THE UNEXPECTED SCALIA

Antonin Scalia was one of the most important, outspoken, and controversial Justices of the past century. His endorsements of originalism, which requires deciding cases as they would have been decided in 1789, and textualism, which limits judges in what they can consider in interpreting text, caused major changes in the way the U.S. Supreme Court decides cases. He was a leader in opposing abortion, the right to die, affirmative action, and mandated equality for gays and lesbians and was for virtually untrammeled gun rights, political expenditures, and imposition of the death penalty. But both the concept and the execution of originalism, by Scalia and other originalists, have been seriously flawed, leading to decisions that are both historically incorrect and socially and politically undesirable. However, he usually followed where his doctrine would take him, leading him to write many liberal opinions. A close friend of Scalia, David Dorsen explains the flawed judicial philosophy of one of the most important Supreme Court Justices of the past century.

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President Reagan listens to Anthony Scalia during the swearing-in ceremony for Chief Justice Rehnquist and Associate Justice Anthony Scalia of the U.S. Supreme Court, while Warren Burger, Natalie Rehnquist, and Maureen Scalia look on, in the East Room. Courtesy of the Ronald Reagan Library.

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A CONSERVATIVE JUSTICE'S LIBERAL OPINIONS

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CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE
UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

4843/24, 2nd Floor, Ansari Road, Daryaganj, Delhi - 110002, India

79 Anson Road, #06-04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781107184107
DOI:10.1017/9781316875407

First published 2017

Printed in the United States of America by Sheridan Books, Inc.

A catalogue record for this publication is available from the British Library.

Library of Congress Cataloging-in-Publication Data
Names: Dorsen, David M., 1935– author.
Title: The unexpected Scalia : a conservative justice's liberal opinions / David Dorsen.
Description: New York : Cambridge University Press, 2017.
Identifiers: LCCN 2016043394 | ISBN 9781107184107 (hardback)
Subjects: LCSH: Scalia, Antonin. | Judges – United States – Biography. | United States. Supreme Court – Biography. | BISAC: LAW / Jurisprudence.
Classification: LCC KF8745.S33 D67 2017 | DDC 347.73/2634 – dc23
LC record available at https://lccn.loc.gov/2016043394

ISBN 978-1-107-18410-7 Hardback
ISBN 978-1-316-63535-3 Paperback

To Kenna Dorsen and Norman Dorsen

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Preface

As long as anyone can remember, himself included, Antonin Scalia was a conservative, at times vexingly so. His professorial law review articles were conservative, and his judicial opinions were conservative. These have included decisions both on issues affecting business and, probably more important in today's world, on social issues. A study in the *Supreme Court Compendium* listed the Justices with whom Scalia agreed and disagreed most. In descending order, the top correlations were with Thomas, Roberts, Rehnquist, Alito, Kennedy, and O'Connor; in ascending order, his lowest correlations were with Marshall, Brennan, Stevens, Blackmun, Breyer, and Ginsburg.[1]

Among Scalia's opinions, however, were many that qualify as liberal under the definition we shall shortly consider. In fact, the number totals 135 (listed in Appendix C) out of 867 opinions on the merits and at least twelve opinions on petitions for *certiorari*.[2] The principal question that this book tries to answer is why Scalia wrote many liberal opinions. His answer was that his legal philosophy compelled him to do so; otherwise, he said, he would have been inconsistent or worse. This book provides substantial support for his answer. Interestingly, he seemed to employ his view of the original understanding, whether or not it was consistent with the view of most historians, equally – well, almost equally – to reach liberal and conservative results. His conservative views on the Second Amendment seem ahistorical, but then, so do some of his liberal views on search and seizure.

Aside from explaining the judicial philosophy of one of the most important Justices in the past century, a goal of the book is to subject the doctrine of originalism to serious scrutiny. Originalism insists that the Constitution should be construed the same way it was understood when it was originally adopted in 1789, when it was amended to include a Bill of Right in 1791, and so on. While an amazing document for its time, the eighteenth-century Constitution would be a reactionary document today. It allowed slavery, denied women the vote, and mandated an indirect vote for President and the Senate. While those constitutional abominations have largely

been eliminated, their original presence says something about the founders and their era, in which Congress could pass a law criminalizing seditious libel and executing someone for forgery. Nevertheless, 60 percent of respondents to a 2012 survey said that the Supreme Court "should base its ruling on its understanding of what the Constitution meant as it was originally written."[3]

Among my findings is that information about the understanding of the Framers, whether in the late nineteen century or in the 1860s, that are germane to present issues are so few and ambiguous that many constitutional judgments cannot be determined by resort to history. What this means, aside from its challenge to originalism as a valid approach to constitutional law, is that Scalia had had little reason to write liberal opinions. More easily, he could have written additional conservative opinions based on originalism.

This book attempts something that may be impossible, namely, to separate Scalia's judicial philosophy from his personality and style. There is no shortage of commentaries that portray him as divisive, combative, overbearing, intolerant, intemperate, bumptious, nasty, bullying, vain, rude, acerbic, narrow-minded, and, also, charming, funny, brilliant, loyal, candid, conscientious, rigorous, exacting, meticulous, willing to engage on issues, larger than life, and an excellent writing stylist. These characteristics were very much part of Scalia the man and Scalia the judge. If they had an impact on his views, they undoubtedly have had a greater impact on his influence, including his status as role model and molder of Supreme Court advocacy.

Scalia criticized his fellow Justices, sometimes mercilessly, and it is impossible to gauge the consequences of that disrespect. He said of one of Stevens's opinions: "I join the opinion of the Court except that portion which takes seriously, and thus encourages in the future, an argument that should be laughed out of court."[4] He said of one of White's arguments that it "should not be taken seriously."[5] He also said that an assertion by O'Connor "cannot be taken seriously."[6] Scalia was equally dismissive of some of Kennedy's opinions, ridiculing, for example, what he called Kennedy's "sweet-mystery-of life passage" in *Lawrence v. Texas* (2003)[7] as a ground for holding unconstitutional laws criminalizing homosexual acts. In one of his last opinions Scalia wrote: "If, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began: 'The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm to define and express their identity,' I would hide my head in a bag. The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie."[8] What seemed to bother Scalia most was the perceived absence of a coherent and rigorous philosophy on the part of Stevens, O'Connor, and Kennedy.[9] He was far more tolerant and respectful of Ginsburg and Breyer.[10]

Commentators have searched for the genesis of Scalia's views in his Catholicism and Catholic schooling and in his Italian-American heritage.[11] I will leave that quest to psychologists (preferably ones with a law degree).[12] I believe that it is enlightening

to separate Scalia's intellectual accomplishments and deficiencies from, for want of a better term, his personal qualities. At least, that is my assumption in this book.

I communicated in person, by telephone, and by e-mail with Scalia frequently about this book. Scalia was an old friend, dating from our overlapping year on the *Harvard Law Review*, 1958–59 (my third, his second, law school year). In recent years, starting roughly in 2003 (after my wife and I sufficiently recovered from *Bush v. Gore*), we dined together regularly and got along splendidly on a personal level. We celebrated election nights and some of each other's birthdays together. He also commented extensively on a draft of *Henry Friendly, Greatest Judge of His Era*, my prior book. When it was published, he graciously threw a book party for me at his home, attended by seven Brethren and others. But the fact that he was a friend should not be confused with whether we agreed on political and social issues. We rarely did. I am liberal, nonoriginalist, and atheist. He most definitely was none of these. Nevertheless, we had some common ground in the liberal opinions discussed in this book. Books are written all the time on people the author either agrees with or disagrees with. This is a book by a friend who disagreed with the subject's main impact.[13] The results will speak for themselves.

With rare exceptions, which I note, I have not relied on speeches not published in law reviews under Scalia's byline, his statements and questions at oral arguments, comments attributed to him, or comments to me. I accepted only what Scalia put his name on for publication, whether articles or judicial opinions. Many of his speeches were provocative, and some had an off-the-cuff quality that may not have reflected his considered thought. He may have been giving his personal views, which were not the same as his judicial views. His questions at oral arguments were often designed to provoke, not necessarily to enlighten. Scalia liked to engage listeners, even to disturb and outrage them, and this does not make for a reliable account of his jurisprudence. Judges and scholars cite judicial opinions and articles, but it is extremely rare, if not unprecedented, for them to cite statements in speeches, questions at oral argument, or the like. Relying on stray comments is not scholarship.

Scalia loved to become engaged in serious issues with those who disagreed with him, such as the meaning of the Second Amendment, whether the death penalty reduced homicide, search and seizure issues, and the role of religion. He debated many liberals and addressed hostile audiences. His well-developed philosophy left little room for persuasion on my part. My fallback position was to urge the Christian value of mercy. While a small minority of our time together, usually with our wives at one of our homes, and sometimes at wine society dinners, a baseball game, or an opera, was devoted to these issues, he and I argued about them in his chambers over a light lunch and a good bottle of wine. He never saw this book but was interested in my arguments and was happy to reply to my e-mails that asked him to explain and even defend his opinions. When I complained by e-mail that I had tried and failed to appreciate his point, he responded almost immediately: "Try harder."

Leaving to one side Scalia's vote in the dismaying *Bush v. Gore* (2000)[14] (about which I have no special knowledge), I believe that Scalia was principled,[15] although

his interpretation of Second Amendment history challenged my charitable characterization. Both are extremely difficult to defend on any ground, including originalism. For me the key to understanding Scalia is his liberal opinions, which as a conservative he did not want to write and, moreover, sometimes took him to the left of what history in fact required and even what the Court's liberal Justices (or I) embraced. He was just as passionate about a violation of his liberal tenets, such as what constituted a search and seizure under the Fourth Amendment and what violated the Confrontation Clause of the Sixth Amendment, as he was about violations of the Second and Eighth Amendments. I note that some not necessarily sympathetic to Scalia's jurisprudence agree with my assessment;[16] many liberals do not.

Part I of the book provides a discussion of Scalia's principles of decision making, virtually all of which predated his tenure on the Supreme Court in the form of law review articles. It starts with the confirmation hearings on Scalia's nomination to the Supreme Court and is followed by a more detailed examination of his views.

Part II is a nonexhaustive review of Scalia's conservative constitutional opinions in the Supreme Court in a variety of areas based largely on the themes discussed in Part I.

Part III is a description of Scalia's liberal constitutional opinions in the Supreme Court, with explanations as to how they flowed from his basic principles of originalism and textualism.

Part IV deals with several areas that are difficult to classify in the abstract as liberal or conservative, including Scalia's refusal to allow limits on political speech and his support of asserted rights of antiabortion picketers on the ground that limitations would restrict exercise of their First Amendment rights.

Part V is a return to originalism and its applications with a more critical and expansive eye. The opinions in Parts II, III, and IV are reexamined in the light of modern scholarship by historians, legal historians, and, to a lesser extent, linguists.

Part VI discusses Scalia's nonconstitutional opinions in the light of his principles, especially textualism. While some attention is paid to his conservative opinions, most attention is paid to his liberal opinions and how his textualism took him there.

Part VII encompasses a comparison of Scalia's positions with those of the Court's other originalist, Clarence Thomas, and a conclusion.

On a technical level, the book makes some changes from traditional legal scholarship citation form. Almost everything quoted in this book has footnotes, and they are uniformly deleted without mention. Emphasis and punctuation that appeared in the original are not identified unless there may be ambiguity. I do not adhere to the *Bluebook* on form.

Acknowledgments

I want to express my great appreciation to Sedgwick, LLP, where I am Of Counsel. The law firm and its predecessor have supported my writing career, including my prior biography of Judge Henry Friendly, by giving me an office and clerical services without accepting anything in return, except, possibly, the satisfaction of helping a lawyer, now largely removed from private practice, engage in a new career as an author of books on judges and the courts. I also want to thank George Washington Law School, where I taught as an adjunct professor more than a decade ago, for allowing me to employ its library and facilities, including its highly professional staff.

A number of people have given generously of their time and knowledge to read and comment on drafts of this book. Three members of the judiciary, present or former judges on U.S. courts of appeals, provided invaluable assistance: Judges Patricia Wald (D.C. Circuit, retired), J. Harvie Wilkinson (Fourth Circuit), and Stephen F. Williams (D.C. Circuit), who also provided assistance on my first book. I want equally to thank four distinguished professors of law: Norman Dorsen (NYU Law School), my brother, whose help and encouragement require special notice; John F. Manning (Harvard Law School and a former law clerk to Justice Scalia); and Stephen B. Presser (Northwestern Law School) – all of whom, like the judges, commented on the entire manuscript – and James J. Grudney (Fordham Law School), who reviewed my chapters on legislation. Their comments have been invaluable to me.

I relied extensively on scholarship in books and professional periodicals, and I have done my best to acknowledge my predecessors in thought. I want to thank the many scholars, primarily historians and law professors with training and advanced degrees in history or related relevant fields, who graciously answered my e-mails and provided encouragement. While I have relied on their learned and often groundbreaking books and articles in my analysis of Justice Scalia's jurisprudence, which are duly noted in the endnotes and sometimes in the text, I especially appreciated their willingness to interrupt their work to respond to my questions.

I want to express my appreciation to Cambridge University Press, especially Lew Bateman and John Berger, for publishing this book and for the assistance they provided.

Thanks are also due to Mike Aronson, who was my editor at Harvard University Press on my previous book and on this book before his untimely retirement, which did not diminish his interest and encouragement.

I also was helped by part-time law student researchers from George Washington Law School, who located hard-to-find citations and sources and did other essential work: Nicholas Sachanda (GWU '13), Joshua Champagne (GWU '14), and Douglas Strauss (GWU '16).

I want to thank the late Justice Antonin Scalia, who graciously responded to my many inquiries about his judicial opinions and views both orally and by e-mail, but who had no say in what is written on these pages and who never read the manuscript. He encouraged me to write a rigorous book. I have endeavored to represent his views accurately and fairly. I also want to thank Maureen Scalia, also a close friend, for making our many dinners together calmer as well as enjoyable.

It goes almost without saying that I take full responsibility for everything in the book.