FEBRUARY 11, 2019

Antonin Scalia, Bendix Autolite Corporation v. Midwesco Enterprises, David A. Schultz, Howard Schweber, The Conservative Revolution of Antonin Scalia

A (Mostly) Misbegotten Attempt to Take Scalia's Measure

by ALLEN MENDENHALL

Justice Antonin Scalia.(Photo by Alex Wong/Getty Images)

On Wednesday it will be exactly three years since Justice Antonin Scalia passed away, yet his towering presence is still felt. Given the extent of his influence on legal education and his popularization of both originalism and textualism, it is no surprise to see a growing number of books and conferences addressing the importance of his legacy. One such book is *The Conservative Revolution of Antonin Scalia*, a collection of disparate essays edited by the political scientists David A. Schultz of Hamline University and Howard Schweber of the University of Wisconsin-Madison and published by Lexington Books.

No consensus view emerges from these wide-ranging essays on everything from Scalia's contributions to administrative law to his Senate confirmation hearings. Nor are the essays universally admiring. On the contrary, most of them are critical. "Was Antonin Scalia a sissy when it came to administrative law?" Schultz asks—unprofessionally, in my view. Mary Welek Atwell of Radford University scrutinizes Scalia's opinions in cases about race and gender, highlighting his apparent "comfort" with the "patriarchal, hierarchical" elements of the Roman Catholic Church, and grandly declaring that Scalia "sympathized more with those who were trying to hold on to their privilege by excluding others than with those who sought to be included."

Is that so? And is it so that Scalia, in the words of contributor Henry L. Chambers, Jr., of the University of Richmond School of Law, "read statutory text relatively simply"? What a relatively simple claim! Scalia's *Reading Law* (2012), coauthored with Bryan Garner, outlines principles or canons for interpreting statutes and legal instruments; it has become a landmark in the field, having been cited in hundreds of cases and over a thousand law review articles in the seven years since its release. While it aims to simplify hermeneutics, providing sound methodological guidance to interpreters of legal texts, it is by no measure simple.

Scalia "might be our most Machiavellian Supreme Court justice," the University of Wyoming law professor Stephen M. Feldman submits. "Scalia sneered, as was his wont," he writes in an aside. Less ad hominem but equally breezy assertions by Feldman: that originalism "is most often applied in practice as a subterfuge for conservative conclusions," and that, in any case, "Scalia's implementation of originalism failed on multiple grounds."

Most of the critiques in this book, in contrast to those just cited, are responsibly researched and tonally reserved. No reasonable person expects scholarly assessments of a controversial jurist's legacy to be an exercise in hagiography. On the other hand, such assessments should avoid coming off like intemperate outbursts.

The 18 contributors come from a range of disciplines. Only three are law professors; two are professors of criminal justice; two are doctoral candidates; and one clerks for a federal judge. Equally diverse are the essays' methodological approaches. The most distinctive belongs to Timothy R. Johnson, Ryan C. Black, and Ryan J. Owens, who in a coauthored chapter attempt to examine empirically—with graphs and figures—Scalia's influence on the behavior of his Court colleagues during oral argument. Whether they succeed is a determination better left to experts in quantitative research.

Scalia the Liberal?

Coauthors Christopher E. Smith of Michigan State University and Charles F. Jacobs of St. Norbert College consider Scalia's conservatism in the context of the criminal law. They do not define what they mean by "conservatism." Before long one gathers that their understanding of it is woefully limited. They conclude, with apparent surprise, that "in nearly 1 in 6 decisions, Scalia cast his vote in support of criminal rights." If Scalia's method involved choosing results and then supplying reasoning to justify them, then perhaps some of his opinions regarding the Fourth Amendment might seem uncharacteristically "liberal." Of course, Scalia's originalism and textualism do not presuppose conclusions; they demand, instead, a rigorous process of determining the meaning and semantic context of written laws. This process may lead to "liberal" or "conservative" outcomes that do not align with a judge's political preferences but that the words of the law necessarily require.

The process is conservative even when it yields "liberal" results.

"One might expect," the editors say of the Smith-Jacobs chapter, "that as a political conservative Justice Scalia would have authored opinions that gave the greatest possible latitude to agents of government." Such an obtuse claim is enough to cast doubt on Schultz and Schweber's understanding of conservatism and, hence, of their ability to critique the claims about conservatism that one comes across throughout the book.

By contrast, the essay by Jesse Merriam of Loyola University Maryland, "Justice Scalia and the Legal Conservative Movement: An Exploration of Nino's Neoconservatism," stands out as historically informed on matters of conservatism—including the relationship between Scalia's jurisprudence and the so-called conservative movement as represented by think tanks, politicos, journalists, and academics.

James Staab of the University of Central Missouri asks in the final chapter whether Antonin Scalia was a great Supreme Court justice. Staab answers no, basing his finding on seven factors:

1. "length of service, including the production of a large body of respected judicial work";
2. "judicial craftsmanship, or the ability to communicate clearly and memorably in writing";
3. "influence, or whether the judge left an indelible mark on the law";
4. "judicial temperament, or the qualities of being dispassionate and even-tempered";
5. "impartiality, or the qualities of disinterestedness and maintaining a strict detachment from partisan activities";
6. "vision of the judicial function, or the proper role of judges in a constitutional democracy"; and
7. "game changers, or whether the judge foreshadowed the future direction of the law and was on the right side of history."

This factoring raises the expectation of a quantitative methodology, yet the chapter lacks any mathematical analysis. Regarding the first criterion, Staab simply offers several paragraphs about Scalia's years of service and many opinions, discusses the jurist's extrajudicial writings, and then declares: "In sum, the body of judicial

work produced by Scalia is truly impressive. It is safe to say that he easily satisfies the first criteria [sic] of what constitutes a great judge."

Regarding the second criterion, Staab mentions Scalia's oft-celebrated writing skills and then lists some of the many memorable Scalia opinions, deducing from this evidence that "Scalia again receives the highest of remarks." He adds that the quality of Scalia's opinions "has sometimes been compared to those of Holmes, Cardozo, and Robert Jackson—a comparison I would agree with." Why should Staab's agreement or disagreement have any bearing? Where are the statistical and computational values that back up his personal judgments? Staab sounds like someone unconvincingly pretending to do quantitative research. Are his factors the best measure of greatness?

The Vagaries of Balancing Tests

What of Staab's negative verdicts? He questions Scalia's temperament and collegiality, pointing to his "strident dissenting opinions" and "no-holds-barred opinions." These opinions, says Staab, "struck a partisan tone," and the jurist's association with the Federalist Society (gasp!) "compromised his impartiality." Staab suggests that Scalia should have recused himself in *Hamdan v. Rumsfeld* (2006) and *Cheney v. United States District Court* (2004). He qualifies as "unprincipled" Scalia's opinions in the areas of the veto power, state sovereign immunity, the incorporation doctrine, regulatory takings, and affirmative action. He alleges that a "major problem for Justice Scalia's legacy is that his originalist jurisprudence was on the wrong side of history" in the sense that several of his views did not win out. Scalia was forced to dissent in controversial cases with sweeping results for the country.

Staab's checklist reminds me of the Scalia line about the utility of balancing tests, or the lack thereof. "The scale analogy is not really appropriate," he wrote in *Bendix Autolite Corporation v. Midwesco Enterprises* (1988), "since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy."

Whatever criteria you use to evaluate greatness, this edition is unlikely to qualify.

Allen Mendenhall

Allen Mendenhall is associate dean at Faulkner University's Thomas Goode Jones School of Law and executive director of the Blackstone and Burke Center for Law and Liberty. Visit his website at AllenMendenhall.com.

About the Author ›