

**On the Origin of Rules (with Apologies to Darwin):
A Comment on Antonin Scalia's
*The Rule of Law as a Law of Rules***

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The dilemma of rules and discretion is ancient and intractable, and it is ubiquitous in the law. Should we govern conduct with relatively precise rules or with discretionary standards that call for the exercise of judgment? Rules generally make matters more predictable; they reduce the danger of arbitrary or discriminatory action; and they are usually easier and less expensive to apply. But rules are invariably crude. They cover some cases that ideally should not be covered, and they fail to cover others that should. For some drivers in some circumstances it is safe to drive faster than fifty-five miles per hour; for others it is not safe to drive that fast. Discretionary standards (“do not exceed a reasonable speed for the conditions”) have the opposite vices and virtues. Ideally they permit the right outcome to be reached in every case. But compared to rules, their application is less certain, and they leave the door open to abuses. There is almost always something to be said for both sides—that’s why it’s a dilemma—although in particular instances it may be possible to figure out that the better solution is a rule, or a discretionary standard, or some combination of the two.

Justice Antonin Scalia’s engaging essay *The Rule of Law as a Law of Rules*¹ covers this familiar ground, but it is an important and influential Article because it does much more. Justice Scalia’s subject, he says, is not the choice between rules and discretion generally but “the dichotomy between general rules and personal discretion within the narrow context of law that is made by the courts.”² As the title reveals, Justice Scalia leans toward the rules side of the dilemma, with a candid acknowledgment of the dangers of doing so. He recognizes that discretionary standards will never be banished from the law made by courts: “We will have totality of the circumstances tests and balancing modes of analysis with us forever—and for my sins, I will probably write some

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¹ Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U Chi L Rev 1175 (1989).

² Id at 1176 (emphasis omitted).

of the opinions that use them.”³ But, Justice Scalia says, those discretionary “modes of analysis” should be “avoided where possible” and rules should be used instead.⁴

Justice Scalia makes some arguments in favor of rules that are unobvious and illuminating—although, unsurprisingly given the nature of this issue, there are counterarguments. But probably the most striking aspect of his essay is that he connects the preference for rules to some other positions he has taken: his reliance on plain language and original understandings in interpreting the Constitution, and his distrust of the common law as a model for adjudication.⁵ A judge who follows the plain language and the original understandings, Justice Scalia says, is more likely to arrive at rule-like principles.⁶ I am not sure that is correct. In fact, I think the source of judge-made rules, at least the rules that survive, is what Justice Scalia derides: the case-by-case method of the common law. The best rules do not spring full-blown from the language of the Constitution or the understandings of the Framers. They are the product of an evolutionary process of trial and error, and they continue to evolve after they are announced. There is much to be said for Justice Scalia’s general preference for rules, but that preference may undermine, rather than cohere with, Justice Scalia’s other methodological commitments.

I. THE UNCERTAIN VIRTUES OF RULES

A. The Sense of Justice

Many of Justice Scalia’s arguments in favor of rules are no less important for being familiar: rules enhance predictability; they reduce the likelihood of arbitrary or discriminatory decisions by judges; and in any system, but especially in a system in which the Supreme Court reviews only a tiny fraction of cases, discretionary standards are sure to bring about greater disuniformity.⁷ Disuniformity has obvious costs (people will waste resources fighting over the choice of forum, for example), although it may also have some benefits (it allows for experimentation and may permit the law to respond to local variations).

³ Id at 1187.

⁴ Id.

⁵ For Justice Scalia’s more extended development of his views on these subjects, see generally Antonin Scalia, *Common-law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in Amy Gutmann, ed, *A Matter of Interpretation: Federal Courts and the Law* 3 (Princeton 1997).

⁶ See Scalia, 56 U Chi L Rev at 1184 (cited in note 1) (“Just as that manner of textual exegesis facilitates the formulation of general rules, so does, in the constitutional field, adherence to a more or less originalist theory of construction.”).

⁷ See id at 1178–79.

But Justice Scalia also identifies a less obvious potential cost of disuniformity. “[O]ne of the most substantial” reasons to favor rules, he says, is the importance of “the appearance of equal treatment”:

As a motivating force of the human spirit, that value cannot be overestimated. Parents know that children will accept quite readily all sorts of arbitrary substantive dispositions—no television in the afternoon, or no television in the evening, or even no television at all. But try to let one brother or sister watch television when the others do not, and you will feel the fury of the fundamental sense of justice unleashed.⁸

Justice Scalia’s argument for rules is that they do much better at deflecting this kind of reaction:

[T]he trouble with the discretion-conferring approach to judicial law making is that it does not satisfy this sense of justice very well. When a case is accorded a different disposition from an earlier one, it is important, if the system of justice is to be respected, not only that the later case *be* different, but that it *be seen to be so*. . . . [It is] better, even at the expense of the mild substantive distortion that any generalization introduces, to have a clear, previously enunciated rule that one can point to in explanation of the decision.⁹

Obviously there is a lot to this argument, but there are, I think, two serious difficulties with it. The first is that it understates the role of what might be called procedural values—specifically, a fair hearing and reason-giving. There is a substantial body of empirical evidence suggesting that procedural fairness—in particular, the belief that one has been listened to—is a key factor in causing people to obey the law.¹⁰ This suggests what is in any event intuitive, that people might not be especially outraged by a discretionary decision if they feel they have had an opportunity to present their case to the decisionmaker. Justice Scalia’s essay begins with an account of Saint Louis, King Louis IX of France, dispensing case-by-case, discretionary justice. Justice Scalia comments that “[t]he judgments there pronounced, under the oak tree, were regarded as eminently just and good King Solomon is also supposed to have done a pretty good job, without benefit of a law

⁸ Id at 1178.

⁹ Id.

¹⁰ See, for example, Tom Tyler, *Why People Obey the Law* 82–83, 116–17 (Princeton 2006) (discussing empirical studies finding that perceived fairness led to increased compliance and that having a chance to state one’s case increases one’s perception of fairness).

degree, dispensing justice case-by-case.”¹¹ To the extent people value the opportunity to be heard, a discretionary regime may even be superior; if the decisionmaker’s hands are tied by a rule, the hearing is more likely to be seen as a sham and not serve the purpose of making individuals feel that they have been treated fairly.

Reasons are also important. Certainly people do not like it when they are treated less well than others who seem indistinguishable. To use a commonplace example, a person who is stopped for speeding when other cars on the same road were going just as fast might have the same reaction as the children in Justice Scalia’s example—even if he was, in fact, speeding. But part of the reason for that reaction is the suspicion that one is being singled out for illegitimate reasons—some form of discrimination or just the officer’s whim. If there was a good reason for stopping that driver and not others—even if the reason is just that the officer could stop only one car and selected his at random—then the driver would at least not be justified in feeling outraged. Arguments based on one’s experience with children go only so far, but the unhappy sibling in Justice Scalia’s example might calm down if he is given a reasonable explanation for the decision about television-watching. The reaction might change from resentment and indignation—the sense of being wronged—to simple disappointment.

The second, more fundamental objection to Justice Scalia’s argument is that people do not get outraged only over seemingly unjust discretionary decisions. Their sense of justice is also offended by what seems to be the excessively rigid application of a rule—that is, by the refusal to leaven the application of the rule with some discretion. Insisting on a rule can seem (and be) every bit as unjust as making a discretionary judgment.

There is a recent example from the Supreme Court’s own work. Last term, in *Bowles v Russell*,¹² the Court, by a 5-4 vote, held that a criminal defendant was barred from appealing a denial of postconviction relief because he had filed his notice of appeal late.¹³ Rule 4(a)(6) of the Federal Rules of Appellate Procedure, which tracks 28 USC § 2107(c)(2), provides that a district judge may reopen the period for filing an otherwise out-of-time notice of appeal “for a period of 14 days after the date when its order to reopen is entered.” In *Bowles*, the district court entered an order reopening the period in which the defendant could file his notice of appeal.¹⁴ The order specified a date by which the notice of appeal had to be filed, but that date, “inexplica-

¹¹ Scalia, 56 U Chi L Rev at 1175–76 (cited in note 1).

¹² 127 S Ct 2360 (2007).

¹³ See id at 2362.

¹⁴ 127 S Ct at 2362.

bly,” was seventeen, not fourteen, days after the entry of the order.¹⁵ The defendant, relying on the order (which did not disclose the date of entry on its face, and therefore was not erroneous on its face),¹⁶ filed on the sixteenth day.¹⁷

The Court held that the appeal was barred even though the defendant had relied on the judge’s order.¹⁸ The majority reasoned that the fourteen-day limit was “a jurisdictional requirement” and that the Court “has no authority to create equitable exceptions to jurisdictional requirements.”¹⁹ The Court overruled two cases that had held that “unique circumstances” might justify an exception.²⁰ *Bowles* is a quintessential rule-governed decision. (Justice Scalia was in the majority.) The Court was asked to allow a small scope for discretion, and it refused to do so: fourteen days means fourteen days, no matter how compelling the case for an exception.²¹

Regardless of whether *Bowles* was correct, there is no question that this is the kind of decision that can precipitate an outraged sense of injustice. In fact, it did. Justice Souter began his dissent by saying: “It is intolerable for the judicial system to treat people this way.”²² It is not hard to imagine others having the same reaction. The reaction may be unjustified; perhaps the rule of *Bowles* is correct, given various institutional considerations. But whether the outraged reaction is justified is beside the point. Justice Scalia’s argument is that even if a rule is not in fact more just—even if it is “arbitrary”—it is likely to be superior to a discretionary standard because a rule is more likely to “satisfy th[e] sense of justice” and to “be seen to be” fair.²³ That argument is at least overstated and probably incorrect: as a general matter, rules and discretionary standards seem equally vulnerable on this score.

Justice Scalia is certainly right to say that people may not have the patience to understand the nuances of the differences between cases in a discretionary regime and therefore may be outraged that they are treated differently from others, even when the difference in treatment is theoretically justifiable. But by the same token, people may not understand the institutional nuances that justify a harsh rule. The appearance of an excessively rigid application of a rule is different from the appearance of an arbitrary use of discretion; but the for-

¹⁵ *Id.*

¹⁶ See *id.* at 2371 (Souter dissenting).

¹⁷ *Id.* at 2362 (majority).

¹⁸ See *id.* at 2366–67.

¹⁹ *Id.* at 2366.

²⁰ See *id.*

²¹ See *id.* at 2367.

²² *Id.* (Souter dissenting).

²³ Scalia, 56 *U Chi L Rev* at 1178 (cited in note 1) (emphasis omitted).

mer, no less than the latter, can prompt the kind of outraged reaction that Justice Scalia described in his Article.²⁴ The need to avoid that reaction is not, then, a reason to favor rules.

B. Judicial Courage

Justice Scalia makes another important and arresting argument for the superiority of rules: rules “embolden” judges to be “courageous.”²⁵ Judges, he says, “are sometimes called upon to be courageous, because they must sometimes stand up to what is generally supreme in a democracy: the popular will.”²⁶ In such circumstances, Justice Scalia says, “[t]he chances that frail men and women will stand up to their unpleasant duty are greatly increased if they can stand behind the solid shield of a firm, clear principle enunciated in earlier cases.”²⁷

A version of this argument has been very influential in free speech cases. In such cases, the Supreme Court has often tried to establish rules, not discretionary standards, particularly when restrictions limit speech that is of high value and is especially subject to popular disapproval.²⁸ Justice Scalia’s point was, in fact, anticipated by a criticism that Judge Learned Hand made of Justice Oliver Wendell Holmes in 1921, when modern First Amendment law was just beginning to emerge. Holmes’s opinions had suggested that speech could be restricted if it created a “clear and present danger” that the speech would “bring about the substantive evils that [the government] has a right to prevent.”²⁹ Hand thought that this formulation was too discretionary because it required an assessment of particular facts and circumstances. Hand’s arguments parallel Justice Scalia’s:

Once you admit that the matter is one of degree . . . you give to Tomdickandharry, D.J., so much latitude that the jig is at once up.

²⁴ See text accompanying note 8.

²⁵ Scalia, 56 U Chi L Rev at 1180 (cited in note 1).

²⁶ Id.

²⁷ Id.

²⁸ The most famous examples are *New York Times v Sullivan*, 376 US 254, 279–80 (1964) (holding that public officials cannot recover for defamation unless they show that the defamatory statement was uttered with “actual malice”), and *Brandenburg v Ohio*, 395 US 444, 447 (1969) (holding that speech that advocates the violation of the law may not be punished unless “such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”).

²⁹ *Schenck v United States*, 249 US 47, 52 (1919). In *Schenck*, Holmes’s opinion for the Court upheld a restriction on speech inciting insubordination during wartime. Holmes subsequently used a similar formulation in famous dissenting opinions that would have declared such restrictions unconstitutional. See *Abrams v United States*, 250 US 616, 624, 628 (1919) (Holmes dissenting) (“It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion.”); *Gitlow v New York*, 268 US 652, 672–73 (1925) (Holmes dissenting).

Besides even [the Justices of the Supreme Court] have not shown themselves wholly immune from the “herd instinct” . . . I own I should prefer a qualitative formula, hard, conventional, difficult to evade. If it could become sacred by the incrustations of time and precedent it might be made to serve just a little to withhold the torrents of passion to which I suspect democracies will be . . . subject.³⁰

This argument has great force in the context of the rights of political dissidents and—Justice Scalia’s example—criminal defendants.³¹ But it is not an argument for preferring rules in all circumstances because it is only half the story. It is true that rules provide a “shield” for judges against popular opinion. But rules can also provide judges with a shield against their own consciences or their own sense of what the law truly requires. The familiar bureaucratic defense “I was just following orders” can have a judicial counterpart in “I am just following the rules.”

Justice Scalia and Judge Hand describe a situation in which the better view of the law requires judges to follow the rules when popular sentiment calls for a deviation. But the opposite situation is also possible. The better view of the law—and the unpopular course—might be for a judge to deviate from the rule or to create an exception to the rule. In those instances, a rule will provide too easy an escape. A strict procedural rule, for example, provides a way for a judge to refuse to hear, on the merits, the claims of an unpopular criminal defendant; if the rule were more flexible, it might be impossible for the judge to convince himself that he was just doing his duty when he was in fact capitulating to public opinion. So in this instance, again, while Justice Scalia has identified a genuine virtue of rules, a discretionary principle may—depending on the circumstances—have a corresponding virtue of equal or greater importance.

II. RULES, TEXT, AND PRECEDENT

A. Rules and the Text

Perhaps the most notable claims in Justice Scalia’s essay are not about the dilemma of rules and discretion in isolation but about the relationship between Justice Scalia’s commitment to rules and his views

³⁰ Letter from Learned Hand to Zechariah Chafee, Jr. (Jan 2, 1921), quoted in Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 *Stan L Rev* 719, 749–50 (1975). The test that the Court settled on in *Brandenburg*, see note 28, avoided using the phrase “clear and present danger”—probably in response to concerns like those expressed by Hand. See Gunther, 27 *Stan L Rev* at 754–55.

³¹ See Scalia, 56 *U Chi L Rev* at 1180 (cited in note 1) (arguing that it is easier for a judge to rule in favor of a “convicted felon who is the object of widespread hatred” and against popular sentiment when the ruling is based on a per se rule rather than a case-specific determination).

on constitutional interpretation. Justice Scalia has long-embraced textualism and originalism in constitutional interpretation—the view that the plain language of the text of the Constitution should control, with that language interpreted according to the meaning that was understood when it was adopted.³²

In *The Rule of Law as a Law of Rules*, Justice Scalia says that his approach to interpretation leads naturally to his preference for rules. “[I]t is perhaps easier for me than it is for some judges to develop general rules, because I am more inclined to adhere closely to the plain meaning of a text.”³³ Justice Scalia gives *Michigan v. Chesternut*³⁴ as an example. In that case, a criminal defendant dropped a package of illegal drugs while he was running away from a police car that was following him.³⁵ The issue was whether the defendant had been “seized” within the meaning of the Fourth Amendment,³⁶ which prohibits “unreasonable searches and seizures.” If the officers’ pursuit of the defendant constituted a “seizure,” then the drugs could not be used as evidence against the defendant unless the officers had probable cause to suspect him of a crime when they undertook the pursuit.³⁷

The Court concluded that “[t]he police can be said to have seized an individual ‘only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.’”³⁸ Justice Scalia joined Justice Kennedy’s concurring opinion,³⁹ which, in Justice Scalia’s description, “said that police conduct cannot constitute a ‘seizure’ until (as that word connotes) it has had a restraining effect.”⁴⁰ His adherence to the plain meaning of the text of the Fourth Amendment, Justice Scalia says, led naturally to a rule-like principle and away from the majority’s more discretionary standard.⁴¹

Justice Scalia’s essay makes a parallel claim about originalism: “Just as that manner of textual exegesis facilitates the formulation of general rules, so does, in the constitutional field, adherence to a more or less originalist theory of construction.”⁴² Here his example is the principle that officers’ entry into a barn located on the same premises

³² See, for example, Scalia, *Common-law Courts* at 37–39 (cited in note 5).

³³ Scalia, 56 U Chi L Rev at 1184 (cited in note 1).

³⁴ 486 US 567 (1988).

³⁵ See *id.* at 569.

³⁶ See *id.* at 572.

³⁷ See *Dunaway v. New York*, 442 US 200, 216, 219 (1979).

³⁸ *Chesternut*, 486 US at 573 (“Moreover, what constitutes a restraint on liberty prompting a person to conclude that he is not free to ‘leave’ will vary.”), quoting *United States v. Mendenhall*, 446 US 544, 554 (1980).

³⁹ See *Chesternut*, 486 US at 576–77 (Kennedy concurring).

⁴⁰ Scalia, 56 U Chi L Rev at 1184 (cited in note 1).

⁴¹ See *id.*

⁴² *Id.*

as a house does not constitute a search within the meaning of the Fourth Amendment. “If a barn was not considered the curtilage of a house in 1791 or 1868 and the Fourth Amendment did not cover it then, unlawful entry into a barn today may be a trespass, but not an unconstitutional search and seizure.”⁴³ Justice Scalia adds: “It is more difficult, it seems to me, to derive such a categorical general rule from evolving notions of personal privacy.”⁴⁴

These arguments seem subject to a straightforward objection: unless the Framers themselves generally favored rules—and there does not seem to be any evidence that they did—there is no reason to think that following the text, or the original understandings, will generally lead a court to adopt rules. The text or the original understandings might suggest a rule; but they might also suggest that discretionary standards are better.

Chesternut bears this out, in two respects. First, it is not clear that the meaning of the word “seizure” leads to the rule Justice Scalia favors. The ordinary meaning of the word “seizure” is taking hold of something, or taking possession of it.⁴⁵ Obviously that meaning has to be adapted for the context of the Fourth Amendment, though, because the Fourth Amendment regulates police conduct other than grabbing persons and things (it regulates the circumstances in which an officer may point a weapon at a person and order him to stop, for example⁴⁶). But once the term is placed in that context, it is not obvious whether the plain meaning of the term favors the *Chesternut* majority’s standard—a person is seized if he reasonably believes that he is not free to go on his way—or Justice Scalia’s rule, that a person is seized only if he in fact does not go on his way.⁴⁷

What Justice Scalia seems to have done is not to examine the word “seizure” and find that it leads him to a rule, but something more like the opposite. He would like to use a rule rather than a standard, and the rule that there is no seizure without actual restraint is a rule that can be easily reconciled with the meaning of the word “seizure.” The text of the Constitution does not generate the rule, although the rule is consistent with the text. That is, in my view at least, a plausible way to proceed in interpreting the Constitution—to treat the text as a limit on permissible

⁴³ *Id.*, citing *United States v Dunn*, 480 US 294 (1987).

⁴⁴ Scalia, 56 U Chi L Rev at 1184 (cited in note 1).

⁴⁵ See 2 *Shorter Oxford English Dictionary on Historical Principles* 2761 (Oxford 2d ed 2002).

⁴⁶ See *United States v Drayton*, 536 US 194, 203–04 (2002) (holding that no seizure existed based partly on the fact that the officer did not brandish his weapon); *Florida v Bostick*, 501 US 429, 432 (1991) (emphasizing, in its determination that seizure did not exist, that “at no time did the officers threaten Bostick with a gun”).

⁴⁷ See text accompanying notes 39–40.

interpretations that have their source somewhere else, rather than treating the text as itself the source—but it is not the approach to constitutional interpretation that Justice Scalia says he uses.⁴⁸

There is a second way in which *Chesternut* seems to undercut Justice Scalia's claim about the relationship between his textualism and his commitment to rules. Just a few words before the word "seizure" in the Fourth Amendment there occurs the word "unreasonable." "Reasonableness" is, of course, the classic discretionary standard, as Justice Scalia notes elsewhere in his essay.⁴⁹ It is very difficult to see how a textualist can take the word "unreasonable" and, without resort to anything but the text, turn that word into a rule.

Textualism will lead you to rules only when the text happens to prescribe a rule. There are provisions of the Constitution that do prescribe rules or, in any event, that do not leave much room for discretion. There are provisions that use numbers, for example—for the minimum ages of federal officials,⁵⁰ for those officials' terms in office,⁵¹ for the number of senators per state,⁵² and for how often a census is to be conducted⁵³—and at least the numerical aspects of those rules, read naturally, do not permit the exercise of much discretion. But most of the provisions of the Constitution that give rise to litigation are like the word "seizure" in that they do not, by their meanings alone, lead either to rules or to discretionary standards. They could plausibly be construed either way. That is true of famous phrases like "the freedom of speech," "the free exercise of religion," and "the equal protection of the laws." And some phrases, like "cruel and unusual punishments" (and "unreasonable" in the Fourth Amendment), interpreted most naturally, seem to lead to a discretionary standard. If Justice Scalia is to find rules in the Constitution systematically, he will have to find them somewhere other than the plain meaning of the words.

The same is true of the original understandings. Relying on original understanding has its own set of problems, of course. There is the problem of ascertaining the original understanding: the historical materials may not make it clear what the original understanding was, or

⁴⁸ See text accompanying note 5.

⁴⁹ See Scalia, 56 U Chi L Rev at 1181 (cited in note 1) (describing the "reasonable man" standard as "the most venerable totality of the circumstances test of them all").

⁵⁰ See, for example, US Const Art 1, § 2, cl 2 ("No person shall be a Representative who shall not have attained the age of twenty five years.").

⁵¹ See, for example, US Const Art 1, § 2, cl 1 ("The House of Representatives shall be composed of members chosen every second year.").

⁵² See US Const Art 1, § 3, cl 1 ("The Senate of the United States shall be composed of two Senators from each state.").

⁵³ See US Const Art 1, § 2, cl 3 (requiring a census "within every subsequent term of ten years").

there may not, in fact, have been a single original understanding about a particular issue. Even if one can determine what the original understanding was, there is the problem of applying it to radically new conditions: is a barn in the rural nation of 1791 to be treated as equivalent to, say, a garden shed in twenty-first century exurbia?

Even assuming that these problems can be solved, though, Justice Scalia's claim that originalism and rules go together faces the same difficulties that are faced by the parallel claim about the text. The original understandings will yield rules only when the original understanding was that a rule was to govern that issue. Justice Scalia's example once again actually makes this point. The Fourth Amendment's protection against unreasonable searches and seizures extends to "persons, houses, papers, and effects." There is, then, a question about the extent to which the Fourth Amendment protects the area around a house. In resolving that issue, the Supreme Court has relied on common law notions: at common law, only an unlawful entry of the "curtilage" of a residence constituted burglary.⁵⁴ But the common law definition does not appear to be entirely rule-like.⁵⁵ And in adapting the common law definition, the Court expressly declined to establish a bright line rule,⁵⁶ instead embracing a four-part test of the kind that Justice Scalia's Article so gleefully criticizes.⁵⁷ The text and the original understandings will generate rules on some occasions, but contrary to Justice Scalia's argument, there does not seem to be any systematic connection between textualism and originalism, on the one hand, and rules on the other.

B. Where Do Rules Come from?

In addition to saying that textualism and originalism lead to rules, Justice Scalia makes the converse claim—that the use of a nontextualist and nonoriginalist approach, one that relies on "evolving notions," will make it "more difficult . . . to derive such a categorical general rule."⁵⁸ This claim, I believe, is not just unproven but actually mistaken. In constitutional law at least, rules that have the virtues Justice Scalia identifies—promoting predictability and uniformity, and reducing the

⁵⁴ See *Dunn*, 480 US at 300.

⁵⁵ See *id.* at 300 n 3, quoting William Blackstone, 4 *Commentaries on the Laws of England* *225 (Clarendon 1769) (failing to define "curtilage" apart from noncontiguous but fenced-in barns, stables, or warehouses).

⁵⁶ See *Dunn*, 480 US at 301 n 4 (denying the government's request to define "curtilage" as whatever lies within "the nearest fence surrounding a fenced house").

⁵⁷ See *id.* at 301 ("[C]urtilage questions should be resolved with particular reference to four factors: the proximity of the area . . . to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken . . . to protect the area from observation.").

⁵⁸ Scalia, 56 U Chi L Rev at 1184 (cited in note 1).

dangers of arbitrariness and discrimination—are routinely the product of evolution. They are the result of trial-and-error experimentation with discretionary standards, leading to the conclusion that a rule would be superior. What is more, these rules continue to evolve after they have been elaborated.

There are, I think, many illustrations of highly successful rules in constitutional law that were the product of this kind of evolutionary process.⁵⁹ I will discuss rules established by two important cases: *Gideon v. Wainwright*,⁶⁰ a decision that was in many ways characteristic of the Warren Court, and the recent decision in *Crawford v. Washington*,⁶¹ a case in which Justice Scalia wrote the opinion of the Court.

1. *Gideon*.

Gideon held that state criminal defendants have the right to appointed counsel in felony cases, even if they cannot afford to hire a lawyer.⁶² *Gideon* overruled *Betts v. Brady*,⁶³ which had held twenty-one years earlier that whether counsel must be appointed in a state prosecution was to be decided case by case, under the Due Process Clause, on the basis of “the totality of facts.”⁶⁴ The question in each case was whether the failure to appoint counsel denied “fundamental fairness” to the defendant.⁶⁵ *Betts* used a discretionary standard; *Gideon* replaced it with a rule.

The Court’s opinion in *Gideon* was written by Justice Black, who considered himself a textualist and originalist,⁶⁶ as Justice Scalia does. Justice Black suggested that the rule in *Gideon* was implicit in the Constitution all along and that *Betts* itself was an “abrupt break” from previous cases.⁶⁷ But Justice Harlan’s concurring opinion criticized that claim,⁶⁸ and Justice Harlan had the better of the argument. None of the

⁵⁹ See note 81 (providing examples where rules replaced discretionary standards).

⁶⁰ 372 US 335 (1963).

⁶¹ 541 US 36 (2004).

⁶² See 372 US at 344–45.

⁶³ 316 US 455 (1942).

⁶⁴ *Id.* at 462.

⁶⁵ See *id.*; *Gideon*, 372 US at 342.

⁶⁶ See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 1–3 (Harvard 1980) (asserting that Justice Black remained faithful to textualism and originalism even when it conflicted with his political views). For a discussion of the justification for the decision in *Gideon* and the relationship of that decision to precedent, see David A. Strauss, *The Common Law Genius of the Warren Court*, 49 Wm & Mary L Rev 845, 868–71 (2007).

⁶⁷ *Gideon*, 372 US at 344.

⁶⁸ See *id.* at 349–50 (Harlan concurring) (“I agree that [*Betts*] should be overruled, but consider it entitled to a more respectful burial than has been accorded.”).

pre-*Betts* cases, fairly read, really suggested an across-the-board rule requiring states to appoint counsel in all felony cases.⁶⁹

The better basis for *Gideon* was that—as Justice Harlan put it—the case-by-case rule of *Betts* “ha[d] continued to exist in form while its substance has been substantially and steadily eroded.”⁷⁰ “This evolution,” as Justice Harlan described it, occurred in several stages.⁷¹ Even before *Betts*, the Court had suggested that there was an automatic right to appointed counsel in any capital case.⁷² The Court reiterated that suggestion in dictum in 1948⁷³ and finally issued a square holding to that effect in 1961.⁷⁴

In noncapital cases, the Court, while applying *Betts*, progressively narrowed the circumstances in which counsel did not have to be appointed. Between 1942, when *Betts* was decided, and 1950, the Court, on several occasions, sustained convictions of defendants who were denied appointed counsel.⁷⁵ At the same time, the Court overturned the convictions of defendants who were denied appointed counsel in a number of cases presenting issues that, while not entirely routine, did not seem exceptionally complex.⁷⁶ Then from 1950 on, the Court, still applying *Betts*, reversed in every right to counsel case that came before it.⁷⁷ In each case, the Court identified some occasion during the proceedings when the defendant might have benefited from counsel—

⁶⁹ *Id.* (showing that decisions requiring provision of counsel rested on a finding of “special circumstances”). See also Jerrold H. Israel, *Gideon v. Wainwright: The “Art” of Overruling*, 1963 S Ct Rev 211, 234–41 (noting that overruling courts will often characterize a case as an “arbitrary break with the past” so that they can reject the case and still claim adherence to stare decisis but concluding that the use of this approach in *Gideon* is “highly questionable”).

⁷⁰ *Gideon*, 372 US at 350.

⁷¹ *Id.* at 351.

⁷² See *Avery v. Alabama*, 308 US 444, 445 (1940) (stating in dicta that the complete denial of representation of counsel in a capital case is a “clear violation of the Fourteenth Amendment[.]”).

⁷³ See *Uveges v. Pennsylvania*, 335 US 437, 440–41 (1948) (noting that some members of the Court thought case-by-case determination was warranted but only where capital punishment was not involved); *Bute v. Illinois*, 333 US 640, 674 (1948) (observing that the “special circumstances” test was only apposite because the case at bar was not a capital case).

⁷⁴ See *Hamilton v. Alabama*, 368 US 52, 55 (1961) (reasoning that only the presence of counsel allows a defendant to plead intelligently and know about all of his available defenses).

⁷⁵ See, for example, *Foster v. Illinois*, 332 US 134, 138 (1947) (holding that the failure to provide counsel was not a “depriv[ation] of rights essential to a fair hearing under the Federal Constitution”); *Bute*, 333 US at 677 (1948) (holding a defendant does not have a right to counsel in a noncapital case unless special circumstances show due process would be violated without counsel); *Gryger v. Burke*, 334 US 728, 730 (1948) (allowing a conviction to stand where defendant had previously been a defendant in eight cases but still made no request for counsel); *Quicksall v. Michigan*, 339 US 660, 661 (1950) (adhering closely to *Foster*, *Bute*, and *Uveges*).

⁷⁶ See, for example, *Williams v. Kaiser*, 323 US 471, 471, 476–79 (1945) (overturning a conviction for robbery with a deadly weapon where the defendant requested, but was denied, counsel and therefore allegedly felt compelled to plead guilty); *Rice v. Olson*, 324 US 786, 787–91 (1945).

⁷⁷ *Gideon*, 372 US at 350–51 (finding no cases after *Quicksall* where the Court found special circumstances lacking).

an objection counsel might have made that the pro se defendant did not; lines of investigation or argument that counsel might have pursued; or complex tactics that might at least have mitigated the sentence.⁷⁸ Between *Betts* and *Gideon*, the Court decided approximately twenty-three cases involving the *Betts* rule.⁷⁹ By the end of this period, as Justice Harlan put it, “[i]n truth the *Betts v Brady* [approach was] no longer a reality.”⁸⁰ The Court had concluded that a rule was needed. The discretionary standard had been replaced by a rule as the result of an evolutionary process.⁸¹

2. *Crawford*.

The issue in *Crawford* was whether the Confrontation Clause of the Sixth Amendment permitted an out-of-court statement that had not been subject to cross-examination to be used against the accused in a criminal trial.⁸² The declarant was the defendant’s wife; she had made a statement in response to police interrogation that the prosecution sought to use against the defendant.⁸³ She could not testify at trial because of the state’s marital privilege law.⁸⁴

Before *Crawford*, a statement of this kind could be admitted if the witness was unavailable and her statement bore “adequate ‘indicia of reliability.’”⁸⁵ In order to satisfy that standard, the testimony would either have to come “within a ‘firmly rooted hearsay exception’ or bear ‘particularized guarantees of trustworthiness.’”⁸⁶ *Crawford* overruled that

⁷⁸ See, for example, *Chewning v Cunningham*, 368 US 443, 446 (1962) (arguing that when subsequent offender statutes were at issue “the labyrinth of law is, or may be, too intricate for the layman to master”); *Hudson v North Carolina*, 363 US 697, 703 (1960) (reasoning a layman could not know he was entitled to protection from the prejudicial effects of his codefendant’s guilty plea or how to invoke such protection). See also *Gideon*, 372 US at 351 (“The Court has come to recognize, in other words, that the mere existence of a serious criminal charge constituted in itself special circumstances requiring the services of counsel at trial.”).

⁷⁹ See Israel, 1963 S Ct Rev at 251 n 236, 252 (cited in note 69).

⁸⁰ *Gideon*, 372 US at 351 (arguing that retaining a rule that is honored only with lip service disservices the federal system in the long run).

⁸¹ *Gideon* is typical of several of the most important Warren Court decisions in these respects—that it replaced a discretionary standard with a rule and did so because the discretionary standard had proved itself to be unsatisfactory in a series of earlier decisions. This was true, I believe, of the decisions in *Brown v Board of Education*, 347 US 483 (1954), and *Miranda v Arizona*, 384 US 436 (1966). The “one person, one vote” rule of *Reynolds v Sims*, 377 US 533 (1964), presents what might be called an anticipatory version of the same process. The Court, concerned that a discretionary standard would be evaded, imposed a rule that was justified principally by the need to avoid evasion. For a defense of these claims, see Strauss, 49 Wm & Mary L Rev at 860–79 (cited in note 66).

⁸² 541 US at 38.

⁸³ *Id* at 38–39.

⁸⁴ *Id* at 40.

⁸⁵ *Id* at 40, quoting *Ohio v Roberts*, 448 US 56, 66 (1980).

⁸⁶ *Crawford*, 541 US at 40, quoting *Roberts*, 448 US at 66.

discretionary standard.⁸⁷ Justice Scalia's opinion echoed the criticisms of discretionary standards that he made in *The Rule of Law as a Law of Rules*: he described “[r]eliability” as “an amorphous, if not entirely subjective, concept” because “[w]hether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them.”⁸⁸ The *Crawford* opinion described how different courts applied this discretionary standard differently.⁸⁹

Crawford substituted, for that discretionary standard, a much more rule-like approach: “Testimonial statements of witnesses absent from trial [may be] admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.”⁹⁰ Justice Scalia's opinion for the Court asserted—again in keeping with a theme of *The Rule of Law as a Law of Rules*—that this approach was “faithful to the Framers’ understanding.”⁹¹ The opinion buttressed that assertion with a lengthy discussion of “the historical background of the [Confrontation] Clause.”⁹² “By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to [the Framers’] design.”⁹³

The historical account in the opinion is by no means uncontroversial. Chief Justice Rehnquist, in an opinion concurring in the judgment, disagreed with the account of the history given in Justice Scalia's opinion for the Court.⁹⁴ Others have sharply challenged that history as well, for Chief Justice Rehnquist's reasons among others.⁹⁵

More importantly, though, Justice Scalia's reliance on the original understanding does not support his claim that evolutionary, common law processes are less likely to give rise to rules—quite the contrary. The historical background that Justice Scalia relied on in *Crawford*

⁸⁷ See *Crawford*, 541 US at 68–69.

⁸⁸ Id at 63.

⁸⁹ See id (describing how one court found reliability based on a statement's detail, while another “found a statement more reliable because the portion implicating another was ‘fleeting’”).

⁹⁰ Id at 59.

⁹¹ Id.

⁹² Id at 43–50 (tracing the history of the right to confront one's accusers from Roman times to early state decisions after ratification of the Constitution).

⁹³ Id at 67–68.

⁹⁴ See id at 69–73 (Rehnquist concurring).

⁹⁵ See, for example, Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 Brooklyn L Rev 105, 107–08 (2005); Thomas Y. Davies, *Revisiting the Fictional Originalism in Crawford's “Cross-examination Rule”: A Reply to Mr. Kry*, 72 Brooklyn L Rev 557, 567–71 (2007). For a response, see Robert Kry, *Confrontation under the Marian Statutes: A Response to Professor Davies*, 72 Brooklyn L Rev 493, 541 (2007).

consisted in large measure of common law cases.⁹⁶ The rule he discerned was a rule developed mostly through those cases, which of course antedated the adoption of the Constitution.⁹⁷ This is not surprising. Anyone trying to uncover the original understandings of constitutional provisions will frequently have to uncover the common law rules in force at the time, because the common law was the model, or at least the starting point, for much legal thinking at the time the Constitution was adopted.

This connection between precedent and the original understandings does, however, call into question Justice Scalia's suggestion that there is something about common law processes that makes it difficult to derive a clear rule from precedent and that the original understandings are more likely to produce rules. In fact, any such difficulties should be even greater when the precedents are not the Court's own, from recent times, but rather precedents from centuries ago.⁹⁸ By the same token, if Justice Scalia did correctly derive a clear rule from those cases, then it ought to be even easier to derive clear rules from the Court's own precedents.

Actually, the most persuasive part of Justice Scalia's *Crawford* opinion appears to be not the controversial claims about the original understanding but rather his analysis of the Court's precedents. Justice Scalia's argument about the precedents paralleled Justice Harlan's argument in *Gideon*: Justice Scalia asserted that the Court's Confrontation Clause cases, while formally applying the "indicia of reliability" test, in fact reached results consistent with the rule that the Court announced in *Crawford*.⁹⁹ In other words, the *Crawford* rule emerged from the evolution of the Court's own precedents.

Finally, the *Crawford* opinion is explicit in acknowledging that the evolution of the rule is not complete. The rule in *Crawford* applies only to testimonial statements.¹⁰⁰ The Court in *Crawford* decided to

⁹⁶ See *Crawford*, 541 US at 45–46 (majority) (citing cases such as *King v Dingler*, 168 Eng Rep 383 (KB 1791), and *King v Paine*, 87 Eng Rep 584 (KB 1696), which addressed the admissibility of examinations where the witness was unavailable).

⁹⁷ See *Crawford*, 541 US at 45 (noting that *Paine* held that "the admissibility of an unavailable witness's pretrial examination depended on whether the defendant had had an opportunity to cross-examine him").

⁹⁸ Chief Justice Rehnquist, in fact, criticized Justice Scalia's account partly on the ground that Justice Scalia had greatly overstated the extent to which those cases gave rise to a clear rule: "It is an odd conclusion indeed to think that the Framers created a cut-and-dried rule with respect to the admissibility of testimonial statements when the law during their own time was not fully settled." *Id.* at 73 (Rehnquist concurring).

⁹⁹ See *id.* at 57–59 (noting that even in *Roberts*, the case that *Crawford* overruled, the Court "admitted testimony from a preliminary hearing at which the defendant had examined the witness").

¹⁰⁰ See *id.* 68 ("Where nontestimonial hearsay is at issue . . . the States [should be afforded] flexibility in their development of hearsay law.").

“leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’”¹⁰¹ Subsequent cases began the process of spelling out this definition, but the process remains incomplete.¹⁰² *Crawford* also left intact the principle that a defendant could forfeit his rights under the Confrontation Clause by certain kinds of wrongdoing (killing the witness to prevent her from testifying would be the clearest example).¹⁰³ A case pending in the Supreme Court will address the scope of that exception.¹⁰⁴ The rule of *Crawford* is, then, best seen as the product of an evolutionary, common law process and as a rule that will be shaped in the future by such a process.

CONCLUSION

The choice between rules and discretionary standards confronts legislators and regulators routinely. It also confronts judges, or at least Supreme Court justices. *The Rule of Law as a Law of Rules* is an elegant and appropriately cautious defense of the position that rules are, as a general matter, superior. It makes enlightening points about the way that rules can help defuse the sense of resentment that discretion might engender and about how rules can protect judges from popular disapproval. Not surprisingly, Justice Scalia also suggests that his preference for rules follows naturally from his commitment to textualism and originalism and that evolutionary, precedent-based, common law-like methods of adjudication, of which he is an outspoken critic, do not lend themselves to rules. But on that point it is not clear that Justice Scalia succeeds. Rules in constitutional law, like many other things in the world, are most often the product—the ongoing, unfinished product—of evolution.

¹⁰¹ *Id.*

¹⁰² See, for example, *Davis v Washington*, 547 US 813, 817 (2006) (“[The Court here was required] to determine [whether] statements made to law enforcement personnel during a 911 call or at a crime scene are ‘testimonial.’”).

¹⁰³ See 541 US at 62.

¹⁰⁴ See *Giles v California*, 128 S Ct 976 (2008) (granting certiorari).