SCALIA'S EVOLUTION: A MATTER OF ADMIRATION

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What follows is a lightly footnoted version of a lecture delivered at Harvard Law School on October 19, 2022, as part of the Herbert W. Vaughan Academic Program. A video of the lecture is available online at https://youtu.be/ajftWFpSLzw and the complete written remarks can be accessed at https://www.harvard-jlpp.com/the-2022-herbert-w-vaughan-academic-program.

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It's always a joy to be back in Cambridge. I went to law school here during Justice Scalia's Mesozoic era—after his Original period and before his Evolved one. And after I graduated, I clerked for the great Judge David Sentelle on the D.C. Circuit—a mentor I proudly share with Professor Vermeule. In fact, Judge Sentelle loved then and still loves today to brag about his beloved Adrian. Apropos of today's conversation, Judge Sentelle once relayed to me this quote from Justice Scalia: "Adrian is the only person ever to clerk in the Scalia chambers and the Sentelle chambers and to be a conservatizing influence in both."

So far be it from me to dispute Professor Vermeule's understanding of a judicial mentor we did *not* share. But I have two principal reservations about his take on the Original Scalia. The first is about the facts. And the second is about the law. Then I'll wrap up with a point on which we agree.

I. FACTS

Let me start with the facts. I struggle to recognize the picture of "Original Scalia" that Professor Vermeule paints. That's in part because that picture is missing the two most important colors.

When I think about the early or "Original" Scalia, I think of two of his most towering opinions, separated by seven months in the 1988–1989 *annus mirabilis*. But I was surprised to hear neither mentioned this afternoon. The first was *Morrison v. Olson*,[1] and the second was *Mistretta v. United States*.[2] They were 7-1 and 8-1 decisions respectively, with Scalia speaking only for himself—just as he did when he concurred alone in *Green v. Bock Laundry*[3] and dissented alone in *Webster v. Doe*.[4] If we focus only on the latter two and ignore the former two, we get at most half the picture of the Original Scalia.

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[1] 487 U.S. 654 (1988) (Scalia, J., dissenting).

[2] 488 U.S. 361 (1989) (Scalia, J., dissenting).

[3] 490 U.S. 504 (1989) (Scalia, J., concurring).

[4] 486 U.S. 592 (1988) (Scalia, J., dissenting).

In *Morrison*, Scalia stood alone in his belief that the independent counsel statute was unconstitutional because it violated the separation of powers, which our Constitution established to "preserve individual freedom."[5] As Scalia put it, "the Framers of the Federal Constitution . . . viewed the principle of separation of powers as the absolutely central guarantee of a just Government. . . . Without a secure structure of separated powers, our Bill of Rights would be worthless."[6] Scalia saw it as his judicial duty to "effectively . . . resist[]" the "gradual concentration of the several powers in the same department."[7] Sometimes, he said, threats to the separation of powers "come before the Court clad, so to speak, in sheep's clothing."[8] But not always. In the case of the delegation effectuated by the independent counsel statute, the "wolf comes as a wolf."[9]

Seven months later in *Mistretta*, Scalia stood alone in concluding that the guidelines promulgated by US Sentencing Commission were unconstitutional. With disgust virtually seething through the pages of the U.S. Reports, Scalia said of the Commission that there is no place in our constitutional system for a "junior-varsity Congress."[10] He remarked that "[i]t is difficult to imagine a principle more essential to democratic government than that upon which the doctrine of unconstitutional delegation is founded: Except in a few areas constitutionally committed to the Executive Branch, the basic policy decisions governing society are to be made by the Legislature. Our Members of Congress could not, even if they wished, vote all power to the President and adjourn *sine die*."[11]

II. LAW

Why are these cases so important? By all accounts, *Morrison* and *Mistretta* rank amongst Justice Scalia's most meaningful opinions of any kind, at any part of his career. Both are literally in the book THE ESSENTIAL SCALIA,[12] and the Justice was known to have been particularly proud of both throughout his career. I'd think any account of the Original Scalia must take account of them.

But the real reason these cases are important is because they tell us about something that was central to Justice Scalia in *all* his periods—Original, Mesozoic, and Evolved. Namely, the separation of powers. In *Morrison* and in *Mistretta*, Scalia railed against Congress's efforts to delegate powers. He chastised Congress's efforts to blur the lines between the legislative, executive, and judicial departments. And he even quoted Madison who in turn quoted Montesquieu for the proposition that tyranny results from the concentration of all powers—legislative, executive, and judicial—in the hands of one body.

Of course, Justice Scalia ultimately rejected the nondelegation argument in *Mistretta*. And he even more forcefully purported to limit the doctrine in *Whitman v. American Trucking*

[5] *Morrison*, 487 U.S. at 727.

[6] Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

[7] *Id.* at 698 (quoting THE FEDERALIST NO. 51 (James Madison)).

[8] *Id.* at 699.

[9] *Id.*

[10] Mistretta v. United States, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting).

[11] *Id.* at 415.

[12] ANTONIN SCALIA, THE ESSENTIAL SCALIA: ON THE CONSTITUTION, THE COURTS, AND THE RULE OF LAW 43–48, 53–61 (Jeffrey S. Sutton & Edward Whelan eds., 2020).

Associations.[13] But the point is that Justice Scalia was staunchly attendant to the separation-of-powers principles underlying the nondelegation doctrine. Indeed, his only concern about the doctrine was, fittingly, a separation-of-powers concern that judges wouldn't be able to apply it consistently because "it is not an element readily enforceable by the courts."[14] That doesn't mean Original Scalia thought the Constitution could be interpreted to allow carte blanche delegations to administrative agencies. Quite the contrary: "the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system," particularly the separation of powers.[15]

So I do not understand how Professor Vermeule can say a goal—much less the "major point"—of Original Scalia's jurisprudence "was, expressly, to protect and expand the executive power."[16] To my eyes, *Morrison* and *Mistretta* stand for the opposite. Both said the Constitution's allocations of power must remain inviolate—none can or should be expanded at the cost of any other.

Now, Professor Vermeule is quite right that Original Scalia recognized the distinction between positive law and background unwritten law. (I might disagree that later or Evolved Scalia lost that focus; in my view, *all* the Scalias recognized the importance of general-law principles in our constitutional order.) But to the extent Original Scalia understood *any* background principle of general law to trump all others, that paramount principle was the separation of powers. In *Morrison*, for example, Original Scalia wrote: "[I]t is a truism that constitutional protections have costs. *While the separation of powers may prevent us from righting every wrong, it does so in order to ensure that we do not lose liberty*."[17]

Those do not sound like the words of a man who thinks courts or administrative agencies have the power to "right every wrong"—or, in Professor Vermeule's words, to exercise case-specific "dispensations." Rather, those sound like the words of someone who understands the Constitution to separate governmental powers in a way that places such dispensations out-of-bounds for the sake of preserving a broader constitutional structure and the more general principles of liberty embedded in the document.

III. AGREEMENT

Finally, a point where Professor Vermeule and I wholeheartedly agree: The question of "who legitimately decides" is of paramount importance. It was important to Aquinas. It was important to the American Founders. And as I believe *Morrison* and *Mistretta* illustrate, it was important to Original Scalia.

As far as I can tell, however, it was not the central focus of Original Scalia's thinking on *administrative* law. I read and re-read the Administrative Law Lecture[18] that Justice Scalia gave at Duke in 1990 and that Professor Vermeule referenced. That lecture does support Professor

[13] 531 U.S. 457, 472–76 (2001).
[14] *Mistretta*, 488 U.S. at 415.
[15] *Id.*
[16] Adrian Vermeule, *The Original Scalia*, 2023 HARV. J. L. & PUB. POL'Y PER CURIAM 2, *10 (2023).
[17] Morrison v. Olson, 487 U.S. 654, 710 (1988) (emphasis added) (quotation omitted).
[18] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 10 J. NAT'L ASS'N ADMIN. L. JUDGES 118 (1990).

Vermeule's arguments in some ways. For example, he's quite right that Justice Scalia was more trusting of *Chevron* in 1990 than he was in later years.

But the lecture doesn't fit neatly into Professor Vermeule's theory in other ways. For example, Justice Scalia concludes the lecture by noting that he thinks most statutory text is crystal clear, which means that he will be less willing to reach *Chevron*'s second step and hence less willing than others might be to defer to agencies' interpretations.[19] So even in 1990, Original Scalia's understanding of *Chevron*'s domain was narrower than most.

And more to the point of the present discussion, no part of that lecture defends *Chevron* (or any other proposition of administrative law) as an answer to the "who legitimately decides" question. Rather, Scalia's defense of *Chevron* in 1990 was pragmatic. He thought it "reflects the reality of government" and hence "adequately serves its needs"—both in terms of Congresses that want to delegate power and agencies that want to wield it.[20] It wasn't until much later in his career that Justice Scalia confronted the question that hangs over so many of our debates today—namely, even if the natural law tradition had a discernible monolithic content regarding administrative discretion, *and* even if it's true that Roman magistrates had significant powers to exercise "dispensation," what if anything does that say about the original public meaning of *our* Constitution, *its* vesting clauses, and the vast array of administrative agencies that do *far more* than "dispense" today?

When Justice Scalia got around to wrestling with that latter question, his approach was deeply rooted in our Constitution and the debates our Founders had in the 1780s about how We the People should organize the government. It wasn't, as far as I can tell, rooted in Aquinas. Nor was it necessarily rooted in Aristotle's POLITICS, which provides much of Professor Vermeule's ammo for today's talk. But I'd suggest that Justice Scalia's evolution, if it really was one, was rooted in Aristotle's ETHICS. Aristotle thought that a life well lived—a life of virtue—is the pursuit of an unattainable yet still worthwhile ideal. Each of us hopes that the person we are in old age is wiser and further in that pursuit than the person we were at 50, or at 25. That's why, I think, Justice Scalia wrote in his last full term on the Court: "the life of the law is experience."[21] Insofar as the Evolved Scalia was a wiser Scalia—one who learned from his decades of experience to examine previously unexamined premises and to seek answers to previously unasked questions—then I'm not sure that's such a bad thing. Aristotle certainly would've admired the effort.

[19] *Id.* at 129.

[20] *Id.* at 130.

[21] Johnson v. United States, 576 U.S. 591, 601 (2015).