

Lawyer's Bookshelf

The Justice of Contradictions: Antonin Scalia and the Politics of Disruption

REVIEWED BY
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By Richard L. Hasen,
Yale University Press, 226 pages.

Antonin Scalia served on the U.S. Supreme Court from 1986 to 2016. Depending upon whom one asks, he was

(a) A pathbreaking jurist, who provided principled theories of statutory and constitutional interpretation

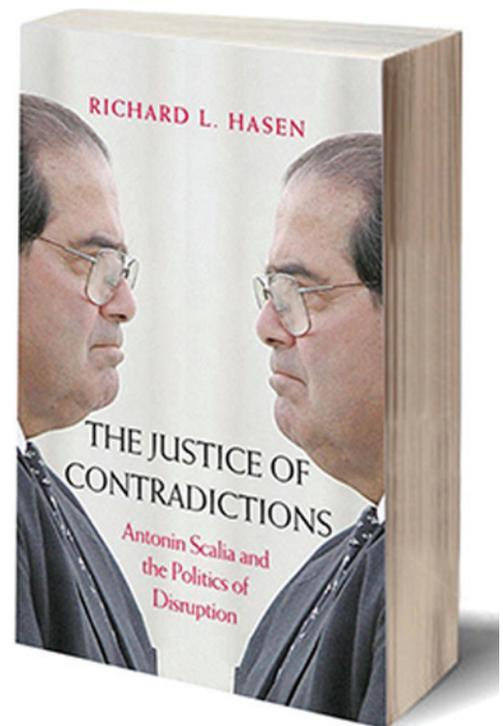
(b) A political and social conservative, whose consistent rulings in favor of states' rights and business interests, and against civil rights, were the product not of a coherent judicial philosophy but of his personal preferences

(c) A sharp and incisive writer, who called his colleagues to task for muddled thinking and politically-motivated decisions, or

(d) A polemicist, whose angry diatribes, especially in dissent, undermined the authority of the Supreme Court.

Richard Hasen, a distinguished and prolific professor of law at the University of California Law School at Irvine, has a decidedly negative view of Justice Scalia. He would answer (b) and (d) above. His book, *The Justice of Contradictions*, contends that Scalia had a political agenda: He favored states over the federal government, business interests over the interests of individuals, and the power of the states over religious groups. According to Professor Hasen, although Scalia purported to champion the doctrines of originalism (roughly, the constitution meant what it was understood to mean when it was enacted) and textualism (the words of the statute should be interpreted without any reference to legislative history) his advocacy for the doctrines was at best inconsistent and at worst cynical. He used them when they advanced his policy preferences, and abandoned them, or applied them disingenuously, when they did not.

Justice of Contradictions discusses numerous cases and doctrines in simple terms so that one can easily follow Hasen's arguments. His decision to cover the material thematically rather than chronologi-



cally makes the book easy to follow. Hasen describes and analyzes Scalia's interpretive methods (textualism and originalism, chapters 2 and 3), his rhetoric (chapter 4), his opinions in the "culture wars," including abortion, gun rights, same sex marriage, and religion (chapter 5), on campaign finance, gerrymandering, and separation of powers (chapter 6), and on criminal matters (chapter 7). His final chapter (chapter 8) is a summing up, but by that point there are no surprises, for Hasen has been up-front

about what he thinks of Scalia: His originalism was “a subconscious crutch, or worse, a fig leaf, a pretext justifying a result that lines up with one’s ideology” (63) and he “let his values affect his jurisprudence.” (174)

Even for those who are generally familiar with Scalia’s opinions, *Justice of Contradictions* can serve as a summary and refresher. Those who are not familiar with the opinions will get a useful, if sharply opinionated, overview.

In the end, though, the book is disappointing because Hasen ploughs no new ground in his criticisms of Scalia, and he is unlikely to convince anyone who thought well of the justice that he should think less well of him after reading the book.

Scalia made no secret of his judicial philosophy. He claimed that the role of a federal judge in the United States was to interpret the constitution as it was originally understood, because to do anything else, and in particular to interpret the constitution as a “living” document, was a usurpation of power. Similarly, he claimed that it was fundamentally undemocratic for unelected judges to attempt to divine what Congress meant in any piece of legislation. The judges’ role was simply to interpret what Congress said.

Hasen criticizes Scalia’s philosophy in two ways. First, he argues that Scalia did not consistently adhere to his own precepts. But even Hasen would have to admit that Justice Scalia usually did, or attempted to do so.

In any event, Hasen’s more significant criticism is not that Justice Scalia applied his precepts inconsistently but that, in Hasen’s view, those pre-

cepts are wrong. But Hasen never explains what exactly is wrong with Justice Scalia’s judicial philosophy, or what a different one would look like. For example, Hasen quotes Justice Scalia expressing his preference for a “dead” constitution, and implies that there is something wrong with that preference. (42) Perhaps so, but Hasen does not explain the problem, or address any of the questions surrounding how one should interpret a “living” constitution.

Professor Hasen’s zest to criticize makes him appear unfairly biased. He is grudging in his assessment of Justice Scalia’s pro-defendant criminal law opinions (e.g., ‘*Apprendi*,’ ‘*Crawford*’). Instead of acknowledging that these are instances in which Justice Scalia followed his jurisprudential convictions to conclusions that he may not have preferred, Hasen suggests, without any authority or evidence, that the opinions were motivated by a political agenda rather than concern for criminal defendants’ rights: “Justice Scalia’s views here might be seen as pro-defendant, but perhaps it is more accurate to say they reflect a distrust of government and his strong belief in personal privacy. For whatever reason, these concerns were not well reflected in many of the justice’s other criminal procedure decisions....” (155)

Hasen is on sounder footing when he observes that Justice Scalia’s rhetoric may have hurt the stature of the Supreme Court. Scalia did not simply write strong dissents—many justices have done that—but he often questioned the good faith of his colleagues who disagreed with him. At

least one of the roles of the Supreme Court, or of any court, should be to show that disagreement can be strong yet civil, and on that score Scalia may be faulted, as Hasen does.

Even here, though, Hasen’s otherwise reasonable observations and judgments are marred by a desire to blame Justice Scalia for all flaws: He blames Justice Scalia for encouraging “the demonization of justices on the opposite side of the aisle,” (80) and while there is a sound basis for that, Hasen goes on to say that “[p]erhaps this polarization is what emboldened [Justice Ruth Bader] Ginsburg to break protocol and publicly oppose the election of Donald Trump in 2016.” (80) That will strike many readers as a step too far. Justice Ginsburg made a mistake in publicly opposing the election of Trump, and she apologized for it. She did not blame Justice Scalia, or anyone else, and neither should Professor Hasen.

As he explains in the preface, Hasen did not purport to write a “comprehensive examination of all of Scalia’s opinions and ideas.” (xi) And, he admirably avoids getting bogged down in academic discussions or jargon. Perhaps as a consequence, *Justice of Contradictions* is more polemical than scholarly. Anyone wishing a balanced assessment of Justice Scalia’s jurisprudence will have to look elsewhere.