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Justice Scalia's Originalism and Formalism: The Rule of Criminal Law as a Law of Rules

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Far too many reporters and pundits collapse law into politics, assuming that the left–right divide between Democratic and Republican appointees neatly explains politically liberal versus politically conservative outcomes at the Supreme Court. The late Justice Antonin Scalia defied such caricatures.

Justice Scalia was a jurist through and through, not a politician, and for the most part practiced what he preached. His consistent judicial philosophy made him the leading exponent of originalism, textualism, and formalism in American law, and over the course of his three decades on the Court, he changed the terms of judicial debate. Now, as a result, supporters and critics alike start with the plain meaning of the statutory or constitutional text rather than loose appeals to legislative history or policy.

Justice Scalia's approach was perhaps most striking and counterintuitive in criminal law and procedure. He was known to confess that as a policy matter, he favored vigorous law enforcement and punishment, but as a jurist, he championed a principled understanding of the rule of law. His approach helped to preserve individual liberty, make the law clearer and more consistent and transparent, give citizens better notice, promote democratic accountability, and check prosecutors' and judges' power.

Sometimes, his principles led to politically conservative results, as with Eighth Amendment limits on punishments; in other areas, such as the Sixth Amendment's Confrontation and Jury Trial Clauses, he was criminal defendants' best friend. Whatever the outcome, Justice Scalia strove to follow his principles, and in doing so, he promoted important values of the rule of law.

A Consistent Methodology

The first thing to note about Justice Scalia's methodology is that he had one. Many jurists drift along, cobbling together a congeries of decisions without articulating how one decides. Justice Scalia, by contrast, was famed as the leading proponent of originalism and formalism.

Justice Scalia championed the Constitution's original understanding. Before him, many originalists seemed to focus on the Framers' subjective intent, a hazardous inquiry given the paucity of sources and the difficulty of separating sincerity from propaganda.

Rather than plumbing the Framers' minds, Justice Scalia took an objective approach. He asked what the words of the text meant at the time they were enacted. Thus, his originalism was a species of textualism.[1] In the Scalia era, litigators learned to put less emphasis on legislative history and more on the words of the Constitution or statute itself, supplemented by dictionary definitions and the like.

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Objective-meaning originalism, he emphasized, respects the democratic decisions of those who voted to enact the text. Moreover, it preserves the separation of powers, a value often overlooked in the criminal law.[2]

Originalism safeguards the Framers' and legislature's prerogative to make and amend laws. It also protects the right to a jury, the "spinal column of American democracy"—the only right that appears in both the body of the Constitution and the Bill of Rights.[3] The Bill of Rights is replete with jury protections, including the Fifth Amendment's Grand Jury Clause, the Sixth Amendment's guarantee of criminal petit juries, and the Seventh Amendment's guarantee of civil petit juries.

The Framers valued juries as essential checks on all three branches of government. Legislatures pass overly broad criminal statutes, which may sweep in morally faultless conduct and sympathetic defendants, but juries apply them to the facts. Overzealous prosecutors must persuade both a grand and a petit jury to charge and convict felony defendants,

and judges can neither override juries' decisions to acquit nor authorize retrial after an acquittal. The lay, popular voice of jurors is supposed to be a counterweight to our increasingly professionalized criminal justice system.

Most often, Justice Scalia's originalism went hand in hand with his formalism. As he famously put it, "Long live formalism. It is what makes a government a government of laws and not of men."[4] Thus, his famous essay praised "the rule of law as a law of rules."[5] Rules help to constrain judicial discretion, preserve space for democratic branches, and increase predictability. Those benefits, in his view, more than outweigh the costs of over- and underinclusive rules as well as rigidity. Of course laws need to be updated from time to time, but that is a job for legislatures, not courts.

Newspaper reporters who saw the Supreme Court of the United States as a political horse race often contrasted Justice Scalia with his supposed political opposite, Justice John Paul Stevens. But in criminal law and procedure, those two justices agreed surprisingly often. Justice Scalia's true foil was, rather, Justice Stephen Breyer.

Justice Breyer looked to the future; Justice Scalia, to the past. Justice Breyer inquired about wise policy and legislative history; Justice Scalia stuck to the text. Justice Breyer trusted technocratic experts; Justice Scalia, democracy. Justice Breyer prized efficiency, but Justice Scalia subordinated efficiency to liberty.[6] And while Justice Breyer emphasized judicial flexibility, Justice Scalia sought to protect juries. As Justice Scalia put it, the jury trial "has never been efficient; but it has always been free."[7] The two justices' approaches could not have been more different.

Criminal Procedure and the Constitution

The Confrontation Clause. Justice Scalia's contributions are clearest in his approach to two provisions of the Sixth Amendment. For one, he rescued the Confrontation Clause from near-oblivion.

For decades, courts had conflated and confounded the constitutional right to confront one's accusers with the nonconstitutional hearsay doctrines in the law of evidence that grew up well after the Founding. In 1980, the Supreme Court had interpreted the clause as establishing only a presumption in favor of live testimony. Out-of-court evidence was nevertheless admissible if it fell within a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness."[8] Those mushy standards suggested multifactor balancing tests that led to inconsistent and unpredictable results.

That approach had drifted far from the text and historical understanding of the Sixth Amendment. The text calls for a rule, not a standard: "In *all* criminal prosecutions, the accused *shall* enjoy the right...to be confronted with the witnesses against him...."[9] That language says nothing about a mere presumption, nor about hearsay. Nor does it entrust judges with gauging substantive reliability. Rather, it requires them to ensure a particular procedure—"confront[ation] with the witnesses against him"—so that juries can weigh reliability for themselves.

The historical understanding of the confrontation guarantee underscored the textual guarantee. The English common-law tradition had long relied on adversarial testing and cross-examining live witnesses in open court, unlike the introduction of pretrial questioning by inquisitorial systems. In the notorious English treason trial of Sir Walter Raleigh, however, the prosecution had introduced a letter and an unsworn out-of-court statement by Raleigh's alleged accomplice and refused to bring the accusers into court for cross-examination. In reaction to this and similar abuses, English and then American law excluded *ex parte* written evidence and required live cross-examination to ensure truth. Thus, the Confrontation Clause's core purpose was to prevent the use of *ex parte* written examinations as a substitute for live testimony in open court.[10]

For years, several justices including Justice Scalia had written separately, seeking to reinvigorate the Confrontation Clause.[11] In 2004, in *Crawford v. Washington*, he succeeded. Writing for a seven-Justice majority, Justice Scalia replaced the hearsay balancing test with a bright-line rule: A witness is one who gives testimony, not just anything that falls within the jumbled hearsay rule, and testimony is a formal statement to government officers made in order to prove a fact.[12] Confrontation requires an opportunity to question a witness and challenge his account face-to-face.

No test is self-defining, and further cases had to spell out the contours of these terms. As Justice Scalia later wrote for a nearly unanimous Court, a domestic-abuse victim's statement to a police officer after a domestic-abuse incident has ended qualifies as testimony, but a 911 call right after such an

incident does not; the former was made primarily to facilitate investigating crime, while the latter was primarily a cry for help.[13]

Some of these line-drawing questions have been controversial. Even if a declarant is unavailable for cross-examination because the defendant allegedly killed her, according to Justice Scalia's opinion for the Court, the defendant has not forfeited his confrontation right by his own wrongdoing unless he killed her in order to prevent her from testifying.[14] And in some, the Court has narrowed the confrontation right over Justice Scalia's dissent. Most notably, the Court, over Justice Scalia's dissent, has been willing to find that a dying gunshot victim's statements to police were made not primarily to ensure the shooter's arrest and conviction, but to address the ongoing threat to public safety posed by a shooter on the loose.[15]

Perhaps the most questionable aspect of the *Crawford* doctrine is its expansion to forensic and scientific tests. Laboratory analysis is a far cry from the unsworn letter and out-of-court interrogation that Sir Walter Raleigh sought to confront. It is not always clear who is the relevant witness, nor what laboratory protocols, experts, and equipment a defendant needs access to in order to challenge a machine readout.[16] Nevertheless, Justice Scalia, writing for the Court, extended *Crawford* to require live testimony, not just sworn lab reports, by the lab analyst who tests drugs. The defendant's ability to subpoena the witness if desired, the Court held, is no substitute.[17]

Justice Scalia has left an enduring legacy and changed the terms of debate. He has renewed focus on the Constitution's text, structure, and history, which prize an adversarial, oral approach to criminal justice in open court.

At its best, the *Crawford* line of cases united a coalition of liberal as well as conservative justices, both formalists and those concerned more pragmatically with the unfairness of introducing unchallenged testimony. But the further the facts are from a classic out-of-court deposition, sworn statement, or police interrogation, the weaker the consensus is. The lab analyst cases, in particular, have fractured the Court. Four justices, led by Justice Scalia, supported or leaned toward applying *Crawford* broadly to forensic evidence. Four justices disagreed. Oddly enough, the swing justice in these cases has been Justice Clarence Thomas, who alone among his colleagues treats formal, sworn laboratory certificates as testimony in violation of *Crawford,* but not unsworn lab reports.[18]

On other Confrontation Clause issues, Justice Scalia likewise sometimes succeeded (and sometimes did not) in bringing along a majority of the Court. He wrote for a majority that shielding child witnesses from seeing a defendant violated the defendant's right to confront his accusers.[19] Soon thereafter, however, a majority of the Court, over Justice Scalia's dissent, upheld a child-abuse victim's testifying via one-way closed-circuit television instead of in the defendant's physical presence.[20] The majority stressed the vital need to protect child-abuse victims from further trauma; Justice Scalia's dissent emphasized the text's bright-line rule.

Justice Scalia did not always succeed in persuading the Court to apply these new rules as he would have liked. He has reproached the Court not only for promulgating vague, unpredictable legal standards (like the pre-*Crawford* standard), but also for applying ostensibly clear rules (like *Crawford* or face-to-face testimony) in strained, fact-specific, or unpredictable ways. Over his dissents, some of the Court's decisions have swung back toward looking at more factors, such as the presence of a gun, the evidence of an ongoing emergency, other indicia of reliability, and harms to children. Justice Thomas's insistence that testimony be formal has limited the breadth of *Crawford*'s reach. In addition, Justice Scalia arguably overreached in extending the Confrontation Clause woodenly to forensic analysts, where there is little text or history to illuminate what confrontation is required.

Nevertheless, Justice Scalia has left an enduring legacy and changed the terms of debate. He has renewed focus on the Constitution's text, structure, and history, which prize an adversarial, oral approach to criminal justice in open court, although there remain plenty of questions about how analogous 18th century abuses are to 21st century technologies.

The Jury Trial Clause. Justice Scalia also spearheaded the revival of another clause of the Sixth Amendment: the Jury Trial Clause.

Throughout most of the 19th and 20th centuries, judges dominated criminal sentencing, finding facts and imposing sentences within broad ranges with little if any role for juries. The Court repeatedly blessed this judicial free hand, largely unfettered by procedural rules, even when a judicial finding triggered a mandatory minimum sentence.[21] The Court refused to lay down any rule specifying what facts must be elements of crimes to be proved to a jury, offering only the most impressionistic, offhand remark in *McMillan v. Pennsylvania*: "The statute gives no impression of having been tailored to permit the [sentence-enhancement] finding to be a tail which wags the dog of the substantive offense."[22]

The Court's casual, pragmatic dismissal of a Sixth Amendment challenge in *McMillan v. Pennsylvania* conflicted both with Justice Scalia's concern for the text and with his insistence upon meaningful, firm rules.

The Court's casual, pragmatic dismissal of a Sixth Amendment challenge conflicted both with Justice Scalia's concern for the text and with his insistence upon meaningful, firm rules. In a seemingly minor immigration-crime case, Justice Scalia revived the issue in a dissent, strongly suggesting (and later arguing) that any fact that increases a maximum sentence must be proved to a jury beyond a reasonable doubt.[23] Within a few years, he succeeded in persuading Justice Thomas, converting his dissenting suggestion into law.

- *Apprendi v. New Jersey* held that prosecutors must prove any fact (other than a prior conviction) that increases a statutory maximum sentence to a jury beyond a reasonable doubt.[24]

- Justice Scalia's opinion for the Court in *Blakely v. Washington* applied the same rule to sentencing guidelines, invalidating binding guidelines triggered by judicial fact-finding.[25]

- Soon after, the Court extended *Blakely*'s logic to invalidate the U.S. Sentencing Guidelines' binding force, rendering them advisory because judges cannot find facts that trigger mandatory enhancements.[26]

- The Court also applied *Apprendi*'s logic to require juries, not judges, to find facts needed to make defendants eligible for the death penalty.[27]

In this line of cases, formalism triumphed over loosey-goosey functionalism. Justice Scalia's *Blakely* majority opinion forcefully criticized the "obvious" "subjectivity" of *McMillan*'s tail-wags-the-dog standard. The standard was so murky that people could always disagree about whether an enhancement went *"too far"* and never prove otherwise.[28] With mordant humor, the justice mocked the canine standard that would:

> require that the ratio of sentencing-factor add-on to basic criminal sentence be no greater than the ratio of caudal vertebrae to body in the breed of canine with the longest tail. Or perhaps no greater than the average such ratio for all breeds. Or perhaps the median. Regrettably, *Apprendi* has prevented full development of this line of jurisprudence.[29]

Justice Scalia's barbs made reading footnotes fun.

Interestingly, the Court later extended *Apprendi*'s logic even further than Justice Scalia was willing to go. Justice Scalia repeatedly voted to allow judges to find facts that trigger mandatory minimum sentences within an authorized sentencing range, because minimums do not exceed the range authorized by the jury.[30] The Court eventually went further, holding that juries must find any fact that raises a minimum or maximum sentence.[31]

As with *Crawford*, in the *Apprendi/Blakely* line of cases, Justice Scalia assembled a coalition of more liberal Justices Stevens, David Souter, and Ruth Bader Ginsburg together with fellow originalist conservative Justice Thomas. The divide on the Court was not between left and right as conventionally understood, but between the formalists (Justices Stevens, Souter, Ginsburg, Scalia, and Thomas, and later Justices Sonia Sotomayor and Elena Kagan) and the pragmatists (Chief Justice William Rehnquist, Justices Sandra Day O'Connor, Anthony Kennedy, and Breyer, and later Justice Samuel Alito and sometimes Chief Justice John Roberts).

And as with *Crawford*, that coalition did not always hold fast. Though five justices in *Booker* found that the U.S. Sentencing Guidelines violated the Sixth Amendment, Justice Ginsburg switched sides on the remedial question. Thus, instead of insisting that juries find guidelines-enhancement facts, the *Booker* remedial opinion invalidated the guidelines' binding force and left judges in charge of applying the now-advisory guidelines. The irony is that the Sixth Amendment jury-trial guarantee produced not a clear rule operated by juries, but a fuzzier standard that entrusts more power and discretion to judges.

The *Apprendi/Blakely* line of cases landed an important symbolic blow for juries, underscoring their constitutional role, but well over a decade later, the impact of this doctrine remains unclear. Juries are still an endangered species, as plea bargaining remains rampant and resolves 19 out of 20 cases. Sentencing guidelines still leave judges with lots of power that is hidden from view and unchecked by juries. Justice Scalia would have dynamited the entire edifice of the U.S. Sentencing Commission as violating the separation of powers, but his lonely dissent to that effect drew no other takers.[32] As with *Crawford*, problems persist in applying an 18th century right to novel and unanticipated 21st century realities.

The Fourth Amendment

Justice Scalia also surprised many observers in his somewhat civil-libertarian approach to the Fourth Amendment. On certain issues, he advocated clear rules that favored law enforcement, such as the objective (rather than subjective) test for the reasonableness of a stop.[33] When it came to defining searches and reasonableness, however, his originalism and formalism led him to support rules that very often favored criminal suspects.

Take the issue of what qualifies as a search in the first place. When an object is in plain view of police who are already lawfully present there, they may seize it without a warrant. Many justices were willing to extend the plain-view doctrine to allow a trivial additional intrusion by police, but not Justice Scalia. Writing for the Court in *Arizona v. Hicks*, he held that police may not move a stereo turntable even a few inches to view and record its serial number without first getting a warrant supported by probable cause.[34]

Unlike many other conservative members of the Court, Justice Scalia was also willing to recognize a variety of intrusions, new and old, as searches.

- His opinion for the Court in *Kyllo v. United States* held that pointing a thermal-imaging device at a house to detect heat emanating from it counts as a search;[35]

- Likewise, in *Florida v. Jardines*, he wrote for the Court in holding that a trained drug-sniffing dog's sniffing of a suspect's front porch and front door constituted a search and required a warrant;[36] and

- His opinion for a majority of the Court in *United States v. Jones* held that attaching a GPS tracking device to a suspect's car and tracking his movements qualified as a search.[37]

In all three of these cases, he rejected the amorphous, unpredictable reasonable-expectation-of-privacy test in favor of bright-line rules rooted in the common law of trespass upon an owner's property rights.

Justice Scalia was also far more willing than many other justices to clearly demarcate searches that were categorically unreasonable. While he was willing to allow drug testing based on individualized suspicion, he dissented from allowing suspicionless searches,[38] and in dissent in *Maryland v. King*, he argued that routine, suspicionless cheek swabs of arrestees to collect their DNA were unreasonable searches: "The Fourth Amendment forbids searching a person for evidence of a crime when there is no basis for believing the person is guilty of the crime or is in possession of incriminating evidence. That prohibition is categorical and without exception; it lies at the very heart of the Fourth Amendment."[39] As he memorably put it, "I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection."[40]

Justice Scalia enforced the Fourth Amendment vigorously, starting from common-law baselines.

In that vein, the justice was the key fifth vote in *Arizona v. Gant* to limit searches of cars incident to arrest. Such searches can include looking for weapons or all destructible evidence only if the area is still within the suspect's reach. Once the suspect is handcuffed

and away from the car, police may search the car only for evidence of the crime of arrest. So when a suspect has been arrested for driving with a suspended license and handcuffed in the back of a patrol car, police may not then rummage around the car in search of drugs or the like. The Court drew this test from one of Justice Scalia's earlier concurrences.[41]

Justice Scalia enforced the Fourth Amendment vigorously, starting from common-law baselines. That led him to reject subjective privacy tests in favor of those that are grounded in trespass and property law. As to vehicle searches, he acknowledged that "the historical practices the Framers sought to preserve" were unclear, so he relied upon "traditional standards of reasonableness."[42]

The justice was quite right that common law and history can often provide clearer baselines than circular reasoning about expectations of privacy, but as Justice Alito has observed, these historical sources cannot provide definitive verdicts on 21st century technological searches, such as DNA analysis or assembling a mosaic of data points from long-term GPS tracking.[43] Justice Scalia did not have all the answers, but at least he began with the right questions.

The Eighth Amendment

Justice Scalia consistently opposed extending the Eighth Amendment's Cruel and Unusual Punishment Clause to forbid capital punishment. The Constitution expressly references the long-settled practice of capital punishment, and judges may not use evolving standards of decency to trump the textual and historical warrant for the death penalty. "[P]assionate and deeply held" views opposing capital punishment, he wrote, are "no excuse for reading them into a Constitution that does not contain them," particularly since doing so would "thrust a minority's views upon the people."[44] In that vein, he dissented from the Court's holdings that a state may not execute a defendant for the crime of raping a child and that it may not execute defendants who are mentally retarded or were under 18 years of age.[45]

Justice Scalia also opposed much of the Court's intricate regulation of capital sentencing procedures. In particular, he rejected the *Woodson/Lockett/Eddings* doctrine requiring unfettered admission of all mitigating evidence in capital sentencing as being starkly at odds with the requirement of rules to channel and guide the capital sentencing process. "To acknowledge that 'there perhaps is an inherent tension' between [the two] line[s] of cases," he wrote in *Walton v. Arizona*, "is rather like saying that there was perhaps an inherent tension between the Allies and the Axis Powers in World War II."[46] That position was not only formalist in embracing rules over unfettered discretion, but also originalist in supporting a textually and historically approved punishment that used to be prescribed for many cases.

Justice Scalia's position in *Walton v. Arizona* was not only formalist in embracing rules over unfettered discretion, but also originalist in supporting a textually and historically approved punishment that used to be prescribed for many cases.

The justice likewise opposed invalidating various noncapital sentences as cruel and unusual, though he could not persuade a majority of his colleagues to agree. He advanced a series of textual and historical arguments to show that the clause forbids only certain modes of punishment and legally unauthorized punishments, not disproportionality between a particular crime and its particular punishment.[47] (While that position is a reasonable one, recent originalist scholarship has argued powerfully for reading the clause to require retributive proportionality.[48]) He also joined in dissenting from recent decisions that restricted sentences of life imprisonment without parole for juvenile defendants.[49]

Substantive Criminal Law

Justice Scalia's insistence on clear rules informed his reading of substantive criminal statutes, often in ways that benefitted defendants. The justice was famous for vigorously advancing the rule of lenity as a corollary of his textualism. If a legislature unambiguously criminalizes conduct, it gives potential violators clear notice and fair warning;[50] if it does not, prosecutors and judges may not take it upon themselves to stretch wording to cover borderline criminal conduct.

There certainly is room to question Justice Scalia's emphasis on notice, which, as he admitted, is necessarily a fiction in practice: Few if any prospective thieves or tax evaders spend their spare time reading

statute books. But lenity gives legislatures a clear background rule against which they can legislate and requires the democratic process to authorize criminal punishment and stigma.[51] If legislatures dislike restrained readings of criminal statutes, they remain free to amend them to make them broader and clearer.

The frequency with which Justice Scalia applied the rule of lenity underscored his willingness to follow his principled methodology even where it produced results he might not personally like.

The justice voted to apply lenity to a wide range of crimes, from money laundering to carjacking to tax evasion,[52] and in doing so, he focused solely on whether the text was clear, without recourse to legislative history.[53] He did sometimes find statutory text clear enough to preclude recourse to lenity, even where other justices disagreed,[54] but the frequency with which he applied the rule of lenity underscored his willingness to follow his principled methodology even where it produced results he might not personally like.

Justice Scalia's emphasis on clear rules, notice, and fair warning also led him to strike down laws that were simply too vague to salvage. He advocated invalidating the residual clause of the Armed Career Criminal Act as violating the due process requirement of fair notice. After advancing this position in repeated dissents for years, he ultimately won a majority of the Court over to his side last year, writing for the Court in striking down the residual clause.[55] He also would have gone further than the Court did to rein in honest-services fraud. While the majority of the Court limited that statute to bribery and kickbacks, Justice Scalia would have invalidated the entire provision as too vague to salvage and beyond the power of judges to rewrite.[56]

Conclusion

In short, Justice Scalia defied simplistic ideological labels. In doing so, he underscored one of his favorite themes: that law is (or at least should be) much more than politics. His methodologically conservative embrace of formalism, clarity, rules, and especially textualism and originalism often put him on the side of criminal defendants, even though his personal sympathies were pro-prosecution.

Often, he could not persuade a majority of his colleagues to follow his originalist principles to his logical conclusion.

- He was no fan of the Fourth Amendment exclusionary rule, but the most he could do was to dissuade his colleagues from expanding it by balancing the rule's speculative deterrent benefits against its concrete costs.[57]

- In a trio of cases, Justice Scalia dissented from extending the right to effective assistance of counsel to plea bargaining, as doing so "embraces the sporting-chance theory of criminal law, in which the State functions like a conscientious casino operator, giving each player a fair chance to beat the house, that is, to serve less time than the law says he deserves."[58]

- In dissent, he criticized *Miranda* as "a milestone of judicial overreaching" and the Court's reaffirmation of it as "the very Cheops' Pyramid (or perhaps the Sphinx would be a better analogue) of judicial arrogance."[59]

He had a rhetorical gift for sharpening the nub of almost any issue, piercing the prosy fog of the U.S. Reports.

One can certainly raise legitimate questions about how far to take Justice Scalia's approach. Elsewhere, I have given him two cheers, not three, criticizing his formalism as sometimes too rigid and impractical and his originalism as stretching beyond its textual and historical foundations.[60] Many of the Framers' 18th century criminal procedural rules have no clear answers for 21st century problems: Think of scientific and forensic experts, high-tech searches, electronic privacy, or a plea-bargaining assembly line that the Court is unwilling to dynamite.

Nevertheless, Justice Scalia's animating concerns will remain enduring touchstones of our law: the importance of protecting the roles of legislatures, juries, and the people; ensuring fair notice; and preserving liberty by limiting judicial discretion and prosecutorial power. His criminal jurisprudence is thus a microcosm of a principled judicial approach to law more generally, and he will be greatly missed.

1. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A Matter of Interpretation 3, 23, 38 (Amy Gutmann ed., 1997).
2. *See id.* at 40–42.
3. Neder v. United States, 527 U.S. 1, 30 (1999) (Scalia, J., concurring in part and dissenting in part).
4. Scalia, *supra* note 1, at 25.
5. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1175 (1989).
6. Blakely v. Washington, 542 U.S. 296, 313 (2004) (Scalia, J., majority opinion) (responding to Justice Breyer's dissent).
7. Apprendi v. New Jersey, 530 U.S. 466, 498 (2000) (Scalia, J., concurring). He prefaced his concurrence: "I feel the need to say a few words in response to Justice Breyer's dissent. It sketches an admirably fair and efficient scheme of criminal justice designed for a society that is prepared to leave criminal justice to the State," but "[t]he founders of the American Republic were not prepared to leave it to the State" and its judges. *Id.*
8. Ohio v. Roberts, 448 U.S. 56, 66 (1980).
9. Emphasis added.
10. Crawford v. Washington, 541 U.S. 36, 44–45, 50 (2004).
11. Lilly v. Virginia, 527 U.S. 116, 140–43 (1999) (Breyer, J., concurring); White v. Illinois, 502 U.S. 346, 361–65 (Thomas, J., joined by Scalia, J., concurring in part and concurring in the judgment).
12. *Crawford*, 541 U.S. at 51.
13. Davis v. Washington, 547 U.S. 813, 826–32 (2006).
14. Giles v. California, 554 U.S. 353 (2008).
15. Michigan v. Bryant, 562 U.S. 344, 361–77 (2011); *id.* at 379 (Scalia, J., dissenting).
16. *See* David A. Sklansky, *Hearsay's Last Hurrah*, 2009 Sup. Ct. Rev. 1, 71–75.
17. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310–11 (2009).
18. *Compare id.* at 329 (Thomas, J., concurring), *with* Williams v. Illinois, 132 S. Ct. 2221, 2259–61 (2012) (Thomas, J., concurring in the judgment). 19. Coy v. Iowa, 487 U.S. 1012, 1020–21 (1988).
20. Maryland v. Craig, 497 U.S. 836, 857, 860–61 (1990) (Scalia, J., dissenting).
21. Williams v. New York, 337 U.S. 241, 250–52 (1949); McMillan v. Pennsylvania, 477 U.S. 79, 85–86 (1986).
22. *McMillan*, 477 U.S. at 88.
23. Almendarez-Torres v. United States, 523 U.S. 224, 260 (1998) (Scalia, J., dissenting) (strongly suggesting this argument in invoking the canon of constitutional avoidance); Monge v. California, 524 U.S. 721, 740–41 (1998) (Scalia, J., dissenting) (advancing the argument substantively).
24. 530 U.S. 466, 490 (2000).
25. 542 U.S. 296, 303–05 (2004).
26. United States v. Booker, 543 U.S. 220 (2005). 27. Ring v. Arizona, 536 U.S. 584, 609 (2002).
28. *Blakely*, 542 U.S. at 307. 29. *Id.* at 311 n.13.
30. Harris v. United States, 536 U.S. 545, 567 (2002); Alleyne v. United States, 133 S. Ct. 2151, 2167 (2013) (Roberts, C.J., joined by Scalia & Kennedy, JJ., dissenting).
31. *Alleyne*, 133 S. Ct. at 2155 (majority opinion).
32. Mistretta v. United States, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting).
33. Whren v United States, 517 U.S. 806, 813 (1996). 34. Arizona v. Hicks, 480 U.S. 321, 324–27 (1987). 35. Kyllo v. United States, 533 U.S. 27, 34–35 (2001).
36. Florida v. Jardines, 133 S. Ct. 1409, 1414–17 (2013).
37. United States v. Jones, 132 S. Ct. 945, 949–52 (2012).
38. *Compare* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) (Kennedy, J., joined inter alia by Scalia, J.) (upholding drug testing of train employees involved in train accidents), *with* Nat'l Treasury Employees Union v. von Raab, 489 U.S. 656, 680 (1989) (Scalia, J., dissenting) (rejecting routine drug testing of Customs officers because of the lack of individualized suspicion).
39. Maryland v. King, 133 S. Ct 1958, 1980 (2013) (Scalia, J., dissenting). 40. *Id.* at 1989.

41. Arizona v. Gant, 556 U.S. 332, 335 (2009) (expressly crediting Thornton v. United States, 541 U.S. 615, 632 (2004) (Scalia, J., concurring in the judgment); *id.* at 351–54 (2009) (Scalia, J., concurring)).

42. *Id.* at 351–54 (Scalia, J., concurring).

43. *Jones*, 132 S. Ct. at 957 (2012) (Alito, J., concurring in the judgment).

44. Callins v. Collins, 510 U.S. 1141 (1994) (Scalia, J., concurring in denial of certiorari).

45. Kennedy v. Louisiana, 554 U.S. 407, 447 (2008) (Alito, J., joined by Roberts, C.J. and Scalia and Thomas, JJ., dissenting) (child rape); Atkins v. Virginia, 536 U.S. 304, 337 (2002) (Scalia, J., dissenting) (mentally retarded); Roper v. Simmons, 543 U.S. 551, 607 (2005) (Scalia, J., dissenting) (16- and 17-year-olds).

46. Walton v. Arizona, 497 U.S. 639, 656–57, 664 (1990) (Scalia, J., concurring in part and concurring in the judgment).

47. Harmelin v. Michigan, 501 U.S. 957, 966–85 (1991) (opinion of Scalia, J., joined by Rehnquist, C.J.).

48. John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 Va. L. Rev. 899 (2011).

49. Miller v. Alabama, 132 S. Ct. 2455, 2477 (2012) (Roberts, C.J., joined by Scalia, Thomas, and Alito, JJ., dissenting); Graham v. Florida, 560 U.S. 48, 97 (2010) (Thomas, J., joined by Scalia & Alito, JJ., dissenting).

50. United States v. R.L.C., 503 U.S. 291, 308–09 (1992) (Scalia, J., concurring in part and concurring in the judgment).

51. Antonin Scalia, *Associated Canards of Contemporary Legal Analysis*, 40 Case W. Res. L. Rev. 581, 582 (1990).

52. *E.g.*, United States v. O'Hagan, 521 U.S. 642, 679 (1997) (Scalia, J., concurring in part and dissenting in part); *R.L.C.*, 503 U.S. at 307 (Scalia, J., concurring in part and concurring in the judgment); *see also* Holloway v. United States, 526 U.S. 1, 20 (1999) (Scalia, J., dissenting) (finding that statute unambiguously favored defendant but arguing in the alternative that any ambiguity should be construed in favor of defendant); Smith v. United States, 508 U.S. 223, 246 (1993) (Scalia, J., dissenting) (same); Moskal v. United States, 498 U.S. 103, 131–32 (1990) (Scalia, J., dissenting) (same).

53. *R.L.C.*, 503 U.S. at 307 (Scalia, J., concurring in part and concurring in the judgment).

54. *E.g.*, Yates v. United States, 135 S. Ct. 1074, 1090 (2015) (Kagan, J., joined by Scalia, Kennedy, and Thomas, JJ., dissenting); Muscarello v. United States, 524 U.S. 125, 139 (1998) (Ginsburg, J., joined by Rehnquist, C.J., and Scalia and Souter, JJ., dissenting).

55. Johnson v. United States, 135 S. Ct. 2551, 2555–57 (2015); Sykes v. United States, 564 U.S. 1, 28 (2011) (Scalia, J., dissenting); James v. United States, 550 U.S. 192, 228–32 (2007) (Scalia, J., dissenting) (suggesting this possibility without yet embracing it).

56. Skilling v. United States, 130 S. Ct. 2896, 2935 (2010) (Scalia, J., concurring in part and concurring in the judgment). 57. Hudson v. Michigan, 547 U.S. 586, 591, 594–99 (2006).

58. Lafler v. Cooper, 132 S. Ct. 1376, 1398 (2012) (Scalia, J., dissenting); *see also* Missouri v. Frye, 132 S. Ct. 1399, 1414 (2012) (Scalia, J., dissenting); Padilla v. Kentucky, 559 U.S. 356, 388 (2010) (Scalia, J., dissenting).

59. Dickerson v. United States, 530 U.S. 428, 465 (2000) (Scalia, J., dissenting).

60. Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, The Unlikely Friend of Criminal Defendants?*, 94 Geo. L.J. 183, 204 (2005).