

THE PRINCIPLED SCALIA: A
LIBERAL FRIEND ON SCALIA'S
LIBERAL OPINIONS

by Stephen B. Presser

A Review of:
The Unexpected Scalia: A Conservative
Justice's Liberal Opinions, by David M.
Dorsen (Cambridge University Press 2017)
<https://www.amazon.com/Unexpected-Scalia-Conservative-Justices-Opinions/dp/131663535X>

Note from the Editor:

The author favorably reviews a new book about Justice Scalia.

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In our politically contentious age, when our two political parties now disagree fundamentally over the most basic notions of jurisprudence, it is a true delight to encounter a fair-minded book written by a self-identified liberal atheist about his good friend Antonin Scalia, a conservative Catholic.¹ David Dorsen, an accomplished Washington lawyer,² has achieved with this book an act of rare and laudable benevolence. Though relatively short as scholarly monographs go—242 pages of text—this book is, I believe, the finest, most detailed, and best-researched work on Justice Scalia's jurisprudence we are likely to get.

This is not Dorsen's first book. He published a biography of Henry Friendly in 2012, which Richard Posner said was one of the best judicial biographies ever published.³ Dorsen's talents are on full display in this compact study of Scalia, a man my colleague Steven Calabresi has said was an even greater Justice than the celebrated Chief Justice John Marshall.⁴ I suspect Dorsen might not make that claim for his subject, but his admiration for Scalia is clear, even though their views differed.⁵ He believes—as do I—that Scalia was the most powerful conservative intellect on the Court in recent years.

Dorsen appears to have read nearly everything ever written by anybody who was anybody in the world of constitutional scholarship in the last few decades—right, left, and center. He does not simply rely on the usual authorities, but has ferreted out some lesser known but wise and incisive scholars, whose depth

1 DAVID M. DORSEN, THE UNEXPECTED SCALIA: A CONSERVATIVE JUSTICE'S LIBERAL OPINIONS xiii (2017).

2 According to the book's jacket, "David Dorsen is Of Counsel with Sedgwick, LLP. He served as an Assistant US Attorney in New York under Robert M. Morgenthau, and later as Assistant Chief Counsel of the Senate Watergate Committee under Senator Sam Ervin. He has taught at Duke University, North Carolina, Georgetown University Law Center, Washington DC, and George Washington University Law School, Washington DC."

3 DAVID DORSEN, HENRY FRIENDLY: GREATEST JUDGE OF HIS ERA (2012). Richard Posner wrote the forward for the book, and after declaring that he was "on the record as having expressed skepticism about judicial biographies," he acknowledged that Dorsen's book on Friendly allowed the reader to "learn more about the American judiciary at its best than we can learn from any other biography—not only more, but an immense amount." *Id.* at ix, xi. The same thoroughness, depth, and insight that Dorsen displayed in the Friendly biography is present in this book on Scalia.

4 Steven G. Calabresi, *Scalia Towered Over John Marshall: Supreme Court Justice Reshaped a Misguided Legal Culture*, USA TODAY, Feb. 24, 2016, <https://www.usatoday.com/story/opinion/2016/02/13/scalia-text-legacy-clerk-steven-calabresi-column/80349810/> (accessed Oct. 14, 2017). Scalia wrote the forward to Calabresi's great contribution to the understanding of originalism. STEVEN G. CALABRESI, ED., ORIGINALISM: A QUARTER-CENTURY OF DEBATE (2007).

5 Dorsen, *supra* note 1, at xiii ("... the fact that he was a friend should not be confused with whether we agreed on political and social issues. We rarely did."). Dorsen notes that commentators described Scalia 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." *Id.* at xii.

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of learning and even-handed perspectives rival Dorsen's own.⁶ His book is thus not only a penetrating study of Scalia, but is a valuable and wide-ranging introduction for anyone new to the field of constitutional hermeneutics who seeks a comprehensive evaluation of academic and judicial contributions to recent jurisprudence. His footnotes provide a truly fulsome tour of the work of originalists, non-originalists, constitutional and legal historians, and an assortment of jurisprudences past and present, and thus an invaluable roadmap for the next generation of students and scholars seeking to plot the future of constitutional law.

In this book, Dorsen makes a persuasive case for the folly of characterizing Scalia as simply a partisan, as so many commentators in the press and the academy do. As the full title of Dorsen's book suggests, he shows that a quite substantial number of the opinions Scalia wrote as a Supreme Court Justice (both majority opinions and dissents) are best characterized as "liberal" rather than "conservative." By Dorsen's exhaustive count, the "liberal" characterization fits 135 of Scalia's 867 opinions on the merits, and at least twelve opinions on petitions for certiorari, which works out to be a bit more than 15%. In making his argument, Dorsen helpfully defines his key term, labelling as "liberal" anyone who "generally supports" twenty-some principles, ranging from "respect for and the primacy of the individual," to "limited or no immunity for wrongful governmental action."⁷ Though Scalia's originalism often led him to conservative conclusions, and though he was characterized as a conservative by most Court-watchers, Dorsen shows that when it came to issues regarding free speech, search and seizure, or the rights of criminal defendants, Scalia often found himself agreeing with his liberal colleagues.

Dorsen concludes and exhaustively demonstrates that Scalia's principled commitment to textualism (interpreting statutes and

the Constitution according to their plain meaning and without reference to legislative history) and originalism (interpreting the Constitution as it would have been understood by those who framed and ratified it) caused him to reach results that political partisans would characterize as both "liberal" and "conservative." As Dorsen puts it, "more than most Justices, Scalia followed his understanding of originalism and textualism, warts and all, where it took him."⁸ In short, Scalia was an intellectually honest man, at least compared to "most Justices," who Dorsen appears to understand often follow their politics rather than their law.⁹

Dorsen's book is not, in spite of his personal closeness with Scalia, a piece of hagiography. He maintains that occasionally Scalia's originalism left something to be desired. For example, in his opinions on the Second Amendment, Scalia probably failed fully to take account of the likelihood that the right to "bear arms" was historically understood to be a collective and not an individual right.¹⁰ Dorsen also excoriates Scalia for his departure from federalism in *Bush v. Gore*,¹¹ which Dorsen hints may have been made not because of any judicial principles, but rather because of sympathy for the plaintiff.¹² Since I think one can mount a strong argument that *Bush v. Gore* was correctly decided,¹³ I found Dorsen less than persuasive on that point, but this was almost the only part of his book that struck a clearly discordant note.¹⁴

Dorsen succeeds splendidly in making his basic point: the great hero of the right, Justice Scalia, after whom Republican candidates for President have modelled their ideal Supreme Court justices since 2000, ought to be understood as the author of many important opinions which furthered the goals of the progressive and liberal American left. One might quibble a bit with Dorsen's labelling, as I think some of Scalia's "liberal" decisions might

6 See, e.g., MARK TUSHNET, RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988) (a work by a noted Critical Legal Studies scholar, cited on page 255); RALPH A. ROSSUM, UNDERSTANDING CLARENCE E. THOMAS: THE JURISPRUDENCE OF A CONSTITUTIONAL RESTORATION (2014) (a book by a thoughtful scholar I would describe as a paleoconservative, cited on page 257); WILLIAM F. NELSON & JOHN PHILIP REID, THE LITERATURE OF AMERICAN LEGAL HISTORY (1985) (a distinguished bibliographical work by two great legal historians I would describe as moderates, cited on page 259); GARY L. MCDOWELL, THE LANGUAGE OF LAW AND THE FOUNDATIONS OF AMERICAN CONSTITUTIONALISM (2010) (a book by a brilliant conservative Straussian, cited on page 260).

7 Dorsen, *supra* note 1, at 2 (emphasis in original). His list of "liberal" principles includes: "respect for and the primacy of the individual; a broad right to free speech, freedom and protection of the press and freedom of assembly. . . ; the right to privacy and to be let alone. . . ; broad and enforced antidiscrimination laws; affirmative action for disadvantaged minorities; the removal of barriers based on class, income, nationality, gender and sexual orientation; a secular orientation. . . ; representative government with broad voting rights and participation. . . ; one person, one vote. . . ; the rule of law and an independent judiciary; ready access to the courts. . . ; pro-plaintiff in civil cases; extensive rights for criminal defendants. . . ; abolition of the death penalty; strong gun control; limited power and influence of corporations and the very rich; government transparency. . . ; federal, not state, government controlling entitlements; the government . . . exercising regulatory control over businesses and property; protection of the environment. . . ; limited or no immunity for wrongful government actions." *Id.* Of course, not all of these positions are inconsistent with a "conservative" perspective.

8 *Id.* at 239.

9 See generally STEPHEN B. PRESSER, LAW PROFESSORS: THREE CENTURIES OF SHAPING AMERICAN LAW (2017). See also STEPHEN B. PRESSER, RECAPTURING THE CONSTITUTION: RACE, RELIGION AND ABORTION RECONSIDERED (1994).

10 Dorsen, *supra* note 1, at 31-32 (discussing *District of Columbia v. Heller*, 554 U.S. 570 (2008)).

11 531 U.S. 98 (2000).

12 Dorsen, *supra* note 1, at xiii ("Leaving to one side Scalia's vote in the dismaying *Bush v. Gore* (2000) (about which I have no special knowledge) I believe that Scalia, was principled . . .") (footnotes omitted).

13 Stephen Presser, *Some Dare Call It Justice*, CHRONICLES: A MAGAZINE OF AMERICAN CULTURE (Nov. 1, 2001). I believe that the Florida Supreme Court, in the decisions under review in *Bush v. Gore*, egregiously departed from Florida election law.

14 I also disagree with the rather disparaging assessment of Justice Thomas as a "silent sphinx" who has chosen to "opt out" of participation in oral arguments. Dorsen, *supra* note 1, at 242. I think Justice Thomas, who probably believes that much of what happens at oral argument is showboating by the Justices, has a principled position. I also think that Dorsen's suggestion that there is a "threat" from originalism, *Id.*, is overstated, since originalism, as Dorsen shows in the work of Scalia, can certainly be an interpretive strategy that reduces judicial discretion and reinforces the rule of law. See also Originalism, *supra* note 4.

also be described as “libertarian,”¹⁵ or even “classically liberal” in the Burkean sense.¹⁶ Scalia, like Burke, generally eschewed abstract theory and emphasized adherence to tradition, the rule of law, morality, and religion.¹⁷ And if Scalia was a champion of American liberty, tradition, and the rule of law, as Dorsen cogently demonstrates that he was, then his opinions ought to reflect the inherent tensions and antinomies in American culture itself. We are, after all, a people simultaneously committed to popular sovereignty, resistance to arbitrary power, economic progress, social mobility, and individual freedom, goals that often conflict with each other.¹⁸

It is no surprise, then, that Scalia, who sought to be faithful most of all to tradition, could move along different paths, both liberal and conservative, in his jurisprudence. Perhaps any true American conservative will, like Scalia, be pulled in different directions. The Federalist Society itself is a group devoted to maintaining originalist Madisonian principles of the separation of powers and dual sovereignty, and it includes within its ranks both libertarians and social conservatives, people of fundamentally differing jurisprudential and philosophical temperament.¹⁹ At this point in our political and judicial history, characterized by deep division and grave doubts about even the rule of law itself,²⁰ Dorsen’s book might perform a signal service in showing us that both liberals and conservatives have a common heritage and work

towards many of the same ends. Thus *The Unexpected Scalia*, though perhaps unexpected, is certainly welcome.

15 By this I mean to suggest that rather than favoring the program of those who would seek to expand the power of the central government to engage in redistribution of resources from the wealthy to the formerly powerless—as would many of today’s “liberals” or “progressives”—Scalia had a healthy commitment to the preservation of individual freedom against the state, and a healthy fear of arbitrary government in any form. On what it means to be a “libertarian,” see, e.g., CHARLES MURRAY, *WHAT IT MEANS TO BE A LIBERTARIAN: A PERSONAL INTERPRETATION* (1997).

16 Edmund Burke (1729-1797), widely regarded as the greatest of the modern conservatives, was a champion of resistance to arbitrary power, especially the English monarch and Parliament, and thus a champion of the rights of the individual against government. See generally CONOR CRUISE O’BRIEN, *THE GREAT MELODY: A THEMATIC BIOGRAPHY AND COMMENTED ANTHOLOGY OF EDMUND BURKE* (1993), and RUSSELL KIRK, *EDMUND BURKE: A GENIUS RECONSIDERED* (2d ed. 2009).

17 See generally EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* (Conor Cruise O’Brien ed., 1982). While the *Reflections* is Burke’s best-known work, his thought is so subtle that the great English stylist William Hazlett actually suggested “that the only fair specimen of Burke’s writing is all that he wrote, because each new work shows additional evidence of his power in thought and brilliance in expression.” PETER J. STANLIS, *THE BEST OF BURKE: SELECTED WRITINGS AND SPEECHES OF EDMUND BURKE* vii (1963). Perhaps Dorsen ought to be read as making the same suggestion about Scalia.

18 Jamil Zainaldin and I have sought to explore the way these tensions have worked out over the course of American legal history in our law school casebook. STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, *LAW AND JURISPRUDENCE IN AMERICAN HISTORY* (8th ed. 2013).

19 On the formation and influence of the Federalist Society, which Justice Scalia played an important role in launching, see, e.g., AMANDA HOLLIS-BRUSKY, *IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION* (2015).

20 See generally Law Professors, *supra* note 9.

