

AGAINST THE RULE OF JUDGES

Judge Thomas M. Reavley and Ryan S. Killian*

I.	Introduction.....	661
II.	The Judge’s Authority.....	664
III.	Obstacles to the Rule of Law	669
IV.	Correcting the Law	675
V.	Conclusion	679

I. INTRODUCTION

In a recent issue of the *Baylor Law Review*, Chief Justice Kem Thompson Frost of Texas’s Fourteenth Court of Appeals tells of her survey of Texas appellate judges, asking how they decide cases and being told of their preferred priorities above predictability in the law.¹ Justice Frost recognized that “predictability” is often pitted against “the better rule” and, after conducting an extensive empirical study, found that judges sacrifice predictability for their conception of the better rule.² Justice Frost not only presents her findings but also calls for promotion of the rule of law.³ We join that call.

The issue is whether judges will follow the rule of law or the rule of judges. By the “rule of law” we speak of how nations respect and comply with laws duly established and applied. Our nation depends upon, for stability and prosperity and justice, the observance of the rule of law by its

*Senior Judge, United States Court of Appeals for the Fifth Circuit; and Law Clerk to Judge Reavley. As used here, the word “I” indicates our judicial author while “we” indicates both authors.

¹Kem Thompson Frost, *Predictability in the Law, Prized Yet Not Promoted: A Study in Judicial Priorities*, 67 BAYLOR L. REV. 48, 51, 97 (2015).

²*Id.* at 52, 116 (“In the final analysis, though judges prize predictability in the law, they share a widely-held belief that in balancing these competing judicial priorities, the right choice is the ‘best rule.’”).

³Justice Frost also summarized her study in the first issue of *Judicature*, a Duke Law School publication. See Kem Thompson Frost, *Predictability in the Law, Prized Yet Not Promoted, A Study in Judicial Priorities*, JUDICATURE (Duke Law Sch. Ctr. for Judicial Studies), May 2015, at 34, 38–39.

government and people. We address here the special role and duty of judges to decide their judgments according to the rule of law.

This is the oath taken by federal judges:

“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.”⁴

People might disagree in various ways about what this oath means, but clearly the judge has no authority to render judgment to meet an individual preference. Nevertheless, judicial decisions often deviate by judges’ intent to apply what they think is better law.

For example, in 2009, the Fifth Circuit convened *en banc* to determine whether § 192 of the Packers and Stockyards Act (“PSA”) forbade business practices that would not “likely affect competition adversely.”⁵ Seventy years prior, the Seventh Circuit, which hosts a disproportionately large share of PSA litigation due to a concentration of meat packing companies within its domain, held decisions brought under § 192 must consider the effect on competition of the challenged business practices.⁶ The Seventh Circuit held violation of § 192 required “some predatory intent or some likelihood of competitive injury.”⁷ In the following years, five circuits followed suit.⁸ No circuit read the PSA in a contrary fashion, and

⁴28 U.S.C. § 453 (2012).

⁵*Wheeler v. Pilgrim’s Pride Corp.*, 591 F.3d 355, 357 (5th Cir. 2009) (en banc).

⁶*See Swift & Co. v. Wallace*, 105 F.2d 848, 854 (7th Cir. 1939); *see also Wheeler*, 591 F.3d at 358.

⁷*Armour & Co. v. United States*, 402 F.2d 712, 717 (7th Cir. 1968); *accord Wheeler*, 591 F.3d at 359.

⁸*Wheeler*, 591 F.3d at 359–60 (citing *Been v. O.K. Indus., Inc.*, 495 F.3d 1217 (10th Cir. 2007)); *see generally Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272 (11th Cir. 2005); *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1304 (11th Cir. 2005); *Philson v. Goldsboro Milling Co.*, Nos. 96-2542 & 96-2631, 1998 U.S. App. LEXIS 24630, (4th Cir. Oct. 5, 1998); *Farrow v. U.S. Dep’t of Agric.*, 760 F.2d 211 (8th Cir. 1985); *De Jong Packing Co. v. U.S. Dep’t of Agric.*, 618 F.2d 1329 (9th Cir. 1980); *see also Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 276 (6th Cir. 2010) (“All of these courts of appeals unanimously agree that an anticompetitive effect is necessary for an actionable claim under subsections (a) and (b).”).

2016]

AGAINST THE RULE OF JUDGES

663

meanwhile, between 1921 and 2002, Congress amended the Act ten times without abrogating the uniform judicial interpretation.⁹

The Fifth Circuit chose that rule as always followed, and said:

The law rules best by being predictable and consistent. It is predictability that enables people to plan their investments and conduct, that encourages respect for law and its officials by treating citizens equally, and that enables an adversary to settle conflict without going to court in the hope of finding judges who will choose a favored result. Predictability requires the judge deciding a case to set her course to reach the judgment that another, fully informed of the evidence and precedent, would expect. Predictability must be the lodestar. We must not be affected by personal preference, or by different notions of justice or what the law ought to be.

How then would an informed person predict the case before us to be decided? He would begin by expecting us to look to the opinions of other circuits for persuasive guidance, always chary to create a circuit split. After understanding the circumstances and concern of those responsible for this statute, he would add all that has been said and held by the Supreme Court and so many circuit courts nearly nine decades since the passage of the PSA, never changed by Congress. So informed, he could not expect a judge to interpret the statute by looking only at the bare words of § 192(a) and (b). Surely he would predict that the next court judgment would be consistent with the judgments of the other circuits.¹⁰

Accordingly, the Fifth Circuit held that “[t]o support a claim that a practice violates subsection (a) or (b) of § 192 there must be proof of injury,

⁹ See Packers and Stockyards Act, 7 U.S.C. § 201 (West 2016); see also Pub. L. No. 100–173, 101 Stat. 917 (1987); Pub. L. No. 95–409, 92 Stat. 886 (1978); Pub. L. No. 94–410, 90 Stat. 1249 (1976); Pub. L. No. 90–446, 82 Stat. 474 (1968); Pub. L. No. 88–61, 77 Stat. 79 (1963); Pub. L. No. 85–909, 72 Stat. 1749 (1958); Pub. L. No. 77–615, 56 Stat. 372 (1942); Pub. L. No. 76–376, 53 Stat. 1351 (1939); Pub. L. No. 74–272, 49 Stat. 648 (1935); Pub. L. No. 69–180, 44 Stat. 397 (1926).

¹⁰ *Wheeler*, 591 F.3d at 363 (footnotes omitted) (citations omitted).

or likelihood of injury, to competition.”¹¹ Seven judges dissented by reading the statute differently and saying: “Predictability may be important, but it does not trump the correct result.”¹²

We insist that judges should take the side of the *Wheeler* majority. Indeed, is the question best phrased as whether predictability trumps the “correct” result? Or is it whether the predictable decision is the correct one? We believe judges should reach the decision a fully informed person would expect or predict.¹³ To reach a predictable result, judges should employ the traditional tools at their disposal—precedent, text, and so forth. Ultimately, because predictability is the *sine qua non* of the rule of law, it must be determinative in judicial decision-making.¹⁴

II. THE JUDGE’S AUTHORITY

Judges occupy an office set by the Constitution in our tripartite form of government.¹⁵ The Constitution was drafted against the backdrop of eleven extant written state constitutions.¹⁶ Of these, the Massachusetts Constitution

¹¹ *Id.*

¹² *Id.* at 382 (Garza, J., dissenting).

¹³ This suggestion is nothing new. I said much the same in 2002. Thomas M. Reavley, *The Rule of Law for Judges*, 30 PEPP. L. REV. 79, 83 (2002) (“If the law is to rule the judge, she must begin with the existing positive law and, laying aside personal preference as to the outcome, reach the judgment a knowledgeable observer would predict. The judge should begin with existing and governing precedents and decide what result lawyers and litigants should reasonably expect.”). More recently, I described my approach at an event hosted by Baylor Law School in Washington D.C. See generally Baylor Law School, *Viewpoints Conversation Series October 29, 2015*, YOUTUBE (Nov. 12, 2015), <https://www.youtube.com/watch?v=7vAbNzGFAWg>.

¹⁴ See F.A. HAYEK, *THE ROAD TO SERFDOM* 80 (1994) (“Stripped of all technicalities, this means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one’s individual affairs on the basis of this knowledge.”); see also, e.g., Ryan S. Killian, *Dicta and the Rule of Law*, 2013 PEPP. L. REV. 1, 6–8 (2013); James R. Maxeiner, *Some Realism About Legal Certainty in the Globalization of the Rule of Law*, 31 HOUS. J. INT’L L. 27, 30 (2008); Mark Tushnet, *Defending the Indeterminacy Thesis*, 16 QUINNIPIAC L. REV. 339, 349 (1996) (“The rule of law concern goes to whether people can predict how the legal system is likely to come to bear on them . . .”).

¹⁵ See John P. Frank, *Historical Bases of the Federal Judicial System*, 13 L. & CONTEMP. PROBS. 3, 9 (1948).

¹⁶ Jamin Soderstrom, *Back to the Basics: Looking Again to State Constitutions for Guidance on Forming a More Perfect Vice Presidency*, 35 PEPP. L. REV. 967, 973 (2008).

penned by John Adams was likely the most influential.¹⁷ The Massachusetts constitution explicitly directed each branch of government to abstain from exercising “powers” allotted to other branches of government “to the end it may be a government of laws, and not of men.”¹⁸ Adams and his counterparts, were in turn influenced by Montesquieu’s *The Spirit of the Laws*, which first described government as properly divided into three parts and declared that the judicial power must be kept separate from the legislative and executive powers.¹⁹

The United States Constitution identified and segregated three branches of government in Article I, Article II, and Article III much like the Massachusetts Constitution did the same with “Chapter I,” “Chapter II,” and “Chapter III”—legislative power, executive power, and judicial power.²⁰ Professor Akhil Reed Amar has observed that, in structuring the Constitution, “the life-tenured judiciary—furthest removed from the people and the states—came last.”²¹ And while the other branches create law, execute law, and participate in deciding who will occupy posts in all three branches of the government, the judiciary (by design, at least) does none of these things. Judges add to precedent when necessary to apply it to decide the appeal, but this is part of the adjudicative process and not overreach to serve the judge’s preference.²² Judicial overreach sucks legislative power from the legislative branch and, consequently, from the people.²³ Disregard of the Constitution’s deliberate and meticulous separation of powers thus, as Adams warned, leads to a government of men rather than law.

Americans have constructed a system of which they are very proud. One need not go far to find someone extolling the virtue and wisdom of our separation of powers and the way we implement democracy while protecting minority values. The judiciary, in particular, has long been a

¹⁷ See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787* 568 (1969).

¹⁸ MASS. CONST. Pt. 1, art. XXX.

¹⁹ BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 157 (Raymond Geuss & Quentin Skinner eds., Anne M. Cohler et al., trans., Cambridge Univ. Press 1989) (1748); see, e.g., 1 JAMES MADISON, *LETTERS OF HELVIDIUS* 1–13 (Philadelphia, Samuel H. Smith 1793).

²⁰ Compare U.S. CONST. arts. I–III, with MASS. CONST. Pt. 2, chs. I–III.

²¹ AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 208 (2005).

²² See Gene R. Nichol, Jr., *Giving Substance Its Due*, 93 YALE L.J. 171, 171–72 (1983) (reviewing PHILIP BOBBITT, *CONSTITUTIONAL FATE* (1982), MICHAEL PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* (1982)).

²³ See *id.*

magnet of praise.²⁴ A closer look today, however, reveals deep dissatisfaction with the performance of all branches of federal government, including the judiciary.²⁵

According to a Gallup Poll released on June 30, 2014, American trust in the Supreme Court is at its lowest ebb since at least 1973, the year Gallup began polling Americans on their confidence in the institution.²⁶ Many people are convinced that federal judges interpret law in accordance with personal and ideological preferences.²⁷ Members of the legislature from both sides of the aisle make the same accusation.²⁸ Legal scholars are in similar accord.²⁹ Judges may deny the charge, but even within their ranks

²⁴ See, e.g., SAMUEL F. MILLER, LECTURES ON THE CONSTITUTION: THE WEAKEST BRANCH 24–29 (1880), reprinted in AN AUTOBIOGRAPHY OF THE SUPREME COURT (Alan F. Westin, ed.) (1963) (“[T]he judiciary have to rely on the confidence and respect of the public for their weight and influence in the government; and I am happy to say that the country, the people, and the other branches of the government have never been found wanting in that respect and in that confidence.”).

²⁵ See, e.g., Frank H. Easterbrook, *Foreword* to ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* xxiii (2012) (“Political scientists, editorial page writers, and cynics often depict judges as doing nothing other than writing their preferences into law.”).

²⁶ Justin McCarthy, *Americans Losing Confidence in All Branches of U.S. Gov’t*, Gallup (June 30, 2014), <http://www.gallup.com/poll/171992/americans-losing-confidence-branches-gov.aspx>.

²⁷ Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2119 n.6 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)) (“In many constitutional cases, much of the public and bar has long since moved from skepticism to disbelief that judges act as neutral, impartial umpires.”); Erwin Chemerinsky, *Ideology and the Selection of Federal Judges*, 36 U.C. DAVIS L. REV. 619, 626 (2003) (“People realize that how judges rule on questions like abortion and affirmative action and the death penalty and countless other issues is a reflection of the individual jurist’s views.”).

²⁸ See, e.g., Senator Sheldon Whitehouse, *Conservative Judicial Activism: The Politicization of the Supreme Court Under Chief Justice Roberts*, 9 HARV. L. & POL’Y REV. 195, 195 (2015) (describing “extreme judicial activism within the conservative bloc of Justices on the Supreme Court.”); Eric Hamilton, Note, *Politicizing the Supreme Court*, 65 STAN. L. REV. ONLINE 35, at *35–36 (2012); Kim McLane Wardlaw, *Umpires, Empathy, and Activism: Lessons from Judge Cardozo*, 85 N.D. L. REV. 1629, 1630 n.3 (2010); Corey Rayburn Yung, *Flexing Judicial Muscle: An Empirical Study of Judicial Activism in the Federal Courts*, 105 NW. U. L. REV. 1, 2 (2011) (describing the reactions of Republican lawmakers to President Barack Obama’s nomination of then-Judge Sonia Sotomayor to the United States Supreme Court).

²⁹ LEE EPSTEIN ET AL., *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL & EMPIRICAL STUDY OF RATIONAL CHOICE* 385 (2013) (“[I]deology influences judicial decisions at all levels of the federal judiciary.”); Chemerinsky, *supra* note 27, at 627–28 (“On the Supreme Court, the decisions in a large proportion of cases are a product of the judges’ views Nor, of course, is this ideological divide limited to the Supreme Court. Every case before the Supreme Court was

you will find acknowledgments in the role of ideology and personal beliefs in judicial decision-making³⁰ as well as outright accusations of an intentional judicial power grab.³¹ And, one influential jurist has made the claim judges *should* “conceive of their task, in every case, as that of striving to reach the most reasonable result in the circumstances”³² While a “reasonable result” sounds, if nothing else, reasonable, the necessary underlying value judgments—*What is reasonable? What should the law be?*—amount to the considered preference of one judge.³³ At this moment, a vacancy on the Supreme Court has resulted in a political conflagration, Republican senators candidly telling President Barack Obama that his nomination will not get hearings and has no chance of confirmation prior to

first decided by the lower federal courts and ideology matters there just as much.”). To be fair to the courts of today, the academy viewed the courts of yesterday as equally ideologically driven. *See, e.g.*, Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 15 (1910) (“[T]he courts in practice tend to overturn all legislation which they deem unwise”).

³⁰ *See, e.g.*, Patricia M. Wald, *A Response to Tiller and Cross*, 99 COLUM. L. REV. 235, 250 (1999) (responding to a controversial study by Professors Emerson H. Tiller and Frank B. Cross: “The only problem that the authors have identified—if indeed it is legitimately labeled a problem—is that judges do have personal ideologies which sometimes enter into their decision-making. But how could it be otherwise?”); BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 13 (1921) (“We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.”).

³¹ *See, e.g.*, J. HARVIE WILKINSON III, *COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE* (2012); ROBERT H. BORK, *COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES* 52 (2003) (bemoaning “virulent judicial activism” and asserting “America is moving from the rule of law to the rule of judges.”); *see also* *Obergefell v. Hodges*, 135 S. Ct. 2584, 2629 (2015) (Scalia, J., dissenting) (describing the majority opinion as “a naked judicial claim to legislative—indeed, *super*-legislative—power . . .”).

³² RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 130 (1990); *see also* RICHARD A. POSNER, *DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY* 86 (2016) [hereinafter POSNER, *Divergent Paths*].

³³ *See* Learned Hand, *How Far Is a Judge Free in Rendering a Decision?*, in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 108 (Irving Dilliard, ed., Alfred A. Knopf, Inc., 3d ed. 1974) (identifying and rejecting the argument that a judge “must conform his decision to what honest men would think right, and . . . look into his own heart to find out what that is.”); Pound, *supra* note 29, at 20 (arguing analysis of judicial opinions suggests cases “are decided in practice as the good sense or feelings of fair play of the tribunal may dictate.”).

the end of the President's term.³⁴ The episode demonstrates that, as far as these leaders are concerned, judging is politics.³⁵

We regret this view, but must acknowledge its perception. And more, this background is sufficient to establish two key facts: (1) the judiciary's reputation is currently at a low ebb, and (2) judges are believed to act in accordance with personal views, even when the law dictates another course. There is distrust because people feel that judges routinely stray from their circumscribed role of saying what the law is.

We have ages of history to recall us. In *The Spirit of the Laws*, Montesquieu declared that there is no liberty "[I]f the power of judging is not separate from legislative power and from executive power. If it were joined to legislative power, the power over the life and liberty of the citizens would be arbitrary, for the judge would be the legislator."³⁶ Less than twenty years later, Blackstone repeated the observation:

In this distinct and separate existence of the judicial power, in a peculiar body of men, nominated indeed, but not removable at pleasure, by the crown, consist one main preservative of the public liberty; which cannot subsist long in any state, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power. Were it joined with the legislative, the life, liberty, and property, of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe.³⁷

³⁴Lisa Mascaro, *Top GOP Senator Meets Obama's Supreme Court Pick to Tell Him There Will Be No Vote*, L.A. TIMES (Apr. 12, 2016), <http://www.latimes.com/nation/la-na-grassley-garland-meeting-20160412-story.html>.

³⁵See, e.g., Richard A. Posner, Opinion, *The Supreme Court Is a Political Court. Republicans' Actions Are Proof.*, WASH. POST, (Mar. 9, 2016), https://www.washingtonpost.com/opinions/the-supreme-court-is-a-political-court-republicans-actions-are-proof/2016/03/09/4c851860-e142-11e5-8d98-4b3d9215ade1_story.html?utm_term=.af865744413b.

³⁶MONTESQUIEU, *supra* note 19, at 157.

³⁷1 SIR WILLIAM BLACKSTONE, BLACKSTONE'S COMMENTARIES 269 (St. George Tucker ed., The Lawbook Exchange, Ltd., 7th prtng. 2008) (1805).

Recognition of the judiciary's limited intended role is a crucial element of our thesis—that judges confronted with uncertainty should provide the predictable answer rather than the “best” or preferred answer. Not only does this mode of judicial decision-making align precisely with the rule of law's predictability aspect, it also minimizes the judge's role as interstitial legislator in accordance with our Constitution's design.³⁸

In summation, we talk about rule of law as predictability (the idea that law is stable and knowable to a degree that permits citizens to plan their lives around it) and separation of powers within a democracy (the idea that law is generally made by elected legislators and applied neutrally by appointed judges). We envision a mode of judicial decision-making that furthers the common good, and we are convinced that the common good is best served by faithful adherence to the rule of law, and not by individual judges seeking good in individual cases.

The stability of financial investments and the success of inventions require predictability of the law.³⁹ Justice requires that rule and compensation stay the same for all. Dispute must have accessible and fair means of resolution. Rules must be available to help settle all controversy; and the settlement should not depend upon judicial intervention and, when it does go there, the parties should find judges to decide promptly according to law without clogging the courts or awaiting appeal by a party most able to afford it.

III. OBSTACLES TO THE RULE OF LAW

Judges choose their own methods of study and judgment for cases coming before them. And during that study they often have impressions of how the conflicts will likely be decided. For the rule of law to be followed, evidence and legal precedent are understood and no experience or personal preference is allowed to trump the predictability of existing law. Judge Posner of the Seventh Circuit, tells us that he decides the best result after he

³⁸Carolyn Dineen King, *Challenges to Judicial Independence and the Rule of Law: A Perspective from the Circuit Courts*, 90 MARQ. L. REV. 765, 768 (2007) (noting Montesquieu's influence on the founders and that “Montesquieu also described as the very definition of tyranny the concentration of executive, legislative, and judicial power in the same hands.”).

³⁹John V. Orth, *The Rule of Law*, 19 GREEN BAG 2D 175, 181 (2016); Reavley, *supra* note 13, at 79.

is familiar with the case, and then writes the judgment preferred unless controlling precedent prevents it.⁴⁰

We do not fault Judge Posner. But for the many judges who accept his statement, we suspect the preferred judgment may become the object—and that one can easily stray over the line between subjectivity and objectivity. And we know that the members of judicial panels can easily become advocates for their preferred judgment. As Judge Posner has said: “It is easy to confuse one’s strong policy preferences with the law.”⁴¹ Advocates are known to misread precedent and evidence. When this occurs within a judicial opinion, it is not revealed to the reader who sees decisions covered by mounds of modified precedent and evidence.

Compare the majority opinion with the record and precedent in *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, where the Fifth Circuit was confronted with the question of whether an arbitration award “must” be vacated “where an arbitrator failed to disclose a prior professional association with a member of one of the law firms that engaged him.”⁴² The Supreme Court had already imposed the “simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias.”⁴³ Applying *Commonwealth Coatings*, a district court ruled vacatur was necessary, and a panel of the Fifth Circuit affirmed.⁴⁴ The *en banc* court reversed,⁴⁵ but to do so it had to modify the law and deviate from the facts.⁴⁶

First, we look at the law. In *Commonwealth Coatings*, while Justice White (joined by Justice Marshall) filed a concurrence, that separate writing began, “While I am glad to join my Brother Black’s opinion in this case, I desire to make these additional remarks.”⁴⁷ Thus, Justice White did not

⁴⁰ POSNER, *Divergent Paths*, *supra* note 32, at 78.

⁴¹ RICHARD A. POSNER, *OVERCOMING LAW* 402 (1995).

⁴² *Positive Software Sols., Inc. v. New Century Mortg. Corp. (Positive Software II)*, 476 F.3d 278, 279 (5th Cir. 2007) (*en banc*).

⁴³ *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 149 (1968).

⁴⁴ *Positive Software Sols., Inc. v. New Century Mortg. Corp. (Positive Software I)*, 436 F.3d 495, 504 (5th Cir. 2006), *aff’g* 337 F. Supp. 2d 862 (N.D. Tex. 2004), *rev’d en banc*, 476 F.3d 278 (5th Cir. 2007).

⁴⁵ *Positive Software II*, 476 F.3d at 286.

⁴⁶ *See id.* at 285–86.

⁴⁷ *Commonwealth Coatings*, 393 U.S. at 150 (White, J., concurring).

conditionally join as Justices do,⁴⁸ and he did not concur in the judgment only, as Justices do.⁴⁹ He flatly joined.⁵⁰ Undeterred by this unambiguous “join,” the Fifth Circuit decided that “the better interpretation of *Commonwealth Coatings*” was to treat Justice White’s separate writing as controlling and to read it “holistically.”⁵¹ To reach this conclusion, the *en banc* majority had to accuse Justice White of disingenuity, saying that he, “the fifth vote in the case, together with Justice Marshall, *purported* to be ‘glad to join’” the majority opinion, but that his desire to “make ‘additional remarks’” rendered the majority a non-binding plurality with the support of only four justices.⁵²

We summarize the facts in this case. Positive Software developed software that was licensed to New Century and the lawsuit was about the claim that New Century had copied the software to be its own instead of paying licensing fees.⁵³ Arbitration was required and a single arbitrator chosen.⁵⁴ That arbitrator had assured the parties he had no professional or

⁴⁸ See, e.g., *McKoy v. N. Carolina*, 494 U.S. 433, 444 (1990) (White, J., concurring) (explaining his view as to what the opinion does *not* “hold or infer” and concurring “[o]n this basis”).

⁴⁹ See *United States v. Hale*, 422 U.S. 171, 182 (1975) (White, J., concurring in the judgment).

⁵⁰ *Schmitz v. Zilveti*, 20 F.3d 1043, 1045 (9th Cir. 1994) (“*Commonwealth Coatings* is not a plurality opinion, however. Justice White said he joined in the ‘majority opinion’ but wrote to make ‘additional remarks.’”); see also Linden Fry, Note, *Letting the Fox Guard the Henhouse: Why the Fifth Circuit’s Ruling in Positive Software Solutions Sacrifices Procedural Fairness for Speed and Convenience*, 58 CATH. U. L. REV. 599, 624 (2009).

⁵¹ *Positive Software II*, 476 F.3d at 283.

⁵² *Id.* at 281 (emphasis added); see also *id.* at 282 (labeling Justice White’s “‘joinder’” “magnanimous but significantly qualified.”). To be fair to the Fifth Circuit, this reading has been adopted by a majority of circuit courts to have considered the issue. See *id.* at 282 (collecting cases). This could show that the Fifth Circuit was correct, but it just as easily demonstrates one premise of this Article—that federal judges are guided by preferred outcomes rather than controlling precedent. Tellingly, the Supreme Court has never suggested *Commonwealth Coatings* represents a plurality decision. See *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 n.3 (1986); see also *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 40 (1987); *Withrow v. Larkin*, 421 U.S. 35, 47 n.14 (1975). Specifically, in *Aetna Life Insurance*, where the Court needed to backtrack from a statement made in *Commonwealth Coatings*, it did so on the grounds that the statement of “[t]he Court” was dicta rather than on the grounds that the statement was made in a non-binding plurality decision. *Aetna Life Ins. Co.*, 475 U.S. at 825 n.3. Further, the Supreme Court has never so much as cited Justice White’s separate concurrence.

⁵³ *Positive Software II*, 476 F.3d at 289 (Reavley, J., dissenting).

⁵⁴ *Id.* at 289–90.

social relationship with counsel for any party.⁵⁵ When he gave an award for New Century, a prior relationship between the lawyers was discovered.⁵⁶

Because the Supreme Court had held that an arbitral award must be vacated “where an arbitrator failed to disclose a prior professional association with a member of one of the law firms that engaged” them,⁵⁷ the district court ruled that vacatur was necessary and a panel of the Fifth affirmed.⁵⁸ On the *en banc* review, the court modified the law to erase a clear line with a malleable “‘impression of bias’ standard.”⁵⁹ That is to be “‘interpreted practically rather than with utmost rigor.’”⁶⁰

And about the prior relationship between arbitrator and lawyer: the court swept it aside as a trivial relationship of a minor lawyer for a period of a year among 34 lawyers in a series of lawsuits.⁶¹ In reality, that minor lawyer had her name on motions and pleadings for two more years, and Positive Software uncovered a letter discussing plans for trial authored by the senior lawyer at her firm addressed to the man who became the arbitrator.⁶² Further, though Positive Software sought the opportunity to conduct discovery regarding this relationship, the district court denied it because “the record had already established a failure to disclose a relationship requiring vacatur under the rule of *Commonwealth Coatings*.”⁶³ Accordingly, the true extent of the relationship is not known.

Judicial efforts to get the law “correct” at the expense of predictability are sometimes so stark they border on startling. We suggest a Ninth Circuit decision. A federal statute makes it a crime to “import” certain drugs “into the customs territory of the United States from any place outside thereof (but within the United States), or . . . into the United States from any place outside thereof.”⁶⁴ As used in this federal law, “[t]he term ‘import’ means, with respect to any article, any bringing in or introduction of such article into any area (whether or not such bringing in or introduction constitutes an

⁵⁵ *Id.* at 290.

⁵⁶ *Id.* at 289.

⁵⁷ *Id.* at 279.

⁵⁸ *Positive Software I*, 436 F.3d 495, 505 (5th Cir. 2006).

⁵⁹ *Positive Software II*, 476 F.3d at 283 (5th Cir. 2007).

⁶⁰ *Id.*

⁶¹ *Id.* at 283–84.

⁶² *Id.* at 290 (Reavley, J., dissenting).

⁶³ *Id.*

⁶⁴ 21 U.S.C. § 952(a) (2012).

importation within the meaning of the tariff laws of the United States).⁶⁵ Notwithstanding this and other laws, a trio of brothers arranged to have a shipment of illegal drugs flown into Guam—non-stop from California.⁶⁶ Their illicit drug operation ultimately became the target of a federal investigation and the brothers were ultimately convicted of violating several laws, including the above-described importation statute.⁶⁷ The brothers insisted the importation statute did not apply because there was no importation; they flew the drugs from California to Guam direct.⁶⁸ For the panel that first considered the argument, guided by predictability rather than preferences, this was an easy case.⁶⁹ The brothers' argument was already foreclosed by two Ninth Circuit cases,⁷⁰ and every circuit but one that had considered the argument rejected it.⁷¹ Moreover, the rationale of the outlier decision rested on a large and embarrassing geographical error.⁷²

⁶⁵ *Id.* § 951(a)(1).

⁶⁶ *United States v. Cabaccang (Cabaccang II)*, 332 F.3d 622, 623–24 (9th Cir. 2003) (en banc).

⁶⁷ *Id.* at 624.

⁶⁸ *Id.*

⁶⁹ *See United States v. Cabaccang (Cabaccang I)*, 16 F. App'x 566, 568 (9th Cir. 2001) (“[W]e have clearly declared that transporting drugs from one point in the United States to another through or over international waters constitutes importation.”).

⁷⁰ *See Guam v. Sugiyama*, 846 F.2d 570, 572 (9th Cir. 1988) (per curiam); *United States v. Perez*, 776 F.2d 797, 801 (9th Cir. 1985).

⁷¹ *See, e.g., United States v. Goggin*, 853 F.2d 843, 846–48 (11th Cir. 1988) (upholding a conviction under the importation statute because the evidence established that the drugs were flown into the United States from international airspace without regard to the point of origin); *United States v. Lueck*, 678 F.2d 895, 905 (11th Cir. 1982) (“Any point outside this twelve mile limit of airspace and waters constitutes a place outside the United States for purposes of proving importation under section 952(a) The fact of crossing the boundary of the United States with contraband suffices to establish importation”) (internal quotation marks omitted); *United States v. Phillips*, 664 F.2d 971, 1033 (5th Cir. Unit B Dec. 1981) (holding that the ““from any place outside thereof”” requirement “may be established by evidence that a boat from which marijuana was unloaded went outside United States territorial waters or met with any other vessel that had—for example, a ‘mother ship.’” (quoting 21 U.S.C. § 952(a) (2012)) (citing *United States v. Miranda*, 593 F.2d 590, 598 (5th Cir. 1979)); *United States v. Maslanka*, 501 F.2d 208, 216 (5th Cir. 1974), *superseded by rule on other grounds*, *United States v. Huntress*, 956 F.2d 1309, 1316 (5th Cir. 1992); *United States v. Seni*, 662 F.2d 277, 286 (4th Cir. 1981) (holding a violation of the importation statute to be complete where a boat sailed, from the United States, into international waters and then returned to its point of origin); *United States v. Peabody*, 626 F.2d 1300, 1301 (5th Cir. 1980) (upholding a conviction under the importation statute where the defendants “were apprehended outside the country, heading in,” and noting that the result would

Nonetheless, after convening an *en banc* panel, the Ninth Circuit abjured the predictable answer in favor of the “better” answer.⁷³ And that answer was decided not by a judgment preference but by the majority’s policy preference.⁷⁴ According to the majority, it would be “absurd” to apply the importation statute to a short intrastate flight that happened to enter international airspace, notwithstanding its concession that overland travel featuring a negligible border crossing or travel by sea that happened to slip into international waters would qualify as importation.⁷⁵ At bottom, what truly bothered the majority was its inability “to conceive of an articulable legislative purpose for punishing the transport of drugs on a domestic flight that passes through international airspace more severely than the identical conduct on a flight that travels entirely within United States airspace.”⁷⁶ In dissent, Judge Kozinski roundly scolded the majority

be the same even if Texas was their point of origin: “[T]hat would not alter the fact that it was meant to re-enter the United States from international waters. That is enough.”)

⁷²In *United States v. Ramirez-Ferrer*, 82 F.3d 1131 (1st Cir. 1996) (en banc), the First Circuit found that the importation statute did not apply to transportation of drugs from one island of Puerto Rico to another, even though the shipment had undisputedly crossed through international waters. *Id.* at 1136. The First Circuit explained:

[T]here is no ‘place’ just outside of the jurisdictional limits of the customs territory of the United States, that is also within the United States. Any place that is just outside the customs territory of the United States is international waters. Thus, arguably no individual could ever violate clause 1 because no one could ship from a place within the United States (but outside the customs territory) directly into the customs territory of the United States: the individual would always be directly shipping from international waters.

Id. at 1138 (quoting 21 U.S.C. § 952(a)).

That is wrong. “[T]his theory is based on a geographical premise that’s demonstrably false.” *Cabaccang II*, 332 F.3d at 643 (Kozinski, J., dissenting). “The U.S. Virgin Islands—the very noncustoms territory *Ramirez-Ferrer* singled out as an example—in fact *is* contiguous with the customs territory, namely, Puerto Rico.” *Id.* (citing *Ramirez-Ferrer*, 82 F.3d at 1137–39).

⁷³*Cabaccang II*, 332 F.3d at 634–36, 38.

⁷⁴*Id.* at 641.

⁷⁵*Id.* at 631; *see also id.* at 636 (“Our holding also leaves undisturbed our well-settled case law establishing that importation occurs when a person reenters the United States from a foreign country carrying drugs that were in her possession when she left the United States.” (citing *United States v. Friedman*, 501 F.2d 1352, 1353–54 (9th Cir. 1974)); *id.* at 634–35 (overruling *Sugiyama* and *Perez*, cases involving travel by sea, only “[t]o the extent that [they] address the transport of drugs through international airspace on a nonstop domestic flight . . .”).

⁷⁶*Id.* at 631.

2016]

AGAINST THE RULE OF JUDGES

675

for turning its preferences into law and ably demonstrated how a search for the “correct” result can easily turn into a defense of the preferred rule.⁷⁷

Do courts choose the wrong judgment because of an error of evidence or law, or both? That is an important question, but not as important as what underlies it: Why do these judges make these errors? We cannot answer that question. We do not say that any judge discussed *intended* to be untrue to the rule of law. To the contrary, we assume their fidelity to their judicial oath. There are other possibilities: the decision for judgment was made too quickly, or the decision was made with bias or prejudice playing some part, or a judge on the panel took a position of advocacy and treated law and evidence as an advocate might. Of course, the judges may have chosen a “correct” rule instead of the predictable rule. We can say that these judges did not consider what judgment a neutral, fully informed person would predict.

IV. CORRECTING THE LAW

For the intermediate appellate judge, we submit that predictability should be the name of the game. They are not saddled with the additional responsibilities of a court of last resort, and their decisions, if wrong, can be corrected. They should merely apply the law as they find it, and predict it. Courts of last resort, however, are charged with unique responsibilities and duties.⁷⁸ Prediction alone would mean the Supreme Court should never overturn its own precedents. Some precedents, however, lead to unforeseen consequences and demand reconsideration. In such cases, the court of last resort should reach the decision that a fully informed person, fully aware of the consequences of existing law, would expect or predict. This articulation permits courts of last resort to make course corrections while hewing closely to the rule of law ideal.

Requiring predictable judgments from courts of last resort preserves their prerogative to overrule prior cases while restraining it enough to protect the rule of law. *Crawford v. Coleman*, a 1987 opinion from the Texas Supreme Court, demonstrates an objectionable repudiation of a prior case simply because, without regard to consequences of the old rule, a

⁷⁷ See *id.* at 638 (Kozinski, J., dissenting).

⁷⁸ Reavley, *supra* note 13, at 82 (“Courts of last resort are expected to consider changes in circumstance and the expectation of society in the development of legal rules over which they have jurisdiction.”).

different set of jurists see the “correct” result differently.⁷⁹ At issue in *Crawford* was the proper interpretation of § 21.23 of the Texas Insurance Code.⁸⁰ The statute was designed to prohibit killers from receiving life insurance benefits from their victims and read:

The interest of a beneficiary in a life insurance policy or contract heretofore or hereinafter issued shall be forfeited when the beneficiary is the principal or an accomplice in willfully bringing about the death of the insured. When such is the case, the nearest relative of the insured shall receive said insurance.⁸¹

Suppose there is a contingent beneficiary who has no role in the murder of the insured. Does the contingent beneficiary or the next of kin receive the insurance benefits? That question came to the Supreme Court of Texas in 1975, and the court decided in *Deveroex v. Nelson* that the contingent beneficiary should prevail. The statute was construed to deny the interest of the guilty beneficiary but not that of the wholly innocent contingent beneficiary. The very same question arose again in a case that reached the Supreme Court of Texas in 1987. And in *Crawford v. Coleman*, the Supreme Court of Texas then held that it was the next of kin who prevailed. There had been no intervening action of the legislature. It was the same statute, but the majority of the judges in 1987 read it differently. For twelve years the law of Texas was that the interest of a contingent beneficiary was not forfeited under those circumstances. The members of the Texas legislature, insurance company executives, and potential beneficiaries of insurance policies would find that to be the law. Presumably, some of them acted and changed their position accordingly. But the majority of the members of the Texas Supreme Court in 1987 felt free to disregard that reading of the statute and give it their own personal reading.⁸²

This sort of “correction” disserves the common good. The court changed the rule without regard to reliance interests or even an explanation as to why the prior rule was unworkable; it changed the law merely for the

⁷⁹ 726 S.W.2d 9, 11 (Tex. 1987).

⁸⁰ *Id.* at 10; see also Reavley, *supra* note 13, at 85–86.

⁸¹ Act of June 28, 1951, 52nd Leg., R.S., ch. 491, sec. 21.23, Tex. Gen. Laws 491, amended by Act of June 19, 1987, 70th Leg., R.S., ch. 840, sec. 21.23, Tex. Gen. Laws 840.

⁸² This paragraph is drawn from one of my earlier articles. See Reavley, *supra* note 13, at 85–86 (footnotes omitted) (citing *Crawford*, 726 S.W.2d at 11; *Deveroex v. Nelson*, 529 S.W.2d 510, 513 (Tex. 1975)).

sake of being *ex post* “correct.”⁸³ The legislature that had been satisfied with *Deveroex* reacted quickly to *Crawford*’s judicial amendment of Article 21.23.⁸⁴ That very same year, the statute was amended to provide that, in cases where a beneficiary was responsible for the death of the insured, “a contingent beneficiary named by the insured in the policy shall receive the insurance unless that contingent beneficiary was also a principal or an accomplice in willfully bringing about the death of the insured.”⁸⁵

I offer the school cases, *Parents Involved in Community Schools v. Seattle School District No. 1* and *Meredith v. Jefferson County Board of Education*, as an example where federal courts of appeals followed their preference rather than precedent and predictability, and where the Supreme Court followed previous decisions instead of what could have been seen as an anticipated modification of the law.⁸⁶ The legal question was whether public schools that either had no history of legal segregation or had rectified past segregation could “choose to classify students by race and rely upon that classification in making school assignments.”⁸⁷

While *Brown v. Board*⁸⁸ repudiated *Plessy v. Ferguson*’s “separate but equal” doctrine⁸⁹ and announced the end of legal school segregation, *i.e. de jure* segregation, it also signaled the need to actively desegregate schools that had previously been segregated.⁹⁰ Local School Boards were called

⁸³There is an understandable, even commendable, judicial instinct to get it right, but as Justice Frost notes, “‘correctness’ in this context refers to the judge’s perception of correctness rather than actual correctness.” Frost, *supra* note 1, at 48, 59, 97. So it ever is. In truly indeterminate cases, actual correctness is essentially unknowable. It is largely for this reason that we believe judges should surrender their ego-driven sense of correctness in favor of predictability.

⁸⁴Act of June 19, 1987, 70th Leg., R.S., ch. 840, § 3, sec. 21.23, Tex. Gen. Laws 840, repealed by Act of May 24, 2001, 77th Leg., R.S., ch. 1419, § 2, Tex. Gen. Laws 1419 (codified at TEX. INS. CODE ANN. § 1103.152).

⁸⁵*Id.* The amended statute further provided that only “[i]f no contingent beneficiary [was] named by the insured in the policy or if all contingent beneficiaries named by the insured in the policy were principals or accomplices in willfully bringing about the death of the insured, the nearest relative of the insured [would] receive said insurance.” *Id.* While Article 21.23 was repealed, the successor statute also follows the rule established by *Deveroex*. See TEX. INS. CODE ANN. §§ 1103.151–.52 (West 2009).

⁸⁶See generally *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1* (*Parents Involved II*), 551 U.S. 701 (2007).

⁸⁷*Id.* at 711.

⁸⁸*Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

⁸⁹*Plessy v. Ferguson*, 163 U.S. 537, 551 (1896), overruled by *Brown*, 347 U.S. at 495.

⁹⁰*Brown*, 347 U.S. at 488, 494–95.

upon to disestablish the dual system of public schools and effectuate a transition to a unitary system, and charged with the duty to convert to a unitary school system.⁹¹ Then in 1978, with four Justices concluding that chronic minority underrepresentation in the medical profession justified remedial use of race in admission to a medical school, the judgment of the Court was to allow consideration of race only for deciding an individual's own admission.⁹² This holding was repeated for the individual's application to law school in *Grutter v. Bollinger*.⁹³

School districts found themselves at this intersection of desegregation and affirmative action where the schools were segregated by housing.⁹⁴ The Seattle school district allowed students to choose the one high school out of ten they wished to attend, but restricted admission of one race when a certain percentage of the other race had not been accepted.⁹⁵ Louisville developed a plan to integrate all public schools with black student enrollment of at least 15% and no more than 50%.⁹⁶ The Sixth and Ninth Circuits both held the plans to be constitutional for the reason that the school district had a compelling interest in securing the educational and social benefits of racial diversity and ameliorating racial isolation due to segregated housing patterns.⁹⁷ However, the public school enrollment was not decided only by individual selection.⁹⁸

The case then came on to the Supreme Court.⁹⁹ The Chief Justice wrote for a divided Court, rejecting both plans and limiting diversity in public schools to be a permissible state purpose only in higher education and where racial segregation had been enforced by law and the subject of a court-ordered desegregation decree.¹⁰⁰ The decision was supported by the Court's prior holdings in *Bakke* and *Grutter*, but this was the Supreme

⁹¹ *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971); *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 437–39 (1968).

⁹² *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 362 (1978).

⁹³ 539 U.S. 306, 307 (2003).

⁹⁴ *Parents Involved II*, 551 U.S. 701, 712 (2007).

⁹⁵ *Id.* at 711–12.

⁹⁶ *Id.* at 715–16.

⁹⁷ *McFarland v. Jefferson Cty. Pub. Schs.*, 416 F.3d 513, 513–14 (6th Cir. 2005) (per curiam); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1 (Parents Involved I)*, 426 F.3d 1162, 1192–93 (9th Cir. 2005) (en banc), *rev'd*, 551 U.S. 701 (2007).

⁹⁸ *Parents Involved II*, 551 U.S. at 711.

⁹⁹ *Id.* at 709.

¹⁰⁰ *Id.* at 709–803.

2016]

AGAINST THE RULE OF JUDGES

679

Court speaking, and the en banc decision of the Ninth Circuit and the dissent of Justice Breyer explained the need and benefit of this limited racial remedy.¹⁰¹ High schools across the country had devised similar plans to overcome the growing segregation of residences and schools, attempting to serve the benefits of diversity for inner city schools and communities.¹⁰² A fully informed person could have expected the Supreme Court to allow the school boards to do as was once done to meet the problem of segregation.

V. CONCLUSION

Chief Justice Kem Frost's survey, which brought us to these observations, is an important marker. We have written this to remind judges and lawyers of the limited authority given to judges and, in this partisan age, to emphasize the importance to litigants and counsel that their judgments be predicted by accurate facts and precedent and not by who is before or on the bench. Respect for the courts and confidence that they perform as supposed is critical to the well-being of the nation. Judgments faithful to the rule of law serve our country for its stability, prosperity, and justice.

¹⁰¹ See *id.* at 803 (Breyer, J., dissenting); see also *Parents Involved I*, 426 F.3d at 1178.

¹⁰² *Parents Involved II*, 551 U.S. at 803 (“The school board plans before us resemble many others adopted in the last 50 years by primary and secondary schools throughout the Nation.”).