THE ORIGINAL SCALIA

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INTRODUCTION

I would like to ask us all today to participate in a kind of thought experiment. Actually, what I propose is an exercise in heroic forgetting. I would ask us all to put aside everything we think we know about Justice Scalia's jurisprudence and imagine we are assessing that jurisprudence as of roughly the late 1980s and for some time after. I will call this version of Scalia original Scalia." As we will see, original Scalia turns out to be remarkably different from the Scalia who emerged later in his career and who quite definitely dominates around 2013–2016, a version I will call evolved Scalia."

My basic claim will be that original Scalia advanced a view of legal interpretation with two notable features. First, it is entirely consistent with the approach to legal interpretation advanced in the classical legal tradition. Indeed, it is expressly premised on the views of Aristotle, who in turn powerfully influenced St. Thomas Aquinas and the civilian lawyers of the tradition. Although my approach here is emphatically not biographical, but instead based on objective interpretation of Scalia's published work both judicial and academic, I note that Scalia had a thoroughly classical education at a Catholic high school[1] and at Georgetown University in the 1950s.[2] We should hardly be surprised to discover that his thinking was deeply influenced by this milieu.

Second, original Scalia takes an expansive view of the administrative state; indeed, he defends a view, one with deep classical roots,[3] according to which the executive and the administrative

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[1] JOAN BISKUPIC, AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA 21 (Farrar, Straus and Giroux 2009) (Scalia earned a scholarship to Xavier High School, an all-boys Jesuit institution in lower Manhattan).

[2] *Id.* at 25 (Graduating valedictorian in 1957).

[3] ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (Polity Press 2022).

agencies represent the living voice" of our law.[4] This is an account of the American small-c, unwritten constitutional order that translates and adapts the classical approach to the circumstances of our own institutions.

Evolved Scalia to some degree abandoned or qualified these commitments. In my view the transition from original to evolved Scalia is a kind of synecdoche for a profound transition in the conservative legal movement over roughly the same period, resulting in American legal conservatism becoming increasingly focused on criticism and limitation of the administrative state. Hence my focus will be on the role of the administrative state in Scalia's thinking, not only because that is my favorite area of law and legal theory, but because that topic has become ground zero for current legal conflicts.

THE ANNUS MIRABILIS

In the remarkable period 1988–1989, an *annus mirabilis* in the sphere of law, Justice Scalia published four major academic articles, all of which are still highly influential in public law theory today, while simultaneously writing some of his most influential opinions. In that year, Scalia published

(1) "The Rule of Law as a Law of Rules,"[5] in which, I will claim, his view of judicial interpretation of the law expressly tracks that of Aristotle and Aquinas.

(2) "Judicial Deference to Administrative Interpretations of Law,"[6] a leading defense of the *Chevron* principle of deference to administrative agencies, an article that still structures our debates about *Chevron*.[7] Here and elsewhere, I will claim, original Scalia advances a vision of administrative agencies as the authorized dispensers of what the classical lawyers would have called *aequitas* or *epikeia*, case-specific adjustments necessary in hard cases, when general rules of positive law are ambiguous, silent, incomplete or absurdly broad in the circumstances.

(3) "Assorted Canards of Contemporary Legal Analysis,"[8] an article an article that, among other things, offers a withering criticism of clear statement rules—in terms that would easily cover the Court's recent use of a clear statement rule called the "major questions doctrine" to limit agency regulatory authority.[9]

(4) "Originalism: The Lesser Evil"[10] - a defense of originalism principally on public-interest grounds very different than those that later became dominant, as I will explain, although the article also contains the seeds of the later "jurisprudential turn" to more abstract and philosophical justifications of originalism.

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[4] *Id.* at 38.
[5] Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).
[6] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1988 DUKE L.J. 511 (1989).
[7] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).
[8] Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581 (1989).
[9] W. Virginia v. Env't Prot. Agency, 213 L. Ed. 2d 896 (2022).
[10] Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

(5) And finally, in 1988 and 1989, on the judicial side of his work, Scalia wrote separate opinions in *Webster v. Doe*[11] and *Green v. Bock Laundry*[12] that appear in a dozen casebooks and that, I will suggest, tried to write into our public law the classical distinction between *lex* and *ius*, between posited civil law and general background principles of law not rooted in any particular positive enactment.

Taking these sources together, let me try to outline a coherent interpretation of the thinking of original Scalia. Of course appropriate cautions are necessary. As with all interesting and complicated legal thinkers, coherent interpretations are inevitably somewhat selective. There were latent tensions within Scalia's thought all along and multiple strands not wholly consistent with one another, and these strands overlapped at any given time. The wheat and the tares grew up alongside one another. Still, there is, I believe, a highly plausible reconstruction of the basic thinking of original Scalia that I will call the model of *administrative equity,* and that is entirely consistent with the classical legal tradition, and inspired by it in important part.

THE CLASSICAL MODEL

To understand this model, we have to begin with the classical legal theory of Aristotle and St. Thomas Aquinas, who closely tracks Aristotle in this regard, and of the *ius commune*, the mainstream of the classical legal tradition that heavily influenced the Anglo-American common law. As we will see, this classical heritage is a direct and explicit influence on original Scalia. What original Scalia adds is a kind of interpretation, adaptation, development or translation of the classical heritage for the circumstances of the modern administrative state.

The baseline idea of the classical approach, as Aquinas argues, expressly quoting Aristotle, is that laws framed in general terms, as rules, conduce to the overall good of the community. Although ideally, Aquinas says, the animate justice [of the living judge] is better than the inanimate justice of the laws," the problem is that the animate justice of the judge is not found in many men and . . . can be distorted." Therefore it is necessary, whenever possible, for the law to determine what the judgment should be, and for very few matters to be entrusted to the decision of men." Quoting and citing Aristotle, Aquinas therefore proceeds to defend the proposition that it is better that all things be regulated by law than left to the decisions of judges." Both Aristotle and Aquinas, in other words, urge that lawmakers should formulate general laws that address the central or most common cases, and that interpreters should follow those rules insofar as possible.

There are three reasons, Aquinas holds, for this preference for law in the form of general rules: first, it is easier to find a few wise men able to frame general laws than the many wise men who would be needed to judge in every single particular case; second, because those who make the general law do so beforehand and take many instances into consideration, whereas the particular case has to be pronounced as soon as it arises and by itself; and third, because lawmakers think of the rule in the abstract and in general, whereas the judge of a particular case is concerned with concrete singulars present before himself, and thus can be more readily led astray by passion and prejudice. As Aquinas puts it, in terms strikingly similar to Fred Schauer's excellent piece Do

[11] Webster v. Doe, 486 U.S. 592 (1988).

[12] Green v. Bock Laundry Mach. Co., 490 U.S. 504 (1989).

Cases Make Bad Law?,"[13] men who sit in judgment . . . may be affected by love or hatred or greed of some kind, and so their judgment may be distorted."[14] In the classical view, then, there is a strong baseline presumption in favor of adherence to general rules of written law.

The problem, however, as both Aristotle and Aquinas go on to emphasize, is the limits of the legislator's foresight and the inevitable indeterminacy of general language. As Aquinas puts it, [s]ince . . . the legislator cannot make provision for every single case, he frames the law according to what happens most frequently, directing his attention to the common good . . . . Moreover, even if a legislator were able to take all cases into consideration, it would not be suitable for him to mention them all, in order to avoid confusion." Because no legislator can foresee all cases and because no language can, under real world conditions, perfectly express or capture all possible qualifications and exceptions, hard cases inevitably arise, in which the reasoned ordination of the legislator for the central or most common cases fails to track the public welfare or common good, due to unusual case-specific circumstances.

In hard cases of this sort, the classical tradition argues, the interpreter must apply what Aquinas calls dispensations," what the Roman lawyers called *aequitas*, and what Aristotle calls *epikeia*, the case-specific adjustment of vague, ambiguous or overly general language to particular circumstances, in order to promote the public-regarding ends the legislator had in view. (Do not too quickly assume that the relevant interpreter here is a judge; as we will see shortly, that is a crucial question for both the classical tradition and original Scalia s modern rendition of it).

On the classical conception, the interpreter applying *aequitas* emphatically does not step outside of law or do something other than law.[15] Here the terminology of law" and equity" that American lawyers took over from the context of the English contrast between common law courts and equity tribunals is potentially gravely misleading. Rather the classical view systematically distinguishes two different senses of law: *lex*, the positive written civil law, and *ius*, the law writ large, which the classical lawyers called "the art of the good and equitable"[16] and which includes general background principles of legality and practical reason. This is a distinction that is preserved in many European languages to this day (*ley* and *derecho* in Spanish, for example). In English, we often conflate the two, using right" or rights" in confusing ways and using a single word law" to cover both *lex* and *ius*. Consider a student saying that I'm taking administrative law, which is partly about the Administrative Procedure Act,[17] which is a law." As we will see, however, original Scalia expressly tries to distinguish these two senses.

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[13] Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883 (2006).

[14] Schauer's version further explains: "[W]hen decisionmakers are in the thrall of a highly salient event, that event will so dominate their thinking that they will make aggregate decisions that are overdependent on the particular event and that overestimate the representativeness of that event within some larger array of events . . . [Additionally] the phenomenon of anchoring suggests that even the judge who is aware of the pitfalls of availability may be hindered in her ability to overcome them, especially because there is evidence that anchoring is particularly resistant to a range of awareness-based debiasing techniques." *See id.* at 894–97.

[15] *See* H.F. JOLOWICZ, ROMAN FOUNDATIONS OF MODERN LAW 56 (1957) ("For [the Roman jurists] *aequitas* remains closely connected with law; it is a criterion of the correctness of law, and a principle of construction, not a contrasting principle"); J.M. KELLY, A SHORT HISTORY OF WESTERN LEGAL Theory 53 (1992) ("*aequitas* conveyed no separate standard recognized by the Roman system as qualifying the law").

[16] *Digest of Justinian* 1.1.1 pr "Ius est ars boni et aequi."

[17] 5 U.S.C. §§ 551–559 (1946).

The classical lawyer draws upon *aequitas* or *epikeia* to resolve ambiguities, interpret generalities, or otherwise clarify, limit or supplement the law. (I am eliding here some differences between the Roman and Greek conceptions which are immaterial for present purposes, and eliding an even more fundamental point that *aequitas*, as a principle of construction, enters into even the understanding of the semantic meaning of posited *lex*, a point I have explained elsewhere). On this view, to call upon *aequitas* is not to have recourse to something outside the law"; rather it is just to do law. It is the application of background principles of law as practical reasonableness to interpret *lex* and to further its aims. This is why Aquinas speaks of dispensations as departures from the letter of the law, but not from the law itself, just as generations of American classical lawyers and judges would later distinguish the letter of the statute" from the statute itself" - a locution that sounds bizarre and self-contradictory to modern textualists.

A final crucial question for the classical approach is: who decides? Who, which legal actor or tribunal, is authorized to make dispensations" or apply *aequitas* or *epikeia*? Here Aquinas is especially instructive—and, as we will see, original Scalia is easily understood to track Aquinas ' account and translate it to the American constitutional order.

At least in non-emergency cases, where there is no sudden risk needing immediate dispensation, Aquinas states that dispensation may be granted only by those who are in authority and have power in similar cases. It is not competent for everyone to expound what is useful and what is not useful to the state: those alone can do this who are in authority, and who, on account of such like cases, have the power to dispense from the laws." The who decides?" question, then, is just another question of the interpretation of the law (in both senses). Although there must be some legal actor in the system with the power of dispensation or *aequitas* for hard cases, judges need not be that actor; the judges may conclude that the law (again in both senses) itself vests that power in other legal actors, such as—you can already see where I am going, and where Scalia will soon go—executive magistrates or, in our terms, the President and administrative agencies. As the classical law put it, the urban praetor, a magistrate lacking the formal authority to enact a *lex*, nonetheless has the authority to aid, supplement or correct" the civil law in the public interest" (*propter utilitatem publicam*). The resulting body of magisterial law is, the classical jurists say, the living voice" of the civil law.

ADMINISTRATIVE EQUITY

So much for the basic structure of classical legal interpretation. In the scholarship written during his *annus mirabilis*, especially the Rule of Law as a Law of Rules,"[18] his *Chevron* piece,[19] and his famous separate opinions in *Webster v. Doe*[20] and *Green v. Bock Laundry*,[21] Scalia follows this path of thought in quite express terms. It is just that current American law professors, many of whom are unfamiliar with the classical legal heritage, have failed to understand the background influences on Scalia's thought.

[18] Scalia, *supra* note 5.
[19] Scalia, *supra* note 6.
[20] 486 U.S. 592 (1988).
[21] 490 U.S. 504 (1989).

In The Rule of Law as a Law of Rules,"[22] Scalia begins with a famous image of the animate justice of the judge"—Louis IX dispensing case-specific justice under an oak tree.[23] For Scalia, as for Aristotle and Aquinas, however, general rules of law are preferable. This isn't some sort of inference; it is what Scalia himself says. He writes in the *Law of Rules* article that [i]n his *Politics*, Aristotle states:

> *Rightly constituted laws should be the final sovereign; and personal rule, whether it be exercised by a single person or a body of persons, should be sovereign only in those matters on which law is unable, owing to the difficulty of framing general rules for all contingencies, to make an exact pronouncement."*[24]

The passage Scalia selected for quotation here was close to his heart; he concludes the main argument of the lecture by repeating the whole quotation in full, including the part about the difficulty of framing general rules for all contingencies, and saying I stand with Aristotle—which is a pretty good place to stand."[25] The passage summarizes, very crisply, both sides of the classical framework, both the presumptive textualism of general rules, and the inevitability of hard cases that call for *aequitas*, *epikeia* or dispensation. Scalia emphasized this at the end of the lecture, saying let me call attention to what I have not said. I have not said that legal determinations that do not reflect a general rule can be entirely avoided."[26]

Crucially, moreover, original Scalia emphatically denies that the preference for general rules, and the duty of the courts to follow the law, implies that courts do not make policy judgments in particular cases. For original Scalia, policy" and law" are not antonyms; rather the making of policy" judgments just is itself part of the traditional practice of legal adjudication. To further this point, let me tax your patience with the quotation of a crucial passage from the *Chevron* article,[27] which I suggest is classical both in express terms and in its overall thrust:

> *The "traditional tools of statutory construction" include . . . quite specifically, the consideration of policy consequences. Indeed, that tool is so traditional that it has been enshrined in Latin: "Ratio est legis anima; mutata legis ratione mutaturet lex." ("The reason for the law is its soul; when the reason for the law changes, the law changes as well.") Surely one of the most frequent justifications courts give for choosing a particular construction is that the alternative interpretation would produce "absurd" results, or results less compatible with the reason or purpose of the statute. This, it seems to me, unquestionably involves judicial consideration and evaluation of competing policies . . . to determine which one will best effectuate the statutory purpose.*[28]

This passage is remarkable. It expressly draws upon the fundamental classical concept, complete with Latin maxim, that the law consists of reason as well as fiat, principle as well as dictate, and that when reason runs out, so does the interpretation of law as *lex*. Even *lex* is to be understood as an ordination of reason—one of the essential elements of Aquinas 'definition of law as an ordination of reason to the common good. (Parenthetically, to complete the classical definition by adding the last element, the common good or public interest or benefit, we will shortly see that original Scalia also thinks, and says, quite in the style of the classical lawyers, that

[22] Scalia, *supra* note 6.
[23] *Id.* at 1175–76.
[24] *Id.* at 1176.
[25] *Id.* at 1182.
[26] *Id.* at 1186–87.
[27] Scalia, *supra* note 6.
[28] *Id.* at 515.

it is a fundamental" feature of all law that it must be understood as ordered to the public interest rather than private interests). And, more remarkably still, the passage is emphatic that evaluation of policy" is part of the traditional judicial armory—a claim that would shock those for whom anything of the sort amounts to result-oriented judging."

But what exactly does Scalia mean by policy" here? In the very same year 1989, in his concurrence in *Green v. Bock Laundry*, [29] original Scalia helpfully explained his conception. Nowadays, the *Bock Laundry* concurrence is cited mostly as an early statement of Scalia's critique of legislative history.[30] The concurrence combines that critique, however, with a clear recognition that judges should apply a doctrine of absurd results" when necessary,[31] using legislative history to identify absurdity, and with the view that the ordinary meaning of statutory text should be read in the way most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which, by a benign fiction, we assume Congress always has in mind."[32] Most importantly, however, Scalia argued that the interpretation he advanced in *Bock Laundry* was preferable not only because it avoided an absurd result, but because (and this is in a sense just a restatement of the need to avoid absurd results) it was the interpretation that was consistent with the *policy of the law in general*"[33]—in *Bock Laundry*, the general legal policy of providing special protection to defendants in criminal cases."[34] This is not merely a claim that one must read the whole code or anything of that sort. There is no single positive provision or even amalgam of positive provisions that encodes such a general legal policy, as opposed to specific protections for defendants; rather, it is a powerful background principle that informs the law generally, indeed an ancient principle of the *ius commune*. Rather than referring to positive law, Scalia's formulation here, the policy of the law in general"[35] is an excellent modern formulation or translation of *ius*.

If in 1989 Scalia glossed policy" as the policy of the law in general,"[36] then don't we have to know, after all, which sense of law" he meant in this setting? We do, and happily he had explained that too the year before, in his 1988 partial dissent in *Webster v. Doe*,[37] probably the best exposition of *ius* to appear in the U.S. Reports since roughly World War II. In fact, the *Webster* dissent offered not merely an account of law, but an interpretation of the statutory term law" itself,[38] as used in the famously delphic Section 701(a) of the Administrative Procedure Act[39] on reviewability of administrative action, which provides that this chapter applies . . . except to the

[29] 490 U.S. 504 (1989).

[30] Justice Scalia argues that the Court's opinion in *Bock Laundry* devoted "four fifths of its substantive analysis" to legislative history and other public materials, "[going] well beyond" what is necessary. *See id.* at 527–28 (Scalia, J., concurring).

[31] For example, in *Bock Laundry*, the Court was confronted "[W]ith a statute which, if interpreted literally, produces an absurd, and perhaps unconstitutional, result. Our task is to give some alternative meaning to the word 'defendant' in [the statute] that avoids this consequence." *See id.* at 527 (Scalia, J., concurring).

[32] *Id.* at 528.

[33] *Id.* at 529.

[34] *Id*.

[35] *Id.*

[36] *Id.*

[37] 486 U.S. 592 (1988).

[38] *See id.* at 608 (Scalia, J., dissenting).

[39] Administrative Procedure Act, 5 U.S.C. § 701(a) (2011).

extent that . . . (1) statutes preclude judicial review or (2) agency action is committed to agency discretion by law."[40]

The majority opinion by then-Chief Justice William Rehnquist, following a notoriously cryptic treatment in two earlier decisions,[41] read this provision to exempt agencies from judicial review when there is no law to apply," such that the agency enjoys a law-free zone of discretion.[42] This reading is strikingly reminiscent of the thin legal ontology of Hartian positivism, in which there is posited law (*lex*), and zones of a legal discretion," and nothing else.

Scalia read the provision very differently, observing that there is always *some* law to apply: There is no governmental decision that is not subject to a fair number of legal constraints precise enough to be susceptible of judicial application—beginning with the fundamental constraint that the decision must be taken in order to further a public purpose rather than a purely private interest"[43] (a fundamental constraint for which he cited no positive constitutional provision). This claim that the public interest is the omnipresent and implicit aim or end of all law, and correlatively a constraint on the exercise of public authority, is one that would have had classical lawyers nodding in agreement. As the comparativist Elisabeth Zoller put it, citing the 3d century A.D. imperial lawyer UIpian, Public law, in the sense first defined by the Romans, is the law of *res publica*, literally the public thing, that is, the public interest or common good . . . ."[44]

If for Scalia the fundamental ordering of law to the public interest means there is always law to apply, what then is the right interpretation of 701(a)(2)?[45] What exactly does the provision mean when it says that agency action may be committed to agency discretion by law"?[46] Original Scalia's account hinges, expressly, on a distinction between positive statutory provisions, on the one hand, and more general principles of law" on the other—between *lex* and *ius*. Here is what Scalia said:

> *The key to understanding the "committed to agency discretion by law" provision of § 701(a)(2) lies in contrasting it with the "statutes preclude judicial review" provision of § 701(a)(1). Why "statutes" for preclusion, but the much more general term "law" for commission to agency discretion? The answer is that the latter was intended to refer to . . . a body of jurisprudence that had marked out, with more or less precision, certain issues and certain areas that were beyond the range of judicial review. That jurisprudence included principles ranging from the "political question" doctrine, to sovereign immunity . . . , to official immunity, to prudential limitations upon the courts' equitable powers, to what can be described no more precisely than a traditional respect for the functions of the other branches….*[47]

Note here that the principles" to which he refers, although adopted by courts, were adopted as a *recognition* of existing law in the sense of *ius*. The sovereign immunity of the United States,

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[40] 5 U.S.C. § 701(a).

[41] *See Webster*, 486 U.S. at 599–600 (citing Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); Heckler v. Chaney, 470 U.S. 821 (1985)).

[42] *Id.* at 600 (holding that the language of § 102(c) of the NSA was strongly in favor of deference to the CIA Director concerning the employee's termination to the extent that, "Short of permitting cross-examination of the Director . . . we see no basis on which a reviewing court could properly assess an Agency termination decision.").

[43] *Id.* at 608 (Scalia, J., dissenting).

[44] Elisabeth Zoller, *Public Law as the Law of the Res Publica*, 32 SUFFOLK TRANSNAT'L L. REV. 93, 95 (2008).

[45] Administrative Procedure Act, 5 U.S.C. § 701(a)(2) (2011).

[46] *Id.*

[47] *Webster*, 486 U.S. at 608–09 (Scalia, J., dissenting).

for example, was originally identified as a general inherent background principle of law. As the Court put it in *United States v. Lee*[48] in 1882, the "principle" of sovereign immunity "has been adopted in our courts as a part of the general doctrine of publicists"[49]—referring, in the language of the day, to the classical juristic doctrines of the *ius gentium* or law of nations. The key to understanding Scalia's account of reviewability, then, is that he draws a distinction between law as *lex* and law as *ius*.

I am almost done reconstructing the views of original Scalia. The last question is the question I adverted to earlier: who decides? Recall that on the classical view, it is a separate question who exactly is authorized to apply interpretive *aequitas* or *epikeia*. Who holds this authority in the circumstances of the administrative state? No direct transliteration or transcription of the classical view is possible, because of changes in the structure of institutions over time; rather what is necessary is a translation that preserves the underlying principles on the classical approach in a new setting.

Original Scalia solves this problem with, in effect, an argument for a parceling and division of the traditional interpretive functions between courts and agencies. A critical limitation of the thesis in *The Rule of Law as a Law of Rules*[50] is that original Scalia repeatedly and expressly limits "the rule of law as a law of rules" to decisionmaking by and in courts. This is because, for original Scalia, the administrative state is, above all, the locus of authorized case-specific dispensing power—the place in which general statutory schemes are adjusted, in hard cases of indeterminacy, to the public interest.[51] As he puts it in 1989, "broad delegation to the Executive is the hallmark of the modern administrative state,"[52] and whereas "the legislature generalizes . . . [e]xecutives and judges handle individual cases."[53] The executive and the administrative agencies, then, are the ones authorized to apply case-specific adjustments to the law where there are gaps and ambiguities under *Chevron*.

In order to enforce this delegation, Scalia argues, we must reject any idea that *Chevron* deference is a mere residual that applies only when judges have exhausted all the "traditional tools of statutory construction."[54] As original Scalia protested in his 1987 concurrence in *INS v. Cardoza-Fonseca*,[55] this approach would make deference a doctrine of desperation, authorizing courts to defer only if they would otherwise be unable to construe the enactment at issue. This is not an interpretation, but an evisceration, of *Chevron*."[56] Rather, original Scalia's view of *Chevron*

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[48] 106 U.S. 196 (1882).

[49] *Id.* at 206.

[50] Scalia, *supra* note 5.

[51] *See id.* at 1182–83. (Explaining courts' difficulties in processing generalities: "In the case of court-made law, the 'difficulty of framing general rules' arises not merely from the inherent nature of the subject at issue, but from the imperfect scope of the materials that judges are permitted to consult . . . [T]he trick is to carry general principles as far as it can go in substantial furtherance of the precise statutory or constitutional prescription.").

[52] Scalia, *supra* note 6, at 516.

[53] Scalia, *supra* note 5, at 1176.

[54] *See* Scalia, *supra* note 6, at 515 (explaining that, along with text and legislative history, "the consideration of policy consequences" is part of the "traditional judicial tool-kit." *Chevron* deference should occur "Only when the court concludes that the policy furthered by neither textually possible interpretation will be clearly 'better' . . . [B]ut the reason it yields is assuredly not that it has no constitutional competence to consider and evaluate the policy.").

[55] 480 U.S. 421 (1987).

[56] *Id.* at 454 (Scalia, J., concurring).

rests on exactly the sort of benign fiction," based on the overall policy of the law in general," law-as-*ius,* that Scalia urged in *Bock Laundry*.[57] Here the benign fiction is that Congress should be taken to have, as a general default rule, authorized agencies to resolve hard cases by filling statutory gaps and ambiguities. As the *Chevron* article[58] put it: any rule adopted in this field represents merely a fictional, presumed intent."[59]

All this translates into the world of the administrative state the classical view that magistrates lacking the power to enact statutes can nonetheless serve as the living voice of the law."[60] Original Scalia's view in effect takes the two distinct interpretive functions identified by the classical tradition—that of following and implementing general rules, and that of dispensing adjustments in hard cases - and divides them across institutions to the extent possible, urging that courts follow general rules of *lex* so far as possible, while also reading the policy of the law generally (*ius*), attributed to Congress by a benign fiction,"[61] to authorize agencies to wield the dispensing power. This is, in effect, a particular determination or specification of the classical view for our constitutional order, the administrative state.

ORIGINAL ORIGINALISM

So far I have said little about originalism at the level of constitutional interpretation, but the originalism of original Scalia in many respects—and with one important exception I will mention shortly—fits this picture well. In Originalism: The Lesser Evil,"[62] Scalia argues at some length that adjudication based on the original public meaning better constrains judicial discretion than do the available alternatives, and thereby promotes the public interest. This is a point about adjudication, strictly. Nothing in this picture at all suggests that originalist interpretation is required by the very idea of written law, or written constitutions, or inherent in the nature of communication, or anything of that sort. Scalia also expressly concedes that originalism is not, and ha[s] perhaps never been, the sole method of constitutional exegesis."[63] In other words, because of the inevitable indeterminacy, vagueness and generality of constitutional language, originalism cannot be a complete account of constitutional interpretation. Indeed, as I will mention shortly, original Scalia was simultaneously casting about for non-originalist methods for coping with indeterminacy. And, finally, his major point in arguing for originalism as a constraint on judicial discretion was, expressly, to protect and expand executive power; his main and almost only example in the article is the expansive decision on presidential power in *Myers v. United States*,[64] which he takes to be justifiable on originalist grounds.[65] Scalia's original originalism, as it

[57] *See Bock Laundry*, 490 U.S. at 528–29 (Scalia, J., concurring).

[58] Scalia, *supra* note 6.

[59] *Id.* at 517.

[60] VERMEULE, *supra* note 3, at 38.

[61] *Bock Laundry*, 490 U.S. at 528 (Scalia, J., concurring).

[62] Scalia, *supra* note 10.

[63] *Id.* at 852.

[64] 272 U.S. 52 (1926).

[65] *See* Scalia, *supra* note 10, at 852 (explaining that in *Myers*, the Chief Justice used "the text of the Constitution and its overall structure, the contemporaneous understanding of the President's removal power, . . . what 'executive power' consisted of under the English constitution, and the nature of the executive's removal power under the various state constitutions in existence when the Constitution was adopted").

were, had an institutional point, broadly the same point we have already seen: to tether judicial discretion to the implementation of general rules, insofar as possible, in order to allocate discretionary exercise of judgment in particular cases to the executive.

Indeed, original Scalia in a sense does not ultimately care about originalism at all. Originalism is a contingent mechanism for implementing the first plank of the Aristotelian and classical interpretive program—tethering judges to rules. Another mechanism for doing so might, on one view anyway, be tradition. Scalia makes this quite express in The Rule of Law as a Law of Rules,"[66] arguing that even if one rejects an originalist approach, it is easier to arrive at categorical rules if one acknowledges that the content of evolving concepts is strictly limited by the actual practices of the society, as reflected in the laws enacted by its legislatures" or an established social norm."[67]

Thus a distinct branch of Scalia's constitutional jurisprudence, exemplified by his plurality opinion in *Michael H. v. Gerald D.*,[68] decided in—you guessed it—1989, addresses the critical problem that constitutional provisions may be interpreted at multiple levels of generality. Many have argued that originalism is helpless to cope with this problem, because original public meaning necessarily lacks the theoretical grounds to dictate at what level of generality the original public meaning should be read; any such claim would be logically circular. In *Michael H.*, Scalia, quite aware of this problem, turns to tradition, and argues that [i]n an attempt to limit and guide interpretation of the [due process] Clause, we have insisted not merely that the interest denominated as a 'liberty 'be 'fundamental '(a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society"[69]—with such traditions interpreted at the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified," because general traditions provide such imprecise guidance" and permit arbitrary decisionmaking."[70] Whether or not that approach is successful—I do not think it is—the larger point is that, as Scalia was writing simultaneously in academic articles, originalism was just a means to the Aristotelian end of tethering judges as far as possible to rules. If traditionalism defined at a low level of generality turned out to be a better means for doing so, then Scalia would cheerfully abandon originalism for traditionalism.

There is, however, a passage in Originalism: The Lesser Evil"[71] that sounds a discordant note, one that would swell over time. Here Scalia attempts to ground originalism in the very nature of constitutional judicial review, arguing that in its nature the sort of 'law 'that is the business of the courts [must be] an enactment that has a fixed meaning ascertainable through the usual devices familiar to those learned in the law."[72] To be sure, this is not yet the full jurisprudential turn" that many have diagnosed in the dizzying array of post-Scalia versions of originalism, many of which attempt to ground originalism in the very nature of law, or language,

[66] Scalia, *supra* note 5.
[67] *Id.* at 1184–85.
[68] 491 U.S. 110 (1989).
[69] *Id.* at 122.
[70] *Id.* at 127 n.6.
[71] Scalia, *supra* note 10.
[72] *Id.* at 854.

or constitutions, or the Constitution, or really anything other than a contingent judgment about the public interest. But it does presage that turn, and foreshadows the coming of evolved Scalia.

EVOLUTION

For a long period after his *annus mirabilis*, original Scalia elaborated upon the basic commitments of the model I have laid out. We see him in the 1980s and 1990s defending *Chevron* against efforts by Justice Stevens and others to issue narrowing interpretations of the decision, and endorsing the doctrine of absurd results" in that context;[73] writing standing decisions that protected executive authority from judicial oversight;[74] authoring *Auer v. Robbins*,[75] the famous or infamous decision that requires courts to defer to reasonable agency interpretations of their own regulations, in 1997; writing, in 2001, one of the Court's most expansive modern precedents rejecting a claim under the putative non-delegation doctrine;[76] and, as late as 2012, authoring the remarkable decision in *City of Arlington v. FCC*,[77] holding that there is no agency jurisdiction" exception to *Chevron* deference. Original Scalia was long known as the Court's champion of *Chevron,* of the administrative state, and of presidential power. Justice Gorsuch, the Court's major critic of *Chevron*, recently recognized original Scalia's role as *Chevron*'s champion in a lone dissent from denial of certiorari.[78]

Change, however, is the destiny of mankind, and something did very much change over time, especially towards the very end of Justice Scalia's career. The contrast with evolved Scalia grows over time, albeit inconsistently, and with important divergences between academic writings and judicial practice. Already by 1997, when Justice Scalia writes his Tanner Lectures published under the title *A Matter of Interpretation: Common Law Courts in a Civil Law System*,[79] he criticizes the *Holy Trinity* decision,[80] spars with Dworkin about the problem of levels of generality, and in general has become distinctly stricter in his textualism. Still, though, even in those lectures he says that the aim of interpretation is to look for a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*,"[81] a standard classical term for the whole body of the law in general; quotes and endorses the claim that the rules of the countless administrative agencies [are] themselves an important, even crucial, source of law;"[82] and preserves a diplomatic silence about his previous reliance on the absurdity doctrine. In general, his theory and his practice diverge; as of 2002, five years after the Tanner Lectures, he is still endorsing something like the absurdity doctrine in judicial opinions,

[73] INS v. Cardoza-Fonseca, 480 U.S. at 452 (Scalia, J., concurring) ("[I]f the language of a statute is clear, that language must be given effect—at least in the absence of a patent absurdity.").

[74] *See* Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992).

[75] 519 U.S. 452 (1997).

[76] Whitman v. Am. Trucking Associations, 531 U.S. 457 (2001) (holding that agencies may not consider financial impacts when making regulations).

[77] City of Arlington, Tex. v. F.C.C., 569 U.S. 290 (2013).

[78] *See* Buffington v. McDonough, No. 21-972, 2022.

[79] *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE Law 3, 3–48 (Amy Gutmann ed., rev. ed. 2018).

[80] *Id.* at 22 ("[T]he [*Holy Trinity*] decision was wrong because it failed to follow the text. The text is the law, and it is the text that must be observed.").

[81] *Id.* at 17.

[82] *Id.* at 13.

invoking reason" as a guide to statutory interpretation.[83] It is only later that the practice fully catches up to the changing theory.

Let us zoom forward to the period circa 2013–2016, when an entirely different model emerges. We see evolved Scalia actually repudiating his own opinion in *Auer* and now rejecting judicial deference to agency interpretations of their own regulations. We see him indicating a willingness to reconsider his views about *Chevron*. More broadly, we see evolved Scalia becoming increasingly critical of the administrative state and increasingly reliant on a simplistic distinction between law and result-oriented policy, conceived as outside of law—a direct contradiction of his earlier views.

Rather than rehash his late opinions, let me instead mention a remarkable episode in January 2016, barely a month before Justice Scalia's death. Scalia was invited to the Dominican House of Studies in Washington and elected, rather boldly given the expertise of the audience, to speak on St. Thomas Aquinas and the Law."[84] (Aquinas was a Dominican friar). He says that despite my veneration for Thomas Aquinas, I plan to contradict what Aquinas says about judging . . . . It is necessary to judge according to the written law—period."[85] He addresses the role of dispensation in Aquinas 'theory, which to repeat is just part of the Aristotelian theory Scalia had previously defended (I stand with Aristotle"), and compares it to the judicial approach of William Brennan.[86] He makes no mention whatsoever of the administrative state or the role of agencies in interpretation. He even, in response to a question about Nuremberg, denies that there is any basis in higher law for holding Nazi officials accountable.[87] To justify the war trials, he instead simply maintained that, as he saw it, winners in a war have a right to punish the losers."[88] The Scalia of 1989, whose views so closely tracked the classical structure of interpretive theory, is nowhere to be seen. And his jurisprudence has become flattened and simplified.

SCALIA AS SYNECDOCHE

It is beyond the scope of my aims here to offer an explanation as to why, exactly, this evolution occurred, if such it may be called. But let me close with two observations—inevitably controversial observations—about the larger significance of my distinction between original and evolved Scalia.

First, Justice Scalia's intellectual odyssey in many ways recapitulates and provides a synecdoche for the transformation of the conservative legal movement in the same period. As of 2022, the movement is operationally dominated by a libertarian strand of American conservatism

[83] See Great-West Life & Annuity Co. v. Knudson, 534 U.S. 204, 217–18 (2002) (per Scalia, J.) ("[I]t is our job to avoid rendering what Congress has plainly done . . . devoid of reason and effect.") (emphasis omitted). See also Hartford Underwriters v. Planters Bank, 530 U.S. 1, 6 (2000) (per Scalia, J.) ("As we have previously noted . . . when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.") (internal citation and quotation omitted).

[84] *See* Antonin Scalia, Address for the 800th Anniversary of the Order of Preachers (Jan. 7, 2016), *in* ANTONIN SCALIA, SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED 243, 243–49 (Christopher J. Scalia & Edward Whelan eds. 2017).

[85] *Id.* at 246.

[86] *Id.* at 245.

[87] *See* Anthony Giambrone, *Scalia v. Aquinas: Lessons from the Saint for the Late, Great Justice*, AM. MAG. (Mar. 1, 2016), https://www.americamagazine.org/issue/who-judge [https://perma.cc/6A5M-ECGD].

[88] *Id.*

that is intensely suspicious of the administrative state, while officially denying that it has any substantive views. This libertarianism in the lion's skin of Scalia's methods is nonetheless entirely willing to abandon the larger structure of original Scalia's classical jurisprudence and his model of a strong administrative state, led by a strong presidency. Don McGahn, former White House counsel under President Trump, who played a crucial role in the selection of Justices Gorsuch and Kavanaugh, assessed the situation in an episode recounted by Ruth Marcus in a recent book.[89] As McGahn . . . told the Federalist Society, 'The greatest threat to the rule of law in our modern society is the ever-expanding regulatory state, and the most effective bulwark against that threat is a strong judiciary.' . . . It was now all about regulatory relief. On that score, McGahn said, Scalia 'wouldn t make the cut.'"[90] In my view McGahn was quite right, given his own premises and aims. In the conservative legal moment as it currently stands, the jurisprudence of original Scalia has no place.

Second, and conversely, the revival of classical legal theory is in many ways an attempt to return to original Scalia, in preference to evolved Scalia. Unsurprisingly, perhaps, this is roughly the structure of the interpretation of the American administrative state that I and other scholars have offered in recent work. I believe or at least hope that is not because I am projecting my views onto Scalia, but quite the reverse, because Scalia impressed his views onto me, so that my views are consistent with and amplify upon those of original Scalia, whose views were in turn consistent with and translate those of the classical tradition. At a minimum, however, I hope that when libertarian originalists claim continuity with Scalia's views, we will get in the habit of asking which Scalia? Original or evolved?" In this case, if no other, I proudly count myself an originalist.[91]

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[89] RUTH MARCUS, SUPREME AMBITION: BRETT KAVANAUGH AND THE CONSERVATIVE TAKEOVER (2019).

[90] *Id.* at 64.

[91] Judge Oldham, in his response at the lecture, raised the question how Justice Scalia's dissents in the *Morrison* and *Mistretta* cases square with the original Scalia's jurisprudence, citing them as examples of Justice Scalia's adherence to the separation of powers. *See* Andrew Oldham, *Scalia's Evolution: A Matter of Admiration*, 2023 HARV. J. L. & PUB. POL'Y PER CURIAM 3 (2023) (discussing Morrison v. Olson, 487 U.S. 654 (1988) and Mistretta v. United States, 488 U.S. 361 (1989)). The reason I did not mention *Morrison* in the lecture is that I thought it obvious that and how it fit the thesis: it is just another illustration that, at the constitutional level, original Scalia's main *point* in deploying pragmatic originalism that constricts judicial discretion was to protect and enhance presidential power, as I discussed above with reference to his treatment of the *Myers* case. See the text accompanying notes 62–63 above. As for *Mistretta*, immediately following the portion of the *Mistretta* dissent from which Judge Oldham derives the thrust of his concerns, Justice Scalia rejects the petitioner's non-delegation claim and explains at some length why courts are not a suitable institution for enforcing nondelegation claims of the usual kind.

This also explains my reaction to Judge Oldham's broader point. Judge Oldham seems to think that the separation of powers is inconsistent with the views of original Scalia, but it is entirely unclear why one would think that. In these cases and elsewhere, original Scalia does not deny the validity of the separation of powers, nor have I claimed that he did. Rather, what I have claimed is that he offers a particular *interpretation* of the separation of powers—an account of how to allocate classical interpretive functions in a way suitable to the different powers and capacities of the branches. So too, original Scalia's basic view of nondelegation—that it is unsuitable for judicial enforcement—itself rests on a particular understanding of the separation of powers, not a repudiation of it. In my view, then, Judge Oldham relies on generalities about the separation of powers for far more than they can possibly deliver, and the *Morrison* and *Mistretta* dissents are in perfect harmony with the underpinnings of original Scalia and the classical tradition.

Professor Lessig, in his clever and engaging response, contends that the classical legal tradition requires epistemological and ontological assumptions about law that our pervasively legal-realist culture—one ever skeptical of the political motives that impel government decisions—is no longer capable of. *See* Lawrence Lessig, *Scalia the Legal Sociologist*, 2023 HARV. J. L. & PUB. POL'Y PER CURIAM 4 (2023). I'm not sure, however, who is the "we" referred to in this picture. Recent work in

experimental jurisprudence, in particular a superb article called "The Folk Concept of Law: Law is Intrinsically Moral," tells a different story. *See* Brian Flanagan & Ivar R. Hannikainan, *The Folk Concept of Law: Law is Intrinsically Moral*, 100 AUSTRALASIAN J. OF PHIL. 165–79 (2022). The paper identifies widespread public intuitions about law that are morally inflected, and that fit the classical tradition in express terms, such as the intuition that "an evil rule is not a fully-fledged instance of law." (Compare Aquinas' view that an unjust law is an instance of perverse or corrupt law). The key question, then, is whether the legal-realist culture to which Professor Lessig refers is "our" legal culture in any broad sense, or rather is the legal culture of a very small set of academics at a very small set of elite schools who are committed to a virulent form of legal realism that thinks "politics" determines all interesting judicial decisions, at least in hard cases. In my view, that form of legal realism is rarely found in the broader culture; rather it is a product that law professors push on their students, a kind of intellectual opiate that the recipients resist until they become addicted to it. There is no deep underlying reason why this process of acculturation into legal realism must occur in the first place; it is a choice we make, and we could do otherwise.