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Highly Original (Book Review)

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Since his appointment to the United States Supreme Court by President Ronald Reagan in 1986, Justice Antonin Scalia has been (to borrow a felicitous phrase from Justice Oliver Wendell Holmes, Jr) a "brooding omnipresence" over the constitutional landscape, revered by conservatives and reviled by liberals. This first Italian-American justice has electrified American constitutional law (and, thereby, American politics) by his firm and largely unflinching commitment to the idea that the "original meaning" of the Constitution is the only legitimate basis for judicial decision. Any other approach, he insists, is nothing less than "a standing invitation to judicial arbitrariness and policy-driven decision making".

There has never really been anyone quite like him on the Court. With a compelling mixture of personal charm, towering intellect, keen legal reasoning, pugnacity and acerbic wit, Scalia has demonstrated time and again an unrestrained – even gleeful – willingness to eviscerate his colleagues when they go beyond what he sees as the constitutional limits of their powers. He has never failed to upbraid them for acting like a "governing caste that knows best", eager to supplant the original meaning of the Founders' Constitution with nothing more profound than their own "unfettered wisdom" and questionable moral predilections. As a result, the Court all too often shows itself no longer engaged in "the interpretation of a Constitution but [in] the creation of one".

By his brilliance and brashness, Justice Scalia has become the judicial eye of the constitutional storm over interpretation that has been

Highly original

GARY L. McDOWELL

Ralph A. Rossum

ANTONIN SCALIA'S
JURISPRUDENCE

Text and tradition

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steadily gathering force for the past fifty years. There is, for example, no other justice who even comes close to the number of law review articles that mention him by name in their titles. And when President George W. Bush pointed to Scalia (along with his only trustworthy originalist colleague, Justice Clarence Thomas) as his model of what a Supreme Court nominee should look like, conservatives whooped for joy while liberals shuddered. As a result, all attention is now focused on whether Chief Justice John Roberts and Associate Justice Samuel Alito will measure up to the Scalia standard. And no one doubts that Scalia will be the first to chastise them should they start to stray.

Ralph A. Rossum's serious and scholarly account of Scalia's jurisprudence appears on the twentieth anniversary of Scalia's accession to the Supreme Court. The author diligently explores every nook and cranny of Scalia's

jurisprudence to give as complete a picture of

Scalia the judge as we are ever likely to have. There is nothing here about Scalia's penchant for duck-hunting with Vice President Dick Cheney while a case involving the Vice President was inching towards the top of the Court's docket; nor is there any discussion of the Justice's understandable willingness to respond to irritating reporters with what he recently described innocently as merely a "Sicilian gesture". There is not even much on Scalia's heritage, his family, or his unanimous confirmation as Associate Justice.

This is, first and foremost, a book about contemporary constitutional law and Scalia's place in it. Those looking for a more anecdotal measure of Scalia may find this penetrating book, with its voluminous recitation of cases, tedious. But one soon sees, as Chief Justice John Marshall once put it, that it is a "tediousness inseparable from the endeavor". Rossum understands that complex legal issues and doctrines can be reduced to mere caricature by yanking them out of context. Here, the reader is given the entire detailed picture of the cases and controversies that have made up constitutional law during Scalia's tenure on the Court. As a result, both those who hate him and those who love him will inevitably learn more about Justice Scalia and his commitment to text and tradition in inter-

pretation than they ever knew before. This is genuinely scholarly constitutional history, of an old-fashioned and rewarding sort.

Rossum covers Scalia's jurisprudence thematically, beginning with assessments of his commitment to the Constitution's fundamental structural principles of the separation of powers and federalism, and then moving on to consider how the Justice has treated fundamental substantive and procedural rights. And while the author confesses at the outset that this is "a generally sympathetic account of Scalia's original-meaning jurisprudence", he does not fail to take the Justice to task when, by abandoning his own commitment to originalism, "he ends up acting like the activist justice he routinely criticizes".

There is, of course, an inevitable weakness in any book like this, which is that we are still very much in the middle of the story. Despite his seventy years, Scalia is remarkably youthful, and seems disinclined to leave the Court in the foreseeable future. While he has been undoubtedly frustrated by much of what the Court has done during his time on it – and especially by the judicial activism of justices Sandra Day O'Connor, David Souter and Anthony Kennedy, each of whom was placed there by a Republican President – he can only be re-vitalized by the prospect of what President Bush's two young appointees will bring to the conference table. One suspects that when it comes to Scalia's jurisprudence, we may well not have seen anything yet. And one hopes that Ralph Rossum will revisit this important tale once the time comes to write the last chapter.