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Edward A. Purcell, Antonin Scalia and American Constitutionalism: The Historical Significance of a Judicial Icon

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Historian Edward Purcell has undertaken a comprehensive study of the constitutional jurisprudence of the late Justice Antonin Scalia. The result is a book of major importance, even in the crowded field of Scalia studies. An earlier work by

the election law scholar, Rick Hasen, covers some of the same ground and sounds in similar themes, but is far less ambitious (*The Justice of Contradictions: Antonin Scalia and the Politics of Disruption* [New Haven: Yale University Press, 2018]). And we have readers like *The Essential Scalia: On the Constitution, the Courts, and the Rule of Law* (New York: Random House, 2020), edited by two former Scalia clerks, Jeffrey S. Sutton and Edward Whelan, which celebrate the judge's contributions to law and legal ideas. But Purcell does not come to celebrate. As the justice himself might put it, "this wolf comes as a wolf" (*Morrison v. Olson*, 487 U.S. 654, 699 (1988) [Scalia, J., dissenting]).

The aim of Purcell's work is to take stock of Justice Scalia's contributions to the constitutional law of the United States. The focus is on those ideas and doctrines to which Scalia is thought to have contributed the most: originalism, separation of powers, constitutional standing, and the Second Amendment. But the book ventures far beyond this territory. Chapter 5 alone covers executive appointments, religious establishment, the Eleventh Amendment, affirmative action, gay marriage, voting rights, and the general contractor defense to liability under the *Federal Tort Claims Act*. The plan is ambitious, but the topics are threaded with skill, and the author reveals a Dumbledore-like command of the law. The study of *Erie* doctrine in Chapter 9 could stand on its own as a contribution to legal scholarship.

The tone is critical throughout. The author is unsparing, and in places his judgment is devastating. After an opening biographical chapter, the book turns to originalism, which Scalia sold on the lecture circuit as an "objective standard to determine constitutional meaning" (25). It "limited the discretion of judges," and prevented them, he insisted, from "making the Constitution say whatever they think it should say" (ibid). Original meaning was "easy to discern and simple to apply" (ibid). But there are good reasons for no one, not even academic originalists, to support these claims anymore. Reviewing the arguments, Purcell concludes that Scalia's originalism was "deeply flawed," its methods "wholly inadequate," and "did not actually resolve that fundamental jurisprudential problem"—judicial discretion—"so much as skate over it wearing ideological colored lenses" (30).

The middle chapters are devoted to doctrine. The author's method is to identify the principles, concepts, and sources invoked by the justice and to compare their use in different cases. Just to pick one example, in suits against state officers for violating civil rights, Scalia averred that the right allegedly violated had to be articulated at a "fact-specific" level, with the result that the officer was often immune from liability on grounds that he could not reasonably have known of such a right. In contrast, in suits against federal contractors, the justice abandoned this principle in an effort to take advantage of judicial precedents friendly to the defense (159). Purcell has dozens of examples like this, and by exhaustively marshalling them for the reader, shows just how unprincipled and political Justice Scalia was.

The technique is effective, but over time I began to bridle, or perhaps to tire, at the endless charges of inconsistency. I found myself wondering whether the portrait was fair, desiring a similar treatment of each of the other justices to provide some kind of a standard. Surely some judges with whom I was ideologically sympathetic could also be charged with inconsistency. I wondered, as well, whether cutting up a jurist's opinions and stitching together a creature made from "principles" best represented their contributions to the law. As theorists have explained, reason in the common law is "defeasible": even if R is a good reason to conclude C in one case, it does not follow in the next case that R *&* *P* (where *P* is a different fact or relevant set of facts) justify C. The facts always potentially matter. (See Graham Hobbs and Douglas Lind, eds., *Pragmatism, Law, and Language* [New York: Routledge, 2014], 20–21). Applying this principle, original meaning may be relevant and even conclusive on one occasion, but not another, although the same piece of text is involved—and without any infidelity, insincerity, or bad faith.

Purcell ends with a reflection on the nature of American constitutionalism. Here he draws on ideas developed in earlier work on federalism, where he exposed the necessarily incomplete, evolving, and political character of American constitutional law (see e.g. *Originalism, Federalism, and the American Constitutional Enterprise: A Historical Inquiry* [New Haven: Yale University Press, 2007], 189–96). Viewed from this perspective, ironically, the inconsistencies identified in earlier chapters appear less blameworthy. "Originalism," it turns out, nicely illustrates the living and politically responsive character of American constitutional law, because it gives effect to the interests and concerns of the judges employing it. Those interests are concerns that are themselves historically situated and change over time as the political and social forces operating on judges change.

It is not necessarily a fault to have bequeathed a jurisprudence that is subjective, informed by politics, and passionately argued. The assumption that judicial autopsy should reveal instead a set of consistent, politically neutral, and fully theorized legal principles reflects a view of law that itself is not above objection. Leading English jurists had certainly required less, resting their opinions on rules of thumb or maxims (not universal principles), stock examples, and common forms of argument. Theirs was a law with a policy and a point of view. Sir Edward Coke, with his own fabricated histories, inconsistencies, and political schemes, would have taken Scalia for kin. Both were possessed of an irrepressible argumentative brilliance that led contemporaries to treat them like living authorities. Scalia's fault, then, lies not so much in failing to hew to principles as in failing to be forthright about it.

Scalia was unwilling, or perhaps unable, to stop himself from habitually overclaiming his warrant: the court had *always* handled the issue this way (when, in fact, it only sometimes did); history *clearly* supported one view of the text (when, in fact, it supported multiple views). The pen wanted a

principle, and so it simply proclaimed one, finding support, *pro re nata* (for the particular situation), in a dictionary, in a precedent, or in some lines snatched from *The Federalist*. In lacking a system, he was not alone among judges and is perhaps not even to blame; in berating the rest of us for failing to adhere to what was in truth a fiction, he was dishonest and mean. This, ultimately, is the labor of this important book: not to argue our way clean of Scalia, but to reveal his arguments for what they were, and to free us thereby from their intellectual domination.

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