# LIMITING JUDGES: A REVIEW OF RALPH A. ROSSUM'S *ANTONIN SCALIA'S JURISPRUDENCE*

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Ralph A. Rossum's monumental work, *Antonin Scalia's Jurisprudence: Text and Tradition,*[1] is "an attempt to articulate the contours of Justice Antonin Scalia's understanding of constitutional and statutory interpretation and the role of the Court."[2] Rossum, the Henry Salvatori Professor of American Constitutionalism at Claremont McKenna College, seeks to "understand Scalia as he understands himself"[3] by focusing on "his arguments and words."[4] To that end, he has reviewed approximately 600 majority, concurring, and dissenting opinions that Scalia wrote between the 1986 Term and the 2004 Term in order to gain a sense of how Scalia approaches the judicial craft.[5] The result is a comprehensive analysis of the jurisprudence of the "most outspoken, intellectually interesting, high profile and colorful member" of the Court.[6] Underlying the entire work is the ultimate objective of Scalia's jurisprudence—limiting the power of judges.[7]

This is not a biography. Scalia's life and legal work prior to joining the bench receive a total of three pages.[8] Unlike *Becoming Justice Blackmun*[9] or *Sandra Day O'Connor*,[10] there is no attempt to explain how or why Scalia has evolved on the bench or even any suggestion that he has evolved on the bench.[11] Unlike Justice

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1. RALPH A. ROSSUM, ANTONIN SCALIA'S JURISPRUDENCE: TEXT AND TRADITION (2006).
2. *Id.* at ix.
3. *Id.*
4. *Id.*
5. *Id.*
6. ROSSUM, *supra* note 1, at 1.
7. *See infra* notes 72–76 and accompanying text (discussing this ultimate objective).
8. ROSSUM, *supra* note 1, at 3–5.
9. LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN (2005).
10. JOAN BIPSOKIC, SANDRA DAY O'CONNOR (2005).
11. To the contrary, throughout the book, Rossum emphasizes that Scalia has been unchanging in his jurisprudence.

Breyer's *Active Liberty,*[12] this is not a broad discussion of some jurisprudential theme.[13] Although he relies on other sources, notably Scalia's provocative work, *A Matter of Interpretation,*[14] and opinions written when Scalia served on the United States Court of Appeals for the District of Columbia Circuit,[15] this is primarily a comprehensive, almost encyclopedic, review of Scalia's opinions.[16] With the exception of the first two chapters, it is more of a reference work than a light read for an airplane trip or the end of the day.[17] However, it is essential reference work. Any Supreme Court advocate should consult it before writing a brief and certainly before presenting oral argument. Any law professor who seeks to explain Scalia or who seeks to criticize his jurisprudence must read and understand Rossum's work. Indeed, both the bar and the academy should yearn for similar books on the other eight justices.

Rossum's approach to this Herculean task is systematic. After a quick introductory chapter dealing with Scalia's pre-judicial life, his service on the District of Columbia Circuit, and a comprehensive review of the Supreme Court confirmation hearing,[18] Rossum—in Chapter 2—offers a general overview of Scalia's jurisprudence—which he calls "text and tradition."[19] Having offered an overview, Rossum then goes into a comprehensive description of Scalia's jurisprudence in the areas of the separation of powers,[20] federalism,[21] substantive rights,[22] and procedural rights[23] before offering a short conclusion on Scalia's impact.[24] His text is followed by an appendix listing every opinion in which Scalia has relied on a dictionary,[25] and perhaps most impressively,[26] sixty-seven pages of two-column law-review-style endnotes.[27]

Ultimately, Rossum, who readily and candidly acknowledges that his work is sympathetic to Scalia's jurisprudence,[28] argues that Scalia is the most influential of

12. STEPHEN BREYER, ACTIVE LIBERTY (2005).

13. For a review of Justice Breyer's book, see William E. Thro, *A Pelagian Vision for Our Augustinian Constitution: A Review of Justice Breyer's Active Liberty*, 32 J.C. & U.L. 491 (2006).

14. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed., 1997).

15. ROSSUM, *supra* note 1, at 5–18.

16. *Id*. at ix–x.

17. This is not meant as a criticism. Rossum writes well and this book is quite accessible.

18. ROSSUM, *supra* note 1, at 1–26.

19. *Id*. at 27–51.

20. *Id*. at 52–89.

21. *Id*. at 90–126.

22. *Id*. at 127–65.

23. *Id*. at 166–97.

24. *Id*. at 198–208.

25. *Id*. at 209–12.

26. Indeed, because of the smaller font and two-column printing, the total length of the endnotes may well exceed the length of the text.

27. ROSSUM, *supra* note 1, at 213–79.

28. *Id*. at x.

any of the current or recently retired justices.[29] Although Rossum makes a persuasive argument that Scalia's "textualist critique of the use of legislative history has produced a major change in [the Court's] decision-making,"[30] he acknowledges that Scalia's colleagues have not embraced his jurisprudence.[31] Nevertheless, Rossum argued that it is "simply not possible" for Scalia or anyone else who believes in judicial restraint to persuade the other "conservative" justices on a regular basis.[32] Just as Justice O'Connor did not, Justice Kennedy will not follow Scalia "on any issue important to them because it will prevent them from doing what they consider the right thing."[33] Even the late Chief Justice Rehnquist was reluctant to follow Scalia's reasoning to its logical conclusion.[34] Moreover, Rossum offers a compelling argument that Scalia has had a more significant impact on the broader legal community than his colleagues.[35] He notes that Scalia's opinions are more likely to be highlighted in law school textbooks[36] and his reasoning is more likely to be the subject of law review commentary.[37] In sum, Scalia has "framed the debate" on a variety of constitutional issues.[38]

Underlying Rossum's systematic review of Scalia's opinions is the ultimate objective of Scalia's jurisprudence. Despite the subtitle, Scalia's jurisprudence is not about text and tradition. Nor is it about structuralism, an element which is missing from Rossum's subtitle but which explains away the inconsistency that Rossum sees with respect to Justice Scalia's dual-sovereignty decisions.[39] Rather, as Rossum's book implicitly, and at times, explicitly demonstrates, text, tradition, and structuralism are merely elements or "means" to the ultimate "end" for Scalia.

Scalia, perhaps more than any other person who has served on the Supreme Court, recognizes the "myth of the legal profession's omnicompetence"[40] and understands the anti-democratic nature of judicial review.[41] Because every political question becomes a judicial one[42] and because the judiciary has the final

29. *Id*. at 198–208.

30. *Id*. at 37–44, 198.

31. *Id*. at 198–203.

32. *Id*. at 204.

33. *Id.*

34. *Id*. at 204–05.

35. *Id*. at 205–07.

36. *Id*. at 205–06.

37. *Id*. at 206–07.

38. *Id*. at 207.

39. *Id*. at 125.

40. People Who Care v. Rockford Bd. of Educ., 111 F.3d 528, 536 (7th Cir. 1997).

41. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 4–5 (1980). To explain, the elected members of Congress or a State Legislature, thinking that they are acting in accordance with the Constitution, pass a law that has the overwhelming support of the people who elected them. The elected President or Governor, thinking that the bill presented is constitutional, signs the proposal into law. Then, the unelected Supreme Court can invalidate the law simply because it interprets the Constitution differently than the elected legislature or elected executive.

42. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 126 (Richard Hefner ed., Mentor Books 1984) (1835).

word on constitutional interpretation,[43] it is quite easy for the Supreme Court to become a "bevy of Platonic Guardians" who constantly substitute their judgment for the policy choices of elected officials.[44] As Scalia himself—responding to a question from Senator Metzenbaum (D-Ohio) during his confirmation hearings—observed:

> [A] constitution has to have ultimately majoritarian underpinnings. To be sure a constitution is a document that protects against future democratic excesses. But when it is adopted, it is adopted by democratic process. That is what legitimates it. . . . [I]f the majority that adopted it did not believe this unspecified right, which is not reflected clearly in the language, if their laws at the time do not reflect that that right existed, nor do the laws at the present date reflect that the society believes that right exists, I worry about my deciding that it exists. I worry that I am not reflecting the most fundamental, deeply felt beliefs of our society, which is what a constitution means, but rather, I am reflecting the most deeply felt beliefs of Scalia, which is not want I want to impose on the society.[45]

Put another way, all aspects of Scalia's jurisprudence are designed to prevent judges—including Scalia—from substituting their views for those of the elected officials, and thus, imposing their views on society. Consequently, rule by democratic institutions—the legislative and executive branches—is preserved.[46]

By seeking to limit the power of judges, Scalia does not abandon the vigorous enforcement of the Constitution's limits on the power of government. To the contrary, by strict adherence to the principles of separation of powers and dual sovereignty, which necessarily includes sovereign immunity,[47] Scalia seeks to limit both each branch of the National Government, and both the National Government

43. *See* Cooper v. Aaron, 358 U.S. 1, 18 (1958).

44. *See* Griswold v. Connecticut, 381 U.S. 479, 526-27 (1965) (Black, J., dissenting) (quoting LEARNED HAND, THE BILL OF RIGHTS 70 (1958)).

45. ROSSUM, *supra* note 1, at 26–27 (quoting *Nomination of Judge Antonin Scalia to be Associate Justice of the Supreme Court of the United States*, 99th Cong. 89 (1986) (statement of Antonin Scalia)).

46. *See generally* William E. Thro & Charles J. Russo, *Judges and the Rule of Law: Reflections for School Business Officials*, 72 SCH. BUS. AFFAIRS 40 (May 2006).

47. Rossum argues that the Court's sovereign immunity jurisprudence, which is generally thought to be based on Chief Justice Rehnquist's opinion in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), is actually based on Scalia's opinion in *Blatchford v. Native Vill. of Noatak,* 501 U.S. 775, 779 (1991). *See* ROSSUM, *supra* note 1, at 34. Although I think Rossum is correct that Scalia's opinions are the basis for the Court's contemporary sovereign immunity jurisprudence, I would place the foundation not in *Blatchford*, but in his dissent in *Pennsylvania v. Union Gas*, 491 U.S. 1, 29 (1989) (Scalia, J., joined by Rehnquist, C.J., O'Connor, J. & Kennedy, J., dissenting). In any event, it is clear that Scalia, not Rehnquist or Kennedy, is the true intellectual architect for what I have called the "sovereign immunity revolution." For a more detailed discussion of the "sovereign immunity revolution," see generally William E. Thro, *The Eleventh Amendment Revolution in the Lower Federal Courts*, 25 J.C. & U.L. 501 (1999); Brian A. Snow & William E. Thro, *The Significance of Blackstone's Understanding of Sovereign Immunity for America's Public Institutions of Higher Education*, 28 J.C. & U.L. 97 (2001).

and the States.[48] Indeed, although Scalia is a devout Roman Catholic, his attitudes toward separation of powers and dual sovereignty issues are similar to the views espoused by the Protestant Theologian Abraham Kuyper in *Sphere Sovereignty*.[49] Moreover, although Scalia's approach to the Constitution's textual limits is "reading text and discerning our society's traditional understanding of that text,"[50] this frequently results in pro-individual rights.[51] In other words, the Constitution's limits—both structural and textual—are enforced, but the enforcement is done in a way that also limits the power of judges to interfere with the democratic process. Several examples illustrate the point.

First, Scalia insists "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[52] As Scalia noted in his monumental essay describing his jurisprudence:

> [I]t is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than what the lawgiver promulgated. . . . Government by unexpressed intent is similarly tyrannical. It is the *law* that governs, not the intent of the lawgiver. That seems to me the essence of the famous American ideal set forth in the Massachusetts [C]onstitution: A government of laws, not of men. Men may intend what they will; but it is only the laws that they enact which bind us.[53]

By refusing to seek what Justice Breyer calls "an interpretation of a statute that tends to implement the legislator's will,"[54] Scalia limits the discretion of judges and preserves the prerogatives of the democratic branches. If the Court's interpretation of the plain text of the statute is contrary to what the legislature wished, then the legislature may amend the statute so that its desires are present in

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48. Scalia's separation of powers and federalism jurisprudence, which are among his most significant contributions, are discussed in Chapters 3 and 4 of Rossum's book. ROSSUM, *supra* note 1, at 52–126. For a short explanation of the principles of dual sovereignty as understood by Scalia and the other conservative justices, see generally William E. Thro, *A Question of Sovereignty: A Review of John T. Noonan, Jr.'s* Narrowing the Nation's Power: The Supreme Court Sides with the States, 29 J.C. & U.L. 745 (2003); William E. Thro, *That Those Limits May Not Be Forgotten: An Explanation of Dual Sovereignty*, 12 WIDENER L.J. 567 (2003).

49. *See* ABRAHAM KUYPER, *Sphere Sovereignty, in* ABRAHAM KUYPER: A CENTENNIAL READER 488 (James D. Bratt ed., 1998) (1880).

50. Planned Parenthood v. Casey, 505 U.S. 833, 999 (1992) (Scalia, J., dissenting).

51. ROSSUM, *supra* note 1, at 29–32, 127–65.

52. Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 79 (1998). Over a century and a half ago, the Supreme Court explained:

> In expounding this law, the judgment of the court cannot, in any degree, be influenced by . . . the motives or reasons assigned by [legislators] for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is the act itself; and we must gather their intention from the language there used . . . .

Aldridge v. Williams, 44 U.S. (3 How.) 9, 24 (1845).

53. Scalia, *supra* note 14, at 17.

54. BREYER, *supra* note 12, at 99.

the text.

Second, Scalia rejects judicial balancing tests[55] "because they have a way of turning into vehicles for the implementation of individual judges' policy preferences."[56] Indeed, Scalia insists that the "the scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy."[57] Instead, Scalia urges the Court to avoid second-guessing the elected branches—at either the state or national level. As he explained in a dissent:

> As a general matter, we are ill advised to adopt or adhere to constitutional rules that bring us into constant conflict with a coequal branch of Government. And when conflict is unavoidable, we should not come to do battle with the United States Congress armed only with a test ("congruence and proportionality") that has no demonstrable basis in the text of the Constitution and cannot objectively be shown to have been met or failed.[58]

In other words, balancing tests should be replaced with bright-line rules that provide clear guidance to the legislature, and more importantly, eliminate judicial discretion.[59]

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55. *See*, *e.g.*, Ewing v. California, 538 U.S. 11, 31–32 (2003) (Scalia, J., concurring in judgment) (declining to apply a "proportionality" test to the Eighth Amendment's ban on cruel and unusual punishment); Stenberg v. Carhart, 530 U.S. 914, 954–56 (2000) (Scalia, J., dissenting) (declining to apply the "undue burden" standard of *Planned Parenthood v. Casey*); BMW of North America, Inc. v. Gore, 517 U.S. 559, 599 (1996) (Scalia, J., dissenting) (declining to apply a "reasonableness" test to punitive damages under the Due Process Clause).

56. Tennessee v. Lane, 541 U.S. 509, 556 (2004) (Scalia, J., dissenting).

57. Bendix Autolite Corp. v. Midwesco, 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

58. *Lane*, 541 U.S. at 558 (Scalia, J., dissenting).

59. For example, Scalia has suggested that the "congruence and proportionality" test—used to determine whether Congress has properly exercised its power to enforce the Fourteenth Amendment—should be abandoned and replaced with:

> [O]ne that provides a clear, enforceable limitation supported by the text of § 5. Section 5 grants Congress the power "to *enforce,* by appropriate legislation," the other provisions of the Fourteenth Amendment. . . . *Morgan* notwithstanding, one does not, within any normal meaning of the term, "enforce" a prohibition by issuing a still broader prohibition directed to the same end. One does not, for example, "enforce" a 55-mile-per-hour speed limit by imposing a 45-mile-per-hour speed limit—even though that is indeed directed to the same end of automotive safety and will undoubtedly result in many fewer violations of the 55-mile-per-hour limit. And one does not "enforce" the right of access to the courts at issue in this case, by requiring that disabled persons be provided access to *all* of the "services, programs, or activities" furnished or conducted by the State. That is simply not what the power to enforce means—or ever meant. The 1860 edition of Noah Webster's American Dictionary of the English Language, current when the Fourteenth Amendment was adopted, defined "enforce" as: "To put in execution; to cause to take effect; as, to *enforce* the laws." Nothing in § 5 allows Congress to go *beyond* the provisions of the Fourteenth Amendment to proscribe, prevent, or "remedy" conduct that does not *itself* violate any provision of the Fourteenth Amendment. So-called "prophylactic legislation" is reinforcement rather than enforcement.

*Id.* at 558–59 (Scalia, J., dissenting) (citations omitted). For an expansion of Justice Scalia's

Third, Scalia does "not accept the proposition that [the Due Process Clause of the Fourteenth Amendment] is the secret repository of all sorts of . . . unenumerated, substantive rights . . . ."[60] As Scalia explained in a dissent:

> In my view, a right of parents to direct the upbringing of their children is among the "unalienable Rights" with which the Declaration of Independence proclaims "all men . . . are endowed by their Creator." And in my view that right is also among the "othe[r] [rights] retained by the people" which the Ninth Amendment says the Constitution's enumeration of rights "shall not be construed to deny or disparage." The Declaration of Independence, however, is not a legal prescription conferring powers upon the courts; and the Constitution's refusal to "deny or disparage" other rights is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people. Consequently, while I would think it entirely compatible with the commitment to representative democracy set forth in the founding documents to argue, in legislative chambers or in electoral campaigns, that the State has no power to interfere with parents' authority over the rearing of their children, I do not believe that the power which the Constitution confers upon me as a judge entitles me to deny any legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right.[61]

In essence, Scalia's approach acknowledges the existence of "natural rights," but leaves enforcement of such rights to the political process. If there is a right to contract, to privacy, or to abortion, then its enforcement is left to the political process. Judges may not recognize such rights or enforce them.[62]

Fourth, Scalia rejects the idea "that American law should conform to the rest of the world."[63] Although the law of other countries may endeavor to "promote the values that underlie an open and democratic society based on human dignity, equality, and freedom,"[64] Scalia correctly recognizes that most nations do not have the

suggestion in the context of sovereign immunity, see generally William E. Thro, *Toward A Simpler Standard for Abrogating Sovereign Immunity*, 6 ENGAGE: J. FEDERALIST SOCIETY'S PRACTICE GROUPS 65 (Oct. 2005).

60. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 470 (1993). *See also* ROSSUM, *supra* note 1, at 170–74. Rossum notes numerous other instances where Scalia has articulated the same idea, including *Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (opinion of the Court) and *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.,* 538 U.S. 188, 200 (2003) (Scalia, J., concurring).

61. Troxel v. Granville, 530 U.S. 57, 91–92 (2000) (Scalia, J., dissenting) (parentheticals in original).

62. Of course, in America's dual sovereignty system, the State Constitutions may include "rights" that are not present in the federal Constitution. Where such state constitutional rights exist, it is appropriate for state judges to enforce them vigorously. *See* A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court,* 62 VA. L. REV. 873 (1976).

63. Roper v. Simmons, 543 U.S. 551, 624 (2005) (Scalia, J., dissenting). *See also* ROSSUM, *supra* note 1, at 50.

64. S. AFR. CONST. 1996 s.39(1)(a). For an analysis of how the South African Constitutional

exclusionary rule, broad free speech protections, broad abortion rights, or the disestablishment of religion.[65] In essence, foreign law is based on very different assumptions.[66] By refusing to consider foreign law, Scalia removes a possible basis for invalidating an American democratic decision. His approach assures that American judicial decisions are based upon the premises that underlie American law.

Finally, Scalia believes that the Court should *never* invalidate statutes on their face. To explain, a facial challenge is "a claim that [a] law is 'invalid *in toto*—and therefore incapable of any valid application.'"[67] Although the Court generally requires that "the challenger must establish that no set of circumstances exists under which the Act would be valid,"[68] in the First Amendment context,[69] the Court—utilizing the overbreadth doctrine—will invalidate a law on its face because it is unconstitutional in *many,* but not all, of its applications.[70] Scalia, however, believes that invalidating statutes *in toto* is incompatible with the democratic process. In a dissent, he observed:

> It seems to me fundamentally incompatible with [the constitutional] system for the Court not to be content to find that a statute is unconstitutional as applied to the person before it, but to go further and pronounce that the statute is unconstitutional in *all* applications. Its reasoning may well suggest as much, but to pronounce a *holding* on that

Court has interpreted this command, see I. J. RAUTENBACH & E. F. J. MALHERBIE, CONSTITUTIONAL LAW (4th ed. 2004).

65. *Roper*, 543 U.S. at 625–26 (Scalia, J., dissenting).

66. Sanchez-Llamas v. Oregon, 126 S. Ct. 2669 (2006).

67. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 n.5 (1982).

68. United States v. Salerno*,* 481 U.S. 739, 745 (1987).

69. To date, the Court has never allowed facial challenges alleging overbreadth outside of the First Amendment context. Of course, the Court recently suggested that it had allowed facial challenges alleging overbreadth in contexts other than the First Amendment. *See* Sabri v. United States, 541 U.S. 600, 609–10 (2004) ("[W]e have recognized the validity of facial attacks alleging overbreadth (though not necessarily using that term) in relatively few settings, and, generally, on the strength of specific reasons weighty enough to overcome our well-founded reticence."). However, a careful examination of the cases listed in *Sabri* indicates that they did not involve "overbreadth" in the traditional sense, but instead involved statutes that were invalid in all of their applications under the relevant standards for evaluating the *merits* of the underlying constitutional claims.

70. As Scalia, writing for the Court, explained:

> The First Amendment doctrine of overbreadth is an exception to our normal rule regarding the standards for facial challenges. The showing that a law punishes a "substantial" amount of protected speech, "judged in relation to the statute's plainly legitimate sweep," suffices to invalidate *all* enforcement of that law, "until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression . . . ."

Virginia v. Hicks*,* 539 U.S. 113, 118–19 (2003) (citations omitted). *See also* Virginia v. Black, 538 U.S. 343, 375 (2003) (Scalia, J., joined by Thomas, J., dissenting) (providing a similar explanation of overbreadth in the First Amendment context). The Supreme Court has created "this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or "chill" constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions." *Hicks*, 539 U.S. at 119 (citations omitted).

> point seems to me no more than an advisory opinion—which a federal court should never issue at all, and *especially* should not issue with regard to a constitutional question, as to which we seek to avoid even *non*advisory opinions. I think it quite improper, in short, to ask the constitutional claimant before us: Do you just want us to say that this statute cannot constitutionally be applied to you in this case, or do you want to go for broke and try to get the statute pronounced void in all its applications?[71]

Put another way, Scalia would entertain only as applied challenges.[72] By limiting constitutional challenges to the facts before the Court—thereby effectively abolishing the First Amendment's overbreadth doctrine—Scalia would severely curtail the ability of the federal judiciary to invalidate state or federal laws.[73]

"What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle."[74] In order to avoid judicial dictatorship, Scalia has rejected:

> [I]ntellectual fads and novel theories of interpretation that have the invariable effect of transferring power from the popular branches to the judges. He has sought to constrain judicial discretion and has fought with all the considerable intellectual tools at his disposal the tendency of judges to substitute their beliefs for society's. In so doing, he has reminded his colleagues of the most important right of a people in a democracy—the right to govern themselves as they see fit and not be overruled in their governance unless the clear text or traditional understanding of the Constitution they have adopted demands it.[75]

If Scalia reminds us that we must avoid judicial dictatorship, then Rossum's *Antonin Scalia's Jurisprudence* reminds us how we can avoid judicial

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71. City of Chicago v. Morales, 527 U.S. 41, 77 (1999) (Scalia, J., dissenting) (citations omitted).

72. Although his colleagues have never endorsed this view, Scalia has persuaded them to allow the States to reject overbreadth challenges. As Scalia, writing for an unanimous Court, explained:

> The problem with [Virginia's and the United States' proposal to limit overbreadth standing to individuals who have engaged in expressive conduct] is that we are reviewing here the decision of a *State* Supreme Court; our standing rules limit only the *federal* courts' jurisdiction over certain claims. "State courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law." Whether Virginia's courts should have *entertained* this overbreadth challenge is entirely a matter of state law.

*Hicks*, 539 U.S. at 120 (citations omitted).

73. For example, a statute that banned all abortions under all circumstances would be constitutional as applied to a woman in the early stages of full term labor. Therefore, it could not be invalidated on its face.

74. McCreary County v. ACLU, 125 S. Ct. 2722, 2751 (2005) (Scalia, J., joined by Rehnquist, C.J. & Thomas, J., dissenting).

75. ROSSUM, *supra* note 1, at 207–08.

dictatorship.[76]

76. Of course, the death of Chief Justice Rehnquist and the retirement of Justice O'Connor have altered the dynamic of the Court. With the addition of Chief Justice Roberts and Justice Alito, it is, perhaps, more likely that the Court will embrace the objectives of Justice Scalia's jurisprudence. There are indications that this is already happening. For example, in *Ayotte v. Planned Parenthood,* decided before Justice Alito joined the Court, the Court declared that when a federal court is confronted with a statute that is constitutional in some circumstances, but not in others, federal courts should not choose "the most blunt remedy—permanently enjoining the enforcement of [the statute] and thereby invalidating it entirely." Ayotte v. Planned Parenthood, 126 S. Ct. 961, 969 (2006). Rather, federal courts should "enjoin only the unconstitutional applications of a statute while leaving other applications in force," or "sever its problematic portions while leaving the remainder intact." *Id.* at 967. *See also* United States v. Booker, 543 U.S. 220, 227–29 (2005) (mandating severability); United States v. Raines, 362 U.S. 17, 20–22 (1960) (enjoining unconstitutional applications). Such a result is fully consistent with Scalia's idea of refusing to invalidate statutes on their face. Similarly, in *Rumsfeld v. Forum for Academic & Institutional Rights*, decided without Justice Alito's participation, the Court declared that if the Constitution prohibits Congress from achieving an objective directly, it may not use the Spending Clause of the U.S. Constitution, article I, section 8, clause 1, to achieve the objective indirectly. Rumsfeld v. Forum for Academic & Institutional Rights, 126 S. Ct. 1297, 1306–07 (2006). This recognition of a structural limitation on the power of Congress and the announcement of a bright-line rule is fully consistent with Scalia's jurisprudence. For an examination of the implications of *Rumsfeld*, see generally William E. Thro, *The Spending Clause Implications Of Rumsfeld v. Forum For Academic And Individual Rights,* 7 ENGAGE: J. FEDERALIST SOCIETY'S PRAC. GROUPS (forthcoming 2006); William E. Thro, *The Constitutionality of the Solomon Amendment*, 4 NACUA NOTES (forthcoming 2006). Finally, in *Sanchez-Llamas v. Oregon,* 126 S. Ct. 2669 (2006), which was decided with Justice Alito participating, the Court rejected the notion that the United States should follow the International Court of Justice's interpretation of treaties and emphasized the unique nature of the American legal system. Such a result is fully consistent with Scalia's rejection of foreign law in interpreting the American Constitution and statutes. Moreover, the Court's adoption of bright-line rules—a treaty violation will never result in the suppression of evidence and will never result in the setting aside of state procedural default rules—constrains lower court judges and allows democratic institutions the widest latitude.