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ESSAY

PRINTZ, THE UNITARY EXECUTIVE, AND THE FIRE IN THE TRASH CAN: HAS JUSTICE SCALIA PICKED THE COURT'S POCKET?

*Jay S. Bybee**

In the film *Mission Impossible*, Ethan Hunt (played by Tom Cruise) is a CIA operative who is wrongfully accused of murderously betraying his colleagues. To clear his name and expose the actual traitor, Hunt must obtain access to computer files that are stored under the most secure conditions at headquarters in Langley. Hunt's first task is to get into CIA headquarters in the middle of the day. Hunt and his associates, masquerading as firefighters responding to a call, walk through the front doors and past security. Once inside, they drug an employee, break into a secured area through a most improbable scheme, and steal the files. Hunt and his associates walk out the front door undetected and drive off in a borrowed fire truck.

It is one of the oldest tricks in the book. The protagonist creates a disturbance that focuses everyone else's attention. While they occupy themselves with the immediate distraction, the protagonist takes care of the *real* business at hand. The story has a thousand variations, but it is one repeated in life and celebrated in print and on celluloid: the thief sets a fire in the trash can. While everyone scrambles to extinguish it, the thief does his duty. He picks pockets; he steals the house blind; he does whatever he can get away with.

The fire in the trash can is a venerable trick, but the nature of tricks that become "venerable" is that they work. *Printz v. United States*¹ is an excellent example of the genre within the Supreme Court.

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¹ 521 U.S. 898 (1997).

In *Printz*, the Court held that certain sections of the Brady Handgun Violence Prevention Act² were unconstitutional.³ Until the Attorney General set up a national system, the Act required the chief local law enforcement official to make certain background checks. The Court held that Congress exceeded its authority by *requiring* local law enforcement officials to take this action. Writing for the majority, Justice Scalia “conclude[d] categorically . . . ‘The Federal Government may not compel the States to enact or administer a federal regulatory program.’”⁴ The Court offered two justifications. First, these commands to the states are “fundamentally incompatible with our constitutional system of dual sovereignty.”⁵ Second, the Brady Act violated the separation of powers because it assigned the enforcement of federal law to state officials, thereby “reducing the power of the Presidency.”⁶

Although the first justification commanded the immediate attention of a majority of the Court,⁷ four justices in dissent,⁸ lower courts,⁹ the national press,¹⁰ and the academy,¹¹ almost no one noticed Justice Scalia’s ever-so-brief aside on separation of powers.¹² Some observers

2 Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified at 18 U.S.C. § 922(s) (1994)).

3 *Printz*, 521 U.S. at 933–34 (holding unconstitutional 18 U.S.C. § 922(s)(2) and § 922(s)(1)(A)(i)(III)–(IV)).

4 *Id.* at 933 (quoting *New York v. United States*, 505 U.S. 144, 188 (1992)).

5 *Id.* at 935.

6 *Id.* at 923–24.

7 *See id.* at 935 (Justice Scalia delivered the opinion of the Court, in which the Chief Justice and Justices O’Connor, Kennedy, and Thomas joined).

8 *See id.* at 969–70 (Justice Stevens filed a dissenting opinion, in which Justices Souter, Ginsburg, and Breyer joined).

9 *See, e.g., Oklahoma ex rel. Okla. Dep’t of Public Safety v. United States*, 994 F. Supp. 1358, 1363 (W.D. Okla. 1997), *rev’d*, 161 F.3d 1266, 1271 (10th Cir. 1998), *cert. denied*, 528 U.S. 1114 (2000); *Condon v. Reno*, 972 F. Supp. 977, 982–83 (D.S.C. 1997), *aff’d*, 155 F.3d 453, 459–60 (4th Cir. 1998), *rev’d*, 528 U.S. 141 (2000).

10 *See, e.g.,* Joan Biskupic, *Court Voids Background Check of Gun Buyer Under Brady Law*, WASH. POST, June 28, 1997, at A1; Steven G. Calabresi, *A Constitutional Revolution*, WALL ST. J., July 10, 1997, at A14; Linda Greenhouse, *Justices Limit Brady Gun Law as Intrusion on States’ Rights*, N.Y. TIMES, June 28, 1997, at A1.

11 For articles on *Printz*, see Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism*: New York, *Printz and Yeskey*, 1998 SUP. CT. REV. 71; Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle*, 111 HARV. L. REV. 2180 (1998); Vicki C. Jackson, *Printz and Testa: The Infrastructure of Federal Supremacy*, 32 IND. L. REV. 111 (1998); Ellen D. Katz, *State Judges, State Officers, and Federal Commands After Seminole Tribe and Printz*, 1998 WIS. L. REV. 1465.

12 Two exceptions are Evan H. Caminker, *Printz, State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199; Neil Kinkopf, *Of Devolution, Privatization and Globalization: Separation of Powers Limits on Congressional Authority To Assign Federal Power to Non-Federal Actors*, 50 RUTGERS L. REV. 331, 375–83 (1998).

may have ignored the point because they thought it was dicta. Perhaps others failed to notice because Justice Scalia's separation of powers analysis sounded so familiar and, thus, appeared unexceptional. The analysis should have been familiar.¹³ Justice Scalia's separation of powers principle has been expounded before—namely, by Justice Scalia in his dissent in *Morrison v. Olson*.¹⁴

In fact, Justice Scalia took his brief separation of powers argument in *Printz*—analytically and rhetorically—straight out of his *Morrison* dissent. Justice Scalia has argued for a theory of the unitary executive that the remainder of the Court has never supported. Remarkably, Justice Scalia offered his argument without any hint of its provenance or its potential. Taken to its logical conclusion, Justice Scalia's separation of powers principle in *Printz* would not only resuscitate his dissent in *Morrison*, it would threaten *Humphrey's Executor v. United States*¹⁵ and the independence of the fourth branch of government, the independent regulatory agencies. Although six Justices wrote opinions in *Printz* and they had more than their share of give-and-take, somewhere in the process no one was watching Justice Scalia. And despite vigorous dissents by Justices Stevens, Souter, and Breyer, Justice Scalia picked the Court's pocket clean on separation of powers.

13 This suggests that I have used the wrong crime metaphor. Rather than diverting the Court with the fire in the trash can (federalism) to pull off a judicial sleight-of-hand (separation of powers), maybe Scalia's point appeared so obvious, so routine, that no one thought to suspect it. Maybe the better analogy is G.K. Chesterton's image in *The Invisible Man* in which a murderer entered the building at mid-day, committed the crime, and left with the body by the front door and past the guard, all without being seen. Father Brown discovers that the murderer walked undetected through the neighborhood as the mail carrier. No one thought to suspect a person so common and routine. G.K. CHESTERTON, *The Invisible Man*, in *THE FATHER BROWN OMNIBUS* 82, 99 (rev. ed. 1951). Although it is hard to think of anyone surrendering a role played by Tom Cruise, given Justice Scalia's Catholic background, see George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1309–20 (1990), perhaps he would not mind matching wits with Father Brown. If Father Brown represents the better metaphor, my alternative title for this piece is "*Printz, Morrison and Separation of Powers: The Postman Rings Twice*."

14 See 487 U.S. 654, 697–734 (Scalia, J., dissenting) (1998); see also Caminker, *supra* note 12, at 226 (suggesting that this section was "an attempted end-run around the Court's rejection of [Scalia's] . . . position in *Morrison*"); Ralph A. Rossum, *The Irony of Constitutional Democracy: Federalism, the Supreme Court, and the Seventeenth Amendment*, 36 SAN DIEGO L. REV. 671, 737–38 (1999) (noting that Scalia's argument in *Printz* "comes, of course, directly from his dissent in *Morrison v. Olson*").

15 295 U.S. 602 (1935).

I. FEDERALISM V. SEPARATION OF POWERS IN *PRINTZ*

The Brady Handgun Violence Prevention Act¹⁶ amended the Gun Control Act of 1968¹⁷ to require that the Attorney General create a new national background check for persons who purchase handguns from dealers. However, practical reasons prevented the Attorney General from implementing the Brady Act immediately, so the legislation prescribed an interim measure. In states that did not have a permitting scheme or background check in place, the Brady Act required the local "chief law enforcement official" (CLEO) to "make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law," including performing "research" in state, local, and national record systems.¹⁸ CLEOs in Montana and Arizona filed separate suits arguing that the Brady Act's modest directive to participate in the interim background check program violated the Constitution because the federal government had "commandeered" state officials.¹⁹ The Court rejected the federal government's argument that the "commandeering" principles did not apply when the Congress required state officials to enforce federal law, except when it directed legislative action.²⁰

Justice Scalia began his opinion for the Court by acknowledging that the text of the Constitution did not address the question presented in this case.²¹ Therefore, the Court would have to resolve the case by relying on historical practice, the structure of the Constitution, and the Court's jurisprudence, "in that order."²² In Section II of

16 16 Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified at 18 U.S.C. § 922(s) (1994)).

17 Pub. L. No. 90-618, 82 Stat. 1213 (1968) (codified as amended at 18 U.S.C. §§ 921-928 (1994)).

18 18 U.S.C. § 922(s)(2) (1994). The Brady Act also requires the CLEO, under specified circumstances, to provide gun dealers with written statement of reasons for a purchaser's ineligibility. *See id.* § 922(s)(6)(C). Under other circumstances, the CLEO was required to destroy the records in his possession. *See id.* § 922(s)(6)(B)(i). The Court in *Printz* held that these latter provisions did not command action on the part of the CLEO unless "he has chosen, voluntarily, to participate in administration of the federal scheme." *Printz*, 521 U.S. at 934.

19 *Printz*, 521 U.S. at 903-04; *see also* *New York v. United States*, 505 U.S. 144, 161 (1992); *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981).

20 *See Printz*, 521 U.S. at 928.

21 *See id.* at 905.

22 *Printz*, 521 U.S. at 905. I find it rather surprising that, having admitted the silence of the text, Justice Scalia turned to "historical understanding and practice" rather than the structure of the Constitution, which he considered in Section III of the opinion. *Id.* at 918-35. Logically, it seems to me that practice and understanding should confirm structure, and not the other way around.

the Court's opinion, Justice Scalia addressed whether earlier Congresses had required the assistance of state officials.²³ Justice Scalia not only made his historical case but also directly engaged the dissents of Justice Stevens and Justice Souter in extensive footnotes.²⁴

In Section III.A, Justice Scalia turned to the structure of the Constitution for guidance on whether Congress can command state law enforcement officials to enforce federal law. The Framers, the Court wrote, "explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States."²⁵ As a consequence, citizens are subject to

"two political capacities, one state and one federal, each protected from incursion by the other"—a legal system . . . establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.²⁶

The Court concluded that this design constituted "structural protections of liberty"²⁷ and that the "power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the 50 States."²⁸

Section III.B presents the critical separation of powers discussion. Remarkably, the entire section consists of one paragraph and a single footnote. The section, including the footnote and all citations, follows in its entirety:

We have thus far discussed the effect that federal control of state officers would have upon the first element of the "double security" alluded to by Madison: the division of power between State and Fed-

I have argued that in the First Amendment arena, Justice Scalia has not brought to the First Amendment the kind of careful parsing of text and structure that he has imposed on separation of powers and federalism cases. See Jay S. Bybee, *Common Ground: Robert Jackson, Antonin Scalia, and a Power Theory of the First Amendment*, 75 TUL. L. REV. 251, 293 (2000). In First Amendment cases, Justice Scalia has announced that he will draw his principles from the "long accepted practices of the American people" and not from a "a text as indeterminate as the First Amendment." 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 517 (1996) (Scalia, J., concurring in part and concurring in judgment). Perhaps *Printz* evidences that Justice Scalia will extend his historical methodology to any constitutional question that he cannot answer from the text.

²³ 521 U.S. at 904–09.

²⁴ See *id.*

²⁵ *Id.* at 920 (quoting *New York v. United States*, 505 U.S. 144, 166 (1992)).

²⁶ *Id.* (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)).

²⁷ *Id.* at 921.

²⁸ *Id.* at 922.

eral Governments. It would also have an effect upon the second element: the separation and equilibration of powers between the three branches of the Federal Government itself. The Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, "shall take Care that the Laws be faithfully executed," Art. II, § 3, personally and through officers whom he appoints (save for such inferior officers as Congress may authorize to be appointed by the "Courts of Law" or by "the Heads of Departments" who are themselves presidential appointees), Art. II, § 2. The Brady Act effectively transfers this responsibility to thousand of CLEOs in the 50 States, who are left to implement the program without meaningful Presidential control (if indeed meaningful Presidential control is possible without the power to appoint and remove). The insistence of the Framers upon unity in the Federal Executive—to ensure both vigor and accountability—is well known. See *The Federalist* No. 70 (A. Hamilton); 2 *Documentary History of the Ratification of the Constitution* 495 (M. Jensen ed. 1976) (statement of James Wilson); see also Calabresi & Prakash, *The President's Power to Execute the Laws*, 104 *Yale L. J.* 541 (1994). That unity would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws.

(FN12) There is not, as the dissent believes, *post*, at 960, "tension" between the proposition that impressing state police officers into federal service will massively augment *federal* power, and the proposition that it will also sap the power of the Federal *Presidency*. It is quite possible to have a more powerful Federal Government that is, by reason of the destruction of its Executive unity, a less efficient one. The dissent is correct, *post*, at 959–960, that control by the unitary Federal Executive is also sacrificed when States voluntarily administer federal programs, but the condition of voluntary state participation significantly reduces the ability of Congress to use this device as a means of reducing the power of the Presidency.²⁹

In Section III.C, the Court argued that the Necessary and Proper Clause did not support federal conscription of state officials,³⁰ and in Section IV, the Court reviewed the jurisprudence concerning the use of state officials.³¹ In Section V, the Court cleaned up some administrative details concerning the CLEOs.³² Except for Section III.B, every other section of the opinion treated the federalism question raised by the CLEO petitioners: Can Congress forcibly enlist state officials to

29 *Id.* at 922–23 & n.12 (emphasis in original).

30 *See id.* at 923–25.

31 *See id.* at 925–33.

32 *See id.* at 933–35.

enforce federal law? The remainder of the opinion directly supports the Court's structural arguments in Section III.A, and no other section addresses historical practices, cases, or other matters that would sustain the Court's opinion in Section III.B. Section III.B apparently stands or falls on its own.

None of the other opinions squarely took on Section III.B. Justice Stevens, who wrote the principal dissent, noted the Court's "colorful hyperbole," but returned immediately to the federalism point, suggesting (rather unhelpfully) only that the Court's separation of powers point "contradicts *New York v. United States*."³³ And in a footnote, Justice Stevens asserted that the "use of state officials on an interim basis [did] not raise even arguable separation-of-powers concerns,"³⁴ yet failed to elaborate. Elsewhere in Justice Stevens's dissent, he employed the language of the separation of powers cases,³⁵ but he still missed Justice Scalia's point entirely. And if the other concurring or dissenting justices noticed Justice Scalia's separation of powers emendation, they neglected to mention it.³⁶

II. WHAT, PRECISELY, DID JUSTICE SCALIA DO?

Let us take a closer look at Section III.B. At the end of Section III.A, the Court quoted James Madison in *Federalist No. 51*, who wrote that the "compound republic of America" supplied a "double security" for the right of the people.³⁷ "[T]he power surrendered by the people is first divided between two distinct governments and then the portion allotted to each subdivision among distinct and separate departments."³⁸ Madison neatly described a vertical division of power between states and the federal government, and a horizontal separation of federal power among the three great departments. This provided a smooth segue from Justice Scalia's previous discussion of federalism to the second part of the "double security," separation of

33 *Id.* at 960 (Stevens, J., dissenting) (footnote omitted).

34 *Id.* at 960 n.22 (Stevens, J., dissenting).

35 *See id.* at 951 (Stevens, J., dissenting) (referring to his own approach to the historical record as a "functional approach"); *id.* at 959 (Stevens, J., dissenting) (referring to the "incentives for the National Government to aggrandize itself").

36 Justice O'Connor and Justice Thomas each concurred separately to emphasize the Tenth Amendment. *See id.* at 935 (O'Connor, J., concurring); *id.* at 936 (Thomas, J., concurring). Justice Souter dissented to argue that *The Federalist* supported federal conscription of the states. *See id.* at 970-76 (Souter, J., dissenting). Justice Breyer, also dissenting, discussed other nations' experiences with federalism. *See id.* at 976-77 (Breyer, J., dissenting).

37 THE FEDERALIST NO. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1961).

38 *Id.*; *see also Printz*, 521 U.S. at 922 (quoting THE FEDERALIST, *supra* note 37).

powers. At initial glance, Section III.B arguably stands on a coequal basis with Section III.A. But Section III.B is less fully developed and never acquires the stature of Section III.A.

First, in the single paragraph that comprises the section, the Court does not refer to any case.³⁹ Moreover, the Court cites none of the standard separation of powers opinions anywhere else in the opinion.⁴⁰ Furthermore, the sources that Justice Scalia actually invokes are an unusual lot. Apart from references to Sections 2 and 3 of Article II, the Court only relied on three sources: *Federalist No. 70*, a statement by James Wilson at the Pennsylvania ratifying convention, and a law review article. The Court has rarely cited *Federalist No. 70*. In fact, only two Justices on the modern Court have invoked it: Justice Scalia in his dissent in *Morrison*,⁴¹ and Justice Breyer in his concurrence in *Clinton v. Jones*,⁴² when he cited both *Federalist No. 70* and Justice Scalia's dissent in *Morrison*. In *Printz*, Justice Scalia also cited James Wilson's comments at the Pennsylvania ratification convention. Although Justice Scalia did not quote Wilson, Justice Scalia's declaration that "the Framers [insisted] upon unity in the Federal Executive . . . to ensure both vigor and accountability"⁴³ echoes Wilson's statement that "the executive authority is one" and outside this principle there is "neither vigor, decision, nor responsibility."⁴⁴ Finally, Justice Scalia cited an

39 See text accompanying note 29.

40 The Court previously referred to *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), but only for a point indirectly related to its later separation of powers discussion. See *Printz*, 521 U.S. at 908 n.2.

41 *Morrison v. Olson*, 487 U.S. 654, 729 (1988) (Scalia, J., dissenting). Justice Scalia quotes *The Federalist No. 70* to emphasize the unity in the executive and the accountability that this requires:

[The Founders] provided that all executive powers would be exercised by a single Chief Executive. As Hamilton put it, "[t]he ingredients which constitute safety in the republican sense are a due dependence on the people, and a due responsibility." The President is directly dependent on the people, and since there is only *one* President, *he* is responsible. The people know whom to blame, whereas "one of the weightiest objections to a plurality in the executive . . . is that it tends to conceal faults and destroy responsibility."

Id. (citations omitted) (emphasis in original).

42 520 U.S. 681, 712 (1997) (Breyer, J., concurring).

43 *Printz*, 521 U.S. at 922.

44 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 495 (Merrill Jensen ed., 1976) (statement of James Wilson) (emphasis in original). Wilson commented:

[T]he executive authority is one; by this means we obtain very important advantages. We may discover from history, from reasoning, and from experience, the security which this furnishes. The executive power is better to be trusted when it has no screen. Sir, we have a responsibility in the person of our Presi-

extensive and important article in the *Yale Law Journal* by Professors Steven Calabresi and Saikrishna Prakash, but he referred to no specific pages.⁴⁵ Thus, in the entire section, Justice Scalia offered two citations to the Constitution, no cases, and three very general citations to outside sources. Scalia's opinion, at least visually, implied that Section III.B's proposition is so clear that mere citation to the Constitution suffices, and the idea is so plain that no Justice has labored to repeat it in an opinion; the proposition may, nevertheless, be usefully supported by general reference to original and academic materials.

Second, even the Court's rhetoric has its source in Justice Scalia's dissent in *Morrison*. The Court in *Printz* referred to the "second element" of the "double security" provided by the Constitution as the "separation and equilibration of powers between the three branches."⁴⁶ Of course, the phrase "separation of powers" is a common and familiar term, but whence "equilibration of powers?" As strange as the phrase sounds, the phrase "separation and equilibration of powers" has appeared before in the *United States Reports*—three times, to be exact. It appeared twice in Justice Scalia's dissent in *Morrison*⁴⁷ and again in Justice Scalia's majority opinion in *Steel Co. v. Citizens for a Better Environment*.⁴⁸ Similarly, Justice Scalia's references to "unity in the Federal Executive" and the "unitary Federal Executive" are not only vintage Scalia, but straight out of *Morrison*.⁴⁹

dent; he cannot act improperly, and hide either his negligence, or inattention; he cannot roll upon any other person the weight of his criminality. . . . We secure *vigor*; we well know what numerous executives are. We know there is neither vigor, decision, nor responsibility in them. *Id.* (emphasis in original).

45 Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541 (1994). The article, which is 124 pages long, responds to Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994).

46 *Printz*, 521 U.S. at 922.

47 See *Morrison*, 487 U.S. at 704 (Scalia, J., dissenting) (referring to "the fountain-head of [our appointment and removal jurisprudence], the separation and equilibration of powers"); *id.* at 727 ("The purpose of the separation and equilibration of powers in general, and of the unitary Executive in particular, was not merely to assure effective government but to preserve individual freedom."); see also *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 30 (1998) (Scalia, J., dissenting) (referring to "separated and equilibrated powers").

48 523 U.S. 83, 101 (1998) (referring to the "constitutional elements of jurisdiction" as "an essential ingredient of separation and equilibration of powers").

49 *Morrison*, 487 U.S. at 727, 732 (Scalia, J., dissenting) (referring to the "unitary Executive"); see also *United States v. Fausto*, 484 U.S. 439, 449 (1988) (same). So far as I can determine, these are the first references to the "unitary executive" in the *United States Reports*. The first reference in federal cases to the "unitary executive" is

Third, aside from the citations and the rhetoric, Justice Scalia's theory of separation of powers in *Printz* reiterates the theory that he developed in his dissent in *Morrison*. In that case, the Court upheld provisions of the Ethics in Government Act of 1978⁵⁰ that created the Office of the Independent Counsel.⁵¹ The Court held that the Act did not violate separation of powers principles when it provided that a special panel of the D.C. Circuit appoint the independent counsel⁵² and that the Attorney General could remove the independent counsel only for "good cause."⁵³ The majority found that the court's appointment comported with the Appointments Clause because the independent counsel was an inferior officer of the United States.⁵⁴ The Court further held that neither the removal provision nor the "reduc[ti]on in] the President's ability to control the prosecutorial powers wielded by the independent counsel" violated the separation of powers.⁵⁵

For Justice Scalia, the lone dissenter in *Morrison*, the independent counsel provision "effect[ed] important change in the equilibrium of power,"⁵⁶ just as the Brady Act effected change in the "equilibration of powers."⁵⁷ His theory in *Morrison* and *Printz* rests on the following premises: (1) The Constitution commits to the President alone the executive power of the United States. As Justice Scalia stated in *Printz*, "[t]he Constitution does not leave to speculation who is to administer the laws enacted by Congress,"⁵⁸ and in *Morrison*, "[the Constitution] does not mean *some* of the executive power, but *all* of the executive

In re Sealed Case, 838 F.2d 476, 482 (D.C. Cir.), *rev'd sub nom. Morrison v. Olson*, 487 U.S. 654 (1988). The phrase also appeared in *Opinion of the Justices to the House of Representatives*, 425 N.E.2d 750, 752 (Mass. 1981).

50 28 U.S.C. §§ 591–599 (1994 & Supp. IV 1998). The Act expired June 30, 1999. *See id.* § 599.

51 *Morrison*, 487 U.S. at 659–60 (holding that the "provisions of the Act do not violate the Appointments Clause of the Constitution, Art. II, § 2, cl. 2, or the limitations of Article III, nor do they impermissibly interfere with the President's authority under Article II in violation of the constitutional principle of separation of powers").

52 *See id.* at 678 (stating that "once it is accepted that the Appointments Clause gives Congress the power to vest the appointment of officials such as the independent counsel in the 'courts of Law,' there can be no Article III objection to the Special Division's exercise of that power" described in 28 U.S.C. § 593).

53 *See id.* at 693 (holding that 28 U.S.C. § 596(a)(1) does not "interfere impermissibly with [the President's] Constitutional obligation to ensure the faithful execution of the laws").

54 *Id.* at 677.

55 *Id.* at 685, 693, 696.

56 *Id.* at 699 (Scalia, J., dissenting).

57 *Printz v. United States*, 521 U.S. 898, 922 (1997).

58 *Id.*

power.”⁵⁹ (2) The executive authority extends to the enforcement of federal laws, including conducting criminal prosecution (as in *Morrison*)⁶⁰ and supervising federal gun restrictions (as in *Printz*). (3) Accordingly, Congress may assign the execution of the laws only to officials subordinate to the President.⁶¹ As Scalia argued in *Morrison*, “the President’s constitutionally assigned duties include *complete* control over investigation and prosecution of violations of the law,”⁶² so the law cannot vest executive authority in an official whom the President can neither appoint nor remove. Thus, “the independent counsel is not an inferior officer because she is not *subordinate* to any officer in the Executive Branch (indeed, not even to the President).”⁶³ Similarly, in *Printz*, “[t]he Brady Act effectively transfer[red] [responsibility for enforcement] to thousands of CLEOs . . . who are left to implement the program without meaningful Presidential control (if indeed meaningful Presidential control is possible without the power to appoint and remove).”⁶⁴

In general, the Court has vigorously enforced the separation of powers when a statute or action grants one branch a power constitutionally committed to a coordinate branch of government—that is, when the branch “aggrandized” itself at the expense of a coordinate branch.⁶⁵ The Court, however, has not enforced the separation of powers as enthusiastically when one branch has “undermined, without appreciable expansion of its own power, the role of [another

59 *Morrison*, 487 U.S. at 705 (Scalia, J., dissenting) (emphasis in original).

60 Professor Krent has questioned the historical accuracy of this premise. See generally Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275 (1989); see also Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 72–74 (1990) [hereinafter Krent, *Fragmenting the Unitary Executive*]; Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 1990–91 (1993).

61 See Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1242 (1994) (“[I]f a statute vests discretionary authority directly in an agency official (as do most regulatory statutes) rather than in the President, the Article II Vesting Clause seems to require that such discretionary authority be subject to the President’s control.”).

62 *Morrison*, 487 U.S. at 710 (Scalia, J., dissenting).

63 *Id.* at 719 (Scalia, J., dissenting).

64 *Printz*, 521 U.S. at 922.

65 See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 734 (1986); *INS v. Chadha*, 462 U.S. 919, 956–59 (1983); *Buckley v. Valeo*, 424 U.S. 1, 138–40 (1976).

branch].”⁶⁶ The Court has not policed “encroachment” on the powers of a branch in the absence of “aggrandizement.”⁶⁷

In the encroachment cases, the Court has asked whether the reduction in power to the one branch (without an increase in power to another branch) “impermissibly undermined”⁶⁸ the branch or “prevent[ed] the . . . Branch from accomplishing its constitutionally assigned functions.”⁶⁹ In *Morrison*, Justice Scalia argued vigorously that the mere fact of *reduction* of a vested power violated the Constitution. It was “ultimately irrelevant *how much* the statute reduces Presidential control”⁷⁰ since “all purely executive power had to be in the President.”⁷¹ And in *Printz*, he explained that “if Congress could act as effectively without the President as with him” then “[t]hat unity would be shattered, and the power of the President would be subject to reduction.”⁷² Thus, for Justice Scalia, Congress cannot reduce the power of the President by conferring the power on some other entity, even if Congress has neither assumed that power for itself nor conferred it upon the federal judiciary. Under Scalia’s theory, the independent counsel statute and the Brady Act violated separation of powers because they lodged executive authority in an entity—an independent prosecutor and state law enforcement official—not subject to the President. It was also irrelevant for Justice Scalia’s purposes that the Brady Act had vested enforcement in public officials, albeit state officials. The Brady Act would have been equally infirm had it charged a private entity—say, IBM or the Rand Corporation—with enforcing the interim background check.

66 *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 856–57 (1986); see also *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 444–45 (1977).

67 See Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 YALE L.J. 51, 107 & n.276 (1994); see also *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 484–85 (1989) (Kennedy, J., concurring in the judgment) (arguing that the Court employs a balancing test when dealing with powers “within the general grant to the President of the ‘executive Power,’” but has “refused to tolerate *any* intrusion” on powers explicitly committed to the President).

68 *Schor*, 478 U.S. at 856.

69 *Nixon*, 433 U.S. at 443; see also *Morrison v. Olson*, 487 U.S. 684, 695 (1988) (quoting the same passage from *Nixon*).

70 *Morrison*, 487 U.S. at 708 (Scalia, J., dissenting) (emphasis in original).

71 *Id.* at 715 (Scalia, J., dissenting).

72 *Printz v. United States*, 521 U.S. 898, 923 (1997).

III. WHAT DOES *PRINTZ* MEAN FOR FUTURE SEPARATION OF POWERS CASES?

Justice Scalia's departure from the Court's prior separation of powers analysis is most notable for its brazenness, not for its novelty. The Justice boldly asserted his own well-known views on separation of powers as though they enjoyed a lineage as obvious as his arguments regarding federalism. But what happens next? How significant is Section III.B? Is it merely dicta, as some commentators and judges have suggested?⁷³ Or is it an alternative holding, entitled to some regard but less than a considered opinion, because the remainder of the justices did not consciously embrace it?⁷⁴ Or perhaps Section III.B represents what Justice Scalia said it was, an alternative holding, considered and consciously adopted by a majority of the Court?⁷⁵

Section III.B may be more than dicta, and it might well signal some movement by a majority of the Court in Justice Scalia's direction. Since the time Justice Scalia wrote his dissent in *Morrison*, several scholars have assessed the question of congressional power to assign law enforcement functions outside of the executive branch.⁷⁶ Other scholars have addressed the narrower issue of Congress' power to assign enforcement responsibility to the states.⁷⁷ The question that the Court answered in *Printz* has had better venting in the academic literature than in case law. It would be easier to dismiss Justice Scalia's articulation if he was merely repeating what he wrote in *Morrison* and was doing so shortly after *Morrison* was issued. Given the additional academic attention devoted to the question, *Printz* may deserve more credence.

Justice Scalia may have felt emboldened by the criticism of Independent Counsels Lawrence Walsh and Kenneth Starr, and the Ethics

73 Professor Kinkopf, emphatically and repeatedly, called Scalia's separation of powers discussion "dictum." Kinkopf, *supra* note 12, at 375-83; *see also* Riley v. St. Luke's Episcopal Hosp., 196 F.3d 514, 525 (5th Cir. 1999) (referring to the separation of powers discussion in *Printz* as "dicta"), *rev'd en banc*, 252 F.3d 749 (5th Cir. 2001); *id.* at 551 (Stewart, J., dissenting) (describing the *Printz* Court as "rest[ing] its decision not on separation of power doctrine but upon notions of federalism").

74 Professor Caminker suggested that this section was "an attempted end-run around the Court's rejection of [Scalia's] . . . position in [*Morrison*]" and "wonder[ed] about *Printz*'s precedential value on this point." Caminker, *supra* note 12, at 226.

75 *See* City of New York v. United States, 179 F.3d 29, 34-35 (2d Cir. 1999) (citing *Printz* as resting on federalism and separation of powers concerns).

76 *See, e.g.,* Krent, *Fragmenting the Unitary Executive*, *supra* note 60.

77 *See, e.g.,* Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers To Implement Federal Law?*, 95 COLUM. L. REV. 1001 (1995); Evan Caminker, *The Unitary Executive and State Administration of Federal Law*, 45 U. KAN. L. REV. 1075 (1997); Prakash, *supra* note 60.

in Government Act.⁷⁸ Perhaps Justice Scalia anticipated correctly the vindication of his *Morrison* dissent in the recent demise of the independent counsel provisions of the Act. The academy came late to Justice Scalia's defense,⁷⁹ but it did defend his *Morrison* dissent (at least on policy grounds)⁸⁰ when it became obvious that "nearly every float in the parade of horrors predicted by Justice Scalia ha[d] come to pass."⁸¹ There are other, more substantive reasons to take Section III.B seriously. The fact that the Court revisited the propriety of Congress assigning federal law enforcement outside of the executive branch in a case involving federalism demonstrates the profundity of the principle. Congress has enacted a number of creative enforcement schemes involving states and private citizens. For example, Congress may encourage state enforcement of federal guidelines through its spending and taxing authority, or it may encourage state cooperation by giving the states the option of enforcing federal guidelines or facing federal preemption of state law followed by federal enforcement.⁸²

Given the Court's current view of cooperative federalism, objections to enforcement of federal law by parties outside the executive

78 See David A. Sklansky, *Starr, Singleton, and the Prosecutor's Role*, 26 FORDHAM URB. L.J. 509, 510 (1999) ("Justice Scalia could be excused for feeling a little smug.").

79 See, e.g., Akhil Reed Amar, *Nixon's Shadow*, 83 MINN. L. REV. 1405, 1414–15 (1999) (stating that Scalia's opinion in *Morrison* was "brilliant and prescient"); Susan Low Bloch, *Cleaning Up the Legal Debris Left in the Wake of Whitewater*, 43 ST. LOUIS U. L.J. 779, 782 (1999) ("I now believe that Justice Scalia was right in *Morrison v. Olson* when he warned us of the dangers of the independent counsel statute."); Robert F. Drinan, *Reflections on Lawyers, Legal Ethics and the Clinton Impeachment*, 68 FORDHAM L. REV. 559, 561 (1999) ("I sometimes wish that the United States Supreme Court had agreed with Justice Scalia's sole dissent in *Morrison v. Olson*."); see also Michael Stokes Paulsen, *Nixon Now: The Courts and the Presidency After Twenty-Five Years*, 83 MINN. L. REV. 1337, 1394 (1999) ("A curious byproduct of Ken Starr's investigation of President Clinton's misconduct has been virtual unanimity that the Independent Counsel arrangement is, if not flatly unconstitutional, deeply problematic and should be scrapped.").

80 See, e.g., Cass R. Sunstein, *Bad Incentives and Bad Institutions*, 86 GEO. L.J. 2267, 2268 n.3 (1998) ("Many of Justice Scalia's objections do point to serious problems in the Act . . . stress[ing] those problems as a policy matter."); Cass R. Sunstein, *Lessons from a Debacle: From Impeachment to Reform*, 51 FLA. L. REV. 599, 610 (1999) ("Justice Scalia is not a gloater, but he must have been something like the most gratified man in Washington to hear people who do not normally like Justice Scalia quoting him and admiring him for his prescience. And his dissenting opinion in *Morrison* was really on the money . . .").

81 Nick Bravin, Note, *Is Morrison v. Olson Still Good Law? The Court's New Appointments Clause Jurisprudence*, 98 COLUM. L. REV. 1103, 1106 (1998) (citation omitted).

82 See *New York v. United States*, 505 U.S. 144, 167–68 (1992); *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288–89 (1981).

branch should be least persuasive in cases of *state* (as opposed to private) enforcement. Because the Constitution does not demand any particular form of separation of powers within a state,⁸³ all of the states have some variation of the theme of separation of powers that should ensure greater “vigor and accountability” in state enforcement of federal law than we would find in private or foreign enforcement of federal law. Furthermore, state officials are generally subject to the same kind of checks and balances as federal officials, and their jurisdiction under the Brady Act extended no further than their jurisdiction under state law.⁸⁴ State governments are, after all, *governments* established and maintained under the United States and state constitutions.

Thus, apart from regimes that *commandeer* the states, the Court should be most reluctant to find *separation of powers* objections in a creative scheme involving the states. In other words, the facts in *Printz* supply the strongest case for Court approval of enforcement outside the executive branch enforcement by state governments—and the Court rejected it. A scheme involving enforcement of federal laws by non-governmental, quasi-governmental, or foreign governmental entities lacks the same assurances of checks and balances and limited jurisdiction that exists with public officers. Such a scheme supplies the weakest case for surviving a separation of powers challenge. *Printz* does not bode well for more creative schemes involving non-governmental enforcement, such as *qui tam* actions.⁸⁵

This last point invites the next question: Does the Court’s separation of powers analysis ever stand independent of its commandeering principle? Justice Stevens argued that the majority’s principle could not stand because Congress also reduces the executive’s enforcement responsibility when it encourages voluntary state enforcement schemes, and the Court has approved of those arrangements.⁸⁶ The majority acknowledged the point, but answered that separation of powers objections do not arise when the states “voluntarily administer federal programs.”⁸⁷ Here the strength of the Court’s federalism principle manifests itself in its separation of powers analysis: the exec-

83 See *Withrow v. Larkin*, 421 U.S. 35, 52 (1975).

84 See 18 U.S.C. § 922(s) (1994) (stating that a state’s chief law enforcement officer must take reasonable steps to determine if buyer’s receipt of handgun would violate federal, state, or local law).

85 See, e.g., False Claims Act, 31 U.S.C. §§ 3729–3733 (1994); see also *infra* text accompanying notes 94–99.

86 See *Printz v. United States*, 521 U.S. 898, 960–61 (1997) (Stevens, J., dissenting).

87 *Id.* at 923 n.12.

utive would not object to the states voluntarily enforcing federal law because, as Justice Scalia explained, "voluntary state participation significantly reduces the ability of Congress to use this device as a means of reducing the power of the Presidency."⁸⁸ In other words, when states voluntarily enforce federal law, the executive (indeed, the federal government as a whole) is relieved of responsibility, but the same could be said of any state-initiated enforcement that persuades Congress that federal action is not needed. So long as the states enforce the state law or federal guidelines voluntarily, the executive remains unitary; Congress has not charged the states with taking care that federal law is faithfully executed.

There is another way of characterizing what the Court said. The federal government and the states are dual sovereigns. In accordance with their respective constitutions, the people have conferred governmental powers on the states and on the federal government. Some of the powers are concurrent, some are exclusive, and some powers that governments might be tempted to exercise are denied to either government. The exercise of coercive force is an essential government function; in our federalist system, that means it is a function of either the state or the federal government (or both). When Congress acts within its exclusive powers, the states may not act. In cases where the Constitution has committed the power exclusively to the federal government, even congressional inaction cannot justify state action.⁸⁹ By contrast, when Congress acts in an area in which it shares authority with the states, congressional regulation coexists with state regulation unless the state regulation actually conflicts with federal regulation, congressional regulation expressly preempts state regulation, or congressional regulation impliedly preempts state regulation (by occupying the field of legislation).⁹⁰ When Congress permits state regulation in accordance with federal guidelines, Congress has merely invited state participation in an area which Congress might regulate directly and preempt all state regulation. Voluntary state participation in federal programs permits the state to retain some power to administer the program under state policies (consistent with federal guidelines) rather than suffer complete preemption. Such arrangements allow the states to regulate areas for which the federal government might otherwise assume responsibility. Although the arrangement enables Congress to avoid establishing a costly federal bureaucracy, state en-

88 *Id.*

89 *See, e.g.,* *S. Pac. Co. v. Arizona*, 325 U.S. 761, 769 (1945).

90 *See, e.g.,* *Grade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992); *Pennsylvania v. Nelson*, 350 U.S. 497, 502-05 (1956).

forcement remains voluntary; the states may withdraw at any time and for any reason, understanding that the consequence of their withdrawal may be direct federal regulation. Congress has great incentive to consider state policies and interests in the federal guidelines, lest the states withdraw from the program and force Congress to regulate the matter directly; the threat that states will refuse to participate gives the states some check on Congress. The whole arrangement is truly cooperative and does not erode the President's power.

In essence, in this cooperative arrangement, the states have made the federal guidelines their own and enforced the latter. If the states refuse to follow federal guidelines, Congress has few options. Congress may authorize federal enforcement, but it cannot conscript the states in the effort. Rather, it must assign the task to the President. Thus, as Justice Scalia explained, when Congress encourages state decisions to enforce federal guidelines, Congress has limited power to reduce presidential powers because the scheme depends on the voluntary cooperation of the states. State enforcement of federal guidelines reduces the opportunity for presidential enforcement, but it does not reduce any federal power that the executive would logically possess. When the Court stated that the Brady Act reduced the President's power,⁹¹ it was because Congress simply required the states, without their consent, to operate the federal program. It was not because Congress had entered into an arrangement of cooperative federalism in which the states might voluntarily bear the costs of administration, knowing that if they declined, Congress might be forced to regulate the matter directly. The Brady Act violated the states' sovereignty, by regulating the states as states,⁹² and it reduced the President's prerogatives as the chief enforcer of federal laws.

There is a sense in which the Court's point about separation of powers may lack any significance independent of the Court's broader argument over the commandeering of the state. The separation of powers objection to this state-federal arrangement could only arise in a case in which there was also a federalism objection. This may help explain why the dissent glossed over the separation of powers point without realizing the broader implications of the theory; it may also explain the acquiescence of at least two members of the majority (Chief Justice Rehnquist and Justice O'Connor) who previously de-

91 See *Printz*, 521 U.S. at 922–23.

92 See *Reno v. Condon*, 528 U.S. 141, 151 (2000) (holding that Congress may regulate states to the extent states participate in interstate markets); see also Jay S. Bybee, *The Tenth Amendment Among the Shadows: On Reading the Constitution in Plato's Cave*, 23 HARV. J.L. & PUB. POL'Y 551, 560 & n.48 (2000) (discussing *Printz* and *Condon*).

clined to join Justice Scalia.⁹³ It does not explain why the remainder of the Court failed to understand, or at least acknowledge, the implications of Justice Scalia's analysis to other entities not subject to presidential control.

The broadest implications of the separation of powers argument in *Printz* are for those creative arrangements in which Congress has committed the enforcement of federal law to non-governmental (or at least non-federal and non-state) entities.⁹⁴ *Printz* presented a strategic context in which Justice Scalia might press his views of separation of powers; the principle was inextricably intertwined with the federalism point, making it easy for those who joined him on the broader federalism analysis to join him in Section III.B as well. Moreover, the point was made in the most compelling context, an arrangement in which upon separation of powers grounds there would be the least objection to a cooperative enforcement arrangement that involved diminishing the President's powers in favor of state and local law enforcement officials. The implications, however, for such assignments outside of the federal-state context may be enormous. *A fortiori*, *Printz* threatens schemes involving enforcement of federal law by non-state entities. I previously mentioned *qui tam* statutes as a prime candidate for this *Printz* analysis. In *Vermont Agency of Natural Resources v. United States*, the Supreme Court in an opinion by Justice Scalia, upheld the standing of *qui tam* relators.⁹⁵ The Court noted, however, that it "express[ed] no view whether *qui tam* suits violated Article II, in particular the Appointments Clause of Section 2 and the "Take Care" Clause of Section 3."⁹⁶ The Court might easily have added a citation to Section III.B. More recently, the Fifth Circuit has engaged Section III.B. In *Riley v. St. Luke's Episcopal Hospital*, the court considered a constitutional challenge to a federal *qui tam* provision. A divided panel of the Fifth Circuit struck down the provision, and arguments over Section III.B figured in the majority and dissenting opinions.⁹⁷

93 Only Chief Justice Rehnquist and Justices Stevens, O'Connor, and Scalia remain from the Court that decided *Morrison*. Justice Kennedy did not participate in the case.

94 See Krent, *Fragmenting the Unitary Executive*, *supra* note 60, at 84–93 (discussing examples).

95 529 U.S. 765, 787 (2000).

96 *Id.* at 778 n.8.

97 196 F.3d 514, 524–25 (quoting most of Section III.B, and later referring to it as "dicta"), *vacated*, 196 F.3d 561, *rev'd en banc*, 252 F.3d 749 (5th Cir. 2001); *id.* at 551–52 (Stewart, J., dissenting) (referring to Section III.B, and arguing that *Printz* "rested its decision not on separation of powers doctrine but upon notions of federalism incorporated in the Constitution"); see also Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens and the Enforcement of Civil Rights*, 100

After the Fifth Circuit vacated the panel's opinion and reheard the case en banc, the court upheld the provision.⁹⁸ The dissenting judges again cited Section III.B as evidence that the *qui tam* provision violated the Take Care Clause.⁹⁹ It is not likely that we have heard the last on the *qui tam* issue.

Finally, the majority's opinion (including its asides on the relative importance of the appointment and removal power) calls into question *Humphrey's Executor v. United States*,¹⁰⁰ threatening the continued independence of the fourth branch of government, the independent regulatory agencies.¹⁰¹ For those who advocate a constitutional theory of the unitary executive, the demise of *Humphrey's Executor* would be the real prize. The Court in *Humphrey's Executor* held that Congress could restrain the President's removal of commissioners of the Federal Trade Commission; the decision appears to conflict with Chief Justice Taft's lengthy and scholarly opinion in *Myers v. United States*.¹⁰² Justice Scalia has repeatedly attacked *Humphrey's Executor* or otherwise attempted to diminish its impact. For example, in his *Morrison* dissent, Justice Scalia announced that the majority opinion "swept [*Humphrey's Executor*] into the dustbin of repudiated constitutional principles," because the Court was even less precise about the President's removal authority in *Morrison* than it had been in *Humphrey's Executor*.¹⁰³ In *Mistretta v. United States*, Justice Scalia (again in lone

COLUM. L. REV. 1384, 1437-39 (2000) (discussing *Riley*). But see *United States ex rel. Wright v. Cleo Wallace Ctrs.*, 132 F. Supp. 2d 913, 920 (D. Colo. 2000) (declining to follow panel opinion in *Riley*); *United States ex rel. Fender v. Tenet Healthcare Corp.*, 105 F. Supp. 2d 1228, 1232-33 (N.D. Ala. 2000) (same).

98 252 F.3d 749, 758 (5th Cir. 2001) (en banc).

99 *Id.* at 760 (Smith, J., dissenting).

100 295 U.S. 602 (1935); see also Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1155, 1170 (1992) ("The non-unitarian position derives support from two major Supreme Court decisions: *Humphrey's Executor v. United States* and *Morrison v. Olson*.").

101 See generally Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

102 272 U.S. 52 (1926).

103 *Morrison v. Olson*, 487 U.S. 654, 725 (1988) (Scalia, J., dissenting). Justice Scalia added:

One can hardly grieve for the shoddy treatment given today to *Humphrey's Executor*, which, after all, accorded the same indignity (with much less justification) to Chief Justice Taft's opinion 10 years earlier in *Myers v. United States*, 272 U.S. 52 (1926)—gutting, in six quick pages devoid of textual or historical precedent for the novel principle it set forth, a carefully researched and reasoned 70-page opinion. It is in fact comforting to witness the reality that he who lives by the *ipse dixit* dies by the *ipse dixit*.

Id. at 725-26.

dissent) warned that *Mistretta* might “aptly be described as the *Humphrey’s Executor* of the Judicial Branch, and I think we will live to regret it.”¹⁰⁴ He wrote in *Freytag v. Commissioner of Internal Revenue* that “adjusting . . . the Constitution to compensate for *Humphrey’s Executor* is a fruitless endeavor.”¹⁰⁵ Thus far, Justice Scalia’s warnings have gone unheeded.¹⁰⁶ *Humphrey’s Executor* has shown resilience and vitality.¹⁰⁷

We do not have to read very far between the lines to understand that *Humphrey’s Executor* remains a substantial impediment to Justice Scalia’s theory of executive power. To the extent that he has turned the Court in *Printz*, he has made *Printz* an embarrassment to *Humphrey’s Executor*, and by extension, to *Morrison* and *Mistretta*.

CONCLUSION

We have not seen the last of Section III.B of Justice Scalia’s opinion in *Printz*. Justice Scalia’s theory of the unitary executive is a coherent, powerful theory, although it is a theory that the modern Court has largely resisted. It is surely ironic that in a case as important and as contentious as *Printz*, the Justices apparently overlooked Justice Scalia’s theory. Justice Scalia will be back with *Printz*. Meanwhile, the next time the fire alarm goes off, everyone check your pockets.

104 488 U.S. 361, 425 (1989) (Scalia, J., dissenting).

105 501 U.S. 868, 921 (1991) (Scalia, J., concurring).

106 See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 851 (1989) (arguing that *Humphrey’s Executor* “essentially overruled” *Myers*); Antonin Scalia, *Historical Anomalies in Administrative Law*, 1985 YEARBOOK (SUPREME COURT HISTORICAL SOCIETY) 103, 106–10.

[C]uriously enough, *Humphrey’s Executor’s* six-page constitutional pronouncement on a matter of central importance to the structure of government—six pages concededly contrary to the much more extensive analysis in the pre-New Deal case of *Myers* nine years earlier—seems to have grown rather than diminished in its stature, or at least in its consequences.

Id. at 110; see also *Synar v. United States*, 626 F. Supp. 1374, 1396–1402 (D.D.C.) (three-judge court per curiam), *aff’d sub nom.* *Bowsher v. Synar*, 478 U.S. 714 (1986). It is generally assumed that then-Circuit Judge Scalia wrote the three-judge panel’s decision.

107 See, e.g., *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 487 (1989) (Kennedy, J., concurring); *Bowsher v. Synar*, 478 U.S. 714, 724–26 (1986) (relying on *Humphrey’s Executor* and concluding that Congress cannot have the power to remove executive officials except by impeachment); *Wigginton v. Centracchio*, 205 F.3d 504, 514 n.13 (1st Cir. 2000); *Swan v. Clinton*, 100 F.3d 973, 987 (D.C. Cir. 1996).