

OPINION

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One of the Most Destructive Justices of Our Time

The legacy of Antonin Scalia

BY DONALD KAUL

My mother always told me never to speak ill of the dead.

For that reason I won't go on at length about Antonin Scalia, the recently departed Supreme Court justice. My opinion wouldn't be worth that much anyway. I didn't know the man — I was never even in the same room with him.



However, I do find this avalanche of posthumous praise of him as “a judicial giant” and one of the great justices of our history a little gag-inducing.

OK, he was a bon vivant and a fun guy who wrote snarky, entertaining opinions. I get that. As a jurist, however, he left much to be desired. As a matter of fact, he was terrible — one of the most destructive justices of recent times.

Named to the court by Ronald Reagan in 1986, he revived a conservative judicial philosophy that had long lain dor-

mant: originalism.

It's an approach that treats the Constitution as holy writ, a set of rules written in stone that allows very little room for broad interpretation. Cases that came to the Supreme Court, in Scalia's view, were to be viewed exclusively through the lens of an 18th-century document, with no attempt to adjust to the changes in society wrought by time.

He didn't want a living, breathing Constitution. He wanted a dead one.

His argument was that the wisdom of nine unelected jurists was no match for the wisdom of the people as expressed in laws written by their elected representatives.

In other words, if people wanted social change, let them vote for it. That argument makes hash of the theory of constitutional government, which holds that the Constitution acts as a bulwark to protect the rights of the minority against the desires of the majority.

And Scalia might say: “Where are those rights in the Constitution? Show me.”

Generally speaking I'm against literalists, whether religious or political. The people who believe in the literal truth of

the Bible, for example — who arrive at the conclusion that the earth was created 5,000 years ago because that's what the “begats” add up to — are only one step removed from the originalists who are slaves to our founding fathers.

Who, not incidentally, accepted the enslavement of millions of Americans and denied a majority of this country's inhabitants the right to vote. Scalia was perhaps useful as a check on judges who might take unbridled license with the Constitution. But I object to the constant theme in Scalia's obituaries that he was a man of ironclad principles who didn't deviate from his beliefs to satisfy expedience. For those who believe that, I offer two words and a letter: Bush v. Gore.

Scalia was the point man on the court when it halted the recount of ballots in Florida and effectively gave the 2000 presidential election to George W. Bush, who received fewer votes nationwide than his opponent, Al Gore. Subsequent reporting revealed that a full recount would have proven that Gore beat Bush in Florida, too — and therefore won that White House race.

Whether or not you agree with Sca-

lia's belief that we should supposedly treat the Constitution as a “sacred” document, there's no evidence that it gives the Supreme Court any role in the conduct of elections. That task is left to the states.

Where was Scalia's famed originalism then? Somehow he swept it under the carpet.

Scalia was unapologetic about his pivotal role in the election. When asked about it in later years, he would dismiss the question with the sneering remark: “Get over it.”

Get over it? I'd love to get over it. I'd love not to have had George W. Bush made president by judicial fiat. Imagine what might have been, just in one regard. Our troops wouldn't have invaded Iraq. Perhaps the Middle East wouldn't have exploded, sending its toxic fallout throughout the Western world.

That's not how things went. I think Scalia went against his principles to make a political decision that favored the party to which he owed his career.

That's his real legacy.

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