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## Textualism for Realists

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# TEXTUALISM FOR REALISTS

Ian Samuel\*

THE JUSTICE OF CONTRADICTIONS: ANTONIN SCALIA AND THE POLITICS OF DISRUPTION. By *Richard L. Hasen*, New Haven and London: Yale University Press. 2018. Pp. xvi, 178. \$30.

## INTRODUCTION

The sudden death of Antonin Scalia was a monumental event.<sup>1</sup> Politically, it set off a confirmation battle over President Obama's chosen nominee, Merrick Garland—a battle that the president lost when the Senate did not hold hearings on the nomination.<sup>2</sup> And there is very good evidence that the vacancy played a major factor in the quite close 2016 presidential election of Donald Trump.<sup>3</sup> Instead of Garland, Scalia was replaced by Neil Gorsuch,<sup>4</sup> a conservative and a self-described textualist and originalist in the mold of Scalia himself.<sup>5</sup> A little over a year later, at the end of October Term 2017, Anthony Kennedy announced his retirement; the president's chosen replacement, Brett Kavanaugh, is widely expected to be more conservative

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1. Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), <https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html> (on file with the *Michigan Law Review*).

2. See Adam Liptak, *Study Calls Snub of Obama's Supreme Court Pick Unprecedented*, N.Y. TIMES (June 13, 2016), <https://www.nytimes.com/2016/06/14/us/politics/obama-supreme-court-merrick-garland.html> [<https://perma.cc/9RBE-TL2P>].

3. Exit polling in 2016 showed that “a majority of those who saw the president’s ability to nominate justices to the high court as the most important factor in their vote backed Trump,” and while “26 percent of Trump voters told pollsters that Supreme Court nominees were the most important factor in their voting,” only “18 percent of Hillary Clinton voters . . . said the same.” Philip Bump, *A Quarter of Republicans Voted for Trump to Get Supreme Court Picks — And It Paid Off*, WASH. POST (June 26, 2018), <https://www.washingtonpost.com/news/politics/wp/2018/06/26/a-quarter-of-republicans-voted-for-trump-to-get-supreme-court-picks-and-it-paid-off/> [<https://perma.cc/WBQ9-PMAA>].

4. Adam Liptak & Matt Flegenheimer, *Neil Gorsuch Confirmed by Senate as Supreme Court Justice*, N.Y. TIMES (April 7, 2017), <https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html> (on file with the *Michigan Law Review*).

5. E.g., Richard L. Hasen, *Gorsuch Is the New Scalia, Just as Trump Promised*, L.A. TIMES (June 27, 2017, 3:00 AM), <https://www.latimes.com/opinion/op-ed/la-oe-hasen-gorsuch-scalia-20170627-story.html> [<https://perma.cc/G4LM-3BJV>].

than Kennedy.<sup>6</sup> The death of the Court's most iconic conservative *member* may thus have ironically created the most conservative *Court* in a very long time, with Chief Justice John Roberts likely occupying the position of the median justice—for now.

These are interesting developments to consider alongside Rick Hasen's<sup>7</sup> newest book, *The Justice of Contradictions: Antonin Scalia and the Politics of Disruption*. In it, Hasen offers up the first posthumous, book-length assessment of Scalia's judicial legacy—the book is very consciously not a biography—and finds it largely wanting. Justice Scalia, he says, should be understood as the judicial equivalent of Donald Trump and Newt Gingrich—a “disruptor,” whose style deliberately delegitimized the institution of which he was a member (p. 5).

Hasen's book ought to be read by everyone with a strong opinion about Justice Scalia, in either direction. Skeptics of Scalia, of course, will find much to nod at. But actually, my recommendation is especially true for the justice's admirers—who will find much to disagree with in the book, but who nonetheless ought to read it to understand what is likely to be the party line of sophisticated Scalia skeptics in the years to come. And although neither virtue counts for much in the academic press, for what it is worth, the book is very readable and (a virtue Scalia himself would have appreciated) admirably free of filler—Hasen gets to the point.

Hasen, to his credit, resists the most hysterical claims of Scalia's critics and offers a measured—but decidedly opinionated—take. When Hasen refers to Scalia as a “justice of contradictions,” he does not really mean that the good and bad in Scalia were complex; rather, he largely seems to mean that Scalia was a jurist who contradicted what *Scalia himself* held out to be the good. Though Scalia may have professed fealty to the text of statutes or to the Constitution's original meaning, Hasen argues this fealty was flexible enough to permit outcomes that were politically agreeable to Scalia (p. 48). Despite what Scalia spent his life arguing, textualism and originalism do not impose any real constraints on judges' discretion. In the end, Hasen says, it's all politics, and he seeks to demonstrate this by examining Scalia's decisions in a dizzying area of substantive areas—everything from abortion to election law to criminal procedure. In almost all of these areas, Scalia's methods proved flexible enough to permit him to reach outcomes consistent with what Hasen believes about Scalia's personal political beliefs (he calls him a “conservative libertarian” who was skeptical of government power<sup>8</sup>).

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6. See, e.g., Jordan Klein, et al., *We Measured Brett Kavanaugh's Likely Impact on the Court*, CROOKED (July 12, 2018), <https://crooked.com/article/kavanaugh-supreme-court/>, [<https://perma.cc/QXN3-7ZTU>] (using Judicial Common Space scores to conclude this).

7. Chancellor's Professor of Law and Political Science, University of California, Irvine School of Law.

8. P. 48. Although this observation is beyond the scope of this review, I will note that this is not how Scalia would have described his own politics, and it does not ring true to me. Cf. Antonin Scalia, *The Two Faces of Federalism*, 6 HARV. J. L. & PUB. POL'Y 19, 22 (1982) (“I urge you then—as Hamilton would have urged you—to keep in mind that the federal government is

If that were all Hasen said, his book would not be nearly as interesting as it is. But Hasen does not argue that this flexibility is solely a feature of Scalia's preferred legal methods. His claim is more sophisticated. He says this indeterminate flexibility is a feature of *all* judicial philosophies. Neither "textualism [nor] *any other set of interpretive rules* will restrict judicial discretion," he says, and the outcomes in the most important cases will *always* be "driven by ideology and a sense of fair results" (pp. 36–37; emphasis added). In other words, Justice Ginsburg, no less than her old opera companion, is *also* just voting her politics, albeit using a very different legal method. For that matter, so is Justice Kagan, despite her professed fealty to textualism. Scalia "was not more ideologically driven or results-oriented than his fellow justices" (p. 63); that is just *what judges do*, in Hasen's view, and we should stop pretending otherwise.

In this Review, I argue that for a person on the political left, in the contingent historical circumstances of the United States in 2018, it would be disastrous as a practical matter to accept or profess this position. Even if a person buys in to Hasen's realist critique, there are good reasons to advocate for relatively formal methods like textualism and originalism. First, such methods are certainly *no worse* than any other methods, insofar as all decisionmaking philosophies are equally indeterminate in Hasen's account. Second, and more important, formal methods are *demonstrably capable*—at least in some cases!—of getting otherwise conservative judges to vote for outcomes that they may not personally like. Given that the Supreme Court may be in the hands of conservative judges for the next twenty-five years, if you are on the political left (as Hasen is, and as I am), some account of how to restrain those conservative judges is of the highest priority.

## I. TEXT, HISTORY, AND OTHER DISTRACTIONS

Aside from a roughly twenty-page interlude that concerns writing style (which I will discuss later), Hasen's argument is about Justice Scalia's substantive judicial legacy. In particular, Hasen is skeptical—deeply skeptical—about textualism and originalism, the two pillars of Scalia's method. The book's second chapter is an extended, critical discussion of textualism as an interpretive theory, the title of which ("Word Games") gives a sense of Hasen's attitude about it. Reducing "serious legal disputes to word games" leads, he says, to "unfair results" and is "not at all in line with how legislators and their staffs who write the statutes view their jobs" (p. 30). Relying on the

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not bad but good. The trick is to use it wisely."). Of course, self-description should not be credited uncritically. In fairness, to the extent Hasen meant the descriptor to apply to Scalia's free-speech jurisprudence, it is more on the mark; that is how he put it in a discussion with me about the book. Dan Epps & Ian Samuel, *In Recess* #8: "Would You Rather", FIRST MONDAYS 26:02–27:49 (Aug. 13, 2018), <https://www.firstmondays.fm/episodes/2018/8/13/in-recess-8-would-you-rather> [<https://perma.cc/Z6MN-B6YR>].

work of Abbe Gluck and Lisa Schultz Bressman,<sup>9</sup> he argues that given how drafters in Congress actually work, “text cannot fairly be the only consideration” (p. 31). And originalism fares no better (Chapter Three). Hasen’s broad attack on originalism opens by quoting Justice Alito making a sarcastic joke about it at oral argument<sup>10</sup> and concludes by describing the “notion that judges can use originalist methods to ‘find’ or ‘discover’ the law, rather than make it,” as a proven “illusion” (p. 63).

Skepticism about textualism and originalism are not new. But Hasen’s claim goes quite a bit further than most critics’, a fact that emerges over the course of the book but becomes especially clear by the closing pages. In those pages, he quotes remarks that Scalia gave to the Philadelphia Bar Association in 2004: “As long as judges tinker with the Constitution to ‘do what the people want,’ instead of what the document actually commands, politicians who pick and confirm new federal judges will naturally want only those who agree with them politically.”<sup>11</sup> Part of that, says Hasen, is “exactly right”: “Justices who approached the Constitution as a living document were likely to be swayed by many factors, including public opinion and their own values, in deciding difficult cases” (pp. 177–78). But Hasen argues that no matter one’s judicial method, it is *impossible*—Hasen uses that word—to “objectively and neutrally determine what the Constitution ‘actually commands’” (p. 178). There is “no methodology” that can do that, argues Hasen, and so “[u]ncertainty in interpretation is inevitable” (p. 178). All that politicians who choose judges can hope for, on this view, is that judges will vote the policy preferences the politicians themselves share. The Supreme Court “has always been a political institution,” says Hasen (p. 178)—and always will be.

This situates Hasen’s argument comfortably within the space created by some combination of the attitudinal model of judicial decisionmaking and the indeterminacy thesis. The former is an empirical model of judicial behavior in which Supreme Court justices simply vote their policy preferences.<sup>12</sup> In other words, the attitudinal model of judging is one where “Su-

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9. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013).

10. P. 40. As Hasen notes, Alito is a consistent critic of originalist methods, though he does not speculate about why that might be. Cf. ROBERT BOLT, A MAN FOR ALL SEASONS (1960) (speculating about the dangers in eliminating formal constraints on power in the name of attacking a powerful adversary who might, all things considered, prefer that the barriers to his counterattack be eliminated).

11. P. 177 (quoting Bill Mears, ‘Get Over It’: Justice Scalia’s Most Memorable Quotes, FOX NEWS (Feb. 15, 2016), <https://www.foxnews.com/politics/get-over-it-justice-scalias-most-memorable-quotes> [<https://perma.cc/Y8UZ-TCUM>]).

12. See Vanessa A. Baird, Book Review, 66 J. POL. 1304, 1304 (2004) (reviewing JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002)) (arguing “there are few areas of research in the field of judicial politics that are not a response to this book or in some way built on its foundation”). See generally JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).

preme Court justices' decisions are driven purely by their sincere, one-dimensional ideological preferences."<sup>13</sup> This descriptive claim is obviously controversial,<sup>14</sup> but it also (like it or not) has significant predictive power in the real world.<sup>15</sup> When Hasen says that the Court is a "political institution" and that decisions are driven by ideology and a sense of fair results, I take him to express at least bounded agreement with this view. (Perhaps unsurprisingly, in addition to being a lawyer, Hasen is a political scientist, a group that has always been more comfortable with this model than pure lawyers.)

The indeterminacy thesis is a more theoretical claim.<sup>16</sup> A proposition of law is said to be "indeterminate" if the ordinary materials of legal analysis (statutes, case law, regulations, and all the rest) are insufficient to resolve the question "is this proposition legally correct?"—or rather, could equally support "this proposition is legally correct" and "this proposition is legally incorrect."<sup>17</sup> Nearly everyone agrees that at least some legal propositions (such as "highly contentious Supreme Court decisions interpreting the Constitution") are indeterminate in that sense.<sup>18</sup> But true believers in the indeterminacy thesis think that nearly all legal propositions—at least, all legally interesting propositions—are indeterminate.<sup>19</sup> I do not know if Hasen would go that far, but he repeatedly refers to the indeterminacy of the right answer at least in "the most difficult cases" (p. 178); this can be fairly read as subscription to some version of the indeterminacy thesis.

A lot of people believe the attitudinal model and the indeterminacy thesis are correct, and both have been defended on empirical and theoretical grounds for a long time (and disagreed with on those grounds for an equally long time). What Hasen essentially attempts to do, however, is demonstrate that these claims are correct by example—by selecting the single person (Antonin Scalia) most visibly and capably associated with the opposite claims and analyzing his body of work to see what it shows. The subtitle of this book is "Antonin Scalia and the Politics of Disruption," but an equally accurate subtitle might be "If He Can't Do It, No One Can." So, in three of the book's final four chapters—"Kulturkampf," "Home of the Brave," and "Rescued From the Grave"—Hasen canvasses Scalia's decisions in a huge range of substantive areas. This takes up about half the book. And when I say huge,

13. Baird, *supra* note 12, at 1304.

14. *Id.* at 1304 (noting, fourteen years ago, the existence of what was then a "decade of relatively hardy criticism"). It is also not supposed to be taken literally—"all models are wrong," as the authors put it, and deliberately simplify reality. *Id.* (quoting SEGAL & SPAETH, *supra* note 12, at 45.)

15. See, e.g., Jeffrey A. Segal et al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812 (1995) (noting remarkably high correlations of judges' votes in actual cases and their positioning on a simple attitudinal scale).

16. See Mark Tushnet, *Defending the Indeterminacy Thesis*, 16 QLR 339, 341 (1996).

17. *Id.*

18. *Id.*

19. *Id.* at 343 ("Every legal proposition that a lawyer would find professionally respectable to assert is indeterminate.").

I mean it: Hasen discusses cases about abortion, same-sex marriage, gun control, affirmative action, religious freedom, campaign finance, gerrymandering, voting rights, federalism, the death penalty, the Confrontation Clause, and the so-called “War on Terror” (Chapters Five to Seven). And that’s just a sample. Simply as a catalog of Scalia’s work in such a large range of areas, Hasen’s book is valuable—it is the sort of catalog prospective law clerks used to have to compile for themselves in advance of the interview<sup>20</sup> (though it would have been prudent to avoid Hasen’s occasionally scathing tone).

A point-by-point discussion of each of Hasen’s arguments in these areas would run the length of a book, rather than a review of one. But an illustrative example is Chapter Five, *Kulturkampf*,<sup>21</sup> the title of which is drawn from one of Scalia’s early gay-rights opinions, *Romer v. Evans*.<sup>22</sup> This chapter is dedicated to so-called “culture war” cases—cases about “abortion, same-sex marriage, affirmative action, guns, and religion” (pp. 89–90). In these cases, says Hasen, the outcomes for which Scalia voted “always followed [his] conservative instincts” (p. 90). He ended up, says Hasen, “in line with where you would expect someone with his political, social, and religious commitments to be” (p. 91). This essential insight is the upshot of more or less all the substantive areas Hasen discusses, with a few exceptions to be named a bit later.

What is interesting, though, is how often Hasen criticizes Scalia for being *insufficiently textualist or originalist*. It is almost as if even Hasen himself is drawn to the power of formal methods—he can’t resist. In the book’s introduction, Hasen previews this criticism: Scalia’s “ostensibly neutral principles . . . usually failed to cabin the considerable discretion afforded Supreme Court justices” (p. 12; emphasis added). Scalia’s problem, Hasen says, was “that he held himself up to a higher standard that neither he nor the other justices could meet” (p. 12). (Pause on that left-originating criticism for a moment: “Textualism and Originalism: The *Higher Standard*.”) To be clear, I have no interest in writing an apologia for Scalia’s works. He does not need me to do it, for one thing. But for another, only a fool would dispute the proposition that all human beings spend most of their lives believing in principles that they are unable to adhere to in a significant proportion of cases. That is why his son, Fr. Paul Scalia, observed (at the justice’s funeral Mass) that “although [he] believed, he did so imperfectly” and asked the assembled not to show a “false love” for “this sinner, Antonin Scalia,” but ra-

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20. See Ian Samuel, In Memoriam, *The Counter-Clerks of Justice Scalia*, 10 N.Y.U. J.L. & LIBERTY 1, 1 (2016).

21. Hasen begins Chapter Five with a discussion of my own essay, *id.* at 12–13, about Justice Scalia’s death, in which I describe my role as Scalia’s left-leaning “counter-clerk” during the Term that the Court first confronted the question of same-sex marriage (among many other cases). Pp. 86–90. Hasen’s description and interpretation of that essay speaks for itself, and I will neither affirm nor quarrel with it. But I thought it fair to alert a reader who was unaware that I am an interested party, of sorts.

22. 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (“The Court has mistaken a *Kulturkampf* for a fit of spite.”).

ther to “show affection for him and do good for him” by praying that his “stain of sin be washed away.”<sup>23</sup>

In other words: by frequently criticizing Scalia’s decisions on textualist and originalist grounds, Hasen is arguing “go, and sin no more,” not “do what thou wilt.”<sup>24</sup> And there is a hint of something there. In his discussion of affirmative action, for example, Hasen charges that Scalia’s view of a “color-blind” Constitution that generally prohibits public universities from taking race into account in admissions “appeared to be at odds with the original understanding of the Equal Protection Clause” (p. 105). Quoting former law clerk Gil Seinfeld’s essay on the occasion of Scalia’s death,<sup>25</sup> Hasen notes that historians have documented a fairly rich body of evidence that, in the years following ratification of the Reconstruction Amendments, Congress routinely enacted laws benefiting black Americans specifically. “The most prominent of these federal race-conscious measures was the Freedmen’s Bureau Act, which established a federal bureaucracy whose explicit mission was to provide assistance to African Americans, including food, clothing, health care, and employment.”<sup>26</sup> There are answers to those arguments (for one, the Equal Protection Clause does not by its terms apply to Congress),<sup>27</sup> but it is a fair point that Justice Scalia, so far as I am aware, never engaged with them. To call that a failing, one must care about history—more broadly, one must care about method. Hasen insists that method is basically irrelevant, but even he cannot resist its pull.

When I raised this argument with Hasen privately, he supplied two answers, both of which deserve a reply on the merits. First, he observed that one can criticize a system as internally inconsistent or badly applied without thinking the system is good. That is fair enough, though note that this critique (“textualism can be badly applied and is internally inconsistent”) is different than “textualism inevitably produces bad results,” which, for the upcoming “weak reply,” is all I will need to demonstrate. But to me, Hasen’s critiques of (for example) the LSD blotter-paper case are more devastating than this reply modestly suggests: Hasen’s argument is utterly devastating to Easterbrook’s opinion *on the merits*, and I think would be so even to many conservatives. (More on that in Part III.) Second, Hasen noted that his cri-

23. *Justice Antonin Scalia Funeral Mass*, C-SPAN (Feb. 20, 2016), <https://www.c-span.org/video/?404962-1/justice-antonin-scalia-funeral-mass> [<https://perma.cc/6PKV-SZX4>].

24. *John* 8:11.

25. P. 106 (quoting Gil Seinfeld, *The Good, the Bad, and the Ugly: Reflections of a Counterclerk*, 114 MICH. L. REV. FIRST IMPRESSIONS 111, 118–19 (2016)).

26. David Gans & Adam Winkler, *Online Fisher Symposium: Affirmative Action Is Consistent with Original Meaning*, SCOTUSBLOG (Sept. 5, 2012, 11:28 AM), <http://www.scotusblog.com/2012/09/online-fisher-symposium-affirmative-action-is-consistent-with-original-meaning/> [<https://perma.cc/S6T2-NNJQ>].

27. U.S. CONST. amends. V, XIV (the former requiring that the national government provide only “due process of law,” and the latter requiring the state governments to afford “equal protection of the law” to all people); see, e.g., Michael B. Rappaport, *Originalism and the Colorblind Constitution*, 89 NOTRE DAME L. REV. 71 (2013).

tique is still compatible with the idea of looking to text as a starting point—but in conjunction with legislative history and contemporary values. To that, I would ask only: so if we agree that text will settle some cases, then what will actually end up dividing textualists from purposivists? And to *that*, I will (for reasons of space) incorporate by reference the more-or-less canonical account of the answer to that question.<sup>28</sup>

Hasen is not a fan of Scalia's opinions on nearly any of the issues he discusses in the culture-war chapter (or most of the others): abortion, same-sex marriage, affirmative action (Chapter Five). But his critique is most powerful on the third of these, the sole issue where Hasen is able to level really effective originalist counterarguments.<sup>29</sup> Scalia has lent Hasen a yardstick by which to measure him, and it enables Hasen to argue (not without some force) that the decisions on affirmative action didn't measure up. If Scalia embraced a more Hasenian "ideology and a sense of fair results" method (p. 37)—as does, say, Justice Alito (p. 41)—by what yardstick could we criticize his vote in *any* of these cases? Only our own view that he was wrong about the merits of affirmative action or abortion or whatever. And fair enough. But if that is all the business of the Court is supposed to be, then it is hard to keep out of one's head the bothersome thought that we *have* a mechanism for resolving disagreements among citizens about contested policy issues: legislatures, filled using elections in which those citizens get to participate. More on that later.

## II. IF METHOD DOESN'T MATTER, THEN NO METHOD IS BAD

The weak reply to Hasen goes something like this: If textualism and originalism do not constrain judicial discretion, and if *no other method of interpretation does either*, then the indeterminacies of formal methods in practice do not supply any reason to abandon them for any other method. In fact, the selection of method is—literally—irrelevant. So, what's all the fuss about? On this account, choosing a judicial method is something like choosing a language to write in: you can express ideas equally well in English and Italian,<sup>30</sup> so it would be rather silly to argue against the choice of one or the other. Hasen, in other words, has proven too much.

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28. John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 70 (2006) (acknowledging that modern textualists "acknowledge that statutory language has meaning only in context, and that judges must consider a range of extratextual evidence to ascertain textual meaning," just as sophisticated purposivists "posited their own 'reasonable person' framework to make purposive interpretation more objective"). In one sense, Hasen and I are recreating in miniature the multigenerational argument about formal methods that has gotten us here and perhaps thereby narrowing the ultimate space of disagreement. Still, that leaves a question about what's to be done—which I address at the end of this Review.

29. See, e.g., p. 103 ("[Justice Scalia] ignored evidence of special programs for newly freed slaves at the time of ratification, which indicated contemporaneous understandings of the amendment's scope.").

30. Compare, e.g., DANTE ALIGHIERI, *THE INFERNO OF DANTE ALIGHIERI* 318 (J.M. Dent & Co., 1906) (1320) ("Cosi s'osserva in me lo contrapasso."), with *Treehouse of Horror IV*, *THE*

At points, Hasen seems to at least suggest that textualism actually *does* produce somewhat determinate results, but that those results are (as he puts it) “nutty” (p. 39) and “unfair” (p. 30). Hasen goes so far as to say that textualism has “harsh results” as its “*inevitable product*” (p. 28; emphasis added). To which one is tempted to reply: Well, which is it? Given that Hasen has argued that no decisionmaking theory in fact provides any constraint on judges, he cannot be simultaneously correct that textualism forces judges (inevitably!) into harsh results. And the same must logically be true of originalism. It would in fact be quite strange if a focus on text produced inherently unjust results in a way that attention to the committee process, for example, did not—what would be the causal mechanism? Hasen does not say, partly, I suspect, because he does not really believe textualism requires any particular results, good or bad. “Any stick to beat a dog,” as the justice used to say, but Hasen’s heart is not in this part of the critique.

To be sure, Hasen quotes the Supreme Court’s decision in *Lamie v. United States Trustee* (a bankruptcy case), which said that courts should not “soften the import of Congress’ chosen words even if we believe the words lead to a harsh outcome,”<sup>31</sup> and then goes on to collect a random handful of cases in a variety of substantive areas that cite *Lamie* for that proposition.<sup>32</sup> But it is equally true, from the perspective of a textualist, that a court should not *harden* the import of Congress’ chosen words even if the court believes they lead to an unduly *generous* outcome. *Lamie* is a statement about legislative supremacy,<sup>33</sup> not the virtues of cruelty: policy judgments should be reserved to the legislature to the maximum extent possible, and nothing more.

Almost as if to prove this point, Hasen, once again, cannot resist textualist criticism of the individual “harsh” decisions he discusses—cannot, in other words, resist suggesting that a fair reading of the text would have produced a more generous result. For example, Hasen discusses a fairly well-known drug case, *United States v. Marshall*,<sup>34</sup> decided by the Seventh Circuit in 1990 (pp. 27–28). The question was whether the mandatory minimum sentence for selling a “mixture” of LSD that weighed more than one gram was triggered if the drug and the blotter paper it was dissolved onto weighed at least that much.<sup>35</sup> In an opinion by Judge Easterbrook (a prominent textualist), the court said yes: “Ordinary parlance calls the paper containing tiny crystals of LSD a mixture.”<sup>36</sup> Nonsense, says Hasen: “What ordinary speaker

SIMPSONS (1993) [www.simpsonsworld.com/video/27520611805](http://www.simpsonsworld.com/video/27520611805) [https://perma.cc/XU2B-CQUU] (“So, you like donuts, eh? Well, have all the donuts in the world!”).

31. P. 28 (quoting *Lamie v. United States Tr.*, 540 U.S. 526, 538 (2004)).

32. Pp. 28–29. It is a bit weird to cite a case as obscure as *Lamie* for this proposition, especially because it is written by Justice Kennedy, who was (as Hasen observes, in fairness) no one’s idea of a committed textualist or a formalist of any sort. See p. 28. But it is not inaccurate—I think any committed textualist would say the same thing.

33. *Lamie v. U.S. Tr.*, 540 U.S. 526, 538 (2004).

34. 908 F.2d 1312 (7th Cir. 1990).

35. P. 27 (quoting *Marshall*, 908 F.2d at 1314).

36. P. 27 (quoting *Marshall*, 908 F.2d at 1317).

of English would refer to LSD-laced blotter paper as a ‘mixture’ of drug and paper?” (p. 28). That response, which I think is absolutely correct, *sounds in textualism*. So it is not true, therefore, that formal methods necessarily lead to “harsh” outcomes. Easterbrook just got *Marshall* wrong. Or, if you like: there is no right answer, and textualism can supply “the defendant wins” just as easily as “the defendant loses.” The same could be said about the other statutory cases Hasen discusses. As he notes, for example, each opinion in *Yates v. United States* (which was about whether fish are “tangible object[s]” for the purpose of a particular obstruction-of-justice statute) “focused primarily upon textual analysis” (p. 33).<sup>37</sup>

For a believer in the indeterminacy thesis, you can always “get there from here,” so to speak. In any legally interesting case, it will be possible to justify victory for either side using formal methods like textualism and originalism in a way that will appear legitimate to well-socialized lawyers. In the culture-war chapter, for example, Hasen observes that Scalia’s “conservative” instincts, rather than strict application of originalism, led to his opinions in cases about same-sex marriage and abortion (pp. 89–90). But although Hasen does not argue that this was an incorrect conclusion on originalist grounds, others have. Steven Calabresi—a founder of the Federalist Society—has argued that the Constitution guarantees same-sex marriage as an originalist matter.<sup>38</sup> Others have argued the same about abortion.<sup>39</sup> Hasen describes Justice Kennedy’s majority opinion in *Lawrence v. Texas*, which invalidated state laws criminalizing sodomy, as one based on “principles of a living Constitution” (p. 99). But others have argued that sentencing gays and lesbians to prison terms for having sex would be “cruel and unusual” under an original understanding of the Eighth Amendment and thus unconstitutional.<sup>40</sup> Both the majority and dissenting opinions in *Heller* deployed a basically originalist method.<sup>41</sup>

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37. By the way: the plurality opinion in *Yates*, in favor of the defendant and against the government, was written by Justice Ginsburg, joined by the Chief Justice and Justices Breyer and Sotomayor; Justice Alito concurred separately in the judgment; and the dissent was written by Justice Kagan, joined by Justices Scalia, Thomas, and Kennedy. *Yates v. United States*, 135 S. Ct. 1074 (2015) (plurality opinion). Whatever explains that lineup, it isn’t the attitudinal model.

38. Steven G. Calabresi & Hannah Begley, *Originalism and Same Sex Marriage*, SSRN (Feb. 25, 2015), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2509443](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2509443) [<https://perma.cc/QT3W-F47K>] (“One of the most important public civil rights issues of the modern era is whether the Fourteenth Amendment to the U.S. Constitution, as originally understood and modified by reading it through the lens of the Nineteenth Amendment, protects a right to gay marriage. We believe it does, and we seek in this essay to briefly explain why we reach the conclusion we do.”).

39. Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007); Andrew Koppelman, *Originalism, Abortion, and the Thirteenth Amendment*, 112 COLUM. L. REV. 1917 (2012).

40. Steven G. Calabresi, *Lawrence, the Fourteenth Amendment, and the Supreme Court’s Reliance on Foreign Constitutional Law: An Originalist Reappraisal*, 65 OHIO ST. L.J. 1097 (2004). Calabresi argues that because the only penalty in *Lawrence* was a small fine, there was

That, in sum, is the weak reply: that by committing himself to some version of the indeterminacy thesis, Hasen has eliminated his ability to argue that any particular judicial methodology is inferior (as a matter of substantive results) to any other. That is not an argument *for* formalism of any sort, of course. But it does reduce substantially the argumentative burden that a formalist must carry: any advantage, no matter how slight, is sufficient to overcome “they’re all the same in the end.”

### III. STILL THE LESSER EVIL

The strong reply to Hasen, however, goes further and attempts to supply that advantage. Formalist methods like textualism and originalism, or—more precisely—methods that at least *aspire* to determinate results, are better than “no worse.” Instead, they both provide a mechanism that has both a *demonstrated ability* to get judges to vote against their imputed policy preferences and—though this is speculative—a mechanism that provides a *potential cause* for why they might do so. In this Part, I address each.

First: Can formal methods really get judges to vote differently than they’d vote if they were “Rep. So-and-So” vs. “Justice So-and-So”? Hasen says no—that the greatest failing of formal methods like textualism and originalism is their “hubris.”<sup>42</sup> By this, he means the “unwarranted sense of certainty” (p. 26) formalism inspires that judges can figure out the right answer in legal cases by relying on the text alone: in reality, no method can “restrict judicial discretion” and the outcomes “[i]n the most important cases” will always “be driven by ideology and a sense of fair results” (p. 36–37). But if the *greatest failing* of textualism and originalism is that they encourage judges to disregard their own ideology and sense of fair results, even if imperfectly, that is a strange failing to call hubris. Attempting to constrain oneself, even without perfect success, is not hubris but its opposite. And more importantly, there is at least some evidence that it worked, at least for Scalia, at least some of the time.

Consider a case that Hasen does not discuss: *Whitman v. American Trucking Ass’ns*, a foundational case about the Clean Air Act.<sup>43</sup> *Whitman* concerned national air-quality standards set by the EPA. One question presented in the case was whether the EPA was permitted to take the economic cost of pollution control into account when setting those standards.<sup>44</sup> The American Trucking Association (warning of “closing down whole industries and thereby impoverishing the workers and consumers dependent upon those industries”<sup>45</sup>) argued that the EPA should take such costs into ac-

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no Eighth Amendment problem, *id.* at 1129, but it is trivial to imagine the argument being modified to omit this distinction while still being phrased in thoroughly originalist terms.

41. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

42. See pp. 26, 47–48.

43. 531 U.S. 457 (2001).

44. *Whitman*, 531 U.S. at 462.

45. *Id.* at 466–67.

count—articulated, in other words, a fairly mainline conservative position against excessive environmental regulation. No, said Justice Scalia, writing a thoroughly textualist opinion for the Court. The relevant provision directed the EPA to set air quality standards “the attainment and maintenance of which . . . are requisite to protect the public health” with “an adequate margin of safety.”<sup>46</sup> That was that, Scalia thought: “Were it not for the hundreds of pages of briefing respondents have submitted on the issue, one would have thought it fairly clear that this text does not permit the EPA to consider costs in setting the standards.”<sup>47</sup> *Whitman* was a win for the precise groups you might have expected Justice Scalia to be dubious of: not just environmentalists but (*quelle horreur*) the actual EPA, arrayed against an industry—truckers!—that could hardly be more quintessentially red-state American. Nonetheless, the text said what it said. In another case, *Decker v. Northwest Environmental Defense Center*,<sup>48</sup> Scalia’s textualist commitments inspired a solo dissent in an 8–1 loss, in which he was (so to speak) more Catholic than the Pope, taking a more pro-environment position than Barack Obama’s EPA. Using the “familiar tools of textual interpretation,” he concluded that the logging industry was not permitted to discharge stormwater runoff from logging roads without a permit.<sup>49</sup>

When it comes to constitutional law, Hasen discusses but explains away the most famous example of Scalia voting against his presumed political preferences: *Texas v. Johnson*, in which he was part of the 5–4 majority that invalidated Texas’s law against flag burning.<sup>50</sup> Scalia himself loved to cite this example of his originalist method committing him sometimes to vote for outcomes he personally disliked.<sup>51</sup> Hasen calls this just a symptom of his “conservative libertarian” instincts. But in truth, this starts to feel like an example of over-fitting the model to the data—and cannot even, on its own terms, explain how or why this ostensible “libertarian” would have voted for *the EPA* in important environmental-law cases. Although I am certain Hasen could provide an attitudinal-indeterminate explanation for all of these votes, at a certain point, Occam’s Razor must take over, and we must confront the uncomfortable suspicion that method might actually be doing some work.

Although *Whitman* and *Decker* and even *Johnson* are interesting, they pale in comparison to the most prominent and extended Scalian heterodoxy against the imputed political imperatives of a Reaganite conservative: criminal procedure. (By “criminal procedure,” I mean the protections of the Fourth, Fifth, and Sixth Amendments—what might be called primary constitutional criminal procedure—as opposed to things like post-conviction habeas review or the limits on punishment imposed by the Eighth Amend-

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46. *Id.* at 472 (quoting 42 U.S.C. § 7409(b)(1) (2000)).

47. *Id.* at 465.

48. 568 U.S. 597 (2013).

49. *Decker*, 568 U.S. at 622 (Scalia, J., dissenting).

50. 491 U.S. 397 (1989).

51. And I, accordingly, have discussed it before. Samuel, *supra* note 20.

ment.) Scalia led what can fairly be called left-wing revolutions in *several* of these areas, including the Fourth Amendment's protections against unreasonable searches and seizures,<sup>52</sup> the Sixth Amendment right to be confronted with the witnesses against oneself,<sup>53</sup> the right to a jury trial,<sup>54</sup> and even the right of a citizen against detention without trial.<sup>55</sup> Scalia successfully led a multiyear crusade to invalidate an important provision of the "Armed Career Criminal Act" (it is what it sounds like) as unconstitutionally vague and thus unfair to criminal defendants.<sup>56</sup> And he wrote what one prominent commentator called his "smartest, wittiest ruling of all time" in a Fourth Amendment case concerning whether a state could take an arrestee's DNA without any reason to believe it would show evidence of a crime (he said no).<sup>57</sup> In that dissent, he was joined by Justices Ginsburg, Sotomayor, and Kagan—a lineup that ought to serve as at least a mild rebuke to the attitudinal model of judging.

Hasen covers this entire subject in the course of just five pages almost at the end of the book (pp. 151–56). The criminal-procedure opinions the book discusses are *Crawford v. Washington* (and three later cases in the same line, *Davis v. Washington*, *Michigan v. Bryant*, and *Ohio v. Clark*), *Apprendi v. New Jersey* (and another later companion *United States v. Booker*), *Johnson v. United States*, *United States v. Jones*, *Kyllo v. United States*, and Scalia's dissent in *Maryland v. King* (pp. 151–55). That is a lot to cram into five pages, especially since *Crawford* takes up three of them. The others zip by in about a paragraph each. That is too bad, because Scalia's criminal-procedure cases are strong evidence that his methodological commitments really did lead him to outcomes that an ordinary conservative might have found objectionable.

Of course, I am not suggesting that textualism and originalism produced uniformly left-wing results in Scalia's hands; any such suggestion, in addition to being absurd, would be amply contradicted by the bulk of counterexamples in Hasen's book. What I am suggesting, however, is that it *sometimes* did. That is hard to square with the idea that judicial method does not and cannot restrict judicial discretion enough to undermine fundamentally out-

52. See, e.g., *Florida v. Jardines*, 569 U.S. 1 (2013); *United States v. Jones*, 565 U.S. 400 (2012).

53. *Crawford v. Washington*, 541 U.S. 36 (2004).

54. *Apprendi v. New Jersey*, 530 U.S. 466, 498–99 (2000) (Scalia, J., concurring). It would be fair to say that Scalia did not "lead" the revolution in *Apprendi*, insofar as he wrote a concurrence rather than the majority opinion. But he was the author of the dissent in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which prefigured and went even further than *Apprendi*, and which was also joined by his three most liberal colleagues—Justices Stevens, Souter, and Ginsburg.

55. *Hamdi v. Rumsfeld*, 542 U.S. 507, 554–79 (2004) (Scalia, J., dissenting).

56. *Johnson v. United States*, 135 S. Ct. 2551 (2015).

57. Jeffrey Rosen, *A Damning Dissent: Scalia's Smartest, Wittiest Ruling of All Time*, NEW REPUBLIC (June 4, 2013), <https://newrepublic.com/article/113375/supreme-court-dna-case-antonin-scalias-dissent-ages> [https://perma.cc/FF4Z-KXSA].

come-driven judicial decisionmaking, as Hasen argues. Why would Scalia have voted that way in these cases? Was he a secret environmentalist? (Maybe that explains the hunting—a clever cover story for his love of the woods.) A softie for armed career criminals? (Maybe *that* explains the hunting.)

Although I do not know what Hasen would say, one reply to these examples is that such cases can be explained away by a person's natural desire to demonstrate fidelity to a "big idea" with which they have become personally associated, so long as the stakes are not *too* high. In other words, it is extremely satisfying to be able to point to areas where you voted "against type," and crow: "You see? Because of my commitment to a neutral philosophy, I am a principled jurist, unlike some people around here that I could name." And it is *certainly* the case that whatever the ordinary judge might enjoy, Scalia himself enjoyed highlighting those examples in public.<sup>58</sup>

If that is true, and I think it at least somewhat is, then it is a virtue of formal methods of the best sort: one that makes them compatible with cynical (and often correct) assumptions about human nature. Formal methods with big aspirations to neutrality and clear rules of play are big ideas, orthogonal to political ideology,<sup>59</sup> to which one's human pride can be semireliably lashed. By contrast, if one adjudicates cases simply based on one's first-order "ideology and . . . sense of fair results," as Hasen argues is inevitable (p. 37), then crowing about one's principles is unavailable—voting "against type" for such people is impossible. Another way of putting it: in those cases, Scalia *was* voting his "ideology"; he just had an ideological commitment to *formalism* that exceeded his ideological commitment to business-friendly regulation, or jailing Beatniks, or whatever, in those cases.

It is fair to say, as Hasen does, that in the absolute highest-stakes cases methodological commitments may be overwhelmed by other factors. But I would have thought that a reason to *encourage* ideological commitments to a methodology, rather than tear them down as foolish illusions. That is especially so if one is a left-leaning person staring down the barrel of a young, conservative Supreme Court and pondering whether to loudly proclaim to them: "Did you know that all you're up to up there is politics?" All that invites is the chilling reply: "Come to think of it, you have a point."

#### IV. THE PERKS OF NOT BEING A WALLFLOWER

In this Review, I have mostly discussed Scalia's substantive legacy and judicial method. This mirrors the book's focus and what I think are Hasen's main subjects of interest. But in a way, Hasen's most serious charge against

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58. See, e.g., Scott Bomboy, *Justice Antonin Scalia Rails Again About Flag-Burning 'Weirdoes'*, NAT'L CONST. CTR.: CONST. DAILY (Nov. 12, 2015), <https://constitutioncenter.org/blog/justice-antonin-scalia-rails-again-about-flag-burning-weirdoes> [<https://perma.cc/89VQ-KL3B>] ("If it were up to me, I would put in jail every sandal-wearing, scruffy-bearded weirdo who burns the American flag," Scalia said. "But I am not king.").

59. William Baude, Essay, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV. 2213, 2224–26 (2017).

Scalia is buried in a roughly twenty-page interlude halfway through the book. I have saved discussion of it for last, in part because it is not easily integrated into my argument above but also because it is simultaneously too important to ignore. This interlude (Chapter Four) is where Hasen pauses to consider two facets of Justice Scalia's *style*: the way he wrote (especially in dissent) and the way he spoke (especially in public appearances).

Justice Scalia's writing, says Hasen, contained "an unparalleled level of nastiness and sarcasm," which "served to coarsen judicial discourse and may have helped undermine the legitimacy of the institution he appeared to love so dearly" (p. 67). To be sure, he was also a "charmer who often played for laughs at the Supreme Court's oral argument," an "engaging and interesting writer on a Court whose other justices could make even the most pressing social and legal issues seem mind-numbingly boring," and "a gregarious public intellectual" (p. 66). But Hasen repeatedly asserts that the justice's writing style served to delegitimize the Court as an institution (pp. 67, 74).

There have always been some people who bristled at the justice's writing style, including some of his former law clerks.<sup>60</sup> But it is important to separate the different criticisms that such a bristler might have. One would be purely aesthetic—they just find strong language distasteful. Whereas I find the phrase "disappearing trail of . . . legalistic argle-bargle"<sup>61</sup> to be so funny that I actually laughed aloud while writing this sentence, they do not, and that is that. An essentially gustatory objection like that is not really a matter for debate any more than my distaste for sweet-potato fries or Scalia's fondness for Nero d'Avola.

A different claim would be that Scalia's style was counterproductive in the sense that it actually *changed outcomes* in particular cases. One sometimes hears that sort of thing.<sup>62</sup> An especially frequent object of speculation in this respect is that *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>63</sup> might have come out differently if Justice Scalia had been nicer—Hasen observes that rumors to that effect have circulated for years (pp. 71–72). As Hasen correctly observes, that particular rumor is contradicted by what we know about how *Casey* was drafted (pp. 71–72). Nevertheless, the sense—a judicial version of "you catch more flies with honey than you do with vinegar"—persists.

Personally, I have always found this suggestion rather shocking—if it is true, it is far less an indictment of Scalia than anyone allegedly "driven to the center" by him. Really, imagine: you have spent your entire life believing

60. E.g., Gil Seinfeld, *The Good, the Bad, and the Ugly: Reflections of a Counterclerk*, 114 MICH. L. REV. FIRST IMPRESSIONS 111, 118–19 (2016).

61. *United States v. Windsor*, 570 U.S. 744, 799 (2013) (Scalia, J., dissenting).

62. See, e.g., Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 122 n.602 (1992) (noting "speculat[ion]" from observers that "Justice Scalia's blistering sarcasm toward Justice O'Connor's and Justice Kennedy's opinions may indicate some personal animosity that has driven them toward the center").

63. 505 U.S. 833 (1992).

that, say, affirmative action is not just wrong but actually unconstitutional. Then, in an unrelated case, perhaps years earlier, one of your colleagues describes your opinion, *in dissent* (that is, you won!), as, say, “irrational.”<sup>64</sup> Is the idea that you then actually *change your mind* about the right answer in the affirmative-action case years later? How does that work, exactly? Or is the idea that you continue to hold your previous belief but vote against it to spite your colleague? I don’t know, but if there are such people, perhaps the label “Justice of Contradictions” should have been reserved for them.

Much more likely, to me, is that Justice Scalia’s writing style greatly magnified his influence on American law, albeit not in ways that Hasen is likely to celebrate. Justice Scalia’s writing style likely had its greatest influence not on his colleagues, but on other readers: law students, young lawyers, even laypeople interested in the business of the Court. Hasen opens the style chapter by discussing a speech by Paul Clement (one of the nation’s leading Supreme Court advocates and a former clerk for Justice Scalia) to the Federalist Society’s national convention about his former boss’s style. The audience, Hasen correctly reports, ate it up (pp. 64–66). Now, why do you suppose that might be? In terms of his votes, Justice Scalia was not so different from (say) Justice Thomas.<sup>65</sup> And Justice Thomas, I am sure, was well-loved in that room too. But could it be that a crisp, confrontational style, which eschews the Marquis-of-Queensbury rules mostly fashionable among the elite, is itself a mechanism of influence? And as to the admirers in that room: just who is it, do you think, that will be selecting judges and justices—that will *become* judges and justices—when the Republican Party controls the selection? Isn’t winning the affection of such people more or less the definition of the sort of influence that counts?

A third sort of criticism, one Hasen takes very seriously, is that the justice’s sharp dissents (and his public appearances, which Hasen criticizes for having a similar tone) were bad because they impaired the “legitimacy” of the Supreme Court as an institution. By this, Hasen means that Scalia “contributed to popular cynicism about Supreme Court decisionmaking” by accusing his colleagues of acting as “super-legislators” rather than as judges deciding cases on the basis of traditional legal materials (pp. 74–75).

I will confess that I find this criticism by Hasen somewhat perplexing, because he is more or less *an adherent* of this exact model of judging—he believes, in other words, that there is no neutral method judges can use to decide cases and that they will always in the end be required to take their own policy preferences into account (pp. 36–37). In other words, Hasen thinks

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64. See *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 536, n.\* (1989) (Scalia, J., concurring in part and concurring in the judgment) (“Similarly irrational is the new concept that Justice O’Connor introduces into the law in order to achieve her result . . .”).

65. Jeremy Bowers et al., *Which Supreme Court Justices Vote Together Most and Least Often*, N.Y. TIMES: THE UPSHOT (updated July 3, 2014), <https://www.nytimes.com/interactive/2014/06/24/upshot/24up-scotus-agreement-rates.html> [https://perma.cc/XJ6H-PFRT] (finding that in 280 signed decisions from cases argued between the 2010 and 2013 terms, Justice Scalia and Justice Thomas voted together 91 percent of the time).

that judges are in an important sense superlegislators and wrote a book illustrating the ways in which not even the most prominent adherent of the opposite view could resist behaving that way. If Hasen is right, then Justice Scalia's stoking of "popular cynicism about Supreme Court decisionmaking" (p. 75) was *correct*—he was, in other words, accurately informing the public about what the Court is doing. What's wrong with that? Is the idea that we're all supposed to keep quiet about what judges are really up to, lest the plebes catch on? Then why is Hasen writing a book letting everyone in on the secret?

At the core of this latter critique is a sense that Justice Scalia has undermined the "respectful tone" that he says lawyers used to use in the good old days (p. 85). Hmm. Really? In his legendary dissent in *Korematsu v. United States*, this is how Justice Murphy opened:

This exclusion of "all persons of Japanese ancestry, both alien and non-alien," from the Pacific Coast area on a plea of military necessity in the absence of martial law ought not to be approved. Such exclusion goes over "the very brink of constitutional power," and *falls into the ugly abyss of racism*.<sup>66</sup>

I would not change a word of this. Would Hasen? I am not a good judge of such things, but is there something about accusing the President of the United States of having gone over "the ugly abyss of racism" that is somehow more genteel than "cannot be taken seriously" (probably the most legendary body slam that Justice Scalia is supposed to have delivered to one of Justice O'Connor's opinions)?<sup>67</sup> (Truth to tell, I have never really understood what scandalized people so badly about Scalia's remark, but it has certainly entered the canon.<sup>68</sup>) Murphy goes on to describe the government's actions as "one of the most sweeping and complete deprivations of constitutional rights in the history of this nation,"<sup>69</sup> resembling "the abhorrent and despicable treatment of minority groups by the dictatorial tyrannies which this nation is now pledged to destroy,"<sup>70</sup> and he began the dissent's final paragraph by saying: "I dissent, therefore, from this legalization of racism."<sup>71</sup> I do too. Should Murphy have been more polite? Why?

66. *Korematsu v. United States*, 323 U.S. 214, 233 (1944) (Murphy, J., dissenting) (emphasis added) (quoting J.L. DeWitt, U.S. Army, Civilian Exclusion Order No. 34 (1942), and *Hirabayashi v. United States*, 320 U.S. 81, 111 (1943) (Murphy, J., concurring)).

67. *Webster*, 492 U.S. at 533 (Scalia, J., concurring in part and concurring in the judgment) ("Justice O'Connor's assertion . . . that a 'fundamental rule of judicial restraint' requires us to avoid reconsidering *Roe*, cannot be taken seriously." (quoting *id.* at 526 (O'Connor, J., concurring in part and concurring in the judgment))).

68. See, e.g., David M. O'Brien, *This Time, It's Personal: Justice Scalia's Increasing Incivility*, L.A. TIMES (July 14, 1996) (describing Scalia as "blasting" O'Connor with this frankly tepid remark), [http://articles.latimes.com/1996-07-14/opinion/op-24100\\_1\\_justice-antonin-scalia](http://articles.latimes.com/1996-07-14/opinion/op-24100_1_justice-antonin-scalia) [<https://perma.cc/8VAA-7296>].

69. *Korematsu*, 323 U.S. at 235 (Murphy, J., dissenting).

70. *Id.* at 240.

71. *Id.* at 242.

Of course, you might respond: *Korematsu* was different. The internment of American citizens on the basis of race, you will say, *really is* racist—and is just not the same thing as a decision protecting a woman’s right to elect an abortion. But notice: such a reply implicitly admits that sharp language is justified when the chips are really down and a moral travesty is afoot. Of course, that is exactly what many people feel about abortion, the subject of *Roe*, *Webster* (the source of the “cannot be taken seriously” line), and *Casey*. Many people do not agree with them, of course, but now we are having a disagreement about substance, not writing style—suggesting only the banal fact that people enjoy a sharp tongue when it is saying things they agree with, and not otherwise.

Or consider Justice Holmes’s dissent in *Lochner v. New York*. In it, he remarks—famously—that “[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.”<sup>72</sup> That sarcastic jab sums up everything that is wrong with the majority’s opinion. Would Hasen have had Holmes take it out? Or how about *Dred Scott*? In his dissent, Justice Curtis wrote that “we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.”<sup>73</sup> That sounds familiar to my ear—Scalia wrote variants of that more times than I can count—and I do not think that Curtis was undermining the legitimacy of the Court by pointing out the truth. To be sure, Curtis’s remarks are milder than some of Scalia’s extrastrength scourgings, but *Dred Scott* is also 160 years old—by the standards of the day, that was stern stuff.<sup>74</sup>

Or (to take an election-law example I know Hasen might appreciate) how about *Bush v. Gore*? There were four separate dissents in that case, but I will bet the one you remember is Justice Stevens’s, and in particular, its closing paragraph, in which he says that the majority’s decision “can only lend credence to the most cynical appraisal of the work of judges throughout the land” and concludes with its most famous lines: “Although we may never know with complete certainty the identity of the winner of this year’s Presidential election, the identity of the loser is perfectly clear. It is the Nation’s confidence in the judge as an impartial guardian of the rule of law.”<sup>75</sup> That is a great, hard-hitting line, a scorching of the majority that I bet Justice Scalia might even have admired simply as a matter of craftsmanship. Would Hasen take it out? (Does *Bush v. Gore* not count because it was handed down after Scalia had already coarsened the culture?)

I could go on and on. But I will restrict myself to one more, perhaps the most illustrative of all. In *FCC v. Pacifica Foundation*, the Supreme Court

72. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

73. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 621 (1857) (Curtis, J., dissenting).

74. See Laura Krugman Ray, *Judicial Personality: Rhetoric and Emotion in Supreme Court Opinions*, 59 WASH. & LEE L. REV. 193, 195 (2002) (noting that through the nineteenth century Supreme Court justices often wrote in an impersonal style).

75. *Bush v. Gore*, 531 U.S. 98, 128–29 (2000) (Stevens, J., dissenting).

approved the government's power to censor speech on the airwaves that was indecent but not obscene.<sup>76</sup> Justice Brennan wrote, in dissent, words that are just about as hard-hitting as anything Scalia ever wrote—and, in fact, validate the style they both enjoyed from time to time:

[T]here runs throughout the opinions of my Brothers Powell and Stevens . . . a depressing inability to appreciate that in our land of cultural pluralism, there are many who think, act, and talk differently from the Members of this Court, and who do not share their fragile sensibilities. It is only an acute ethnocentric myopia that enables the Court to approve the censorship of communications solely because of the words they contain.<sup>77</sup>

What Brennan meant is that what sounds coarse to one ear doesn't sound coarse to another. If you have a sense that the country is not the exclusive property of well-mannered Mayflower descendants and belongs equally (to pick a random example) to working-class Catholic children born of southern-European immigrants, you might actually even value an ability to talk like a normal person. On Brennan's view,<sup>78</sup> delicate enforcement of the genteel sensibilities of the elite is basically a way to enforce their substantive views on *hoi polloi*:

Today's decision will thus have its greatest impact on broadcasters desiring to reach, and listening audiences composed of, persons who do not share the Court's view as to which words or expressions are acceptable and who, for a variety of reasons, including a conscious desire to flout majoritarian conventions, express themselves using words that may be regarded as offensive by those from different socio-economic backgrounds. In this context, the Court's decision may be seen for what, in the broader perspective, it really is: another of the dominant culture's inevitable efforts to force those groups who do not share its mores to conform to its way of thinking, acting, and speaking.<sup>79</sup>

And who am I to disagree with William Brennan?

#### CONCLUSION

I would like to close by posing the following question to people who agree with Hasen—who agree, in other words, that Justice Scalia's purport-

76. 438 U.S. 726 (1978) (plurality opinion in part).

77. *Pacifica Found.*, 438 U.S. at 775 (Brennan, J., dissenting).

78. In this as in so many other matters, Scalia did not agree with Brennan on the particulars of this controversy. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 527 (2009) (plurality opinion) (expressing “doubt, to begin with, that small-town broadcasters run a heightened risk of liability for indecent utterances. In programming that they originate, their down-home local guests probably employ vulgarity less than big-city folks; and small-town stations generally cannot afford or cannot attract foul-mouthed glitteratae from Hollywood.”). To this, all I can say is that Scalia may have misapprehended his own virtues: though vulgarity, in the pejorative sense, was not his thing (usually), in the more benign sense of “drawn of the *vulgate*,” it was absolutely a register in which he brilliantly sung when he needed to.

79. *Pacifica Found.*, 438 U.S. at 776–77 (footnote omitted).

edly neutral methods did not produce, in practice, neutral answers and who believe, in fact, that there is no method that can.<sup>80</sup> The question is further directed to the people who are unpersuaded by my argument above—that the adoption of relatively more formal methods might still be a good idea even if Hasen’s descriptive account is largely true, as I believe it is.<sup>81</sup> And this is a question posed at the level of practical reality, not ideal theory: even if one believes that the right answers to legal questions exist at some level by definition, my question is about how to order a world that is not governed by Justice Hercules,<sup>82</sup> or even Justice Holmes.

The question I want to pose is this: So what should be done about it? That is, if Hasen’s argument is correct, then what should change about the role of courts in American democracy? Many of the most important issues in American life are settled by the Supreme Court. In just the last few years, the Court has decided whether same-sex couples will be permitted to marry,<sup>83</sup> whether the Affordable Care Act should continue to exist,<sup>84</sup> whether states may regulate most abortion providers out of existence,<sup>85</sup> whether universities may consider race in admissions,<sup>86</sup> whether corporations may spend money to influence elections,<sup>87</sup> and the circumstances under which the government may learn the movements of any or every person in the country.<sup>88</sup> And, of course, there was the small matter of who was going to be president after Bill Clinton.<sup>89</sup> That is a vast role indeed.

If one is with Hasen, “nothing: things are good, and the role of the courts should remain the same” is at minimum an uncomfortable answer to my question, given standard assumptions about why the federal courts’ current practices are legitimate.<sup>90</sup> That is because it is extremely difficult to justify the extent of federal courts’ power if there is no way to objectively demonstrate what the relevant legal materials require in a large proportion of, and in the *most important*, cases. (Or, phrased differently, if the relevant materials can respectably support either answer in a large percentage of cases.) In 1959, Herbert Wechsler argued that although judicial review was justified by the text of the Supremacy Clause, it was nonetheless essential that

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80. Cf. Tushnet, *supra* note 16, at 351 (“[I]f no . . . methods eliminate indeterminacy[], we may be faced with a real challenge to common understandings about the rule of law”).

81. See *supra* Part III.

82. See RONALD DWORKIN, *LAW’S EMPIRE* (1986).

83. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

84. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

85. *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

86. *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016); see also *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297 (2013).

87. *Citizens United v. FEC*, 558 U.S. 310 (2010).

88. *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

89. *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam).

90. By “legitimate,” I mean the sense in which it is used in, for example, Jeremy Waldron, Essay, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346, 1386–95 (2006).

the “main constituent of the judicial process” was that it be “genuinely principled,” in the sense that it rests on neutral, general rules that would produce acceptable results not just in the case at hand but also in “other cases, preferably those involving an opposing interest.”<sup>91</sup> A lot of water has gone over the dam since Weschler, but I think some version of his argument is still at the core of many lawyers’ instincts about why federal courts can legitimately exercise power on the scale that they do now. And leaving things the same in a world of attitudinalism and indeterminacy should be *especially* unappealing to liberal critics of Justice Scalia, given that the federal courts are firmly in the grip of their ideological adversaries and are likely to remain so for a very long time. So if Hasen is right, and I am wrong, then at minimum there should be a further discussion about what’s to be done in response—a discussion I am more than willing to have.

One possibility is to aggressively reduce the role of courts in American political life, in ways both external and internal. Externally, people who agree with Hasen should logically favor legislation that would reduce the scope of the judiciary’s jurisdiction or alter its decision procedures in ways that would make it harder for it to do anything (perhaps supermajority requirements for invalidating legislation). Internally, at the level of legal doctrine, people who agree with Hasen should logically favor aggressive deference regimes, which move decisions out of the courts and into democratically accountable branches of government like executive agencies and legislatures.<sup>92</sup> Even then, the judiciary might invalidate attempts at jurisdiction stripping<sup>93</sup> and manipulate deference rules to preserve their authority. In that case, the only solution would be something like court-packing—to win political power and add members to the courts that would vote more congenially to the majority’s wishes.<sup>94</sup>

91. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959).

92. See, e.g., Jacob E. Gersen & Adrian Vermeule, *Improving Deference: Chevron as a Voting Rule*, 116 YALE L.J.F. (2007), <https://www.yalelawjournal.org/forum/improving-deference-chevron-as-a-voting-rule> [<https://perma.cc/R6A2-CTSJ>].

93. See, e.g., *Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289 (2001).

94. This reckless idea is typically advocated by notorious hotheads without an appreciation for the elementary game theory possessed by all of said hotheads’ opponents. See, e.g., Ian Samuel, *Good Riddance to Anthony Kennedy—Now #PackTheCourts*, JEWISH CURRENTS (June 30, 2018), <https://jewishcurrents.org/essay/good-riddance-anthony-kennedy-now-packthecourts/> [<https://perma.cc/4VCK-QKLC>].

Of course, there might also be legal challenges to court-packing. See Neil Siegel, *Some Notes on Court-Packing, Then and Now*, BALKINIZATION (Nov. 26, 2017, 4:42 PM), <https://balkin.blogspot.com/2017/11/some-notes-on-court-packing-then-and-now.html> [<https://perma.cc/54D6-HRWJ>] (observing that the Senate Judiciary Committee’s report regarding President Roosevelt’s court-packing plan regarded it as “anticonstitutional” and “unconstitutional”). A full reply to that argument is beyond the scope of this Review, though I do hope to supply that reply. But in brief: on the merits, I doubt it, given how often the Court’s membership has changed in size for explicitly political reasons. But the real answer, I am sorry

These are radical ideas, but that does not make them wrong.<sup>95</sup> My point is not to endorse any particular proposal but to illustrate the need for one *if* Hasen is right. And there is, to be clear, at least one thing about which Hasen is absolutely correct. The story of Justice Scalia's life on the bench and the state of play in interpretive method today represents a crucial arc in American legal history. Justice Scalia spent his years on the Court advocating, in the end very successfully, for the adoption of certain formal legal methods. Now he is gone, but he has left more than a few disciples, including both of his successors to the bench. In Hasen's view, this experiment has been a failure. And in the wake of the failure sits a Court that is stacked with conservative jurists with the formal power to—if they wish—radically remake the law in ways that Hasen would object to. And so the question for tomorrow is one that is urgent but, in fairness, beyond the scope of Hasen's book:

Do you have a better idea?

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to say, can only sound in *realpolitik*: "Better seat the new justices before the challenge to the legislation reaches the Court."

95. Cf. Mark Tushnet, *Epstein's Best of All Possible Worlds: The Rule of Law*, 80 U. CHI. L. REV. 487, 493 (2013) (book review) ("As stated, the form of the argument is, 'Were X to be true, there would be dire consequences; therefore X is false.' To which the response is, 'Tough luck.'").