SCALIA THE LEGAL SOCIOLOGIST

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I want to talk about one of my favorite "original Scalia" opinions—one not mentioned by Professor Vermeule, either today or in his extraordinary book, COMMON GOOD CONSTITUTIONALISM.[1] This is an opinion written—it is reported, as the opinion was per curiam—by Judge Scalia, when he served on the D.C. Circuit Court of Appeals. The case involved the Gramm-Rudman-Hollings Act,[2] which was designed to reduce the federal deficit by giving to the comptroller the power to cut the budget if Congress failed to meet certain spending targets. The D.C. Circuit struck the act; *Bowsher v. Synar*,[3] affirmed the D.C. Circuit.

Here's the passage of the "original Scalia" that I want to focus upon, discussing the removal cases of the Supreme Court:

> These cases reflect considerable shifts over the course of time, not only in the Supreme Court's resolutions of particular issues relating to the removal power, but more importantly in the constitutional premises underlying those resolutions. . . . Justice Sutherland's decision in *Humphrey's Executor*, handed down the same day as *A.L.A. Schechter Poultry* . . . is stamped with some of the political science preconceptions characteristic of its era and not of the present day . . . . It is not as obvious today as it seemed in the 1930s that there can be such things as genuinely "independent" regulatory agencies . . . or, indeed, that the decisions of such agencies so clearly involve scientific judgment rather than political choice that it is even theoretically desirable to insulate them from the democratic process.[4]

What's striking about this opinion is that it is Scalia—speaking as legal sociologist. It is Scalia reporting something about us, or at least about them in the 1980s. It is Scalia telling us something about how they spoke, about what their "preconceptions" were. Those "preconceptions" would be familiar to anyone educated at the Harvard Law School in the 1950s. They were realist preconceptions; they would mature into critical legal studies preconceptions. And according to those

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[1] ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022).

[2] Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037 (codified as amended in scattered sections of 2 U.S.C.).

[3] 478 U.S. 714 (1986).

[4] Synar v. United States, 626 F. Supp. 1374, 1398 (1986) (per curiam).

preconceptions, when lawyers or judges tell us they are telling us about science, they are actually telling us about politics. Or at least, when they are telling us what science requires, it is not "so clear" that those tellings are the project of "scientific judgment" rather than "political choice."

This realism was central to the original Scalia—too. Think about his opinion in *Printz v. United States*,[5] striking the Brady Act, rejecting the idea that commandeering state administrators was different from commandeering state legislatures:

> The Government's distinction between "making" law and merely "enforcing" it, between "policymaking" and mere "implementation," is an interesting one. . . . Executive action that has utterly no policymaking component is rare . . . . Is it really true that there is no policymaking involved in deciding, for example, what "reasonable efforts" shall be expended to conduct a background check?[6]

Or, in other words, is it really not true that "It's all politics"?

But there's a subtlety in Scalia's language that we should not overlook. Scalia's not telling us how things are. He is telling us how *we*, now, view things. He's not rejecting the idea that at an earlier time, such a line could be drawn. Whether it could be drawn or not was a function of them, and how they spoke, or understood the law. Just because we can't draw that line doesn't mean they couldn't, just as the fact that we can't speak Latin doesn't mean Justice Bradley (and most of the best 19th century justices) couldn't. What we can do is a function of us, and our language and practice and culture—that's why I called it sociology. And what we can't do doesn't entail anything about what another culture at a different time could or could not do.

Seen like this, Scalia's language should remind us of another extraordinary 20th century justice, also educated at this law school, Justice Louis Brandeis. In one of that century's most important cases—and again, a case not mentioned by Professor Vermeule either today or in his book—the Court overturned what is said to be the doctrine of *Swift v. Tyson*.[7] In *Erie v. Tompkins*,[8] Brandeis says this:

> The doctrine rests upon the assumption that there is "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute" . . . . But law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State . . . is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else.[9]

Here again is a kind of realism. Whatever they might have been able to do in the 19th century, it is not something we can do today. "Law in the sense in which courts speak of it today" does not allow it. And instead, we must craft our practice—and indeed the constitution, for remember, *Erie* declared the practice of federal general common law *unconstitutional*—according to our present "speaking" abilities.

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[5] 521 U.S. 898 (1987).
[6] *Id.* at 927.
[7] 41 U.S. 1 (1842).
[8] 304 U.S. 64 (1938).
[9] *Id.* at 79.

I say all this because I want to suggest that at the heart of Professor Vermeule's extraordinary work—both his analysis of Scalia today and his book—is a presumption about our abilities today that I don't think we can take for granted. Professor Vermeule's work asks us to reimagine—so we might practice again—the classical model of law. In this classical model, law is both *lex*—what legislatures, presumptively, write—and *ius*—the principles and traditions and morals behind that *lex*. Scalia, Professor Vermeule says, aims to "translate[]" this classical model to the American constitutional order.[10] And in doing so, he recognizes an unavoidable need for the law applier—whether judge or administrator—to make "dispensations," "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."[11] Professor Vermeule urges—not so much here, today, but in his book—a return to this practice. And he now bolsters the argument for return by invoking the Scalia that is easiest for most of us to accept, or respect—the original Scalia.

But the question I want to press—drawing upon the Scalia from *Synar* and *Printz*, and inspired by Brandeis in *Erie*—is this: Are we, as a legal culture, today, capable of this practice, this classical model practice, anymore? Are we skilled in it? Could we imagine teaching it to our students? And more pressingly, are we able to imagine administrators—whether courts or agencies—engaging in a practice of "adjusting vague, ambiguous or overly general language to particular circumstances, in order to promote the public regarding purposes [that that administrator believes the] legislature had in view"—without viewing such "adjusting" as just another example of politics?

Because such a practice presumes something about the legal culture that engages in it. It presumes, in particular, a trust or confidence or good faith. It imagines a culture that doesn't meet each act of a Supreme Court with a skeptical, political eye. It presumes that we don't look for the ulterior motive, a political motive, behind every decision—and speak about that openly, as we do, for example, about *Dobbs v. Jackson Women's Health Organization*,[12] or *Bush v. Gore*,[13] or whatever—because presumably, the institutions have not given us any reason, or any good reason, to be so suspicious.

Yet I would submit, our legal culture today is not the culture that the classical model presumes. Whether justified or not, our culture today, our legal culture, is deeply suspicious. Profoundly skeptical. And in our culture today, whenever any court (and from the perspective of the D.C. Circuit, any agency) acts, we do not presume it acts in the public interest. We instead suspect it acts for a political interest. That's not necessarily partisan, but it reads like that. And what that means is that any act of "dispensation" becomes presumptively illegitimate, at least when it comes down on one side of an issue seen to be political.[14]

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[10] Adrian Vermeule, *The Original Scalia*, 2023 HARV. J. L. & PUB. POL'Y PER CURIAM 2, *2 (2023).

[11] *Id.* at *4.

[12] 142 S. Ct. 2228 (2022).

[13] 531 U.S. 98 (2000).

[14] Professor Vermeule doubts that "we"—as in the "widespread public"—are realist in the sense I've described. Vermeule, *supra* note 10, at *14–15 n.91. I have no doubt he is correct about the folk sense of justice in ordinary people. Yet the question I'm raising is whether that folk sense of justice transfers to the institutions of justice. A poll in November 2021 found 60% of Americans believe the Supreme Court is motivated "primarily by politics," while only 32% believe it is "motivated by the

My sense is that Scalia sensed this. And that what explains his evolution—his abandonment of the classical model—is not so much him, as his perception about us—about the law in our legal culture today. And I would agree with this perception. What explains his apostasy is the belief that, to remix *Synar*, "such 'dispensations' do not so clearly involve 'public regarding purposes' rather than political choice"; or to remix *Printz*, "Is it really true that there is no policymaking involved in deciding, for example, what this proper 'dispensation' is?" Or finally, to remix Brandeis, Scalia's apostasy is the product of believing that "law in the sense in which courts speak of it today does not exist without some definite politics behind it," and that the job of the courts, therefore, is to minimize as much as possible any action that might be seen to be the product of such politics.

From this perspective, Scalia's words but a month before he passed make perfect sense: "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."[15] Why? Because it is right, always and everywhere? Or because it is right, for us, given our deeply realist legal culture, now?

I suggest the Evolved Scalia has simply translated Thomas Aquinas, or the classical tradition, from a very different legal culture into our own, very skeptical, legal culture. Or more precisely, that Scalia has translated Aquinas in light of his recognition of the "public regarding purpose" that Scalia believed the Constitution imposed upon the Court—to minimize judicial acts that might be seen to be political acts. The Evolved Scalia is simply the Original Scalia, translated. Respecting fidelity to Aquinas' meaning, subject to the constraint of the judicial role.

law." That represents a 6 point increase in skepticism in just two years. Bryan Metzger & Oma Seddiq, *More than 60% of Americans say the Supreme Court is motivated by politics, while just 32% believe they rule based on law: poll*, INSIDER (Nov. 19, 2021), https://www.businessinsider.com/61-percent-think-supreme-court-motivated-politics-not-law-poll-2021-11. That increase is consistent with the high and growing disapproval (58%) of the Supreme Court. *Supreme Court*, GALLUP, https://news.gallup.com/poll/4732/Supreme-Court.aspx. Against that background, it seems difficult, confidence of the people in their own sense of justice notwithstanding, to imagine courts becoming more interpretively ambitious, and sustaining through that interpretive ambition greater trust from the people. Much more likely, in my view, is that confidence would be weakened even more, as the charge that the institutions were political would become easier to make.

[15] ANTONIN SCALIA, SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED 245 (Christopher J. Scalia & Edward Whelan eds., 2017).