A review: The Oath

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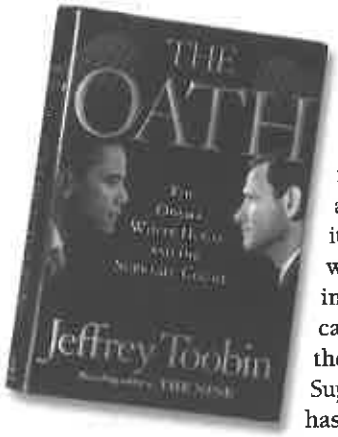

Law schools design their curriculum around the premise that three years spent reading appellate court decisions, particularly Supreme Court decisions, will make lawyers better prognosticators of what the courts and the Court will do when faced with interpreting novel facts and law. Because of principles of stare decisis and precedent, the courts tend to give considerable deference to decisions already on the books.

Even the Supreme Court usually defers to its own decisions. That deference makes lawyers' job of forecasting what a court will decide considerably easier in all but a few cases. In *Roe v. Wade*, for example, we would predict the Supreme Court would not overturn that decision outright, since it has already found the right to abortion constitutional within the limits set out in that decision. We would, however, predict that a Supreme Court that does not particularly like the precedent or its rationale would uphold regulation and restrictions in subsequent cases coming before it involving abortion, which is what has happened.

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The reason I have been lugging Jeffrey Toobin's book, ***The Oath***, around for the last two months is that I have wondered what happened to my soothsaying ability since around the turn of the millennium. More precisely, ever since ***Bush v. Gore***, a case in which the Supreme Court intervened in the presidential election, my ability to predict what the Supreme Court would do has been slightly off kilter. I had zealously announced to everyone and anyone that I did not think that the Court would involve itself in the blatantly political morass involving the counting (or non-counting) of chad, hanging chad, dimpled chad and butterfly ballots in Florida. I was wrong, and I have been troubled probably more that I was clueless that the Supreme Court would involve itself in state politics than by the actual decision rendered. ***The Oath*** is readable, and if not exactly a page turner, it's certainly workmanlike in making the case for Toobin's thesis: the Supreme Court has fundamentally changed in the last decade. The conservative Justices – Scalia, Thomas, Alito, Kennedy–led by Chief Justice Roberts have embraced originalism or textualism to an extent that would have been unimaginable 15 years ago. Despite the book's title and the considerable time developing how the Presidential oath of office was bungled on January 20, 2009, leading to it being re-administered, ***The Oath*** is more a treatise on the change in the Supreme Court particularly since the appointment of Chief Justice Roberts.

In support of his thesis, Toobin reviews a host of decisions ranging from campaign finance reform, gun control and, of course, the Affordable Care Act (ACA). In case after case, Toobin supports the proposition that the current makeup of the Supreme Court has resulted, and will continue to result, in split Supreme Court decisions upholding originalism as a jurisprudential philosophy. This is particularly highlighted in cases like the ***District of Columbia v. Heller***, which Toobin describes as a textualist and originalist tour de force. In ***Heller***, Justice Scalia reviewed the Glorious Revolution of seventeenth-century England to uncover the roots of the constitutional right to bear arms. Scalia concludes that the "Second Amendment right is exercised individually and belongs to all Americans." Toobin points out that the greatest tribute to Justice Scalia's opinion is that a dissent by Justice Stevens relied on textual originalism in refuting the majority opinion.

The Supreme Court's upholding of ACA, otherwise known as ObamaCare, is not qualitatively different than the ***Heller*** decision, Toobin argues. Chief Justice Roberts wrote an opinion upholding the law based on the validity of the taxing clause of Congress' enumerated power to "lay and collect taxes." Chief Justice Roberts simultaneously struck down that portion of the government's argument that the commerce clause supported the individual mandate under the ACA. In effect, Chief Justice Roberts, according to Toobin, orchestrated an act of "strategic genius" in that he "laid down a marker on the scope of the commerce clause." If the present composition of the Supreme Court remains unchanged, there will be more cases in which laws will be struck down on the basis that the commerce clause is not implicated.

Toobin's thesis makes understandable, at least on one level, why predictability of decisions at the Supreme Court have become much more difficult. Most law students are not taught originalism other than as a concept. While the Supreme Court may be embracing the concept, most law school faculty have not.

My bone to pick with Toobin, ultimately, has nothing to do with his thesis, but rather his denigration of some of the Justices of the Supreme Court. The reader can reach her own conclusions about the political leanings of the Court based on the decisions, but stating that Justice Scalia's "age had coarsened his rough edges" and pointing out his "belligerence" during oral argument does nothing to foster debate on the role of originalism as a jurisprudential philosophy, nor does it help to predict what will happen when other cases come before the Supreme Court. I suspect there are many lawyers who simply will not read the book or dismiss it out of hand as liberal propaganda just because Toobin bad mouths the conservative Justices on the Supreme Court at times. Too bad. Toobin has a good point that is effectively made throughout much of the book. ▪