What is the methodology of originalist constitutional interpretation? Is it wise to go parasailing with Ruth Bader Ginsburg? How should a Supreme Court justice decide whether to overturn a previous holding of the Court? What is the most important thing to remember if you and a friend are being chased by a bear? What kind of life should a recent law school graduate aspire to?

Those questions and many others, many weighty and some not so weighty, were addressed by Supreme Court Justice Antonin Scalia during his packed two-day visit to the Law School in February, during which he delivered the 2012 Ulysses and Marguerite Schwartz Memorial Lecture before a full auditorium, taught a Constitutional Law class, spoke with members of the Federalist Society, exchanged ideas with faculty members over lunch, and answered students’ questions in an hour-long session.

Warmth and humor blended seamlessly with deep substance throughout Scalia’s visit, as he fully lived up to Professor Geoffrey Stone’s description of him as “one of the ablest, most interesting, most provocative, and most engaging justices ever to serve on the Supreme Court.”

Dueling Constitutions
What might serve as a metaphor for Scalia’s primary theme throughout his visit occurred during his lunchtime question-and-answer session with students. The Justice’s first questioner, Barrett Young, ’14, inquired about the relevance of a section of the Constitution to Scalia’s view of limited federal-government powers. Within moments, Scalia had his pocket copy of the Constitution opened to the section in question—and so did Young. “Are you reading from the same Constitution I am?” Scalia asked.

Throughout his visit, Scalia contrasted his originalist method of Constitutional interpretation with the alternative method that he variously characterized as “so-called evolutionary Constitutional jurisprudence”; a “living Constitution philosophy … that caters to the weaknesses of judges”; and the work of “Constitutional consequentialists … who like to update the Constitution according to their own preferences.” Asked by Kimberly Rhoten, ’13, whether his own judging might be affected by his social and political values, Scalia answered, “I hope not. I hope I’m bound by the original intent. For me, that’s the test of being a good judge: whether you occasionally reach results that you really don’t like.”

Scalia pointed to several instances in which he had reached constitutional conclusions that differed from his own predilections. “I’m a law-and-order type,” he said, “but I ought to be the pin-up for the criminal defense bar, because my originalist philosophy leads me to defend rigorously the right to jury trial, to defend the original meaning of the confrontation clause—all of which benefits criminal defendants, who I would rather see put away. But once you show me the original thinking, I am handcuffed. I cannot do the nasty conservative things I would like to do to the country.”
History in the Courtroom
In his Schwartz Lecture, titled “The Methodology of Originalism,” and elsewhere during his visit, Scalia made the positive case for his approach, that “the Constitution has a static meaning which does not change from generation to generation,” a view that he said was “orthodoxy in American law until the Warren Court.”

Saying, “Those who oppose originalism exaggerate the difficulty of inquiry into original meaning,” he discussed the means for ascertaining how particular words and phrases—such as “to keep and bear arms”—were understood when they were employed in the Constitution; he explained the necessity of close reading of phrases—saying, for example, that “the right of the people to keep and bear arms shall not be infringed” denotes that the Second Amendment was not conferring a new right but recognizing an existing right—and he insisted on the importance of contemporaneous context to make sense of the words and phrases: “The Framers knew that the way the Stuart kings had destroyed the people’s militia was not by abolishing it but by disarming those members of the militia with whom they disagreed.”

Originalist judging has been aided in recent years by briefs that thoroughly present the historical background of cases, Scalia said. Referring to the Supreme Court’s 2008 Second Amendment case, District of Columbia v. Heller, he said, “The mass of briefing in this case is nothing short of astounding,” filling five volumes in the Supreme Court’s library and consisting largely of “an array of historical material whose thoroughness would have been unthinkable twenty years earlier.”

Acknowledging that historical analysis does not always lead to the same conclusions, Scalia discussed the different outcomes reached in one case (McIntyre v. Ohio Elections Commission) by him and Justice Clarence Thomas, whom Scalia characterized as “the only other thoroughgoing originalist on the Court.” “See—originalists can have fun, too,” he observed.

Whatever imperfections there may be in the originalist method do not trouble him greatly, the Justice said. To illustrate, he told the story of two men who are running from a bear. One of the men says to the other, “We’ll never outrun this bear,” and the other says, “I don’t have
to outrun the bear; I just have to outrun you. “I don’t have to prove that originalism is perfect,” Scalia said. “It’s not perfect. The question is whether it’s better than anything else. And it is.”

When he was asked by a student in Professor Aziz Huq’s Constitutional Law class how he would approach past Supreme Court decisions that he believed were wrongly decided, Scalia answered that while he was not going to “go back and rip out half a century’s worth of jurisprudence,” he would consider overturning precedents based on three criteria: “How bad was the prior decision? ... How well accepted has it been? ... Does that prior decision permit me to function as a judge—which is to say, as a lawyer?” He cited *Roe v. Wade* as an example of a decision that does not withstand any of those tests.

Where he will not overturn past rulings that he believes were wrongly decided, Scalia said that he will limit the future applications of doctrines whose legitimacy he rejects. Of Substantive Due Process, for example, he said, “I’m not going to overturn everything that’s been decided on that basis, but I will not apply so-called Substantive Due Process in the future ... That means that there are all sorts of new rights that would otherwise be created that I will leave to the democratic process.”

In general, he told the students, “The Framers were trying to set a bar below which the society cannot go. They didn’t believe that every day we get better and better—the ‘evolving standards of decency that mark the evolution of a maturing society.’ They understood that societies not only mature—they sometimes rot. And they were trying to set a bar to prevent that rotting. To understand it in any other way, to mean whatever some future society wants it to mean, is to deprive it of all its effect.”

The Structure of Our Democracy

The democratic process, particularly as it is affected by the structure of the Constitution, was a main topic of Scalia’s when he led a spirited interaction with Professor Huq’s

Below; Justice Scalia met with the board of the Federalist Society, which he helped to found when he was a faculty member, and their faculty advisor, Professor M. Todd Henderson.
that interpretive approach. “Whenever you constitutionalize something, you are also federalizing it,” he said. In general, he said, the Bill of Rights is “just a parchment guarantee—any two-bit dictator can have a Bill of Rights.” The structural relationships established by the Constitution, particularly the separation of powers, are the true genius of American democracy. “You ignore the structure at your peril,” he told the students. “Letting life’s most important questions, like abortion, like [assisted] suicide, all those things, be decided by nine lawyers instead of by voters—Why would you want to do that?”

What is the Meaning of Life?

Asked by a student what he considered to be the most important issue that has not yet come before the Court, Scalia paused for a few moments before answering, “What is the meaning of life?” and then proceeding to share some jokes on that topic.

On a more serious note, he responded to a question from another student, about what advice he would give a law student today, by saying, “Try to find a practice that enables you to have a human existence. I’m not talking about time for goofing off; I’m talking about time to
Scalia answered that it would be remarkable if there were many fewer such decisions, since the high court generally finds itself considering very good decisions that have been carefully reasoned by excellent judges in lower courts. Assistant Dean Richard Badger inquired about the nature of the still-ongoing monthly poker game that Scalia and the late Chief Justice William Rehnquist founded in the 1980s. Scalia described the game’s stakes as “penny-ante, adjusted for inflation.” As for the outcome, he said, “I keep telling my wife that it evens out.”

**At the Federalist Society**

The Justice spent about an hour engaging with the board of the Chicago Law chapter of the Federalist Society and the Society’s faculty advisor, Professor M. Todd Henderson. Scalia helped organize the Society at the Law School in 1982 (as one of the first three law school chapters in the country), and served as its first faculty advisor. Society president Mark Jackson, ’12, says that Scalia’s presence was as inspiring as his words: “To have the most influential scholar and practitioner of originalism right there with us was an amazing honor in itself, and then to be able to bounce ideas off him and hear his thinking on many key issues—it’s something I’m not going to forget, and I think that’s true for all of us who enjoyed this great privilege.”

**The Elephant in the Room**

After his Schwartz lecture, Scalia entertained a half hour of questions. Asked why today’s Supreme Court confirmation hearings are so contentious, he first offered some historical perspective: “I was confirmed—it’s hard to believe this—I was confirmed by a vote of ninety-eight to nothing. Me!” He then stated his conviction that today’s close scrutiny of nominees arises from citizens’ awareness of the subjective nature of judging that has overtaken the Court. “Once they figured out that the Court is amending the Constitution, putting in new rights that didn’t exist before and taking out some rights that used to exist—once they have figured that out … the most important criterion becomes, is he or she writing the Constitution that I want? And of course that finds its way into the confirmation process.”

Asked about the Court’s controversial decision in *Kelo v. City of New London*, he said, “By my lights at least, the Court often gets the law wrong, but it very rarely gets the politics wrong—goes a bridge too far—but in this case it did…I don’t think *Kelo* is long for this world.”

Late in the questioning, Paxton Williams, ’13, was called on. “I have a question I’ve been wanting to ask you since 1994,” Williams said. Scalia asked, “Really? What did I
do in 1994? “You went to India,” Williams responded, “and what I want to know is, whose idea was it to take the elephant ride?” To much laughter, Scalia answered, “It was probably Ruth’s. I have a wonderful picture at home of me and Ruth Bader Ginsburg on the back of an elephant, led by a guy in a turban. Ruth is an incredible lady. We taught some summers together in Nice, and she went parasailing! You know, I’m surprised she ever came down—she’s so light. I wouldn’t go parasailing—are you crazy? So I’m pretty sure the elephant ride was Ruth’s idea.”

Mutual Appreciation
Scalia told his audience at the Schwartz Lecture, “A whole lot of what I am intellectually is attributable to this place. The University of Chicago is one of two or three of the most formidable intellectual institutions in the world; a really impressive place. You’re lucky to be here. And I’m glad to be back.”

Justice Scalia’s visit was, in many ways, a homecoming. During his visit he caught up with old faculty friends, visited his old office (now with a plaque commemorating his occupancy), and even spent time with his son Gene, a Class of 1990 graduate of the Law School. As he introduced Justice Scalia before the Schwartz Lecture, Dean Schill reinforced the connection between the Justice and the Law School. After amply profiling the Justice’s career, the Dean said, “With a career that extensive and varied, I suppose it might seem odd for all of us here at the Law School to continue to think of Justice Scalia as one of our own—which, make no mistake about it, we absolutely do. But all it takes is a glance at what has occupied Justice Scalia’s professional life for these last twenty-five years to see why we don’t just claim him as our own—in true Chicago fashion, we can prove it.” The proofs that the Dean provided, with ample supporting evidence, included Scalia’s reputation as a fierce debater; his prolific and influential writings; and “perhaps the most quintessentially Chicago trait, his intellectual honesty, combined with his desire to spend time with those who disagree with him.”

“He also gets more laughs during oral argument than any other Justice, by a lot,” the Dean added, “but I am not sure it is fair to say that that is a very Chicago trait.”

Reflecting on the Justice’s visit, Professor Stone praised Scalia’s “incredible generosity” with his time and energy.

“He’s just been great,” Stone said.

And so he was: honest, open, sometimes fierce, often funny, always generous. The meaning of life, however, will have to be left for another day.