The Essential Scalia:

On the Constitution, the Courts, and the Rule of Law

Edited by Jeffrey S. Sutton and Edward Whelan

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As a law student, I had amazing luck. My law school was walking distance from the U.S. Supreme Court. During my first year, my classmates and I sometimes sat in the gallery and tried to soak it all in. There we watched as the same Justices whose opinions we read in Con Law engaged with the lawyers at the lectern. During one hearing, my friend Julie Grohovsky leaned over and offered an observation about Sandra Day O'Connor. "She is *so* into federalism," Julie whispered.

So was the late Antonin Scalia.

In "The Essential Scalia: On the Constitution, the Courts, and the Rule of Law" (Penguin Random House 2020), editors Jeffrey S. Sutton and Edward Whelan offer a carefully-curated selection of speeches, essays, testimony, and opinions penned by the late Antonin Scalia, hero of the conservative movement and favorite punching bag of the left wing. To appreciate "The Essential Scalia," you need not identify with one group or the other. You need only be honestly curious about American law, judging, and the federal system created by the Framers of the U.S. Constitution.

Sutton and Whelan have divided their work into four sections, each devoted to a single theme: general principles of interpretation, constitutional interpretation, statutory interpretation, and review of agency action. Each section gives a sampling of Scalia's writings, abridged to eliminate citations, inconsequential quotation marks, and other clutter. The best of Scalia is here, with his thinking laid bare in bite-sized chunks and his writing chops on vivid display. Scalia's trademark flashes of wit, irony, and occasional sarcasm enliven the rigor, honesty, and thoughtfulness permeating his jurisprudence.

Scalia-lovers will find a lot to love here. Scalia-haters, if they be honest, will find something to love too, if they will only dare to admit it.

Scalia's views on judging will come as no surprise to any informed citizen. He didn't think judges ought to arrogate to themselves decisions which are left to the people and their elected representatives, however meanly and stupidly the people and their representatives make those decisions. He insisted that judges not act like superlegislators. He despised thinking about judging as "playing common-law judge, which in turn consists of playing king -- devising, out of the brilliance of one's own mind, those laws that ought to govern mankind." He thought the job of judging requires

judges to discern the meaning of statutes from their text and not from the supposed intentions of those who enacted them.

In 2015, the court decided *Obergefell v. Hodges*. In it, Anthony Kennedy, writing for a one-Justice majority, wrote that the Fourteenth Amendment demanded the nationwide abolition of state laws prohibiting same-sex marriage. In dissent, Scalia pointed not to human rights, or the moral and social dimensions of marriage. He pointed instead to the federal system set up by the Constitution. It, he wrote, had allowed eleven states to decide to expand the traditional definition of marriage. It had also allowed many more states not to. It had allowed advocates for both sides to keep pressing their cases in legislatures and on ballots, secure in the knowledge that they could negate a loss today with a win tomorrow. "That is exactly how our system of government is supposed to work," Scalia wrote. "It is not of special importance to me what the law says about marriage. It is of overwhelming importance however, who it is that rules me. Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of nine lawyers on the Supreme Court."

And those nine, Scalia wrote humbly, hardly represented a proper Ruler of us all. Eight of the nine were graduates of the Harvard Law School; the ninth, of Yale. None were from the South or West (California, Scalia wryly observed, "does not count"). Not one was a Protestant. Four were New York City natives. In short, the nine represented a "strikingly unrepresentative" body.

Like his eight colleagues, Scalia occupied the highest station in American public life and had life tenure. Yet he did not adopt the pomposity and self-importance displayed by so many judges whose humility and modesty seem to evaporate after they ascend to the bench, start collecting their guaranteed pay and benefits, and become surrounded by their security details, law clerks, secretaries, and other servants. (Don't you know a few of those?) "We federal judges live in a world apart from the vast majority of Americans," he wrote in *Glossip v. Gross* in 2015. "After work, we retire to homes in placid suburbia or to high-rise coops with guards at the door. We are not confronted with the threat of violence that is ever present in many Americans' everyday lives." Was it possible, he wondered, that such judges found themselves oblivious to the effects their decisions made on the lives of ordinary people?

I wonder if judges would enjoy a higher reputation if they asked this question every once in a while.

The term most closely associated with Scalia, of course, is originalism, the idea that the federal Constitution has a fixed meaning which changes only by amendment and means today what it meant when it was adopted. The Constitution doesn't change, any more than a contract does once the parties have signed it. The very act which it once permitted, it doesn't now forbid (the death penalty, for example). Scalia conceded inquiry into original meaning could be difficult. He admitted originalist methodology doesn't always yield a clear and easy answer. But, to him, that was no reason to reject it as an honest means of interpretation.

"The question before the house is not whether originalism is perfect," he wrote. "I will stipulate that it is not. The question is whether it is better than anything else. My burden is not to show that originalism is perfect, but merely to show that it beats the other available alternatives. And that is not difficult.

"Is the death penalty prohibited? Are laws against abortion, homosexual sodomy, and assisted suicide prohibited? . . . It is a piece of

cake to determine that no one in the Founding generation thought so. . . . How are the living constitutionalists going to arrive at their decisions? To tell the truth, I don't know – and neither do they. . . . If originalism is to be supplanted, it must be supplanted with *something*. If the judge is not to look to the original understanding of the text, what is he to look to? . . . As a practical matter, there is no alternative to originalism but standardless judicial constitution-making."

And standardless law-making was, to Scalia, no better than standardless-anything else. To illustrate, Scalia imagined how the standardless approach would play at oral argument in a case about whether there is a constitutional right to assisted suicide: "The question is not whether the Constitution originally established a right to die but whether there is a right to die today. Do you think there is a right to die, Justice X? I don't. What about you, Justice Y? Let's have a show of hands. Well, that's five in favor of a right to die. Now on to the next case."

The reality, Scalia wrote, is that originalism is "the only game in town – the only real, verifiable criterion that can prevent judges from making the Constitution say whatever they think it should say."

The standardless approach, unfortunately, has prevailed various times in the court's jurisprudence. In Con Law I, we all knew *Roe v. Wade*, as a work of legal reasoning and constitutional law, was a piece of garbage. Of course, you couldn't say that out loud at my law school without being ostracized. Nor can you say it in polite company today without having the words *chauvinist* or *knuckle-dragger* or *religious fanatic* tattooed on your forehead.

Of *Roe* and its progeny, Scalia described the constitutional issue precisely, in a dissent in *Planned Parenthood v. Casey* in 1992. It was not whether the power of a woman to abort her unborn child is a liberty in the absolute sense. Nor was it whether it is a liberty of great importance to many woman. Of course, it is both. The issue, he wrote, is whether it is a liberty protected by the U.S. Constitution. "I am sure it is not," he wrote. The Constitution says nothing about it. And so, to Scalia, the issue of legal regulation of abortion belonged where it always had before *Roe* – in the legislature.

It mattered not what Scalia thought about the morality or wisdom of abortion, gun control, same-sex marriage, punitive damages, or the procedural rights of detainees held by the Pentagon at Guantanamo Bay. Those questions were correctly left to the branches of government charged with deciding them and most closely accountable to the voters, most often the legislature.

To Scalia, the easy questions were less interesting than the hard ones. One of them arises daily in the life of every lawyer and judge. It is: how do we properly construe a statute? A few basic rules supplied the answer, Scalia thought. One of them is that, when the text of the statute is clear, that is the end of the matter.

Scalia hated the "discouraging truth" that the court "favors some laws over others, and is prepared to do whatever it takes to uphold and assist its favorites," even if that meant ignoring the text of the law enacted by those charged with doing so. "That may be a good idea," Scalia wrote of changing a statute which regulated rates for long distance telephone service, in *MCI v. AT&T*. "But it was not the idea that Congress enacted into law in 1934."

Most lawyers and judges I know live in southern California. They fancy themselves highly enlightened and politically correct. Many don't mind proclaiming their supposedly-superior value systems to others. They do it

on their law firm websites. They do it in their pious and carefully-phrased holiday greeting cards (really just crass advertisements for their law practices). They do it at meetings of their Inns of Court chapters and at parties where lawyers and judges mingle. In the straitened and insular class inhabited by many of us, it almost seems a competition to see who can signal their virtue the loudest on Juneteenth, at the news of the passing of Justice Ginsburg, and in response to the latest police shooting of an African-American citizen. By comparison, it's distinctly *un*-glamorous to champion the hard and tedious work of studying the Constitution and laws and applying them as they were written. But tedious attention to un-glamorous detail is where the best and most valuable work is done, whether it be in practicing law, sailing a boat, repairing an automobile, cooking a good meal, or flying an airplane. Scalia cared about doing that work, not about whether he was in vogue among the loudest of the chattering classes.

In recent years, Justice Ruth Bader Ginsburg achieved an ennobled status in American culture. In some quarters, this phenomenon resembles a kind of adoring cult. Rightly revered for her integrity, intellect, and triumph over the obstacles which littered the path of women attorneys during the 1960s and 1970s, she became the subject of an award-winning film, several books, and treatment from journalists and pundits that bordered on deification. Mention RBG's name at a cocktail party or backyard barbecue populated by those who consider themselves progressives, feminists (be they male or female), the "woke," and right-thinking Americans, and you instantly brand yourself as One of Us, *Mr. O.K.-All Rite*. Among such people, it's cool to let slip your ardor for equality and against discrimination.

Juxtaposed with her image of the bookish, indomitable hero to women everywhere, the scowling, beetle-browed Scalia enjoys no similar status, except in the Federalist Society. It isn't fashionable to invoke his name at most gatherings. To be for federalism and against a "living Constitution" is to induce a yawn, a searching glance over your shoulder for the place where the more interesting people at the party might be, a polite nod accompanied by the slightly disapproving look that says, *Neanderthal*.

It is too bad. Scalia's contributions to law and to the hard work of judging were every bit as monumental as Ruth Bader Ginsburg's. No billboards or neon signs advertising a documentary film about his life will ever grace the Sunset Strip or Times Square.

As a lucky man, I had a great law school experience. My professors were mostly wonderful. They took my mush-filled head and trained me to think like a lawyer, as John Houseman's Kingsfield warned his timorous charges he would in "The Paper Chase." But like every other law student I had a peeve or two. One was the opacity, verbosity, circumlocution, and academic double-talk permeating the judicial opinions in our casebooks. The sentences were too long. There was too much passive voice and Latin, not enough plain English. There was lots of plain bad writing presented as holy scripture because it had issued from the pens of jurists on the Supreme Court or the Second Circuit and found its way into a casebook composed by a legal scholar who had probably never practiced law in his life. To one weary of trying to decipher such prose, Scalia's opinions came as a breath of fresh air. He wrote plainly, in language anybody could understand, whether they'd attended law school or not.

Here is an example, from a dissent in a case in which Scalia's colleagues approved the

practice of taking DNA swabs from suspects in custody without a warrant. "Make no mistake about it: As an entirely predictable consequence of today's decision, your DNA can be taken and entered into a national DNA database if you are ever arrested, rightly or wrongly, and for whatever reason."

If every case excerpted in every casebook in every American law school were written in that style, the lives of thousands of law students would improve by leaps and bounds.

Forget about politics for a moment. No lover of good prose, no matter how besotted with the socialist orthodoxy of Bernie Sanders and The Squad, can fail to love this: "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of the Center Moriches Union Free School District."

"The Essential Scalia" examines the urban myth that Scalia was mostly a dissenter, a member of a minority inhabited usually by himself and Clarence Thomas (sometimes joined by one or two others), fulminating at the excesses of the majority but, in the end, a lone voice crying in the wilderness, irrelevant and uninteresting except as a conservative crank with a big personality. Like other myths, it is far from the truth. Scalia's dissents re-emerged as majority views as time passed and his colleagues or Congress came to embrace their soundness and rigor.

The Ethics in Government Act of 1978 offers a case in point. The statute gave independent counsels appointed by the attorney general certain powers reviewable by a special three-judge court. In 1988, Scalia authored a lone dissent which denounced the law as a violation of the separation of powers, one which invited abuse of power by special prosecutors gone rogue. Scalia foresaw the rise of special counsels like Kenneth Starr, who infamously pursued the Whitewater, Travelgate, and Lewinsky investigations at expense to the taxpayers of $60 million and no result, like a modern-day Javert gone mad. In 1999, the law expired after Congress decided not to renew it. Scalia wrote other dissents which became majority positions in later decisions. They are testament to the long-lasting effect he had on his colleagues.

"The Essential Scalia" opens with a touching foreword authored by Justice Elena Kagan, who both argued before Scalia as solicitor general and served as his colleague after ascending to the Supreme Court. In it, she writes of an unwavering rule she observed during the six years she and Scalia served together. "When Nino circulated a new opinion, I would put aside whatever else I was doing to read it," writes Justice Kagan. "I wanted to dive into his inimitable writing style. To marvel at the power of his mind. And most important, to take the measure of his ideas."

Whether you love Scalia or harbor some other emotion, once you finish "The Essential Scalia," you will feel the same way.

"We are all textualists now," said Justice Kagan in 2015 at the inaugural Scalia Lecture at Harvard Law School. If you wanted to sum up Scalia's contribution to American law in five words, it would be hard to find five better ones. In their timely and punchy collection of Scalia's writings, Jeffrey Sutton and Ed Whelan have marvelously illustrated that contribution. Their book is a must-read for all law students, lawyers, and judges. Bravo.