



Justice Antonin Scalia and Justice Ruth Bader Ginsburg in Jaipur, India, February 1994

## Scalia v. The World

by MICHAEL O'DONNELL

**T**he dean of the modern conservative legal movement, Justice Antonin Scalia, is neither an intellectual nor a primitive. He is both. Scalia has fused the cerebral and the atavistic strains of conservatism in a manner that leaves one wondering if they were ever distinct at all. For decades Scalia has beguiled conservative law students with his abhorrence of compromise and the colorful, take-no-prisoners style of his opinions. More than any other contemporary jurist, he claims to abide by a host of scrupulous legal principles: strict fidelity to a statute's text, adherence to the Constitution's original meaning, respect for the nation's federal structure of government. But notwithstanding these "neutral" principles and his habit of adorning his defense of them with intellectual flourishes, Scalia writes his opinions in boiling ink, mixing prodigious citations and vast learning with callous disregard for others and bursts of derision bordering on bigotry.

In a recent dissent that was joined by Justice Clarence Thomas, Scalia argued, astonishingly, that the Constitution does

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### American Original

*The Life and Constitution of Supreme Court Justice Antonin Scalia.*

By Joan Biskupic.

Sarah Crichton. 434 pp. \$28.

### The Rise of the Conservative Legal Movement

*The Battle for Control of the Law.*

By Steven M. Teles.

Princeton. 339 pp. Paper \$24.95.

not forbid executing a demonstrably innocent man, so long as he has been given a fair trial first. (Justice John Paul Stevens, the senior liberal on the Court, responded in a concurring opinion that putting to death an innocent person would "be an atrocious violation of our Constitution.") In his dissent in *Lawrence v. Texas*, from 2003, in which the Supreme Court struck down Texas's anti-sodomy law, Scalia compared laws outlawing gay sex with those prohibiting bigamy, incest and bestiality. Having cleared his throat, Scalia then declared,

Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view

this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive. The Court views it as "discrimination" which it is the function of our judgments to deter. So imbued is the Court with the law profession's anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that culture are not obviously "mainstream" [and] that in most States what the Court calls "discrimination" against those who engage in homosexual acts is perfectly legal.

Scalia's expression of base sentiments in fluid, vigorous prose is a strange blending of the high and the low—like a Catholic Mass in which the liturgy is led by a bearded hippie strumming a guitar and singing in Latin. Scalia attempted to qualify these ugly lines in the next paragraph of his dissent by insisting, "I would no more *require* a State to criminalize homosexual acts—or, for that matter, display *any* moral disapprobation of them—than I would *forbid* it to do so." Scalia seems genuinely baffled at the widespread incredulity that increasingly greets such protestations. His trademark busy italics might convey a spirit of apolitical rectitude, but they can't conceal the striking overlap of his judicial opinions with socially conservative policy preferences.

If there is nothing more admirable than a judge forgoing personal beliefs to uphold legal principles, there is nothing more distasteful than a judge who claims to do so against strong evidence to the contrary. Scalia's purportedly neutral, apolitical jurisprudence has moved him to vote against affirmative action, protection for abortion, rights for gays and lesbians, and equal treatment of women, and in favor of practically unfettered capital punishment, gun ownership and the open embrace of Christianity by the state. When questioned about this unbroken string of conservative decisions, Scalia is quick to highlight his votes striking down state and federal laws that banned flag burning, in *Texas v. Johnson* (1989) and *United States v. Eichman* (1990), stating that flag burning is repugnant to him personally (as it is to most conservatives) but is protected by the First Amendment. The cases have become his little black friends, inoculating him against any charge of legislating from the bench—the ultimate conservative heresy. But a more likely explanation than dutiful professionalism for his votes in the flag-burning cases is that free-speech principles do not animate him in the way social issues

do. Just as principled judges are not always consistent, unprincipled judges are not always inconsistent.

Because Scalia, more than any other Supreme Court justice, has staked his reputation and legacy on a commitment to neutral principles, he invites ridicule for abandoning those principles when they fail to produce politically conservative results. In the 1990s he voted enthusiastically with the Court's federalists, Sandra Day O'Connor and William Rehnquist, to limit Congress's power and advance the historically dubious cause of state sovereignty. Happily for him, these votes had the effect of nullifying federal laws that regulated guns and protected women from violence. But more recently, when state

## "Screams!" Harry Blackmun wrote in the margin of a shrill Scalia dissent from 1988.

"laboratories of democracy" produced laws inimical to the social conservative agenda, like those authorizing medical marijuana and physician-assisted suicide, his solicitude for state prerogatives went up in smoke.

His vote in *Bush v. Gore* (2000) is the most notorious in this regard. Despite having fought vigorously in previous cases to limit the Constitution's equal protection guarantee as applied to minorities, Scalia found an unprecedented equal protection violation in the manner in which Florida counties conducted their recounts. More remarkable still, he refused to defer to the Florida Supreme Court's construction of a question of Florida election law, such deference being perhaps the most abiding feature of the Court's federalism jurisprudence. These days Scalia grows testy when asked about *Bush v. Gore*, telling his critics to "get over it." But the case dramatically reveals his fickle fidelity to neutral principles, rendering qualifications like those in the *Lawrence* dissent highly suspicious. In other words, Scalia was not merely channeling others in the "anti-homosexual" camp when he explained why many people find gays and lesbians intolerable: he was speaking his mind.

**J**oan Biskupic began covering the Supreme Court for *USA Today* in 1989, three years after Scalia joined the Court. One might have expected her to pull a punch or two in *American Original: The Life and Constitution of Supreme Court Justice Antonin Scalia* so as not to be

shut out of the most interesting chambers. But while *American Original* is no scathing critique, neither is it an easy endorsement. Biskupic clearly admires Scalia's pluck: on a beat where dry written opinions and aversion to the press are commonplace, he stands out as brash, funny, outspoken and controversial—a walking headline machine. But she dislikes his inconsistent jurisprudence, devoting an entire chapter to *Bush v. Gore*, as well as the caustic and sarcastic tone of his writing, which has only become sharper and more pronounced over the years, eroding the collegiality of the Court and leaving Scalia increasingly alone in dissent. "Scalia wrote with a recriminatory tone that often undercut his effectiveness," she writes. "He was hyperbolic and almost entirely dismissive of arguments from the other side." She gathers representative examples of his disrespectful references to his colleagues' opinions: they "cannot be taken seriously," are "beyond the

absurd" and even should be considered "nothing short of preposterous." In light of the justices' reluctance to criticize one another personally, Biskupic also obtained several surprisingly candid observations made by Scalia's colleagues about his negative influence on the Court. "I think everybody respects Nino's wonderful writing ability and his style and all the rest," Justice Stevens told Biskupic. "But everybody on the Court from time to time has thought he was unwise to take such an extreme position, both in tone and in the position." Justice Ruth Bader Ginsburg, a close friend of Scalia's, was even more direct in an interview with Biskupic: "I love him. But sometimes I'd like to strangle him."

Biskupic does not provide any revelations in her portrait of the past fifteen years of Scalia's career, but she has lent it depth and texture. She has made excellent use of the archives of Justices Lewis Powell and Harry Blackmun from the 1980s and early '90s to flesh out the lonely role Scalia has earned for himself on the Court. Biskupic has a fine eye for a telling memo or private comment; Blackmun's archives in particular overflow with revealingly wry jottings. For example, when Scalia circulated a notably shrill dissent in 1988, Blackmun wrote in the margin of the draft, "Screams! Without the screaming, it could have been said in about 10 pages." Biskupic also cites a number of instances in which Scalia was assigned to write an opinion and then lost the majority because of his sanctimoniousness and refusal to compromise. On other occasions, Chief Justice

Rehnquist simply declined to assign a case to Scalia for fear that this would happen.

Biskupic calls Scalia "the purest archetype of the conservative legal movement that began in the 1960s in reaction to the Warren Court." That's not quite right. Scalia is indeed the top conservative legal thinker of our time, universally admired by the right, but he was one of the patrons of the modern conservative legal movement, not one of its products. The prominence of his generation is fading and a new, more effective generation is in ascendance. It is well organized and strategically deft, with an eye always on results. Its purest archetype is not the grandiose but easily ignored Scalia, who at his worst might as well be standing on a corner shouting at people, but the faux-modest radical John Roberts, who in 2005 took the seat on the bench that Scalia thought was his to become Chief Justice of the United States.

Whereas Scalia smokes cigars, uses off-color language and flicks his chin like a hotheaded Soprano, Roberts wears his hair neatly, speaks mildly and displays his handsome family for the camera. His credentials and performance before the Senate Judiciary Committee so impressed Orrin Hatch that the senator recently told *The New Yorker*, "You have to be a partisan ideologue not to support Roberts." (If the modern judicial nominations process is a dance, Roberts is Baryshnikov.) As Roberts has shown particularly in cases dealing with race issues, he is every bit as conservative and cerebral as Scalia but also excels at consensus building and the game of institutional politics, and was an astute pick for that reason. If Roberts can retain an ally by withholding a sharp rebuke to an argument he finds disingenuous, he will do so, and conservatives will enjoy the results when the clerk calls the next case.

Roberts hardly figures in the story told by Steven Teles in *The Rise of the Conservative Legal Movement*, but the young Chief Justice is unquestionably one of many beneficiaries of the long-term planning and organizing—not to mention fervent praying—undertaken by that movement's founding fathers. Scalia was one of them. Shortly after the Federalist Society—which Teles rightly describes as "an organization of extraordinary consequence"—was founded as a conservative debating club by law students at Yale and the University of Chicago in the early 1980s, Scalia, then a law professor at Chicago, became one of its most important sponsors. As Teles explains, Scalia

helped connect the Yale and Chicago contingents with the conservative law

group at Stanford, helped them with fund-raising, spoke at their first conference, hosted visiting Harvard Law Federalist Society members at his home when the Society had its conference at the University of Chicago Law School, and facilitated the Society's early move into an office at the American Enterprise Institute.

At a moment when the Federalist Society could well have flamed out as another student cafeteria organization, Scalia lent it connections, prestige and momentum. Perhaps he wanted the next generation to profit from a level of support that he never enjoyed; as a law student in the 1950s, he had to settle for the St. Thomas More Society. The Federalist Society has since evolved into a powerful, loose alliance of conservative lawyers and law students. Its leaders shrewdly decided to forgo position taking and litigation clinics—both of which could divide its diverse members; instead, it has promoted debates, networking and, above all, institution building, through clerkships, government posts and law professorships.

Scalia's interactions with one of the society's founders nicely illustrates the way it patiently established a beachhead and then penetrated every corner of the profession. Lee Liberman Otis co-founded the Federalist Society while a student of Scalia's at Chicago in the early '80s. In 1982 Scalia became a judge on the US Court of Appeals for the DC Circuit, and he asked Liberman to clerk for him. A few years later she took a position vetting judicial nominees in President Reagan's Justice Department, where she determinedly championed Scalia for the Supreme Court in 1986 over his better-known colleague on the DC Circuit, Judge Robert Bork. Scalia was nominated and confirmed, and he promptly hired Liberman to clerk for him again, granting her the one credential that can open any door in the legal world. Liberman went on to teach law at George Mason University and then returned to work in the two Bush administrations. She currently serves as senior vice president of the Federalist Society. A mutually beneficial relationship installed a giant on the Supreme Court and twice provided him the services of a reliably conservative law clerk, and in turn landed a young conservative lawyer posts in the judicial and executive branches of federal government and in the predominantly liberal academy. Multiply this story by a thousand, and you begin to grasp the Federalist Society's muscle.

**T**hroughout *The Rise of the Conservative Legal Movement*, Teles emphasizes the libertarian and intellectual dimensions of the conservative counterrevolution, even to a fault. He does not discuss social conservative organizations like Jay Sekulow's American Center for Law and Justice, which in September published an op-ed titled "The President's New Name: President Barack Obortion"; nor does he examine those organizations motivated by religious conservatism, like Pat Robertson's Regent University School of Law. Yet these institutions and the sentiments that animate them—Scalia's territory—have been indispensable to the movement's successes. For every principled intellectual who finds the Supreme Court's theoretical conception of the due process clause inherently flawed, there is someone else who doesn't want teachers saying that man descended from monkeys. Given that such hidebound ideas are integral to legal conservatism, statements about the mission of the Federalist Society like that of Steven Calabresi, one of the organization's founders, sound impossibly optimistic: "We want to be a reasonable organization like AEI, an organization of thoughtful and intelligent people, an organization that's engaged in dialogue with people on the left, not an organization that's a caricature of what conservatives could be." Thoughtful and intelligent people don't call gay men "homos," as Robertson was famously caught doing during the commercial break of an interview on *Larry King Live*. By founding an organization deliberately intended to welcome the likes of *The 700 Club*, the Federalist Society's leaders made its mission statement a contradiction in terms.

If Scalia's ascendance and the role of social and religious conservatism suggest some fundamental inseparability of the conservative legal movement from the worst elements of the base, then so does the movement's bloody shirt: the Senate's rejection of Bork's Supreme Court nomination in 1987. Teles describes the impact of this defeat in vivid terms, emphasizing the pain and anger many legal conservatives felt as their godfather was savaged on the Senate floor. Bork was extremely well connected in Washington legal circles and mentored scores of up-and-coming conservative lawyers in his various positions as solicitor general, a popular law professor and a judge of the US Court of Appeals alongside Scalia. His many acolytes took his humilia-

tion personally. "People felt genuinely outraged," Calabresi told Teles; it was as if "their father or mother had not been confirmed to the Supreme Court."

But Teles is mistaken to compare this referendum on conservative constitutionalism with the "seminal moment[s] of injustice" that motivated other social movements, like Stonewall and the attacks on black civil rights marchers. Minorities who were targeted and physically attacked merely for their intrinsic identities are simply not in the same category as elite judges who feel disenfranchised or indignant because the majority of the country finds their views unacceptable. Yet regardless of whether legal conservatives were justified in feeling the same way about

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Bork that liberals felt about civil rights icons, the point is, those feelings were genuinely held. And Bork is not a gentle conservative in the tradition of David Souter. He is a true reactionary who might well have edged out Clarence Thomas for the seat on the farthest right of the bench. With people like Bork and Scalia as its heroes, the conservative legal movement is to a great extent incapable of moderation.

Teles concludes that conservatives have caught up to liberals in some regards—at least in the sense of gaining representation, if not dominance, in elite institutions that feed the power structures of the legal profession—but certainly have not outmatched or uprooted them. And while their successes over the past thirty years have been impressive, those successes should not be understood through what Teles calls "the myth of diabolical competence," which essentially means the fallacy of a vast right-wing conspiracy. There was plenty of trial and error, and the whole thing wasn't hatched up and executed by a coterie of militants hunched over a set of blueprints in some underground bunker. This is a useful point to make, for when it comes to successful conservative movements, conspiracy theories abound yet are simplistic and unifying.

If the movement's greatest success has been to place ideologically sympathetic judges like Scalia on the courts, it still straggles far behind in the legal academy, where ideas are shaped and prestigious degrees handed out.

One exception, to which Teles devotes considerable attention, is the law and economics movement, which approaches legal problems through the language and analytic tools of economics. The movement began at the University of Chicago in the 1950s, and its most prestigious accolade was the John M. Olin Fellowship in Law and Economics, given each year to a handful of accomplished young scholars. (The fellowship program ended in 2005, when the Olin Foundation, as stipulated by its mission, disbanded after exhausting its assets.) But even here, the results are limited. If law and economics (and the Olin Fellowship) was once a proxy for more overt conservative credentials, now it is just another research field with questionable correlation to political views. Even the movement's biggest superstar, Richard Posner, makes little use of its tenets in his opinion writing; as a judge, he is much better described these days as a pragmatist than as a law and economics guru. (Full disclosure: I worked for Posner and other judges as a staff attorney at the US Court of Appeals for the Seventh Circuit from 2004 to 2006.) And regardless, a little knowledge of economics is a dangerous thing. While hard economics research is, of course, an important and empirically based discipline, applying economic principles broadly and casually is a little like psychoanalyzing your neighbor: anyone can do it, and the results are laden with spongy assumptions and frequently wrong.

I was reminded of this several months ago by an exchange on The Volokh Conspiracy, a law blog founded by the wunderkind UCLA professor Eugene Volokh that counts among its contributors libertarian legal scholars, many of them former Supreme Court clerks, who are very smart and have many thoughtful things to say about law, politics and culture. In September the blog featured a short post about the botched lethal injection of convicted murderer and rapist Romell Broom, whose executioners were unable for several hours to find a vein and had to reschedule the procedure. The Eighth Amendment—which prohibits cruel and unusual punishment—is a topic of scholarly interest to several of the blog's contributors, and Broom's terrible story undoubtedly caught their attention for that reason. The posting was sober and respectful, attempting little more than a summary of the awful facts and a few links. One commenter broke with decorum, offering that sparing Broom would "give death row inmates the option of overeating or getting hooked on smack during years before execution to make veins buried or trashed." Law

and economics! Look, professor—an incentive! That this combination of would-be intellectualism and primitive sympathies is only a pose is less illuminating than what it

is a pose of. Chief Justice Roberts might have expressed the same sentiment more diplomatically, and Bork more harshly, but only Scalia could've said it better. ■



Andrew Garfield (left) as Eddie Dunford and Sean Bean (right) as John Dawson in *Red Riding: 1974*

## No Way Out

by STUART KLAWANS

If we are to believe the *Red Riding* trilogy, the prevailing atmospheric condition in 1974 West Yorkshire was a cigarette haze, as damp as atomized gin. Social rites were limited to cremations and admonishments, the latter sometimes being accompanied by a stream of piss to the auditor's trousers. Sex proceeded in jump cuts, which began in dim concrete pubs and blacked out on random furniture. It was an interruptible place, which a young man apprehended in the intervals between ignorance and oblivion.

West Yorkshire in 1980, by contrast, was a place that a middle-aged man could observe steadily through a rain-spattered windshield. Evidence of disorder was now officially posted on billboards and collected in files (however questionable), as well as unofficially spray-painted on walls and circulated in photographs (which surfaced as awkwardly as half-forgotten murder victims); and so the corruption and violence seemed as if they ought to be legible. Readings of it proceeded straight-on, like a Direct Cinema documentary, or an eyeball-to-eyeball confrontation in a police station's

back office. The prevailing atmospheric condition was menace, broken here and there by the ironic glow of Christmas lights or the gleam of brass fittings and social niceties at a hotel's front desk.

Local secrets did not actually become communicable in West Yorkshire until 1983, when the prevailing condition split into voice-overs, flashbacks and crane shots. Points of view multiplied and converged, with lines of sight originating in a genteel front parlor (used for séances), a prison holding cell (used for interviews with a terrified inmate) and a disheveled bachelor's quarters (used by the disheveled bachelor for sleeping, entertaining and pretending to run a law office). In its social psychology, the region was now characterized by a repetition compulsion, manifested in the urge to relive events from nine years before. The atmosphere was clear, except for occasional flurries of symbolic dove feathers.

A tale of abductions and murders and payoffs and cover-ups, which cascade and swirl through the years but ultimately flow together, the much-praised *Red Riding* trilogy emerged from a single literary source (a se-