Book Reviews

American Original: The Life and Constitution of Supreme Court Justice Antonin Scalia

Joan Biskupic

United States: Sarah Crighton Books, 2009, pp 434, ISBN 978 0 37 453244 4, $23.23

Ms Biskupic is a journalist who has covered the Supreme Court since 1989, first for the *Washington Post* and currently for *USA Today*. If the titles of some of her articles are any guide (eg, 'In Terms of Moral Indignation, Justice Scalia is in a Majority of One'[1]), Ms Biskupic is not of a particularly sympathetic disposition to conservative causes. Nevertheless her Scalia biography is as fair as it is thorough and readable.

The lingering impression left by the book is that Scalia, as well as being super bright and intellectually combative, is a likeable individual – cheerful, gregarious, witty and thoughtful. He and his wife Maureen have nine children, all launched on successful careers, and thirty grandchildren at last count. Although his judicial opinions not infrequently refer to those of his colleagues with a ferocity and disdain that startle the Australian reader ('cannot be taken seriously', 'beyond the absurd', 'nothing short of preposterous'),[2] his off-bench relationships seem quite amicable. He is a particular friend of Justice Ruth Bader Ginsberg, a regular member of the liberal bloc on the Court.[3] On a personal level, it must be hard to regard as sinister or threatening someone with the nickname Nino.

Born in 1936 in Trenton, New Jersey, the son of Italian immigrants, Scalia graduated from Harvard Law School. After stints in private practice, law teaching, government service and on a Federal Court of Appeals, he was appointed to the Supreme Court by President Reagan in 1986.

Notwithstanding his prominent identification with conservative viewpoints, Scalia sailed through the Senate Judiciary Committee hearing and was confirmed 98-0 by the Senate. In part, this was due to a reaction against a bitter hearing on the Rehnquist Chief Justice appointment the previous year and the positive effect of Scalia's ethnic background. Scalia's genial style also helped. Senator Heflin from Alabama remarked that every Senator with an Italian-American connection had come forward to welcome the candidate. He continued:

---

[1] *Washington Post* (Washington, DC), 30 June 1996.
[2] Joan Biskupic, *American Original: The Life and Constitution of Supreme Court Justice Antonin* Scalia (Sarah Crighton Books, 2009) 276.
[3] Ibid 88-89, 256, 304.

> I would be remiss if I did not mention the fact that my great-great-grandfather married a widow who was first married to an Italian-American.[4]

Quick as a flash, Scalia replied:

> Senator, I have been to Alabama several times too.

Subsequent Republican nominees did not fare so well. Bork was rejected by the Senate after an acrimonious debate on his conservative philosophy. Justice Clarence Thomas survived, but only narrowly and after sensational allegations of sexual harassment. Scalia had given ample evidence of being at least as conservative as Bork and Thomas, but was blessed with the essential political gifts of good luck and good management.

Biskupic provides a lucid and perceptive discussion of the major Supreme Court cases on which Scalia sat. For present purposes, it is sufficient to note some recurrent themes.

Scalia has become particularly associated with the interpretive philosophy of original intent. First introduced into mainstream legal thinking by Bork when teaching at Yale in the1970s, the doctrine, broadly speaking, is that the *Constitution* must be read in the sense it would have conveyed at the time of its framing in the late eighteenth century. The test is an objective one – it does not enquire into the actual subjective intent of the framers.[5] On this approach, capital punishment could not be unconstitutional, or an infringement of the Eighth Amendment's ban on cruel and unusual punishment, since it was an accepted fact of life (and death) in the 1780s and, moreover, is explicitly contemplated in the *Constitution*.[6] Likewise, sodomy was a criminal offence then and for 200 years thereafter, so could not be protected by any implied right to privacy.

Scalia has been an implacable opponent of affirmative action. He accepts, even supports, the right of the individual to complain of discrimination, but rejects the notion of 'a creditor and debtor race', which he regards as fundamentally inconsistent with the *Constitution*.

A standard issue weapon in culture wars, legal and otherwise, is the accusation of inconsistency. 'Your supposed principles A, B and C should logically compel result X in this case, but your political/religious/ideological objectives have led you to result Y. So

---

[4] Ibid 110.
[5] Antonin Scalia, *A Matter of Interpretation* (Princeton University Press, 1997) 38.
[6] Fifth and Fourteenth Amendments; Scalia, above n 5, 46.

there!' Ralph Waldo Emerson's warning that 'a foolish consistency is the hobgoblin of little minds' is largely ignored.[7]

Scalia's critics point out, for example, that his stated philosophy of deferring to democratically elected legislatures is applied on issues such as the death penalty, abortion and gay rights, but not on gun control and affirmative action.[8] On the other hand, as Biskupic makes clear, on some criminal defence issues such as the right to confront witnesses and the right to jury trial on all issues (including those relevant only to sentence) Scalia has joined with liberal Justices Stevens, Souter and Ginsberg in broadly construing *Constitutional* rights.

The major count in Scalia's inconsistency indictment is the celebrated case of *Bush v Gore*,[9] which effectively decided the 2000 Presidential election.

Under the *United States Constitution*, federal elections are not conducted by a national body but by each State applying its own electoral laws and systems. Votes in Florida seemed likely to be decisive in favour of Candidate Bush. There being evidence that many votes were arguably invalid, the Florida Supreme Court, on the application of Candidate Gore, had ordered a recount. The Bush team sought leave to appeal and by a 5-4 majority the US Supreme Court granted leave and ordered a stay of the recount. The majority, in an opinion delivered by Scalia, gave as its reason that letting the recount continue would threaten the 'legitimacy' of Bush's election – if Bush were ultimately to show the recount was unfair, he would suffer 'irreparable harm' if the recount had continued and ended up favouring Gore, albeit invalidly.[10] The logic is, to say the least, not compelling. Moreover, Scalia and Chief Justice Rehnquist had long favoured deference to the States, and, in particular, to State courts.[11]

On the substantive merits of the Bush case, a principal argument was based on the claim that Florida officials in different counties were giving different results for the same irregularities, such as ballot papers being incompletely punched in various ways ('hanging chads', 'dimpled chads' etc). It was put, and accepted by the majority, that this offended the equal protection guarantee of the Fourteenth Amendment. Scalia, however, had long been a vigorous opponent of the use of the Fourteenth Amendment to strike down State measures which the Court deemed unfair to racial minorities and the politically disenfranchised.[12]

---

[7] *Conduct of Life, ii Self-Reliance*.
[8] Biskupic, above n 2, 355
[9] 531 US 98 (2000).
[10] Biskupic, above n 2, 237
[11] Ibid 234, 241-242
[12] Ibid 241

Usually Scalia has gone out of his way to deprecate any attention to world opinion. He has rejected the 'sanctimonious criticism' of America's death penalty by foreign 'finger-waggers'.[13] Scalia, along with many American judges, opposes the citation of the judgments of foreign courts.

This reaction to a practice that in other common law countries seems routine and unremarkable may be a manifestation of American Exceptionalism, the concept that the United States is somehow unique among nations, and morally superior to all others. Indeed, the link is explicitly made by Steven Calabresi, Professor of Constitutional Law at Northwestern University, in his article *'A Shining City on a Hill:' American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law*.[14]

Calabresi sees many Americans believing, as he clearly does himself, that 'Americans are a special people, in a special land, with a special mission … (t)he *Constitution* is the focal point of American exceptionalism: it is our holiest of holies, the ark of the covenant of the New Israel'. He says that American Exceptionalism 'is not racist whereas the nationalist exceptionalism of Ancient Greece, Rome, the British Empire and Nazi Germany were all explicitly racist' and later that 'America is a good country that is committed to good values in a way that Ancient Greece, Rome, the British Empire, and Nazi Germany were not.'

Without wishing to descend to the tiresome America-bashing of some in the Australian commentariat, the point can surely be made that the lofty ideals enshrined in the *United States Constitution* and Bill of Rights did not stand in the way of 80 years of slavery and a further century of law-backed racial segregation and discrimination.

As Scalia's career demonstrates, United States Supreme Court Justices are long-term super-legislators, there being no mandatory retirement age. They tend to be appointed at a relatively young age, for the very reason that their influence will probably extend far beyond the maximum eight years of the President appointing them. Not infrequently they serve well into their eighties or even nineties, sometimes postponing retirement until the party of the President who appointed them regains power.

As the makeup of the Court changes, Court-made law can change – but over a very long time frame and removed from any direct democratic involvement. Sometimes those changes remedy what have come to be

[13] Ibid 404, n 26. This is not to say that Scalia is a xenophobe. He has visited many countries, including Australia.

[14] Steven Calabresi, 'A Shining City on a Hill: American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law' (2006) 86(5) *Boston University Law Review* 1335.

seen as wrong turnings in earlier decisions: endorsing slavery in *Dred Scott v Sanford*,[15] upholding racial segregation in *Plessy v Ferguson*,[16] and striking down workplace regulation in *Lochner v New York*.[17] The immensely powerful role of a US Supreme Court Justice is exemplified by the career of Justice Scalia, as vividly portrayed in the Biskupic biography.

The Hon Peter Heerey AM QC[*]

This article was first published in the Victorian Bar News appearing at (2012) 1 Victorian Bar News 1 and is republished in the University of Tasmania Law Review with the permission of the Hon Peter Heerey AM QC and the Victorian Bar Inc.

[15] 19 Howard 393 (1857).
[16] 163 US 537 (1896).
[17] 198 US 45 (1905).
[*] BA LLB (Hons), former judge of the Federal Court of Australia.