that on election night Lincoln enjoyed "a midnight supper prepared by the town's Republican ladies" (172). Political historians also know that, to the consternation of white southerners, enslaved southerners followed partisan politics and were especially intrigued by the avowedly antislavery Republicans. For slaves, this was undoubtedly an election about slavery. And what about African Americans in the Free States, some of whom voted? Did Frederick Douglass's qualified endorsement of Lincoln show that he was alarmed by political corruption, or did he see something else at stake in this contest? Holt discusses the surge in young men's interest in the election, exemplified by Republicans' youthful auxiliary, the "Wide Awakes." The youth vote was a factor in the election's outcome. This is an instructive example of incorporating diverse groups, who brought their own agendas into political contests, the parameters of which were not predetermined by party elders.

The absence from this book of vast swaths of Americans, who influenced the parties even when they could not vote, does not reflect the current state of the field of political history. Partisan politics engaged every aspect of life, and *all* Americans found elections compelling. A presidential election, with political enthusiasm at fever pitch, should prove just how relevant and consequential nineteenth-century electoral politics was to everyone. After all, the results of this election prompted Americans to kill each other. Holt gives us a new and historiographically provocative analysis of an old and familiar story. Thinking about the election in broader terms and asking how diverse Americans understood it would make the 1860 election a new story altogether.

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Richard L. Hasen: *The Justice of Contradictions: Antonin Scalia and the Politics of Disruption*. (New Haven, CT: Yale University Press, 2018. Pp. 248.)

David M. Dorsen: *The Unexpected Scalia: A Conservative Justice's Liberal Opinions*. (Cambridge: Cambridge University Press, 2017. Pp. 394.)

doi:10.1017/S0034670518000803

Even after his death in 2016, Justice Scalia has continued to confound observers. He is perhaps the most consequential justice in the last half century. His strong defense of an approach to judicial interpretation based on plain language and the original public meaning of constitutional and statutory

provisions, sometimes called "originalism" or "textualism," revolutionized the way the Supreme Court heard and decided cases, and therefore how lower courts did as well. His opinions, especially his acerbic and sometimes funny dissents, became the talk of law schools and law offices across the country. His nonlegal speech and writings have been collected in a separate volume, and during his lifetime he became something of a judicial celebrity, starting a trend that has continued—compare, for example, the star-struck manner of some fans of Justice Ruth Bader Ginsburg, the "Notorious RBG," with Scalia's "Nino."

Commentators are still trying to come to grips with Scalia's legacy. Originalism is now probably the dominant interpretive approach among the judiciary; at the very least, respectful consideration of original meaning, linguistic analysis, and similar tools are now very much a part of Supreme Court argument in a way they were not before Scalia ascended to that bench. But originalism is not uncontroversial, as the disputes over Supreme Court nominees such as John Roberts, Neil Gorsuch, and Brett Kavanagh, who has declared his adherence to a version of it, attest.

"Originalism" was initially a term of opprobrium, first used in a 1980 article by Paul Brest, though the debate over how to assess the meaning of constitutional provisions according to the views of the Founders dates back to the 1970s. Its defenders adopted the term as a badge of honor. Scalia mentioned originalism in a speech in 1986, but even then the term was changing its meaning, in part as a result of a large and growing body of scholarly and judicial work. Indeed, Scalia himself in that speech moved beyond "original intent" to "original public meaning" as the basic criterion of an originalist jurisprudence. That body of originalist scholarship has moved in different directions from the ones in which Scalia was interested as a judge, and has now grown into what Grant Huscroft and Bradley Miller call a "family" of originalist theories.

The two books under consideration here are popular accounts of Scalia as both a personality and a judge. Dorsen's aim is to prove that Scalia was actually a judicial "liberal," as Dorsen defines the term. He identifies 135 opinions of Scalia's that fit the definition, Scalia's own conservative inclinations notwithstanding. Hasen wants to show that Scalia's originalism is largely a fig leaf for conservative results. Neither author has much sympathy for originalism as an interpretive method: Hasen thinks it too open to manipulation, and Dorsen contends that "information about the understanding of the Framers . . . that are germane to present issues are so few and ambiguous that many constitutional judgments cannot be determined by a resort to history" (Dorsen, xii).

Hasen, a professor of law and political science at the University of California, acknowledges Scalia's intellectual power and the force of his arguments and the extent to which his originalism has influenced even nonoriginalist judges, but ultimately thinks it is all a dodge: "whether a justice used originalism or textualism turns out to be a terrible predictor of his or her

voting pattern. Instead, the ideological views of the justice … are a very accurate predictor of votes in the most contentious cases" (Hasen, 12). As for Scalia himself, Hasen argues that his caustic manner and at times very critical assessment of the opinions of other justices caused his "ostensibly neutral jurisprudential theories . . . to politicize the Court and delegitimize his opponents, leaving us with a weakened Supreme Court" (13). It is unclear what that could mean, since the Court is among the most powerful institutions in America. The 2016 presidential campaign was fought, in no small part, with an eye to the question of which candidate would have control over the composition of the Supreme Court, as well as the lower appellate and trial courts. What Hasen seems to mean is that a "weak" court is one that is not as "proactive" in areas he deems important. But he does not make that argument so much as assume it.

Hasen describes Scalia's jurisprudence early in the book as a "type of populist, nationalist, conservative libertarianism" (7), but he does not really define these terms so much as deploy them as pejoratives. He then recasts this word salad as a "vision of individual freedom from overreach built into the Constitution itself." But this is not enough. Hasen also wants to argue that Scalia's method was mostly show, a cover for an ideology. In this, he is generally unsuccessful. At the outset, Hasen cites a figure that should cast doubt on his argument that, on one hand, Scalia is not influential and, on the other, he has weakened the Court. In his three-plus decades on the Court, Scalia voted with the majority seventy-five percent of the time. It is true that in many of these instances, Scalia wrote separate concurrences to join the judgment of the Court but not the reasoning. Nevertheless this is hardly the portrayal of a Justice who is weakening the Court or is out of step with his colleagues.

Hasen's arguments that Scalia's jurisprudence makes no sense or is an ideological smokescreen largely fall flat. For example, he seeks to show how Scalia appears to use "textualism" when it suits him, and compares two cases to try to prove the point. He pairs *King v. Burwell* (2015), the Obamacare case, with the 1989 case *Green v. Bock Machine Laundry Company*. In *Bock*, the Court was asked to construe a rule of evidence that allowed evidence of a defendant's felony conviction to be admitted at trial if it was sufficiently probative. In this case, though, the defendant was attempting to use a felony conviction against a plaintiff in a civil case without such a probative finding. This seemed an unfair result. Scalia wrote that the evidentiary rule should be applied only to criminal defendants, even though the word "criminal" was not in the rule. He contended that the meaning that governs should be the one that was "(1) most in accord with context and ordinary usage," and thus likely to have been understood by the whole Congress, as opposed to some subsection of it, and "(2) most compatible with the surrounding body of law into which the provision must be integrated," in this case the rules of evidence. Based on those principles, Scalia wrote, the best way to interpret the language of the rule would be for it to apply only to criminal defendants.

In *Burwell*, the Court found that a healthcare exchange "established by a state" could also mean "established by the federal government." Scalia dissented, and blasted the majority opinion. What he said about that language one does not find in Hasen, who does not discuss Scalia's reasoning in any detail. Hasen simply claims these results are inconsistent, and even says that Scalia "rewrote" the rule in *Bock* to avoid an absurd result, but did not do so in *Burwell*, because Scalia was ideologically opposed to Obamacare. But they are not inconsistent: in both cases, Scalia attempted to construe the plain meaning of the text at issue. If Hasen had included Scalia's actual reasoning from his *Burwell* dissent, the reader would have learned that (as in *Bock*) there was evidence to provide contextual support for Scalia's position that "established by a state" could not also mean not established by the federal government. There are other uses of the phrase "by a state" in the Affordable Care Act itself, for example, and common judicial practice is to give similar meaning to the same terms used in a statute so far as possible. On Scalia's view, accepting the majority opinion would essentially mean deleting or recasting that phrase numerous times in the statute, rendering actual statutory language meaningless. One may agree or disagree with this position, but it is not obvious that this position is in fact "inconsistent" with what Scalia wrote in *Bock*.

Moreover, Hasen elides the fact that in *Bock* Scalia *concurred* with the majority opinion, written by Justice Stevens; Scalia simply had a more straightforward way of reaching his decision than Stevens's examination of the intricacies of legislative history and ancient versions of the rule, which the Congress as a whole is not likely to have known. This again undercuts Hasen's argument for an "ideological" Scalia. Hasen thinks Scalia should simply have declared Rule 609 unconstitutional, but that kind of ruling (as canons of judicial reasoning generally advise) is to be avoided if some other reasonable interpretation of the language is possible. And he acknowledges that his own preferred resolution of the *Bock* case, drawn from William Eskridge, would be to add the phrase "in a criminal case," which is essentially what Scalia did, so his objection is a distinction without a difference. In both *Burwell* and *Bock*, Scalia tried to make the best sense out of the language of the statute, in a similar fashion.

Moreover, Hasen feels the unfortunate need to cast aspersions on Scalia, even by indirect association. He guesses that Scalia included a detailed account of a gruesome series of murders in his *Kansas v. Carr* decision because he "consumes conservative media," even though Hasen acknowledges that he has no idea whether this is true. And the *Carr* decision was a majority opinion, which at least suggests that the other justices also acceded to the level of detail of the crime. In noting that public opinion polls suggest a drop in the Court's reputation, Hasen muses, "it is impossible to say whether Scalia's coarsened rhetoric contributed to the decline, but it could not have helped" (75). But this makes little sense without further support. As Hasen does acknowledge, Scalia's rhetoric was rarely directed

at anyone individually; his target was rather the Court as a whole and the usurpation, as he saw it, by the judiciary of functions reserved to and better performed by the other branches.

Originalism has spawned a number of variants, and not all of them lead to results with which Scalia would concur. To this extent, Hasen has a point: it is not intuitively obvious, for example, that the doctrine of incorporation of the Bill of Rights is consistent with a textualist or originalist position. And for a school of thought that purports to be based on public understanding of constitutional terms, some of the scholarship has become increasingly arcane. As Lawrence Solum has stated in a helpful primer on originalist thinking, there are really only two (and perhaps just one) points on which all originalists agree: that the meaning of a provision is fixed at the time of its enactment, and that this fixed meaning should constrain (to some degree) judicial interpretation of that provision. But beyond that, the results of an originalist approach need not be uniform. This is perhaps especially the case with statutory as opposed to constitutional provisions, since the former are not governing documents in the way the latter are, and other interpretive tools may be better employed (as well as techniques such as so-called *Chevron* deference). So Hasen's secondary point that originalism can lead to several results depending on what is being considered is valid. But that does not justify Hasen's major point: that because the method allows several results, it is largely without substance.

Similarly with Hasen's point about Scalia's influence. The better argument perhaps is that made by Jesse Merriam (not specifically about Scalia's jurisprudence), that judicial conservative activism in fact has failed. Too often conservative victories simply preserve the liberal status quo and so the "conservative revolution" that so dismays Hasen (and Dorsen) has not really occurred, and the real constitutional story is how routed the conservative positions are, so much so that conservative interest groups propose ever-narrower positions to protect a dwindling position.

This nuance of originalist thinking is much better expressed in Dorsen's *The Unexpected Scalia*. Dorsen, a Washington, DC, lawyer who knew Scalia, recognizes that originalism and textualism, as methodologies, can return results that vary across a liberal-conservative spectrum. Indeed, he argues that one can describe the "liberal" opinions of Scalia in a way one cannot distinguish the "conservative" opinions of , say, Chief Justice Warren or Justice Brennan (or for that matter Justice Sotomayor). You know where the liberal justices are going to vote, because their approach focuses on getting the "right" result, with less constraint than an originalist considers appropriate for the judicial role. And Dorsen notes a number of areas in which Scalia has written or joined "liberal opinions," particularly in criminal law. In a number of opinions, Scalia's textualism argued for clearly written criminal statutes. Otherwise, a defendant may not have understood that conduct was actually criminal, and so the benefit should be given to the accused. Similarly, where an administrative regulation was not ambiguous, the Court need not defer to

that agency, and Scalia on several occasions voted with a liberal majority on this basis. But although this discussion offers a thoughtful analysis of Scalia's opinions, it suffers from a similar flaw to Hasen's. The criteria Dorsen uses to categorize Scalia's opinions are based on a (not unreasonable but still subjective) definition of "liberal" and "conservative." Dorsen uses "liberal" and "conservative" generally as they occur in contemporary political discourse: liberals favor criminal and other rights, labor unions, and expansion of state power over the economy, conservatives prefer the authority of law enforcement government power in areas like criminal law and are suspicious of the administrative state. But as Dorsen recognizes, the fact that Scalia's decisions straddle this divide is just a consequence of his consistent application of his methods.

Dorsen also offers examples of "conflicted" opinions, about which he argues that "what is conspicuous is the selective application of originalism" in areas such as the availability of punitive damages and the right to free exercise of religion (Dorsen, 111). He also has a substantial section analyzing whether originalism even has the materials it needs to perform the kind of analysis it claims it does. In the end, though, he concludes that Scalia's approach does not ordinarily stand in the way of "liberal" opinions, and that Scalia seems to go where his approach leads him. "By and large, his liberal and conservative statutory opinions are cut from the same cloth and, more than many Justices and judges, he seems to avoid a bias in statutory construction" (200). Generally this is to the good, but Dorsen argues persuasively, if not conclusively, that tools Scalia disdained, such as legislative history, may provide helpful context even if restraints based on the text remain appropriate. Dorsen also questions Scalia's jurisprudence in some First Amendment areas, where Dorsen argues that the historical record of, for example, state accommodation of religion, or the extent of free speech, is not as clear as Scalia believed—though here too, these positions "are not ideologically based" (238).

Dorsen's conclusions are what one would expect, especially in light of Solum's work: decisions based on a method positing that texts have a fixed meaning that restrain judicial action would lead to varied results across a given ideological spectrum. That method, whatever its results in individual cases, may be Justice Scalia's lasting legacy.

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