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FREE SPEECH AND "A LAW OF RULES"

In 1989, Justice Antonin Scalia published an essay in The University of Chicago Law Review titled "The Rule of Law as a Law of Rules."[2] The essay sets forth, and defends, one of the primary jurisprudential themes of Justice Scalia's three decades as a Supreme Court Justice: the need for and obligation on judges, especially Supreme Court Justices, to articulate clear rules in resolving cases, rather than relying on vague balancing or multifactor tests. Or alternatively, as no one but Justice Scalia could have put it, the essay explains why throughout his career Justice Scalia opposed "the'ol' totality-of-the-circumstances test"[3] under which "[t]he law is, by definition, precisely what the majority thinks, taking all things into account, it ought to be."[4]

Justice Scalia's commitment to clear rules over mushy standards is as important an element of his First Amendment jurisprudence as of his administrative law and separation-of-powers opinions (the sources of the earlier quotes). It was, for example, undoubtedly the driving force behind his majority opinion in Employment Division v. Smith, severely limiting the scope of the Free Exercise Clause, and in Brown v. Entertainment Merchants Association, extending full First Amendment protection to the sale of violent video games to children. And there are many other examples.

Generally, a commitment to clear rules is a good thing, especially in the area of free speech where vague standards risk chilling protected speech. However, this article identifies some unexpected barriers to the "law of rules" approach. The reason, essentially, is that simple rules can very easily lead to unacceptable results. Faced with such results, a justice committed to clear rules might be pushed to adopt complex, arbitrary ones, even irrational ones, to avoid them. The result is epicycles within epicycles. My intention is to demonstrate that in at least some areas – notably sexually oriented expression, hate speech, and government funding of speech– this is precisely where Justice Scalia ended up. The problem is that an excessively complex body of rules, such as I identify, sacrifices many of the most powerful advantages that rules enjoy over standards. I finish by speculating as to why Justice Scalia had such a difficult time formulating clear rules in the free speech arena, concluding that the likely reason is that unlike in many other areas of jurisprudence, Justice Scalia lacked an underlying theory of how and why we protect free speech. Workable, clear rules, I conclude, need an underlying theoretical scaffolding. Absent that, ad hocery is inevitable—a point that Justice Scalia may well have recognized, and been the reason why he wrote so few free speech opinions in comparison to other areas of constitutional jurisprudence.

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2 56 U. Chi. L. Rev. 1175 (1989).

3 *United States v. Mead Corporation*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting); *see also American Broadcasting Companies, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2517 (2014) (Scalia, J., dissenting).

4 *Morrison v. Olson*, 487 U.S. 654, 733-734 (1988) (Scalia, J., dissenting).

Introduction

In 1989, Justice Antonin Scalia published an essay in the University of Chicago Law Review titled "The Rule of Law as a Law of Rules" (the essay was based on the Oliver Wendell Holmes, Jr. lecture that Justice Scalia delivered at Harvard in February of that year).[5] The basic thesis of the essay is that judge-made law, especially law declared by the Supreme Court, should to the extent possible consist of clear rules rather than discretionary standards. Moreover, Justice Scalia's commitment to clear rules was not a merely academic argument, it was also a hallmark of his work during his three decades as a Supreme Court justice. And nowhere was this more true than in Justice Scalia's First Amendment jurisprudence.

In this essay, I will explore how Justice Scalia's commitment to rules over standards influenced—indeed, arguably dominated—his free-speech decisions. I will show that almost every influential free speech opinion authored by Justice Scalia, both for the majority and when writing separately, was deeply shaped by his need to articulate a clear, doctrinal rule to justify the result he supported. Moreover, I will argue that the reasons Justice Scalia articulated for generally preferring rules over standards apply especially strongly in the free speech arena – as Justice Scalia appears to have recognized.

Ultimately, however, Justice Scalia was confronted by a problem. In area after area of free speech law, Justice Scalia's quest to find clear, simple, and objective rules ran into difficulties, because of the messiness of many free speech conflicts. The result was a jurisprudence notable more for its convoluted nature and for its undefended and artificial distinctions than for clarity.

I begin by examining the reasoning behind Justice Scalia's general preference for rules over standards. I then explore three areas where Justice Scalia wrote important or noteworthy free speech opinions: sex and violence, hate speech, and government funding of speech. In each of these areas, I will argue, Justice Scalia tried valiantly to articulate clear and objectively defensible doctrinal rules – and in each of these areas he ultimately failed. I conclude by considering why it is that Justice Scalia's quest for clear rules failed in the free speech arena. The ultimate lesson from all of this, I will argue, is that while there is certainly much to be said in favor of simple, clear rules, such rules cannot emerge out of nowhere. Instead, creating such a system requires an underlying theoretical framework, which in turn shapes the rules. However, free speech law currently lacks such a framework, and therefore a coherent set of rules. This may well be why in a notably influential career, Justice Scalia's contributions to free speech law were so limited.

A Law of Rules

The basic question that Justice Scalia addresses in his University of Chicago essay is, in his own words, the "dichotomy between 'general rule of law' and 'personal discretion to do justice."[6] Ultimately, as his title of course implies, Justice Scalia comes out strongly in favor of the "general rule of law" and against flexible standards that

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5 56 U. Chi. L. Rev. 1175, 1175 n.* (1989).
6 *Id*. at 1176.

permit judges to exercise discretion based on the specific facts of a case. In the course of his essay, he articulates several reasons for preferring rules over standards. First, he notes that rules enhance the uniformity and predictability of the law, especially in a system where the highest court (his court) can only hear a tiny fraction of the cases litigated in the legal system.[7] Second, he argues that clear rules constrain judges in future cases, and so make it harder for judges to decide later cases based on the judge's own "political or policy preferences."[8] Finally, he suggests that, perhaps counterintuitively, clear rules make it easier for judges to announce unpopular results, because they provide "a solid shield of a firm, clear principle enunciated in earlier cases."[9]

Each of these rationales appears in Justice Scalia's jurisprudence, but there is no doubt that the second—the value of rules as a bulwark against biased judicial decisionmaking—was ultimately the dominant driving force behind his disdain for standards. His most famous articulation of this principle appeared in what was arguably his most influential opinion: his solo dissent in *Morrison v. Olson* (which not coincidentally was decided in 1988, just a year before the Chicago essay was published).[10] Objecting vehemently (how else?) to the majority's decision to uphold the independent counsel provisions of the Ethics in Government Act of 1978, Justice Scalia began his dissent with the comment "It is the proud boast of our democracy that we have 'a government of laws and not of men.'"[11] He then accused the majority of "replac[ing] the clear constitutional principle that the executive power belongs to the President with a 'balancing test'"[12] – which needless to say was not a complement. Finally, he closed his dissent with this statement:

> A government of laws means a government of rules. Today's decision on the basic issue of fragmentation of executive power is ungoverned by rule, and hence ungoverned by law. It extends into the very heart of our most significant constitutional function the "totality of the circumstances" mode of analysis that this Court has in recent years become fond of. . . . The ad hoc approach to constitutional adjudication has real attraction, even apart from its work-saving potential. It is guaranteed to produce a result, in every case, that will make a majority of the Court happy with the law. The law is, by definition, precisely what the majority thinks, taking all things into account, it *ought* to be. I prefer to rely upon the judgment of the wise men who constructed our system, and of the people who approved it, and of two centuries of history that have shown it to be sound.[13]

This passage is probably the most eloquent statement of the importance of clear and well-defined rules in the history of the Supreme Court. And it is worth remembering that

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7 *Id.* at 1178-79.
8 *Id.* at 1179-80.
9 *Id*. at 1180. One wonders if Justice Scalia had in mind *Texas v. Johnson*, 491 U.S. 397 (1989), which was argued and decided in the spring of 1989, and in which Justice Scalia provided the fifth vote to strike down Texas's flag desecration statute, a notably controversial and unpopular result.
10 *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).
11 *Id*.
12 *Id*. at 711 (Scalia, J., dissenting).
13 *Id*. at 733-34 (Scalia, J., dissenting).

essentially all of Justice Scalia's lonely warnings in *Morrison* came to fruition, ironically, during the Starr investigation of President Bill Clinton, resulting in the independent counsel law falling into such utter disrepute that Congress permitted it to expire.

Justice Scalia's disdain for balancing tests certainly did not end, or even reach its peak in the 1980s. His later pronouncements in this regard are perhaps more caustic, and less poetic, but equally on point. For example, in 2001 in *United States v. Mead Corporation*,[14] an administrative law case, Justice Scalia, again alone, dissented from the majority's decision to limit the scope of so-called *Chevron* deference that administrative agencies receive when interpreting regulatory statutes.[15] In particular, he accused the majority of replacing a clear rule "with the test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th'ol' 'totality of the circumstances' test."[16] He went on to predict that the consequences of the majority's approach would be "protracted confusion"[17] (he was right[18]), and would be "enormous, and almost uniformly bad"[19] (the jury is still out on that).

In addition to the separation of powers and administrative law, Justice Scalia unsurprisingly expressed disdain for balancing tests in many other areas of law.[20] But now it is time to turn to our topic, the First Amendment, and in particular, free speech. In the remainder of this paper, I will discuss how Justice Scalia applied his rule-of-law approach in free speech cases, and consider whether he was successful. But as a preliminary matter it is worth noting one point: every one of Justice Scalia's arguments in favor of "a law of rules" applies fully, and indeed particularly strongly, to free speech.

Consider first the values of uniformity and predictability. Both are of course important values across the legal spectrum – but they are especially important for free speech law. The reason is that private speech, especially noncommercial speech, is particularly susceptible to what the Court has called a "chilling effect."[21] In the face of legal uncertainty regarding the scope of First Amendment protections, potential speakers may choose to remain silent because of fear of prosecution even though after adjudication their speech would most likely have been found to be constitutionally protected. Political and ideological speech is particularly subject to being chilled because it is often unremunerated; and the chilling effect on speech is particularly problematic for society because of "the transcendent value to all society of constitutionally protected expression."[22] This is the reason why the Court has created an exception to general requirements of standing for free speech plaintiffs under the rubric of the "overbreadth"

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14 533 U.S. 218 (2001).

15 *See Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

16 *Id*. at 241 (Scalia, J., dissenting).

17 *Id*. at 245 (Scalia, J., dissenting).

18 *See* Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 Vand. L. Rev. 1443 (2005).

19 *Id*. at 261 (Scalia, J., dissenting).

20 *See, e.g., American Broadcasting Companies, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2517 (2014) (Scalia, J., dissenting) (accusing the majority, in applying the Copyright Act to a new technology, of adopting "nothing but th'ol' totality-of-the-circumstances test (which is not a test at all but merely assertion of an intent to perform test-free, ad hoc, case-by-case evaluation)"); *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105, 128 (2008) (Scalia, J., dissenting) (rejecting "the Court's totality-of-the-circumstances (so-called) 'test'" in an ERISA case).

21 *See, e.g., Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965); *Reno v. American Civil Liberties Union*, 521 U.S 844, 872 (1997).

22 *Gooding v. Wilson*, 405 U.S. 518, 521 (1972).

doctrine;[23] and it is why more broadly free speech law is most effective if it consists of clear rules rather than discretionary, and unpredictable standards.

Justice Scalia's second rationale for preferring rules over standards was that clear rules tend to prevent judges from deciding cases based on their own political or ideological predilections. Again, this consideration is particularly relevant to free speech. After all, while ideological factors play a role in many areas of law, especially constitutional law, they are most likely to be relevant in free speech cases, especially cases involving speech on matters of public concern. The danger, of course, is that courts will protect only speech they agree with, while permitting suppression of ideologies they find threatening or subversive. Consider in this regard *Dennis v. United States*.[24] In *Dennis*, the Court affirmed the convictions of the leadership of the Communist Party of the United States under the Smith Act, which criminalized advocating or teaching "the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence."[25] There can be little doubt that the Court's decision was deeply influenced by the fact that the justices in the majority found Communist ideology both threatening and subversive, and *Dennis* is generally considered an archetypal example of the Court invoking balancing methodology—in particular, a watering down version of the Holmes/Brandeis "Clear and Present Danger" test into a cost/benefit calculation[26]—to balance away the rights of political speakers. More recently, in *Holder v. Humanitarian Law Project*,[27] the Court relaxed its traditionally highly-stringent strict scrutiny analysis to balance away the free speech rights of individuals who sought to provide training to designated Foreign Terrorist Organizations on how to invoke humanitarian and international law to *peacefully* resolve disputes.[28] It seems fairly clear that neither result would have been reached if the Court had adhered to the clear rule, announced after *Dennis* but implicit in the pre-*Dennis* opinions of Justices Holmes and Brandeis that the *Dennis* Court purported to follow,[29] that speech advocating illegal action may be prosecuted only if "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[30] Admittedly, Justice Scalia joined the majority opinion in *Holder* and thereby (in my opinion) deviated from his jurisprudential principles; but the principles remain sound.

Finally, we come to the question of unpopular decisions. There is obvious overlap between this consideration and the last one (since speakers that judges do not like are also likely to be broadly unpopular), but regardless of that, clear rules undoubtedly play a distinct and important role in fortifying the Court to protect unpopular, even vile political speakers. An obvious example of this is the *Brandenburg* decision in which the Court announced the current, strict rule (quoted above) protecting advocacy of violence.[31] In that case, the Court reversed the Criminal Syndicalism conviction of a Ku Klux Klan leader—by 1969 a largely reviled organization—after years of failing to protect other

23 *Id*.
24 341 U.S. 494 (1951).
25 *Id*. at 496.
26 *Id*. at 510 ("in each case (courts) must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.")
27 561 U.S. 1 (2010).
28 *Id*. at 14.
29 *See Dennis*, 341 U.S. at 505-07.
30 *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).
31 *Id*.

harmless but unpopular speakers such as communists and anarchists.[32] Concurring, Justice Douglas explicitly tied the Court's (belated) willingness to protect such unpopular speakers to its abandonment of the "free-wheeling" (*i.e.*, discretionary) test of *Dennis*;[33] and there is much to be said for his argument, though the result in *Brandenburg* and subsequent cases also undoubtedly reflects changing social attitudes and conditions. Another example of the Court relying on a clear rule to reach a wildly unpopular result was *Texas v. Johnson*,[34] where the Court reversed the conviction of a protestor who burned the American flag by invoking the almost absolute modern presumption against content-based regulations of speech.[35] The dissenting opinions in that case, in contrast, advocated a fuzzy standard under which the special status of the flag justified deviation from standard First Amendment rules.[36] Finally, in *Synder v. Phelps* the Court invoked the equally strong First Amendment presumption against punishing speech on matters of public concern to reverse a massive damages award against an extremely unpopular, and thoroughly vile, group that regularly protested at military funerals.[37] There is little doubt that if flexible standards had been applied under which the law is "what it *ought* to be," all three of these cases would have come out differently.

Sex and Violence

To this point, I have described Justice Scalia's longstanding commitment to clear rules over discretionary standards, and have argued that the reasons underlying his commitment are peculiarly relevant to free speech law. I now turn to Justice Scalia's own contributions to free speech jurisprudence, to see how his commitment to rules played out in this arena. The answer, in brief, is that "it's complicated."

Let us begin with what is probably one of Justice Scalia's two most important majority opinions on free speech,[38] *Brown v. Entertainment Merchants Association*.[39] In *Brown*, the Court struck down a California statute banning the sale or rental of violent video games to minors. The reasoning is vintage Scalia, eschewing all fuzzy standards and instead moving from one simple principle to another. First, he articulated the clear rules that the First Amendment protects entertainment as well as political speech because there is no way to easily distinguish the two,[40] and that it protects all communications technologies equally.[41] As a result, video games are fully protected speech. He then turned to the question of whether the fact that the speech regulated here is *violent* speech directed at minors exempts it from constitutional protection. He said it does not, and

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32 *See, e.g.*, *Scales v. United States*, 367 U.S. 203 (1961); *Barenblatt v. United States*, 360 U.S. 109 (1959); *Dennis v. United States*, *supra*; *Whitney v. California*, 274 U.S. 357 (1927); *Gitlow v. New York*, 268 U.S. 652 (1925); *Abrams v. United States*, 250 U.S. 616 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Schenck v. United States*, 249 U.S. 47 (1919).
33 *Id*. at 454 (Douglas, J., concurring).
34 491 U.S. 397 (1989).
35 *Id*. at 412. I say "almost" because of *Holder v. Humanitarian Law Project*, discussed *supra*, where the Court abandoned its clear rule, and predictably reached a popular but problematic result.
36 *Id*. at 434 (Rehnquist, C.J., dissenting); *id*. at 438-39 (Stevens, J., dissenting).
37 *Synder v. Phelps*, 562 U.S. 443, 451-52 (2011).
38 The other is *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992), discussed in the next section.
39 564 U.S. 786 (2011).
40 *Id*. at 790.
41 *Id*.

again, his reasoning was entirely rule-based. Reaffirming the previous Term's decision in *United States v. Stevens*,[42] Justice Scalia firmly rejected the view that categories of unprotected speech can be created using "a 'simple balancing test,'"[43] holding instead that such categories must be based on historical tradition—a (seemingly) objective rule.[44] He also rejected California's attempted analogy to the law of obscenity, noting that historically obscenity was limited to sex.[45] He concluded therefore that since there is no historical tradition of restricting children's access to violence, there can be no category of unprotected speech justifying California's statute.[46] Finally, Justice Scalia invoked the long-standing presumption against content-based regulations of speech to strike down the California law.[47] Thus, moving from clear, simple rule to clear, simple rule he reached the (perhaps surprising) conclusion that minors have a broad, constitutional right to access even highly violent speech.

The decision in *Brown* thus on its face appears to be a perfect example of applying clear First Amendment rules to protect unpopular speech—a posterchild for a law of rules. Appearances, however, can be deceiving. And underneath Justice Scalia's simple rules lie many unanswered questions. California had written its statute to consciously mimic a New York statute that the Court had previously upheld, prohibiting the sale to minors of materials obscene as to minors.[48] It was therefore critical for Justice Scalia's reasoning to distinguish unprotected obscenity from protected violent speech, based on an appeal to history. The problem, as Geoffrey Stone has recently and convincingly demonstrated, is that the historical evidence that obscenity was considered unprotected speech at the time of the ratification of the First Amendment is in fact extremely weak.[49] Widespread regulation of obscenity was rather a product of grocer Anthony Comstock's political campaigns in the 1860s, not the Framing era.[50] It is true that from the 1860s to the modern era (at least until the growth of the Internet), obscenity was vigorously suppressed. But as Justice Scalia's opinion implicitly admits by citing examples, during this period there were also recurring and widespread attempts to shield minors from violent speech.[51] So, the clear history-based "rule" underlying *Brown* turns out to have shaky foundations.

Nor do the problems end there. One of the striking aspects of *Brown* is its extension of almost complete First Amendment rights to children. But the only case Justice Scalia cited to support this proposition[52] was primarily about a city's power protect all citizens from offense, by banning nudity in drive-in movies visible from a public place,[53] not about the rights of children; and even the discussion of children's First Amendment rights in *Erznoznik* did not purport to equate adults' and children's free

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42 559 U.S. 460 (2010).
43 *Id*. at 792 (*quoting Stevens*, 130 S. Ct. at 1585).
44 *Id*.
45 *Id*. at 793.
46 *Id*. at 794-96.
47 *Id*. at 799-804.
48 *Id*. at 793 (*citing Ginsburg v. New York*, 390 U.S. 629 (1968).
49 Geoffrey R. Stone, *Sex, Violence and the First Amendment*, 74 U. Chi. L. Rev. 1857, 1861-63 (2007).
50 *Id*. at 1865.
51 *Brown*, 564 U.S. at 797-98 (discussing 19th century efforts to condemn time novels and "penny dreadfuls," as well as later campaigns against violence in movies and comic books).
52 *Id*. at 794 (*citing Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-13 (1975)).
53 *Erznoznik*, 205 U.S. at 208.

speech rights.[54] Moreover, in other areas of constitutional litigation such as abortion the Court has been more willing to uphold parental consent requirements[55] (which the California statute effectively was, since it permitted parents and close relatives to buy violent video games for minors). We are thus left unclear as to why the "rule" in this context is that children are full rights-bearers, but not in others—a particularly notable omission given that Justice Thomas dissented in *Brown* precisely on the grounds that historically children had no rights to bypass parental authority.[56]

Indeed, the uncertain sources of the clear rules Justice Scalia invoked in the free-speech arena are not limited to *Brown*; they also pervade his jurisprudence regarding sexually oriented expression. One striking example emerged in a series of cases spanning his long career, involving challenges to regulations of businesses distributing non-obscene, and so presumably constitutionally protected, but sexually-oriented materials. In each case, Justice Scalia wrote separately, arguing that even though the regulations at issue clearly discriminated against speech based on its content, the laws should still not receive close judicial scrutiny (so much for the "clear rule" of *Brown*) because the Constitution does not protect "commercial entities which engage in 'the sordid business of pandering.'"[57] Indeed, in several more recent opinions Justice Scalia asserted that "We have recognized" this rule, "we" referring presumably to the Court.[58] In truth, however, the Court as a whole has *never* recognized such a rule, and no other justice has expressed agreement with it. Justice Scalia's citations in these cases are to his own separate opinions, to one majority opinion from the 1960s—*Ginzburg v. United States*[59]—as well as a handful of cases that applied the *Ginzburg* decision.[60] The problem is that neither *Ginzburg* or its progeny ever held that the business of "pandering" was automatically outside the First Amendment. They only held that evidence that the defendant "pandered" the materials at issue—*i.e.*, emphasized their salacious nature—could be considered by the jury in making the ultimate determination of whether the materials at issue were obscene under the prevailing legal standard.[61] But the convictions in all of those cases were for distributing obscene materials, *not* pandering non-obscene speech, and the *Ginzburg* Court emphasized that its "analysis simply elaborates the test by which the obscenity vel non of the material must be judged."[62] Furthermore, in no other area of First Amendment law has the Court even hinted that the commercial distribution of

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54 *Id*. at 213.
55 *See, e.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833, 899 (1992).
56 *Brown*, 564 U.S. at 821-39 (Thomas, J., dissenting).
57 *Ashcroft v. ACLU*, 542 U.S. 656, 676 (2004) (Scalia, J., dissenting) (*quoting United States v. Playboy Entertainment Group*, 529 U.S. 803, 831 (2000) (Scalia, J., dissenting) (*quoting Ginzburg v. United States*, 383 U.S. 463, 467 (1966))); *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 443 (2002) (Scalia, J., concurring in part and dissenting in part); *United States v. Playboy Entertainment Group*, 529 U.S. 803, 831-32 (2000) (Scalia, J., dissenting); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 253 (1990) (Scalia, J., concurring in part and dissenting in part).
58 *Ashcroft v. ACLU*, 542 U.S. at 676 (Scalia, J., dissenting); *Playboy Entertainment Group*, 529 U.S. at 831 (Scalia, J., dissenting).
59 383 U.S. 463 (1966).
60 *See, e.g.*, *Playboy Entertainment Group*, 529 U.S. at 831-32 (Scalia, J., dissenting) (*citing Ginzburg*, 383 U.S. 463, 467 (1966); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 253 (Scalia, J., concurring in part and dissenting in part); *Pinkus v. United States*, 436 U.S. 215, 257-58 (1978); *Splawn v. California*, 431 U.S. 595, 597-99 (1977); *Hamling v. United States*, 418 U.S. 87, 130 (1974)).
61 *See, e.g.*, *Ginzburg*, 383 U.S. at 470-71; *Splawn*, 431 U.S. at 598-99.
62 *Ginzburg*, 383 U.S. at 475.

protected materials may be punished, even if the underlying material may not be suppressed. Indeed, such a rule is inconceivable given the importance of the commercial press and commercial publishers to our national dialogue. So, Justice Scalia's clear "rule" emerged out of nowhere, based on an underlying assumption—sex is different—that also has little historical basis.

Why then did Justice Scalia walk this path? The answer, I think, must lie in the essentially intractable nature of obscenity doctrine. The modern definition of obscenity, adopted in 1973 in *Miller v. California*, is a three-part "test" that requires judgments regarding the challenged materials' "prurient interest," "patently offensive" nature, and "serious . . . value."[63] This is not so much a rule as an open-ended judgment, highly discretionary in nature and so inevitable driven by the eyes of the beholder—a point that Justice Scalia himself once made with respect to the "value" prong of *Miller*.[64] It is the antithesis of a law of rules. But it is well-settled law, and in any event, decades of struggle by the Court prior to *Miller* suggest that no clearer definition, no "rule," is possible here. The *Miller* test also defines obscenity narrowly, to ensure that valuable speech is not suppressed in the name of obscenity regulation (as happened often prior to the modern era[65]). The result, however, is to hamstring the ability of local communities to restrict businesses which specialized in highly sexual but non-obscene materials—a situation that Justice Scalia bemoaned in his first opinion in this line of cases.[66] Basically, faced with fairly clear rules that created what Justice Scalia considered (reasonably enough) a socially problematic result, he crafted a new, narrow, but essentially made-up rule to avoid the result.

Consider finally Justice Scalia's separate opinions in the Court's two "nude dancing cases."[67] In each case, Justice Scalia argued that a) laws regulating conduct in order to prevent noncommunicative harms, with only an incidental impact on expression, should not receive any heightened scrutiny; and b) laws banning nudity do not target expression.[68] As such, applying nudity laws to prohibit nude dancing raised no First Amendment issues. While it has never garnered majority support, rule (a) above is surely a clear rule, and so concededly consistent with "a law or rules" philosophy. But (b) is problematic at best. In *City of Erie*, Justice Scalia conceded that the ordinance at issue might have been specifically targeted at nude dancing, not nudity generally[69] (it surely was[70]), and that the city's stated reason for adopting the law—to control the blight associated with nude dancing—was disingenuous at best.[71] Yet he remained convinced

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63 *Miller v. California*, 413 U.S. 15, 24 (1973).

64 *Pope v. Illinois*, 481 U.S. 497, 504-05 (1987) (Scalia, J., concurring).

65 *See, e.g., Commonwealth v. Friede*, 271 Mass. 318, 171 N.E. 472 (1930) (suppressing as obscene Theodore Dreiser's "An American Tragedy"); Kevin Birmingham, The Most Dangerous Book: The Battle for James Joyce's Ullyses (2015) (describing obscenity prosecutions of Ullyses).

66 *FW/PBS*, 493 U.S. at 251 (Scalia, J., concurring in part and dissenting in part).

67 *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 572 (1991) (Scalia, J., concurring in the judgment); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 302 (2000) (Scalia, J., concurring in the judgment).

68 *Barnes*, 501 U.S. at 573-74, 576 (Scalia, J., concurring in the judgment); *City of Erie*, 529 U.S. at 307-10 (Scalia, J., concurring in the judgment).

69 *Id*. at 310 ((Scalia, J., concurring in the judgment).

70 *Id*. at 318 (Stevens, J., dissenting).

71 *Id*. at 310 ("I am highly skeptical, to tell the truth, that the addition of pasties and G-strings will at all reduce the tendency of establishments such as Kandyland to attract crime and prostitution, and hence to foster sexually transmitted disease").

that the goal of the statute was not based on hostility to the message communicated by nude dancing, but rather it was "to foster good morals."[72] But isn't it possible, indeed likely, that the "morals" being fostered here are opposition to eroticism, precisely the "message" communicated by the dancing? Ultimately, as in the cases involving regulation of sexually oriented businesses, Justice Scalia resolved the issues based on a "rule" whose basis and scope remain far from clear.

A critic might argue that I am being unfair to Justice Scalia. After all, even if the roots of the rules he applied in the above-discussed cases are not clear, they are still *rules* and so perform the functions of a law of rules. But that is not so. Remember the underlying arguments for rules: they enhance uniformity and predictability, they constrain judges, and they make it easier to announce unpopular results, with the second argument being the most significant in the area of free speech. The difficulty is that if judges can announce narrow, tailor-made rules created out of whole cloth, and worse, if those rules can be used to justify suppression of specific speech content, then the constraint argument has evaporated. Justice Scalia's narrow rules disfavor sexual speech. But the same approach might be invoked to justify special rules for subversive speech (as was true before *Brandenburg*[73]). Or it could be used to create a special rule for racist speech, a position advocated by many academics[74] but not, as we shall next see, Justice Scalia. The problem, in short, is that clear rules without any methodology backing them up are as susceptible to political and ideological manipulation as the mushy standards that Justice Scalia quite rightly excoriated. And the problem is exaggerated when those clear rules become extraordinarily narrow and convoluted, because then rules can be created which in practice affect only a very few cases, thus reducing their binding effect substantially. Which takes us to our next topic.

Hate Speech and Epicycles

Aside perhaps from *Brown v. Entertainment Merchants Ass'n*,[75] Justice Scalia's most important contribution to the law of free speech was undoubtedly his opinion for the Court in *R.A.V. v. City of St. Paul, Minn.* in 1992.[76] The facts of *R.A.V.* are simple and stark. R.A.V., a minor, burned a cross on the lawn of a black family that lived across the street from him. That this act of terrorism was punishable no one doubted, including Justice Scalia.[77] However, the Court found that the *law* St. Paul prosecuted R.A.V. under was unconstitutional. The statute at issue, titled "Bias-Motivated Crime Ordinance," read as follows:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a

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72 *Id*.
73 *See supra* at __.
74 *See, e.g.*, Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320 (1989); Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 Harv. L. Rev. 1596 (2010).
75 *See supra* at __.
76 505 U.S. 377 (1992).
77 *Id.* at 379-80 & n.1 ("this conduct could have been punished under any of a number of laws" and listing clearly constitutional laws R.A.V. violated).

> burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.[78]

The Court concluded that because the ordinance only prohibited words that insult or provoke "on the basis of race, color, creed, religion or gender," it in effect discriminated against speech based on content and viewpoint (since only bigoted speech was prohibited).[79] Thus far, the case looks like a simple application of the Court's long-standing presumption against content-based regulation of speech, as well as the neigh-absolute prohibition of viewpoint-based regulation, and so should have been a simple and unanimous decision. It was nothing but.

The difficulty the Court (and Justice Scalia) faced was that the Minnesota Supreme Court had adopted a binding construction of the St. Paul ordinance, limiting its reach to "fighting words," a category of speech that the Court has long held to be unprotected by the First Amendment.[80] Until *R.A.V.*, the general understanding (which the Minnesota court followed) had been that the prohibitions on content and viewpoint discrimination applied only to regulations of *protected* speech, not unprotected speech such as fighting words. In *R.A.V.*, Justice Scalia rejected this longstanding (albeit unarticulated) assumption. Instead, the Court held that calling categories of expression unprotected means that they "can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content."[81] This holding in itself added a major complication to free speech law. But the complexity did not end there. Justice Scalia went on to state that not all content discrimination within unprotected categories is suspicious. Instead, he identified three exceptions to his new rule. First, he explained that "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class."[82] Second, a law may discrimination against "even a content-defined subclass of proscribable speech [if] that subclass happens to be associated with particular 'secondary effects' of the speech."[83] Third, "a particular content-based category of proscribable speech may be swept up incidentally within the reach of a statute directed at conduct rather than speech."[84] Finally, the Court prevaricated further by suggesting that these exceptions may not be unique. Rather, "so long as the nature of the

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78 *Id*. at 380 (*quoting* St. Paul, Minn., Legis. Code § 292.02 (1990)).
79 *Id*. at 391.
80 *Id*. at 380-81 (*citing In re Welfare of R.A.V.*, 464 N.W.2d 507, 510 (Minn. 1991) (*citing Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). Fighting words are defined as those "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky*, 315 U.S. at 572.
81 *R.A.V.*, 505 U.S. at 383-84 (emphasis in original).
82 *Id*. at 388.
83 *Id*. at 389.
84 *Id*.

content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot," it may be permissible.[85]

Justice Scalia's recognition of these exceptions, as should be obvious, added massive additional intricacy to free speech doctrine. Moreover, the last potential, open-ended exception largely converted what had been at least a rule (albeit a very complicated one) into more of a standard. Nonetheless, given his first doctrinal move, the later complications were inevitable. The reason is that content-based distinctions are ubiquitous in regulating unprotected or low-value speech. Many laws, for example, regulate fraud in the sale of one particular service or product, not fraud generally—but that is a content-based distinction. Similarly, no one believes that laws that impose restrictions only on commercial advertising of, for example, alcohol trigger strict scrutiny.[86] Indeed, the language of *R.A.V.* and subsequent developments make clear that the exceptions are very real. Most notably, in *Virginia v. Black* the Court invoked the first *R.A.V.* exception to mainly uphold a Virginia statute banning cross burning, on the theory that cross burning, because of its historical association with KKK violence, was an especially virulent form of "true threats" (another unprotected category).[87] In *R.A.V.* Justice Scalia also suggested that the application of Title VII's prohibition on sex discrimination to ban "sexually derogatory 'fighting words'" from the workplace was permissible under the third exception.[88] The key point here is that the exceptions recognized by the *R.A.V.* Court were as essential an aspect of the holding as the broader rule that content discrimination within unprotected categories triggers strict judicial scrutiny.

R.A.V. and its progeny arguably represent the most prominent example in free speech law of what one might call the "epicycles" approach to doctrine:[89] a body of rules which are clear enough on their own terms, but are necessarily extraordinarily complex in order to either match physical reality or (in this case) produce acceptable results. The problem with an epicycle-based approach to rules is much the same as an approach to rules lacking a methodological basis—it fails to protect the values that rules should advance. As *Virginia v. Black* illustrates, numerous and complicated exceptions permit judges to avoid the ideologically unpleasant consequences of supposedly clear rules, and also substantially undermine predictability. *R.A.V.* seemed to suggest that hate speech, including cross burning, could not be constitutionally singled out by the state. *Black* shows that is not so, leaving unclear the question of which hate speech regulations are or are not permissible. And more generally, *R.A.V.*'s final, catchall exception (for content discrimination "where there is no realistic possibility that official suppression of ideas is afoot") seems to leave judges with almost limitless discretion to depart from the *R.A.V.* "rule" when so inclined. The ultimate result, in short, is a body of doctrine with the outward appearance of "a law of rules," but little of the substance.

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85 *Id*. at 390.482 (1995) (applying intermediate scrutiny to such a regulation).
86 *See, e.g.*, *Rubin v. Coors Brewing Co.*, 514 U.S. 476,
87 *Virginia v. Black*, 538 U.S. 343, 362-63 (2003).
88 *Id*. at 389.
89 Epicycles are of course the extraordinarily complex model of circles-within-circles developed by early astronomers to reconcile actual observations of planetary movement with the assumption of a Ptolemaic (earth-centered universe). They could be abandoned once the Copernican (sun-centered) model of the solar system was accepted. *See* http://csep10.phys.utk.edu/astr161/lect/retrograde/aristotle.html.

Government Funding and "Forums"

A final area we will briefly discuss, where Justice Scalia promoted a distinct doctrinal approach—albeit primarily in separate opinions—is government funding of speech. He expounded his views most famously in a concurring opinion in *National Endowment for the Arts v. Finley*.[90] At issue in *Finley* was a 1990 amendment to the National Foundation on the Arts and Humanities Act, which required the National Endowment for the Arts ("NEA"), in approving grants to support the arts, to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public."[91] (The amendment was adopted in response to controversy over NEA funding for an exhibit of Robert Maplethorpe's photography which included homoerotic images, as well as for Andres Serrano's photograph "Piss Christ.")[92] The majority upheld the amendment on the (improbable) grounds that the provision was "merely hortatory" and did not require viewpoint discrimination by the NEA.[93]

Justice Scalia agreed with the result but firmly rejected the majority's reasoning with the memorable opening line "The operation was a success, but the patient died."[94] Justice Scalia began by conceding, indeed emphatically arguing, that the amendment "establishes content- and viewpoint-based criteria upon which grant applications are to be evaluated."[95] But, he insisted, it was still "perfectly constitutional."[96] The reason, quite simply, was that when Congress denies funding to speech, it does not *abridge* the freedom of speech, which is the only thing the First Amendment prohibits.[97] Given this broad principle, Justice Scalia's conclusion was not dependent on the nature of NEA funding program or any other specific facts of the case. Instead, he emphasized, his view was that the government "may allocate both competitive and noncompetitive funding *ad libitum*, insofar as the First Amendment is concerned."[98]

Three years later, Justice Scalia forcefully reiterated his position on subsidies and funding. In *Legal Services Corp. v. Velazquez*, the Court struck down a congressional statute that forbade lawyers employed by entities receiving grants issued by the Legal Services Corporation[99] from participating in legal representation with the aim of amending or otherwise challenging existing welfare laws.[100] Justice Scalia dissented.[101] The Legal Services Corporation Act is, he pointed out, "a federal subsidy program, not a federal regulatory program, and . . . [while r]egulations directly restrict speech, subsidies do not."[102] He did concede that in narrow circumstances, a subsidy might indirectly

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90 524 U.S. 569, 590 (1998) (Scalia, J., concurring in the judgment).
91 *Id*. at 572.
92 *Id*. at 574.
93 *Id*. at 580-82.
94 *Id*. at 590 (Scalia, J., concurring in the judgment).
95 *Id*.
96 *Id*.
97 *Id*. at 595-96 (Scalia, J., concurring in the judgment).
98 *Id*. at 599 (Scalia, J., concurring in the judgment).
99 The Legal Services Corporation is an entity created by Congress to distribute federal funds to organizations who provide noncriminal legal services to the poor.
100 *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 536-37 (2001).
101 *Id*. at 549 (Scalia, J., dissenting).
102 *Id*. at 552 (Scalia, J., dissenting).

abridge speech because of coercive effect, but thought those situations exceedingly rare.[103] Given the selective nature of the funding program in *Velazquez* there was no serious argument for coercion, and so the constitutionality of the congressional restriction followed naturally.[104]

Finally, Justice Scalia reiterated and indeed strengthened his position on government funding just three years ago, in *Agency for International Development v. Alliance for Open Society International*.[105] The issue in that case was the constitutionality of a federal provision that restricted funding from a multibillion dollar program to combat the spread of HIV/AIDS to organizations that had an explicit policy opposing prostitution and sex trafficking.[106] The majority struck down this restriction on the grounds that while the government may set funding conditions within a program restricting how federal money is to be spent, here the restriction was "outside" the program, and so was an unconstitutional condition in violation of the First Amendment.[107] Justice Scalia of course dissented. His view was that the government was generally welcome to impose ideological conditions on funding recipients, and that this was all that was going on here.[108] In so arguing, Justice Scalia was adopting an extremely narrow of the unconstitutional conditions doctrine, and so granting the government virtually unlimited discretion to limit what speech it subsidies as well as to select recipients on ideological grounds.

Government funding/subsidies thus appears to be an area where Justice Scalia has adopted a clear, consistent position without epicycles or inconsistencies, and based on a simple, underlying principle, that denying subsidies is not abridgement and so cannot violate the First Amendment.[109] But there is a fly in the ointment, and that fly's name is *Rosenberger*. In 1995, Justice Scalia joined a majority opinion authored by Justice Kennedy in *Rosenberger v. Rector and Visitors of University of Virginia*.[110] The University of Virginia had established a Student Activities Fund which, *inter alia*, paid the printing costs of student publications, but excluded from participation any student paper or publication that "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality."[111] The Court held that this exclusion constituted forbidden viewpoint discrimination, because the University funded publications expounding secular but not religious viewpoints on issues relevant to the community.[112] The fact that the discrimination was part of a funding program did not save it because in creating the Student Activities Fund, the University had created a "limited public forum," within which content- but not viewpoint-discrimination is permitted.[113] Further, the Court emphasized that while previous decisions had permitted the state, when speaking on its

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103 *Id*.
104 *Id*.
105 133 S. Ct. 2321 (2013).
106 *Id*. at 2324.
107 *Id*. at 2330.
108 *Id*. at 2332-33 (Scalia, J., dissenting).
109 *See also Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 236 (1988) (Scalia, J., dissenting) (arguing that a selective tax exemption constituted a subsidy, and so did not implicate the First Amendment).
110 515 U.S. 819 (1995).
111 *Id*. at 822-23.
112 *Id*. at 830-31.
113 *Id*. at 829-30.

own behalf, to prefer its "own favored message," this case involved "private speech of students," not the speech of the University, and so was different.[114] Finally, the Court held that the fact of scarcity, that money is limited, also did not justify viewpoint discrimination though the state could of course ration or allocate limited funds using "some acceptable neutral principle."[115] Justice Scalia joined the majority opinion in full, and never repudiated or questioned his vote.

The tension between *Rosenberger* and Justice Scalia's other funding opinions—notably *Finley*—is obvious. In all the other opinions Justice Scalia vehemently insisted that discriminatory funding choices raised no First Amendment issues absent coercion (of which there was none in *Rosenberger*); but in *Rosenberger* he voted—indeed, provided the crucial fifth vote—to strike down just such a program. Moreover, it is clear that the government v. private speech distinction invoked in *Rosenberger* cuts against the government in *Finley*, unless the NEA wanted to take the remarkable position that "Piss Christ" conveys the government's own message. In *Finley*, Justice Scalia distinguished *Rosenberger* with the brief comment that *Rosenberger* "found the viewpoint discrimination unconstitutional, not because funding of 'private' speech was involved, but because the government had established a limited public forum—to which the NEA's granting of highly selective (if not highly discriminating) awards bears no resemblance."[116] Similarly, in *Velazquez* Justice Scalia off-handedly commented that *Rosenberger* was distinguishable because "the government created a public forum with the spending program" without explaining why the Student Activities Fund, but apparently no other spending program, was a "forum." In particular, *Rosenberger* Court's insistence that scarcity was not determinative, and its explicit endorsement of allocating scarce funds using "some acceptable neutral principle" even within a forum make it very difficult to distinguish the Student Activities Fund from NEA grants based on the competitive nature of the latter. After all, NEA grants could be awarded based on the presumptively viewpoint neutral principle of artistic originality and excellence. So, once again, we are left with a "rule" which permits some, but not other, government funding programs to engage in viewpoint discrimination based on a complex, ambiguous, and not fully articulated set of distinctions—the very antithesis of a law of rules.

Rules and Theories

Why is it that Justice Scalia was never able to articulate a clear set of rules to resolve First Amendment disputes? Part of the reason is no doubt that free speech disputes, pitting as they often do crucial liberty values against serious social harms, are not easily susceptible to simple rules. But that is not, I think, the whole story. After all, free speech is hardly the only area of constitutional law where constitutional principles find themselves in tension with perceived societal demands. To ferret out the deeper problem here, it is worth contrasting Justice Scalia's free speech jurisprudence with parts of constitutional law where Justice Scalia was able to develop a clear philosophy and set of principles.

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114 *Id*. at 834-35.
115 *Id*. at 835.
116 *Finley*, 524 U.S. at 598-99 (Scalia, J., concurring in the judgment).

The separation of powers is almost certainly the area of constitutional law where Justice Scalia's ideas have had, and will continue to have, the most profound, and lasting impact. The reason, I think, is quite simple: underlying all of Justice Scalia's myriad specific views on the separation of powers is a simple, fully articulated and instinctively appealing theoretical construct. Throughout his tenure on the Court, he clung to a vision of a formalistic separation of powers in which each of the three branches of government (no "veritable fourth branches"[117] for him) possesses a specific species of authority, which is not shared with the other branches except in narrow circumstances delineated in the Constitution (such as the presidential veto), and which may not be interfered with by the other branches. From this basic vision many specific implications follow, such as that Article II's vesting clause means that the President must control "not . . . *some* of the executive power, but *all of* the executive power";[118] that *all* private rights cases must be litigated before an Article III tribunal;[119] and that "the term 'inferior officer' [in the Appointments Clause] connotes a relationship with some higher officer or officers below the President."[120] These specific results, each of which rest on simple and clear rules, follow because they derive from the same underlying, consistent theory.

A similar phenomenon can be observed in Justice Scalia's approach towards legislative intent. Justice Scalia was famously opposed to even consulting legislative history.[121] In isolation, this insistence seems a bit odd—after all, what is the point of completely ignoring potentially relevant, albeit often unreliable evidence? But it turns out that Justice Scalia's insistence was not based in stubbornness, it was founded on an underlying theory of legislative meaning. As he put it in *Conroy v. Aniskoff*, in the course of criticizing the majority's reliance on legislative history, "[w]e are governed by laws, not by the intentions of legislatures."[122] Therefore, even if legislators' subjective intent could be gleaned from legislative history (a dubious proposition), it *still* wouldn't matter. The same philosophy led him, in *Church of Lukumi Babalu Aye v. City of Hialeah* to refuse to rely on the subjective intent of legislators in finding a Free Exercise Clause violation (though he did agree that given the laws actual effect, it was unconstitutional).[123] And in *Edwards v. Aguillard* he carried this argument even further, arguing that subjective legislative intent is not only unknowable, with a collective body such as a legislature it often does not even exist.[124] For this reason, Justice Scalia would have rejected entirely the "purpose" prong of the *Lemon* test for Establishment Clause violations.[125] As with Justice Scalia's separation of powers jurisprudence, it is not necessarily that he was

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117 *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 487 (1952 (Jackson, J., dissenting) (describing administrative agencies as "a veritable fourth branch of Government, which has deranged our three-branch legal theories").

118 *Morrison v. Olson*, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting).

119 *Branfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 65-66 (1989 (Scalia, J., concurring in part and concurring in the judgement).

120 *Edmond v. United States*, 520 U.S. 651, 662 (1997) (Scalia, J.).

121 *See* Kenneth R. Dortzbach, *Legislative History: The Philosophies of Justice Scalia and Breyer and the Use of Legislative History by the Wisconsin State Courts*, 80 Marq. L. Rev. 161, 182-93 (1996) (

122 *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment).

123 *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 557-59 (1993) (Scalia, J., concurring in part and concurring in the judgment).

124 *Edwards v. Aguillard*, 482 U.S. 578, 636-40 (1987) (Scalia, J., dissenting).

125 *Id*.

correct in his approach to legislative intent, or that the rest of the Court agreed with him; but his approach was simple, predictable, and based on a clear, underlying theory.

The contrast between these areas and the First Amendment is stark. Justice Scalia never articulated or endorsed a clear theory of what speech is, and why the Constitution singles it out for protection. As a consequence, his opinions and his votes in free speech cases seem inconsistent and sometimes result-driven, the very antithesis of a law of rules. Why this was so is of course harder to say, but I suspect one reason is that Justice Scalia's preferred theoretical construct for constitutional interpretation—Original Public Meaning Originalism—has very little to say regarding free speech law. The only serious contender for an Originalist reading of the First Amendment is that the Speech and Press Clauses prohibit only prior restraints on speech.[126] Not only is this reading absurdly narrow, it is also almost certainly wrong as a historical matter.[127] Narrow Originalism thus fails in this area, and Justice Scalia does not appear to have adopted any alternative, overarching understanding of the First Amendment, even though he often (though certainly not always) voted to enforce First Amendment rights. The result was a jurisprudence that appears somewhat ad hoc, and to some extent driven by the types of speech he approved of (religious speech), and the types that he did not (sexual speech).

To be fair, the lack of an overarching theory of the First Amendment is hardly unique to Justice Scalia—it is a general aspect of the modern Supreme Court's approach to free speech. And the contradictions in Justice Scalia's free speech decisions reflect a broader incoherency in the Court's jurisprudence as a whole.[128] But for Justice Scalia, a man deeply committed to consistency and clarity in legal doctrinal this incoherence must have been particularly painful—which is perhaps why Justice Scalia wrote so few important free speech opinions in comparison to his many contributions to other areas of constitutional law.

Conclusion

This essay began as a meditation on Justice Scalia's contributions to free speech jurisprudence, and ended up a lamentation regarding the generally incoherency of modern free speech law. That is not a coincidence—the exact same forces that prevented Justice Scalia from developing a clear body of law here have also hamstrung the Court as a whole. The problem, in short, is the lack of any overarching theory of why speech is special for *constitutional* purposes. The lack of an agreed upon theory of free speech admittedly is not a new development, and yet the Court has muddled on. However, as free speech disputes arise in ever more areas including economic regulation, telecommunications law, and privacy law, and as the stakes in free speech disputes rise astronomically as a consequence of the spread of the Internet, the time for theoretical agnosticism has come to an end. We need a way to think about free speech that is

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126 *See, e.g.*, *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (Holmes, J.) ("the main purpose of such constitutional provisions is 'to prevent all such *previous restraints* upon publications as had been practiced by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare"); *ACLU v. Alvarez*, 679 F.3d 583, 610 (7th Cir. 2012) (Posner, J., dissenting).
127 *See generally* Ashutosh Bhagwat, *Posner, Blackstone, and Prior Restraints on Speech*, 2015 BYU L. Rev. 1151 (demonstrating extensive historical problems with the "no prior restraints" reading of the Speech and Press Clauses).
128 *See* Robert Post, *Recuperating First Amendment Doctrine*, 47 Stan. L. Rev. 1249 (1995)

grounded, clear, and does not yield absurd results. What that approach might be, however, is a task for another day (hint: it involves democracy).