



THE ORIGINALIST

BY JOHN STRAND



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THE ORIGINALIST was originally produced by Arena Stage (Molly Smith, Artistic Director; Edgar Dobie, Executive Director), Washington, D.C., as part of Arena's Power Plays initiative, on March 6, 2015. It was directed by Molly Smith, the set design was by Misha Kachman, the costume design was by Joseph P. Salasovich, the lighting design was by Colin K. Bills, the sound design was by Eric Shimelonis, and the production stage manager was Susan R. White. The cast was as follows:

SCALIA Edward Gero
CAT Kerry Warren
BRAD Harlan Work

THE ORIGINALIST was subsequently produced by Asolo Repertory Theatre (Michael Donald Edwards, Producing Artistic Director; Linda DiGabriele, Managing Director), Sarasota, Florida.

ACKNOWLEDGMENTS

The Originalist was developed at Arena Stage at the Mead Center for American Theater, where I was playwright in residence (2014–2016). Molly Smith, Arena’s artistic director, not only directed the premiere production, she also skillfully nurtured the play, the playwright, and the entire creative team and process. I am deeply grateful to her for her expertise, her support, and her friendship.

Many people generously offered their time and expert opinions, legal and textual, during the shaping of this play. Among them I thank especially the Hon. William S. Sessions, Hubert M. “Hank” Schlosberg, Alice Schlosberg, Larry Kaye, Joan Biskupic, Nina Totenberg, Wendy Ackerman, and our legal adviser throughout, Elliot Feldman, Esq. Among the Arena Stage artistic staff, I thank dramaturg extraordinaire Jocelyn Clark, Director of Artistic Programming Robert Barry Fleming, and Literary Manager Linda Lombardi. And a special thanks to U.S. Supreme Court Justice Ruth Bader Ginsburg, who generously provided us ringside seats to sessions of the court.

And finally I thank Edward Gero, who brought his extraordinary talent and intelligence to the daunting task of portraying onstage Antonin Scalia. I wrote this role for Ed. He rewarded me, and our audiences, immeasurably.

—John Strand

For Amanda Bidlack Strand

Dedicated to Beth Newburger Schwartz

A NOTE

Originalism, like many -isms, is a relatively simple concept that only gets complicated when it is put into practice. America's Founding Fathers crafted the document known as the United States Constitution in 1787. Even with its considerable flaws, it may well be, as the character Justice Scalia declares in this play, "the best thinking about law and justice in the past three hundred years." Originalists such as the real Justice Scalia insist that the Founders' text is the purest, most reliable source for a fair interpretation of the law as it is applied today. Go back to the original text. As simple as that.

Complications arise as soon as I disagree with you as to what the Founders meant. We know what they wrote. The nine justices of the U.S. Supreme Court are tasked with interpreting the law, not making it. A vast army of lawyers and lower-court judges join in the effort, ongoing for more than two centuries. Interpretation, Scalia's law clerk in this play states, must always have some element of guesswork to it, "a shot in the dark" at being right. The justice disagrees.

But that law clerk is not concerned only with her justice's brand of Originalism. She wants to know what happened to the political middle. How did compromise become a dirty word in American politics? How did we become so polarized that we see our political opponents as monsters? Civil discourse has been replaced by a verbal food fight. Why?

Why not ask the most polarizing figure in American political life, Antonin Scalia?

This play, however, is not exclusively about Justice Scalia, real or fictional. It is not a bio-play or a docudrama, although excerpts from some of the justice's dissents and opinions are included here. But the play does use the character Scalia to get to this question: What does it cost us to suppress our fear and distrust, take a step toward the middle, and sit down with the monsters?

—JS

CHARACTERS

U.S. Supreme Court Justice Antonin SCALIA, 70

CAT, black, Scalia's law clerk, 20s

BRAD, white, recent law school graduate, 20s

SETTING

The play takes place in and around Washington, D.C., during the 2012–2013 term of the U.S. Supreme Court.

Running time: approximately 95 minutes.
There is no intermission.

THE ORIGINALIST

Scene 1

In darkness, opera music: Verdi's "Libiamo," La traviata...

To the music, enter Supreme Court Justice Antonin Scalia in his robes, looking like some sort of modern-day wizard, moving to the soaring sounds, gesturing to the glory of the music... We are at one of the justice's speaking engagements, a college—a safely conservative school... After a few moments, the music ends.

SCALIA. Exquisite. My God, that is so good. I love opera. The most complete and demanding art form. Of course the audience for it is disappearing, what do you expect? It requires effort. And erudition... And costumes.

A beat, as he looks at his robe.

I want to thank the law school faculty and the Federalist Society for inviting me here tonight to speak... I asked for the musical interlude to underscore a point.

A great opera by Verdi or Donizetti must always be only what it is. Oh, you can interpret the meaning in different ways. But there is a sanctity to the score. The notes are the notes. They are exactly what the composer composed, now and a hundred years from now.

That is precisely how I view the Constitution, and thus, the law.

Now, if only I could sing my decisions... Or my dissents. Those would be more fun.

*I dissent, I dissent, I dissent!
A shameful display
of judicial supremacy!*

Absolute lunacy!
I dissent!

He ends with the requisite operatic flourish.
(*Acknowledging applause.*) Thank you. Thank you.

He removes his robe.

I was in an opera, you know, a few years back. Strauss. The chorus. I wonder sometimes... If I had followed in the great tradition of the Italian tenors. A life in the theater...

No. Where would the country be without me? I have taken the whole of Washington—monuments, bureaucrats, history and all—and moved it solidly, measurably, to the right. The Court has been my theater. (*His robe.*) I have the costume. And yes, I sometimes perform from the bench, shocking the keepers of the liberal flame in this country. Let me tell you something: They're easy to shock.

But that is the secret of my charm: I tell people what they don't want to hear.

It is also what makes me a monster. That's how half the country sees me. Aggressive. Combative. Law-and-order conservative. The other half sees me as a hero. Aggressive. Combative. Law-and-order conservative.

Which am I?

Enter discreetly Cat, a young woman in her mid-20s. She takes a seat, apart, another member of the audience.

I'm controversial—that's what they tell me. Why? I am everything America wants in its Americans. The son of immigrants. I grew up playing stickball on the streets of Queens. I worked my way through Georgetown University, made it into Harvard Law. I am a devoted husband and father—married to the same woman for, what?—it's 2012—fifty-four years. Nine children, thirty-three grandchildren, the last time I counted... Justice William O. Douglas was married four times. His last wife was a 22-year-old college student, he was 68. Compared to him, I'm boring.

But I do have a reputation. A young man came up to me after a speech I gave—it was in St. Louis, I think—and he announced, "Sir, I named my pet fish after you." "Really," I remarked, not quite sure

what to say. “Do you have other fish named after Supreme Court justices?” “Not anymore,” he replied, “Justice Scalia ate them all.”

Look, I’m not an ideologue. I am an Originalist. Okay? Anybody need a definition? Originalism: to interpret the Constitution as it is written and as it was understood when its authors crafted the original document. As simple as that.

(Back to the point.) The other side of the argument is obvious—and wrong. The Constitution is a living document, it has to change with the times. Nonsense. Society changes, fashion changes—the Constitution stands. It’s not a living document, it’s dead—a monument to the best thinking about law and justice in the past three hundred years.

(Sarcastic, a whining objection.) “But it is not contemporary.” Right. Thank God for that.

It was a lonely job, once, Originalist. Oh, but we’re everywhere now. It used to be, I could fire a round of buckshot into the faculty lounges of the top law schools in this country and never hit an Originalist.

A beat.

(More intimate, naughty.) I’ve always really liked that image.

I was hired to interpret the law, not make it. Same for my eight fellow justices. And when they forget that, I am there to remind them. If that makes me a monster, well, then... Grrr! *(Makes a monster gesture.)*

He takes some note cards from a pocket.

Right. I have some questions here that Professor Katzenbaum’s law students submitted. And no, I have not reviewed these, so...

(Reads.) “Why are you so hostile to affirmative action? See *Richmond v. Croson* 1989, and a whole slew of later rulings.”

“Hostile”? I object to affirmative action as a federal mandate. It violates the Constitution. Fourteenth Amendment, Equal Protection Clause. The principle of equality has to be just that—applied equally. It’s not that you don’t make an effort to correct past wrongs. Of course you do. But you don’t use discrimination—even so-called “reverse discrimination”—to correct the wrongs of discrimination. That doesn’t “even the score,” it reinforces thinking by race, which was the source of the injustice in the first place.

The government cannot favor one race over another. The Constitution forbids it.

Cat stands, raises her hand, and speaks without being acknowledged.

CAT. The government favored one race over another for two hundred years. Wasn't that the Originalist intent in the Constitution?

SCALIA. (*To someone off.*) Are we taking questions from the audience now?

CAT. And if that's not the intent now, doesn't that prove, sir, that the Constitution is a living, changing document?

SCALIA. Professor Katzenbaum?... Okay, I'll finish with these, then we'll take questions... But I will say this: affirmative action has an element of intergenerational guilt.

It posits that my father, who was white, bears some share of guilt for the crimes committed during slavery and after, and that I, and my children and grandchildren, share it. My father was born in Sicily and came through Ellis Island in 1920. He was more likely to *be* a slave than to own one.

Cat, apart, raises her hand, asking to continue commenting. Scalia ignores her and reads another note card.

"Justice Scalia, how much longer do you think *Roe v. Wade* can last before it is finally, finally overturned?"

I think it's on its deathbed. I hope and pray it is. Abortion, the Supreme Court held in *Roe v. Wade*, is a right—Justice Harry Blackmun, 7–2 decision, 1973: abortion is protected by the Fourteenth Amendment's guarantee of right to privacy. I find that absurd.

The question is whether aborting an unborn child is a right protected by the Constitution. Of course not! The Constitution says absolutely nothing about abortion. You want to secure the right to abortion? Pass a law. That's how democracy works. With legislation, unlike the Constitution, you can compromise.

Roe v. Wade is just bad law. The real issue is this: What the Court calls the fetus is a human life. Life begins at conception. End of discussion.

CAT. But that's the *start* of the discussion!

SCALIA. (*Ignoring her, reading another card.*) The next question...

CAT. Aren't you being naïve, Justice Scalia?

SCALIA. Miss, are you unable to restrain yourself, or are you just ignorant of the rules? (*To someone off, who evidently approaches Cat to get her to sit down.*) No, no, it's all right. Let her ask the question. (*To Cat.*) I'm being naïve?

CAT. (*Hardly pausing to take a breath.*) Sir, your best chance to overturn *Roe* was the Partial-Birth Abortion Ban Act signed by Bush through *Gonzalez v. Carhart*, but with Obama's appointment of Sotomayor and Kagan to the Court, I estimate that your overturn chances have been reduced to a maximum of twenty-five percent and that's being generous.

A beat.

SCALIA. (*For the laugh.*) Was that a question?

CAT. Sir, the three women justices will favor a woman's right to do what she wants with her own body over the moral issue of termination.

SCALIA. Will they.

CAT. In my estimation.

SCALIA. First, your scenario still leaves six votes, and one of them is mine. We only need five to overturn, so who's being naïve? And second, I never presume how a justice will vote. I've been fooled too many times over the years.

CAT. Case in point, Chief Justice Roberts's ruling on the Affordable Care Act—

SCALIA. Miss?

CAT. —and the constitutionality of the minimum coverage provision—

SCALIA. Miss! Is there an "off" switch on you anywhere?

You've had your chance to show off. But they hired *me* to do the lecturing tonight. You're one of Katzenbaum's students?

CAT. No, sir. Harvard Law 2010. I'm interviewing for a clerkship.

SCALIA. (*Restrained sarcasm.*) You are? Well, that says something about declining standards. Which court?

CAT. The Supreme Court, sir.

SCALIA. Seriously. Well, good for you—although maybe not so

THE ORIGINALIST

by John Strand

2 men, 1 woman

When a bright, liberal, Harvard Law School graduate embarks on a nerve-wracking clerkship with fearsome conservative Supreme Court Justice Antonin Scalia, she discovers him to be both an infuriating sparring partner and an unexpected mentor. John Strand's critically acclaimed drama depicts passionate people risking heart and soul to defend their version of the truth. What does it cost us to suppress our fear and distrust, take a step toward the middle, and sit down with the monsters?

"...a timely, almost revolutionary work."

—**The Economist**

"Now the country's most famous legal showman has gotten his show. ...Mr. Strand writes lively, fluid dialogue, particularly for Scalia, who gets the best jokes and jabs..."

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"The mission of THE ORIGINALIST is to get people to listen...it may be that rare play of political ideas that can woo audiences in territory marked blue, red or purple... You feel the force of the ideas, the bedrock of thought and of principle, even if you disagree."

—**The Washington Post**

"[THE ORIGINALIST] depicts robust, aggressive, passionate disagreement in a context of respect and developing friendship. It accepts power and winning as measures of success, but decency and kindness as even more important measures of a person. In that regard, it feels like a play we need right now."

—**Chicago Sun-Times**

"THE ORIGINALIST is a meditation on Scalia's judicial philosophy as he intellectually spars with Cat, his liberal law clerk. Their exchanges—cutting, fierce and comical—speak to the nation's rancor in an era when even the Supreme Court has been tainted by allegations of partisan politics. ...the back and forth between the two is reminiscent of the snappy dialogue in Spencer Tracy and Katharine Hepburn films."

—**Los Angeles Times**

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