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BOOKSHELF

Weighing a Justice

Antonin Scalia's judicial philosophy is not just a cover for conservative ideology.

BY JOHN O. MCGINNIS

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Considering the trial by fire that Judge Samuel Alito faced before the Senate Judiciary Committee, and the strict party-line vote that followed, it is remarkable to recall that during Antonin Scalia's confirmation hearings in 1986 he received the committee's unanimous approval. Not only that: The Senate itself confirmed him unanimously. By contrast, Judge Alito will today get "no" votes from about 40 senators after surviving a filibuster attempt. These days many liberal Democrats--as keen as ever on a "flexible" reading of the Constitution in support of their own causes--no doubt regret their earlier goodwill toward Justice Scalia. He has been nothing but trouble for them ever since.

For others, though, he has been a source of pride, and not only for his intellect and biting prose. By insisting on adhering to the constitutional text, he has presented a sweeping challenge to the orthodoxies of the legal establishment. In "Antonin Scalia's Jurisprudence," Ralph Rossum captures the qualities that have made Justice Scalia's ideas such a formidable and, to some, terrifying force.

Respecting the original meaning of the constitutional text is, for Justice Scalia, the only way of making judicial decision-making consistent with the rule of law and democracy. The greatest threat to both, he believes, is the temptation of judges to substitute their own values for those of the Framers, thereby cutting legal rules free from their moorings and, too often, usurping elected legislatures and the popular will. The constitutional text may at times be ambiguous, he concedes, but the best response to such ambiguity is to defer to American traditions, not to the enthusiasms of the moment.



Antonin Scalia

Does freedom of speech, for example, prohibit government officials from firing contractors who make political contributions to their opponents? The Constitution does not address the question with specificity. For Justice Scalia, the history of political patronage is a guide. It is as old as the Republic and suggests that the First Amendment should not be so broadly construed as to deny such a prohibition. As Mr. Rossum explains, political traditions embody democratic norms; they help to rein in judicial fads and whims.

Mr. Rossum takes pains to show that Justice Scalia's jurisprudence is not simply a cover for conservative ideology. In a variety of cases, particularly in the area of criminal procedure, Justice Scalia has reached results pleasing to political liberals. With Justice Stevens, he pushed for invalidating mandatory sentencing guidelines, because the Sixth Amendment requires that juries, not judges, make the factual determinations of guilt that result in sentences of varying lengths. He has also fiercely defended the Fifth Amendment right of the criminally accused to be physically present

at their trials, even when psychologically vulnerable children testify against them.

Textualism has the virtue of consistency, Mr. Rossum notes. In almost every case, Justice Scalia tries to square his results with the constitutional text. A justifiable exception: those areas of the law where citizens have come to rely on such a long line of contrary precedents that resort to the Constitution's original meaning would, potentially if not probably, destabilize the Republic. The Constitution permits Congress to regulate only interstate commerce, for example, but Justice Scalia would not overrule precedent that effectively permits Congress to regulate economic matters even within a single state; too much modern government rests on earlier decisions. But Mr. Rossum also notes a lapse that does not derive from precedent. Justice Scalia has voted to immunize states against federal lawsuits even though the Constitution does not provide such immunity and an early Congress rejected an amendment offering it.

Mr. Rossum is no hagiographer--he is critical of all lapses from textual fidelity--but he is certainly respectful of Justice Scalia's judicial career. He notes insightfully that the most important opinion Justice Scalia wrote in defense of federalism, in 1997, actually reflected his concern with preserving the separation of powers. In that case, Justice Scalia argued that Congress could not require state officials to enforce federal law, in part because such mandates detract from the president's authority to control the agents of federal law enforcement. This analysis makes less surprising his refusal--in the medical marijuana case that the Supreme Court ruled on in June--to protect the right of states to permit medicinal drug use: The president's power was not at issue in that case.

As cogent as Mr. Rossum's analysis is, he might have spent less time explicating the details of Justice Scalia's cases, especially from his days as a lower-court judge, and more time exploring the tensions in his thinking. The Constitution--even the "originalist" Constitution--sometimes governs through open-ended standards rather than tightly written rules. The best reading of the Free Exercise of Religion Clause, for instance, may require that believers be exempted from complying with laws that burden their practices, assuming that the government has no substantial need to insist on compliance. But determining the substantial needs of government can be quite a subjective exercise. What should Justice Scalia do in such cases, where his two ideals--honoring the original meaning of the Constitution and maintaining clear rules--appear to conflict? Such questions will soon become even more pressing if Judge Alito joins Justice Scalia in reviving the Constitution's text as the touchstone of our fundamental law.

Mr. McGinnis is a professor at the Northwestern School of Law. You can buy "Antonin Scalia's Jurisprudence" from the [OpinionJournal bookstore](#).

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