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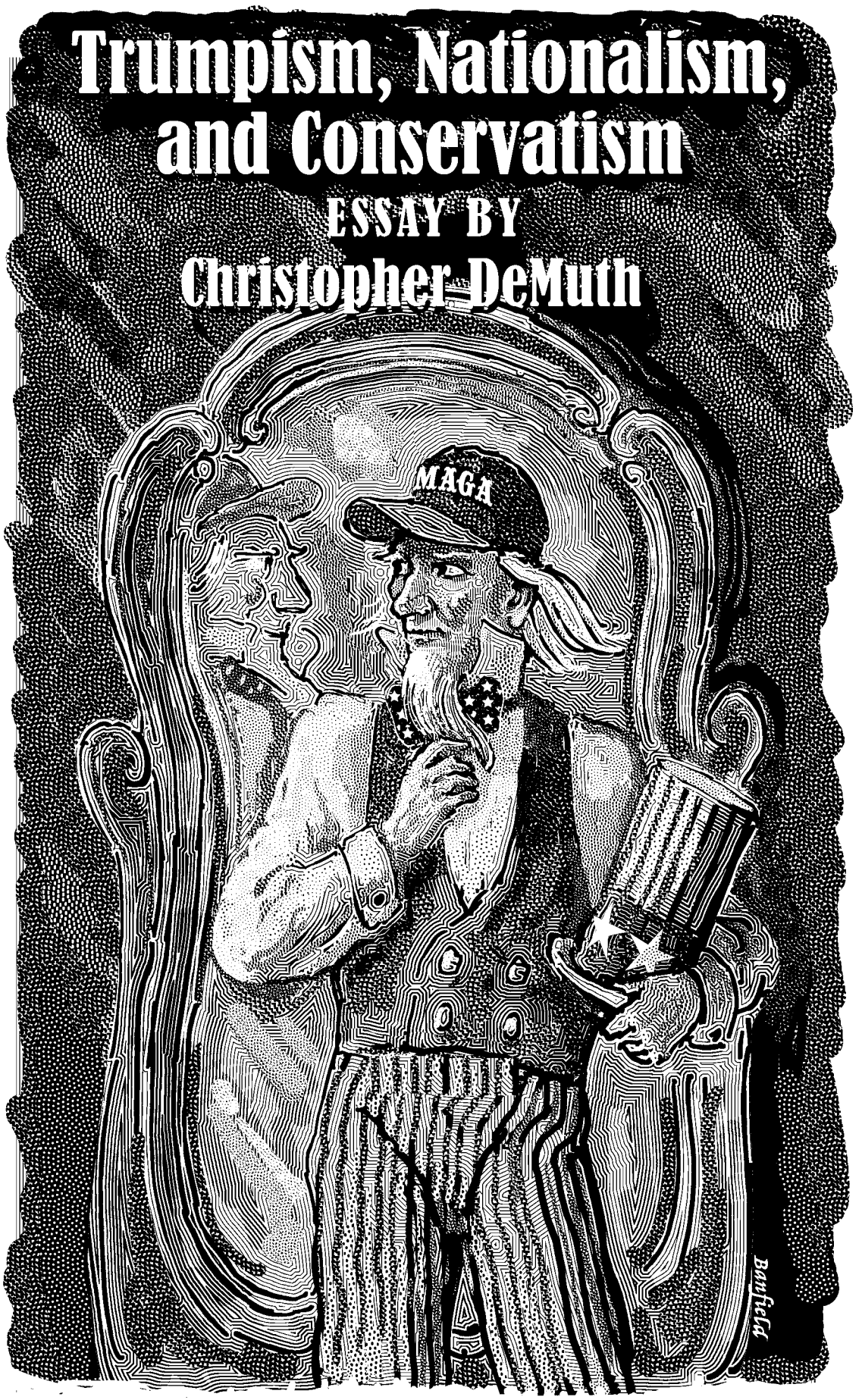

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Book Review by John C. Eastman

Consistently Original

The Justice of Contradictions: Antonin Scalia and the Politics of Disruption, by Richard L. Hasen.
Yale University Press, 248 pages, $30

In constitutional law, the theory designed to accomplish the progressive vision is known as "living" constitutionalism. The idea was to treat the Constitution as an evolving document that could be expansively reinterpreted—manipulated may be a better word—by judges in order, among other things, to ratify the exercise of power by experts in independent administrative agencies. The Constitution was still the supreme law of the land, they acknowledged, but it was merely whatever the judges said it is, as Charles Evans Hughes (later to become Chief Justice of the United States) infamously said in 1907 at the dawn of the Progressive movement. By the 1970s, this view had become the prevailing orthodoxy in the halls of government and in the legal academy.

Ronald Reagan's attorney general, Edwin Meese, III, challenged this view, most notably in a speech delivered to the American Bar Association in 1985, arguing for a return to the original understanding of the Constitution as binding law. The following year, President Reagan appointed to the Supreme Court Antonin Scalia, who promptly began to articulate how "originalism" was a constitutionally-compelled restraint on the judiciary. The originalism project, under Scalia's leadership—later joined (with some important but nuanced differences) by Justices Clarence Thomas and Samuel Alito, and advanced in the law schools by the Federalist Society and more broadly by the Claremont Institute—proved to be so successful that by the 25th anniversary of Meese's speech, even a "living" constitutionalist like Elena Kagan had at least nominally to subscribe to the view, in her Supreme Court confirmation hearing, that "we are all originalists" now.

Richard Hasen's *The Justice of Contradictions* takes a new tack. If even Justice Scalia couldn't faithfully apply originalism as a jurisprudential theory, the book argues, then the enterprise itself is flawed and must be abandoned. For Hasen, who teaches at the University of California, Irvine School of Law, Scalia's originalism was merely a "pretext" and a "fig leaf," masking the conservative ideology that drove his decisions. This was true even of these decisions cheered by liberals, such as the flag-burning case *Texas v. Johnson* (1989) and his "remarkably pro-defendant" decisions in *Apprendi v. New Jersey* (2000), *Crawford v. Washington* (2004), and *United States v. Jones* (2012). For Hasen, those cases only showed that Scalia's distrust of government outweighed his antipathy toward criminal defendants.

Hasen barely acknowledges that these and other opinions might actually be the result of Scalia's deep commitment to the Constitution itself. His opinions upholding the death penalty, for example, only prove that Scalia was an "enthusiastic supporter of the death penalty"; they have nothing to do with the fact that the Constitution itself explicitly recognizes the validity of capital punishment. Likewise, Scalia's supposed prejudice against affirmative action trumped his commitment to the original understanding of the 14th Amendment, claims Hasen, which fully supported race-based preferences because the

Reconstruction Congress gave "legal advantages to…newly freed slaves who needed state aid in becoming self-sufficient." The clear distinction between the Reconstruction-era laws aimed at benefiting former slaves, and modern race-based preferences that bestow benefits on the basis of skin color's alleged contributions to diversity, seems to have escaped his attention. But this crucial distinction made Scalia's opposition to modern racial preferences perfectly compatible with—even mandated by—equal protection under the 14th Amendment.

Hasen makes much of this question of consistency in Scalia's use of originalism, dodging, to a great extent, the much harder task of proving why Scalia's opinions were unconstitutional. Thus, to take another example, Hasen charges that Scalia refused to defer to the legislature when it limited money in politics (exhibiting the Left's ongoing anger over the *Citizens United v. Federal Elections Commission* [2010]), but two years later did defer to the legislature in voting to uphold the law banning foreign money in American political campaigns, a "contradiction." Yet, far from being inconsistent, the two cases are perfectly compatible with the original understanding of both the Constitution and the Declaration of Independence: *citizens* have the right to engage in political speech unfettered by government regulation, but foreign nationals have no right to try to influence the choice of the government to which they are not a party. That distinction merely embodies the "consent of the governed," an idea that seems to give progressives like Hasen a lot of trouble.

Hasen also attempts to discredit Scalia (and through him originalism itself) by dwelling on what he calls the Justice's "unparalleled level of nastiness and sarcasm," even while acknowledging that his "sarcasm was rarely *ad hominem*." Scalia "served to coarsen judicial discourse and may have helped undermine the legitimacy of the" Court, Hasen writes, because his "constant claims that the majority's decisions were illegitimate, and not even true acts of judging, served as a model for populist denunciations of elitist Court decisions." "As partisan talk about the Court has increased," he adds, "public opinion about the Court has grown increasingly polarized." Missing from this analysis is even a nod to the possibility that judges who impose their own political views from the bench—such as the late Harry Pregerson, who declared at his confirmation hearing to the Ninth Circuit that he would "find a way to follow my conscience and do what I perceived to be right and just" rather than faithfully apply the law—are to blame for the Court's loss of legitimacy, not Justice Scalia for calling them out.

What really seems to trouble Hasen is that Scalia has had a lasting impact on *jurisprudence*. Although it's bad enough that Scalia had a profound influence in moving the political pendulum back from the progressive side of things, for Hasen and most of the legal academy that is just a temporary setback—however unpleasant in the interim—that will ultimately be set right again. The real danger from their perspective is that Scalia may have "transformed" the law of the Constitution back to what it was supposed to be—a fixed text that remains binding both on the political branches and on the judiciary, until altered by the sovereign people. That view—and we should concede here, as Hasen himself notes, that Scalia was not always as thoroughly originalist as, say, Justice Thomas—does not merely threaten to moderate the swings of the pendulum, but to stop it in its tracks.

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