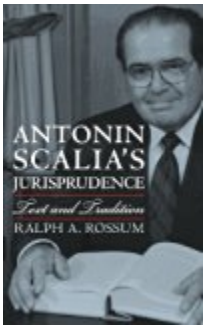
H-Net Reviews
in the Humanities & Social Sciences

Ralph A. Rossum. *Antonin Scalia's Jurisprudence: Text and Tradition.* Lawrence: University Press of Kansas, 2006. x + 298 pp. $34.95 (cloth), ISBN 978-0-7006-1447-9.



Reviewed by Helen Knowles (Department of Political Science, Boston University)
Published on H-Law (August, 2006)

Justice Scalia: Telling It Like It Is

When the only appendix in a judicial biography lists the dictionaries that the subject has cited in his or her court opinions, it is reasonable to assume that the judge under discussion approaches judicial decision-making with a particular respect for the words of the legal documents that he or she interprets. In 2003, Rossum, a political scientist at Claremont McKenna College, provided us with a taste of his argument that this assumption rings truer for Justice Antonin Scalia than it has done for perhaps any other member of the U.S. Supreme Court.[1] In *Antonin Scalia's Jurisprudence: Text and Tradition*, Rossum seeks to confirm this argument by describing the Justice's decisions in numerous areas of the law.

In so doing, Rossum tries "to understand Scalia as he understands himself" (p. ix), confining his analysis to the Justice's Court opinions, supplemented only by interviews with the Justice and limited references to off-the-bench speeches. This research strategy serves Rossum well because this book is clearly the result of a descriptive enterprise. It is a sympathetic treatment of the Justice's work (Rossum acknowledges this from the beginning); the reader will find very little critical analysis of the judicial opinions, or the interpretive methodology, that it describes. As such, whether the book makes a significant contribution to understanding either the intricacies of Justice Scalia's jurisprudence, or his role as only one member of a *collegial institution* is open to question. This is an important observation because Scalia has a strong tendency to write separate opinions–separate from those (and the jurisprudential expositions that they contain) of his colleagues.

To be sure, Rossum does undertake some substantive institutional analysis, but ironically one has to wait until the final chapter for this to appear. There, Rossum examines the impact of Scalia's jurisprudence on the other members of the Supreme Court. Unfortunately, the analytical effort, more obviously than in other chapters, is tainted by Rossum's authorial bias. Mark Tushnet has shown us that the Rehnquist Court was composed of a majority of justices whose work was directed by numerous different conservatisms.[2] Rossum's defense of Scalia's role on the Court stems from the alternate conclusion that there was an identifiable conservative bloc that *could* have been a successful majority if only its members had adhered to the principled and objective approach to judging that Scalia's rules-based jurisprudence emphasizes. For example, Rossum writes that Justices "O'Connor and Kennedy will refuse to follow Scalia's textualist lead on any issue important to them because it will prevent them from doing what they consider to be the right thing" (p. 204). The "right thing," we are told, can only be a focus on statutory and constitutional "text and tradition."

As Justice Scalia revealed in an interview with Rossum, he injects his particular brand of witty aphorisms and acerbic criticisms of his colleagues' jurisprudence into his Supreme Court opinions in a conscious effort to ensure that his eminently readable writings make it into constitutional law casebooks (p. 205). This is Scalia's way of ensuring that future generations of le-

gal students and scholars are exposed to (even if they ultimately reject) a focus on "text and tradition," which he believes is the only legitimate interpretive methodology with which to decide the cases that come before him. Rossum says that the large number of Scalia-authored opinions that casebook editors choose to include is evidence of Scalia's success in this educational enterprise. Whether or not this is a legitimate conclusion to reach, what is clear is that this rhetorical effort does not sit well with some of Scalia's colleagues. For example, Justice Anthony M. Kennedy considers it important to correctly educate the next generation of lawyers, but he pursues this goal using a different, more mild-mannered approach.[3]

Some of Scalia's rhetoric (although Rossum is to be commended for limiting his use of it), is on show in chapters 3 through 6, where Scalia's jurisprudence is analyzed with specific regard to several areas of the law. In the first two chapters Rossum provides us with an introduction, and an overview of the various components of the text and tradition methodology.

Ironically, because they identify cases in which there are inconsistencies between his text and tradition approach and his actual opinions, chapters 3 and 4 provide us with the best insight into the nature of the Justice's jurisprudence. Here, Rossum describes Scalia's treatment of two "structural features" of the Constitution–the separation of powers (chapter 3) and federalism (chapter 4). Rossum takes issue with the Justice's seeming text and tradition infidelity in these cases, and accounts for the absence of this methodology by concluding that Scalia wants to provide more protection to these features than they are afforded by the text of the Constitution.

On occasion, Justice Scalia has made the extra-judicial statement that "structure is destiny"–the destiny of constitutional law.[4] In chapters 5 and 6 (which are rather ambitious in scope), Rossum makes his most important observation as he seeks to reconcile the Justice's application of textualism in structural cases with the textualism used in decisions concerning the First Amendment, the Fifth Amendment's takings clause, and the equal protection provision of the Fourteenth Amendment (chapter 5), and criminal procedural rights (chapter 6). It is in these rights-based decisions, says Rossum, that Scalia's "textualism requires only that he 'preserve our society's values' as they have been traditionally understood" (p. 127). This suggests an interpretive enterprise every bit as subjective as the "structure is destiny" approach. This is a conclusion that Rossum might deny because, as he repeatedly argues, Scalia is a rules-based Justice whose jurisprudence is explicitly formulated to avoid the pitfalls of judicial subjectivity.

Chapter 5 also presents an occasion where Rossum's description of Scalia's opinions would really benefit from an historical perspective (however brief). Throughout the book, there is a surprising absence of references to Justice Hugo Black–a textualist to whom Scalia is sometimes compared.[5] Justice Black famously adopted an absolutist interpretation of the First Amendment's protection of free speech: "I read 'no law â€¦ abridging' to mean *no law abridging*."[6] Yet, he distinguished between speech (which was protected by the First Amendment), and conduct (which was not). Rossum suggests that Justice Scalia also makes such a distinction. This is not an easy distinction to make, and Rossum seems uncomfortable with Scalia's application of it. The current Court draws on opinions from the years that Black was on the Court (1937-1971) to help it address this question, so surely we cannot understand the modern opinions without indulging in a little historical analysis ourselves.

Antonin Scalia has now been an Associate Justice of the U.S. Supreme Court for two decades, making timely the window into his jurisprudence which Professor Rossum's book provides us. However, as the concerns expressed above suggest, the reader of this book must be aware that the window Rossum constructs for us is rose-tinted and certainly is not, to borrow a phrase from Queen Elizabeth I, a window into the soul of the nine-person institution of which Scalia is only one member.[7]

Notes

[1]. Ralph A. Rossum, "Text and Tradition: The Originalist Jurisprudence of Antonin Scalia," in *Rehnquist Justice: Understanding the Court Dynamic*, ed. Earl M. Maltz (Lawrence: University Press of Kansas, 2003), pp. 34-69.

[2]. Mark Tushnet, *A Court Divided: The Rehnquist Court and the Future of Constitutional Law* (New York: W.W. Norton, 2005).

[3]. Helen J. Knowles, "A Dialogue on 'Liberty': The Classical Liberal Origins of Justice Kennedy's Vision of Judicial Power" (Ph.D. diss., Boston University, forthcoming 2006).

[4]. For example, see Justice Scalia quoted in Gregory M. Jones, "Proper Judicial Activism," *Regent University Law Review*14 (2001): p. 145.

[5]. For example, see Michael J. Gerhardt, "A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia," *Boston University Law Review*74 (1994): pp. 25-66.

[6.] *Smith v. California*, 361 U.S. 147, 157 (1959) (Black, J., concurring).

[7.] "I would not open windows into men's souls." Queen Elizabeth I, quoted in *Oxford Dictionary of Political Quotations*, 3rd ed., ed. Antony Jay (New York: Oxford University Press, 2006), p. 133.