The Originalist
written by
John Strand

October 17 –
November 12, 2017
on the IRT’s
Upperstage

STUDY GUIDE

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The Originalist
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Supreme Court Justice and conservative icon Antonin Scalia hires a young, liberal, female law intern, and opinions start flying right and left. Every point of view is explored in this thoughtful, witty, open-minded look at one of our most galvanizing national figures. In The Originalist, students will witness an enthralling debate about many of our most polarizing national questions. Both sides of every issue are presented with compelling arguments and real human consequences. Whether your class is studying civics, current events, or the rhetoric of writing and speech, The Originalist will make your students examine their own beliefs and seek to understand opposing viewpoints in political discourse.

STUDENT MATINEES 10:00 AM on October 25, 27, & November 1, 2, 7

ESTIMATED LENGTH Approximately 1 hour, 45 minutes

CONTENT ADVISORY
The Originalist is a modern drama that contains strong language and adult themes. A script preview is available upon request.

AGE RANGE Recommended for grades 9-12

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SYNOPSIS: MEETING THE ORIGINALIST

The Originalist takes place in and around Washington, DC, during the 2012-2013 term of the U.S. Supreme Court. The play opens as Supreme Court Justice Antonin Scalia (1936-2016) begins a speaking engagement at a conservative law school. With his usual blend of intelligence, humor, and biting wit, he discusses his reputation as an aggressive, combative, leader of the right. He explains the concept of originalism: “to interpret the Constitution as it is written and as it was understood when its authors crafted the original document.” His talk is interrupted several times by Cat, a young black law school graduate with pointedly opposing liberal views.

Cat is soon found interviewing for a position as one of Justice Scalia’s Supreme Court clerks. Following an intense debate on several controversial court decisions, Scalia surprises Cat by hiring her. (The real Antonin Scalia often hired one liberal court clerk each year, to maintain lively debate in his chambers.) 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 past and his driving forces. She goes with him to a firing range, hoping to learn more about the guns whose pervasive presence in American life she opposes. She also begins to work with Brad, an extremely conservative law clerk whom Scalia has assigned to help her research United States v. Windsor, a prominent gay marriage case. As rigid barriers between opposite-thinking colleagues begin to break down, both Cat and Justice Scalia consider the possibilities of mutual admiration and respect, while agreeing to disagree.

PLAYWRIGHT

JOHN STRAND

John Strand is a playwright, journalist, drama critic, and author. His plays include Our War, Tom Walker, The Miser (an adaptation of Molière’s comedy that comments on the Reagan years), Three Nights in Tehran (about the Iran-Contra affair), Charity Royal, and his Charles MacArthur Award–winning Lovers and Executioners (Arena Stage); An Italian Straw Hat (South Coast Repertory); Lorenzaccio (Lansburgh Theatre); Lincolnesque (Burstein Family Stage); Highest Yellow, The Diaries, and Otabenga (Signature Theatre); and The Cockburn Rituals (Woolly Mammoth Theatre). Strand has received multiple playwriting commissions from South Coast Repertory, Arena Stage, Shakespeare Theatre, and Signature Theatre. He was named Playwright of the Year by Broadway Play Publishing. His novel Commieland was published in 2013. The Originalist premiered in 2015 at the Arena Stage in Washington, DC.
ART IN/OF/FOR OUR TIME

BY JANET ALLEN, EXECUTIVE ARTISTIC DIRECTOR

I’m sure it surprises no one that artists are busily attempting to incorporate into their various art forms their responses to the current political conditions of our country and our world. This is a tradition that goes back centuries, even to the beginnings of art making. Playwrights have always been among the artists who most keenly yearn to refract social and political concerns, largely because they make art that is highly social and very temporal. A play requires a gathering of audience members to make it happen, which means a gathering of people leaving the theatre, we hope, ripe for further discussion. Examples are profuse at this moment. *Hamilton* may be the most vivid example we have currently of political theatre, not only in content but in production methodology. But even people far removed from the politics of the theatre may have read or heard about the controversial production of *Julius Caesar* produced by the Public Theater in New York City this summer, and the fallout among its funders. The ensuing firestorm in social media debated many issues, including, “What would Shakespeare say” about this volatile production?

*The Originalist* stands among these plays, created by its writer to reflect on and elicit a social-political debate. What interests me so much about this play is the question that lives at its center: In the words of playwright John Strand, from an interview on SCOTUSblog.com, “Is there still a political middle, and what does it cost to meet there?” I think many of us wonder this, no matter what side of the political argument we may lean towards.

It’s useful to know that Strand did not intend this play as a biography of Antonin Scalia. He said, “*The Originalist* is not a bio play, or a documentary, or a law lecture (for which I am utterly unqualified, and which no theatre audience would tolerate, anyway). I wanted to use this combative, almost operatic figure to explore how two people on opposite sides of a political, social, and even legal spectrum can take a step toward one another, begin to listen, learn to hear and respect each other’s argument.”

These are very good goals for all of us, as we watch our world become increasingly combative over many issues and ways of life. Justice Scalia was considered one of the most polarizing figures in American political life, before his unexpected death in early 2016. But I promise you that no matter where you fall on the scale of Scalia like/dislike when you enter the theatre, the course of the play will alter that view, as great experiences in the theatre do. Most of all, it will humanize him, also as the theatre is masterful at accomplishing. We produce this play this year to offer you the experience of great, relevant theatre, but also to encourage your conversation with your fellow theatregoers—as we do our part to encourage a more conversational world.
HARD CONVERSATIONS

BY JAMES STILL, DIRECTOR

In some ways, John Strand has written a wonderful “fly on the wall” kind of play, putting us (the audience) in the privileged position of listening in on conversations involving a Supreme Court justice and his law clerks inside the Supreme Court itself—an institution that values and guards its privacy and decision-making process. The play prizes “the art of the argument”—especially the legal argument. I am deeply interested in the law, how it works, and who decides its meaning. I’m particularly interested in how those lawmakers feel about the laws they make—not just what they think and what they can intellectually defend with dazzling brilliance. It’s the ways that Mr. Strand explores what’s deeply personal that makes The Originalist a compelling study of flawed human beings rather than 90 more minutes of C-SPAN.

Directing a play on the Upperstage is always a celebration of invention, as it literally requires an ever-evolving change of physical perspective. It feels especially poetic to do The Originalist with that viewpoint in mind. In a sense, doing a play about taking sides on the Upperstage allows for the possibility of looking at the conflicts and arguments literally from multiple points of view.

The three characters in Mr. Strand’s play are often pitted against each other in a shifting triangle, always making choices about the responsibility of engagement. While I might be suspicious of such smart, passionate, legal-minded thinkers being profoundly and personally changed by the end of a 90-minute play, I have come to believe that these characters do affect each other—but that change may be slower and more subtle than we want to believe. They are each different, from having known one another and risked some hard conversations. Not only do they get to have their say, they also get to listen to the other side have their say.

For many years I’ve thought about the hard conversations many of us on all sides of the political spectrum have risked, and not risked. Difficult conversations and debates can pit us one against another. Doing a play that features hard conversations about ethics, morals, law, and the Constitution itself, might be a fresh opportunity to participate in those challenging conversations in a different way. For me, hard conversations are better than silence and isolation. I’m grateful to Mr. Strand for writing a play that invites our engagement, and to you the audience, for being part of the conversation.
DESIGNER NOTES:

INSIDE THE JUSTICE’S CHAMBERS

REUBEN LUCAS  SCENIC DESIGNER

Visual research for this production quickly narrowed onto the grandeur of the Supreme Court Building and its architecture; ordered, symmetrical, and glistening. This real-world place and how it “feels” was used as inspiration for our fictitious world. It is not a faithful reproduction of any one place, but an elegant combination of modern and historical elements, unifying the differing locations of the play so they can co-exist simply and harmoniously. The physical world of this production is most notably shaped by an immense gilded wall with two large portraits. The portraits are of two of our founding fathers, James Madison and Alexander Hamilton. Scalia had great admiration for *The Federalist Papers*, of which Madison and Hamilton were authors. As the debate about the founding fathers’ intent for our democracy continues, these fading historical individuals are ever present in this world and, yet, are silent.

Preliminary computer rendering by scenic designer Reuben Lucas.

JASON TUTTLE  SOUND DESIGNER

Justice Scalia was well known for his love of opera, especially Italian opera. The playwright is very specific about the choices of music, and director James Still and I have chosen to honor those choices. Given the nature of the scenic design, and the challenges that the Upperstage places upon all scenic designers, sound plays an important role in helping to reinforce location and time, where the scenery may only be able to provide hints.
GUY CLARK  COSTUME DESIGNER

In *The Originalist*, the character of Justice Antonin Scalia refers to the black robe he wears as a costume, a symbolic garment that imbues the wearer with the qualities his audience hopes to find in a judge—wisdom, authority, fairness. Tradition, rather than strict rule, suggests simple black robes as appropriate judicial attire in the United States. Early justices borrowed this tradition from their English counterparts, eschewing the “monstrous wigs” Thomas Jefferson declared made “English judges look like rats peeking through bunches of oakum.” When asked about his robe, Justice Scalia observed, “I guess we could sit in a bus station and not wear robes but business suits or even tank tops, but I don’t think that creates the kind of image you want for the Supreme Court of your country.” Although most justices have adhered to Jefferson’s distaste for monarchical pomp, over the last two hundred plus years a few have embellished their robes. John Jay, the Court’s first chief justice, sported a robe accented with scarlet silk. Sandra Day O’Connor, the first of only four women to serve on the court, added a white lace jabot, and Chief Justice William Rehnquist, inspired by a night at the opera, had gold stripes sewn to the sleeves of his robe. Ever the originalist, Scalia stuck to basic black.

Preliminary costume sketches for Justice Scalia (left) & Cat (right) by designer Guy Clark.

BETSY COOPRIDER-BERNSTEIN  LIGHTING DESIGNER

*The Originalist* asks us to question our assumptions about the validity of original ideas as being the best ideas, the only worthy ideas. In our current polarized political climate, I truly find solace in the collaborative environment of the theatre. I look to the playwright’s original ideas for insight, but my own reflections and life experiences often present new ones. I am instantly drawn to the engaging banter between Scalia and his intern, feeling the urge for crisp, sparkling light: the kind of atmosphere that encourages you to laugh freely. In contrast, I have experienced the nightly bedside vigil in a hospice where I sought more intimate and comforting light: even just a glow from the streetlight beyond the window. In this war of ideas, the play also turns to even darker places. The playwright offers us a distinction between the Scalia the justice and Scalia the man. The lighting needs to draw us into this dichotomy as we try to understand his thoughts on how the interpretation of our Constitution has changed, over the decades and centuries.
SUPREME COURT JUSTICE

ANTONIN SCALIA

BY RICHARD J ROBERTS, RESIDENT DRAMATURG

In his three decades as a Supreme Court Justice, Antonin Scalia’s rigorous legal viewpoint, vivid writing, and larger-than-life personality made him a leader of conservative American opinion—and one of the most controversial figures in the nation. In response to his critics, Scalia said, “A man who has made no enemies is probably not a very good man.”

He was born in 1936 in Trenton, New Jersey, to Italian immigrants. His father, a professor of 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.

Known as Nino to his family and friends, he 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; together they would have 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 70,000 members nationwide.

In 1982 Scalia was appointed by Ronald Reagan to be a judge in the U.S. Court of Appeals for the District of Columbia. In 1986, Reagan appointed him to the Supreme Court. The Senate, having just endured a divisive 65-33 battle over the appointment of William Rehnquist as Chief Justice, 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. On cases of federal authority versus states’ rights, he usually sided with the state.
During oral arguments at the Supreme Court, Scalia made more comments and asked more questions—and provoked more laughter—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 grows and 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.”

As a source for the original intent of the founding fathers, originalists often cite The Federalist Papers, a collection of 85 articles and essays written and published in 1787 and 1788 by Alexander Hamilton and James Madison (whose portraits can be seen on the stage set for the IRT’s production of The Originalist) along with John Jay. Alexander Hamilton would become the nation’s first Secretary of the Treasury; James Madison was the primary drafter of the Constitution and eventually the nation’s fourth President; John Jay would be the first Chief Justice of the Supreme Court. The Federalist Papers were written to explain the newly proposed Constitution to the general public, and to promote its ratification. They were widely read and had a great influence on the early US government. During his Supreme Court tenure, Scalia brought the originalist point of view to great prominence in the United States.

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.”
WHAT HAPPENED TO THE MIDDLE?

A NOTE FROM PLAYWRIGHT JOHN STRAND

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 300 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?
HOW THE SUPREME COURT WORKS

The nine Justices of the Supreme Court are nominated by the President, confirmed by the Senate, and appointed for life. The Supreme Court is the first, and only, court to hear cases involving disputes between the states or ambassadors, but most Supreme Court cases are appeals from lower courts.

WRITS OF CERTIORARI
The Court receives about 10,000 petitions a year. If four of the nine Justices feel the case has value, a writ of certiorari orders the lower court to send the case records for review. The Court hears about 80 cases a year—less than 1%—most involving constitutional issues or national legal questions.

LAW CLERKS
Each Justice has three or four law clerks per year, typically the top recent graduates from the best law schools. Among other things, they do legal research to assist decisions on what cases to accept; help to prepare questions for oral arguments; and assist with drafting opinions.

BRIEFS
If a case is placed on the docket, the petitioner and the respondent file 50-page briefs putting forth their cases; then each files a shorter brief countering the other. If the U.S. government is not directly involved in the case, the Solicitor General may file a brief. Parties without a direct stake in the case, but nevertheless interested, may, if permitted, file an amicus curiae (Latin: “friend of the court”) brief.

ORAL ARGUMENTS
The Court’s term begins on the first Monday in October; the Court is typically in recess from late June through September. From October through April, for two weeks each month, the Court hears oral arguments, open to the public, on Mondays, Tuesdays, and Wednesdays. Two cases are heard each day; each is allotted an hour. Lawyers for each party have 30 minutes to make their case, but most of this time is spent answering questions that the Justices have developed while reading the briefs. Counsel for the petitioner may reserve some of their 30 allotted minutes for rebuttal.

CONFERENCE
Cases are decided at the Justices’ Conferences on Wednesday and Friday afternoons. Before the Conference, Justices often discuss the case with their law clerks, seeking different perspectives. Only the Justices are allowed in the Conference itself—no police, law clerks, secretaries, etc. After all the Justices shake hands, they discuss the week’s petitions for certiorari, then the week’s cases. All Justices may state their views and raise questions. Each speaks without interruption, first the Chief Justice, then the other Justices in descending order of seniority. Votes are then cast in the same order. The Chief Justice (or the senior majority Justice if the Chief Justice dissents) assigns a majority Justice to write the opinion of the Court. Any Justice may write a separate dissenting opinion.

OPINIONS
Opinions of the Court are handed down before the end of the term. A majority of Justices must “sign on” to all of the contents of the Court’s opinion before it is publicly delivered. Unanimous decisions are typically released sooner, while more controversial opinions may not be delivered until just before the recess. No opinion is considered the official opinion of the Court until it is delivered in open court.
Justice Scalia had controversial opinions on many issues throughout his career. Any of these would make excellent topics for classroom discussion or debate.

**Abortion**
Scalia’s belief, as stated in several cases, was that since the original framers of the Constitution did not mention abortion, the federal court had no business ruling on it; to him, it was clearly a subject for the states to decide. He consistently opposed *Roe v. Wade* as precedent on the grounds that the case had been wrongly decided in the first place; to him, the original constitutional text was more important than recent legal precedent.

**Affirmative Action**
Affirmative action is the policy of favoring members of a disadvantaged group who suffer or have suffered from discrimination within a culture. Supporters of affirmative action seek to bridge inequalities in employment and pay, increase access to education, promote diversity, and redress past wrongs, harms, or hindrances. Scalia was strongly opposed to any program anywhere that uses race to advantage minorities in any way. In one of his more controversial statements, Scalia went so far as to suggest that affirmative action was harmful to the intended beneficiaries. During a 2015 hearing of oral arguments for the case of *Fisher v. University of Texas at Austin*, to decide whether race-conscious admissions should be upheld at Texas’s flagship university, Scalia cited “those who contend that it does not benefit African Americans to get them into the University of Texas where they do not do well, as opposed to having them go to a less-advanced school—a slower-track school where they do well.” He went on to say: “One of the briefs pointed out that most of the black scientists in this country don’t come from schools like the University of Texas…. They come from schools where they do not feel that they’re being pushed ahead in classes that are too fast for them.”

**Campaign Financing & Citizens United**
In *Citizens United v. Federal Election Commission* (2010), Scalia voted with the 5-4 majority to eliminate limits on how corporations can spend money in elections. Scalia saw such restrictions on corporations or individuals as obstructions of free speech and thus unconstitutional.
capital punishment
Scalia in a 2015 speech: “For me ... the constitutionality of the death penalty is not a difficult, soul-wrenching question. It was clearly permitted when the Eighth Amendment was adopted (not merely for murder, by the way, but for all felonies—including, for example, horse-thieving, as anyone can verify by watching a western movie). And so it is clearly permitted today.”

evacutive privilege
Executive privilege is the power of the President of the United States to refuse cooperation with subpoenas and other interventions by the legislative and judicial branches of government seeking information or testimony relating to the President. Scalia was a strong advocate for the power of the executive branch. As assistant attorney general under the Ford administration, he defended the concept of executive privilege before Congress, arguing that the privilege extended not only to the President but to cabinet secretaries and agency heads as well; this expansion of the concept of executive privilege is still in practice today.

the Florida recount
In the case of the extremely close Florida returns of the 2000 presidential election, Scalia ruled with the 5-4 majority that to impose a special recount on certain Florida counties would violate the Constitution’s Equal Protection clause.

gay marriage
Scalia felt that the Supreme Court’s decision in Obergefell v. Hodges, which brought marriage equality to every state, was “the furthest imaginable extension of the Supreme Court doing whatever it wants.” He believed that the question of same-sex marriage had “nothing to do with the law.” He claimed that the Obergefell majority justices rewrote the Constitution instead of interpreting it, operating as “policy-makers” instead of judges.

gun rights
Scalia believed firmly in the right of individuals to possess firearms for traditional lawful purposes such as self-defense within the home and for hunting. While he supported laws that forbid guns in sensitive places such as schools and government buildings, and that prohibit possession of firearms by felons and the mentally ill, he also stated that felons may possess guns unless the state explicitly prohibits it. He strongly believed that the Second Amendment protects the individual right to own a gun for private use—not only in connection with service in a militia.
**WORD OF THE LAW**

*Legal terminology and institutions mentioned in the play.*

**activist judge**
Judicial activism refers to judicial rulings that are suspected of being based on personal or political considerations, rather than on existing law. This pejorative term 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.

**Blackstone**
Jurist Sir William Blackstone (1723–1780) published his *Commentaries on the Laws of England* between 1765 and 1769. Blackstone’s *Commentaries* were long regarded as the leading work on the development of English law and played a role in the development of the American legal system.

**call memos for en banc matters**
An *en banc* session (French for “in bench”) is when a case is heard before all the judges of a court, rather than just one judge. (In this instance, the term “court” refers not to a court *room* but to a court *jurisdiction*, such as one of the 13 U.S. courts of appeals, each of which has 6 to 29 authorized judges.) All Supreme Court cases are heard *en banc*, by all nine justices. A call memo from one judge informs the other judges of a court of the need for an *en banc* hearing.

**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.

**Federalist Society**
The Federalist Society is an organization of conservatives and libertarians seeking reform of the current American legal system in accordance with a textualist or originalist interpretation of the U.S. Constitution. It is one of the nation’s most influential legal organizations, playing a significant role in moving the national debate to the right on many issues. The society began in 1982 as a student organization that challenged what its founding members perceived as the orthodox American liberal ideology found in most law schools. The society claims 10,000 law students and 60,000 practicing attorneys as members.
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 16 to 23 citizens.

hostis humani generes
Latin for “enemy of mankind.” The term originated in admiralty law, when pirates and slavers of no particular nation were held to be “enemies of mankind” beyond legal protection, and so could be dealt with legally by any nation.

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.
COURT CASES

A number of prominent court cases are cited in the play.

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 U.S. 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.

Richmond v. Croson (1989)
In this case the Supreme Court held that a program in Richmond, Virginia, giving preference to minority businesses in the awarding of municipal contracts, was unconstitutional under the Equal Protection Clause. The Court found that the city failed to identify either the need for remedial action or that other non-discriminatory remedies would be insufficient.

In this case, the Supreme Court sanctioned the death penalty for offenders who were as young as 16 at the time of the crime. In 2003, Kentucky Governor Paul E. Patton commuted the death sentence of Kevin Stanford. Two years later in Roper v. Simmons, the Supreme Court overruled Stanford and held that all juvenile offenders are exempt from the death penalty.

Baehr v. Miike (1990)
This lawsuit argued that Hawaii’s prohibition of same-sex marriage violated the state constitution. The Hawaii Supreme Court concluded that there was no fundamental right to same-sex marriage, but that denying marriage licenses to same-sex couples constituted discrimination based on sex, and remanded the case to a lower court. The possibility that the courts might invalidate Hawaii’s marriage eligibility requirements propelled the enactment of DOMA in 1996, and inspired dozens of state laws banning same-sex unions.
In this case the Court ruled that a state constitutional amendment in Colorado preventing protected status based upon homosexuality or bisexuality violated the Equal Protection Clause. The majority opinion stated that the amendment lacked “a rational relationship to legitimate state interests,” setting a new precedent for subsequent gay rights cases..

**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 U.S. state and territory.

**Gonzalez v. Carhart** (2007)
This Supreme Court case upheld the Partial-Birth Abortion Ban Act of 2003, finding that there is “uncertainty [in the medical community] over whether the barred procedure is ever necessary to preserve a woman’s health,” and that in the past the court had given lawmakers wide discretion to pass legislation in areas where there is medical and scientific uncertainty.”

This case challenged a local law that restricted Washington, DC, residents from owning handguns, and required that all firearms including rifles and shotguns be kept “unloaded and disassembled or bound by a trigger lock.” The Supreme Court held that the Second Amendment protects an individual’s right to possess a firearm unconnected with service in a militia for traditionally lawful purposes, such as self-defense within the home.

**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 DOMA (see Glossary), 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.” When the Department of Justice decided not to defend the law, the Bipartisan Legal Advisory Group (BLAG) intervened to do so. Local and appeals courts found the law unconstitutional under the due process guarantees of the Fifth Amendment, BLAG petitioned the Supreme Court to review the decision, and the Court issued a writ of certiorari in December 2012. On March 27, 2013, the court heard oral arguments. 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.”

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.
Recent U.S. Presidents who are mentioned in the play:

**President Ronald Reagan** (in office 1981-1989)
Ronald Reagan (1911–2004) was the oldest elected president prior to Donald Trump. Reagan’s economic policies advocated tax reduction and deregulation. An icon among Republicans, his tenure began a realignment towards conservative policies in the United States.

**President George H. W. Bush** (in office 1989-1993)
During the term of Republican George H. W. Bush (born 1924), military operations were conducted in Panama and the Persian Gulf, the Berlin Wall fell, and the Soviet Union dissolved.

**President Bill Clinton** (in office 1993-2001)
Bill Clinton (born 1946) was the third-youngest president and the first from the Baby Boomer generation. A Democrat, he presided over the longest period of peacetime economic expansion in American history, and had the highest end-of-office approval rating of any President since World War II.

**President George W. Bush** (in office 2001-2009)
After the September 11 attacks, George W. Bush (born 1946) launched a “War on Terror,” starting the war in Afghanistan in 2001 and the Iraq War in 2003. A Republican, he received heated criticism from across the political spectrum for his handling of the Iraq War, Hurricane Katrina, and other challenges.

**Vice President Dick Cheney** (in office 2001-2009)
Dick Cheney (born 1941) played a leading role in the George W. Bush administration. Cheney was often criticized for policies regarding the campaign against terrorism, wiretapping by the National Security Agency, and torture. In 2006, while quail hunting in Texas, he shot Harry Whittington, an attorney, who was treated for birdshot wounds. Both parties have called the incident an accident.

**President Barack Obama** in office (2009-2017)
Barack Obama (born 1961) was the first African American to have served as president. In 2009 he was awarded the Nobel Peace Prize “for his extraordinary efforts to strengthen international diplomacy and cooperation between peoples.” A Democrat, Obama left office in January 2017 with a 60% approval rating.
SUPREME COURT JUSTICES

*Supreme Court Justices who are mentioned in the play:*

**William O. Douglas** (Associate Justice 1939-1975)
William O. Douglas (1898–1980) was one of the youngest justices appointed to the court; his 37-year term is its longest, and he wrote more opinions than any other justice. *Time* magazine called him “the most doctrinaire and committed civil libertarian ever to sit on the court.”

**Harry Blackmun** (Associate Justice 1970-1994)
Harry Blackmun (1908–1999) was appointed by Republican President Richard Nixon, but ultimately became one of the most liberal justices on the Court. He is best known as the author of the Court’s opinion in *Roe v. Wade*.

William Rehnquist (1924–2005), considered a conservative, favored a conception of federalism that emphasized the Tenth Amendment’s reservation of powers to the states.

**Anthony Kennedy** (Associate Justice since 1988)
Anthony Kennedy (born 1936) is currently the senior Associate Justice of the Supreme Court. Since the retirement of Sandra Day O’Connor in 2006, he has been the swing vote on many of the Court’s 5–4 decisions. A moderate-conservative, he has authored the majority opinion in many cases, notably each of the Court’s landmark gay rights cases.

**Ruth Bader Ginsburg** (Associate Justice since 1993)
Ruth Bader Ginsburg (born 1933) the second female justice on the court and, from 2006 to 2009, the only female justice. She is generally viewed as belonging to the liberal wing of the Court.

**Chief Justice Roberts** (Chief Justice since 2005)
John Roberts (born 1955) has been described as having a conservative judicial philosophy. From age 10 to 18 he lived with his family in Long Beach, Indiana.

**Sonia Sotomayor** (Associate Justice since 2009)
Sonia Sotomayor (born 1954) is the first Supreme Court justice of Hispanic heritage and the third female justice.

**Elena Kagan** (Associate Justice since 2010)
Constitution
The U.S. Constitution is the supreme law of the United States. Written by committees of the Constitutional Convention in 1787, it delineates the form of our national government. It first establishes three branches of the federal government: legislative, the bicameral Congress; executive, the President; and judicial, the Supreme Court and other federal courts. It goes on to describe the rights and responsibilities of state governments and their relationship to the federal government. Since adopted in 1789, the Constitution has been amended 27 times. The first ten amendments, known collectively as the Bill of Rights, offer specific protections of individual liberties and justice, and place restrictions on the powers of government. The majority of the 17 later amendments expand individual civil rights protections; others address issues related to federal authority or modify government processes and procedures. The first constitution of its kind, adopted by the people’s representatives for an expansive nation, it has influenced the constitutions of many other nations.

Second Amendment
The Second Amendment to the United States Constitution protects the right of the people to keep and bear arms. It was adopted in 1791 as part of the first ten amendments contained in the Bill of Rights. The Supreme Court has ruled that the right belongs to individuals, while also ruling that the right is not unlimited and does not prohibit all regulation of firearms. In the 21st century, the amendment has been subjected to frequent academic inquiry and judicial interest. The debate regarding gun control and gun rights continues.

Eighth Amendment
The Eighth Amendment of the United States Constitution prohibits the federal government from imposing excessive bail, excessive fines, or cruel and unusual punishment.

Fourteenth Amendment
The Fourteenth Amendment was adopted in 1868 following the Civil War. It addressed citizenship rights and equal protection under the law, issues related to former slaves. The amendment marked a large shift in American constitutionalism, applying substantially more restrictions against the states than previously. The amendment was bitterly contested, particularly by the states of the defeated Confederacy, which were forced to ratify it in order to regain representation in Congress. The amendment’s Equal Protection Clause of the Fourteenth Amendment provides that no state shall deny to any person within its jurisdiction “the equal protection of the laws.” This amendment is one of the most litigated parts of the Constitution, forming the basis for several landmark decisions discussed in The Originalist.
ALIGNMENT GUIDE

Seeing a performance at Indiana Repertory Theatre is a great way to help make connections for students and facilitate their understanding of a text. Some key literature standards to consider on your trip would be:

Reading – Literature
• RL.1 – Read and comprehend a variety of literature independently and proficiently
• RL.2 – Build comprehension and appreciation of literature by analyzing, inferring, and drawing conclusions about literary elements, themes, and central ideas
  o Sample: 9-10.RL.2.2: Analyze in detail the development of two or more themes or central ideas over the course of a work of literature, including how they emerge and are shaped and refined by specific details.
• RL.3 – Build comprehension and appreciation of literature, using knowledge of literary structure and point of view
  o Sample: 11-12.RL.3.2: Analyze a work of literature in which the reader must distinguish between what is directly stated and what is intended (e.g., satire, sarcasm, irony, or understatement) in order to understand the point of view.
• RL.4 – Build comprehension and appreciation of literature by connecting various literary works and analyzing how medium and interpretation impact meaning

Reading – Nonfiction
• RN.2 – Extract and construct meaning from nonfiction texts using a range of comprehension skills
  o Sample: 8.RN.2.3: Analyze how a text makes connections and distinctions among individuals, events, and ideas.

Reading – Vocabulary
• RV.3 – Build comprehension and appreciation of literature and nonfiction texts by determining or clarifying figurative, connotative, and technical meanings
  o Sample: 9-10.RV.3.3: Interpret figures of speech (e.g., euphemism, oxymoron) in context and analyze their role in the text.
BEFORE THE SHOW

Share with students the information on page 11, “How the Supreme Court Works.”

Discuss with students landmark Supreme Court cases they have learned about, such as Brown v. Board of Education (prohibiting school segregation) or Loving v. Virginia (legalizing mixed-race marriage). How do these Supreme Court decisions affect students’ everyday lives? How would the United States be different without them?

POST-SHOW DISCUSSION QUESTIONS

How do students deal with differences of opinion among their friends and family? How are those issues handled differently within each of those two groups? How likely are we to make friends with those with whom we disagree about significant issues? How do we handle it when we discover that a close friend believes differently about a significant issue? How do we handle situations with relatives who hold opinions with which we strongly disagree?

Discuss the concepts of patriotism and civil disobedience. How do these ideas both oppose and agree with each other? What are the duties of good citizenship? How does the individual citizen make his or her voice heard in the court of public opinion? What are the options for a citizen who wishes to protest government action? … or who wishes to show support for government action?

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? Pragmatically, how do we practice our right of free speech in a manner that is fair and equitable? How does one recognize the boundaries between civil disobedience, good citizenship, and rudeness? How do we, as individual citizens, make our opinions known, in a world of media outlets that widely broadcast the opinions of a select few?

Cat tells Justice Scalia that she wants to be his law clerk because he is “a monster,” and “I need to learn about monsters.” What does she mean? Who (or what) are the monsters in students’ lives? Why would it be useful to learn about them? How can students learn about them?

How does the introduction of a new character, Brad, more than halfway through the play, shift the play’s balance? How does a third character create opportunities for different kinds of debate and discourse between the characters? How does the presence of Brad affect the viewer’s feeling about the two central characters?

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 work place? How do our personal lives intertwine with our lives as workers or students? How do the legal decisions of the Supreme Court (and other courts) affect our individual personal lives?

At what moments in the play were students surprised by their own reactions to characters who expressed opinions with which the students disagreed? How did seeing the play prod students to think differently about those who hold differing social or political viewpoints?
WRITING PROMPTS

The premise of *The Originalist* is inspired by the fact that Justice Scalia often hired one liberal law clerk each term to inspire debate among his staff. Write a scene or short story involving a character with power and authority in a particular field and a subordinate who holds strongly differing opinions. It might be a teacher and a student, a coach and an athlete, a parent and a child, or some other relationship. What are the inherent conflicts? What situations lead to anger? Where is there common ground? Give your play or story a beginning, a middle, and an end, with some sort of resolution.

Write a letter from Cat to Justice Scalia, looking back from a year after the end of the play, in which she expresses her feelings about her time with him. What is she grateful for? What is she still in disagreement about? What does she feel she learned? Perhaps you might give each letter to a different student, and now have them write Justice Scalia’s response to Cat, based on this new letter.

We learn about characters from what they say, what they do, and from what other characters say about them. Choose one of the play’s characters and do a character analysis beginning with those three points. Then extrapolate more biographical information, such as age, education, passions, aspirations, likes and dislikes, hopes and dreams, work life, relationships, socioeconomic position, etc. Write an interview in the guise of an actor, asking questions of your chosen character, not only about the events of the play, but also about aspects of his or her life that are not seen in the play.

Write a review of the play. A well-rounded review includes your opinion of the theatrical aspects—scenery, lights, costumes, sound, direction, acting—as well as your impressions of the script and the impact of the story and/or themes and the overall production. What moments made an impression? How do the elements of scenery, costumes, lighting, and sound work with the actors’ performance of the text to tell the story? What ideas or themes did the play make you think about? How did it make you feel? Did you notice the reactions of the audience as a whole? Would you recommend this play to others? Why or why not? To share your reviews with others, send to: education.irt@gmail.com

ACTIVITIES

Choose a few controversial topics from today’s news, such as immigration, or Confederate memorials, or health care. Divide the class into small groups and assign each a different topic. Have students discuss both sides of their topic, preparing separate strategies for debating both sides of their topic. Have each group present a short presentation to the class on both sides of their topic. As a class, discuss what students learned by looking at both sides of their issue. How challenging was it to keep personal opinion out of the conversation and discuss these controversial topics in a calm and friendly manner? What are the advantages and challenges of learning about both sides of an issue?

Divide the class into small groups. Assign each group a different Supreme Court case (for example, [http://content.time.com/time/specials/packages/completelist/0,29569,2036448,00.html](http://content.time.com/time/specials/packages/completelist/0,29569,2036448,00.html)). Have each group give a class presentation or create a display about the case, the individual lives, what made it important, what precedents it established, and how it still affects our lives today.

Here is an interesting courtroom simulation activity involving teens and Facebook: [http://www.uscourts.gov/educational-resources/educational-activities/elonis-v-us](http://www.uscourts.gov/educational-resources/educational-activities/elonis-v-us)
RESOURCES

BOOKS

*Scalia Speaks: Reflections on Law, Faith, and Life Well Lived*  
by Antonin Scalia, edited by Christopher J. Scalia & Edward Whelan

*Scalia Dissents: Writings of the Supreme Court’s Wittiest, Most Outspoken Justice*  
by Antonin Scalia, edited by Kevin A. Ring

*Scalia: A Court of One* by Bruce Allen Murphy

*American Original: The Life and Constitution of Antonin Scalia* by Joan Biskupic

*The Nine: Inside the Secret World of the Supreme Court* by Jeffrey Toobin

*The Brethren: Inside the Supreme Court* by Bob Woodward & Scott Armstrong

*In Chambers: Stories of Supreme Court Law Clerks and Their Justices*  
edited by Todd C. Peppers & Artemus Ward

*Notorious RBG: The Life and Times of Ruth Bader Ginsburg* by Irin Carmon & Shana Knizhnik

*Sisters in Law: How Sandra Day O’Connor and Ruth Bader Ginsburg Went to the Supreme Court and Changed the World* by Linda Hirshman

*They Broke the Law—You Be the Judge: True Cases of Teen Crime* by Thomas A. Jacobs

*What Are My Rights? Q&A about Teens and the Law* by Thomas A. Jacobs

WEBSITES

http://www.nytimes.com/learning/issues_in_depth/10SupremeCourtIdeas.html  
quick, easy, engaging ways to learn about the Supreme Court

Ten Supreme Court cases that specifically affect teens

https://www.pbs.org/wnet/supremecourt/educators/lessons.html  
Lesson plans for topics surrounding the Supreme Court

http://www.uscourts.gov/about-federal-courts/educational-resources  
educational resources from the U.S. Federal Courts

http://www.classroomlaw.org/resources/teaching-materials/  
teaching youth participation in democracy
GLOSSARY

Affordable Care Act
The Patient Protection and Affordable Care Act was enacted by Congress and signed into law by President Obama in 2010. The law was designed to increase health insurance quality and affordability, lower the uninsured rate by expanding insurance coverage, and reduce the costs of healthcare. The law requires insurers to accept all applicants, cover a specific list of conditions, and charge the same rates regardless of pre-existing conditions or sex.

crypto-fascist
A pejorative term for one who secretly supports or admires fascism, famously used by Gore Vidal in a 1968 debate with William F. Buckley.

Defense of Marriage Act
The Defense of Marriage Act (DOMA, 1996) defined marriage for federal purposes as the union of one man and one woman, and allowed states to refuse to recognize same-sex marriages granted under the laws of other states. It barred same-sex married couples from being recognized as “spouses” for purposes of federal laws, barring them from receiving federal marriage benefits. In United States v. Windsor (2013), the Supreme Court declared Section 3 of DOMA unconstitutional under the Due Process Clause of the Fifth Amendment.

Ellis Island
Ellis Island, in Upper New York Bay, was the gateway for more than 12 million immigrants to the United States as the nation’s busiest immigrant inspection station from 1892 until 1954. The island has hosted a museum of immigration since 1990.

fascist
Fascism is a far-right form of radical authoritarian nationalism that originated in Italy during World War I and spread to other European countries. Fascists believe that liberal democracy is obsolete, and they regard the complete mobilization of society under a totalitarian one-party state as necessary to prepare a nation for armed conflict and to respond effectively to economic difficulties. Such a state is led by a strong leader—usually a dictator supported by a martial government—to forge national unity and maintain a stable and orderly society. Since the end of World War II in 1945, few parties have openly described themselves as fascist, and generally the term is now used by political opponents as a pejorative.
Gabon
Gabon is located at the equator on the west coast of Central Africa. It has an area of nearly 100,000 square miles (about the size of Oregon), and its population is estimated at 1.5 million people. Despite abundant resources, a significant proportion of the population remains poor.

Hail Mary
The Hail Mary is a traditional Catholic prayer asking for the intercession of the Blessed Virgin Mary, the mother of Jesus. It is common for a priest in confession to assign a parishioner to recite a certain number of Hail Mary’s, while meditating on his or her sin, as a penance.

Incarnation
In Christian theology, the doctrine of the Incarnation holds that Jesus, the Son of God, taking on a human body and human nature, “was made flesh” and conceived in the womb of Mary, thus being both fully God and fully human.

Omertà
Omertà is the Mafia code of silence. It refers to the idea of maintaining silence in any police or government investigation. The term is often used today to refer to any sort of code of silence maintained by members of a wide variety of groups, including court officials.

Virginia Tech
On April 16, 2007, at Virginia Tech, Seung-Hui Cho, a senior, shot and killed 32 people and wounded 17 others before committing suicide. At the time, it was the deadliest shooting carried out by a single gunman in U.S. history (since surpassed by the 2016 Orlando nightclub shooting). The attacks drew widespread criticism of U.S. gun culture, sparking intense debate about gun violence, gun laws, mental health treatment, the responsibility of college administrations, privacy laws, journalism ethics, and other issues.

Voting Rights Act
The Voting Rights Act of 1965 is a landmark piece of federal legislation that prohibited racial discrimination in voting. Designed to enforce the voting rights guaranteed by the Fourteenth and Fifteenth Amendments, the Act secured voting rights for racial minorities throughout the country, especially in the South. It prohibited state or local governments from imposing voting laws that result in discrimination against racial or language minorities, including literacy tests and similar devices historically used to disenfranchise racial minorities. It also contained special provisions that applied only to certain jurisdictions that engaged in egregious voting discrimination at the time, as determined by a coverage formula, prohibiting them from implementing any change affecting voting without receiving federal preapproval attesting that the change did not discriminate against protected minorities. The Act is considered by the U.S. Department of Justice to be the most effective piece of civil rights legislation ever enacted in the country. In Shelby County v. Holder (2013), the Supreme Court struck down the coverage formula as unconstitutional, reasoning that it was no longer responsive to current conditions; without a coverage formula, the Act is unenforceable. Since this decision, several states have enacted voter regulations considered by many to be discriminatory.
THE ROLE OF THE AUDIENCE

You, the audience are one of the most important parts of any performance. Experiencing the theatre is a group activity shared not only with the actors, but also with the people sitting around you. Your attention and participation help the actors perform better, and allow the rest of the audience to enjoy the show. Here are a few simple tips to help make each theatre experience enjoyable for everyone:

Leave mp3 players, cameras, mobile phones, and other distracting and noise-making electronic devices at home.

You may think texting is private, but the light and the motion are very annoying to those around you and on stage. Do not text during the performance.

Food and drink must stay in the lobby.

The house lights dimming and going out signal the audience to get quiet and settle in your seats: the play is about to begin.

Don’t talk with your neighbors during the play. It distracts people around you and the actors on stage. Even if you think they can’t hear you, they can.

Never throw anything onto the stage. People could be injured.

Remain in your seat during the play. Use the restroom before or after the show.

Focus all your attention on the play to best enjoy the experience. Listen closely to the dialogue and sound effects, and look at the scenery, lights, and costumes. These elements all help to tell the story.

Get involved in the story. Laugh, cry, sigh, gasp—whatever the story draws from you. The more emotionally involved you are, the more you will enjoy the play.

Remain at your seat and applaud during the curtain call because this is part of the performance too. It gives you a chance to recognize a job well done and the actors a moment to thank you for your attention.