

In Conversation: Antonin Scalia

On the eve of a new Supreme Court session, the firebrand justice discusses gay rights and media echo chambers, *Seinfeld* and the Devil, and how much he cares about his intellectual legacy (“I don’t”).

By **Jennifer Senior** Published Oct 6, 2013



(Photo: Platon)

On September 26—a day that just happened to be the 27th anniversary of his swearing-in as associate justice—Antonin Scalia entered the Supreme Court’s enormous East Conference Room so casually that one might easily have missed him. He is smaller than his king-size persona suggests, and his manner more puckish than formal.

Washingtonians may know Scalia as charming and disarming, but most outsiders tend to regard him as either a demigod on stilts or a menace to democracy, depending on which side of the aisle they sit. A singularity on the Court and an icon on the right, Scalia is perhaps more responsible than any American alive for the mainstreaming of conservative ideas about jurisprudence—in particular the principles of originalism (interpreting the Constitution as the framers intended it rather than as an evolving document) and textualism (that statutes must be interpreted based on their words alone). And he has got to be the only justice to ever use the phrase “argle-bargle” in a dissent.

You came to Washington as a lawyer during the Nixon administration, just before Watergate. What on Earth was that like?

It was a sad time. It was very depressing. Every day, the *Washington Post* would come out with something new—it trickled out bit by bit. Originally, you thought, *It couldn’t be*, but it obviously was. As a young man, you’re dazzled by the power of the White House and all that. But power tends to corrupt.

Then you served in the Ford administration. That must have been an awfully lonely time to be a young conservative.

It was a terrible time, not for the Republican Party, but for the presidency. It was such a wounded and enfeebled presidency, and Congress was just eating us alive. I mean, we had a president who had never been elected to anything except ... what? A district in Michigan? Everything was in chaos.

It was a time when people were talking about “the imperial presidency.” I knew very well that the 900-pound gorilla in Washington is not the presidency. It’s Congress. If Congress can get its act together, it can roll over the president. That’s what the

framers thought. They said you have to enlist your jealousy against the legislature in a democracy—*that* will be the source of tyranny.

But weren't you just saying that you learned from Watergate that presidents aren't incorruptible?

What, and Congress is? I mean, they're all human beings. Power tends to corrupt. But the power in Washington resides in Congress, if it wants to use it. It can do anything—it can stop the Vietnam War, it can make its will felt, if it can ever get its act together to do anything.

Had you already arrived at originalism as a philosophy?

I don't know when I came to that view. I've always had it, as far as I know. Words have meaning. And their meaning doesn't change. I mean, the notion that the Constitution should simply, by decree of the Court, mean something that it didn't mean when the people voted for it—frankly, you should ask the other side the question! How did they *ever* get there?

But as law students, they were taught that the Constitution evolved, right? You got that same message consistently in class, yet you had other ideas.

I am something of a contrarian, I suppose. I feel less comfortable when everybody agrees with me. I say, "I better reexamine my position!" I probably believe that the worst opinions in my court have been unanimous. Because there's nobody on the other side pointing out all the flaws.

Really? So if you had the chance to have eight other justices just like you, would you not want them to be your colleagues?

No. Just six.

That was a serious question!

What I do wish is that we were in agreement on the basic question of what we think we're doing when we interpret the Constitution. I mean, that's sort of rudimentary. It's sort of an embarrassment, really, that we're not. But some people think our job is to keep it up to date, give new meaning to whatever phrases it has. And others think it's to give it the meaning the people ratified when they adopted it. Those are quite different views.

You've described yourself as a fainthearted originalist. But really, how fainthearted?

I described myself as that a long time ago. I repudiate that.

So you're a stouthearted one.

I try to be. I try to be an honest originalist! I will take the bitter with the sweet! What I used "fainthearted" in reference to was—

Flogging, right?

Flogging. And what I would say now is, yes, if a state enacted a law permitting flogging, it is immensely stupid, but it is not unconstitutional. A lot of stuff that's stupid is not unconstitutional. I gave a talk once where I said they ought to pass out

to all federal judges a stamp, and the stamp says—*Whack!* [*Pounds his fist.*]—
STUPID BUT CONSTITUTIONAL. *Whack!* [*Pounds again.*] STUPID BUT -
CONSTITUTIONAL! *Whack!* STUPID BUT CONSTITUTIONAL ... [*Laughs.*] And
then somebody sent me one.