

The Originalist

By John Strand
Directed by Molly Smith



Summary

The Originalist opens as Supreme Court Justice Antonin Scalia (1936-2016) gives a speech at a conservative law school. With his characteristic blend of intelligence and sarcasm, he discusses his reputation as an aggressive leader of the right. He defines his central legal tenet, originalism, as interpreting the Constitution “as it is written and as it was understood when its authors crafted the original document.” His speech is interrupted several times by Cat, a young black law school graduate with decidedly liberal views.

Cat soon interviews for a position as one of Justice Scalia’s Supreme Court clerks, and after an intense debate on several controversial court decisions, Scalia hires Cat. After long days writing memos and doing research for Justice Scalia, Cat visits the inspiration for her law career, her father, at a hospice where he lies in a coma.



As Cat continues to work with Justice Scalia, she learns more about his passions and motivators. She also begins to work with Brad, an extremely conservative law clerk

whom Scalia has assigned to help her research *United States v. Windsor*, an important gay marriage case. As barriers between opposing ideologies begin to break down, both Cat and Justice Scalia consider the possibilities of mutual admiration and respect, while still agreeing to disagree.

Biography of Justice Scalia

Antonin Scalia was born in 1936 in Trenton, New Jersey. Scalia's father, a Sicilian immigrant who taught Romance Languages at Brooklyn College, was an advocate of formalism in literary theory—that is, the study of literature that focuses on its formal aspects (mode, genre, structure, etc.) without regard to content, authorship, or socio-cultural influences. Scalia's mother was an elementary school teacher.



Known as Nino to his family and friends, Scalia graduated as valedictorian of his class at Xavier High School, a Jesuit military school in Manhattan. He then studied history at Georgetown University, where he was a champion debater and a noted thespian, once again graduating first in his class. He attended Harvard Law School, where he graduated magna cum laude.

A devout Roman Catholic, Scalia married Maureen McCarthy, and together they had nine children. He spent six years with a Cleveland international law firm, but left to teach law at the University of Virginia. He worked in the Nixon and Ford administrations, where one of his assignments was to formulate federal policy for the growing cable industry. He served as Assistant Attorney General from 1974 to 1977. He returned to teaching at the University of Chicago, where he was the first official faculty advisor for the Federalist Society, a student organization founded in 1982 to challenge what its members perceive as the liberal bias in American law schools; today the group has seventy thousand members nationwide.

In 1982 Scalia was appointed by Ronald Reagan to be a judge in the US Court of Appeals for the District of Columbia. In 1986, Reagan appointed him to the Supreme Court. The Senate confirmed Scalia 98-0 with little debate.

Scalia's career on the bench was marked by his conservative ideology. He was a strong advocate for the power of the executive branch. He opposed affirmative action; in fact, he generally voted to strike down any laws that made distinctions by race, gender, or sexual orientation. He opposed abortion and defended the death penalty.

During oral arguments at the Supreme Court, Scalia made more comments than any other justice. His dissenting opinions were famous for their blistering, even insulting, language. He said, "I attack ideas. I don't attack people. And some very good people have some very bad ideas. If you can't separate the two, you gotta get another day job.

You don't want to be a judge."



Perhaps surprisingly, Scalia was friends with fellow opera lover Ruth Bader Ginsburg, considered one of the Supreme Court's more liberal justices. In his early years on the court, Scalia made it a point to hire one liberal law clerk each year to keep staff debates lively. He said, "I love to argue. I've always loved to argue. And I love

to point out the weaknesses of the opposing arguments . . . I feel less comfortable when everybody agrees with me. I say, 'I better reexamine my position!'"

Scalia's judicial viewpoint was shaped by originalism: the belief that the interpretation of the Constitution should be based on what it originally meant to the people who ratified it more than 200 years ago. This view opposes the idea of the Constitution as a living document, one that was written by its framers in flexible terms that would allow and even encourage an evolving interpretation as society changes. Scalia believed that "originalism says that when you consult the text, you give it the meaning it had when it was adopted, not some later modern meaning."

In February 2016, during a hunting trip, Antonin Scalia died in his sleep of natural causes.

During his time on the Supreme Court, Scalia wrote more dissenting opinions than any other Justice. In 2009 he said, "Winning and losing, that's never been my objective. It's my hope that in the fullness of time, the majority of the court will come to see things as I do."

Setting

The Originalist takes place in and around Washington, DC during the 2012-2013 term of the US Supreme Court. Significant Supreme Court cases during this term or referenced in the show include:

Baker v. Nelson (1971)

In 1970, Jack Baker and Mike McConnell were refused a marriage license in Minneapolis, Minnesota. They filed a suit, but the district court, the Minnesota Supreme Court, and the US Supreme Court all dismissed the case, which received extensive national media attention. Meanwhile Baker and McConnell moved to another county, where they received a license to marry and did so. Although the marriage was not recognized by the government, the license was never revoked, making this the first legal same-sex marriage in the United States. Nonetheless, the dismissal of *Baker v. Nelson* set precedent that lasted until 2015, when the Supreme Court overruled the case, making same-sex marriage legal nationwide.

Roe v. Wade (1973)

In this case, the Supreme Court ruled that a right to privacy under the Due Process Clause of the 14th Amendment extended to a woman's decision to have an abortion, but that this right must be balanced against the state's interests in regulating abortions: protecting women's health and protecting the potentiality of human life.

Lawrence v. Texas (2003)

This Supreme Court case struck down the sodomy law in Texas and, by extension, 13 other states, making same-sex sexual activity legal in every US state and territory.

United States v. Windsor (2013)

New Yorkers Edith Windsor and Thea Spyer were lawfully married in 2007 in Toronto, Canada. In 2008, New York recognized their marriage. When Spyer died in 2009, Windsor sought to claim the estate tax exemption for surviving spouses. Citing the Defense of Marriage Act (DOMA), which defined marriage for federal purposes as the union of one man and one woman, the IRS denied her claim. Windsor's case argued that DOMA singled out legally married same-sex couples for "differential treatment compared to other similarly situated couples, without justification." On June 26, 2013, the Supreme Court declared Section 3 of DOMA to be unconstitutional "as a deprivation of the liberty of the person protected by the Fifth Amendment." Justice Kennedy wrote: "The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."

Obergefell v. Hodges (2015)

In this case, the Supreme Court legalized gay marriage nationwide, again on the grounds that DOMA violated the equal protection clause of the Fifth Amendment.

Legal Terminology

Some of the terms used throughout the show include:

Activist judge: Judicial activism refers to judicial rulings that are suspected of being based on personal opinion, rather than on existing law. It is sometimes used as an antonym of judicial restraint.

Bench memoranda: A bench memo briefly and neutrally summarizes the facts, issues, and arguments of a court case. Used by the judge as a reference when preparing for trial, when hearing lawyers' arguments, and when drafting a decision, they are generally written by the judge's law clerk.

Case law: the set of decisions of previous court cases that can be cited as precedent (see stare decisis)

Due process: Due process is the legal requirement that the state must respect all legal rights that are owed to a person. The Fifth and Fourteenth Amendments to the United States Constitution each contain a due process clause.

Grand jury: A grand jury is a legal body empowered to conduct official proceedings and investigate potential criminal conduct, and determine whether criminal charges should be brought. The term grand jury comes from its size, usually sixteen to twenty-three citizens.

Hostis humani generes: Latin for "enemy of mankind"

Judicial supremacy: According to Conservapedia, "Judicial Supremacy is the liberal, elitist view that courts are 'supreme' over the other two branches of government and the Constitution, and that courts have the authority to tell the president and Congress what they may or may not do . . . Under judicial supremacy, courts are above checks and balances by other branches of government. This subverts the Constitutional Separation of Powers that exists to prevent the rise of tyrannical government."

Jurisprudence: the theory or philosophy of law; how a legal system works

Petition for a writ of certiorari: A party who wants the Supreme Court to review a decision of a federal or state court files a petition for writ of certiorari in the Supreme Court. If the Court grants the petition, the case is scheduled for the filing of briefs and for oral argument.

Stare decisis: Latin for “to stand by things decided.” This is the doctrine of precedent—a principle or rule established in a previous legal case that is either binding on or persuasive for a court when deciding subsequent cases with similar issues or facts, therefore yielding similar outcomes.

Discussion Questions

1. In the first scene of the play, Cat interrupts Justice Scalia several times during a public speech at a college. Is her behavior appropriate? Why or why not? In other words, how does someone recognize the boundaries between good citizenship and rudeness?
2. The real Scalia liked to hire one liberal law clerk per session. What can be gained by working with people with opposing viewpoints?
3. Cat tells Justice Scalia that she wants to clerk for him because he was “a monster,” and she wanted to “learn about monsters.” What does she mean? Is working with a “monster” the same thing as working with someone with opposing views? Who are “monsters” in your life, and would you like to learn more about them?
4. What does the presence of Cat’s comatose father bring to the play? How does the introduction of personal life issues affect a play that is largely centered in the workplace? How do our personal lives interact with our lives as workers or students? How do the legal decisions of the Supreme Court (and other courts) affect our individual personal lives?
5. Did this play change your thinking about any social/political figures or ideologies?