

JUDGING TITLES

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Editor's Note: This is the first installment in JLPP: Per Curiam's series titled *Obiter Dicta*, which will feature speeches and other works by judges from across the country.

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The text below is modified slightly, for clarity and non-concision, from an address delivered at the investiture of Judge Benjamin Beaton on May 20, 2022, at The Palace Theatre in Louisville, Kentucky. Consistent with Judge Beaton's advice to members of the bar, this abridgement omits a platitudinous litany of humble acknowledgements familiar to the genres of judicial ceremony and academic legal writing alike. In their stead, this "scholarly" republication adds an equally familiar (and no less unwelcome) profusion of footnotes, several of which bear a tenuous relationship to the law. A year into a lifetime of answering to "Your Honor," Judge Beaton urged the assembled lawyers to resist that ungrammatical and un-American honorific: at least in his courtroom, the title is factually dubious and legally misconceived. Article III invests judicial power—to interpret laws, decide disputes, and explain rulings—that rests on authority external to and independent of any status or nobility. Emphasizing the role of "Judge," rather than the status of "Your Honor," better serves jurists, litigants, and the rule of law.

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The lawyers here today are the ones I'd like to address most directly, because my appointment and oath affect you and your clients most directly. Our conversations are usually clipped and formal, recorded by the court reporter and measured in 6-minute billing increments. Today I have a little longer to reiterate and explain an idiosyncratic request some of you heard during our early hearings: "Good morning, Your Honor," you all would politely say. "That's correct, Your Honor." "Good point, Your Honor. . . ." Finally I'd interject: "Counsel, enough with this 'Your Honor' stuff. Please just call me Judge."

Now please don't worry about a rap on the knuckles for using this most customary of phrases in Louisville's Courtroom 2: as a Burkean, I understand that old habits can and should die hard.¹ Rest assured you aren't at risk of sanctions. Though let me insert a broad disclaimer that I'm not

* District Judge, United States District Court for the Western District of Kentucky. Many thanks are due to the clerks and interns who, in their role as loyal critics, helped develop the ideas set out in this speech and—far more important—helped deploy them in judicial decisions.

¹ See EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 52 (Frank M. Turner ed., 2003) (1790) ("[I]t is with infinite caution that any man ought to venture upon pulling down an edifice which has answered in any tolerable degree for ages the common purposes of society, or on building it up again without having models and patterns of approved utility before his eyes.").

announcing district-wide policy.² At least in my courtroom, just as not every wrong (and not even every right!) has a judicial remedy,³ not every violation carries a penalty.

And that's a good thing, because taking a public position against the term Your Honor exposes me to a charge of inconsistency. A few years ago Judge Amul Thapar and I wrote an article that included a rhetorical question: "Why does it matter whether law clerks call their boss 'Judge,' 'Your Honor,' 'Amul,' or 'Hey you'?"³ We were responding to the famous and prolific Judge Richard Posner, who devoted half of a book about the federal judiciary to issues that struck us as trivialities.⁴ "Who cares about a judge's choice of titles," I thought at the time, when the rest of his book says judges may circumvent text and precedent "by hook or by crook" to achieve a result the judge prefers.⁵

But now, viewing this question of titles from the other side of the bar, I wonder if we missed a deeper point (though probably not the one Judge Posner was driving at). Because the difference between Your Honor, on the one hand, and Judge, on the other, does strike me as potentially significant.

Now I readily concede that my position on honorifics is an outlier. I learned this the hard way as a young lawyer at Sidley Austin. During an utterly ordinary scheduling teleconference for a case in the Western District of Virginia, I committed the cardinal sin of addressing the judge as Sir rather than Your Honor. Gordon Todd jumped out of his chair and slammed the mute button. He'd seen lawyers twice as good as me dressed down for half that offense. Just a rookie mistake, he probably thought.

But no, my guerrilla campaign against judicial honorifics dates back much further. During my clerkship, I bucked hard against the convention of referring to members of the Supreme Court as Justice rather than judge. It was all so obsequious. "Good morning, Justice." "That's an excellent point, Justice, and well put too!" "Oh, did you hear? My Justice said the wittiest and most profound thing!"

Maybe this manner of speech came easy to my co-clerks who studied under dons and socialized at final and eating clubs.⁶ But it sounded like fingernails on a public-school chalkboard to this kid from Paducah.

² According to some, "[t]he custom is to use 'Your Honor' when speaking to a judge in the courtroom, and the less formal 'Judge' only *outside* the courtroom." Catherine Thérèse Clarke, *Missed Manners in Courtroom Decorum*, 50 MD. L. REV. 945, 994 (1991). But customarily does not always mean correctly, as even Burke would admit. His theory of reform, as described by J.G.A. Pocock, rested on common-law notions that "custom was constantly being subjected to the test of experience, so that if immemorial it was, equally, always up to date." *Burke and the Ancient Constitution—a Problem in the History of Ideas*, in *POLITICS, LANGUAGE AND TIME: ESSAYS ON POLITICAL THOUGHT AND HISTORY* 202, 231 (1971).

³ *Contra Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803) (*not* granting a remedy to Mr. Marbury based on lack of jurisdiction).

⁴ Amul R. Thapar & Benjamin Beaton, *The Pragmatism of Interpretation: A Review of Richard A. Posner, The Federal Judiciary*, 116 MICH. L. REV. 819, 821 (2018).

⁵ Richard A. Posner, *The Federal Judiciary: Strengths and Weaknesses* (2017).

⁶ *Id.* at 80.

⁶ In recent years, most Supreme Court clerks come from the Yale and Harvard Law Schools. See Adam Feldman, *The New Clerks in Town*, EMPIRICALSCOTUS (Apr. 11, 2022), <https://empiricalscotus.com/2022/04/11/the-new-clerks-in-town/> [<https://perma.cc/TG6Y-Z6AX>]. And a great many Yale and Harvard law students come from . . . Yale and Harvard Colleges. See Bulletin of Yale University, Series 114 No. 10 at 115 (August 10, 2018), <https://bulletin.yale.edu/sites/default/files/yale-law-school-2018-2019.pdf> [<https://perma.cc/LSB9-TA8W>].

Even worse than Justice, I've now come to think, is the title of Your Honor. How jarring those words are to a lawyer-turned-judge when he starts entering the courthouse through the back door! On December 4, 2020, Andrea and I arrived—dragging my commission and a Bible and our four children—running late for my own swearing-in. The security officers were offering their warmest welcome despite my harried state. “Oh don't worry about that metal detector, Your Honor.” “Nice to meet you, Your Honor.” About the fifth or sixth Your Honor stuck in my craw. “How the heck do you how ‘honorably’ I've been behaving?”, I asked the chattiest guard. “All you know is that I'm a *judge*, so that'll do just fine.”

As a descriptive matter, of course, “Your Honor” is aspirational at best. As a matter of basic English usage, we'll generously say it's non-standard, if not ungrammatical. Why are you addressing only my honor (whatever abstract portion that might represent) and not the man in full?

For goodness sakes, this country fought a war and wrote a Constitution to blot out titles of nobility. It's right there in Article 1, Section 9, Clause 8: “No Title of Nobility shall be granted by the United States.”⁷

Titles, Ben Franklin warned, posed a risk to our new republic. They could render their holders “proud, disdain[ing] to be employed in useful arts, and thence falling into . . . servility and wretchedness.”⁸ That may go a bit too far: I don't see any judge here who disdains the useful arts.⁹

⁷ The question whether “Your Honor” amounts to a title of nobility has generated at least a little litigation. One ambitious and apparently like-minded pro se plaintiff, undeterred by notions of judicial immunity, sought discovery(!) regarding U.S. district judges who “allow[ed] themselves to be referred to as ‘your, honor,’” thereby “tak[ing] a title of nobility,” such that their “citizenship is void; they are foreign powers, [with] no standing in law [whose orders] are void from the beginning and confer no power to enforce.” *Pendleton v. United States*, No. 396-cr-1, 2008 WL 11417642, at *1 (N.D. W. Va. June 24, 2008) (alteration in original). Alas, the court rejected this contention based on its lack of “coherent factual allegations.” *Id.* Whether a litigant armed with the latest corpora or Founding Era historical research would meet the same fate, however, apparently remains an open question. At least according to Garner, the “nobility” includes “[p]ersons of social or political preeminence, usu. derived by inheritance or from the sovereign.” *Nobility*, BLACK'S LAW DICTIONARY (11th ed. 2019). And during Blackstone's time, titles of nobility in England “consist[ed] of dukes, marquises, earls, viscounts, and barons.” 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 479 (Herbert Broom & Edward A. Hadley eds., 1875) (1765).

⁸ Letter from Benjamin Franklin to Sarah Bache [Franklin's daughter] (Jan. 26, 1784), in 10 THE WORKS OF BENJAMIN FRANKLIN 275 (John Bigelow ed., 1904).

⁹ Supreme Court Justices, however, arguably *should* devote more time to their useful art. Since the Justices stopped riding circuit in 1911, see Judicial Code of 1911, Pub. L. No. 61-475, 36 Stat. 1087 (abolishing the circuit courts and fully transferring their jurisdiction to district and appellate courts), they have embraced the flexibility their discretionary docket affords. The Court has granted certiorari review of fewer and fewer cases over time. In 1890, the Court “disposed” of 610 cases. See Felix Frankfurter & James M. Landis, *The Business of the Supreme Court at October Term, 1930*, 45 HARV. L. REV. 271, 307 (1931). “[T]he Roberts Court,” by contrast, has recently “average[d] less than 70 signed opinions per year.” Meg Penrose, *Overwriting and Under-Deciding: Addressing the Roberts Court's Shrinking Docket*, 72 SMU L. REV. F. 8, 8–9 (2019). Has this contributed to an idle-hands problem? Justice Breyer, for his part, recently observed that too many dissenting opinions clog the Supreme Court's docket these days. Christina Pazzanese, *Breyer Offers Advice on Being on Losing Side*, HARV. L. SCHOOL (Sept. 12, 2022), <https://hls.harvard.edu/today/breyer-offers-advice-on-being-on-losing-side/> [<https://perma.cc/G2WC-T3FN>].

Could more decided cases and correspondingly fewer pages of separate opinions aid the Court's efficacy? At least some on the lower courts suspect it might. And if the Justices can't find enough cert-worthy petitions, perhaps they should revisit the lower-court caseload they abandoned in the 1910s. Riding (Zooming?) circuit once again “would require [judges] to apply their tests and precedents in the mine-run of litigated disputes, rather than in their more curated appellate dockets. This, more than anything, could lead judges to prefer bright-line rules to complex opinions, fractured decisions, and multifactor tests, which are time-consuming and costly to litigants and lower-court judges.” Thapar & Beaton, *supra* note 3, at 823.

But I do think many of you would agree that a daily dose of honorifics can't help but affect any judge,¹⁰ and not necessarily in a good way.¹¹ In fact, one old friend here today specifically volunteered to monitor me for signs of early-onset black-robitis. Although I worry about his reliability: since then he's decided he wants to become a judge, too.

I would confess to him that this emphasis on words and titles has provided some solace for a husband who's always felt a bit self-conscious about the disparity between his work and that of his wife. During a Halloween party years ago at my old law firm, our daughter Kate—then just two or three—dressed up as Lulu the Ladybug. Fully sugared up after indoor trick-or-treating, she clambered into my office chair and called for her parents' attention. "Look, I'm Daddy. I do emails!" Then she twisted the knife: "Mommy takes care of sick babies' hearts!" As the Romans probably said: *In saccharo veritas*. According to many pediatricians, children are the best antidote for black-robitis.

But we do need *some* way to refer to the people whose job it is to decide disputes, partly because the name itself carries legal significance. In the 1950s, a law journal asked the legendary Henry Friendly, for whom my one-time boss Judge Randolph later clerked, what changed most during the first year on the Second Circuit. He identified "the enormous change in the effect of the simple act of signing [the judge's] name. He does something he has done thousands of times without any great consequences attaching to it; then suddenly . . . 'the whole power of the state will be put forth, if necessary,' to carry out his will."¹² Over time that's bound to leave an impression on a person, too.

So if we're going to use titles and names to carry out these official duties, then "Judge" seems like the least risky option. It has historical pedigree and linguistic precision on its side: While Your Honor is a term of nobility that English judges apparently borrowed from French hereditary aristocrats,¹³ "judge" is a title that we find in the Old Testament, which used the term to describe

¹⁰ It might also be bad for the general public. No less an authority than Joseph Story, referring to the Titles of Nobility Clause, wrote that "[d]istinctions between citizens, in regard to rank, would soon lay the foundation of odious claims and privileges, and silently subvert the spirit of independence and personal dignity, which are so often proclaimed to be the best security of a republican government." 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 215 (1833).

¹¹ *But see* Edward J. Devitt, *Your Honor*, 55 *Judicature* 144, 144 (1971) ("Being called 'Your Honor' day in and day out is a constant reminder, not alone of the prestige of the office, but more importantly of the tremendous power and heavy responsibility and absolute independence of the federal judge."). This of course begs the question whether Lord Acton was right about tremendous power and absolute independence.

¹² Henry J. Friendly, *Reactions of a Lawyer—Newly Become Judge*, 71 *YALE L.J.* 218, 218 (1961) (quoting OLIVER WENDELL HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167 (1920)).

¹³ According to the Oxford English Dictionary, the word "honour" was partly borrowed from the French "honneur," which denoted a "mark of esteem," as well as "feudal possession" and "dignity." *See honour* | *honor*, OXFORD ENGLISH DICTIONARY ONLINE, <https://www.oed.com/view/Entry/88227>, (last accessed Sept. 28, 2022). English use of the phrase "Your Honour" dates back at least to 1551. *See id.* The phrase "Your Honour" is defined as both "(a) a deferential form of address for any person of higher rank or status" and "(b) a title of respect or form of address for a person holding a particular office, esp. that of court judge." *Id.* English judges were referred to as "Your Honour" at the time of the revolution, and the same term was used to referred to colonial judges at least as far back as 1735. *See* NEIL POSTMAN, *BUILDING A BRIDGE TO THE 18TH CENTURY: HOW THE PAST CAN IMPROVE OUR FUTURE* 3–4 (Vintage Books 1st ed. 1999).

the leaders who were *not* kings. The role rotated and was not inheritable.¹⁴ And although I'm no Hebraic scholar, my understanding is that the ancient writings used the term judge more as a verb rather than a noun, much less a title or honorific. As in: "Tola the son of Puah, the son of Dodo, a man of Issachar . . . judged Israel twenty-three years."¹⁵

And that distinction—between a professional duty and a personal rank—is the one I'm trying to highlight. Judges aren't the law, despite whatever Yale might be teaching these days.¹⁶ And what judges say and write doesn't supplant the actual law as written down in the Constitution and code books. What judges say only really matters if it's necessary to resolve an ongoing dispute.¹⁷ So maybe the country would be better off if the legal profession devoted less attention to the *status* of judges and more attention to the *act* of judging.

Because thinking about the responsibility of judging, rather than the status of Your Honor, reflects an important and different cast of mind.¹⁸ Some Americans have grown accustomed to hearing and saying that judges "make" law.¹⁹ But that's almost never right. Let's choose our words carefully: To judge or adjudicate a dispute, federal judges apply law made by *someone else*. And we do so through three main steps: we interpret, we decide, and we explain.²⁰

First, interpretation. If a judge is faithfully interpreting law enacted by others, that judge is probably not making law.

¹⁴ Indeed, when Gideon's son Abimelech conspired to inherit his father's role as judge, the Tanakh substituted the Hebrew word for "ruling" or "reigning" in lieu of "judging." See *Judges* 9:22. The cautionary tale of Abimelech is almost literally too on the nose: his unobtrusive name meant "my dad is king," he died on the battlefield after a brave woman in a tower under siege dropped a millstone onto his head, and his misogynistic last words ordered his servant to run him through so no one could say he died at the hands of a woman. After all that, the Hebrews returned to *kritarchy*: rule by judges. *Id.* at 10:1–2.

¹⁵ *Judges* 10:1–2 (New King James Version).

¹⁶ Compare [YLS Prof.] Stephen L. Carter, *Kavanaugh, Nixon and the Death of Rational Discourse*, BLOOMBERG (July 27, 2018, 10:00 AM) <https://www.bloomberg.com/opinion/articles/2018-07-27/kavanaugh-nixon-and-the-death-of-rational-discourse?leadSource=verify%20wall> [<https://perma.cc/ZTC3-PDPG>] ("There must be some doubt that the constitutional structure is enforced by an opinion that says no more than: 'The President cannot assert that he is the law, because we are the law.'"), with Aaron Sibarium (@aaronSibarium), Twitter (May 3, 2022, 8:39 PM), <https://twitter.com/aaronSibarium/status/1521650701092458498> [<https://perma.cc/7B7F-6V9B>] (documenting Yale Law students chalking "WE ARE THE LAW" on school grounds).

¹⁷ As Justice Scalia explained in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992), although "[v]indicating the public interest . . . is the function of Congress and the Chief Executive," "[t]he province of the court . . . is, solely, to decide on the rights of individuals." (quoting *Marbury*, 5 U.S. (1 Cranch) at 170). See also *PDK Labs., Inc. v. Drug Enforcement Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (describing "the cardinal principle of judicial restraint" that if it is not necessary to decide more, it is necessary not to decide more") (Roberts, J., concurring in part); *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1255 (11th Cir. 2020) (Pryor, C.J.) (judges must avoid the writ-of-erasure fallacy that we can or may "erase a duly enacted law from the statute books") (quotation omitted).

¹⁸ Judge Devitt, *supra* note 11, at 144, again supplies the counterpoint: "The appellation 'Your Honor' is the trigger which commands our conscience to proper personal conduct and to the faithful performance of our duties, and it is 'Your Honor' which encourages judicial patience, inspires industry, nurtures prudence and counsels us with the great virtue of common sense." Woe to the advocate who failed to pull that all-important trigger in Judge Devitt's courtroom!

¹⁹ See, e.g., David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 935 ("Even sudden changes [to the Constitution] are possible . . . [T]he common law approach, unlike some other methods, allows judges to make them."); Strauss, *Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 2, 2–5 (2015); Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001).

²⁰ "A judge ought, moreover, not only to decide correctly, but to give correct reasons for his decision, so that, the grounds on which it rested being understood, the judgment itself may afterwards be confidently applied." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 6–7 (Herbert Broom & Edward A. Hadley eds., 1875).

Consider the difference between two requests that I've fielded in this new job. "Your Honor, just use your *inherent* authority to issue a worldwide injunction against the United States." This is a bold request indeed! (In chambers we call them hold-my-beer motions.)²¹ Are the lawyers aware that the Senate and President just a few months ago made me a judge over only one half of one state? And now they want me to tell the entire federal government what it can't do anywhere in the world? You'd better have a pretty good explanation where such far-flung authority comes from.²² But some lawyers (again, surely none in this room) probably are just thinking about judicial power, not legal authority: why not take a shot with this judge?

Contrast that with a second request that called for interpretation, not simply power: "Judge, please issue a nationwide injunction. I know it seems a little crazy, but Congress actually enacted a law entitling my client to seize property, without a hearing, from unknown people, who probably won't ever receive a hearing." That is also kinda bonkers—but if the law says what the lawyers claims, then why would it be any more appropriate or restrained for me to decline that injunction rather than to grant the relief the law requires? This would mean faithfully executing Congress' command, wild though it may be.²³

Viewed this way, the act of interpretation focuses on a source of authority outside the judge, not the mere status of the judge and whatever moral philosophy or utilitarian calculus she happens to have. Flipping the default from "Why not?" to "Says who?" is one of the most important ways to refocus on the content of the law rather than the identity of the judge.

Doing so can avoid problems big and small. To take an extreme example, think of the infamous *Dred Scott*²⁴ case, in which the pre-Civil War Supreme Court grasped to *protect* the institution of slavery by "engraft[ing] on [the Constitutional text] a substantive exception not found in it," as Justice Benjamin Curtis explained in dissent.²⁵ The majority's decision to ignore the text in favor of "reasons purely political, render[ed] its judicial interpretation impossible."²⁶

²¹ Perhaps these requests are not so surprising anymore, given the increasing willingness of federal judges to issue nationwide injunctions. See Z. Payvand Ahdout, *Enforcement Lawmaking and Judicial Review*, 135 HARV. L. REV. 937, 991 (2022) ("[P]arties are asking and courts are issuing these injunctions with such frequency that [statistics] quickly become out of date.").

²² Compare *J.P. Morgan Sec. LLC v. Kittell*, 554 F. Supp. 3d 895, 896 (W.D. Ky. 2021) ("No matter how convenient and agreeable . . . federal courts may not dispense unsupported injunctions on the parties' request; these orders require articulated judicial findings of law and fact."), with *Lexington Ins. Co. v. Ambassador Grp. LLC*, 581 F. Supp. 3d 863, 870 (W.D. Ky. 2021) (entering "consent" order "[d]espite the uneasy relationship between consent decrees and federal courts' limited Article III jurisdiction," because "the law of this circuit and the Lanham Act authorize and—on this Court's reading, at least—effectively compel approval of the parties' proposed resolution").

²³ See generally *Merch Traffic, LLC v. Does*, --- F. Supp. 3d. ---, No. 3:21-cv-576, 2022 WL 3154202 at *1 (W.D. Ky. Aug. 8, 2022) ("How is any of this lawful?").

²⁴ *Dred Scott v. Sandford*, 60 U.S. 393 (1857). Dred Scott sued for his freedom based on his previous travel from Missouri, a slave state, to the free states of Illinois and Wisconsin, where Scott resided for several years. *Id.* at 431. The Supreme Court, however, held that it lacked subject-matter jurisdiction over the case because Scott was not a "citizen" for purposes of diversity jurisdiction under Article III. *Id.* at 406. The Court went on to hold that Congress lacked constitutional authority to outlaw slavery in U.S. territories, because doing so would deprive citizens, such as Sandford, of their "property" without due process of law. *Id.* at 450–52.

²⁵ *Scott v. Sandford*, 60 U.S. at 620 (Curtis, J., dissenting). See William H. Pryor Jr., *Against Living Common Goodism*, 23 FEDERALIST SOC'Y REV. 24, 39–40 (2022) ("Justice Curtis . . . repudiated the approach that would allow judges to read unmentioned exceptions into unambiguous texts.").

²⁶ *Id.*

“Political reasons,” he continued, “have not the requisite certainty to afford rules of judicial interpretation. They are different in different men. They are different in the same men at different times. And when . . . the fixed rules which govern the interpretation of laws [are] abandoned . . . we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.”²⁷

Now that’s chilling stuff that most of us, thank God, will never confront.

But the importance of constrained interpretation comes up all the time in more mundane ways, too. Take the oft-mocked Federal Rules of Civil Procedure. Are they riveting reading? No. Do they tell me what to do? Usually.²⁸ Do they and other laws, given their original meaning, as Henry Monaghan of Columbia said, at least make clear what *not* to do? Almost always. And that saves me, and you lawyers, and even your clients in the real world, from many errors. We can all read those same words on the page, and that shared act of interpretation reduces our areas of confusion and disagreement.²⁹ Compared to guessing the mindset of “Your Honor,” interpreting legal texts makes the legal process far more predictable and egalitarian.³⁰

The second part of the judicial task is deciding individual cases. Not positing broad rules like a legislator, or perhaps a French aristocrat. To me this is where the oath I just took has its real teeth: “to administer justice without respect to persons,” another odd and wonderful old phrase.³¹

Notice how the oath describes the judge’s status relative to the law: it refers to the *duties*, not the privileges or honor, of “a judge *under* the Constitution and the laws.”³² We swear an oath not to do right as we see it, as a philosopher-king might, but instead to faithfully follow the law as agents would serve their principals—in accordance with the interests and instructions of someone else, not the agents’ own self-interest.

²⁷ *Id.* at 620–21.

²⁸ See, e.g., Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1905 (1989) (“The Rules are youthful, alive, and well. We should exchange congratulations for the great success of the last half century, and joyously usher the spirit of the Rules into the next.”). The most enterprising of lawyers understand, moreover, that we are not helpless to address the Rules’ gaps or flaws when they become apparent. See, e.g., David Wenthold & Zachary Reynolds, Comment Regarding Rule 41, No. 22-CV-J (July 24, 2022), available at <https://www.uscourts.gov/rules-policies/archives/suggestions/david-wenthold-zachary-reynolds-22-cv-j> [https://perma.cc/Y3EL-FRY5].

²⁹ See William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609, 612–13 (1990) (explaining Hans-Georg Gadamer’s principle that “[w]hatever the method [of interpretation] that is purportedly being followed, interpretation is a search for a common understanding of truth by the text and interpreter, mediated by historical tradition”); Frank Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 552 n.2 (1983) (“Wittgenstein showed that no system of language can be self-contained and that meaning thus must depend in part on logical structure and understandings supplied by a community of readers . . . There is no ‘private language’; meaning lies in *shared* reactions to text.”).

³⁰ See Thapar & Beaton, *supra* note 3, at 827–28.

³¹ The oath reads in full: “I, ____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ____ under the Constitution and laws of the United States. So help me God.” 28 U.S.C. § 453.

³² *Id.* (emphasis added).

To be sure, disinterestedness is not intuitive for most humans, which is why the law's formal rules are so important. Formalism is another word that gets a bad rap.³³ But imposing written constraints on judicial decisionmaking minimizes the role of a particular judge, and thereby maximizes the rule of law.

This too is aspirational. Even Justice Scalia, textualism's foremost champion, conceded that "the main danger in judicial interpretation of the Constitution—or, for that matter, in judicial interpretation of any law—is that the judges will mistake their own predilections for the law. Avoiding this error is the hardest part of being a conscientious judge; perhaps no conscientious judge ever succeeds entirely."³⁴

But the fact that deciding is difficult is no cause for surrender. Rather, it's a reminder of how hard we judges should work at faithful decisionmaking.

Testing our intuitions against others' "helps," as Justice Ginsburg told me, "to think a little bit harder about these cases."³⁵

And as Judge Randolph used to say, channeling Judge Friendly, judges must decide based on a principle.³⁶ Hard thinking and principled reasoning can place a lot of strain on a judge.

But as Justice Thomas told my co-clerks and me once, in a line that called to mind my grandparents as I'm sure it did his: "Our jobs aren't hard work, they're just long work."³⁷ And in judging, as in parenting, as in life, it's not about you—much less your own honor. It's about deciding how you'll apply the words and lessons of those who came before you—to the questions that affect those around you.

Which brings us to the third and final aspect of judging: explaining our decisions and interpretations. My clerks certainly will attest that this aspect of the job consumes a disproportionate amount of my and their time. But that's time well spent if it reinforces the perception—and the reality—of a legal system driven by judges judging, rather than Your Honors choosing.

Now anyone who's read much legal writing understands that it can either illuminate, or it can obscure, the reasons for a decision. But we try our best to write in a way that clarifies not only what the decision is, but also why it is.

³³ From some quarters, anyway. Justice Scalia dissented with typical flair: "Long live formalism. It is what makes a government a government of laws and not of men." *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION* 25 (Amy Gutmann ed., 1997).

³⁴ Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989). That is not to excuse a judge's failure to meet the mark. See Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 13–19 (2006) (criticizing the notion that infidelity to the original meaning of the Constitution is sometimes justified).

³⁵ See Benjamin Beaton, *The Ginsburg Court? A Contrarian View*, 121 COLUM. L. REV. 589, 608 (2021).

³⁶ "[T]he decider," according to Judge Friendly, "should celebrate rather than emote about what he is deciding . . . he should endeavor to provide a principle that can be applied not simply to the parties before him but to all having similar problems [and] he should tell what he is doing in language that can be understood rather than indulge in flights of rhetoric." A. Raymond Randolph, *Administrative Law and the Legacy of Henry J. Friendly*, 74 N.Y.U. L. REV. 1, 5 (1999) (quoting Henry J. Friendly, *BENCHMARKS*, viii (1967)).

³⁷ Justice Thomas grew up on a farm in rural Georgia, where his grandfather "made sure" that Thomas was "too busy to suffer" from "the evil consequences of idleness." CLARENCE THOMAS, *MY GRANDFATHER'S SON* 26 (2007) ("[I]t was our lot in life to work 'from sun to sun.'").

How to persuade someone that a ruling is the product of reason and law, not just personal choice? To start, my opinions don't use the first-person singular. And I urge students and young lawyers that they shouldn't use the "I" word, either. With all due respect, counsel, the law doesn't much care what you think, or want, or feel.³⁸ Please show me the text or precedent—the external source of authority—that constrains my decisionmaking and compels the result you seek. As with your advocacy, so too with my orders. When I can explain the result in a way that makes clear why it flows from the law, not from me, that's when the opinion is ready.

Justice Barrett offered a great tip on how to get there: read the opinion from the perspective of a family member of the losing party.³⁹ Would the decision make sense? Would it identify a governing principle apart from the judge's own preferences? Would it treat the losing party as somehow less than honorable?

How can someone burdened by years of legal training, and insulated by countless honorifics, step into the shoes of a mother who wonders why her son is going to jail rather than coming home? One way to start is for judges to think less of their status relative to others, and more about their status relative to the law.

My judicial hero, John Marshall Harlan, was someone who knew how to view legal questions through eyes of others.⁴⁰ He reminded us that "all citizens"—even judges—"are equal before the law. The humblest is the peer of the most powerful."⁴¹

Not by coincidence, perhaps, this product of Kentucky and Centre College benefited from what Larry Matheny, Centre's John Marshall Harlan Professor of Government, later described as a "genuine [liberal arts] education."⁴² One that "teaches us to practice intellectual moderation," "warns us of the danger of impulsive judgement," and "instills in us the habit of agreeing or disagreeing in graduated terms."⁴³ An education that "counsels caution and calm second thoughts," and that "struggles for those old Aristotelian virtues of prudence and proportion."⁴⁴

Those sound like pretty good habits of judging. They require effort and discipline, not status or honor. And they ask a lot of us judges. But much is required of those to whom much is given.⁴⁵ And the judicial oath has given very much indeed. So I'll commit to you, who have also given me

³⁸ In response to an observation from then-clerk, now-Judge Randolph that a particular outcome was harsh, Judge Friendly drew a sharp line between law and everything else: "[D]on't tell me about harsh. You're here to give me your legal analysis, not your feelings." Randolph, *supra* note 36, at 5.

³⁹ See Nomination of Amy Coney Barrett to the U.S. Supreme Court: Questions for the Record 57 (Oct. 16, 2020) <https://www.judiciary.senate.gov/imo/media/doc/Barrett%20Responses%20to%20QFRs.pdf> [<https://perma.cc/EJG6-MAPH>].

⁴⁰ Justice Harlan, according to Frederick Douglass, was a "moral hero." *Civil Rights and Judge Harlan*, American Reformer, Nov. 1883. He was also a legal hero. A Kentucky native, the first Justice Harlan graduated from Centre College, a school with "an illustrious reputation." PETER S. CANELLOS, *THE GREAT DISSENTER* 70 (2021).

⁴¹ *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("Our constitution . . . neither knows nor tolerates classes among citizens."). Judge Constance Baker Motley, who helped litigate *Brown v. Board of Education* and went on to become our nation's first black female federal judge, described "a 'bible' to which" Thurgood Marshall "must have turned during his most depressed episodes"—"the first Mr. Justice Harlan's dissent in *Plessy v. Ferguson* . . . which has since become the law of the land." CANELLOS, *THE GREAT DISSENTER*, at 494.

⁴² Larry R. Matheny, Address at Centre College Commencement (May 28, 2000) (on file with the author).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Luke* 12:48.

so very much, that I'll strive to judge well—to interpret, decide, and explain based on the law as written. And in return, I'll ask that you strive to never call me Your Honor.