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## Justice Scalia and the Idea of Judicial Restraint

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CLASSIC REVISITED

JUSTICE SCALIA AND THE IDEA OF  
JUDICIAL RESTRAINT

John F. Manning\*

A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW. By  
*Antonin Scalia*. Princeton and Chichester: Princeton University  
Press. 1997. Pp. xiii, 159. \$18.95.

INTRODUCTION

When one thinks about Justice Antonin Scalia's legacy, it is tempting to focus on his role in promoting statutory textualism and constitutional originalism. He pressed these related approaches with surprising success in a legal culture that had not taken either idea all that seriously before his arrival on the Court.<sup>1</sup> He accomplished this feat, in part, by developing the *affirmative* claim that taking the text seriously best respects the democratic process.<sup>2</sup>

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1. During Justice Scalia's tenure, the Court drastically reduced its reliance on legislative history and increased its reliance on semantic resources such as dictionaries. *See, e.g.*, James J. Brudney & Corey Ditslear, *The Decline and Fall of Legislative History? Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras*, 89 JUDICATURE 220 (2006); Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 BUFF. L. REV. 227, 252–60 (1999). In the same period, the Court also abandoned its longstanding practice of enforcing the spirit or purpose of a statute rather than the letter or text of the law when the two conflicted. *See, e.g.*, *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1710 (2012) (“[P]etitioners’ purposive argument simply cannot overcome the force of the plain text.”). Constitutional originalism has not had the same impact on the Court’s decisions, *see* David A. Strauss, *The Supreme Court, 2014 Term—Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 6–12 (2015), but it still seems to carry greater weight and provoke far more discussion than it did before Justice Scalia arrived on the Court, *see, e.g.*, Jamal Greene, *Heller High Water? The Future of Originalism*, 3 HARV. L. & POL’Y REV. 325, 332 (2009) (“Scalia has been originalism’s social entrepreneur *par excellence*, and his mark can be seen not just in politics and conservative popular culture but in the legal academy and, most recently, in actual Court opinions.”); William Michael Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar’s Bill of Rights*, 106 MICH. L. REV. 487, 497 (2007) (discussing the growing influence of constitutional “textualism”).

2. *See, e.g.*, *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991) (Scalia, J.) (“The best evidence of [a statute’s] purpose is the statutory text adopted by both Houses of Congress and submitted to the President.”), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No.

For him, if a lawmaking body goes to the trouble of reducing its policies to writing through a carefully prescribed process, then common sense dictates that a faithful interpreter must ascertain, as accurately as possible, the meaning of the words the lawmaker has chosen.<sup>3</sup>

Perhaps no less important, however, was his *negative* claim about appropriate limits on judicial power in our system of separated powers. Every theory of interpretation entails a theory of lawmaking and of adjudication.<sup>4</sup> Justice Scalia's was no exception. Much of his theory of adjudication built on what he took to be a constitutionally warranted view of judicial restraint.<sup>5</sup> In the Tanner Lectures he published as part of *A Matter of Interpretation: Federal Courts and the Law*,<sup>6</sup> his defense of textualism and originalism rested heavily on a critique of the "common law" mindset that he saw federal judges bringing to statutory and constitutional interpretation (pp. 3–14, 16–18, 21, 25, 28, 36, 38–39, 45–46). In this account, as in many of his most arresting opinions,<sup>7</sup> Justice Scalia exploited an apparent cultural suspicion of judicial discretion—especially the kind that judges exercised *sub rosa*, as in the guise of legislative intent or living constitutionalism.<sup>8</sup> If our system of government makes the democratically accountable branches primarily responsible for lawmaking, he did not want the federal judiciary to make an end run around the democratic process by exercising common law discretion "to *make* the law" (pp. 6, 10).

What did Justice Scalia mean by that? Certainly, he understood that judges necessarily exercise *some* discretion when they decide cases.<sup>9</sup> It is doubtful, therefore, that he worried about what Ronald Dworkin called "weak" discretion—the kind that judges routinely exercise whenever "the standards [they] must apply cannot be applied mechanically but demand the

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102-166, § 113, 105 Stat. 1071, 1079, as recognized in *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 82–83 (2012) ("Originalism is the *only* approach to text that is compatible with democracy.").

3. See Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1610 (2012) (arguing that in a constitutional system "in which the people and agents of the people owe fidelity to democratically enacted texts, it would perhaps seem uncontroversial to suggest that an interpreter's job entails determining what those texts convey").

4. See Jerry Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685, 1686 (1988); Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 593–94 (1995). For a contrasting view, see, for example, ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 33 (2006), which argues that "[b]ecause the Constitution does not speak to interpretive method, the decisive considerations are institutional."

5. See, e.g., Scalia & Manning, *supra* note 3, at 1616–17.

6. See p. xii.

7. See *infra* Part I.

8. See pp. 16–17, 38.

9. See *infra* text accompanying notes 177–181.

use of judgment.”<sup>10</sup> Instead, as many of Justice Scalia’s opinions suggest,<sup>11</sup> he resisted discretion in Dworkin’s “stronger sense”—the variety exercised when a judge’s decision is not meaningfully “bound by standards” external to his or her own authority.<sup>12</sup> To put it crudely, Justice Scalia thought it wrong, in a constitutional democracy, for his Court to determine the rights and duties of the populace based on little more than the morals, conscience, or policy predilections of five unelected, life-tenured justices.<sup>13</sup> Hence, in area after area, Justice Scalia pressed his Court to ground its decisions in some source of authority *external* to the judge’s will—in text, original meaning, longstanding legal tradition, or widespread social practice.<sup>14</sup> For convenience, I call this theory of judicial restraint the “anti-discretion principle.”

This view of Justice Scalia’s approach, it should be said, is not the same as the frequently expressed view that he cared, above all else, about rules qua rules—about devising clear, self-constraining doctrines even when applicable texts, properly read, *invited* the judiciary to exercise common law powers.<sup>15</sup> On that premise, his concern with “discretion” centered more upon limiting free-form judicial policymaking than upon rooting judicial decisions in legitimate external authority.<sup>16</sup> That position, I think, is misplaced. Although it is true that Justice Scalia’s Holmes Lecture expressed a strong preference for rule-like judicial decisions—and that he often pressed for doctrinal approaches congenial to that view<sup>17</sup>—I argue here that his judicial philosophy cut deeper than a mere preference for rule-like rules of decision. In particular, I contend that an insistence upon decisional justifications external to the judges’ will, and not a naked preference for rules, provided the

10. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 31 (1977)

11. *See infra* Part I.

12. DWORKIN, *supra* note 10, at 32.

13. Roscoe Pound captured the stronger conception of “discretion” when he defined it as the power “to act in certain conditions or situations in accordance with an official’s or an official agency’s own considered judgment and conscience.” Roscoe Pound, *Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case*, 35 N.Y.U. L. REV. 925, 926 (1960).

14. *See infra* Part I.

15. *See, e.g.*, Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. CIN. L. REV. 7, 10–13 (2006) (contending that Justice Scalia’s commitment to rules dominated other commitments); Steven G. Calabresi & Gary Lawson, *The Rule of Law as a Law of Law*, 90 NOTRE DAME L. REV. 483, 486–88 (2014) (making a similar claim); Richard H. Fallon, Jr., “The Rule of Law” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 28–29 (1997) (“When his preference for rules conflicts or threatens to conflict with his originalist commitments, Justice Scalia on at least several occasions appears to have opted, perhaps reflexively, for rules.”); David A. Strauss, *On the Origin of Rules (with Apologies to Darwin): A Comment on Antonin Scalia’s The Rule of Law as a Law of Rules*, 75 U. CHI. L. REV. 997, 997–98 (2008) (discussing Justice Scalia’s preference for a rule-based jurisprudence); *see also infra* Section II.F.

16. I thank Adrian Vermeule for bringing that point to my attention.

17. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178–80 (1989); *see also infra* Sections II.E & II.F.

central grounding for all of Justice Scalia's commitments—not only his affinity for rule-like doctrinal tests, but also, more fundamentally, his commitments to textualism, originalism, and a tradition- or practice-based approach to unenumerated rights.

This Review explores Justice Scalia's idea of judicial restraint. Starting from Justice Scalia's own account of his judicial philosophy in *A Matter of Interpretation*, Part I suggests that his theory of judging—in particular, his critique of common law discretion—accounts for a surprisingly large element of his textualism and originalism. Using mainly opinions from Justice Scalia's early years on the Court, Part II argues that his anti-discretion principle was an independent value that swept more broadly than his core commitments to textualism and originalism, standing alone.

Part III offers tentative thoughts about Justice Scalia's theory of judicial restraint. Section III.A considers two puzzles. First, as others have noticed, even though Justice Scalia's anti-discretion principle is ultimately a theory of judicial power, he does not focus his justification upon any sort of detailed account of Article III's original understanding.<sup>18</sup> Second, applying Justice Scalia's anti-discretion principle itself invites judicial discretion. Because no one, including Justice Scalia, would deny that judges exercise some discretion when they decide statutory or constitutional cases, an anti-discretion principle requires judges to answer the elusive question of how much is too much. But that line-drawing exercise itself entails judicial discretion.

Section III.B then speculates about why Justice Scalia's campaign against judicial discretion got traction despite those puzzles. I suspect that much of his influence came at the level of close analysis rather than high theory. With an exceptional capacity to deconstruct judicial reasoning, Justice Scalia could reveal discretion long understood as something more constrained and objective. If he correctly intuited that an important strain in the legal culture mistrusted broad judicial discretion, then merely exposing such discretion could do much of the work for him. In short, he may have set a mood for the Court, even if his anti-discretion principle could not be reduced to an exact formula for judicial decision.

#### I. A JUDGE SUSPICIOUS OF JUDGES

*A Matter of Interpretation* shows that Justice Scalia's theory of interpretation was not motivated solely, or perhaps even primarily, by his felt obligation to the words chosen by democratic lawmakers. His text-based approach *also* rested on, and sought to implement, his anti-discretion principle. Unless the Constitution or a statute clearly authorized judges to act on their own sense of the good, Justice Scalia insisted that they ground decisions in some form of constraint external to the judges' own preferences. This Part sketches the theory of judicial restraint elaborated in his first book and early academic writings.

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18. See, e.g., William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1522–32 (1998) (reviewing *A Matter of Interpretation*).

### A. *The Common Law Versus the Rule of Law*

The very first pages of *A Matter of Interpretation* show that Justice Scalia's primary concern is with the post-realist, common law mindset that had taken hold in American law (pp. 3–14). He wrote that, in contrast with an earlier time in which common law judges plausibly saw themselves as “mere expositors of generally accepted social practices” (p. 4), today's post-realist culture “acknowledge[s] that judges in fact ‘make’ the common law.”<sup>19</sup> On that view, the common law judge's job is really that of “playing king—devising, out of the brilliance of one's own mind, those laws that ought to govern mankind” (p. 7). Hence, if *Hadley v. Baxendale* holds that a carrier is not liable for the consequential damages suffered by its customer because of a delayed delivery,<sup>20</sup> the next case might just as easily hold that such damages will lie if the customer gave specific notice of the expected losses.<sup>21</sup> From there, a common law judge, free of any text, might add a “privity of contract” requirement to the *Baxendale* rule and then craft sensible exceptions to *that* requirement as well.<sup>22</sup> In other words, “the common-law . . . mind-set” invites the judge to ask: “What is the most desirable resolution of this case, and how can any impediments to the achievement of that result be evaded?” (p. 13).

Justice Scalia thought this judicial attitude profoundly antithetical to the ambitions of democratic self-governance. And that conviction informed his justifications for statutory textualism and constitutional originalism.

### B. *Textualism and the Common Law Method*

In the area of statutes, Justice Scalia targeted the Court's preference, typified by the *Holy Trinity* case,<sup>23</sup> for enforcing the “spirit” rather than the “letter” of a statute (pp. 18–23). According to *Holy Trinity Church v. United States* and its ilk, Congress cannot craft generally worded texts that anticipate, and provide for, all contingencies that may arise in the life of a statute.<sup>24</sup> So when a statute as written seemed at odds with the mischief at which it was directed, with deeply felt social values, or with plain old common sense, the Court in that era presumed that Congress had “intended” something other than what it had written.

Justice Scalia's central critique of *Holy Trinity* was that following presumed legislative “intent” rather than enacted text is “incompatible with democratic government” (p. 17). Simply put, a faithful agent must respect

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19. P. 10. For a thoughtful opposing view about the common law, see Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 VA. L. REV. 1, 8 (2015), which stresses the constraints upon common law reasoning.

20. (1854) 156 Eng. Rep. 145; 9 Ex. 341.

21. See pp. 5–7 (describing a variation to the *Baxendale* fact pattern).

22. See p. 8.

23. *Holy Trinity Church v. United States*, 143 U.S. 457 (1892).

24. *Id.* at 459.

the words Congress selected. Quite apart from that position, however, Justice Scalia stressed “that, under the guise or even the self-delusion of pursuing unexpressed legislative intents, common law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field” (pp. 17–18). He elaborated:

When you are told to decide, not on the basis of what the legislature said, but on the basis of what it *meant*, and are assured that there is no necessary connection between the two, your best shot at figuring out what the legislature meant is to ask yourself what a wise and intelligent person *should* have meant; and that will surely bring you to the conclusion that the law means what you think it *ought* to mean—which is precisely how judges decide things under the common law. (p. 18)

This practice, he said, was especially pernicious because judges used the fiction of “unexpressed legislative intent” to hide the fact that they were, in fact, making law on their own account.<sup>25</sup> In short, his statutory textualism rested not only on a theory of the legislative process, but also on a theory of proper judicial behavior.

### C. *The Living Constitution*

In contrast with theories of originalism rooted in the founders’ social contract,<sup>26</sup> Justice Scalia’s Tanner Lectures grounded originalism mainly in rule-of-law concerns related to judicial discretion.<sup>27</sup> While mentioning that the Constitution is “a democratically adopted text” (p. 40), Justice Scalia defended originalism *primarily* by criticizing what he thought of as the “ascendant” alternative—“[t]he Living Constitution” (p. 38). To him, that approach, which assumes that constitutional meaning “grows and changes from age to age,” reproduces all the pathologies of “common law” judging (p. 38). Rather than focusing on the constitutional text, the Court’s material of choice is its own precedents (p. 39). And if those precedents do not produce “the *desirable* result for the case at hand, . . . the Court will distinguish its precedents, or narrow them, or if all else fails overrule them, in order that

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25. P. 21. He contrasted “honest nontextualists,” like Guido Calabresi and William Eskridge, both of whom had acknowledged the common law component of this sort of “interpretation.” Pp. 21–22 (discussing GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982), and WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994)).

26. See, e.g., Edwin Meese, III, U.S. Att’y Gen., Speech Before the American Bar Association (July 9, 1985), in *ORIGINALISM: A QUARTER-CENTURY OF DEBATE* 47, 53 (Steven G. Calabresi ed., 2007) (arguing that originalism “reflects a deeply rooted commitment to the idea of democracy” because the Constitution derives its authority from “the consent of the governed to the structures and powers of the government”).

27. Michael Dorf, for one, thinks that concerns about judicial discretion and social contract theory are flip sides of the same justification for originalism. See Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 *GEO. L.J.* 1765, 1766 n.2 (1997). Whatever the merits or demerits of that position, it seems significant that Justice Scalia made the former rather than the latter the central basis for his originalism.

the Constitution might mean what it *ought* to mean” (p. 39). This arrangement, he feared, produced outcomes that reflected little more than the morality or conscience of five justices: “Should there be . . . a constitutional right to die? If so, there is. Should there be a constitutional right to reclaim a biological child put out for adoption by the other parent? Again, if so, there is. If it is good, it is so” (p. 39, footnotes omitted). Originalism, he said, had its difficulties of application and its indeterminacies (pp. 45–46). Under living constitutionalism, however, these problems were endemic because “every question is an open question, every day a new day” (p. 46). And the only certainty is that “an evolving constitution will evolve the way [a] majority [of the Supreme Court] wishes” (p. 46). The net effect, he lamented, was to take power from “the legislature and to give it to the courts” (p. 41).

These concerns, I should add, accord with Justice Scalia’s most fully articulated rationale for judicial review, which rests on rule-of-law rather than contractarian premises.<sup>28</sup> In his Taft Lecture, Justice Scalia emphasized that while nothing in the Constitution explicitly authorizes judicial review, *Marbury v. Madison*<sup>29</sup> treats that extraordinary power as an incident of the courts’ very ordinary power to interpret law.<sup>30</sup> Accordingly, although the Constitution “has an effect superior to other laws, [it] is in its nature the sort of ‘law’ that is the business of the courts”—a text whose “meaning [is] ascertainable through the usual devices familiar to those learned in the law.”<sup>31</sup> Federal courts have a duty to interpret and apply any constitutional text that is relevant to the case or controversy before them, just as they have a duty to interpret and apply the statute with which that constitutional text might conflict. All of that is ordinary interpretation.

If, however, the question was whether and how “to apply current societal values,”<sup>32</sup> then judges could readily substitute their own moral preferences for those of the legislature.<sup>33</sup> In Justice Scalia’s words:

[T]he main danger in judicial interpretation of the Constitution . . . is that the judges will mistake their own predilections for the law. . . . Nonoriginalism, which under one or another formulation invokes “fundamental values” as the touchstone of constitutionality, plays precisely to this weakness. It is very difficult for a person to discern a difference between those political values that he personally thinks most important, and those political values that are “fundamental to our society.” Thus, by the adoption of such a criterion *judicial personalization of the law* is enormously facilitated.<sup>34</sup>

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28. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989); see also, e.g., Barnett, *supra* note 15, at 10 (arguing that Justice Scalia defended originalism based on “the role of the judiciary” rather than a “theory of popular sovereignty”).

29. 5 U.S. (1 Cranch) 137, 177 (1803).

30. See Scalia, *supra* note 28, at 854.

31. *Id.*

32. *Id.*

33. *Id.* at 863.

34. *Id.* (emphasis added).



Notice, again, that the primary concern expressed here is to constrain the subjectivity of today's judges rather than to vindicate the political judgments of the founding generation.<sup>35</sup>

## II. JUSTICE SCALIA'S ANTI-DISCRETION PRINCIPLE

Justice Scalia was hardly the first person to invoke concerns about judicial subjectivity as a way to justify textualism or originalism.<sup>36</sup> He did two things, however, that made his anti-discretion principle distinctive and, as I argue below, difficult for lawyers and judges to ignore.<sup>37</sup>

First, Justice Scalia made the concern pervasive. Especially in his early years on the Court, the anti-discretion principle suffused his analysis in area after area. The principle was mostly not context specific; that is, its invocation generally did not depend upon the interpretation of particular texts in particular cases. Rather, it represented a freestanding philosophy of judging—a background aspiration for the federal judiciary's behavior in a system of separated powers. Hence, for example, the anti-discretion principle helped (1) drive Justice Scalia's approach to textualism and originalism; (2) structure his disposition of unenumerated rights; (3) justify a more streamlined political question doctrine; (4) define a novel approach to *stare decisis*; and (5) provoke, from time to time, the exercise of *acknowledged* judicial discretion in a way that consciously sought to minimize or channel the discretion conferred.

Second, Justice Scalia used close analysis of cases to show that seemingly constraining doctrines, when applied in practice, effectively left five justices free to implement their own sense of the good. In a number of cases, he showed, for example, that familiar balancing tests asked the Court to compare incommensurable values or make sense of multiple unweighted and unranked factors—techniques that allowed the Court to come out either

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35. In keeping with that theme, Justice Scalia allowed that the Court might insist that any newly identified “‘fundamental values’ . . . be clearly and objectively manifested in the laws of the society.” *Id.* He added, however, that he knew of no non-originalist theorist who proposed such a test. *Id.*

36. Justice Rehnquist, for example, argued that unless judicial review “is somehow tied to the language of the Constitution that the people adopted,” judges would become just “a small group of fortunately situated people with a roving commission to second-guess Congress, state legislatures, and state and federal administrative officers concerning what is best for the country.” William H. Rehnquist, Observation, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 698 (1976). Similarly, then-Professor Robert H. Bork once wrote that “a legitimate Court must be controlled by principles exterior to the will of the Justices.” Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 6 (1971). Accordingly, he thought judges should “stick close to the text and the history, and their fair implications, and not construct new rights.” *Id.* at 8. In statutory interpretation, legal philosopher John Austin contended that when a court “depart[s] from the manifest sense of a statute, in order . . . [to] carry into effect its *ratio* or scope,” the judge embarks on “a process of legislative amendment, or a process of legislative correction, which lays all statute law at the arbitrary disposition of the tribunals.” 2 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 629 (Robert Campbell ed., 5th ed. 1885).

37. See *infra* Section III.B.

way in any given case.<sup>38</sup> He focused, as well, upon the ways judges could effectuate their own values by manipulating the levels of generality at which they defined the purpose of a statute or the principle underlying a common law tradition.<sup>39</sup> He also wrote about doctrines that posed questions of degree without providing any principled metric for deciding whether a given case properly fell on one side or the other of the relevant line.<sup>40</sup> In other words, he was on the lookout for doctrines that authorized “ad hoc [judicial] judgment” and, thus, “guaranteed . . . a result, in every case, that [would] make a majority of the Court happy.”<sup>41</sup>

This Part offers examples of the ways in which Justice Scalia applied his anti-discretion principle across diverse areas of law. The analysis tries to show the freestanding character of the principle. It also highlights Justice Scalia’s use of close, case-intensive analysis to uncover the nearly standardless discretion present in familiar judicial doctrines.

#### A. *Discretion and the Text*

Justice Scalia’s anti-discretion principle did not necessarily derive from his interpretation of a particular governing text. Instead, he used that principle as an independent reason to adhere to the textual conclusions he reached by ordinary interpretation. For example, the anti-discretion principle underlaid his rejection of strong purposivism in statutory interpretation. In constitutional cases, too, that principle led him, at times, to reject a particular reading of a constitutional text if he thought that reading would give judges discretion incompatible with their constitutional role.

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38. See, e.g., *McDonald v. City of Chicago*, 561 U.S. 742, 795 (2010) (Scalia, J., concurring) (“The ability of omnidirectional guideposts to constrain is inversely proportional to their number.”); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 96 (1990) (Scalia, J., dissenting) (arguing that a multipart balancing test leads to results “favored by the personal (and necessarily shifting) philosophical dispositions of a majority of this Court”); see also *infra* text accompanying notes 114–117. In this vein, H.L.A. Hart once wrote that discretion arises from the absence “clear principles or rules determining the relative importance of the[ ] constituent values [that inform a decision] or, where they conflict, how compromise should be made between them.” H.L.A. Hart, *Discretion*, 127 HARV. L. REV. 652, 659 (2013).

39. See *infra* text accompanying notes 45–56, 79–85.

40. See, e.g., *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 600 (1996) (Scalia, J., dissenting) (arguing that substantive due process review of whether punitive damages are excessive “reflects not merely . . . ‘a judgment about a matter of degree,’ but a judgment about the appropriate degree of indignation or outrage, which is hardly an analytical determination” (citation omitted)); *Sisson v. Ruby*, 497 U.S. 358, 372 (1990) (Scalia, J., concurring in the judgment) (“The impossibility of drawing a principled line with respect to what, in addition to the fact that the contract relates to a vessel . . . is needed in order to make the contract itself ‘maritime,’ has brought ridicule upon the enterprise.”); see also *infra* Section II.C. This theme mirrors Hart’s observation that discretion arises from a governing test that predictably generates no “right or wrong choice.” Hart, *supra* note 38, at 660.

41. *Morrison v. Olson*, 487 U.S. 654, 733–34 (1988) (Scalia, J., dissenting).

### 1. Statutory Purposivism

Justice Scalia successfully challenged the longstanding principle that judges should enforce the spirit rather than the letter of a statute.<sup>42</sup> Under that principle, a statute that prohibited “dogs from the national parks” might apply to any disruptive pet, canine or not, if extrinsic evidence revealed a background statutory spirit or purpose to ensure the quiet enjoyment of those parks. Justice Scalia contested this approach primarily on the legislative process ground that if a judge elevates a statute’s purpose over its enacted text, he or she might unknowingly disrupt awkward, behind-the-scenes compromises that had been essential to the law’s enactment.<sup>43</sup>

Independent of that legislative process claim, however, Justice Scalia also argued that a judge, unmoored from the text, would improperly exercise personal discretion to set rather than discern a statute’s policy. The kernel of this idea comes from legal realist Max Radin, who observed that all laws have multiple layers of purposes, culminating in the ultimate purposes of “justice and security.”<sup>44</sup> On that view, once a court departs from the immediate rules embedded in the statutory text and shifts to the background purposes, the judge has broad discretion to define its purposes at whatever level of generality he or she sees fit. Or, to put it more tendentiously, once a court decides not to enforce a statute as written, the judge has considerable discretion to decide how to rewrite it.

This concern was central to Justice Scalia’s analysis in the case that, more than any other, marked the Court’s shift away from *Holy Trinity* and toward textualism. To simplify, in *West Virginia University Hospitals, Inc. v. Casey*,<sup>45</sup> Justice Scalia’s opinion for the Court held that the plain text of 42 U.S.C. § 1988—which authorized prevailing civil rights plaintiffs to recover a “reasonable attorney’s fee”<sup>46</sup>—did not *also* authorize recovery of “expert fees.”<sup>47</sup> In dissent, Justice Stevens argued that the Court’s reading of § 1988 contradicted the statute’s background purpose. In particular, he said, both the legislative history and the timing of § 1988’s enactment made clear that Congress had passed the statute in order to overturn *Alyeska Pipeline Service*

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42. See John F. Manning, *The Supreme Court, 2013 Term—Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 22–23 (2014).

43. See, e.g., *Artuz v. Bennett*, 531 U.S. 4, 10 (2000) (Scalia, J.) (adhering to “the only permissible interpretation of the text—which may, for all we know, have slighted policy concerns on one or the other side of the issue as part of the legislative compromise that enabled the law to be enacted”).

44. Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 876 (1930); see also *id.* (“[N]early every end is a means to another end.”).

45. 499 U.S. 83 (1991), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in* *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994).

46. 42 U.S.C. § 1988 (1988).

47. The Court cited the fact that numerous other fee-shifting statutes authorized recovery of both “attorney’s fees” and “expert fees,” thereby confirming that the former did not encompass the latter. *Casey*, 499 U.S. at 88–92, 102.

*Co. v. Wilderness Society*<sup>48</sup>—a case that had displaced an equitable doctrine allowing courts to shift *both* attorney’s fees *and* expert fees, the very elements sought by the plaintiffs in *Casey*.<sup>49</sup> According to Justice Stevens, reading § 1988 literally would defeat the statute’s obvious purpose of restoring the pre-*Alyeska* status quo and making plaintiffs, like the hospital, whole for their litigation expenses.<sup>50</sup>

To Justice Scalia, the dissent picked an arbitrary level of generality at which to define the statute’s purpose. He allowed that many legislators had voted for § 1988 in order to overturn *Alyeska* and that pre-*Alyeska* case law had shifted *both* attorney’s fees *and* expert fees, just as Justice Stevens said.<sup>51</sup> Justice Scalia also noted, however, that the pre-*Alyeska* regime differed from § 1988 in other important respects, as well. Among them, “civil rights plaintiffs could recover fees . . . only if private enforcement was necessary to defend important rights benefiting large numbers of people, and cost barriers might otherwise preclude private suits.”<sup>52</sup> And because “*Alyeska* itself . . . involved not a civil rights statute but the National Environmental Policy Act,” a judge taking purposivism to its logical conclusion might read § 1988 to govern environmental as well as (or perhaps even instead of) civil rights actions such as the one at issue in *Casey*.<sup>53</sup>

These observations gave point to the concerns about judicial discretion that Radin had identified.<sup>54</sup> Even when dealing with a purpose as concrete as that of overruling *Alyeska*, the dissent in *Casey* could pick a level of generality that corresponded to its own view of sensible fee-shifting policy. The impossibility of neutrally identifying *the* purpose of § 1988 made its characterization a matter of judicial, and not legislative, choice.<sup>55</sup>

## 2. Judicial Discretion and the Constitutional Text

Justice Scalia’s anti-discretion principle often informed, rather than reflected, the way he read particular constitutional texts. That is, while he understood that governing law *might* authorize common law discretion, his

48. 421 U.S. 240 (1975), *superseded by statute*, Civil Rights Attorney’s Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641; *see Casey*, 499 U.S. at 108–11 (Stevens, J., dissenting).

49. *See Casey*, 499 U.S. at 109 n.8 (describing the pre-*Alyeska* case law).

50. *See id.* at 111 (“It is fair to say that throughout the course of the hearings, a recurring theme was the desire to return to the pre-*Alyeska* practice in which courts could shift fees, including expert witness fees, and make those who acted as private attorneys general whole again, thus encouraging the enforcement of the civil rights laws.”).

51. *Casey*, 499 U.S. at 97, 101 n.7 (majority opinion).

52. *Id.* at 97–98.

53. *Id.* at 98.

54. *See Radin*, *supra* note 44, at 876.

55. Justice Scalia often revisited this theme. *See, e.g., King v. Burwell*, 135 S. Ct. 2480, 2505 (2015) (Scalia, J., dissenting) (“We lack the prerogative to repair laws that do not work out in practice, just as the people lack the ability to throw us out of office if they dislike the solutions we concoct.”); *United States v. Johnson*, 481 U.S. 681, 702 (1987) (Scalia, J., dissenting) (arguing that a judge-made exception to the Federal Tort Claims Act came from the Court’s “ignoring what Congress wrote and imagining what it should have written”).

presumption that federal judges did not appropriately exercise such discretion inclined him to read constitutional texts accordingly.<sup>56</sup> Consider his treatment of Eighth Amendment proportionality. In *Harmelin v. Michigan*, Justice Scalia wrote a plurality opinion for himself and Chief Justice Rehnquist that disclaimed Eighth Amendment authority to ask whether a statutory punishment fit the crime—that is, whether the penalty was disproportionate to the severity of the offense.<sup>57</sup> Most of the opinion consisted of ordinary interpretation: carefully parsing the Amendment’s text, analyzing its origins in the English Declaration of Rights, contrasting the Amendment’s language with that in other eighteenth-century American constitutions that had authorized proportionality review, and looking at the way the Amendment’s meaning had been clarified through early practice.<sup>58</sup>

Despite finding those sources “conclusive,” Justice Scalia also invoked generic concerns about the discretion judges would exercise under proportionality review.<sup>59</sup> He suggested that the inevitability of judicial discretion in proportionality analysis likely accounted for *why* the founders omitted proportionality from the Constitution.<sup>60</sup> When it came to proportionality, he wrote, the founders would have lacked direction comparable to the “clear historical guidelines and accepted practices that enable judges to determine which *modes* of punishment are ‘cruel and unusual.’”<sup>61</sup> In addition, he opined that no legislature sets out to prescribe a disproportionate punishment, but rather that punishments may come to appear that way “because they were made for other times or other places, with different social attitudes, different criminal epidemics, different public fears, and different prevailing theories of penology.”<sup>62</sup> In that light, Justice Scalia said that “[t]he real function of a constitutional proportionality principle, if it exists, is to enable judges to evaluate a penalty that some assemblage of men and women has considered proportionate—and to say that it is not.”<sup>63</sup> He found that the standards available for such a task were “so inadequate that the proportionality principle becomes an invitation to imposition of subjective values.”<sup>64</sup> Having so concluded, Justice Scalia refused to attribute to the founders the aim of adopting a clause that authorized such subjectivity.<sup>65</sup>

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56. Indeed, this presumption is reflected, perhaps unconsciously, in his suggestion that “adherence to a more or less originalist theory of construction” would more likely produce constrained, rule-based case law. See Scalia, *supra* note 17, at 1184.

57. 501 U.S. 957, 965 (1991) (plurality opinion).

58. See *Harmelin*, 501 U.S. at 966–85.

59. *Id.* at 976–85.

60. *Id.* at 985–86.

61. *Id.* at 985.

62. *Id.*

63. *Id.* at 986 (emphases omitted).

64. *Id.*

65. *Id.* at 985–86; see Bradford R. Clark, *Constitutional Structure, Judicial Discretion, and the Eighth Amendment*, 81 NOTRE DAME L. REV. 1149 (2006) (making a similar argument).

### B. Unenumerated and Evolving Rights

Early in his time on the Court, Justice Scalia declared himself a “faint-hearted originalist”—one who would, subject to an important qualification discussed below,<sup>66</sup> apply the traditional doctrine of *stare decisis*.<sup>67</sup> As a result, although Justice Scalia thought substantive due process a clear departure from the constitutional text,<sup>68</sup> he joined the Court in enforcing that doctrine as a matter of precedent.<sup>69</sup> He structured his approach, however, around the anti-discretion principle, insisting upon a tradition-based framework that he thought would constrain judges’ discretion to impose their own moral judgments on the polity. For difficult moral questions (such as the right to die), he thought that the answers were no better “known to the nine Justices of this Court . . . than they are known to nine people picked at random from the . . . telephone directory.”<sup>70</sup> Hence, he took the position that “no ‘substantive due process’ claim can be maintained unless the claimant demonstrates that the State has deprived him of a right *historically and traditionally* protected against state interference.”<sup>71</sup>

No case better illustrates his position—or its grounding in the anti-discretion principle—than does *Michael H. v. Gerald D.*<sup>72</sup> Michael H. claimed paternity of a child born to Gerald D. and Gerald’s wife Carole.<sup>73</sup> California law, however, denied an outsider to a marriage the right to establish paternity of a child born to “a wife cohabiting with [a] husband” able to procreate.<sup>74</sup> Michael H. claimed that this restriction impermissibly interfered with a constitutional “liberty interest in his [parental] relationship,” as protected by earlier cases.<sup>75</sup>

In a plurality opinion, Justice Scalia rejected Michael H.’s claim. After examining the American common law of family relationships, Justice Scalia concluded that Michael H. (and Justice Brennan’s dissent) had focused on “parental rights” at too high a level of generality.<sup>76</sup> The common law, said Justice Scalia, did not protect parental rights at all costs; rather, “our traditions have protected the marital family . . . against the sort of claim Michael

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66. See *infra* Section II.D.

67. See Scalia, *supra* note 28, at 861 (observing that “almost every originalist would adulterate it with the doctrine of *stare decisis*—so that *Marbury v. Madison* would stand even if [a legal scholar] should demonstrate unassailably that it got the meaning of the Constitution wrong”).

68. See *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 293 (1990) (Scalia, J., concurring).

69. In his very first Term on the Court, Justice Scalia joined an opinion of the Court enforcing an unenumerated right to marry. See *Turner v. Safley*, 482 U.S. 78 (1987).

70. *Cruzan*, 497 U.S. at 293 (Scalia, J., concurring).

71. *Id.* (emphasis added).

72. 491 U.S. 110 (1989) (plurality opinion).

73. *Michael H.*, 491 U.S. at 114.

74. *Id.* at 115 (quoting CAL. EVID. CODE § 621(a) (West 1989)).

75. *Id.* at 121.

76. See *id.* at 124–30.

asserts.<sup>77</sup> In particular, Justice Scalia found that the common law's "presumption of legitimacy" made no exception for Michael H.'s situation.<sup>78</sup>

In a footnote (joined only by Chief Justice Rehnquist), Justice Scalia explained that, in substantive due process cases, 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."<sup>79</sup> Justice Scalia elaborated that "[i]f, for example, there were no societal tradition, either way, regarding the rights of the natural father of a child adulterously conceived, we would have to consult, and (if possible) reason from, the traditions regarding natural fathers in general."<sup>80</sup> But since "a more specific tradition . . . unqualifiedly denies protection to" Michael H., that tradition must govern.<sup>81</sup>

Justice Scalia used this approach as a way to avoid "arbitrary decision-making."<sup>82</sup> Because more "general traditions"—such as parental or family rights—"provide[d] such imprecise guidance, they [would] permit judges to dictate rather than discern the society's views."<sup>83</sup> And if the Court did not use the "most specific tradition as [its] point of reference," there was no principled basis "for selecting among the innumerable relevant traditions that could be consulted."<sup>84</sup> In short, if Justice Scalia was to participate in implementing substantive due process, he would insist that the decisions be grounded in considerations other than "the [moral] predilections of those who happen at the time to be Members of this Court."<sup>85</sup>

### C. Political Question Doctrine Lite

Justice Scalia helped rerationalize a consistently puzzling area of law when he persuaded his colleagues to formalize judicial forbearance from enforcing the nondelegation doctrine through judicial review.<sup>86</sup> In that context,

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77. *Id.* at 124.

78. *Id.* at 126–27.

79. *Id.* at 127–28 n.6 (emphasis added).

80. *Id.* at 128 n.6.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 121 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977) (plurality opinion)). The desire for external indicia of constitutional values also structured Justice Scalia's approach to the "evolving standards of decency" that the Court applied to determine "cruel and unusual punishments" under the Eighth Amendment. See *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (adopting the "evolving standards" approach). To Justice Scalia, any such evolution needed, at a minimum, to reflect something other than "the subjective views of five Members of this Court." *Roper v. Simmons*, 543 U.S. 551, 608 (2005) (Scalia, J., dissenting). Hence, to the extent that he accepted the possibility of evolving Eighth Amendment standards, he insisted upon "objective indicia that reflect the public attitude toward a given sanction," *Stanford v. Kentucky*, 492 U.S. 361, 370 (1989) (quoting *McCleskey v. Kemp*, 481 U.S. 279, 300 (1987))—for example, "statutes passed by society's elected representatives" or accumulated judgments of prosecutors and juries administering relevant criminal penalties, *id.*

86. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474–75 (2001).

Justice Scalia relied on judicial manageability concerns to argue that Congress, rather than the federal judiciary, should have the discretion to determine how broadly Congress may assign subordinate lawmaking authority to administrative agencies.<sup>87</sup> The Court had consistently held that because Article I vests “[a]ll legislative Powers herein granted” in Congress,<sup>88</sup> legislators may not delegate such authority to another branch of government.<sup>89</sup> Yet, the Constitution provides no good definition of what it means to delegate legislative powers.<sup>90</sup> In an effort to define that principle, the Court had established that Congress may not ask the other branches to make basic or fundamental policy decisions, but rather may task them only with “fill[ing] up the details” of statutory policy.<sup>91</sup> Settled doctrine implemented that idea by asking whether a statute contains an “intelligible principle” to guide agency decisions.<sup>92</sup>

Despite these precedents, however, the Court had time and again upheld statutes that authorize agency lawmaking pursuant to intelligible principles as vaporous as “fair and equitable,” “just and reasonable,” and even the “public interest.”<sup>93</sup> Against this backdrop, Justice Scalia thought it better to take the Court formally out of the business of enforcing the doctrine, except in the most extreme cases.<sup>94</sup> Based on the text and structure of the Constitution, he acknowledged that “the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system.”<sup>95</sup> But he worried about judicial subjectivity—about the Court’s capacity to draw the necessary lines between the basic policy judgments that Congress must make and the lesser policy details that Congress may leave to agency discretion.

Once it is conceded . . . that no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it, the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree.<sup>96</sup>

And without any reliable metric for drawing the necessary lines, the Court “ha[s] almost never felt qualified to second-guess Congress regarding the

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87. See *id.*; *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting).

88. U.S. CONST. art. I, § 1.

89. See, e.g., *Loving v. United States*, 517 U.S. 748, 758 (1996) (stating that Congress may not delegate its legislative power to others); *Touby v. United States*, 500 U.S. 160, 164–65 (1991) (same).

90. See *Wayman v. Southard*, 23 U.S. (1 Wheat.) 1, 43, 46 (1825).

91. *Id.* at 43.

92. See *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

93. See, e.g., *Yakus v. United States*, 321 U.S. 414, 427 (1944) (“fair and equitable”); *Fed. Power Comm’n v. Hope Nat. Gas Co.*, 320 U.S. 591, 600 (1944) (“just and reasonable”); *NBC v. United States*, 319 U.S. 190, 225–26 (1943) (“public interest, convenience, or necessity”).

94. See *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 474–75 (2001).

95. *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting).

96. *Id.*



permissible degree of policy judgment that can be left to those executing or applying the law.”<sup>97</sup> However “fundamental” the nondelegation doctrine might be in principle, Justice Scalia did not think it “readily enforceable by the courts.”<sup>98</sup>

Professors Calabresi and Lawson have taken issue with Justice Scalia’s approach, arguing that the anti-discretion principle persuaded him to forbear from enforcing a doctrine that, in their view, was clearly mandated by the Constitution’s original meaning.<sup>99</sup> Even if they are correct about the original meaning,<sup>100</sup> however, there is, I think, a better way to understand Justice Scalia’s position. Under one prominent version of the so-called political question doctrine, the Court can properly recognize a constitutional norm while also acknowledging that the Constitution assigns its application, within broad limits, to a branch other than the judiciary.<sup>101</sup> In the nondelegation context, Justice Scalia reasoned that if the line between permissible and impermissible delegations turned, as the Court had said, on “common sense and the inherent necessities of the governmental co-ordination,”<sup>102</sup> then “Congress is no less endowed with common sense than we are, and [is] better equipped to inform itself of the ‘necessities’ of government” and to consider relevant factors that “are both multifarious and (in the nonpartisan sense) highly political.”<sup>103</sup> For him, if the nondelegation doctrine necessitated unprincipled line drawing and multifarious political judgments, it was not appropriate business for the federal judiciary.<sup>104</sup>

Notice that the anti-discretion principle is doing real work here. Justice Scalia did not close off judicial discretion based on his reading of Article I; rather, his sense that such discretion was undesirable preceded and helped drive that interpretation. Although Justice Scalia did not ground his approach in the political question doctrine per se, his reasoning reads like a

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97. *Id.* at 416.

98. *Id.* at 415.

99. Calabresi & Lawson, *supra* note 15, at 490–91.

100. For a contrasting view of the Constitution’s adoption of a nondelegation principle, see generally Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002), which questions the functional and historical basis for the doctrine.

101. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7–9 (1959); see also *Nixon v. United States*, 506 U.S. 224, 228 (1993) (holding that Article I assigns to the Senate exclusive authority to “try” an impeachment within the meaning of the Impeachment Clause). The Wechsler view, which treats the question as one of constitutional interpretation, stands in contrast with the prominent competing view that the political question doctrine’s forbearance represents an appropriate exercise of judicial prudence. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 125–26, 184 (Yale Univ. Press, 2d ed. 1986) (1962).

102. *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928)).

103. *Id.* at 416.

104. *Id.* at 415.

streamlined version of that doctrine, one that focuses solely upon the criterion of judicial manageability.<sup>105</sup> Because the Court had no *principled* basis to resolve the validity of a delegation, the matter's resolution (for Justice Scalia) properly lay in a different branch.

#### D. *Stare Decisis and the Anti-Discretion Principle*

Justice Scalia also relied on the anti-discretion principle to justify a novel exception to the doctrine of *stare decisis*. In general, he took a rather conventional view of his obligation to follow precedent.<sup>106</sup> At the same time, however, he made clear that “[w]hen . . . a constitutional doctrine adopted by the Court is not only mistaken but also insusceptible of principled application, I do not feel bound to give it *stare decisis* effect—indeed, I do not feel justified in doing so.”<sup>107</sup>

Justice Scalia's approach to the “dormant commerce clause” illustrates the point. Although the Commerce Clause explicitly grants regulatory power to Congress,<sup>108</sup> the Court had long treated that clause as a source of *judicial* power to address the burdens that state law might impose upon interstate commerce.<sup>109</sup> The Court's doctrine had two strands. First, when state laws discriminated against interstate commerce, the Court applied something like strict scrutiny, striking down state law in most instances.<sup>110</sup> Second, when a neutral state regulation incidentally burdened interstate commerce, the

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105. The Court has used the absence of judicially manageable standards as *one* of several factors that determine whether a matter is a political question beyond the power of the Courts. *See, e.g., Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012); *Nixon v. United States*, 506 U.S. 224, 228 (1993); *Baker v. Carr*, 369 U.S. 186, 217 (1962). Consistent with his anti-discretion principle, it appears that Justice Scalia was more willing to find that factor decisive. *See Vieth v. Jubelirer*, 541 U.S. 267, 291 (2004) (Scalia, J.) (plurality opinion) (arguing that the Court's political gerrymandering doctrine lacks a “judicially manageable standard” because the governing test “is essentially a totality-of-the-circumstances analysis, where all conceivable factors, none of which is dispositive, are weighed”).

106. *Compare, e.g., Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 34–35 (1989) (Scalia, J., concurring in part and dissenting in part) (attaching great weight to society's longstanding reliance on a well-known precedent), *with South Carolina v. Gathers*, 490 U.S. 805, 824–25 (1989) (Scalia, J., dissenting) (attaching little weight to a recent precedent that he thought worked “a plainly unjustified intrusion upon the democratic process”).

107. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 599 (1996) (Scalia, J., dissenting); *see also, e.g., Witte v. United States*, 515 U.S. 389, 406 (1995) (Scalia, J., concurring in the judgment) (making a similar point); *Walton v. Arizona*, 497 U.S. 639, 673 (1990) (Scalia, J., concurring in part and concurring in judgment) (same).

108. U.S. CONST. art. I, § 8, cl. 3.

109. *See* DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888*, at 338–39 (1985).

110. *See, e.g., Armco Inc. v. Hardesty*, 467 U.S. 638 (1984); *Bos. Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 332 n.12 (1977).

Court asked a more forgiving question—namely, “whether the State’s interest [in the regulation] is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.”<sup>111</sup>

In his first Term, Justice Scalia critiqued the dormant commerce power on originalist grounds, noting that the clause grants power to Congress, and not the courts.<sup>112</sup> Despite this view, however, Justice Scalia was prepared to leave undisturbed the bright-line strict scrutiny test for state laws that discriminate against interstate commerce.<sup>113</sup> The incidental burden doctrine, however, went too far. In an oft-cited separate opinion, he wrote that the Court’s “balancing” test imposed no constraint on the judiciary because “the interests on both sides [of the balance] are incommensurate.”<sup>114</sup> He reasoned that weighing a state’s interest in regulation against its intrusion on interstate commerce was no more meaningful than asking “whether a particular line is longer than a particular rock is heavy.”<sup>115</sup> Because of the test’s indeterminacy, he thought that the Court’s opinion applying the test “could as persuasively have been written coming out the opposite way.”<sup>116</sup> To Justice Scalia, overruling a doctrine so subjective and so unpredictable would do “no damage to the interests protected by the doctrine of *stare decisis*.”<sup>117</sup>

#### E. *Exercising Discretion to Limit Discretion*

A final category offers the most striking and, as discussed below,<sup>118</sup> perhaps the most controversial example of Justice Scalia’s freestanding anti-discretion principle. To put it simply, Justice Scalia sometimes pressed rule-like doctrines in contexts in which open-ended statutory or constitutional phrases, or even textual lacunae, seemed to leave room for judicial discretion.<sup>119</sup> Consider a statutory example close to his heart—the *Chevron* doctrine.<sup>120</sup> That doctrine instructs reviewing courts to “defer” to an agency’s

111. See, e.g., *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986) (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443–44 (1960) (applying a similar standard).

112. See *Tyler Pipe Indus. v. Wash. State Dep’t of Revenue*, 483 U.S. 232, 260 (1987) (Scalia, J., concurring in part and dissenting in part). For a contrasting view of the historical and textual arguments, see Mark V. Tushnet, *Scalia and the Dormant Commerce Clause: A Foolish Formalism?*, 12 *CARDOZO L. REV.* 1717, 1718–24 (1991).

113. See *Bendix Autolite Corp. v. Midwesco Enter.*, 486 U.S. 888, 897–98 (1988) (Scalia, J., concurring in the judgment).

114. *Id.* at 897.

115. *Id.*

116. *Id.*

117. See *id.* at 897–98.

118. See *infra* Section II.F.

119. See, e.g., *Calabresi & Lawson*, *supra* note 15, at 492–95; *Strauss*, *supra* note 15, at 1005–06.

120. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). At least in his early days on the Court, Justice Scalia had a great deal of affection for the *Chevron* doctrine. See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 *DUKE L.J.* 511, 516–17 (praising the *Chevron* approach).

“reasonable” interpretation of the statute it administers, even if the court would read the statute differently.<sup>121</sup> On its face, such deference seems at odds with *Marbury*’s observation that the judiciary’s job is to “say what the law is”<sup>122</sup>—a proposition reinforced by the judicial review provisions of the Administrative Procedure Act (APA).<sup>123</sup> Still, it is possible to reconcile deference with the judiciary’s law-declaration function by noting that if an organic act delegates power to an agency to resolve indeterminacies in the act itself, then a reviewing court fulfills its duty to “say what the law is” by deciding whether the agency has stayed within the boundaries of that delegated authority (namely, whether the agency has reasonably interpreted its organic act).<sup>124</sup>

The conceptual basis for deference is not hard. The hard part—and what makes this area so interesting—is that an organic act almost never gives an unambiguous indication of whether or not it means to delegate interpretive lawmaking power to an agency.<sup>125</sup> Hence, from the earliest days of the APA, the Court assumed that *it* had discretion to make the call and that the best way to do so was by asking whether a hypothetical reasonable legislator might want a reviewing court to defer.<sup>126</sup> For nearly four decades after the APA’s adoption, the Court answered that question by applying a fact-bound, multifactor, case-by-case approach that took into account all relevant factors—such as whether statutory question at issue required special agency expertise or whether the agency had played a role in drafting the language under review.<sup>127</sup> For a time, *Chevron* replaced that longstanding totality-of-the-circumstances approach with a relatively clean, rule-like formula that instructed reviewing courts to defer to an agency’s reasonable resolution of any ambiguity in an agency-administered statute.<sup>128</sup>

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121. *Chevron*, 467 U.S. at 843–45.

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

123. 5 U.S.C. § 706 (2012) (providing that reviewing courts must “decide all relevant questions of law” and “interpret . . . statutory provisions”).

124. See Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 6, 27 (1983).

125. See, e.g., David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 203; Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1194 (2007).

126. See Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370–72 (1986). This reflected the dominant interpretive approach at the time, which instructed judges to presume that statutes were enacted by “reasonable [legislators] pursuing reasonable purposes reasonably.” See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1124 (William N. Eskridge, Jr. & Philip P. Frickey eds., Found. Press, Inc. 1994) (1958); see also John F. Manning, *Essay, Chevron and the Reasonable Legislator*, 128 HARV. L. REV. 457 (2014).

127. See, e.g., *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 134–35 & n.25 (1977) (agency expertise); *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 315 (1933) (agency role in drafting).

128. That view of *Chevron* developed over time. Gary Lawson & Stephen Kam, *Making Law out of Nothing at All: The Origins of the Chevron Doctrine*, 65 ADMIN. L. REV. 1, 59–60 (2013) (describing *Chevron*’s reception).

Though he was not yet on the Court when *Chevron* was decided, Justice Scalia spent a lot of judicial energy defending *Chevron*'s rule-like approach against the Court's eventual movement back toward, if not all the way to, a totality-of-the-circumstances approach.<sup>129</sup> What is striking about Justice Scalia's position on deference is the frankness with which he acknowledged that the governing legal materials left the Court with discretion to craft a sensible approach. In an article published shortly after he joined the Court, Justice Scalia thought it obvious that, in most administrative statutes, Congress had simply failed to resolve the question of when it was appropriate for a reviewing court to defer to an administrative agency.<sup>130</sup> In his view, when it came to whether Congress preferred deference in a particular agency context, the reality was that legislators generally "neither (1) intended a single result, nor (2) meant to confer discretion [and thus deference] upon the agency, but rather (3) didn't think about the matter at all."<sup>131</sup> Hence, the Court had to construct what was, in reality, "a fictional, presumed intent"<sup>132</sup>—itself an exercise of *judicial* discretion necessitated by the absence of any clear signal from Congress about appropriate levels of deference, if any.

Because governing legal materials left the Court an open field, Justice Scalia thought that the resulting discretion to craft a rule of decision *also* gave him the discretion to narrow the field of play, much as a common law judge might do in refining a common law principle. He made no pretense of doing anything else. For him, the *Chevron* rule did not capture legislative intent, and the judicial "quest" for legislative intent about deference was "a wild-goose chase."<sup>133</sup> Accordingly, Justice Scalia felt authorized to prefer *Chevron* simply because of its predictability and because of the baneful consequences of the alternative. For him, *Chevron* had the virtue of offering a clear "background rule of law against which Congress can legislate."<sup>134</sup> In contrast, the "totality-of-the-circumstances test" was "not a test at all but an invitation to [courts to] make an ad hoc judgment regarding congressional

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129. In *United States v. Mead Corp.*, 533 U.S. 218 (2001), the Court limited *Chevron* deference to cases in which an agency has announced its interpretation through notice-and-comment rulemaking or formal adjudication—that is, through "relatively formal administrative procedure[s] tending to foster the fairness and deliberation that should underlie" delegations of interpretive lawmaking power. *Id.* at 230. The Court added that, even when agency action did not fit within those procedural safe harbors, a reviewing court still owed *Chevron* deference if "any other circumstances reasonably suggest[ ] that Congress . . . thought of [the agency action at issue] as deserving the deference." *Id.* at 231. In dissent, Justice Scalia lamented that the majority had "largely replaced *Chevron* . . . with that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th'ol' 'totality of the circumstances' test." *Id.* at 241 (Scalia, J., dissenting).

130. Scalia, *supra* note 120, at 515–16.

131. *Id.* at 517.

132. *Id.*

133. *Id.*

134. *Id.*

intent” in every case.<sup>135</sup> For those reasons, he thought the Court should use the discretion it had in order to narrow that very discretion.

#### F. *Rules for Rules’ Sake?*

The previous example suggests that, before turning to a broader assessment of Justice Scalia’s theory of judicial restraint, it is worth addressing the view of some that Justice Scalia’s unifying theme is, in fact, an overriding preference for general rules—one that supersedes even his commitment to text or original meaning.<sup>136</sup> Calabresi and Lawson, for example, argue that a commitment to rules qua rules caused Justice Scalia to give short shrift to standard-like original meaning in areas such as the nondelegation doctrine, incorporation of the Bill of Rights against the states, the commerce power, and the equal protection guarantee.<sup>137</sup> Others have their favorite examples, as well.<sup>138</sup>

Whatever the merits or demerits of those contentions about particular areas of law (a question beyond the scope of this inquiry), the claim that Justice Scalia elevated his love for rules over his love for text seems, at the very least, neither categorically true in practice nor plausibly reflected in his articulated theory of judicial restraint. Justice Scalia recognized (though perhaps not as often as he should have) that some texts call upon judges to exercise their own judgment. Consider, for example, the Fourth Amendment’s guarantee “against unreasonable searches and seizures.”<sup>139</sup> Where no clarifying rule existed at common law (or had developed through the accretion of judicial precedent), Justice Scalia acknowledged that the Fourth Amendment’s express criterion of reasonableness “depends largely upon [a judicial assessment of] the social necessity that prompts the search.”<sup>140</sup> He recognized that, under this framework, the Court properly exercised value-soaked discretion to decide the permissibility of administrative searches in

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135. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013).

136. See, e.g., Barnett, *supra* note 15, at 11 (“Justice Scalia’s approach would seem to justify judicial enforcement of only those passages of the Constitution that are sufficiently rule-like to constitute a determinate command that a judge can simply follow.”); Calabresi & Lawson, *supra* note 15, at 487 (arguing that rule-following is the dominant theme in Justice Scalia’s jurisprudence); Strauss, *supra* note 15, at 1003–07 (questioning the connection between Justice Scalia’s commitment to rules and his commitment to textual interpretation).

137. See Calabresi & Lawson, *supra* note 15, at 489–95 (discussing, inter alia, *Mistretta v. United States*, 488 U.S. 361, 415–16 (1989) (Scalia, J., dissenting) (nondelegation); *McDonald v. City of Chicago*, 561 U.S. 742, 766–70 (2010) (incorporation); *Gonzales v. Raich*, 545 U.S. 1, 33 (2005) (Scalia, J., concurring) (congressional authority to regulate intrastate commerce); *Fisher v. Univ. of Texas*, 133 S. Ct. 2411, 2422 (2013) (Scalia, J., concurring) (consideration of race in college admissions)).

138. See, e.g., Barnett, *supra* note 15, at 11 (discussing Justice Scalia’s approach to the Ninth Amendment); Fallon, *supra* note 15, at 47–48 (citing affirmative action and takings).

139. U.S. CONST. amend. IV.

140. *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 681 (1989) (Scalia, J., dissenting).

public schools, fixed border checkpoints, drug testing for railroad or Customs employees, and the like.<sup>141</sup> The Fourth Amendment was not the only area, moreover, in which Justice Scalia acted on a perceived invitation to exercise the kind of common law discretion he presumed judges generally should not have.<sup>142</sup>

Moreover, even if he sometimes elevated rules over text as his critics say (surely, all judges err),<sup>143</sup> he never claimed authority to devise and enforce general rules in the teeth of the text. Certainly, because Justice Scalia thought case-by-case discretion presumptively at odds with the American judicial process, he was disinclined to recognize such authority unless a governing text gave him a “clear” warrant to do so.<sup>144</sup> It is likely, moreover, that Justice Scalia thought it appropriate, where possible, to flesh out open-ended constitutional texts through the generation of rule-like doctrines that were “consistent with the text” even if not “generate[d]” by it.<sup>145</sup> As my colleague Richard Fallon has written, open-ended constitutional clauses invite or, more accurately, *require* the Court to devise doctrinal tests that implement the broad values embodied by such clauses.<sup>146</sup> Justice Scalia doubtless preferred to exercise that operational discretion, where possible, by adopting rule-like rather than standard-like tests—in much the same way that the Court has implemented the Sherman Act’s open-ended prohibition against restraints of trade, in part, through a *per se* rule against horizontal price fixing.<sup>147</sup>

Even those observations, however, do not fully answer the criticism that Justice Scalia was fonder of rules than he should have been, at least in the constitutional context. In statutory cases, Justice Scalia made a large splash by focusing new attention upon the level of generality at which statutory texts spoke. He pushed hard on the idea that broad or open-ended statutes

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141. *See id.* at 681–82.

142. *See, e.g.,* *Withrow v. Williams*, 507 U.S. 680, 715 (1993) (Scalia, J., dissenting) (arguing that habeas is an equitable writ and should not be granted to vindicate a *Miranda* claim if the petitioner had a full and adequate opportunity to press that claim in the state court); *Burnham v. Superior Court*, 495 U.S. 604, 626–27 (1990) (Scalia, J.) (plurality opinion) (acknowledging, in an *in personam* jurisdiction case, that the “evils[ ] necessarily accompanying a freestanding ‘reasonableness’ inquiry[ ] must be accepted at the margins[ ] when we evaluate nontraditional forms of jurisdiction newly adopted by the States”); *see also infra* notes 148–149 and accompanying text (discussing statutory examples).

143. *See infra* text accompanying notes 148–152 (arguing that differences in his approach to statutory and constitutional texts may suggest a tendency to overrate the determinacy of the latter).

144. *See* Scalia, *supra* note 17, at 1185 (stating that he was (a) “inclined to disfavor, without clear congressional command, the acknowledgement of causes of action” that defy “general principles” and (b) “not inclined to find an invitation” for “standardless balancing” in a constitutional text that did not invite it).

145. Strauss, *supra* note 15, at 1005; *see also id.* (discussing Justice Scalia’s rule-like interpretation of the word “seizure” in the Fourth Amendment).

146. *See generally* RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* (2001).

147. *See, e.g.,* Scalia, *supra* note 17, at 1183 (using the Sherman Act example). Justice Scalia’s approach to *Chevron* reflects the same strategy. *See supra* Section II.E.

would have unanticipated applications that reached far beyond the particular expectations of the drafters.<sup>148</sup> And in one of his most influential critiques of legislative history, Justice Scalia objected to mining a committee report for its detailed elaboration of broad statutory terms, in part, because doing so would artificially limit the “common law” authority that an open-textured statute otherwise conferred upon the Court.<sup>149</sup> In contrast, Justice Scalia seemed to focus less upon the level of generality at which constitutional texts speak.<sup>150</sup> Perhaps because he believed that the “whole purpose [of a constitution] is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away” (p. 40)—he was more apt to think that a constitutional text did not evolve, even if it spoke at a high level of generality.<sup>151</sup> And as Mark Greenberg and Harry Litman have shown, in contrast with his approach to statutes, Justice Scalia gave greater effect to the founding generation’s uncodified *expectations* about the ways an open-ended constitutional text was to apply.<sup>152</sup>

If one understands the anti-discretion principle as an insistence upon grounding judicial decisions in external authority rather than the judge’s own preferences, then it would violate that principle to read determinacy into constitutional texts that do not necessarily warrant such a reading. In other words, it offends Justice Scalia’s anti-discretion principle for a judge to allow his or her personal predilections for self-constraint to trump external sources of authority that confer wide policymaking discretion in particular

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148. See, e.g., *Oncle v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (Scalia, J.) (“[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”); *Brogan v. United States*, 522 U.S. 398, 403 (1998) (Scalia, J.) (explaining that “it is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy—even assuming that it is possible to identify that evil from something other than the text of the statute itself”).

149. See *Blanchard v. Bergeron*, 489 U.S. 87, 98–99 (1989) (Scalia, J., concurring in the judgment). *Blanchard* addressed what constitutes a “reasonable attorney’s fee,” for purposes of 42 U.S.C. § 1988 (1988), in the context of a representation undertaken pursuant to a contingency agreement. See *id.* at 88. In his opinion for a lopsided (8–1) Court, Justice White determined what constitutes a “reasonable” fee, in that context, by applying a twelve-factor test that (a) had been set forth in a court of appeals case cited by both legislative committee reports and (b) had been applied specifically to contingent fee agreements by several district court cases cited by one committee. See *id.* at 91–93. Justice Scalia refused to follow the legislative history. See *id.* at 99 (Scalia, J., concurring in the judgment). Given the open-ended grant of power to award “reasonable” fees, he preferred for the Court to exercise the common law powers Congress gave it and “to develop an interpretation of the statute that is reasonable, consistent, and faithful to its apparent purpose.” *Id.* at 100.

150. A notable exception is his observation, in *A Matter of Interpretation*, that “[i]n textual interpretation, context is everything, and the context of the Constitution tells us not to expect nit-picking detail, and to give words and phrases an expansive rather than narrow interpretation—though not an interpretation that the language will not bear.” P. 37.

151. See, e.g., Scalia, *supra* note 28, at 861–62 (suggesting that “cruel and unusual,” “due process,” “equal protection,” and “privileges and immunities” presumptively have fixed content).

152. See Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569, 574–82 (1998).



contexts. Still, even if one accepts the critics' view that Justice Scalia sometimes misapplied his own principle in that way, such a conclusion does not change the essential character of the principle itself. Properly understood, Justice Scalia's anti-discretion principle was *not* a naked preference for rules qua rules, but rather reflected the ideal that American judges, at least federal judges, must justify their decisions in light of authority *external to their own personal morals, conscience, or policy sense*.

To sharpen and illustrate this claim, consider Herbert Wechsler's call for judges to apply "neutral principles" in constitutional adjudication.<sup>153</sup> Robert H. Bork famously replied that proper rules of decision had to be not only neutral in application, but also legitimately grounded in some authority "exterior to the will of the Justices."<sup>154</sup> In his words, "[t]he judge's power to govern does not become more legitimate if he is constrained to apply his principle to all cases but is free to make up his own principles."<sup>155</sup> Surely, Bork's rather than Wechsler's view of judicial power better captures Justice Scalia's judicial philosophy, even if it cannot account for every one of his decisions.

Nowhere did Justice Scalia suggest that just any old rule would do.<sup>156</sup> Instead, in cases and academic writings, he repeatedly called for the identification, first and foremost, of some external source of legitimacy. In *A Matter of Interpretation*, he stressed that his first choice was to enforce policies proximately traceable to an enacted text, whether it be statutory or constitutional.<sup>157</sup> In *Michael H.* and "evolving standard of decency" cases, he added that tradition or social practice might stand as a proxy for *society's* accumulated judgments—something to be preferred over the raw moral preferences of five Supreme Court justices.<sup>158</sup> Indeed, the *Michael H.* plurality surely could have devised many rules to govern Michael's paternity claim—including the breathtakingly constraining one that anyone with a colorable claim to paternity has a right to genetic testing. Justice Scalia, however, insisted on finding the most specific common law tradition that bore on the precise question at issue. Only then could he reassure himself that the Court was

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153. Wechsler, *supra* note 101, at 17, 19.

154. Bork, *supra* note 36, at 6.

155. *Id.* at 16.

156. Justice Scalia, for example, frequently resisted rule-like rules of decision that he did not think could be traced to some external source of authority. *See, e.g.,* *Roper v. Simmons*, 543 U.S. 551, 608 (2005) (Scalia, J., dissenting) (rejecting as too "subjective" the holding that it is "cruel and unusual" to impose capital punishment on defendants who committed their offenses before reaching eighteen years of age); *County of Riverside v. McLaughlin*, 500 U.S. 44, 68–70 (1991) (Scalia, J., dissenting) (arguing that to require a Fourth Amendment probable cause hearing within 48 hours after arrest, as the Court had, was inadequate because widespread judicial practice had suggested a 24-hour limit).

157. *See supra* Sections I.B–C.

158. *See supra* Section II.B.

discerning rather than prescribing the fundamental values that precedent required him to enforce.<sup>159</sup>

Having said all of that, even if Justice Scalia's judicial philosophy, properly understood, reflected an insistence upon rooting judicial decisions in some authority exterior to the judge's will or preferences, a theory of judicial restraint so defined presents puzzles of its own: From where did Justice Scalia derive that theory? And is his anti-discretion principle itself a judicially manageable standard? The next Part elaborates on those puzzles and then offers some preliminary thoughts about why Justice Scalia's focus on judicial discretion may have gotten the traction it did despite those unanswered questions.

### III. A PRELIMINARY ASSESSMENT OF THE ANTI-DISCRETION PRINCIPLE

Justice Scalia's anti-discretion principle seems, in some ways, an unlikely candidate to have the impact it appears to have had as a theory of judicial restraint. Put to one side the fact that the principle was not a conventional theory of judicial restraint—that it did not call for explicit judicial deference to the judgments of the political branches.<sup>160</sup> Even taken on its own terms, Justice Scalia's anti-discretion principle had curious features that at least cast a burden of persuasion on its proponents. For one thing, although Justice Scalia was an originalist, he did not put the text or history of Article III front and center in the articulation of his theory of proper judicial behavior.<sup>161</sup> Moreover, because Justice Scalia accepted that judging inevitably entails *some* discretion, his antipathy to common law discretion itself necessitated line-drawing of the kind he disfavored.

So why did Justice Scalia's focus on judicial subjectivity get the traction it did? It is impossible to know for sure. But perhaps his emphasis on standardless judicial discretion tapped into a preexisting, and deeply rooted, strain of American legal culture that aspires to judicial objectivity and constraint. On that hypothesis, Justice Scalia's impact may not have rested upon his articulation of constitutional theory as such, but rather upon his ability

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159. In that vein, he wrote that, "even if one rejects an originalist approach, it is easier to arrive at categorical rules if one acknowledges that the content of evolving concepts is strictly limited by the actual practices of the society, as reflected in the laws enacted by its legislatures." Scalia, *supra* note 17, at 1184. A rule was not enough; it had to reflect something external to the judges' own sense of the good.

160. I had initially thought that the burden of persuasion upon Justice Scalia's anti-discretion principle was heightened by its lack of connection to the classic American theory of judicial restraint—Thayer's ideal that judges should forbear from invalidating state or federal legislation in the absence of clear constitutional error. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). I am now persuaded that Justice Scalia's failure to incorporate the Thayerian ideal is beside the point. Subscription to one has nothing to do with the other. Someone who takes Justice Scalia's view of discretion could *also* opt either (a) to look only for clear constitutional error or (b) to embrace *de novo* review of constitutional claims. The exact same choice would lie open to someone who subscribes to a common law approach.

161. See Eskridge, *supra* note 18, at 1522–32.

to expose discretion hidden below the surface of familiar doctrines. And even if he could not reduce his anti-discretion principle to a precise formula, that principle may have done as much work as *any* vague standard of judicial conduct can do; that is, it set a mood for decision, reminding lawyers and judges to put the proper role of the courts in the front rather than the back of their minds.

This Part will briefly explore the two potential anomalies in Justice Scalia's theory of judicial restraint. It will then speculate, again briefly, about why his anti-discretion principle may have had the influence it did despite those concerns.

### A. *Two Puzzles*

#### 1. The Source of the Principle

Once again, Justice Scalia had a clear methodological commitment to textualism and originalism—a commitment that imposes upon those who interpret the Constitution a duty, first and foremost, to find out what the enacted words meant in their historical context.<sup>162</sup> As noted, Justice Scalia's academic writings and judicial opinions start from the proposition that federal courts lack common lawmaking authority unless a statute or constitutional text endows them with it in a particular context (p. 13). That theory suggests a particular reading of “[t]he judicial Power” vested by Article III in the federal judiciary.<sup>163</sup>

But as William Eskridge wrote in his review of *A Matter of Interpretation* in these pages two decades ago, Justice Scalia did not make a central point of tracing his theory of judicial behavior back to eighteenth-century historical understandings.<sup>164</sup> Rather, Eskridge contended that the founders would have understood the judicial power in light of longstanding English judicial practice, which had applied “equitable” power to smooth out a statute's rough edges, mitigate unintended harshness, and make the law more coherent with its purposes.<sup>165</sup> This understanding, he wrote, accorded with evidence of the founders' attitudes toward judging, as reflected in sources such as the ratification debates and the practices of early American courts, especially state courts.<sup>166</sup>

Whether or not Eskridge is right, there is much to be said on both sides. Because the structure of the U.S. Constitution differed substantially from the English model (which, for example, commingled the roles of judges and legislators), many English judicial practices—including crafting common

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162. See *supra* Sections I.B–C.

163. See U.S. CONST. art. III, § 1.

164. See Eskridge, *supra* note 18, at 1526 (arguing that Justice Scalia “does not consider judicial practice and contemporary understanding of what ‘judicial Power’ meant in statutory cases” at the time of the founding).

165. See *id.* at 1523–24.

166. See *id.* at 1524–26 (discussing state court practice); *id.* at 1529–31 (examining ratification debates).

law crimes—ultimately did not survive the transition into the U.S. system of separated powers.<sup>167</sup> In addition, because much of the U.S. Constitution's design was a reaction against state practices, early state court precedents offered an uncertain basis for understanding federal judicial power.<sup>168</sup> Finally, by the time of Chief Justice Marshall, the Court had (at least formally) embraced interpretive premises squarely at odds with English traditions of equitable interpretation.<sup>169</sup> Nonetheless, despite the extensive structural and historical questions posed by the judicial power to interpret statutes, *A Matter of Interpretation* notably makes only brief references to the relevant history.<sup>170</sup>

The same is true with respect to constitutional adjudication. If the power of judicial review derives from the ordinary judicial power “to say what the law is” when a federal court decides cases or controversies,<sup>171</sup> an originalist approach to constitutional adjudication should presumably consider the way early Americans understood the law-declaration function in constitutional adjudication.<sup>172</sup> Much has been written on the subject. Scholars have debated the basic interpretive assumptions the founding generation would have brought to the document.<sup>173</sup> Others have unpacked founding-era expectations about the allocation of interpretive responsibility both among

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167. See, e.g., John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 36–70 (2001).

168. See John F. Manning, Response, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1660–65 (2001).

169. See Manning, *supra* note 167, at 89–102.

170. To be fair, in the paragraph in Justice Scalia's main essay that addressed original understanding, he referred to the two most important structural difference between federal judges and their English counterparts: “[J]udges are no longer agents of the king, for there are no kings. In England, I suppose, they [could] be regarded in a sense agents of the legislature, since the Supreme Court of England [was] theoretically the House of Lords.” P. 9. And in response to Professor Gordon Wood's historical critique of the book's overall theory of judicial power, see Comment by Gordon S. Wood, pp. 50–62, Justice Scalia set out several more pages of historical analysis, see pp. 129–31. In addition, Justice Scalia and Bryan Garner's treatise on interpretation offered a brief, one-paragraph reply to Professor Eskridge that emphasized the “commingling” of governmental functions at common law, the Court's early embrace of textualism, and the rarity of modern assertions of equitable power. See SCALIA & GARNER, *supra* note 2, at 23–24. My point here is not that Justice Scalia ignored the relevant history, but rather that he did not make the original meaning central to his argument here, as he did in other contexts. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 576–603 (2008) (Scalia, J.) (excavating the original meaning of the Second Amendment); *Harmelin v. Michigan*, 501 U.S. 957, 966–85 (1991) (Scalia, J.) (plurality opinion) (analyzing in detail the Eighth Amendment's original meaning).

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

172. See John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 751 (2009).

173. Compare, e.g., H. Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 U. CHI. L. REV. 1513, 1534 (1987) (book review) (arguing that the founding generation would have used “the common law's techniques of construction,” which “might or might not [produce] the meaning consciously intended by the document's makers”), with Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENT. 77, 93–102

the branches of government and between the government and the people.<sup>174</sup> Still others have looked at whether early judicial review did or did not presuppose unwritten fundamental law, including elements of a natural law tradition.<sup>175</sup> Again, neither Justice Scalia's academic writings nor his opinions focus on the historical record concerning these points.

I point this out not as a criticism. Rather, the book's lack of engagement with the history of the judicial power merely reinforces the hypothesis that, at some level, Justice Scalia's project on judicial discretion was not primarily originalist in origin or appeal. Rather, the anti-discretion principle, which Justice Scalia deployed to great effect, seemed to reflect something more akin to political theory or, perhaps, a high-level inference from the ideal of democracy that underpins so much of the Constitution.<sup>176</sup> Whatever its source, however, Justice Scalia did not ground his ideal primarily in the original understanding of the U.S. Constitution.

## 2. Discretion About Discretion

Ironically, the application of Justice Scalia's anti-discretion principle seems to entail the kind of line-drawing that the principle itself seeks to avoid. Justice Scalia freely acknowledged that judges necessarily exercise *some* discretion when they interpret law and decide cases. Recall that, in *Mistretta v. United States*,<sup>177</sup> his analysis of the nondelegation doctrine began from the proposition "that no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it."<sup>178</sup> In his famous *Chevron* article, moreover, Justice Scalia went further still, noting that statutory interpretation requires judges to consider "policy consequences" that enable them to decide which competing interpretation "best effectuate[s] the statutory purpose."<sup>179</sup> This position, moreover, accords with a number of decisions in which Justice Scalia recognized broad discretion that accrued to

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(1988) (arguing that the founding generation would have cared about the ratifiers' understanding).

174. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 93–127 (2004); SYLVIA SNOWISS, *JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION* 13–89 (1990); Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More out of Less*, 56 WASH. & LEE L. REV. 787, 796–99 (1999).

175. SNOWISS, *supra* note 174, at 121–25; Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1135–42 (1987).

176. See Comment by Ronald Dworkin, p. 127 (arguing that Justice Scalia's approach and its limitations can be best understood in relation to "majoritarian theory").

177. 488 U.S. 361 (1989).

178. *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting).

179. Scalia, *supra* note 120, at 515.

the judiciary by dint of some accommodating text or unmistakable tradition.<sup>180</sup> In Justice Scalia's words, "[i]t is all a matter of degree."<sup>181</sup>

Viewed in that light, Justice Scalia's anti-discretion principle poses the same concerns that led him (and the Court) largely to forgo enforcing the nondelegation doctrine.<sup>182</sup> In *Mistretta*, Justice Scalia explained that, because all laws give their implementers some discretion, judges lack a principled metric to determine, for nondelegation purposes, how much statutory discretion is too much.<sup>183</sup> His anti-discretion principle raises similar concerns. Consider, for example, one of Justice Scalia's key contributions to separation-of-powers law—the proposition that if Congress authorizes litigants without a constitutionally cognizable injury to bring suit, the resultant cause of action may violate Article III's case-or-controversy requirement.<sup>184</sup> Under that doctrine, the acid test for standing's injury-in-fact requirement—whether the alleged injury is sufficiently concrete, particularized, and imminent<sup>185</sup>—poses one of the most difficult line-drawing questions in constitutional law.<sup>186</sup> As Professor Susan Bandes has said, because standing questions “exist on a continuum,” the Court must “make distinctions of degree, not of kind.”<sup>187</sup> It is at least not immediately apparent why the line drawing in standing cases leaves the interpreter with less discretion than does the similar exercise in nondelegation cases.

One could find many such examples, even if one confined the search to the areas of structural constitutional law that I follow most closely. The Court doubtless exercised broad judicial discretion when it determined that a statute requiring state officials to do federal background checks on gun purchases violates freestanding federalism principles implicit in the Necessary and Proper Clause.<sup>188</sup> Similarly, the Court surely exercised discretion when it decided that Article II requirements permit Congress to insert one level, but not two levels, of removal restrictions between the President and executive officers working for him or her.<sup>189</sup> In matters of statutory interpretation, moreover, the growing complexity of the Court's interpretive approach—including the uncertain role of clear statement rules, the diverse nature of canons of construction, and the general challenge of applying interpretive norms consistently—doubtless leaves the justices broad discretion

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180. See *supra* notes 141–143 and accompanying text.

181. Scalia, *supra* note 17, at 1177.

182. See *supra* Section II.C.

183. 488 U.S. at 415 (Scalia, J., dissenting).

184. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559–60 (1992).

185. See *id.* at 560.

186. See, e.g., Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 212–13 (1992) (discussing line-drawing issues in standing cases).

187. Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 264 (1990).

188. See *Printz v. United States*, 521 U.S. 898, 923–24 (1997).

189. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010).

about how to resolve statutory cases.<sup>190</sup> The question of how one places some such matters on the permissible side of the anti-discretion line, and others on the impermissible side, may not itself admit of clear answers. Hence, applying the anti-discretion principle may involve the very kind of discretion the principle seeks to avoid.

This difficulty, of course, would have been greatly alleviated had Justice Scalia tied his anti-discretion principle more tightly to the particular texts that supplied the rule of decision in a given case. That is, he might have more systematically calibrated his judgments about the permissibility of discretion to the straightforward question of whether a governing text was crisp and precise, thereby limiting discretion, or vague or open-ended, thereby inviting it.<sup>191</sup> Under such an approach, the acceptability of judicial discretion ceases to be a matter of degree and becomes one of interpretation.<sup>192</sup> As I have explained, however, Justice Scalia's approach to discretion seemed to be a freestanding principle—one that not only informed but sometimes transcended the interpretation of particular statutory and constitutional texts.<sup>193</sup>

### B. *The Intuition Behind the Anti-Discretion Principle*

If all I've said to this point is plausible, Justice Scalia's theory of judicial restraint requires some explaining. It does not rest upon a worked-out, originalist theory of limited judicial power. Nor does it have the virtue of easy administrability. So what, if anything, gives that theory of judicial restraint its intuitive appeal?

Without attempting a comprehensive account, one may start by noting that Justice Scalia's anti-discretion principle reflects a persistent strain of thought in the American legal tradition.<sup>194</sup> It made prominent appearances, for example, in contexts as diverse as Hamilton's case for judicial review,<sup>195</sup>

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190. Recent scholarship by Professors Abbe Gluck and Lisa Bressman has questioned whether the Court has applied its rules of interpretation consistently or, indeed, whether it is able to do so. See Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 *STAN. L. REV.* 901, 961–64 (2013). Some scholars have proposed that the Court develop criteria for harmonizing the application of rules of construction. See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 *HARV. L. REV.* 26, 85–86 (1994); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 *HARV. L. REV.* 405, 497–502 (1989).

191. As noted, Justice Scalia did so more consistently in statutory cases than in constitutional ones. See *supra* text accompanying notes 148–152.

192. See Manning, *supra* note 42, at 29 (discussing the way textual signals can be read to grant or withhold discretion).

193. See *supra* Part II.

194. See, e.g., Or Bassok, *The Sociological-Legitimacy Difficulty*, 26 *J.L. & POL.* 239, 245–53 (2011) (discussing post–Civil War views on judicial objectivity or expertise); Clark, *supra* note 65, at 1169–93 (examining founding-era and early-nineteenth-century attitudes).

195. Hamilton thus wrote that unless judges aspire to exercise “WILL instead of JUDGMENT” in both statutory or constitutional adjudication, they risked “substitut[ing] . . . their

the Jeffersonian resistance to federal common law crimes,<sup>196</sup> the aspirations of Langdellian formalism to treat law as a science,<sup>197</sup> Roscoe Pound's worries about "spurious interpretation,"<sup>198</sup> and Justice Holmes's dissent in *Lochner*.<sup>199</sup> Obviously, the very idea of judicial objectivity came under withering attack from the realists,<sup>200</sup> who showed that law is too complex and judges

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pleasure [for] that of the legislative body." THE FEDERALIST No. 78, at 437 (Alexander Hamilton) (Clinton Rossiter ed., 1999). If that were to come to pass, he wrote, "there ought to be no judges distinct from [the legislative] body." *Id.* In the same number of *The Federalist*, Hamilton added that "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them." *Id.* at 439. I offer Hamilton's views here as a prominent articulation of the theme, and not as representative of the founding generation's general views.

196. In 1800, during the debate between the Federalists and the Jeffersonians over federal common law crimes, Madison prominently wrote that "whether the common law be admitted as of legal or of constitutional obligation, it would confer on the judicial department a discretion little short of a legislative power." JAMES MADISON, MADISON'S REPORT ON THE VIRGINIA RESOLUTIONS (1800), reprinted in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 546, 566 (Jonathan Elliot ed., J. B. Lippincott Co. 2d ed. 1937) (1836). He farther cautioned that "[a] discretion of this sort has always been lamented as incongruous and dangerous, even in the colonial and state courts, although so much narrowed by positive provisions in the local codes on all the principal subjects embraced by the common law." *Id.* Following the Jeffersonians' consolidation of power several years later, the Supreme Court concluded that power to "make an act a crime" and "affix a punishment" properly belongs to Congress, and not the federal courts. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812).

197. See, e.g., MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 9–10 (1992) (discussing the formalists' goals of making law objective and scientific).

198. Roscoe Pound borrowed the term "spurious interpretation" to describe the process by which courts reshape statutes "to meet deficiencies or excesses in rules imperfectly conceived or enacted." Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 381 (1907). While Pound thought that such a technique was sometimes necessary, he also expressed the reservation that "spurious interpretation reintroduces the personal element into the administration of justice" and that "[t]he whole aim of law is to get rid of this element." *Id.* at 385.

199. *Lochner* invalidated a state law regulating bakers' hours, reasoning that the law had an insufficient connection to health or other legitimate state interests and thus violated substantive due process. *Lochner v. New York*, 198 U.S. 45, 64 (1905). In an important dissent, Justice Holmes argued that the Constitution "is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States." *Id.* at 76 (Holmes, J., dissenting). The concern with judicial subjectivity came to be the "traditional" way for judges and legal academics to criticize *Lochner*. See David E. Bernstein, *Lochner's Legacy's Legacy*, 82 TEX. L. REV. 1, 5–6 nn.16–17 (2003) (collecting examples).

200. See BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 187–94 (2009) (discussing the rise of legal realism); see also JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE (3d prtg. 1973) (articulating the realist approach); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935) (same).



too human to eliminate personal predispositions from judging.<sup>201</sup> And, yet, despite the wide influence of the realist critique (at least among legal academics), the aspiration to identify external legal constraints upon judging continues to have a pull.

Although the aspiration today is often associated with the likes of Bork, Rehnquist, and Scalia,<sup>202</sup> it has had far wider appeal than that. John Ely, for example, wrote that “few come right out and argue for the judge’s own values as a source of constitutional judgment.”<sup>203</sup> Any such call for personal judicial discretion, moreover, could not easily be reconciled “with the basic democratic theory of our government.”<sup>204</sup> In the same vein, a liberal no less estimable than Archibald Cox opined that “[t]he legitimacy of judicial decrees depends . . . in considerable part on public confidence that the judges are predominantly engaged not in making personal political judgments but in applying a body of law.”<sup>205</sup> And while Alexander Bickel made famous the idea that the Court has discretion to “stay[ ] its hand” from deciding certain cases on prudential grounds, he was equally insistent that when the Court actually exercised judicial review, it “must act rigorously on principle,” whether invalidating *or* sustaining a piece of legislation.<sup>206</sup> Indeed, it is perhaps telling that while judges may be found who openly take a contrary view, they are few and far between—and mostly express such positions while wearing their other hats as legal academics.<sup>207</sup>

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201. See, e.g., Hanoch Dagan, *Doctrinal Categories, Legal Realism, and the Rule of Law*, 163 U. PA. L. REV. 1889, 1889–93 (2015) (summarizing and cataloging the realist position on doctrinal complexity and the problem of sources of authority). In its strong form, this intellectual movement questions the very possibility of rule-following or of adhering to “neutral principles.” See, e.g., Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 19 (1984) (explaining that rules “generally do not determine the scope of their own application”); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 822–23 (1983) (arguing that judges have an infinite capacity to (re)define the level of generality at which they apply governing principles).

202. See *supra* note 36.

203. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 48 (1980).

204. *Id.* at 45; see also *id.* (“In America it would not be an acceptable position that appointed judges should run the country . . .”).

205. ARCHIBALD COX, *THE COURT AND THE CONSTITUTION* 362 (1987).

206. BICKEL, *supra* note 101, at 69–70; accord, e.g., KENT GREENAWALT, *LAW AND OBJECTIVITY* 154 (1992) (“The limits of a judge’s role provide an additional reason for following the discipline of principles. Legislatures are representative and politically responsible . . . Courts are not representative and responsible in the same senses.”); J. Harvie Wilkinson III, *The Role of Reason in the Rule of Law*, 56 U. CHI. L. REV. 779, 792 (1989) (“The judicial system as a whole is designed to promote reason as the paramount judicial virtue. To reason, moreover, is to reason *from* the received postulates of the law, not *outside* of them. Legal reason represents the process of applying impersonal principles of law to varying facts.”).

207. See, e.g., CALABRESI, *supra* note 25 (calling upon judges to exercise common law discretion to deem statutes obsolete); FRANK, *supra* note 200 (elaborating and defending a legal realist theory of judging); Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 32, 54–60, 90 (2005) (arguing that judges should take a “pragmatic” approach to decisions and characterizing “a pragmatic court . . . as a tolerable

Indeed, the scruple that judges should not read their moral or policy predilections into the law formed a key part of the anti-*Lochner* consensus that, at least for a time, defined post-New Deal constitutional law. Cases that loomed large in Justice Scalia's formative years as a lawyer reflected a clear and unmistakable theory of judicial power—one that resonated strongly with Holmes's view that judges should not force their view of the good upon society. Hence, for the post-New Deal Court, it had become an article of faith that the federal adjudication is “not concerned . . . with the wisdom, need, or appropriateness of . . . legislation.”<sup>208</sup> From that starting point, the justices disclaimed power to disturb legislative classifications they thought “unwise, improvident, or out of harmony with a particular school of thought.”<sup>209</sup> In perhaps the high water mark of the anti-*Lochner* theme, the Court wrote in 1963 that its members had no warrant to second-guess “the wisdom and utility of legislation”—matters that, in the Court's view, properly entailed “legislative value judgments.”<sup>210</sup>

One way to understand Justice Scalia's approach, and perhaps some of his influence too, is to see his anti-discretion campaign as an effort merely to embrace and generalize that lingering post-New Deal sentiment and the broader instinct about American judicial power that lay behind it. He did not, as I and others have said, develop and market the anti-discretion principle as the best originalist understanding of “[t]he judicial Power.”<sup>211</sup> Nor, with the exception of some pragmatic arguments for rules qua rules,<sup>212</sup> did he provide an elaborate theoretical defense of the anti-discretion principle as such. Rather, somewhat ironically, his value added seemed to have come mostly from close, fact-bound, case analysis that laid bare the wide discretion truly at stake. A superb deconstructionist, Justice Scalia was able to direct his considerable analytical power to showing how seemingly neutral, objective, or constraining doctrines or tests gave judges an open field. In that sense, he took a page from Justice Robert Jackson, who wrote in another context that “we half overcome mental hazards by recognizing them.”<sup>213</sup>

Recall that, in *Casey*, Justice Scalia showed that by enforcing the purpose rather than the text of an “attorney's fee” statute, the dissent could pick and choose precisely what elements of the statute's many purposes it wished to enforce.<sup>214</sup> And in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, Justice

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form of political court—in part because it is likely to take [a] ‘modest’ approach to political judging”).

208. *Olsen v. Nebraska ex rel. W. Reference & Bond Ass'n.*, 313 U.S. 236, 246 (1941).

209. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955).

210. *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963).

211. *See supra* Section III.A.1.

212. *See* Scalia, *supra* note 17, at 1178–80 (arguing that rule-like judicial doctrines promote predictability and even-handedness while also furthering not only judicial self-restraint but also judicial courage).

213. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

214. *See supra* Section II.A.

Scalia saw what no one else had cared to see—that it is impossible to balance a state’s interest in a neutral state regulation against the burden that such a regulation imposes on interstate commerce.<sup>215</sup> Because the two values are incommensurable, trying to apply the Court’s doctrinal test was no easier than trying to answer the question “whether a particular line is longer than a particular rock is heavy.”<sup>216</sup> In *Michael H.*, Justice Scalia showed that if the Court focused on the broad notion of “parental rights” and not the specific common law doctrines that traditionally defined where those rights began and ended, then five justices could decide for all fifty states the morally contestable question of when someone outside a marriage had the right to challenge the paternity of a child born within it.<sup>217</sup>

In all of this, Justice Scalia had a knack for exposing the raw human agency in decisions that claimed a cloak of objectivity. On Justice Scalia’s watch, the Court suddenly had to confront its own capacity to imagine the shared intentions of 536 legislators on a question they never resolved, to pick the right level of generality at which to describe an uncodified statutory purpose or a general common law tradition, to balance interests that were incommensurable, to apply multifactor tests whose factors were neither weighted nor ranked, or to draw lines that could be drawn no less justifiably here rather than there. In all of those contexts, he showed that familiar tests lacked resolving significance—that those tests would allow the Court to come out just as easily either way on the facts before it. (He might have added, as he did in academic writing, that the exceedingly small number of Supreme Court cases made it unlikely that doctrinal indeterminacy would be narrowed through the accretion of clarifying precedents.)<sup>218</sup> If it sufficed simply to expose the Court’s legal fictions, to reveal the almost standardless discretion in long-accepted doctrines, then perhaps Justice Scalia was right to think, as he apparently did, that a scruple against judicial subjectivity had become part of the legal system’s DNA.

One final point: Why didn’t it matter more that Justice Scalia could not draw a principled line between appropriate interstitial discretion and the kind of personal judicial discretion that he wished to resist? In objecting to a certain exercise of federal common law, Justice Holmes famously tried to address that very problem by observing “that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.”<sup>219</sup> For Justice Scalia, however, there may have been a heavier burden of explanation. How could he say, for example, that

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215. See *supra* notes 113–117 and accompanying text.

216. *Bendix Autolite Corp. v. Midwesco Enter.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment).

217. See *supra* notes 72–85 and accompanying text.

218. *E.g.*, Scalia, *supra* note 17, at 1178–79 (“The idyllic notion of ‘the court’ gradually closing in on a fully articulated rule of law by deciding one discrete fact situation after another . . . simply cannot be applied to a court that will revisit the area in question with great infrequency.”).

219. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

nondelegation lay on one side of the anti-discretion line, but Article III limits on statutory standing lay on the other?<sup>220</sup> It may just be that, as a human being with human fallibility, Justice Scalia sometimes treated like cases differently because the values or stakes at issue struck him differently. It may also be that there was simply no way for him, or anyone else, to give a meaningful answer to the question, “How much discretion is too much?”

If the latter is true, how can one explain the seeming impact of his anti-discretion principle on the terms of the debate? The answer may lie in an observation that Justice Frankfurter once made about a standard of judicial review in administrative law. Such a standard, he wrote, could supply a “mood [to] . . . be respected, even though it can only serve as a standard for judgment and not as a body of rigid rules assuring sameness of application.”<sup>221</sup> On that theory, if a judge treats it as his or her mission to make judicial discretion generally more visible to the eye, perhaps the Court becomes more mindful of that discretion, even if the line between its proper or improper exercise cannot be reduced to a formula. The very act of focusing on judicial discretion may have cast upon the Court a burden of explanation, if not justification. Perhaps that is why Justice Scalia had so much success shaping the discussion,<sup>222</sup> even when he was making his case, as he often did, in lonely separate opinions rather than opinions for the Court.

#### CONCLUSION

Justice Scalia will surely be remembered for his textualism and originalism. But those approaches alone did not define his jurisprudence. Justice Scalia also advanced a distinctive theory of judicial restraint. Unlike the most conventional theory of judicial restraint, Justice Scalia’s theory did not call upon judges to bend over backwards to avoid striking down legislation. Instead, it focused on the process of judicial decisionmaking. Justice Scalia wanted judges to ground their decisions, statutory or constitutional, in criteria external to their own wills—to rest their judgments on something other than their personal morality, conscience, or policy preferences. He did not explicitly ground that ideal in the text or original meaning of the Constitution. Nor did he explain how judges could draw principled lines between acceptable and excessive exercises of judicial discretion. Still, his campaign against judicial subjectivity doubtless affected the way we talk about, and perhaps the way we practice, public law. By pulling back the curtain on the exercise of broad—almost standardless—judicial discretion in doctrines

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220. Compare, e.g., *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 474–75 (2001) (nondelegation), with *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559–62 (1992) (standing).

221. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951) (discussing the “substantial evidence” standard for questions of fact under the APA)

222. See Elena Kagan, *In Memoriam: Justice Antonin Scalia*, 130 HARV. L. REV. 5, 9 (2016) (“Does anyone now ignore the Founders’ commitments when addressing constitutional meaning—or just as important, dispute the need for a viable theory of constitutional interpretation, even if not Justice Scalia’s brand of originalism, to constrain judges from acting on their personal policy preferences?”).

long taken for granted, Justice Scalia required his Court to focus, again and again, upon the source of its own power. By getting so far with an idea that was more intuitive than formal, Justice Scalia may also have reaffirmed that an important strain of the American legal culture rejects rule by judges. That is no small legacy.