A TRIBUTE TO JUDGE HAMILTON

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About ten years ago, I teamed up with my colleague David Hamilton for a presentation to a group of lawyers in Indianapolis on the topic of judicial decision-making. We had been asked to comment on Judge Wilkinson's latest book, *Cosmic Constitutional Theory*,[1] in which the veteran Fourth Circuit judge issued a clarion call against the rise of constitutional theory. Judge Wilkinson criticized each of the three big theories of constitutional adjudication in the post-New Deal era—living constitutionalism, originalism, and pragmatism. Each one, he argued, promotes judicial supremacy at the expense of democratic self-government. He urged a return to humility and restraint as the primary judicial virtues.

After some thoughtful remarks on Judge Wilkinson's thesis, Judge Hamilton declined to endorse any particular judicial philosophy, explaining instead that he practices what he called "ordinary judging," bringing all relevant legal tools to bear on each case—text, precedent, doctrine—while paying special attention to the structural relationships among different institutions of government.[2]

Though he used the phrase "ordinary judging" to describe his work,[3] anyone who has read Judge Hamilton's opinions knows that they are far from ordinary. Indeed, "extraordinary" is a more apt descriptor. Judge Hamilton has a gift for synthesizing the law and explaining it in a compelling and accessible way. His opinions do not simply recount the facts, recite the law, and announce the court's decision. He goes further, showing the links in the chain of factual and legal reasoning that led to the court's decision; he also explains how the operative legal framework fits within the broader doctrinal context and why the outcome is fair and makes sense. In short, his are *teaching* opinions. As he moves to senior status, it is fitting for us to pay tribute to Judge Hamilton and his extraordinary body of work—secure in the knowledge that he will continue to grace the court with many more years of exceptional contributions to our nation's law.

Judge Hamilton first joined the federal judiciary in 1994 as a district judge in Indianapolis. President Clinton nominated him in June of that year to fill a vacancy in the Southern District of Indiana.[4] At the time, Judge Hamilton was in private practice as a partner at the Barnes & Thornburg firm in Indianapolis,

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1. J. HARVIE WILKINSON, III, COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE (2012). Judge Wilkinson is a Circuit Judge on the United States Court of Appeals for the Fourth Circuit.

2. Circuit Judge David F. Hamilton, U.S. Ct. of Appeals for the Seventh Cir., Remarks at the Meeting of the Indianapolis Chapter of the Federalist Society on *Cosmic Constitutional Theory* by J. Harvie Wilkinson, III (Dec. 12, 2012), *in* THE CIR. RIDER: THE J. OF THE SEVENTH CIR. BAR ASS'N, Apr. 2013, at 12.

3. *Id.* at 11. Judge Hamilton acknowledged that he borrowed the phrase "ordinary judging" from Professor William Popkin of Indiana University's Maurer School of Law.

4. *Hamilton, David Frank*, FED. JUD. CTR., https://www.fjc.gov/history/judges/hamilton-david-frank [https://perma.cc/7EWQ-L9T7] (last visited Feb. 8, 2023).

where he had worked since 1984 except for a two-year stint—from 1989 to 1991—serving in state government as Legal Counsel to Indiana Governor Evan Bayh. Judge Hamilton earned his law degree at Yale Law School in 1983 and joined Barnes & Thornburg a year later, after clerking for Seventh Circuit Judge Richard Cudahy, with whom he would later serve as a colleague. Judge Hamilton also holds a bachelor's degree from Haverford College and was awarded a prestigious Fulbright Scholarship, which he used for graduate studies in Germany at the University of Tübingen.[5]

In October 1994 the United States Senate confirmed Judge Hamilton's nomination by a voice vote—practically inconceivable today—and he served with distinction in the Southern District of Indiana for fifteen years, the last two as the court's chief judge.[6] In March 2009, President Obama nominated him for a seat on the Seventh Circuit Court of Appeals; the Senate confirmed his nomination eight months later. He received his commission and officially joined our court on November 23, 2009, succeeding his fellow Hoosier, Senior Judge Kenneth Ripple of South Bend.[7] His roots, however, are in a different part of the state.

A native of Bloomington, Judge Hamilton has lived most of his life in southern Indiana. He spent the greater portion of his professional life in Indianapolis, the state's capital, where he practiced law, served the governor, and was a district court judge. After his elevation to our court, he opted to move his chambers to the Indiana University Maurer School of Law in Bloomington, on the campus of the state's flagship public university.[8] It was a novel choice, but it aligned with Judge Hamilton's scholarly bent and affinity for teaching—whether through his opinions or more conventionally by working with law students and the newly minted lawyers who serve as our law clerks and staff attorneys. With his chambers located in the heart of the law school, he periodically gathers for discussions with students over brown-bag lunches and otherwise contributes to the intellectual life and educational mission of the law school.

After he was confirmed to the court of appeals, Judge Hamilton made his mark almost immediately. As those who practice in the Seventh Circuit know, our court hears oral argument in nearly every case with counsel on both sides, so we are in session quite frequently. When Judge Hamilton arrived, appellate lawyers quickly learned what the trial bar in Indiana's Southern District no doubt already knew: he is always thoroughly prepared, his questions are astute and searching, and he is adept at drawing out the factual and legal pressure points in each side's arguments. To these substantive observations I add the following about his gracious nature: Judge Hamilton is invariably calm and courteous as he questions counsel from the bench. He elevates our oral-argument sessions closer to the gold

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5. *Id.*; Press Release, Ind. Univ., U.S. Court of Appeals Judge to Relocate Chambers to Indiana University Maurer School of Law (June 3, 2010), https://newsinfo.iu.edu/news/page/normal/14624.html [https://perma.cc/D7MR-2FJX].

6. *See Hamilton, David Frank*, *supra* note 4.

7. *Id.*

8. Press Release, Ind. Univ., *supra* note 5.

standard of appellate oral advocacy, using our time with the lawyers as an opportunity for dialogue about the strengths and weaknesses of their cases, with the goal of reaching a better reasoned decision.

We, his new colleagues, quickly learned that he approaches our post-argument discussions in the same spirit. Judge Hamilton's contributions to our deliberations in the conference room are uniformly thoughtful and collaborative as we work through the legal problem presented in each case. The same is true as we write our opinions and comment on drafts from other chambers. His suggestions are always generous and insightful, and he is tactful and respectful when he disagrees. I always learn a great deal when I sit with Judge Hamilton.

By the time he took senior status late last year, Judge Hamilton had written more than 630 majority opinions and more than 100 concurrences and dissents. It's impossible to distill this large body of distinguished appellate work into a short essay, so I will mention just a few of his opinions to illustrate his approach to appellate judging and then close with Judge Hamilton's own words about the judicial role.

Geinosky v. City of Chicago[9] is one of Judge Hamilton's most frequently cited opinions. There the court addressed the vexing problem of the legal standard for "class-of-one" equal-protection claims—more specifically, the requirement that the plaintiff must allege that he was treated differently than others similarly situated.[10] Mark Geinosky received twenty-four bogus parking tickets from the Chicago Police Department in a fourteen-month period.[11] He sued the Department alleging that he had been singled out for harassment in violation of his rights under the Equal Protection Clause.[12] That is, Geinosky alleged that he was discriminated against as a "class-of-one." But he did not identify any similarly situated person who was treated more favorably, an omission that led the district judge to dismiss the case.[13]

Our court reversed,[14] with Judge Hamilton writing for a unanimous panel. He began by situating the case within the Supreme Court's class-of-one doctrine, explaining that although the Equal Protection Clause is "most familiar" as a protection against governmental discrimination on the basis of race and other class-based distinctions, it is also understood "to protect individuals against purely arbitrary government classifications, even when a classification consists of singling out just one person for different treatment for arbitrary and irrational purposes."[15] Under the usual formulation of the class-of-one framework, the plaintiff "must allege that he was 'intentionally treated differently from others similarly situated and that there is no rational basis for the difference in

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9. 675 F.3d 743 (7th Cir. 2012).

10. *Id.* at 746.

11. *Id.* at 745.

12. *Id.* at 746.

13. *Id.*

14. In relevant part. *See id.* at 751 (reversing the dismissal of the equal-protection and conspiracy claims but affirming the dismissal of the claim for violation of substantive due process).

15. *Id.* at 747.

treatment.'"[16]

Judge Hamilton then explained that a central challenge in class-of-one doctrine is separating "ordinary and inevitable mistakes by government officials" from actionable discrimination—a key concern to avoid constitutionalizing every garden-variety wrongful act by a government agent.[17] To guard against this slippery slope, the doctrine typically requires a class-of-one claimant to identify a similarly situated person who was treated differently. Judge Hamilton explained why a strict enforcement of that requirement served no purpose in Geinosky's case:

> [R]equiring Geinosky to name a similarly situated person who did not receive twenty-four bogus parking tickets in 2007 and 2008 would not help distinguish between ordinary wrongful acts and deliberately discriminatory denials of equal protection. Such a requirement would be so simple to satisfy here that there is no purpose in punishing its omission with dismissal. Here, the pattern and nature of defendants' alleged conduct do the work of demonstrating the officers' improper discriminatory purpose. Geinosky's general allegation that defendants "intentionally treated plaintiff differently than others similarly situated" is sufficient here, where the alleged facts so clearly suggest harassment by public officials that has no conceivable legitimate purpose. To require more would elevate form over substance.[18]

On this reasoning, the court concluded that "Geinosky's complaint states a class-of-one claim in light of the pattern of unjustified harassment he has alleged."[19]

In *United States v. Correa*,[20] law-enforcement agents discovered illegal drugs during a lawful traffic stop and recovered several automatic garage-door openers and key fobs from the stopped car. One of the agents then drove around a Chicago neighborhood looking for the suspected stash house by pushing buttons on the seized garage openers.[21] When the door of a shared garage on a condominium building opened, the agent entered the locked lobby of the building using one of the seized key fobs and identified the target condo unit by testing the key in the mailboxes.[22]

The case raised an unusual set of Fourth Amendment questions: (1) was the officer's use of the automatic garage opener a search; (2) if so, was it reasonable; (3) was the officer's use of the seized key fob a search; and (4) if so, was it reasonable?[23] In his opinion for a unanimous court, Judge Hamilton answered

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16. *Id.* (quoting Engquist v. Or. Dep't of Agric., 553 U.S. 591, 601 (2008)).
17. *Id.*
18. *Id.* at 748.
19. *Id.*
20. 908 F.3d 208 (7th Cir. 2018).
21. *Id.* at 211.
22. *Id.* at 211-12.
23. *Id.* at 216-21.

"yes" to each of these novel questions.[24] The officer's use of the garage opener was "close to the edge but did not violate the Fourth Amendment, at least where it opened a garage shared by many residents of the building";[25] the use of the key fob was likewise reasonable under the Fourth Amendment.[26] The opinion is a masterful synthesis of the evolution in Fourth Amendment doctrine as the Supreme Court has ruled on contemporary suppression challenges in the digital age—particularly the Court's integration of the property- and privacy-based analytical approaches to search-and-seizure law.

Courthouse News Service v. Brown[27] illustrates Judge Hamilton's careful attention to the structural relationships between different governmental institutions. The case involved a suit by a national news agency claiming a First Amendment right to access civil complaints filed electronically in state court.[28] The Cook County Clerk of Courts permitted the press to access a newly filed civil complaint only after the e-filing was processed and the document was formally accepted for filing.[29] The news agency claimed a First Amendment right to immediate access—without waiting for processing—and sued the Clerk of Court seeking injunctive relief under 42 U.S.C. § 1983.[30] The district judge granted the requested injunction.[31]

Again writing for a unanimous court, Judge Hamilton reversed and remanded with instructions to dismiss the case without prejudice based on abstention principles.[32] He began by tracing the Supreme Court's jurisprudence regarding the First Amendment right of the press and the public to access public records and proceedings, including judicial proceedings and documents filed in court.[33] Though the claim clearly fell "within the terms of 42 U.S.C. § 1983,"[34] the animating principles of abstention doctrine—namely, comity and federalism—led the court to a prudential decision abstaining from exercising jurisdiction.[35] Judge Hamilton explained that the "[s]tate courts have a significant interest in running their own clerks' offices and setting their own filing procedures—especially in a court like the Circuit Court of Cook County, where more than one million cases are filed annually."[36] In this context, federal court intrusion into the operations of the state courts was unwise. The news agency had not sought relief in the state court: "Proceeding straight to the federal court to resolve a dispute with a state

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24. *Id.*
25. *Id.* at 212.
26. *Id.* at 221.
27. 908 F.3d 1063 (7th Cir. 2018).
28. *Id.* at 1065-66.
29. *Id.* at 1066.
30. *Id.* at 1065, 1067.
31. *Id.* at 1067-68.
32. *Id.* at 1075.
33. *Id.* at 1068-70.
34. *Id.* at 1070.
35. *Id.* at 1070-75.
36. *Id.* at 1071.

court clerk over the timing of access conflicts with the general principles of federalism, comity, and equity that underlie abstention [doctrine]."[37]

Judge Hamilton's opinion concludes:

> This principle of comity takes on special force when federal courts are asked to decide how state courts should conduct their business. The Illinois courts are best positioned to interpret their own orders, which are at the center of this case, and to craft an informed and proper balance between the state courts' legitimate institutional needs and the public's and the media's substantial First Amendment interest in timely access to court filings. . . . The claims here are not suitable for resolution in federal court at this time. [The news agency] is free to pursue a remedy in the state courts.[38]

This tiny sampling of Judge Hamilton's opinions gives a taste but cannot begin to capture the broader substance of his jurisprudence. So I will return to his own words in that joint presentation to the lawyers' group in Indianapolis. In his remarks, Judge Hamilton eschewed philosophical labels and instead described a more holistic approach to judging. He explained that he works with legal texts "that invite[] interpretation and elaboration in case law" and that "[t]ext, original intent, precedent, [and] doctrine . . . can take you a very long way"—especially when tempered by a "concern about the structures and relationships among different branches [of government]."[39] Beyond that, he said, "there is a need to focus on the institutional competencies [of the courts]."[40]

He summed up with this:

> We need to focus on what you can call ordinary judging or good old-fashioned legal analysis. Focus on the things that are the key elements of the rule of law—interpretation and application of public sources of law, done through a public explanation for which the authors are accountable; rules that will be indifferent as between different parties; and a willingness to apply rules generally. [These] elements are not original, obviously, but they are what I've learned to recognize as the key elements of a genuine rule of law.[41]

Judge Hamilton has faithfully applied these principles in every one of his cases, and his influence on our law will long endure. He has earned the deep respect and admiration of the bench and bar in his home circuit and across the nation. We are fortunate and grateful that he intends to remain active as a senior judge and look forward to his continued exceptional work and lasting friendship in our shared mission.

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37. *Id.*

38. *Id.* at 1074.

39. Remarks by Judge Hamilton, *supra* note 2, at 11.

40. *Id.*

41. *Id.* at 12.