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The Justice of Contradictions: Antonin Scalia and the Politics of Disruption

by Richard L. Hasen



Reviewed by Marc Alexander



Marc Alexander

With scalpel and sledgehammer, Richard L. Hasen, Chancellor's Professor of Law and Political Science at UCI, slices, dices, and slams the jurisprudence of the late Supreme Court Justice Antonin Scalia. As the title of Hasen's book foreshadows, two of his major themes

are that the jurisprudence of the rambunctious Associate Justice was riddled with contradictions, and that Scalia was a disruptive presence on the court. Hasen's core critique of Justice Scalia's jurisprudence is that it



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promised to deliver an objective and neutral jurisprudence, based on textualism and originalism, but that in fact, Justice Scalia's profound personal values often explained his opinions better than did his professed methodology.

Textualism, as explained by Hasen, "states an aim to apply a fair reading of a statute as its meaning would have been understood by common speakers of English at the time it was drafted." "Under Scalia's theory," which Hasen criticizes, "deciding a statute's meaning is more akin to solving a word puzzle than to delving into the minds of the legislators who passed it, or figuring out the best policy answer or the fairest result given current circumstances." As practiced by Scalia, textualism leads attorneys to dictionary-shop for the meaning of words, and results in linguistic "parlor games." Ambiguities may be resolved by resort to canons of construction deftly employed to parse meaning. It may be quite within the interpretive power of the judge to create, or to erase ambiguity, making textualism and originalism flexible doctrines capable of yielding result-oriented outcomes. Word parlor games that do not make use of historical context, legislative history, tradition, and values can lead to strained or even absurd results.

"Roughly speaking," Hasen explains, "originalism is the idea that the meaning of a constitutional provision is fixed at the time it is adopted and it cannot be changed through judicial interpretation." As Hasen further explains, Justice Scalia, "derided the idea of an evolving or 'living' Constitution in which the courts decide cases based on contemporary values or understandings. He was fond of saying that he likes his Constitution, 'dead, dead, dead.'"

Originalism and textualism share similarities: both look to the text and the meaning of words, seek to enforce the law as written, seek to promote popular sovereignty by relying on the work of elected legislators, and purport to be neutral and objective tools for deciding cases.

Unfortunately, Justice Scalia did not set forth general rules for when to deviate from textualism and originalism, though perhaps he meant his statement to NPR's Nina Totenberg, "I'm an originalist and a textualist, not a nut" to serve as a clue that he could exercise common sense.

As Hasen points out, Justice Scalia's opinions are not entirely predictable and may sometimes surprise us. Tough on crime, Justice Scalia could nevertheless write in favor of the rights of a criminal defendant, based on his reading of the Constitution, and on his mistrust of an overreaching government. However, the surprises should not be over-emphasized. More often, Justice Scalia's views are predictable. Relying on his interpretation of the First Amendment in his concurrence in *Citizens United v. FEC* (2010). Scalia did not limit the fire-hose flow of money fueling corporate political speech. He was anti-abortion, and turned off by gay rights ("If we cannot have moral feelings against homosexuality, can we have it against murder ...?"). He was against affirmative action, expansive standing for plaintiffs, over-judicialized decision making, any reliance on foreign law in domestic cases, and interfering with partisan gerrymandering and state efforts to limit the vote, which he viewed as nonjusticiable issues. He was for the death penalty, states' rights over federal power, less regulation, reliance on written legislation, a robust war against terrorism, which he char-

acterized as a war against “Islamic radicalism,” and expansive religious freedom, never meeting an Establishment Clause case he liked. His opinions and dissents on those subjects pretty well define the constellation of his conservative values.

Hasen did not intend to write a comprehensive analysis of Justice Scalia’s jurisprudence, which would require a longer book. Instead, he focuses on some interesting contradictions in Scalia’s jurisprudence. Here are a few examples:

Item: Justice Scalia’s views about limiting class actions (*Walmart Stores, Inc. v. Dukes* (2011)) and also about enforcing arbitration at the expense of class actions (*AT&T Mobility LLC v. Concepcion* (2011)) do not square with his populist views and “defense of the little guy.”

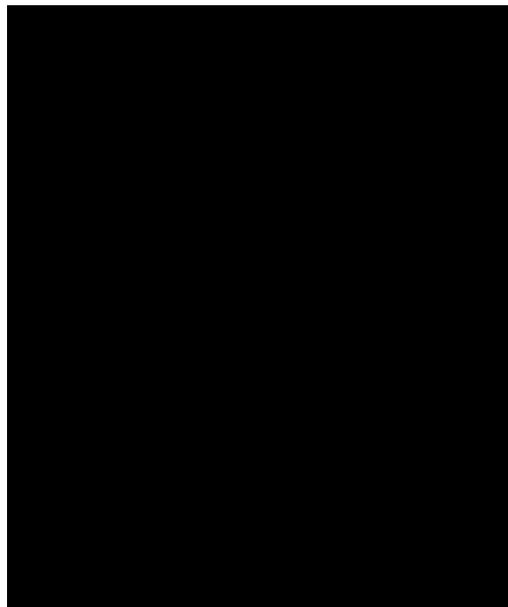
Item: Justice Scalia’s view about judicial deference to the legislative branch is hard to reconcile with his position in *Shelby County v. Holder* (2013), the case gutting the Voting Rights Act of 1965, because the Act had been renewed by a 98-0 vote of the Senate as recently as 2006 – though it is consistent with his view on states’ rights.

Item: Justice Scalia’s deference to state rights may be hard to reconcile with his position in *Bush v. Gore* (2000) putting an end to the vote count in Florida, and guaranteeing that Bush would be president.

Item: Justice Scalia’s views on affirmative action are difficult to reconcile with an originalist interpretation of the 14th Amendment, and the purpose of the Amendment, because Congress created special programs to assist newly freed slaves at the time of ratification of the Amendment, evidence ignored by Scalia.

Item: Justice Scalia’s interpretation that the Second Amendment created a personal right to bear arms is at odds with his under-

standing of originalism and *stare decisis*. “As he wrote in *A Matter of Interpretation*, ‘Originalism, like any other theory of interpretation put into practice in an ongoing system of law, must accommodate the doctrine of *stare decisis*; it cannot remake the world anew.’” Yet Scalia’s opinion that the introductory language of the Second Amendment, “A



well regulated militia, being necessary to the security of a free state ...” “amounted to prefatory throat-clearing, was at odds with existing Second Amendment case law. Scalia also believed that the individual right to bear arms applied to the states, through the incorporation theory of the 14th Amendment, showing that he could pick and choose which substantive due process rights he wanted to

elevate as fundamental rights.

Justice Scalia's lasting legacy as a proponent of a distinct legal jurisprudence is difficult to assess, because when pressed about the political nature of some of his opinions, he tended to deflect and answer obliquely, rather than offer a principled defense, most famously, in the case of *Bush v. Gore*, where his response to critics was: "Get over it." Cryptically, *Bush v. Gore* announced, "[o]ur consideration is limited to the present circumstances," making some question its precedential value, and Justice Scalia's elucidation is more of a head-scratcher than a road to enlightenment.

The deeper problem with Justice Scalia's jurisprudence is that he did not consistently hew to his jurisprudential methodology, but could decide cases based on text, history, and values when it led to the preferred result. With a few exceptions, the "contradictions" in his jurisprudence could be resolved when viewed from on-high, by resort to Justice Scalia's conservative values. The contradictions in Justice Scalia's jurisprudence could limit the long-term influence of his methodology, such as it is.

Assuredly, one can be conservative in one's views and consistent at the same time. And occasionally Hasen appears to be better at pointing out Justice Scalia's conservative compass than at exposing his inconsistencies. The "war on terror" cases illustrate this point. In *Hamdi v. Rumsfeld* (2004), the Supreme Court considered whether an American citizen captured in Afghanistan was entitled to a writ of habeas corpus. Justices Scalia and Stevens, dissenting, wrote that Hamdi, as an American citizen on U.S. soil, was not sufficiently protected, and that he had to be charged with a crime, or Congress had to lift the writ of habeas corpus in wartime.

In *Hamdan v. Rumsfeld* (2006), Justice

Scalia dissented from a majority opinion holding that Hamdan, a non-citizen detainee in Guantanamo Bay, had the right to bring habeas corpus cases before a judge. In *Boumediene v. Bush* (2008), another case involving a non-citizen held at the Guantanamo prison, Justice Scalia again dissented, agreeing with Chief Justice Roberts' separate dissent that the Detainee Treatment Act provided enough procedural protections to satisfy essential habeas corpus guarantees.

While one might see inconsistency in Justice Scalia's willingness to argue for habeas corpus protections in the *Hamdi* case, but not in the other two cases, one could also argue that his willingness to elevate the rights of American citizens over non-citizens reveals a certain consistency, as well as revealing his hardline view that the U.S. was at war with "Islamic terrorism"—admittedly a very fraught phrase, as even President George W. Bush wished to assure that we were not involved in a religious war.

While one might argue that Justice Scalia's view in *AT&T Mobility v. Concepcion* (2011), the case enforcing an arbitration agreement in California, at the expense of a viable class action, reflected a conservative prioritizing of business and corporate interests over "the little guy," surely Justice Scalia would have replied that his opinion in *Concepcion*, and other arbitration cases, was consistent with his plain reading of the Federal Arbitration Act.

And in *Bush v. Gore*, while Scalia's views about states' rights may appear at first blush to be at odds with his concurring opinion to stop the vote count, he wrote that he was relying on the decision of the Florida legislature. Furthermore, Scalia was part of the Court's per curiam opinion that the vote-counting method in Florida lacked a consistent standard and violated the Equal Protection Clause. Still, Justice Scalia's brush-off comment, "get over it", in lieu

of a strong defense of the patently political decision that followed party lines, suggests that the case was neither the Court's nor Scalia's proudest moment.

So what will be Justice Scalia's legacy? Textualism and originalism will continue to be influential methodologies, advanced by members of the conservative majority on the high court, and reenforced through the appointment of Justice Neil Gorsuch, and other conservative jurists vetted by the Federalist Society, with Justice Thomas being the most avowedly "originalist" of the lot. "Textualism" need not be a radical approach; indeed, Justice Kagan has remarked that "we're all textualists now" (though she would give more weight to statutory purpose and pragmatism than would have Scalia), and it is hornbook law that one begins with the plain text of a statute before turning to other interpretive aids in case of ambiguity. "Originalism" is more of a problem, if it means constitutional text is detached from history and context, and the Constitution must be served up "dead, dead, dead." According to Hasen, the "blind spot" of Scalia's legacy is in the view that one can objectively and neutrally determine what the Constitution "actually commands" and the hubris resulting from the belief that one holds the interpretive key to the one and only true kingdom. That purportedly neutral methodology can mask a political agenda.

Hasen believes, as does Erwin Chemerinsky, that one of the baneful legacies of Justice Scalia was the deligitimization of the Court, resulting from Justice Scalia's partisanship, caustic attacks on judges who disagreed with him, and the strident and contemptuous way in which he treated his brethren, especially in written dissents. In *Obergefell v. Hodges* (2015), Scalia wrote in a footnote that if he had ever joined an opinion written like the majority opinion, "I would

hide my head in a bag," comparing the legal reasoning "to the mystical aphorisms of the fortune cookie." That may seem witty, snarky, even funny, or extremely cranky, but it is hardly collegial, and it did nothing to preserve the legitimacy and authority of the Supreme Court. And that is ironic, because clearly Justice Scalia loved the institution. He also told an interviewer that one of the things that "upsets me about modern society is the coarseness of manners. ... It's very sad." That's one last contradiction.

Hasen concludes, "[A]t the end of the day the Supreme Court has always been a political institution, deciding the most difficult cases by considering text, history, practice, and yes, each justice's values. Even Justice Scalia's." Following Hasen's lead that the Supreme Court has always been a political institution, one might add that over the long arc of history, the Supreme Court has been a conservative and reliable defender of property rights and corporate interests. (See Adam Winkler, *We the Corporations – How American Businesses Won Their Civil Rights* (2018).) The Court has also strongly supported national security interests in times of crisis, too often at the expense of civil liberties. In this perspective, the liberal Warren Court years and several years during the New Deal, appear now to be more the exception than the rule. Without his caustic and flamboyant writing style, his canny proselytization to promote his "neutral" methodology, and his readiness to jump into the political fray, Justice Scalia's political conservatism would not qualify him as a political outlier over the Court's long history.

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