

Justice Scalia, Originalism and Dark Money

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Antonin Scalia's death should, I suppose, have come as no surprise. All men are, after all, mortal, and Scalia, well, he was a man. But his death surprises me nonetheless. It's as though a dark star suddenly imploded. Throughout my life in the law, the man has hovered at the periphery, grumbling, from time to time casting lightning bolts, serving as an illusory bridge to a past none of us really share, and from which we may now, at long last, free ourselves.

I am referring, of course, to the justice's commitment to "originalism," a quirky means of construing the Constitution, our fundamental commitment to one another to live in a civil society governed according to law. Scalia was a textualist who thought our best bet was interpreting the document as it was understood at the time of the founding of this republic. He was a perpetual constitutional convention re-enactor.

His approach was a secular verdict of the fundamentalist strain of textual interpretation, a species of reading influential texts that has wreaked all manner of havoc on religious life. I think of the great religious fundamentalists of the past century—B.B. Warfield, Billy Graham, Francis Schaeffer—and I gasp for air. (I studied briefly with Schaeffer and his disciples in Switzerland some 40-plus years ago.)

If God spoke, and speaks, to humankind, I'd like to think He is still living, not absent, hidden behind opaque intentions, requiring either the suspension of disbelief, or special rules of canonical interpretation. So too the founders of this republic: they revolted to make room for a liberty, not ossified doctrinal commitment.

One can revere James Madison without making a fetish of him.

The intellectual history of our times has yet to be written, but I suspect that when it is, the role of money, of who paid for the scribes, will feature prominently. Antonin Scalia and the Federalist Society, his church, really, are products of the same forces that gave us *Citizens United*, the Supreme Court's 2010 decision giving to corporations the rights of persons, at least so far as the First Amendment is concerned.

Dark money chokes the republic. If you doubt it, read Jane Mayer's jaw-dropper of a new book, "Dark Money: The Hidden History of the Billionaires Behind the Rise of the Radical Right." The book is a revelation, dropping the veil and showing the financial support that gave the radical right a permanent institutional voice in American politics. The Cato Institute's libertarianism? A

smoke screen for the Koch brothers's passion to destroy government so as to make the world safe for corporate interests. Law and economics? A beachhead into the academy paid for by those who worship Mammon.

I'm not saying Scalia was on the corporate dole. Such a notion is ridiculous. But I am saying his idiosyncratic brand of constitutional interpretation could only thrive in the context of an ideological universe that big money made possible. The radical right is awash in cash, Mayer notes.

Follow the money now in the standoff between President Barack Obama and Senate Republicans. Why won't the Senate vote to confirm a nominee? The corporate class won't stand for it. Better to wait and hope that a Republican wins the election.

Politics are more interesting than usual this election season. Hillary Clinton blasts Bernie Sanders for being a "single-issue" candidate. Perhaps he is. But the gap between rich and poor is the single most important issue in American politics right now. Bernie may not be the best candidate, but he's right about corporate control of American politics.

So I'll advance a thesis and watch to see if I am right: "Originalism" dies with Antonin Scalia. His life's work candidly reeks of the wick, a scholar's fetish, better suited to a minor university than to the nation's highest court.

The intentions of the dead should not govern the living. They never should have. But Scalia was good enough to make it seem charming. The charm died with the justice. Let's move on and find a way to live together. The founding fathers have little to teach about what matters most; neither, in the end, did Antonin Scalia.