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LAW AS FAITH: THE PERSONAL AND UNCONSTITUTIONAL JOURNEY FROM RULE OF LAW TO LAW OF RULISM

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***71 LAW AS FAITH: THE PERSONAL AND UNCONSTITUTIONAL JOURNEY
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Rules of law must be promulgated, and, so long as they do no wrong, must be upheld, but let us not forget the ringing words of Magna Charta . . . ‘To none will we sell, to none will we deny, to none will we delay justice. [\[FN1\]](#)

I. . .agree with Professor Wechsler that it is possible for Justices to articulate and apply reasonably clear rules of law, actually rooted in the Constitution, that may conflict with their personal and political views. [\[FN2\]](#)

I. Introduction

Rulists [\[FN3\]](#) extol the virtues of a Law of Rules [\[FN4\]](#) as the only, or perhaps most legitimate, approach to achieving the Rule of Law in constitutional interpretation. [\[FN5\]](#) Rulists equate “Rules” with the undefined and amorphous concept “Law,” a concept whose meaning has provoked philosophic debate for centuries, even millennia. [\[FN6\]](#) Using the openly clandestine analysis of sophistry, Rulists pull their favorite phrase, “Law of Rules” out of the “Rule of Law” hat. For example, with the title of his article, “The *72 Rule of Law as a Law of Rules,” [\[FN7\]](#) Supreme Court Justice Antonin Scalia either (1) equates the two phrases or (2) implicitly asserts that “Rule of Law” should be rewritten as “Law of Rules.” [\[FN8\]](#) Either way, Scalia, provides an example of Redrafting Rulism, redrafting while claiming to interpret or explain the phrase the “Rule of Law.” He applies his redrafted version of the “Rule of Law” to constitutional interpretation for the purpose of claiming elimination of imposing personal predilections in constitutional interpretation, the irony being that rewriting “Rule of Law” to say “Law of Rules” necessarily requires relying personal predilections.

This essay first demonstrates that equating “Rule of Law” to “Law of Rules” modifies rather than interprets “Rule of Law.” Second, the essay suggests and identifies the personal motivations behind equating “Rule of Law” to “Law of Rules.” Third, the essay demonstrates that equating “Rule of Law” to “Law of Rules” violates the principles behind the desire for a Law of Rules. Fourth, the essay demonstrates that the purpose behind making the equation cannot be achieved. And, finally, the essay seeks to prove that the purpose behind making the equation violates the rationality and morality (or at least principles) of the Constitution.

II. Scalia's Article: Equation of Modification

The title to Justice Scalia's article, "Rule of Law as the Law of Rules," uses an equation format to surreptitiously rewrite the phrase "Rule of Law." This essay does not seek to prove that numerous scholars and judges and other politicians rewrite the phrase "Rule of Law" under the pretense of explaining it, nor does this essay purport to be a social science paper with accurate statistical analysis designed to prove the exact number of scholars, judges or other politicians agree with the statement that "Rule of Law" really means "Law of Rules." [FN9] The essay assumes that at least some people who discuss "Rule of Law" actually intend to say "Law of Rules;" the fact that at least one sitting Supreme Court Justice, Scalia, takes this approach sufficiently justifies considering the significance of the rewrite. [FN10]

*73 Scalia's use of the term "as the" might suggest an equational phrase [FN11] with "as the" having the meaning equivalent to an "equal sign" in math. At first blush, "as the" strongly suggests an equality or an equation. [FN12] By using "as the" Scalia suggests an equivalence, even equality, between "Rule of Law" and "Law of Rules." Alternatively, "as the" could be an express effort to amend the meaning of "Rule of Law" in order to suggest that "Rule of Law" should be given the meaning in the phrase "Law of Rules." This essay first considers the possibility that Scalia's title suggests equality between the phrases "Rule of Law" and "Law of Rules." The essay takes this approach partly because "as the" does not really suggest an effort to amend meaning. [FN13] Certainly, a desire to amend the meaning of a phrase could be accomplished with a better phrasing and verb choice, and Scalia's words, at the very least, imply an equation. By exploring the ramifications of this assumption, this essay seeks to demonstrate the error of this assumption to demonstrate that Scalia's title cannot be an equation, and that while Scalia's title has the surface look of an equation "Rule of Law" is not, in fact, the same as "Law of Rules" .

A. Different Words; Same Meaning?

Seeing Scalia's title as a verbal equation creates visual clarity of the equation's effect. The verbal phrase "as the," i.e., the "equal sign," separates each side of the equation, and therefore, each side of the equation is equal, or rather, each side has the same meaning. [FN14] Each side contains a phrase with three words, in the middle of which resides the preposition "of." [FN15] The next assumption is that "of" means, well, "of," i.e., that the use of the word "of" in each of the three-word phrases has the same connotation and denotation. This conclusion, so obvious and unremarkable, obtains significance from the fact that the same word with the same meaning, i.e., "of," resides in the middle of two separate (and previously proclaimed to be equal) three-word phrases. In each phrase, two single words *74 bookend the middle word, "of," a word with the identical meaning and usage in each equated phrase. If the phrases equate and if each phrase has two words bookending the same word, "of," then one can reasonably conclude that: (1) the first word in each equated phrase has the same meaning; and (2) that the third word in each equated phrase has the same meaning. Each first word, as well as each third word, must be virtually identical.

Putting the above analysis into the context of Scalia's words, i.e., "rule of law as the law of rules," a number of conclusions follow. First, and most obvious, "Rule of Law" equals

“Law of Rules.” Second, “rule” and “law” have the same meaning. Third, singular and plural are indistinguishable. Visually this is proven thusly:

(1) Rule of Law equals (as the) Law of Rules.

(2) Rule (the first word of the first phrase) equals Law (the first word of the second phrase).

(3) Law (the third word of the first phrase) equals Rules (the third word of the second phrase).

(4) Using the equality suggested by Equation (2), Equation (3) becomes Rule equals Rules.

This conclusion conflicts with a fundamental law (rule?) of language, i.e., two words do not and cannot have identical connotations and denotations. Additionally, another law (rule?) of the English language is that an “s” at the end of a word changes the meaning of the initial word. “Car,” for example suggests one, single car, while “cars” suggests at least two cars. [\[FN16\]](#) “Car” and “cars,” then cannot possibly have the same meaning. Similarly, “rule” and “rules” cannot possibly have the same meaning, nor, of course, can “law” and “laws” have the same meaning. This article gives no proof to these two conclusions. The article accepts these two conclusions as fundamental premises of the English language. Perhaps the reader rejects the two premises, in which case describing Scalia's title as an equation may make perfect sense.

Under Scalia's Law of Interchangeability, as described above, i.e., (1) that plural and singular have the same meaning and (2) that the words “rule” and “law” have the same meaning, 256 possible equations exist. A few examples are:

Rule of Law equals Law of Rules, and

Rule of Law equals Law of Rule, and

Rule of Law equals Rule of Law, and

Rule of Law equals Rule of Rule, and

Law of Rules equals Law of Rules, and

Law of Rules equals Law of Rule, and

***75** Law of Rules equals Rule of Rule,

Etc., etc. . .

The first question might be whether the English language really supports 256 different ways to say exactly the same thing. This does not mean 256 ways of saying similar things, but 256 ways of saying exactly the same thing.

Assuming that the same thing can be said 256 ways, one might wonder why Scalia would choose one format over the other or whether Scalia had any reason rather than his own personal predilection for choosing one of 256 different versions of the same phrase. If each of the 256 versions has the same meaning, then the reader of Scalia's article might ask, “Why take the time and effort to make the change?” Admittedly, attacking the value of law review articles is great sport these days (ironically a sport which uses law review articles as a forum). Assuming each of the 256 versions has the same meaning, then an article taking the time to show preference for one of those 256 versions demonstrates utter absurdity. Assuming that the 256 versions have the same meaning, then Scalia's article explains his preference for choosing a different version of a phrase, a different version that has exactly the same meaning. Of course, since each version has the same meaning, there is no point in picking one version over the other nor really any point in reading his article any more than there would be much reason for reading an article with

the goal of proving that “one” has the same meaning as “1.” Assuming all 256 versions have the same meaning, there doesn't seem to be any reason to change the words, other than perhaps personal preference for phrasing.

The idea that “rule” and “law” have identical meanings, and that plural and singular indicate the same number inspires a final thought. One of the 256 versions would be “Rule of Rule means Rule of Rule” or “Laws of Laws mean Laws of Laws.” Such phrasing might make sense in the Wonderland of Alice's adventures, but surely they have no value in a discussion of jurisprudence. And yet, such a thing, is what Scalia requires if he asks his readers to accept that “Rule of Law” and “Law of Rules” have indistinguishable meanings. The other conclusion, the more rational conclusion, is that Rule of Law and Law of Rules have different meanings.

III. Not an Equation, but a Rewrite

The prior section indicates the absurdity of assuming that “Rule of Law” has the same meaning as the “Law of Rules.” One need not rely on assumptions to conclude that the two phrases have distinct meanings. Indeed, a brief review of the different ways that people use the words “rule” and “law” demonstrates the distinctive meanings.

*76 A. Rules Outside Law

Certainly, “Do not exceed 70 miles per hour” could be described as a “rule.” For example, one of the Twelve Rules of Happiness could include, “Do not exceed 70 miles per hour,” because driving in excess of 70 miles per hour creates emotional, psychological, and even physical exhaustion, which exhaustion leads to stress. Do not exceed 70 might be a rule of happiness, because driving in excess of 70 means that the driver misses the flowering trees or the deer and the antelope playing in the fields. Indeed, at 70, most people drive with their windows shut and miss the intoxicating smell of orange blossoms as they travel through the heart of Florida. So following the Rule of Do Not Exceed 70, may lead to spiritual happiness, but that does not make it a law. Most games, similarly, have rules, but not laws. These rules actually define the game. For example, tennis, football, the other football (soccer), baseball, cricket, softball, lacrosse, and golf all have rules related to balls, size, shape, density, materials, and more. All of them, other than football one and football two, also have some version of a “stick.” Rules govern the “stick,” too. Not only do the rules describe, in some way, the “stick,” the rules describe the use of the “stick.” These rules (along with lots of other rules) create the game. They also create happiness. For example, a baseball “stick” might not be very effective in catching a lacrosse ball, but surely, lacrosse players are happy that players on the other team are not permitted by the rules to hit them with a baseball “stick.” In games, rule violations may result in penalties, but even those penalties do not turn the rules into laws.

Finally, legislative bodies have rules of procedure, which if not followed, generally mean nothing once a bill has passed. Violation of internal rules of procedure has no effect on the validity of work done by a legislative body. “The decisions are nearly unanimous in holding that an act cannot be declared invalid for failure of a house to observe its own rules.” [\[FN17\]](#) Charles Luce, in his article from seven decades ago, similarly concluded,

“The court will not invalidate an act because it appears that the respective houses of the legislature have not complied with their own rules in passing it.” [\[FN18\]](#) So, ironically, those who enact laws that can be used to incarcerate, fine, or execute others, need not follow their own rules. Not all rules, then, are laws.

*77 B. Law without Rules

The next question is whether all laws are rules. Violation of a law might result in a penalty, e.g., death, loss of a hand, or a fine. And with any law, a rule of punishment may attach, e.g., break this law and some relatively specific punishment will be imposed. Punishment may follow from the rule of punishment, but some laws, the violation of which incurs punishment, cannot in any real way be described as a rule. Examples include prohibition of unfair trade practices or negligent homicide. Certainly, once a jury (or judge, depending on the rule or law) finds that a person has engaged in unfair trade practices or negligently committed homicide, a rule may require imposition of a penalty, but to be honest with ourselves, we cannot really say the prohibition against unfair trade practices create a rule of conduct, but instead a rule of punishment that punishes a law violator based on a vague (a very vague) law.

C. Rule/Law Interchangeability

A law, however, can be a rule, and vice versa. A legally imposed punishment can be based on violating a rule. Consider the following: All those who exceed 70 miles per hour on the highway will be assessed a penalty of \$50. Such a statement, when made by a governing authority, such as a state, qualifies as a rule (do not exceed) and a law (punishment follows upon proof of violation). The word “law,” then, can describe the very same thing that the word “rule” describes, and vice versa. Similarly, “rule” could have a meaning different than “law,” and “law” could have a different meaning than “rule.”

D. Openly Clandestine Rewrite

The reader of Scalia's equation could, and should, conclude that the words “rule” and “law” have different meanings; that singular and plural do not have the same meaning; and that, Scalia changed its meaning of “Rule of Law.” Perhaps, Scalia wrote a law review article asserting his personal favorite phrasing out of 256 possible identically meaning phrasings due to boredom. The better conclusion is that, looking at the English language and Scalia's equation, Scalia (perhaps creatively) changed the meaning of the phrase Rule of Law. Scalia, most likely, understands that different words have different meanings, even if the differences remain subtle or even hidden most of the time. “Rule” and “law” do not fall into the universe of indistinguishable words, and not even Scalia would suggest that singular and plural indicate the same number. [\[FN19\]](#) Perhaps Scalia had no idea that by changing the phrasing he changed the meaning, but such a charge of ignorance seems unfounded. His prose *78 is elegant, his arguments often well-reasoned, he uses words with such great skill, that one can (this author anyway will) assume that Scalia completely understood that he changed the meaning of the

phrasing and that he did so intentionally. His effort is clandestine because he does not openly acknowledge his effort to rewrite the phrase. At the same time the effort is open, because in a public forum, a law review article, he engages in his verbal prestidigitation, pulling the “Law of Rules” from the “Rule of Law hat.

IV. Justifying the Clandestine Rewrite

Scalia might have many reasons to modify “Rule of Law,” i.e., to write an article justifying his rewrite of the phrase “Rule of Law” and arguing that “Law of Rules” correctly states the intended and proper meaning of “Law of Rules.” Indeed, his article suggests a few:

1. “I stand with Aristotle, then--which is a pretty good place to stand--in the view that ‘personal rule, whether it be exercised by a single person or a body of persons, should be sovereign only in those matters on which law is unable, owing to the difficulty of framing general rules for all contingencies, to make an exact pronouncement.’” [\[FN20\]](#)
2. “It is rare, however, that even the most vague and general text cannot be given some precise, principled content--and that is indeed the essence of the judicial craft.” [\[FN21\]](#)
3. “I believe that the establishment of broadly applicable general principles is an essential component of the judicial process.” [\[FN22\]](#)
4. Scalia is not inclined to find an invitation in the constitution for standardless balancing. [\[FN23\]](#)
5. “[W]e should recognize that, at the point where an appellate judge says that the remaining issue must be decided on the basis of the totality of the circumstances, or by a balancing of all the factors involved... when there still remains a good deal of judgment to be applied: equality of treatment is difficult to demonstrate and, in a multi-tiered judicial system, impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; judicial courage is impaired.” [\[FN24\]](#)

Rephrased, Scalia kneels at the alter of Rulism because he likes, wants, and believes in rules. Rules, in Scalia's perhaps not-so-humble *79 opinion: [\[FN25\]](#) (1) improve predictability; (2) create equality; (3) lessen judicial arbitrariness; and finally, (4) eliminate personal rule (as in governance). In opposition to rules, he suggests that “laws” such as “totality of the circumstances” provide no predictability or equality, [\[FN26\]](#) and such “laws” encourage, or at least permit, arbitrariness and ensconce personal predilections, i.e., ensconce personal rule of judges. [\[FN27\]](#) Inferentially, Scalia prefers, or claims to prefer, a predictable judicial system driven by equality while he seeks to eliminate an “arbitrary” judiciary based on personal rule, i.e., personal predilections. In sync with Scalia's non-textual goals, Professor Arnold Loewy, agrees that the Supreme Court should create constitutional interpretational “rules,” urging, “[p]redictability, fair notice to those who govern and those who are governed, and the feeling that constitutionality ought not depend on comparing incomparables (such as is a yard longer than a rock is heavy) all militate in favor of rules, or at least carefully cabined standards.” [\[FN28\]](#) As Professor Sunstein has recently observed:

The impulse toward originalism in constitutional law is best understood as an effort to make constitutional law into, or closer to, a system of rules, in which judges are disciplined by provisions that are far from open-ended standards, that limit in advance, that do not threaten predictability, and that have a democratic pedigree by virtue of their

connection to past judgments of those who have ratified constitutional provisions--“we the people.” [\[FN29\]](#)

***80** John L. Gedid may even go further regarding rules and predictability, arguing that “constitutionalism” requires, as “an essential element...the maintenance of...stability and predictability of ...rules.” [\[FN30\]](#)

A. A Non-Textual Personal Proclivity

“Rulists,” then, proclaim a predictability proclivity. They personally, subjectively want, embrace, and desire, for the judiciary (and not any other branch or part of the government) to have a “system of rules,” not because the Constitution mentions a system of rules requirement, not because “Law” requires a system of rules, and not because the Constitution demands predictability. These worshipers of rules prestidigitate from the Article III hat a series of unwritten, made-up, society-benefiting, majoritarianism-supporting, subjectively-desired and undefined and indefinable goals, inter alia, of predictability and stability. While predictability and stability may provide value, the Constitution says nothing about their value, at least as applied to the judicial power the Constitution vests in the courts of the United States. Perhaps more important, the Constitution itself does not contain any words which demand predictability and stability, particularly with regard to its meaning.

B. Adding Unwritten Limits to Textual Limits on the Judiciary

Constitutional Rulists, while claiming allegiance to predictability and stability, incongruously add to the Constitution's written text unwritten limits to judicial power. Article III of the Constitution vests “judicial power,” [\[FN31\]](#) while simultaneously limiting the exercising of that power. Those written limits include restricting the use of that power to (1) certain specified “cases” or in other specified “controversies,” [\[FN32\]](#) (2) specified and limited parties, e.g., diversity of citizenship cases, [\[FN33\]](#) and (3) limited substantive issues, e.g., cases arising under the Constitution. [\[FN34\]](#) Not surprisingly, the Supreme Court has consistently held that the listing of these various specified grants of jurisdiction explicitly limit judicial power. [\[FN35\]](#) If the Court has correctly interpreted the Constitution, then, undoubtedly, the Constitution expressly limits judicial power. Constitutional Rulists, apparently ***81** not satisfied with the Constitution's express rules limiting and defining judicial power, insist on more rules limiting judicial power, e.g., predictability, fairness (or at least fair notice), equality, and elimination of arbitrariness. Restated, the Rulists want courts to engage in self-restraint where the Constitution does not, by its words, require, or even imply that it requires judicial restraint. Rulists, claiming to seek elimination of personal predilection from constitutional interpretation, add their own personal favorite rules to the process. Rulists might assert two justifications for demanding adoption of their non-express, i.e., non-textual, limitations on judicial power: (1) a personal predilection, i.e., they believe in or desire limitations on judicial power, [\[FN36\]](#) or (2) an inference they obtained from reading the Constitution, and to the extent that not all rational people agree with such an inference, an inference can fall into the category of personal, as in one reader “sees” the inference while another does not. [\[FN37\]](#) The Constitution provides no support for either

justification.

C. Constitutional Text Militates Against the Rulist Rule-making

The structure of the government does not require that courts restrain themselves to please the Rulists. Indeed, the structure of our government strongly suggests that the Rulist approach to judicial self-restraint violates the Rulist goal of, well, rules. The Constitution breaks the general government, now more commonly referred to as the national government, into three powers and identifies the officials responsible for the exercise of each of those powers. [FN38] The Constitution does not refer to “three branches” or “three departments.” [FN39] Rather than starting with the idea that the Constitution breaks that government into parts (however designated), the constitutional interpreter should note that all power to govern the people belongs to the people. [FN40] These people, the “We” in the Preamble, have indicated that “Our power” can be, and is, divided into three types of power: legislative, executive and judicial. [FN41] “We” then delivered each type of power to different officials. [FN42] “We” granted power with the exact same word: “vest.” [FN43] In each case, “We” have placed some limits on *82 the exercise of each of those powers. [FN44] Each of the first three Articles of the Constitution “vests” power in three different officials or sets of officials. [FN45] None of the three Articles suggests an implied limitation on the grant of judicial power, or either of the other two grants of power. Notwithstanding the lack of text to support the limitation on judicial power, the Rulists (not all of “Us” [FN46]) personally prefer [FN47] to limit (perhaps better stated as, the Rulists personally prefer the Supreme Court to limit) judicial power, and they give us their personal reasons for desiring unwritten limitations on judicial power. Relying on personal desires or reasons, i.e., personal predilections, to create or invent unwritten rules [FN48] has its obvious inconsistency with a goal of eliminating personal rule, as (apparently) Aristotle wanted (for “Our” government). [FN49] More important, inasmuch as the text of the Constitution provides express limits on judicial power, personally desired implied limits on judicial power seem inappropriate.

D. Circular Justification for Predictability

Rulists argue that ensconcing their personal choice, i.e., rules, eliminates what Scalia calls personal rule and urge that if the Supreme Court follows their advice, the Court, in particular, and the judiciary, in general, will move towards predictability. [FN50] The Rulists tell “Us” the role “We” intended for the judiciary, i.e., predictability. Having told “Us” what “We” intended, they tell the Court how to meet “Our” expectations, i.e., *83 using rules to create predictability. The Rulists create a fictional, utopian universe where imaginary “rules” create predictability.

First, they simply tell us that “rules,” in particular, unstated, non-yet-created rules create predictability. They begin with a hypothetical “Rule,” hypothetical because they do not tie the “Rule” to any particular constitutional clause or phrase, they do not state the rule, they do not say where to find the rule. They simply claim that a predictability-creating “rule” exists (or might exist or could exist). Because rules could create predictability, the Rulists urge, rules should be adopted. Having adopted rules, the Rulists conclude, courts

have created predictability. Their argument circles with perfection. Within their circular universe the value of rules is unassailable. Rephrased: (1) The Supreme Court should be predictable; (2) predictability-creating rules can be created; (3) once created, these predictability-creating rules, well, obviously, create predictability. The Rulists achieve all this without actually identifying a single rule that creates predictability. Put another way, Rulists believe (1) that rules create predictability; (2) that courts should be predictable; and (3) that, therefore, courts should adopt rules. [FN51] Rulists could have saved much time and energy by simply saying that courts should govern by Rules because we, the Rulists, said so, and we, the Rulists, say so notwithstanding the fact that “We the People” did not.

E. Undefined Amount of Discretion

Rulists prove the value of rules by suggesting, explicitly or implicitly, that rules, at least hypothetically achieve the Rulist's goals, e.g., predictability, discretion-cabining, fair notice, equality, et.al., and, because rules (at least hypothetically) achieve Rulist goals, courts should adopt rules. [FN52] Not only do Rulists rely on circular reasoning, they also fail to identify rules that actually achieve their asserted goals. Rulists, for example, hypothesize a rule that cabins discretion, but they do not suggest that all discretion can, or even should, be cabined. On the other hand they do not really give a “rule” as to how much discretion should be acceptable (or rather, is acceptable to them). Scalia, for example, suggests that a rule of law fails to meet his standard for discretion-cabining, if the rule permits “a good deal of judgment to be applied.” [FN53] This standard, i.e., a court may use a rule that does not permit a court to apply “a good deal of judgment,” seems a little standardless. Scalia suggests two other tests for determining if a rule appropriately cabins discretion that these rules must either be (1) *84 “precise” and “principled” or (2) consist of “broadly applicable general principles.” [FN54] Besides being inconsistent with each other and completely different from leaving “a good deal of judgment,” these “guidelines” give no real direction. Perhaps the Supreme Court that seeks to follow Scalia's advice must simply have faith that discretion-cabining Rules exist, and that the Court will know the rule that sufficiently cabins discretion when it sees it. [FN55]

In sum, Scalia and other Rulists claim that rules cabin discretion, but do not tell “Us” that discretion can, or even should, be eliminated. In other words, courts may exercise some discretion, but in one article, Scalia gives at least three different and inconsistent versions of when a court's exercise of discretion goes too far. Courts, then, must apply three different standards to determine when it exercises too much discretion. Such an undefined goal of discretion strongly suggests that discretion-cabining rules may exist more in the realm of theoretical than real.

F. Arbitrary Limitation on Arbitrary Governance

Assuming that the Supreme Court determines to limit the power “We” vested in it and, assuming the Supreme Court can create rules that cabin discretion sufficiently to meet the Rulists' undefined standards of discretion, the Rulists would have created their jurisprudential utopia where Congress and the President (and those millions of others

who exercise executive power) exercise the power “We” vested in them without self-imposed requirements to govern according to any sense of discretion-cabining rules, i.e., rules that eliminate inequality, lack of notice, and arbitrariness. In this “utopia”, executive officials may roam freely without being burdened by self-imposed rules that might keep them from exercising power arbitrarily, without fearing that they need to act in predictable manner, a manner that ignores the need for fair notice of the rule to be executed in any particular case, and without fearing that someone may assert that one exercise of power seeks to prohibit or discourage an activity that another exercise seeks to promote.

If a lack of discretion-cabining rules creates an “arbitrary” judiciary that fails to treat people equally, then the lack of similar rules creates an even greater risk when federal executive officers with guns exercise their power in complete darkness. When officers with guns use executive power, they do not even necessarily report their reasons to “Us” so “We” might know what balancing of factors they used when making their decisions. “We,” more often than not, do not even know what they have *85 done, much less whether they had a rational and consistent reason to do what they have done. “We” do not know if they have reasons because they must not give reasons. High-ranking executives cannot even know whether executive officer and employee acts with the same “rules” as another. Speeding tickets come to mind. For example, the question could arise whether anyone, inside or outside the executive branch, could explain why some get tickets at 78 miles per hour and others do not. “We” cannot read executive reports and compare their decisions with other decisions and see if perhaps they may have acted arbitrarily or whether the thousands of gun empowered executive officials might be treating people unequally.

On at least one occasion, in *Furman v. Georgia*, [FN56] the Supreme Court reviewed a multitude of decisions that went into the imposition of the death penalty and essentially concluded that the death penalty was so arbitrarily imposed that it was like “being struck by lightning.” [FN57] Recast, the Court in *Furman* found that the death penalty violated the Cruel and Unusual Punishment Clause because the governments imposing that penalty were in no sense following any rules whatsoever. An honest appraisal of a variety of executive decisions would lead to the same conclusion: executives follow no rules with a variety of exercises of executive power. [FN58] More to the point, the Rulists would clearly be offended at the Supreme Court's use of “lightning strike” as its standard for determining whether a punishment violated the Cruel and Unusual Punishment Clause, but the Rulists do not impose a “rule” requirement on the executive, even though the Supreme Court has effectively found “ruleless” executive decision-making in at least one very serious instance.

With Congress, too, Rulists permit inequality, lack of notice, and arbitrariness. The Congress need not fear engaging in the kind of inequality Rulists fear in the judiciary inasmuch as they do not burden Congress with complying with discretion-cabining rules. Congress may subsidize the growing of tobacco and tax its purchase. [FN59] Congress may enact race-based laws relying on a compelling interest in a diversified military and may also claim a rational reason to use an entrance test that destroys the diversity Congress claims it wants. [FN60] Congress need not follow any rules *86 when it criminalizes marijuana use, [FN61] but not cage fighting or boxing. Congress need not explain the “rule” it followed if it were to require a man to pay child support for a

foreign-born illegitimate child, but not allow for that same child to automatically receive, what may be the most precious gift from the biological father, citizenship. [\[FN62\]](#) Congress may refuse to recognize gay marriage with the goal of “honoring” the “institution” of heterosexual marriage while at the same time providing higher taxes for the married heterosexual. [\[FN63\]](#) Congress may put in prison the polygamous father of children of multiple wives, destroying the livelihood of such father even though such father financially supports all the children and spouses. [\[FN64\]](#) In other words, Congress can enact laws that imprison a financially supportive father, leaving children destitute, while in the same legislative breath imprison a different father who refuses to pay child support. The Rulists ask nothing from Congress or the President remotely similar to what they ask of the judiciary. Certainly, Congress and the President must comply with the Constitution, but Congress and the President need not follow the same unwritten, extra-textual rules which the Rulists impose on the judiciary. Indeed, the Congress and the President need not explain the reasoning behind their law-making. Rulist Utopia, then, allows the Congress and the President to live unconstrained by unwritten, undefined discretion-cabining rules, while constraining the courts with these “rules.” Requiring discretion-cabining for one vested power, but not for the other two, exemplifies rule-less and arbitrary decision-making. In other words, Rulist Utopia violates the very premise for which Rulists would create it.

G. Arbitrary (and Personal) Reason for the Arbitrary Rulist Choice

Rulists should explain their arbitrary, but bright line rule, i.e., why the judiciary, but not the executive nor the legislative, must govern according to “rules.” The Rulists refuse to address the reason that they demand discretion-cabining, extra-constitutional rules, for the exercise of judicial power, but make no such demand for the exercise of legislative or executive power. They do not explain creating a set of unwritten rules for exercising one power and not the others. Perhaps Rulists demand that the judiciary cabin its power because people do not elect (federal) judges, but *87 people do elect the President and the Congress. Bickel, in coining the most famous jurisprudential red-herring term, the “Counter-Majoritarian Difficulty,” certainly suggests that the judiciary should be hesitant to use its constitutionally granted power to invalidate the use of executive or legislative power because the officials who exercise those powers are elected. [\[FN65\]](#) Assuming that Rulists generally agree with Bickel, two conclusions follow: (1) Rulists fear that, because judges are unelected, judicial decision-making must be cabined by rules in order to prevent arbitrary lawmaking; or (2) rulists do not require discretion-cabining rules for the executive and the legislative lawmaking because the executive and legislative are subject to election; or (3) both. A third conclusion then follows in the Rulists' utopia: Elected officials can be trusted with greater discretion than unelected judges, because they answer to the people. These conclusions, which defy logic [\[FN66\]](#) and the Constitution and its principles, can be explained only by resort to personal choice by their supporters.

“We” select the executive and legislative differently than “We” select judicial officers. “We” elect executive and legislative officers. “We,” through the President, nominate judicial officers. [\[FN67\]](#) “We,” through the advice and consent of the Senate, confirm judicial officers. [\[FN68\]](#) Neither election nor nomination and confirmation, guarantee the

Rulists' hopes and desires, e.g., “equal treatment,” “fair notice,” non-arbitrary decision-making. According to the Rulists, without discretion-cabining rules, judges may become arbitrary, i.e., engage in “personal rule.” [FN69] The Rulists begin with the proposition that judges, as human beings, might act like human beings and act on “personal predilection.” [FN70] Of course, the President and the members of Congress, also human beings, might also act like human beings and act on personal predilection.

The President and members of Congress do not become less human by virtue of election. Conversely, the selection process for judges does not make them less virtuous. Yet, the Rulists provide no justification for demanding discretion-cabining rules for the judiciary and not the executive and the legislative other than selection process. Selection process does not relate to integrity, intelligence, fairness or any other human characteristic.*88 [FN71] While selection process may relate to other goals or ideals, it does not relate to the human characteristics that the Rulists seek to cabin. Inasmuch as humans exercise all powers of government, it would make sense if Rulists sought to have all powers cabined by rules or no powers cabined by rules. Either would be a “rule” in the sense desired by Rulists as it would treat “equally” each power and each person that exercises that power. Rulists have not, however, chosen that “rule.” Instead, they choose a “rule” that clearly implies something like: Humans who exercise power should live with cabining rules, unless those people are subject to election. [FN72] This “rule” seems so unrelated to the goals of the Rulists, e.g., equal treatment and fair notice, as to rank as absurdly arbitrary. Elections do not relate to equality, just power. Elections do not prohibit unequal treatment, unless, of course, the Rulists assert that after centuries of elections, the southerners in the early 1950s were on the cusp of eliminating arbitrary and unequal laws. [FN73] Elections do not cabin discretion; elections have zero relation to discretion, only the choice of those who might exercise discretion, unless, of course, the Rulists believe that two arbitrary statutes make one rational statute, sort of like two negatives make a positive (at least with math and electrical charges). Rulists draw a completely arbitrary line, based on selection by election or not, in deciding that the courts should be bound by extra-constitutional, discretion-cabining rules.

H. Unconstitutional (and Personal) Reason for the Arbitrary Rulist Choice

The Constitution suggests another arbitrary aspect of the Rulist approach. “We” gave power to some, whom “We” wanted elected. “We” gave power to others, whom “We” wanted to nominate and confirm. “We” did not suggest that our chosen selection process required an unwritten, power-limiting rule. The Rulists have determined that “Our” chosen method of selection of judges requires extra-textual limits. They have arbitrarily determined that “Our” choice for selection creates too much risk of arbitrary decision-making. They implicitly suggest that if “We” had chosen elections to select judges, then judges would not need discretion cabining rules. [FN74] Of course, “We” chose to select judges because “We” did not want to subject them to the vagaries and whims of elections.*89 “We” decided that election of judges would encourage arbitrary and unequal justice. [FN75] Perhaps “We” guessed wrong. Perhaps, the Rulists correctly conclude that elections encourage fair and equal treatment. Whether or not the Rulists have reached a “better” conclusion, they have reached an anti-constitutional decision, a decision contrary to “Our” values, as set forth in the Constitution. Put simply, Rulists demand that judges

have their discretion cabined because judges are selected as required by the Constitution. That demand grates the Constitution and its values and principles. According to Rulists, the judiciary cannot be trusted because it is selected as required by the Constitution. To state the Rulist principle is to recognize its absurdity and its irrelevance to constitutional adjudication.

I. Electing Law

The relevance of elections to the Law of Rules can be looked at from the opposite direction. If, indeed, elections cabin the discretion of those who exercise executive or legislative power, then one could reasonably suggest the same for those who exercise judicial power. This leads inevitably to electing judges. But if elections cabin the discretion of elected officials, the elections work only indirectly. The idea must be that those who risk being removed by election will act less arbitrarily than those who serve for life. Assuming this conclusion to be correct, then the goal is to have the elected officials follow the desires of the voters. A more direct way to assure that elected officials follow the will of the voters is to eliminate the middle person and have “less arbitrary” and “more equal” laws adopted by direct democracy. [\[FN76\]](#)

Similarly, if elections are relevant to equality and less arbitrary rule-making, then juries should consist of all eligible voters; adjudication should be by vote of the people. This last conclusion is at the core of the view, which seems to be suggested by Rulism, that the judiciary should be cabined because it is not elected. If this conclusion is correct, then the Rulists may be correct in justifying discretion-cabining rules due to the lack of elections. If, however, Rulists believe that voting on constitutional adjudication is inconsistent with adjudication, then elections are irrelevant to the duties of judges, and Rulists have irrationally and arbitrarily relied *90 on an irrelevant fact (selection process) to create constitutional rules. Of course, the Constitution, perhaps fool-hardy in its distrust of election of judges, strongly suggests adjudication by vote is inconsistent with the Constitution. [\[FN77\]](#) Indeed, the Constitution, from the Senate to the Electoral College, suggests that electoral majorities should have their discretionary power cabined. [\[FN78\]](#) Rulists inexplicably take the opposite approach in explaining their personal desire to impose rules on the judiciary.

V. Other Critiques of the Law of Rules

A. Ancient Philosophical Foundations

Perhaps not all would agree, but it seems ironic that Scalia, a person vehemently opposed to using foreign law in interpreting the Constitution, would rely on a foreign philosopher (dead for far more than 2000 years) for the basis for his understanding of the role of the judiciary in a tri-partite form of government that Aristotle had never encountered. [\[FN79\]](#) This opposition to relying on “foreign law,” as with most of Scalia's jurisprudence remains solely in his discretion. In other words when his personal predilections favor foreign law, he relies on it, or better, when he determines that “the law of nations is not foreign law.” [\[FN80\]](#) Foreign law or law of nations, perhaps it matters not, and perhaps

when Scalia relies on an ancient philosophy to guide he is not technically relying on law but just foreign ideas, and perhaps this is a distinction with a difference, and perhaps not. Presumably, Scalia “stands” with Aristotle [\[FN81\]](#) in a figurative or metaphorical or metaphysical and not literal sense. Scalia, using the metaphorical, suggests that if he and Aristotle could stand together as “soldiers” in a philosophical battle, he would stand next to Aristotle, claiming an intellectual brotherhood with Aristotle. Scalia then tells his readers that such ***91** brotherhood is “good” (as in “a pretty good place to stand”) because Scalia tells the reader that “standing” with Aristotle is “good.” [\[FN82\]](#) He thus tells the reader that his (Scalia's) ideas are “good” because his ideas are similar to Aristotle. So what he has said is: (1) His ideas are like Aristotle's; (2) Aristotle's ideas are, in his view, good; (3) because he has told the reader that Aristotle's ideas are good, they are indeed good; (4) because his ideas are like Aristotle's, his ideas are good. So, to sum, Scalia's ideas are good because he has said so.

Quite clearly, Scalia has not told us why he has chosen to “stand” next to Aristotle other than that it is “a good place to stand.” He has not explained why he prefers standing next to Aristotle, as opposed to Marx or Engels or Kierkegaard or Buddha or Sun Tsu or Confucius. [\[FN83\]](#) This author presumes that Scalia could easily dismiss “eastern” philosophers as not being part of “our traditions.” Dismissing European philosophers could be done, but with a little more explanation as to the fact that the referenced philosophers have a viewpoint that is not consistent with our “democratic institutions.” In the end, the Aristotle reference raises a far more important point. Scalia chooses not to explain why he stands with Aristotle and not, say, Thomas Jefferson. Why Aristotle and not the signers of the Declaration of Independence? Scalia joins Aristotle in opposing “personal rule,” and such may be a good choice, but why not choose to stand with “Jefferson's” principle of unalienable rights? Why not stand with rights that are enumerated, rights that are not tied to a book or any text, rights that exist within any person who exists, rights that, by definition, cannot be defined by a discretion-cabining “rule”? Maybe Scalia has a reason why he chooses Aristotle and not Jefferson. Perhaps he prefers not to stand next to those who advocate unalienable rights. Perhaps he personally would rather give up unalienable rights in order to avoid personal rule. Maybe he simply fears people and naively believes that rules can eliminate personal rule. Maybe the reader does not care and just likes Scalia's conclusion as much as Scalia likes Scalia's conclusion. In the end, the author has no complaint with Scalia arguing that “personal rule,” is bad because he says so. “Because I said so” just seems inconsistent with eliminating “personal rule.”

***92** B. Rules versus Standards

Scalia, at this point, should be praised for his integrity in admitting that his interpretational methodology springs, at least in part, from his personal belief. For example, Scalia “believes” that “an essential component of the judicial process” requires courts, as in judges, i.e., people, to “[establish] broadly applicable general principles,” although, only a couple of pages earlier Scalia concluded that the “essence of the judicial craft. . . [is]. . . giv[ing]. . . text. . . precise, principled content.” [\[FN84\]](#) So, the essence of the craft of courts is to create “precise. . . content” by using a process that “[establishes] broadly applicable general principles.” [\[FN85\]](#) At first glance, the reader of Scalia's

words might conclude that he might require inconsistent approaches from courts. Fortunately, Scalia uses the terms “process” and “craft” so that he can require “judicial craft” to create precise principles while simultaneously requiring “judicial process” to create broad general principles. As long as the reader understands the difference between “judicial process” and “judicial craft,” Scalia's approach might make sense.

By stating that he is “not inclined,” [\[FN86\]](#) Scalia further infuses his personal predilections into his approach to interpreting the Constitution. He does not suggest that the Constitution is “not inclined.” Nor does he suggest that the Constitution inclines him (perhaps in order to hold him under volumes of text or original intent until he “voluntarily” speaks his own words). He does not even suggest that the first President Bush, prior to appointing Scalia to the Court, required that Scalia make an “unbreakable vow” of fealty to rules. He does, however, refuse to acknowledge his choice in the matter. [\[FN87\]](#) He uses a passive voice, i.e., he is “not inclined.” He should accept responsibility for his choice and say, “I choose to avoid ‘standardless balancing.’” The author has great respect for that choice, and Scalia, or any other person, could make a reasonable and rational argument as to why that choice (or another choice) is the best choice for interpreting the Constitution. In making his choice, however, he fails to enlighten the reader as to whether he has a personal aversion to balancing. He does not explain whether he believes that all balancing is standardless or whether he willingly engages in “standard-based” balancing, without, of course, explaining what standard he uses or would use. Nor does Scalia explain the difference between standard-based and standardless balancing. The reader of Scalia's personal predilection must guess what is in Scalia's mind. Perhaps a Ouiji board might be used to find out what ‘The Founders’, who are dead, meant, but Scalia is alive, and the author has not read of a [*93](#) Ouiji board that will decipher the meaning of words used by a live person. [\[FN88\]](#)

More important, Scalia's aversion to balancing seems inexplicable. Constitutional analysis depends on balancing. Regularly, the Court balances state interests or police power or governmental choices against individual rights or liberties. [\[FN89\]](#) Indeed, the Court even engages in balancing when the Constitution has what may appear to be a bright line rule on the surface of the text. For example, the First Amendment provides that Congress “shall make NO law abridging the Freedom of Speech.” [\[FN90\]](#) And yet, the Court (with Scalia regularly joining in) allows the government to abridge speech if the government interests are important enough. [\[FN91\]](#) Additionally, the Preamble of the Constitution requires, if it has meaning, a balancing of interests including the establishment of the government, liberty, common defense, general welfare, justice, and domestic tranquility. [\[FN92\]](#) The words of the Preamble states “in Order” to achieve certain enumerated goals, “We. . .ordain and establish. . . the Constitution.” [\[FN93\]](#) Those words suggest a “purpose” for creating the government. Restated, the Preamble suggests that when “We” gave legislative power to Congress, “We” did so as part of “our” plan to, among other things, “establish Justice.” [\[FN94\]](#) It seems that any exercise of power which disestablished justice would be a power outside that which is given in the Constitution. In other words, the Preamble should be used in interpreting the constitutionality of government exercises of power. This should be particularly true for a Rulist, a person who seeks to eliminate arbitrary decision making, because eliminating the Preamble from determining the meaning of the [*94](#) constitutional text defines “arbitrary.” The Rulist-Textualist conundrum requires giving up part of the text, i.e., the

Preamble, or, alternatively, requires recognizing that the Rulist goal of avoiding balancing is inconsistent with the countervailing (and often conflicting) principles within the Preamble. Scalia and the Rulists claim a difference between rules and standards, but give no definition. They claim the personal desire to eliminate balancing without explaining the balancing that occurs regularly in constitutional analysis. They seek elimination of the balancing that the Preamble suggests to be central to constitutional analysis, and they do so without giving a rule that could rationally explain why part of the constitutional text should not be considered as part of the Constitution.

C. Precision

Undeniably, Scalia considers the Constitution both text and law (as in “law” from the idea “rule of law”). Presumably, he would consider at least some phrases “vague” or “general.” He does not explain, however, why courts should substitute precise words for the vagueness of the text. He certainly indicates his personal preference for precision, [\[FN95\]](#) but that does not justify a change in approach. Put another way, the adopters of the Constitution chose (through the complex adoption process [\[FN96\]](#)) vague words, i.e., they intended the Constitution to be vague. If the Constitution grants the power to say what the law is to judges, then the Constitution gave to judges the power to roam freely within the range of vague and general rules written into the Constitution. Precision might be better, but the Constitution chose not to give judges precise rules. Scalia may have correctly concluded that vagueness creates opportunity for personal choice or even personal choice gone awry, i.e., arbitrariness. Scalia may also have the high moral ground (standing with Aristotle) in urging that judges should be cabined by “preciseness.” The founders/framers/adopters of the Constitution do not, however, stand with Scalia. They may have been imbeciles for intentionally choosing vagueness, but their imbecility does not eliminate their intent. Scalia does not like vagueness, so, perhaps, if a constitutional convention is ever called, Scalia will have an opportunity to rewrite the Constitution with precision. Until that time he must be satisfied with using his personal power (meaning power that he has as a justice, power that can be exercised personally only by Scalia) attempting to enforce precision onto a document that expressly chose vagueness.

*95 D. Equality

Presumably, those interested in equality would prefer an equal protection clause that had the same meaning in all circumstances. Such a person, one espousing belief in equality and predictability and opposed to personal predilection, would embrace an equal protection clause interpretation that race is race is race and that any race-based law must always meet strict scrutiny (or any other test that was the same for race in all circumstances) in order to pass constitutional muster. Fortunately, Scalia is not such a justice. In *Johnson v. California*, he joined Justice Thomas in arguing that strict scrutiny does not always apply to race-based discrimination. [\[FN97\]](#) He agreed that strict scrutiny does not apply in prisons because other people (as in justices) held that prisons are quasi-constitutional zones where the Constitution applies, but only sort of. [\[FN98\]](#) This is over-simplified as Thomas, and hence Scalia, urge that determining whether the Constitution applies in the prison context requires a review of the “totality of the circumstances,”

including, inter alia, the prison rule, the Constitutional provision involved. [\[FN99\]](#) They could have agreed, of course, with a simple rule that the Constitution does not apply in prison. That rule would avoid any sense of judicial arbitrariness. Under that plain and simple rule, the prison could require prayer or, perhaps, prohibit reading or writing. The prison could engage in any arbitrary punishment that did not rise to the level of cruel and unusual. That would be a simple rule: prisoners have no Constitutional rights (other than, perhaps, those related to trials and lawyers). [\[FN100\]](#) Instead, the “rule” applied by Thomas provides that prisoners have reduced constitutional rights. [\[FN101\]](#) No one can, with a straight face, argue that the text requires, or even suggests, that the Constitution only sort of applies in prisons. This argument does not seek to fault Scalia's personal choice to ignore the text of the Constitution and “balance” the interests of the government. Instead, this argument recognizes that Scalia, as with so many others, would prefer that his “listeners” do as he says, not as he does.

Tangentially, the question arises whether Scalia and Thomas and other Rulists would consider a pre-trial detention facility, which houses only those awaiting trial, to be a prison, i.e., whether those who await trial have no constitutional rights, because they have been arrested and cannot *96 post bail, because the government houses them in a facility declared by the state or the judiciary or both to be a “prison.” At least with regard to constitutional rights vis a vis prisons and those who live there, Scalia and Thomas would permit the Court to review the totality of the circumstances to determine whether a state that treats pre-trial detainees unequally violates that provision of the Constitution that prohibits any state from denying to any person the equal protection of the laws. [\[FN102\]](#) Then again, one might believe that those who believe in rules would prefer the simple rule that racial discrimination always requires strict scrutiny review, as Scalia and Thomas have, when convenient, argued. [\[FN103\]](#)

E. How Much Length (of Silk) Equals an Ounce of Rock (Gold or Silver)

Of course, it is not fair to judge a jurisprudential goal by noting that one of the preachers of that goal fails to abide by the goal. Others agree that the court should avoid balancing tests. “Predictability, fair notice to those who govern and those who are governed, and the feeling that constitutionality ought not depend on comparing incomparables (such as is a yard longer than a rock is heavy) all militate in favor of rules, or at least carefully cabined standards.” [\[FN104\]](#) It may be that the Court should not “compare incomparables,” but it cannot be that the Court cannot “compare incomparables.” The Court is composed of people, and people regularly compare incomparables. People regularly compare the length of silk or cotton cloth to the weight of a chunk of silver or gold. That comparison has no sense of predictability or notice, until someone with power arbitrarily draws a line giving a value to one or both. Once a value is given people, at least in a market society, must then compare the incomparable, silk and silver.

Many statutes, as well as constitutional law, compare the incomparables, e.g., weighing the “value” of “free speech” against the “value” of the American flag. [\[FN105\]](#) When the legislature bans flag burning, the legislature has necessarily weighed the value of speech against the value of protecting the sacred national symbol. [\[FN106\]](#) The question is not whether people have the capacity to compare those two incomparables. The question is whether the last branch of the government to weigh those incomparables *97 is the

legislature or the judiciary. Both are composed of people. If people do not have the capability to make the comparison, then legislators are no more capable than judges. When the Court compares incomparables, e.g., speech v. flag, “We” are told expressly how it engages in that comparison. [FN107] “We” are at least given some idea of the Court's reasoning. On the other hand, when the legislature compares incomparables and, for example, criminalizes flag burning “We” have no idea if the legislature even considered the value of speech, much less compared it. [FN108] And perhaps, that is what the Rulists want. They cannot really claim that incomparables cannot be compared because such comparison is endemic to creating statutes and constitutional decisions. They apparently prefer that the weighing be hidden behind the curtain. As long as “We” do not “see” the weighing “We” have better law. So if Rulists urged that the judiciary act in the same fashion as the Congress and the executive, then courts could compare incomparables, e.g., declare that the anti-flag burning statute is (or is not) invalid, as long as it does not offend “our” sensibilities by using standards that do not meet the Rulists' standards for law-making. Such a ruling of valid or invalid is simple and clean and, far more important, has as much discussion regarding the Constitution as the Congress gives, none. The Court, acting as unburdened by Rulist rules as Congress acts today, privately compares and then issues a rule, e.g., a statute prohibiting burning the flag of the United States violates the Constitution. Keeping Congress in the dark as to the Court's reasoning seems no more inappropriate than Congress keeping its constituents in the dark as to its reasoning. Actually, it seems worse for Congress to keep citizens in the dark inasmuch as Congress is set up to answer to citizens, and the judiciary is not set up to answer to the Congress.

F. The Less Equal Constitutional Power

Once again, the author seems desperately confused by a Rulist such as Scalia. He has the personal desire (personal as in a desire not expressed in the Constitution) to have rules. Scalia demands that judicial power be exercised pursuant to rules. Scalia claims that he seeks to prohibit arbitrary decision-making. [FN109] Scalia creates confusion by applying those two rules to the exercise of judicial power, a power the Constitution grants with a limited and defined number of express reservations. [FN110] Similarly, the Constitution grants executive power and legislative power with a limited number of *98 express reservations. [FN111] Scalia, not the Constitution, would impose on the judiciary, but not the executive and the legislature, the requirement that exercises of power be made pursuant to previously expressed, discretion-cabining rules. Rulists do not require either the executive or the legislative exercise expressly granted power pursuant to rules. Congress can enact statutes that cannot be explained by any more than an arbitrary choice. The Rulist rule, then, is that only one of three exercises of power, the judiciary, be exercised pursuant to clearly defined rules.

G. Stability: Another Personal Predilection

Rulists believe rules will create a stable Constitution. They desire, they seek, this stable Constitution. And such may be the best Constitution, but it remains their Constitution. They seek to make it “ours” even though not all of “Us” wish for such stability. Some

commentators argue that the Constitution, as a document for the ages, [\[FN112\]](#) suggests adaptability not predictability, that adaptability requires unpredictability. [\[FN113\]](#) Rules may create some sense of predictability, while more vague standards permit adaptability at the cost of predictability. With regard to police powers, virtually no one demands predictability from the government. Certainly, Scalia does not demand predictable police powers or predictable public purposes. Rulists solve the unpredictability of an adaptable government with a rule that supports some sense of predictability, at least as to the validity of the unpredictable use of power. Each of the two most common “rules” used to judge the exercise of police power lead to the predictable result of upholding the law. Those two similar rules are: (1) presumption of validity of legislation; and (2) a law will be upheld as constitutional as long as it is not irrational or arbitrary, perhaps restated as rationally related to a legitimate state interest. The third rule is that what is a legitimate state interest must be adaptable to a changing society. Those rules do not lead to predictability in the laws that govern society only to the predictable judicial result of upholding the validity of a statute that responds to a changing society. Rulists might choose different rules to obtain predictability and stability, e.g., the judiciary will presume the invalidity of any statute. Predictability in and of itself has a personal value that appeals to the Rulist, but not to all. Rulists desire for predictability would have the Supreme Court create predictable rules whether or not those predictable rules are otherwise*99 consistent with the Constitution. Predictability is a personal desire of Rulists, a desire not demanded or even requested by a Constitution that, with very simple and broad language, grants judicial power.

VI. Conclusion

With the goal of eliminating personal choice, Scalia, engaging in the quintessential Rulist approach, makes the personal choice to reinterpret the “Rule of Law as the “Law of Rules.” Because he applies this approach to remaking the Supreme Law of the Land into the Supreme Rules of the Land, this essay takes to task the Rulist quixotic quest to eliminate personal predilection within constitutional interpretational methodology. This essay seeks to pull back the curtain to demonstrate: (1) Scalia's rewrite of the words and meaning of the Rule of Law; and (2) the ideal of the Law of Rules hide the personal predilections of Scalia and the Rulists. They seek to eliminate the personal from constitutional interpretation by imposing their personal views on constitutional interpretation. They engage in the personal interpretational methodology that they claim to abhor. They demand an interpretational methodology inspired by, and founded upon, their personal choices in order to eliminate what they believe are the personal choices of judges. In the end, the essay seeks to prove that all constitutional interpretation requires human interaction with “Law.” Eliminating the human element from constitutional interpretation cannot be achieved. No rule or no law stops judges from being human. And, even if that were somehow achievable, the Rulist goal of creating binding rules for the judiciary, while leaving those with guns (the executive) and the power to take and spend money (the legislature) without similar rules creates an unbalanced and dangerous society. A society that brought us, for example, Jim Crow Laws, Black Codes, imprisonment for the crime of being of Japanese descent, [\[FN114\]](#) the shooting of young adults at Kent State, and more; all of which are or were protected by “rules” such as: (1)

“separate but equal;” (2) deference to the discretion or policy choice of the “political branch;” and (3) deference to the “sovereign” states. Truly, judges will make human errors, even horrible ones, but so will the other humans that exercise governmental power. In the end, Rulists cannot avoid the truth of law; that law, as a human institution, must rely on faith in those who exercise judicial power. “We” can ask them to follow discretion-cabining rules demonstrating faith in those judges who apply rules *100 and faith in those (perhaps long-dead) judges who created the rules. Alternatively, “We” can demonstrate faith in those who announce the result of a decision and ask that they use reasoned analysis, relying on, inter alia, original intent, text, precedent, and principle, but this need not be blind faith as “We” can read their analysis. “We” can have faith in the Law of Rules and what lies behind the curtain of rules. Or “We” can have faith in the justices “We” see and demand an explanation from them.
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[\[FN1\]](#). C. La Rue Munson, [How Far Shall the Justice and Rights of the Particular Cause Prevail Over a Strict Application of Established Rules of Law](#), 13 *Yale L. J.* 124, 136 (1904) (emphasis omitted).

[\[FN2\]](#). Robert J. Pushaw, Jr., *Partial-Birth Abortion and the Perils of Constitutional Common Law*, 31 *Harv. J.L. & Pub. Policy* 519, 589 (2008).

[\[FN3\]](#). See generally Frederick Schauer, [Formalism](#), 97 *Yale L.J.* 509 (1988) (describing Rulists as those who seek judicial decisions based on “rule like” standards while discounting the importance of current readings, justifications, and original intent).

[\[FN4\]](#). Munson, *supra* n. 1, at 133 (“Lord Coke may well stand for an example of lawyers of his class; learned, profound, honest and wise, and who would measure what is right, just and fair between man and man by the rigid rules of law, rather than to measure the law by the rules of justice and right.”).

[\[FN5\]](#). See Mitchell N. Berman, [Originalism is Bunk](#), 84 *N.Y.U. L. Rev.* 1, 35 n. 90 (2009) (describing why, in his opinion, Scalia is a Rulist, and the effect it has had in his judicial rulings and opinions).

[\[FN6\]](#). See generally Aharon Barak, [A Judge on Judging: The Role of a Supreme Court in a Democracy](#), 116 *Harv. L. Rev.* 16 (2002) (discussing the challenges of judicial review in light of the historically philosophical uncertainties created by any attempt to define the role of a judge and by extension law itself).

[\[FN7\]](#). Antonin Scalia, [The Rule of Law as the Law of Rules](#), 56 *U. Chi. L. Rev.* 1175 (1989).

[\[FN8\]](#). See e.g. [id. at 1176-79](#) (discussing the historical notion that law literally rules America like a king would rule in a monarchy and then extolling the virtues of laws being formulated as rules to withdraw discretion and its purported problems from the American court system).

[\[FN9\]](#). Id.

[\[FN10\]](#). Id. at 1177 (describing the importance of the Supreme Court's reasoning and by extension the reasoning of its Justices).

[\[FN11\]](#). See Robert P. Stockwell, J. Donald Bowen, & John W. Martin, *The Grammatical Structures of Both English and Spanish* 24-25 (U. of Chi. Press 1965) (defining an equational phrase as an assertion pattern in which the two parts of a simple sentence are linked by a verb phrase with “be” as its main element).

[\[FN12\]](#). Id. at 20. (explicitly stating that any verb with “be” as its main element is the crucial required component for making equational assertions while listing “is”, “am”, and “could be” as qualifying examples).

[\[FN13\]](#). Id. at 20-25.

[\[FN14\]](#). See Id. (discussing the significance and giving examples of the sentence structure of a phrase containing two noun phrases separated by a verb phrase derived from “be,” thus signifying the equality of the two noun phrases).

[\[FN15\]](#). See Id. (note that in identifying the equational assertion, preliminary importance in identification is merely given to the inclusion of two nouns separated by a verb phrase derived from “be,” not necessarily the presence of two mirror image noun phrases).

[\[FN16\]](#). In at least one instance “Cars” may be singular, despite the “s” on the end. Cars is singular when referring to the band known as “The Cars.”

[\[FN17\]](#). Norman J. Singer, *Statutes and Statutory Construction* § 7.4, 609-11 (6th ed. West Group 2002).

[\[FN18\]](#). Charles Luce, *Judicial Regulation of Legislative Procedure in Wisconsin, 1941* Wis. L. Rev. 439, 453-54 (1941) (citing [McDonald v. State, 50 N.W. 185 \(Wis. 1891\)](#)).

[\[FN19\]](#). Conversely, “fish” refers to singular and plural. “Fish” could also refer to Professor Stanley Fish, who might also have an opinion about Rulism.

[\[FN20\]](#). Scalia, *supra* n. 7, at 1182.

[\[FN21\]](#). Id. at 1183.

[\[FN22\]](#). Id. at 1185.

[\[FN23\]](#). Id.

[\[FN24\]](#). Id. at 1182. (“[J]udicial courage is impaired[?]” What? What hat did Scalia

prestidigitate that from? And why does courage matter? Do common law judges lack courage when acting with discretion? How is courage defined? How much courage does it take to follow a rule?).

[FN25]. Brett Scharffs, The [Role of Humility in Exercising Practical Wisdom](#), [32 U.C. Davis L. Rev. 127, 171 n. 108 \(1998\)](#) (“John Marshall, Oliver Wendall Holmes, Earl Warren, William Brennan, Antonin Scalia, Richard Posner-- these may not be names that immediately come to mind when we think of judges who have been or who are humble.”).

[FN26]. Scalia, *supra* n. 7, at 1178-79.

[FN27]. See e.g. Baher Azmy, [Executive Detention, Boumediene, and the New Common Law of Habeas](#), [95 Iowa L. Rev. 445, 466 \(2010\)](#) (“As Justice Scalia stressed, bright-line jurisdictional rules promote clarity and predictability for the political branches that have to interpret them and the potential litigants who have to follow them.”); Richard H. Fallon, Jr., [Judicially Manageable Standards and Constitutional Meaning](#), [119 Harv. L. Rev. 1274, 1284, n. 34 \(2006\)](#) (“According to Justice Scalia, clear rules promote the equal treatment of like cases, enhance predictability, foster judicial restraint by limiting judges' discretion, and encourage judicial steadfastness by providing judges a ‘solid shield’ when they resist popular pressures.”); Jay Michaelson, *In Praise of the Pound of Flesh: Legalism, Multiculturalism, and the Problem of the Soul*, *6 J.L. Socy.* 98, 119 (2005) (“Justice Scalia, for example, has argued that the ‘rule of law’ must be a ‘law of rules’ in order to promote equality, uniformity, and predictability within a judicial system.”).

[FN28]. Arnold H. Loewy, *Constitutional Law and Civil Rights Symposium, Part I: Rethinking Free Exercise of Religion after Smith and Boerne: Charting a Middle Course*, [68 Miss. L.J. 105, 121-22](#) (footnote omitted).

[FN29]. Richard B. Saphire, [Originalism and the Importance of Constitutional Aspirations](#), [24 Hastings Const. L.Q. 599, n.73 \(1997\)](#) (quoting Cass Sunstein, *Legal Reasoning and Political Conflict* 174 (Oxford U. Press 1996)).

[FN30]. John L. Gedid, *Annual Survey of Pennsylvania Administrative Law: Administrative Law Progress: Major Constitutional and Administrative Decisions of 1996: Progress of the Supreme Court of Pennsylvania*, [6 Widener J. Pub. L. 595, 634 \(1997\)](#) (quoting [In re Salary of Juvenile Director](#), [552 P.2d 163, 170 \(Wash. 1976\)](#)).

[FN31]. U.S. Const. art. III. § 1.

[FN32]. U.S. Const. art. III. § 2, cl. 1.

[FN33]. [28 U.S.C. § 1332 \(2006\)](#).

[FN34]. U.S. Const. art. III. § 1.

[FN35]. See e.g. [Simon v. E. Ky. Welfare Rights Org.](#), 426 U.S. 26, 37 (1976) (explicitly stating that “[n]o principle is more fundamental to the judiciary’s proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.”).

[FN36]. See e.g. Scalia, *supra* n. 7, at 1178-79.

[FN37]. See Randy E. Barnett, William Howard Taft Lecture: [Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism](#), 75 U. Cin. L. Rev. 7 at 13-15 (discussing the times and ways in which Scalia has shunned originalist analysis with particularly poignant insight on Scalia’s reliance on the Necessary and Proper Clause in [Gonzales v. Raich](#), 545 U.S. 1 (2005)).

[FN38]. U.S. Const. art. I-III.

[FN39]. *Id.*

[FN40]. U.S. Const. preamble.

[FN41]. U.S. Const. art. I-III.

[FN42]. *Id.*

[FN43]. E.g. [U.S. Const. art. I § 1](#) (vesting legislative power in a Senate and House of Representatives).

[FN44]. *Id.*

[FN45]. U.S. Const. art. I-III.

[FN46]. In this case the author takes the liberty of using the objective form of the subjective personal pronoun “we” from the Preamble as previously stated.

[FN47]. This article concludes “the Rulists... personally prefer” for the following reasons. They assert the “need” for predictability without citing to a source for that need. The lack of a source suggests a personal choice of some sort. The lack of a source also suggests a preference. In other words, these Rulists do not suggest that they are bound in any way by an outside source. That lack of outside source, that lack of a commanding voice, that lack of authority suggests that the Rulist simply prefers predictability. See e.g. Scalia, *supra* n. 7, at 1178-79 (explicitly stating how his opinion has changed regarding the importance of rule like law, and how his change of opinion resulted in no small part from a perceived need in the law for predictability).

[FN48]. What the author means is rules that do not exist before the Rulist invents the rules. The Rulist writes her or his “rule” then, of course making it a written, albeit,

invented rule, but, the author supposes, inventing rules is, to the Rulist, the point of the Rulist goal of making law a set of Rules. See *id.* at 1176-77 (admitting that the American judicial system is set up so that judges can and do make law).

[FN49]. See *id.* at 1176 (stating that Aristotle thought personal rule should not have a prominent role in governing a free society when “[r]ightly constituted laws should be the final sovereign.”).

[FN50]. See *id.* at 1178-79 (listing predictability as an “obvious advantage” of propagating a “clear, general principle of decision.”).

[FN51]. See *id.* at 1175 (discussing the personal realization that rules are predictable and that law should be predictable by giving deference to historical philosophers and then changing to a discussion of the “theoretical” to support his personal realizations and arguments over the direction that the American judiciary should take).

[FN52]. *Id.*

[FN53]. *Id.* at 1182.

[FN54]. *Id.* at 1183-85.

[FN55]. Perhaps this will occur after Scalia creates the rule by balancing completely rule less factors such as history, text, context, original meaning, original intent of the “Founders,” precedent, structure of the Constitution and government, etc.

[FN56]. [408 U.S. 238 \(1972\)](#).

[FN57]. [Id. at 309-10](#) (Stewart, J., concurring).

[FN58]. See e.g. Robert J. Reinstein, [The Limits of Executive Power](#), 59 *Am. U. L. Rev.* 259, 282-83 (discussing two historical British cases where the arbitrary exercise of executive power was recognized by the court); Ashlee Smith, [Vice-a-Verdict: Legally Inconsistent Jury Verdicts Should Not Stand in Maryland](#), 35 *U. Balt. L. Rev.* 395, 398 (citing the Supreme Court's affirmation of historical reality that the jury verdict was created to check arbitrary uses of executive power).

[FN59]. [7 U.S.C.S. § 518 \(Lexis 2004\)](#); [26 U.S.C.A. § 5701\(a\)-\(h\)](#) (Lexis 2009).

[FN60]. See Katherine Connor & Ellen J. Vargas, [The Legal Implications of Gender Bias in Standardized Testing](#), 7 *Berkeley Women's L.J.* 13, 16 (1992) (discussing in detail the problems surrounding the ASVAB test and relaying statistical evidence that seems to show it as having a detrimental impact upon women and minorities).

[FN61]. See [Gonzales v. Raich](#), 545 U.S. 1, 2 (2005) (stating that marijuana is a controlled substance and affirming Congressional power to regular such substances).

[FN62]. [32 C.F.R. § 584.5\(a\)](#) (WL current through Sep. 29, 2011).

[FN63]. [26 U.S.C.A. § 1\(c\)-\(d\)](#) (West 2008).

[FN64]. Sen. Comm. on Jud., Crimes Associated with Polygamy: The Need for a Coordinated State and Federal Response, 110th Cong. I (July 24, 2008) (available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_senate_hearings&docid=F:44773.pdf).

[FN65]. See Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16-23* (Yale U. Press 1986) (detailing arguments why judicial review may be out of place within a democratic society).

[FN66]. See Nicholas Murray Butler, *True and False Democracy* viii (MacMillan Co. 1907) (“It must never be forgotten that the same individuals constitute both the mob and the people. When their lower nature rules, these individuals are a mob; when their higher nature guides, they are the people.”).

[FN67]. [U.S. Const. art. II § 2, cl. 2](#).

[FN68]. *Id.*

[FN69]. See Scalia, *supra* n. 7, at 1182.

[FN70]. See *id.*, at 1182-83 (discussing how there are very few instances where law cannot be made “precise” and “principled” so as to minimize the influence of personal rule).

[FN71]. See Butler, *supra* n. 65, at vii.

[FN72]. If one agrees with the sanctity of elections as necessarily creating a just government, consider William Brustein, *The Social Origins of the Nazi Party* xi (Yale U. Press 1996) (asking “[h]ow then could so many Germans, nearly fourteen million adults (37.3 percent of the electorate), have voted for the Nazi Party in a free and open election in July 1932”).

[FN73]. For an interesting look at how elections have stymied racial equality past the 1950s, see Laughlin McDonald, *The Majority Vote Requirement: Its Use and Abuse in the South*, 17 *Urb. Law.* 429 (1985) (discussing how elections and the requirement of majority rule have been used to prevent the acquisition of equal rights of blacks).

[FN74]. See Bickel, *supra* n. 64, and accompanying text.

[FN75]. See Nathan S. Heffernan, [Judicial Responsibility, Judicial Independence and the Election of Judges](#), 80 *Marq. L. Rev.* 1031, 1035 (1997) (noting that the Constitution

created a system where judges were dependent upon multiple parts of the government for appointments as a way to alleviate the grievance that colonists had regarding unfair rulings when English judges were entirely at the whim of the king for their positions).

[FN76]. See Lucy Adams, [Death by Discretion: Who Decides Who Lives or Dies in the United States of America?](#) 32 *Am. J. Crim. L.* 381, 400 (2005) (arguing that the discretion employed by the criminal justice system in deciding the fate of those on death row is directly tied to the unequal, unjust, and arbitrary laws covering capital punishment in America).

[FN77]. See Heffernan *supra* n. 74, and accompanying text.

[FN78]. See U.S. Const. art. I-II (detailing the very specific rules controlling the Legislative and Executive compartments of the United States government).

[FN79]. For discussion or mention of Scalia's "aversion" to foreign law, see, *inter alia*, Rebecca Bratspries, The [Intersection of International Human Rights and Domestic Environmental Regulation](#), 38 *Ga. J. Intl. & Comp. L.* 649, 670 n. 96 (2010) ("Justice Scalia in particular has expressed hostility towards the use of foreign law."); Mark S. Stein, [Originalism and Original Exclusions](#), 98 *Ky. L.J.* 397, 451 (2009-2010) ("Justice Scalia rejected a consideration of foreign law, and made, in passing, a pejorative reference to the legal systems of other countries"); David Alan Sklansky, [Anti-Inquisitorialism](#), 122 *Harv. L. Rev.* 1634, 1665 (2009) ("Justice Scalia, Chief Justice Roberts, and Justice Thomas--have...been the Justices most prominently opposed to relying, even loosely, on foreign and international precedents in interpreting our own Constitution.").

[FN80]. Steven G. Calabresi and Stephanie Dotson Zimdahl, The [Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision](#), 47 *Wm. & Mary L. Rev.* 743, 759 (2005).

[FN81]. Scalia, *supra* n. 7, at 1182.

[FN82]. *Id.*

[FN83]. Perhaps it is because Aristotle is known for having engaged in thinking and reasoning in "which doctors or generals engage in." An interesting note is that Scalia may stand with Aristotle in more than one way; Aristotle has caused much debate and argument due to being perceived as vague and contradictory. John M. Cooper, *Reason and the Human Good in Aristotle 1* (Hackett Publ. Co.1986).

[FN84]. Scalia, *supra* n. 7, at 1183-85.

[FN85]. *Id.*

[FN86]. *Id.* at 1185.

[FN87]. Perhaps Scalia even does more than avoid acknowledgment of his choice and knowingly avoids intellectual inquiry and enlightenment. See *Id.* (stating that he is “not inclined to find” suggesting that he knows he could if only he looked) (emphasis added).

[FN88]. Perhaps this is because of the prevalence of judicial decisions detailing the reasoning behind a Judge's ruling. There is, ironically, something that Ouiji Boards may share with judicial opinions; reliability. See generally Robert A. Leflar, *Honest Judicial Opinions*, 74 *Nw. U. L. Rev.* 721 (1979) (discussing the debate that rages around whether written judicial opinions are honest and forthright when detailing the supposed reasons behind any given ruling).

[FN89]. For a recent case showing the frequency at which the Court takes up balancing interests against one another see [NASA v. Nelson, 131 S. Ct. 746 \(2011\)](#) (deciding that the government interest in finding capable employees outweighed a minimal intrusion into an individual's right to privacy).

[FN90]. [U.S. Const. amend. I](#) (emphasis added).

[FN91]. It is interesting to note that in many circumstances the abridgement of speech that the Court allows is actually a balancing test with precedent and a good measure of predictability. It seems like one can find balancing tests with more reasoning and rigor than Scalia wants quite easily. See [Bd. of County Comm'rs v. Umbehr, 518 U.S. 668 \(1996\)](#) (stating that the free speech rights of a government employee hinge upon a balance between the interests of the citizen employee in speaking on public matters and the government's interest in promoting efficiency in its workplace).

[FN92]. See U.S. Const. preamble.

[FN93]. *Id.*

[FN94]. *Id.*

[FN95]. See Scalia, *supra* n. 7, at 1183.

[FN96]. For a detailed look into the Constitutional Convention and its importance see John Alexander Jameson, *The Constitutional Convention: Its History, Powers, and Modes of Processing* (Charles Scribner & Co. 1867).

[FN97]. [543 U.S. 499, 524 \(2005\)](#) (Thomas, J., joined by Scalia, J., dissenting).

[FN98]. [Id. at 524, 528-29.](#)

[FN99]. See [id. at 524-50.](#)

[FN100]. A conclusion to this effect would have resulted in a possible contradiction with

the Declaration of Independence. Thankfully the Court did not find this way and prisoner's only see their rights become alienable some of the time. Compare Declaration of Independence (1776) with [Johnson, 543 U.S. 499](#) (noting the mentioning of “unalienable rights” in the Declaration of Independence and the Court's willingness to determine the alienability based on factors and circumstances brought before the Court).

[\[FN101\]](#). [Johnson, 543 U.S. 499 at 524, 529.](#)

[\[FN102\]](#). See [Id. at 524.](#)

[\[FN103\]](#). See e.g. [Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 239 \(1995\)](#) (Scalia, J., concurring in part and concurring in the judgment) (arguing that the government can never have a “compelling interest” to discriminate based on race).

[\[FN104\]](#). Loewy, *supra* n. 28, at 121-22 (footnote omitted).

[\[FN105\]](#). See [Tex. v. Johnson, 491 U.S. 397 \(1989\)](#) (specifically discussing the issues involved in weighing the value of the American flag as an icon versus the value of burning it as expressive speech).

[\[FN106\]](#). See e.g. *id.* (discussing how Texas claimed it took into account the need to protect the flag as a national symbol when banning flag burning).

[\[FN107\]](#). See e.g. *id.* (discussing the Court's balancing and the history of the issue and other opinions that have been reached throughout history).

[\[FN108\]](#). Ironically unless brought up in a judicial proceeding. See *id.*

[\[FN109\]](#). Scalia, *supra* n. 7, at 1179-80.

[\[FN110\]](#). See [U.S. Const. art. III § 1.](#); U.S. Const. art. III. [§ 2, cl. 1.](#); [28 U.S.C. § 1332 \(2006\)](#); [Simon, 426 U.S. 26 at 37.](#)

[\[FN111\]](#). See U.S. Const. art. I-II.

[\[FN112\]](#). John F. Manning, [Federalism and the Generality Problem in Constitutional Interpretation, 122 Harv. L. Rev. 2003, 2039 \(2009\)](#) (“[T]he Constitution adopts a highly complex governmental structure meant to endure through the ages.”); see also Mark D. Rosen, [From Exclusivity to Concurrence, 94 Minn. L. Rev. 1051, 1148 \(2010\)](#) (“[T]he Constitution was ‘intended to endure for ages to come.’”).

[\[FN113\]](#). See *id.* at 2042.

[\[FN114\]](#). “Japanese Internment Camps” is a phrase that hides the truth, that the Japanese descendants were imprisoned, even if their prison was not as horrific as the gulags of the Soviet Union. For a very honest and insightful look into the actual conditions suffered by

the individuals imprisoned within the United States due to their Japanese ancestry, and the lasting effect that this has had upon such individuals, their families, and society as a whole, see *Last Witnesses: Reflections on the Wartime Internment of Japanese Americans* (Erica Harth ed., Palgrave 2001).