federalism or states' rights probably follow a somewhat different path, which does not correlate perfectly with liberal vs. conservative politics: both liberals and conservatives seem to value judicial restraint or states' rights according more to which branches of the federal government they control than to any consistent principles for allocating executive versus legislative power, defining the proper role of an unelected judiciary, or determining the extent of federal power over local matters. And the picture with respect to trends in the dominance of statutory and regulatory law, modes of statutory interpretation, attitudes toward litigation reflected in rules of civil procedure, and what remains of the common-law fields of property, tort, and contract may roughly follow rightward and leftward movements in politics and constitutional law, but these are all subject to their own vagaries and more specific evolving notions of law that only roughly correlate with those movements. Organizing the various legal rules that emerge from changing trends in so many different fields of law into some overarching coherent theory of the principles animating American law seems a hopeless task.

Second, geography matters as well as history. Dworkin didn't really expect judges to construct a coherent principled structure of *American* law, as opposed to the law of the particular jurisdiction, federal or state, New York or Wisconsin, within which the particular judge sat. After all, the United States is composed of at least 51 sovereign entities, each

entitled to diverge and develop its own body of law, within very broad limits set by the provisions of the Bill of Rights that bind state governments and by a handful of other constitutional rules.

Projects that aim to state common-law rules representing American law, most notably the Restatements issued by the American Law Institute (ALI), thus face a challenging task. Many black-letter principles derived from case law are common to all or the great majority of states, which after all share many aspects of a common Anglo-American legal culture. But on the hard calls, divergence is common, and the ALI has a hard time identifying what to present as even heavily caveated black letter. Sometimes there are clear majority and minority positions. But sometimes too few states have expressly ruled on a particular aspect of a rule—can we say that there is a majority rule when five states have clear holdings in one direction and three take the opposite position? What if a traditional common-law rule has been overturned in a majority of states that have addressed the issue in relatively recent times (however “recent” is defined), but many others have not had occasion to reconsider an older precedent?

And of course statutory rules, being subject to more rapid wholesale change in response to the politics of the moment, are even more likely to diverge. What, if anything, can be said to represent fundamental principles underlying the American legal system if we try to draw those principles out

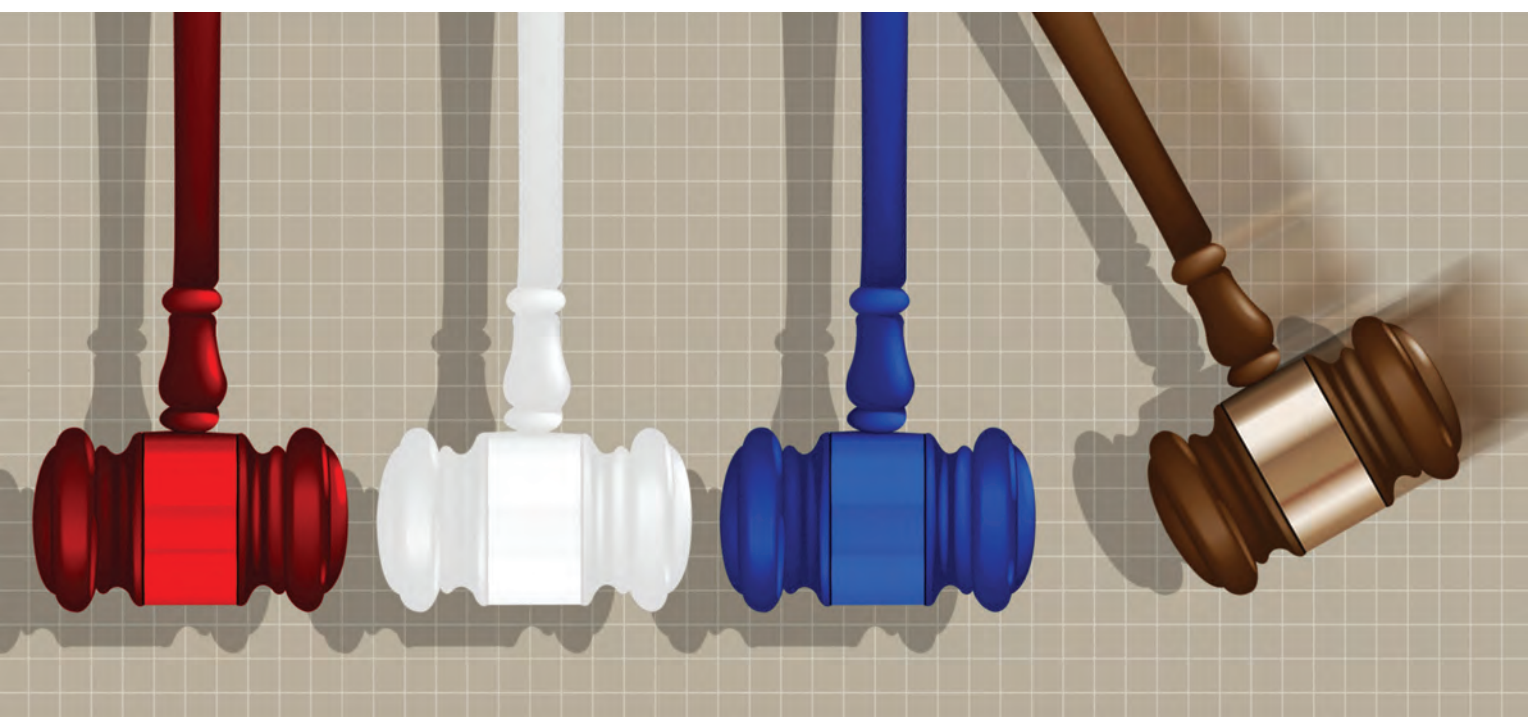
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of such a wide range of rules on different topics? Perhaps there are a few, but they would be at too high a level of generality to help in resolving a seriously controversial question of law that arose for the first time in a given court.

That diversity of rules across states influences even the development of federal law. Conceptually, the United States is a separate sovereign that geographically overlaps the territory of the states constituting it but that operates independently within its assigned spheres, as distinct from New York or Wisconsin as New York and Wisconsin are distinct from each other. But that Madisonian conception appears much fuzzier in practical operation. The federal appellate courts are organized into regional circuits, whose judges are almost always selected from the particular states within each circuit and can be expected to share the cultural and political predilections of their regions and the legal assumptions drawn from the laws of the states in which they have practiced law or judged.

In a world in which the Supreme Court now hears as few as 60 cases per year out of the many thousands decided in the courts of appeals, it is not surprising that uniformity on questions of federal law can be elusive. And if that is true at the level of formal legal rules, it is probably even more true on matters of practice, or matters confided to the discretion of trial judges.

Consider the period from 1987 to 2005, during which federal sentencing was supposedly



constrained by mandatory nationwide guidelines. Sentences in different circuits and even different districts within circuits varied considerably, as judges exercised their limited discretion more aggressively, and in different directions. Rates of departure from the guidelines differed systematically, often influenced by the disparity between nationwide rules set for the federal sovereignty and the sentences customary under local law for similar conduct. The Madisonian underpinning of the sentencing guideline system was the belief that it was unjust for a federal convict in New York to get a very different sentence from someone convicted of the same federal crime in Texas. But there is a different horizontal equity concern when someone who commits a crime that could be prosecuted in state or in federal court in either state faces a very different sentence depending on whether the officer making the arrest brings the case to a state or federal prosecutor. It is not surprising that federal judges, observing that the sentences they were obligated to impose differed significantly from those being imposed in the state courthouse across the street, might have been more moved by this latter type of disparity, leading to regional divergence in adherence to the guidelines. That tendency is all the more pronounced now that the guidelines are no longer mandatory.

II. Is the Absence of a Coherent Theory a Bug or a Feature?

Given all this temporal and geographic diversity in American law, I don't see how a judge could fashion a truly persuasive argument that the judge's preferred solution to a hard case should be accepted because of its congruence with some overarching grand unified theory of the underlying principles of American law; the theory would almost certainly be at least as controversial as the answer it supposedly supports. But recall: I am already on record as believing that no formal principle can dictate a convincing, neutral answer in the small but important category of truly hard cases, in which the result is not dictated by the clear meaning of the controlling statutory text or a convincing similarity of the case to a controlling precedent.

So my point tonight is not primarily to further criticize a small subpart of Dworkin's argument. I'm not here as a legal philosopher in any event. I stress the succeeding historical waves of differing principles and philosophies that have shaped all branches of American law, each leaving behind

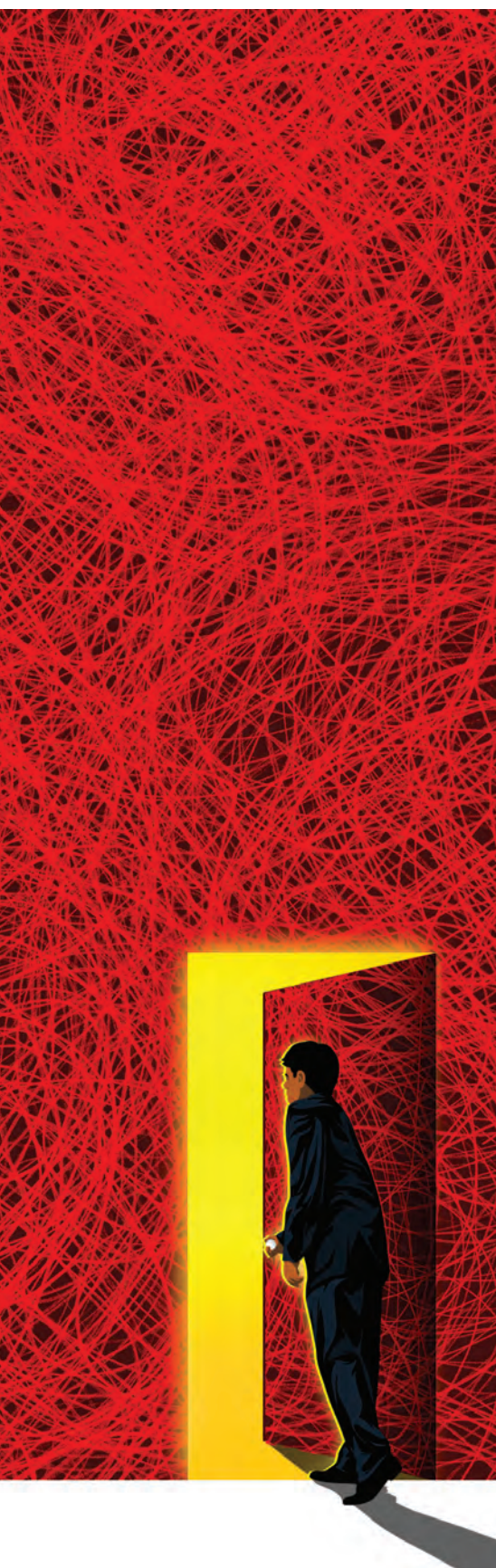
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some residue of particular rules, and the different regional experiences that have shaped divergent traditions across states, even within federal law, for a different reason. I wish to suggest some ways in which those divergent pieces of the puzzle, which defeat any effort to form a single jurisprudence encompassing them all, constitute not a bug of our system, but rather a feature.

Don't misunderstand. I tried to be clear in my Madison Lecture that I was speaking of a category of cases, large in absolute number and in salience but quite small in proportion to the total range of legal questions that could be asked, to which there is no objectively or formally correct answer. That does not mean that there is no right answer to any legal question. To the contrary, most legal questions do have objectively correct answers, answers that are so clearly correct that no one would think to litigate them. Similarly I agree that clear and definitive rules of law governing particular issues are highly desirable, and generally achievable. If hard cases cannot be resolved according to some overarching philosophy, it is nevertheless a good thing that hard cases be resolved—because then, in a world ruled by precedent, once the highest court of a particular jurisdiction has decided the issue, the formerly hard case becomes an easy one. Fairness and predictability, important goals of the legal system, are furthered by definitive legal resolution.

But what counts here is a definitive resolution of a particular recurring legal problem, and not an overarching coherence of different rules in different areas of law according to a dominant, universal jurisprudential system. Take, for example, a small issue that the American Law Institute is grappling with in formulating a Third Restatement of Conflict of Laws. The question is whether the validity of a restraint on alienation—say, the stipulation by the donor of a painting to a museum that the museum may never deaccession the painting—is controlled by the law of the domicile of the donor, or of the state where the museum is situated, or of the state where the donative instrument was executed. Different states answer this question in different ways, just as they differ on the substantive issue of the validity of the restraint.

For the most part, it is more important, even in a single state, that this specific legal rule be settled than whether the way it is settled is derived from the same underlying theory of choice of law that determines what law applies where conflicts arise in family law or tort law. Clarity of rule as to the



particular issue is important; consistency of the deep principles of decision-making or the abstract theory that led to the resolution of each rule, possibly in different centuries, may not be.

Indeed, the search for consistency may be unsettling to stability, as the history of choice-of-law rules in the late 20th century showed. Then a new theory, widely adopted by judges and embraced by the 1971 Second Restatement of Conflict of Laws as helpful in resolving some particularly difficult problems, called various widely settled rules into question, resulting in great uncertainty. The Third Restatement, currently being drafted, seems destined to reassert a number of simpler rules, some more traditional and others derived from the patterns of results in cases decided under the “modern” theory, because the effort to achieve theoretical consistency led to more turmoil than was good for the law.

So what I want to do is to reflect on some possible advantages of the lack of uniformity and principled consistency within American law, which have been stimulated by my long-evolving encounter with the difficulties in deciding hard cases according to Dworkin’s, or indeed anyone else’s, theory of how to go about my job.

III. The Unique Attributes of the Different Federal Courts and Their Relationship to Legal Complexity

In order to understand some of those advantages and disadvantages, I think it will be helpful to descend from the heights of legal philosophy to speak about some very mundane and practical institutional features of the organization of the federal court system. The structure of that system is well known to all lawyers. But I’d like to discuss the ways in which the differences between the selection, experiences, and functions of judges at the different levels of court help generate diversity of results and inconsistent principles and methodologies in the understanding of federal law in particular.

As you all know, there are three levels of federal courts: the trial-level district courts, the intermediate courts of appeals, and the Supreme Court of the United States. All three levels are charged with applying federal (and often state) law fairly and impartially, to resolve all manner of disputes. The judges on all three levels of court enjoy life tenure, after being appointed by the president with the advice and consent of the Senate. So one might think that judges at all three levels will tend to be the same types of people doing the same general job in more or less the same way. But there are profound differences in the process by which the judges at each level are selected, the functions they perform in administering our legal system, the procedures they follow, and the daily experience of judges serving at each level.

A. The Supreme Court

When most ordinary people are asked what they think of the federal courts, when political pundits discuss the role of the courts in our government, and even when law professors devise theories of jurisprudence, they all seem to focus disproportionately on the distinctive role of the Supreme Court. In recent years, that Court has been hearing on the merits no more than about 70 cases annually—and probably no more than around half of them involve the major constitutional issues of great political and social interest that dominate the front pages. Examples at the most extreme level of controversy and public concern would be cases in 2022 such as *Dobbs*, which overturned the constitutional right to abortion announced nearly 50 years earlier in *Roe v. Wade*, and *Bruen*, which invalidated New York’s century-old law requiring a special license to carry a firearm outside a home or business. How the Supreme Court decides cases like these has a huge impact on public perceptions of the court system in general, as well as on the selection of judges both for that Court and for the federal courts in general.

But the Supreme Court, especially when acting in these especially salient cases, is anything but typical of the federal courts in general.

Critically, the justices, by the certiorari procedure, get to choose what cases they will decide, and they choose them based on the issues they present. A high proportion of the Supreme Court's cases will have at least some political salience, and almost all of them are difficult, sometimes extremely so, since the job of the Court is to resolve issues on which lower courts disagree and cases as to which the statutory or constitutional texts or the existing Supreme Court precedents do not give clear guidance. On those cases that are hardest and most politically fraught, the results are likely to be less predictable by reference to established law, but often quite predictable on the basis of the jurisprudential proclivities of a majority of the justices. The Supreme Court always sits en banc. That is, all nine justices hear and decide every case. A five- or six-member bloc with similar values and similar approaches to deciding cases will win every time.

For many years now, the process by which the members of that Court are nominated and confirmed has drawn intense public scrutiny, including nationally televised confirmation hearings and highly contentious political debates focused on how the nominees are likely to vote on issues that are expected to come before the Court. It may be hard for younger lawyers to grasp the fact that in the 1950s, President Dwight D. Eisenhower's nomination of justices such as Earl Warren and William J. Brennan received little public attention and resulted in Senate confirmation by overwhelming majorities after fairly perfunctory hearings.

Because the justices can be expected to serve for a very long time, vacancies are rare, and they arise on no predictable schedule. Not every president gets to appoint even one justice: among one-term presidents, Jimmy Carter did not have a single appointment, while

Donald Trump had three. Presidents are personally involved in the selection process, and candidates for appointment are intensely vetted with an eye to how they would be likely to vote on issues that can be expected to arise within the immediate future that might have an impact on the political fortunes of the president and his party.

Increasingly, presidents nominate to the Court younger candidates than was once the norm, seeking to maximize the length of their service on the Court, and candidates who, because of their track record as judges or law professors, have taken positions on legal issues that can help predict their views on anticipated cases. Although a few justices have retired from the Court for personal reasons while still healthy and able, the public and the political commentators seem to expect justices either to serve out their full lifetime tenure or—as suggested by the widespread criticism of the otherwise lionized Justice Ruth Bader Ginsburg for doing just that—to time their retirements to the political convenience of a president of the same party as the one who appointed them.

B. The District Courts

But the Supreme Court is a unique institution, differing dramatically from the rest of the federal court system. The “inferior” federal courts, as the Constitution terms them, have very different dockets from the Supreme Court's. More than 400,000 cases are filed annually in the federal district courts, and approximately 50,000 or so appeals arrive to the various circuit courts of appeals. Those cases look very different from those heard at the Supreme Court, and the judges who decide them are engaged in very different functions from the justices.

To go to the other extreme on the pyramid: District judges have the least power to “make law” by the cases they decide. Their opinions are not binding on any other of the hundreds of district

judges hearing similar cases. Nevertheless their opinions matter: The number of cases and issues they decide so far outstrips the number of cases heard and decided at higher levels of the system that, in addressing the legal issues that come before them, district judges must and do look for, rely on, and cite as precedents the opinions of other district judges.

Unlike the Supreme Court, district judges have no choice in the cases they hear. The district courts have to decide the cases that litigants bring to them, and those cases are generally assigned at random, within the federal district in which the cases were filed, to the district judges who will preside over them. Wholly apart from the influence the opinions that they write may have on the development of the law, however, district judges have the most power of anyone in the system to affect the outcome of the particular disputes they are charged with managing and resolving. Deciding formal questions of law is only one part of their jobs—while for the Supreme Court, that is quite literally the only thing the justices do. District judges supervise pretrial litigation, preside over trials, and encourage settlements. Many rules of law, procedure, and evidence vest district judges with discretionary authority to decide what to do in particular cases as they see fit.

The wise district judge is not usually looking over her shoulder at what the court of appeals (let alone the Supreme Court) might do with her decisions—although the careful district judge will often take care to create a clear record of the decisions she makes and the reasons for them. District judges know that most of the decisions they make, about legal as well as practical administrative matters, will never be reviewed. Most cases eventually settle—with the settlement terms strongly influenced by rulings the judge has made in the course of the case to that point—and thus there will be no appeal or any review of the rulings.

Moreover, even those cases that are

litigated to ultimate resolution and then appealed will be presented to the courts of appeals based on a limited number of rulings selected by appellate lawyers as possible hooks to overturn the judgment; thus, many rulings over which the trial judge agonized will not be challenged. On rulings that are reviewed, the governing standard of review will often grant considerable deference to the district judge. So the chances that any given decision made by a judge in the often lengthy process of presiding over litigation will be overturned by an appellate court are quite low.

While at least some of the decisions made by a district judge will attract public attention and even controversy, most of even those matters, such as sentencings in high-profile criminal cases, are of only passing interest to the general public and do not implicate major political questions; in the few that do, the press mostly understands that the district court decision is only a way station en route to resolution of the issue by higher courts. So there is little public scrutiny of district judges' decisions relative to the close public attention to the work of the Supreme Court.

Finally, the work of the district court judge is powerfully shaped by the sheer volume of cases. There is a need for speed. In my district court days, I would often remind my clerks that in all legal decision-making, there is a tension between getting

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it right and just getting it *done*. Justice delayed is justice denied, as the saying goes, and many issues raised by lawyers in the course of litigation are raised in hopes of securing a marginal advantage—obtain a few more documents in discovery, get another piece of evidence excluded or admitted. Cumulatively those issues matter, but each one has to be decided quickly, will not affect anyone but the particular parties before the court, and probably will not be determinative of whether the case is won or lost. And there are many cases in line behind the one before you at any given moment, all with a claim to your attention.

District judges are necessarily primarily focused on doing justice to the individual parties who appear before them, in the factual contexts in which abstract legal issues are presented in particular cases. That inevitably influences how the judges see the merits of broader legal questions, and it can encourage judges to stretch the boundaries of abstract principles to do justice in a particular case. Sometimes, too, the focus on the particular case might obscure the fact that the proclaimed rule that decides this case correctly may not be right across other possible applications in other cases.

Unlike the Supreme Court, every district judge is a solo act, king or queen in his or her own court. If issues are close and the law unclear, the individual judge makes the decision, which, as I've



Compared to members of the Supreme Court, district judges have very different incentives with respect to how they handle their life tenure. Federal judges have a very good retirement program.

noted, often will not be appealed. And on those close issues, if the judge is only 51 percent sure of which side is right, that side will win the day. Of course, the judges are constrained by their oaths, and also by inclination, to follow the law as best they can discern it. But discerning it is not so easy. I was always amused, while a district judge, when nonlawyers asked whether I was often tempted to depart from the law to impose my own views. I would point out that I had to decide issues of law arising in an unbelievably broad range of legal specialties, from admiralty and bankruptcy through insurance disputes and personal injury, to securities fraud, pension benefits, and intellectual property. In almost none of those areas did I have any preexisting expertise or experience, let alone any preformed opinions about how specific legal questions in those fields should be answered. Even where I had some generalized policy preferences, the issues arising in individual cases tended to be so highly specific that I would never have given them the slightest thought before they came before me, and a general belief about broad principles of law was of little help in grappling with the sometimes-unknowable practical effects of adopting one rule or another to resolve the particular question posed by the case. I was delighted when I could find any guidance at all in clear statutes or prior decisions of other courts about what the law was, so I wouldn't have to decide the more difficult question of what I thought the law ought to be.

At the same time, for many questions, either the law was unclear, or it clearly instructed me to exercise discretion and do what I thought was fair. And of course, what I thought fair was the product of my own thought and experience. To the extent that, for example, a judge tends, based on his or her experience and political philosophy, to think that litigation is a way for the little guy to hold big corporations accountable, or alternatively to think that litigation is mostly a way for lawyers to make money and a drain on the efficient operations of the marketplace, close calls on summary judgment or class certification or whether a pleading is "plausible" under the rule of *Bell Atlantic Corp. v. Twombly* (U.S. 2007) are likely to be made differently in different courtrooms. I don't think any sensible person would dispute that where the law gives little guidance, a particular litigant with a particular type of case, if given the power to choose his own judge, would quite rightly think that he would be better off with, say, a Republican rather than a Democrat, or

with a liberal rather than a conservative, when close questions need to be decided.

The selection process for the judges who do this work is, *de jure*, the same as for Supreme Court justices: presidential nomination and Senate confirmation. But the *de facto* political process is quite different. The sheer number of judges who must be appointed makes it impossible for a president, or even a Senate committee, to thoroughly vet every candidate.

While the number of Supreme Court justices any given president will get to appoint is the product of chance and, to put it bluntly, largely depends on when the Grim Reaper strikes, every president will get to appoint a substantial number of district judges and judges of the courts of appeals. That is partly a function of the number of judgeships: nearly 700 in the district courts, for example, compared to just nine. Besides the sheer number of judgeships, other factors influence the frequency with which presidents exercise the power to appoint district judges. Compared to members of the Supreme Court, district judges have very different incentives with respect to how they handle their life tenure. Federal judges have a very good retirement program. One of its key provisions is that a judge, upon reaching certain benchmarks of age and service, may take "senior status," opening up a vacancy while continuing to sit, often for something close to a full caseload, but with the ability to temper the grueling work of a full-time judge. Most of us take advantage of that opportunity. In fact, most (though not all) district judges take senior status upon reaching eligibility. That assures regular turnover in the courts, giving every president the responsibility, and the opportunity, to appoint a large number of federal judges. Given the august status and considerable power of Supreme Court justices, retirement or a reduction in activity is much less attractive.

Moreover, the White House has much less involvement in the selection process for district judges than it does for Supreme Court justices. District judges are typically recommended by the senators of the state in which they sit; this tends, even in highly contentious times, to motivate senators to protect their own patronage by not unnecessarily attacking the candidates proposed by their colleagues. Senators of the party in opposition to the president's will snipe at candidates who seem, or can be made to seem, to stray from the political principles of the opposition party. But the lower-court benches

must be peopled, so that the important work of resolving lawsuits can be accomplished. And while senators will often seek to score points off presidents of the opposing party, and may at some point want to appear to their constituents or donors to be safeguarding the courts from the radical or reactionary judges the opposing party would appoint, for the most part district judge nominees are going to be confirmed, even where the opposition party has the political strength to refuse confirmation. Even if a nominee fails of confirmation, the replacement nominee will often have rather similar ideas, although perhaps he or she has been less outspoken or more temperate in making them known over the course of a career in practice.

The result of all this is that the lower court benches are far more politically diverse than the justices of the Supreme Court, and the composition of those courts is less affected by the vagaries of when a vacancy occurs. Since every president will get to appoint a substantial number of district judges and judges of the courts of appeals, so long as there is reasonable turnover of the party that controls that White House—and in the past 75 years, there has only been one stretch when the same party held the presidency for as long as three terms—the makeup of the lower federal courts will be widely representative of the views of both major political parties. And remember, while you might prefer to have your case decided by a liberal or a conservative judge, the case—in most circumstances—will be assigned to a judge at random. Whether the federal bench as a whole has more judges appointed by one party or the other will not matter to your case.

That reality may depart from an idealized model of equal justice. If you believe that there is a platonically or divinely ordained right answer to every legal question, it will be distressing to think that not every case will be decided according to what *you* think is the right answer. But if you recognize that not every tough legal call has only one right answer, and that many have a reasonable range of answers, you will recognize as well that not every case is going to go the same way, and that this may be a desirable rather than a damaging feature of our system of justice. The consumer, the worker, the welfare recipient may not win every close case, but neither will he or she lose them all.

C. The Courts of Appeals

The courts of appeals are one step up from the district courts, not just in hierarchy, but in the level of abstraction of the issues they decide. Their decisions set precedents that will affect a range of cases. While the context of a particular case can still shape the way that the court perceives an abstract principle, the wise appellate judge has to be more careful to test whether what seems like a fair rule for this case will work in a broader range of cases to which it might apply. Unlike the district judge, we on the courts of appeals may never see the human beings who are parties to the cases—or may see them only as spectators in the gallery. We may study the record of a trial, but we have not seen, up close and personal, the witnesses and victims whom the district judge has encountered in the courtroom.

Moreover, we appellate judges are more like pathologists than emergency room doctors, dissecting what went right or wrong in a case that has most likely passed the point at which it had any urgency for the parties—if the parties needed an answer immediately, they would probably have settled the case long ago and gotten on with their lives. The pressure to get it done of course remains. Even in a case that has been fully resolved below, the parties need to know, in some reasonable time, whether that resolution is final. Also, as at the district court, efficient resolution is important not only to the parties but to the many others whose cases await decision. You can't take forever on any one case, however important and difficult it may be, because dozens of other cases are waiting in line for your attention. But on the appellate court, the balance tilts a little further away from getting it done and a little further toward getting it right.

As for selection, there are only about 180 court of appeals judges in “regular active service” (as distinguished from judges who have taken senior status), so screening for nominations is more centralized in the White House and greater scrutiny by the Senate is possible. Political controversy over nominees is more frequent than for district judges. Still, legislative attention for even that many judges is limited.

The decision-making process at the courts of appeals also differs from that at the Supreme Court, as well as from the solitary intellectual struggles of the district judge. We decide every case to begin with, and nearly every case with finality, in panels of three. My court has 13 judgeships. Of the active judges

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at this moment, six members have been appointed by President Joe Biden, five by President Donald Trump, one by President Barack Obama, and one by President George W. Bush, and we also have 15 senior judges sitting regularly who have been appointed by presidents going back to Jimmy Carter. The panels are more or less randomly created, and the cases assigned to each panel are entirely randomly distributed.

It matters little to the resolution of any given case whether the majority of active judges on the court are “liberal” or “conservative,” or were appointed by Democrats or Republicans. Even at the level of the panel, the easy cases, and there are many, tend to be decided unanimously, because the merits are clear and controlling.

For closer, harder cases, the proclivities of different judges will take on more importance. But given the random assignment of cases to panels, the close cases will not all go a single way. Narrow issues of law get settled, and are then applied as precedents, fairly and scrupulously, to other cases. But each new issue that arises and presents a close question gets decided by a different panel, and so some rulings may have a more liberal tinge while others take a more conservative direction. Which party has appointed a majority of the entire body of active judges on the Court is less significant than the newspapers (with their breathless accounts of how the incumbent president's latest appointment may have “flipped” a circuit) make it appear. Although there is a mechanism by which the full group of active judges can review the decision of a panel, that process is too cumbersome to be invoked in any but highly important cases. So most of the decisions of panels will not be reviewed, by the full court or by the Supreme Court.

Let me note one other feature of deciding cases in panels. In my experience, a body of three judges, drawn from a politically and jurisprudentially diverse pool, has some significant advantages over decision-making not only by individual judges (three heads being better than one) but also by larger bodies of judges such as an en banc court. Most of our decisions are unanimous, not only because most of our cases are not all that close or all that divisive but also because the close or difficult cases are also fairly specific. They involve not a choice of fundamental political or legal direction, or the resolution of a single issue presenting a binary choice of rules, but the selection of which of two or more competing principles or ways of reading a specific text will control the result in a highly particular circumstance. There

The law, in consequence, does not come to us from a single lawgiver, with a consistent set of principles from which every rule or every outcome is deduced. Such a coherent body of law would be great if the lawgiver were perfectly knowledgeable and perfectly just.

will often be a range of views, rather than a binary choice, and there is an opportunity for compromise and considerable pressure to do what I was taught judges are supposed to do—to decide the least that needs to be decided to resolve the case. The easiest way to lose the “swing voter,” where there is one, is to stake out an extreme position that will purport to control the broadest range of future cases. A small group of judges can really listen to each other's arguments, and try to reach a consensus on a rule of decision that resolves the present case in a way least disrespectful of the concerns that animate each judge's advocacy of one or another competing rule.

The courts of appeals sit halfway between the trial courts and the Supreme Court with respect to their relation to the facts of the cases before them. As I noted above, the district judges are intimately close to the facts of each case, and most often will directly confront the parties to the case. Doing justice in the particular case is paramount. By the time a case reaches the Supreme Court, the case is typically a vehicle for deciding a particular legal issue that the Court has decided needs to be resolved at a relatively high level of abstraction because the issue is important to a wide range of cases that may come up. The courts of appeals are in between: their decisions set precedents that need to be followed, but it is often possible to decide a particular case in a way that is fair to the parties but creates only a rather narrow rule, which will affect only cases closely similar to the one before the court. The Supreme Court, too, has some incentive to proceed slowly and narrowly—but given the small number of cases it decides, there is a greater pressure, or temptation, to go big: to answer a question in a way that settles, once and for all, a major issue. Close attention to the narrow facts of the particular case can interfere with announcing a broad rule. Announcing broad rules promotes consistency, at least at the level of principle.

The greater focus on the facts of particular cases, and a process that promotes compromise and the creation of narrow rules, both features of the process in the intermediate appellate courts, are additional factors leading to greater diversity—and less ideological coherence and consistency—across outcomes in those courts.

IV. The Virtues of Incoherence, and Some Practical Tips to Maximize Them

So we return to the question of consistency and coherence. If one thinks, as I do, that many



hard and novel issues do not have unambiguously right answers, it seems to me that a considerable amount of diversity is a good thing. Would I rather that every case be decided the way I would decide it? *Sure*, a part of me says. Like any private citizen, I have my own ideas of what a just society would look like, and I would like the law to conform, in all respects, to that notion. But in a democratic society, even one that has certain counter-majoritarian features built in, the ultimate shape of society and the ultimate resolution of issues are political questions, which must be settled by the people. I can't expect all citizens, or all judges, to share my vision. Nor will a single political vision consistently dominate the views of a majority, election after election.

The law that emerges from this somewhat messy system is the product of the political choices of the citizenry, as expressed through electoral results, shifting over time. Each election leaves a residue, in the form of legislation adopted by the political branches of government, which cannot easily be totally overhauled with each change of administration. Each election will also produce a crop of life-tenured judges who will interpret that legislation, and who will also interpret the vague terms of the Constitution that can trump the legislative preferences of passing majorities. The law, in consequence, does not come to us from a single lawgiver, with a consistent set of principles from which every rule or every outcome is deduced. Such a coherent body of law would be great if the lawgiver were perfectly knowledgeable and perfectly just. But the vision of such a system is also inherently totalitarian, and will go drastically awry when the Supreme Leader, or the dominant faction, is misguided. A more complicated system gives room for more flexible outcomes, which in turn move the entire system in a more moderate direction. That is frustrating for reformers. Progress in any direction is slow, and proceeds in fits and starts, with cycles in which reformers of

an opposite persuasion move the law in what seems to the previous group of reformers a very wrong direction.

The system is unruly, and a little bit ramshackle, but even as limited to federal law, and putting aside the great diversity of state law, this inconsistency has the great advantage of preventing either wild swings in the overall shape of the law or the hardening of a single vision into a perpetual and immovable body of rules dominated by a single philosophy. In the end, I prefer that to a more winner-take-all system. The existence of the Supreme Court imposes some discipline on the system as a whole. Many major questions will be resolved by that Court, and the lower courts will have to fall in line. But the Supreme Court, too, changes its shape over time. So long as a system of precedent holds—and despite occasional appearances, the fact is that precedent is so essential a feature of legal reasoning that for the most part this system will hold—the Supreme Court, too, presides over a body of its own law, which itself is the creation, over time, of justices with different agendas and approaches.

Let me close by looking at a few concrete lessons from this way of looking at the evolution of law and the structure of the federal judiciary. As I suggest some of these lessons, I recognize that they take the form of advice to actors who have little interest in anything I say, and who will most certainly not take my advice, particularly in our highly partisan times.

First, advice for presidents on the selection of lower court judges. Federal district judges have a very hard job, and one that will rarely determine issues of the magnitude of the question whether abortion will be a crime or a constitutional right. Presidents will presumably appoint people whose political and social views, and whose judicial philosophies, are roughly congruent with their own. But many lawyers will satisfy that criterion. The judges you pick are the face of fairness in our system. District judges are the only

judges most litigants will ever see. They will have to be calm, poised, and willing to listen. You want people who are smart, moderate—in temperament even more than in politics—and fair-minded. And no small thing: you want people who will show up for work. Life tenure and judicial independence mean that a federal judge answers to no one. When I took a vacation as a district judge, I needed no one's permission, and effectively the only people I even needed to tell that I'd be away for a week or two were my own staff. The dumb or the lazy should not apply. Nor is there much place for judges whose primary agenda is to change the world. That's not really the job description for district or even court of appeals judges. So a lawyer who will be bored by the ordinary cases that have to be decided will chafe in the role and will not be very good at the real work of the courts.

Senators should apply similar criteria, and once satisfied that the candidates have the smarts, skills, patience, and work ethic to do the work, the members of the Senate should presumptively confirm the choices of the president. In this I agree with Senator Lindsey Graham, who has consistently noted that elections have consequences and that one of those consequences is that the president will get to appoint the judges. Sure, the Senate can vote a couple of them down, but the next person nominated will probably be only marginally different in philosophy. So stop with the political theater. Litmus tests about the issues that will dominate the Supreme Court are not especially relevant in the selection of trial judges, and not dominant even with respect to judges of the courts of appeals.

Second, advice to lower court judges about how to conduct themselves in doing their job. As noted, federal judges have a great deal of independence, and so have no more reason to listen to my advice than the president or a senator. But consider: Resist the tendency to succumb to "black robe disease." You are not infallible. Humility is a cardinal virtue in judges. This mostly affects how

you treat litigants and lawyers in the courtroom. But it also applies in deciding legal issues. Adhere to the traditional rule of avoiding broad rulings where possible and deciding only what you must to resolve the dispute before you. And, to highlight an issue that has been in the news a bit for the last couple of political administrations, don't reach to impose a nationwide injunction. Decide the case in front of you, and stay in your own lane.

If you are on a collegial court such as a court of appeals, actually listen to what your colleagues have to say. One basic problem with the philosophy that "there is a right answer to every legal issue" is that of course, to each of us, the right answer is *our* answer—the one dictated by our own preferred methodology and our own substantive views. And if your view is taken to be the definitive right answer, there can be no compromise.

For what it is worth, I have found that sitting on panels with judges whose views on many subjects may diverge widely from mine has given me a better understanding of the concerns that motivate their views. My court is not representative of the political views of the majority of voters in the three very blue states that the Second Circuit comprises, and certainly not of the academic and liberal neighborhood in which I live. That is a function of the fact that the presidency turns over, while the local political majorities do not change. So I have more contact, and more importantly I have to share decision-making power, with more conservative legal thinkers than I have worked with in any other legal job I have held. I have learned from that experience, but you only learn if you listen.

Finally, to the Supreme Court. Remember the principles of judicial restraint. Now, I want to say straight out that some of you in the audience may think, "Yeah, suddenly these liberal judges have discovered judicial restraint now that they don't control the Supreme Court." There is truth in that. I think about these issues now rather differently than I did as a callow Supreme Court

law clerk in 1976. But that's what age and experience are supposed to do: they make you more conservative, in the truest sense of that word. Times change, and majorities shift. The courts get their power, ultimately, from the reality and the perception that judges adhere to precedent and exercise moderation. Adopting the view that "no principle is settled until it is settled right"—meaning, of course, settled the way I think it should be settled—may allow you to make a lot of change quickly but exposes you to the risk that the next generation will be equally able to undo your legacy, and the sense of politicization and instability will reduce the value of the courts as respected and fair arbiters.

Here's another issue that has been salient in recent press coverage of the Supreme Court, the so-called "shadow docket." That refers to the Court's power to issue temporary stays of lower court orders, and it's a misnomer. There's nothing shadowy about it. It is not secret, except to whatever extent the media have long paid it less attention and only now have learned to attend to it. The real issue with such requests for emergency rulings is that those requests push the Court to intervene earlier into cases. Normally the Supreme Court takes cases only after they have been finally resolved in the lower courts. There are good reasons for that. It used to be said that it was good for complex issues to be allowed to "percolate" through the lower courts, so that the Supreme Court could learn from the diverse views advanced as the issues were decided by a number of different courts. Early intervention into that process smacks of arrogance and inevitably gives the impression that the justices think that they have nothing to learn from that process, or indeed even from having cases fully and carefully briefed and argued before them. If you think that every case has only one right answer, and that that right answer is yours, well, you'll probably behave accordingly. But I don't think it's the right way to behave. Are there cases in

which it is clear that a lower court has gone off the rails, or where the status quo should be preserved precisely in order to enable an issue to be carefully considered? Of course. But those are infrequent.

If we were to fantasize about possible fundamental change in the federal court system, the one proposal for radical change in the Supreme Court that has any appeal to me is the notion of term limits for Supreme Court justices. A system with term limits could have several valuable results. First, it could reduce the pressure on political actors to engage in such practices as appointing the youngest candidates, and to engage in extreme vetting of the views of potential nominees and bitter confirmation fights, by lowering the stakes of each appointment. Second, it could reduce the calcification of views as justices serve for 30 years or more and become political and cultural icons. The current appointment practices can't be good for avoiding judicial arrogance. And third, it could make the Supreme Court bench more changeable and more diverse in political views, like the lower federal courts.

The terms would have to be long. We really want being on the Supreme Court to be the last job a lawyer will hold or, if not, one that sees the justice thereafter continuing as a life-tenured senior federal judge, rather than to be a stepping stone to some other public office or private profit-making venture.

Now, I want to say straight out that some of you in the audience may think, "Yeah, suddenly these liberal judges have discovered judicial restraint now that they don't control the Supreme Court."

But we also should want to guarantee that every president who wins election by the people will have an equal opportunity to leave his or her mark on the Court. You can do the math and find a length of term that would serve both of those goals.

That change is almost certain not to happen. If it did, it would probably guarantee that any dream I might sometimes have of a long-term Court that would decide all the cases exactly as I would want them decided could never come to fruition. But it would avoid the long-term tyranny of a Court that would follow a single philosophy or be consistently out of step with changing generations of legal and political thinking.

If you get the impression that I have some skepticism about the Supreme Court, and a great deal of affection for the "inferior" courts, you are correct. I think the sometimes messy and inconsistent jurisprudence that emerges from the buzz of diverse, case-specific judgments of courts grappling with concrete cases and real people is superior to the jurisprudence of philosophers, academics, and judges who deal at a high level of abstraction with broad principles.

And that, friends, is my case against excessive consistency, and in favor of the complex and sometimes contradictory principles that animate American law. ■

