SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 73 | Issue 4 Article 3

2023

2022 Sumner Canary Memorial Lecture: On Being Predictably Unpredictable

Honorable Kevin C. Newsom

— Lecture —

On Being Predictably Unpredictable

Honorable Kevin C. Newsom†

Good afternoon, everyone. It's such a pleasure to be here. And more than a pleasure, really, it's an honor. Late last week, I told a judge friend of mine back home that I'd be traveling to Case Western to give a talk, and he responded—and this is a late addition to the text, so I want to make sure I have it just right—"Wait, you" (emphasis on the "you") "are giving the Canary Lecture? You must be a bigger deal than I thought!" In all seriousness, I can't even remotely promise to fill the shoes of those who have come before me—including three members of the current Supreme Court—but I'm thrilled to bask in their glory.

Before I get started, a brief story that involves our host, Professor Adler, whom I've had the good fortune to know for almost twenty years now. I'm not sure that it was the first time we met, but I have a vivid memory of sharing a stage with Jonathan at a "Constitution Day" event that the Cato Institute sponsored in the mid-2000s. I was then serving as Alabama's Solicitor General, and I had been invited to discuss an amicus brief that I had filed in *Gonzales v. Raich*[1]—which, as many of you know, presented the Supreme Court with the question, in essence, whether Congress has the authority under the Commerce Clause to criminalize a single individual's simple possession of marijuana.[2] On behalf of my famously "law and order" home state, I had filed what I like to call a "pot-side" brief urging the Court to reject the federal government's sweeping assertion of regulatory authority—unsuccessfully, I'm sorry to report.[3] I'll have to say, I quite enjoyed being feted by the libertarian-leaning Cato crowd—right up until the time came for audience questions, a hand went up, and I was asked (skeptically, warily), "Aren't you the guy who defended Alabama's criminal prohibition on the commercial sale of recreational sex toys?"

† Judge, United States Court of Appeals for the Eleventh Circuit. This Essay is adapted from the 2022 Sumner Canary Lecture delivered at Case Western Reserve University School of Law on October 26, 2022.

1. 545 U.S. 1 (2005); Brief for the States of Alabama, Louisiana, & Mississippi as Amici Curiae Supporting Respondents, Gonzales v. Raich, 545 U.S. 1 (2005) (No. 03-1454).

2. *Gonzales*, 545 U.S. at 5–10.

3. Brief for the States of Alabama, Louisiana, & Mississippi, *supra* note 1; *Gonzalez*, 545 U.S. at 16–33.

Well, yes, that was me too. I fear that in that moment I might have fatally undermined Jonathan's street cred.

With that rather salacious introduction out of the way, let's get down to serious business. Several years ago, I gave a speech in which I extolled what I take to be the "Three Cardinal Virtues of Good Judging"—(1) objectivity, (2) humility, and (3) civility.[4] Not surprisingly, since then, as I've grown into the job, all three have been put to the test. The importance of humility is clear enough—both personally and professionally. As a personal matter, too many judges, I fear, are too impressed by themselves, too big for their britches—in short, too "judgey," a character trait that I find pretty distasteful. One of the best compliments I've ever received was relayed to me by one of my law clerks, who told me that she had overheard one of our court security officers describing me to one of his colleagues as, "You know, the one who doesn't act like a judge!" I think that pretty well captures the problem. Beyond the personal, humility also has a constitutional dimension. I believe that I have a solemn obligation to exercise what Article III calls the "Judicial Power" modestly, in a manner that is consistent with the Framers' design. When judges refrain from overextending our own power, we leave decision-making authority in the hands of the political branches and ordinary Americans—the democratic actors in our system—incentivizing them to perk up, pay attention, and get involved.

The second virtue I highlighted was civility, which seems to be in increasingly short supply these days—and thus, I think, is more important than ever. Judges owe an obligation of civility toward one another, toward the lawyers who appear before them, and toward ordinary citizens. I'm fortunate that mine is a particularly collegial court—as I was reminded all over again at our en banc sitting last week—but even we can get after one another pretty good from time to time. But as I told a colleague with whom I'd tangled not long ago, as much as I like being right, relationships will always be paramount to me. Life is short, and I'm keenly—if a little grimly—aware that mine is now more than half over. In any event, if civility is to be restored to the public square, I'm afraid that we can't rely on our politicians. Judges are going to need to lead the way.

Today, I want to take a deep dive into the third of the three virtues—objectivity—and, in particular, to explain the importance (hence the title of my speech) of being "predictably unpredictable." What do I mean by that? I mean that I aspire to have a perfectly objective and predictable methodology—knowing full well (and

4. Hon. Kevin Newsom, The Cardinal Virtues of Good Judging, Address (June 5, 2018), *in* NO. 1291, LECTURE: THE CARDINAL VIRTUES OF GOOD JUDGING 2 (The Heritage Found. ed., 2018), https://www.heritage.org/courts/report/the-cardinal-virtues-good-judging [https://perma.cc/X2WB-XG8K].

expecting, frankly) that if I faithfully adhere to that methodology, the *results* that follow should be somewhat unpredictable. In popular conversation, judges are often assigned to teams—Republican or Democrat, conservative or liberal, us or them. Call me a Boy Scout, but I reject the contention that there is any necessary correlation between the law, properly done, and politics, and my sincere hope is that a non-lawyer observer would have a hard time pigeonholing me—or my decisions—as being on one "side" or the other. As a test of sorts, in preparation for this speech, I took an informal inventory of my 100-plus published opinions. I think it's fair to say, and I'm proud to say, that I've given pretty much every conceivable interest group reasons to love me—*and* to hate me. These names won't mean anything to you, but here's a sampling:

- Personal-injury lawyers loved me in *Hunstein*[5] and *Losch*,[6] but they hated me in *Johnson*.[7]

- Civil-rights plaintiffs loved me in *Ziyadat*[8] and *Babb*,[9] but they hated me in *Lewis*.[10]

- Constitutional claimants loved me in *Netchoice*[11] and *Speech First*,[12] but they hated me in *Jimenez-Shilon*.[13]

- Cops and prison officials loved me in *Swain*[14] and *Crocker*,[15] but they hated me in *Piazza*.[16]

5. Hunstein v. Preferred Collection & Mgmt. Servs., Inc., 17 F.4th 1016 (11th Cir. 2021), *rev'd en banc*, 48 F.4th 1236 (11th Cir. 2022).
6. Losch v. Nationstar Mortg. LLC, 995 F.3d 937 (11th Cir. 2021).
7. Johnson v. NPAS Sols., LLC, 975 F.3d 1244 (11th Cir. 2020).
8. Ziyadat v. Diamondrock Hosp. Co., 3 F.4th 1291 (11th Cir. 2021).
9. Babb v. Sec'y, Dept. of Veterans Affs., 992 F.3d 1193 (11th Cir. 2021).
10. Lewis v. Gov. of Ala., 944 F.3d 1287 (11th Cir. 2019).
11. Netchoice, LLC v. Att'y Gen., Fla., 34 F.4th 1196 (11th Cir. 2022).
12. Speech First, Inc. v. Cartwright, 32 F.4th 1110 (11th Cir. 2022).
13. United States v. Jimenez-Shilon, 34 F.4th 1042 (11th Cir. 2022).
14. Swain v. Junior, 961 F.3d 1276 (11th Cir. 2020).
15. Crocker v. Beatty, 995 F.3d 1232 (11th Cir. 2021).
16. Piazza v. Jefferson Cnty., 923 F.3d 947 (11th Cir. 2019).

- Criminal defendants loved me in *Caniff*,[17] *Campbell*,[18] and *Pate*,[19] but they hated me in *Litzky*[20] and *Baptiste*.[21]

And then there was *Courtney Wild*[22]—in which I held for the en banc court that the Crime Victims Protection Act didn't afford one of Jeffrey Epstein's most sympathetic victims any means by which to challenge prosecutors' failure even to tell her before they struck Epstein's sweetheart non-prosecution deal.[23] There, I'm pretty sure everyone just hated me.

I take some comfort—and again, pride—in the fact that both "sides" have found, and will continue to find, reasons and occasions both to love me and to hate me. The way I see it, that means I must be doing something right. Here's the thing: as I've said, I resist labels, but I'm not blind to the fact that, out there, in the discourse, I'm viewed as a "conservative"—and I want to unpack today what I think it means to be a conservative judge. But—and this is the point—if I don't more than occasionally find myself in some odd places, reaching what outsiders would call "liberal" results, then I need to check my premises, because I must be doing something wrong.

A lot of people will say similar things, but the proof is in the pudding. Here's a bit more of mine: I've written in each of the last three cases that our court has decided en banc. In the most recent, a capital case arising under the federal habeas statute, I wrote the majority opinion for the so-called "conservative" bloc to reject a condemned inmate's challenge to his death sentence—because, I concluded, "the law," which, I submit, is a real thing, required that result.[24] In the two preceding en bancs—one a Fourth Amendment case and one about Article III standing—I authored dissents for myself and "the libs," because, again, I concluded that the law required it.[25]

* * *

17. United States v. Caniff, 955 F.3d 1183 (11th Cir. 2020).

18. United States v. Campbell, 26 F.4th 860 (11th Cir. 2022).

19. United States v. Pate, 43 F.4th 1268 (11th Cir. 2022).

20. United States v. Litzky, 18 F.4th 1296 (11th Cir. 2021).

21. United States v. Baptiste, 935 F.3d 1304 (11th Cir. 2019).

22. *In re* Wild, 994 F.3d 1244 (11th Cir. 2021).

23. *Id.* at 1247.

24. *See* Pye v. Warden, Ga. Diagnostic Prison, 50 F.4th 1025, 1057 (11th Cir. 2022).

25. *See* United States v. Campbell, 26 F.4th 860, 922 (11th Cir. 2022) (Newsom, J., dissenting); Hunstein v. Preferred Collection & Mgmt. Servs., Inc., 48 F.4th 1236, 1272 (11th Cir. 2022) (Newsom, J., dissenting).

So let's talk first about predictable methodology. Then, having done that, we can explore in detail a few illustrative unpredictable results.

Methodologically, I'm a confessed formalist. I echo what Justice Scalia once said about his own interpretive approach: "Of all the criticisms leveled against [it]," he said, "the most mindless is that it is 'formalistic.' The answer to that is, of course it's formalistic! The rule of law is *about* form. . . . Long live formalism. It is what makes a government a government of laws and not of men."[26]

What, more precisely, do *I* mean by "formalism"? What are its constituent elements? For me, there are three biggies. First, rigorous adherence to principles of *textualism* in interpreting statutes, regulations, and private agreements. Second, rigorous adherence to principles of *originalism* in interpreting the Constitution. (And parenthetically, to be clear, I don't take textualism and originalism to denote meaningfully different approaches. Textualism is really just originalism as applied to *ordinary* written instruments; and originalism is really just textualism as applied to the *extraordinary* written instrument that we call the Constitution.) And third, consistent with my role on what the Constitution calls an "inferior" court, rigorous adherence—like it or not—to principles of *stare decisis*.

Formalism is under attack—from both the Right and the Left. On the Right, the "common good constitutionalists" insist that formalism has outlived its usefulness, and that it should be scrapped in favor of a muscular, natural-law-infused statism.[27] On the Left, formalism is assailed as a convenient political cover with which to disguise the effort to drive politically conservative results.[28] Colleagues of mine have defended formalism against the former, which is the more recent challenge. Justice Barrett recently said, for instance, that she's "not a fan" of—and that her old boss Judge Silberman was "horrified" by—common-good constitutionalism,[29] and my Chief Judge, Bill Pryor, has given a series of speeches in which he critiques what he calls "living

26. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 25 (new ed. 1997).

27. *See, e.g.*, ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022); Conor Casey & Adrian Vermeule, *Myths of Common Good Constitutionalism*, 45 HARVARD J.L. & PUB. POL'Y 105 (2022).

28. *See, e.g.*, ERWIN CHEMERINSKY, WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM (2022); Ofer Raban, *Between Formalism and Conservatism: The Resurgent Legal Formalism of the Roberts Court*, 8 N.Y. UNIV. J.L. & LIBERTY 342, 363–67 (2014).

29. David Lat, *In Memoriam: Judge Laurence H. Silberman (1935–2022)*, ORIGINAL JURISDICTION (Oct. 4, 2022), https://davidlat.substack.com/p/in-memoriam-judge-laurence-h-silberman [https://perma.cc/5TLN-U72B].

common goodism."[30] The more persistent challenge, though, is the latter—that formalism is just a veneer, a decoration for a decision already made for other, politically motivated reasons. As the dean of U.C. Berkeley School of Law, Erwin Chemerinsky, recently charged, referring to originalism in particular: "Originalism is not an interpretive theory at all. It is just the rhetoric conservative justices use to make it seem that they are not imposing their own values, when they are doing exactly that."[31] It's that challenge—which applies to formalism more generally—to which I'll aim to respond today.

Using an exemplary case from each of three buckets, I'd like to underscore and demonstrate how adherence to formalist principles constrains judicial decision making and can yield surprising—even disappointing, and sometimes nauseating—results. And that's OK. In fact, it's more than OK—it's just as it should be. In particular, by using real-life examples from my own experience, I'd like to kill (or at least wound) the popular canard that formalism in the law—as manifested, in particular, in textualism and originalism—is the same as, or even necessarily travels hand in hand with, political conservatism.

* * *

Let's talk first about *textualism*. Overwhelmingly, modern law is written down—in statutes, regulations, and private contracts—and overwhelmingly, the job of the modern judge is to interpret those written instruments. Textualism is, to my mind, the way that judges should go about doing that job. What exactly is textualism, and why do I say it's the proper method of interpreting written law? Textualism, put simply, is the principle that the words of a legal document constitute the governing law, and, correlatively, that those words must be understood in context and in accordance with their ordinary meaning at the time of the instrument's adoption. It represents the best approach to written law for both formal and practical reasons. Practically, conscientious adherence to the written text (1) best ensures that ordinary citizens have fair notice of the rules that govern their conduct, (2) best incentivizes legislators to write clear laws, agencies to write clear regulations, and contracting parties to write clear agreements, and (3) best keeps courts within their proper lane. And as

30. Hon. William H. Pryor, Against Living Common Goodism, Address at the Federalist Society's 2022 Ohio Chapters Conference (April 5, 2022), *in* 23 FEDERALIST SOC'Y REV. 24, 26 (Federalist Society ed., 2022), https://fedsoc.org/commentary/publications/against-living-common-goodism [https://perma.cc/ZUX4-R8VH]; Hon. William H. Pryor, Politics and the Rule of Law, 14th Annual Joseph Story Distinguished Lecture (Oct. 20, 2021), *in* NO. 1325, LECTURE: POLITICS AND THE RULE OF LAW 2 (The Heritage Found. ed., 2018), https://www.heritage.org/the-constitution/lecture/politics-and-the-rule-law [https://perma.cc/8UC5-K9CR].

31. CHEMERINSKY, *supra* note 28, at xiii.

a formal matter, at least as applied to statutes, there's a very colorable argument that the Constitution actually requires a textualist methodology: it is of course only the statutory text that is "law" in the constitutional sense—the only thing that was enacted through the bicameral legislative process and presented to the President for his signature.[32]

Let me describe for you an example of textualism in action—predictable methodology, unpredictable result. Federal law criminalizes the solicitation of child pornography in 18 U.S.C. § 2251(d). In pertinent part, that provision makes it a crime to "make, print, or publish . . . any notice or advertisement" for child pornography.[33] In *United States v. Caniff*,[34] our court considered the case of a defendant who had sent private, person-to-person text messages requesting nude photos to an undercover officer he thought was a thirteen-year-old girl.[35] His conduct was indisputably disgusting, and it was undoubtedly worthy of condemnation. The question for us, though, was whether it was *criminal*.[36] No one contended that Caniff had "printed" or "published" anything, and no one contended that he had "made" an "advertisement" for anything. The question, therefore, boiled down to whether, in sending the text messages, Caniff had "made" a "notice" for child pornography.[37] The majority held that he had—in particular, it said, the word "notice" in the solicitation statute was "broad enough to include individually directed text messages like the ones at issue" in the case.[38] I dissented.

I framed the interpretive inquiry this way: "The question," I said, "isn't whether in the abstract the word 'notice' might *possibly* be understood to encompass person-to-person communications. Rather, . . . the question is whether the word 'notice' as used in § 2251(d)—and as informed by statutory context—would *ordinarily* be understood by the *average speaker of American English* to cover a private text message sent from one individual to another."[39] I answered that question "no" for two main reasons. First, I explained that, in my view, that's not the plain, ordinary, and common usage of the word "notice." I used the following example: "If I send a text message to my son asking him to pick up some milk on the way home from school, have I "ma[de]"

32. U.S. CONST. art. I, § 7, cls. 2–3.

33. 18 U.S.C. § 2251(d).

34. 916 F.3d 929 (11th Cir. 2019).

35. *Id.* at 930–31.

36. *Id.* at 932.

37. *Id.* at 932–33.

38. *Id.* at 936.

39. *Id.* at 942 (Newsom, J., concurring in part and dissenting in part) (emphasis removed and added).

a "notice" for milk?" In short, I said, "[t]hat's just not how people talk."[40]

Second, I explained that to the extent there was any doubt about that, the context in which the word "notice" was used served to "disambiguate[]" matters.[41] Deploying the familiar "noscitur a sociis" canon—which is just a fancy way of describing the commonsense intuition that "[a] word is known by the company it keeps"—I explained that it was necessary to read the words "make" and "notice" in the light shed by the terms around them. In particular, because the word "make[]" was followed closely by the words "print[]" and "publish[]," it seemed to me that although it *might plausibly* be read quite capaciously to capture a variety of things, it was *more properly* understood to refer to a public-facing statement. So too, because the critical word "notice" was paired with the word "advertisement," it should be understood to refer to a public-facing—and probably commercial—communication.[42]

Putting it all together, I just couldn't bring myself to conclude that the phrase "make [a] notice" was fairly read to reach the act of sending a private, person-to-person text message. Which meant, of course, that Caniff—while guilty of many things—was not guilty of soliciting child pornography, no matter how revolting his conduct.[43]

Now, did I like that result? Not particularly. In fact, I led my opinion with what, in retrospect, might have been a slightly overwritten invocation of a famous colloquy from *A Man for All Seasons*, in which Sir Thomas More's son-in-law-to-be Richard Roper asks More, incredulously:

> **Roper**: So, now you'd give the Devil benefit of law!
>
> **More**: Yes. What would you do? Cut a great road through the law to get after the Devil?
>
> **Roper**: Yes, I'd cut down every law in England to do that!
>
> **More**: Oh? And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? This country is planted thick with laws from coast to coast—man's laws, not God's—and if you cut them down . . . do you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.[44]

40. *Id.* at 941–42.

41. *Id.* at 942.

42. *Id.* at 942–45.

43. *Id.* at 945, 948.

44. *Id.* at 940 (quoting A Man for All Seasons (Columbia Pictures 1966)).

More's point, of course—and mine as well—is that the law is a real thing, which exists and operates independently of personal preference. You needn't necessarily agree with my interpretive analysis to appreciate that allegiance to method can—and should—produce some unexpected results. If an avowed textualist like me—employing what is typically thought to be a "conservative" interpretive methodology—doesn't occasionally reach "liberal" results, he should check his premises, because he's likely doing it wrong.

* * *

How about *originalism*? As I said earlier, although textualism and originalism are often discussed as if they were different approaches, they're really fundamentally one and the same. Originalism, properly understood, is just a means of bringing rigorous textual analysis to bear on the Constitution—an effort to discern the common, public understanding of the words of a particular constitutional provision at the time of its adoption.

Lower-court judges like me—"middle managers," as I like to call us—don't often have the chance to engage in ground-up originalism. More often than not, the Supreme Court has interpreted the provision before us—sometimes repeatedly—and our first obligation is to faithfully apply its precedents. More on that to come. But every now and then, an opportunity presents itself. During the last couple of years, I've done several originalist "deep dives," and in each instance my research generated a result that might be thought to be at odds with party-line political conservatism. In one, I delved into the history underlying the Eighth Amendment's Excessive Fines Clause and concluded that, properly understood, it more strictly limits Congress's discretion to impose monetary penalties than existing precedent would suggest.[45] In another, I concluded that the Second Amendment, a favorite of political conservatives, was not originally understood to protect an undocumented alien's right to keep and bear arms.[46] And in a third—which I'd like to unpack today—I concluded that Article III of the Constitution, as originally understood, embodies *much* more liberal "standing" rules than the Supreme Court has been willing to recognize.

In *Sierra v. City of Hallandale*,[47] I wrote a lengthy concurring opinion in which I proposed pretty radically reformulating existing standing doctrine around two key ideas. First, a rule: that a "case" exists within the meaning of Article III, and a plaintiff thus has what

45. Yates v. Pinellas Hematology & Oncology, P.A., 21 F.4th 1288, 1321–23 (11th Cir. 2021) (Newsom, J., concurring).

46. United States v. Jimenez-Shilon, 34 F.4th 1042, 1052 (11th Cir. 2022) (Newsom, J., concurring).

47. 996 F.3d 1110 (11th Cir. 2021).

we have come to call "standing," whenever he has a legally cognizable cause of action—whether derived from the common law or a statute—"regardless of whether he can show a separate, stand-alone factual injury." And second, a corollary: that in limited instances, "Article II's vesting of the 'executive power' in the President and his subordinates [may] prevent[] Congress from empowering private plaintiffs to sue for wrongs done to society in general or to seek remedies that accrue to the public at large."[48]

It's really the first of those two ideas—that a plaintiff has standing so long as he has a cognizable cause of action—that I'd like to pursue today. "Injury in fact," I said in my opinion—at least as a constitutional prerequisite—is a modern invention, without any firm foundation in the language or history of Article III.[49] I won't bore you with the details, but here are a few of the highlights. The relevant text, of course, is the word "case." After careful investigation, I discovered that the Framing-era sources—early dictionaries and Supreme Court decisions alike—defined the term "case" to mean, in effect, a *cause* or a *suit in court*. The first edition of Noah Webster's American dictionary, for instance, defined "case" as "[a] cause or suit in court, as [in] *the case was tried at the last term*," and it defined the term "cause," in turn, to mean "[a] suit or action in court . . . by which [a plaintiff] seeks his right or his supposed right."[50] And early Supreme Court decisions similarly explained that "[t]he words 'case' and 'cause' are constantly used as synonyms in statutes and judicial decisions, each meaning a proceeding in court, a suit, or action."[51] I found further evidence in the way Founding Era sources treated (1) suits for nominal damages, (2) qui tam actions, and (3) criminal prosecutions. In *none* of those circumstances had the "plaintiff" (if you will) suffered a personal injury in fact, and yet in *all* of them the plaintiff had a legally cognizable cause of action—and in *all* of them the courts recognized the plaintiff's right to sue.[52] All of that—and a lot more that I'll leave aside for the moment—indicated to me that the term "case" in Article III was *not* originally understood to impose a freestanding injury-in-fact prerequisite. Instead, the courts had manufactured that requirement in the second half of the twentieth century—likely for what may be entirely valid practical reasons (in particular, to stem the tide of administrative-state litigation), but reasons that had *no* meaningful connection to constitutional text or history.

48. *Id.* at 1115 (Newsom, J., concurring).

49. *Id.* at 1117–18, 1122.

50. *Id.* 1122–23 (quoting Webster's American Dictionary of the English Language (1828)).

51. Blyew v. United States, 80 U.S. (13 Wall.) 581, 595 (1871).

52. *Sierra*, 996 F.3d at 1123–26.

Needless to say, that's hardly Republican Party platform. Nor is it the Chamber of Commerce's preferred understanding. Nor, sadly for me, is it the current Supreme Court's understanding. Less than two months after I issued my opus, the Supreme Court released *TransUnion LLC v. Ramirez*,[53] in which it doubled down on its earlier decision in *Spokeo v. Robins*,[54] vigorously enforced the injury-in-fact requirement as an Article III limitation, and held, definitively, that a plaintiff's possession of both a private right *and* a cause of action does not in and of itself give her standing to sue.[55] *Spokeo* and *TransUnion* might be entirely *sensible* decisions. But they are not, to my mind, *originalist* decisions—nor, for that matter, do they even claim to be.

* * *

Finally, *precedent*. As I said earlier, more often than not—and especially in constitutional cases—court of appeals judges find ourselves wading through a sea of existing case law, much of it handed down by our bosses at the Supreme Court. It's my view, anyway, that at least in deciding cases, we are bound to privilege that precedent over our own view of the law. Take, for instance, the different ways in which a Fifth Circuit panel and I recently dealt with materially identical cases concerning states' authority to regulate the way that social media platforms like Twitter and YouTube curate and moderate the content on their sites. In its opinion, the Fifth Circuit began its analysis by saying that "[a]s always, we start with the original public meaning of the Constitution's text," and it politely criticized the parties for focusing their arguments on Supreme Court precedent rather than text and history.[56] For better or worse, my opinion was an analysis of Supreme Court case law from stem to stern. Not, mind you, because I don't consider myself an originalist—I do—but because the Supreme Court had already so thoroughly plowed the ground. The question, it seemed to me, was whether the line of decisions beginning with *Miami Herald* and culminating in *Hurley* gave the platforms a First Amendment right to curate the content that they publish—or whether, instead, decisions like *Pruneyard* and *FAIR* gave the states the power to limit the platforms' editorial discretion. The way I saw it, there just wasn't any room for me—again, a middle-manager—to engage in my own ground-up originalism.[57]

53. 141 S. Ct. 2190 (2021).

54. 136 S. Ct. 1540 (2016).

55. *TransUnion*, 141 S. Ct. at 2205.

56. NetChoice, LLC v. Paxton, 49 F.4th 439, 452–53 (5th Cir. 2022).

57. NetChoice, LLC v. Att'y Gen., Fla., 34 F.4th 1196, 1212, 1215 (11th Cir. 2022).

In any event, let me tell you briefly about a decision in which I concluded that faithful adherence to Supreme Court precedent required a result that a lot (and I mean a *lot*) of people didn't just hate, but flat-out scorned—*Johnson v. NPAS Solutions, LLC*.[58] The question there was whether a couple of nineteenth-century Supreme Court decisions—*Trustees v. Greenough* (1882)[59] and *Central Railroad & Banking Co. of Georgia v. Pettus* (1885)[60]—prohibit the typically small-dollar "incentive awards" of the sort that are routinely paid to lead plaintiffs in class-action litigation.[61] In my judgment, on a plain reading of those decisions, the answer was pretty clearly yes. Together, they hold that while a plaintiff suing on behalf of others can be reimbursed for attorneys' fees and his expenses, he *cannot* be paid a salary or reimbursed for his personal services.[62] And nothing in Rule 23, adopted in 1937, changes matters, because the rule doesn't say anything about incentive awards one way or the other.[63] I freely acknowledged in the opinion the facts that (1) incentive awards have become commonplace in class actions and (2) prohibiting them could destabilize the status quo and pretty radically alter class-action practice. But neither authorized me to ignore what it seemed to me the Supreme Court had clearly held.[64] I concluded by saying that the issue was in others' hands: "If the Supreme Court wants to overrule *Greenough* and *Pettus*, that's its prerogative. Likewise, if either the Rules Committee or Congress doesn't like the result we've reached, they are free to amend Rule 23 or to provide for incentive awards by statute. But as matters stand now, we find ourselves constrained"—and that's the key word, "constrained"—"to reverse the district court's approval of Johnson's . . . award."[65]

* * *

So, what's the upshot? There are, I hope, two important takeaways from what I've said today.

First, as I flagged at the outset, scholars and commentators have long criticized formalist methodologies—textualism and originalism, in particular—as being infinitely manipulable, just a shiny wrapping in which judges (particularly conservative judges) disguise their personal

58. 975 F.3d 1244, 1259–60 (11th Cir. 2020).

59. 105 U.S. 527 (1882).

60. 113 U.S. 116 (1888).

61. *Johnson*, 975 F.3d at 1257, 1259.

62. *Id.* at 1257.

63. *Id.* at 1259; FED. R. CIV. P. advisory committee's historical note to 2021 amendments.

64. *Johnson*, 975 F.3d at 1260.

65. *Id.* at 1260–61.

policy preferences. That, in short, simply hasn't been my lived experience. Needless to say, I'm hardly pro-porn—and yet there is *Caniff*. I'm not at all sure that our country is best served by throwing the courthouse doors open to any plaintiff who can lay claim to a common law or statutory cause of action, irrespective of any real-world harm—and yet there is *Sierra*. Frankly, I don't give one whit whether class-action lawyers pay their lead plaintiffs modest awards for being the faces of their lawsuits—and yet, there is *Johnson*. My votes in those cases—and so many others like them—are evidence that while formalist methodologies aren't perfectly determinate in every instance, they do impose real and meaningful constraints.

Second, there is the related (if less cynical) objection that formalist methodologies are, well, formalistic—in the sense that they are both wooden and a little Pollyannaish, divorced from the realities of modern American governmental gridlock. If the courts can't massage and maneuver the law to make it responsive to current problems, won't those problems just go unaddressed? The short answer, I think—at least in the short term—is that they might. But that's only, I contend, because we currently find ourselves in the midst of a vicious cycle: courts are doing too much, and the political branches are doing *way* too little. I'm not going to adjudicate the "chicken-and-egg" issue: Is it that the political branches failed in their responsibility to address pressing social issues, and as a result the courts felt a need to step into the breach? Or is it that the courts got a little aggressive and appointed themselves the stewards of social change, and as a result the political branches saw no need to lead? Either way—whatever the cause and effect—I think we're now in a pretty tough spot. The political branches—which, in our system of separated powers, are the ones with policymaking authority—have lost any real incentive to innovate because the courts seem all too willing to do it for them. Formalism, I think, is one—if only a partial—solution. It will force the policymaking initiative back onto the agendas of our elected representatives, where it belongs. I don't doubt that there might be some growing pains, as perceived "wrongs" go un-righted. In the end, though, I'm confident that our democracy will come out the other side healthier and more vigorous.

* * *

In sum, and in short, if you believe in the separation of powers—in representative democracy—then being a formalist is easy. I, for one, am a believer. Which brings me back to the theme and title of today's talk: "Predictable Unpredictability." Properly executed, formalism is a philosophy of predictable unpredictability. A predictable methodology that sometimes yields unpredictable results. That is neither surprising

nor regrettable. To the contrary, it is something to be embraced, even celebrated.

Thank you all, so very much.