Best Meaning Interpretation

*Hon. Neomi Rao**

It is a pleasure to be here at the Cato Institute to deliver the annual B. Kenneth Simon lecture. On this Constitution Day, Cato brings together scholars and practitioners to discuss the Supreme Court's recent work. To close out the event, my lecture will focus on what I consider to be the Supreme Court's return to a "best meaning" approach to the law. One of the clearest examples from this past Term is *Loper Bright*.[1] Not only did the Supreme Court end *Chevron* deference,[2] but the majority pronounced: "In the business of statutory interpretation, if it is not the best, it is not permissible."[3]

When said out loud, this hardly seems controversial—why would courts consider anything other than the best meaning of the law? Yet in fact there are many other approaches to constitutional and statutory interpretation that do not seek the best meaning of *the law*. Rather they emphasize the "best" policy outcome, strict adherence to precedent, judicial modesty, or deference to the political branches. We also live with the brooding omnipresence of legal realism, which casts doubt on whether law even has a meaning that judges can ascertain.

Best meaning interpretation rejects these competing understandings of the judicial power. In this lecture, I will take a closer look at the Court's embrace of best meaning interpretation. First, I will explain why best meaning interpretation marks a return to the traditional understanding of the Article III judicial power. Second, I will explain how alternative theories have competed with and, at times, eclipsed, a best meaning approach to judicial decisionmaking.

* Judge, United States Court of Appeals for the District of Columbia Circuit. These remarks were delivered as part of the B. Kenneth Simon Lecture hosted by the Cato Institute on September 17, 2024.

[1] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

[2] Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

[3] *Loper Bright*, 144 S. Ct. at 2266.

Finally, I will elaborate on how best meaning interpretation works in practice. This approach recognizes that law has an objectively best meaning. Judges must find that meaning by exercising independent judgment. And, importantly, best meaning interpretation is incompatible with judicial minimalism and strong forms of *stare decisis*.

I. Best Meaning and the Judicial Power

Let me begin with a brief overview of how best meaning approaches are consistent with the Anglo-American legal tradition and the original meaning of the judicial power. Best meaning interpretation is one way of capturing the traditional understanding of the Article III judicial power. The courts were established to uphold the law and to protect individual rights and liberties, including from the arbitrary and unlawful actions of the government.[4]

The Article III judicial power is accompanied by a judicial duty to decide cases in *accordance with law*. Or as Chief Justice John Marshall famously said, "It is emphatically the province and duty of the judicial department to say what the law is."[5] The duty to expound and interpret the law requires ascertaining its best meaning, not creating a new meaning. As Blackstone said, the judge is "sworn to determine, not according to his own private judgement, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one."[6] Emphasizing that judges must find the best meaning of the law draws a sharp line between the law and the judge's will.[7] "The *discretion* of a Judge is the Law of Tyrants," one English judge explained, "In the best it is often times Caprice, in the worst it is every Vice, Folly, and Passion to which human Nature is liable."[8] Deciding a case in accordance with the best meaning of the law reinforces the essential separation between judgment and will.

[4] The Federalist No. 78, at 405 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

[5] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[6] 1 William Blackstone, Commentaries on the Laws of England *69 (1765).

[7] Osborn v. Bank of U.S., 22 U.S. (9 Wheat.) 738, 866 (1824) ("Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing.").

[8] Doe v. Kersey (C.P. 1765), Lord Camden's Argument in Doe on the Demise of Hindson, & Ux. & al. v. Kersey, 15, 53 (London, 1766) (emphasis added), *quoted in* Philip Hamburger, Law and Judicial Duty 146 (2008).

Furthermore, judicial independence is linked to the duty to find the best meaning of the law. The Constitution confers independence on Article III judges by giving them life tenure and irreducible salaries.[9] That independence from political bullying and removal frees judges to decide cases in accordance with law.[10] It is unsurprising then that the Chief Justice's opinion in *Loper Bright* has more than a dozen references to judicial independence.[11] Judicial independence and judgment go hand in hand. The constitutional bedrock of judicial independence shows why *Chevron* was wrong. But more fundamentally it highlights why exercising independent judgment requires judges to find the best meaning of the law.

II. Challenges to the Best Meaning Approach

I hope that this traditional understanding of the Article III judicial power is familiar. And perhaps to this audience, a best meaning approach to interpretation is intuitive and obvious. I agree.

Best meaning interpretation is consistent with formalism and with theories of textualism and originalism that have restored a focus on the meaning of the written law. But we should not take this way of thinking for granted. The best meaning approach was eclipsed for many years by a variety of "innovative" alternatives.

Let me offer a few examples. The original progressives at the turn of the 20th Century candidly advocated for courts to step aside. Thinkers like Roscoe Pound championed "executive justice," which would allow the unfettered flourishing of expert administration.[12] The progressives openly lamented that courts relied on an archaic Constitution to protect individual rights and private property.[13] To these progressives, the best meaning of the law came at the expense of efficiency and modernity. But at least the progressives frankly

[9] U.S. Const. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

[10] *See* Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 120–21 (2015) (Thomas, J., concurring); Hamburger, *supra* note 8, at 148.

[11] *See Loper Bright*, 144 S. Ct. at 2257–58, 2262–63, 2265–66, 2268–69, 2273.

[12] *See generally* Roscoe Pound, *Executive Justice*, 55 U. Pa. L. Rev. 137 (1907).

[13] *E.g.*, Frank Johnson Goodnow, The American Conception of Liberty and Government 12–21 (1916); James M. Landis, The Administrative Process 1–5, 96, 123–35 (1938).

acknowledged that their views were at odds with the original Constitution and the traditional understanding of the judicial power as essential for maintaining individual rights and liberties.[14]

Next we have the legal realists, who denied the possibility of an objectively best meaning of the law.[15] They believed in the radical indeterminacy of law. They considered judging a matter of personal discretion. By shrinking the realm of law, they sowed doubt about the objectivity of judges and the possibility of law as an objective and independent study.[16] Legal realism and its modern variants remain the prevailing undercurrent in the legal academy. Many law students are taught that formalism is overly simplistic and that those who think there is a best meaning of a legal text are kidding themselves.

During the Warren Court, the Supreme Court also offered interpretations of the Constitution that perhaps are most charitably characterized as aspirational, rather than faithful to the Constitution and to the limits of the Article III judicial power.[17] Justice William Brennan and Justice Thurgood Marshall, for instance, defended their decisions by reference to social justice and human dignity.[18]

[14] *See, e.g.*, Roscoe Pound, *Mechanical Jurisprudence*, 8 Colum. L. Rev. 605, 612 (1908) ("The law [has] become[] a body of rules. This is the condition against which sociologi[cal jurists] now protest, and protest rightly.").

[15] *See, e.g.*, Karl N. Llewellyn, *Remarks on the Theory of Appellate Decisions and the Rules or Canons About How Statutes Are to Be Construed*, 3 Vand. L. Rev. 395, 396 (1950) (critiquing the "mistaken idea" that "cases themselves and in themselves, plus the correct rules on how to handle cases, provide one single correct answer to a disputed issue of law").

[16] *See*, *e.g.*, Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 461 (1897) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."); Jerome Frank, Law and the Modern Mind 104 (6th ed. 1930) ("Whatever produces the judge's hunches makes the law.").

[17] *See* Akhil Reed Amar, America's Unwritten Constitution 193 (2012) (arguing the Warren Court "seemed contemptuous" of constitutional text); J. Harvie Wilkinson III, Cosmic Constitutional Theory: Why Americans Are Losing Their Inalienable Rights to Self-Governance 19 (2012) ("Perhaps more than any other cosmic constitutional theory, living constitutionalism, both in theory and in practice, has elevated judicial hubris over humility, boldness over modesty, and intervention over restraint.").

[18] *See e.g.*, Furman v. Georgia, 408 U.S. 238, 270 (1972) (Brennan, J., concurring) ("A punishment is 'cruel and unusual,' therefore, if it does not comport with human dignity."); Milliken v. Bradley, 418 U.S. 717, 782 (1974) (Marshall, J., dissenting) ("[T]his Court['s] . . . appointed task [is] making a 'living truth' of our constitutional ideal of equal justice under law.").

They looked to broader moral and political values, rather than the best meaning of the original Constitution.[19]

Or consider prominent legal theorists, such as Ronald Dworkin, who depicted his judge Hercules as one who would interpret the law consistent with particular moral and philosophical ideals.[20] Meanwhile, William Eskridge advanced a theory of dynamic statutory interpretation, according to which the meaning of the text can evolve alongside a changing social and political context.[21] And of course, the popular media is suffused with a policy-forward view of the courts. For instance, a recent *New York Times* essay grumbled that originalism prevents the courts from doing "good things."[22] Importantly, such "good things" are favored wholly apart from the best meaning *of the law*. Some law professors have called for simply abandoning the Constitution altogether.[23] I could go on, but the ideas are no doubt familiar.

Against these currents, a best meaning approach has gradually been restored. It is implicit in theories of textualism and originalism.[24] As Justice Clarence Thomas explained in his speech "Be Not Afraid" more than 20 years ago, there may be reasonable disagreement about the meaning of the law,

> [b]ut that does not mean that there is no correct answer, that there are no clear, eternal principles recognized and put into motion by our founding documents. These principles do exist. The law is not a matter of purely personal opinion. The law is a distinct, independent discipline, with certain principles and modes of analysis that yield what we can discern to be correct and incorrect answers.[25]

[19] *See* Thurgood Marshall, *The Constitution's Bicentennial: Commemorating the Wrong Document?*, 40 Vand. L. Rev. 1337, 1338, 1340–41 (1987).

[20] *See generally* Ronald Dworkin, Law's Empire (1986).

[21] *See* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. Pa. L. Rev. 1479, 1479 (1987).

[22] *See* Jennifer Szalai, *The Constitution Is Sacred. Is It Also Dangerous?*, N.Y. Times (Aug. 31, 2024), archived at https://perma.cc/U4ZZ-D57Q (emphasis omitted).

[23] Ryan D. Doerfler & Samuel Moyn, Opinion, *The Constitution Is Broken and Should Not Be Reclaimed*, N.Y. Times (Aug. 19, 2022), archived at https://perma.cc/D7SC-P8TK.

[24] *See, e.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L. J. 1, 9 (1971); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 862 (1989).

[25] Justice Clarence Thomas, Be Not Afraid, Speech at the American Enterprise Institute Annual Dinner (Feb. 13, 2001), archived at https://perma.cc/AT9T-VCMU.

When Justice Thomas joined the Supreme Court in 1991, his commitment to finding the right answer in each case was sometimes criticized as quixotic, dismissed as the voice of a lone dissent or concurrence. But now, in 2024, six Justices joined the *Loper Bright* majority, which fully embraces the traditional understanding that judges must ascertain the best meaning of the law when deciding cases.

III. Best Meaning Interpretation in Practice

Let me next turn to a practical question—how should courts go about finding the best meaning of the law? Volumes have been written on questions of statutory and constitutional interpretation. Here, I will provide an overview of best meaning interpretation at what I think of as the retail level, namely judicial decisionmaking.

Best meaning interpretation begins with positive law: the law enacted by the People and their representatives. I will not shy away from saying that best meaning interpretation *is* formalist. Justice Antonin Scalia once said that the most mindless critique of textualism is that it is "formalistic." "*Of course it is formalistic!*" he said, "The rule of law is *about* form."[26]

When interpreting a statute, for instance, a judge must first look to its text. This may require consulting dictionaries and determining whether Congress used words in a technical sense or incorporated common law principles. The meaning of a particular provision must also be understood in light of the entire statute.[27] Too often parties present bits and pieces of statutes as they have been divided up in the U.S. Code. As a judge, when faced with a question of statutory interpretation, I consider it essential to read the entire public law that Congress enacted. The meaning of each part of the statute becomes clearer on reviewing the whole scheme of the law, not to mention other similar laws.

But the inquiry does not stop there. Ascertaining the best meaning also requires a judge to consider legal background principles. These principles often include the constitutional limits on the

[26] Antonin Scalia, *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: Federal Courts and the Law 25 (Amy Gutmann, ed., 1997) (emphasis in original).

[27] *See, e.g.*, Pennington v. Coxe, 6 U.S. (2 Cranch) 33, 52–53 (1804) (Marshall, C.J.).

federal government and the structure of separated powers. Judges must consider constitutional and other legal backdrops, such as the common law and established legal principles.[28] Meaning also derives from the context in which that law was passed—every law exists within the broader province of our legal frameworks and traditions.[29]

Although judges must work to find the best meaning of the law, they may not always agree. One example is the recent decision about whether former presidents have criminal immunity for their official acts.[30] No former president had been prosecuted for official acts—so this was an issue of first impression. Chief Justice John Roberts masterfully explained the historical understanding of the Article II executive power and the importance of its independence in the scheme of separated powers.[31] He examined the Constitution's original meaning, text, structure, and history to conclude such an immunity existed.[32] From my understanding of the issues, I think the majority had the better interpretation. But the dissenters offered a different historical understanding of the meaning of the executive power and emphasized what they viewed as the dangers of a broad presidential criminal immunity.[33] Some commentators point to such disagreement to argue that the law is indeterminate or that there is no best answer.[34] Some cases are hard. But the *difficulty* of interpretation should not be confused with the *impossibility* of finding the correct answer.

[28] *See* Stephen E. Sachs, *Constitutional Backdrops*, 80 Geo. Wash. L. Rev. 1813, 1831 (2012); Neomi Rao, *Textualism's Political Morality*, 73 Case W. Rsrv. L. Rev. 191, 200 (2022).

[29] *See generally* Neomi Rao, *The Province of the Law*, 46 Harv. J. L. & Pub. Pol'y 87 (2023).

[30] *See* Trump v. United States, 144 S. Ct. 2312 (2024).

[31] *See id.* at 2327–32.

[32] *See id.*

[33] *See id.* at 2357–60 (Sotomayor, J., dissenting); *id.* at 2378 (Jackson, J., dissenting).

[34] *See, e.g.*, Brian Leiter, *Constitutional Law, Moral Judgment, and the Supreme Court as Super-Legislature*, 66 Hastings L. J. 1601, 1605 (2015) ("Since federal judges do not converge on a single way of fixing constitutional meaning, it follows, on the positivist view, that in large parts of so-called 'constitutional law' there really is no law because there are no criteria of legal validity generally accepted and applied by judges.").

IV. Implications of the Best Meaning Approach

Next, I want to explore some of the implications of a best meaning approach to interpretation.

A. The literal meaning is not always the best meaning.

The best meaning approach recognizes that there is no meaning without context. Even if an interpretation appears plain, a judge must consider the broader structure, context, and history of the law to ensure that the seemingly plain meaning is in fact the best one.

I think a great example of this difference between *plain* and *best* meaning can be found in the Supreme Court's decision in *Fischer v. United States*.[35] In that case, the Court considered whether a provision of the Sarbanes-Oxley Act could be used to prosecute individuals who forcibly entered the Capitol on January 6th.[36] In brief, the statute criminalized the destruction of documents or objects for use in an official proceeding, and it also criminalized "*otherwise* obstruct[ing], influenc[ing], or imped[ing] any official proceeding."[37] In dissent, Justice Amy Coney Barrett concluded that the statute was straightforward and could be understood in just "three paragraphs" with reference to a few dictionaries and past precedents.[38] She determined that the meaning was plain and that the actions of the January 6th defendants came within that plain meaning.

But I think the majority had the better interpretation. Chief Justice Roberts concluded that the statute did not apply to the January 6th defendants. He reasoned that the best meaning of the phrase "otherwise obstructs, influences, or impedes any official proceeding" was limited by the narrower offenses listed in the preceding subsection.[39] The Chief Justice looked at the statute's text and the broader context in which Congress enacted that law, which cabined the potentially sweeping criminal liability.[40]

[35] 144 S. Ct. 2176 (2024).

[36] *Id.* at 2181–82.

[37] 18 U.S.C. § 1512(c)(1)–(2) (emphasis added).

[38] *Fischer*, 144 S. Ct. at 2195 (Barrett, J., dissenting).

[39] *Id.* at 2183–86 (majority opinion).

[40] *Id.* at 2186–87.

Fischer exemplifies how a supposedly "plain meaning" of a statute may not in fact be the best one once a judge has considered the statutory structure, relevant background legal principles, and the mischief the act was aimed at rectifying.

Again, the fact that the Justices disagreed does not mean that there is no right or best answer. Focusing on "best" meaning interpretation does not require a judge to turn a blind eye to legal uncertainty or the difficulty of interpretation in hard cases.[41] In fact, by emphasizing *best* meaning interpretation, the Court recognizes that there might be other plausible meanings. The best meaning approach acknowledges that deciding cases is not mechanical or always easy—the law may be uncertain on a particular question or ambiguous.[42] Nonetheless, judges must use their judgment to determine the best or most natural meaning of the law.

B. So, what about the role of stare decisis *in finding the best meaning of the text?*

Stare decisis has never been an inexorable command. Justices of the Supreme Court sometimes determine that a precedent is wrong or unworkable and must be overruled.[43] Stability in the law is an important principle, but it is not the only one.

Despite furious debates about *stare decisis*, its contours have never been reduced to a widely accepted formula.[44] Rather, the question

[41] *See* Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 Harv. J. L. & Pub. Pol'y 411, 420–21 (1996) ("[If] all you are looking for is the best answer that you can possibly attain under the circumstances, the level of *indeterminacy* goes essentially to zero even if the level of *uncertainty* is very high.") (emphasis in original).

[42] *See* Frank H. Easterbrook, *Foreword* to Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts, at xxiii (2012) ("Interpretation is a human enterprise, which cannot be carried out algorithmically by an expert system on a computer.").

[43] *See e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) (overruling Roe v. Wade, 410 U.S. 113 (1973)); Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954) (implicitly overruling Plessy v. Ferguson, 163 U.S. 537 (1896)); Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938) (overruling Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842)); Hudson v. Guestier, 10 U.S. (6 Cranch) 281, 284 (1810) (overruling Rose v. Himely, 8 U.S. (4 Cranch) 241 (1808)).

[44] *See* Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 Cornell L. Rev. 422, 422 (1988) ("[T]here is no contest in the theory of stare decisis. Not because one candidate has swept the boards, but because no one has a principled theory to offer.").

of whether to follow precedent turns, as do many questions of interpretation, on judgment. As an example, consider the Supreme Court's decision in *Dobbs*, which overruled *Roe v. Wade* and returned the policy questions about abortion to the States.[45] Writing for the majority, Justice Samuel Alito explained why *Roe* and the cases that followed it were incompatible with the Fourteenth Amendment. He emphasized that "The Judicial Branch derives its legitimacy, not from following public opinion, but from deciding by its *best* lights whether [a law] comport[s] with the Constitution. The doctrine of *stare decisis* is an adjunct of this duty, and should be no more subject to the vagaries of public opinion than is the basic judicial task."[46]

By contrast, Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan's joint dissent in *Dobbs* was not really about the best meaning of the Fourteenth Amendment. They did not provide a detailed argument that *Roe* and its progeny were consistent with the Constitution. Instead, their dissent responded with the inviolability of *stare decisis*, the way "liberty" and "equality" evolve over time, and the importance of reliance interests.[47] As Justice Alito said in *Dobbs*, "We can only do our job, which is to interpret the law, *apply longstanding principles of* stare decisis, and decide this case accordingly."[48] The best meaning of the law is not always compatible with precedent.

Of course, judges must proceed with humility. In trying to determine the best meaning, a wise judge will consider the reasoning of other judges who have wrestled with difficult interpretive questions. But as Justice Neil Gorsuch explained in his *Loper Bright* concurrence, "different decisions carry different weight."[49] Well-reasoned decisions and those that are "repeatedly confirmed" may provide good evidence of best meaning.[50] On the other hand, judicial decisions that fail to engage with the best meaning of the law using traditional tools of interpretation may be less useful. Judges should give less weight to precedents that rely on policy preferences or

[45] *Dobbs*, 142 S. Ct. at 2242.

[46] *Id.* at 2278 (emphasis added) (quoting Planned Parenthood v. Casey, 505 U.S. 833, 963 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part)).

[47] *Id.* at 2326, 2333, 2343–44 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

[48] *Id.* at 2279 (majority opinion) (emphasis added).

[49] *Loper Bright*, 144 S. Ct. at 2277 (Gorsuch, J., concurring).

[50] *Id.* at 2278 (cleaned up).

values drawn from outside the law. Such decisions may tell us what some judges thought was "best," but they provide little evidence of the best meaning of the *law*.

But even a clearly reasoned decision is not *automatically* the best meaning of the law simply because it was decided first. This basic truth runs through our legal tradition from Blackstone and Chief Justice Marshall through to the present.[51] This respectful, but not deferential, attitude to judicial precedent applies equally to the longstanding practices of the political branches. Particularly in cases of first impression where there might be a long-settled practice outside the courts, judges should consider the views of the political branches in understanding their respective constitutional powers.[52] But such arrangements cannot trump the court's independent judgment.[53] As the Chief Justice explained in *Loper Bright*, there is a long tradition of courts affording *respect* to executive branch interpretations, but respect is a far cry from deference.[54]

At bottom, the independent duty of the courts to say what the law is means that they must ascertain the best meaning of the law. If that best meaning conflicts with precedent, the judges must say so.

C. Next, how should we think about judicial minimalism and a best meaning approach?

A best meaning mode of interpretation is incompatible with judicial minimalism. Judicial minimalism is often touted as a "passive virtue."[55] This often means a supposedly prudential choice not to

[51] *See id*. at 2276; *see also* Gamble v. United States, 139 S. Ct. 1960, 1983 (2019) (Thomas, J., concurring) ("[J]udges *should* disregard precedent that articulates a rule incorrectly when necessary to vindicate the old rule from misrepresentation." (cleaned up)); *see also* 1 Blackstone, *supra* note 6, at *71 ("[*T*]*he law*, and the *opinion of the judge* are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may *mistake* the law.") (emphasis in original).

[52] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) ("Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them."); NLRB v. Noel Canning, 573 U.S. 513, 525 (2014) (same).

[53] *See Noel Canning*, 573 U.S. at 525.

[54] *Loper Bright*, 144 S. Ct. at 2257–58 ("'Respect,' though, was just that. The views of the Executive Branch could inform the judgment of the Judiciary, but did not supersede it.").

[55] *See* Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 Harv. L. Rev. 40, 79 (1961).

decide legal questions even when they are properly before the court. Of course, courts should not be willful or strain to resolve questions not properly presented in a case. Party presentation limits the issues before the court, even if not the range of possible legal arguments.[56] But minimalism is emphatically not a claim about the best meaning of the law.[57] Rather, it is a claim about the judge's role—that the judge should duck questions presented by a case, deciding as little as possible. Restraint and minimalism have few guideposts—and leave much to the judge's discretion. Deciding not to decide a difficult or controversial question presented in a case may be as much an act of *will* as deciding a question not properly presented.

The Constitution establishes a delicate balance between the three departments of the federal government, vesting each with particular powers and providing limits on their exercise. For ambition to counteract ambition, each department must exercise its powers fully.[58] For instance, the Court has often invalidated the attempts of Congress or the Executive to give up their powers. The Court has struck down innovations like the one-house legislative veto or the line-item veto.[59] And there is good reason for this. The Constitution carefully limits and separates power in order to preserve individual liberty.[60] It is perhaps easier to appreciate the threats from a branch that overreaches its powers. But individual liberty is also threatened when one of the branches *abdicates* its powers.[61]

[56] N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2130 n.6 (2022) ("The job of judges is not to resolve historical questions in the abstract; it is to resolve *legal* questions presented in particular cases or controversies.") (emphasis in original).

[57] *See* Diane S. Sykes, *Minimalism and Its Limits*, 2014–2015 Cato Sup. Ct. Rev. 17, 22 (2015) ("[A]lthough minimalism is an approach to judging, it's *not* a theory of constitutional interpretation. Unlike originalism, it's not a method for determining the meaning, scope, and application of the Constitution.") (emphasis in original).

[58] *See* The Federalist No. 51, *supra* note 4, at 268 (James Madison).

[59] INS v. Chadha, 462 U.S. 919, 959 (1983) (striking down the legislative veto); Clinton v. City of New York, 524 U.S. 417, 448–49 (1998) (striking down the line-item veto).

[60] *See* Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 272 (1991) ("The ultimate purpose of this separation of powers is to protect the liberty and security of the governed."); Morrison v. Olson, 487 U.S. 654, 710–11 (1988) (Scalia, J., dissenting) ("While the separation of powers may prevent us from righting every wrong, it does so in order to ensure that we do not lose liberty.").

[61] *See* Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. Rev. 1463, 1465 n.7 (2015).

Judges should stay within their constitutional limits. But within those limits, judges should not cower from deciding issues properly presented in a case. And for the Supreme Court, this means granting review in the cases that need to be decided. As I have often heard Justice Thomas say, it is the "J-O-B *job*" of a judge to decide cases. By determining the best meaning of the law and applying it to the case before them, courts fulfill their duty to uphold the law and protect individual rights and liberties.

V. The Importance of *Judgment*

There is much more to be said about these topics. But for tonight, I would like to conclude on the importance of retaining faith in the possibility of reasoned and independent judgment by our courts.

Aiming to find the best meaning of the law requires judgment. Ideally judges have this requisite judgment because, as Hamilton hoped, they would be learned in the law, legal precedents, and the legal backdrops of common law and political theory.[62] Maintaining the rule of law requires having faith in both the objective meaning of law and the possibility of reasoned judgment by courts. Yet both are under severe strain. Consider Justice Kagan's dissent in *Loper Bright*. She accuses the majority of "judicial hubris" in overruling *Chevron*.[63] She emphasizes that the law is often ambiguous and uncertain, and that statutes "run out."[64] If the law often runs out, then most judicial interpretations are just policy choices.

Yet uncertainty in the law is nothing new. And ambiguity has never been a warrant for abdicating the judicial power.[65] Our Founders and the theorists they looked to recognized the problem of ambiguity and the difficulty of interpretation in hard cases.[66]

[62] The Federalist No. 78, *supra* note 4, at 407 (Alexander Hamilton).

[63] *Loper Bright*, 144 S. Ct. at 2294 (Kagan, J., dissenting).

[64] *Id.*

[65] *Gamble*, 139 S. Ct. at 1987 (Thomas, J., concurring) ("Although the law may be, on rare occasion, truly ambiguous—meaning susceptible to multiple, equally correct legal meanings—the law never 'runs out.'").

[66] The Federalist No. 37, *supra* note 4, at 183 (James Madison) ("The experience of ages, with the continued and combined labours of the most enlightened legislators and jurists, have been equally unsuccessful in delineating the several objects and limits of different codes of laws . . . .[N]o language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many, equivocally denoting different ideas."); 1 Blackstone, *supra* note 6, at *59–61 (surveying methods used to "interpret the will of the legislator" when the "words are dubious").

They believed, however, that judges could rely on their learning, experience, and judgment to render a decision according to law.[67]

An emphasis on uncertainty and indeterminacy has long been the seemingly sophisticated posture to take. But it has the dangerous consequence of shrinking the province of the law, and therefore the province of the courts. If the law frequently runs out, courts have nothing to do other than decide cases by deferring to the political branches.

A weakening of the courts is not just a problem for the institutional power of the courts. The traditional purview of the courts is to adjudicate the rights and obligations of individuals—to settle both private rights as well as public rights against the government. But if a good deal of law is simply indeterminate, individuals will have less recourse to protect their rights. Shrinking the realm of law in order to promote judicial modesty or humility does not promote the rule of law. Nor does it protect individuals raising legal claims and rights against the leviathan that is our federal government.

This is why courts have an obligation to exercise their independent judgment to decide cases in accordance with the best meaning of the law. Applying the traditional tools of interpretation and reasoned judgment to deciding hard cases is not "hubris." It is our sworn duty.

[67] *See, e.g.*, The Federalist No. 78, *supra* note 4, at 407 (Alexander Hamilton); *see also* John O. McGinnis, *The Duty of Clarity*, 84 Geo. Wash. L. Rev. 843, 871–72 (2016) ("[For] [j]udges at the time of the Framing . . . law was not only a science but a demanding one. It required the application of a great deal of knowledge of various relevant considerations. But it was precisely the application of legal science that reflected the view of many in the founding generation that the meaning of law could be discovered, not made . . . . Even if the text of the Constitution taken on its own is susceptible to different interpretations, the science of law at the time creates a sophisticated technology of interpretation that is thought to reduce uncertainty.").