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Steven G. Calabresi
Northwestern University School of Law

Gary Lawson
Boston University School of Law

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ARTICLES

THE RULE OF LAW AS A LAW OF LAW*

*Steven G. Calabresi***
*Gary Lawson****

Abstract

Justice Scalia is famous for his strong rule orientation, best articulated in his 1989 article, The Rule of Law as a Law of Rules. *In this Article, we explore the extent to which that rule orientation in the context of constitutional interpretation is consistent with the Constitution's original meaning. We conclude that it is far less consistent with the Constitution than is generally recognized. The use of standards rather than rules is prescribed not only by a few provisions in the Bill of Rights and the Fourteenth Amendment but also by key aspects of the 1788 constitutional text. The executive power, the necessary and proper power, and indeed the entire scheme of enumerated powers are all infused with standards, largely through the Constitution's implicit incorporation of fiduciary norms as a background principle of interpretation. The Constitution often prescribes rules, but it often does not. The law is what it is, whether or not it conforms to some abstract jurisprudential norm. The rule of law is not a law of rules. It is a law of law.*

Introduction

In 1980, a law professor at the University of Chicago named Antonin Scalia advised the Supreme Court in the then-pending case of *Industrial Union Department, AFL-CIO v. American Petroleum Institute*[1] that, "even with all

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* With apologies to, profound admiration and respect for, and modest disagreement with Justice Antonin Scalia.

** Professor, Northwestern University School of Law.

*** Philip S. Beck Professor, Boston University School of Law. I am grateful to the participants at a workshop at Boston University School of Law for their many helpful suggestions.

1 448 U.S. 607 (1980). The case involved section 6(b)(5) of the Occupational Safety and Health Act of 1970, which provides that the Secretary of Labor must promulgate standards for workplace exposure to toxic substances "which most adequately assure[ ], to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard . . . for the period of his working life." 29 U.S.C. § 655(b)(5)

its Frankenstein-like warts, knobs, and (concededly) dangers, the unconstitutional delegation doctrine is worth hewing from the ice."[2] The chief danger of reviving the nondelegation doctrine feared by Professor Scalia was that, given "the difficulty of enunciating how much delegation is too much,"[3] judicial enforcement of a nondelegation principle would be "an invitation to judicial policy making in the guise of constitutional law."[4] "But," countered Professor Scalia in response to his own concerns, "surely vague constitutional doctrines are not automatically unacceptable."[5]

In 1989, in *Mistretta v. United States*,[6] a Supreme Court Justice named Antonin Scalia faced a statute at least as empty and vacuous as the statute that Professor Antonin Scalia had urged the Court to invalidate on nondelegation grounds less than a decade earlier. The Sentencing Reform Act of 1984 charged the United States Sentencing Commission with devising legally binding sentencing ranges for federal offenses,[7] subject only to three broad goals,[8] four broad purposes,[9] seven incommensurable factors for determining offense categories,[10] and eleven incommensurable factors for determining offender characteristics.[11] It is hard to imagine a more open-ended grant of authority to an agency on so important a matter. Justice Scalia, without citing Professor Scalia, wrote:

> But while the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element read-

(2012). For discussion of the fundamental emptiness of this statute—with or without the "to the extent feasible" language that engaged the attention of some of the Justices in *Industrial Union*—see Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 381–86 (2002).

2 Antonin Scalia, *A Note on the Benzene Case*, REGULATION, July/Aug. 1980, at 25, 28. The ice from which the nondelegation doctrine had to be hewed was the deep freeze placed on it after 1935, when it was first and last employed by the Court to invalidate a congressional statute. *See* Panama Ref. Co. v. Ryan, 293 U.S. 388, 433 (1935) (first); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935) (last).

3 Scalia, *supra* note 2, at 27 ("The relevant factors are simply too multifarious: How significant is the power in question (for example, fixing customs duties versus fixing prices and wages for the entire economy)? How technical are the judgments left for executive determination (for example, establishing construction criteria for nuclear reactors versus establishing standards for 'fair' advertising)? What degree of social consensus exists with respect to those nontechnical judgments committed to the executive (for example, defining 'unfair or deceptive trade practices' versus defining acceptable levels of air pollution)? And—most imponderable of all—how great is the need for immediate action (for example, the executive-determined price controls authorized in World War II versus those authorized in 1970, during the Vietnam conflict)?").

4 *Id.* at 28.

5 *Id.*

6 488 U.S. 361 (1989).

7 *See* 28 U.S.C. § 994(a) (2012).

8 *See id.* § 991(b)(1), § 994(f).

9 *See id.* § 994(g); *see also* 18 U.S.C. § 3553(a)(2).

10 *See* 28 U.S.C. § 994(c).

11 *See id.* § 994(d).

> ily enforceable by the courts. Once it is conceded, as it must be, that no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and the judges applying it, the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree. . . . [I]t is small wonder that we have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.[12]

While Justice Scalia dissented from the Court's judgment in *Mistretta* upholding the statute because the Sentencing Commission did not have even nominal executive authority to anchor its rulemaking power,[13] he made it clear that he "fully agree[d]" with the otherwise unanimous Court's "rejection of petitioner's contention that the doctrine of unconstitutional delegation of legislative authority has been violated because of the lack of intelligible, congressionally prescribed standards to guide the Commission."[14]

Moreover, in 2001, in *Whitman v. American Trucking Association*,[15] Justice Scalia wrote the opinion for a unanimous Court upholding against a nondelegation challenge a provision of the Clean Air Act mandating the administrative issuance of air quality standards, "the attainment and maintenance of which in the judgment of the Administrator [of the Environmental Protection Agency], based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health."[16] Apart from a brief comment in a statutory interpretation case in 2012, in which the relevant statute specified no governing standard whatsoever,[17] nothing since 2001 suggests that Justice Scalia has changed his mind about enforcing the nondelegation doctrine.

What happened during the transition from Professor Scalia to Justice Scalia? And was the Professor or the Justice correct?

Part I of this Article addresses the first question, which we think has a very straightforward answer. When Professor Scalia became a judge, certain of his always-present jurisprudential inclinations came strongly to the fore. The same year that *Mistretta* was decided, Justice Scalia published a famous law review article entitled *The Rule of Law as a Law of Rules*[18] that provides

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12 Mistretta v. United States, 488 U.S. 361, 415–16 (1989) (Scalia, J., dissenting).

13 *See id.* at 420–21.

14 *Id.* at 416.

15 531 U.S. 457 (2001).

16 42 U.S.C. § 7409(b)(1).

17 *See* Reynolds v. United States, 132 S. Ct. 975, 986 (2012) (Scalia, J., dissenting) ("[I]t is not entirely clear to me that Congress can constitutionally leave it to the Attorney General to decide—with no statutory standard whatever governing his discretion—whether a criminal statute will or will not apply to certain individuals. That seems to me sailing close to the wind with regard to the principle that legislative powers are nondelegable . . . .").

18 *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989). As evidence of the article's fame, a simple search of WestlawNext's "Law Reviews and Journals" database on October 23, 2014 showed 1329 citations.

crucial insight—in our view more insight than any other article or opinion that he has written—into his jurisprudential philosophy. While the article itself has the modest goal of describing how Justice Scalia thinks courts should formulate judge-made doctrinal principles,[19] the title and the subthemes running though the piece perfectly encapsulate Justice Scalia's broad approach to constitutional (and indeed all kinds of) adjudication.

For Justice Scalia, the essence of law is impersonal rules that can be impersonally applied. While he stopped short in *The Rule of Law as a Law of Rules* of calling for an absolute ban on balancing tests and vague totality-of-the-circumstances standards—he noted dryly that "for my sins, I will probably write some of the opinions that use them"[20]—it is clear that Justice Scalia finds those kinds of inquiries antithetical to both the judicial enterprise and the very notion of law. Indeed, he describes decisions under these kinds of vague standards as "not so much pronouncing the law in the normal sense as engaging in the less exalted function of fact finding."[21] If a legal norm is not rule-like, then for Justice Scalia it is not really law at all—or at the very least not law that is judicially enforceable.

Professor Scalia worried about this sort of thing quite a bit back in 1980, but clearly Justice Scalia, when faced with the actual task of formulating a workable nondelegation doctrine, elevated those worries to a new level. Because it is impossible to formulate the nondelegation doctrine in a fashion that does not leave considerable room for judicial discretion,[22] it is not surprising that Justice Scalia effectively declared it nonjusticiable.

We believe that almost all of Justice Scalia's jurisprudence, including some parts that are sometimes thought to be anomalous, can be understood in terms of his strong equation of law and rules. This conception of law as properly consisting only of rules generally overwhelms any other influences on Justice Scalia's decisionmaking, including influences drawn from interpretative theory.[23] Thus, on more than infrequent occasions, Justice Scalia's law-of-rules approach seems to lead to results that are inconsistent with his professed originalist methodology, which he set forth in another famous 1989 law review article called *Originalism: The Lesser Evil*.[24] His approach to the nondelegation doctrine is a good example, as is his treatment of the Privileges or Immunities Clause of the Fourteenth Amendment.[25]

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19 *See id.* at 1176–77.

20 *Id.* at 1187.

21 *Id.* at 1180–81.

22 *See infra* notes 36–45 and accompanying text.

23 We are hardly the first to make this observation. *See* Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 82 (1992) ("[F]or Justice Scalia, the enterprise of rationalizing constitutional interpretation is dominated by favoritism for rules. If the quest for rules is primary, it does not matter on which interpretive axis he finds one.").

24 *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989). A search of WestlawNext's "Law Reviews and Law Journals" database on October 23, 2014 yielded a "mere" 1005 citations to this article.

25 *See infra* notes 52–62 and accompanying text.

All of this is understandable—and we say understandable rather than correct—once one grasps that *The Rule of Law as a Law of Rules* rather than *Originalism: The Lesser Evil* is the urtext for Justice Scalia's jurisprudence. Put in constitutional terms, if the "judicial Power"[26] is fundamentally the power and duty to decide cases in accordance with governing law,[27] then for Justice Scalia that amounts to the power and duty to decide cases in accordance with governing rules.

In Part II, we address whether Professor Scalia or Justice Scalia has the stronger argument on the legal acceptability of standards in constitutional law, and we come down squarely on the side of Professor Scalia. As (if we may be so bold) a matter of interpretation,[28] Justice Scalia is wrong to try to impose an across-the-board, rules-oriented presumption on the Constitution. The Constitution sometimes prescribes rules and it sometimes prescribes standards. Indeed, as we will show, it prescribes standards more often than one might think, including in the text of the Constitution of 1788. The original document is infused with standards to a degree that often escapes notice. The nondelegation doctrine is only the tip of the iceberg; all of the enumerated powers are granted against a background of fiduciary law that is largely driven by standards. If Justice Scalia refuses to enforce constitutional provisions that he does not regard as sufficiently rule-like, such as the nondelegation principle or less-than-absolute antidiscrimination norms,[29] the result will be to sustain objectively unconstitutional governmental acts and institutions or to invalidate objectively constitutional ones.

Of course, Justice Scalia does not advance his rule orientation directly as a theory of meaning; he grounds it primarily in concerns about the institutional role of courts. But, as we suggested above, his argument could be cast in interpretative terms by treating it as a reading of Article III's grant of the "judicial Power."[30] That is, Justice Scalia could be saying that because the judicial power is the power to apply law to particular disputes, Article III requires federal courts to apply only rules in adjudication because only rules actually constitute law. If the American Constitution was a common law construct along the lines of a simple caricature of the British Constitution, for which the object of interpretation is to induce the norms that are immanent in practices, customs, and social structures, there would in fact be much to Justice Scalia's position; there are very good arguments for conducting common law adjudication of that form with a strong, and perhaps even overwhelming, preference for rules.[31] Accordingly, when federal courts are

26 U.S. CONST. art. III, § 1.

27 *See* Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1273–74 (1996).

28 *Cf.* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997).

29 *See infra* notes 46–51 and accompanying text.

30 U.S. CONST. art. III, § 1.

31 Indeed, we plan to make those arguments in a subsequent work, and they are foreshadowed in Steven G. Calabresi & Bradley G. Silverman, *Hayek and the Citation of Foreign*

fashioning federal common law, Justice Scalia's jurisprudential approach is sound. But interpretation of the American Constitution is not a common law enterprise of that sort.[32] The American Constitution already provides the relevant norms in explicit fashion; the job of interpretation is to decode them and apply their meaning deductively to particular circumstances. For that enterprise, Article III instructs courts to find and apply the law—whatever that law may be and whatever form the relevant norms happen to take. And if the Constitution wants to defy an ideal conception of legal metaphysics and define some standards to be law, that is the Constitution's prerogative. If federal courts are to be faithful to their charge under Article III, the rule of law must be a law of law.[33]

I

Randy Barnett has flatly accused Justice Scalia of "ignoring the original meaning of those portions of the Constitution that conflict with his conception of 'the rule of law as a law of rules.'"[34] Justice Scalia, for his part, thinks that his commitment to rules flows quite naturally from his theory of interpretation, writing that "it is perhaps easier for me than it is for some judges to develop general rules, because I am more inclined to adhere closely to the plain meaning of a text."[35] Professor Barnett and Justice Scalia are both, as Obi Wan might say, right from a particular point of view, and it is not our task in this Part to mediate that dispute. Rather, we aim here simply to describe the extent to which Justice Scalia's jurisprudence is driven by a search for rules rather than a more calibrated interpretative search for original meaning. Subsequently, in Part II, we explore the extent to which that commitment is consistent with the Constitution.

There are numerous examples of Justice Scalia's rule-driven rather than meaning-driven approach to decisionmaking, including many examples in which that approach seems to place him at odds with the consensus views of

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Law, 2015 MICH. ST. L. REV. (forthcoming) (manuscript at 16–17) (on file with authors). Professor Lawson, speaking only for himself, believes that there might also be a very modest case for preferring rules to standards in the interpretation of the actual American Constitution in close cases, though the rule-preference would enter only through an epistemological decision about when to cease looking for additional evidence of the right answer. He plans to explore this possibility in a future work, though even if he is right, it would affect the conclusions of this paper only at some very remote margins.

32 On the differences among common law, statutory, and constitutional adjudication from the perspective of a Hayekian account of rules, see Nicholas Terrell, *Private Law, Legislation, and Constitutional Limitations: A Modern Hayekian Analysis of Law* (unpublished manuscript at 33–50) (on file with authors).

33 *Accord* JACK M. BALKIN, LIVING ORIGINALISM 6–7, 14, 23–24 (2011); *see* David A. Strauss, *On the Origin of Rules (with Apologies to Darwin): A Comment on Antonin Scalia's* The Rule of Law as a Law of Rules, 75 U. CHI. L. REV. 997, 1006 (2008) ("Textualism will lead you to rules only when the text happens to prescribe a rule.").

34 Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 12 (2006).

35 Scalia, *supra* note 18, at 1184.

his fellow originalists (including us). We mean for this discussion to be illustrative, not exhaustive.

The example of the nondelegation doctrine is perhaps the clearest case. The originalist case for a nondelegation doctrine is very strong, and even overwhelming.[36] But because application of the doctrine requires drawing lines among the legislative, executive, and judicial powers—a task that James Madison said "puzzle[s] the greatest adepts in political science"[37] and that Chief Justice John Marshall said was "a subject of delicate and difficult inquiry"[38]—it will necessarily entail a strong element of judgment in accordance with hard-to-articulate standards. Chief Justice Marshall described the inquiry as distinguishing "those *important* subjects, which must be entirely regulated by the legislature itself, from those of *less interest*, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."[39] Professor Lawson, after spending much of his professional life studying the nondelegation doctrine, came up with a formulation (which he intends as a serious description of the actual required inquiry): "Congress must make whatever policy decisions are sufficiently important to the statutory scheme at issue so that Congress must make them."[40] In other words, "[t]he line between legislative and executive power (or between legislative and judicial power) must be drawn in the context of each particular statutory scheme. In every case, Congress must make the cen-

36 The essence of an originalist case for a standards-based nondelegation doctrine is laid out in Lawson, *supra* note 1, at 336–53, and Gary Lawson, *Discretion as Delegation: The "Proper" Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235, 268 (2005); *see also* Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for* Clinton v. City of New York, 76 TUL. L. REV. 265, 303–12 (2001) (defending a constitutional nondelegation doctrine and noting that it might apply differently in varying contexts). Professor Lawson today would locate the source of the nondelegation principle in the fiduciary character of the Constitution rather than, as he argued in 2002 and 2005, the Necessary and Proper Clause, which is simply a context-specific articulation of the broader fiduciary norms that underlie the document. This change in view, however, affects only the *domain* of the nondelegation doctrine rather than its *formulation*. That is, if the doctrine springs from the Necessary and Proper Clause, it would not apply to legislation regarding federal territories, federal lands, or the District of Columbia because congressional power over those areas does not stem from the Necessary and Proper Clause. *See* U.S. CONST. art. I, § 8, cl. 17 (giving Congress power of "exclusive Legislation" over the District of Columbia); *id.* art. IV, § 3, cl. 2 (giving Congress power to make "all needful Rules and Regulations respecting" federal territories or property). A fiduciary theory of nondelegation, however, would extend the doctrine to all exercises of congressional power, which Professor Lawson now thinks is the better view. *See* Gary Lawson, Guy I. Seidman & Robert G. Natelson, *The Fiduciary Foundations of Federal Equal Protection*, 94 B.U. L. REV. 415, 447–48 (2014). But the content of the doctrine is the same regardless of its precise domain.

37 THE FEDERALIST NO. 37, at 183 (James Madison) (George W. Carey & James McClellan eds., 2001).

38 Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 46 (1825).

39 *Id.* at 43 (emphasis added).

40 Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1239 (1994).

tral, fundamental decisions, but Congress can leave ancillary matters to the President or the courts."[41]

These are not the kinds of formulations that are likely to inspire Justice Scalia. It is therefore not surprising that he effectively announced in *Mistretta* that he would normally not enforce the nondelegation doctrine, notwithstanding his acknowledgement that it is "unquestionably a fundamental element of our constitutional system,"[42] because it is "a debate not over a point of principle but over a question of degree."[43] The clear implication is that debates over questions of degree are not matters of law (or principle) and are accordingly not fit subjects for constitutional adjudication by the courts, even when there are strong originalist reasons for thinking that the Constitution prescribes a degree-oriented inquiry. Justice Scalia thus treats the Constitution as though it is subject to an implicit version of § 701(a)(2) of the Administrative Procedure Act: judicial review is not available when a matter is "committed to agency [or legislative] discretion by law,"[44] meaning that there is simply "no law to apply."[45] And in this context, no law to apply means no rule to apply.

Other examples of Justice Scalia's rule orientation abound. For instance, Justice Scalia endorses a strict colorblind interpretation of the Constitution that, among other things, categorically forbids all state and federal affirmative action efforts—a view that he strongly reiterated in 2013.[46] It has been observed on many occasions that this is a difficult position to derive from originalist interpretative methods.[47] To be sure, there is a serious originalist case for concluding that the Fourteenth Amendment indeed imposes a colorblind norm on the States;[48] we do not mean to resolve the issue here or to declare flatly that Justice Scalia is wrong. Our points are only that Justice Scalia has not grounded his position in that originalist case[49] and that the case is far from a slam-dunk. The categorical unconstitutionality of federal rather than state affirmative action is, if anything, even less clear. As an original matter, the doctrine of "federal equal protection" is grounded in the fiduciary character of the Constitution and, in particular, in the fiduciary requirement that agents serving multiple principals treat all of the principals

41 Lawson, *supra* note 1, at 376–77.

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

43 *Id.*

44 5 U.S.C. § 701(a)(2) (2012).

45 Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971) (quoting S. REP. NO. 79-752, at 26 (1945)).

46 *See* Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2422 (2013) (Scalia, J., concurring) ("I adhere to the view I expressed in *Grutter v. Bollinger*: 'The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.'" (quoting Grutter v. Bollinger, 539 U.S. 306, 349 (2003) (Scalia, J., concurring in part and dissenting in part))).

47 *See, e.g.*, Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 427 (1997).

48 *See* Michael B. Rappaport, *Originalism and the Colorblind Constitution*, 89 NOTRE DAME L. REV. 71, 74–77 (2013).

49 *See id.* at 76–77.

fairly and reasonably.[50] That fiduciary norm, however, does not necessarily mandate strictly equal treatment in all cases,[51] and figuring out the proper application of that norm to federal affirmative action is actually very difficult in many contexts. If Justice Scalia's jurisprudence was driven primarily by interpretative originalism, he would probably find matters such as the constitutionality of affirmative action, particularly federal affirmative action, quite vexing. But he is adamant about imposing a strict colorblind norm on all government action. This position is completely understandable if one views it through the lens of "law as rules"—that is, if one takes *The Rule of Law as a Law of Rules* rather than *Originalism: The Lesser Evil* as the guiding text. "No racial discrimination" is far more rule-like than "no unfair or unwarranted racial discrimination"—even if the latter is actually closer to the "true" constitutional norm.

As far as action by the states is concerned, the strong consensus among originalist scholars is that the Privileges or Immunities Clause of the Fourteenth Amendment, rather than the Equal Protection Clause, is the appropriate source of a general nondiscrimination norm, with the Equal Protection Clause's reference to "protection of the laws" focused on executive and judicial application of norms.[52] Acceptance of this view, however, requires one to see the Privileges or Immunities Clause as the central provision in Section 1 of the Fourteenth Amendment.[53] Could that also make it the appropriate vehicle (if there is one) for some kind of incorporation of the Bill of Rights against the states? Or perhaps even for enforcement against the states of some category of "privileges or immunities" not limited by the specification in the 1791 Bill of Rights?

This issue squarely arose in *McDonald v. City of Chicago*,[54] in which the Court had to decide whether to apply the Second Amendment's guarantee of an individual right to keep and bear arms[55] to state and local governments. The majority opinion, which Justice Scalia joined, so applied it pursuant to the Due Process Clause of the Fourteenth Amendment,[56] as has been the Court's practice with regard to incorporation for more than a century.[57] Justice Thomas wrote an extensive, scholarly concurring opinion setting out the originalist case for reliance upon the Privileges or Immunities Clause

50 *See* Lawson, Seidman & Natelson, *supra* note 36, at 424–46.

51 *See id.* at 441–46.

52 *See, e.g.*, Steven G. Calabresi & Andrea Mathews, *Originalism and* Loving v. Virginia, 2012 BYU L. Rev. 1393, 1419; John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385, 1390 (1992).

53 *See, e.g.*, Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Barnett*, 103 Mich. L. Rev. 1081, 1086 (2005).

54 561 U.S. 742 (2010).

55 *See* District of Columbia v. Heller, 554 U.S. 570, 635 (2008). We do not address here whether *Heller* was correctly decided.

56 *See McDonald*, 561 U.S. at 766–70.

57 *See* Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 236–39 (1897) (applying the principles of the Takings Clause to the states).

instead.[58] Justice Scalia did not give a reason for not joining Justice Thomas's opinion other than precedent. Perhaps that is more than sufficient reason for anyone who does not have a bugaboo about precedent on his brain,[59] but we suspect that Justice Scalia might be reluctant to open a can of worms about what constitutes "privileges or immunities" without a specified rule to cabin judicial discretion. After all, Justice Scalia has very reluctantly acceded to precedent with respect to substantive due process (of which incorporation is a special case) only on the condition that rights imported through that mechanism be defined by reference to "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified,"[60] because "a rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all."[61] Surely he would say the same of attempts to derive doctrine from the Privileges or Immunities Clause, even if that clause is the "correct" provision to apply under originalism.[62]

There are numerous instances other than constitutional colorblindness in which Justice Scalia has firmly opted for a rule-like norm when the "correct" originalist answer is either a standard or, at best, unclear. In *Tennessee v. Lane*,[63] Justice Scalia exhaustively catalogued the many cases, spanning provisions from Section 5 of the Fourteenth Amendment to the various provisions of the Eighth Amendment to the existence/meaning/universe/mystery-of-life clause intuited by the joint opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[64] in which he has refused to go along with "proportionality" tests[65] because they are "flabby" and "a standing invitation to judicial arbitrariness and policy-driven decisionmaking."[66] In some of those cases, such as *Casey*, the originalist answer is clear and Justice Scalia's decision was wholly in sync with it.[67] In others, however, such as the correct meaning of the Eighth Amendment, matters are more difficult. It would require a separate article to produce an originalist analysis of the Eight Amendment, so we are not saying that Justice Scalia was necessarily wrong (though we suspect that he might have been) to reject a proportionality anal-

58 *McDonald*, 561 U.S. at 805–58 (Thomas, J., concurring in part and concurring in the judgment).

59 *See* Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1 (2007); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994).

60 Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (plurality opinion).

61 *Id.*

62 For similar suspicions, see James E. Fleming, *The New Originalist Manifesto*, 28 CONST. COMMENT. 539, 553–56 (2013) (book review).

63 541 U.S. 509 (2004).

64 505 U.S. 833 (1992) (plurality opinion).

65 *See Lane*, 541 U.S. at 557 (Scalia, J., dissenting).

66 *Id.* at 557–58.

67 *See* Steven G. Calabresi, *Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling* Planned Parenthood of Southeastern Pennsylvania v. Casey, 22 CONST. COMMENT. 311 (2005).

ysis in Eighth Amendment cases. Our point is only that his rejection was driven by a theory of law rather than by a theory of interpretation.[68]

Without belaboring the point, similar rule-oriented themes can be drawn from much of Justice Scalia's jurisprudence, involving provisions as diverse as the Takings Clause,[69] the Appointments Clause,[70] and the Confrontation Clause.[71] Moreover, his rule orientation fully explains much of his behavior that sometimes perplexes critics. For instance, before the decision in *National Federation of Independent Business v. Sebelius*[72] was issued, many people thought that Justice Scalia might uphold the individual mandate in the Patient Protection and Affordable Care Act in view of his opinion in *Gonzales v. Raich*[73] approving the power of Congress to regulate the growing of plants in one's home for personal use.[74] Some have subsequently criticized Justice Scalia's vote in *Sebelius* to invalidate the mandate as inconsistent with his position in *Raich*.[75] But any apparent inconsistency vanishes when one thinks about Justice Scalia's view of law as rules. Justice Scalia voted as he did in *Raich* because he thought (wrongly as a matter of original meaning but consistently with precedent) that federal power under the Necessary and Proper Clause included the power to regulate even noneconomic local activity where it is a "necessary part of a more general regulation of interstate commerce."[76] Throw in the (also wrong as a matter of original meaning but consistent with precedent) premise that "necessary" means "rationally related to,"[77] and one has a rule: Congress can regulate virtually any activity, however

68 *See* Mitchell N. Berman & Kevin Toh, *On What Distinguishes New Originalism from Old: A Jurisprudential Take*, 82 FORDHAM L. REV. 545 (2013) (suggesting that much of modern originalist thought is based on theories of law rather than theories of meaning).

69 *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) (searching for a categorical rule in takings jurisprudence).

70 *See* Edmond v. United States, 520 U.S. 651 (1997) (searching for a categorical rule for defining inferior officers).

71 *See* Crawford v. Washington, 541 U.S. 36 (2004) (searching for a categorical rule governing when the introduction of hearsay evidence violates the Sixth Amendment).

72 132 S. Ct. 2566 (2012).

73 545 U.S. 1, 33 (2005) (Scalia, J., concurring).

74 *See, e.g.*, Sam Stein, *Justice Scalia, Not Kennedy, Eyed as Key Vote in Support of Health Care*, HUFFINGTON POST (Feb. 3, 2011, 5:53 PM), http://www.huffingtonpost.com/2011/02/03/justice-scalia-health-care-reform_n_818396.html (noting some scholars believed that Justice Scalia would be an important vote in the health care debated based on his concurring opinion in *Raich*).

75 *See, e.g.*, David S. Schwartz, *High Federalism: Marijuana Legalization and the Limits of Federal Power to Regulate States*, 35 CARDOZO L. REV. 567, 617 n.193 (2013) ("I see no convincingly principled distinction between that ground for upholding the [Controlled Substances Act] in *Raich* and his vote to strike down the individual mandate in *NFIB*.").

76 *Raich*, 545 U.S. at 37 (Scalia, J., concurring).

77 The modern Court has repeatedly described the inquiry into necessity as a rationality test. *See, e.g.*, United States v. Comstock, 560 U.S. 126, 134 (2010); Sabri v. United States, 541 U.S. 600, 605 (2004). The correct inquiry, however, is the one suggested by James Madison that runs between the latitudinarian rational basis test favored by Hamilton and the strict necessity standard favored by Jefferson. *See* Lawson, *supra* note 36, at 246–48.

local, when it is done pursuant to a general scheme that regulates interstate commerce. The individual mandate is not within this rule, because failing to purchase health insurance is not activity in this sense at all.[78] *Raich*'s rule does not allow Congress to regulate people for sitting in their living rooms and doing nothing. In order to extend Congress's power to include the individual mandate, a new rule was needed. The government was offered the chance to provide such a rule but was not able to come up with a plausible rule that would authorize the mandate.[79] For Justice Scalia, the case was therefore clear: no rule, no law, no mandate.

As Justice Scalia himself predicted,[80] there are occasions in which Justice Scalia opts for standards over rules. That is not surprising; real-world adjudication is driven by a complicated network of forces, some of which are very unruly. For example, any Justice who gives any weight at all to precedent will see even the strongest interpretative or jurisprudential inclinations compromised from time to time. And even the strongest preference for rules (or, for that matter, the strongest preference for standards) will surely give way when the only available rules (or standards) are interpretatively implausible.

A good illustration of the tensions in real-world adjudication is *United States v. Virginia*,[81] in which the Court held unconstitutional as a violation of equal protection the single-sex admission policy of the Virginia Military Institute (VMI), using a standard of review approaching, if not quite reaching, the "strict scrutiny" generally afforded classifications based on race or national origin.[82] Strict (or near-strict) scrutiny will almost always result in invalidation of challenged governmental action and is therefore more rule-like than an "intermediate" scrutiny that involves more calibrated balancing of governmental, social, and private interests by asking whether there is "a

78 Living and breathing are, of course, activities of sorts, but the rule in *Raich* rather clearly contemplated something more particular and (for lack of a better word) active to count as "activity." Any such qualification necessarily makes the rule less determinate, but a norm does not have to be entirely determinate in order to be a rule. *See infra* note 90 (describing the spectrum of rules and standards). Seeking to participate in the market for health care services, by contrast, is probably activity within the meaning of *Raich*—and the joint opinion in *Sebelius* accordingly made clear that Congress could properly have regulated people's insurance practices at that point of entry. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2647 (2012) (joint dissent).

79 *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2647 (joint dissent) ("The Government was invited, at oral argument, to suggest what federal controls over private conduct (other than those explicitly prohibited by the Bill of Rights or other constitutional controls) could *not* be justified as necessary and proper for the carrying out of a general regulatory scheme. It was unable to name any." (citing Transcript of Oral Argument at 27–30, 43–45, *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. 2566 (No. 11-398))). To be sure, "the government can regulate anything and everything" is a rule, just as is "the government always wins" or "the government always wins on even-numbered Tuesdays." For Justice Scalia, rule-ness is a necessary but not sufficient condition for a norm to be law. The norm must also be grounded in some authoritative source.

80 *See supra* note 20 and accompanying text.

81 518 U.S. 515 (1996).

82 *See id.* at 532–33.

'substantial relation' between the classification and the state interests that it serves."[83] Justice Scalia nonetheless advocated the use of intermediate scrutiny, under which he would have upheld VMI's admissions policy.[84]

But of course this case, as do many real-world cases, presented a far more complex set of choices than a decision between rules and standards. Justice Scalia regards the Court's entire scheme of levels of review for classifications as "made-up tests,"[85] which he accepts only provisionally, partly because of precedent and partly because he believes that, if fairly and honestly applied, such "abstract tests . . . are essential to evaluating whether the new restrictions that a changing society constantly imposes upon private conduct comport with that 'equal protection' our society has always accorded in the past."[86] And even his seeming acceptance of standard-like balancing is mitigated somewhat by his insistence that interest balancing must serve only to *protect* rather than *change* pre-existing social traditions:

> But in my view the function of this Court is to *preserve* our society's values regarding (among other things) equal protection, not to *revise* them; to prevent backsliding from the degree of restriction the Constitution imposed upon democratic government, not to prescribe, on our own authority, progressively higher degrees. For that reason it is my view that, whatever abstract tests we may choose to devise, they cannot supersede—and indeed ought to be crafted *so as to reflect*—those constant and unbroken national traditions that embody the people's understanding of ambiguous constitutional texts.[87]

Even when adopting standards, Justice Scalia hedges them with rules. The resulting levels of scrutiny as applied by Justice Scalia in *United States v. Virginia*, while hardly rule-like, represent Justice Scalia's accommodation to some very powerful realities of modern equal protection adjudication. If that makes Justice Scalia something of a "faint-hearted rule-ist,"[88] he can at least plausibly claim that he is more consistent in his orientation than are most people in this business.

Others can surely find other examples of Justice Scalia choosing less rather than more rule-like options.[89] We do not claim that a rule-preference is the only force driving Justice Scalia's jurisprudence; that would be flat-out silly. But we do think that a very strong rule-preference is one of the most important vectors that affects his decisions and that in many contexts that rule vector swamps other considerations, including the Constitution's original meaning.

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83 *Id.* at 573 (Scalia, J., dissenting).

84 *See id.* at 570–71.

85 *Id.* at 570.

86 *Id.* at 568.

87 *Id.*

88 *Cf.* Scalia, *supra* note 24, at 864 (describing himself as a "faint-hearted originalist").

89 It would be very difficult, for example, to characterize standing law—as articulated by Justice Scalia or by anyone else—as "rule-like" in any meaningful sense.

If the Constitution objectively consisted entirely of rules, Justice Scalia's position would be trivially correct as an application of the Constitution. But that is emphatically not the case.

II

There is no single, noncontroversial way to determine the extent to which a norm is rule-like. Rules, as distinct from standards or particularistic decisionmaking methods, have some significant degree of generality and definiteness,[90] but there is no metric for measuring how general and/or definite something must be in order to be called a rule. Rules are sometimes defined in terms of their effects—for example, rules "say that if certain routinely identifiable circumstances obtain, then a certain determinate response is required, or permitted, or that it will have a certain legal standing or consequence attached"[91]—and are sometimes said to be "opaque to their justifications,"[92] meaning that "we usually need not look to the values that warrant their adoption in order to know when they are to be applied."[93] None of this, however, provides a foolproof way to tell whether a particular norm is a rule or a standard.[94]

Notwithstanding these difficulties, people distinguish rules from standards all of the time, and at least over a significant range of cases there is little dispute about the proper characterizations. Everyone understands that when the Constitution says that a person must "have attained to the Age of thirty five Years"[95] in order to be President, it is prescribing a rule, and when tort law makes the test of liability the behavior of the "reasonable person,"[96]

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90 *See* LARRY ALEXANDER & EMILY SHERWIN, THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW 30–31 (2001); *see also* ALAN H. GOLDMAN, PRACTICAL RULES 108 (2002) (noting that rules "should be definite and their application should be predictable"); Sullivan, *supra* note 23, at 58 ("A legal directive is 'rule'-like when it binds a decision-maker to respond in a determinate way to the presence of delimited triggering facts."). To be sure, although this is the canonical set of criteria for rule-ness, as a jurisprudential matter it is not obvious that rules are always more definite or predictable than standards. Indeed, it is possible that the rules/standards distinction cannot really be drawn verbally but can only be recognized in practice, though that is a matter for another day. We are grateful to David Lyons for highlighting this problem of definition.

91 GOLDMAN, *supra* note 90, at 107; *cf.* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 560 (1992) (adopting a scheme of definitions "in which *the only distinction between rules and standards is the extent to which efforts to give content to the law are undertaken before or after individuals act*").

92 GOLDMAN, *supra* note 90, at 107.

93 *Id.*

94 For a readable general introduction to the distinction between rules and standards, which provides no clear method for demarcating the line between them, see Lawrence B. Solum, *Legal Theory Lexicon 026: Rules, Standards, Principles, Catalogs, and Discretion*, LEGAL THEORY LEXICON, http://lsolum.typepad.com/legal_theory_lexicon/2004/03/legal_theory_le_3.html (last modified Sept. 22, 2014).

95 U.S. CONST. art. II, § 1, cl. 5.

96 *See* 57A AM. JUR. 2D *Negligence* § 7 (2014) ("[N]egligence consists of acting other than as a reasonable person would do in the circumstances . . . .").

it is prescribing a standard. The existence of numerous hard cases of classification does not eliminate the easy ones, even if one cannot precisely articulate what makes the easy cases easy.

There are many easy cases in which the Constitution rather obviously prescribes standards rather than rules. The usual example is the Fourth Amendment's prohibition against "unreasonable searches and seizures,"[97] which stands in marked (even if not sharp) contrast to the more rule-like requirement in the same amendment that courts can only issue warrants "particularly describing the place to be searched, and the persons or things to be seized."[98] A quick look through the rest of the Bill of Rights yields a number of relatively plain rules rather than standards, such as the flat bans on congressional laws "respecting an establishment of religion"[99] or infringing "the right of the people to keep and bear Arms,"[100] provisions forbidding the federal government from making any person "be subject for the same offence to be twice put in jeopardy of life or limb"[101] or compelling a person "in any criminal case to be a witness against himself,"[102] and the requirement that criminal trials be conducted in the "district wherein the crime shall have been committed; which district shall have been previously ascertained by law."[103] It also yields a substantial number of standards in addition to the search and seizure clause of the Fourth Amendment. The requirement of indictment by grand jury can be suspended in case of "public danger,"[104] deprivations of life, liberty, and property must be accompanied by "due process of law,"[105] compensation for takings of property must be "just,"[106] criminal defendants must be given "speedy"[107] trials by "impartial"[108] juries, and neither fines nor bail shall be "excessive."[109] Again keeping in mind that there is no hard and fast line between rules and standards, these latter provisions all seem to have at least one foot, if not both feet, in the "standards" section.

The original constitutional text at first glance seems much more rule-like.[110] The various selection procedures for members of Congress, the President, and the Vice President, in particular, look quite detailed and precise, and the requirements for valid legislation in Article I, Section 7 do not

97 U.S. CONST. amend. IV.

98 *Id.* Midway between those two provisions on the rules/standards spectrum stands the requirement that warrants issue only upon a showing of "probable cause." *Id.*

99 *Id.* amend. I.

100 *Id.* amend. II.

101 *Id.* amend. V.

102 *Id.*

103 *Id.* amend. VI.

104 *Id.* amend. V.

105 *Id.*

106 *Id.*

107 *Id.* amend. VI.

108 *Id.*

109 *Id.* amend. VIII.

110 *See* GOLDMAN, *supra* note 90, at 122–23.

appear to leave much to the imagination. Importantly, a rule-like formulation does not necessarily exclude all ambiguity or vagueness in terms,[111] so to say that a provision is rule-like does not mean that it is necessarily crisp and clear in all applications. The Appointments Clause, for example, reads like a highly technical rule,[112] but the interpretative questions left unanswered by the text are legion.[113] Article I, Section 7 is about as rule-like a provision as one can draft,[114] but that does not foreclose disputes about what constitutes a "Bill"[115] or what sorts of legislative actions, other than passage of a bill, require presidential presentment.[116] It is only to say that the provision takes

111 On the important distinction between ambiguity and vagueness, see Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 469–70 (2013).

112 *See* U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.").

113 For an incomplete compendium of such questions, many of which result in standard-like answers as a matter of original meaning, see GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 142–43 (6th ed. 2013).

114 For the text of the legislative process, see U.S. CONST. art. I, § 7:

> [1] All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.
>
> [2] Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.
>
> [3] Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

115 *See* J. Gregory Sidak & Thomas A. Smith, *Four Faces of the Item Veto: A Reply to Tribe and Kurland*, 84 NW. U. L. REV. 437, 466–74 (1990).

116 *See* Gary Lawson, *Burning Down the House (and Senate): A Presentment Requirement for Legislative Subpoenas Under the Orders, Resolutions, and Votes Clause*, 83 TEX. L. REV. 1373 (2005); Seth Barrett Tillman, *A Textualist Defense of Article I, Section 7, Clause 3: Why* Hol-

a form that, more than not, meets the generality and determinateness criteria for being a rule. With this understanding, it is fair to say that the bulk of the original Constitution consists primarily of rules.

But there is also ample representation of standards even in the original text of the Constitution, albeit in a somewhat subtle form. Indeed, standards infuse the Constitution of 1788 in a way that is easy to miss on a casual reading.

The Article II Vesting Clause provides that "[t]he executive Power shall be vested in a President of the United States of America."[117] On its face, this looks like a rule, and in many contexts it functions that way[118] (which is why the rules/standards spectrum is a spectrum).[119] But it has important standard-like features as well. Putting aside for present purposes the many disputes over the contours of the "executive Power,"[120] the indisputable core of that power is the ability and obligation[121] to execute the laws.[122] And at the core of the power and duty to execute the laws is the power and duty to select the means of enforcement. Presidents, acting personally or through agents, must, among other things, choose whether to proceed by rulemaking or adjudication where that is a statutory option, allocate scarce resources among competing enforcement priorities, and select from among a wide range of both civil and criminal investigatory and enforcement techniques. The constitutional text is expressly silent on these crucial implemental features of the executive power.

But that express textual silence does not mean an absence of constitutional guidance and constraint. Quite to the contrary. The President's executive power is a delegated power to implement law. In the late eighteenth century, under then-venerable English principles of administrative law, delegated implemental power was subject to fundamental, implicit constraints that much later took the name of the *principle of reasonableness*.[123] Generally speaking, the principle of reasonableness "requires delegated power to be

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lingsworth v. Virginia *Was Rightly Decided, and Why* INS v. Chadha *Was Wrongly Reasoned*, 83 TEX. L. REV. 1265 (2005); Seth Barrett Tillman, *The Domain of Constitutional Delegations Under the Orders, Resolutions, and Votes Clause*, 83 TEX. L. REV. 1389 (2005).

117 U.S. CONST. art. II, § 1, cl. 1.

118 *See, e.g.*, Gary Lawson, *It Depends*, 62 VAND. L. REV. EN BANC 139, 141–42 (2009) (noting that Article II vests *all* of the executive power in the President even if some of that vesting was unwise or inconvenient).

119 *See* Sullivan, *supra* note 23, at 58 n.231 (noting that there is a "continuum" of rules and standards).

120 *See, e.g.*, Saikrishna Bangalore Prakash, *The Imbecilic Executive*, 99 VA. L. REV. 1361 (2013) (discussing and criticizing theories of emergency executive power).

121 That obligation is confirmed by the Take Care Clause, which commands the President to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3.

122 *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701.

123 For detailed treatments of the principle of reasonableness, of which this discussion is a very brief summary, see GARY LAWSON & GUY SEIDMAN, THE CONSTITUTION OF EMPIRE 52–56 (2004); Gary Lawson & Guy I. Seidman, *Necessity, Propriety, and Reasonableness*, *in*

exercised in an impartial, efficacious, proportionate, and rights-regarding fashion,"[124] even when the grant of power contains no such specification. As an English court said in 1658, "wheresoever a commissioner or other person hath power given to do a thing at his discretion, it is to be understood of sound discretion, and according to law, and . . . this Court hath power to redress things otherwise done by them."[125] Thus, a sewer commission granted power to assess the costs of water control measures as the commissioners "shall deem most convenient to be ordained"[126] could not lawfully assess the full costs on one landowner when others were benefitted by the measure.[127] Paving commissioners given power to pave and repair streets "in such manner as the commissioners shall think fit" could not lawfully raise a street so high that it obstructed a landowner's doors and windows.[128] And a President who made prosecutorial decisions by flipping a coin or consulting a fortune teller would exceed the scope of his delegated "executive Power"—just as a judge would exceed the scope of her "judicial Power" by pulling judgments out of a hat. Similarly, a President who burned down a city in order to catch someone accused of the interstate shipment of small amounts of marijuana would be acting not only unwisely but also unconstitutionally and would accordingly be subject to impeachment and removal for malfeasance.

An early twentieth-century English court aptly summarized the principle of reasonableness:

> A person in whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so—he must in the exercise of his discretion do not what he likes but what he ought. In other words, he must, by use of his reason, ascertain and follow the course which reason directs. He must act reasonably.[129]

This requirement of reasonableness is the quintessential standard, and it underlies the executive (as well as the judicial) power delegated by the Constitution. Moreover, the range of actions that will satisfy the principle of reasonableness varies with circumstances. This idea is familiar from other contexts:

> Suppose that government agents break into a farmhouse without a warrant and seize papers that they find inside. Have they violated the Fourth Amendment? There is no way to answer in the abstract. Under normal circumstances, the search might very well be unreasonable. But if the United

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GARY LAWSON ET AL., THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE 120, 121–33, 136–41 (2010) [hereinafter ORIGINS].

124 Lawson & Seidman, *supra* note 123, at 141.

125 Estwick v. City of London, (1647) 82 Eng. Rep. 515, 516 (K.B.).

126 A genall Acte concnynge Comissions of Sewers to be directed in all parts within this Realme, 1531, 23 Hen. 8, c. V, § 1 (Eng.).

127 *See* Rooke's Case, (1598) 77 Eng. Rep. 209 (C.P.).

128 *See* Leader v. Moxon, (1773) 96 Eng. Rep. 546 (C.P.).

129 Roberts v. Hopwood, [1925] A.C. 578, 613 (H.L.).

> States was at war, and suspected enemy agents had been seen entering the house repeatedly over the previous four hours, it would be hard to say that the search and seizure was necessarily unreasonable. Whether a search is "reasonable" is a function of external events.[130]

By the same token, "presidents should have more discretion in 'reasonably' enforcing the law when foreign soldiers are advancing toward Baltimore or terrorists are plotting to blow up buildings than in normal times of peace."[131] Of course, all presidential discretion must be an exercise of "executive" power rather than of some other kind of governmental power. No number of advancing troops or terrorists can authorize the President to seize steel mills without statutory authorization[132] or to order courts to dismiss pending cases.[133] But even within the compass of the President's executive power, that power is constrained by the principle of reasonableness.

Thus, the exercise of large portions of the President's "executive Power" is governed by a standard—and a standard that varies with circumstances—rather than a rule. In essence, the Article II grant of executive power to the President is qualified by the principle of reasonableness so that it effectively reads: "the executive power [necessary and proper for carrying into execution presidential functions] shall be vested in a President of the United States."

The phrase that we have interpolated into the Article II (and also the Article III) Vesting Clause appears expressly in Article I, which grants Congress power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof."[134] This clearly has elements of a standard, and the range of "necessary and proper" laws, like the range of necessary and proper executive actions, could expand or contract with circumstances. "Laws that are necessary and proper during wartime may not be necessary and proper during peacetime."[135] While the Necessary and Proper Clause is considerably less elastic than modern law would have it,[136] it still has strong standard-

130 Gary Lawson, *Ordinary Powers in Extraordinary Times: Common Sense in Times of Crisis*, 87 B.U. L. Rev. 289, 303–04 (2007).

131 *Id.* at 307.

132 *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (getting it right).

133 *See* Dames & Moore v. Regan, 453 U.S. 654 (1981) (getting it wrong).

134 U.S. Const. art. I, § 8, cl. 18. The phrase expressly appears in Article I but not in Articles II and III because it was unclear in the eighteenth century whether the principle of reasonableness applied to a legislative body such as Congress. *See* Lawson & Seidman, *supra* note 123, at 133–36. A drafter who wanted to confirm the application of the principle to Congress was well advised to specify it, though we think the better view would hold that the principle would apply to Congress even without specification because Congress, unlike Parliament, exercises only delegated authority.

135 Lawson, *supra* note 130, at 308.

136 The causal connection required by the word "necessary" is stronger than a rational basis test (though less stringent than Jefferson's proposed test of absolute necessity), *see* Lawson, *supra* note 36, at 246–48, and the word "proper" imports a range of requirements

like rather than rule-like qualities. And because the Necessary and Proper Clause is implicated in some fashion in virtually all federal legislative activity,[137] its standard-like character pervades the document.

But the Article II (and Article III) Vesting Clause and the Necessary and Proper Clause are only the tip of an iceberg of standards floating beneath the surface of the Constitution. Or, more precisely, the principle of reasonableness embodied by these provisions is a special case of a much wider standard-like principle that underlies the entire constitutional scheme of enumerated powers.

One of us has elsewhere argued—though he would prefer to say "explained" or "demonstrated"—that the Constitution is best understood as a kind of agency instrument, in which the principal, "We the People," entrusts some measure of control over its affairs to a set of governmental agents.[138] Under eighteenth-century agency law (and today), governmental agents such as Congress are therefore under fiduciary obligations in the exercise of their powers. Some of those fiduciary obligations are rule-like, such as the flat obligation not to re-delegate their delegated authority but to exercise their own judgment within the scope of their agency.[139] Other fiduciary obligations, however, are quintessential standards, such as the obligation to treat multiple principals fairly and equitably (though not necessarily with strict equality)[140] and to exercise reasonable judgment and care. Because these fiduciary standards are a backdrop against which all of the powers in the Constitution are granted, they pervade the entire document. When Congress exercises its power to, for example, regulate commerce among the several states,[141] it violates the Constitution if it fails to provide, for lack of a better term, equal protection to all of its beneficiaries or fails to exercise reasonable care in its inquiries and judgments.

The extensive role of standards in understanding the Constitution means that one cannot dismiss expressly standard-like provisions as constitu-

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that go far beyond (but certainly include) respecting fundamental principles of federalism. *See* Lawson & Seidman, *supra* note 123; *see also* Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993).

137 *See* Gary Lawson et al., *Raiders of the Lost Clause: Excavating the Buried Foundations of the Necessary and Proper Clause*, *in* ORIGINS, *supra* note 123, at 1, 3–4.

138 *See* Lawson, Seidman & Natelson, *supra* note 36. More accurately, Rob Natelson has explained and demonstrated this point; Professors Lawson and Seidman are simply—though they think constructively—helping to develop his insights.

139 This fiduciary obligation is the ultimate source of the nondelegation doctrine, though that obligation is focused and channeled through the textual requirement in the Necessary and Proper Clause that congressional acts implementing other federal powers be "proper." The President, for his part, is permitted to, in effect, "delegate" executive authority to subordinates because the "executive Power" with which he is vested includes the power either to act or to supervise. *See id.* at 448 n.173. Judges who delegate their judicial power to law clerks, on the other hand, are irresponsible and impeachable. *See id.*

140 *See id.* at 441.

141 U.S. CONST. art. I, § 8, cl. 3.

tional anomalies, to be minimized or ignored for interpretative purposes. The Constitution uses rules when it means to use rules, and it uses standards when it means to use standards. It makes extensive use of both. To discover the meaning of the Constitution, one cannot start with a presumption in favor of one or the other kind of formulation. One finds what one finds. If Justice Scalia believes otherwise, he is simply wrong.

To be sure, one could offer a somewhat sideways argument against this conclusion. The Constitution proclaims itself to be law—indeed, to be "supreme Law."[142] If law really does consist only of rules as a matter of legal metaphysics, then any features of the Constitution that seem to be standards would therefore not qualify as law, and therefore would not qualify as part of the Constitution. But this argument, at least as a matter of interpretation, puts the cart before the horse. What is declared by the Constitution to be supreme law is "this Constitution"—whatever it happens to be. What was ordained and established by "We the People" was "this Constitution"[143]—whatever it happens to be. What takes effect upon ratification is "this Constitution"[144]—whatever it happens to be. Judges and other governmental officials swear an oath to support "this Constitution"[145]—whatever it happens to be. If "this Constitution" declares certain standards to be law, then that is the definition of law that governs the meaning of the document for purposes of interpretation.

In a similar vein, if Article III incorporated something like Justice Scalia's view of adjudication as part of the "judicial Power" vested in Article III courts, then there would be a straightforward interpretative case for courts to prefer rules. But we do not see much future in that argument in its boldest form.[146] For one thing, it would not apply to adjudication by state courts, state officials, jurors, federal legislative courts, the President, members of Congress, or any other actors who do not gain their power from Article III. It is not impossible that the Constitution prescribes a particular method of constitutional adjudication for federal judges and only federal judges, but it is an odd enough result to give one. More fundamentally, however, it runs into the same cart-before-the-horse problem noted above. The essence of the judicial power is the power and duty to decide cases in accordance with governing law. The Constitution is part of that governing law, and indeed is, according to its own terms, hierarchically superior to all competing sources of law. If the Constitution includes as part of its own supreme law a standard, it is hard to see a constitutional reason for declining to follow it. To be sure, there may be moral or philosophical reasons for disregarding the Constitution or for placing some other source of law above it, but they are not constitutionally grounded reasons.

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142 *Id.* art. VI, cl. 2.

143 *Id.* pmbl.

144 *Id.* art. VII.

145 *Id.* art. VI, cl. 3.

146 Professor Lawson thinks that there might be a very modest future for such an argument in a significantly meeker form. *See supra* note 31.

Accordingly, we think that Justice Scalia is wrong to insist upon rules and only rules in adjudication in circumstances in which the Constitution clearly prescribes standards instead. Judges swear an oath to uphold "this Constitution," whatever it might prescribe. If the Constitution prescribes the exercise of relatively unconstrained judicial judgment in some contexts, that is its prerogative, however wise or unwise that prescription might be. Thus, with respect to matters such as the nondelegation doctrine, where the original meaning of the Constitution is quite clear that there are real limits on the extent to which Congress can vest discretion in executive or judicial actors, there is no constitutional warrant for ignoring that principle in adjudication simply because the principle takes the form of a standard rather than a rule. The rule of law is a law of law.