



## Antonin Scalia, Reform Conservative

Adam J. White

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In the aftermath of Justice Scalia's untimely passing, the outpouring of remembrances describe his astonishing legal career: a Supreme Court justice, of course, and before that a D.C. Circuit judge, a University of Chicago law professor, and chief of the Ford Administration's Office of Legal Counsel.

But to focus only on Scalia's legal career risks overlooking a crucial aspect of his life and work: his time at the American Enterprise Institute, and as editor of its in-house magazine, *Regulation*. This moment in his career, though brief, propelled him into position for appointments to the D.C. Circuit and then the Supreme Court.

Antonin Scalia had been a law professor before joining the Ford Administration. But when Jimmy Carter's election sent Scalia and his colleagues into political exile, he did not return immediately to teaching. Instead, for the first half of 1977 he took up residence at AEI, until joining the University of Chicago law faculty later that year. And even after leaving for Chicago, Scalia kept his ties to AEI, contributing to — and later editing — *Regulation*.

Days after President Reagan nominated Scalia to the Supreme Court, the *L.A. Times* described his AEI years:

Before going to Chicago, however, Scalia spent perhaps the most crucial year of his early career at the American Enterprise Institute--then the largest conservative think-tank in Washington. It was a Republican refuge, a stronghold from which to issue attacks on the Carter Administration, as well as to formulate what would become much of the Reagan agenda. Along with Bork and Laurence H. Silberman, both also now on the District of Columbia Circuit Court of Appeals, Scalia joined James C. Miller III, now director of the Office of Management and Budget; Jeane J. Kirkpatrick, former ambassador to the United Nations; Irving Kristol, the influential neo-conservative, and Jude T. Wanniski, architect of supply-side economics.

At the University of Chicago, Scalia maintained his association with AEI, serving as editor of its magazine, *Regulation*, writing articles attacking Carter's regulatory policies. He also helped found the Federalist Society, a fraternity of law students from which the Reagan Administration would fill its ranks of lawyers.

Irving Kristol describes those days affectionately, in the introductory essay of *Neoconservatism: The Autobiography of an Idea* (later republished in *The Neoconservative Persuasion*):

There were many fine people in the Ford Administration, and by election time they were all defeatist, in the sense that they thought the Republican party would be better off out of office than in it. Their party had reached the end of the road—the post-New Deal road—and was floundering in a blind alley.

A fair number of these people came to AEI, as a kind of temporary haven. . . . [T]he men I formed the closest ties with were three newly unemployed lawyers—Robert Bork, Antonin Scalia, and Laurence Silberman—who have remained close friends to this day.

AEI had no lunchroom at that time and so we "brown-bagged it" every day, munching on our hamburgers or sandwiches while talking about everything but law, for this would have excluded me from the conversation. Our main topics for discussion were religion (my permanent favorite) and economics, about which none of us knew as much as we would have liked.

But it was clear to all of us that the Republican party would have to become more than the party of a balanced budget if it was to be invigorated.

Alas, we'll never hear what Scalia and his friends said in those private chats. And to the extent that there exist video or audio tapes of public events featuring the late Justice, we can only wait and see what AEI unearths and publishes. (AEI already has republished one monograph, a transcript of a 1979 debate on the merits of a constitutional convention, featuring Scalia, Walter Berns, Paul Bator, and Gerald Gunther.)

But happily we can treasure the articles that Scalia wrote for *Regulation*, both in his time at AEI the years that followed. They are all archived on the web site of the Cato Institute, which acquired the magazine from AEI in 1989.

And looking through those articles, one finds Scalia in a moment very similar to our own: With the Republican Party out of power, he and his fellow conservative reformers diagnosed the problems at hand, urging new new solutions for the problems then challenging the country.

In his contribution to *Regulation's* inaugural issue — "Two Wrongs Make a Right: The Judicialization of Standardless Rulemaking" — Scalia called attention to the federal courts' efforts to micromanage the work of agencies, piling ever more onerous procedural requirements on the agencies. The courts, Scalia argued, were attempting to impose on agencies an "ideal of depoliticized agency rulemaking." The courts saw political influence on the regulatory process as illegitimate. Scalia, by contrast, saw such political accountability as at least somewhat beneficial, especially so long as Congress saw fit to delegate far too much power to agencies without real guidance or limits on regulatory discretion:

While an agency "legislating" under a political check is better than an agency "legislating" under no democratically imposed constraints at all, surely it is best for the Congress itself to determine the main lines of legislation—and to do so in detail much

greater than the platitudinous goals of pursuing "the public interest" or preventing "sex discrimination."

[If judicial micromanagement of agencies spurs Congress to reform its delegations of power to agencies, then] out of evil cometh good—or out of a vaguely moralistic tinkering which misperceives the nature of existing processes, an accidentally better system for giving the people better control.

In the years that followed, Scalia wrote a series of articles on subjects ranging from medical school admissions to reforming the FTC and FCC. (I list and link his *Regulation* articles at the end of this post).

But perhaps the most important — or, in any event, my favorite — is "Regulatory Reform: The Game Has Changed." Writing for Reagan's inauguration, Scalia urges his fellow conservatives not to impose on Reagan's agencies the procedural constraints that they long had sought to impose on regulatory agencies:

Executive-enfeebling measures such as those discussed above do not specifically deter regulation. What they deter is change. Imposed upon a regulation-prone executive, they will on balance slow the increase of regulation; but imposed upon an executive that is seeking to dissolve the encrusted regulation of past decades, they will impede the dissolution. Regulatory reformers who do not recognize this fact, and who continue to support the unmodified proposals of the past as though the fundamental game had not been altered, will be scoring points for the other team.

This is a key point, and (as I explain in my article this week) I think it helps to explain Scalia's late-career doubts about doctrines of judicial deference to regulatory agencies' legal interpretations. Throughout his career, Scalia was a proponent of such deference, because he believed that when federal regulatory statutes are phrased in ambiguous terms, then it is better for them to be interpreted by politically accountable agencies instead of unaccountable judges. But late in his career, as agencies became ever more aggressive in disregarding statutory constraints, Scalia seemed to have ever greater doubts about judicial deference. Perhaps the balance between political accountability and legal legitimacy had been lost, and it was time for judges to be less deferential.

In these *Regulation* essays, Scalia is a forerunner of today's "Reform Conservatives." He was pursuing the promotion of conservative principles, but he recognized that yesterday's policy prescriptions can be ill-suited to present-day circumstances — and that to vindicate the underlying conservative principles might require a change in tactical judgment.

He exemplified this approach a few years later in a speech challenging conservatives' reflexive opposition to federal power. This anti-federal instinct was easily explained, after having "been out-gunned at the federal level for half a century." That unquestionably was "an understandable tactical reason for opposition to the exercise of federal power. Unfortunately, a tactic employed for half a century tends to develop into a philosophy." And so Scalia urged conservatives to

rethink their conventional policy wisdom, to ensure that their policies would truly further conservative *principles*, not just continue long-employed tactics.

Scalia will justly be remembered as one of the greatest legal minds of his generation, one of the greatest Supreme Court justices in history. But as we sit down to re-read his legal writings, we should take care to read his essays too — to do justice to his legacy, and to the challenges that we face without him.