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Stephen R. McAllister

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AN EAGLE SOARING: THE JURISPRUDENCE OF JUSTICE ANTONIN SCALIA

AUTUMN FOX*
STEPHEN R. McALLISTER**

INTRODUCTION

"[T]o say that Justice Antonin Scalia is a conservative is to say that an eagle is just a bird. For Scalia is not just a conservative, he is a magnificent conservative, often soaring above his friends and foes with a power and a style that are his alone."¹

Antonin Scalia was appointed to the Supreme Court of the United States by President Ronald Reagan in 1986.² Appointed to take Justice William Rehnquist's seat after he was selected as Chief Justice, Scalia was described at the time as the "intellectual lodestar who would pull the Court to the right by the force of his brilliance."³ Ten years later, however, not only is Scalia criticized for failing to build a conservative consensus, he is increasingly criticized for his caustic attacks on his colleagues and for the high moral tone of his opinions.⁴ Some critics say that "it is hard to

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¹ Law clerk to The Honorable Jerry G. Elliott, Kansas Court of Appeals. J.D., University of Kansas, 1997.
² Associate Professor of Law, University of Kansas. Former Law Clerk to The Honorable Byron R. White and The Honorable Clarence Thomas, Supreme Court of the United States.
⁴ Id. at xii.

⁴ See, e.g., Joan Biskupic, Scalia and His Scorchers: High Court Justice Vehemently Upholds Values in His Opinions, HOUSTON CHRONICLE, July 4, 1996,
recognize the bright witty Chicago law professor who ascended to the Court ten years ago [his] charm has given way to bombast and petulance.5

In spite of this criticism, Scalia has been the focus of a maelstrom of scholarly attention.6 Love him or hate him, Antonin


Scalia demands attention. He demands attention through his opinions, through his sense of wit, and through his jurisprudence. It may be, therefore, that Scalia's failure to build a consensus on the Court will, in the end, matter very little. Instead, it is his intellect, his legal principles, and his writing ability that will be his legacy to the Court.

This legacy, comprised of clear logic, concise writing, and the advocacy of clear legal rules, can be very seductive. It is difficult to argue, for example, that clear rules are not preferable to unclear ones. Or, that when the Constitution explicitly states that certain powers “shall be vested” in the President, those powers rightfully belong to the President and the President alone. Or, that a word says what it means and means what it says. As seductive as these arguments are, however, they still should be examined with a critical eye.

One way to do this is to review Justice Scalia's opinions and consider the Justice's explication of his preferred legal principles. This article examines three of Justice Scalia's preferred legal principles as explained by the Justice himself in his opinions and other rulings. Section I addresses Scalia's call for a Rule of Law as a law of rules. Section II reviews Scalia's separation-of-powers jurisprudence. Section III discusses Scalia's theory of statutory interpretation. Finally, Section IV considers two of Scalia's more vocal critics.

Justice Scalia's jurisprudence is indeed seductive, both in its simplicity and in its clarity. Additionally, Justice Scalia generally applies his principles consistently and honestly. While many may disagree with the outcome of Scalia's opinions, or with his choice of legal principles, one is left with the question, often posed by Scalia himself, if not these legal principles then what principles? The primary challenge for Scalia's critics is to answer this ques-

7. While Justice Scalia frequently authors dissents, it is in his concurrences that he perhaps most often asserts his jurisprudential viewpoint. In 1986 he wrote seventeen concurring opinions, the Court average was eight. In 1987, he wrote sixteen concurring opinions, the Court average was ten. In 1988, he wrote twenty-four concurring opinions, fully double that of the average of twelve. In 1990, he wrote eighteen to the Court's average of five. In 1989, he wrote fifteen concurring opinions and fourteen dissenting opinions, far exceeding the Court average of eight and ten respectively. While he may not always “win,” he is more often than not “heard.” See Schultz & Smith, supra note 3, at 109.
tion and, secondarily, to demonstrate that they can and will apply their chosen legal principles in a consistent and honest manner.

I. "A BAD RULE IS BETTER THAN NO RULE AT ALL" 8

"Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after repeatedly being killed and buried, Lemon stalks our Establishment Clause jurisprudence once again, frightening little children and school attorneys . . . ." 9

In his 1989 essay "The Rule of Law as a Law of Rules," 10 Justice Scalia advocates a Rule of Law rather than a discretionary approach to the law. 11 By "discretion," Scalia is referring to the use of "balancing" or "totality of the circumstances" tests to decide cases. 12 According to Scalia, when the Court decides cases by "balancing" competing interests, it is not the Court that will be deciding the law, but thirteen different courts of appeals and fifty state supreme courts. 13 Scalia believes that this approach to deciding the law leads to a lack of predictability and certainty, a "needful characteristic of any law worthy of the name." 14

Further, Scalia believes that it is only through the use of clear, generally applicable rules that judges hedge themselves in, thereby decreasing the risk that they will decide cases based on their own biases, beliefs, or sympathies rather than on objective legal principles. 15 Additionally, Scalia asserts that while a firm rule can inhibit courts, it can also embolden them. Scalia states that "[t]he chances that frail men and women will stand up to their unpleasant duty is greatly increased if they can stand behind the solid shield of a firm, clear principle." 16 Scalia concludes that the establishment of such rules is an essential component of the judicial process. 17 He admits, nonetheless, that balancing tests will be with the Court forever and states that "for my sins, I will probably write some of the opinions that use them.

10. Scalia, supra note 8, at 1175.
11. See id.
12. See id. at 1179.
13. Id.
14. Id.
15. Id. at 1180.
16. Id.
17. Id. at 1185.
All I urge is that the Rule of Law, the law of rules, be extended as far as the nature of the question allows.”18

A. Employment Division v. Smith

In Employment Division v. Smith19 Respondents were Native Americans who were fired from their jobs with a private drug rehabilitation organization for their ceremonial use of peyote.20 When Respondents applied for unemployment compensation, Petitioner denied their request, stating that they were ineligible for benefits because they were fired for work-related misconduct.21 The Oregon Court of Appeals reversed, holding that Petitioner’s denial of benefits violated Respondents’ right to the free exercise of religion under the First Amendment.22

On appeal to the Oregon Supreme Court, Petitioner argued that the denial was permissible because consumption of peyote was a crime under Oregon law.23 That court determined that the purpose of denying benefits due to misconduct—to preserve the financial integrity of the unemployment fund—was inadequate to justify infringing Respondents’ First Amendment rights.24

The Supreme Court of the United States vacated the judgment and remanded to the Oregon Supreme Court for determination of whether the sacramental use of peyote was a “crime,” and thus prohibited by Oregon law.25 The Oregon Supreme Court found that the ceremonial use of peyote was a crime, but reaffirmed its ruling and held that prohibiting the ceremonial use of peyote was invalid under the First Amendment.26 The United States Supreme Court once again granted certiorari.27

In a victory for the Rule of Law, Justice Scalia authored a majority opinion extending the Rule of Law to the First Amendment Free Exercise Clause, an area historically fraught with bal-

18. Id. at 1187.
20. Id. at 874.
21. Id.
22. Id.
23. Id. at 875.
24. See id.
25. Id. at 875-76.
ancing tests and "flexibility." 28 Although it appeared that Scalia's victory might be short lived, 29 it was a victory nonetheless.

1. The First Amendment and Conduct Prohibited by Law

Scalia began his analysis by rejecting Respondents' argument that the Court was bound by its precedent in *Sherbert v. Verner* 30 and *Thomas v. Review Board of Indiana*. 31 In both of those cases the Court held that a state could not condition the receipt of unemployment benefits on an individual's willingness to forgo conduct required by his or her religion. 32 Scalia reiterated that in *Smith I*, the Court held that if Oregon law prohibited the use of peyote, and if that prohibition was consistent with the Constitution, then Respondents had no right to violate that law. 33 This being true, *Sherbert* and *Thomas* offered no protection to the Respondents. 34 Recognizing a "Rule of Law" opportunity when he saw one, Scalia went on to consider whether Oregon's prohibition of the use of peyote was permissible under the First Amendment. 35

Scalia recognized that the Free Exercise Clause of the First Amendment protects the free exercise of religion, but stated that the free exercise of religion means "first and foremost, the right to believe and profess whatever religious doctrine one desires." 36 Therefore, any governmental regulation of beliefs as such, would be unconstitutional. 37 In the case before him, Scalia argued, Respondents sought to extend this plain meaning of "prohibiting free exercise," 38 to "include requiring any individual to observe a generally applicable law which forbids them from performing an

29. The Religious Freedom Restoration Act (RFRA) was passed on November 16, 1993 as a direct response to the holding in Smith II. This past term, the Court granted certiorari in a case which upheld the constitutionality of RFRA, *see* *Flores v. City of Boerne*, 73 F.3d 1352 (5th Cir.), *cert. granted*, 117 S.Ct. 293 (1996) (argued Feb. 19, 1997) and on June 25, 1997, the Court in a 6-3 decision declared RFRA unconstitutional. *See* *City of Boerne v. Flores*, 521 U.S. ___, 65 U.S.L.W. 4612, 1997 WL 345322 (1997).
32. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 877 (emphasis added).
37. *Id.*
38. *Id.* at 878.
act that their religious beliefs require.” Scalia rejected this argument both as a misreading of the text and as a matter of precedent.

Quoting Reynolds v. United States and Minnersville School District Board of Education v. Gobitis as support, Scalia stated that:

Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law that is not aimed at the promotion or restriction of religious beliefs. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinion, they may with practices. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious beliefs superior to the law of the land, and in effect to permit every citizen to become a law unto himself.

Scalia was not alone then, in his application of a generally applicable law analysis. He had the company of Justice Felix Frankfurter and precedent for support.

Citing United States v. Lee as further support, Scalia reiterated that the right of free exercise does not relieve an individual from the obligation to comply with a generally applicable law on the grounds that the law prohibits religious conduct. Additionally, Scalia stated that the only decisions where the Court has held that the First Amendment bars the application of generally applicable laws in this context have involved the Free Exercise Clause plus other constitutional protections, such as freedom of speech.

39. Id.
40. Id.
41. 98 U.S. 145 (1879).
42. 310 U.S. 586 (1940) (Frankfurter, J.).
44. 455 U.S. 252 (1982).
45. Employment Division, 494 U.S. at 879 (citing United States v. Lee, 455 U.S. 252, 263, n.3 (1982) (Stevens, J. concurring)). In Lee, the Court held that an Amish employer was not exempt from the payment of social security taxes simply because the Amish faith prohibited participation in governmental support programs.
46. Id. at 881.
2. Strict Scrutiny and the Political Process

Finding no such "hybrid" violation in *Smith II*, Scalia goes on to reject Respondents' argument that claims for religious exemption from generally applicable laws must be evaluated under the *Sherbert* "compelling interest" balancing test. 47 Scalia stated that while this test has been used to analyze free exercise challenges to generally applicable laws, it has never been used to invalidate one. 48 Neither was Scalia willing to apply the test only when the conduct prohibited is "central" to the individual's religion. 49 Scalia asserted that "[i]t is no more appropriate for judges to determine the 'centrality' of religious beliefs . . . than it would be for them to determine the 'importance' of ideas . . . in the free speech field." 50 Scalia stated that what this test "produces in those other fields —equality of treatment and an unrestricted flow of contending speech—are constitutional norms; what it would produce here—a private right to ignore generally applicable laws—is a constitutional anomaly." 51 Scalia held, therefore, that where a law is neutral and generally applicable, it is enforceable and will not violate the Free Exercise Clause. 52

In conclusion, Scalia extended the Rule of Law when he said:

47. *Id.* at 882-83.
48. *Id.* at 884-85.
49. See *id.* at 886.
50. *Id.* at 886-87.
51. *Id.*
52. *Id.* at 885. At least one legal scholar agrees with Scalia's holding in *Smith*. See Fronzuto, supra note 43, at 760. He states that:

The historic support for the test of general applicability is compelling. Beginning with acceptance of a rationalistic interpretation of religion by Thomas Jefferson early in American history, and the Supreme Court's affirmation of this standard with decisions such as *Reynolds* and *Smith II*, the constitutional principle promulgated is that individuals may not be exempt from the civil consequences of their actions simply because these acts are engaged in for religious purposes . . . .

Commenting on the passage of RFRA, Fronzuto also asserts that it is not the duty of Congress to impose upon the Court a standard of free exercise review that the Court has specifically rejected. He states that:

By allowing the legislature to provide religious accommodation, and not the courts, the test of general applicability is a classic exercise of judicial restraint . . . . It is not for a biased . . . judge to determine . . . what religious beliefs are constitutionally significant enough to be exempt from the law. Under the test of general applicability, all religious actors are treated fairly, providing little room for judicial abuse.

*Id.*
It may be fairly said that leaving accommodation to the political process will place at relative disadvantage those religious practices that are not widely engaged in, but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weight the social importance of all laws against the centrality of all religious belief...53

Smith II was Scalia's greatest victory in extending the Rule of Law in the constitutional arena.54

B. Barnes v. Glen Theater, Inc.

In Barnes v. Glen Theater, Inc.,55 Respondents were the Kitty Kat Lounge, Inc., the Glen Theater, Inc., and individual dancers who wished to provide totally nude dancing as entertainment.56 The state of Indiana's indecency law required that the dancers wear "pasties" and a "G-string."57 Totally nude dancing was, therefore, illegal. Respondents brought suit in district court claiming that the First Amendment's guarantee of freedom of expression prevented Indiana from enforcing the law.58

The district court granted Respondents' request for injunctive relief, holding that the statute was over broad.59 The Court of Appeals for the Seventh Circuit reversed and remanded to the district court, allowing respondents to pursue their First Amendment claim as it related to their dancing.60 On remand, the district court concluded that totally nude dancing was not expressive activity as defined and protected by the Constitution of United States.61 On appeal, the Seventh Circuit reversed the district

53. Employment Division, 494 U.S. at 890 (emphasis added).
54. See also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993). In this case, decided three years after Smith, the Court again applied the test of general applicability to a First Amendment Free Exercise challenge. Many commentators hoped that the Court would take this opportunity to reverse or limit its holding in Smith II. Contrary to these hopes, the Court, in a unanimous decision, did not retreat from Smith II at all. For further discussion of the Court's decision in this case see Renee Skinner, Note, The Church of Lukumi Babalu Aye, Inc. v. City of Hialeah: Still Sacrificing Free Exercise, 46 BAYLOR L. REV. 259 (1994).
56. Id. at 562-63.
57. See IND. CODE § 35-45-4-1 (1988).
58. Barnes, 501 U.S. at 563.
59. Id.
60. Id. at 564.
61. Id. at 564-65.
court and held that totally nude dancing was expressive conduct protected by the First Amendment. The Seventh Circuit then heard the case en banc. The en banc court held that non-obscene nude dancing performed for entertainment was expression protected by the First Amendment. Further, the court held that Indiana’s indecency statute improperly infringed Respondents’ right of expression because its purpose was to prevent the message of eroticism and sexuality conveyed by the dancers. The Supreme Court granted certiorari and, applying the four part O’Brien test, held that Indiana’s indecency statute did not violate the First Amendment.

1. On Nudity, the Hoosier Dome, and Generally Applicable Laws

While he agreed with the judgment of the Court in Barnes, Justice Scalia wrote separately. He wrote to extend the Rule of Law. Decided one year after Employment Division v. Smith, this case presented Scalia with an opportunity to reiterate his Rule of Law analysis in the First Amendment context, this time with respect to speech instead of religion. He agreed that Indiana’s indecency law should be upheld, not because it survived some “lower level” of First Amendment scrutiny, but because it was a generally applicable law not specifically directed at expression, and therefore not subject to First Amendment scrutiny at all.

62. Id.
63. Miller v. Civil City of South Bend, 904 F.2d 1081 (7th Cir. 1990) (en banc).
64. Id.
65. Id.
66. United States v. O’Brien, 391 U.S. 367 (1968) The Court set forth a four-part test to determine whether a statute impermissibly infringes on the First Amendment, and specifically, whether it infringes symbolic speech. The test is whether (1) The statute is within the constitutional power of the government; (2) Whether it furthers an important or substantial governmental interest; (3) Whether the governmental interest is unrelated to the suppression of free expression and (4) Whether the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. Id. at 376-77.
68. Id. at 572. (Scalia, J., concurring).
69. Id.
2. The Text, the Text, the Text

Scalia began his analysis, as he did in Employment Division v. Smith, by looking at the text of the statute. The text of the statute provided:

(a) A person who knowingly or intentionally in a public place:
(1) engages in sexual intercourse;
(2) engages in deviate sexual conduct;
(3) appears in a state of nudity;
(4) fondles genitals of himself or another person; commits public indecency, a Class A misdemeanor.

(b) ‘Nudity’ means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple . . . .

Scalia stated that on its face, the law was not directed at expression in particular. Quoting Judge Easterbrook of the Seventh Circuit, Scalia agreed that “Indiana does not regulate dancing. It regulates public nudity . . . . Almost the entire domain of Indiana’s statute is unrelated to expression, unless we view nude beaches and topless hot dog vendors as speech.” Scalia rejected the Respondents’ assertion that the statute could not be characterized as a generally applicable law because it impinged their right to convey a “message of eroticism.” Scalia, looking again to the text, stated that the intent to convey such a message is not a necessary element of the offense, “nor would one commit the offense by conveying the most explicit message of eroticism, so long as he does not commit any of the four specified acts in the process.”

3. History & Tradition

Next, Scalia looked at the “history and tradition” of the statute to support his Rule of Law analysis. He pointed out that Indiana’s first indecency law, promulgated in 1831, predated totally

71. IND. CODE § 35-45-4-1 (1988).
72. Barnes, 501 U.S. at 572.
73. Id. at 572-73 (quoting Miller v. Civil City of South Bend, 904 F.2d 1081, 1120 (7th Cir. 1990) (en banc) (Easterbrook, J., dissenting).
74. Id.
75. Id.
76. Barnes, 501 U.S. at 572-73 (Scalia, J., concurring).
nude dancing. Additionally, Scalia stated that if "Indiana in practice targeted only expressive nudity, while turning a blind eye to nude beaches and unclothed purveyors of hot dogs and machine tools, it might be said that what posed as a regulation of conduct in general was in reality a regulation of only communicative conduct." Because Respondents could offer no proof of such targeting, Scalia concluded that Indiana's nudity statutes, from 1831 to the present, were and always had been, generally applicable laws.

4. Enforcing Traditional Moral Beliefs

After arguing that the statute was generally applicable based on its text and history, Scalia looked at its purpose. He rejected the dissent's assertion that the purpose of the statute was to protect nonconsenting parties from offense, and that because patrons of the Kitty Kat Lounge and the Glen Theater were consenting adults the only purpose that remained was to restrict expressive conduct. Scalia argued that the dissent's analysis of the purpose of the statute presupposed that offense to others is the only reason for restricting nudity in public places. Instead, he argued, our society prohibits certain activities not because they might harm others, but because they are immoral. While some may disagree as to whether these prohibitions should exist, or whether they are, in fact, immoral, Scalia asserted that absent specific constitutional protection for the conduct, the Constitution does not prohibit the laws simply because they regulate morality.

Scalia concluded that the purpose of the Indiana statute, as demonstrated by its text and the manner in which it had been enforced, was to enforce the "traditional moral belief that people should not expose their private parts indiscriminately," regardless of whether those who see them are offended. Underscoring this point, Scalia stated that "[t]he purpose of Indiana's nudity law would be violated . . . if 60,000 fully consenting adults crowded

77. See id. at 573.
78. Id. at 574.
79. Id. at 573-74.
80. Id. at 574.
81. Id.
82. Id. at 574-75.
83. Id. at 575.
84. Id.
85. Id.
into the Hoosier Dome to display their genitals to one another, even if there were not an offended innocent in the crowd.\textsuperscript{86}

5. The First Amendment and Expressive Conduct

Finally, Justice Scalia reiterated that because Indiana's nudity statute is a \textit{generally applicable law}, the First Amendment is not implicated.\textsuperscript{87} Scalia conceded that the First Amendment does protect expressive conduct where the government prohibits the conduct precisely because of its expressive message.\textsuperscript{88} But, Scalia pointed out, "[v]irtually every law restricts conduct, and virtually any prohibited conduct can be performed for an expressive purpose—if only expressive of the fact that the actor disagrees with the prohibition," so it could not be said that every restriction of expression produced by a general law must pass First Amendment scrutiny.\textsuperscript{89}

Scalia cited \textit{Employment Division v. Smith}\textsuperscript{90} as an example of this generally applicable law analysis. Further, he stated that

\textsuperscript{86.} Id. In dissent Justice White disagreed with Justice Scalia's assertion that the statute at issue did not implicate the First Amendment. Justice White stated:

We agree with Justice Scalia that the Indiana statute would not permit 60,000 consenting Hoosiers to expose themselves to each other in the Hoosier Dome. No one can doubt, however, that those same 60,000 Hoosiers would be perfectly free to drive to their... homes... and, once there, to parade around, cavort, and revel in the nude for hours in front of relatives and friends. It is difficult to see why the State's interest in morality is any less in that situations, especially if, as Justice Scalia seems to suggest, nudity is inherently evil, but clearly the statute does not reach such activity... the State's failure to enact a truly general proscription requires closer scrutiny of the reasons for the distinctions the State has drawn.

\textit{Id.} at 595-96.

\textsuperscript{87.} Id. at 576.

\textsuperscript{88.} Id. at 577. Scalia cites the following as cases in which "expressive conduct" has been protected speech for purposes of the First Amendment: United States v. Eichman, 496 U.S. 310 (1990) (flag burning as protected speech); Texas v. Johnson, 491 U.S. 397 (1989) (same); and Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969) (students wearing of black arm bands as a form of protest as protected speech). \textit{See also} Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (Scalia, J., concurring) (ordinance forbidding the slaughter of animals was not a generally applicable law and governmental interest asserted failed to justify the targeting of the religious activity).

\textsuperscript{89.} \textit{Barnes}, 501 U.S. at 577.

\textsuperscript{90.} 494 U.S. 872 (1990).
there is an even greater reason to apply the analysis to expressive conduct because "[r]elatively few can plausibly assert that their illegal conduct is being engaged in for religious reasons; but almost anyone can violate almost any law as a means of expression."91 Scalia concluded that "[i]n the one case, as in the other, if the law is not directed against the protected value . . . the law must be obeyed."92 The Rule of Law is, after all, a law of rules. Speech is speech, nudity is nudity, and nude dancing is just that, dancing—nothing more, and nothing less.

C. Lamb's Chapel v. Center Moriches Union Free School District

Nowhere is Scalia's preference for the Rule of Law more clearly evidenced than in his First Amendment Establishment Clause jurisprudence. In Lamb's Chapel v. Center Moriches Union Free School District,93 Scalia wrote a concurring opinion to once again advocate for the death of the Lemon three-part balancing test.94

In Lamb's Chapel, Petitioner, a church, brought suit alleging that the Respondent school district had violated its constitutional rights by refusing the church's request to use school facilities to show a film series on family values and child-rearing.95 Section 414 of New York's education law authorized school boards to adopt reasonable regulations for the use of school property.96 Among the permitted uses were "social, civic, and recreational meetings."97 These meetings were to be non-exclusive and open to the general public.98 Specifically, Rule 7 of these regulations, consistent with New York state law, provided that the school premises could not be used for religious purposes.99

91. Barnes, 501 U.S. at 579.
92. Id.
94. Lemon v. Kurtzman, 403 U.S. 602 (1971) (In order to defeat an Establishment Clause challenge, the defendant must prove that the law in issue: (1) is primarily secular in purpose; (2) does not have a principal or primary effect of advancing or inhibiting religion; and (3) that the law does not foster an excessive entanglement with religion.).
95. Lamb's Chapel, 508 U.S. at 389
96. Id. at 386.
97. New York Education Law § 414(c).
98. Id.
Petitioner twice submitted a request to use the school facilities to show the above referenced film series.\textsuperscript{100} Twice this request was denied.\textsuperscript{101} Petitioner brought suit in District Court alleging violations of the Freedom and Assembly Clauses, the Free Exercise Clause, the Establishment Clause, as well as the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{102}

The District Court rejected all of these claims, and granted Respondent's motion for summary judgment.\textsuperscript{103} The court characterized the school district's facilities as a limited public forum, and noted that Rule 7 explicitly prohibited the use of school facilities for religious purposes.\textsuperscript{104} The court concluded that once a limited public forum is opened to a particular type of speech, selective denial of access to that forum is forbidden.\textsuperscript{105} Noting that Respondent had never opened its facilities to religious organizations, the court found no First Amendment Violation.\textsuperscript{106}

On appeal, the United States Court of Appeals for the Second Circuit affirmed the judgment of the District Court.\textsuperscript{107} The court held that Respondent's facilities were a limited public forum open for specific purposes only, thus allowing it to remain non-public except for those specific uses.\textsuperscript{108} The Supreme Court granted certiorari because the appellate court's decision was "questionable" under the Court's previous decisions.\textsuperscript{109}

1. The Majority and the Creature

Justice White, writing for the majority, found that Petitioner's denial of Respondent's request constituted a violation of the Free Speech Clause of the First Amendment and that showing the film would not have been a violation of the Establishment Clause.\textsuperscript{110} The Court explained that the subject matter of the film, family values and child-rearing, fell within the broad spec-

\textsuperscript{100} Id.
\textsuperscript{101} Id. at 388.
\textsuperscript{102} Id.
\textsuperscript{103} Id.
\textsuperscript{104} Id. at 389.
\textsuperscript{105} Id. at 389-90.
\textsuperscript{106} Id. at 390.
\textsuperscript{107} Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 959 F.2d 381, 389 (2d Cir. 1992).
\textsuperscript{108} Id. at 386.
\textsuperscript{110} Lamb's Chapel, 508 U.S. at 394.
trum of permitted uses of the property, and that the denial of Petitioner's request could only have been based upon the religious perspective of the film. The Court held that while Respondent could legally preserve the property under its control, once the property was open to the public for such a broad spectrum of uses the denial of Petitioner's request constituted a violation of the First Amendment. Much to the dismay of Justice Scalia, the majority did not stop there with its analysis. The Court went on to say that under the Lemon test, the showing of the film would not have constituted an Establishment Clause violation.

2. Drive a Pencil Through the Creature's Heart

Scalia agreed with the judgment of the Court, but could not agree with the majority's reliance on Lemon. The Court's invocation of Lemon, a test in direct opposition to a Rule of Law both in its substance and in its application, was more than Scalia could tolerate. He analogized Lemon to a ghoul in a late-night horror show, repeatedly returning from the dead. He pointed out that over the years, "no fewer than five of the currently sitting justices have personally driven pencils through the creature's heart," and that he personally has done so repeatedly.

Scalia stated that the secret to the Lemon test's survival is that it is "so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will." He goes on to say that when the Lemon test would strike down a practice it forbids, the Court uses it. When the Court wishes to uphold a practice it forbids, Lemon is simply ignored. Scalia cited numerous scholarly articles calling for the death of Lemon, and concluded that he will decline to apply Lemon—whether it validates or invalidates the government action in question—whenever and wherever he can.

In advocating for the interment of the Lemon test, Scalia seeks to extend the Rule of Law. His dislike of Lemon is consis-

111. Id. at 393.
112. Id.
113. Id. at 395.
114. Id. at 398.
115. Id.
116. Id. at 399.
117. Id.
118. Id.
119. Id. at 398-99.
120. See id. at 399-400.
tent with his preference for clear, predictable rules. It is consistent with a desire to give the lower courts clear rules with which to decide cases. Lamb's Chapel was not Scalia's first, nor will it be his last, call for the death of Lemon.\footnote{121} He has many pencils, sharpened and ready, to drive through the heart of all creatures which haunt the Rule of Law.

\section*{D. On Taking a Leaf From Scalia's Rule of Law Book}

Nowhere do liberals fear Justice Scalia more than in his abortion jurisprudence. On this issue Justice Scalia is said to be the Chief Nightmare in the liberal anxiety closet.\footnote{122} Of the Court's decision in Roe v. Wade\footnote{123} Scalia has said that, "[t]he emptiness of the 'reasoned judgment' that produced Roe is displayed in plain view by the fact . . . that the best the Court can do to explain how it is that the word 'liberty' must include the right to destroy human fetuses is to rattle off a collection of adjectives that simply decorate a value judgment and conceal a political choice."\footnote{124} Because of statements like this, liberals have predicted that Scalia will be instrumental in overturning Roe v. Wade.\footnote{125} Liberals have, in fact, spent much time and effort in analyzing exactly how and when Scalia will achieve this goal.\footnote{126} Perhaps, that time

\begin{footnotes}
\footnotetext[121]{See Edwards v. Aguillard, 482 U.S. 578 (1987) (Scalia, J., dissenting) (Justice Scalia rejected the Court's argument that Lemon sacrifices clarity and predictability for flexibility. Instead, he argued that it was time for the Court to sacrifice some flexibility for clarity and predictability.).}
\footnotetext[122]{See Young, supra note 6.}
\footnotetext[123]{410 U.S. 113 (1973).}
\footnotetext[124]{Planned Parenthood v. Casey, 112 S. Ct. 2791, 2875 (1992) (Scalia, J., concurring in judgment in part and dissenting in part) (emphasis in original).}
\footnotetext[125]{Accord Young, supra note 6, at 586. (Young quotes Professor Tribe as saying that "Scalia's method is designed to overrule virtually all of the Court's decisions protecting individual rights."); George Kannar, The Constitutional Catechism of Antonin Scalia, 99 Yale L. J. 1297, 1309 (1990) (Professor Kannar states that "Scalia plainly does reach conventionally 'conservative' positions on abortion," but concedes that Scalia's "tone and his not infrequent outcome 'contradictions' suggest strongly that a facile focus on any supposed 'result-orientation' in explaining his approach to constitutional adjudication does not do the Justice justice.").}
\footnotetext[126]{See, e.g., Peter B. Edelman, Justice Scalia's Jurisprudence and the Good Society: Shades of Felix Frankfurter and the Harvard Hit Parade of the 1950's, 12 Cardozo L. Rev. 1799, 1815 (1991) (In this article, Professor Edelman discusses a number of Justice Scalia's opinions, including those involving abortion, and concludes that Justice Scalia's "world" is not one of judicial restraint. Instead, as the title of the article suggests, he argues that Justice Scalia wants to take us back in time with his jurisprudence, rather than forward.)}
\end{footnotes}
could have been better spent analyzing the value of clear legal rules and the protections that they afford. Perhaps, that time could have been better spent in borrowing a leaf from Justice Scalia's Rule of Law Book.

"Justice Scalia's jurisprudence is constructed around the problem of judicial discretion and what he calls 'the main danger' in judging: the possibility 'that judges will mistake their own predilections for the law.'" While it is true that this rule-based theory of the law may leave more room for discretion than Justice Scalia is willing to admit, the many legal scholars who criticize Scalia's methodology fail to offer an objective alternative.

It is, for example, tempting for those who believe that the Bill of Rights should be interpreted to provide broad freedoms to criticize Justice Scalia's rule-based view of the role of judges. "But, this criticism of Justice Scalia's methodology stems from the

He concludes that "[t]he question about [Scalia's] jurisprudence is not whether it will take us back in time. That is obvious. The question is how far he really means to go if he can garner the votes to do so."); George Kannar, Strenuous Virtues, Virtuous Lives: The Social Vision of Antonin Scalia, 12 CARDOZO L. REV. 1845, 1866 (1991) (In his article, Professor Kannar states that "[b]ecause the rigid application of his narrow judicial world-view so consistently leads Justice Scalia to reach politically conservative results, . . . we have the strongest inclination to believe that some overreaching vision must drive them." He concludes, however, that "a Supreme Court Justice who attempts always to give life to such a pure version of the general American sensibility may not be the one who, in the long run, serves his or her country best."); Toby Golick, Justice Scalia, Poverty and the Good Society, 12 CARDOZO L. REV. 1817, 1830 (1991). Although Professor Golick's article deals with Justice Scalia's jurisprudence as it relates to cases involving government benefits for the poor, he too predicts that Scalia will achieve his conservative agenda. He states that:

It is not good enough in a 'good society' for the poor to be free to burn the flag to protest their hunger, homelessness and oppression. In a good society . . . no one should be without adequate food, clothing, or shelter . . . . Lawyers and courts have a role in attaining the good society and . . . can make some things better for the poor as we struggle towards this goal. If we succeed, I fear it will be despite and not because of Mr. Justice Scalia.

127. Larry Kramer, Judicial Asceticism, 12 CARDOZO L. REV. 1789, 1791 (1991) In his article, Professor Kramer characterizes Justice Scalia's belief that judges should renounce their own desires when interpreting the law as "judicial asceticism." He does so because he believes that in Justice Scalia's jurisprudence, "[f]ormalism, textualism, and originalism are only means: denial and self-control are the reasons." Id. at 1794-97.

128. Id. at 1792.

129. See generally Young, supra note 6.

130. See Segall, supra note 6, at 1039.
premise that unelevated, life-tenured federal judges will secure those social goals more frequently than elected, accountable public officials." 131 Whether federal judges actually attain those goals is not as certain as Scalia's critics would have us believe. The failure of this criticism is the premise that the skills of a lawyer can "make political choices for society in the name of a fictive constitution, as if the Supreme Court really were a superlegislature . . . ." 132 No one should forget Plessy v. Ferguson, 133 Lochner v. New York, 134 and A.L.A. Schlechter Poultry Corp. v. United States, 135 all of which were decided by the Supreme Court but which are now viewed as decisions contrary to the general social welfare.

Nor, should we forget the lesson of Roe. 136 Those who favor the outcome in Roe—scholars, judges, and lawyers alike—would do well to recognize the inherent weaknesses in the majority's analysis in Roe. 137 The opinion, while giving extraordinary detail

131. Id.
132. Richard A. Posner, The Constitution as a Mirror: Tribe's Constitutional Choices, 84 Mich. L. Rev. 551, 567 (1986) (review of Professor Tribe's book, CONSTITUTIONAL CHOICES (University Press 1995)). Judge Posner finds that the failure of the book, much like the failure of Tribe's constitutional analysis, is in its method, a method which advocates for a Supreme Court that is, or should be, a superlegislature making political choices for our society. Posner goes on to criticize the style of Tribe's writing when he says that:

These faults of style . . . are not unrelated to the book's substance. They pad and bedazzle, and if one stripped them away one would lay bare a slim and unimpressive substance, the literary counterpart to a shaven Persian cat. Also, a writer's style indicates, if not always the quality of his (or her) thought, always the character of his culture.

Id.
133. 60 U.S. (19 How.) 393 (1857) (invalidating a federal law that prohibited slavery in some parts of the United States).
134. 198 U.S. 45 (1905) (invalidating a New York law limiting the hours of bakery employees).
137. See, e.g., Ruth Colker, An Equal Protection Analysis of Untied States Reproductive Health Policy: Gender, Race, Age and Class, 1991 Duke L. J. 324, 356 ("Many feminists criticized the Court's privacy approach [in Roe], because it could not protect the most disadvantaged women from coercive anti-abortion regulations); Ruth Bader-Ginsberg, Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade, 63 N.C. L. Rev. 375, 386 (1985) ("Overall, the Court's Roe position is weakened, I believe, by the opinion's concentration on a medically approved autonomy idea, to the exclusion of a constitutionally based sex-equality perspective."); Sylvia A. Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955, 1020 (1984) ("The rhetoric of privacy, as opposed to equality, blunts our
as to the history of abortion, makes no effort "to use the statutory exception for abortions necessary for the protection of the mother's life to drive a wedge between fetal life and other human life;" it makes no effort "to relate the right of abortion to the right of marital privacy recognized in Griswold, and finally, it makes no effort to identify the "constitutional provenance of a right to abortion . . . ."138 Had Roe been premised on clear legal rules rather than a "balancing test," on predictability rather than uncertainty, perhaps a woman's right to choose would not still be so heatedly debated, challenged and litigated.

Justice Scalia's preference for predictability and consistency is, in the end, based "on the idea that general rules can, for future cases, separate the legal from the personal, the objective from the subjective."139 Perhaps, therefore, his critics need to ask themselves whether clear legal rules are such an enemy to them and to their causes. For clear legal rules, whether written by Justice Antonin Scalia or Justice William Brennan, provide a significant measure of protection. At a minimum, clear rules tend to ensure protections beyond the Court's next term, beyond the next presidential election, and beyond the selection of new Supreme Court Justices.

II. THE PROPHET OF DOOM: A LONE VOICE ON SEPARATION-OF-POWERS

"What the people care about, what affects them is the Bill of Rights . . . . That is a profoundly mistaken view . . . . For the fact is, that it is the structure of the government, its constitution, in the real sense of the word, that ultimately destroys freedom. The Bill of Rights is not more than ink on paper unless . . . it is addressed to a government which is so constituted that no part of it can obtain excessive power. . . . ."140

The separation-of-powers doctrine guarantees the structural integrity necessary for our democratic system of government. Scholars have examined this doctrine from every angle, searching for ways to apply the rules in a manner that respects the Constitution and the rights of all individuals.
for its meaning and parameters. Much as these scholars have searched for a meaning, the Supreme Court has zigzagged back and forth, creating a patchwork of decisions in its own interpretation of the doctrine. In *I.N.S. v. Chada* and *Bowsher v. Synar*, for example, the Court applied a rigid, formalistic approach to strike down so-called "legislative veto" practice and balanced budget legislation. Just a few years later, however, in *Morrison v. Olson* and *Mistretta v. United States*, the Court applied a much more functional, flexible methodology in upholding the independent counsel law and the United States Sentencing Commission legislation.

Separation-of-power scholars, like the Court, are largely divided into two groups: formalists and functionalists. Formalists interpret the doctrine to mean that the powers of the government are divided into three "wholly and independent" branches: Congress, the Executive, and the Judiciary. When determining whether the doctrine has been violated, formalists ask whether a branch has acted "within the scope of its authority." The question is not how far over the line of separation a branch has stepped, but whether it has stepped over at all. If it has, the doctrine has been violated unless the action has been explicitly authorized by the text of the Constitution.

Functionalists reject this line-drawing interpretation of the doctrine. Instead, they believe that the question is whether the action has disrupted the balance of power between the branches. The question is not whether a branch has stepped


147. *See Olson*, 487 U.S. at 705.


over the line of separation, but how far. So long as the "stepping" does not prohibit a branch from accomplishing its constitutionally assigned tasks, and so long as the impact of the action is justified by an overriding interest within the constitutional authority of that branch, the overstepping by one branch is not constitutionally excessive.

Justice Scalia is a formalist whose separation-of-powers jurisprudence has earned him a reputation as the "Prophet of Doom." Scalia served in the Office of Legal Counsel in the mid-1970's, an office which advises the President on separation-of-powers issues. As an assistant attorney general in that office, he testified before Congress in opposition to the legislative veto. According to one author, "Assistant Attorney General Scalia was a willing knight well prepared to ride into battle . . . [Scalia] had no doubts in his own mind about the legislative veto's unconstitutionality, and had no hesitancy in speaking his mind to anyone who would listen." Additionally, Scalia advocated a formalistic interpretation of the doctrine while a law school professor, while serving on the United States Court of Appeals for the District of Columbia, and he has continued to do so since coming to the Court. He himself has commented that "[i]f there is anyone who, over the years, has had a greater interest in the subject of separation of powers, he does not come readily to mind."

As the lone dissenter in Morrison and Mistretta, perhaps Scalia is a prophet of doom. Prophet or not, however, he is consis-

150. See id.
151. See Schultz & Smith, supra note 3, at 82.
152. See Smith, supra note 122, at 39. (citing BARBARA CRAIG, CHADA: THE STORY OF AN EPIC CONSTITUTIONAL STRUGGLE 53 (1988)).
153. Id.
154. Id.
155. Demonstrating his commitment to the Separation of Powers even before being appointed to the bench, Scalia wrote a law review article criticizing the legislative veto. See Antonin Scalia, The Legislative Veto: A False Remedy for System Overload, 3 REG. 19 (Nov./Dec. 1979). Additionally, Scalia authored the amicus curae brief opposing the constitutionality of the legislative veto which was submitted by the American Bar Association in I.N.S. v. Chada. See SCHULTZ & SMITH, supra note 3, at 83. Finally, Scalia wrote an article on standing as an element of separation of powers while a judge on the United States Circuit Court of Appeals for the District of Columbia. See Antonin Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 SUFFOLK U. L. REV. 881 (1983).
156. See id.
157. See SCHULTZ & SMITH, supra note 3, at 84.
tent. In his advocacy for clear lines, whether they are drawn in the sand or in the Constitution, "[t]he rule of law . . . animates his separation-of-powers decisions."^158

A. Morrison v. Olson

The Respondents in *Morrison v. Olson*^159 were three former government officials who were the recipients of grand jury subpoenas issued by independent counsel Alexia Morrison. Respondents challenged the appointment of Morrison^161 under § 592 of the Ethics in Government Act (hereinafter the Act),^162 which allows for the appointment of an independent counsel to investigate and prosecute high ranking government officials for violations of federal criminal laws. The Act requires the Attorney General to investigate persons covered by the Act who may have violated federal criminal law. When the Attorney General has completed the investigation, he or she must report to a special court created by the Act "for the purpose of appointing independent counsels."^165 If the Attorney General determines that there are reasonable grounds for further investigation, he must apply to the court for the appointment of independent counsel.^166 Upon receipt of the application, the special court appoints an appropriate independent counsel and defines that counsel's jurisdiction. If the Attorney General finds insufficient grounds for further investigation, the special court has no authority to appoint an independent counsel. An independent counsel, once appointed, has full power to investigate, prosecute, or dismiss matters within her jurisdiction. An independent counsel may be removed pursuant to 28 U.S.C. § 596(a)(1) which provides:

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160. *See id.* at 668.
161. *Id.*
164. *Id.* at 660-61.
165. *Id.* at 661.
166. *Id.*
167. *Id.*
168. *Id.*
169. 28 U.S.C. §§ 594(a) & 594(g) respectively.
An independent counsel . . . may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause .....

Finally, the Act provides for Congressional oversight of the independent counsel’s activities.\textsuperscript{170}

When served with subpoenas from Petitioner, Respondents moved to quash the subpoenas claiming that the independent counsel provisions of the Act were an unconstitutional violation of the separation-of-powers doctrine.\textsuperscript{171} The district court upheld the constitutionality of the Act and denied Respondents’ motion.\textsuperscript{172} The Respondents were subsequently held in contempt of court for refusing to comply with the subpoenas.\textsuperscript{173} The district court stayed the contempt orders pending an expedited appeal.\textsuperscript{174} The United States Court of Appeals for the District of Columbia Circuit reversed, holding the Act violated the Appointments Clause because it did not provide for the independent counsel to be nominated by the President and confirmed by the Senate, a requirement for all “principal” officers.\textsuperscript{175} The Supreme Court granted certiorari and reversed.\textsuperscript{176}

\textbf{1. A Majority of Functionalists}

In its analysis, the Court first found that the independent counsel was an inferior officer for purposes of the Appointments Clause.\textsuperscript{177} The Court also stated that the Act was not an attempt by Congress to gain a role in the removal of an executive official.\textsuperscript{178} Instead, the Act “puts the removal power squarely in the hands of the Executive Branch” because the independent counsel could only be removed by the personal action of the Attorney General.\textsuperscript{179} Additionally, the Court found that the “good cause” removal provision of the Act did not impermissibly burden the President’s power to control the independent counsel.\textsuperscript{180}

\textsuperscript{170} 28 U.S.C. § 595(a)(2).
\textsuperscript{171} Morrison v. Olson, 487 U.S. 654, 668 (1988).
\textsuperscript{172} Id.
\textsuperscript{173} In re Sealed Case, 665 F. Supp. 56 (D.C. 1988).
\textsuperscript{174} Id.
\textsuperscript{175} In re Sealed Case, 838 F.2d 476 (U.S. App. D.C. 1988).
\textsuperscript{176} Morrison v Olson, 484 U.S. 1058 (1988).
\textsuperscript{177} Morrison v Olson, 487 U.S. 654, 691 (1988).
\textsuperscript{178} Id. at 686.
\textsuperscript{179} Id. at 692.
\textsuperscript{180} Id.
The Court also found that the Act did not violate the separation-of-powers doctrine.\textsuperscript{181} Applying a functional approach to the doctrine, the Court stated that the Act did not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch.\textsuperscript{182} The Court gave cursory attention to the fact that certain members of Congress could request the Attorney General to appoint an independent counsel, finding that the Attorney General had no \textit{duty} to comply with the request.\textsuperscript{183}

Similarly, the Court found that the Act did not constitute a judicial usurpation of executive functions.\textsuperscript{184} Emphasizing that the independent counsel is an "inferior" officer, the Court stated that the power to appoint such officers is not an executive function "in the constitutional sense."\textsuperscript{185} Nor, did the Court find that the Act impermissibly undermined the power of the Executive Branch.\textsuperscript{186} While the Court acknowledged that the Act reduced the amount of control that the Attorney General, and through him, the President, exercised over the investigation and prosecution of a certain class of alleged criminal activity, the Court pointed out that the Attorney General could not appoint the individual of his choice as independent counsel; could not determine the counsel's jurisdiction; his power to remove a counsel was limited; and he retained the power to remove the counsel for "good cause."\textsuperscript{187} Thus, the Court concluded that the Act was constitutional.\textsuperscript{188}

2. \textit{A Fundamentalist, A Government of Laws, and the Wolf}

Scalia began his dissent by stating that "[i]t is the proud boast of our democracy that we have 'a government of laws and not of men.'"\textsuperscript{189} Citing Article II, § 1, clause 1 of the Constitution, Scalia reiterated that the text says that executive Power \textit{shall} be vested in the President of the United States of America.\textsuperscript{190} Scalia then looked to the Framers of the Federal Constitution for support for his formalist approach to the separation-of-powers doctrine. Cit-

\begin{footnotesize}
\begin{itemize}
\item 181. \textit{Id.} at 693.
\item 182. \textit{Id.}
\item 183. \textit{Id.}
\item 184. \textit{Id.} at 695.
\item 185. \textit{Id.}
\item 186. \textit{Id.}
\item 187. \textit{Id.} at 695-96.
\item 188. \textit{Id.}
\item 189. \textit{Id.} at 697. (Scalia, J., dissenting) (citation omitted).
\item 190. \textit{Id.} at 698.
\end{itemize}
\end{footnotesize}
ing James Madison's Federalist Number 51, Scalia recognized that the words of the Constitution are not self-effectuating, but that they must be fortified. 191 In the case of Executive Power, Scalia argued, that fortification is in the form of the presidential veto power and, more importantly, in the Founders refusal to weaken the Executive Power. 192

Unlike the legislative Powers which are divided into the Senate and the House of Representatives, Scalia noted, there is no such division of the Executive Powers. 193 And that, Scalia stated, is what this case was all about. Power. Scalia warned the Court that "[f]requently an issue of this sort will come before the Court clad . . . in sheep's clothing: the potential of the asserted principle to effect change in the equilibrium of power is not immediately evident . . . But this wolf comes as a wolf."

3. From Back to Front and Front to Back

Scalia discovered this wolf, boldly displaying itself, in the history and text of the Act. Having reviewed many of the same provisions of the Act that the majority did, Scalia came to a much different conclusion about its allocation of power. 194 He stated that the application of the statute in the present case effectively compelled a criminal investigation of a high-level presidential appointee. 195 Further, Scalia stated that in accordance with the Act the scope of that investigation, its duration, and the decision to prosecute are beyond the control of the President and his subordinates. 196

Scalia dismissed the majority's attention to the technical details of the Appointments Clause and the removal power as being backwards. 197 He stated that "[i]f to describe this case is not to decide it, the concept of a government of separate and coordinate powers no longer has any meaning." 198 Scalia, therefore, continued his analysis by looking first at the separation of powers,

191. Id.
192. Id. at 698-99.
193. See id.
194. Id. at 701-03.
195. Id. at 703.
196. Id.
197. Id. at 704.
198. Id. at 703.
and then only briefly, at the Court’s appointments clause and removal jurisprudence.\textsuperscript{199}

4. Who Has the Power?

After reminding the majority that where an issue pertains to separation-of-powers the Court owes no deference to Congress’ view that what it has done is constitutional, Scalia applied the following test for determining who has the power: (1) Is the conduct of a criminal prosecution (and of an investigation to decide whether to prosecute) the exercise of purely executive power? and, (2) Does the statute deprive the President of the United States of exclusive control over the exercise of that power?\textsuperscript{200}

In analyzing the first part of this test, Scalia noted that even the majority conceded that the functions performed by the independent counsel were law enforcement functions typically undertaken by the Executive Branch.\textsuperscript{201} Scalia easily determined, therefore, that there was no possible doubt that the independent counsel’s functions were, in fact, executive.\textsuperscript{202} Analyzing the second part of the test, Scalia stated that the majority did not, and could not, assert that the Act did not deprive the President of exclusive control over quintessentially executive activity.\textsuperscript{203} While the majority pointed out that the President, through the Attorney General, has “some” control—the power to remove the counsel for good cause—Scalia retorted that “[t]his is somewhat like referring to shackles as an effective means of locomotion.”\textsuperscript{204}

Citing \textit{Humphrey’s Executor v. United States}\textsuperscript{205} as support, Scalia stated that limiting removal power to “good cause” is an impediment to, not an effective grant of, Presidential control.\textsuperscript{206} Scalia concluded that neither the removal power nor any of the “less important” controls that the President retained were relevant, because the case was over when the Court acknowledged that the Act reduced the amount of control or supervision that the President had over the investigation and prosecution of a certain

\textsuperscript{199.} \textit{Id.} at 704.
\textsuperscript{200.} \textit{See id.} at 704-05.
\textsuperscript{201.} \textit{Id.} at 705-06.
\textsuperscript{202.} \textit{Id.} at 706.
\textsuperscript{203.} \textit{Id.}
\textsuperscript{204.} \textit{Id.}
\textsuperscript{205.} 295 U.S. 602 (1935).
\textsuperscript{206.} \textit{Morrison}, 487 U.S. at 706-07 (Scalia, J., dissenting).
class of alleged criminal activity.\textsuperscript{207} Scalia concluded that "[i]t is not for us to determine, and we may never presume to determine, how much of the purely executive powers of the government must be within the full control of the president. The Constitution proscribes that they all are."\textsuperscript{208}

5. Checks and Balances and the Unfettered Wisdom of the Majority

In what is probably the most criticized portion of his dissent, Scalia had no difficulty with the President having the exclusive power to investigate himself.\textsuperscript{209} Scalia found this no more difficult than the idea that Congress has the exclusive power to legislate, and no more difficult than the Court having the exclusive power to determine the justiciability of a statute reducing the salaries of its Justices.\textsuperscript{210}

After finding that there are sufficient checks on such abuses of power—retaliation by one of the other branches use of its exclusive powers and the political check that the people will replace those in the political branches—Scalia stated that "[a] system of separate and coordinate powers necessarily involves an acceptance of exclusive power that can theoretically be abused . . . . While the separation of powers may prevent us from righting every wrong, it does so in order to ensure that we do not lose liberty."\textsuperscript{211} Scalia warned that the majority's decision replaced the clear constitutional prescription that the executive power belongs to the President with a "balancing test" which had no discernible stopping place.\textsuperscript{212} Scalia also warned that the effect of the Act on the President was twofold. First, it deeply wounds the President by substantially reducing his ability to protect himself and his staff.\textsuperscript{213} And second, the institution of the independent counsel "enfeebles him more directly . . . by eroding his public support."\textsuperscript{214}

"Evidently," Scalia concluded, "the governing standard is to be what might be called the unfettered wisdom of a majority of this Court, revealed to an obedient people on a case-by-case basis.

\hspace{1cm}207. \textit{Id.} at 708 (citing majority opinion at 696).
\hspace{1cm}208. \textit{Id.} at 709.
\hspace{1cm}209. \textit{Id.} at 710.
\hspace{1cm}210. \textit{Id.}
\hspace{1cm}211. \textit{Id.} at 710-11.
\hspace{1cm}212. \textit{Id.} at 711.
\hspace{1cm}213. \textit{Id.} at 713.
\hspace{1cm}214. \textit{Id.}
This is not only not the government of laws that the Constitution established, it is not a government of laws at all.215 For these reasons, Scalia found that the Act was an unconstitutional violation of separation-of-powers.216

6. On Grieving for the Constitution

Finally, Scalia analyzed the constitutionality of the Act under the Appointments Clause and the President’s removal power. In contrast to the majority, Scalia found that the independent counsel was not, in fact, an “inferior officer.”217 Scalia stated that the majority’s argument that the independent counsel was an “inferior officer” because he or she is more difficult to remove than most principle officers, would be like saying that the President is “inferior” to Congress.218 Additionally, Scalia rejected the majority’s argument that the independent counsel’s duties are “limited”219 and that the limited nature of the independent counsel’s jurisdiction and tenure made her an inferior officer.220

Finally, Scalia resorted to his favorite source for determining the meaning of a term, the dictionary. Scalia explained that the discretionary meaning of inferior is “subordinate,” plainly connoting a relationship of subordination.221 Scalia found this definition to be consistent with the Court’s own precedent. In United States v. Nixon,222 the Court explicitly stated that the Watergate Special Prosecutor was a “subordinate officer” because the President, or the Attorney General could have removed him at any time.223 While Scalia conceded that an inferior officer, by definition, does not have to be subordinate to a principal officer, he said that “it is surely a necessary condition for inferior officer status that the officer be subordinate to another officer.”224 Finding that the independent counsel was not even subordinate to the President, Scalia concluded that “she was not an ‘inferior’ officer and her

215. Id. at 712.
216. See id.
217. Id.
218. Id. at 716.
219. Id. at 717-18. See also id. at n.3, which lists, in detail, the independent counsel’s enumerated powers.
220. Id.
221. Id. at 721.
223. Id. at 696.
appointment other than by the President with the advice and consent of the Senate” was unconstitutional.\textsuperscript{225}

Scalia declined to discuss at length why the restrictions upon the removal of the independent counsel were also unconstitutional, and instead commented on the effect of the majority’s opinion on the Court's jurisprudence regarding removal of officials.\textsuperscript{226} Conceding that there is no constitutional provision stating who may remove executive officers except for references to impeachment, Scalia reiterated that it was, nonetheless, well established that the President's power to remove principal executive officers who exercised purely executive functions was absolute,\textsuperscript{227} while his power to remove inferior officers who exercise purely executive functions could be restricted.\textsuperscript{228}

Scalia pointed out, however, that since the Court's decision in\textit{Humphrey's Executor} the permissible restriction upon removal of principle officers has been the point at which the powers exercised by those officers are no longer purely executive.\textsuperscript{229} The majority’s analysis, according to Scalia, removed this restriction and simply stated that Congress cannot interfere with the President's exercise of the executive power and his constitutionally appointed duty to take care that the laws be faithfully executed.\textsuperscript{230} Scalia stated that while “[o]ne can hardly grieve for the shoddy treatment given today to \textit{Humphrey's Executor}, which, after all, accorded the same indignity . . . to Chief Justice Taft's opinion ten years earlier in \textit{Myers v. United States} . . . one must grieve for the Constitution.”\textsuperscript{231}

Scalia, the Prophet of Doom, declared that the Court's decision permanently encumbered the Republic with an institution that would do it great harm.\textsuperscript{232} “Worse than what it has done,” he warned, “is the manner in which it has done it. A government of laws means a government of rules. Today's decision . . . is ungoverned by rule, and hence ungoverned by law.”\textsuperscript{233}

\textsuperscript{225} Id. at 723.
\textsuperscript{226} Id.
\textsuperscript{227} Id. at 723 (citing \textit{Myers v. United States}, 272 U.S. 52 (1926)).
\textsuperscript{228} Id. at 723-24 (citing \textit{United States v. Perkins}, 116 U.S. 483 (1886)).
\textsuperscript{229} Id. at 724.
\textsuperscript{230} Id. at 725.
\textsuperscript{231} Id. at 725-26.
\textsuperscript{232} Id. at 733.
\textsuperscript{233} Id. (emphasis added).
B. Mistretta v. United States

It was not long before the Prophet of Doom spoke again. Less than one year after the Court decided Morrison, it took up Mistretta v. United States. At issue in Mistretta was the constitutionality of the Federal Sentencing Guidelines (hereinafter "the Guidelines") promulgated by the United States Sentencing Commission (hereinafter "the Commission."). The Petitioner was indicted, along with another man, in the United States District Court for the Western District of Missouri on three counts of "centering a cocaine sale." Petitioner moved to have the Guidelines ruled unconstitutional on the grounds that the Commission was constituted in violation of the doctrine of separation-of-powers and that Congress delegated excessive authority to the Commission to structure the Guidelines.

The district court rejected Petitioner's delegation argument on the grounds that the Commission should be judicially characterized as having Executive Branch status, and on the basis that the Guidelines are similar to substantive rules promulgated by other agencies. The court also rejected Petitioner's claim that the Act was unconstitutional because it required Article III federal judges to serve on the Commission. The court did, however, express some doubts about "parts of the Sentencing Guidelines and the legality of their anticipated operation." Petitioner appealed to the Eighth Circuit, but both the Petitioner and the United States, pursuant to Supreme Court Rule 18, petitioned the Court for certiorari review before judgment in the Court of Appeals. Because of the "imperative public importance" of the issue, and because of the extensive split among

237. Id.
239. Id.
240. Id.
242. Supreme Court Rule 18 requires that the issue on appeal be one of "imperative public importance" in order for certiorari to be granted. In a footnote, the Court noted that the disarray among the District Courts was made more imperative by a subsequent split among the Courts of Appeal. Mistretta, 488 U.S. at 371 n.6.
United States District Courts, the Court granted review before judgment.²⁴³

1. The Majority and An Unusual Hybrid in Structure and Authority

After reviewing the history of federal sentencing in this country, the Court first stated that determining the scope and extent of punishment through sentencing has never been the exclusive jurisdiction of one branch.²⁴⁴ The Court went on to describe the precursor to the Guidelines—indeterminate sentencing—which, the Court pointed out, often led to serious disparities in sentencing.²⁴⁵ It was these disparities, which led to the creation of mandatory sentencing guidelines.²⁴⁶ The Guidelines which were ultimately promulgated, explained the Court, were meant to establish a range of determinate sentences for categories of offenses and defendants according to certain factors.²⁴⁷

The Court went on to outline the establishment of the Commission “as an independent commission in the judicial branch of the United States,” and to explain its make-up.²⁴⁸ The Commission is made-up of seven voting members, at least three of whom are required to be federal judges. The Attorney General, or his designee, is a non-voting member.²⁴⁹ The Chairman and other members of the Commission are subject to removal by the President “only for neglect of duty or malfeasance in office or for other good cause shown.”²⁵⁰ And, each voting member serves for six years, and may not serve more than two full terms.²⁵¹ Finally, the Commission is responsible for the promulgation of determinative sentencing guidelines, and has an obligation to review and revise them.²⁵²

a. Common Sense and the Nondelegation Doctrine

In its analysis of Petitioner’s arguments, the Court first rejected his argument that delegating the power to promulgate

²⁴⁴. Mistretta, 488 U.S. at 364.
²⁴⁵. Id.
²⁴⁶. See id.
²⁴⁷. Id. at 368.
²⁴⁹. Id.
²⁵⁰. Id.
²⁵¹. 28 U.S.C. § 992(a)-(b).
sentencing guidelines to the Commission constituted an impermissible delegation of legislative power. Recognizing that the nondelegation doctrine is rooted in the principle of separation-of-powers, the Court nonetheless found that this principle does not prevent Congress from obtaining the "assistance" of its coordinate Branches. Applying a functionalist approach to the issue, the Court quoted Chief Justice Taft when it said that in determining what Congress may do when it seeks assistance from another branch, "the extent and character of that assistance must be fixed according to common sense . . . ."

Applying this "broad" principle to the case before it, the Court found that Congress' delegation of authority to the Commission was constitutional.

b. The Majority, Madison, and the Separation of Powers Doctrine

The Court also rejected Petitioner's argument that the Act violated the separation-of-powers doctrine. Ironically, in seeking to "give life to" the Framers view of the appropriate relationship among the Branches, the majority quoted from Humphrey's Executor, which held that each of the three Branches must remain "entirely free from the control or coercive influence, direct or indirect, of either of the others." Additionally, the Court stated that the Framers "did not require—indeed rejected—the notion that the three Branches must be entirely separate and distinct." As support for this statement, however, the Court did not cite the Framers, instead, it cited its own decisions in Nixon v. Administrator of General Services and United States v. Nixon.

In concluding that the Act did not violate separation-of-powers principles, the Court once again invoked the Framers when it said that by "adopting this flexible understanding of the separation of powers, we simply have recognized Madison's teaching that

254. Id. at 372.
255. Id. (citing J.W. Hampton Jr., Co. v. United States, 276 U.S. 394, 406 (1928)).
256. Id.
257. Id. at 384.
258. Id. at 380 (citing Humphrey's Executor v. United States, 295 U.S. 602, 629 (1935)).
259. Id.
the greatest security against tyranny—the excessive accumulation of power in a single Branch—lies not in a hermetic division among the Branches, but in a carefully crafted system of checked and balanced power within each Branch.”

**c. Location, Location, Location**

The Court also rejected Petitioner’s argument that the location and composition of the Commission violated separation-of-powers principles. Although the Court admitted that the Commission is “unquestionably . . . a peculiar institution within the framework of our Government,” it found that the Commission is not a court and does not exercise judicial power. Instead, the Court stated that the Commission is an “independent” body, and that the mere “anomaly” or “innovation” of its placement in the Judicial Branch does not violate separation-of-powers.

The Court also acknowledged that under Article III the judicial power of the United States is limited to “cases” or “controversies,” but found that just as separation-of-powers is not violated when courts promulgate rules of procedure, neither is it violated when they promulgate “rules of sentencing.” The Court held that the location of the Commission was constitutional and that such placement could not possibly be construed as preventing the Judicial Branch from accomplishing its constitutional functions.

Additionally, the Court held that the composition of the Commission did not violate the separation-of-powers doctrine. After reiterating that the Commission is not a court and thus exercises no judicial power, the Court “inferred” from the text of the Constitution and from precedent that Article III judges are not prohibited from undertaking extrajudicial duties. The Court held that “the principle of separation-of-powers does not absolutely forbid Article III judges from serving on commissions such as that created by the Act,” and that while the Court was “somewhat

262. *Mistretta*, 488 U.S. at 381.
263. Id. at 390.
264. Id. at 385.
265. Id.
266. See id. at 385-93.
267. Id. at 395-96 (citing *Nixon v. Administrator of Gen. Svcs.*, 433 U.S. 425, 443 (1977)).
268. Id. at 408.
269. Id. at 398-404.
270. Id. at 404 (emphasis added).
troubled by petitioner’s argument that the Judiciary’s entanglement in the political work of the Commission undermines public confidence in the . . . Judicial Branch, that danger is far too remote for consideration here.”

d. A Fanciful Notion of Presidential Control

Finally, the Court rejected Petitioner’s argument that the Act, which empowers the President to appoint and remove the members of the Commission, prevented the Judicial Branch from performing its constitutionally assigned duties. In fact, the Court concluded that “[t]he notion that the President’s power to appoint federal judges to the Commission somehow gives him influence over the Judicial Branch . . . is fanciful.” Similarly, the Court found that because the President’s removal power has no effect on the tenure or compensation of Article III judges, he would have no power to coerce judges in the exercise of their judicial duties.

The Court concluded that “in creating the Sentencing Commission—an unusual hybrid in structure and authority—Congress neither delegated excessive legislative power nor upset the constitutionally mandated balance of powers . . . .” The Court held that the Act was, therefore, constitutional.

2. The Prophet of Doom Rises Again

After agreeing with the majority that Petitioner’s nondelegation claim should be rejected because the scope of delegation is largely uncontrolled by the courts, Scalia donned his guise as the Prophet of Doom and wrote a scathing dissent. It is precisely because the delegation doctrine is uncontrollable by the courts, Scalia asserted, that the Court must “be . . . rigorous in preserving the Constitution’s structural restrictions that deter excessive delegation.” “Lawful” delegation is not lawful simply because Congress is sometimes too busy and can therefore delegate its lawmaking responsibility, Scalia argued, rather, it is that “a cer-

271. Id. at 407.
272. Id. at 409.
273. Id.
274. Id. at 411.
275. Id. at 412.
276. Id. at 416 (Scalia, J., dissenting).
277. Id. at 416-17.
tain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action . . . . 278

To support his argument, Justice Scalia quoted Justice Harlan in Field v. Clark, 279 and reminded the Court that:

The true distinction . . . is between the delegation of power to make the law, which necessarily involves discretion as to what it shall be, and conferring authority or discretion as to its execution . . . . The first cannot be done; to the latter no valid objection can be made. 280

Additionally, Scalia pointed out that the lawmaking function of the Commission is completely divorced from any execution of the law, any adjudication of private rights under the law, and from any exercise of judicial powers. 281

It is divorced, Scalia argued, not only because it is not said to be "located in the Executive Branch," but because the Commission exercises no executive power on its own and it is not subject to the control of the President, who does. 282 And the Commission's lawmaking is divorced from judicial powers, Scalia argued further, because it is not a court itself, it has no judicial powers itself, and it is not subject to any other body of judicial powers. 283 Finally, Scalia argued that because this delegation of lawmaking authority is unsupported by any legitimate theory explaining why it is not a delegation of legislative power, "[t]he power to make law at issue here . . . is not ancillary but quite naked." 284

Scalia warned that by reason of the Court's decision, he anticipated that "Congress [would] find delegation of its lawmaking powers much more attractive in the future . . . . How tempting to create an expert Medical Commission . . . to dispose of such thorny 'no-win' issues as the withholding of life-support systems . . . or the use of fetal tissue for research." 285 He argued that the Court's precedent was undemocratic not because of the scope of the delegated power, but because the recipient—the Commission—was not one of the three Branches of Government. 286 "The only gov-

278. See id. at 417.
279. 143 U.S. 649 (1892).
280. Id. at 693-94.
281. Mistretta, 488 U.S. at 420-21 (Scalia, J., dissenting).
282. Id.
283. Id.
284. Id. at 421.
285. Id. at 422.
286. Id.
ernmental power the Commission possesses,” Scalia concluded, “is the power to make law; and it is not Congress.”

3. The Prophet and the Humphrey’s Executor of the Judicial Branch

Rejecting the Court’s argument as to the location of the Commission, Scalia said that “[t]he strange character of the body that the Court today approves, and its incompatibility with our constitutional institutions, is apparent from that portion of the Court’s opinion entitled ‘Location of the Commission.’”

Scalia was, he said, “at a loss to understand why the Commission is ‘within the Judicial Branch.’” Scalia argued that the logical way to determine which Branch an agency belongs to is on the basis of who controls it.

Admitting that the Court has previously approved the concept of a “branchless agency,” Scalia reminded the Court that this was true only where the agency exercises no executive power. Citing the Court’s decision in Morrison, Scalia argued that over the years, Humphrey’s Executor has come to mean something quite different—”not an ‘independent agency’ in the sense of an agency independent of all three Branches, but an ‘independent agency’ in the sense of an agency within the Executive Branch . . . independent of the control of the President.” Finding the concept of an independent agency in the Judicial Branch even more illogical than one found in the Executive Branch, Scalia warned that “[t]oday’s decision may aptly be described as the Humphrey’s Executor of the Judicial Branch, and . . . we will live to regret it.”

4. The Prophet and A Junior Varsity Congress

In conclusion Scalia argued, as he has repeatedly, that the question is not how much commingling has occurred within the Branches but, rather, whether there has been any commingling at all. Responding to the majority’s use of a quote by James

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287. Id.
288. Id.
289. Id.
290. Id. at 423.
291. Id.
292. Id. at 423-24.
293. See id. at 426.
Madison to support their decision, Scalia said that Madison would be "aghast" to hear his words used as justification for ignoring the carefully designed structure of the Constitution. Issuing his final warning in the case, Scalia said:

I think the Court errs, in other words, not because it mistakes the degree of commingling, but because it fails to recognize that this case is not about commingling, but about the creation of a new Branch altogether, a sort of junior-varsity Congress. It may well be that in some circumstances such a Branch is desirable. But there are many desirable dispositions that do not accord with the constitutional structure we live under. And in the long run the improvisation of a constitutional structure on the basis of perceived utility will be disastrous.

Once again Scalia was the lone dissenter, the Prophet of Doom, vigorously defending the structure of the Constitution and predicting disastrous consequences for a Court, and for a Nation, which fails to defend the separation-of-powers.

C. Plaut v. Spendthrift Farm, Inc.

The Prophet of Doom's tenacity eventually paid off when in Plaut v. Spendthrift Farm, Inc., Scalia finally authored a majority opinion in which he asserted his separation-of-powers theory as law.

Petitioners in Plaut were investors who brought suit alleging that Respondents had committed fraud and deceit in the sale of stock in violation of § 10(b) of the Securities and Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission. Petitioners' case had not yet come to trial when the Supreme Court decided Lampf, Pleva, Lipkind, Prupis & Petrigrow v. Gilbertson, which held that "[l]itigation instituted pursuant to § 10(b) and Rule 10b-5... must be commenced within one year after the discovery of the facts constituting the violation

294. The majority quoted Madison when they said that "separation of powers 'does not mean that these [three] departments ought to have no partial agency in, or no control over the acts of each other.'" Id. at 380-81 (citing The Federalist No. 47, 325-26 (James Madison)).
295. Id.
296. Id. at 427.
299. Plaut, 115 S. Ct. at 1450.
and within three years after such violation." The Court applied its holding to the plaintiff-respondents in Lampf and found their suit to be untimely. On the same day, the Court decided James B. Beam Distilling Co. v. Georgia, which held that "a new rule of federal law is applied to the parties in the case announcing the rule must be applied as well to all cases pending on direct review." The district court in Plaut, applying the Lampf rule, found that Petitioners' claims were untimely and dismissed their action with prejudice on August 13, 1991. Petitioners filed no appeal, and the judgment became final 30 days later.

On December 19, 1991 President Bush signed the Federal Deposit Insurance Corporation Improvement Act of 1991. Section 476 of the Act later became § 27A of the Securities and Exchange Act of 1934 (hereinafter § 27A). This section provided for the reinstatement by motion of all actions filed pursuant to § 10b of the Act which were commenced on or before June 19, 1991. The text of the pertinent section read:

(b) Effect on dismissed causes of action
Any private civil action implied under section 78j(b) of this title that was commenced on or before June 19, 1991—(1) which was dismissed as time barred subsequent to June 19, 1991, and (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991, shall be reinstated on motion by plaintiff not later than 60 days after December 19, 1991.

On February 11, 1992, Petitioners moved the district court to reinstate their claim. The district court found that the conditions of §§ 27A(b)(1) and (2) had been met, and granted Petitioners' motion. The United States Court of Appeals for the Sixth Circuit affirmed, and the Supreme Court granted review.

301. Id. at 364.
302. Id.
304. Id.
305. Plaut, 115 S. Ct. at 1450.
306. Id. at 1451.
310. Plaut, 115 S. Ct. at 1451.
311. Id.
1. On Bravely Reopening Final Judgments

Scalia began his analysis by rejecting Respondents “brave[ ] conten[tion] that § 27A(b) does not require federal courts to reopen final judgments . . . . “314 Respondents argued first that the language of § 27A(b)—“the laws applicable in the jurisdiction . . . as such laws existed before June 19, 1991”—could be construed to refer to the limitations period provided in Lampf, in which case Petitioners’ action would have been time barred even under § 27A(b).315 Scalia responded that this argument confused the question of what the law in fact was on June 19, 1991, with the distinct question of what § 27A means by its reference to what the law was.316

Scalia found that there were two reasons why this reference in § 27A did not refer to the law enunciated in Lampf. First, because Lampf provided a uniform, national statute of limitations instead of the applicable state statute of limitations, Scalia found that “[i]f the statute referred to that law, its reference to ‘laws applicable in the jurisdiction’ would be quite inexplicable.”317 Second, Scalia argued, if the statute referred to the law enunciated in Lampf it would be utterly without effect, a result which would “avoid a constitutional question by holding that Congress enacted and the President approved a blank sheet of paper. . . .”

Finally, Scalia rejected respondents alternative argument that § 27A(b) did not require the reopening of final judgments because the subsection applied only to cases still pending in the federal courts when § 27A was enacted.318 Scalia stated that this argument had “only half of the defect of the first argument, for it makes only half of § 27A purposeless—§ 27A(b).”319 Scalia pointed out that there is no need to “reinstate” actions that are still pending, because § 27A(a) would be applied by the courts of appeals.320 Finding that Respondents’ argument would require courts to disregard the language of the provision, Scalia concluded that “there is no reasonable construction on which § 27A(b) does not require federal courts to reopen final judgments in suits dis-

314. Plaut, 115 S. Ct. at 1451.
315. Id.
316. Id.
317. Id. at 1452.
318. See id.
319. Id.
320. Id.
missed with prejudice by virtue of Lampf.”321 Brave or not, Scalia found no merit in Respondents’ arguments.

2. The Judicial Power to Render Dispositive Judgments

Respondents also argued that § 27A(b) violated the separation-of-powers, and the Due Process Clause of the Fifth Amendment.322 Scalia first determined that the former would be the narrower ground for adjudication of a constitutional question because the latter claim might dictate a similar result in a state court challenge under the Fourteenth Amendment.323 Scalia then concluded that Congress exceeded its authority in § 27A(b) by requiring the federal courts to exercise “the judicial Power of the United States’ . . . in a manner repugnant to the text, structure, and traditions of Article III.”324

Scalia pointed out that the Court’s precedents to date had identified only two types of legislation that require federal courts to exercise judicial power in a manner that Article III normally forbids.325 First, the Court has refused to “give effect to a statute that . . . ‘proscribed rules of decision to the Judicial Department of the government in cases pending before it.’”326 Scalia explained that this prohibition does not, however, have effect when Congress merely “amend[s] applicable law.”327 Scalia concluded that § 27A(b) does not set out substantive legal standards for the Judiciary to apply, and therefore changes the law, even if only retroactively.328 Second, the Court has recognized that Congress cannot “vest review of the decisions of Article III courts in officials of the Executive Branch.”329 Because under any application of § 27A(b) only courts were involved, Scalia concluded that it offended neither of these previously established prohibitions.330

Scalia went on, however, to find that § 27A(b) “offsends a postulate of Article III just as deeply rooted in our law . . . .”331 He

321. Id.
322. Id.
323. Id.
324. Id.
325. Id.
326. Id. (citing United States v. Klein, 13 Wall. 128, 146 (1872)).
327. Id. (citing Robertson v. Seattle Audobon Society, 503 U.S. 429, 441 (1992)).
328. Id. at 1453.
329. Id. (citing Hayburn’s Case, 2 Dall. 409 (1792)).
330. Id.
331. Id.
found that Congress, by retroactively commanding the federal courts to reopen final judgments, had violated the fundamental principle that "'a judgment conclusively resolves the case' because 'a judicial Power' is one to render dispositive judgments.'\footnote{332. Id. (citing Frank Easterbrook, Presidential Review, 40 Case W. Res. L. Rev. 905, 926 (1990)).}

3. The Evils of A Judiciary Controlled By the Legislature

To support this conclusion, Scalia turned to the Framers' experience, opining that "'[t]he Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers . . . ."\footnote{333. Id.} Citing many examples of legislative correction of judgments during this time, Scalia asserted that "[v]oices from many quarters . . . decried the increasing legislative interference with the private-law judgments of the courts."\footnote{334. Id. Scalia cites an Address to the Council Censors of Vermont as an example. In an address to the Freemen of the State, the Council reported that the legislative branch had usurped greater power than it was entitled to by "instances . . . of judgments being vacated by legislative acts." Vermont State Papers 1779-1786 at 531-33 (Slade ed. 1823).} Scalia quoted James Madison who, when describing the need for separation-of-powers, said that "'[t]he legislative department is everywhere extending its sphere of activity, and drawing all power into its impetuous vortex.'\footnote{335. Id. at 1454.} Scalia argued that to the Framers, the need for "separation of legislative from judicial power was plain, the principle effect to be accomplished by that separation was even plainer."\footnote{336. Id.}

Scalia continued in his historical analysis, citing federal and state decisions from the period immediately after ratification of the Constitution as support for the premise that interference with final judgments of the courts was forbidden.\footnote{337. Id. at 1455-56. Scalia cited the following cases for support for this premise: Calder v. Bull, 3 Dall. 386, 398 (1798) (In this case the Court noted that in enacting a statute that set aside the final judgment of a state court, the legislature of Connecticut was exercising judicial, not legislative power); Bates v. Kimball, 2 Chipman 7, 90 (Vt. 1824) (In answering the question of whether the legislature had the power to vacate or annul an existing judgment, the court held that the power to annul a final judgment was an "assumption of Judicial Power," and therefore forbidden).} Scalia stated that "'[b]y the middle of the 19th century, the constitutional equilibrium created by the separation of the legislative power to make
general law from the judicial power to apply that law . . . was so well . . . accepted that it could survive even *Dred Scott v. Sandford*338 . . . .”339 Quoting Abraham Lincoln, Scalia concluded that although it is possible that a decision may be erroneous in any given case, the chance of this “can be better borne than could the evils of a different practice.”340

4. *The Last Word of the Judicial Department*

After concluding that § 27A(b) effected a clear violation of the separation-of-powers doctrine, Scalia determined that even where the legislation is retroactive, where it “requires its own application in a case already finally adjudicated, it does no more and no less than ‘reverse a determination once made, in a particular case.’”341 Scalia argued that the Court’s precedence stemming from *Hayburn’s Case*, while not directly on point, “provided fair warning that such an act exceeds the power of Congress.”342

Next, Scalia acknowledged that Congress can revise decisions of Article III courts in that new laws which are retroactive must be applied to cases pending appeal.343 He refused, however, to extend this principle to finally adjudicated cases.344 He concluded that when a case has achieved finality, “a judicial decision becomes the last word of the judicial department . . . and Congress may not declare by retroactive legislation that the law applicable to that very case was something other than what the courts said it was.”345

5. *On Hypothetical Horribles Flowing From Rigid Holdings*

Scalia also rejected the Government’s argument that Congress has previously set aside the final judgment of an Article III

338. 19 How. 393 (1857).
340. *Id.* (quoting R. Basler, *The Collected Works of Abraham Lincoln* 268 (1953) (First Inaugural Address 1861)).
341. *Id.* (quoting *The Federalist* No. 81, 545 (Alexander Hamilton)).
342. *Id.* (citing United States v. O’Grady, 22 Wall. 641, 647-48 (1875) (Judicial jurisdiction implies the power to hear and determine a case, and . . . Congress cannot subject the judgments of the Supreme Court to the re-examination and revision of any other tribunal.”); Gordon v. United States, 117 U.S. 697, 700-04 (decided in 1864, printed in 1885) (Taney, C.J.) (judgments of Article III courts are “final and conclusive upon the rights of the parties.”)).
343. *Id.* at 1457.
344. *Id.*
345. *Id.* (emphasis added).
The Government argued that in *United States v. Sioux Nation* the Court did just that. In *Sioux Nation*, the Court held that separation-of-powers was not violated where a statute required the Court of Claims to review Native Americans' claims for just compensation on their merits, without regard to the defense of res judicata.

Scalia stated that the basis for the Court's finding was that "Congress has the power to waive the res judicata effect of a prior judgment entered in the Government's favor on a claim against the United States" and that trial courts may raise the res judicata bar on their own motion. Therefore, Scalia argued, "[w]aiver subject to the control of the courts themselves would obviously raise no issue of separation of powers . . . ."

Likewise, Scalia rejected Petitioners' argument that § 27A(b) is similar to Federal Rule of Civil Procedure 60(b), which authorizes courts to relieve parties from a final judgment on grounds such as excusable neglect, newly discovered evidence, fraud, and any other reason justifying relief. Scalia pointed out that while the effect of the two might be similar, Rule 60(b) "does not impose any legislative mandate-to-reopen upon the courts, but merely reflects and confirms the courts' own inherent and discretionary power . . . to set aside a judgment whose enforcement would work an inequity."

Scalia also responded to the dissent's "contemporary examples" of statutes that retroactively require final judgments to be reopened. Scalia argued that none of the dissents examples—Rule 60(b), the Soldiers' and Sailors' Relief Act, and the Handicapped Children's Act—reopen final judgments. Scalia argued further that the dissent's "perception that retroactive reopening provisions are to be found all about . . . reverses the traditional rule . . . that statutes do not apply retroactively unless Congress expressly states that they do."
Thus, Scalia concluded that there were no "hypothetical horribles flowing from our assertedly 'rigid holding.'"\textsuperscript{357} What is horrible, said Scalia, "is not . . . our holding," but the underlying statutes which enact "a 'rigid' jurisdictional bar to . . . untimely civil petitions."\textsuperscript{358}

6. \textit{On High Walls, Clear Distinctions, \& Good Fences}

Finally, Scalia responded to the concurrence's suggestion that the case should have been decided more narrowly.\textsuperscript{359} While the concurrence was willing to acknowledge that Congress sometimes lacks the power under Article I to reopen final judgments, it considered the fact that § 27A(b) was retroactive and that it applied only to a limited number of individuals to be critical.\textsuperscript{360} Scalia argued that this was wrong in both fact and law.\textsuperscript{361} He said that § 27A(b) did not "single out" any defendant, but identified a class of actions\textsuperscript{362} and that even if § 27A(b) had been applied prospectively, it would not have caused the statute to be less of an infringement on judicial power.\textsuperscript{363}

While the concurrence agreed with the Court's judgment, it did so only because § 27A(b) embodied the risk "of the very sort our Constitution's 'separation of powers' prohibitions seek to avoid."\textsuperscript{364} Scalia, the Prophet to the end, responded that "the doctrine of separation of powers is a structural safeguard rather than a remedy to be applied only when specific harm . . . can be identified . . . . [I]t is a prophylactic device, establishing high walls and

\textsuperscript{357} \textit{Id.} at 1462.
\textsuperscript{358} \textit{Id.} In dissent, Justices Stevens and Ginsberg argued that the Court had previously upheld similar remedial statutes that provoked no separation-of-powers challenges. \textit{Id.} at 1469. Additionally, they argued from a functionalist perspective when they said that:

'We must remember that the machinery of government would not work if it were not allowed a little play in the joints.' The three Branches must cooperate in order to govern . . . . Rigid rules often make good law, but judgments in areas such as the review of potential conflicts among the three coequal Branches of the Federal Government partake of art as well as science.

\textit{Id.} at 1476 (citing Bain Peanut Co. of Texas v. Pinson, 282 U.S. 499, 501 (1931) (Holmes, J.).)
\textsuperscript{359} \textit{Id.}
\textsuperscript{360} \textit{Id.}
\textsuperscript{361} \textit{Id.}
\textsuperscript{362} \textit{Id.}
\textsuperscript{363} \textit{Id.} at 1462-63.
\textsuperscript{364} \textit{Id.} at 1463.
clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict.\textsuperscript{365} Holding that § 27A(b) was unconstitutional to the extent that it required federal courts to reopen final judgments, Scalia, a victor at last, ended his analysis by saying that "[s]eparation of powers, a distinctively American political doctrine, profits from . . . advice authored by a distinctively American poet: Good fences make good neighbors."\textsuperscript{366}

D. A Prophet of Doom or A Guardian of Rights?

How one should characterize Justice Scalia's solitary voice raising dire warnings of future harm if the separation of powers is not respected is a good question. Is he a prophet? Is he a guardian of those things valuable to all, but recognized by few? Or is he simply a historical gadfly, making unrealistic claims in the modern day world? Justice Scalia, prophet, guardian, or gadfly, firmly believes that individual rights are best protected by the institutions of government.\textsuperscript{367} Further, he believes that the Court's failure to protect these institutions, a failure caused in part by the Court's willingness to play the role of "latter day counsel of censors," will cause harm not only to those institutions, but ultimately to the rights of individuals.\textsuperscript{368}

\begin{itemize}
  \item 365. Id.
  \item 366. Id. (citation omitted). In his concurrence, Justice Breyer responded to Justice Scalia's analysis and to his invocation of the poetry of Robert Frost when he said:

  [B]ecause the law before us both reopens final judgments . . . we need not, and we should not, go further — to make of the reopening itself . . . a foundation for the building of a new 'high wall' between the branches. Indeed, the unnecessary building of such walls is, in itself, dangerous, because the Constitution blends, as well as separates, powers . . . . As the majority invokes the advice of an American poet, one might consider as well that poet's caution, for he not only notes that 'Something there is that doesn't love a wall,' but also writes, 'Before I built a wall I'd ask to know/ What I was walling in or walling out.'

  Id. at 1466. (citing Robert Frost, Mending Wall, in THE NEW OXFORD BOOK OF AMERICAN VERSE 395-96 (R. Ellman ed., 1976)).
  \item 367. See, e.g., Smith, supra note 140, at 793 ("Fundamentally, Scalia sees individuals' personal rights and liberties as resting upon the preservation of clearly-divided authority between the branches of government."); Morrison v. Olson, 487 U.S. 654 (1989) (Scalia, J., dissenting) (In dissent, Scalia said that "The purpose of the separation and equilibration of powers in general, and of the unitary Executive in particular, was not merely to assure effective government but to preserve individual freedom.").
  \item 368. See generally Marshall, supra note 6.
\end{itemize}
Scalia finds structural rigor preferable to the "vagaries of balancing tests" for maintaining the separation-of-powers doctrine. As with his preference for clear rules, Scalia believes that the Constitution provides for clear lines, lines which delineate the roles for the three branches of government. One scholar has said that Scalia's preference, like James Madison's, is based on "realistic assumptions about individuals and about the governments peopled by those individuals." Likewise, Scalia's warnings to the Court are based on his fear that the Court has unleashed the wolf—Congress—by not appreciating its voracious appetite for power.

While some may criticize Scalia's separation-of-powers jurisprudence as being unnecessarily rigid, Scalia himself recognizes that the edges of each branch's sphere of power are not entirely clear. Unlike his critics, however, Scalia is "willing to travel only a short distance from the command of the text" of the constitution when he analyzes those edges. While a majority of the Court may believe that there is enough "flexibility" in the Constitution to allow for commingling among the branches, "for Justice Scalia the issue is clear-cut: the Court's obligation is to enforce the existing framework. To do otherwise is to mistake the judicial role for that of the advocate, or worse, for that of the framer."

In his article about Scalia and the institutions of government, Christopher Smith states that "[a]lthough Scalia's warnings about the consequences of the Supreme Court's recent separation of powers jurisprudence have not come to identifiable fruition . . . Justice Scalia who raised concerns about preserving individual liberty in the separation of powers context, has been an active participant in many recent cases limiting the scope of individual rights." Smith asserts that the very dangers that Scalia warned the Court about have occurred—not because of the Court's separation-of-powers decisions—but because of "conscious decisions by politically conservative justices." Further, Smith says that if Scalia "is so consistent and thoughtful in his role as

369. Id. at 252.
370. Id.
371. See id.
372. See id. at 253.
373. See Morrison v. Olson, 487 U.S. at 706.
374. See Marshall, supra note 6, at 257.
375. Id. at 259.
376. Smith, supra note 140, at 800.
377. Id. at 801.
self-appointed institutional guardian... he should be more careful that his behavior and tone do not lead him to fulfill... the dire prophecies... that he so loudly trumpets.\textsuperscript{378}

Smith, like many of Scalia's critics, fails to see that Scalia's opinions affecting individual rights are consistent with his separation-of-powers jurisprudence. Scalia decides cases as he does precisely because to do otherwise would violate the line which separates the role of the judiciary from the role of the other branches, and precisely because doing so preserves individual rights. Scalia's critics need look no further than his opinion in \textit{Smith II} for verification of this consistency. If he were truly intent on doing nothing more than effectuating a conservative agenda, Scalia—a life long, devout, and even somewhat outspoken Catholic—would surely have decided \textit{Smith II} differently. In \textit{Smith II}, Scalia reminded us that it is not for the judiciary to evaluate the merits of religious claims.\textsuperscript{379} It is for the \textit{individual}, through his or her legislature, to make that evaluation.\textsuperscript{380} Scalia simply determined that "the Court's continued use of the compelling interest test in the free exercise context is not an appropriate exercise of judicial power."\textsuperscript{381} He argued that the job of legislating, and of deciding difficult political issues, is best left to the legislature, not to the judiciary.\textsuperscript{382} Is this really any less protection for the individual, or more?

In commenting on the fact that most people do not recognize the importance of separation-of-powers in protecting liberty, Justice Scalia once said that "[i]t is a lot easier to get a crowd to form behind a banner that reads 'Freedom of Speech or Death' than behind one that reads 'Bi-cameralism or Fight.' But in point of fact, ... the latter goes much more to the heart of the matter."\textsuperscript{383} While bicameralism may not superficially appear to protect or enhance the rights of individuals, it in fact does so in very fundamental ways.\textsuperscript{384} A separation-of-powers analysis which is defined by the rule of law preserves individual freedom "by fostering the

\textsuperscript{378. Id. at 809.}
\textsuperscript{379. See Employment Division v. Smith, 494 U.S. 872 (1993).}
\textsuperscript{380. Id.}
\textsuperscript{381. Brant, supra note 141, at 20.}
\textsuperscript{382. See id.}
\textsuperscript{383. Remarks of Justice Antonin Scalia at Washington D.C. Panel Discussion on Separation of Powers (audio tape of C-SPAN broadcast Nov. 15, 1988).}
\textsuperscript{384. See Marshall, supra note 6, at 260.}
accountability, deliberation, consensus, and moderation of government decision makers.” 385

Scalia may well be the Prophet of Doom, but without adherence to the text of the Constitution, and without attention to the lines which separate the three branches, there “may be nothing left between potential tyranny of the political branches and the liberty of the people but a vigilant judicial branch.” 386 If this is true, one can only hope that the judiciary will have the intelligence, and the good will, to remain ever vigilant. 387 The alternative is to build high walls now, guard them carefully, preserve them for the future, and to fly the “Bi-cameralism or Fight: The Choice of Freedom is Yours” banner from the parapets.

III. TOWARDS A NEW THEORY OF STATUTORY INTERPRETATION

"When the House Judiciary Committee was drafting an anti-crime bill two weeks ago, some members suggested resolving a dispute by putting compromise language into a committee report, which accompanies a bill to the floor. But Barney Frank, D-Mass., warned off his colleagues with just two words: 'Justice Scalia.'" 388

Nowhere has Justice Scalia's jurisprudential influence been felt more keenly than in the area of statutory interpretation. 389 Scalia is credited with moving the academic discussion about statutory interpretation from the "Big Sleep" to the "Big Heat." 390 As with his Rule of Law and separation-of-powers jurisprudence, Scalia began writing and lecturing about statutory interpretation long before coming to the Court. 391 After his arrival on the Court,

385. Werhan, supra note 141, at 2689.
386. See Kurland, supra note 141, at 611.
387. Id.
389. See Smith, supra note 140, at 59-78.
391. Much as he does on the Court today, while a judge on the D.C. Circuit Scalia wrote a number of concurring and dissenting opinions in order to espouse his theory of statutory interpretation. See, e.g., Hirschey v. FERC, 777 F.2d 1.
however, Scalia began to challenge aggressively, and to influence, the Court's approach to statutory interpretation.\footnote{392. See Karkkainen, supra note 6.}

While judges had engaged in debate for years about whether statutes were plain on their face or whether legislative history rebutted that meaning, Scalia was the first to change the terms of the debate.\footnote{393. See id.} In his first year on the Court, Scalia wrote a "jarring" concurring opinion in which he said,

[although it is true that the Court in recent times has expressed approval of [using legislative history to trump plain meaning], that is to my mind an ill-advised deviation from the venerable principle that if the language of the statute is clear, that language must be given effect—at least in the absence of a patent absurdity.\footnote{394. Id. (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 452 (1987) (Scalia, J., concurring)).}

Scalia articulated his approach to interpreting statutes most clearly two years later in \textit{Green v. Bock Laundry Machine Co.}.\footnote{395. 490 U.S. 504 (1989) (Scalia, J., concurring).}

He said that:

The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the whole Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which, by a benign fiction, we assume Congress always had in mind.\footnote{396. \textit{Green}, 490 U.S. at 528.}

More recently, Scalia declared "[t]he text is the law, and it is the text that must be observed."\footnote{397. ANTONIN SCALIA, A MATRER OF INTERPRETATION 22 (1997).} While critics contend that Scalia's approach to statutory interpretation has failed to win

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"general acceptance on the Court," one need look no further than the Court’s recent statutory interpretation cases to trace the influence of Scalia’s theory. While other justices still resort to the use of legislative history on occasion, they do so only after looking at the text of the statute. Additionally, Scalia’s influence is evidenced by the attention—now almost a cottage industry—that his theory of statutory interpretation has received from legal scholars.

Professor William Eskridge was one of the first scholars to write about Scalia’s theory of statutory interpretation, labeling it the “New Textualism.” Professor Eskridge predicted that if Scalia’s approach was adopted, it would “represent a significant change in the way the Court writes its statutory interpretation decisions, and probably even in the Court’s role in interpreting statutes . . .” Eskridge stated that “Scalia’s new textualism is a . . . bold rethinking of the Court’s role.” Professor Eskridge’s “prediction” has proven correct. The Court is rethinking its role, but just as not all of the Justices agree as to what that role should be, neither do scholars agree that Scalia’s theory is the correct one.

Justice Scalia’s textualism theory of statutory interpretation is consistent with his vision of the constitutional role that courts should play, and with his preference for a rule of laws rather than a law of rules.

His approach to statutory interpretation ultimately rests on his views concerning separation of powers and notions about the rule of law as a system of constraining rules. These views encompass a vision of limited government . . . in which an essential function of courts is to check the tendency of the legislative branch to aggrandize itself by ‘usurping’ power.

Scalia made this vision clear when he said, “[i]t is our task, as I see it, not to enter the minds of the Members of Congress . . . but rather to give a fair and reasonable meaning to the text of the

398. Karkkainen, supra note 6, at 401.
399. The articles referenced in footnote 390, supra, are but a few of the articles that have been written about Justice Scalia’s theory of statutory interpretation. One has only to do a brief search on Westlaw or Lexis, to find numerous articles.
400. See Eskridge, supra note 6, at 623.
401. Id. at 624.
402. Id.
403. Karkkanian, supra note 6, at 403.
Indeed, part of Scalia's hostility to the use of legislative history as an interpretive aid is that he considers reliance on items such as congressional committee reports to be unconstitutional on separation-of-powers grounds. "The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators."

His theory also is consistent with his preference for a "formalist" approach to the law. Formalists argue that judges can and should be tightly constrained by the objective, or "plain meaning," of a statute. "In a representative democracy," formalists argue, "major policy decisions should be made by . . . Congress. Unelected judges should make as few policy choices as possible, especially when interpreting statutes." According to formalists, reliance on legislative history to interpret a statute distorts the voice of Congress and violates the bi-cameralism requirement by elevating the views of committees in one chamber over that of Congress as a whole.

405. Recently he explained:

The legislative power is the power to make laws, not the power to make legislators. It is nondelegable. Congress can no more authorize one committee to "fill in the details" of a particular law in a binding fashion than it can authorize a committee to enact minor laws. Whatever Congress has not itself prescribed is left to be resolved by the executive or (ultimately) the judicial branch. That is the very essence of the separation of powers.

Scalia, supra note 397, at 35.
406. Conroy v. Aniskoff, 484 U.S. 439, 447 (1988) (Scalia, J.). In contrast to Scalia's view that the use of legislative history threatens separation-of-powers, Judge Patricia Wald, one of Scalia's critics states that:

To disregard committee reports as indicators of congressional understanding because we are suspicious that nefarious staffers have planted certain information for some undisclosed reason, is to second-guess Congress's chosen form of organization and delegation of authority, and to doubt its ability to oversee its own constitutional functions effectively. It comes perilously close . . . to impugning the way a coordinate branch conducts its operations and, in that sense, runs the risk of violating the spirit if not the letter of the separation of powers principles.

407. See Eskridge, supra note 6, at 646.
408. Id. at 648.
409. Id. at 649.
Yet Justice Scalia’s formalism is not formalism merely for its own sake. His is a vision of governmental minimalism, resting on strict separation of powers to preserve individual liberties by keeping the power of each branch limited . . . . Moreover, for Justice Scalia, separation of powers and the rule of law are deeply intertwined; a limited government must be constrained by the rule of law.\textsuperscript{410}

So, it is in his statutory interpretation jurisprudence that the advocate of the Rule of Law, the Prophet of Doom, and the formalist all converge. It is here that his critics must once again answer the questions—if not plain meaning, if not the Rule of Law, if not formalism, then what?\textsuperscript{411}

A. Johnson v. United States

In \textit{Johnson v. United States},\textsuperscript{412} a 5-4 decision involving the Federal Tort Claims Act (FTCA), Justice Scalia was joined in dissent by Justice Brennan, Justice Marshall, and Justice Stevens, defying (confusing?) his critics.\textsuperscript{413} In \textit{Johnson}, the Petitioner was the widow of a deceased Coast Guard helicopter pilot.\textsuperscript{414} The deceased, Lieutenant Commander Horton Johnson, was killed in a helicopter crash while responding to a distress call from a boat.\textsuperscript{415} Petitioner brought a wrongful death action against the

\textsuperscript{410}. See Karkainen, supra note 6, at 427.

\textsuperscript{411}. This article does not propose to analyze, at length, Justice Scalia’s theory of statutory interpretation. Instead, in keeping with the thesis of the article, the focus is on whether Justice Scalia applies this theory consistently and whether it has, in fact, influenced the Court. For a fuller discussion of Justice Scalia’s theory on statutory interpretation, the following articles are excellent. Read in order, they give a chronology of the evolution and the influence of Justice Scalia’s theory. See, e.g., William K. Eskridge, The New Textualism, 37 U.C.L.A. L. Rev. 621 (1990); Nicholas Zeppos, Legislative History and the Interpretation of Statutes: Towards a Fact Finding Model of Statutory Interpretation, 76 Va. L. Rev. 1295 (1990); Phillip Frickey, From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation, 77 Minn. L. Rev. 241 (1992); W. David Slawson, Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law, 44 Stan. L. Rev. 383 (1992); Bradley C. Karkkainen, “Plain Meaning:” Justice Scalia’s Jurisprudence of Strict Statutory Construction, 68 S. Cal. L. Rev. 259 (1994); Stephen A. Plass, The Illusion and Allure of Textualism, 40 Vill. L. Rev. 93 (1995).


\textsuperscript{413}. Id.

\textsuperscript{414}. Id. at 683.

\textsuperscript{415}. Id.
United States under the FTCA. 16 In her complaint, Petitioner sought damages from the United States on the grounds that the civilian FAA flight controllers negligently caused her husband’s death. 17

The Government filed a motion to dismiss, asserting that Petitioner’s claim was barred because the deceased was killed during the course of his military duties. 18 The district court agreed and dismissed the complaint relying exclusively on the Supreme Court’s decision in Feres v. United States. 19 In that case, the Supreme Court held that the Government has no FTCA liability for injuries to members of the military arising out of or in the course of activity incident to service. 20

On appeal, the Eleventh Circuit reversed. 21 The court noted that although the language of Feres precludes suits by service members against the government when the negligence alleged is on the part of another service member, when the negligence alleged is on the part of a non-service member, Feres does not bar the suit. 22 Thereafter, the Eleventh Circuit granted the Government’s request for a rehearing en banc and upheld the panel’s decision. 23 The Supreme Court granted certiorari to “review the Court of Appeals’ reformulation of the Feres doctrine and to resolve the conflict among the circuits.” 24

1. The Majority and The Broad Purposes of the FTCA

The majority began its analysis by reiterating that Feres does not allow service members to bring suits under the FTCA, and that this rule has remained unchanged by Congress or case law for over 40 years. 25 Further, the Court stated that contrary to Petitioner’s arguments, the military status of the alleged tortfeasor has never been held to be crucial to the application of the doctrine. 26 The Court refused to modify the doctrine to

417. Id.
418. Id.
419. Id.
420. See id.
422. Id. at 1539.
423. 177 F.2d 535 (2d Cir. 1949) (en banc).
426. Id. at 687.
exclude suits where the alleged tortfeasor was a civilian rather than a member of the military.\textsuperscript{427}

The Court then reviewed the three broad rationales underlying the \textit{Feres} decision, which are:

(1) \textit{The relationship between the government and the members of the armed forces is 'distinctively federal in character.'}

(2) \textit{The existence of . . . generous statutory disability and death benefits [to members of the military] is an independent reason why the \textit{Feres} doctrine bars suit for service-related injury.}

(3) \textit{Feres} and its progeny indicate that suits brought by service members against the Government for injuries incurred incident to service are barred . . . because they are the 'types of claims that . . . would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness.'\textsuperscript{428}

As to the first purpose, the Court found that "[w]here a service member is injured incident to service . . . it 'makes no sense to permit fortuity of situs of the alleged negligence to affect the liability of the Government . . . ."\textsuperscript{429} As to the second purpose, the Court found that not only do those injured incident to service receive benefits that "'compare extremely favorably with those provided by most workmen's compensation statutes,'" but the recovery of those benefits is swift, efficient, and generally requires no litigation.\textsuperscript{430} Finally, as to the third purpose, the Court found that even where military negligence is not specifically alleged in a tort action, "a suit based upon service-related activity necessarily implicates military judgments and decisions that are inextricably intertwined with the conduct of the military mission."\textsuperscript{431}

Applying this analysis to the case before it, the Court found that the decedent was killed incident to his military service and that his suit was therefore barred.\textsuperscript{432} Additionally, the Court reaffirmed its holding in \textit{Feres} and held that the doctrine was applicable to all injuries incident to service in the military, regardless of whether the tortfeasor is a member of the military or not.\textsuperscript{433}

\textsuperscript{427} Id. at 687-88.
\textsuperscript{428} Id. at 689-91.
\textsuperscript{429} Id. at 689. (quoting \textit{Stencel Aero Engineering Corp. v. United States}, 431 U.S. 666, 672 (1977)).
\textsuperscript{430} Id. at 690. (quoting \textit{Stencel}, 431 U.S. at 673).
\textsuperscript{431} Id. at 691.
\textsuperscript{432} Id. at 692.
\textsuperscript{433} See id.
2. On Incorrect Reading of Text & Strange Bed Fellows

In dissent Scalia turned first, as always, to the text of the statute. He began by saying that although the majority provided several reasons why Congress might have been wise to exempt certain claims from the FTCA, "[t]he problem now, as then, is that Congress not only failed to provide such an exemption, but quite plainly excluded it." 434 Lamenting that the Respondent did not ask the Court to overturn Feres, Scalia, along with Justices Brennan, Marshall, and Stevens, nonetheless refused to extend it. 435

The pertinent portion of the FTCA renders the Government liable:

[F]or money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstance where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. 436

Scalia explained that "[r]ead as it is written," the language of the statute "renders the United States liable to all persons, including servicemen, injured by the negligence of Government employees." 437 Scalia argued that although there are a number of exceptions set forth in the FTCA, none generally precludes suits brought by servicemen. 438 In fact, Scalia pointed out, one exception excludes "[a]ny claim arising out of the combatant activities of the military . . . during time of war,' demonstrating that Congress specifically considered . . . the special requirements of the military." 439

Scalia also argued that in the first FTCA case brought by a serviceman, the Court gave effect to the plain meaning of the statute. 440 In Brooks v. United States, 441 the Court rejected the Government's argument that those injured while enlisted in the military could never recover under the FTCA. 442 The Court held

434. Id. (Scalia, J., dissenting).
435. Id.
436. 28 U.S.C. § 1346(b).
438. Id.
439. Id. (citing 28 U.S.C. § 2680(j)).
440. Id.
441. 337 U.S. 49 (1949).
442. Id.
that the FTCA gives jurisdiction "over any claim founded on negligence brought against the United States," and that the exceptions to the Act did not "permit an inference that . . . Congress intended to bar all suits brought by servicemen." The Court found that the plaintiffs in Brooks could recover under the FTCA, but in dicta, the Court cautioned that an attempt by a serviceman to recover for injuries suffered "incident to . . . service" would present a "wholly different case."

This "wholly different case" reached the Court one year later in Feres. The Court gave three reasons for holding that injuries arising out of or in the course of activity incident to service were barred, they were:

[T]he parallel private liability required by the FTCA was absent; (2) Congress could not have intended that local tort law govern the 'distinctively federal' relationship between the Government and enlisted personnel; and (3) Congress could not have intended to make FTCA suits available to servicemen who have already received veterans' benefits . . . for injuries suffered incident to service.

Several years after Feres, the Court thought of a fourth rationale: "Congress could not have intended to permit suits for service-related injuries because they would unduly interfere with military discipline."

Scalia rejected all of these rationales. He stated that only the first rationale purports to be textually based and because no "private individual" can raise an Army and no State has consented to suit by members of its militia, § 2674 shields the government from liability. Scalia argued that under this reasoning, "many of the Act's exceptions are superfluous, since private individuals typically do not, for example, transmit postal matter, . . . collect taxes, . . . impose quarantines, . . . or regulate the monetary system." In any event, Scalia argued, the Court subsequently recognized and rejected the error of this rationale. Scalia stated that in spite of the fact that the Court had rejected this

443. Id. at 51.
444. Id. at 52.
447. Johnson, 481 U.S. at 694 (Scalia, J., dissenting).
448. Id.
449. Id. at 694.
450. Id. at 694-95 (citing Rayonier, Inc. v. United States, 352 U.S. 315, 319 (1957) and Indian Towing Co. v. United States, 350 U.S. 61, 61-69 (1955)).
"textual" reading, "the Feres rule is now sustained . . . by three disembodied estimations of what Congress must (despite what it enacted) have intended."\textsuperscript{451}

As to the second rationale, Scalia stated that "[t]he unfairness to servicemen of geographically varied recovery is, to speak bluntly, an absurd justification, given that, as we have pointed out in another context, nonuniform recovery cannot possibly be worse than uniform nonrecovery."\textsuperscript{452} As to the rationale resting upon the military's need for uniformity, Scalia argued that "it is difficult to explain why uniformity . . . is indispensable for the military, but not for the may other federal departments and agencies that can be sued under the FTCA . . . ."\textsuperscript{453} Scalia concluded that regardless of how it is understood, "the second Feres rationale is not a plausible estimation of congressional intent, much less a justification for importing that estimation, unwritten, into the statute."\textsuperscript{454}

As to the third rationale, Scalia pointed out that it too had been denominated "no longer controlling" by the Court.\textsuperscript{455} Scalia argued that it is only in \textit{dicta} that the Court has characterized recovery under the Veterans' Benefits Act (VBA) as the sole remedy for service-related injuries.\textsuperscript{456} Additionally, Scalia argued that "[t]he credibility of this rationale is undermined severely by the fact that both before and after Feres we permitted injured servicemen to bring FTCA suits, even though they had been compensated under the VBA."\textsuperscript{457} Citing \textit{Brooks v. United States}\textsuperscript{458} and \textit{United States v. Brown}\textsuperscript{459} as support, Scalia concluded that "the presence of an alternative compensation system neither explains nor justifies the Feres doctrine; it only makes the effect of the doctrine more palatable."\textsuperscript{460}

\begin{itemize}
  \item \textsuperscript{451} \textit{Id.} at 695.
  \item \textsuperscript{452} \textit{Id.} at 695-96.
  \item \textsuperscript{453} \textit{Id.} at 696.
  \item \textsuperscript{454} \textit{Id.} at 696-97.
  \item \textsuperscript{455} \textit{Id.} at 697 (citing United States v. Shearer, 473 U.S. 52, 58, n.4 (1985)).
  \item \textsuperscript{456} \textit{Id.} (citing Hatzlachh Supply Co. v. United States, 444 U.S. 460, 464 (1980) (per curiam)).
  \item \textsuperscript{457} \textit{Id.} (citing Brooks v. United States, 337 U.S. 49, 69 (1949)).
  \item \textsuperscript{458} 337 U.S. 49 (1949).
  \item \textsuperscript{459} 381 U.S. 437, 111 (1965).
  \item \textsuperscript{460} \textit{Johnson}, 481 U.S. at 698 (citing Hunt v. United States, 636 F.2d 580. 598 (U.S. App. D.C. 1980)).
\end{itemize}
3. The Morale of Comrades in Arms

As to the fourth rationale, Scalia said that “[t]he foregoing three rationales—the only ones actually relied upon in Feres—are so frail that it is hardly surprising that we have repeatedly cited the later-conceived-of ‘military discipline’ rationale as the ‘best’ explanation for that decision.” Scalci conceded that if the statute in question were vague he would take into account the possibility that some suits brought by servicemen would adversely affect military discipline. But, he argued, “I do not think the effect upon military discipline is so certain . . . that we are justified in holding (if we can ever be justified in holding) that Congress did not mean what it plainly said in the statute before us.” Scalia also argued that it was strange that Congress’ “obvious” intent to preclude Feres suits because of their potential effect on military service was “discerned neither by the Feres Court nor by the Congress that enacted the FTCA . . . .”

Scalia stated that to the extent that the reading of the FTCA would require civilian courts to examine military decision making and thus influence discipline, “it is outlandish to consider that result “outlandish” . . . since in fact it occurs frequently even under the Feres dispensation.” For example, Scalia argued, if Lieutenant Commander Johnson’s helicopter had crashed into a civilian’s home, the homeowner could have brought suit under the FTCA thus requiring the court to examine military decision making no less than it would in the present case. After all, Scalia pointed out, “the morale of Lieutenant Commander Johnson’s comrades-in-arms will not likely be boosted by the news that his widow and children will receive only a fraction of the amount they might have recovered had he been piloting a commercial helicopter at the time of his death.” Scalci concluded that none of the four rationales justified the Court’s failure to apply the FTCA as written.

461. Id. at 698-99.
462. Id. at 699.
463. Id.
464. Id.
465. Id.
466. See id. at 700.
467. Id.
468. Id.
4. **On Finding Beauty in What the Court Wrought**

Finally, Scalia criticized the *Feres* Court's claim that its decision was necessary to make "the entire statutory system of remedies against the Government a workable, consistent, and equitable whole." 469 Pointing out the many inconsistencies that have resulted from *Feres*, Scalia argued that "bringing harmony to the law has hardly been the consequence of our ignoring what Congress wrote and imagining what it should have written." 470 Scalia stated that he could find no comfort from Congress' failure to amend the FTCA to overturn *Feres*, as the "unlegislated desires of later Congresses with regard to one thread in the fabric of the FTCA could hardly have any bearing upon the proper interpretation of the entire fabric of compromises that their predecessors enacted into law in 1946." 471

Finding no beauty in the Court's decision, Scalia concluded that:

Had Lieutenant Commander Johnson been piloting a commercial helicopter when he crashed into the side of a mountain, his widow and children could have sued and recovered for their loss. But because Johnson devoted his life to serving in his country's Armed Forces, the Court today limits his family to a fraction of what they might otherwise have received. If our imposition bore the legitimacy of having been prescribed by the people's elected representatives, it would (insofar as we are permitted to inquire into such things) be just. But it has not been, and it is not. 472

Scalia found no beauty in the Court's decision because it ignored the plain meaning of the statute. He found no beauty, because one thread that consistently runs through the fabric of Scalia's opinions is his reliance on the text, no matter that it occasionally results in his having strange bed fellows.

**B. Blanchard v. Bergeron**

In *Blanchard v. Bergeron*, 473 Petitioner brought suit under 42 U.S.C. § 1983, claiming that Respondent, a sheriff's deputy, had beaten him and thereby deprived him of his civil rights. 474 The case was tried before a jury, and Petitioner was awarded $5,000 in

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469. See id. at 701.
470. Id. at 702.
471. Id. at 702-03.
472. Id. at 703.
474. Id. at 88-89.
compensatory damages and $5000 in punitive damages on his § 1983 claim.475 Under the provisions of 42 U.S.C. § 1988, which permits the award of attorney's fees to a prevailing party in certain civil rights actions, Petitioner also sought attorney's fees and costs totaling more than $40,000.476 The district court awarded $7500 in attorney's fees and $886.92 for costs and expenses.477

Petitioner appealed the award of attorney's fees to the Fifth Circuit, seeking to increase the award.478 The Fifth Circuit, however, reduced the award because it found that Petitioner had entered into a contingency-fee agreement with his attorney, the terms of which dictated that the attorney was to receive 40% of any damages awarded to Petitioner.479 The court relied on its prior decisions and ruled that contingency-fee agreements serve as a cap on the amount of attorney's fees that can be awarded.480 Additionally, the court found that hours billed for the time of law clerks and paralegals was not compensable since they would be included within the contingency fee.481 Accordingly, the court limited the fee award to 40% of the $10,000 damages award, and held that Plaintiff could recover no additional "attorneys fees."482 The Supreme Court granted certiorari and reversed.483

1. The Johnson Factors

In beginning its analysis, the Court, oddly enough, looked first to the text of the statute. Section 1988 allows for reasonable attorney's fees in the event that a party prevails, but does not define a "reasonable" fee.484 The Court also looked to the legislative history of the statute and found that "[i]n computing the fee, counsel for prevailing parties should be paid . . . 'for all time reasonably expended on the matter.'"485

After considering the legislative history, the Court then looked at the case of Johnson v. Georgia Highway Express, Inc.486

475. Id. at 89.
476. Id.
477. Id.
478. Id. at 90.
479. Id.
481. Id.
482. Blanchard, 489 U.S. at 90.
485. Blanchard, 489 U.S. at 91 (citing S. Rep. No. 94-1011, p. 6 (1976)).
486. 488 F.2d 714, 717-719 (5th Cir. 1974).
a case that was decided prior to the enactment of 42 U.S.C. § 1988. In Hensley v. Eckerhart, the Court cited with approval the factors set forth in Johnson for determining attorney's fees. The Court stated that the Johnson factors provided guidance as to Congress' intent because both the House and Senate reports refer to the twelve Johnson factors for assessing the reasonableness of attorney's fees.

Based on these factors and three district court decisions pointed to in the statute's legislative history, the Court found that the contingency-fee factor "is simply that, a factor." While the presence of a contingency-fee agreement might aid in determining the reasonableness of fees, the Court found that such an agreement "does not impose an automatic ceiling on an award of attorney's fees, and to hold otherwise would be inconsistent with the statute and its policy and purpose." Additionally, the Court stated that a plaintiff's recovery will not be reduced by what he must pay his attorney.

Finally, the Court reiterated that an initial assessment of attorney's fees is made by applying the "Lodestar Formula," that is, by multiplying the prevailing billable rate by the hours reasonably expended on the claim. Then, courts may adjust the fee upwards or downwards in accordance with the Johnson factors. The Court stated that it is clear that Congress intended the amount of fees awarded in civil rights actions to be determined by the same standards that are applied in other actions. This intent, the Court stated, is consistent with the purpose of § 1988,

488. The twelve Johnson factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill required to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship; (12) awards in similar cases. Johnson, 489 F.2d at 717-19.
490. Id.
491. Id.
492. Id. at 94 (citing Hensley v. Eckerhart, 461 U.S. 424 (1983)).
493. Id.
494. Id. at 95.
which ensures "effective access to the judicial process for persons with civil rights grievances."\textsuperscript{495}

Additionally, the Court found that § 1988 makes no distinction between actions for damages and actions for equitable relief.\textsuperscript{496} The Court concluded that a contingent-fee agreement is inappropriate for the determination of fees under § 1988 and that "the attorneys fees provided for in a contingent-fee agreement is not a ceiling upon fees recoverable under § 1988."\textsuperscript{497} The Court declined to answer whether legal assistants' fees should be included in the award.\textsuperscript{498}

2. The Unrestrained Use of Legislative History

Justice Scalia concurred in the judgment of the Court except for that portion which relied upon the Fifth Circuit's analysis of \textit{Johnson v. Georgia Highway Express, Inc.} and on the three district court decisions mentioned in the FTCA's legislative history.\textsuperscript{499} Scalia stated that the Court resolved the fact that \textit{Johnson} contradicts the three district court opinions by "concluding in effect that the analysis in Johnson is dictum, whereas in the three District Court opinions it was a holding."\textsuperscript{500}

Scalia argued that:

Congress did no such thing. Congress is elected to enact statutes rather than to point to cases, and its Members have better uses for their time than poring over District Court opinions. That the Court should refer to the citation of the three District Court cases in a document issued by single committee of a single house as the action of Congress displays the level of unreality that our unrestrained use of legislative history has attained.\textsuperscript{501}

Further, Scalia stated that he was confident that only a small number of the Members of Congress even read the Committee Reports, and "that very few of those who did set off for the nearest law library to check out what was actually said in the four cases at issue."\textsuperscript{502}

\textsuperscript{495} Id. (citing Hensley v. Eckerhart, 461 U.S. 424, 429 (1983)).  
\textsuperscript{496} Id.  
\textsuperscript{497} Id. at 96.  
\textsuperscript{498} Id. at 97.  
\textsuperscript{499} Id. (Scalia, J., concurring).  
\textsuperscript{500} Id. at 98.  
\textsuperscript{501} Id.  
\textsuperscript{502} Id.
3. On Modern Day Drafting, Consistency, and Faithfulness

Having attacked the Court's use of legislative history, Scalia went even further when he declared that:

[Anyone familiar with modern-day drafting of congressional committee reports is well aware that] the references to cases were inserted at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist . . . . What a heady feeling it must be for a young staffer, to know that his or her citation of obscure district court cases can transform them into the law of the land, thereafter dutifully to be observed by the Supreme Court itself.503

Scalia concluded by saying that he declined to participate in this process of turning obscure legislative history into law.504 He argued that it is neither compatible with the Court's judicial responsibility to apply statutes effectively, or to congressional intent, to give "legislative force to each snippet of analysis . . . in committee reports that are increasingly unreliable evidence of what the voting Members of Congress actually had in mind."505

Recognizing that the Court had, however, utilized his theory of statutory analysis to a large degree, Scalia closed by saying that "[e]xcept for a few passages . . . today's opinion admirably follows our more recent approach of seeking to develop an interpretation of statute that is reasonable, consistent, and faithful to its . . . purpose, rather than to achieve obedient adherence to cases cited in committee reports. I therefore join the balance of the opinion."506 Even with this victory of sorts, Scalia recognized that his job was not finished.

C. Smith v. United States

An excellent example of the complexity and depth of Scalia's textualism is Smith v. United States,507 in which he was joined in dissent by Justices Stevens and Souter.508 Petitioner John Smith was convicted of knowingly "using" a MAC-10 machine-gun with a silencer during and in relation to the sale of cocaine.509 Under 18 U.S.C. § 924(c)(1) a defendant who uses a firearm in this manner

503. Id. at 98-99.
504. Id. at 99.
505. Id.
506. Id. at 99-100.
508. Id. at 224.
509. Id. at 226.
must be sentenced to five years in prison. And where the firearm is a “machine-gun,” or is fitted with a silencer, the sentence is 30 years.\textsuperscript{510} Petitioner attempted to trade his MAC-10 for drugs in a sale to an undercover police officer.\textsuperscript{511} This “trade” was defined as a “use” for purposes of the sentencing enhancement, and Petitioner was sentenced to 30 years in prison.\textsuperscript{512}

On appeal to the Eleventh Circuit, Petitioner argued that §924(c)(1)’s penalty for the use of a firearm during a drug trafficking offense covers only those situations in which the firearm is used as a weapon.\textsuperscript{513} The Eleventh Circuit rejected Petitioner’s argument and held that the plain language of the statute imposes no requirement that the firearm be used as a weapon.\textsuperscript{514} Instead, the court explained, any use of the weapon to facilitate the commission of the offense suffices.\textsuperscript{515} The Supreme Court granted certiorari to resolve a conflict among the circuits as to the appropriate meaning of 18 U.S.C. §924(c)(1).

1. On Borrowing A Trick From Scalia’s Statutory Interpretation Bag

The Court started its analysis by resorting to one of Justice Scalia’s favorite sources for statutory interpretation, the dictionary.\textsuperscript{516} The Court, again borrowing from Scalia’s method of interpretation, stated that when a word is not defined by statute, the words are defined in keeping with their ordinary meaning.\textsuperscript{517} Using Webster’s dictionary, the Court defined “use,” to mean “to use” or “to convert to one’s service” or “to employ.”\textsuperscript{518}

The Court then applied this definition to the two-part test required by the statute. In order for the additional penalties to be imposed, the prosecution must demonstrate that the defendant “used or carried a firearm,” and that the use or carrying was “during and in relation to” a crime of violence or drug trafficking.\textsuperscript{519}

\textsuperscript{510} 18 U.S.C. §924(c)(1).
\textsuperscript{511} Smith, 508 U.S. at 225-26.
\textsuperscript{512} See id. at 227.
\textsuperscript{513} Smith v. United States, 957 F.2d 835 (11th Cir. 1992).
\textsuperscript{514} Id. at 837.
\textsuperscript{515} Id.
\textsuperscript{516} Smith, 508 U.S. at 228-29.
\textsuperscript{517} Id. at 228.
\textsuperscript{518} Id. at 228-29 (citing WEBSTER’S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2806 (2d ed. 1949) and BLACK’S LAW DICTIONARY 1541 (6th ed. 1991)).
\textsuperscript{519} Id. (citing 18 U.S.C. §924(c)(1)).
The Court found that Petitioner's handling of the MAC-10 fell "squarely within those definitions. By attempting to trade his MAC-10 for drugs, he 'used' or 'employed' it as an item of barter to obtain cocaine." Additionally, the Court rejected Petitioner's argument that § 924(c)(1) should require proof that the firearm was used as a weapon. Instead, the Court stated that the broad sweep of the statute's language punishes any "use" of a firearm so long as that use is during, and in relation to, a drug trafficking offense.

Perhaps anticipating Justice Scalia's criticism, the Court conceded that language cannot be interpreted apart from its context. The Court stated that "[t]he meaning of a word that appears ambiguous if viewed in isolation may become clear when the word is analyzed in light of the terms that surround it." Applying this analysis to Petitioner's "use" of a gun, the Court stated that it was both reasonable and normal to say that Petitioner "used" his MAC-10 when he traded it for cocaine.

Responding to the dissent, the Court rejected the argument that a cane, for example, is normally used to aid in walking. The Court pointed out that "[t]he most infamous use of a cane in American history had nothing to do with walking . . . the use of a cane as an instrument of punishment was once so common that 'to cane' . . . [became] a verb meaning 'to beat with a cane.'" Likewise, the Court rejected the dissent's reliance on the United States Sentencing Commission Guidelines Manual as "reflecting its interpretation of the phrase 'uses . . . a firearm.'" On the contrary, the Court found it "perfectly reasonable" to construe § 2B3.1(b)(2)(B) to include uses such as trading and bludgeoning.

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520. Id.
521. Id.
522. Id.
523. Id.
524. Id.
525. See id. at 230.
526. Id.
527. Id. at 230-31. (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1949)).
529. Smith, 508 U.S. at 231.
530. Id. at 232.
After determining that the Petitioner's actions comported with the normal definition of the word "use," the Court went back to the text of the statute for further support. The Court stated that to the extent that there is uncertainty about the scope of the phrase "uses . . . a firearm," the remainder of § 924 "sets it to rest." The Court found that Congress had also "employed" the words "use" and "firearm" together in § 924(d)(1), which deals with forfeiture of firearms. Specifically, the section states that any firearm intended to be "used" in an interstate trade is prohibited and is subject to forfeiture. Thus, the Court concluded that anyone who trades a firearm "uses" it within the meaning of § 924(d)(1).

Finally, the Court rejected the dissent's argument that its interpretation created a "strange dichotomy" between "using" a firearm and "carrying" one. The Court responded that "[t]he dichotomy arises, if at all, only when one tries to extend the phrase 'uses . . . a firearm' to any use for any purpose whatsoever." Likewise, the Court rejected the dissent's argument that § 924(c)(1) originally dealt with the use of firearms during crimes of violence. The Court stated that even if Congress had intended the statute to have a more limited scope in its original version, "we believe it clear from the face of the statute that the Congress that amended § 924(c)(1) in 1986 did not." Accordingly, the Court found that using a firearm in a guns-for-drugs trade may constitute using a firearm within the meaning of § 924(c)(1).

531. Id. at 233.
532. Id.
533. Note that the Court was careful not to utilize the word "use" in this sentence. Instead, it substituted the word "employ," being careful not to "use" the word "use" in a manner that would be consistent with its ordinary usage.
534. Id. at 233-34.
535. Id. (citing 18 U.S.C. § 922(d)(3)(C) and (F)).
536. Id. at 234-35.
537. Id. at 236.
538. Id.
539. Id.
540. Id.
541. Id. at 237.
3. **Back to the Dictionary**

The Court went on to analyze whether Petitioner's "use" of the MAC-10 was "in relation to" his drug trafficking offense.\(^{542}\) Once again, the Court turned to Webster's and stated that "in relation to" means "with reference" or "was regards."\(^{543}\) The Court concluded, however, that it did not need to determine the precise meaning of "in relation to," "as petitioner's use of his MAC-10 meets any reasonable construction of it."\(^{544}\)

Finally, the Court rejected Petitioner's reliance on *United States v. Phelps*,\(^{545}\) a case in which the Court of Appeals for the Ninth Circuit held that a gun was not used or carried "in relation to" a drug trafficking offense when it was used as an item of barter and not as a weapon.\(^{546}\) The Court stated that a gun, even when it is used as an item of barter, can suddenly transform itself into a weapon, thus justifying a broad interpretation of the phrase.\(^{547}\) The Court used this same argument in rejecting the dissent's invocation of the rule of lenity.\(^{548}\) The Court stated that the rule of lenity cannot dictate an impossible interpretation of a statute, and that there is no reason why "Congress would have intended courts . . . applying § 924(c)(1) to draw a fine metaphysical distinction between a gun's role in a drug offense . . . and its role as an item of barter . . . ."\(^{549}\)

The Court therefore held that a criminal who trades his firearm for drugs "uses" it during and "in relation to" a drug trafficking offense.\(^{550}\) The Court upheld Petitioner's 30-year mandatory sentence.\(^{551}\)

4. **On Ordinary Usage & Prying Open Cash Registers**

Because the majority had usurped his usual starting place, Scalia did not begin his analysis with the text of the statute. Instead, he began with the fundamental principle of statutory

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542. *Id.*
543. *Id.* at 237-38 (citing *WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE* 2102 (2d ed. 1945)).
544. *Id.* at 238.
545. 895 F.2d 1281 (9th Cir. 1990).
546. *Smith*, 508 U.S. at 239.
547. *Id.*
548. *Id.*
549. *Id.* at 240.
550. *Id.* at 241.
551. *Id.*
interpretation that the meaning of a word cannot be determined in isolation, but must be defined from the context in which it is used. 552 Scalia argued that this was "especially true of a word as elastic as 'use,' whose meanings range all the way from 'to partake of' . . . to 'to be wont or accustomed.'" 553 Additionally, Scalia reminded the Court that when searching for statutory meaning, courts must give nontechnical words their ordinary meaning. 554 Scalia went on to analyze the phrase "to use" in the context of these principles. He said that to use an instrumentality ordinarily means to use it for its intended purpose and that when "someone asks 'Do you use a cane?,' he is not inquiring whether you have your grandfather's silver handled walking-stick on display in the hall; he wants to know whether you walk with a cane." 555 Similarly argued Scalia, when someone asks if you "used" a gun in the course of a crime, they are not asking whether you traded a gun for drugs. 556 He argued that "the Court does not appear to grasp the distinction between how a word can be used and how it is ordinarily used . . . . It would, indeed, be reasonable and normal to say that petitioner 'used' his MAC-10 in his drug trafficking offense. It would also be reasonable and normal to say that he "used" it to scratch his head." 557 Scalia goes on to argue that the normal meaning of the phrase "to use" is reflected in the United States Sentencing Guidelines, which provides for sentence enhancements when firearms are "brandished," "discharged," "possessed," or "otherwise used." 558 In a footnote, Scalia demonstrated the absurdity that could result from the Court's interpretation.

Reading the Guidelines as they are written . . . , and interpreting 'use of a firearm' in the strange fashion the Court does, produces, . . . a full seven-point upward sentence adjustment for firing a gun at a storekeeper during a robbery; a mere five-point adjustment for pointing the gun at the storekeeper . . . but an intermediate

552. Id. (Scalia, J., dissenting).
553. Id. at 241-42 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2806 (2d ed. 1939)).
554. Id. at 242.
555. Id.
556. See id.
557. Id.
558. Id. at 243 (quoting United States Sentencing Comm'n, Guidelines Manual § 2B3.1(b)(2) (Nov. 1992)).
six-point adjustment for using the gun to pry open the cash register or prop open the door.559

Scalia argued that such an outcome is quite ridiculous, and that it is inconsequential that the words “as a weapon” do not follow “to use a firearm,” because they are “reasonably implicit.”560

5. On Stretching Language to Fit

After concluding that “to use” should be defined by its ordinary and reasonable meaning, Scalia criticized the Court for seeking to avoid § 924(d) of the statute, which does not employ the phrase “uses a firearm.”561 Instead, it provides for the confiscation of firearms that are “used in” certain crimes, including the crimes of transferring, selling, or transporting firearms in interstate commerce.562 The Court concluded that whenever the phrase appears in the statute, “use” of a firearm must include nonweapon use.563 Scalia disagreed. He argued that “[w]e are dealing here not with a technical word or an ‘artfully defined’ legal term, ... but with common words that are ... inordinately sensitive to context.”564 Therefore, Scalia concluded, just as every appearance of “use” in the statute does not have to be given narrow meaning, neither does the appearance of “use a firearm” have to be defined to mean “use a firearm in crimes such as unlawful sale of firearms.”565

Scalia also considered the “dichotomy” which § 924(c)(1) would cause by providing for increased penalties not only for someone who “uses” a firearm, but for someone who “carries” a firearm in relation to a crime.566 He argued that the interpretation that he would give the language produces “an eminently reasonably dichotomy between ‘using a firearm’ ... and ‘carrying a firearm.’ The Court’s interpretation, by contrast, produces a strange dichotomy between ‘using a firearm for any purpose whatever, including barter,’ and ‘carrying a firearm.’” Scalia rejected the Court’s response to this argument, saying that:

559. Id.
560. See id. at 244.
561. Id.
562. Id.
563. Id.
564. Id. at 244-45.
565. Id. at 245.
566. Id.

http://scholarship.law.campbell.edu/clr/vol19/iss2/2
The Court responds to this argument by abandoning all pretense of giving the phrase ‘uses a firearm’ even a permissible meaning, much less its ordinary one. There is no problem, the Court says, because it is not contending that ‘uses a firearm’ means ‘uses for any purpose,’ only that it means ‘uses as a weapon for trade.’ Unfortunately, this is not one of the options our mother-tongue makes available. ‘Uses a firearm’ can be given broad meaning... or its more ordinary narrow meaning...; but it can not possibly mean ‘uses as a weapon for trade.’ 567

Finally, Scalia stated that it was significant that Petitioner was prosecuted under that portion of § 924(c)(1) pertaining to us of a firearm “during and in relation to any... drug trafficking offense.” 568 Scalia explained that this was significant because that portion of the statute is affiliated with the pre-existing provi-sion pertaining to the use of a firearm “during and in relation to any crime of violence,” rather than with those firearm-trafficking offense listed in § 922. 569 Scalia argued that the word “‘use’ in the ‘crime of violence’ context has the unmistakable import of use as a weapon and that import carries over... to the subsequently added phrase ‘or drug trafficking crime.’” 570 Further, Scalia argued that even if the issue is not as clear as he thinks it is, it is at least debatable—thereby requiring the Court to apply the rule of lenity and find for the Petitioner. 571

Scalia concluded by rejecting the Court’s argument that giving the language its ordinary meaning would frustrate the purpose of the statute. 572 Scalia, a textualist to the end, warned the Court that “[s]tretching language in order to write a more effective statute than Congress devised is not an exercise we should indulge in.” 573

D. On Changing the Rules of the Game

Whether for good or bad, Justice Scalia has changed the rules of the statutory interpretation game. 574 He has changed them, if not entirely, then to a substantial degree. The Court’s reliance

567. Id. at 246, n.3.
568. Id. at 246 (quoting 18 U.S.C. § 924(c)(1)).
569. Id.
570. Id.
571. Id.
572. Id. at n.4.
573. Id. at n.4.
574. See Smith, supra note 140, at 38.
upon legislative history has declined significantly. If nothing else, Justice Scalia has reminded the Court that statutory interpretation is, first and foremost, an exercise in textual analysis. And, he has reminded the Justices that it is the Court, and the Court alone, that "has the power to change the federal system back to the theory of law as statute, because it alone has the power to set the rules for when and how legislative history may be used."

According to Justice Scalia's rules of the game, legislative history may be used only when the plain text of the statute, if applied literally, would create an absurd result. Scalia replaces legislative history with dictionary definitions and interpretive canons, which critics argue are no less immune from manipulation because it is unlikely that all judges will agree on a single meaning of the text, and that every canon has a counter-canon. Additionally, they argue that textualism, like legislative history, "gives courts a neutral-looking way to conceal real policy choices . . ." Resort to legislative history, for example, "permits judges to claim that their own policy preferences are really the unexpressed will of Congress. Textualism serves much the same function, only it replaces the fiction of Congressional intent with . . . fictions about the . . . meaning of the language."

There is no basis in Justice Scalia's opinions, however, to support this view. Justice Scalia, contrary to this criticism, is not a "pure" textualist or strict constructionist. Rather, he urges a

575. See Eskridge, supra note 400, at 657. In his article, Professor Eskridge demonstrates, through the use of statistics, that even as early as 1988, the Court's use of legislative history had decreased. In 1986, the Court used legislative history to confirm plain meaning 18 times, in 1988 they did so only 11 times. Additionally, in 1986 the Court used legislative history to get around apparent meaning 7 times, it did so only 4 times in 1988. Id.

576. See id. at 690.

577. See Slawson, supra note 411, at 424.

578. See Polich, supra note 6, at 270.

I acknowledge an interpretative doctrine of what the old writers call lapsus linguæ (slip of the tongue), and what our modern cases call "scrivener's error," where on the very face of the statute it is clear to the reader that a mistake of expression (rather than of legislative wisdom) has been made. Scalia, supra note 399, at 20.

579. See id. at 274-76.

580. Id. at 288.

581. Id.

582. See Karkkainen, supra note 6, at 406.

583. Id.
common-sensical textualism that takes into account context and ordinary typical meaning but which avoids slavish attention to individual words or the pursuit of hypertechnical deconstructive methods. For instance, Justice Scalia believes, as do many, that statutes can be understood only in context.\textsuperscript{584} Additionally, Scalia looks at the purpose of the statute to interpret the meaning of the text, but insists that this interpretation remain consistent with the text itself.\textsuperscript{585} He warns that "[t]he principle of our democratic system is not that each legislature enacts a purpose, independent of the language of the statute, which the courts must then perpetuate, assuring that it is fully achieved but never overshot by expanding or ignoring the statutory language as changing circumstances require."\textsuperscript{586}

Ultimately, "Justice Scalia's antipathy toward legislative history probably has less to do with its evidentiary value than its consequences for how law is made. Judicial reliance on legislative history, in his view, allows Congress to write and courts to effectuate vague, ambiguous, broadly drawn, and far-reaching statutes."\textsuperscript{587} While Justice Scalia's choice of statutory rules still involves judicial discretion, at a minimum his choices mean that Congress must be fairly explicit, and that courts must begin their analysis with the text of the statute. And Justice Scalia recognizes that his textualism is not fail-safe:

I concede, of course, that textualism is no ironclad protection against the judge who wishes to impose his will, but it is \textit{some} protection. The criterion of "legislative intent," by contrast, positively invites the judge to impose his will; by setting him off in search of what does not exist (there is almost never any genuine legislative intent on the narrow point at issue), it reduces him to guessing that the legislature intended what was most reasonable, which ordinarily coincides with what the judge himself thinks best. Other nontextual methodologies are similarly wish-fulfilling.\textsuperscript{588}

According to Scalia, by utilizing textualism and pursuing the rule of law as the basis for deciding cases he not only constrains lower courts but, at a minimum, he constrains himself. "If the next

\textsuperscript{584} Id.
\textsuperscript{585} Id. at 412.
\textsuperscript{587} See Karkkainen, supra note 6, at 424. See also Scalia's quote at text accompanying note 404, supra.
\textsuperscript{588} SCALLA, supra, note 397, at 132.
case should have such different facts that my political or policy preferences regarding the outcome are quite the opposite, I will be unable to indulge those preferences . . . Only by announcing rules do we hedge ourselves in."

At a minimum, it is a good place to start.

IV. THE "REAL WORLD" AND THOSE WHO WOULD SOAR

While Scalia's principles may be seductive in their logic and clarity, are they realistic and workable? Among the many criticisms directed at Scalia, the most frequent is that rigid adherence to rules is unworkable in the real world in which lawyers and judges practice and people live and work. Are Justice Scalia's rules, however, any more unworkable than the balancing tests and case-by-case analyses which Scalia's critics generally advocate? Or, are his principles a better place to start because at a minimum they offer an identifiable beginning point, definable rules for judges to apply, and concrete principles to guide them?

While there is no shortage of people who criticize Scalia, there are few—if any—who are willing to set aside their own ideologies long enough to analyze Scalia's jurisprudence objectively, critically and honestly. Indeed, there are several among Scalia's critics who speak loudly, many who speak often, and some who simply speak, but few, if any, who truly soar.

A. Laurence Tribe and A Living Constitution

When Professor Laurence Tribe speaks, many people listen. As a well known and respected professor of constitutional law, Tribe appeals to a wide audience. He is known not only for his academic work, but for his skills as a Supreme Court litigator. He can often be found arguing before the Supreme Court, defending the rights of individuals and advocating for a living or "evolving"

589. See Scalia, supra note 8, at 1179.
AN EAGLE SOARING

It is this notion of an evolving constitution which brings him into conflict with the jurisprudence of Justice Scalia.

1. The Rule of Love as the Rule of Law

Tribe pays lip service to the Rule of Law. He and Scalia part paths, however, in defining the Rule of Law and how it should be applied. Tribe has criticized Scalia's Rule of Law as being "an ideal of exalted formalism under which regularity and predictability and closure count for more than substantive justice." While agreeing that the Rule of Law is a "vital baseline" for legal analysis, Tribe's Rule of Law—unlike Scalia's—has memory, soul, compassion, sympathy, a heart, and peripheral vision. In fact, Tribe's Rule of Law has "no ultimate conflict with the Rule of Love."

Where Scalia's Rule of Law provides for general rules that limit the discretion of judges, Tribe's Rule of Law would incorporate judges' "common knowledge about the facts of life." Tribe asserts that "we make a grievous mistake when we equate the Rule of Law with the narrowest . . . most unfeeling and unseeing versions of the Ideal of Law." As an example of the Rule of Love as the Rule of Law, Tribe points to the Supreme Court's decision in Brown v. Board of Education.

590. In the past Term, Professor Tribe argued three cases before the Supreme Court. Most notably, he argued Quill v Vacco, 80 F.3d 716 (2d Cir.), cert. granted, 117 S. Ct. 36 (1996), which presented the Court with the question whether a legally competent person has a constitutional right to physician-assisted suicide. (The answer is "No." See Vacco v. Quill, 65 U.S.L.W. 4695, 1997 WL 348037 (1997)). On this issue, Justice Scalia was criticized for making extra-judicial remarks last year about his belief that no such "right" exists under the Constitution.

591. In remarks to the student body of the University of Kansas School of Law on October 3, 1996, Scalia said that while many advocate a living constitution, he advocates a dead one.


594. Tribe, supra note 592, at 728.

595. See id. at 729-30.

596. Id. at 729.

597. Id. at 730.

598. Id. at 729.

In Brown, Tribe argues, the Supreme Court recognized the "compassionate and simple principle that black Americans should not be treated differently than whites, because doing so put blacks in a position of inferiority that was "hurtful to human beings." Tribe argues that just as the Court and the American people came to recognize that segregation was a denial of equal protection, these same notions of decency and compassion can and should be incorporated into the Rule of Law.

Having waved what Scalia has called "the bloody shirt of Brown," Tribe nonetheless fails to accurately interpret Scalia's view of the Rule of Law. Scalia does not assert that the law itself is without compassion or vision, he asserts that the personal opinions of judges—whether they are compassionate or heartless—have no place in a system of jurisprudence that is founded upon the Rule of Law. Scalia would agree that Brown was rightly decided, but it was rightly decided not because of society's notions of decency and compassion, but because the text of the Equal Protection Clause required that result.

Ultimately, Tribe mischaracterizes Scalia's Rule of Law as a threat, rather than a protection. If the Rule of Law is to remain a "vital baseline," only clear legal rules and clear principles that will provide that protection, not a romantic ideal of beneficent rules. More importantly, if judges are to be restrained from deciding cases based on their personal beliefs and biases, again only clear rules and clear principles will afford that protection, not judges' "common knowledge about the facts of life." In the end, it is the Rule of Law and not vague notions of a Rule of Love that will provide for a Law of Rules.

600. Tribe, supra note 592, at 730.
601. See id. at 731.
602. In remarks made to student body at the University of Kansas School of Law on October 3, 1996, Justice Scalia, in response to a question, said that his critics often "wave the bloody shirt of Brown" to demonstrate the weaknesses in his theory of constitutional interpretation. Scalia went on to say that he agreed with the decision in Brown not because of the "rightness" of that decision, but because the text of the Equal Protection Clause would allow no other result.
603. Id.
604. Id. at 730.
2. **On Footnotes, Individual Rights & the Constitution**

Professor Tribe also has criticized Justice Scalia's method of constitutional interpretation. He admits, however, that he has no theory of his own. Further, Tribe states that he doubts that "any defensible set of 'rules'" for interpreting the constitution exists. Although Tribe states that there is no "how to" manual on constitutional interpretation, he asserts that there is a how not to manual.

According to Tribe, the way not to interpret the Constitution is by using its text as the sole or ultimate point of reference. While the text has "primacy," Tribe argues that there is nothing in the text itself that tells us how its meaning is to be ascertained. Except, of course, for the Ninth Amendment. This Amendment, according to Tribe, allows for the recognition of rights not found in the text of the Constitution. When the Fourteenth Amendment fails, when the Fourth Amendment fails, or when Supreme Court justices fail to recognize a right, the Ninth Amendment is there to protect us all.

Tribe also criticizes Scalia for failing to follow his own rules of constitutional interpretation. Pointing out that Scalia has upheld free speech rights where a "conservative" would not have done so, Tribe concludes that Scalia is guided by "a set of principles whose understanding may evolve over time, reflecting . . . some of the aspirations of the former colonists about what sorts of rights they

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605. See Lawrence H. Tribe & Michael C. Dorf, Levels of Generality in the Definition of Rights, 57 U. Chi. L. Rev. 1057 (1990). In this article, Tribe and Dorf challenge Scalia's method of constitutional interpretation. In particular, they challenge Scalia's preference for examining whether a right is fundamental or not by examining "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be defined." Id. at 1058 (citing Michael H. v. Gerald D., 109 S. Ct. 2333, 2334 n.6 (1989)).

606. Scalia, supra note 397, at 73. In this book, Justice Scalia writes an introductory essay and several scholars — legal and otherwise — respond to what he has written. In his response, Professor Tribe focused primarily on Scalia's theory of constitutional interpretation.

607. See id.

608. Id.

609. Id. at 77.

610. Id. at 77-78.

611. Id. at 78. The text of the Ninth Amendment states that "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX

612. See Scalia, supra note 397, at 78.

613. See id.
... would enjoy." Tribe argues that Scalia's reading of the First Amendment's freedom of speech to encompass flag burning or cross burning "entail[s] a most ambitious exercise in attributing modern ideas of the free speech principle to our predecessors." Additionally, Tribe asserts that Scalia, through his willingness to apply the doctrine of stare decisis, "implicitly accepts some notion of evolving constitutional principles," Tribe argues that because Scalia is willing to apply precedent when deciding cases, he implicitly accepts the notion of a "transtemporal" Constitution. That is, Scalia is willing to accept the idea of a living Constitution. This being true, Tribe nonetheless agrees that some constitutional provisions do not invite broad interpretation. Further, he agrees that some provisions should be "understood as putting in place a quite definite architecture... through which power is to be exercised, rather than proclaiming open-ended principles of any kind." He argues, however, that "not all constitutional provisions are of this sort," and that it is in this belief that he and Justice Scalia will continue to differ.

Finally, Tribe argues that Scalia's theory of constitutional interpretation will "achieve neutrality by all but abdicating judicial responsibility to protect individual rights." In particular, Tribe criticizes Scalia's belief that in determining fundamental rights, the Court must "refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." Tribe points out that "the law has never given its blessing to behavior simply because it is 'traditional.'" In fact, he argues, "legally cognizable 'traditions' mirror majoritarian, middle-class conventions." Tribe not only criticizes this method of interpretation, but also its application. He argues that "historical traditions are susceptible to even greater manipulation than are legal precedents." Additionally,

614. Id. at 81.
615. Id. at 82.
616. Id.
617. See id.
618. Id.
619. Id. at 93 (Emphasis in the original).
620. Id. at 94 (Emphasis in the original).
621. Tribe & Dorf, supra note 605, at 1086.
623. See Tribe & Dorf, supra note 605, at 1087.
624. Id.
625. Id.
Tribe argues that deciding what is the “most specific level at which a relevant tradition exists,” is like asking whether “a particular line is longer than a particular rock is heavy.” Further, Tribe argues that because Scalia does not tell courts how to measure the specificity of traditions, “he cannot escape the value-laden choice of a level, and a direction, of abstraction.”

In Michael H. for example, Tribe argues that the most specific level of tradition would not be “what are the rights of the natural father of a child adulterously conceived,” as asserted by Scalia. Instead, the most specific level of tradition would be “what are the rights of the natural father of a child conceived in an adulterous but long-standing relationship where the father has played a major, if sporadic, role in the child’s life.” In part because the most specific level of tradition is not addressed, Tribe argues that “Justice Scalia is aware that this method... would severely curtail the Supreme Court’s role in protecting individual liberties. Indeed, that seems to be his purpose.”

Combining this method with Scalia’s statement that “looking at [an] act which is assertedly the subject of a liberty interest in isolation from its effect on other people [is] rather like inquiring whether there is a liberty interest in firing a gun where the case at hand happens to involve its discharge into another person’s body,” Tribe warns that faithfully carried out, Scalia’s method “could eliminate the use of the Due Process Clauses as guarantors of any fundamental liberties.” Moreover, he argues that this method would have courts start their search from “a very specific liberty indeed—one that has the state interest built into it from the start.” Additionally, Tribe argues that while in a “perfect world” elected legislatures would protect individual rights, “[l]ike it or not, judges must squarely face the task of deciding how... to define our liberties.”

626. Id. at 1090.
627. Id. at 1092.
629. See Tribe & Dorf, supra note 605, at 1092.
630. Id. at 1093.
632. See Tribe & Dorf, supra note 605, at 1096.
633. Id. at 1098.
634. Id. at 1099.
3. Scalia Responds

In his recently published book, A Matter of Interpretation, Scalia had the opportunity to respond directly to many of Tribe's criticisms. While Scalia appreciated Tribe's humility and candor in admitting that he has no constitutional theory of his own, he stated that such characteristics "would assuredly carry the day if the issue before us were quality of character . . . [b]ut they are of little use to the judge who must determine whether and wither the Constitution has wandered, and who is not permitted to render a candid and humble judgment of 'Undecided.'"

Responding to Tribe's criticism that some provisions of the Constitution should be read strictly from the text while others, like the Fourteenth Amendment, "reflect the aspirations of the former colonists about what sorts of rights they . . . would come to enjoy," Scalia stated that:

I do not believe that. If you want aspirations, you can read the Declaration of Independence, with its pronouncements that 'all men are created equal' with 'unalienable rights' that include 'Life, Liberty and the pursuit of Happiness.' . . . There is no such philosophizing in our Constitution, which unlike the Declaration of Independence . . . is a practical and pragmatic charter of government.

Additionally, Scalia stated that if Professor Tribe is correct that the Bill of Rights is aspirational, then it is the legislature and not the courts who should be the Constitution's ultimate interpreter. Moreover, Scalia argued, the underlying holding of Marbury v. Madison—that "[i]t is emphatically the province and duty of the judicial department to say what the law is"—would be wrong. Marbury is not wrong, however, Scalia concludes, and judges are naturally appropriate expositors of the law. They are not, on the other hand, "naturally appropriate

635. See Scalia, supra note 397, at 133-43.
636. Id. at 137.
637. Id. at 81 (emphasis added).
638. Id. at 134.
639. Id.
640. 5 U.S. (1 Cranch) 137 (1803).
641. Id. at 177.
642. See Scalia, supra note 397, at 136.
643. Id.
expositors of the aspirations of a particular age; that task is better done by [the] legislature . . . .644

Next, Scalia responds to Tribe’s contention that because of his First Amendment jurisprudence he is at heart an aspirationist:

[All three examples [Tribe] selects involve the First Amendment, for which the Court has developed long-standing and well accepted principles . . . that are effectively irreversible. That my opinions sought to apply those principles faithfully does not prove . . . that I am unfaithful to my interpretive philosophy. Originalism, like any other theory of interpretation put into practice in an ongoing system of law, must accommodate the doctrine of stare decisis; it cannot remake the world anew.645

Similarly, Scalia argues that his use of stare decisis does not, as Tribe suggests, leave him “open to the charge of importing [his] own views and values into the law.”646

Acceptance of the doctrine of stare decisis is not, Scalia argues, unique to originalists or textualists.647 “The demand that originalists alone ‘be true to their lights’ and forswear stare decisis is essentially a demand that they alone render their methodology so disruptive of the established state of things that it will be useful only as an academic exercise and not as a workable proscription for judicial governance.”648 Scalia does not deny, however, that the application of the doctrine may result in some arbitrariness. Instead, he constrains his own use of the doctrine by applying consistent rules.649 Additionally, Scalia responds to Tribe’s criticism that whatever those rules might be, they are not found in the original meaning of the text by saying that “stare decisis is not a part of my originalist philosophy; it is a pragmatic exception to it.”650

Finally, Scalia responds to Tribe’s idea that the text of the Constitution can be read in a transtemporal manner. While agreeing that the Constitution can be read in a different manner over time, Scalia argues that reading it in a different way “does not require reading it in such a fashion that its meaning changes.”651

644. Id.
645. Id. at 138-39.
646. Id. at 140.
647. Id. at 139.
648. Id.
649. Id. at 140.
650. Id.
651. Id.
4. On Advocating for a Dead Constitution

Tribe's idea of a "transtemporal" constitution is simply a synonym for an evolving constitution. An evolving constitution is the antithesis of a constitution comprised of clear rules, clear lines, and clear principles. When Scalia advocates, tongue in cheek, for a "dead" constitution, he does not advocate for a constitution that cannot withstand the changes of time, nor for one that fails to protect the citizens of this country. Indeed, his desire for clear rules and for structural rigor advocate just that: individual rights. By beginning with the text and insisting on structural safeguards, Scalia ensures that all people will be treated in the same manner.

Whether you are a Catholic drinking alcohol at mass, or a Native American smoking peyote in a religious ceremony, all generally applicable criminal laws apply to you. And, whether you are an independent counsel appointed by judges, or a sentencing commission comprised of judges, the text of the Constitution dictates the limits of your powers. And, whether you are a citizen seeking the passage of a bill, or the head of the House Judiciary Committee seeking the same, the text of that bill must be clear. An evolving constitution may travel through the vagaries of time, but a dead constitution—in all of its stillness—affords protection not just for the moment, and not for one person, but for all time and for all people.

B. Christopher Smith's Labels and Tables

Another of Scalia's critics has created a virtual cottage industry for himself by criticizing Scalia. Professor Christopher Smith has published eight articles and two books on Scalia in just seven years. Of all Scalia's critics, however, Smith appears to be the

least willing to look critically and objectively at his jurisprudence. Smith’s articles and books consistently direct the same criticisms at Scalia. His articles often contain statistics concerning the Court’s record as a whole, and Scalia’s “record” in particular. These statistics purport to demonstrate the Court’s move to the right. While this may be true, Smith’s superficial analysis, and simplistic use of labels—“conservative” or “liberal”—add little to the debate about Scalia’s jurisprudence.

1. Scalia, Judicial Restraint, & Political Minorities

Smith has correctly stated that Justice Scalia is one of the most vocal advocates of judicial restraint. While accepting the premise that judicial restraint is necessary, Smith nonetheless asserts that Scalia’s restraint hides a majoritarian bias. In contrast to Professor Tribe, Smith argues that Scalia is more than willing to overturn precedent with which he disagrees. For example, when Scalia said that “I would think it a violation of my oath to adhere to what I consider a plainly unjustified intrusion upon the democratic process in order that the Court might save face,” Smith interpreted this to mean that Scalia is “concerned about advancing his own interpretations of the Constitution regardless of contrary case precedents.”

Reagan and Bush, 57 ALB. L. REV. 111 (1994); Christopher E. Smith, The Constitution and Criminal Punishment: The Emerging Visions of Justices Scalia and Thomas, 43 Drake L. Rev. 593 (1995); Christopher E. Smith, The Impact of New Justices: The United States Supreme Court and Criminal Justice Policy, 30 Akron L. REV. 55 (1996); David A. Schultz & Christopher E. Smith, The Jurisprudential Vision of Justice Antonin Scalia (1996). It is interesting to note, however, that while the articles and books are numerous, the criticism — and the support for that criticism — stay much the same. Professor Smith’s first article about Scalia, Justice Antonin Scalia and the Institutions of American Government, is a virtual blueprint for his subsequent books. While Smith includes additional cases and some additional material in the books, the books are largely a restatement of the article. His subsequent articles, while about the Rehnquist Court as a whole, focus primarily on Scalia, reiterating many of the same criticisms found in his books.

654. See id. at 409-21.
655. Id. at 406.
657. See Smith, supra note 653, at 406.
Additionally, Smith has criticized Scalia’s belief that the Court should remove itself from politics. Smith asserts that the public has little awareness of the Court or its functions and that if Scalia were “truly concerned about preserving the Supreme Court’s image as a legal rather than a political institution, [he would] show more concern about maintaining the stability of the law . . . ."

Further, Smith argues that Scalia is insensitive to political minorities. Smith cites Employment Division v. Smith as an example of this insensitivity. Smith states that all religions are not created equal, and that because “Native Americans have little power in Congress . . . [the defendants] turned . . . to the Supreme Court, the one institution of government structured to protect individuals’ constitutional rights from destruction by majoritarian policy initiatives.”

Smith also argues that Scalia’s deference to the legislative and executive branches of government “significantly narrow the scope of individuals’ free exercise rights.” Such deference, according to Smith, “creates risks that the ‘tyranny of the majority’ will infringe upon the religious freedom of political minorities who lack clout in the legislative and executive branches of government.” Smith asserts that allowing Native Americans to use peyote in their religious ceremonies is no different than allowing Christians to use alcohol in their ceremonies.

Smith concludes that, if the Supreme Court will not safeguard the rights of religious minorities, no one will. He argues that although women and racial minorities have “increasingly succeeded in gaining political power through the electoral process . . . and are now better able to protect their interests in the executive and legislative branches . . . [r]eligious minorities tend to be too

658. Id. at 408.
659. Id. at 409.
660. Id. at 411-12.
662. See Smith, supra note 653, at 413 (emphasis added).
664. Id. at 937.
665. See id. at n. 233.
666. Id. at 941.
small to organize effectively in order to gain political power through the electoral process."\textsuperscript{667}

Another example of Scalia’s insensitivity, Smith argues, is his treatment of criminal defendants.\textsuperscript{668} According to Smith, the Court’s unwillingness to recognize criminal defendants as a political minority leads to their victimization by the elected branches of government.\textsuperscript{669} In particular, Smith argues, Scalia’s judicial philosophy “undercut[s] the courts’ constitutional mandate to serve as a check on political branches protecting the rights of minorities . . . .”\textsuperscript{660} Smith warns that this insensitivity will lead to the abdication of the Supreme Court’s role as guardian of the rights of political minorities.\textsuperscript{671}

Finally, in his “labels and tables” articles, Smith casts Scalia as an inflexible conservative who consistently votes his political ideologies.\textsuperscript{672} Beginning in 1991, Smith has devoted much time and space to gathering statistics about how the justices, and Scalia in particular, vote.\textsuperscript{673} Smith labels Scalia a “conservative,” and then with little or no analysis, places most of his opinions in that same category.\textsuperscript{674}

2. On Analysis, Objectivity, and Clear Vision

Although Professor Smith has \textit{written} prolifically about Scalia, it appears that he has failed to \textit{read} and digest Justice Scalia’s writings. If he had given thoughtful consideration to

\begin{footnotes}
\item[667] Id. at 942.
\item[668] See Smith, supra note 653, at 414.
\item[669] See id. at 415.
\item[660] Id.
\item[671] Id. at 420.
\item[673] See Smith, supra note 653, at 420.
\item[674] See id.
\end{footnotes}
Scalia's opinions as a whole, rather than simply dividing them into neat categories and labeling them, perhaps Smith would not be so quick and sure in his judgments about Scalia. It is Scalia's point precisely that the Supreme Court is not the primary institution of government that protects individual liberties, rather Congress is. When Scalia says that it would be a violation of his oath to adhere to decisions which intrude upon the democratic process, that statement is consistent with his belief that judges should be restrained. It does not mean, and has never meant, that Scalia would advance his own theory of constitutional interpretation without regard for precedent.

Similarly, Smith criticizes Scalia's "deference" to the legislative and executive branch. This "deference" is not, however, another one of Scalia's theories used to advance his own ideologies. It is a "theory" born from the text of the Constitution. It is ironic that Smith believes that such deference will lead to a tyranny of the majority, for separation-of-powers prevents exactly that. Without the structure inherent in this doctrine, there would be no clear division of power. Scalia defers to this structure not because he seeks to advance his own causes, but because no judge should be allowed to advance his own cause. As a judge, Scalia protects this framework not for his own sake, but for the sake of us all. It would be much more logical for Justice Scalia to advance a personal agenda by claiming for the Court itself as much governmental power as possible.

Smith himself unwittingly gives the best example of why Scalia is "insensitive" to political minorities. He says that women and racial minorities have succeeded in gaining political power through the electoral process, power which has enabled them to protect their interests at all levels of government.\(^675\) He goes on to say that religious minorities, such as the defendants in Smith, are too small as a group to gain such power effectively.\(^676\) Smith has aptly—if inadvertently—described "a trend in government that has developed in recent centuries, called democracy."\(^677\) It is precisely this system of government which allows political minorities to organize and gain political power. Scalia himself admits, however, that this same system of government will leave at a relative disadvantage those political minorities that are not well organized, or those who have not gained power. Still, this democratic

\(^{675}\) See Smith, supra note 663, at 942.

\(^{676}\) Id.

\(^{677}\) See Scalia, supra note 397, at 9.
system of government should be preferred to "a system in which each conscience is a law unto itself..." 678

In the end, Smith fails to soar because he looks primarily at the result of Scalia's decisions, rather than at the principles and the methodology underlying those decisions. Smith labels Scalia a conservative and labels his opinions as wrong, but he fails to analyze critically Scalia's jurisprudence. It is, after all, far simpler to label Scalia than it is to engage him.

V. CONCLUSION

While Professor Tribe may be the most prominent of Scalia's critics, and Professor Smith the most prolific, they are by no means alone or even in the minority. Scholars, students, and journalists all form a line, anxiously awaiting their turn to criticize the Justice. The American people, with little to inform them other than newspaper accounts of Scalia, often join this band of critics. Nonetheless, it is to the people, the lawyers, and the law schools that the significance and implications of Scalia's jurisprudence must be explained. Justice Scalia, with his usual wit, explained the dilemma well when he said:

The American people have been converted to the belief in the Living Constitution, a 'morphing' document that means, from age to age, what it ought to mean... This, of course, is the end of the Bill of Rights, whose meaning will be committed to the very body it was meant to protect against: the majority. By trying to make the Constitution do everything that needs doing from age to age, we shall have caused it to do nothing at all. 679

In the end, Justice Scalia's preferred principles—the Rule of Law, strict separation-of-powers, and textual statutory interpretation—are inextricably bound together by his preference for clear rules, clear lines, and clear text. Ultimately, Scalia soars because he has a strong vision of our constitutional system of government, he is unwilling to compromise on his bedrock principles, and he articulates his principles with a wit and style that few can match. Justice Scalia waits still for his critics to propose and explicate legitimate, workable alternatives to his principles. Thus, the challenge is clear for those who would join the debate with Justice Scalia. If not his favored principles, then which ones?

679. See Scalia, supra note 397, at 47.