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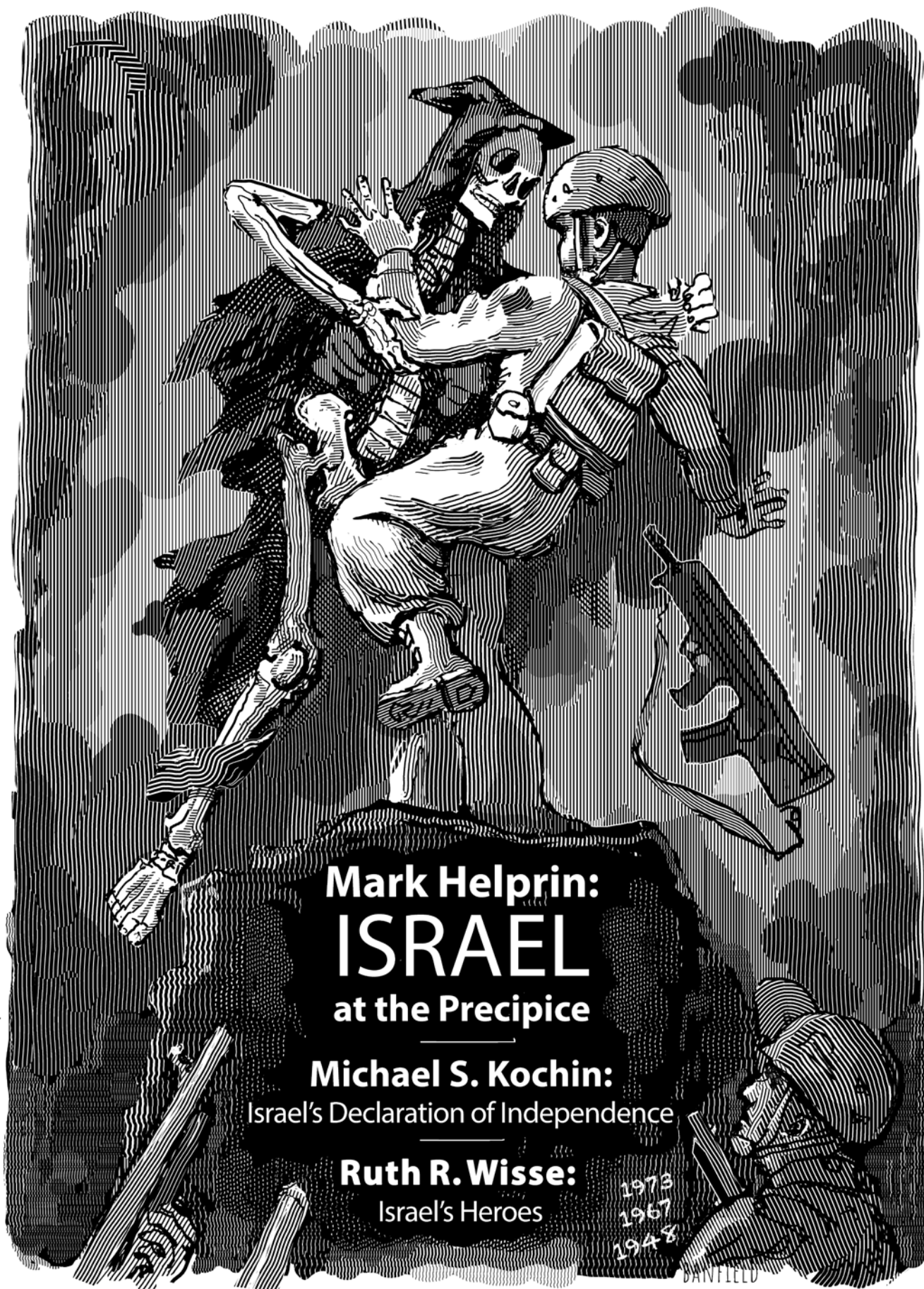
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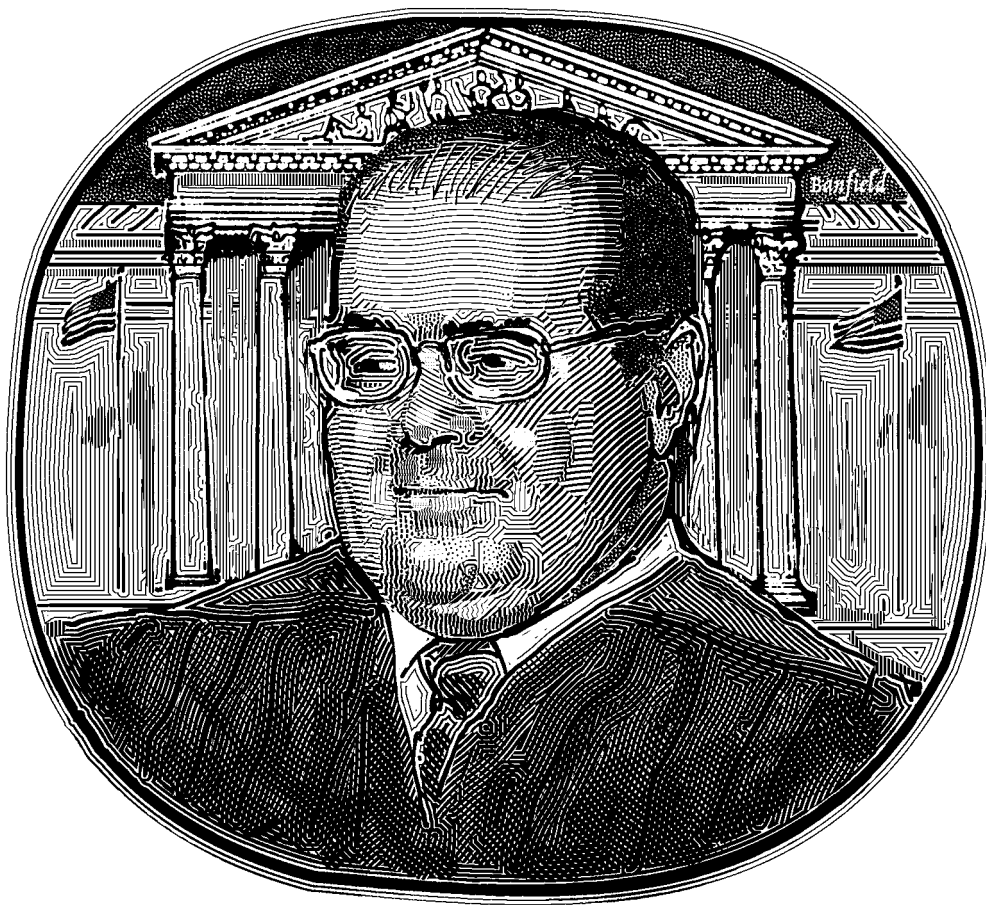
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Book Review by Ilya Shapiro

NINO THE GREAT

Scalia: Rise to Greatness, 1936–1986, by James Rosen.
Regnery Publishing, 500 pages, \$39.99



ALTHOUGH CALLING SOMEONE “LARGER than life” is a cliché, Antonin “Nino” Scalia was undoubtedly someone whom the phrase fit. He lived a life full of hard work, passion for learning and excellence, and dedication to family and public service. His era-defining judicial opinions had made him, at the time of his death in 2016, a month shy of his 80th birthday, one of the most consequential figures of American history. Even his youngest daughter described him as larger than life, adding that in raising his kids “he was putting on a show—but it was a great show.”

Many books have been written about the man, including a couple of notable—and skeptical, if not outright hostile—biographies while he was alive, and a trio of edited collections of speeches and writings shepherded by his former clerk Ed Whelan after Scalia passed away. What more can be said about him? Well, though many remember Justice Scalia’s commitment to the Constitution, his razor-sharp wit, his devotion to his faith and the rule of law, and his unlikely friendship

with Justice Ruth Bader Ginsburg, his pre-Supreme Court years have hitherto been covered only in a perfunctory manner. Historian and former Fox News D.C. correspondent James Rosen has filled that gap with *Scalia: Rise to Greatness, 1936–1986*.

ROSEN UNEARTHS LOADS OF NEVER-before-reported information, from vignettes of Scalia’s youth to colorful nuggets out of the dark recesses of federal agencies. The book is well worth reading even if you’re uninterested in the Commerce Clause or the Second Amendment—or if you disagree with Scalia’s interpretation of them. Comprehensively reported and filled with stylistic flourishes of the sort its subject would have appreciated, *Rise to Greatness* is the definitive work on Scalia’s early years.

Rosen paints a generous picture of a precocious only child, who built on his father’s intellectual pursuits to excel not just in foreign and classical tongues but theater, piano, and debate (with his ability to think on his feet al-

ready evident in a television appearance at age 15). You’ve probably heard that he commuted by subway, with his rifle slung over his shoulder as part of his school’s cadet corps. But did you know that he led the marching band in New York’s Saint Patrick’s Day parade?

“Nino’s academic excellence and extracurricular zeal were stellar,” writes Rosen, “but there was something else, the third leg of the stool that completed his greatness: the caliber of his *moral character*.” Scalia considered joining the priesthood, but ultimately realized that God “was not calling me.” Instead, “I’m going to the Supreme Court,” he confided to a classmate who did become a priest. “I will be sent to Washington, and then I will rise.” That integrity—the commitment to principle over convenience or consequence, even to the detriment of healthy ambition—was a major theme of the young man’s life. He carried it into a career that would take him to the highest levels of American government.

He was also tenacious in the face of disappointment. After Princeton turned Scalia

down for undergraduate studies in 1953—one of the few times in his life he could point to anti-Italian bigotry—he redoubled his efforts and became valedictorian at Georgetown before attending Harvard Law School. He was passed over for solicitor general in 1981, then for both the Supreme Court and D.C. Circuit, but he kept his nose to the grindstone until another opening arose the following year.

And he was stubborn. “He didn’t care,” Rosen notes, “when it came to his positions in life, whether you liked him or not; he was sure that he was right.” That stubbornness manifested as arrogance at times; one critic, when interviewed for Scalia’s FBI background check, suggested that such stubbornness “would affect his judgment.” But Scalia could “back it up”—and also disarm you. He thrilled to intellectual jousting regardless of how convinced he was of the righteousness of his own view. As a student of his put it, “He’d pick somebody and he’d work on you for a while during the class—you felt like you were bouncing, intellectually, off the walls. I mean it was almost a physical experience dealing with him, his presence.”

SCALIA MADE HIS FIRST MARK IN PUBLIC service as general counsel to the new White House Office of Telecommunications Policy in 1971—taking the job “just to see how the big monster works,” as he put it, and proving himself an agile bureaucratic infighter. He then became chairman of the Administrative Conference of the United States, an obscure agency that seeks to improve the functioning of the federal bureaucracy. He gained a reputation for what one conference colleague described as “intellectual precision, unfailing humor, and relentless fairness... helping build a consensus even when it did not reflect his own judgment.”

Rise to Greatness distinguishes itself by emphasizing the impact that specific periods of Scalia’s pre-judicial life had on his professional development. You can see the character traits of the Antonin Scalia we’ve come to know in his time as a workaday lawyer at the Cleveland office of Jones Day (now the most conservative of the big national firms), law professor at the Universities of Virginia and Chicago, and as one of William Rehnquist’s successors as head of the Justice Department’s elite Office of Legal Counsel (OLC). Rosen presents so many tantalizing details of these periods, such as the peculiar circumstances of his OLC nomination—nominated by Richard Nixon, appointed by Gerald Ford, such that “my commission as assistant attorney general is something of a collector’s item”—that you wonder whether

he employed time-traveling nanobots in his research.

There are countless other interesting experiences: the fellowship to travel Europe on the condition he not enroll in any academic programs, tussles with the CIA over its domestic surveillance powers, working at the American Enterprise Institute and editing their *Regulation* magazine. Other biographies have glossed over these formative points or described them as careerist rungs, but Rosen understands Scalia as an earnest professional instead of an agenda-driven icon.

ROSEN ALSO UNDERSTANDS THE CENTRALITY of family to Scalia, and how he couldn’t have done what he did without a partner who was his equal: “Everything he accomplished, Maureen made possible.” Which isn’t to say that Scalia was always the best father, given the demands on his time, or that he couldn’t make light of what to modern eyes looked to be an unusual family setup. “Mr. Justice,” he was told by a *60 Minutes* interviewer in 2008, “we know you love children—” “Where did you get that?” he interjected. “You have nine of them.” “No,” he said. “It means I love my wife.”

In an almost-throwaway appositive amid a discussion of Scalia’s affirmative-action jurisprudence, Rosen gives a picture of a man in full: “devout Catholic, loving husband and father, top-ranked scholar, Latin speaker, indefatigable worker, eminent lawyer, well-regarded neighbor, holder of high office, practitioner of the most principled standards of human conduct.”

And then he rose. Although the timing of Chief Justice Warren Burger’s retirement in 1986 came as a surprise, and the selection of Rehnquist to replace him was a bit of a fight foreshadowing future confirmation battles, the nomination of the gregarious yet scholarly 50-year-old Scalia for the resulting associate justiceship was neither. A year earlier, *The New Republic* had written that a Scalia pick “makes political sense.” The only question was whether he would be picked for this vacancy or the next one, ultimately edging out perennial candidate Robert Bork by being a decade younger and more easily confirmable—despite also being what *Time* magazine characterized as “a more energetic true believer.”

Scalia easily met Attorney General Ed Meese’s three criteria for nomination: intellectual and lawyerly capability, integrity, and “a commitment to the interpretation of the law rather than making it from the bench.” White House Counsel Peter Wallison urged

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the president to go with Bork because that wouldn't change the balance of the Court, leaving the more personable Scalia for the next, more consequential, vacancy. President Reagan wouldn't go for that strategy. In announcing the nomination, he said that Scalia's "great personal energy, the force of his intellect, and the depth of his understanding of our constitutional jurisprudence uniquely qualify him for elevation to our highest court."

GIVEN WHAT WE NOW KNOW ABOUT the lightning rod Justice Scalia became, it's hard to imagine the acclamation his nomination received, in part because he was the first Italian-American nominee—and, as New York congressman Mario Biaggi put it, with "special pride...for consideration based on merit." It's also hard to imagine that the Senate confirmed him 98-0. ("We didn't get [Barry] Goldwater and [Jake] Garn:" he inquired of a young John Bolton concerning the two nonvoting senators.) Scalia's handling of oft-inane hearing questions—expansive responses while puffing on a pipe—inured to his benefit, even if he later called it "an absurd spectacle."

For court-watchers, it's always interesting to learn what Supreme Court nominees were doing when they discovered that they'd achieved their loftiest ambition. When Scalia's vote came, Rosen describes the jurist as "blithely puffing on his pipe, sipping champagne, mingling, and playing it cool at the Willard [Hotel]," where he'd given a speech to mark the Constitution's bicentennial. Scalia "moved with ease, confidence: the kid from Queens, a self-made man who had vaulted to Harvard Law and the federal bench. His confidence in himself and his own story, in the story of his immigrant father—in the Ameri-

can Dream—created a fierce independence in the man: no one intimidated him."

In retrospect, Scalia's ascent seems predestined. But it's interesting to think about what would've happened had Bork been nominated first. These two intellectuals with outsized personalities were, by Reagan's second term, the clear picks for the next two vacancies. Had their order been flipped, they would've likely both gotten through.

There are three main factors that changed from Scalia's nomination in 1986 to Bork's in 1987. First, Scalia was paired with the more controversial Rehnquist (for Chief Justice), who drew fire away from the nominee for Associate Justice. Second, Republicans lost their Senate majority in the November 1986 elections. Third, and perhaps most important, the first vacancy was to replace the conservative Rehnquist; the second was to replace a swing vote, Justice Lewis Powell. Had Reagan picked Bork alongside Rehnquist, Bork may well have gotten through. Scalia would likely have been confirmed the following year, probably with a couple dozen "no" votes given that the Democratic Senate would be out to wound the president.

But Scalia found himself in the right place at the right time because the Reagan Administration was making a concerted effort to appoint not simply loyal Republicans, but those who espoused what Meese would characterize in a 1985 speech as "a jurisprudence of original intention," seeking to "resurrect the original meaning of constitutional provisions." Meese refused to accept the idea that the judiciary should conform to the bar and the academy, searching instead for the "counterculture" judges Reagan had secured a mandate to appoint. Scalia embodied that ethos and would mold that proto-originalism into a

high theory of "original public meaning" jurisprudence. It now commands a loose majority on the Supreme Court.

Just as Scalia reached the pinnacle of the legal profession, he received one more piece of advice about the type of justice he should want to be—or not be. "Nino, don't worry so much about the reasoning, just get the right result," Rehnquist told him around the time of his confirmation. Although Scalia was fond of his colleague, the remark would haunt him.

IF THERE'S ONE QUIBBLE I HAVE WITH Rosen's account it's that it too often relies on linguistic crutches like the idea that Scalia was "il matador," sparring against bureaucrats and, especially, politicians. For one thing, even as Scalia was known for making bullfighting analogies with respect to administrative law, matadors come from the Spanish, not Italian, tradition. For another, not every response to a senatorial query can or should be likened to swishing a red flag just out of reach of a bull's horns. But that and other minor annoyances are surely pedantic quibbles of the sort the Great Nino would have relished.

Rosen's book ends with Scalia taking the judicial oath at the Supreme Court, sworn in by now-Chief Justice Rehnquist, who thus became the last person to call Scalia "judge" and the first to call him "Justice." It's a fitting end to the first half of a story that can only be told in America. I can't wait for *Scalia: Supreme Court Years, 1986–2016*.

Ilya Shapiro is the director of constitutional studies at the Manhattan Institute and author of Supreme Disorder: Judicial Nominations and the Politics of America's Highest Court (Regnery Gateway).

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