5-1-2014

Justice Antonin Scalia: Consistently Orginalist

Christopher Scott Myles

JUSTICE ANTONIN SCALIA: CONSISTENTLY ORGINALIST

Christopher S. Myles

INTRODUCTION

Throughout his tenure on the Supreme Court, Justice Antonin Scalia has been applauded and criticized as a crusader for political conservatives.[1] Critics often accuse Justice Scalia of allowing his personal views to dictate his decisions. Some argue that after reaching these predetermined conclusions, Scalia masterfully relies on "originalism" to justify the holding, or conversely, that he abandons his constitutional principles when they clash with his beliefs.[2] Section I of this paper examines Justice Scalia's background and details the events that led to his appointment to the Supreme Court. Section II explains originalism and how Justice Scalia applies this methodology of constitutional interpretation throughout his cases. Finally, Section III analyzes several of Justice Scalia's opinions in the areas of Free Speech,[3] Separation of Powers, the Establishment Clause and Criminal Procedure and contrasts them with his background, ideology and judicial philosophy. As discussed *infra*, although Justice Scalia has strong personal views about religion, strong executive power and traditional American values, this paper seeks to show that Justice Scalia's opinions appear to be predominantly driven by originalism rather than his personal beliefs.[4]

---

[1] Jeffrey Rosen, *A Man of Influence*, N.Y. TIMES (Jan. 3, 2010), http://www.nytimes.com/2010/01/03/books/review/Rosen-t.html.

[2] *See, e.g.*, JOAN BISKUPIC, AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA (2009).

[3] The free speech analysis is limited to the rights of corporations as decided in *Citizens United v. Fed. Election Com'n*, 558 U.S. 310 (2010).

[4] The author admits that this conclusion is limited to the areas of Free Speech, Separation of Powers, Establishment Clause and Criminal Procedure. Furthermore, the author recognizes that critics have set forth plausible criticisms that Scalia's methodology allows him to reach conclusions that support his ideological beliefs under the guise of originalism. However, as discussed *infra*, Scalia has reached several holdings that contravene his personal beliefs.

I. THE ROAD TO THE SUPREME COURT

Justice Antonin Scalia was born during Lent on March 11, 1936 in Trenton, New Jersey.[5] His father Salvatore was an immigrant from Sicily who came to the United States at age 17.[6] His mother Catherine was born only two years after her parents immigrated to the United States from Italy.[7] Catherine and Salvatore, who were married in 1929, both valued religion and education.[8] At the time of their marriage, Catherine taught elementary school and Salvatore commuted between Trenton and New York City where he worked as a research assistant while he pursued his Ph.D. at Columbia University.[9] In 1934, Salvatore received an Italian-American fellowship that allowed him to study abroad at the University of Rome and University of Florence.[10] It was in Florence, during the summer of 1935, that Salvatore and Catherine learned that she was pregnant.

Shortly after Scalia was born, Salvatore accepted a job as an instructor in the Romance languages department at Brooklyn College.[11] However, the Scalias continued to reside in the tight-knit Italian neighborhoods of Trenton. During this time the family moved often, and lived with family members and friends. During Scalia's early childhood in Trenton, he was constantly surrounded by family who valued the traditions of Catholicism as well as education.[12] Finally, when Antonin was six years old the Scalia's moved to Queens, New York. This was the first time that the Scalias did not share a home with other families. The family home in Queens was filled with books and Catherine instilled in Scalia the importance of education at a young age. In Queens, Antonin attended elementary school at Public School 13. However, he was actively

---

[5] BISKUPIC, *supra* note 2, p. 11.
[6] *Id.* at p. 13.
[7] *Id.* at p. 11.
[8] *Id.* at p. 14.
[9] *Id.* at p. 14.
[10] *Id.* at p. 14.
[11] *Id.* at p. 15.
[12] *Id.* at pp. 12-5.

involved with religion and Antonin would leave school early each Wednesday to attend to Catholic education classes.[13]

When Antonin completed eighth grade, he obtained a scholarship to attend Xavier High School, a Jesuit school in Manhattan.[14] During his time at Xavier, Scalia participated in ROTC and performed military drills after school at the nearby armory; he proudly recalls carrying his rifle with him on the subway.[15] The four years spent at Xavier provided Scalia with discipline, "academic prowess," a high regard for Catholicism, and helped form his conservative ideals.[16] Scalia explained that he seriously considered becoming a priest after graduating from Xavier.[17] However, after graduating first in his class from Xavier in 1953, Scalia decided to attend college at Georgetown University. In 1957, Scalia graduated *summa cum laude* and received a Bachelor of Arts degree in History. As valedictorian, Scalia gave a speech to the graduating class which revealed his views about the influence of Catholicism in daily life. Scalia remarked, "If we will not be leaders of a real, a true, a Catholic intellectual life, no one will."[18]

From Georgetown, Scalia went to Harvard Law School. At Harvard, Scalia was the Notes Editor for the Harvard Law Review and graduated *magna cum laude* in 1960. While at Harvard, Scalia met Maureen McCarthy who was an undergraduate at Radcliffe College. The two met on a blind date that was arranged by a mutual friend who believed "the two Catholics in Cambridge would naturally like each other."[19] Maureen fell for Scalia quickly and the two were married shortly after graduation in 1960.[20] As Scalia recalls, "we were both devout Catholics. That was perhaps the most important thing we had in common. And being devout Catholic

---

[13] *Id.* at pp. 17-9.
[14] *Id.* at p. 21.
[15] *Id.* at pp. 21-2.
[16] *Id.*, at p. 21.
[17] *Id.*, at p. 28.
[18] *Id.* at p. 26.
[19] *Id.* at p. 30.
[20] *Id.*

means you have children when God gives them to you, and you raise them."[21] Eventually, Scalia and Maureen would have nine children together.

In 1961, Scalia took a job as an attorney in Cleveland, Ohio at the law firm of Jones, Day, Cockley and Reavis.[22] He left the firm in 1967 for a job as a Law Professor at the University of Virginia.[23] After four years of teaching, President Nixon appointed him general counsel for the Office of Telecommunications. In his role as general counsel, Scalia spent much of his time drafting federal policy for cable television. In mid-1974, Nixon nominated Scalia as Assistant Attorney General for the Office of Legal Counsel. Shortly after Nixon's resignation, President Ford continued the nomination and Scalia was confirmed on August 22, 1974.

As an Assistant Attorney General in the aftermath of Watergate, Scalia spent a lot of time testifying before congressional committees. He constantly defended the Ford administration by refusing to turn over documents on the basis of executive privilege.[24] It was also during the Ford Administration that Scalia argued his first, and only, case before the Supreme Court. Advocating for the government on behalf of Dunhill in the case of *Alfred Dunhill of London, Inc. v. Republic of Cuba*, Scalia's position was successful.

After Ford lost the election to President Carter, Scalia worked for the American Enterprise Institute for several months before taking a job at the University of Chicago Law School from 1977 to 1982. While at the University of Chicago, Scalia became the first faculty adviser to the University of Chicago's chapter of the Federalist Society.

When President Reagan was elected in 1980, Scalia interviewed for the position of Solicitor General but he was unsuccessful. Subsequently, he was offered a position on the Court

---

[21] *Id.*, at pp. 30-1.
[22] *Id.* at pp 31-2.
[23] *Id.*
[24] *Id.* at pp. 42-44.

of Appeals for the Seventh Circuit in 1982. However, Scalia declined hoping he would be nominated for a seat on the Court of Appeals for the District of Columbia ("D.C. Circuit"). The declination worked in Scalia's favor as he was offered a position on the D.C. Circuit later that year. Scalia accepted and was confirmed by the senate and sworn in on August 17, 1982.

During his tenure on the D.C. Circuit, Scalia was noted for his writing ability. He also drew the attention of the Reagan administration who liked his conservative opinions and criticisms of the Burger Court. In 1986, after Chief Justice Burger announced his retirement, Reagan nominated Justice William Rehnquist to fill the Chief Justice's seat. Reagan decided to nominate Scalia to fill Rehnquist's previous seat. Scalia gladly accepted the nomination.

During Scalia's confirmation hearings, he stated: "I assure you, I have no agenda. I am not going onto the Court with a list of things that I want to do. My only agenda is to be a good judge."[25] On September 17, 1986, Scalia was confirmed by the Senate in a vote of 98-0. On this date, he became the 103rd Justice of the Supreme Court and the first Italian-American on the Supreme Court.

III. THE JURISPRUDENCE OF AN ORIGINALIST

"I do not think the Constitution, or any text should be interpreted either strictly or sloppily; it should be interpreted reasonably."[26] Justice Scalia uses a methodology to statutory and Constitutional interpretation known as "originalism." Originalists believe that the Constitution should be interpreted to "mean what it meant when it was adopted."[27] In other words, if the text of a Constitutional provision is ambiguous Scalia will look toward the writings of the Framers to determine what the words of the provision *meant* when they were adopted in

---

[25] *Id.*, at p. 113.
[26] Justice Antonin Scalia, Speech to Woodrow Wilson International Center for Scholars (Mar. 14, 2005).
[27] BISKUPIC, *supra* n. 2, p. 4.

the eighteenth-century.[28] Scalia explains that his "manner of interpreting the Constitution is to begin with the text, and to give that text the meaning that it bore when it was adopted by the people."[29] However, the methodology of originalism differs from that of "original intent." Although judges that are guided by "original intent" review similar, if not the same, writings as originalists, proponents of original intent use these documents to interpret the provision based on what they subjectively believe the Framers sought to accomplish.[30] Conversely, proponents of original meaning will analyze the writings of the Framers as well as other relevant historical documents to understand what the most informed people of the time believed the text to *mean.* Scalia believes that the words should be interpreted in their plain meaning at the time of adoption; i.e., in order to understand the provision, one must identify what the words meant to the drafter.[31] In other words, interpretation should be guided by the original meaning of the text, not the intent of the drafters.

To do determine original meaning, Justice Scalia often relies on dictionaries from the time the text was drafted in order to ascertain the original understanding of the word at the time the provision was drafted.[32] For example, in *Arts v. Finley,*[33] Justice Scalia used a dictionary from 1776 to define the term "abridging" in order to determine if a statute violated the First Amendment's guarantee of freedom of speech.[34]

---

[28] *Id.*
[29] Id.
[30] KEVIN A. RING, SCALIA DISSENTS 6-9 (2004).
[31] *Id.; see also, Citizens United v. Fed. Election Com'n*, 558 U.S. 310, 385-86 (2010) (Scalia, J. concurring) (criticizing Justice Stevens for ignoring the meaning of the text and relying on the Framers' personal views to determine that they did not intend for the First Amendment to apply corporations).
[32] *See, e.g., Holloway v. United States*, 119 S. Ct. 966, 972-73 (1999) (Scalia, J., dissenting) (quoting *Black's Law Dictionary* to determine the customary meaning of intent); *Chisom v. Roemer*, 501 U.S. 380, 410 (Scalia, J. dissenting) (citing *Webster's Dictionary* for the meaning of "representatives").
[33] *Arts v. Finley, 524 U.S. 569 (1998)*
[34] *See, Arts v. Finley*, 524 U.S. 569, 595 (1998) (Scalia, J., concurring in part, concurring in the judgment); U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances")

In defense of his originalist approach, Scalia has argued that his personal views do not influence his opinions. In a speech to the Woodrow Wilson International Center for Scholars, Scalia explained:

> You see, I have my rules that confine me. I know what I'm looking for. When I find it — the original meaning of the Constitution — I am handcuffed. If I believe that the First Amendment meant when it was adopted that you are entitled to burn the American flag, I have to come out that way even though I don't like to come out that way. When I find that the original meaning of the jury trial guarantee is that any additional time you spend in prison which depends upon a fact must depend upon a fact found by a jury — once I find that's what the jury trial guarantee means, I am handcuffed. Though I'm a law-and-order type, I cannot do all the mean conservative things I would like to do to this society. You got me.[35]

Scalia makes a compelling argument that can be supported by many of his opinions in the Fourth Amendment area. It is unlikely to believe, as a Catholic and political conservative, that Justice Scalia would personally favor many of the rights his Constitutional interpretation affords criminal suspects. Additionally, as a political conservative it is unlikely that he would argue against regulation of punitive damage awards.[36]

Additionally, Scalia is skeptical of legislative intent for two reasons. First, he argues that legislative intent is unreliable because it is not always unitary.[37] In situations where it is impossible to ascertain a singular intent of the drafters, it is likewise impossible to attribute singular intent to the law. Second, Scalia firmly believes that legislative intent is illegitimate and that "we are governed by laws, not the intentions of the legislature."[38]

In addition to his traditionalist approach, Scalia is also a federalist and a judicial conservative.[39] He believes in a strict separation of powers between the branches of government. To Scalia, separation of powers and federalism are more important to protecting

---

[35] Justice Antonin Scalia, Speech to Woodrow Wilson International Center for Scholars (Mar. 14, 2005)
[36] *See e.g., B.M.W. of N. Am., Inc. v. Gore,* 517 U.S. 559 (1996) (Scalia, J. dissenting).
[37] RING, *supra* n. 30, pp. 8, 24-5.
[38] *Id.*
[39] *Id.* at pp. 8-9.

individual liberties than the Bill of Rights.[40] Accordingly, Scalia believes that judges should exercise judicial restraint and avoid legislating from the bench.[41] This coincides with Scalia's view that the Constitution is not a living document. In his view, interpreting the Constitution as a living document gives judges too much power and allows them to make determinations as to which rights are valued by the public and which rights can be discarded.[42]

IV. Justice Scalia's Search for Original Meaning as Evidenced by his Opinions

A. Original Meaning of the First Amendment's Right to Free Speech

The First Amendment to the United States Constitution provides, in pertinent part, "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[43] Justice Scalia's concurring opinion in *Citizens United v. Federal Election Commission,*[44] is a prime example of his disdain for the method of interpretation based on original intent.[45] In *Citizens United*, the Court held, *inter alia*, that a provision of the Bipartisan Campaign Reform Act of 2002 ("BCRA") violated the First Amendment because it restricted political speech by corporations and barred independent corporate expenditures for electioneering communications.[46] Although Justice Scalia joined the opinion of the Court, he wrote a concurring opinion to address the dissent's argument related to the original meaning of the First Amendment.[47] As previously indicated, Justice Scalia employs originalism, a method of interpretation that requires an analysis of the original meaning of the text, to interpret

---

[40] *See generally, id.* at pp. 43-6.
[41] *Id.*
[42] *See id.* at pp. 6-8; *see also,* Justice Antonin Scalia, Speech to Woodrow Wilson International Center for Scholars (Mar. 14, 2005).
[43] U.S. CONST. amend. I.
[44] *Citizens United v. Fed. Election Com'n*, 558 U.S. 310 (2010) [hereinafter, *Citizens United*].
[45] *See id.* at 385-86 (Scalia, J. concurring)
[46] *Id.* at 311.
[47] Scalia's concurring opinion is in response to Section III(1) of Justice Stevens' dissent titled, "Original Understandings." *See Citizens United,* 558 U.S. at 425 (Stevens, J. dissenting).

constitutional provisions.[48] In his concurrence, Scalia criticizes the dissent for reasoning that the Court's interpretation of the First Amendment, as it applies to free speech, was unsupported by the *original understanding* of the Constitution.[49] Scalia explains that Justice Stevens' dissent, which argued that the First Amendment does not extend free speech protections to corporations, is flawed because it fails to provide evidence that the text of the First Amendment could not apply to a corporation. To Scalia, the dissent mistakenly focuses on the Framers' personal distaste for corporations in order to conclude that corporations were not entitled to exercise free speech. For example, Scalia summarizes the dissents position as, "the Framers didn't like corporations . . . and therefore it follows (as night the day) that corporations had no rights of free speech."[50] He explains that the reasoning is flawed because the dissent's original understanding argument fails to address the original meaning of the actual text.[51] Scalia states, "[o]f course the Framers' personal affection or disaffection for corporations is relevant only insofar as it can be thought to be reflected in the understood meaning of the text they enacted – not, as the dissent suggests as a free standing substitute for that text."[52] He suggests that when dealing with a constitutional text that does not distinguish between speakers, the proper analysis would be to cite statements from the founding era that show corporations are not covered by the text.[53] Conversely, to support his position that the First Amendment was originally meant to apply to corporations, Scalia used historical examples of colonial corporations exercising their First Amendment freedoms. Scalia writes, "[f]or example: An antislavery Quaker corporation petitioned the First Congress, distributed pamphlets, and communicated through the press in

---

[48] *See* RING, *supra* n. 30, pp. 6-9.
[49] *Citizens United*, 558 U.S. at 385 (Scalia, J. dissenting).
[50] *Id.* at 386.
[51] *Id.*
[52] *Id. at 386.*
[53] *Id.*

1790.[54] Furthermore, he cites additional historical evidence to show that the freedom of the press, a textually similar clause, was understood to protect the publishing activities of editors and printers that acted through newspapers, which Scalia analogizes to modern-day corporations.[55]

Ultimately, Justice Scalia concludes that the original meaning of the First Amendment protects corporate speech because it is written in terms of "speech" and not in terms of "speakers."[56] He states there is no evidence to suggest that the text excludes any category of speaker.[57]

B. Scalia's Originalist Approach to Separation of Powers Often Results in Consistent Formalist Outcomes

Justice Scalia's jurisprudence in the separation of powers cases has become predictably consistent based on his formalist approach to the three branches of government and his originalist method of interpretation. Articles I, II, and II of the Constitution created three separate branches of federal government: the legislative, executive and judiciary. When interpreting the relationship or balance of power between these branches, most judges either take a formalist or functionalist approach. Justice Scalia's use of originalism routinely produces results that are formalist in the sense that they consistently interpret the Constitution as creating distinct separation of power between each branch of government.[58] Like most formalists, Justice Scalia believes that the Constitution draws clear lines and *separates* power between each branch of government. Accordingly, the Constitution assigns different powers to the executive,

---

[54] *Id.*
[55] *Id. at 390.*
[56] *Id.*
[57] *Id. at 392-93.*
[58] *See, e.g., Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) (Constitution forbids Congress to interfere with courts' final judgments and thus, the statute violated the Constitution's separation of powers); *Mistretta v. United States,* 488 U.S. 361, 413 (1988) (Scalia, J. dissenting) (Promulgation of sentencing guidelines is a lawmaking function and Congress violated separation of powers when they delegated that power to the United States Sentencing Commission).

legislative and judiciary and it does not allow these branches to share authority. Scalia's approach to interpreting the clear meaning of the Constitution has put him at odds with other members of the Court who embrace a more pragmatic, functionalist approach to separation of powers. Unlike formalists who draw sharp lines and build high-walls, functionalists use a "checks and balances" approach to provide for greater flexibility between the three branches.[59] Functionalists often look at the balance of power between the branches and then determine if one branch has usurped *too much* power from another.[60] Scalia openly opposes the functionalist approach to power between the branches. In his words, "[s]eparation of powers, a distinctively American political doctrine, profits from the advice authored by a distinctively American poet: Good fences make good neighbors."[61]

Scalia's views toward separation of power are not surprising given his jurisprudential approach of original meaning and his professional background. First, Article II, Section 1 of the Constitution reads: "[t]he executive Power shall be vested in a President of the United States of America."[62] In order to interpret this provision, Scalia looks at the plain meaning of the text. As he explains, this provision "does not mean *some* of the executive power, but *all* of the executive power."[63] Second, Scalia's actions during his position as Assistant Attorney General in the Office of Legal Counsel indicates that he firmly believes in strict separation of power in order to preserve the autonomy of the executive branch. For example, as Assistant Attorney General during the Nixon and Ford Administrations, Scalia often invoked "executive privilege" and refused to provide Congress with documents related to the Watergate Scandal.[64] Furthermore,

---

[59] William Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases,* 22 HARVARD J. L. & PUB. POL'Y 21, 21-3 (1998).
[60] *Id.* at p. 21-2.
[61] *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. at 240 (quoting Robert Frost).
[62] U.S. CONST. art. II, § 1, cl. 1
[63] *Morrison v. Olson,* 487 U.S. 654, 705 (1988) (Scalia, J. dissenting) (emphasis in original); *see infra at ??*
[64] BISKUPIC, *supra* n. 2, pp. 42-4.

when a bill was passed by Congress to amend the Freedom of Information Act ("FOIA") which would have increased the scope of FOIA, Scalia advocated for President Ford to exercise his veto power.[65] Scalia viewed the bill as a further intrusion on executive authority and he successfully persuaded Ford to veto the bill, however, the veto was overridden by Congress.[66] Given Justice Scalia's originalist methodology and the positions he took, as a member of the executive branch, to thwart the legislative branch from infringing on executive privilege, it not surprising that his opinions in *Morison,*[67] *Mistretta*[68] and *Plaut*[69] emphasize a strict separation of power between all three branches of government.

1. MORRISON V. OLSON[70] AND THE USURPATION OF EXECUTIVE POWER ACCORDING TO JUSTICE SCALIA

Up until 1978, investigations into the wrongdoings of executive officials were carried out by a "special prosecutor" who was appointed by the attorney general.[71] The special prosecutor was a position that could be terminable at will by the attorney general. During Watergate,[72] Archibald Cox was appointed by Attorney General Elliot Richardson as a special prosecutor assigned to investigate the Nixon administration's involvement in the break-in of the Democratic National Committee headquarters.[73] During the investigation, Cox learned that President Nixon used a secret taping system in the White House. Subsequently, Cox obtained a grand jury

---

[65] BISKUPIC, *supra* n. 2, pp. 45-7.
[66] *Id.*
[67] *Morrison v. Olson,* 487 U.S. 654 (1988) (Scalia, J. dissenting)
[68] *Mistretta v. United States,* 488 U.S. 361, 413 (1988) (Scalia, J. dissenting) (Promulgation of sentencing guidelines is a lawmaking function and Congress violated separation of powers when they delegated that power to the United States Sentencing Commission)
[69] *Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211 (1995)
[70] This case is given a longer analysis then some of the other cases because the author believes that it clearly demonstrates Justice Scalia's method of analysis and use of textualism.
[71] BISKUPIC, *supra* n. 2, 42-7.
[72] "Watergate" refers to the political scandal surrounding the break-in at the Democratic National Committee headquarters at the Watergate office in Washington, D.C. and the Nixon administration's attempted cover-up of it's involvement.
[73] BISKUPIC, *supra* n. 2, 42-7.

subpoena ordering Nixon to produce the recordings. However, Nixon refused and asserted that executive privilege allowed him to withhold the tapes. In October 1973, Nixon ordered the attorney general to terminate Cox as the special prosecutor. This dismissal led Congress to pass the Ethics in Government Act of 1978 ("Ethics Act").[74] The law allowed a "special court" to appoint an independent counsel upon the recommendation of the attorney general.[75] This new independent counsel could only be removed by the attorney general upon a showing of "good cause."[76]

The constitutionality of the independent counsel came before the Supreme Court in 1988 in the case of *Morrison v. Olson.*[77] Prior to the case reaching the Court, the House Judiciary Committee had begun an investigation into the Justice Department's role in a controversy between the House of Representatives ("House") and the Environmental Protection Agency ("EPA").[78] Specifically, the Judiciary Committee had found that Olson, and other officials in the attorney general's office, had given false testimony during an EPA investigation. Additionally, they found that two other officials in the attorney general's office, Schmults and Dinkins, had obstructed the investigation by withholding documents.[79] Consequently, the Special Division[80] appointed Morrison to investigate the allegations against Olson only but gave her jurisdiction to investigate whether Olson's testimony or any other matter related thereto violated federal law.[81] Eventually, a dispute arose between Morrison and the Attorney General regarding the scope of

---

[74] RING, *supra* n. 30, *p. 44-5.*
[75] *Id.*
[76] *Id.*
[77] *Morrison v. Olson,* 487 U.S. 654 *(1988)*
[78] *Id.* at 654.
[79] *Id.*
[80] The "Special Division" was a special court that was created by the Ethics in Government Act. In accordance with the procedures set forth in the Act, the Judiciary Committee provided their report to the Attorney General and requested that he seek appointment of an independent counsel to investigate the allegations against Olson and the other officials, Schmults and Dinkins. *See, id.*
[81] *Id.*

Morrison's jurisdiction and whether the independent counsel was given the power to investigate the other officials in the attorney general's office.[82] After the Special Division ruled that Morrison had jurisdiction to investigate whether Olson had conspired with other officials, she issued grand jury subpoenas to Schmults and Dinkins.[83] In response, Olson, Schmults and Dinkins made a motion to quash the subpoenas arguing that the independent counsel provisions were unconstitutional.[84] The District Court for the District of Columbia found the Act was constitutional and refused to quash the subpoenas. However, the D.C. Circuit reversed the lower court and found that the provisions violated the Appointments Clause of the Constitution.[85]

The majority in *Morrison*, used a functional approach to hold that the independent counsel provision of the Ethics Act did not violate the separation of powers principles of the Constitution. The Court explained that Article II of the Constitution vests executive power in the President which is extended to grant the President the power to appoint and remove "inferior officers."[86] Additionally, the independent counsel was an inferior officer with limited jurisdiction that could be terminated by the President (through the attorney general) for misconduct. The Court reasoned that the Act did not involve an attempt by Congress to increase its own powers at the expense of the executive branch. Additionally, by limiting the President's removal power to a showing of good cause, the Ethics Act did not undermine the President's ability to perform executive functions, nor did it allow the judiciary to usurp executive power.[87] In sum, the President's executive power was not impaired by the appointment of the independent counsel.

---

[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.* at 654-55.
[86] *Id at 655.*
[87] *Id.*

Justice Scalia's dissent in *Morrison* is a clear example of his formalist view that the Constitution establishes clear lines and separation of power between the three branches of government. Scalia dissented in *Morrison* on the basis that the Ethics Act was a violation of the Constitution's separation of powers. Specifically, he explained that criminal prosecution is an exercise of purely executive power and the appointment of the independent prosecutor deprived the President of exclusive control of that power. However, Scalia's opinion makes clear that he believes the implications of the majority's decision goes far beyond the facts of this case; to Scalia, the decision attacks the fundamental liberty that the Constitution was drafted to protect. In a long and passionate dissenting opinion, Scalia expresses dissatisfaction with the Court's functionalist approach to "balancing" powers between the branches.[88] Moreover, he criticizes the majority for focusing too much analysis on the technical details of the Appointments Clause and the removal power.[89, 90]

Scalia uses a regimented, step-by-step analysis to determine if the Ethics Act is unconstitutional. First, he looks at the text of the Constitution to determine which powers are granted to the executive. Next, he looks at the text of the Ethics Act to assess the powers given to the independent counsel. Finally, he determines if these powers conflict with those exclusively granted to the President. At the offset, Scalia states that the Ethics Act must be invalidated based on separation of powers principles if the Court determines that (1) the conduct

---

[88] *Id.* at 711-12.
[89] *Id.* at 703.
[90] Additionally, Scalia argues that creation of independent counsel is a product of a political power struggle between the legislative and executive branches. He discusses at length the political motivations and dangers that can arise through the appointment of independent counsel. For example, Scalia suggests that the independent counsel can be used as a tool by Congress to weaken the President and erode public support. He is skeptical about future uses of the independent counsel. Although this portion of Scalia's opinion has been omitted from my analysis, it is worth noting that Scalia's fears were felt by republicans and democrats alike prior to the 1992 election when an independent counsel leaked documents that suggested President Bush (then running for reelection) had lied regarding the Iran-Contra affair and during President Clinton's presidency when the independent counsel investigated Clinton's extramarital relationships and suspect land deals that led to his impeachment by the House of Representatives. *See*, Ring, *supra*, p. 47.

of a criminal prosecution is the exercise of purely executive power, and (2) the statute deprives the President of exclusive control over the exercise of that power.[91]

In accordance with his originalist approach to interpretation, Scalia began his analysis by looking at the principle of separation of powers enumerated in the text of the first sections of Articles I, II and III of the Constitution.[92] Scalia explains that the framers created separate branches of government in order to prevent a concentration of power in one department. For support, he cites the writings of framers James Madison and Alexander Hamilton:

> "[t]he Framers of the Federal Constitution similarly viewed the principle of separation of powers as the absolutely central guarantee of a just Government. In No. 47 of The Federalist, Madison wrote that '[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty.'"[93]

Scalia believes, "[w]ithout a secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of many nations of the world that have adopted, or even improved upon, the mere words of ours."[94]

Next, Scalia focuses his analysis on the language of Article II and the powers granted to the executive branch. As Scalia reiterates throughout his dissent, Article II states, "[t]he executive Power shall be vested in a President of the United States."[95] Scalia, relying on plain meaning, argues that the Constitution "does not mean *some of* the executive power, but *all of* the executive power."[96] He then explains that criminal prosecution is a purely executive power.

To determine if the statute violates separation of powers, Scalia's analysis moves to the powers given to the independent counsel. He explains that the independent counsel is "vested

---

[91] *Id.* at
[92] *See Id.* at 697-98.
[93] *Id.* at 697. (internal citations omitted).
[94] *Id.*
[95] *Id.* at 705 (quoting, U.S. CONST. Art. II., § 1, cl. 1)
[96] *Id.* (emphasis in original).

with the 'full power and independent authority to exercise all *investigative and prosecutorial* functions and powers of the Department of Justice [and] the Attorney General.'"[97] Additionally, the independent counsel may only be removed by a showing of good cause. In accordance with his original meaning philosophy, Scalia looks to the House Reports to determine the meaning of "good cause." In doing so, he explains that Congress meant the term "good cause" to be a limitation "protecting the independent counsel's ability to act independently of the President's direct control since it permits removal only for misconduct."[98]

To complete the analysis, Scalia finds that criminal prosecution is a purely executive function and thus the power granted to independent prosecutor infringes upon that power. Moreover, since the "good cause" limitation was *meant to,* and does, deprive the President of exclusive control of that power.

Scalia's dissent in *Morrison* is a prime example of his use of textualism to determine if a statute is Consitutional. Here, Scalia looked at the text and writings of the drafters of the Constitution to determine the exclusive powers granted to the executive branch. Subsequently, he looked at the text of the statute and the writings of Congress to determine the original meaning. Finally, he compared the powers given by each and concluded that the statute granted powers that were non-delegable by the Constitution. Some critics would argue that Scalia came to this conclusion based on his background as an assistant attorney general and his prior assertions of executive privilege. However, Scalia's opinion in *Morrison* appears to be entirely consistent with his jurisprudential approach to plain meaning and originalism.

---

[97] *Id.* at 706. (quoting, 28 U.S.C. § 594(a)) (emphasis in original).
[98] *Id.* at 707 (citing, H.R. Conf. Rep. 100-452, p. 37 (1987))

2. MISTRETTA V. UNITED STATES:[99] SCALIA TAKES ISSUE WITH THE CREATION OF A "JUNIOR VARSITY CONGRESS"

Shortly after the decision in *Morrison*, the Court was faced with another separation of powers case. In *Mistretta v. United States*,[100] the Court was asked to consider the constitutionality of the Sentencing Reform Act of 1984 ("SRA").[101] Specifically, the Court was asked to determine if Congress violated the nondelegation doctrine of the Constitution by delegating the power to promulgate sentencing guidelines for every federal criminal offense to the United States Sentencing Commission ("Commission"), an independent sentencing commission.[102] In an 8-1 decision, the Court found that the Sentencing Guidelines were constitutional. The majority's opinion, authored by Justice Blackmun, held that Congress "neither delegated excessive legislative power [to the Commission] nor upset the constitutionally mandated balance of powers among the coordinate Branches."[103] Specifically, the Court reasoned that the Constitution does not prohibit Congress from delegating the task of determining sentencing guidelines to an expert body in the judicial branch.[104] Justice Scalia, the lone dissenter, disagreed with the majority and argued that the issuance of guidelines was a lawmaking function that could not be delegated by Congress.[105]

In his dissent, Scalia once again analyzes the meaning of the challenged statute. He starts his analysis by looking at the role of the sentencing guidelines. To Scalia, the act of drafting sentencing guidelines is equivalent to drafting law because judges are bound to their restrictions

---

[99] 488 U.S. 361 (1989) (hereinafter, *Mistretta).*
[100] *Id.*
[101] The SRA established the United States Sentencing Commission ("Commission") within the judicial branch. *Mistretta,* 488 U.S. at 367-68. The Commission is comprised of seven voting members, at least three of which must be Federal Judges. The Commission must promulgate determinative sentencing guidelines which are binding on the courts. *Id.* at 367-69.
[102] *Id.* at 371.
[103] *Id.* at 412.
[104] *Id* at 412.
[105] *Id.* at 681. (Scalia, J. dissenting).

and can be overturned if they fail to abide by them. Scalia acknowledges that Congress may create advisory committees to *assist* them with their functions.[106] The constitutional problems arise when that agency is granted power. Similar to his analysis in *Morrison*, Scalia analyzes the text of Articles I, II and III of the Constitution. He distinguishes the language in Article I, that "*all* legislative Powers shall be vested in Congress," from the language of Article III, "the executive Power shall be vested in the President . . . ." Specifically, Scalia interprets the language and historical meaning to suggest that although the President may employ agencies to carry out executive functions, the legislative and judicial branches may not. By way of example, Scalia writes, "a judge may not leave the decision to his law clerk" and "Senators and Members of the House may not send delegates to consider and vote upon bills in their place"[107] He describes the Commission as "an independent agency exercising governmental power on behalf of a Branch where all governmental power is supposed to be exercised personally by the judges of courts."[108] Even more critical, Scalia points out that allowing the judiciary to appoint independent agency to fix sentencing previously exercised by district courts could lead to independent agencies that adopt rules of procedure and evidence – both purely judicial powers.

Following his typical framework of analysis, Scalia invokes the writings of the Framers of the Constitution to defend his position. He criticizes the majority for treating the Constitution as a mere "generalized prescription that the functions of the Branches should not be commingled too much" and their position that the Court should be the ultimate arbiter of "how much is too much" on a case-by-case basis.[109] He argues that the Framers already determined how much commingling was acceptable and documented it in the Constitution. To set forth original

---

[106] *Id.*
[107] *Id.* at 682.
[108] *Id.* at 682.
[109] *Id.* at 682-83.

meaning, Scalia quotes James Madison's explanation that separation of powers "[d]oes not mean that these [three] departments ought to have no *partial agency* in, or no *control* over the acts of each other." Although Scalia admits that the majority correctly cited this quote in their opinion, he argues that they improperly interpreted it. Scalia states that the meaning of Madison's statement was that "the commingling specifically provided for in the structure that he and his colleagues had designed – the Presidential veto over legislation, the Senate's ratification of treaties, the Congress' power to impeach and remove executive and judicial officers – did not violate a proper understanding of separation of powers."[110] It is clear that Scalia believes the Court is mistaken. He states that the Court places too much focus on their comingling analysis and fails to realize that the Constitution does not allow for a body that is not the Congress to make rules that have the effect of laws. To Scalia, the creation of the Commission was equivalent to the creation of another branch of government – a junior varsity Congress.[111]

Scalia's opinion in *Mistretta* is not a surprising result given his dissent in *Morrison* a year earlier. Following his textualist approach to separation of powers, Scalia is once again disappointed with the Court for taking a pragmatic approach to balancing the powers between the branches and ultimately concluding that Congress' delegation of power to the Commission was Constitutional because it was not excessive. To Scalia, the Constitution provides rules, not guidelines, which create exclusive powers to be exercised by each branch. As he points out, the Commission is not one of the three branches of government and "the only governmental power the Commission possesses is the power to make law; and it is not the Congress."[112]

---

[110] *Id.* at 683.
[111] *Id.* at 683.
[112] *Id.* at 681.

3. FINALLY IN THE MAJORITY: PLAUT V. SPENDTHRIFT FARM, INC.

Consistent with his prior dissents advocating a strict separation of powers, Scalia wrote the majority opinion in the 1995 case of *Plaut v. Spendthrift Farm, Inc.*[113] In *Plaut*, the Court held that Section 27A(b) of the Securities Exchange Act of 1934 (hereinafter, "1934 Act"), which required federal courts to reopen final judgments entered before its enactment, was unconstitutional because it violated separation of powers. Justice Scalia's analysis was consistent with his previous separation of powers cases as he methodically addressed the language of the Constitution and relied upon the writings of the Framers to assess the original meaning of the text.

In *Plaut*, the question presented to the Court was whether § 27A(b) of the 1934 Act, to the extent that it requires federal courts to reopen final judgments in private civil actions, contravenes the Constitution's separation of powers.[114][115] Prior to reaching the Supreme Court, this case was dismissed as time-barred following the Court's decision in *Lampf*,[116] which established a national statute of limitations standard for cases brought under §10(b) of the 1934 Act of "one year after the discovery of facts constituting the violation and within three years after such violation."[117] In response to the Court's decision in *Lampf*, Congress passed Section 27A[118] of the 1934 Act. The statute provided, *inter alia,* that civil actions brought under § 10(b) that

---

[113] *See Plaut*, 514 U.S. 211.
[114] The Court also analyzed whether § 27A(b) violated the Due Process Clause of the Fifth Amendment. However, this paper will only assess the separation of powers analysis.
[115] *Id.* at 213.
[116] *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991)
[117] Prior to the Court's decision in *Lampf*, district courts applied the applicable state statute of limitations for cases arising in their respective jurisdiction. The effect of the *Lampf* decision mandated application of the 1-year/3-year limitation period to pending suits in the lower courts, including the Petitioner's suit in *Plaut*. *Plaut*, 514 U.S. at 213-14.
[118] Section 27A of the 1934 Act was originally signed into law on December 19, 1991, approximately six months after the *Lampf* decision as Section 476 of the Federal Deposit Insurance Corporation Improvement Act of 1991. This section, which became § 27A of the 1934 Act was unrelated to FDIC improvements. *See Plaut*, 514 U.S. at 215.

were commenced prior to June 19, 1991[119] shall be subject to the limitation period provided by the laws of the applicable jurisdiction, *including principles of retroactivity.*[120] Additionally, it allowed actions that were dismissed as time-barred subsequent to June 19, 1991, which would otherwise have been timely filed under the limitation period of the applicable jurisdiction to be "reinstated on motion by the plaintiff not later than 60 days after December 19, 1991."[121] Following the enactment of § 27A, Petitioners filed a motion with the district court to reinstate their case. The district court found that Petitioners met the conditions set forth in the statute but nonetheless denied their motion on the grounds that § 27A(b) was unconstitutional.

Writing for the majority, Scalia seizes the opportunity to reiterate and solidify his Constitutional interpretation of a strict separation of powers between the three branches of government that he conveyed in his dissenting opinions in *Morrison* and *Mistretta.* Interestingly, Scalia's analysis and reasoning is almost entirely based on separation of powers principles which he believes to be "the narrower ground for adjudication of the constitutional questions in the case;" he only briefly addresses the due process challenge.[122] This is not surprising in light of Scalia's previous position on the dissenting end of the Court's separation of powers cases. His opinion, analysis and reasoning throughout the *Plaut* opinion appears is entirely consistent with his prior separation of powers opinions. In *Plaut*, Scalia clarifies that the doctrine of separation of powers is a structural safeguard rather than a remedy to be applied only when specific harm can be identified.[123] He explains that the separation of powers doctrine is a "prophylactic

---

[119] June 19, 1991 was the date that the Court decided *Lampf.*
[120] *Plaut, 514 U.S. at 214-15* (citing 15 U.S.C. § 78aa-1) (emphasis added).
[121] *Id.*
[122] *Id.* at 217.
[123] *Id.* at 239.

device" that established "high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict."[124]

Like his dissenting opinions in *Morrison* and *Mistretta,* Scalia began his analysis in *Plaut* by dissecting the language of the statute. Following his usual analytical framework, Scalia started his analysis by looking at the language of Section 27A(b) to determine the statute's plain meaning. Finding the text unambiguous, Scalia explained that the statute retroactively commanded federal courts to reopen final judgments.[125] Next, he examined the text of Article III of the Constitution, which provides the judicial branch with "the judicial Power of the United States."[126] Scalia then concludes that Congress, by requiring federal courts to exercise their judicial power, exceeded its authority "in a manner repugnant to the text, structure and traditions of Article III."[127] To support this conclusion, he looks at the historical role of the judiciary,[128] the writings of the Framers,[129] and the historical underpinnings of colonial legislatures that led to tripartite branches of government with separate and distinct powers.[130]

Scalia's search for original meaning in the *Plaut* analysis is a prime example of originalism. To support his proposition that the Constitution prevents the legislative branch from requiring the judiciary to reopen final judgments, Scalia cites "Colonial Censor Reports"[131] from Massachusetts, Vermont and Pennsylvania. The Censor Reports provided detailed accounts of

---

[124] *Id.* at 239.
[125] *Plaut*, 514 U.S. at 217-19.
[126] *Id.*
[127] *Id.*
[128] *See id.* at 218 (discussing *Marbury v. Madison*, 5 U.S. 137 (1803), the meaning of Article III powers and the role of the judicial branch in government).
[129] *See e.g., id.* at 219-23 (quoting the writings of James Madison, Thomas Jefferson and Alexander Hamilton)
[130] *See e.g., id.* at 219-221 (discussion of colonial legislatures and the Massachusetts, Vermont and Pennsylvania Counsil of Censor Reports which addressed issues related to judgments vacated by their respective legislatures).
[131] In the years leading up to the adoption of the U.S. Constitution, some of the individual state constitutions had created "Councils of Censors" that were required to "report to the people 'whether the legislative and executive branches of government have assumed to themselves, or exercised, other or greater powers than they [were] entitled to by the [respective state] Constitution.'" *Id.* at 219-220 (quoting Vermont State Papers 1779-1786, pp. 531, 533 (Slate ed. 1823)).

instances where state legislatures were usurping power from the state judiciary by vacating judgments of the courts through legislative acts.[132] Scalia argues that it was this type of legislative interference with judicial power by colonial legislatures that led the Framers to establish a clear separation between the legislative and judicial branches. After laying the historical foundation for his interpretation, Scalia concludes the analysis by quoting the writings of Jefferson, Hamilton and Madison. In each quotation, the respective Framer acknowledged the problems faced by Colonial judiciaries and their inability to perform judicial functions due to legislative interference. Scalia argues that this meddling was the reason why the Framers established an independent judiciary when they drafted Article III. To Scalia, ascertaining the original meaning of Article III, as it relates to the facts of this case, was relatively simple because Alexander Hamilton already described it when he wrote, "[a] legislature without exceeding its province cannot reverse a determination once made, in a particular case; though it may prescribe a new rule for future cases."[133] As Scalia has said in his defense of textualism, who better to gain insight from in what the text means than the informed people who drafted it.

C. SCALIA AND THE RELIGION CLAUSE CASES[134]

Justice Scalia does not hide the fact that religion plays a fundamental role in his life. Born and raised as a Roman Catholic, Scalia spent most of his early academic life in parochial school and later attended college at Georgetown, a Roman Catholic college.[135] Additionally, Scalia has been known to travel great distances to attend *more* traditional masses at churches he believes to be more in line with his conservative practice of the religion. As further evidence,

---

[132] *Id.*, at 220.
[133] *Id.* at 222 (quoting the writings of Alexander Hamilton in The Federalist No. 81, p. 545 (J. Cooke ed. 1961)).
[134] References throughout this paper to the "Religion Clause" or "Religion Clauses" refer to the Establishment Clause and Free Exercise Clause of the First Amendment to the U.S. Constitution.
[135] *See e.g.*, Kathleen M. Sullivan, *Justice Scalia and the Religion Clauses*, 22 U. HAW. L. REV. 449 (2000); and Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385 (2000).

Scalia seriously consider joining the seminary after high school and one of Scalia's sons is a catholic priest.[136] Critics are quick to point out Scalia's deeply religious personal life. Most often, they cite to his religious background after pointing out that Scalia has never once found a law to establish religion and thus, violate the Establishment Clause.[137] Consequently, many critics of Justice Scalia have used his Religious Clause opinions, especially dissenting opinions, to argue that he is a judicial activist furthering his own religious agenda.[138] However, as discussed in more detail below, an analysis of several of Scalia's opinions reveals that his conclusions on many Religious Clause cases are consistent with his original meaning approach to textual analysis. Moreover, it could be argued that Scalia's passionate and openly critical dissents in the Religious Clause cases are instead fueled by his disillusionment by the Court's selective use of tests to determine challenges to the Establishment Clause which contravenes his judicial philosophy that the Court should follow clear rules to interpretation in order to provide the public with notice and certainty.[139]

1. THE TEXT OF THE ESTABLISHMENT AND FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT

The First Amendment states, *inter alia*, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[140] The first portion of the text, known as the Establishment Clause,[141] has been interpreted by the Court to prevent the government from establishing a national religion and bar coercive or symbolic government union with religion.[142] The latter text, known as the Free Exercise Clause, protects the liberty of

---

[136] BISKUPIC, supra n. 2, p. 28.
[137] *See e.g., id.*
[138] *See e.g., id.*
[139] As discussed *infra*, Scalia is critical of the Court for picking and choosing when to invoke the Establishment Clause Test set forth in *Lemon*, and when to outright ignore the Lemon Test.
[140] U.S. CONST. amend. I.
[141] Specifically, "Congress shall make no law respecting an establishment of religion . . . ."
[142] *See*, Sullivan, *supra* n. 135, 449-452; RING, *supra* n. 30, p. 169.

religious practice from government interference.[143] Although government actions are often challenged in a single case as violating both Establishment and Free Exercise Clauses,[144] each clause produces a separate analysis for the Court.[145] In these situations, the Court first examines whether the government action violated the Establishment Clause.[146] Prior to the Court's decision in *Lee v. Weisman,*[147] the Court employed the "*Lemon Test,*" established in the Court's 1971 decision in *Lemon v. Kurtzman,*[148] to determine if a statute or government action violated the Establishment Clause.[149] The Lemon Test consisted of three prongs: (1) the government's action must have a secular legislative purpose; (2) the government's action must not have the primary effect of either advancing or inhibiting religion; and (3) the government's action must not result in an "excessive government entanglement" with religion. Under *Lemon,* if any one of these three prongs is violated, the government action violated the Establishment Clause.[150] If the action did not violate the Establishment Clause, the Court moves to the Free Exercises analysis and analyzes whether the government action overly burdens an individual's right to adhere to his or her religious customs.[151]

However, the Court changed course in their approach to the Establishment Clause analysis in the 1992 decision of *Lee v. Weisman.* Here, the majority largely ignored the *Lemon* Test and instead held that the government action violated the Establishment Clause because it subjected students to pressure and coercion.

---

[143] *Id.*
[144] RING, *supra* n. 30, p. 169.
[145] RING, *supra* n. 30, p. 167.
[146] Add footnote re the Lemon Test and then coercion and etc.
[147] *Lee v. Weisman,* 505 U.S. 577 (1992)
[148] 403 U.S. 602 (1971)
[149] *See generally, id.*
[150] *Id.*
[151] RING, *supra* n. 30, p. 169.

2. *LEE V. WEISMAN*[152]

In *Lee*, a student and her father challenged a Rhode Island public school's practice of inviting members of the clergy to offer an invocation and benediction prayer at the school's graduation ceremony.[153] Following a nonsectarian invocation and benediction prayer by a Rabbi at the school's graduation ceremony, the student and father sued the school district and argued that the prayer amounted to government required participation in religion.[154] Justice Kennedy, writing for the majority, ignored the *Lemon* Test and found that the prayer at graduation violated the Establishment Clause because it resulted in coercion and pressure on non-believing students.[155] Kennedy wrote, it is the "duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people."[156]

Scalia, joined by Chief Justice Rehnquist and Justices White and Thomas, dissented in *Lee.*[157] Although the heart of his analysis focused on the original meaning, history and tradition of the Establishment Clause, Scalia's opinion was very critical of Justice Kennedy and the majority for several additional reasons. First, Scalia attacks the majority for omitting any reference to history or tradition in their interpretation of the Establishment Clause. In doing so, he focuses on the inconsistency of Justice Kennedy's jurisprudence. Scalia dramatically highlights this at the offset by stating that he *cannot* join the majority opinion, which lacks any reference to history, because he previously joined Justice Kennedy's concurring opinion in *Allegheny,*[158] which stated that the

---

[152] *Lee v. Weisman*, 505 U.S. 577 (1992)
[153] *Id.* at 580.
[154] *Id.*
[155] *Id.*
[156] *Id.* at 597-99.
[157] *See Lee, 505 U.S. at 631* (Scalia. J., dissenting).
[158] *County of Allegheny v. ACLU, Greater Pitt. Chapter*, 492 U.S. 573, 657, 670 (1989) (Kennedy, J. concurring in judgment in part and dissenting in part).

> Establishment Clause must be construed in light of the '[g]overnment policies of accommodation, acknowledgment, and support for religion [that] are an accepted part of our political and cultural heritage.' That opinion affirmed that 'the meaning of the Clause is to be determined by reference to historical practices and understandings.' It said that '[a] test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause.'[159]

Second, in addition to bashing Justice Kennedy for turning his back on his *Allegheny* analysis, Scalia alleges that the majority is oblivious to the history and traditions of religious freedoms in the United States. For support, he cites a myriad of examples from important moments in U.S. history where the Framers have used prayers during ceremonies.[160] Third, Scalia mocks the Court's use of the psychological coercion test which he refers to as an "instrument of destruction" and "bulldozer of its social engineering."[161] Finally, Scalia predicts that the illogical reasoning employed by the Court had the potential to invoke a battle over the Pledge of Allegiance's phrase, "under God."[162]

Although Scalia's dissent in *Lee* is filled with harsh criticisms and colorful language that attacks the majority's reasoning, the crux of his analysis is based on the original meaning of the Establishment Clause as evidenced by the traditional use of prayer at government ceremonies and proclamations ranging from the days of George Washington and James Madison to President George H.W. Bush.[163] It is reasonable for those unfamiliar with Scalia's jurisprudence, to read his hostile dissent in *Lee* and opine that Scalia is biased toward right-wing policies of keeping God in the classroom. However, after closer analysis of Scalia's opinions in the separation of

---

[159] *Lee*, 505 U.S. at 631 (Scalia, J. dissenting) (quoting *Allegheny*, 492 U.S. at 657, 670 (Kennedy, J. concurring in judgment in part and dissenting in part).
[160] *See e.g., id.* at 633-36 *(quoting Madison's and Washington's inauguration ceremonies)*
[161] *Id.* at 631.
[162] Scalia's prediction was proven correct when the issue reached the Supreme Court in 2003.
[163] *See e.g., id.* at 634 (quoting text from James Madison's inaugural address, "In the guardianship and guidance of that Almighty Being whose power regulates the destiny of nations . . . .")

powers cases, it becomes clear that the *Lee* dissent was based on the same methodical analysis of original meaning.

3. *Lambs Chapel v. Center Moriches Union Free School District*[164]

In *Lambs Chapel*, the *Lemon* Test once again reemerged as the majority's test for Establishment Clause violations, despite the Court's failure to use it one-year prior in *Lee v. Weisman.* The case reached the Court on a church' challenge to a New York policy that allowed school facilities to be used for civic and social purposes but prohibited the use by any group for religious purposes.[165] The majority found that the New York school district's policy violated the free speech rights of the church. Additionally, the majority also stated that use of the school by the church would not violate the Establishment Clause.[166] Relying on *Lemon*, the Court found that showing films related to family values would not offend any of the three prongs.[167]

Concurring in the free speech judgment, Scalia took the opportunity presented by *Lambs Chapel*, to emphasize the irrationality of the Court's use of the *Lemon* test. In an eloquent fashion, Scalia informs the reader that *Lemon* has resurfaced by stating, "[l]ike some ghoul in the late-night horror movie that repeatedly sits up in its grave and shuffles abroad after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Central Moriches Union Free School District."[168] Once again, Scalia uses a textual approach to reach the conclusion that the church' use of the school would not violate the Establishment Clause. Looking for the meaning of the text, Scalia argues that it would be illogical for the Constitution, which gives "religion in general" preferential treatment through the Free Exercise Clause, to forbid endorsement of

---

[164] 508 U.S. 384 (1993).
[165] *Id.* at 393-95.
[166] *Id.*
[167] *Id.*
[168] *Id.* at 398 (Scalia, J. dissenting).

religion *in general*.[169] Scalia points out that the Establishment Clause was only meant to prevent government establishment of a national religion. To bolster this interpretation, Scalia quotes the Northwest Territory Ordinance that the Framers drafted during the summer of 1789, simultaneous to their drafting of the First Amendment, in which they wrote: "religion, mortality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall be forever encouraged."[170]

4. *McCreary County, Ky. v. ACLU of Ky.*[171,172]

Justice Scalia's passionate dissent in *McCreary* is one of Scalia's most controversial decisions in the Establishment Clause progeny. In *McCreary County,* the majority, led by Justice Souter, held that public displays of the Ten Commandments at county courthouses violated the Establishment Clause. Once again relying on the *Lemon* Test, the Court found that the government's actions violated the purpose prong. Specifically, the Court found that the predominant purpose of placing the statues in the courthouses was to advance religion which was a direct violation of the Establishment Clause.

It is clear from his dissent that Justice Scalia is enraged by the Court's analysis and reasoning for their interpretation of the Establishment Clause. In the majority opinion, Justice Souter stated, "[t]he divisiveness of religion in current public life is inescapable . . . [t]his is no time to deny the prudence of understanding the Establishment Clause to require the government to stay neutral on religious belief, which is reserved for the conscience of the individual." Consistent with his prior interpretations, Scalia again reiterates that the Establishment Clause

---

[169] *Id.* at 400.
[170] *Id.* at 400-01 *(quoting* Northwest Territory Ordinance of 1789).
[171] 545 U.S. 844 (2005)
[172] It is worth noting that on the same day the Court decided *McCreary*, the Court came to a different outcome based on similar facts in *Van Orden v. Perry*, 545 U.S. 677 (2005) (holding that display of monument inscribed with the Ten Commandments on the grounds of the Texas State Capitol *did not* violate the Establishment Clause because the monument was passive and had historical meaning in the Nation's history).

does not prohibit the government from allowing religious displays in the public forum. Furthermore, he takes issue with the majority's position that posting the Ten Commandments is unconstitutional because it favors one religion over another. Scalia concedes that this is a valid principle if it were applied in situations where public aid or assistance to religion is concerned, but he argues that the application is much more limited in relation to public acknowledgment of the Creator. In what appears to be a radical expansion from his previous opinions, Scalia states that the history and understanding of the Framers was for the Establishment Clause to allow government to actually favor religion over non-religion. He reaches this conclusion by determining that the founding fathers allowed "acknowledgment of a single Creator." From there, he argues that "it is entirely clear from our nation's historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits disregard of devout atheists."[173]

Scalia's opinion in *McCreary* appears to be a departure from his previous interpretations of the Establishment Clause. If so, this should present a conflict with originalism since their judicial approach is founded on the original meaning of the words in the Constitution. In other words, Scalia has been consistently citing and interpreting the same writings of the founding fathers to proclaim the meaning of the Establishment Clause since his early opinions in the mid-1980's.

In prior cases, Scalia took the position that the Establishment Clause originally meant that the government was prohibited from establishing a national church. In *Lambs Chapel,* Scalia alluded to the proposition that it would be illogical for the Establishment Clause to mean government was forbidden from endorsing religion in general. Here, Scalia expands his theory to a level not previously proffered through his historical analysis and search for the original

[173] *McCreary*, 545 U.S. at 893-94 (Scalia, J. dissenting).

meaning of the Establishment Clause. Scalia contends that the Establishment Clause not only allows for the government to favor religion over nonreligion – it also allows the government to favor monotheistic religions over polytheistic religions.[174] He argues that "it is entirely clear from our nation's historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits disregard of devout atheists." To Scalia history and tradition suggest the Constitution permits the government to favor religion over non-religion.[175]

At first glance, it would appear that Scalia's opinion in *McCreary* is a departure from his previous holdings and inconsistent with his original meaning approach to the Establishment Clause. However, closer analysis of Scalia's other cases and citation to historical tradition suggests that he has been alluding to his monotheistic favoritism theory all along. For example, in previous cases, Scalia has cited many speeches given by the Framers which give reference to "God" or "the Almighty" which would suggest their preference for a monotheistic god.[176]

D. Originalism Applied to Criminal Cases

Justice Scalia's use of textualism and original meaning is readily apparent in his opinions in the area of criminal procedure. Additionally, it is this area of law that makes it most difficult for critics to argue that his personal opinions influence his judicial outcomes. As Scalia explains, he searches for the original meaning of the text and "once I find that's what the [language of the Constitution] means, I am handcuffed. Though I'm a law-and-order type, I cannot do all the mean conservative things I would like to do to this society."[177] His opinions make it difficult to label him pro-prosecution or pro-defendant since many are favorable and many are unfavorable

---

[174] *Id.*, at 892-93.
[175] *Id.*
[176] *See, e.g., Lee v. Weisman, supra* n. 157.
[177] Justice Antonin Scalia, Speech to Woodrow Wilson International Center for Scholars (Mar. 14, 2005).

to criminal defendants. For example, Scalia has consistently limited the rights of police to conduct warrantless searches and he has vehemently argued that the confrontation clause allows criminal defendants to confront witnesses in open court in *all circumstances.* Conversely, Scalia has found that the death penalty is not cruel and unusual, even as applied to minors and that the Fifth Amendment does not require suspects to be advised of their Miranda Rights. \

1. SEARCH AND SEIZURE CASES

In *Kyllo v. United States,*[178] the Court held that the warrantless use of thermal imaging devices to scan a home was an unreasonable search under the Fourth Amendment.[179] In this case, government agents suspected that Kyllo was using high-intensity lamps to grow marijuana in his home. Without a warrant, agents used a thermal-imaging device to scan the home which uncovered disproportionate amounts of heat, consistent with the use of lamps, present in certain areas of the house. Based on the thermal imaging, agents were able to obtain a warrant to search Kyllo's home which uncovered marijuana.

The question before the Court was "whether the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a "search" within the meaning of the Fourth Amendment.[180] For Scalia, the question presented is not limited to thermal-imaging devices; rather, the Court must broadly address what limits there are to the use of advancing technologies to shrink the guaranteed privacy.[181] Writing for the majority, Scalia thought it necessary to take the "long view" of the Constitution to protect all types of warrantless surveillance of areas that cross the bright-line drawn at the entrance of the house. He explained, "[w]here, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant."[182] Scalia begins the analysis with his usual starting point – the text of the Fourth

---

[178] 533 U.S. 27 (2001)
[179] *Id.* at
[180] *Id.* at 29.
[181] *Id.* at 34.
[182] *Id.* at 40.

Amendment.[183] From there, he explains the history and tradition of the law of trespass and how the Court has interpreted the term, "search." Scalia explains that an area is "searched," for Fourth Amendment purposes, if it is an area that the individual has an expectation of privacy in in the area that society would recognize as reasonable. The interior of the home is one such area that is fundamentally protected from a search. Conversely, the exterior of the home is readily visible to the public and individuals walking on the public streets. Next, Scalia places emphasis on creating a distinction between ordinary visual surveillance of the exterior of a home and the use of a sense enhancing device to see into the home. He explains that visual surveillance, which does not include a physical intrusion, does not constitute a search because it is not shielded from the public view and the reasonable person wouldn't have a reasonable expectation of privacy. However, when a device is used to penetrate these walls the act becomes a search. Scalia argues that the original meaning of the Constitution was to allow a man to retreat into the safety of his home. Furthermore, the Fourth Amendment is to be construed in light of what was deemed to be unreasonable search when it was adopted. Although colonial agents did not have thermal imaging technology, it is clear that the Framers were concerned with warrantless searches of the home and technology that allows the government to look inside the home, without physical intrusion, is nevertheless a warrantless search.

Scalia is criticized by the dissent for creating a bright line in *Kyllo*. Justice Stevens points out that under Scalia's holding, the line drawn at the entrance to the house would be meaningless once the technology was brought into general public use. The dissent also argues that thermal imaging does not constitute a search because the device measures heat that is radiating from the external surface of the house. Heat, similar to light and aroma, enters the

[183] *See id.* at 31 ("The Fourth Amendment provides that '[the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated.'") (quoting, U.S. Const. am. IV.)

public domain once they leave the building. Stevens explains that the thermal imaging device was "off the wall" surveillance because it did not reveal intimate details of the area within the home. In response, Scalia attacks the dissent's position as illogical and impractical. He argues that it is contrary to the goals of creating workable accomodations between the interests of law enforcement and the interests protected by the Fourth Amendment. Under the dissents theory, there could never be a workable rule for law enforcement officers to determine if their actions were constitutional. By limiting the prohibition of thermal imaging to intimate details, an officer would not be able to know *in advance* whether his surveillance picks up intimate details.

Twelve years after the Court handed down the *Kyllo* decision, the Court was asked to determine if the use of a drug-sniffing dog on a homeowner's porch, to investigate the contents of the home, was a "search" within the meaning of the Fourth Amendment.[184] In *Jardines*, Police brought a drug-sniffing dog to Jardines' front porch. After the dog signaled a positive alert for narcotics, officers obtained a warrant to conduct a search of the home. The search revealed marijuana plants and Jardines was charged with drug trafficking offenses.

Justice Scalia, writing for the majority, held that investigation was a "search" within the meaning of the Fourth Amendment. Interestingly, Scalia found that the search was unconstitutional based on property rights[185] and did not address the *Katz*[186] analysis to determine whether the officers had violated the homeowner's reasonable expectation of privacy.[187] To this end, Scalia justifies his property-based analysis by clarifying that in *Katz*, the Court simply said

---

[184] *Florida v. Jardines*, 133 S. Ct. 1409, 1413 (2013)
[185] Specifically, the law of trespass.
[186] In *Katz v. United States*, 389 U.S. 347 (1967), the Court addressed whether the governments performed an unreasonable search by placing an electronic listening device in a public phone booth to listen to the defendant's conversations. The Court found that the Fourth Amendment protects people, not simply places and the content a person seeks to preserve as private, even in a public space, may be protected by the Fourth Amendment. The *Katz* test is to determine if the individual has a reasonable expectation of privacy that society is prepared to recognize. In *Katz*, the Court found that defendant had a reasonable expectation of privacy which the government violated.
[187] Most Fourth Amendment cases addressing the issue of unreasonable searches

that property rights were not the *sole* measure for Fourth Amendment violations. In other words, although *Katz* adds to the baseline to address situations where the governmental intrusion is *not* physical, it does nothing to prevent property rights from being used when the government *does* engage in physical intrusion.[188]

Justice Scalia's analysis, not surprisingly, begins with the text. He explains that information gathered by a physical intrusion is a "search" within the original meaning of the Fourth Amendment. Scalia adds that the language expressly protects the home. Thus, the curtilage, areas immediately surrounding and associated with the home, is also protected because it has been interpreted to be part of the home itself for Fourth Amendment purposes. Since Jardines' porch is curtilage, it must follow that it is also protected as being part of the home.

After determines that Jardines' porch is a protected area based on the original meaning of the Fourth Amendment, he addresses whether or not the officers' conduct constituted an unlicensed physical intrusion. Scalia lays the foundation of his analysis by examining the history and tradition of implied licenses. As he explains, a license may be implied from the habits of the country. Thus, he concedes, an individual who knocks on another's front door is typically not trespassing. The implicit license permits the visitor to approach the home, knock, wait to be received, and leave. However, Scalia argues that there is no customary invitation for a police officer to introduce a trained police dog to explore the area in hopes of discovering incriminating evidence. He determines that social norms that invite a visitor to the front door do not invite him to conduct a search. Here, the purpose of the officer bringing the drug-sniffing dog on the porch was to conduct a search. Scalia concludes that since the officers did not have an implied license to enter the porch, there search could not have been objectively reasonable.

---

[188] *Jardines*, 133 S. Ct. at 1414.

Justice Kagan, writing for the dissent, believes that Justice Scalia could have reached the same conclusion by applying the facts of *Jardines* to the bright-line rule he described in the *Kyllo* decision. For the concurring justices, the officers violated Jardines' right to privacy because they used a device not in the general public use (the trained drug-sniffing dog) to explore the details of the home that they would not have otherwise discovered without entering.

2. SCALIA AND THE CONFRONTATION CLAUSE

One of the best examples of Scalia's approach to original meaning of the Constitution can be found in his controversial dissenting opinion in *Maryland v. Craig.*[189] In this case, a child accused the defendant of sexually abusing her. Because the child was unable to testify in front of the defendant due to severe emotional trauma, the Court allowed her to testify via closed circuit television in which the defendant and the jury could see her, but she could not see them. The defendant was convicted and appealed on the basis that the transmitted testimony violated the Sixth Amendment's Confrontation Clause.[190] The Supreme Court held that the Sixth Amendment did not bar the use of the transmitted testimony because the jury could see the witness' demeanor, the witness was cross-examined by the defense attorney, and the defendant had an opportunity to test her credibility in front of the jury.[191] The majority found that the Confrontation Clause only provides a "preference" for face to face in person confrontation which could be limited to protect sufficiently important interests.[192]

In dissent, Scalia slammed the Court for their holding and accused them of subordinating explicit constitutional text to current favored public policy. He states, "[t]he Sixth Amendment provides, with unmistakable clarity, that '[i]n all criminal prosecutions, the accused shall enjoy

---

[189] *Maryland v. Craig,* 497 U.S. 836 (1990).
[190] *Id.* at 840-43.
[191] *Id.* 859-60.
[192] *Id.*

the right . . . to be confronted with the witnesses against him'[193] . . . Because the text of the Sixth Amendment is clear, and because the Constitution is meant to protect against, rather than conform to, current "widespread belief," I respectfully dissent."[194] Scalia criticizes the Court's reasoning that face to face confrontation is not an indispensable element of the right to confront one's accusers. He states, "That is rather like saying "we cannot say that being tried before a jury is an indispensable element of the Sixth Amendment's guarantee of the right to a jury trial."[195]

Scalia classifies the Court's opinion as anti-textualist and accused them of "cobbling together scraps of dicta from various cases" that are irrelevant to the issue.[196] (p. 863). He interprets the text to be clear and unambiguous. Furthermore, he states that the Court's use of interest-balancing tests are irrelevant and not permitted, "[w]e are not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then to adjust their meaning to comport with our findings." To Scalia, it is not enough that the Maryland procedure gave the defendant "virtually" all of the same rights that the Confrontation Clause guarantees. In other words, under Scalia's textual interpretation, if the procedure does not allow defendant to confront the witness face-to-face it is unconstitutional.[197]

IV. CONCLUSION

It is unquestionable that Justice Scalia's life has been heavily influenced by religion, federalism and political conservatism. However, based on the opinions analyzed above, it appears that his legal conclusions and opinions are based on his original meaning methodology to constitutional interpretation. Although some would argue that Scalia uses his religions views

---

[193] *Id.* at 860-61(Scalia, J. dissenting) (quoting U.S. CONST. amend. VI.)
[194] *Id.*
[195] *Id. at* 862.
[196] *Id.* at 863.
[197] *Id. at* 870.

and conservative values to reach his outcomes, close analysis of his opinions suggests that he reaches consistent conclusions based on his original understanding of the text. Furthermore, his decisions protecting individuals that burn the American flag, allow minors to purchase violent video games, allow violent criminal defendants to face their victims, protect drug dealers from nonintrusive searches and his dissent arguing that the government cannot limit punitive damages awards are all contrary to his personal beliefs.