

LAW'S IRONY

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Thank you for the kind introduction. It is an honor to be with you and a pleasure to be part of a lecture series dedicated to the memory of Barbara Olson and to some of the causes she held dear—the rule of law, limited government, and human liberty.

Let me begin by asking if you've ever suffered through a case that sounds like this one:

[I]n [the] course of time, [this suit has] become so complicated, that no man alive knows what it means . . . [A] long procession of [judges] has come in and gone out; the legion of bills in the suit have been transformed into mere bills of mortality . . . [but still it] drags its dreary length before the Court, perennially hopeless.¹

How familiar does that sound? Could it be a line lifted from a speaker at an electronic discovery conference? From a brief in your last case? Or maybe from a recent judicial performance complaint?

Of course, the line comes from Dickens, *Bleak House*, published 1853. It still resonates today, though, because the law's promise of deliberation and due process sometimes—ironically—invites the injustices of delay and irresolution. Like any human enterprise, the law's crooked timber occasionally produces the opposite of its intended effect. We turn to the law earnestly to promote a worthy idea and sometimes wind up with a host of unwelcome side effects and find ourselves ultimately doing more harm than good. In fact, the whole business is something of an irony: we depend on the rule of law to guar-

* Judge, United States Court of Appeals for the Tenth Circuit. What follows is a speech—originally given as the annual Barbara Olson Memorial Lecture—and more than that it does not pretend to be. Just because what follows lacks a footnote after every dependent clause, do not assume anything here is original: nearly everything is borrowed, and from too many sources, some too long ingrained and too dimly remembered, to capture faithfully—but borrowed gratefully all the same. What citations exist here are thanks to the work of my excellent law clerk, Michael Kenneally.

1. CHARLES DICKENS, *BLEAK HOUSE* 4 (Wordsworth Editions 1993) (1853).

antee freedom but we have to give up freedom to live under the law's rules.²

In a roundabout way, that leads me to the topic I'd like to discuss with you tonight: law's irony. Dickens had a keen eye for it. But even he was only reworking long familiar themes. Hamlet rued "the law's delay."³ Goethe left the practice of law in disgust after witnessing thousands of aging cases waiting vainly for resolution in the courts of his time.⁴ Demosthenes plied similar complaints 2000 years ago.⁵ Truth is, I fully expect lawyers and judges to carry on similar conversations about the law's ironies 2000 years from now.

But just because unwelcome ironies may be as endemic to law as they are to life, Dickens would remind us that's hardly reason to let them go unremarked and unaddressed. So it is I would like to begin by discussing a few of the law's ironies that I imagine he would consider worthy of attention in our time.

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Consider first today's version of the *Bleak House* irony. Yes, I am referring to civil discovery.

The adoption of the "modern" rules of civil procedure in 1938 marked the start of a self-proclaimed "experiment" with expansive pre-trial discovery—something previously unknown to the federal courts.⁶ More than seventy years later, we still call them the "new" and the "modern" rules of civil procedure.

2. See CICERO, *The Speech of M.T. Cicero in Defence of Aulus Cluentius Avitus* § 53, in 2 THE ORATIONS OF MARCUS TULLIUS CICERO 104, 164 (C.D. Yonge trans., 2008) ("[W]e are all servants of the laws, for the very purpose of being able to be free-men."). Timothy Endicott has recently made the point eloquently, and I am indebted to him for the title of this talk. See Timothy Endicott, *The Irony of Law*, in REASON, MORALITY, AND LAW: THE PHILOSOPHY OF JOHN FINNIS 327, 327 (John Keown & Robert P. George eds., 2013).

3. WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 1.

4. 2 JOHANN WOLFGANG VON GOETHE, *THE AUTOBIOGRAPHY OF GOETHE* 119 (John Oxenford trans., Boston, S.E. Cassino 1882) ("Twenty thousand cases had been heaped up: sixty could be settled every year, and double that number was brought forward.").

5. See DEMOSTHENES, *The Oration Against Midias*, in THE ORATIONS OF DEMOSTHENES AGAINST LEPTINES, MIDIAS, ANDROTION, AND ARISTOCRATES 59, 103–04 (Charles Rann Kennedy trans., London, George Bell & Sons 1877).

6. See Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 691 & n.4 (1998).

Now, that's a pretty odd thing, when you think about it. Maybe the only thing that really sounds new or modern after seventy years is Keith Richards of the Rolling Stones. Some might say he looks like he's done some experimenting too.

In any event, our 1938 forefathers expressly rested their "modern" discovery "experiment" on the assumption that with ready access to an opponent's information parties to civil disputes would achieve fairer and cheaper merits-based resolutions.⁷

Now, how is *that* working out for you?

Does modern discovery practice *really* lead to fairer and more efficient resolutions based on the merits? I don't doubt it does in many cases. Probably even most. But should we be concerned when eighty percent of the American College of Trial Lawyers say that discovery costs and delays keep injured parties from bringing valid claims to court?⁸ Or concerned when seventy percent also say attorneys use discovery costs as a threat to force settlements that *aren't* based on the merits?⁹ Have we maybe gone so far down the road of civil discovery that—ironically enough—we've begun undermining the purposes that animated our journey in the first place?

What we have today isn't your father's discovery. Producing discovery anymore doesn't mean rolling a stack of bankers' boxes across the street. We live in an age when every bit and byte of information is stored seemingly forever and is always retrievable—if sometimes only at a steep price. Today, the world sends fifty trillion emails a *year*.¹⁰ An average employee sends or receives over one hundred every day.¹¹ That doesn't begin to account for the billions of instant messages shooting

7. See Edson R. Sunderland, *Discovery Before Trial Under the New Federal Rules*, 15 TENN. L. REV. 737, 737–39 (1939).

8. See INTERIM REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM at A-6 (2008), available at http://iaals.du.edu/images/wygam/documents/publications/Interim_Report_Final_for_web.pdf, [<http://perma.cc/6VD6-7Y93>].

9. *Id.* at A-4.

10. RADICATI GROUP, EMAIL STATISTICS REPORT, 2012-2016, at 3 (2012), <http://www.radicati.com/wp/wp-content/uploads/2012/04/Email-Statistics-Report-2012-2016-Executive-Summary.pdf>, [<http://perma.cc/WG3V-KETX>].

11. RADICATI GROUP, EMAIL STATISTICS REPORT, 2011-2015, at 3 (2011), <http://www.radicati.com/wp/wp-content/uploads/2011/05/Email-Statistics-Report-2011-2015-Executive-Summary.pdf>, [<http://perma.cc/9CX9-2A27>].

around the globe.¹² This isn't a world the writers of the discovery rules could have imagined in 1938—no matter how “modern” they were.¹³

No surprise, then, that many people now simply opt out of the civil justice system. Private alternative dispute resolution (ADR) abounds. Even the federal government has begun avoiding its own courts. Recently, for example, it opted to employ ADR to handle claims arising from the BP oil spill.¹⁴ These may be understandable developments given the costs and delays inherent in modern civil practice. But they raise questions, too, about the transparency and independence of decisionmaking, the lack of development of precedent, and the future role of courts in our civic life. For a society aspiring to live under the rule of law, does this represent an advance or perhaps something else?

We might even ask what part the rise of discovery has played in the demise of the trial.¹⁵ Surely other factors are at play here, given the disappearance of criminal trials as well. But we've now trained generations of attorneys as discovery artists rather than trial lawyers. They are skilled in the game of imposing and evading costs and delays, they are poets of the

12. CTIA-THE WIRELESS ASSOC., CTIA'S WIRELESS INDUSTRY INDICES: SEMI-ANNUAL DATA SURVEY RESULTS, A COMPREHENSIVE REPORT FROM CTIA ANALYZING THE U.S. WIRELESS INDUSTRY, YEAR-END 2012 RESULTS (2013), <http://www.ctia.org/resource-library/facts-and-infographics/archive/us-text-messages-sms>, [http://perma.cc/5V6F-GRNM].

13. To be fair to the drafters of the 1938 rules, they're not entirely responsible for the current state of affairs. While providing new and more liberal access to depositions, the 1938 rules didn't make document discovery a matter of right. In fact, at that time, and for a good while after, documents could be discovered only by agreement among the parties or on a showing of good cause before the district court. 8B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2205 (3d ed. 2010). The federal rules took the question of document discovery away from the district courts and codified its expansive view of document discovery only in 1970. *See id.*; FED. R. CIV. P. 34 Advisory Committee's Note (1970). About the same time photocopies became relatively inexpensive. *See* DAVID OWEN, COPIES IN SECONDS 9–10 (2004). One can't help but wonder if the timing was merely coincidental.

14. *See* Sheryl Gay Stolberg, *Administering Fund, a Master Mediator*, N.Y. TIMES, (June 16, 2010), available at <http://www.nytimes.com/2010/06/17/us/17feinberg.html>, [http://perma.cc/BB3L-VCYV].

15. *See, e.g.*, Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459 (2004) (“The portion of federal civil cases resolved by trial fell from 11.5 percent in 1962 to 1.8 percent in 2002, continuing a long historic decline.”).

nasty gram, able to write interrogatories in iambic pentameter. Yet terrified of trial.

The founders thought trials were a bulwark of the rule of law. As Hamilton saw it, the only room for debate was over whether jury trials were (in his words) "a valuable safeguard to liberty" or "the very palladium of free government."¹⁶ But is that still common ground today? No doubt, our modern discovery experiment is well-intentioned. Yet one of its effects has been to contribute to the death of an institution once thought essential to the rule of law.

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What about our criminal justice system, you might ask? It surely bears its share of ironies too. Consider just this one.

Without question, the discipline of writing the law down, codifying it, advances the rule of law's interest in fair notice. But today we have about 5000 federal criminal statutes on the books,¹⁷ most added in the last few decades.¹⁸ And the spigot keeps pouring, with hundreds of new statutory crimes inked every few years.¹⁹ Neither does that begin to count the thousands of additional *regulatory* crimes buried in the federal register. There are so many crimes cowled in the numbing fine print of those pages that scholars actually debate their number.²⁰

When he led the Senate Judiciary Committee, Joe Biden worried that we have assumed a tendency to "federalize everything that walks, talks, and moves."²¹ Maybe we should say hoots, too, because it's now a federal crime to misuse the likeness of Woodsy the Owl or his immortal words, "Give a Hoot, Don't Pollute."²² Businessmen who import lobster tails in plas-

16. THE FEDERALIST NO. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

17. See John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, HERITAGE FOUND. LEGAL MEMORANDUM (June 16, 2008), <http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes>, [<http://perma.cc/TS2X-SEK2>] (explaining that there were at least 4450 federal crimes as of 2007).

18. TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, AM. BAR ASS'N, THE FEDERALIZATION OF CRIMINAL LAW 7-8 (1998).

19. See Baker, *supra* note 17, at 1.

20. See *id.* at 2, 4.

21. Dan Freedman, *FBI Criticizes Trend Toward "Federalizing": Agents Don't Want to Be Street Cops*, HOUS. CHRON., Dec. 19, 1993, at A2.

22. 18 U.S.C. § 711a (2006).

tic bags rather than cardboard boxes can be brought up on charges.²³ Mattress sellers who remove that little tag: yes, they're probably federal criminals too.²⁴ Whether because of public choice problems or otherwise, there appears to be a ratchet clicking away relentlessly, always in the direction of more—never fewer—federal criminal laws.

Some reply that the growing number of federal crimes isn't out of proportion to our growing population. Others suggest the recent proliferation of federal criminal laws might be mitigated by allowing the mistake of law defense to be more widely asserted.²⁵ Others still suggest prosecutorial discretion can help with the problem.²⁶

But however that may be, isn't there still a troubling irony lurking here? Without written laws, we lack fair notice of the rules we must obey. But with too many written laws, don't we invite a new kind of fair notice problem? And what happens to individual freedom and equality—and to our very conception of law itself—when the criminal code comes to cover so many facets of daily life that prosecutors can almost choose their targets with impunity?²⁷

The sort of excesses of executive authority invited by too few written laws helped lead to the rebellion against King John and the sealing of the Magna Carta—one of the great advances in the rule of law. But history bears warnings that too much and too much inaccessible law can lead to executive excess as well. Caligula sought to protect his authority by publishing the law in a hand so small and posted so high no one could be sure what was and wasn't forbidden. (No doubt, all the better to keep everyone on their toes. Sorry) In *Federalist 62*, Madison warned that when laws become just a paper blizzard citizens are left unable to know what the law is and cannot con-

23. See *United States v. McNab*, 331 F.3d 1228, 1232 (11th Cir. 2003); see also Alex Kozinski & Misha Tseytlin, *You're (Probably) a Federal Criminal*, in *IN THE NAME OF JUSTICE* 43, 48 (Timothy Lynch ed., 2009).

24. Stuart P. Green, *Why It's a Crime to Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 *EMORY L.J.* 1533, 1610 & n.264 (1997).

25. E.g., Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 *J. CRIM. L. & CRIMINOLOGY* 725, 783–84 (2012).

26. See Erik Luna, *Prosecutorial Decriminalization*, 102 *J. CRIM. L. & CRIMINOLOGY* 785, 791 (2012).

27. See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 2–5 (2011).

form their conduct to it.²⁸ It is an irony of the law that either too much or too little can impair liberty. Our aim here has to be for a golden mean. And it may be worth asking how far we might have strayed from it.

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Beyond the law itself, there are the ironies emanating from our law schools. A target rich environment, you say? Well, let's be kind and consider but one example.

In our zeal for high standards, we have developed a dreary bill of particulars every law school must satisfy to win ABA accreditation. Law schools must employ a full time librarian (dare not a part timer).²⁹ Their libraries must include microform printing equipment.³⁰ They must provide extensive tenure guarantees.³¹ They invite trouble if their student-faculty ratio reaches 30:1,³² about the same ratio found in many public schools. Keep in mind, too, under ABA standards adjunct professors with practice experience (like me) count as only one-fifth of an instructor (maybe they're onto something here after all).³³

Might it be worth pausing to ask whether commands like these contribute enough to learning to justify the barriers to entry—and the limits on access to justice—they impose? A legal education can cost students \$200,000 today. That's on top of an equally swollen sum for an undergraduate degree—yet another ABA requirement.³⁴ In England, students are allowed to earn a law degree in three years as undergraduates or in one year of study after college, all of which must be followed by

28. THE FEDERALIST NO. 62, at 381 (James Madison) (Clinton Rossiter ed., 1961) ("It will be of little avail to the people, that the laws are made by men of their own choice if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow.").

29. See AM. BAR ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, 2013–2014, at 46, available at http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2013_2014_final_aba_standards_and_rules_of_procedure_for_approval_of_law_schools_body.pdf, [http://perma.cc/ET6G-HYEU].

30. See *id.* at 48.

31. See *id.* at 34–35.

32. See *id.* at 33.

33. See *id.* at 32.

34. See *id.* at 38.

extensive on-the-job training.³⁵ None of this is thought a threat to the rule of law there. One might wonder whether the sort of expensive and extensive homogeneity we demand is essential to the rule of law here.³⁶

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So far, we've briefly visited ironies where the law aims at one virtue and risks a corresponding vice. But it seems to me that maybe the law's most remarkable irony today comes from the opposite direction—a vice that hints at virtues in the rule of law.

These days our culture buzzes with cynicism about the law. So many see law as the work of robed hacks and shiny suited skills. Judges who rule by personal policy preferences. Lawyers who seek to dazzle them. On this view, the only rule of law is the will to power. Maybe in a dark moment you've fallen prey to doubts along these lines.

But I wonder whether the law's greatest irony might just be the hope obscured by the cynic's shadow. I wonder whether cynicism about the law flourishes so freely only because—for all its blemishes—the rule of law in our society is so successful that sometimes it's hard to see.

I wonder if we're like David Foster Wallace's fish: surrounded by water, yet somehow unable to appreciate its existence.³⁷ Or like Chesterton's man on the street who is asked out of the blue why he prefers civilization to barbarism and has a hard time stammering out a reply because the "very multiplicity of proof which [should] make reply overwhelming makes [it] impossible."³⁸

Now the cynicism surrounding law is easy enough to see. When Supreme Court Justices try to defend law as a professional discipline, when they explain their jobs as interpreting

35. See Adam Beach, *How to qualify as a lawyer in England and Wales*, INT'L BAR ASS'N, http://www.ibanet.org/PPID/Constituent/Student_Committee/qualify_lawyer_EnglandWales.aspx, [<http://perma.cc/E7F2-5UV7>] (last visited Mar. 18, 2014).

36. As the American Bar Association has recently started to do, at least to some degree. See TASK FORCE ON THE FUTURE OF LEGAL EDUCATION, AM. BAR ASS'N, DRAFT REPORT AND RECOMMENDATIONS 22–23 (2013), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/taskforcecomments/task_force_on_legaleducation_draft_report_september2013.authcheckdam.pdf, [<http://perma.cc/HE9X-S574>].

37. See DAVID FOSTER WALLACE, THIS IS WATER: SOME THOUGHTS, DELIVERED ON A SIGNIFICANT OCCASION, ABOUT LIVING A COMPASSIONATE LIFE 3–8 (2009).

38. GILBERT K. CHESTERTON, ORTHODOXY 152–53 (1908).

legal texts, when they echo the traditional *Federalist 78* conception of judging, they are mocked, often viciously. Leading media voices call them “deceiving.”³⁹ Warn that behind their “benign beige facade[s]” lurk “crimson partisan[s].”⁴⁰ Even law professors venture to the microphones to express “complete[] disgust[]” and accuse them of “perjur[y]” and “intellectual vacuity.”⁴¹ Actual quotes all.

If this bleak picture I’ve sketched were an accurate one, if I believed judges and lawyers regularly acted as shills and hacks, I’d hang up the robe and hand in my license. But even accounting for my native optimism, I just don’t think that’s what a life in the law is about. At heart, I doubt you do either.

As a working lawyer, I saw time and again that creativity, intelligence, and hard work applied to a legal problem could make a profound difference in a client’s life. I saw judges and juries that, while human and imperfect, strove to hear earnestly and decide impartially. I never felt my arguments to courts were political ones, but ones based on rules of procedure and evidence, precedent, and standard interpretive techniques. The prosaic but vital stuff of a life in the law.

As a judge now, I see colleagues striving every day to enforce the Constitution, the statutes passed by Congress, the precedents that bind us, the contracts adopted by the parties. Sometimes with quiet misgivings about the wisdom of the regulation at issue. Sometimes with concern about their complicity in enforcing a doubtful statute. But enforcing the law all the same, believers that ours is an essentially just legal order.

This is not to suggest that we lawyers and judges bear no blame for our age’s cynicism about the law. Take our self-adopted model rules of professional conduct. They explain that the duty of diligence we lawyers owe our clients doesn’t “require the use of offensive tactics or preclude . . . treating [people] with courtesy and respect.”⁴² Now, how’s that for a profession-

39. Maureen Dowd, *Men in Black*, N.Y. TIMES, April 3, 2012, <http://www.nytimes.com/2012/04/04/opinion/dowd-men-in-black.html>, [<http://perma.cc/9NXA-ZLV6>].

40. *Id.*

41. Louis Michael Seidman & Wendy Long, The Sotomayor Nomination, Part II (July 13, 2009), available at <http://www.fed-soc.org/debates/dbtid.30/default.asp>, [<http://perma.cc/9ZSG-HQFD>].

42. See MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. 1 (1983) (emphasis added).

al promise? A sort of ethical commandment that, as a lawyer, you should do unto others before they can do unto you. No doubt we have reason to look hard in the mirror when our profession's reflected image in popular culture is no longer Atticus Finch but Saul Goodman.

Of course, too, we make our share of mistakes. As my daughters remind me, donning a robe doesn't make me any smarter. But the robe does mean something—and not just that I can hide coffee stains on my shirt. It serves as a reminder of what's expected of us—what Burke called the “cold neutrality of an impartial judge.”⁴³ It serves, too, as a reminder of the relatively modest station we're meant to occupy in a democratic society. In other places, judges wear scarlet and ermine. Here, we're told to buy our own plain black robes—and I can attest the standard choir outfit at the local uniform supply store is a good deal. Ours is a judiciary of honest black polyester.

In defending law as a coherent discipline, I don't mean to suggest that every hard legal question has a single right answer. That some Platonic form or Absolute Truth exists for every knotty statute or roiled regulation—if only you possess the superhuman power to discern it. I don't know about you, but I haven't met many judges who resemble Hercules. Well, maybe my old boss Byron White. But how many of us will lead the NFL in rushing?⁴⁴ When a lawyer claims Absolute Metaphysical Certainty about the meaning of some chain of ungrammatical prepositional phrases tacked onto the end of a run-on sentence buried in some sprawling statutory subsection, I start worrying. For questions like these, my gospel is skepticism—though I try not to make a dogma out of it.⁴⁵

But to admit that disagreements do and will always exist over hard and fine questions of law doesn't mean those disagreements are the products of personal will or politics rather

43. EDMUND BURKE, *Preface to the Address of M. Brissot to His Constituents*, in 8 THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 381, 381 (London, F. & C. Rivington 1801).

44. EDWARD J. RIELLY, *Byron Raymond White (Whizzer) (1917-2002)*, in FOOTBALL: AN ENCYCLOPEDIA OF POPULAR CULTURE 389, 390 (2009) (Byron White was the NFL's rushing leader twice—as a Pittsburgh Pirate in 1938 and then as a Detroit Lion in 1940—though his football career was interrupted by Rhodes Scholarship studies at Oxford and cut short for Navy service during World War II).

45. See Lewis F. Powell, Jr., *Foreword* to GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* xii (1994) (quoting *Learned Hand*).

than the products of diligent and honest efforts by all involved to make sense of the legal materials at hand.

The first case I wrote for the Tenth Circuit to reach the Supreme Court involved a close question of statutory interpretation, and the Court split 5-4.⁴⁶ Justice Breyer wrote to affirm. He was joined by Justices Thomas, Ginsburg, Alito, and Sotomayor. Chief Justice Roberts dissented, with Justices Stevens, Scalia, and Kennedy. Now that's a lineup the public doesn't often hear about, but it's the sort of thing that happens—quietly—day in and day out throughout our country.

As you know but the legal cynic overlooks, the vast majority of disputes coming to our courts are ones in which *all* judges do agree on the outcome. The intense focus on the few cases where we disagree suffers from a serious selection effect problem. Over ninety percent of the decisions issued by my court are unanimous; that's pretty typical of the federal appellate courts.⁴⁷ Forty percent of the Supreme Court's cases are unanimous too, even though that court faces the toughest assignments and nine, not just three, judges have to vote in every dispute.⁴⁸ In fact, the Supreme Court's rate of dissent has been largely stable for the last seventy years—this despite the fact that back in 1945, eight of nine justices had been appointed by a single President and today's sitting justices were appointed by five different Presidents.⁴⁹

Even in those few cases where we *do* disagree, the cynic also fails to appreciate the nature of our disagreements. We lawyers and judges may dispute which tools of legal analysis are most appropriate in ascertaining a statute's meaning. We may disagree over the order of priority we should assign to these competing tools and their consonance with the Constitution. We may even disagree over the results our agreed tools yield in a particular case. These disagreements sometimes break along

46. See *Dolan v. United States*, 130 S. Ct. 2533, 2533 (2010).

47. See Christopher A. Cotropia, *Determining Uniformity Within the Federal Circuit by Measuring Dissent and En Banc Review*, 43 LOY. L.A. L. REV. 801, 815 (2010).

48. PAMELA C. CORLEY ET AL., *THE PUZZLE OF UNANIMITY: CONSENSUS ON THE UNITED STATES SUPREME COURT* 96 (2013).

49. Frank H. Easterbrook, *Agreement Among the Justices: An Empirical Note*, 1984 S. CT. REV. 389, 392-93; Kurt G. Kastorf, *A more divisive, political U.S. Supreme Court? Think again*, CHRISTIAN SCI. MONITOR, June 25, 2012, <http://www.csmonitor.com/Commentary/Opinion/2012/0625/A-more-divisive-political-US-Supreme-Court-Think-again>, [<http://perma.cc/9TFU-PE8M>].

familiar lines, but sometimes not. Consider, for example, the debate between Justices Scalia and Ginsburg, on the one hand, and Justices Thomas and Breyer, on the other hand, over the role the rule of lenity should play in criminal cases,⁵⁰ or similar disagreements between Justices Scalia and Thomas about the degree of deference due precedent.⁵¹ Debates like these are hugely consequential. But they are disputes of legal judgment, not disputes about politics or personal will.

In the hardest cases, as well, many constraints narrow the realm of admissible dispute: closed factual records; an adversarial process where the parties usually determine the issues for the court's decision; standards of review that command deference to finders of fact; the rules requiring appellate judges to operate on collegiate panels where we listen to and learn from one another; the discipline of writing reason-giving opinions; and the possibility of further review. To be sure, these constraints sometimes point in different directions. But that shouldn't obscure how they serve to limit the latitude available to all judges, even the cynic's imagined judge who would like nothing more than to impose his policy preferences on everyone else. And on top of all that, what today appears a hard case tomorrow becomes an easy one—an accretion to precedent and a new constraint on the range of legally available options in future cases.

50. Compare *Smith v. United States*, 508 U.S. 223, 246 (1993) (Scalia, J., dissenting) (suggesting the rule of lenity applies because the defendant's reading of the statutory language is "eminently debatable"), and *Muscarello v. United States*, 524 U.S. 125, 148 (1998) (Ginsburg, J., dissenting) (invoking the rule of lenity because of ambiguity in the criminal statute), with *United States v. R.L.C.*, 503 U.S. 291, 311 (1992) (Thomas, J., concurring in part and concurring in the judgment) ("[T]he rule [of lenity] is not triggered merely because a statute appears textually ambiguous *on its face*."), and *Muscarello*, 524 U.S. at 138 (Breyer, J.) ("The simple existence of some statutory ambiguity . . . is not sufficient to warrant application of [the] rule [of lenity], for most statutes are ambiguous to some degree.").

51. Compare, e.g., *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010) (Scalia, J., concurring) ("Despite my misgivings about Substantive Due Process as an original matter, I have acquiesced in the Court's incorporation of certain guarantees in the Bill of Rights 'because it is both long established and narrowly limited.'" (quoting *Albright v. Oliver*, 510 U.S. 266, 275 (1994) (Scalia, J., concurring))), with *id.* at 3062–63 (Thomas, J., concurring in part and concurring in the judgment) ("I acknowledge the volume of precedents that have been built upon the substantive due process framework, and I further acknowledge the importance of *stare decisis* to the stability of our Nation's legal system. But *stare decisis* is only an 'adjunct' of our duty as judges to decide by our best lights what the Constitution means." (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 963 (1992) (Rehnquist, C.J., concurring in judgment in part and dissenting in part))).

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Now maybe I exaggerate the cynicism that seems to pervade today. Or maybe the cynicism I see is real but endemic to every place and time—and it seems something fresh only because this is our place and time. After all, lawyers and judges have never been much loved. Shakespeare wrote the history of King Henry VI in three parts. In all those three plays there is only a single joke. Jack Cade and his followers come to London intent on rebellion, and offer as their first rallying cry—“let’s kill *all* the lawyers.”⁵² As, in fact, they pretty much did.⁵³

But maybe, just maybe, cynicism about the rule of law—whatever the place and time—is its greatest irony. Maybe the cynicism is so apparent in our society only because the rule of law here—for all its problems—is so successful. After all, who can make so much fun of the law without being very sure the law makes it safe to do so? Don’t our friends, neighbors, and we ourselves expect and demand—not just hope for—justice based on the rule of law?

Our country today shoulders an enormous burden as the most powerful nation on Earth and the most obvious example of a people struggling to govern itself under the rule of law. Our mistakes and missteps are heralded by those who do not wish us well, and noticed even by those who do. Neither should we try to shuffle our problems under the rug: we have too many to ignore. The fact is, the law can be a messy, human business, a disappointment to those seeking Truth in some Absolute sense and expecting more of the Divine or Heroic from those of us wearing the robes. And it is easy enough to spot examples where the law’s ironies are truly bitter.

But it seems to me we shouldn’t dwell so much on the bitter that we never savor the sweet. It is, after all, the law that permits us to resolve our disputes without resort to violence, to organize our affairs with some measure of confidence. It is through the careful application of the law’s existing premises that we are able to generate new solutions to changing social

52. WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY THE SIXTH* act 4, sc. 2 (emphasis added).

53. For an account of the rebellion and its victims, see ALEXANDER L. KAUFMAN, *THE HISTORICAL LITERATURE OF THE JACK CADE REBELLION 199–202* (2009).

coordination problems as they emerge. And, when done well, the law permits us to achieve all of this in a deliberative and transparent way.

Here, then, is the irony I'd like to leave you with. If sometimes the cynic in all of us fails to see our Nation's successes when it comes to the rule of law maybe it's because we are like David Foster Wallace's fish that's oblivious to the life-giving water in which it swims. Maybe we overlook our Nation's success in living under the rule of law only because, for all our faults, that success is so obvious it's sometimes hard to see.