

## **More than A Law of Rules**

John C. P. Goldberg & Benjamin C. Zipursky

### **Introduction**

Who, in American law, has been the most influential jurist of the past 50 years? Some will dismiss this question as idle or unanswerable. We are inclined to think it is neither. And so, without further ado, here's our nominee: Antonin Scalia.

We arrive at this conclusion mindful that Justice Scalia is a polarizing figure. Relatedly, we should emphasize that, in crediting him with influence, we are not endorsing his views, any more than we would be endorsing Justice Oliver Wendell Holmes' views by describing him as the jurist with the most influence on Twentieth-Century American legal thought. Finally, we do not mean to suggest that Scalia's positions on particular substantive issues in administrative or constitutional law today prevail at a higher rate than the positions developed by other jurists. Maybe they do, but that is not our immediate concern. Instead, our claim is that Scalia's jurisprudential ideas, and particularly his thoughts on adjudication, have had an unparalleled impact in shaping the contemporary American legal mind.<sup>1</sup>

Readers will be forgiven for responding to this declaration with a shrug. Surely it is not saying anything new to report that textualism and originalism – two core features of Scalia's approach to adjudication – are all the rage among federal and state judges. But ours is a different point. Scalia's deepest impact, we will suggest, has come from his articulation of a particular version of *formalism*. More than any other modern jurist, he deserves credit for encouraging courts, lawyers, and legal scholars to disown modes of adjudication that are ad hoc or “pragmatist” in a pejorative sense.<sup>2</sup> Thus, when – in the inaugural Scalia lecture at Harvard Law School – Justice Elena Kagan declared that “we are all textualists now,” she was as much acknowledging the influence of Scalia's formalist ideal of law-governed rather than freewheeling

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<sup>1</sup> John F. Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747, 750 (2017) (arguing that Scalia's influence involved tapping into “an important strain in the legal culture [that] mistrust[s] broad judicial discretion,” thereby setting for the Supreme Court (and presumably other U.S. courts) a “mood” of judicial restraint). Dean Manning suggests that Scalia wielded this influence mainly by example, through his decisions, rather than through “high theory.” In partial contrast, we contend Scalia's writings about the connections between rules and the rule of law are an important part of the story.

<sup>2</sup> “Pragmatist” adjudication (in this context) refers to a method of decision according to which the judge identifies the best or most justifiable result then finds whatever support can be found in traditional legal sources for that conclusion. RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 405 (2003).

adjudication as she was invoking his preferred approach to statutory interpretation.<sup>3</sup> Likewise, the fact that constitutional law as practiced in courts around the country tends these days to be an exercise in historical analysis is, we would argue, more a testament to Scalia's insistence that adjudication (done right) is a significantly constrained exercise than it is to American judges having fully embraced originalism.

For professional legal academics there might be something mildly demoralizing in the thought that a judge with a slim corpus of extra-judicial writings has played a leading role in shaping the American legal mind. Rather than offering an unseemly lament, however, we propose to engage critically with what Scalia actually wrote, particularly his 1989 essay titled *The Rule of Law as the Law of Rules*.<sup>4</sup>

Our first main contention is that Scalia's jurisprudential influence owes much to the superficial appeal of his essay's claim that judicial reliance on legal rules is at the heart of a legal system that conforms to the requirements of the rule of law. On this reading, the attractive center of Scalia's position is not so much its insistence on broad judicial deference to democratically accountable legislatures, but instead a rule-of-law notion according to which all officials, including judges, must operate under and by general rules so that the populace is given clear notice of what the law forbids and so that is not victimized by officials' arbitrary exercise of their powers. This argument for a particular kind of judicial restraint – adjudication according to clear rules – is supremely well-tailored not only for 'law-and-order' (tough-on-crime) types, but for anyone who places a lot of value on living in an orderly, law-governed society.<sup>5</sup> For judges to forsake rule-bound adjudication, he maintained, is for them to violate the most basic principles of a legal system; principles arguably internal to the idea of a law-governed society itself. It is to give up on the rule of law.

Our second contention is critical. While we agree with Scalia that an important dimension of the rule of law is a judicial system with courts that issue law-governed decisions, we maintain he was mistaken in supposing that the way to have courts engage in law-governed decision-making is for them to err strongly on the side of issuing decisions that follow and frame bright-line rules. Using some of his own judicial opinions, we will demonstrate that, even on a relatively thin understanding of

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<sup>3</sup> Harvard Law School, *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes* (Nov. 25, 2015) <https://www.youtube.com/watch?v=dpEtszFI0Tg> (last visited Oct. 18, 2023). Kagan would later accuse some of her fellow Justices of being unfaithful textualists. *West Virginia v. Env'tl Protection Agency*, 597 U.S. \_\_\_, 142 S.Ct. 2587, 2641 (2022) (Kagan, J., dissenting).

<sup>4</sup> Antonin Scalia, *The Rule of Law as A Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

<sup>5</sup> Invocations of the rule of law are common in American constitutional law, a fact that perhaps attests to their power. See Richard H. Fallon, Jr., "The Rule of Law" As A Concept In *Constitutional Discourse*, 97 COLUM. L. REV. 1, 6 (1997).

the rule of law,<sup>6</sup> a relentless commitment to rules and judicial restraint stands to *disserve* rather than serve the rule of law.

Unlike many critiques of Scalia's jurisprudence, our is not that he endorses problematic values, or has misguided views about federalism, or fails properly to appreciate the counter-majoritarian role of the courts in our political system. Nor is that he overstates the importance of the rule of law relative to other desiderata for a legal system, such as the amelioration of historical forms of subordination. It is instead that his overemphasis on bright-line rules in adjudication is inimical to the rule of law itself. If we are correct, this is a blow to Scalia's project on its own terms, and a reason for lawyers, courts, and scholars who are sympathetic to the idea that formalism – understood as law-governed judicial decisions – is important to the rule of law to identify and embrace alternative approaches to adjudication.

Our analysis proceeds as follows. Part I lays out the argument of Scalia's *Law of Rules* essay, explaining how he ties the need for judges to follow and fashion bright-line rules to the ideal of the rule of law. Part II distills from the vast academic literature on the rule of law a conception that is appropriately deployed to examine the validity of his position. Part III provides a close analysis of two Scalia opinions – one a dissent, one a majority opinion – to demonstrate how a fixation on fashioning law in the form of bright-line rules can disserve the rule of law. Part IV steps back to consider the basis on which Scalia offered his rule-of-law-based argument for rules, concluding that it consists of an implausible contention about the conditions under which judges can engage in authentic forms of legal reasoning.

## I. Scalia on Rules, Restraint, and the Rule of Law

Scalia's *The Rule of Law as the Law of Rules* and Holmes's *The Path of the Law* have much in common.<sup>7</sup> Both are written versions of lectures given at Boston-area law schools by prominent, tough-minded judges. Indeed, Scalia's lecture was delivered in the series at Harvard Law School named after Holmes. By academic standards, both are also compact and engaging essays that offer thoughts on jurisprudence, and particularly on how judges do and should decide cases. And, while Holmes's essay holds an unmatched place in the hearts and minds of U.S. legal academics, our suggestion is that Scalia's – reinforced by his outsized persona as a Justice – has also had a significant impact in shaping the American legal mind.

In his essay, Scalia maintained that courts should, whenever possible, issue decisions that frame and apply abstractly defined, generally applicable rules, as

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<sup>6</sup> We discuss thinner and thicker conceptions of the rule of law below. By way of preview: ours is thin in that it does not associated adherence to the rule of law with the embrace of substantive due process or versions of equal protection of the sort Scalia criticized. This allows us to offer an 'internal' rather than 'external' critique of his position on rules and the rule of law.

<sup>7</sup> Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 453 (1897).

opposed to standards that require judges to make nuanced, fact-intensive decisions. To invoke one of his examples: even though agreements by business competitors to allocate geographic markets among themselves are not always anti-competitive, a judge interpreting the Sherman Act's prohibition on "[e]very contract, combination ..., or conspiracy, in restraint of trade or commerce" will do better to adopt a blanket prohibition on such agreements and to eschew an approach employing fact-sensitive standards that aims to distinguish agreements that actually inhibit competition from those that don't.<sup>8</sup>

How will they do 'better'? Here, the essay's title is illuminating. In two ways, judicial rule-creation and rule-following are said by Scalia to promote the rule of law.

First, they help ensure that persons subject to the laws of a jurisdiction are given adequate notice and guidance, such that they have a fair opportunity to conduct themselves as the law requires. Scalia's essay offers 'negative' and 'positive' versions of this thought. On the negative side, it suggests that, if a court is not in a position to decide a case by fashioning a rule, then the court will probably do better to make no decision at all, given how little guidance heavily context-specific rulings provide.<sup>9</sup> On the positive side, he invoked the famous parable of the emperor Nero placing edicts at a height that made them difficult to read. Such a violation of "rudimentary justice," Scalia maintained, is an obvious "Rule of Law" problem because it left Nero's subjects too uncertain about what they were permitted to do.<sup>10</sup> Likewise, the essay concludes by invoking the famous pair of tort cases in which Justices Holmes and Cardozo disagreed over whether, for negligence cases involving collisions between trains and vehicles, a clear rule or a context-sensitive standard should be used to determine whether the plaintiff was contributorily negligent. In doing so, Scalia quoted a famous passage from Holmes's opinion emphasizing the importance of identifying clear rules in giving individuals fair notice as to which conduct will trigger which legal consequences.<sup>11</sup>

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<sup>8</sup> Scalia, *supra* note 4, at 1183 (discussing 15 U.S.C. §1 (U.S.C.A. 2023)). As Scalia noted, his example raises the question of whether a court's reading of bright-line rules into a vague statutory standard is an instance of judges usurping legislative authority. He insisted that it was not, because a legislature, when it legislates, can be presumed to know that courts will do such things. Thus, in the absence of statutory language clearly directing judges to apply a statutory provision using a 'totality of the circumstances' approach, a rule-based approach is valid a matter of proper statutory interpretation. *Id.*

<sup>9</sup> Thus, Scalia expressed the hope that Congress's then-recent narrowing of the Supreme Court's appellate jurisdiction would translate into fewer instances in which the Court would have to employ a balancing test to determine whether a given state law violates the Interstate Commerce Clause. *Id.* at 1185-86.

<sup>10</sup> *Id.* at 1179.

<sup>11</sup> *Id.* at 1187-88 (discussing *Baltimore & Ohio R.R. v. Goodman*, 275 U.S. 66 (1927) (Holmes, J.) and *Pokora v. Wabash Rwy Co.*, 292 U.S. 98 (1934) (Cardozo, J.)). Holmes was unequivocal that an important value of legal rules is that they, more so than standards, allow individuals to know

A second virtue of rules concerns the role that they can play in adjudication itself, rather than in guiding polity members' primary conduct. This is the idea alluded to in the essay's opening vignette about the French king Louis IX sitting under an oak tree, resolving individual disputes brought before him based merely on his sense of what made for a "fair" outcome in each.<sup>12</sup> According to Scalia, this scenario, precisely because it constituted a system of "personal discretion to do justice," violates a core tenet of the rule of law, according to which officials must rule in accordance with law, rather than by individual choice or preference.<sup>13</sup> Just as Louis IX's monarchy suffered from a serious rule-of-law deficit, so too do modern political systems in which judges have the power to decide important cases on the basis of individual preference. In short, according to Scalia, judges must fashion rules and decide in accordance with rules if a legal system is going to be a 'government of laws, not men.'<sup>14</sup> It is in this sense that Scalia's essay adopts a *formalist* account of adjudication as properly a rule-governed activity.

What is it about rules that promotes a government of laws? After all, isn't there a sense in which a judge who fashions a broad rule will have exercised greater power than a judge who fashions a context-sensitive standard? Perhaps.<sup>15</sup> But, even so, she will be constraining future courts, assuming they too embrace a rules-based approach. Thus, according to Scalia, adjudication by rules is essential because it is "[o]nly by announcing rules [that] we [judges] hedge ourselves in."<sup>16</sup> A standards-based approach – particularly one that calls on judges to make decisions by balancing multiple conflicting factors – provides no constraints, and thus exposes members of a polity to arbitrary exercises of power in the form of judges imposing their will on others.<sup>17</sup>

Scalia's point – that the same criticism that could be leveled at the regime of Louis IX could be leveled at a modern system of separated powers in which judges behave pragmatically or deploy highly fact-sensitive standards – is an important

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where they stand in relation to the risk of being sanctioned by an official. OLIVER W. HOLMES, JR., *THE COMMON LAW* 111 (1881).

<sup>12</sup> Scalia, *supra* note 4, at 1175-76.

<sup>13</sup> *Id.*

<sup>14</sup> This, of course, is the dated, sexist version of the phrase, which appears in *Marbury v. Madison*, 5 U.S. 137, 163 (1803), and which is sometimes attributed to John Adams. Scalia's essay does not explicitly invoke it, but does invoke Aristotle for the seemingly similar thought that "rightly constituted rules should be the final sovereign..." *Id.* at 1176.

<sup>15</sup> *Id.* at 1179.

<sup>16</sup> *Id.* at 1180.

<sup>17</sup> *Id.* Scalia at one point suggests that when judges issue decisions based on 'totality of circumstances' reasoning they do not so much pronounce law as engage in fact-finding. By this he meant that they act like jurors in a negligence case deciding the issue – often deemed a "fact" issue – of whether the defendant acted with due care. Whatever the jury concludes, its decision is almost immune from being second-guessed because nobody knows its basis (other than it was thought warranted by jurors based on all the facts before them).

variant on the message that had been delivered forty years earlier by Learned Hand in his own Holmes lectures. Hand, too, was deeply concerned about judges imposing their “personal preferences” on the populace.<sup>18</sup> However, his jurisprudential skepticism was more thoroughgoing than Scalia’s. A Legal Realist, Hand did not believe that ‘law’ could limit the ability of judges to use their official positions to impose their personal values or preferences.<sup>19</sup> By contrast, Scalia the formalist believed that the adoption and application by judges of legal rules makes possible a world in which individuals are not at the mercy of judges’ personal predilections.

In his essay, Scalia tempered the foregoing account in two respects. He first acknowledged that reliance on rules, particularly judicial reliance on rules, will inevitably have downsides. As Fred Schauer emphasized in contemporaneous work on the value of rules, it is their nature to be over- and under-inclusive relative to their justifications.<sup>20</sup> In Scalia’s words, a legal system that relies heavily on rules will sometimes generate “mild substantive distortion” of laws relative to the purposes they are meant to serve.<sup>21</sup> Scalia also conceded that a legal system can only aspire to operate exclusively by rules – that, in the real world, judges (including himself) will inevitably find themselves writing some opinions that rely on or fashion fact-sensitive standards and balancing tests.<sup>22</sup>

Finally, we note that, in the course of presenting his argument, Scalia offered some passing thoughts on the relation, within his approach to adjudication, of textualism and originalism, on the one hand, to formalism (as we are calling it) on the other. The need for judges to fashion rules, he recognized, is complicated by the fact that, in cases that call for the application of statutes and constitutions, the courts are obligated to apply those instruments. Indeed, that judges operate under such an obligation is an important component of an overall system of law-governed adjudication and hence of the rule of law. It is thus possible and perhaps inevitable that there will be a tension between two fundamental judicial role obligations: the duty to fashion rules that constrain judicial discretion in service of the rule of law and the duty faithfully to apply controlling law – a tension that would come to the fore in

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<sup>18</sup> LEARNED HAND, *THE BILL OF RIGHTS* 70 (1958).

<sup>19</sup> *Id.* (suggesting that legal terms of art merely mask decisions reached on the basis of judges’ personal preferences). Thus, what Hand found seriously “irksome” in the thought of being ruled by a bevy of enrobed Platonic guardians was not its arbitrariness. In his view, all rule is ‘arbitrary,’ in that it involves officials enforcing some set of preferences that are not defensible by reason. Hand’s point instead was that he would rather live in a democratic polity that gives its citizens some chance to influence which set of (arbitrary) preferences officials will enforce.

<sup>20</sup> FREDERICK SCHAUER, *PLAYING BY THE RULES* (1991).

<sup>21</sup> Scalia, *supra* note 4, at 1178.

<sup>22</sup> *Id.* at 1187.

cases governed by a constitutional or statutory provision couched in language that invites judges to apply standards rather than rules.<sup>23</sup>

Although he did not suggest this tension could be eliminated, Scalia maintained that a judge's choice of interpretive methods can do something to manage it: "the extent to which one can elaborate general rules from a statutory or constitutional command depends considerably on how clear and categorical one understands the command to be, which in turn depends considerably on one's method of textual exegesis."<sup>24</sup> In other words, textualism in statutory interpretation and originalism in constitutional law are here defended on the ground that they better enable judges to serve the rule of law both by fashioning rules and by faithfully applying controlling sources of positive law. In this articulation, at least, textualism and originalism are cast as servants of formalist adjudication.<sup>25</sup>

## II. The Rule of Law: A Moderately Thin Conception

Some who are inclined to resist the claims of Scalia's essay will argue, in the spirit of Learned Hand, that the idea of legal rules constraining adjudication is fantastical. Others will maintain that it overstates the value of predictability, consistency, and constraint relative to the value of achieving sensible and just results in particular cases. In this essay, we offer a different kind of criticism. We do so in part because we are sympathetic to some version (although not Scalia's) of the idea that judicial decision-making is and should involve law-application – that there are indeed powerful separation-of-powers, institutional competence, and rule-of-law reasons to reject approaches to adjudication that consistently grant judges very broad discretion to decide cases as they see fit.

Our central concern here is Scalia's contention that, for rule-of-law reasons, appellate judges must craft their decisions in a rule-heavy manner, notwithstanding that doing so will sometimes come at the cost of achieving just and sensible results. As we will demonstrate, an insistence on appellate decisions that are rule-like and context-insensitive will often *disserve* the rule of law. Thus, even if one supposes, with Scalia, that there are *some* rule-of-law based reasons for favoring rules over standards,

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<sup>23</sup> Cf. Steven G. Calabresi & Gary Lawson, *The Rule of Law as a Law of Law*, 90 NOTRE DAME L. REV. 483 (2104) (arguing that Scalia's commitment to rule-governed adjudication was incompatible with his commitments to textualism and originalism, given that statutes and the Constitution sometimes direct judges to apply standards). As indicated in the text, Scalia hypothesized that conflicts between his formalism and his textualism and originalism could be minimized.

<sup>24</sup> Scalia, *supra* note 4, at 1183-84.

<sup>25</sup> See Manning, *supra* note 44, at 749-50 (arguing that Scalia's textualism, originalism and his emphasis on rules were all components of an account of adjudication designed to limit the instances in which judicial decisions are a matter of "will" rather than law).

it does not follow that rules should consistently be adopted. Indeed, it does not even follow that the rule-of-law itself ultimately favors rules over standards.

To flesh out this critique, we will of course need to invoke a conception of the rule of law. We do so aware that we cannot take advantage of the notorious plasticity of this concept to bake our conclusions into the premises of our analysis. As Dick Fallon, Brian Tamanaha, John Tasioulas, Jeremy Waldron, and many others have emphasized, it is not entirely clear what it means to say of a polity that it is one in which the rule of law prevails, or prevails to a greater extent than elsewhere.<sup>26</sup> Still, the extensive literature on this topic has identified several attributes of a legal system that mark it as one that instantiates, or more fully instantiates, the rule of law. The same works also helpfully distinguish between “thinner” and “thicker” conceptions, based on which attributes one supposes ought to be included or excluded in judgments about a polity’s commitment to the rule of law. Our argument will proceed on the basis of a conception that is relatively thin.

According to this conception – for which we claim no originality – a polity can be said to better conform to the rule of law in so far as its laws and legal system instantiate or respect the following principles:

1. *Legality*. The law must be knowable and otherwise capable of being followed by officials and non-officials.
2. *Universality*. All polity members are subject to the law; no person or entity is above the law. This goes for both duty-imposing and power-conferring laws, which means (among other things) that institutions, including legislatures and courts, must operate through appropriate procedures.
3. *Efficacy*. The law is not merely an abstraction, or ‘paper law’, but actually governs the polity at a concrete level; those who are subject to it tend to act roughly in conformity with its requirements; those who violate it are generally subject to some form of adverse consequences for having done so.<sup>27</sup>

We will briefly elaborate on each of these principles below. Before doing so, we should note what does not appear on our list. It is these exclusions that permit us to

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<sup>26</sup> Fallon, *supra* note 5, at 6 (1997); BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 4 (2004), John Tasioulas, *The Rule of Law*, in in THE CAMBRIDGE COMPANION TO THE PHILOSOPHY OF LAW 117, 117 (John Tasioulas ed., 2020); Jeremy Waldron, *The Rule of Law as an Essentially Contested Concept*, in THE CAMBRIDGE COMPANION TO THE RULE OF LAW 121, 121 (Jens Meierhenrich & Martin Loughlin eds. 2021). To be clear, none of these scholars suggests that the elusiveness of the concept provides grounds for skepticism about its intelligibility or usefulness.

<sup>27</sup> Cf. Jeremy Waldron, *Faces of the Rule of Law* (ms. at 8) (identifying as three “faces” of the rule of law: (1) the “constraint conception” (state and officials bound by law); (2) “Fuller’s conception” (laws must present themselves in a certain way to those to whom they apply); and (3) the “law-and-order conception” (treating legal compliance as incumbent on ordinary people)).



characterize the conception of the rule of law that will guide our analysis as moderately thin.<sup>28</sup>

On our account, for the rule of law to obtain, the legal rights that persons actually enjoy need not be those that they are entitled to enjoy as a matter of political theory, morality, or international human rights law. Thus, for example, a polity could score well on an imagined rule-of-law ‘index’ even though it to some degree, or in some ways, violates fundamental rights, such as the right of free expression. This is not to say that the protection of fundamental rights, including free speech rights, has *nothing* to do with the rule of law. For example, it is a feature of our conception that legislation must emerge out of open discussion and debate, and that litigants in court have an opportunity to be heard. Any regime that unjustifiably stifles expression so as to prevent these things from happening has acted in a manner contrary to what the rule of law requires. At the same time, a polity with properly promulgated and applied criminal libel laws that significantly curtail individuals’ freedom to criticize government officials and policies, even if properly condemnable for violating a fundamental right, is not on that basis alone a polity that flouts the rule of law.

Along the same lines, we allow for the possibility that undemocratic regimes can be polities that respect the rule of law. To be sure, a version of the same proviso we just offered in connection with rights applies here too – undemocratic regimes probably tend to operate in ways that do violate rule-of-law principles. Our point is merely that a polity ruled by officials who obtain office by means other than elections (e.g., heredity) need not be one that fails to instantiate the rule of law.

Our conception also permits the possibility that observance of the rule of law can coincide with significant inequalities in opportunities or wealth. To this substantive failing, the same proviso applies yet again: radically inegalitarian regimes, like rights-violating and undemocratic regimes, may in fact tend to violate rule-of-law principles. But they need not. The same goes for a polity with very burdensome governmental regulations – such as environmental laws that drastically affect the usability or resale value of certain private property, or taxation measures that render certain business ventures or investments vastly less profitable than they were reasonably expected to be. A polity of this sort can still respect the rule of law even if one supposes that polities that adopt extremely onerous use-restricting and wealth-depriving regulations are prone to engage in forms of expropriation that do not comport with rule of law principles.<sup>29</sup>

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<sup>28</sup> Here we follow the lead of Tamanaha, Tasioulas, Joseph Raz and others in so far as we: (a) reject thick conceptions of the rule of law that have been offered by the likes of Tom Bingham and Ronald Dworkin, yet (b) acknowledge that adherence to the rule of law as such will sometimes involve recognizing and partially vindicating important substantive rights or values. TAMANAHA, *supra* note 26, at 120; Tasioulas, *supra* note 26, at 120; Joseph Raz, *The Rule of Law and Its Virtue*, in THE AUTHORITY OF LAW 210-11 (1979).

<sup>29</sup> See generally JEREMY WALDRON THE RULE OF LAW AND THE MEASURE OF PROPERTY (2012).

So much for exclusions. We now turn to an elaboration of what is included, starting with what we have labeled “legality.” The idea that laws must be stable, knowable and otherwise capable of guiding conduct – what is sometimes referred to as “formal legality” – has been emphasized by many scholars, perhaps Fuller and Raz most notably.<sup>30</sup> Different treatments of legality have emphasized different values that it serves. From within his Austinian framework, Holmes, for example, sometimes emphasized the importance of giving individuals a fair opportunity to avoid have disagreeable consequences visited upon them by officials.<sup>31</sup> Raz meanwhile stressed that legality is essential if a legal system is to respect human dignity and to be able to do what, in the first instance, law is supposed to do – i.e., provide reasons for actions to agents who are capable of taking such reasons into account in deciding how to act.<sup>32</sup>

The idea that the rule of law requires universality – that law must apply to officials as much as nonofficials – is also a standard feature in most accounts. In some respects it is an extension or application of the idea of legality: the thought being that individuals can’t know where they stand in relation to the law if officials that make, apply, and enforce it are not themselves adhering to law governing those activities.<sup>33</sup> But there is also at work in this aspect of the rule of law ideas of equal treatment and nondomination. Albert Dicey’s account emphasized (among other things) the egalitarian ideal of no person being above the law.<sup>34</sup> The point is not that the same substantive rules need apply to officials and non-officials. Rather, it is that their status as officials does not render them unduly exceptional in terms of their entitlement to be free from legal requirements. Dicey and others, including Raz and Gerald Postema, have further emphasized the links between law as a restraint on official action and the idea that persons with power over others must be restrained from exercising that power arbitrarily or abusively. Notably, on these accounts, this dimension of the rule

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<sup>30</sup> LON FULLER, *THE MORALITY OF LAW* (rev. ed. 1969); Raz, *supra* note 28, at 210; *see also* TAMANAHA, *supra* note 26, at 91 (referring to this aspect of the rule of law as “formal legality”).

<sup>31</sup> HOLMES, *supra* note 11, at 111 (“When a man has to pay damages, he is supposed to have broken the law, and he is further supposed to have known what the law was.”). This idea was of course also central to Hayek’s treatment of the rule of law. F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* (1960).

<sup>32</sup> Raz, *supra* note 28, at 221. Waldron helpfully suggests that these two dimensions of legality correspond to negative and positive conceptions of liberty. Waldron, *supra* note 27, at 18-19.

<sup>33</sup> *See* Raz, *supra* note 28, at 216, 218. One might also say the opposite: that legality is an expression of the idea that no one, whether official or private actor, is above the law. Waldron, *supra* note 27, at 17.

<sup>34</sup> A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 189 (6<sup>th</sup> ed. 1902) (“every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals”); *see also* HOLMES, *supra* note 11, at 110 (“any legal standard must, in theory, be one that would apply to all men, not specially excepted, under the same circumstances. It is not intended that the public force should fall upon an individual accidentally, or at the whim of any body of men.”).

of law extends beyond the conduct of officials to private actors.<sup>35</sup> A regime that allows a person to be beaten, imprisoned, or have their property taken at the whim of a fellow citizen is one that has a rule of law deficit.<sup>36</sup>

To deem officials to be bound by law is not only to maintain that they must be subjected to and heed various duty-imposing rules that limit their ability to abuse their powers, but also that they exercise their official powers in accordance with the terms of certain power-conferring laws. Legislation that otherwise satisfies rule-of-law principles (is clear, prospective, etc.), yet that was rammed through the legislative body at gunpoint by a tyrant, is not the product of proper procedures and in that sense defective from a rule-of-law perspective. The rule of law requires that putative legislation be presented, deliberated over, and approved in the right ways.<sup>37</sup> Much the same goes for courts, which must operate in a manner that is suitably impartial, and must permit the introduction of relevant evidence and argumentation.<sup>38</sup>

Finally, a word about what we have dubbed “efficacy.” Fuller, who was mainly focused on officials’ conduct, referred to a version of this idea under the heading of “congruence” – that is, a match between “the rules announced and their actual administration.”<sup>39</sup> Dicey was particularly emphatic about this aspect of the rule of law. One of the great virtues of the English Constitution, he claimed, is that it did not consist of abstract, paper proclamations but instead was the product of myriad court decisions. That the Constitution had emerged from innumerable instances in which independent courts had occasions to define the scope of, and to enforce, particular rights (such as rights against wrongfully inflicted bodily harm or wrongful confinement) was, in his view, a primary reason why England had (at least for a time) enjoyed a more robust commitment to the rule of law than continental European nations.<sup>40</sup> In recent work, Waldron has also referenced something like this idea in suggesting that “general obedience and enforcement” of the law is part of what it means for there to be the rule of law.<sup>41</sup>

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<sup>35</sup> DICEY, *supra* note 34, at 186 (offering as examples of rule-of-law violations Voltaire having enjoyed no protection against being imprisoned on the whim of an official or being beaten by the lackeys of an aristocrat); GERALD POSTEMA, *LAW’S RULE: THE NATURE, VALUE AND VIABILITY OF THE RULE OF LAW* 17, 23-28 (2022) (explaining that the rule of law seeks to combat the arbitrary exercise of power within various kinds of power relations).

<sup>36</sup> Benjamin C. Zipursky, *Torts and the Rule of Law*, in *PRIVATE LAW AND THE RULE OF LAW* 139, 147 (Lisa Austin & Dennis Klimchuk eds., 2014); DON HERZOG, *HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY* 131 (1989) (offering the example from pre-modern England of peers acting with impunity toward commoners).

<sup>37</sup> Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, in *NOMOS L: GETTING TO THE RULE OF LAW* 3, 25-26 (James Fleming ed., 2011) (emphasizing the importance of legislative process if a parliamentary democracy is to comport with rule-of-law principles).

<sup>38</sup> *Id.* at 6.

<sup>39</sup> FULLER, *supra* note 30, at 81-82.

<sup>40</sup> DICEY, *supra* note 34, at 191-95.

<sup>41</sup> Waldron, *supra* note 27, at 26.

Central to law’s realization is not only some degree of acceptance from broad segments of the population, but also the existence and operation of institutions that, in principle, stand ready to make law’s paper rules real. It seems unlikely that the idea of the rule of law is definite enough to identify any particular arrangements as in all circumstances necessary for this task. One might imagine, for example, more or less reliance on state-centric enforcement (prosecutions, regulatory fines, etc.) versus making courts available to empower individuals to vindicate legal rights through civil actions.<sup>42</sup> The core idea is that the rule of law requires, among other things, that particular law-violations be identified and that they receive some sort of response if the law is to be real rather than notional.

### **III. Rules Disserving the Rule of Law: Due Process and Qualified Immunity**

The principal point of this section is to establish that Scalian bright-line-ism in appellate adjudication conflicts with a serious commitment to basic rule of law values. It makes this point not (simply) to savor the irony of the conclusion, but to display the unsustainability of a rule-fetishistic conception of the rule of law. In law-professor rather than empiricist mode, we will make our point by examining in detail some of Scalia’s judicial opinions.

#### **A. *Caperton* and The Appearance of Impropriety**

Our first example comes from *Caperton v. A.T. Massey Coal Co.*<sup>43</sup> There the U.S. Supreme Court ruled that the West Virginia Supreme Court’s 3-2 decision reversing Caperton’s \$50 million fraud judgment against the defendant Massey was tainted by a Due Process violation. That conclusion turned on the fact that one of the state high court’s elected justices – Brent Benjamin – had unjustifiably declined to recuse himself from the court’s decision to reverse the judgment against Massey. The basis for recusal asserted by Caperton was that Don Blankenship, Massey’s CEO, Chairman and President, in anticipation of Massey’s appeal of the judgment against it to the

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<sup>42</sup> Zipursky, *supra* note 36, at 148-50. When, in *Marbury*, John Marshall invoked the “government of laws, not men” aphorism, he did so to emphasize that it is essential – or at least was essential under then-prevailing conditions – for courts to provide legal remedies to persons who suffer legal rights-violations. *Marbury v. Madison*, 5 U.S. 137, 163 (1803). Postema also builds into his conception of the rule of law a notion of “accountability,” understood as the vulnerability of one person to be made answerable to another for having acted unlawfully in a way that adversely impacts the other. Whether this feature of his account renders it unduly “thick” depends in part on the breadth of the notion of accountability: Postema emphasizes that it can take different forms and need not involve state-imposed sanctions. POSTEMA, *supra* note 35, at 48-49.

<sup>43</sup> 556 U.S. 868 (2009).

West Virginia Supreme Court, had given huge sums to an organization that ran attack ads against Justice Benjamin's electoral opponent for a seat on the state court.<sup>44</sup>

In an opinion penned by Justice Anthony Kennedy, the majority held that the Fourteenth Amendment's Due Process Clause requires recusal when objective features of a case bespeak a substantial probability of judicial partiality. Such features, Kennedy's opinion continued, are not present just because a party to litigation has contributed funds to a presiding judge's electoral campaign. However, they are present where someone "with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent."<sup>45</sup> Because these were precisely the facts of *Caperton*, Benjamin's refusal to recuse himself constituted a violation of Due Process.<sup>46</sup>

In dissent, Chief Justice John Roberts decried the majority's decision for tying the determination of Due Process violations for failures to recuse to an ill-defined notion of "probability of bias." Previously, Roberts insisted, the Court had adopted a "clear line" according to which judicial recusals in state courts are exclusively a matter of state law except in two specific circumstances: (1) when the judge has a direct, personal and substantial pecuniary interest in the matter being resolved, and (2) when the judge presides over criminal contempt proceedings against a defendant who had previously expressed great hostility toward or disrespect for that judge.<sup>47</sup> By contrast, he reasoned, the majority's test "fails to provide clear, workable guidance for future cases."<sup>48</sup> On this basis, Roberts predicted that the courts would be flooded with *Caperton* recusal motions, and hence that the majority's desire to bolster perceptions of courts as institutions with integrity would, paradoxically, undermine that

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<sup>44</sup> Benjamin was elected for the first time to the state high court two years after the entry of judgment by the trial court in favor of Caperton against Massey, but before that judgment was appealed to the state's high court. Blankenship donated approximately \$3,000,000 to a political organization that supported Benjamin's candidacy by running ads that depicted Benjamin's opponent, incumbent Justice Warren McGraw, as lenient in punishing child molesters. Jed Handelsman Shugerman, *In Defense of Appearances: What Caperton v. Massey Should Have Said*, 59 DEPAUL L. REV. 529, 529 (2010).

<sup>45</sup> *Caperton*, 556 U.S. at 884.

<sup>46</sup> When the case was re-heard by the West Virginia Supreme Court with a temporary justice replacing Benjamin, it was decided in favor of Massey on the ground that a forum selection clause in the contract between the parties precluded litigation of their dispute in the West Virginia courts, and instead required litigation in Virginia's courts. *Caperton v. A.T. Massey Coal Co.*, 690 S.E.2d 322 (W.Va. 2009). The Virginia Supreme Court later concluded that the litigation could proceed in that state's courts, rejecting Massey's argument that suit was barred by *res judicata* principles. *Caperton v. A.T. Massey Coal Co.*, 740 S.E.2d 1 (Va. 2013).

<sup>47</sup> *Id.* at 893 (Roberts, C.J., dissenting).

<sup>48</sup> *Id.*

perception by constantly subjecting them to allegations of bias.<sup>49</sup> Consistent with the core message of Scalia’s 1989 essay, Roberts conceded that his position might sometimes result in judges not recusing themselves when they should. (Hence his invocation – remarkable, given the facts of *Caperton*! – of the hoary hard-cases-make-bad-law aphorism.)<sup>50</sup> However, he suggested that this was the price to be paid for maintaining a rule that, by virtue of its clarity, would better promote confidence in the courts.

Not content merely to register his strong disagreement, Roberts, writing in a seemingly sarcastic tone, produced a list of no less than 40 questions as a sample of those that would now need to be litigated in the lower courts thanks to the majority’s ruling. Here is a small sample:

26. Is the due process analysis less probing for incumbent judges—who typically have a great advantage in elections—than for challengers?

27. How final must the pending case be with respect to the contributor's interest? What if, for example, the only issue on appeal is whether the court should certify a class of plaintiffs? Is recusal required just as if the issue in the pending case were ultimate liability?

28. Which cases are implicated by this doctrine? Must the case be pending at the time of the election? Reasonably likely to be brought? What about an important but unanticipated case filed shortly after the election?<sup>51</sup>

In reference to his entire list of questions Roberts then wrote:

These are only a few uncertainties that quickly come to mind. Judges and litigants will surely encounter others when they are forced to, or wish to, apply the majority's decision in different circumstances. Today's opinion requires state and federal judges simultaneously to act as political scientists (why did candidate X win the election?), economists (was the financial support disproportionate?), and psychologists (is there likely to be a debt of gratitude?).

The Court's inability to formulate a “judicially discernible and manageable standard” strongly counsels against the recognition of a

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<sup>49</sup> *Id.* at 891. A retrospective analysis suggests that Roberts’s predicted parade of horrors has not yet made its way through America’s courthouses. Aman McLeod, *Caperton v. A.T. Massey Coal Co.: A Ten-Year Retrospective On its Impact on Law and the Judiciary*, 12 W. VA. L. REV. 67, 69 (2021).

<sup>50</sup> *Caperton*, 556 U.S. at 899 (Roberts, C.J., dissenting).

<sup>51</sup> *Id.* at 896-97.

novel constitutional right. (citations omitted) The need to consider these and countless other questions helps explain why the common law and this Court's constitutional jurisprudence have never required disqualification on such vague grounds as “probability” or “appearance” of bias.<sup>52</sup>

Perhaps by design, Roberts’ over-the-top rhetoric almost causes the reader to forget what the actual case before the Court was about: (1) whether the two then-recognized categories for finding Due Process violations in cases involving judicial failures to recuse should be deemed exhaustive, or whether instead the norm of judicial impartiality demands in-principle openness to other grounds, and (2) if so, whether such grounds were present in a case involving extravagant, targeted campaign expenditures by a litigant with a pending appeal before the court on which the candidate-judge would sit if elected. With one possible caveat, the questions seem almost too easy to be worth asking. The possible caveat is: should the difficulty of framing a clear rule that sets forth the criteria for other grounds foreclose the Court from finding a Due Process violation in cases involving litigant funding of judicial seats? Roberts – along with Scalia and Justices Clarence Thomas, and Samuel Alito – of course concluded that the failure to find clear and bright lines *should* foreclose such Due Process conclusions.

Roberts’ sentiments were echoed by Scalia himself in separate dissent. Displaying his substantial rhetorical gifts, Scalia wrote that:

what above all else is eroding public confidence in the Nation’s judicial system is the perception that litigation is just a game, that the party with the most resourceful lawyer can play it to win, that our seemingly interminable legal proceedings are wonderfully self-perpetuating but incapable of delivering real-world justice. The Court’s opinion will reinforce that perception, adding to the vast arsenal of lawyerly gambits what will come to be known as the *Caperton* claim.<sup>53</sup>

Then, taking things up a notch, he concluded with a remarkable swipe at the majority:

A Talmudic maxim instructs with respect to the Scripture: “Turn it over, and turn it over, for all is therein.” 8 The Babylonian Talmud: Seder Nezikin, Tractate Aboth, Ch. V, Mishnah 22, pp. 75 – 77 (I. Epstein ed.1935) (footnote omitted). Divinely inspired text may contain the answers to all earthly questions, but the Due Process Clause most assuredly does not. The Court today continues its quixotic quest to right all wrongs and repair all imperfections through the

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<sup>52</sup> *Id.* at 898.

<sup>53</sup> *Id.* at 903 (Scalia, J., dissenting).

Constitution. Alas, the quest cannot succeed—which is why some wrongs and imperfections have been called nonjusticiable. In the best of all possible worlds, should judges sometimes recuse even where the clear commands of our prior due process law do not require it? Undoubtedly. The relevant question, however, is whether we do more good than harm by seeking to correct this imperfection through expansion of our constitutional mandate in a manner ungoverned by any discernable rule. The answer is obvious.<sup>54</sup>

It is hard to know where to begin in reacting to the *Caperton* dissenters. The bottom line is that they believed that the importance of not dulling what they took to be extant bright-line rules for when judicial recusal is constitutionally required meant that the Court could not go one inch further in policing recusals, even to correct blatant improprieties with respect to judicial impartiality. The irony for Scalia, of course, is his contention that the importance of clear rules lies precisely in their contribution to rule-of-law values. Jurists from Dicey and Hayek to Raz, Bingham, and Waldron treat the observance of due process, including the provision of impartial tribunals, not as instrumental to the rule of law, but as essential to it. It is as if the Court had before it an appeal from a conviction based on an unpromulgated criminal law, yet Roberts and Scalia somehow concluded that, because it is too difficult to set a bright-line rule for what counts as “unpromulgated,” the Court could not justifiably intervene. Abandoning the imperative of judicial impartiality because one cannot find sufficiently rule-like words to craft one’s holdings is throwing out an incontrovertibly critical component of the rule of law to satisfy a puzzlingly strong commitment to a bright-line-rules-or-nothing approach to adjudication.

Scalia’s remarkable comparison of the majority’s approach to Talmudic exegesis is (to spoil its charm) fundamentally an epistemic critique. He regarded it as fantastical to suppose that omniscient knowledge of what process is appropriate is provided by the Due Process Clause. In adverting to Talmudic scholars, he was contending that judges who strive to glean such knowledge from the words of the Constitution are essentially engaged in faith-based or magical thinking that has no place in our legal system.

But this, too, is more than hyperbolic: it is flat-out false. The contention that the majority was relying to an implausible degree on the words of the Due Process Clause presumes that there was little else to support its analysis. Even putting aside its use of precedent – which of course is perfectly conventional within the realm of constitutional adjudication – the majority adverted to a variety of codes that lawyers and judges have constructed to flesh out norms of judicial impartiality.<sup>55</sup> And central

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 898 (Kennedy, J.) (discussing state judicial conduct codes and the ABA’s Model Code of Judicial Conduct).



to Kennedy's analysis was the principle that a judge's own reflection on his subjective motives does not suffice where there are strong objective indicia of potential bias. This is not a rabbit pulled out of a hat or a wisp of religious wisdom 'discovered' in the vagaries or interstices of a sacred text. It is drawn from an institutional understanding of the judicial role that is articulated in a range of positive laws and norms of the legal profession.

Lest we find ourselves engaging in the sort of hysterical overreaction to the *Caperton* dissenters that we are attributing to them, it is worth considering two aspects of Kennedy's analysis that might be taken to justify the tone and substance of their dissents. First, while the facts of *Caperton* itself are quite stunning,<sup>56</sup> it is a fair question whether the actual language Kennedy employed to articulate the Court's holding was problematic. At various points in his opinion, there are suggestions that the determination of whether there is a due process problem is all a matter of degree. And a key sentence near the end of the opinion reads as follows: "On these extreme facts *the probability of actual bias rises to an unconstitutional level.*" (emphasis added).<sup>57</sup> A legal test that turns on when a "probability" reaches an undefined magnitude is quintessentially a fact-intensive standard. Thus, if one were to focus exclusively on this articulation of the Court's holding, one would perhaps be justifiably concerned that the majority was inviting lower courts to engage in know-it-when-I-see-it jurisprudence. Relatedly, much of Kennedy's opinion involves a trial-court-like application of this standard to the particular facts of the case before him, rather than laying out the analytical framework that lower courts should use in future cases.

Second, one might think that the majority opinion at moments poured fuel on the fire by manifesting what for Kennedy was a characteristically Chancery-like conception of the Supreme Court's role in our legal system. After suggesting that the facts of *Caperton* were "extraordinary" and "extreme by any measure," and after insinuating that situations like it are bound to be rare, he wrote:

It is true that extreme cases often test the bounds of established legal principles, and sometimes no administrable standard may be available to address the perceived wrong. But it is also true that extreme cases are more likely to cross constitutional limits, requiring this Court's intervention and formulation of objective standards. This is particularly true when due process is violated.<sup>58</sup>

On the Court, Kennedy famously occupied a position like that of Justices Sandra Day O'Connor and Lewis Powell before her. Like these predecessors, Kennedy often

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<sup>56</sup> As the majority noted that, another West Virginia justice who had received campaign funds from Blankenship had been photographed on the Riviera with Blankenship during the pendency of the appeal of the judgment against Massey. *Id.* at 874.

<sup>57</sup> *Id.* at 887.

<sup>58</sup> *Id.*

presented himself as moderate and restrained in his exercise of power, but the political reality on the Court was that he possessed, and knew he possessed, extraordinary power as the swing Justice. While the joint opinion in *Casey* and other substantive due process decisions obviously rankled Scalia more, Kennedy's language in *Caperton* seems almost designed to trigger for Scalia the image of Louis IX dispensing 'justice' from under the oak tree.

We offer these points not to justify the *Caperton* dissents but to dig deeper – to re-examine our rule-of-law-based critique of the dissents. It is plausible that Kennedy's underspecified holding, along with his equity-like conception of judicial power, combined synergistically to reduce the dissenters nearly to apoplexy. They seem to have perceived in Kennedy's opinion a kind of an overconfidence in the Court's capacity to right wrongs that come before it, as if Kennedy conceived of the judgment exercised by the Justices as a kind of intuitive seeing where the constitutional lines are and when they have been crossed. Scalia believed that this was pernicious self-aggrandizement, doubly so in a federal system. The fact that there is an obvious due process problem in some cases – as in *Caperton* itself – makes it seem silly, foolish, or corrupt to deny that there are such lines, but the hard truth is that there are none to be drawn. There are only individuals exercising power based on their own discretionary judgments. To elevate decisions based on personal preference to the level of law – and indeed supreme law – was for Scalia a usurpation and arbitrary exercise of power. This is perhaps why *Caperton* struck him an instance of the rule of persons, and thereby antithetical to the rule of law.

In the end, our (charitable!) reconstruction of the dissenters' view does not rescue it, but instead compounds the already substantial irony we have observed within an understanding of adjudication that invokes rule-of-law considerations as the ground for turning a blind eye to blatant judicial impropriety. In saying this, we do not mean to advert to the expanding crisis of confidence in a Court with some members who seem to see themselves as above both the principles and the rules of judicial ethics. Rather, the further irony we have in mind is that the aspects of Kennedy's reasoning that seem to have so irked the dissenters derive from Kennedy's own efforts to be restrained in his reasoning and not to overstep his judicial role, again for reasons of institutional fidelity and respect for the rule of law.

To Scalia's credit, he was explicit in *The Rule of Law as a Law of Rules* in identifying and criticizing the view that context-sensitive decision-making aids the cause of judicial restraint. A Supreme Court decision of this sort turns out to look less like a guide for other actors in our legal system, which is what it should be, and more like an imprint of judicial personality and judgment. This, he argued, actually undermines the predictability of the law and elevates the importance of the individuals staffing the court, as compared to the institution and the law itself. Perhaps this is what Scalia found so agitating in *Caperton*.

Perhaps. The problem is that nothing we have said to render the *Caperton* dissenters' position more understandable speaks to the merits of the decision. At

most, they speak to certain features of Kennedy’s presentation, and none speaks to the issue of whether egregious failures of judges to recuse themselves ought to be deemed consistent with Due Process. As should be apparent, we believe they should not. Here we note that both the reasons they should not, and the standards that should be used to govern future decisions about when a constitutional violation has occurred, can be expressed in words quite distant from “probability” and without requiring adoption of anything like a “we-know-it-when-we-see-it” standard. Indeed, as Jed Shugerman has pointed out, it is not so difficult to find a ruling that provides guidance in many of things that Kennedy’s opinion actually says.<sup>59</sup> The core issue in *Caperton* was whether, objectively, it creates an “appearance of impropriety” for a recently elected judge to decline to recuse himself from participating in the review of a lower-court decision against an entity that is run by the person who served as that judge’s main electoral benefactor, and whose outsized beneficence was bestowed in an election that took place while the appeal of the very decision at issue was pending. It does. Both as a matter of legal ethics and judicial ethics, this sort of situation is paradigmatic of the type of situation in which an obvious potential conflict of interest requires the judge to recuse. Though sometimes obscured by Kennedy’s use of probability language and his allusions to an image of the Court as a court of discretionary error-correction, these points can all be found in the majority opinion.

### **B. *Anderson* and Qualified Immunity**

Our second example of an especially troubling law-of-rules decision by Scalia comes from an area more sensitive and timely than that of judicial conflicts of interest, namely, the doctrine of qualified immunity within the law of constitutional torts. In *Anderson v. Creighton*, Scalia, writing for a majority, addressed the potential liability of law-enforcement officers who conducted an unlawful search of an innocent family’s home.<sup>60</sup> *Anderson* held that officers are “entitled to summary judgment in all cases where,” as a matter of law, they *could* reasonably have believed that their search was lawful “in light of the clearly established principles governing warrantless searches.”<sup>61</sup> As we argue below, Scalia’s decision for the Court, even more than other Court rulings in the domain of constitutional torts, stands as a road block to accountability for police officers who have trampled on individuals’ constitutional rights.

Legal scholars have paid less attention to *Anderson* than we think warranted, partly because it might seem at first blush to add incrementally to an already liability-restrictive test that the Court had previously adopted in another, better-known

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<sup>59</sup> Shugerman, *supra* note 44, at 541-49 (discussing precedents for, and the relatively determinate nature of, an appearance-of-impropriety standard as the measure for when Due Process requires recusal).

<sup>60</sup> 483 U.S. 635 (1987).

<sup>61</sup> *Id.* at 641.

decision. This is a mistake. Scalia's *Anderson* opinion displays the same paradoxical twist found in his (and Roberts') *Caperton* dissents: the insistence on bright-line rules dramatically undercuts the rule of law.

By way of stage setting, *Anderson* must be examined against the backdrop of three lines of cases. We begin, first, with Section 1 of the federal Enforcement Act of 1871 – the predecessor to the law that is today known as 42 U.S.C. § 1983. It authorized civil actions in federal courts by individuals who suffer constitutional rights violations at the hands of persons acting under color of state law. Moribund for almost a century, the statute received new life in the Supreme Court's 1961 decision in *Monroe v. Pape*.<sup>62</sup> *Monroe* expanded the reach of the statute by making clear that its "under color of law" requirement does not require the plaintiff to prove that the defendant officials were fully complying with their state-law duties when they violated the plaintiff's federal constitutional rights.<sup>63</sup>

A subsequent case, *Pierson v. Ray*,<sup>64</sup> introduced the idea that this newly revived form of liability is subject to a qualified immunity defense. The plaintiffs, African-American and White ministers, peacefully entered a 'whites-only' waiting room at a bus terminal in Jackson, Mississippi. Police ordered them to leave and, when they did not, arrested them for violating a state law prohibiting persons from congregating in manner likely to cause a breach of the peace. The plaintiffs sued under Section 1983, alleging that the arrests violated their rights under the Equal Protection Clause of the Fourteenth Amendment. The Court concluded that, even if the police had in fact violated the plaintiffs' rights by unconstitutionally enforcing racial segregation in the bus terminal, the officers would not be subject to liability if they could persuade a jury that they had acted in the good faith belief that they had probable cause to arrest the plaintiffs for threatening to cause a breach of the peace. By contrast, no immunity would attach if the jury were to find that the police arrested the plaintiffs simply to maintain racial segregation. Thus, the Court remanded for jury trial on the question of whether the arresting officers "reasonably believed in good faith that the arrest was constitutional."<sup>65</sup>

The second important line of cases commenced with the Court's landmark *Bivens* decision.<sup>66</sup> It ruled that, while Section 1983 applies by its terms to state governmental officials, the Fourth Amendment itself generates a private right of action for damages for a person whose rights under the Amendment are violated by a search conducted by officials. *Bivens* doctrine, then and now, is thus understood to impose the equivalent of Section 1983 liability on *federal* officials, which liability regime includes the doctrine of qualified immunity recognized in *Pierson*.

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<sup>62</sup> 365 U.S. 167 (1961).

<sup>63</sup> *Id.* at 187.

<sup>64</sup> 386 U.S. 547 (1967).

<sup>65</sup> *Id.* at 557.

<sup>66</sup> *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

Having deemed *Bivens* a “landmark,” we should acknowledge the well-known fact that majorities on both the Rehnquist and Roberts Courts have expressed great hostility to the idea of private tort rights of action under the Constitution, based in part on a broader skepticism about the idea of implied rights of action. In keeping with this skepticism, they have deliberately restricted the availability of *Bivens* actions for violations of a range of constitutional rights, and have greatly diminished the prospects of civil rights plaintiffs successfully suing federal actors (quite apart from the Court’s expansion of qualified immunity). Emblematic of this outlook is *Hernández v. Mesa*, which rejected a *Bivens* suit alleging that a federal border agent had shot and killed a 15-year-old boy while the boy was playing a game with friends that involved running back and forth across a culvert that marked the U.S.-Mexico border.<sup>67</sup> Nonetheless, *Bivens* is still available for core Fourth Amendment violations, and indeed the key claims in *Anderson* were *Bivens* claim against FBI officers.

Third and finally, a decade after *Bivens*, the Supreme Court revisited the issue of qualified immunity in *Harlow v. Fitzgerald*.<sup>68</sup> After plaintiff Fitzgerald was discharged from his position in the military in retaliation for testifying before a Congressional subcommittee about cost overruns, he sued President Nixon and White House staff for violations of both statutory and First Amendment rights. In a companion case, the Court held that the President enjoys *absolute* immunity from civil liability for constitutional rights violations resulting from actions taken within the scope of his official duties.<sup>69</sup> In *Harlow*, by contrast, it bestowed only qualified immunity on other executive branch officials.

Specifically, Powell’s opinion in *Harlow* deemed ordinary officials immune from liability for rights-violations unless they acted with “malicious intention to cause a [rights-deprivation].”<sup>70</sup> It further held that this test for bad faith has an “objective reasonableness” component, such that officials who raise the qualified immunity defense should prevail so long as “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known.”<sup>71</sup> Thus, judges would henceforth be required to examine the state of the law at the time of the official’s alleged wrongful actions to determine if there was a clearly established rule prohibiting the action in question. The proffered justification for this approach was two-fold: it would give officials breathing room to allow them to act “with independence and without fear of consequences,”<sup>72</sup> while also enabling courts to

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<sup>67</sup> 589 U.S. \_\_\_, 140 S. Ct. 735 (2020) (declining to “extend” *Bivens* to claims for constitutional rights violations that arise from a cross-border shooting on the ground that permitting it might interfere with the province of the executive branch to conduct foreign relations and maintain border security).

<sup>68</sup> 457 U.S. 800 (1982).

<sup>69</sup> *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

<sup>70</sup> *Harlow*, 457 U.S., at 815.

<sup>71</sup> *Id.* at 818.

<sup>72</sup> *Id.* at 819.

dispose of insubstantial claims without the difficulties, expenses, and delays of discovery and trial.<sup>73</sup>

With this background in place, we now turn to *Anderson*. The Eighth Circuit's recitation of the facts of *Anderson* were (appropriately) taken in part from the plaintiffs' pleadings. The backdrop is that a man named Dixon had allegedly been involved in a bank robbery on the afternoon of November 11, 1983, and that persons whom the police had interviewed allegedly stated that Dixon and his wife had sometimes stayed overnight with Dixon's sister, Sarisse Creighton. Events then unfolded as follows:

.... On the night of November 11 ... Sarisse and Robert Creighton and their three young daughters were spending a quiet evening at their home when a spotlight suddenly flashed through their front window. Mr. Creighton opened the door and was confronted by several uniformed and plain clothes officers, many of them brandishing shotguns. All of the officers were white; the Creightons are black. Mr. Creighton claims that none of the officers responded when he asked what they wanted. Instead, by his account (as verified by a St. Paul police report), one of the officers told him to "keep his hands in sight" while the other officers rushed through the door. When Mr. Creighton asked if they had a search warrant, one of the officers told him, "We don't have a search warrant [and] don't need [one]; you watch too much TV."

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One of the officers asked Mr. Creighton if he had a red and silver car. As Mr. Creighton led the officers downstairs to his garage, where his maroon Oldsmobile was parked, one of the officers punched him in the face, knocking him to the ground, and causing him to bleed from the mouth and forehead. Mr. Creighton alleges that he was attempting to move past the officer to open the garage door when the officer panicked and hit him. The officer claims that Mr. Creighton attempted to grab his shotgun, even though Mr. Creighton was not a suspect in any crime and had no contraband in his home or on his person.<sup>74</sup>

The officers who conducted the raid included FBI agent Anderson, as well as several police officers employed by the city of St. Paul. The plaintiffs sued the city officer-defendants under Section 1983, while suing agent Anderson under *Bivens*, and it was the claim against Anderson that remained

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<sup>73</sup> *Id.* at 818.

<sup>74</sup> *Creighton v. City of St. Paul*, 766 F.2d 1269, 1270-71 (8th Cir. 1985), *rev'd sub nom.* *Anderson v. Creighton*, 483 U.S. 635 (1987).

when the case went to the Eighth Circuit and the Supreme Court.<sup>75</sup> As to all of the defendants, plaintiffs argued that they had been subjected to an unconstitutional search in violation of the Fourth Amendment because there was no probable cause for the search. Even if there had been probable cause, their complaint added, the officers had not obtained a warrant and the exigent circumstances exception to the warrant requirement were not satisfied. The District Court judge granted Anderson's summary judgment motion, concluding that, as a matter of law, there was probable cause for the search and there were grounds for invoking the exigent circumstances exception to the warrant requirement.

The three-judge Eighth Circuit panel reversed. On both the probable cause and the exigent circumstances issues, the court explained in a carefully reasoned and detailed opinion, Anderson was not entitled to summary judgment because numerous issues of fact needed to be resolved in connection with them.<sup>76</sup> The panel then took up the qualified immunity defense, using *Harlow* as its guide.

Because it sheds light on the qualified immunity rule that ultimately emerged from the Supreme Court's own analysis, it is worth quoting the Eighth Circuit's treatment of it at length:

In *Harlow*, the Supreme Court held that "government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." . . . Anderson argues that, under *Harlow*, he is entitled to immunity from damages if his conduct was "objectively reasonable." However, this misstates the standard. *Harlow* does not give courts unguided discretion to determine what conduct is or is not objectively reasonable. Instead, the *Harlow* Court stated that the first inquiry of the qualified immunity analysis is whether, assuming that the government defendant violated plaintiffs' constitutional or statutory rights as they are presently defined, did the defendant's conduct "violate *clearly established* statutory or constitutional rights of which a reasonable person would have known" of [sic] at the time of the alleged violation? The Court then stated that "if the law was clearly established, the

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<sup>75</sup> The federal officers successfully removed to federal court, while the 1983 claims (and related state claims) against state officers were remanded to state court.

<sup>76</sup> A close reading of the opinion suggests the appellate court really sought a jury finding on facts on the probable cause issue – where it was quite a close call -- while it was quite skeptical that the defendants' factual pleadings would warrant an exigent-circumstances finding.

immunity defense ordinarily should fail since a reasonably competent public official should know the law governing his conduct.”<sup>77</sup>

The Eighth Circuit then found that the Creightons’ Fourth Amendment rights and the exigent circumstances doctrine were “clearly established” on November 11, 1983, and that Anderson had “cited no persuasive reason why he could reasonably have been unaware of this clearly established law.”

Scalia’s avowed commitment to *very* bright lines (and the law of rules) is robustly displayed in *Anderson*, as we explain below. Preliminarily, it must be acknowledged that *Harlow v. Fitzgerald* had previously held that objectively reasonable conduct (relative to the clear constitutional law at the time) defeats liability even when there is a showing that the defendant official harbored subjective malice toward the plaintiff. In so doing, *Harlow* embraced a brighter line than had been in place before. What is remarkable about *Anderson*, however, is that Scalia’s reversal of the Eighth Circuit relies upon not one or two but at least *three* conjoined arguments about the virtue of bright lines in the law. To foster clarity, we will label these: (1) *definitiveness of right*; (2) *procedural cushion*; and (3) *generality of doctrine*.

Definitiveness of Right: The best-know aspect of *Anderson* is its holding that, for a constitutional tort plaintiff to overcome an official’s qualified immunity requires much more than proving that the defendant violated a clearly established right, which an objectively reasonable government actor would have been aware. Rather, the plaintiff must show that the right allegedly violated was clearly established at the correct level of specificity, i.e., “in a more particularized, and hence more relevant, sense.”<sup>78</sup> This led Scalia to reject the Eighth Circuit’s conclusion that the right not to have one’s home broken into at night without probable cause and a warrant was clearly established. Indeed, even when one qualified it as the right not to have one’s home broken into at night without probable cause and a warrant *absent exigent circumstances*, it was still not sufficiently well-defined. If the officer could reasonably but mistakenly have believed that the circumstances qualified as exigent circumstances, then qualified immunity should apply, he ruled. The Eighth Circuit, and dissenting Justices Stevens, Brennan, Marshall all regarded this as double counting in favor of the police officer, given that the Eighth Amendment’s probable cause and exigent circumstances doctrines themselves give officers considerable leeway.<sup>79</sup> But for Scalia, anything less sharply defined “would destroy ‘the balance that our cases strike between the interests in vindication of citizens’ constitutional rights and in public officials’ effective performance of their duties,’ by making it impossible for officials ‘reasonably [to] anticipate when their conduct may give rise to

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<sup>77</sup> *Creighton*, 766 F.2d at 1277 (quoting *Harlow*) (internal citations omitted).

<sup>78</sup> *Anderson*, 483 U.S. at 640.

<sup>79</sup> *Id.* at 648-49 (Stevens, J., dissenting).



liability for damages.”<sup>80</sup> As in his *Caperton* dissent, Scalia here insists that allegedly crucial rule-of-law principle requires a very sharply demarcated rule of liability.

Procedural Cushion: The Eighth Circuit had concluded that summary judgment was unwarranted because whether it would be reasonable for the officers to regard themselves as having “probable cause,” under the circumstances, and whether it would be reasonable to think their situation qualified as an “exigent circumstance,” turned on contested issues of fact. Justice Stevens’ dissent took the same view: even if the right not to have one’s home invaded without proper grounds was clearly established, government defendants would be entitled to try to prove at trial that they held a good faith reasonable belief that the conduct was legally and constitutionally permissible, i.e., that their conduct did not amount to a rights-violation.<sup>81</sup> While Stevens acknowledged that *Harlow* incentivized pre-discovery determinations of whether there was a clearly established right in order to forestall unnecessary litigation expenses for government officials (in cases in which the plaintiff alleged the violation of right that had not been clearly established), it nonetheless recognized that the qualified immunity defense raises fact issues as to whether the defendants held a reasonable good faith belief in the legal permissibility of their actions. Scalia, by contrast, rejected the Eighth Circuit’s procedural conclusion (about the existence of issues of fact) by subtly changing the reasonableness inquiry. The question was no longer whether the defendants held the belief that their conduct was lawful, or whether they held that belief in good faith, or whether it was a reasonable belief. Rather the question became, in Scalia’s hands, whether a “reasonable officer *could* have believed” the conduct in question was lawful, “in light of clearly established law and the information the searching officers possessed.”<sup>82</sup> The opinion in turn makes crystal clear that courts are expected to be able to answer this question as a matter of law before going to trial. It is not a question of fact any longer, but a hypothetical question of what a reasonable officer *could have believed*. In short, a seemingly minor change to the *Harlow* test dramatically extended the reach – the bright-line-ness – of the qualified immunity defense.

Generality of Doctrine. In *Anderson*, lawyers for the Creightons argued to the Court that *Harlow* was an entirely different kind of case involving higher public officials (presidential aides) and that a different analysis sensibly could apply to run-of-the-mill policing cases involving allegedly unconstitutional searches of innocent persons’ homes. For his part, Stevens accepted that this distinction was of crucial importance:

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<sup>80</sup> *Id.* at 239 (Scalia, J.) (quoting *Davis v. Scherer*, 468 U.S. 183, 195 (1984)).

<sup>81</sup> *Id.* at 657-58 (Stevens, J., dissenting).

<sup>82</sup> *Id.* at 641 (Scalia, J.) (emphasis added).

As the Court of Appeals recognized, assuring police officers the discretion to act in illegal ways would not be advantageous to society. While executives such as the Attorney General of the United States or a senior assistant to the President of the United States must have the latitude to take action in legally uncharted areas without constant exposure to damages suits, and are therefore entitled to a rule of qualified immunity from many pretrial and trial proceedings, quite different considerations led the Second Circuit to recognize the affirmative defense of reasonable good faith in the *Bivens* case. Today this Court nevertheless makes the fundamental error of simply assuming that *Harlow* immunity is just as appropriate for federal law enforcement officers such as petitioner as it is for high government officials. .... [T]he Court errs by treating a denial of immunity for failure to satisfy the *Harlow* standard as necessarily tantamount to a ruling that the defendants are exposed to damages liability for their every violation of the Fourth Amendment.<sup>83</sup>

While Scalia appeared to reject this suggestion out of hand, he offered a telling response to a variant of the suggestion – that the Court should be especially unwilling to stretch qualified immunity to warrantless searches for fugitives and thereby put into play the nuances of the common law.

The general rule of qualified immunity is intended to provide government officials with the ability “reasonably [to] anticipate when their conduct may give rise to liability for damages.” *Davis*, 468 U.S., at 195 .... Where that rule is applicable, officials can know that they will not be held personally liable as long as their actions are reasonable in light of current American law. That security would be utterly defeated if officials were unable to determine whether they were protected by the rule without entangling themselves in the vagaries of the English and American common law. We are unwilling to Balkanize the rule of qualified immunity by carving exceptions at the level of detail the Creightons propose.<sup>84</sup>

Once again, Scalia depicts the effort to draw distinctions as an enemy of basic rule-of-law values. Conversely, a Court that knows how to stand firm with a bright-line rule is one that knows how to treat legal actors fairly by giving them adequate notice and guidance for how to steer clear of liability.

When Scalia has completed his efforts to brighten the lines of qualified immunity in the several ways described above, the result is – as Stevens put it – one

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<sup>83</sup> *Id.* at 653-55 (Stevens, J., dissenting).

<sup>84</sup> *Id.* at 646 (Scalia, J.) (quoting *Davis v. Scherer*, 468 U.S. 183, 195 (1984)).

that “stunningly restricts the constitutional accountability of police” by adopting “a new rule of law that protects federal agents who make forcible nighttime entries into the homes of innocent citizens without probable cause, without a warrant, and without any valid emergency justification for their warrantless search.”<sup>85</sup> Here, once again, the law of rules is supposedly being put to work to justify the rule of law. And yet, even thin understandings of what the rule of law stands for include the notion that government officials are *not above the law* but rather must operate within a regime that, in general, operates so as to assign some adverse consequences for their unlawful acts.

*Caperton* and *Anderson* are just two cases, but the phenomenon they illuminate can be found elsewhere in Scalia’s decision-making and in the opinions of the many jurists he has influenced. Some examples are as striking as the two we selected in illustrating the paradoxical tendency of bright-line-rule formalism to undercut values central to the rule of law (on even a thin rendition). Candidates may include: the Court’s expansion of Eleventh Amendment immunity, its resistance to *Bivens* claims for grotesquely abusive government conduct, the unwillingness for a long period of time to consider rendering the Excessive Fines Clause enforceable, and Scalia’s notorious attachment to due process notions too narrow and archaic even for Chief Justices Rehnquist and Roberts. While there may be some cases or domains in which the embrace of bright-line rules does indeed foster important rule-of-law values, Scalia’s broad contention that the rule of law is a law of rules cannot be sustained, and indeed turns out to be shallow and self-defeating.

#### IV. The Rule of Law and Legal Reasoning in the Common Law

It will be tempting to see the foregoing critique as yet another in a too-long line of hypocrisy-based takedowns of prominent jurists. Scalia, we can be read to say, claimed to be deciding cases on rule-of-law-inspired principles but in the end issued opinions inconsistent with them. This description of our essay is not completely unwarranted. For the two examples we have discussed at length – declining to address the obvious appearance of corruption at a top state court and refusing to permit accountability for textbook civil rights violations by racist police officers – we have bridled at Scalia’s audacity in defending his conclusions on the grounds that doing so was necessary to sustain or advance the rule of law, and we obviously have succumbed to the temptation to call him out for it.

Without wholly disowning this aspect of our project, we nonetheless maintain that it is not our main point. For a famous and even moderately self-righteous judge of any ideological stripe, one probably can find instances of hypocrisy. Scalia – one of the longest serving Justices in our history – is no exception. Our other and more important points are twofold. The first is that, notwithstanding his identification of

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<sup>85</sup> *Id.* at 647 (Stevens, J., dissenting).

the rule of law as a fundamental theme of the modern conservative counterrevolution in American law, he and probably many of his fellow conservatives have on these and other occasions operated with an indefensibly selective notion of what it means for a legal system to observe the rule of law. The expansion of qualified immunity almost to the point of treating government actors as exempt from the rules that apply to others, the lack of concern for a seemingly blatant violation of judicial impartiality, and the lack of interest more generally in seeing to it that extant law actually applies and is enforceable – all of these display an impoverished understanding of what it means for a legal system to instantiate or respect the rule of law. As we have noted, this criticism stands even without packing the ideal of the rule of law with progressive values.

Our second concern cuts deeper still. It seems to us that a certain approach to adjudication – one that is on its face not inherently conservative or progressive – has gained a great deal of credibility among American lawyers today, not only in the Supreme Court, but in federal and state courts around the country. The accumulated power and popularity of this approach is, we suspect, attributable in significant part to the power of Scalia’s vision, the thought among many lawyers that he was unusually acute and candid in his opinions and extra-judicial writings, and the notion that rule-of-law values transcend political differences. Today, many jurists in the United States today seem to believe, with Scalia (and in part thanks to Scalia) that taking the rule of law seriously requires accepting the ‘hard truth’ that appellate judges cannot dispense justice in anything like a context-sensitive manner. If we are truly to be a nation of laws, not persons (the thought goes), we must instead adopt and follow bright-line rules and bite lots of (supposedly) distasteful bullets in the process.<sup>86</sup>

We have chosen to focus on *Caperton* and *Anderson* because they are emblems of two domains of legal controversy that plainly lie at the core of rule-of-law concerns. In each case, a stern insistence on bright-line rules seems to eviscerate the law’s capacity to hold true to those values. And in each case, this is for a combination of three reasons: (i) a bright-line rule that would work in favor of persons seeking to change official behavior or hold officials accountable is unavailable;<sup>87</sup> (ii) the complexities of the issues at hand preclude finding a moderate approach that can be articulated in bright-line rules; (iii) the only bright-line rules thus available are extraordinarily permissive to the relevant government actors and thus necessarily (if unfortunately) under-protective of critically important rule of law values.

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<sup>86</sup> In a related vein, one of us has criticized the view that austere, tough-minded approaches to adjudication are best suited to render decisions that comport with and advance rule-of-law values. See Benjamin C. Zipursky, *Austerity, Compassion, and the Rule of Law*, in *IMAGINATION, VIRTUE AND EMOTION IN LAW AND LEGAL REASONING* (A. Amaya & M. Del Mar eds., 2020).

<sup>87</sup> In the first case, such a rule is unavailable because it would be inconsistent with federalism. In the second, it would be too onerous given special policy considerations that justify granting police more leeway to commit legal wrongs than private citizens.

What we regard as the untenability of the dissent’s position in *Caperton* and the majority position in *Anderson* – that both are required *because of rule-of-law values* – leads us to try to isolate what is wrong with the arguments invoked in support of them. In our view, the weakest link is the contention that the elaboration of doctrine in complex areas will inevitably generate domains of judicial caprice comparable to the justice dispensed at the whim of Louis IX. Why should we accept that this is so?

Here again we must give credit to Scalia for recognizing, at some level, that the resolution of this question is central to his overall defense of bright-line rules. Indeed, it is the subject of what may be his other best-known extra-judicial writing: an essay titled *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*.<sup>88</sup> For reasons we will know explain, this essay completes the argument made in *The Rule of Law as the Law of Rules*.

In its arresting opening pages, *Common-Law Courts* relays the lessons that purportedly were taught to Scalia and his fellow Harvard 1Ls by their “crusty” if “good-hearted” professors.<sup>89</sup> These were as follows: (1) American law is at its core common law; (2) in modern times, there is no such thing as “common law,” if by that phrase one means law that reflects customary norms and practices; (3) the actual referent of the phrase “common law” is instead law that has been “invented” by judges acting in the manner of a “king”; and (4) judicial law-invention is distinct from the type of lawmaking done by Louis IX only in that it requires skills that enable the judge to play the “game” of distinguishing precedents.<sup>90</sup> A student so instructed is left with the strong impression – indeed, according to Scalia, an impression that lasts “for life” – that great judges are those with ‘sound’ views on what case outcomes are instrumentally best, and who possess the verbal dexterity that permits them to present those outcomes as warranted by precedent.

Scalia goes on to cite – and, it would seem, to endorse – the Benthamite critique of common-law adjudication offered back in 1836 by Massachusetts legislator and later U.S. Senator Robert Rantoul:

“Judge-made law is ex post facto law, and therefore unjust. . . . The legislature could not effect this, for the Constitution forbids it. The judiciary shall not usurp legislative power, says the Bill of Rights; yet it not only usurps, but runs riot beyond the confines of legislative power.

Judge-made law is special legislation. The judge is human, and feels the bias which the coloring of the particular case gives. If he wishes to

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<sup>88</sup> ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3-48 (New Ed. 2018) (providing this essay along with commentary from other jurists and a response).

<sup>89</sup> “Arresting” is our attempt at a relatively neutral description. Scott Hershovitz has described them as “defamatory” (of common law judges). SCOTT HERSHOVITZ, *LAW IS A MORAL PRACTICE* 50 (2023).

<sup>90</sup> SCALIA, *supra* note 4, at 3-9.

decide the next case differently, he has only to distinguish, and thereby make a new law. The legislature must act on general view, and prescribe at once for a whole class of cases.”<sup>91</sup>

This strong condemnation notwithstanding, Scalia allowed that the common law – understood as a regime of judges as quasi-kings who dispense ad hoc (in)justice – might be tolerable or even desirable (!) if confined to certain fields of the law (presumably areas such as property and torts). The real problem with the common law, he argued, is not its application in these narrow domains, but instead the judicial mentality it creates – a mentality that, when it is carried over from these outposts to the heartland of modern law, creates huge problems:

though I have no quarrel with the common law and its process, I do question whether the attitude of the common-law judge—the mind-set that asks, “What is the most desirable resolution of this case, and how can any impediments to the achievement of that result be evaded?”—is appropriate for most of the work that I do, and much of the work that state judges do. We live in an age of legislation, and most new law is statutory law. ... It will not do to treat the enterprise [of statutory interpretation] as simply an inconvenient modern add-on to the judge’s primary role of common-law lawmaker. Indeed, attacking the enterprise with the Mr. Fix-it mentality of the common-law judge is a sure recipe for incompetence and usurpation.<sup>92</sup>

Scalia of course made clear that this same point applies to constitutional interpretation. He thus offered textualism in statutory interpretation and originalism in constitutional interpretation as the necessary antidotes to the exportation of the “Mr. Fix-it” mindset to American law writ large.

For this essay, it is obvious enough who are Scalia’s targets. In statutory interpretation, it is judges who invoke legislative “intent” or legislative history in the same way that (according to Scalia) common-law judges use precedent – as guises for acts of raw law-creation. In constitutional law, it is judges (especially progressive Justices of the Warren and Burger Court eras) who unashamedly adopt a pragmatist-instrumentalist approach under the label of “living constitutionalism.”

Note that these opponents are not necessarily the same opponents that Scalia targeted in *Law of Rules* essay, which seems at least as attentive to the problem posed by the ‘Chancellor’ model of adjudication of the sort sometimes associated with an

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<sup>91</sup> SCALIA, *supra* note 88, at 10-11 (quoting Robert Rantoul, *Oration at Scituate* (July 4, 1836), in KERMIT L. HALL, WILLIAM M. WIECECK & PAUL FINKLEMAN, *AMERICAN LEGAL HISTORY: CASES AND MATERIALS* 317, 317-18 (1991)).

<sup>92</sup> *Id.* at 13-14.

O'Connor or a Kennedy than the imperial model sometimes associated with a Brennan or a Posner. This merely indicates that, for Scalia, rule at the whim of judges can come in different forms. It might be the determined 'activist' who confidently invents broad unenumerated rights. Or it might be the superficially more cautious balancer who insists on deciding each case on a one-off basis. The thought is that the only hope for judging – and for all of us subject to judicial rulings – is the happy fact that the realm of the common law has been steadily shrinking, and that there are modes of adjudication in the ever-expanding realm of statutory and constitutional interpretation that can provide a check on radical judicial subjectivity. As we noted above in Part I, Scalia seems to suggest that these modes of adjudication offer such hope in large part because they encourage judges to interpret authoritative legal texts in terms of bright-line rules.

Scalia's argument, unfortunately, rests on nothing more than autobiography and *ipse dixit*. Indeed, at its center is the almost entirely undefended claim that the judicial reasoning characteristic of common law adjudication – constructing rules and standards out of categories, concepts, principles and rules found in case law – is necessarily discretionary and always a usurpation (even if, in certain narrow contexts, a tolerable one), whereas judicial reasoning involving a certain kind of textual interpretation (or, in the case of constitutional law, textual interpretation and historical analysis) amounts to genuine law-following and law-application. As scholars of tort law and students of American law generally, it strikes us as beyond remarkable that Scalia could so confidently rely on this distinction. Across-the-board Realist-style skepticism about legal reasoning has a certain logic to it: the thought is that legal concepts are 'nonsense' and hence incapable of constraining adjudicators, or that standard legal sources always underdetermine the decision in any contested case. By contrast, a sharp distinction between common-law reasoning (always a charade) and textualist statutory interpretation and originalist constitutional interpretation (authentic legal reasoning) is bizarre. The thought seems to be this: with authoritative texts, and only with authoritative texts, there can be the rule of law. In their absence, there can only be an endless sequence of judicial lawmaking. Bright legal lines emerging out of the process of textual interpretation is our only hope for fostering disciplined adjudication and, with it, the rule of law.<sup>93</sup>

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<sup>93</sup> While we are not advocating that common law should be crafted so that it is filled with Scalian clear rules, we would be remiss not to point out the obvious fact that such rules are hardly strangers to the common law and are today routinely applied by judges. (To stick to our knitting in torts: In many jurisdictions, a child under a certain age can't be deemed negligent; in all American jurisdictions of which we are aware a parent is not vicariously liable for the tortious conduct of their child; in no jurisdiction of which we are aware is driving a car or providing medical or legal services an "abnormally dangerous activity" to which strict liability applies, etc.) Thus, if it were desirable for the common law to be filled with bright-line-rules, there is plenty of experience-based reason to believe that it could be. What, then, permits Scalia to designate common-law adjudication as a uniquely irredeemable locus of judicial caprice?

Scalia's version of formalism presupposes an almost nihilistic attitude toward legal reasoning untethered from text. or text supplemented by a certain kind of objective historical inquiry. To say the same thing, it simply dismisses the thought – shared among accomplished jurists ranging from Cooley and Cardozo to Hart and Sacks to Fuller and Dworkin – that, just as there are authentic versions of statutory and constitutional interpretation that are not mere subterfuge, so there are authentic versions of common law reasoning that are not mere subterfuge. To put the point more affirmatively, each of these thinkers made the argument – and in the case of Cooley and Cardozo demonstrated in their judicial opinions – that there is a way for judges authentically to work with the categories, concepts, rules, and principles that are in the cases, and that provide genuine legal grounds for their decisions. This 'way' has nothing to do with the tired notion of mechanical jurisprudence, any more than textualism in statutory interpretation reduces down to the naïve supposition that words on a page speak univocally, such that they can only contain a single meaning. Rather, it involves the interpretive enterprise of making sense of – rendering coherent or reconstructing – a mass of evolving legal materials.

However best done (and, obviously, the jurists we have just mentioned disagreed on this question), some version of the common-law method is not inimical to the rule of law, but essential to it. It is what would allow a judge in *Caperton* to argue, cogently, that Due Process stands for (among other things) a notion of judicial impartiality that does not permit judges to participate in decisions when their doing so presents an obvious appearance of serious impropriety. It is what would allow a judge in *Anderson* to explain why the rule of law is being sacrificed, not advanced, by a bright-line rule of immunity that renders law enforcement officials unanswerable for violations of fundamental constitutional rights so long as a hypothetical reasonable officer in their position could believe, after consulting applicable judicial decisions, that their specific actions had not yet been marked off by a court as unlawful.

### **Conclusion**

We hope to have convinced readers, first and foremost, that it is simply a mistake to suppose, with Justice Scalia, that those who cherish the rule of law must endorse a legal regime dominated by bright-line rules. On standard and relatively modest conceptions of what it means for a legal system to adhere to the rule of law, bright-line rules will often degrade it rather than maintaining or advancing it. Not only is Scalia's argument to the contrary undermined by some of his own opinions, it relies on an undefended and implausible claim about the conditions under which genuine legal reasoning can take place. At a minimum, he offered no defense of that claim, which runs in the face of everyday legal experience and a huge body of thought about adjudication developed by jurists with a range of political and intellectual dispositions.

By exposing the unsoundness of Scalia's position, we are inviting those who have been influenced by his arguments to reconsider their zeal for bright-line rules in



judicial decision-making. Beyond that, we are suggesting that, without a commitment to the possibility of authentic legal reasoning that goes beyond the announcement of bright-line rules, the rule of law – in the most straightforward and uncontroversial sense of that term – will be imperiled.