

12-1-2017

Reflections upon the Jurisprudence of Justice Antonin Scalia: Selections from Securities Law, Arbitration, and Administrative Law

Anthony Michael Sabino

Follow this and additional works at: <https://scholarlycommons.law.hofstra.edu/hlr>



Part of the [Law Commons](#)

Recommended Citation

Sabino, Anthony Michael (2017) "Reflections upon the Jurisprudence of Justice Antonin Scalia: Selections from Securities Law, Arbitration, and Administrative Law," *Hofstra Law Review*. Vol. 46: Iss. 2, Article 4. Available at: <https://scholarlycommons.law.hofstra.edu/hlr/vol46/iss2/4>

This document is brought to you for free and open access by Scholarship @ Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarship @ Hofstra Law. For more information, please contact lawscholarlycommons@hofstra.edu.

REFLECTIONS UPON THE JURISPRUDENCE OF JUSTICE ANTONIN SCALIA: SELECTIONS FROM SECURITIES LAW, ARBITRATION, AND ADMINISTRATIVE LAW

*Anthony Michael Sabino**

I. INTRODUCTION

It would be a herculean task, indeed, to catalog the many, many contributions made to American jurisprudence by the late Justice Antonin Scalia in his thirty years on the Supreme Court, even when the scope of such an analysis is narrowed to topics germane to corporate and business law. Such an endeavor would be far beyond the pale of the oral presentation recently given by the instant writer, even accounting for the inclusion of supplementary written materials therewith.

Therefore, the objective of the instant Article is to provide a more comprehensive treatment of the topics touched upon that day, via, among other means, the inclusion herein of appropriate citations to the opinions of the great man himself, as further augmented with references to other relevant authorities.

A secondary goal, albeit no less desirable, is to promote a more fulsome discussion of the learned Justice's jurisprudence, and thereby encourage a greater appreciation of his opinions. This is a worthwhile

*Partner, Sabino & Sabino, P.C., Professor of Law, St. John's University Tobin College of Business, Special Professor of Law, Maurice A. Deane School of Law at Hofstra University, Judicial Law Clerk, Hon. D. Joseph DeVito, United States Bankruptcy Court for the District of New Jersey. This Article is an expansion of remarks originally delivered to the Nassau Academy of Law, Nassau County Bar Association, on May 24, 2017. Accordingly, we extend appreciation to the principal speakers from that event, the Honorable Joseph F. Bianco, United States District Court for the Eastern District of New York, and Professor Ronald J. Colombo, Maurice A. Deane School of Law at Hofstra University. As with all our writings, we remember our constant source of inspiration, the late Mary Jane C. Sabino, Esq., attorney, professor of law, author, and, most important, beloved spouse and mother. Our thanks to Michael A. Sabino, Esq., and James N. Sabino, M.S., M.B.A., for their invaluable assistance in researching this Article. This Article is dedicated to our newest family member, William Michael Sabino, son of Michael A. and Katlyn. Welcome to the family, with this first of what will surely be many such dedications.

endeavor, not merely to ascertain the precise holdings of the Supreme Court, as illuminated by Justice Scalia's opinions, but also to better comprehend the influence of Justice Scalia's writings upon the shape and direction of American law.

In order to facilitate the reader's focus, the following discussion is synthesized along three dominant topical lines. The first of these, while rooted in the laws of securities regulation, concomitantly provides valuable insight into deciding just how far American law can reach beyond our own national borders.

II. FEDERAL SECURITIES LAWS, EXTRATERRITORIALITY, AND STATUTORY CONSTRUCTION: *MORRISON V. NATIONAL AUSTRALIA BANK LTD.*

Assuring transparency and honesty in the securities markets is one of the most significant achievements of American law. This is accomplished, in the main, by the Securities Act of 1933,¹ and the Securities Exchange Act of 1934,² which substituted the insidiously flawed former policy of *caveat emptor* for the more disciplined and fair standard of *caveat vende*.³

To be sure, while this comprehensive scheme of market regulation has not been without its share of failures,⁴ these twin pillars of federal securities law have historically accomplished great things in assuring that the American stock markets are fundamentally fair, transparent, and honest. And, when malefactors defy the statutory regime of, simply put, "disclosure, disclosure, disclosure,"⁵ there are more than adequate means to punish them for their dishonesty.⁶

But in an increasingly interlinked global economy, can foreigners, purportedly defrauded in overseas securities transactions, seek redress

1. 15 U.S.C. §§ 77a-77bbb (2012).

2. *Id.* §§ 78a-78qq.

3. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 170-71 (1994).

4. *See, e.g., In re Bernard L. Madoff Inv. Sec. LLC*, 779 F.3d 74, 77 (2d Cir. 2015) (summarizing the essence of the now-infamous Madoff fraud, and citing numerous prior decisions detailing the same).

5. *Cent. Bank of Denver*, 511 U.S. at 171, 173 (discussing the significance of disclosure among the federal securities laws).

6. *See* 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5 (2017) (commonly referred to as, respectively, section 10(b) of the 1934 Act and Rule 10b-5 promulgated thereunder). These broad anti-fraud prohibitions have been rightly characterized as the "ultimate weapon" against stock market fraudsters. *See* Anthony Michael Sabino & Michael A. Sabino, *From Chiarella to Cuban: The Continuing Evolution of the Law of Insider Trading*, 16 FORDHAM J. CORP. & FIN. L. 673, 680 (2011) ("Rule 10b-5 and its parent Section 10(b) are paramount.").

for their alleged injuries under American securities laws *and* bring their grievances before the courts of the United States?

That question bedeviled the federal bench for decades, but was finally put to rest by Justice Scalia in *Morrison v. National Australia Bank Ltd.*⁷ *Morrison* presented the divisive issue known by the mathematical moniker of “foreign securities fraud cubed” or “foreign securities fraud to the third power.” In other words, the formula was foreign investor times foreign securities times purchased on a foreign stock exchange.⁸

In *Morrison*, the lead plaintiff was an Australian national. He and others had purchased the securities of the titular bank on a foreign stock exchange.⁹ Hence, the appellation “securities fraud cubed” or “securities fraud to the third power” was fully apropos. The essential question was whether U.S. courts had jurisdiction over such an alien matter to decide the controversy pursuant to the anti-fraud provisions of federal securities law.¹⁰

Prior to *Morrison* becoming the law of the land, a number of federal appellate courts had answered that question in the affirmative. Chief among these tribunals was the Second Circuit, which had long advocated asserting federal jurisdiction over such cases. The tribunal had well-established precedent, which endorsed litigation in the U.S. courts under American law, even when initiated by foreigners who had purchased foreign securities abroad.¹¹

To justify this exercise of federal jurisdiction, the vaunted Second Circuit employed a modality entitled the “conduct” and “effects” test, best exemplified in the modern iteration titled *Alfadda v. Fenn*.¹² Briefly stated, *Alfadda* upheld the tandem notions that if the alleged securities fraud entailed “conduct” within the United States or had some “effect” upon the American capital markets, federal jurisdiction was obtained, and a lawsuit under American securities law was viable.¹³

7. 561 U.S. 247 (2010).

8. *Id.* at 250-51.

9. *Id.* at 251-52.

10. *Id.* at 253.

11. See Anthony Michael Sabino, “Big Eight” Beware: Multinational Accounting Firms and the Increasing Scope of Subject Matter Jurisdiction Under the Federal Securities Laws, 63 ST. JOHN’S L. REV. 467, 474-75 (1989).

12. 935 F.2d 475, 478 (2d Cir. 1991); see also *Itoha Ltd. v. Lep Grp. PLC*, 54 F.3d 118, 121-22 (1995).

13. See *Alfadda*, 935 F.2d at 478; see also Sabino, *supra* note 11, at 493-97 (discussing, inter alia, *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 31 (D.C. Cir. 1987), wherein the D.C. Circuit opted for a “more restrictive test” such as the Second Circuit’s promulgation).

Writing for the Supreme Court in *Morrison*, Justice Scalia wholeheartedly rejected the “conduct” and “effects” test so long employed by the lower tribunals. Melding a variety of elements emblematic of his core beliefs, Justice Scalia grounded the majority opinion upon the following.

Justice Scalia first called attention to the longstanding precept that there can be no extraterritorial application of U.S. law, absent a clear declaration by Congress.¹⁴ The learned Justice wisely refused to do violence to the well-established edict that American law does not normally extend beyond our own borders.¹⁵ Among other justifications for this doctrine, Justice Scalia pointed out the potential for chaos and enmity should we attempt to impose our legal standards upon the world at large.¹⁶

Justice Scalia noted that the foregoing axiom against the extraterritorial application of American law can be set aside *if* Congress makes clear in a statute’s text that it is intended to have transnational application.¹⁷ Yet “[w]hen a statute gives no clear indication of an extraterritorial application, it has none.”¹⁸

From that cornerstone principle, Justice Scalia proceeded to debunk the once prevalent “conduct” and “effects” test in a most straightforward manner. First, he scrutinized the plain text of the operative statutes around which the plaintiffs in *Morrison* had structured their case, most especially the anti-fraud prohibition.¹⁹ The learned Justice concluded that the plain text of section 10, the primary weapon in the war against securities chicanery, never countenanced extraterritorial application.²⁰

Moreover, Justice Scalia chided the Second Circuit for having strayed too far afield when it crafted the “conduct” and “effects” test found in *Alfadda* and its antecedents.²¹ In his own inimitable words, he took the New York-based tribunal to task, for reason that it “never put forward a textual or even extra-textual basis for these tests.”²²

14. *Morrison*, 561 U.S. at 255.

15. *See id.* at 255; *see also* *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

16. *Morrison*, 561 U.S. at 269-70.

17. *Id.* at 255.

18. *Id.*

19. *Id.* at 261-62.

20. *Id.* at 265.

21. *Id.* at 258.

22. *Id.* This debunking of the “conduct” and “effects” test by Justice Scalia was no small matter, since that maxim was a creation of the Second Circuit, a tribunal long and well “regarded as the ‘Mother Court’ in this area of the [securities] law.” *See* *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 762 (1975) (Blackmun, J., dissenting).

Upon a careful review of the legislative promulgations in this realm from the time of the Great Depression to the modern day, Justice Scalia concluded that the primary anti-fraud statute of the American securities laws is bereft of any clear indication that Congress intended that proviso to extend beyond U.S. borders.²³ To cement the point, Justice Scalia referenced other portions of the federal acts, and came to an identical conclusion, to wit, a plain reading of the clear text of other sections of the 1934 Exchange Act clearly lent no support to a finding of an extraterritorial reach for our federal securities laws.²⁴

It was at this juncture that Justice Scalia invoked the principles of judicial reasoning for which he is legendary. Writing for the *Morrison* Court, he warned against the evil of “judicial-speculation-made-law,” that is to say, creating law out of whole cloth.²⁵ The transgression of the appellate tribunals upon this issue was that they continually indulged in “divining what Congress would have wanted if it had thought of the situation,” in this context, the extraterritorial application of American law to the transacting in foreign securities by foreigners as conducted on exchanges beyond America’s borders.²⁶

To correct that error, Justice Scalia lauded the efficacy and common sense of jurists abstaining from guessing as to what lawmakers might have desired in unlegislated scenarios.²⁷ The mistake of the lower courts in this instance was particularly acute, found the Justice, given that all that was required of the courts below was to forthrightly apply the established presumption against the extraterritorial application of American law.²⁸

To be sure, Justice Scalia understood the context in which he was disabusing the “conduct” and “effects” test for all time (unless the same is revived by legislative enactment, of course). The clear-sighted jurist parenthetically admitted that the federal securities laws are replete with judge-made rules.²⁹ Yet it was for this very reason that he urged his brethren in the federal judiciary to scrupulously avoid imposing

23. *Morrison*, 561 U.S. at 264-65.

24. *Id.* at 263-64. Better known as section 30 of the Exchange Act, its plain text provides that the 1934 Act does *not* bring within its purview the actions of “any person insofar as he transacts a business in securities without the jurisdiction of the United States,” unless he undertakes such activity in a purposeful attempt to evade what would otherwise be the lawful application of American securities law. *Id.*; see also 15 U.S.C. § 78dd(b) (2012).

25. *Morrison*, 561 U.S. at 261.

26. *Id.*

27. *Id.*

28. *Id.* at 255-56.

29. *Id.* at 261 n.5 (quoting *id.* at 276 (Stevens, J., concurring)).

their own preferences, and leave it to Congress to “legislate with predictable effects.”³⁰

We regard *Morrison* as one of Justice Scalia’s more notable opinions because it so well reflects the character of his jurisprudence. The learned Justice utilized *Morrison*, not merely to bring an end to judicially invented rubrics that were sadly lacking in a statutory foundation, but also to provide a cautionary tale against judicial fiat.

Consonant with his overall approach to principled adjudication, Justice Scalia took this opportunity to advocate for judicial restraint, championing for his brethren to delimit themselves to applying statutes as written by the people’s elected representatives.³¹ As was his wont, Justice Scalia grounded such precautions upon the importance of the separation of powers and checks and balances that are the hallmarks of our tripartite system of government.³²

The sensibility of Justice Scalia’s words in *Morrison* have already begun to resonate across all branches of federal law. Notwithstanding its relative newness to the scene, the decision has already given birth to some notable progeny. Justice Scalia’s wisdom in the opinion provided the cornerstone for the Court’s decision in *RJR Nabisco, Inc. v. European Community*.³³

In that opinion authored by Justice Alito, the high bench carefully parsed the Racketeer Influenced and Corrupt Organizations Act of 1970 (“RICO”),³⁴ yet another complex body of federal law, and held that certain provisions of that anti-racketeering act specifically contemplate wrongful acts outside the United States as a predicate for jurisdiction.³⁵ On that basis, the *Morrison* presumption against extraterritoriality was overcome.³⁶

It was all for naught, however, in that particular instance. Since RICO demands that the plaintiff allege a domestic injury, and these claimants had waived all allegations of injuries sustained within American territory, the Supreme Court ultimately held the case had to be dismissed.³⁷ Nevertheless, *RJR* provides an important utilization of the precepts set forth by Justice Scalia in *Morrison*.

And so, we end here our discussion of our first segment of Justice Scalia’s more noteworthy contributions to a specific realm of American

30. *Id.* at 261.

31. *Id.* at 261 & n.5.

32. *See id.*

33. 136 S. Ct. 2090 (2016).

34. 18 U.S.C. §§ 1961–1968 (2012).

35. *RJR Nabisco*, 136 S. Ct. at 2101–02.

36. *Id.* at 2101.

37. *Id.* at 2111.

law. Our next topic of choice pertains to a methodology of dispute resolution that has become increasingly important to the administration of justice in America. The late Justice played an important role in assuring the continued vitality of that alternative to litigation, and we now turn to examine that contribution to the relevant jurisprudence.

III. ARBITRATION, THE SUPREMACY CLAUSE,
CONSUMERS, AND A WORD ON CLASS ACTIONS:
AT&T MOBILITY V. CONCEPCION

Courtroom litigation has always been a difficult and time-consuming endeavor, combined with risks that sometimes outweigh the potential rewards. Modern times have exacerbated such factors, particularly so with regard to the prodigious expense and delay attendant with bringing a contemporary matter to trial.

That explains why current modes of alternative dispute resolution, particularly arbitration, have come into great favor. Arbitration offers various efficiencies and levels of participation in the process that ordinary litigation does not.³⁸

Notwithstanding such positive attributes, opposition decidedly hostile to arbitration has recently arisen. Seemingly rooted in the opinions of the press, as inflamed by certain politicians, those critical of alternative dispute resolution contend it has been rendered unfair and unjust by powerful corporate interests who have rigged the process to serve their own avaricious ends.³⁹ Enemies of arbitration now agitate to

38. See, e.g., *Rule 12403. Cases with Three Arbitrators*, FIN. INDUSTRY REG. AUTHORITY, http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4141 (last visited Feb. 15, 2018). In securities industry arbitration, all parties in a particular controversy are given lists of neutral adjudicators to rank in order of their individual preferences. *Id.* The final panel of arbitrators is drawn based upon the combined rankings. *Id.* Parties thereby actually participate in selecting their arbitrators, a process far different from the random selection of the presiding jurist in ordinary court cases. *Id.* (describing the procedure for parties to rank and strike arbitrators, these rankings subsequently combined to bring forth an arbitration panel).

39. See, e.g., Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System'*, N.Y. TIMES, Nov. 2, 2015, at A1. Asserting that “corporations . . . have used arbitration to create an alternate system of justice,” the article purports to bring to light “many troubling cases” of abuses of the arbitral process. *Id.* at A1, B4. With all due respect to the venerable *New York Times*, the piece is largely a collection of anecdotes, heavy on the melodrama and loose with characterizations of arbitration as “legal free-for-alls” presided over by arbitrators with open conflicts of interest that lead them to favor defendants, particularly corporate ones. We respectfully suggest the critics of arbitration, especially the Gray Lady of the Fourth Estate, examine, among other things, securities industry arbitrations conducted by the Financial Industry Regulatory Authority (“FINRA”). There, one will find over seven *thousand* arbitrators who in 2016 closed 3635 arbitrations, with 3681 new cases filed that same year. See *Dispute Resolution Statistics*, FIN. INDUSTRY REG. AUTHORITY, <http://www.finra.org/arbitration-and-mediation/dispute-resolution-statistics> (last visited Feb. 15, 2018). In the same period, FINRA arbitrators confronted

restrict or ban outright arbitration clauses from various types of contracts, specifically contracts for goods and services that consumers often enter into with large providers.⁴⁰

Yet before the nay-sayers become too self-righteous in their virulent opposition to arbitration, we would advise them to closely examine the Supreme Court's decision in *AT&T Mobility v. Concepcion*,⁴¹ a decision that resoundingly placed the high Court's continuing imprimatur of approval upon arbitration as a valid and lawful means of resolving disputes.⁴² It was there that Justice Scalia made his own weighty contribution to assuring that arbitration maintains its rightful place as a worthy alternative to the tumult and risk of litigation.⁴³ The Justice accomplished this, not only by virtue of the cogent reasoning found therein, but also by his exemplification of a factual template for an arbitral process that will surely influence the shape of such proceedings for many years to come, particularly in disputes involving ordinary consumers.⁴⁴

In brief, the facts of the case tell us the Concepcions claimed the supposedly "free" cell phones they had purchased from the wireless carrier were not truly "free," for reason that AT&T had charged them a few dollars of state sales tax.⁴⁵ Thus aggrieved, but recognizing the paltry dollars at stake, the couple aimed to commence a class action against the telecom giant, no doubt in order to garner a more worthwhile recovery.⁴⁶

But maintaining a class action in the Concepcions' native California state court should have been stymied by the fact that their wireless service contract called for the referral of all controversies to arbitration.⁴⁷ In reliance upon that accord, AT&T sought to compel the Concepcions to arbitrate the dispute, just as their agreement demanded.⁴⁸

customer disputes encompassing, inter alia, allegations of misrepresentation in 1670 cases, and fraud in 1301 proceedings. *Id.* It is contended this is but one of several samplings more representative of the efficacy of modern arbitration, when properly conducted, of course.

40. See Suzanne Barlyn, *Warren Slams Wells Fargo Over Arbitration Position*, REUTERS (Nov. 29, 2016), www.reuters.com/article/us-wells-fargo-accounts-arbitration-idUSKBN13N2GA (characterizing the bank's dispute resolution process as "closed-door, industry-friendly arbitration," and calling for federal regulation eliminating mandatory arbitration clauses from consumer contracts).

41. 563 U.S. 333 (2011).

42. *Id.* at 344-45.

43. *Id.* at 350-52.

44. See *id.* at 344-52.

45. *Id.* at 337.

46. *Id.*

47. *Id.* at 336-37.

48. *Id.* at 337.

Determined to overcome the arbitration clause, these putative class representatives sought to exploit a judge-made rule of the California state courts that disfavored arbitration if that alternative process posed an obstacle to a class action lawsuit.⁴⁹ The essential question thus presented in *Concepcion* was this: Could a contradictory rule of state law overwhelm a strong federal policy endorsing arbitration as an alternative means of resolving disputes?⁵⁰

Writing for the high Court, Justice Scalia replied with a most definitive “no.”⁵¹ He then proceeded to author an opinion exemplifying the Supreme Court’s vigorous and uninterrupted support for the strong federal policy favoring arbitration, as mandated by the robust statutory authority ousting any state law doctrine to the contrary.⁵² Furthermore, Justice Scalia in *Concepcion* articulated a number of enduring points that should assure a bright and continuing future for arbitration across a broad spectrum of domains.⁵³

As the first step in his cogent analysis, Justice Scalia once more advocated for the interpretation of statutes in accordance with their plain meaning.⁵⁴ He precisely applied that axiom to the Federal Arbitration Act (“FAA”), a body of law enacted by Congress in 1925.⁵⁵

Justice Scalia found the nearly century old law unequivocally upheld agreements to arbitrate as legal, valid, and enforceable.⁵⁶ Thereafter, the Court readily concluded that the arbitration clause in question, when viewed through the prism of this title of the United States Code, was indisputably binding.⁵⁷

Yet another stone had to be set into the foundation of *Concepcion*, and for that Justice Scalia implicitly relied upon the constitutional edict found in the Supremacy Clause.⁵⁸ Elementarily, the Supremacy Clause declares that federal law overwhelms and nullifies any contrary state rule of law, whether the latter is statutory or judge-made.⁵⁹

49. *Id.* at 337-38; *see also* *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005) (asserting that contractual provisions compelling arbitration were unconscionable if they forbade the plaintiff from asserting a class action), *abrogated by Concepcion*, 563 U.S. 333.

50. *Concepcion*, 563 U.S. at 339-40.

51. *Id.* at 341.

52. *Id.* at 344-52.

53. *Id.* at 339, 344.

54. *Id.* at 344.

55. *Id.* at 339-40 (citing 9 U.S.C. § 2 (2012)).

56. *Id.* at 344.

57. *Id.* at 351-52.

58. *See id.* at 341.

59. U.S. CONST. art. VI, cl. 2. In a layperson’s terms, the Supremacy Clause puts the “United” in “United States,” by assuring that a local law which conflicts with the unitary national law is rendered unenforceable, for reason of its contradictory nature. *See* Anthony Michael Sabino,

The principles of federal supremacy are as old as the Republic itself, and these maxims, in turn, give rise to the implementing doctrine of “preemption.”⁶⁰ As implicated by *Concepcion*, this broad notion is then subdivided along the lines of “field preemption” and “conflict preemption.”⁶¹

As to the first, where Congress intends to occupy a certain legislative domain, any contradictory state law is ousted from the field already occupied by federal enactments.⁶² In a similar vein, the precept of conflict preemption is that a state postulation in evident conflict with a national proviso must yield to the latter, in order to forestall disharmony from state to state.⁶³

Justice Scalia brought this constitutional notion to bear, writing in *Concepcion* that preemption of the contrary California rule was the only possible result.⁶⁴ He found Congress clearly intended to occupy the field by promulgating an act that explicitly favored arbitration as a means of alternative dispute resolution.⁶⁵ The strictures of supremacy mandated that the FAA prevail in *Concepcion*.⁶⁶

In sweeping aside the state rule that purported to prevent the enforceability of the arbitration clause in the case at bar, the Justice expounded upon the history of the FAA.⁶⁷ He noted that one of the legislation’s paramount goals was to, once and for all, set aside the parochial interests of the states, and even state court jurists, who stood arrayed in opposition to arbitration as an alternative to full-blown litigation.⁶⁸

For our aside to those aforementioned current foes of arbitration, we ask them to take due note that Justice Scalia in *Concepcion* did not blindly award victory to so-called “corporate interests.” Rather, the learned Justice engaged in principled decision making, based foremost upon longstanding Supremacy Clause jurisprudence, as exemplified in well-established axioms of constitutional preemption.⁶⁹

Supremes Affirm Supremacy Clause but Point Out Alternatives for States, NAT. GAS & ELECTRICITY, July 2016, at 1, 3.

60. Sabino, *supra* note 59, at 3.

61. See *Concepcion*, 563 U.S. at 344-46 (applying conflict preemption); *id.* at 352 (applying field preemption).

62. Sabino, *supra* note 59, at 3.

63. See, e.g., *Concepcion*, 563 U.S. at 344-46.

64. *Id.* at 352.

65. See *id.* at 343, 345.

66. See *id.* at 351-52.

67. See *id.* at 339-41.

68. *Id.* at 344.

69. See *supra* note 61 and accompanying text.

Returning to a point made at the outset of this discussion, we opined that *Concepcion* provides a valuable template as to how to properly structure an arbitration procedure in order to assure fairness, especially in the context of a consumer-related controversy. Our point of view is solidly grounded upon Justice Scalia's detailed elaboration of how the arbitration process engineered by AT&T in that case actually worked in favor of the *Concepciones* and similarly situated consumers.

In parsing the terms and conditions for arbitration found in the wireless service contract these consumers had signed, Justice Scalia pointed out that the corporation was required to pay all the costs of arbitration (unless the customer's claim was subsequently found to be frivolous).⁷⁰ The venue of the arbitration was to be closest to the consumer's home, not the company's.⁷¹ If the customer's claim was for \$10,000 or less, the customer was allowed to choose to be heard in person, via telephone conference with the arbitrator, or on papers alone.⁷² Undeniably, the provisions of the arbitration clause already provided a number of advantages to the consumer in taking on this corporate titan.

Yet Justice Scalia found even more aspects of this agreed-to-process worthy of noting. An "escape hatch" provided the customer with the option to forego arbitration entirely, and proceed directly to a small claims court.⁷³ An aggrieved consumer could request punitive damages against AT&T.⁷⁴ In contradistinction, the company was forbidden to seek attorneys' fees for defending itself in this consumer arbitration.⁷⁵ Finally, in the event the arbitrator awarded the customer an amount that exceeded AT&T's last written settlement offer, the telecom giant was required to pay the consumer a minimum of \$7500 and twice the claimant's attorneys' fees.⁷⁶

We find Justice Scalia's exemplification of the procedural aspects of the underlying arbitration in *Concepcion* to be quite prescient. Predating by several years the current outcry by some against contractual consumer arbitration, the Justice illuminated the key characteristics of an arbitral structure that assures fairness, and, one might even say, solicitude to the ordinary claimant. We might very well look back upon

70. *Concepcion*, 563 U.S. at 337, 351-52.

71. *Id.* at 337.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*; see also Anthony Michael Sabino & Michael A. Sabino, *Law of the Land: U.S. Supreme Court Upholds Arbitration Agreements Despite State Court Resistance*, NASSAU L., Dec. 2011, at 3 (discussing the terms of the AT&T arbitration agreement).

Justice Scalia's contribution in *Concepcion* as pioneering the road towards more fair and just consumer arbitration proceedings.

For a final note, *Concepcion* also imparts certain wisdom of Justice Scalia upon the related matter of class actions. In a pithy commentary upon class actions generally, and Federal Rule of Civil Procedure 23 specifically,⁷⁷ Justice Scalia emphasized that class action lawsuits are a form of representative litigation.⁷⁸ As such, they present entirely unique issues of notice, due process, and proper defense.⁷⁹

Pertinent to the resolution of *Concepcion*, Justice Scalia strongly reminded that litigation by a class is intrinsically antithetical to arbitration.⁸⁰ The latter is a virtuous process for reason of its efficiencies, and the more expeditious track that arbitration routinely takes. It achieves these things by delimiting itself to resolving disputes between parties on an individual basis, and not via putative representatives speaking for outsized groups.⁸¹

Properly aligning these distinctions as part and parcel to deciding *Concepcion*, Justice Scalia was quite explicit in concluding that lawful agreements to arbitrate must be upheld, precisely as the statutes require, even when the erstwhile putative class representatives prefer to bypass the arbitral forum in favor of leading a class of claimants.⁸²

I am confident that Justice Scalia's insights into class actions brought pursuant to Rule 23 shall play a role in shaping class litigation in the federal courts for many years to come. More important, however, is his endorsement of the continued preeminence of the FAA, whenever and wherever arbitration is validly agreed to. His writing in *Concepcion* assures that arbitration remains a viable and worthwhile alternative to customary courtroom proceedings.

To be sure, an early indication of the truth of the foregoing was most recently provided by the Court in *Kindred Nursing Centers Limited Partnership v. Clark*,⁸³ where once more the high bench invalidated a state-created rule disfavoring arbitration, and directed the parties to return to the arbitral forum.⁸⁴ For its *ratio decendi* in *Kindred*, the present day Court built its reasoning around the cornerstone of

77. See FED. R. CIV. P. 23 (governing class actions in the federal courts).

78. *Concepcion*, 563 U.S. at 348-49.

79. *Id.* at 348-50; see also *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348, 362-63 (2011) (discussing, in an opinion by Justice Scalia, the procedural protections of class action suits).

80. *Concepcion*, 563 U.S. at 346-48.

81. *Id.* at 347-48, 352.

82. *Id.* at 351-52.

83. 137 S. Ct. 1421 (2017).

84. *Id.* at 1426-27.

Concepcion, amply demonstrating that Justice Scalia's reasoning therein still lights the path towards enforcing agreements to arbitrate.⁸⁵

Thus far, we have exemplified Justice Scalia's paramount contributions to the fields of federal securities law and arbitration, respectively. A characteristic of such jurisprudence is that it impacts, most keenly, parties involved in discrete and private disputes.

IV. *CHEVRON* DEFERENCE AND CABINING ADMINISTRATIVE AGENCIES

What of controversies arising between the people, acting in matters of commerce, and representatives of their elected government seeking to regulate those same enterprises? This can be said to fall under the general heading of administrative law. We are pleased to report that, once more, Justice Scalia's writings have had an impact in that domain, and so we turn to this for our next topic.

A. *Utility Air Regulatory Group v. Environmental Protection Agency*

While the orthodoxy regarding constitutional law espouses that there are only three separate and equal branches of government, much has been said about the ascendancy of a Fourth Branch of the federal construct, that being the administrative branch. It is beyond peradventure that, since before the midpoint of the last century, administrative agencies play an influential role in regulating businesses, and even everyday American life.

The touchstone for defining the scope of regulatory power has long been the eponymous "*Chevron* deference" standard, as set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁸⁶ In that decision authored by Justice Sandra Day O'Connor, a legend in her own right, the Court announced that the judiciary must defer, at least in the first analysis, to the agencies when the latter are engaged in promulgating rules within the sphere of their administrative bailiwick.⁸⁷

Notwithstanding the banner raised by *Chevron*, Justice Scalia from time to time questioned the continued viability, and even the desirability, of that holding's central tenet. During what subsequently turned out to be some of his final years on the high bench, Justice Scalia participated

85. *Id.* at 1426-28.

86. 467 U.S. 837, 843-44 (1984) (holding wherever Congress has left a gap in a statutory scheme, an agency's interstitial regulations "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute").

87. *Id.* at 842-45.

in at least two noteworthy opinions addressing the boundaries of administrative agency power.

One of these was the admittedly tortuous read, *Utility Air Regulatory Group v. Environmental Protection Agency*,⁸⁸ wherein the Justices undertook the unenviable task of dissecting incredibly dense and confounding environmental regulations propounded by the abovenamed agency in its efforts to administer the Clean Air Act.⁸⁹

The highly technical substance of *Utility Air* defies easy synthesis, but, fortunately, such a burdensome exercise is not our purpose here. I am content, rather, to call to the reader's attention to the far more significant and long-lasting commentary of Justice Scalia pertaining to the ever-present need to check the unbridled power of administrative agencies, and the unelected and faceless bureaucrats that reside therein.

Among other things in the opinion he authored for the majority, Justice Scalia remonstrates that agencies "must operate 'within the bounds of reasonable interpretation'" of the regulatory schemes created by elected lawmakers.⁹⁰ In order to stay within that zone of rational interpretation, administrative matrices devised by Congress must be contemplated by the regulators as a whole, not as disjointed pieces.⁹¹ And should an administrative agency stray outside those boundaries, nominal *Chevron* deference dissipates, and the courts are permitted to make a penetrating inquiry into the legality of the rules propounded by the agency.⁹²

Justice Scalia made it abundantly clear in *Utility Air* that the deference *Chevron* imposes upon the judicial review of agency action is not without limitation. Such acquiescence first requires that regulators have acted within the confines of the clear statutory text provided by Congress.⁹³ The worthy Justice qualified the deferential standard as applicable where the agency has confined its actions to resolving "interstices created by statutory silence or ambiguity."⁹⁴

88. 134 S. Ct. 2427 (2014).

89. *Id.* at 2434 (citing Clean Air Act, Pub. L. No. 159, 69 Stat. 322 (codified as amended at 42 U.S.C. §§ 7401–7671q (2012))). Given the vociferous debate of the present era over the phenomenon called "climate change," it is worth noting that the EPA standards at issue in *Utility Air* pertained to "greenhouse gases" emitted by motor vehicles, and believed by many to be a major contributor to that species of manmade pollution. See *Chevron*, 134 S. Ct. at 2434.

90. *Chevron*, 134 S. Ct. at 2442 (quoting *City of Arlington v. F.C.C.*, 569 U.S. 290, 295 (2013)).

91. *Id.* (describing perceived ambiguity in an isolated proviso often disappears when that same section is viewed as part of a larger whole).

92. *Id.*

93. *Id.* at 2439.

94. *Id.* at 2445.

The veteran jurist readily admitted that regulators possess “both authority and responsibility to resolve some questions left open by Congress,” which arise in the ordinary course of carrying out a given administrative scheme.⁹⁵ Nevertheless, Justice Scalia found it manifest that such allowance “does not include a power to revise clear statutory terms.”⁹⁶

Lucid as always, the Justice declared that administrative agencies simply “cannot change the law” when it suits them.⁹⁷

In justifying the need for such a clear-cut imperative, Justice Scalia takes the time in *Utility Air* to explain why it is so vital to cabin the power of administrative agencies.⁹⁸ Nothing less than the fundamental constitutional safeguard of separation of powers is at stake, he opined.⁹⁹

In emoting the fundamental truth that “Congress makes laws and the President, acting at times through agencies . . . faithfully execute[s] them,” Justice Scalia illustrates how that guarantee of our ordered system of liberty is at serious risk when agencies, ostensibly limited to administering the law, deign to pronounce it themselves, without the sanction of elected legislators.¹⁰⁰ To condone agencies indulging themselves in the latter is to “deal a severe blow to the Constitution’s separation of powers.”¹⁰¹

Justice Scalia once more demonstrated his matchless ability to turn a pithy phrase, announcing in *Utility Air* that the Supreme Court is “not willing to stand on the dock and wave goodbye” whenever administrative agencies chart their own course.¹⁰² Quite to the contrary, “the core administrative law principle [is] that an agency may not rewrite clear statutory terms to suit its own sense of how [a] statute should operate.”¹⁰³

With such customary eloquence, Justice Scalia achieves a faithful duality regarding the principles of regulatory power. While remaining true to the established jurisprudence of *Chevron* deference, he nevertheless spoke convincingly that such an axiom must never be misconstrued as a license to government regulators to do as they please, without accountability to the American electorate.¹⁰⁴

95. *Id.* at 2446.

96. *Id.* (citing *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438 (2002)).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* (internal quotations omitted) (citing U.S. CONST. art. III, § 2).

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

B. Environmental Protection Agency v. EME Homer
City Generation, L.P.

For our last exemplification on this precise topic, we briefly take cognizance of *Environmental Protection Agency v. EME Homer City Generation, L.P.*¹⁰⁵ best classified as a first cousin to Justice Scalia's opinion for the majority in *Utility Air*.¹⁰⁶ Yet, in sharp contrast, on this occasion we witness Justice Scalia writing in dissent, as joined by his colleague Justice Thomas.¹⁰⁷

Justice Scalia opens his *riposte* with a stirring pronouncement. "Too many important decisions of the Federal Government are made nowadays by unelected agency officials exercising broad lawmaking authority, rather than by the people's representatives in Congress."¹⁰⁸

In the instant case, Justice Scalia repeated the axiom that administrative agencies are limited to imposing rules that fall within the proscriptions first established by Congress in the animating statutory scheme.¹⁰⁹ Finding the air pollution restrictions propounded by the agency in *EME* to exceed those legislative boundaries, the learned dissenter declared they "deserve[d] no deference under *Chevron*."¹¹⁰

In this fashion, the worthy Justice decried the presence in *EME* of the very dangers he forecast in *Utility Air*; government regulators exercising the lawmaking function constitutionally reserved to the Article I branch, in derogation of separation of powers.¹¹¹

Given the conjunction between *Utility Air* and *EME*, we witness in the former opinion Justice Scalia's willingness to uphold *Chevron* deference, provided the agency action in controversy falls within the confines of the statutory scheme enacted by the lawmakers. Yet in contradistinction, the learned Justice sharply pivoted to a contrary view in the latter decision, based upon his conclusion that there the agency's wanderings outside its legislated domain usurped the lawmaking prerogatives exclusively reserved to the legislature.

It is respectfully asserted that the principled decision making of Justice Scalia in these companion decisions shall continue to resonate in

105. 134 S. Ct. 1584 (2014).

106. In sum, the *EME* Court addressed the efforts of Congress and the EPA "to cope with a complex problem: air pollution emitted in one State, but causing harm in other States. Left unregulated, the emitting or upwind State reaps the benefits of the economic activity" while "downwind states . . . are unable to achieve clean air." *Id.* at 1593.

107. *Id.* at 1610 (Scalia, J., dissenting).

108. *Id.*

109. *Id.* at 1610-11.

110. *Id.* at 1611.

111. *Id.* at 1610.

administrative law jurisprudence for many years to come.¹¹² Far more important, his postulations in that domain shall no doubt play a role in the even more important matter of maintaining one of the more virtuous paradigms of our constitutional system.

That constitutional imperative is the separation of powers. The peculiar nature of the so-called administrative branch—ostensibly a mere subsidiary of the executive branch, yet oft times realistically an independent organ of government—frequently gives rise to controversies implicating that very mandate. One such conflagration is with us now, and it is forecast that Justice Scalia’s relevant jurisprudence will play a key role in squelching its fires. For that reason, we turn to it as our final subject.

V. ADMINISTRATIVE LAW JUDGES AND AGENCY HEADS: A NEW STRUGGLE OVER THE APPOINTMENTS CLAUSE AND SEPARATION OF POWERS

While the immediately foregoing material reflects Justice Scalia’s views upon the *institutional* power of administrative agencies, the Justice’s writings are similarly instructive in considering equally important questions regarding the constitutional exercise of power by *individuals* within such regulatory bodies. To begin, one must first recognize the path by which these administrators take and continue to hold positions of responsibility within the Article II branch.

Such matters are regulated by the firm demands of the Appointments Clause, which installs in the President the power to appoint principal “Officers of the United States” necessary to assist the President in executing the laws of the land.¹¹³ Significantly, this power to appoint is conjoined to the Chief Executive’s right to dismiss these same officials at will.¹¹⁴

It can truthfully be said that the second prerogative is the more significant of the two. The removal power assures foremost that these unelected officeholders remain accountable, not just to the President who appointed them, but, more importantly, to the people who elected that Chief Executive in the first instance.

Standing in contradistinction to the principal officers of the nation are the so-called “inferior officers” of government. The Appointments

112. For further analysis of the scope of administrative agency power, see generally Anthony Michael Sabino, *As Oneok Drew Regulatory Line for Gas, So Does EPSA for Electricity*, NAT. GAS & ELECTRICITY, May 2016, at 10; and Michael A. Sabino, *Supreme Court Clarifies Federal Versus State Authority over Natural Gas*, NAT. GAS & ELECTRICITY, Jan. 2016, at 1.

113. U.S. CONST. art. II, § 2, cl. 2.

114. *See id.*

Clause provides that such persons may be appointed by the President alone, the courts or the heads of the federal departments.¹¹⁵

The functional reality is that these officeholders are much more akin to civil servants in how they attain and remain in their positions. Germane to the following analysis, this distinguishing characteristic quite logically places these inferior officers beyond the Chief Executive's power to terminate their time in office.¹¹⁶

Yet it is not unknown in our jurisprudence to encounter a situation where an individual is responsible for the execution of the laws of the United States, but, for whatever reason, is thought to stand beyond the President's removal power. Such scenarios have provided the Supreme Court with a plenitude of opportunities to first classify such persons as principal or inferior officers, and second, if necessary, declare a constitutional infirmity for reason of infidelity to Appointments Clause strictures, primarily the vital inclusion of a presidential right of removal.¹¹⁷

Presently, just such an Appointments Clause controversy is roiling its way through the federal courts. Truth be told, the dispute is actually comprised of two distinct, yet intertwined, branches. The first arises from the arena of federal securities law, a domain where Justice Scalia played an influential role, as previously discussed.

For most of its history, the Securities and Exchange Commission ("SEC") has employed administrative law judges ("ALJs").¹¹⁸ These jurists preside and issue rulings in proceedings brought by the SEC against those accused of malfeasance in the stock markets.¹¹⁹ Notably, ALJs are not appointed by the President, and enjoy a form of tenure that places them beyond the President's power to remove them at will.¹²⁰

In a highly contentious spate of cases, a number of respondents in SEC enforcement actions have resisted the power of the ALJs to hear and decide their cases.¹²¹ The defendants contend that, since these quasi-jurists hold office without being subject to the removal power of the

115. *Id.*

116. *Id.*

117. *See* Free Enter. Fund v. Public Co. Accounting Oversight Bd., 561 U.S. 477, 483-86 (2010) (finding an Appointments Clause violation where members of an accounting industry oversight board exercised executive power, yet were immune from removal by the President).

118. *See* Michael A. Sabino & Anthony Michael Sabino, *Challenging the Power of SEC ALJs: A Constitutional Crisis or a More Nuanced Approach?* 43 SEC. REG. L.J. 369, 369, 376 (2015).

119. *Id.* at 373, 378.

120. *Id.* at 376, 378.

121. *Id.* at 373, 376-77, 379.

President, the Appointments Clause is violated whenever the ALJs exercise their adjudicatory powers.¹²²

The first iteration of this tempestuous litigation comprised a divergent body of district court opinions. Nearly every one of these early decisions reflected the idiosyncratic approach of the presiding trial judge, as each jurist sought a resolution true to the canons of the Appointments Clause.¹²³

Now that this plethora of lower court rulings has percolated to the appellate level, we now have before us a veritable legion of circuit court cases seeking answers to the fundamental question of whether or not the SEC ALJs constitutionally hold office.¹²⁴ Admittedly, the tribunals appear to be coalescing, more or less, around a rough consensus supportive of maintaining the SEC's adjudicators in power.¹²⁵ Yet it is undeniable that there exists an internecine conflict that only the Supreme Court can end.

To be sure, it is respectfully contended that the intervention of the high Court in this matter is a necessity. More is at stake here that the singular issue of the power of this particular batch of ALJs to hear proceedings brought by Wall Street's primary watchdog.

In this century, entire battalions of ALJs work at countless federal agencies. They decide controversies that impact Americans great and not so great each and every day. The reach of the anticipated postulations of the high Court in this context shall not end with the securities law arena. Rather, the Supreme Court's findings with regard to the Appointments Clause here shall resonate across an entire galaxy of administrative agencies and their own in-house adjudicators.

Having illuminated the first branch of this controversy, we now proceed to the second. The latter segment of the ongoing dispute calls into question the constitutionality of the continuance in office of the head of an influential federal agency. Ironically, the body in question is one recently given authority over certain subdivisions of the worlds of banking and finance, and, one might venture, conducts its regulatory

122. *Id.* at 376-77, 379.

123. *See id.* (analyzing the then-extant cases).

124. As of this writing, a representative sampling of those circuit decisions includes, but is not limited to: *Bandimere v. S.E.C.*, 844 F.3d 1168, 1171 (10th Cir. 2016); *Raymond J. Lucia Cos. v. S.E.C.*, 832 F.3d 277, 280 (D.C. Cir. 2016), *vacated, reh'g granted*, 868 F.3d 1021 (D.C. Cir. 2017), *cert. granted sub nom. Lucia v. S.E.C.*, No. 17-130, 2018 WL 386565 (U.S. Jan. 12, 2018); *Hill v. S.E.C.*, 825 F.3d 1236, 1239 (11th Cir. 2016); *Tilton v. S.E.C.*, 824 F.3d 276, 279-81 (2d Cir. 2016), *cert. denied*, 137 S. Ct 29 (2016); *Bebo v. S.E.C.*, 799 F.3d 765, 768 (7th Cir. 2015); and *Jarkesy v. S.E.C.*, 803 F.3d 9, 15, 17 (D.C. Cir. 2015).

125. *See, e.g., Raymond J. Lucia*, 832 F.3d at 283-89 (reasoning that SEC ALJs do not violate the Constitution).

business in a state of tension with the above discussed SEC regarding which one of them is the primary regulator in these domains.

The agency in play is the newcomer Consumer Financial Protection Bureau (“CFPB”), and, dissimilar to nearly every other federal administrative body of consequence, it has but a single Director at its apex.¹²⁶ More to the point, that bureau chief enjoys a form of tenure placing him outside the President’s power to remove at will.¹²⁷ And therein lies the root of the controversy.

That case is *PHH Corporation v. Consumer Financial Protection Bureau*,¹²⁸ where the titular plaintiff, a mortgage lender, was the subject of an agency proceeding.¹²⁹ Finding the company in violation of various pertinent regulations, the CFPB’s Director ordered it to pay a \$109 million charge.¹³⁰ Refusing to knuckle under, the mortgage lender challenged the decision on the grounds that the Director held office in violation of the Appointments Clause, and that constitutional defect nullified his regulatory edicts.¹³¹

Upon hearing the case for the first time, the D.C. Circuit concurred that the Appointments Clause had indeed been violated when Congress structured the bureau in such a manner as to give its leader immunity from presidential removal.¹³² In a strongly worded opinion authored by Circuit Judge Kavanaugh, the panel made an in-depth exploration of separation of powers, and related it to the prerequisites of the Appointments Clause.¹³³

Yet the matter is far from over. On January 31, 2018, the D.C. Circuit, sitting en banc, reversed—a fractured bench found the CFPB Director’s insulation from presidential oversight consistent with the Appointments Clause.¹³⁴

Similar to the foregoing prognostications with regard to the SEC ALJ offshoot of the fundamental controversy, this author is confident that the high Court will ultimately review the matter. Moreover, the need for such oversight is even more pronounced.

126. *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 6 (D.C. Cir. 2016), *rev’d en banc*, No. 15-1177, 2018 WL 627055 (D.C. Cir. Jan. 31, 2018).

127. *Id.* at 15.

128. *Id.* at 6.

129. *Id.* at 7.

130. *Id.*

131. *Id.* at 12.

132. *Id.* at 31, 36.

133. *Id.* at 6-9.

134. *See generally* *PHH Corp. v. Consumer Fin. Prot. Bureau*, No. 15-1177, 2018 WL 627055 (D.C. Cir. Jan. 31, 2018) (en banc).

In *PHH*, we see in sharp definition, not only the matter of the proper interpretation of the Appointments Clause, but the far more essential issue of separation of powers. Only the Supreme Court can speak authoritatively to questions of such magnitude.

Now, this Article rightly concerns itself first and foremost with the selected jurisprudence of Justice Scalia. Staying true to that purpose, the following demonstration is given.

First, the SEC ALJ question implicates the enforcement of federal securities law, a domain where this Article has already explicated Justice Scalia's outsized contribution to the field in the form of *Morrison*. The second aspect of the pending Appointments Clause dilemma holds at its center a federal agency principally tasked with regulating consumer protection, a matter very much implicated by Justice Scalia in *Concepcion*.¹³⁵

In addition, the opinions of the learned Justice in the companionable decisions of *Utility Air* and *EME* might well play a role in determining the proper scope of the CFPB's power as an administrative body. Yet this pales in comparison to what is foreseeable as to be the invocation of Justice Scalia's wisdom on the essential constitutional point at issue in both these boiling controversies.

It is respectfully posited here that the paramount constitutional question of separation of powers, as exemplified in this two-headed controversy, shall ultimately be determined with a powerful reliance upon an opinion rendered by Justice Scalia in his early days sitting on the high Court. That case is one of the learned Justice's most memorable and enduring contributions to constitutional jurisprudence.

This is the edifice of constitutional law called *Morrison v. Olson*.¹³⁶ There, Chief Justice Rehnquist, writing for a seven-to-one majority, held that the appointment of Morrison as an independent counsel was constitutional, for reason that her post was one of an "inferior officer."¹³⁷ Therefore, the fact that this individual could not be removed at the will of the Chief Executive did not constitute a violation of Appointments Clause requirements.¹³⁸

In his solitary dissent, Justice Scalia, at the time still quite new to the austere corridors of the Supreme Court, authored words that to this day strongly resonate when the Constitution is believed to be in crisis.

135. See *supra* notes 40-44 and accompanying text.

136. 487 U.S. 654 (1988). This *Morrison* bears no relation to the aforementioned *Morrison v. National Australia Bank*. See *supra* Part II. To avoid confusion, we shall refer to the former by its full caption.

137. *Morrison*, 487 U.S. at 659-60, 671-72, 695.

138. *Id.* at 670-71.

His first robust characterization was that our system of ordered liberty is not one of men, but of laws.¹³⁹ And one of those most sacred laws is the founding axiom of separation of powers.¹⁴⁰

Justice Scalia then turned to place the foundational doctrine of separation of powers in counterpoise to the matters disputed in *Morrison v. Olson*, and found an essential correlation. He declared, “That is what this suit is about. Power. The allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish” in order to resist a concentration of authority in the one or the few.¹⁴¹

The learned Justice swiftly rejected any banal assertion that separation of powers was merely some convenience assuring a smoothly functioning bureaucracy.¹⁴² Quite to the contrary, Justice Scalia resolutely declared that “[t]he purpose of the separation of powers in general, and of the unitary Executive in particular, was not merely to assure effective government but *to preserve individual freedom*.”¹⁴³

Even in those relatively early days of his tenure on the Court, Justice Scalia commenced to build the foundation for his strong belief in textualism and originalism, and to justify his adherence to those maxims. Demonstrating his enduring faith in the Founders and the monument to freedom we know as the Constitution, Justice Scalia proclaimed a belief he would often reiterate in his many opinions. “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.”¹⁴⁴

This brings us to our denouement, which indefatigably links the current Appointments Clause tempest to the words of warning first announced by the learned Justice nearly three decades prior. Refusing to treat the case then at bar as some pedestrian inter-branch rivalry, Justice Scalia recognized it as a challenge to core constitutional principles.

His stinging declaration: *Morrison v. Olson* did not present a wolf in sheep’s clothing. Rather, “this wolf comes as a wolf.”¹⁴⁵ Today, we need look no further than *PHH*’s direct quotation of that pronouncement, as part and parcel of that panel’s holding,¹⁴⁶ to be convinced that Justice

139. *Id.* at 697 (Scalia, J., dissenting).

140. *Id.*

141. *Id.* at 699.

142. *Id.*

143. *Id.* (emphasis added).

144. *Id.* at 734 (emphasis added).

145. *Id.* at 699.

146. *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 8 (D.C. Cir. 2016) (citing *Morrison*, 487 U.S. at 699 (Scalia, J., dissenting)), *reh’g en banc granted, order vacated*, No. 15-

Scalia's wisdom, as found in *Morrison v. Olson*'s iconic dissent and elsewhere within his writings, shall play a pivotal role in the Supreme Court arriving at decisions in these matters that uphold the separation of powers so vital to the continuance of our ordered system of liberty.¹⁴⁷

VI. CONCLUSION

This Article commenced with the notation that the discussion would be limited to a small, well defined subset of Justice Scalia's opinions. While endeavoring to restrict this writing to those highly selective domains, it is nonetheless self-evident that the learned Justice's wisdom is not so easily confined.

In our view, this only serves to prove the magnitude of the late Justice's contribution to American jurisprudence. Even when one is sharply focused upon Justice Scalia's opinions addressing securities law, arbitration, and administrative law, the reader will still witness how the learned Justice's reasoning reflects a profound understanding of the founding document in all its aspects.

Let us revel in the fact that Justice Scalia, even when ostensibly instructing upon matters of commerce and finance, concurrently expands our knowledge of the Constitution, and deepens our appreciation for the freedom it guarantees. For these reasons, it can be anticipated that the totality of the learned Justice's writings shall continue to influence our jurisprudence for many generations to come.

1177, 2017 U.S. App. LEXIS 2733 (D.C. Cir. Feb. 16, 2017). To be quite certain, Circuit Judge Kavanaugh not only cites or quotes Scalia's dissent in *Morrison v. Olson* several times, he accurately mirrors its animating point, to wit: "This is a case about executive power and individual liberty." *Id.* at 5.

147. Indeed, we fully anticipate Justice Scalia's teachings shall continue to define the scope of the CFPB's authority in other, equally significant ways. Most recently, the agency, still led by a solitary Director, promulgated a new rule aimed at "prohibiting financial firms from forcing [consumers] into arbitration in disputes over their bank and credit card accounts." Jessica Silver-Greenberg & Michael Corkery, *U.S. Agency Moves to Allow Consumers to Pursue Suits Against Banks*, N.Y. TIMES, July 10, 2017, at A1; see also C. Ryan Barber, *CFPB, Testing Trump and Republicans, Moves to Restrict Forced Arbitration*, NAT'L L.J. (July 10, 2017), <https://www.law.com/nationallawjournal/almID/1202792598949/?slreturn=20180004222702> (discussing the finalized CFPB rule). Witness the unmistakable irony here. The CFPB promulgates a rule that evidently defies Justice Scalia's postulations in *Concepcion* regarding arbitration mere months after the learned Justice's teachings in *Morrison v. Olson* provide a significant part of the basis for declaring that the head of that agency holds office in violation of the doctrine of separation of powers. How can one avoid Justice Scalia's voice being resoundingly heard in both of these instances?
