

**REFLECTIONS ON THE LEAST DANGEROUS
BRANCH***

*Chief Judge Jennifer Walker Elrod***

TABLE OF CONTENTS

I. INTRODUCTION 550

II. HISTORY AND VISION: THE “LEAST DANGEROUS” BRANCH 551

III. THE MODERN FEDERAL JUDGE’S TOOLBOX 553

A. Traditional Tools 554

B. New Tools..... 556

IV. CONCLUSION 562

* Based upon remarks at Texas Tech University School of Law on April 22, 2025, as part of the 16th Annual Walter B. Huffman Distinguished Lecture Series. This speech has been lightly edited for clarity and readability. Special thanks to Sara B. Baumgardner, my law clerk and an alumna of both the Texas Tech University School of Law (J.D. 2021) and the *Texas Tech Law Review*, for her help in preparing these remarks for publication. I would also like to thank my law clerk McKenna Gilliland for her help in preparing the speech.

** Chief Judge, United States Court of Appeals for the Fifth Circuit.

I. INTRODUCTION

Thank you so much, Sam, for the very generous introduction, and thank you, General Huffman, for your kind words. Your friendship is the main reason that I am here today, in addition to my love for this school and my appreciation for the *Law Review* here. Thank you so much for having me.

I was very honored to be asked to give this year's Huffman Lecture by Sam Dick, and I have enjoyed reading the *Law Review*'s Volume 57. I especially enjoyed the excellent student scholarship by Chase Bailey, Alexandra Blair, Sydney Dumas, Michelle Sutton, and Ashley Trujillo.

Of course, I think the world of General Huffman. He is a dedicated public servant who has inculcated the value of public service into the very fiber of this law school. And I am honored to join the ranks of distinguished past speakers, like General Malinda Dunn and eminent attorney Mark Lanier, who have also given this lecture in General Huffman's name. General Huffman embodies the principles of excellent leadership, leading over 4,000 attorneys in the military, leading this law school, and leading some of you who took his leadership class this term. He embodies the principles of public servanthood, leadership, and good American common sense. I am grateful that he is my friend, and I am thankful to be asked to give a lecture in his honor.

As was referenced, this is not my first time at Texas Tech. In 2011, I was privileged to serve as your M.D. Anderson Public Service Visiting Professor, and I spoke to the students about the American jury system. I also spoke to General Huffman's criminal-law class about justice and our criminal-justice system, after meeting General Huffman at a State Bar dinner. General Huffman served with distinction in the State Bar leadership even while he was doing so many other things. Then, in 2016, I was very thankful to give the first-ever speech for the Judge William Shaver Legal Ethics Lecture Series. So, I am delighted to be back at Texas Tech today.

I am also delighted that I have been able to see some of my friends: Justice Johnson and Judge Cummings. I hope to see Judge Hendrix at some point and so many other friends. I am also delighted to have an incoming law clerk, Sara Baumgardner, who is here today. And she is a Texas Tech graduate, a distinguished Texas Tech graduate. Jason Jordan, another Texas Tech graduate, also clerked for me.

I was really happy to be able to have a little tour in between the time of the breakfast this morning and this lecture, and I got to see some new things that have popped up here in Lubbock since I was last here. You have a lovely performing arts center here—the Buddy Holly Performing Arts Center. It looks like an amazing place, and I cannot wait to hear the acoustics in there at a future visit.

And I did see that the Buddy Holly statue has been moved to a new place. I did not get to go into the Buddy Holly Museum this time, but I have

been there several times before. I was once visiting with some British lawyers and judges, as part of the Inns of Court program that I participate in. Some of them were from the Temple Bar and some from the other bars. They heard that I was from Texas, and they asked me if I would take them *not* to see NASA or something like that, but if I would take them to the Buddy Holly Museum. I explained to them that Lubbock was far from Houston, but that we had friends in Lubbock, and we would make sure that they could get out to Lubbock on a future visit, or they could extend their visit. So, we may have some visitors from the Temple Bar or something in the future because they are apparently big Buddy Holly fans.

My most memorable Buddy Holly experience took place during COVID. I was on a cruise ship in South America, and we had picked up a band that was a Buddy Holly tribute band to play during this cruise. This was when COVID was just starting out—the cruise started in February, and it was getting into March, and things were changing. On the last day of the cruise, as we were in Chile, they closed the port to us and told us that we could not get off the ship. Well, neither could the Buddy Holly tribute band. So, as we traveled all the way back to San Diego, they became a Beach Boys tribute band, an Elvis Presley tribute band—you name it, they played it. But I have to say that my favorite was when they were playing the classic Buddy Holly tributes. So, I hope that you do not mind my taking the time to tell you that Buddy Holly has played a role in my life.

I titled my talk today “Reflections on the Least Dangerous Branch.” That title comes from Alexander Hamilton, who once described the Judiciary as the “least dangerous branch” of our country’s federal government. When Hamilton said this, he quite literally meant that the Judiciary, as envisioned by the Framers, was the weakest branch of government and the least likely of the three to endanger the rights enshrined in our Constitution.

Today, I want to explore what it means to serve in this “least dangerous” branch and to discover what the role of a judge actually looks like in the modern day. How has the Judicial Branch changed since Hamilton’s time, and what tools do judges use today? Is the Judiciary still the “least dangerous branch?”

II. HISTORY AND VISION: THE “LEAST DANGEROUS” BRANCH

I begin with some background to frame our discussion. In *Federalist No. 78*, Alexander Hamilton famously said this about the Judiciary:

[T]he [J]udiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The [E]xecutive not only dispenses the honors but holds the sword of the community. The [L]egislature not only commands the purse but prescribes the rules by which the duties and rights

of every citizen are to be regulated. The [J]udiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.¹

Hamilton further declared, “[T]he [J]udiciary is beyond comparison the weakest of the three departments of power”² Is this the same Judiciary that we have been hearing about on the news?

Hamilton did not mean to say this dismissively. He was simply being precise. It is true that federal judges cannot send armies into battle, write checks out of the federal treasury, or even write the laws that we spend so much time thinking about. The Judicial Branch was a limited institution, in many senses, at the time of the Founding. For one, it was physically much smaller.³ It still had a small budget and number of employees, for example.⁴ The Constitution itself wrote minimally about what the structure of the courts would look like, saying, “The judicial [p]ower of the United States, shall be vested in one [S]upreme Court, and in such inferior [c]ourts as the Congress may from time to time ordain and establish.”⁵ So, we created the Supreme Court—and even that Court was smaller than it is now, consisting of only six Justices.⁶ But we did not actually create any other courts—inferior courts were optional, to be created at Congress’s discretion.⁷

In the Judiciary Act of 1789, Congress first exercised that option and created some circuit courts.⁸ But this Act created no circuit judges to fill those courts!⁹ This means that, for a time, there were very few federal judges to

1. THE FEDERALIST NO. 78 (Alexander Hamilton), in THE FEDERALIST PAPERS 457, 458 (Dover Thrift ed., 2014) (1788).

2. *Id.*

3. See Judiciary Act of 1789, ch. 20, §§ 1–4, 1 Stat. 73 (1789) (current version at 28 U.S.C. §§ 1–5001) (laying out that the Supreme Court would be made up of a chief justice and four associate justices and creating thirteen district courts and three circuit courts); *Federal Judiciary Act (1789)*, NAT’L ARCHIVES, <https://www.archives.gov/milestone-documents/federal-judiciary-act> [<https://perma.cc/CG2F-LUDB>] (last reviewed May 10, 2022).

4. See Judiciary Act of 1789 §§ 1–4.

5. U.S. CONST. art. III, § 1.

6. Judiciary Act of 1789 § 1.

7. U.S. CONST. art. III, § 1. And even now that Congress has created many such “inferior courts,” the federal Judiciary still has quite a small budget relative to other parts of the federal government, as well as a smaller number of employees. For example, my circuit-judge colleagues and I generally have four law clerks each (though I have five at the time of this writing). And the office of the Fifth Circuit’s Clerk of Court has far more employees and processes an average of 5,000 cases per year. JUDICIAL WORKLOAD STATISTICS, CLERKS ANNUAL REPORT JULY 2024-JUNE 2025: UNITED STATES COURT OF APPEALS FIFTH CIRCUIT 4 (2025), https://www.ca5.uscourts.gov/docs/default-source/default-document-library/clerk’s-annual-report-july-2024-to-june-2025.pdf?sfvrsn=44b3ce2d_1 [<https://perma.cc/3LVW-2VDJ>].

8. Joshua Glick, Comment, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1754 (2003).

9. *Id.*

serve all of these functions; as a result, for the first 121 years of the Supreme Court's history, the Justices rode circuit, traveling around the country to hear cases in the circuit courts as well as doing their Supreme Court work, instead of Congress creating a full and separate inferior judiciary.¹⁰ It was the Judiciary Act of 1869 that finally created a separate circuit—court judiciary, and the practice of Justices riding circuit was abolished completely in 1911.¹¹

The Judicial Branch was also designed to be limited in its power. Hamilton was not the only member of the Founding generation to want it this way; this was made evident in *Federalist No. 78*, which attempted to assuage people's fears that the Judiciary would have broad powers and be a tyrannical institution. Thomas Jefferson was also a big proponent of a limited judiciary. In 1804, for instance, he wrote a letter to Abigail Adams, saying, "[T]he opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the [L]egislature [and] [E]xecutive also in their spheres, would make the [J]udiciary a despotic branch."¹² In other words, he thought that if judges were given the power of judicial rule for all the branches, the Judiciary could become tyrannical and too powerful compared to the other branches.¹³

Today, our Judiciary has many differences from the Founders' original vision. As I said before, Hamilton said that the Judiciary is the "least dangerous branch" because it has the least "capacity" to "annoy or injure" citizens' rights under the Constitution.¹⁴ But a federal judge's "capacity" has greatly expanded since then, and our constitutional structure now places many more important questions in the hands of judges than it did at the Founding. In particular, the modern judge has at his or her disposal a varied set of tools that we use to do our jobs that were either not available or not fully developed back then.

The question I pose to you today is: how do the tools at the modern judge's disposal affect the Judiciary's "power of judgment" and its status as the "least dangerous branch?" To attempt to answer this question, let us unpack the modern federal judge's toolbox together.

III. THE MODERN FEDERAL JUDGE'S TOOLBOX

I have spoken on numerous occasions about a judge's toolbox and about individual tools that comprise this kit. But today, I want to weave some of these thoughts together and outline a collection of tools that I see as particularly important in shaping the role and power of the modern Judiciary.

10. *Id.*

11. *Id.*

12. Letter from Thomas Jefferson to Abigail Adams (Sep. 11, 1804) (available at <https://founders.archives.gov/documents/Jefferson/01-44-02-0341> [<https://perma.cc/DBA9-MZAB>]).

13. *See id.*

14. *See* Hamilton, *supra* note 2.

Some of these tools have been around for decades, if not centuries. Others have developed more recently. I will first discuss the more established, traditional tools that federal judges have gained since the Founding, and then I will discuss some new tools that I see shaping the power of the Judiciary in the last few years. Note that this is not necessarily a well-rounded or coherent set of tools. It is simply an assortment of tools that can be used—indeed, some are used quite often.

As I discuss these tools, I ask you to think: how do these tools square with Hamilton's vision of the Judiciary as the "least dangerous" branch?

A. Traditional Tools

The first traditional tool I want to mention is judicial review. As many have probably guessed when I mentioned Jefferson's letter to Abigail Adams, Jefferson was on the losing end of his argument about judicial review. In 1803, the year before Jefferson even wrote to Abigail Adams, the Supreme Court declared in *Marbury v. Madison* that the Judiciary *did* have the right to hold laws unconstitutional, thus granting itself this awesome power of judicial review.¹⁵ The Supreme Court has since extended this power. In *Cooper v. Aaron*, the Supreme Court declared that *Marbury* means that the "federal [J]udiciary is supreme in the exposition of the law of the Constitution."¹⁶ Since then, judicial review and judicial supremacy have been considered the most important tools in the federal judge's toolbox.

Another traditional tool in the federal judge's toolbox is federal-question jurisdiction.¹⁷ The Judiciary Act of 1789 did not include federal-question jurisdiction due to fears that granting that kind of jurisdiction would give too much power to federal courts.¹⁸ The Federalists added federal-question jurisdiction to federal courts for a short time in 1801, but such jurisdiction was repealed the very next year.¹⁹ Our current federal-question-jurisdiction statute, 28 U.S.C. § 1331, dates only to 1875.²⁰ Of course, we have had diversity jurisdiction since the Judiciary Act of 1789.²¹ But that jurisdiction has also expanded, as the amount in controversy has not grown to keep up with inflation.²² Many think that diversity

15. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–78 (1803).

16. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

17. See 28 U.S.C. § 1331 (establishing that district courts have original jurisdiction in civil actions arising under the Constitution, laws, or treaties of the United States).

18. See Judiciary Act of 1789, ch. 20, §§ 1–4, 1 Stat. 73 (1789) (current version at 28 U.S.C. §§ 1–5001); BRUCE A. RAGSDALE, *ESTABLISHING A FEDERAL JUDICIARY* 4 (Fed. Jud. Center 2007), <https://www.fjc.gov/sites/default/files/pdf/establishjudiciary.pdf> [<https://perma.cc/787J-DVY6>].

19. *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 826 n.5 (1986) (Brennan, J., dissenting).

20. 28 U.S.C. § 1331.

21. Judiciary Act of 1789, § 11.

22. See 28 U.S.C. § 1332(a).

jurisdiction is far too broad today. I take no position on that but only note it for your use.

Next is standing. Our standing doctrine has waxed and waned over time, but various theories of standing have given judges the fundamental power to decide who can have their day in federal court and who cannot. The reach of standing in federal court thus has an enormous effect on the contours of justice in our country. Standing's reach has been at its zenith in cases like *Massachusetts v. EPA*, which had a very broad understanding of standing.²³ But we have seen that reach decrease in some of the more recent Supreme Court cases. Whether that doctrine is growing or diminishing remains to be discussed by the professors in the room.

One last traditional tool—or, rather, set of tools—that I use all the time is the canons of construction. These are a collection of rules and principles that jurists use to interpret legal texts when those texts' meaning is unclear and that help judges to arrive at a reasonable interpretation of the law. At our disposal, we have textual canons of construction, like the presumption of consistent usage and the surplusage canon. These help us to understand what statutory provisions mean.²⁴ “We also have substantive canons, like the rule of lenity, that infuse our application of the law with certain values that society has agreed upon.”²⁵ In addition, common-law principles and *stare decisis* guide judges' decisions.

In my view, applying rules and principles of construction is a constraint on judges in a healthy way. It “removes the judge from the judging” in a way that leads to “a government of laws and not of men.”²⁶ So, these canons can actually contract the raw power of the judges because they give us a framework within which to operate.

When I was sworn in as a state judge, I quoted the French jurist Raymond Saleilles, who described judicial decision-making in this way: “One wills at the beginning the result; one finds the principle afterwards; such is the genesis of all juridical construction.”²⁷ I did not quote him because I agreed with him! I quoted him because I adamantly *disagreed* with him. A results-oriented approach has not completely waned in certain legal circles since the nineteenth century. But I have always emphatically rejected that theory of judging. Judges are not like architects or builders—we never know

23. See *Massachusetts v. EPA*, 549 U.S. 497, 516–27 (2007).

24. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 168, 170, 174 (2012).

25. Jennifer Walker Elrod, *Trial by Siri: AI Comes to the Courtroom*, 57 HOUS. L. REV. 1083, 1094 (2020); see, e.g., SCALIA & GARNER, *supra* note 25, at 296–302 (discussing the rule of lenity).

26. Elrod, *supra* note 26, at 1094–95 (quoting MASS. CONST. art. XXX) (internal quotations omitted).

27. RAYMOND SALEILLES, *DE LA PERSONNALITÉ JURIDIQUE* [LEGAL PERSONALITY] 45–46 (1910); Benjamin N. Cardozo, *The Nature of the Judicial Process* 54 (Yale U. Press. 1921), <https://www.agathonlibrary.com/wp-content/uploads/2022/05/Benjamin-N.-Cardozo-Nature-of-the-judicial-process.pdf> [<https://perma.cc/NKJ8-ZCAH>].

exactly what the product will look like. Rather, judicial interpretation is more like archaeology or treasure hunting. We apply our tools of construction to discover what the law says and what the outcome of the case, therefore, is.

It is worth noting, though, that even when multiple judges espouse a textualist and originalist approach and use the same tools of construction, we do not always come to the same answer.²⁸ This can be perplexing for law-school students and can also be fodder for law-review articles by professors. As an example, my long-time friend and esteemed colleague, Judge Donny Willett, and I disagreed enthusiastically in a recent tax case involving the oil and gas industry.²⁹ The question was whether a particular statutory term should receive its common ordinary meaning or a technical statutory definition.³⁰ I concluded the former; Judge Willett quite reasonably concluded the latter.³¹ Even we, like-minded textualists, disagreed about what the right answer was in a particular case. So, these tools are helpful and perhaps constraining, but they do not always tell us what the answer to the question is.

B. New Tools

Now that I have discussed a few judges' tools that have been around for a long time, I want to discuss some new tools that may be on the rise in the federal Judiciary and that are equally important to judges' work.

First, with the rise of the administrative state in the past few decades has come a much greater role for federal judges. The expansion of the administrative state has led to an increase in litigation and, as a result, a larger voice for the Judiciary in the work of the Executive. Although for years we gave agencies great deference when interpreting the statutes that the agencies applied,³² *Loper Bright* has now told inferior judges like myself that the Judiciary has a bigger role to play in this area, allowing federal courts to exercise more of their own judgment in deciding whether agency regulations are proper.³³ We'll have to wait and see how this plays out and whether this expands the power of the "least dangerous branch." Likewise, *SEC v. Jarkesy* has held that, under the Seventh Amendment, certain determinations require

28. Compare *Douglass v. Nippon Yusen Kabushiki Kaisha*, 46 F.4th 226, 243 (5th Cir. 2022) (en banc) (majority op.), and *id.* at 243–49 (Ho., J., concurring), with *id.* at 249–82 (Elrod, J., dissenting), and *id.* at 284–87 (Oldham, J., dissenting).

29. See generally *Vitol, Inc. v. United States*, 30 F.4th 248 (5th Cir. 2022).

30. See, e.g., *id.* at 249–50 (majority op.), 257–58 (Elrod, J., dissenting).

31. Compare *id.* at 257–62 (Elrod, J., dissenting), with *id.* at 249–57 (majority op.).

32. See generally *Chevron, U.S.A. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (establishing this principle of deference to agency interpretation of ambiguous statutes), *overruled by* *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024). Compare *id.* (mandating deference to agency interpretation), with *Auer v. Robbins*, 519 U.S. 452, 457 (1997) (applying *Chevron* to hold that deference should be given to an agency's interpretation of its own regulations), and *Kisor v. Wilkie*, 588 U.S. 558, 563–64 (2019) (limiting *Auer* deference in scope).

33. See *Loper Bright Enters.*, 603 U.S. at 412.

juries rather than agency adjudications; as a result, parties may bring more of those actions in courts rather than in the agencies.³⁴ So, there will be a bigger role for the Judiciary in some of these areas of administrative review based upon some of the recent Supreme Court case law that we have seen in this area—some of which has come out of my Circuit.³⁵

Another area that has emerged has been the power of the nationwide injunction. Traditionally, court orders were limited to the parties in a lawsuit. But in the past decade or two, nationwide injunctions have proliferated; these allow a single judge to halt the enforcement of a government policy or law nationwide, rather than just within the specific district where the lawsuit is filed.³⁶ This allows one federal judge to control policy for the entire country. This power is something that could potentially be curtailed because, just this month, legislation is making its way through Congress that would limit the authority of federal district judges to issue nationwide injunctions. But for now, this is a big power that federal judges have in their hands.³⁷

Another modern tool consists of class actions, mass actions, multidistrict litigation, and Class Action Fairness Act (CAFA)³⁸ cases—mechanisms for case management that belong together in one big section of the toolbox. Class actions give federal judges the ability to bring many injured plaintiffs together in important cases, which gives judges a broader power to resolve disputes affecting large groups of individuals.³⁹ Mass actions and multidistrict litigation also gather cases together.⁴⁰ Class actions have seen a significant rise in recent years due to factors like increased data breaches,⁴¹ labor and employment disputes,⁴² and mass torts. Class action settlements and mass tort settlements reached record levels in 2022 and 2023, when the cumulative value of those settlements exceeded over \$40 billion for the third year in a row.⁴³ And gathering these cases into the federal courts has also played a role in increasing the power of the “least dangerous branch.”

34. See *SEC v. Jarkesy*, 603 U.S. 109, 140–41.

35. See *Jarkesy v. SEC*, 34 F.4th 446, 449 (5th Cir. 2022), *aff’d*, 603 U.S.109.

36. See generally Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67 (2019) (explaining and advocating for nationwide injunctions).

37. These remarks were given before the United States Supreme Court handed down its decision in *Trump v. CASA, Inc.*, 606 U.S. 831 (2025), which may impact the viability of nationwide injunctions in the future.

38. 28 U.S.C. § 1711.

39. See generally FED. R. CIV. P. 23 (listing procedural rules for class actions).

40. See, e.g., *Mass Actions & Multidistrict Litigation*, U.S. DIST. CT. S. D. OF ILL., <https://www.ilsd.uscourts.gov/mass-actions-multidistrict-litigation> [<https://perma.cc/M9MU-U6WV>] (last visited Mar. 1, 2026) (explaining the two).

41. See DUANE MORRIS LLP, *CLASS ACTION REVIEW 2025 26* (2025), https://cdn.prod.website-files.com/6392041b1e5410ee3fb63644/677b6c695d3722c24df0887b_Duane%20Morris%20Class%20Action%20Review%20%E2%80%9393%202025%20%E2%80%944%20Executive%20Summary.pdf [<https://perma.cc/52H2-JUHA>].

42. See *id.* at 18–20.

43. *Id.* at 1–2.

Another tool in federal judges' toolbox, which may be helpful to understanding of cases, is amicus briefs, which allow courts to receive the opinions of non-parties about a case—non-parties who may or may not actually be our “friends.” Effective January 1, 2023, the Supreme Court has expanded the use of amicus briefs by limiting the requirement for party consent to file them; this allows individuals or organizations to file amicus briefs in a case without seeking parties' permission.⁴⁴

There have been, of course, amicus briefs before. We usually consider the first historical amicus brief to be the Brandeis Brief (which, unfortunately, turned out to contain errors and bad social science).⁴⁵ One problem with amicus briefs is that amici, who are, by definition, not involved in the case, sometimes try to sneak in things that have not been adjudicated, such as untested expert opinions. Amici might try to say that something is settled, such as a settled medicine or settled science, to get the court to accept it—all without any *Daubert* testing⁴⁶ or any of the normal tools that the parties and courts would generally use to test things. Thus, amicus briefs give power to the Judiciary because parties can use those briefs to get the courts to weigh in on, for example, not-yet-litigated facts or unproven science. That judicial power could be potentially problematic, but it could also help judges who are not scientific experts. I leave it for you to decide.

Videos constitute perhaps the newest tool that makes the most difference in the way we do our work, and they are showing up in legal work—and in judges' hands—with increasing frequency. We review videos when we are dealing with sentencing issues and sentencing enhancements. We probably review videos most frequently in § 1983 lawsuits. You will recall the Supreme Court's decision in *Scott v. Harris*, in which a police officer ended a high-speed chase by ramming the suspect's car, causing a crash that left the driver quadriplegic.⁴⁷ The legal issue in that case was whether the officer used excessive force in violation of the Fourth Amendment.⁴⁸ But what made that case remarkable was the dashcam footage from the police cruiser, which formed a critical part of the record. Based on that video, the majority concluded that Harris's “version of events [was] so utterly discredited by the record that no reasonable jury could” find the officer's actions unreasonable.⁴⁹

44. See SUP. CT. R. 37.2 (requiring an *amicus curiae* filing a brief to “ensure that the counsel of record for all parties receive notice of its intention to file an *amicus curiae* brief at least [ten] days prior to the due date for the *amicus curiae* brief,” unless the brief is filed earlier).

45. See generally Brief for the State of Oregon, *Muller v. Oregon*, 208 U.S. 412 (No. 107), 1908 WL 27605 (relying on non-legal data rather than case law).

46. See generally *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) (laying out factors for expert qualifications).

47. *Scott v. Harris*, 550 U.S. 372, 375 (2007).

48. *Id.* at 376.

49. *Id.* at 380.

Critically, in *Scott*, the Supreme Court did not just treat the video like any other evidence. It held that where the video contradicted other evidence, the lower court “should have viewed the facts in the light depicted by the videotape.”⁵⁰ So, where the video is dispositive, the video controls⁵¹—and that is true not only in trial court. The court of appeals can say in the first instance, “We have looked at the video, we think it’s dispositive, and this is the answer.” So, juries and district courts no longer decide certain cases—which means that those cases no longer receive clearly erroneous factual review.⁵²

Developments related to *Scott v. Harris* have changed the way that we do our business. Right now, cases are percolating within our circuit that deal with whether district courts should allow the video to come in at the Rule 12(b)(6) stage if the video overrides the complaint. Different judges are percolating in different ways on that question. Our circuit has not yet weighed in on it, as far as I know. This is one of the biggest changes that we have had because it effectively removes trial-level factfinders from the equation on appeal.

Founding-era judges could never have dreamed of using video to help them resolve cases. And questions still remain about whether *Scott v. Harris*’s holding is the right approach in cases that feature video evidence. Critics of *Scott* say that the video unduly shapes the narrative, bypasses conflicting testimony, and narrows the scope of what could be debated—compressing the fact-finding process and expanding the Supreme Court’s ability to decide summary judgment as a matter of law. Others believe that using video allows judges to cut to the heart of the case, using their own eyes when evidence is conflicting. Changing the speed of the video can shape an impression. And we can review footage repeatedly for details that could be at issue or to try to understand the instant perception of someone on the scene.

I think that we will see more of these videos actually embedded in opinions. I was the first Fifth Circuit judge to directly embed a video from a dash camera into an opinion (a dissent, unfortunately).⁵³ This spring, in a dissent in a Second Amendment case, a Ninth Circuit judge embedded a different kind of video in an opinion—one that he himself had written, narrated, and produced, depicting him handling and describing the parts and functions of several guns. Now, I am not here to weigh in on whether that video was proper or persuasive, but I will say this: The tool of video represents a new frontier in how judges may be able to communicate and persuade. If other judges replicate this use of video or other similar types of

50. *Id.* at 381.

51. *See id.* at 380, 381; e.g., *Boyd v. McNamara*, 74 F.4th 662, 665–66 (5th Cir. 2023) (reviewing video evidence in the light depicted by the video).

52. *See Boyd*, 74 F.4th at 665–66.

53. *Poole v. City of Shreveport*, 691 F.3d 624, 635–44 (5th Cir. 2012) (Elrod, J., concurring in part and dissenting in part).

digital media in their work, that could have profound impacts on the role of the Judiciary in our American system.

In the past decade or so, judges have also had the new field of corpus linguistics at their disposal. Corpus linguistics searches and analyzes vast databases of text—or “corpus”—to determine how words or phrases were actually used at the time when they appeared in the statute. My friend Tom Lee, a retired Justice of the Utah Supreme Court, is a big proponent of corpus linguistics and has argued that it can be used effectively “to introduce transparent, falsifiable evidence on the questions at stake.”⁵⁴

Corpus linguistics has popped up in several Supreme Court cases, as well. In his dissent in *New York State Rifle & Pistol Association v. Bruen*, Justice Breyer used corpus evidence to support his arguments about the proper meaning of the Second Amendment’s phrase “bear [a]rms.”⁵⁵ And in *Facebook, Inc. v. Duguid*, Justice Alito suggested in concurrence that corpus linguistics could be used in the future to support the judicial canons of construction.⁵⁶ Corpus linguistics is what we were doing with our use of all the various dictionaries. We are still working with dictionaries, but now people are using corpus linguistics to help us.

One last new tool—and we would be remiss if we did not mention it—is artificial intelligence (AI). The past few years have seen a flurry of discussion about lawyers’ AI use. We have all seen high-profile examples of cringeworthy briefs riddled with hallucinated case law. Some judges, dismayed by such occurrences, have publicly decried the use of AI in the legal profession generally.

But AI has been assisting courts across the country for far longer than many realize. “Basic” tools using predictive algorithms, tools that courts and lawyers alike use for legal research, like Westlaw and LEXIS, have been AI-assisted for years.⁵⁷ And some states, like Pennsylvania, Kentucky, and Wisconsin, have expanded their AI use to other functions, like using evidence-based risk-assessment programs to assist courts with criminal prosecution and sentencing.⁵⁸ These programs take criminal and demographic data, compare it with information about an individual to be sentenced, and provide recommendations for sentence length.⁵⁹ Some courts have also used predictive algorithms like these to help them set bail amounts.

54. Thomas R. Lee & Stephen C. Mouritsen, *The Corpus and the Critics*, 88 U. CHI. L. REV. 275, 275 (2021).

55. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 109–10 (2022) (Breyer, J., dissenting); see U.S. CONST. amend. II.

56. *Facebook, Inc. v. Duguid*, 592 U.S. 395, 410–13 (2021) (Alito, J., concurring).

57. Joe Martinez, *Generative AI in the Legal Sphere: Revolutionizing and Challenging Traditional Practices*, COMPLETE LEGAL (Mar. 5, 2024), <https://completelegal.us/generative-ai-in-the-legal-sphere-revolutionizing-and-challenging-traditional-practices/> [https://perma.cc/G74V-R5JV].

58. Elrod, *supra* note 26, at 1089–90.

59. Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 809, 811–13 (2014).

I do not know of any federal courts yet using these, but this innovation is undoubtedly coming.

Our court clerks' offices have also begun exploring and using some of the new generative AI tools to make their work more efficient. In the past few years, for example, the Fifth Circuit Clerk's Office has begun using AI to summarize certain filings and to screen cases for judge conflicts. To date, though, our court is using AI just to streamline processes—not to actually evaluate the merits of any legal arguments. But one Eleventh Circuit judge, at least, has taken a crack at using AI in his substantive case work. In a concurring opinion, he conducted what he called a “humble little mini-experiment,” asking ChatGPT and two other generative AI programs the ordinary meaning of the phrase “physically restrained,” the meaning of which was important to the outcome of the case.⁶⁰ It will likely not be long before other judges follow suit in finding ways to use AI to help them substantively resolve cases. Similarly, the Probation Office has tools that gather and organize large quantities of information. And I can imagine new AI features in our existing tools developing in the next few years. So, we need to be prepared for this; it could be a tool that can help us with our work.

Now, it is not yet in my toolkit to ask Siri how I should decide a case. You do not have to worry about that. Maybe some of you think that might be a good thing because you think Siri might decide the case better than I, but nonetheless, Siri is not in my toolbox for judicial decision-making.

I think that many young lawyers will be using AI in their research, and I am not going to say that you should not. It's readily available in all the major services—services devoted specifically to the law and certain uses—and it can save you time and your clients money. All kinds of reasons exist why you should use AI to help you do your research. But, ladies and gentlemen entering the practice of law, please: if you use AI in your research, follow the ethical guidance of our State Bar and of this old judge who is speaking to you today. Check your sources to make sure that they are real cases. Please make sure that the cases exist. Please make sure that you have checked for different biases and prejudices and things that can creep in. Know what source you are using. And please do not reveal your client's confidences as you are doing searches—especially not on public platforms, where client confidences could become part of the corpus of the AI information. Please do not do that.

In a legal system where volume can overwhelm, AI offers the promise of speed, efficiency, and a kind of consistency that human review alone may not achieve. But it remains to be seen just how such tools impact the Judiciary's work and, consequently, its role and power in our judicial order.

I am sure that you all can think of other tools besides these. But I raise this collection of tools, old and new—some of which I use with great

60. *United States v. Deleon*, 116 F.4th 1260, 1270–77 (11th Cir. 2024) (Newsom, J., concurring).

frequency—as examples of tools that I see as helping judges to wield their “power of judgment.”

IV. CONCLUSION

One of the most important things I think of as a judge deciding cases is using similar tools for similar problems. I do not pick a tool because I want a particular outcome. I generally use the same tools in the same order, unless the case is wildly disparate and requires a different tool that the parties have urged me to use and that I consider. All the time, I am using the same tools in the same order so that I can have predictable, fair results with fidelity to law and justice.

It is clear to me that all these tools in a judge’s toolbox have expanded the Judicial Branch’s power. So, even in changing times with new tools being developed, I strive to keep in mind the role that the Judiciary is intended to play in our constitutional order. At the end of the day, we are still one branch of three, and we still interact with the other branches in numerous ways. When Congress decides not to exercise its power and provides little guidance in statutory text, the Executive may step in and be more robust or muscular. And some perceive the Judiciary as stepping in as well. And some people think that’s a good thing, and some people think that’s a very bad thing.

But on the other hand, the Judiciary has no mechanism to enforce our decisions. We depend on the Executive Branch for that, as well as on Congress to fund us. I always think of the example of President Eisenhower, who sent the National Guard to Little Rock to enforce the Supreme Court’s decision in *Brown v. Board of Education*,⁶¹ even though he personally disagreed with it. We also depend on the other branches for our security. In an age of increased threats against judges,⁶² judges are beholden to the Executive and Legislative Branches to find solutions to keep us physically safe.⁶³

To end, I turn back to Hamilton. In the second half of *Federalist No. 78*, he pivots from his discussion of the Judiciary’s weakness to a somewhat more positive portrayal, describing the courts as “the bulwarks of a limited Constitution” against encroachments of the other branches and “an essential safeguard against the effects of occasional ill humors in the society.”⁶⁴

61. See generally 347 U.S. 483 (1954) (holding that the segregation of schools based on race violated the Equal Protection Clause of the Fourteenth Amendment).

62. See, e.g., Hon. John G. Roberts, Jr., 2024 Year End Report on the Federal Judiciary 5–6 (2024) [<https://perma.cc/VT4V-A96C>]. Of course, and unfortunately, judges have long dealt with security concerns. See *Cunningham v. Neagle*, 135 U.S. 1, 5–6 (1890).

63. See, e.g., *U.S. Senate Passes Judicial Security View*, NAT’L CTR. FOR STATE CTS. (Nov. 21, 2025), <https://www.ncsc.org/news/us-senate-passes-judicial-security-bill> [<https://perma.cc/BK4M-BW93>] (recounting legislative efforts to protect judges).

64. Hamilton, *supra* note 2, at 460–63.

As we have discussed today, the Judiciary's powers and its toolbox have expanded since Hamilton's time. So, I ask you, do these tools help us protect our Constitution and safeguard society, as Hamilton believed is the Judiciary's ultimate function, or do they actually cause us to "annoy or injure" Americans' constitutional rights? You, the students here today, will be the next generation to inherit our legal order. As lawyers, you will encounter judges at every turn who wield their power using these and other tools. And some of you will be judges yourselves, and you will have to decide what tools to carry around in your toolbox. I ask you these questions and hope that you will keep them in mind and use your influence to uphold the rule of law when deciding what tools are best for federal judges to wield. You have been trained well to lead by those such as General Huffman and his tremendous example of leadership to you.

The rule of law and government of laws, not of men or women, depends on you and what you decide should be in the judge's toolbox in the future. I leave this in your capable hands. Thank you.