Weight, Principle, and Law:
The Presence of Taboo in Adjudication

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Introduction

This paper sets out to explore and defend the presence and operation of a phenomenological adjudication model proposed by Duncan Kennedy in his 1986 work: *Freedom and Constraint in Adjudication: A Critical Phenomenology*.[1] In that piece Kennedy identifies various legal reasoning tools judges can employ to dispose of a case in a manner which suits their conscious, or moral, or political convictions, but ultimately contradicts what the law prescribes. These tools are skillfully balanced all along a spectrum of freedom and constraint with a constant and objectively necessary thumb on the scale which demands constraint – that is, the mere application of what the law prescribes. Thus, in order to elicit some freedom and move away from the social, political, and legal demands of constraint or what the law prescribes, judges can enlist a plethora of generally prohibited tools to finesse their written opinion in a way that obscures what quite simply amounts to judicial activism. Such tools as identified by Kennedy involve the manipulation of facts, legal virtues, principles, and precedent, among others; each of which holds a particular weight in a given context and exists within a settled boundary. But for the deft, discreet, and ambitious judge, the weight of legal principles and virtues, their context, and their settled boundaries are malleable resources poised for adaptation. I refer to the utilization of such tools as "judicial taboo."

In Part I we will set out to survey the basics of Kennedy's model, some social and political consequences of its practice, and how it can be illustrated in different forms through the lens of popular legal theories present in the United States today. Then, in Part II, we begin to observe how the operation of judicial taboo manifests with judges internally and externally by applying Kennedy's model to a judicial opinion. Our primary illustration will focus on the regulatory takings opinions of the late Supreme Court Justice, Antonin Scalia, an ardent textualist and originalist cut from the molds of legal positivism. The application of the model, however, is not limited to any one legal theory in-particular – thus legal realist and natural law theorists are just as capable, indeed just as guilty, of judicial taboo as all the rest. Nevertheless, our audit of Scalia should prove sufficient to illustrate the salient points of Kennedy's model.

[1] Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL. EDUC. 518 (1986) [hereinafter *Kennedy*].

The observation of how the use of judicial taboo manifests internally within a judge's mind will, necessarily, be based partly on inferences as it is impractical to know exactly what internal debate someone is having within their own psyche – even a judge explicitly tasked with recording their "opinion." The observation of how judicial taboo manifests externally in a judge's recorded opinion, however, will also prove to be somewhat inconclusive precisely due to the tactics of manipulation and misdirection used by the judicial activist and hypothesized in Kennedy's model. Nonetheless, an inconclusive observation is emphatically not the same as not existent. Justice Scalia is well known for his candor and participated in several public discourse events over his tenure on the bench.[2] He wrote articles and whole books distilling and advocating the value and primacy of his views on textualism and originalism.[3] These musings are sure to aid in analyzing Scalia's guiding legal philosophy, yet, despite his bold sense of transparency, we are still left wanting an objective conclusion – how do we determine whether his external expressions truly align with his internal motivations? We will explore this enigma by running Scalia's opinions on regulatory takings through Kennedy's model to see if we can identify some attempt to obfuscate the use of judicial taboo – some inference or tacit inconsistency between what the law prescribes and how Scalia ultimately comes out. In the conclusion we will reflect on the strengths and weaknesses of the internal and external observations as well as the question concerning whether the veil of disapproval which clouds judicial taboo serves a functional role in the effective administration of our republican constitutional democracy.

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[2] *See* The Annenberg Found. Tr. at Sunnylands, *A Conversation on the Constitution with Justices Stephen Breyer and Antonin Scalia: Judicial Interpretation*, ANNENBERG CLASSROOM (2008), https://www.annenbergclassroom.org/resource/conversation-constitution-judicial-interpretation/; Univ. of Ariz. James E. Rogers Coll. of L., *A Conversation on the Constitution: Principles of Constitutional Statutory Interpretation*, YOUTUBE (Oct. 26, 2009), https://www.youtube.com/watch?v=jmv5Tz7w5pk; The Nat'l Press Club, *The Kalb Report – Ruth Bader Ginsburg & Antonin Scalia*, YOUTUBE (Apr. 17, 2014), https://www.youtube.com/watch?v=z0utJAu_iG4; Univ. of Cal. Hastings Coll. of L., *Legally Speaking: A Conversation with Antonin Scalia*, YOUTUBE (Mar. 2011), https://www.youtube.com/watch?v=KvttIukZEtM; The Hoover Inst., *Uncommon Knowledge with Justice Antonin Scalia*, YOUTUBE (Oct. 30, 2012), https://www.youtube.com/watch?v=DaoLMW5AF4Y.

[3] *See* Antonin Scalia & Bryan A. Garner, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES (2006); Antonin Scalia, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed., 1997); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

I. Setting Up the Internal Debate and the External Finesse

A. Kennedy's Model of Critical Phenomenology in Adjudication

In his essay, Kennedy describes a somewhat fictional trial court judge who, through a process of critical phenomenology, subjects himself to a rigorous internal debate that guides how he will ultimately rule on the dispute before him. This internal debate is highlighted by the hypothetical, but entirely plausible quagmire of a judge who finds themselves stuck between how the law prescribes they should rule and how they want the case to turn out. When what the law prescribes and how the judge wants the case to turn out do not align, Kennedy details how and why the prescribed law acts as a constraint on the judge's ability to shape the outcome of the case. In contrast, however, if the judge is so inclined, the employment of dynamic legal reasoning can supply the freedom they seek to dispose of the case in a way that suits their conscious better than what the law prescribes. These two forces, freedom and constraint, exist along a spectrum where all manner of accepted and objectionable principles are employed to resolve disputes.

As Kennedy walks the reader through this judge's process of reasoning, he exposes a plethora of judicial taboo, most of which I suspect, and will argue, is present, and has been present, within the judiciary of the United States since its founding. In the spirit of particularization – a staple also encouraged by Kennedy when making claims about the judiciary – I define judicial taboo here to represent those elements of legal reasoning that are historically or traditionally objectionable or prohibited as legitimate tools for use by a judge on the bench. Kennedy broadly describes these taboo to be when a judge "tak[es] [a] step into the 'second [or third] order,' forsaking the [first order] strategy of mere rule application. . . ."[4] Some examples of a step into the "second order" include: (1) "the manipulation of the facts and holdings of precedents to redefine the [settled] boundary [of their general rule],"[5] and (2) policy arguments.[6] A step into the "third order" can be found in the practice of overruling.[7] When measured against a spectrum of activism that is bookended by freedom on the one end, and constraint on the other, Kennedy's model places

[4] *Kennedy* at 536.
[5] *Kennedy* at 536.
[6] *Kennedy* at 537.
[7] *Kennedy* at 537.

the first order step, mere rule application, squarely within the boundary of constraint, while second and third order steps skew toward freedom.

It is important to stop here and make note of the fact that neither I, nor do I think Kennedy is arguing that such second or third order steps serve as foundational or fundamental tools of any and every judge on the bench. Indeed, one major theme of the critical phenomenological model is the internal and external constraint felt by judges to adhere to the first order of mere rule application. I only argue that judges who wish to use these tools are, with enough skill and discretion, able to do so, though, albeit, given the nature of taboo, usually without explicitly acknowledging that they have done so. I will also argue that, despite the often-objectionable characterization of "taboo," these judicial steps are perhaps necessary to "grease the wheels" of a large democratic republic like the United States. The obvious question presented by such a claim, however, is whether exposing and embracing these steps for what they are – judicial activism – would cause more harm to society than keeping them hidden or obscured. In other words, are the benefits (i.e., grease) of judicial activism only functional in an environment where it operates behind a veil of disapproval? A condemning wag of the finger with a simultaneous wink of the eye? My initial response to the question is, "probably, yes; given the size and nature of our country, particularly with respect to federalism, second and third order judicial steps are crucial to the efficient functioning of our democracy. But, at the same time, lifting the veil of disapproval surrounding such steps might precipitate social and political chaos."

There is most certainly a case to be made for the corrosive social and political effects of these second and third order judicial steps; regardless of whether their use remains taboo or not. Professor Benjamin Zipursky[8] expressed these corrosive effects in terms of the distrust fomented amongst ourselves when we mask our true intentions behind a filter of legitimacy – or as some might call it: cheating. Such distrust has produced social and political silos and echo chambers where people are, without qualification, facially resistance to the perspective of others simply because they are "other." So, where does that leave us? maintain the status quo? assign machines and algorithms to adjudicatory roles? something in-between? I maintain my position that the status quo of judicial taboo is useful as an instrument to grease the wheels of a large democratic republic like the United States, but a

[8] Benjamin C. Zipursky is a professor of law and James H. Quinn '49 Chair in Legal Ethics at Fordham Law School

definitive answer to the question is, for now, far beyond the scope of this essay. I do, however, implore the reader to consider it nonetheless as I explore and defend the presence of Kennedy's phenomenological model throughout the judiciary of the United States.

i. Operative Tools Used to Obscure or Deny Judicial Taboo

In his essay, Kennedy's sets out several dimensional-type steps and legal reasoning tools available to judges caught in a legal quagmire. Dimensional in the sense that the steps can tend to feel multi-directional; lateral, vertical, pitch, yaw. Indeed, the manipulation defined in second and third order steps by a judge can seem much like a pilot dodging airborne flak while trying to maintain a level horizon - it takes skill and it's probably less dangerous to not have gotten into the aircraft in the first place. And legal quagmire meaning they feel simultaneously constrained by what the law prescribes they do in a given case, but also seek the freedom to dispose of the dispute in a manner that suits their conscious, their moral, or their political convictions. Thus, when what the law prescribes is in conflict with how the judge wants to rule, they can, and as I argue sometimes do, enlist the operative tools identified by Kennedy to obscure or deny any evidence they are engaging in judicial conduct that is generally prohibited or taboo – they deny their activism and obscure the tools used in achieving such freedom. I find it wholly plausible too, however, to imagine that some judges engage in the use of generally prohibited legal reasoning tools subconsciously without fully recognizing they have done so. Such an example, although perhaps unhelpful for this analysis, could highlight both the facial innocence of judicial taboo, but also its pernicious omnipresence; to the extent it is so ubiquitous that the habit goes unnoticed by either the judge, the broader legal community and public, or both. Nonetheless, whether the judge utilizes legal reasoning tools generally considered taboo consciously (as does the fictional judge in Kennedy's essay) or subconsciously, the taboo remains.

As previously mentioned, Kennedy identifies three orders of steps judges employ when considering how to adjudicate disputes before them. The first order presents no danger of taboo as it represents the mere application of the law as the judge perceives it and as the judge presumes other judges and the legal or political community will perceive it as well. It is in the second and third orders where judicial taboo resides. Second order steps include (1) "the manipulation of the facts and holdings of precedents to redefine the

[settled] boundary [of their general rule],"[9] and (2) policy arguments.[10] And third order steps can be found in the practice of overruling.[11] Kennedy's essay focused primarily on second order steps and my analysis will parallel that approach. There are, however, tools identified which Kennedy does not necessarily fit into one of the three orders; such tools include the strategic judicial tactic of delay or the denial of appeal or review to prevent the application of what the law would prescribe if the case were to be timely adjudicated. These tactics are explored in detail by Professor Alexander Bickel in his 1961 article, *"The Passive Virtues*,"[12] and are certainly just as taboo as second and third order tools. Still, our focus here will be tailored to second order steps.

ii. A Condensed Working Model of Critical Phenomenology in Adjudication

In the following paragraphs I will articulate a condensed working model of Kennedy's critical phenomenology in adjudication. Given the depth and dynamic nature of the model and the ambitious yet limited resources available for this essay, I will undoubtably fall short of fully embodying Kennedy's masterpiece. But I do hope to present a fair representation of how the model operates and that effort begins with mapping out the multi-dimensional framework available to the skilled and discreet judge so inclined to make use of it. Some preliminary notes, however, before we jump into the condensed model: Kennedy does not seem to suggest or imply that all of the following steps or legal reasoning tools are sequential in nature. In practice it is much more likely, given the ethereal complexity of human thought, that these steps are capricious and disordered. It might help to think of these as part of a connected three-dimensional grid or fabric where the application of each step or tool influences some or all of the others. The balancing act of the judge who pursues their personal preference rather than what the law requires is to avoid tearing that fabric in a way that would expose their use of judicial taboos and therefore impair their legitimacy. Sometimes the law in a particular area is so well settled that any attempt to manipulate its application is so obvious that no amount of concealment can mask the presence of judicial taboo – the fabric will stretch beyond its limits and tear with

[9] *Kennedy* at 536.
[10] *Id.* at 537
[11] *Id.*
[12] Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

a *rip* exposing the judge and questioning their legitimacy. Yet, of course, at other times the law is settled – or not, "whatever,"[13] – and fully susceptible to the impact of the tools of judicial taboo which are strategically paraded as valid legal reasoning. And with that, we begin.

If it was not obvious by now, the model requires a legal quagmire presented to a judge. That is, the judge is faced with a conflict between what they think law prescribes and how the judge wants the case to turn out. Kennedy then insists the model of critical phenomenology in adjudication begins with specifying the particular preference of the judge and their objective in the case before them. In considering preference, are they socially or politically progressive? conservative? libertarian? These factors add life to the conflict in that they affect what Kennedy refers to as "double objectivity,"[14] or the way in which a judge can imagine the application of the law in the case before them from both the internal and external perspective. On the one hand, the judge may view the case internally as "not clearly governed by the rule," but still "anticipate that the relevant others will see it as 'open and shut.'"[15] Next, in considering objective, this can be broad in scope, meaning the judge desires that their ruling in the case will have some degree of influence across a range of the population beyond just the parties in the case before them. Kennedy characterizes this objective as moving the law as much as possible in a direction that favors the population the judge wants to help. This might come in the form of a "frontal assault"[16] on the application of the rule with the goal of benefiting a particular population who will be impacted by the decision. Or, the objective can be narrow in scope, meaning the judge is satisfied with a ruling that favors only the immediate party in the present dispute before them without the same regard or weight applied to the consequences of others who are or might be similarly situated. This might come in the form of "read[ing] something in"[17] to a contract when one exists between the parties. Or, their objective might be both broad and narrow. For now, however, the more important element in the model is the affirmative decision of the judge to forsake mere rule application and take the second order step toward manipulation of the facts and holdings of precedent or policy arguments.

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[13] *See Kennedy* at 519.
[14] *Kennedy* at 521.
[15] *Kennedy* at 521.
[16] *Kennedy* at 522.
[17] *Kennedy* at. 522.

With these preliminary considerations of preference and objective in mind, the model then turns to the real meat of judicial taboo. The judge will take stock of their present legitimating power and determine how much distance separates what the law prescribes from how they want the case to turn out. The greater the perceived distance, the more legitimating power is at stake and the more inventive the judge will need to be with their use of objectionable legal reasoning tools.[18] Curiously, too, however, the greater the distance a judge is able to overcome, the more legitimate they could appear in future cases. This would occur when someone believes the case is clearly open and shut, but is persuaded otherwise through the judge's use of taboo legal reasoning tools masked as valid ones. Ultimately, it is a gamble. However, the model shows how judges can be incentivized to participate in judicial taboo not only to satiate their social, political, or moral convictions, but to build up stock in their legitimating power for future cases. This power may be best characterized as judicial capital or the deference parties and the legal community give the judge based on their perceived excellence. The legal communities' collective, "I never thought he could persuade me of *that!*"[19] translates into, "I should pay more attention to the opinions of this judge – they clearly know more than I do."

While these considerations begin to fill out the multi-dimensional grid, there remains still more layers to the model. Enter the strategic restatement of facts and holdings. To make good use of this strategy, the judge should identify other laws that operate as a limitation on what appears to be the objectively applicable law from the perspective of relevant external actors. This could come in the form of recharacterizing the facts of the present case so they analogize better with a more favorable rule than the objectively applicable one. For example, the judge could take facts that appear to implicate a federal labor law applicable against improper union strike tactics and restate them in a manner that now more closely implicates a First Amendment law that actually permits certain civil disobedient protests as freedom of expression.[20] This could also come in the form of redefining the holding of the objectively applicable precedent so it no longer appears objectively applicable. For example, the judge could attempt to persuade that the federal

[18] *Kennedy* at 529.
[19] *Kennedy* at 529.
[20] *See Kennedy* at 524.

labor law we thought was applicable against improper union strike tactics is actually much more narrow in scope and therefore does not apply in the present case.

Once these variable factors and tools have been considered and placed into the strategy of the judge, they begin to operate as checks and balances against each-other – that is, freedoms and constraints. Let us return to the connected multi-dimensional grid or fabric discussed above. Now we have substantive tools spread across the grid and the application of each will influence some or all of the others. Take, for example, how the amount of present legitimating power will influence the amount of effort required by a judge to overcome the distance separating what the law prescribes and how they want to rule. More present legitimating power could result in less effort to overcome the distance because the judge has stockpiled judicial capital and their opinion receives deference from the legal community, or, put differently, less scrutiny than would a judge with lower legitimating power. The distance itself can also influence the amount of effort the judge invests in restating the facts or holdings of precedent. If the distance is short, the act of moving the settled or unsettled boundaries of precedential facts and holdings will not require as much effort as when the distance is wide.

This is the quintessential representation of the effect of weight and principles on the law. That is to say, all the variable elements related to the case, including the social, political, and cultural environment, the legitimating power of the judge, the tools they employ – whether taboo or valid – all hold independent weight, but simultaneously influence the weight of each-other when combined in the adjudication of a case. The fluctuating weight of these elements is what enables the judge to employ judicial taboo and get away with it. The law, despite our best efforts to the contrary, is inherently slippery, and judges, with enough discretion and skill, can take advantage of that. Through the use of judicial taboo, up becomes down, left becomes right, and it is sold under the guise of valid and acceptable legal reasoning.

B. Justice Antonin Scalia: Undeniably Brilliant, Unduly Self-Righteous

In order to facilitate the objective of this essay, I will use the opinions of late Supreme Court Justice, Antonin Scalia to explore the presence, in some form, of Kennedy's model of critical phenomenological adjudication in the courts – vis-à-vis judicial taboo. This portion of the analysis will require some sleuthing given that judges, in order to preserve

their legitimating power, will generally obscure or hide both (i) the fact that they are pursuing a social, cultural, or political aim contrary to what the law prescribes, and (ii) the taboo legal reasoning tools they employ to achieve the same. As previously stated, there is no tool, test, or oath available that can yield the objective truth about exactly what internal debate any given judge may have on the case before them. Therefore, we must rely on their external opinions for indications about whether they are employing second and third order tools. In the following section, Part II, we will apply the condensed working model outlined in Part I. A. ii. to Justice Scalia's opinion from the 1992 regulatory takings case, *Lucas v. South Carolina Coastal Council*.[21] But first, a brief explanation of the choice to analyze Scalia as our case in point.

Justice Scalia has, for better or for worse, left an indelible mark on jurisprudence in the United States. Such a well-known and controversial figure surely makes for an interesting analysis, indeed – yet, I was hesitant to contribute even more literature to an already exhaustive body of work covering the life and legacy of the man. Quite candidly, one may accurately infer from the title of this section my concurrent respect and animus for Scalia – his oft colorful language and cutting sarcasm is, in my opinion, unbecoming of a judge and particularly so of a Supreme Court Justice.[22] Professor Erwin Chemerinsky adequately sums this up, arguing back in 2000 that, "there is a disingenuousness to Justice Scalia's decision-making and a meanness to his judicial rhetoric that I believe are undesirable and inappropriate."[23]

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[21] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

[22] *See Brown v. Plata*, 563 U.S. 493, 554 (2011) (Scalia, J., dissenting) (lamenting how most inmates who qualify for release under California's prison "decrowding" order do not fall within the aggrieved class in need of medical care or suffering severe mental illness, but "will undoubtedly be fine physical specimens who have developed intimidating muscles pumping iron in the prison gym"); *Id.* at 561 (predicting "the inevitable murders, robberies, and rapes to be committed by the released inmates").

[23] Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385 (2000) [hereinafter *Chemerinsky*]; (Professor Chemerinsky cites several noteworthy examples of Scalia lambasting his own colleagues: "describing the majority's approaches as 'nothing short of ludicrous,' and 'beyond absurd,' 'entirely irrational,' and not pass[ing] the most gullible scrutiny. . . . Perhaps most famously, in *Webster v. Reproductive Health Services*, he pointedly attacked Justice O'Connor . . . [writing that] her opinion 'preserves a chaos that is evident to anyone who can read and count'") *Chemerinsky* at 399-401 (first quoting *Lee v. Weisman*, 505 U.S. 577, 637) (1992) (Scalia, J., dissenting); then quoting *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 684 (1990) (Scalia, J., dissenting); then quoting *Morgan v. Illinois*, 504 U.S. 719, 748 (1992) (Scalia, J., dissenting); and then quoting *Webster v. Reproductive Health Services*, 492 U.S. 490, 535 (1989) (Scalia, J., concurring in part and concurring in the judgment)).

And, at the same time, yes, "his views on textualism and originalism, his views on the role of judges in our society, on the practice of judging, have really transformed the legal debate in this country," exclaimed Justice Elena Kagan (then Dean of Harvard Law School).[24] Nevertheless, despite my hesitation and repugnance, Scalia's resolute conviction that legislatures, not judges, are the sole purveyors of law-making is too tempting to ignore. Take, for example, his bemoaning attack of the plurality in *Hamdi v. Rumsfeld* in 2004:

> The plurality seems to view it as its mission to Make Everything Come Out Right, rather than merely to decree the consequences . . . of the other two branches' actions and omissions. . . . The problem with this approach is not only that it steps out of the courts' modest and limited role in a democratic society; but that by repeatedly doing what it thinks the political branches ought to do it encourages their lassitude and saps the vitality of government by the people.[25]

Thus, in Part II I will explore the argument, that, while Scalia's ardent campaign for both originalism and textualism is "founded on the premise that the Supreme Court should decide cases without Justices making value choices," he also "selectively [relies on this philosophy] when it leads to the conservative results he wants, but ignores when it does not generate the outcomes he desires."[26] In his stubborn confidence that his jurisprudence is devoid of value decisions and is simply "neutral judicial methodology," Scalia artfully hides "behind a claim that [his] results have been discovered not chosen."[27] Such behavior wholly epitomizes the foundational themes of Kennedy's model and Scalia's cynical, self-righteous scorn for those "other" judicial activists exposes him and his legacy to a sobering reality – respectfully, Justice Scalia, you too sit amongst them.

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[24] Thomas A. Schweitzer, *Justice Scalia, Originalism and Textualism*, 33 TOURO L. REV. 749, 750 (2017) (quoting KEVIN A. RING, SCALIA'S COURT: A LEGACY OF LANDMARK OPINIONS AND DISSENTS, 19 (2016)).

[25] *Hamdi v. Rumsfeld*, 542 U.S. 507, 576-77 (2004).

[26] *Chemerinsky* at 394 (Professor Chemerinsky partially concedes the counter-point that instances exist where Scalia does, "at times, [follow] his interpretive methodology even when it leads to results inconsistent with a conservative's likely beliefs," citing to his opinions on flag burning and the preservation of the right to confrontation in child abuse cases. But he also notes that such opinions are present only during Scalia's first few years on the Court. I will give this observation greater treatment in Part II as it conforms well with the idea of preserving legitimating power described in Kennedy's model).

[27] *Chemerinsky* at 385.

II. Observing the Model in Practice

As we trek into the analysis, let us retrace the salient elements present in a condensed version of Kennedy's phenomenological model. These key points are in no particular order and of variable weight and relevance: a legal quagmire is presented so that a conflict exists between what the law prescribes and how the judge wants to come out; there is a preference or social/cultural/political tilt held by the judge which presents both an internal and external objectivity of what the law prescribes; the judge has an objective as to whether their ultimate ruling is applied narrowly, broadly, or both; the judge will take stock of their present legitimating power and stay conscious of how their present actions will impact that power in the future; the judge will determine the distance, whether large or small, that separates what the law prescribes from how they want the case to come out; and finally, the judge will strategically restate the facts of the case before them, or the objectively applicable precedent(s) as well as the holding(s) of other precedent(s) in order to move the boundary of what most in the legal community would consider to be the objectively applicable rule.

A. Scalia on Regulatory Takings

In 1992, *Lucas v. South Carolina Coastal Council* presented the Supreme Court with the question whether South Carolina's *Beachfront Management Act* resulted in a taking of private property requiring the payment of "just compensation" under the Fifth Amendment of the U.S. Constitution.[28] Here is a brief summary of the facts: in 1986 David Lucas purchased two lots of beachfront property on the Isle of Palms which is considered a "barrier island." Lucas intended to construct single-family residences on the lots. In 1988, South Carolina, pursuant to previous legislation enacted over a decade before, passed the relevant *Beachfront Management Act* which directed the state's Coastal Council to establish geographic "baselines" prohibiting, among other things, "occupyable improvements" in certain coastal zone areas identified as being in danger of harmful erosion.[29] Lucas' two lots fell within the established baseline thus preventing the

[28] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).
[29] *Lucas*, 505 U.S. at 1009.

construction of the residences he had intended – Lucas filed suit. "[He] did not take issue with the validity of the Act as a lawful exercise of South Carolina's police power, but contended that the Act's complete extinguishment of his property value entitled him to compensation regardless of whether the legislature had acted in furtherance of legitimate police power objectives."[30] The counter argument asserted that, (i) because Lucas conceded the validity of the state statute, the court was "bound to accept the 'uncontested . . . findings' of the South Carolina Legislature that new construction in the coastal zone – such as petitioner intended – threatened this public resource," and that, (ii) Takings Clause jurisprudence precluded compensation to private property owners when the regulation "is designed 'to prevent serious public harm,' . . . regardless of the regulations effect on the property's value."[31]

i. Legal Quagmire, Bridging the Gap, and Risk to Legitimating Power

With Justice Scalia authoring the majority opinion, the stage is set to observe how he employs, then obscures, the objectionable legal reasoning tools of judicial taboo. In order to assess how Scalia smooths out the bumps on his path between what the law seems to prescribe and how he wants to come out, we need to identify the legal quagmire that conflicts (or, perhaps more accurately, confronts) him. Here, Scalia's conservative values regarding individual property rights puts him in conflict with the generally settled law of the Takings Clause (i.e., the counter-argument asserted against Lucas). Internally, he wrestles with a discomfort in allowing the States to rely on environmental concerns as a basis for restricting real property rights without compensation. Externally, he recognizes, that, objectively, the law seems pretty clear "that the State has full power to prohibit an owner's use of property if it is harmful to the public."[32]

Next, when you consider the casual tone of Scalia's opinion here, it becomes difficult, even by pure speculation, to determine just how great he perceives the distance is between what the law prescribes and how he wants to come out. Either he sees a relatively small

[30] *Lucas*, 505 U.S. at 1009.
[31] *Lucas*, 505 U.S. at 1010.
[32] *Lucas*, 505 U.S. at 1051 (Blackmun, J., dissenting).

gap and, hence, his dispassionate use of language such as, "simply,"[33] "surely,"[34] "merely,"[35] and "regrettably,"[36] (which he uses to gently dismantle any vulnerability he can find in the precedent or principles applicable to the case); or, he recognizes a large gap and strategically misdirects the reader into thinking that his dispassion is the result of a conclusion so obvious it doesn't warrant strong, persuasive language.

By any characterization, however, his recognition of a quagmire and the decision to pursue how he wants to come out manifests the need to bridge that gap, whether large or small. And, to his credit, Scalia's unique rhetorical style actually works to make this question about distance almost inconsequential because he stakes his position so matter-of-factly. Perfectly emblematic of Kennedy's model, Scalia trivialized the bindingness of what most in the legal community would consider to be the objectively applicable rule in order to move the boundary and tuck how he wants to come out under the wing of regulatory takings that require just compensation. What's more, given Scalia's firm advocacy for rules[37] over standards, his preference, unsurprisingly, propels him to create precedent that will apply far beyond the parties in this case with what Justice Blackmun characterized in dissent as a new "per se" takings rule.[38]

Now, with regard to legitimating power. Supreme Court justices can serve on the bench for life (which Justice Scalia did), and are famously insulated from the public sphere in their capacity as private citizens. With such circumstances, it is difficult to determine what effect Scalia might have considered his use of judicial taboo could have had on his personal reputation in this case. What's more, perhaps he relied on a cache of judicial

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[33] *Lucas*, 505 U.S. at 1017 (regarding how the Court has never justified the rule that "the Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests *or denies an owner economically viable use of his land*) (citing *Agins v. Tiburon*, 447 U.S. 255, 260 (1980) (emphasis in original).

[34] *Lucas*, 505 U.S. at 1017 (regarding how the "extraordinary circumstance" of depriving a private land owner of all "productive or economically beneficial use of land" surely warrants an exception to the presumption that the State's may do so without compensation if the legislature determines it will prevent public harm).

[35] *Lucas*, 505 U.S. at 1026 (regarding how the Court's precedential understanding of the "'prevention of harmful use' was merely [their] early formulation of the police power justification necessary to sustain (without compensation) *any* regulatory diminution in value") (emphasis in original).

[36] *Lucas*, 505 U.S. at 1016 n.7 (regarding the regrettable imprecision of whether the "deprivation of all economically feasible use" rule is measuring the particular tract of land burdened by the regulation, or the "value of the tract as a whole").

[37] Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

[38] *Lucas*, 505 U.S. at 1052 (Blackmun, J., dissenting).

capital built up from previous opinions which appear to contradict his conservative values. Consider, for example, the controversial flag burning cases brought before the Supreme Court in 1989 and 1990 – both relatively early on in Scalia's tenure, and both relatively closely decided in time with regard to *Lucas*.[39] Scalia's endorsement of citizens' right to burn the American flag, a symbol widely considered sacrosanct by conservatives, serves as convincing evidence that he does, "at times, [follow] his [neutral judicial] methodology even when it leads to results inconsistent with a conservative's likely beliefs."[40] Thus, it's possible in *Lucas* that Scalia, feeling comfortable with his store of judicial capital, gave little weight to the effect the use of judicial taboo could have on his future legitimating power.

But personal legitimacy should not be his only concern – more significant is the potential loss of legitimating power to the Court itself as a whole. More so than State or even Federal courts, the United States Supreme Court is not just responsible for saying "what the law is,"[41] but is emphatically symbolic of our society's commitment to sound principles of justice, fairness, equality, and, yes, sometimes individual sacrifice for the greater good. When the Court is perceived as ignoring or dismissing such fundamental values due to the personal preferences of its Justices, there is reason to fear the respect and authority afforded to the judiciary (which holds no tangible power to enforce or defend) will be lost on the people. Nonetheless, in the present case under review, let's consider it safe to assume the existential consequences of an illegitimate Supreme Court were not at stake in a dispute about the Takings Clause; particularly where the ruling favors the individual over the State by requiring just compensation when economic viability of the individual's land is denied. Thus, if Justice Scalia were to have considered the risk his use of judicial taboo could present to his or the Court's legitimating power, he likely saw it as negligible and marched on.

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[39] *See Texas v. Johnson*, 491 U.S. 397 (1989) (*1 flag burning protected under First Amendment free speech); *United States v. Eichman*, 496 U.S. 310 (1990) (*2 flag burning held protected under First Amendment free speech); (Scalia was appointed to the Court in 1986); (*Lucas* was decided in 1992).

[40] *Chemerinsky* at 394; *See Chemerinsky*, *supra* note 26.

[41] *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

ii. Manipulating Facts and Precedent to Move the Boundary

Finally, we will observe and analyze how Scalia used judicial taboo by exploiting the facts in *Lucas* and the holdings of applicable precedent in order to move the boundary of what most in the legal community would consider to be the objectively applicable rule. Recall the objectively applicable rule as asserted against Lucas was: (i) because Lucas conceded the validity of the state statute, the court was "bound to accept the 'uncontested . . . findings' of the South Carolina Legislature that new construction in the coastal zone – such as petitioner intended – threatened this public resource," and (ii) Takings Clause jurisprudence precluded compensation to private property owners when the regulation "is designed 'to prevent serious public harm,' . . . regardless of the regulations effect on the property's value."[42] Scalia accomplished his move in two significant ways: first, he gave incredible weight to the factual findings of the trial court by blindly accepting their determination that Lucas had indeed lost all economically beneficial use of his land,[43] and second, he exploited the language of applicable precedent in *Agins v. Tiburon* by selecting and relying on those phrases that advanced his argument, while pointedly ignoring those that did not.[44]

Beginning with his blind acceptance of the trial court's determination regarding Lucas' complete loss of economically beneficial use of his land. There is, of course, great deference afforded to trial courts on factual findings because they are closest to the minute details of the dispute. Here, however, there is little, if any, effort required to evaluate this determination. The real question is whether a regulation prohibiting the construction of "occupyable improvements"[45] equates to a total loss of economically beneficial use – Scalia, in his conservative lean favoring individual land owners, says "yes," but the law, Justice Blackmun in dissent, and common sense maintain a resounding, "no." Lucas was indeed prohibited from making the economically beneficial use he *wanted*, but a deprivation of this personal preference cannot defeat the myriad other fully practical ways in which his land retains economic value. Consider, for example, the obvious fact that "[Lucas] can picnic,

[42] *Lucas*, 505 U.S. at 1010.
[43] *See Lucas*, 505 U.S. at 1020.
[44] *See Lucas*, 505 U.S. at 1016 (citing *Agins*, 447 U.S. at 260); *See also Lucas*, 505 U.S. at 1060 (Blackmun, J., dissenting).
[45] *Lucas*, 505 U.S. at 1009.

swim, camp in a tent, or live on the property in a movable trailer."[46] In fact, "State courts frequently have recognized that land has economic value where the only residual economic uses are recreation or camping."[47] Although, however, to his very limited credit, Scalia does give a notably brief nod to the fact Lucas is still able to make "certain nonhabitable improvements, *e.g.*, "wooden walkways no larger in width than six feet," and "small wooden decks no larger than one hundred forty-four square feet," he also quietly hides this concession in a single-sentence footnote and leaves it at that. Thus, in blindly accepting the "valueless" determination, however flawed, Scalia primes this fact as a tool used to exploit the application of Takings Clause precedent in *Agins* and other applicable caselaw.

Subsequently, after establishing the Court's acceptance of Lucas' "valueless" argument, Scalia is able to then pair that determination with choice phrases from applicable precedent in order to (internally) invent a new "per se" regulatory takings rule,[48] while claiming (externally) that it has simply, even innocently, been discovered.[49] First, Scalia hones in on context-specific language in *Agins*, but, conveniently, ignores the context. Where the Court in *Agins* noted that the "Fifth Amendment is violated when land-use regulation . . . denies an owner economically viable use of his land," Scalia was apparently satisfied with lifting the sentence on its own because it worked to advance how he wanted to come out. But the sentence is married to a qualification and Scalia's separation of the two is a manipulation of the holding. As Justice Blackmun notes in his dissent, the full context of Scalia's choice quote from *Agins* states, "'no precise rule determines when property has been taken' but instead . . . 'the question necessarily requires a weighing of public and private interest.'" Nonetheless, Scalia, having moved the boundary just enough to march on to his next manipulation, then proceeds to drop in policy arguments to obscure his objectionable legal reasoning tools and shore up any doubts about his intent.

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[46] *Lucas*, 505 U.S. at 1044 (Blackmun, J., dissenting).

[47] *Lucas*, 505 U.S. at 1044 (Blackmun, J., dissenting) (citing *Turnpike Realty Co. v. Dedham*, 362 Mass. 221, 284 N.E.2d (1972); *Turner v. County of Del Norte*, 24 Cal. App. 3d 311 (1972), cert. denied, 409 U.S. 1108 (1973); *Hall v. Board of Environmental Protection*, 528 A.2d 453 (Me. 1987).

[48] *Lucas*, 505 U.S. at 1052 (Blackmun, J., dissenting).

[49] *See Lucas*, 505 U.S. at 1017-19 (regarding Scalia's observation that no justification for requiring compensation for takings resulting in deprivation of economically viable use of land had ever been set forth, while proceeding to then discover one).

Scalia's first endorsement of sound policy relies on Justice Holmes in *Pennsylvania Coal Co. v. Mahon*.[50] Scalia again resorts to cherry-picking choice quotes from the opinion, but given the legitimating power of the author (Holmes), Scalia perhaps recognized the enormous weight afforded to the quote whether it was in or out of context. Thus, once Scalia stumbled on to Holmes' language in *Mahon*, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking,"[51] he was apparently satisfied enough to stop reading and, again, conveniently ignore the accompanying context. What Holmes went on to say about the question of how much regulation is too much is that it "is a question of degree – and therefore cannot be disposed of by general propositions."[52]

Next, Scalia makes what I consider to be one of his most daring moves by according a substantial amount of weight to an illusory "historical compact recorded in the *Takings Clause* [between our citizens and the State] that has become part of our constitutional culture."[53] As Justice Blackmun in dissent points out, "it is not clear from the Court's opinion where our 'historical compact' or 'citizens' understanding' comes from, but it does not appear to be history."[54] Nevertheless, Scalia, evidenced by the five justice majority, was convincing and deft enough in his use of judicial taboo to persuade four others to join his opinion.

In observing the strategic moves made by Scalia throughout his journey to get from what the law prescribes to how he wants to come out, we see him taking advantage of the entire range of second order tools detailed in our condensed working model of Kennedy's theory. He undertook to manipulate first the facts of *Lucas* by blindly accepting a flawed determination regarding the economic viability of Lucas' land, then the holdings of applicable precedent like *Agins* and *Mahon* by cherry-picking from the opinions, and finally, he slips in a policy determination by relying, without the accompanying limitations, on the "maxim,"[55] that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[56] Evidently Scalia felt he had "discovered" precisely when regulation has gone too far, despite almost one-hundred years of caselaw since Justice

[50] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).
[51] *Mahon*, 260 U.S. at 415.
[52] *Mahon*, 260 U.S. at 416.
[53] *Lucas*, 505 U.S. at 1028.
[54] *Lucas*, 505 U.S. at 1055-56 (Blackmun, J., dissenting).
[55] *Lucas*, 505 U.S. at 1014.
[56] *Mahon*, 260 U.S. at 415.

Holmes first penned the "maxim," and despite the explicit limitations in both *Agins* and *Mahon* that regulatory takings determinations are specific to individual cases.[57] Accordingly, it seems to me quite reasonable to conclude, notwithstanding his strong convictions about originalism, textualism, and neutral judicial methodology, that Justice Antonin Scalia was not immune to the temptations of judicial taboo when it worked to suit his values.

B. Greasing the Wheels of Democracy

I have labored over the preceding pages in an effort to illustrate how the use of judicial taboo and the activism it enables can be found across the spectrum of legal philosophies and personalities spread throughout the judiciary of the United States. Justice Antonin Scalia was an interesting case study mainly because of his vehement conviction that he was not among this group. But, is it really all bad? Can judicial activism serve a functional role in our constitutional democracy by facilitating structural efficiencies, access to justice, and other exigencies of society? Could one argue that it already does? While candidly admitting that such activism cuts both ways, i.e., sometimes it's good and other times it's not, I tend to think a United States without judicial activism would actually be a rather ominous and incredibly gridlocked place to live. The following discussion will explore the traditional routes of lawmaking and why judicial activism seems, to some degree, reasonably necessary for our society to function as a practical matter.

i. Amending the Constitution

When the constitution was ratified in 1788, the United States was substantially smaller, more agrarian, rural, white, and, generally, much more culturally monolithic than present day. These were the settings in which the founders created the amendment process, but the United States no longer looks or operates as it did 230 years ago. American citizens are arguably less civically engaged and less informed about the intricate details of our history from the earliest Europeans and Africans of the 1600's all the way to present day.

[57] *See Agins*, 447 U.S. at 260-1 ("[a]lthough no precise rule determines when property has been taken, see *Kaiser Aetna v. United States, 444 U.S. 164 (1979)*, the question necessarily requires a weighing of private and public interests) (formatting taken from original); *Mahon*, 260 U.S. at 413 (regarding Justice Holmes statement that "the question depends upon the particular facts").

And, admittedly, it can be difficult to blame them as each passing year adds more for the next generation to learn from, but also as technology and globalism – somewhat ironically – tend to isolate us from our neighbors while simultaneously blurring our borders both culturally and economically.

If you were to survey the average American, I think you would be hard pressed to find more than a handful of people who would answer, "yes," when asked if the constitution can be amended. Not because of some ignorance about the procedural ability to do so, but because of the rancid partisanship that continues to plague our country. Assuredly, every generation of Americans experiences some level of divide amongst its population, but the notable deterioration of meaningful civic engagement and understanding of our storied history seems to have produced a deeply divided culture devoid of a collective community with regard to our most pressing issues of today. No, I think the most common reaction to the question of "can the constitution be amended?" would be a laugh.

What's more, I think if there were to be significant, cross-party, cross-cultural support for some constitutional amendment, I also see it being met with resistance purely because some portion of the population is going to demand, "well, if this amendment gets passed, then we should pass this other one, too." So even when there is widespread agreement for change, the process feels fragile in a world where no-one gets anything unless everyone gets something. In this environment, where even objectively agreeable constitutional amendments feel laughably impossible, judicial taboo and the activism it enables starts to feel like a necessity. But, constitutional amendments are, of course, not the only route for change.

ii. Creating and Revising Statutes

The Congress and State Legislatures tend to serve as the main sources of new or revised lawmaking, and are, by fundamental design, easier to work with than changes to the constitution. The legislatures are, however, in perpetual turn-over and serve as revolving doors where new representatives come and go. This fact highlights one fatal flaw in the philosophy of originalists and textualists like Justice Scalia: as a practical matter, the amorphous nature of legislatures significantly complicates, if not altogether precludes, the oft stated remedy of "simply" fixing problems by creating or revising statutes. Such a

solution, while admirable on paper, feigns ignorance of the critical reality that Congress and State Legislatures sometimes fail to do the right thing.

Consider for a moment the structure and power afforded to modern administrative agencies. They are casually referred to as the fourth branch of government and there is, however small, some substance to that claim. Yet, as a practical matter, we collectively suspend this doubt in recognition of the crucial function these agencies serve in our constitutional democracy. Consider also the incorporation doctrine, or even judicial review – more quasi-questionable claims that we collectively accept because the consequences of rejecting them would be catastrophic. If the originalist's philosophy prevailed and original meaning always trumped legislative intent, statutes would require endless revisions as the meaning of words and the standards of decency in our maturing society evolve.[58] One need not labor much to anticipate the existential calamity a reliance on this "simply fix it" remedy could produce. The point being that judicial activism, like administrative agencies, the incorporation doctrine, judicial review, and other structural imperatives, helps grease the wheels of our society by lubing the precarious engines we call the legislatures.

iii. Veil of Disapproval

Now, after exploring the likely necessity of judicial taboo, the question remains: are the benefits of judicial activism only functional in an environment where it operates behind a veil of disapproval? Recall the introductory metaphor – a condemning wag of the finger with a simultaneous wink of the eye? But what would be the consequences of lifting that veil? eliminating the taboo of judicial activism and exposing, even outright endorsing its practice? My response to that query remains social and political chaos; but then just what is the right amount of judicial activism? And is there an expressly "safe" environment in which we can discuss its role in our society? I think Kennedy put it best, although, in the spirit of judicial taboo, I am splicing together his words for my own benefit: there can be no answer to the question because the field is unknowable.[59]

[58] *See Trop v. Dulles*, 356 U.S. 86, 101 (1958).
[59] *See Kennedy* at 547.

Conclusion

In the end, Kennedy's model has proven a useful tool to try and illustrate the various ways in which judges can shape the law to suite their social, cultural, and political convictions. But it is not without flaws – mainly, as I note in the Introduction, because it is based partly on inferences and the impracticality of knowing exactly what internal debate someone is having within their own psyche. Because both the law as well as the inferences one makes about the intent of others are inherently slippery, the model really only works as a best-guess hypothesis. But then, Kennedy never set out for the model to serve as a "gotcha" device in the first place. Nonetheless, I see an incredible degree of truth in the applicability of Kennedy's process of legal reasoning and it can undoubtably serve as a source of knowledge to law students, professors, lawyers, judges, and the public at-large. I suppose the final question that remains is: how will you use it?