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# Adherence to the Code: Justice Antonin Scalia's Italian American Jurisprudence

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**Adherence to the Code: Justice Antonin Scalia's**  
**Italian American Jurisprudence**

By: Michael Spizzuco

Supreme Court Justice Antonin Scalia is arguably the most controversial Justice on the United States Supreme Court. Justice Scalia is known for his scathing dissents and originalist views. This paper analyzes Justice Scalia's jurisprudence and asserts that a motivating factor in Justice Scalia's decision-making is his Italian-American heritage. Part I of this paper offers a biography of Justice Scalia. Part II introduces the theory of this paper and Justice Scalia's jurisprudential approach. Finally, Part III summarizes ten (10) Supreme Court Opinions authored by Justice Scalia and explains how his decision in each opinion relates to his Italian-American heritage.

## **I. BIOGRAPHICAL INFORMATION**

Antonin Gregory Scalia was born in Trenton, New Jersey, on March 11, 1936.<sup>1</sup> Justice Scalia was born to Salvatore Eugene Scalia, a Sicilian immigrant who eventually became a professor of romance languages at Brooklyn College, and Catherine Scalia, an elementary school teacher.<sup>2</sup> When Justice Scalia was six years old, his family moved from Trenton to Elmhurst, Queens.<sup>3</sup> Upon completion of middle school, Justice Scalia was awarded a scholarship to attend the prestigious Xavier High School in Manhattan. After graduating first in his class at Xavier<sup>4</sup>, Justice Scalia attended Georgetown University for his undergraduate studies. Justice Scalia graduated from Georgetown as class valedictorian and *summa cum laude* with a degree in History in 1957.<sup>5</sup> For his graduate studies, Justice Scalia attended Harvard Law School and graduated magna cum laude in 1960, while also attaining the Sheldon Fellowship of Harvard University.<sup>6</sup>

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<sup>1</sup> Molotski, Irwin, "The Supreme Court: Man in the News; Judge with tenacity and charm: Antonin Scalia", *The New York Times*, (June 18, 1986), retrieved August 23, 2014.

<sup>2</sup> Biskupic, Joan, *American Original: The Life and Constitution of Supreme Court Justice Antonin Scalia*, Sarah Crichton Books, pp. 11-15. (2009).

<sup>3</sup> Biskupic pp. 17-19.

<sup>4</sup> Marcus, Ruth, "Scalia tenacious after staking out a position", *The Washington Post*, (June 22, 1986), retrieved August 23, 2014.

<sup>5</sup> Molotski (1986).

<sup>6</sup> Fox, John, *Biographies of the Robes: Antonin Gregory Scalia*, pbs.org, retrieved August 23, 2014.

From 1961 through 1967, Justice Scalia served as an associate for the firm Jones, Day, Cockle and Reavis in Cleveland, Ohio.<sup>7</sup> Justice Scalia soon moved his family to Charlottesville, Virginia where he spent four years as a Professor of Law at the University of Virginia.<sup>8</sup> After four years teaching at the University of Virginia, President Richard Nixon appointed Justice Scalia as the general counsel for the Office of Telecommunications Policy. From 1972 until 1974, Justice Scalia served as the chairman of the Administrative Conference of the United States.<sup>9</sup> Halfway through 1974, President Nixon nominated Justice Scalia as an Assistant Attorney General for the Office of Legal Counsel.<sup>10</sup> Justice Scalia taught at University of Chicago Law School from 1977 continuing through 1982.<sup>11</sup> He did, however, spend one year as a visiting professor at Stanford Law School.<sup>12</sup>

In early 1982, Justice Scalia was offered a seat on the United States Court of Appeals for the Seventh Circuit in Chicago. However, Justice Scalia turned the position down, hoping instead to be appointed to the United States Court of Appeals for the District of Columbia Circuit. In mid-1982, Justice Scalia got his wish when President Ronald Reagan appointed him to the D.C. Circuit.<sup>13</sup> While serving on the D.C. Circuit, Justice Scalia's scathing opinions caught the attention of the Reagan administration officials.<sup>14</sup> In 1986, Chief Justice Warren Burger stated his intent to retire. President Reagan nominated Associate Justice William Rehnquist to be the Chief Justice, however,

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<sup>7</sup> *Scalia Speaks in Ames, Scolds Aggressive Student*, Harvard Law Record, December 7, 2006, retrieved August 23, 2014.

<sup>8</sup> Biskupic (2009), pp. 37-38

<sup>9</sup> Fox.

<sup>10</sup> Fox.

<sup>11</sup> Shipp, E. R., "Scalia's Midwestern colleagues cite his love of debate, poker, and piano", The New York Times, (July 26, 1986), retrieved August 23, 2014.

<sup>12</sup> Staab, James, *The Political Thought of Justice Antonin Scalia: A Hamiltonian on the Supreme Court*, Rowman & Littlefield, (2006).

<sup>13</sup> Biskupic (2009), pp.80.

<sup>14</sup> Taylor, Stuart, "Scalia's views, stylishly expressed, line up with Reagan's", *The New York Times*, (June 19, 1986), retrieved August 23, 2014.

that left a position as Associate Justice open.<sup>15</sup> President Reagan nominated Judge Scalia<sup>16</sup> and the Senate unanimously confirmed him on September 17, 1986, allowing Justice Scalia to become the first Italian-American Supreme Court Justice.<sup>17</sup>

There has been some controversy of Justice Scalia's confirmation, however. The Senate Judiciary Committee overseeing Justice Scalia's confirmation had just finished affirming Chief Justice Rehnquist's nomination, which proved challenging. According to witnesses and Democratic Senators, Justice Rehnquist has engaged in activities designed to discourage minorities from voting.<sup>18</sup> Further, the Senate Judiciary Committee had learned that the proposed Chief Justice wrote a legal memorandum for Justice Robert H. Jackson on the landmark *Brown v. Board of Education*<sup>19</sup> case. The memo read: "I realize it is an unpopular and unhumanitarian position, for which I have been excoriated by 'liberal' colleagues, but I think *Plessy v. Ferguson*<sup>20</sup> was right and should be reaffirmed."<sup>21</sup> Of course, a plain meaning of this memorandum would offer the conclusion that Chief Justice Rehnquist did not support integration of public school systems. Accordingly, the Committee members did not wish to battle over a second nomination and were reluctant to oppose the first Italian-American nominee.<sup>22</sup>

## **II. JUDICIAL APPROACH**

Justice Scalia is a self-described originalist, meaning that he interprets provisions of the United States Constitution as it would have been understood when the provision was put into

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<sup>15</sup> Biskupic (2009), pp. 104-109.

<sup>16</sup> Biskupic (2009), pp. 104-109.

<sup>17</sup> Dautrich, Kenneth; Yalof, Alistair Yalof. *American government: historical, popular, and global perspectives*. Cengage Learning. p. 241. (2009).

<sup>18</sup> Biskupic (2009), pp. 100, 109-110.

<sup>19</sup> 347 U.S. 483 (1954)

<sup>20</sup> 163 U.S. 537 (1896)

<sup>21</sup> Liptak, Adam. *New Look at an Old Memo Casts More Doubt on Rehnquist*. The New York Times, published March 19, 2012. Retrieved November 25, 2014.

<sup>22</sup> Biskupic 2009, pp. 100, 109-110.

effect. According to the Justice himself, "It's what did the words mean to the people who ratified the Bill of Rights or who ratified the Constitution."<sup>23</sup> This, therefore, means that Justice Scalia believes Amendments to the Constitution are also to be interpreted based upon their meaning at the time the Amendment was passed.<sup>24</sup> Further, Justice Scalia opposes other scholars who speculate about the intent of the drafters and the view that the Supreme Court must interpret the language of the Constitution figuratively.<sup>25</sup> Moreover, Justice Scalia is vehemently opposed to the concept of a living constitution, meaning, the power of the judiciary to modify the interpretation and meaning of constitutional provisions to adapt to the changing ideals of society.<sup>26</sup> Similar to his views on constitutional interpretation, Justice Scalia is a textualist regarding statutory interpretation. This school of thought believes that the ordinary and plain reading of the statute should govern its application and meaning. In interpreting statutes, Justice Scalia refuses to reference or take into consideration the legislative history behind said statutes.<sup>27</sup> This approach and Justice Scalia's decisions are due, in part, to his Italian-American heritage.

In Italian-American culture, family is incredibly important.<sup>28</sup> According to Thomas and Mary Shaffer, "It was the family, not the individual, that moved from the highly protective enclave of the old way (*la via vecchia*) to concern (*campanilismo*) for place of origin (*paese*) and for the extended family that eventually resulted from this broader community of concern (*paesani*)."<sup>29</sup>

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<sup>23</sup> *Justice Scalia on the record*, cbs.com, August 24, 2008, archived from the original on January 4, 2010, retrieved August 23, 2010.

<sup>24</sup> Greenhouse, Linda, "Washington talk: High Court still groping to define due process", *The New York Times*, (May 31, 1990), retrieved August 23, 2014.

<sup>25</sup> Scalia, "The Rule of Law as a Law of Rules," 56 U. Chi. L. Rev. 1175

<sup>26</sup> Greenhouse (1990).

<sup>27</sup> Rossum, Ralph, *The textualist jurisprudence of Justice Scalia*, Claremont McKenna College, archived from the original on January 25, 2010, retrieved August 23, 2014.

<sup>28</sup> D'Andrea, *The Social Role Identity of Italian American Women: An Analysis and Comparison of Familial and Religious Expectations*, in THE FAMILY AND COMMUNITY LIFE OF ITALIAN AMERICANS 61 (R.N. Juliani ed. 1983)

<sup>29</sup> Thomas L. Shaffer Mary, *Character and Community: Rispetto As A Virtue in the Tradition of Italian-American Lawyers*, 64 Notre Dame L. Rev. 838, 843 (1989)

Further, the Shaffer's determined that this shift was possibly due to the concept of *rispetto*. *Rispetto* is the way to "acknowledge publicly one's position...and thereby to incur a set of obligations."<sup>30</sup> Incurring obligations, though, is a position that is within and from the family, thereby creating obligations for the family. However, modern Italian-Americans have shifted their focus from primarily on the family, to the immediate community and finally through the contributions of a group to the host culture. Specific characteristics that support this notion include:

- (1) a sense of place (*paese*), an inheritance from the generation of immigrants who expanded the protection of the family to include fellow villagers (*paesani*);
- (2) independence, the desire and skill to act on one's own "and in the event of a real need for help [to go] to one's family";
- (3) courage — *segendo in piume in fama non si vien ne sotto coltre* (fame does not come to one who lies on feathers under a blanket);
- (4) self-respect—*fare bella figura*—which necessarily includes respect in and for the family; and
- (5) respect for the place of the outsider, when one is in the outsider's place, so that one does not flaunt one's own ways in the presence of strangers.<sup>31</sup>

Equally as important as family to Italian-American culture, is a penchant for a strict set of rules to be followed, leading to a strong sense of cohesiveness in the family structure.<sup>32</sup> Structure in Italian-American families is largely authoritarian; freedom for the children is not encouraged or

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<sup>30</sup> *Id.* at 844, citing Notarianni & Raspa, *The Italian Community of Helper, Utah: Its Historic and Folkloric Past and Present*, in THE FAMILY AND COMMUNITY LIFE OF ITALIAN AMERICANS, *supra* note 23 at 31.

<sup>31</sup> *Id.* at 845, citing Viscusi, *Il Caso della Casa: Stories of Houses in Italian America*, in THE FAMILY AND COMMUNITY LIFE OF ITALIAN AMERICANS, *supra* note 23 at 115-116

<sup>32</sup> Peter A. Lauricella, *Chi Lascia La Via Vecchia Per La Nuova Sa Quel Che Perde E Non Sa Quel Che Trova: The Italian-American Experience and Its Influence on the Judicial Philosophies of Justice Antonin Scalia, Judge Joseph Bellacosa*, 60 Alb. L. Rev. 1701, 1706 (1997)

permitted by the parents.<sup>33</sup> This resulted in strict discipline and a delayed independence from family.<sup>34</sup> Accordingly:

...there were rules Italian-American children were to follow, no questions asked, which gave them a strong sense of right and wrong. This rule-oriented upbringing led Italian-American scholar John Horace Mariano to conclude that two resultant characteristics of Italian-Americans are “[s]traightforwardness and honest dealing” and “[s]ubmission to the majesty of the law.”<sup>35</sup>

The “rules” mentioned above aren’t necessarily the law of the United States; there has long been a history of organized crime within Italian-American culture. However, the “mafia” has their own code: *Omerta*. *Omerta* is the code of silence that all Mafioso undertake.<sup>36</sup> Specifically, *omerta* refers to the “categorical prohibition of cooperation with state authorities or reliance on its services, even when one has been a victim of a crime.”<sup>37</sup> Further, according to *omerta*, Mafioso should avoid interfering in the business of others and should not inform the authorities of a crime under any circumstances. The mafia follows this code uniformly; deviation is punishable by death.<sup>38</sup> Although the mafia’s rules (*omerta*) are not legal by any means, the Italian-American mafia still follows their code or set of rules, much like all Italian-Americans. The code is strict and deviation is not acceptable.

This paper seeks to establish that Justice Scalia’s originalist and textualist beliefs are a result of his Italian-American upbringing. Two main theories permeate through Justice Scalia’s decision-making and opinion writing; the strong sense of family and a strict sense of obedience to

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<sup>33</sup> *Id.* at 1707, citing Andrew Rolle, *The Italian-Americans: Troubled Roots* (1980) at 114.

<sup>34</sup> *Id.*, citing Colleen Leahy Johnson, *Growing Up and Growing Old in Italian-American Families* (1985) at 183

<sup>35</sup> *Id.*, citing John Horace Mariano, *The Italian Contribution to American Democracy* 239 (1975)

<sup>36</sup> Cutrera, Antonio *La mafia e i mafiosi*, Reber, Palermo: 1900, p. 27 (reprinted by Arnaldo Forni Editore, Sala Bolognese 1984, quoted in Nelli, *The Business of Crime*, p. 13-14.

<sup>37</sup> Paoli, Letizia, *Mafia Brotherhoods: Organized Crime, Italian Style (Studies in Crime and Public Policy)*. Oxford University Press, New York. 2003.

<sup>38</sup> *Id.*



a set of rules or code.<sup>39</sup> The section that follows analyzes ten (10) of Justice Scalia's opinions<sup>40</sup> and proffers a theory on how Justice Scalia's Italian-American heritage and upbringing influenced each decision.

### **III. CASE STUDIES**

#### **A. Roper v. Simmons**<sup>41</sup>

The Defendant, Christopher Simmons, plotted a murder with two young men when he was seventeen (17) years old. One of the individuals eventually backed out of the plan. Nonetheless, Simmons and an accomplice broke into the victim's home by reaching through an open window and unlocking the door. When the victim awakened and wandered into the hallway, Simmons immediately recognized her from a previous car accident involving the both of them. The perpetrators bound the victim with electrical wire and wrapped her entire face in duct tape. From there, the perpetrators forced her into a vehicle, drove her to a state park<sup>42</sup> and threw her off a bridge, drowning the victim.

When the case was brought to trial, the evidence to convict Simmons was overwhelming. Not only had Simmons confessed to the police, but he also performed a video reenactment of the crime. Additionally, there was testimony from Simmons' accomplice that implied that the murder was premeditated. After trial, the jury returned a guilty verdict for Simmons<sup>43</sup> and recommended a death sentence, which was accepted by the court. Immediately, Simmons appealed the case, initially arguing that he received ineffective assistance of counsel<sup>44</sup> since his trial attorney did not

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<sup>39</sup> A host of sub-factors related to the main theories opined above include: A sense of place or comfort in one's place, courage, self-respect, respect for others, a limitation on freedoms, and straightforwardness.

<sup>40</sup> A blend of majority, concurring and dissenting opinions.

<sup>41</sup> 543 U.S. 551 (2005).

<sup>42</sup> *Id.* at 556.

<sup>43</sup> *Id.* at 557

<sup>44</sup> *Id.* at 558

raise his age, impulsiveness and troubled background as potential mitigating factors. The trial court rejected Simmons' motion, which Simmons appealed.

As Simmons appealed his sentence, the Supreme Court ruled on *Atkins v. Virginia*<sup>45</sup>, holding that the mentally retarded could not be executed. Simmons thereafter filed a new petition for post conviction relief and the Supreme Court of Missouri followed *Atkins*<sup>46</sup> and Simmons was then sentenced to life imprisonment without parole.<sup>47</sup> The State of Missouri appealed the Missouri Supreme Court's decision to the United States Supreme Court.

In writing the majority opinion, Justice Kennedy, joined by Justice Stevens, Justice Souter, Justice Ginsburg and Justice Breyer, began his analysis by examining a number of cases decided in the past determining the validity of capital punishment for those under the age of eighteen (18).<sup>48</sup> In 1988, the Court decided *Thompson v. Oklahoma*<sup>49</sup>, which barred the execution of criminal offenders under the age of sixteen (16).<sup>50</sup> Further, in 1989, the Court upheld capital punishment for offenders sixteen (16) or seventeen (17) years old when they committed capital offenses.<sup>51</sup> However, in 2005, using the "evolving standards of decency" test, the Court held that it was cruel and unusual punishment to execute an offender who was under the age of eighteen (18) at the time of the murder. The majority cited numerous sociological and scientific studies that concluded juveniles have a lack a maturity and responsibility compared to their adult counterparts.<sup>52</sup> Further,

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<sup>45</sup> 536 U.S. 304 (2002).

<sup>46</sup> *Id.* at 559 .

<sup>47</sup> *Atkins* overturned the death penalty for the mentally retarded. According to the Supreme Court of Missouri, "a national consensus has developed against the execution of the mentally ill" and as such, the execution of the mentally ill was deemed to violate the Eighth Amendment. Taking this decision into consideration, the Supreme Court of Missouri sentenced Simmons to life imprisonment, as opposed to death. While Simmons was not mentally retarded, the court may have compared the capability of understanding crime at his age to those that are mentally retarded. See Katcsh, M. Ethan, *Taking Sides. Clashing Views on Legal Issues* (13<sup>th</sup> Ed.), Boston: McGraw Hill Higher Education, p. 247 (2008).

<sup>48</sup> *Id.* at 560

<sup>49</sup> 487 U.S. 815 (1988).

<sup>50</sup> *Id.* at 561

<sup>51</sup> *Stanford v. Kentucky*, 492 U.S. 361 (1989).

<sup>52</sup> 542 U.S. at 564-569

teenagers were found to be the most overrepresented group in many categories of reckless behavior. The Court also acknowledged that almost every state prohibited those under eighteen (18) from serving on juries, voting, or marrying without parental consent.<sup>53</sup>

The Court also noted that there was an increasing frequency in which states were choosing not to execute juvenile offenders. At that time, twenty (20) states had the legal authority to execute juvenile offenders. However, only six (6) states had actually executed juveniles since 1989 and only three (3) of those doing so in the previous ten (10) years. Moreover, five (5) of the states which allowed the child death penalty in 1989 had since abolished it. The Court also looked to contemporary practice in the international community. Between 1990 and the time of the decision, only seven (7) countries other than the United States has executed juvenile offenders. Those countries included Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of the Congo and China. The majority further noted that since 1990, each and every one of those countries had either abolished the practice of executing juvenile offenders or had made a public disavowal of the practice. Finally, the Court noted that only the United States and Somalia had not ratified Article 37 of the United Nations Convention on the Rights of the Child, which expressly prohibits capital punishment for crimes committed by juveniles.<sup>54</sup> Ultimately, the Court held that the Eighth Amendment of the United States Constitution prohibits the execution of individuals under the age of eighteen (18).<sup>55</sup>

In concurrence, Justice Stevens, joined by Justice Ginsburg, pointed out that the most important part of the decision was the reaffirmation of the basic principle of interpretation of the Eighth Amendment to the United States Constitution.<sup>56</sup> According to Justice Stevens, “If the

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 570-578

<sup>55</sup> *Id.* at 579

<sup>56</sup> *Id.* at 587.

meaning of that Amendment had been frozen when it was originally drafted, it would impose no impediment to the execution of 7-year-old children today.”<sup>57</sup>

Justice O’Connor dissented, criticizing the Missouri Supreme Court for failing to follow the precedent established by *Stanford*. While Justice O’Connor agreed that the evidence presented in the immediate matter was similar to the evidence in *Atkins*, she contended that at least eight (8) states adopted legislation that permitted the execution of sixteen (16) and seventeen (17) year-old offenders.<sup>58</sup> Further, Justice O’Connor argued that the difference in maturity between adults and juveniles was not significant enough to justify excluding juveniles from the death penalty.<sup>59</sup>

Justice Scalia wrote a scathing dissent in this case. The over-arching theme of Justice Scalia’s dissent was that the appropriate question was not whether there was a national consensus against the execution of juveniles; rather, whether the execution of the defendants was considered cruel and unusual at the time at which the Bill of Rights was ratified. In addition, Justice Scalia also objected to the Court comparing American law to international norms. Justice Scalia took particular issue with the Court’s willingness to “invoke alien law when it agrees with one’s own thinking, and ignore it otherwise.” This statement was made in respect to abortion laws in the United States being less restrictive than the rest of the world and the Court’s reliance on English law, which did not possess the same double jeopardy law the United States had. Further, Justice Scalia felt the majority was acting outside of the Supreme Court’s designated power, in that, the Supreme Court was essentially interpreting the law of what it should say rather than what the law actually says.<sup>60</sup>

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 597-599.

<sup>59</sup> *Id.* at 598-607.

<sup>60</sup> *Id.* at 607-630

In this case, Justice Scalia's Italian-American heritage permeates his criticism of the Supreme Court usurping the legislature's power in determining what the law should say, rather than viewing and interpreting what the law actually says. In this way, Justice Scalia is adhering to a strict set of rules rampant in Italian-American culture. Justice Scalia specifically noted the line of the Court's power and how they crossed into another branch of government's power, i.e., breaking the separation of powers "rule." Further, Justice Scalia chastised the majority for not taking into consideration that the Missouri Supreme Court flatly ignored the Court's precedent set forth in *Stanford*.<sup>61</sup> Justice Scalia, in this point, states his disdain for the Missouri Supreme Court for going against the Court as Justice Scalia points out "it is this Court's prerogative alone to overrule one of its precedents."<sup>62</sup> This frustration can be attributed to Justice Scalia's desire for a strict following of rules.

In this opinion, Justice Scalia seems to have no sympathy for those who commit heinous offenses, even when under the age of eighteen (18). Justice Scalia's wish to rely on precedent over the empirical data the majority cited not only demonstrates his need for a strict set of rules; it also may demonstrate that Justice Scalia fits within the mold of Italian-Americans demanding a strong sense of right and wrong from children. While the majority cites data and international precedent in an effort to "protect" the minor, Justice Scalia finds the data (and the minor's age) irrelevant. Finally, Justice Scalia's disgust with the majority's reliance on international law/custom could be attributed to the emphasis on independence formed in Italian-Americans.

**B. R.A.V. v. City of St. Paul**<sup>63</sup>

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<sup>61</sup> *Id.* at 628-629

<sup>62</sup> *Id.* at 629, citing *State Oil Co. v. Khan*, 522 U.S. 3, 20 (2001)

<sup>63</sup> 505 U.S. 377 (1992)

In this case, the petitioner and several other teenagers made a cross out of broken chair legs and tape. Once the cross was assembled, the youths placed the cross in the front yard of an African-American family and set it on fire. The petitioner was charged with a violation of the St. Paul Bias-Motivated Crime Ordinance, which provided:

Whoever places on public or private property, a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor. <sup>64</sup>

The petitioner argued that the statute was facially invalid under the First Amendment of the United States Constitution and moved to dismiss the count on the ground that it was substantially overbroad and impermissibly content based. The trial court granted the motion, however, the Minnesota Supreme Court reversed, holding that the Minnesota Court had construed the phrase “arouses anger, alarm or resentment in others” <sup>65</sup> to conduct that amounted to fighting words under the *Chaplinsky v. New Hampshire* <sup>66</sup> case. Furthermore, the Minnesota Court concluded that the ordinance was not impermissible because “the ordinance is a narrowly tailored means towards accomplishing the compelling governmental interest in protecting the community against bias-motivated threats to public safety and order.” <sup>67</sup> The petitioner sought certiorari, which the Supreme Court granted.

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<sup>64</sup> *Id.* at 379

<sup>65</sup> *Id.* at 380

<sup>66</sup> 315 U.S. 568 (1942). This opinion held:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting” words those, which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

<sup>67</sup> *In re Welfare of R.A.V.*, 464 N.W.2d 507, 510 (Minn. 1991)

In writing the majority opinion, joined by Chief Justice Rehnquist, Justice Kennedy, Justice Souter and Justice Thomas, Justice Scalia noted that petitioner's conduct could have been prosecuted under a variety of Minnesota statutes.<sup>68</sup> Justice Scalia also stated that the Supreme Court was bound by the conclusion that the ordinance at issue only reached expressions of "fighting words" under *Chaplinsky*.<sup>69</sup> The petitioner contended that the *Chaplinsky* standard should be narrowed; therefore the ordinance would be invalid as substantially overbroad. However, the Court concluded that even if the offense amounted to "fighting words" under *Chaplinsky*, the ordinance was unconstitutional on its face in that it prohibited permitted speech solely on the basis of the subject the speech addressed. The Court reached this conclusion after a careful and thought-provoking analysis.<sup>70</sup>

First, the Court began its analysis with a review of free speech principles, beginning with the rule that the First Amendment prevents the government from proscribing speech because of the ideas expressed.<sup>71</sup> However, the Court noted that in a limited number of circumstances, society has permitted restrictions on the content of speech when there is "...such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."<sup>72</sup> The Court then clarified previous free speech cases, stating that some areas of free speech:

...can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.) — not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination.<sup>73</sup>

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<sup>68</sup> 505 U.S. at 379-380, N.1

<sup>69</sup> *Id.* at 380

<sup>70</sup> *Id.* at 381

<sup>71</sup> *Id.* at 382

<sup>72</sup> *Id.* at 382-383, citing *Chaplinsky*, 315 U.S. at 572

<sup>73</sup> *Id.* at 383-384

Therefore, in Justice Scalia's opinion, the government could "proscribe libel, but it may not make the further content discrimination of proscribing *only* libel critical of the government." <sup>74</sup>

Further, Justice Scalia explained that while an utterance of speech may be allowable on the basis of one feature, the Constitution could very well prohibit it on the basis of another feature. For example, burning a flag in violation of an ordinance against outdoor fires could be punishable, but burning a flag in violation of an ordinance dishonoring that flag is not. <sup>75</sup> Additionally, other reasonable time or place restrictions could be upheld, but only if those restrictions were "justified without reference to the content of the regulated speech." <sup>76</sup>

The Court then analyzed two final principles of free speech. One describes that when "the entire basis for the content discrimination consists entirely of the very reason the entire class of speech is proscribable, no significant danger of viewpoint discrimination exists." <sup>77</sup> The other principle involves a valid basis for according treatment to certain sub-classes of speech if that speech "happens to be associated with particular 'secondary effects' of the speech, so that 'the regulation is *justified* without reference to the content of the ... speech.'" <sup>78</sup> For example, the Court noted that a State may permit obscene performances except those involving minors. <sup>79</sup> In applying the principles to the city ordinance at issue, the Court found that it was unconstitutional on its face.

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Justice White, joined by Justice Blackmun and Justice O'Connor, opined that the Supreme Court of Minnesota's judgment should have been reversed since the ordinance criminalized

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<sup>74</sup> *Id.* at 384

<sup>75</sup> *Id.* at 385

<sup>76</sup> *Id.* at 386, citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)

<sup>77</sup> *Id.* at 388

<sup>78</sup> *Id.* at 389, quoting *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)

<sup>79</sup> *Id.* at 389

<sup>80</sup> *Id.* at 391



expression protected by the First Amendment to the Constitution.<sup>81</sup> By reaching that expressive conduct that causes hurt feelings, offense, or resentment is criminal, Justice White concluded that the ordinance was overbroad.<sup>82</sup> Further, Justice White determined that the First Amendment does not protect “fighting words” along with other particular categories of speech.<sup>83</sup> Finally, Justice White concluded that if the ordinance had not been overbroad, it would have been valid as a regulation of unprotected speech for purposes of the Fourteenth Amendment equal protection clause.<sup>84</sup>

Justice Blackmun concurred in judgment, however, Justice Blackmun concluded that the majority’s approach would result in two consequences: (1) the decision would relax the level of strict scrutiny applicable to content-based laws or (2) the decision would be regarded as a manipulation of the First Amendment to strike down an ordinance whose premise the majority opposed.<sup>85</sup>

Justice Stevens, joined by Justice White and Justice Blackmun, opined that the ordinance was overbroad.<sup>86</sup> However, Justice Stevens determined that the majority was incorrect in ruling that proscribable speech cannot be regulated based on subject matter.<sup>87</sup> Further, Justice Stevens criticized the majority for giving “fighting words” and obscenities the same protection afforded to political speech.<sup>88</sup> Finally, Justice Stevens concluded that not all content-based distinctions are uniform and presumptively invalid.<sup>89</sup>

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<sup>81</sup> *Id.* at 397-416.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 415-416

<sup>86</sup> *Id.* 416-436.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

In this case, Justice Scalia's Italian-American characteristics are not in the forefront of the opinion as in the previous case. However, the two characteristics that could have contributed to Justice Scalia's decision in this matter are a limitation on freedoms and respect for others property/family. In the first point of analysis, Justice Scalia acknowledged a limited number of circumstances where an individual's right to freedom of speech can be limited.<sup>90</sup> This is an obvious nod to a willingness to restrict freedom. In the Court's second point of analysis, Justice Scalia stated that the Constitution can limit and permit freedom of speech on a similar subject.<sup>91</sup> In his final points of analysis, Justice Scalia touches on the respect for others factor. Specifically, Justice Scalia noted that when subclasses of speech have a secondary effect, the regulation could be justified.<sup>92</sup> In this case, the sensitive nature of the facts could certainly be considered under this analysis.

### **C. Lee v. Weisman**<sup>93</sup>

In this case, Petitioner Robert E. Lee, the principal of a middle school in Providence, Rhode Island, invited a Jewish rabbi to lead a prayer at the school's graduation ceremony.<sup>94</sup> The parents of a student, Deborah Weisman, requested an injunction to bar the rabbi from speaking at the ceremony. The school district denied the family's request.<sup>95</sup> After the graduation ceremony, the family proceeded with litigation and won in the First Circuit Court of Appeals. The school district, on behalf of Lee, filed a writ of certiorari United States Supreme Court.<sup>96</sup> The school district argued that the prayer was non-denominational and was voluntary, as Deborah did not have to

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<sup>90</sup> *Id.* at 382-383, citing *Chaplinsky*, 315 U.S. at 572

<sup>91</sup> *Id.* at 385

<sup>92</sup> *Id.* at 389, quoting *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)

<sup>93</sup> 505 U.S. 577 (1992)

<sup>94</sup> *Id.* at 581-584

<sup>95</sup> *Id.* at 584

<sup>96</sup> *Id.* at 585.

stand during the prayer. Further, the school board argued that Deborah and Deborah's family did not have to attend the ceremony at all. <sup>97</sup>

The majority found in favor of the family in a 5-4 decision. Justice Kennedy, joined by Justice Blackmun, Justice Stevens, Justice O'Connor, and Justice Souter, authored the majority opinion, which found that Lee's decision to give the rabbi the forum to conduct a public prayer for a civic occasion was wrongful:

Through these means, the principal directed and controlled the content of the prayers...It is a cornerstone principle of our Establishment Clause jurisprudence that it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government, and that is what the school officials attempted to do. <sup>98</sup>

Further, the majority noted that the non-denominational nature of the prayer was not a valid defense, since the Establishment Clause forbids coerced prayers in public school. The coerced prayer does not have to be of one religious sect to be prohibited. <sup>99</sup> Moreover, the majority dismissed the notion that the graduation ceremony was voluntary as extreme, since graduation is one of life's most significant occasions and absence of the ceremony would "require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years." <sup>100</sup> In answering the school district's contention that the prayer itself was voluntary, Justice Kennedy formulated the coercion test, holding:

The school district's supervision and control of a high school graduation ceremony places subtle and indirect public and peer pressure on attending students to stand as a group or maintain respectful silence during the invocation and benediction. A reasonable dissenter of high school age could believe that standing or remaining silent signified her own participation in, or approval of, the group exercise, rather than her respect for it. And the State may not place the student dissenter in the dilemma of participating or protesting. Since adolescents are often susceptible to peer pressure, especially in matters of social convention, the State may no more use

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<sup>97</sup> *Id.* at 587-589

<sup>98</sup> *Id.* at 588

<sup>99</sup> *Id.* at 621-626

<sup>100</sup> *Id.* at 595

social pressure to enforce orthodoxy than it may use direct means. The embarrassment and intrusion of the religious exercise cannot be refuted by arguing that the prayers are of a *de minimis* character, since that is an affront to the rabbi and those for whom the prayers have meaning, and since any intrusion was both real and a violation of the objectors' rights. <sup>101</sup>

Justice Kennedy further stated that the Constitution of the United States guarantees that the government “may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which ‘establishes a [state] religion or religious faith, or tends to do so.’”

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Justice Blackmun, joined by Justice Stevens and Justice O’Connor, concurred with the majority’s holding. Justice Blackmun concluded that the Establishment of Religion Clause prohibits government endorsement of religion and the government’s active involvement in religion. <sup>103</sup> Justice Blackmun found this conclusion despite the fact that government coercion is sufficient to prove a violation of the clause. <sup>104</sup>

Justice Souter, joined by Justice Stevens and Justice O’Connor, expressed that the cause bars a state from endorsing generically Theistic prayers when the state could not sponsor denominational prayers in his concurrence. <sup>105</sup> Moreover, government sponsorship of prayer at graduation ceremonies is reasonably understood as an unconstitutional endorsement of religion. In this case specifically, the government endorsement rose to support of Theistic religion. <sup>106</sup> Finally, Justice Souter opined that a showing of coercion is not necessary to a successful claim of a violation of the Establishment of Religion Clause. <sup>107</sup>

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<sup>101</sup> *Id.* at 577, Syllabus, *citing Id.* at 590-594

<sup>102</sup> *Id.* at 587

<sup>103</sup> *Id.* at 599-609.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 609-631.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

In his dissent, Justice Scalia, joined by Chief Justice Rehnquist, argued against the adoption of the coercion test. Justice Scalia believed that the majority's holding "lays waste a tradition that is as old as public school graduation themselves, and that is a component of an even more longstanding American tradition of nonsectarian prayer to God at public celebrations generally."<sup>108</sup> Scalia pointed to historical examples of calling on divine guidance by former Presidents, including President Washington's proclamation of Thanksgiving in 1789.<sup>109</sup> Further, Scalia disputed the Court's holding that attendance at graduation ceremonies were required as social norms and the conclusion that students were subtly coerced to stand for the prayer. In his view, only "official" penalties for refusing to support a religion resulted in an Establishment Clause violation.<sup>110</sup>

The main indicator of Justice Scalia's Italian-American heritage in this case is his adherence to a strict set of rules. Specifically, Justice Scalia mentions that only "official" penalties violated the Establishment Clause.<sup>111</sup> In that sense, Justice Scalia essentially states that only an explicit refusal to support a religion arises to a Constitutional violation.<sup>112</sup> Further, Justice Scalia refused to acknowledge that the school had implicit control over the attendance of the high school graduation.<sup>113</sup> In this way, Justice Scalia also followed his strict code, as he only would acknowledge an explicit control over attendance as opposed to implicit control.

#### **D. Edwards v. Aguillard**<sup>114</sup>

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<sup>108</sup> *Id.* at 632

<sup>109</sup> *Id.* at 633-636

<sup>110</sup> *Id.* at 636-646

<sup>111</sup> *Id.*

<sup>112</sup> An example of such a violation would be a public school graduation refusing to allow a Jewish prayer.

<sup>113</sup> *Id.*

<sup>114</sup> 482 U.S. 578 (1987)

In the early 1980's, numerous states attempted to introduce the teaching of creationism<sup>115</sup> along with the teaching of evolution in schools. Louisiana instituted a law that did not require teaching of creationism or evolution; but the law did require that if evolution was taught, creationism must be taught as well.<sup>116</sup> The District Court ruled against Louisiana, with the Fifth Circuit Court of Appeals affirming the decision. Both courts found that the motive in passing the statute was to promote creationism.<sup>117</sup>

The majority opinion, written by Justice Brennan and joined by Justice Marshall, Justice Blackmun, Justice Powell and Justice Stevens, ruled the law unconstitutional as an infringement on the Establishment Clause of the First Amendment. The majority's basis for this conclusion was an analysis under the *Lemon*<sup>118</sup> test, which is comprised of three steps: (1) The government's action must have a legitimate secular 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 entanglement" of the government and religion.<sup>119</sup> Based upon this premise, the majority held the law facially invalid since it lacked a clear, secular purpose.<sup>120</sup> The Court found that the law did not further its stated purpose of "protecting academic freedom" and the law impermissibly endorsed religion by advancing creationism. Further, the law gave teachers no freedom they did not already possess and limited their ability to decide what academic principles should be taught.<sup>121</sup>

Justice Powell, joined by Justice O'Connor, concurred, concluding that the language of the statute and the statute's history confirmed the intent of the Louisiana legislature to promote a

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<sup>115</sup> Creationism is the belief that the universe and living organisms originate "from specific acts of divine creation."

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 582.

<sup>118</sup> *Lemon v. Kurtzman*, 403 U.S. 602 (1971)

<sup>119</sup> *Edwards* 482 U.S. at 583, *citing Lemon* 403 U.S. at 612-613.

<sup>120</sup> *Id.* at 585.

<sup>121</sup> *Id.* at 586-594

specific religious belief.<sup>122</sup> Further, Justice Powell wrote that the nothing in the majority opinion limited the broad discretion state and local school officials traditionally enjoyed, regarding the selection of public school curriculum.<sup>123</sup> In conclusion, Justice Powell held that under a challenge of the Establishment Clause, interference with the decisions of school boards is only warranted when the intended purpose behind a decision is obviously religious.<sup>124</sup>

Justice White also concurred with judgment of the majority. In his opinion, Justice White wrote that even if a different conclusion regarding the purpose of the statute could be ascertained by a plain reading of the statute, the lower courts were not so obviously wrong in their decision that they should be reversed.<sup>125</sup>

In his dissent, with Chief Justice Rehnquist joining, Justice Scalia accepted the state's stated purpose of "protecting academic freedom" as sincere. He construed the term "academic freedom" to refer to "students' freedom from indoctrination"<sup>126</sup>; in this case their freedom "to decide for themselves how life began, based upon a fair and balanced presentation of the scientific evidence."<sup>127</sup> Further, Justice Scalia scrutinized the first portion of the *Lemon* test, stating "To look for the sole purpose of even a single legislator is probably to look for something that does not exist."<sup>128</sup>

Justice Scalia's Italian-American factor in this case is harder to decipher than most. However, its possible that Justice Scalia considered the sense of place/comfort in one's place is the motivator here. Justice Scalia stated that school children are free for themselves to decide how

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<sup>122</sup> *Id.* at 597-608.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 608-610.

<sup>126</sup> *Id.* at 627

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 637

life began.<sup>129</sup> He therefore, wishes to allow children to be comfortable in their decision. Moreover, this decision may also point to Justice Scalia's willingness to keep this type of material in the family structure. It is possible that Justice Scalia's parents instilled his creationist views in him. This could be an instance of Justice Scalia wanting a strong, family structure to foster children's beliefs.

#### **E. Gonzales v. Raich**<sup>130</sup>

In 1996, California passed Proposition 215, which legalized the use of medical marijuana.<sup>131</sup> The Defendant, Angel Raich, used his own homegrown medical marijuana, which was acceptable under California law, but was illegal under federal law. The plants were considered Schedule I drugs under the federal Controlled Substance Act.<sup>132</sup> On August 15, 2002, the Drug Enforcement Agency and officers of the Butte County Sheriff's Department destroyed all of co-defendant Diane Monson's marijuana plants, even though they determined that her possession was entirely legal under California state law.<sup>133</sup> Both Monson and Raich sought injunctive and declaratory relief, claiming that enforcing the CSA would violate the Commerce Clause, the Due Process Clause, and the Ninth and Tenth Amendments to the United States Constitution.<sup>134</sup>

Both Raich and Monson were treated by physicians, who determined, after prescribing numerous prescription medications, that medicinal marijuana would be the only "medication" available to alleviate their symptoms. Both women used marijuana medicinally for years prior to their doctors' recommendations. Further, evidence suggested that both women heavily relied on marijuana to function daily. In the case of Raich, her physician believed that if Raich stopped

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<sup>129</sup> *Id.* at 627

<sup>130</sup> 545 U.S. 1 (2005)

<sup>131</sup> *Id.* at 5

<sup>132</sup> *Id.* at 14, *citing* 21 U.S.C. §§ 841(a)(1)

<sup>133</sup> *Id.* at 7

<sup>134</sup> *Id.* at 7-15



using marijuana, the excruciating pain she would suffer from could turn fatal.<sup>135</sup> The District Court denied the motion for a preliminary injunction.<sup>136</sup> The United States Court of Appeals for the Ninth Circuit, however, reversed the District Court's judgment and ordered the preliminary injunction, finding that the plaintiffs demonstrated a strong likelihood that the CSA exceeded Congress' authority under the Commerce Clause.<sup>137</sup>

Justice Stevens, joined by Justice Kennedy, Justice Souter, Justice Ginsburg, and Justice Breyer, wrote the majority opinion. The decision was a 6-3 ruling, first pointing out that the defendants never disputed that Congress had the power to control the non-medical uses of marijuana. Further, the defendants did not dispute the passage of the CSA as illegal under the Commerce Power. The Court noted that all the defendants argue is that the CSA's "prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeds Congress' authority under the Commerce Clause."<sup>138</sup> However, the Court reasoned that based on the rulings in *Wickard v. Filburn*,<sup>139</sup> *United States v. Lopez*,<sup>140</sup> and *United States v. Morrison*,<sup>141</sup>:

...the regulation is squarely within Congress' commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity.<sup>142</sup>

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<sup>135</sup> *Id.* at 7

<sup>136</sup> *Raich v. Ashcroft*, 248 F. Supp. 2d 918, 931 (N.D. Cal. 2003)

<sup>137</sup> *Raich v. Ashcroft*, 352 F.3d 1222, 1243 (9<sup>th</sup> Cir. 2003)

<sup>138</sup> *Id.* at 15

<sup>139</sup> 317 U.S. 111 (1942)

<sup>140</sup> 514 U.S. 549 (1995)

<sup>141</sup> 529 U.S. 598 (2000)

<sup>142</sup> *Gonzales* 545 U.S. at 19

Further, the difficulty in distinguishing marijuana that is grown locally or elsewhere led the Court to have no difficulty in believing that Congress had a rational basis for believing that intrastate possession of marijuana would leave a hole in the CSA.<sup>143</sup>

Justice Scalia wrote a concurring opinion in this case in an effort to differentiate the decision from those in *Lopez* and *Morrison*. Although Justice Scalia voted in favor of limiting the Commerce Clause in the previous cases, he felt that his reading of the Necessary and Property Clause forced him to vote for the expansion of the Commerce Clause in this case:

Unlike the power to regulate activities that have a substantial effect on interstate commerce, the power to enact laws enabling effective regulation of interstate commerce can only be exercised in conjunction with congressional regulation of an interstate market, and it extends only to those measures necessary to make the interstate regulation effective. As *Lopez* itself states, and the Court affirms today, Congress may regulate noneconomic intrastate activities only where the failure to do so ‘could ... undercut’ its regulation of interstate commerce. ... This is not a power that threatens to obliterate the line between ‘what is truly national and what is truly local.’<sup>144</sup>

Further, Justice Scalia pointed out that both *Lopez* and *Morrison* did not declare that noneconomic intrastate activities were beyond the scope of the Federal Government’s regulation.<sup>145</sup> Finally, Justice Scalia states that Congress’ ability to enact prohibitions of intrastate controlled substance activities depend only upon whether the regulations are an appropriate means of achieving the legitimate ends of eradicating “Schedule I” substance from interstate commerce.<sup>146</sup>

Justice O’Connor, joined by Chief Justice Rehnquist and Justice Thomas, dissented, expressing that the majority decision allowed an application of the CSA that destroyed California’s position without any proof that the medicinal possession and use of marijuana had a substantial

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<sup>143</sup> *Id.* at 22

<sup>144</sup> *Id.* at 38

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 40

effect on interstate commerce.<sup>147</sup> Further, in Justice O'Connor's opinion, the Court essentially promulgated a rule that gave Congress an incentive to legislate broadly under the Commerce Clause.<sup>148</sup> Accordingly, Justice O'Connor wrote that the position the majority allowed was irreconcilable with the prior Supreme Court decisions.<sup>149</sup>

Justice Thomas also dissented, stating that the local cultivation and consumption of medicinal marijuana by the two patients was not commerce amongst the states.<sup>150</sup> Further, Justice Thomas held that the CSA as applied in the case was not necessary and proper in upholding Congress' restrictions on interstate drug trade.<sup>151</sup> Therefore, according to Justice Thomas, neither the Commerce Clause nor the Necessary and Proper Clause gave Congress the power to regulate the conduct at issue.<sup>152</sup>

Justice Scalia's opinion in this case could be derived from his need for a strict sense of rules. Here, Justice Scalia read the Necessary and Proper Cause in a narrow fashion, holding that "Congress may regulate noneconomic intrastate activities only where the failure to do so 'could ... undercut' its regulation of interstate commerce."<sup>153</sup> In a narrow reading of this clause, Justice Scalia is exhibiting his desire for a strict set of rules with limited exception. Possibly, if Justice Scalia had a different upbringing rather than the traditional Italian-American family he grew up in, he would be more open to exceptions or a broader reading of Constitutional provisions.

#### **F. Michael H. v. Gerald D.**<sup>154</sup>

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<sup>147</sup> *Id.* at 42-57.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 58-74.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 38

<sup>154</sup> 491 U.S. 110 (1989)

In 1981, Gerald D. was listed as the father on the birth certificate of Victoria D.<sup>155</sup> Victoria D.'s mother, Carole D., believed, however, that the real father of Victoria D. was Michael H., a man with whom she had been having an affair. A paternity test revealed a substantial likelihood that Michael H. was indeed the father of Victoria D.<sup>156</sup> Michael H. thereafter filed an action in California to attain visitation rights and to be established as Victoria D.'s father.<sup>157</sup> Gerald D., however, petitioned for summary judgment under California Evidence Code § 621, which states "the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage."<sup>158</sup> The California Supreme Court agreed with Gerald D., but Michael H. was granted certiorari to the United States Supreme Court. Michael H. claimed that § 621 violated substantive due process rights under the Fourteenth Amendment.<sup>159</sup>

In writing the plurality opinion, Justice Scalia, joined by Chief Justice Rehnquist, Justice O'Connor, and Justice Kennedy, opined that § 621 did not violate due process rights and therefore Michael H. could not rebut California's evidentiary presumption that Gerald D. was Victoria's father. Justice Scalia was open with his disgust of the facts of the case with comments such as "[t]he facts of this case are, we must hope, extraordinary"<sup>160</sup> and "California law, like nature itself, makes no provision for dual fatherhood."<sup>161</sup> To establish the scope of the Due Process Clause, Justice Scalia wrote that the interest in limitation must be so fundamental that it is an interest that is traditionally protected by society.<sup>162</sup> The tradition that was to be rebutted in this case, is the traditional marital family structure and the presumption of legitimacy of children that

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<sup>155</sup> *Id.* at 113

<sup>156</sup> *Id.* at 114

<sup>157</sup> *Id.*

<sup>158</sup> Cal. Evid. Code § 621(a) (Deering 1986)

<sup>159</sup> *Michael H.*, 491 U.S. at 116

<sup>160</sup> *Id.* at 113

<sup>161</sup> *Id.* at 118

<sup>162</sup> *Id.* at 122

was rooted in common law.<sup>163</sup> Therefore, Michael H. had to prove that society afforded natural fathers parental rights; or at least, society did not outright deny them when there is a child born into a traditional family. The Court found that the states did not award substantive parental rights to the natural father where a child was born into an existing family.<sup>164</sup> Ultimately, Justice Scalia found “to provide protection to an adulterous father is to deny protection to a marital father, and vice versa.”<sup>165</sup>

Justice O’Connor, joined by Justice Kennedy, concurred with Justice Scalia’s plurality opinion, except that none of the modes of historical analysis expressed by the plurality should be imposed when analyzing due process liberty interests.<sup>166</sup>

Justice Stevens also concurred in the judgment. According to Justice Stevens, the statute at issue did not violate due process since it prevented the putative father from obtaining the judiciary’s determination of the paternity.<sup>167</sup> Further, Justice Stevens opined that the possibility of a constitutionally protected relationship between a natural father and child should not be foreclosed in light of the decision in this case.<sup>168</sup> Finally, in assuming the putative father’s relationship with the adolescent was strong enough to allow a constitutional right for visitation, California’s legislative scheme was consistent with due process.<sup>169</sup>

Justice Brennan, joined by Justice Marshall and Justice Blackmun, dissented, expressing that natural father’s link to his child, combined with a parent-child relationship between them, guarantees the natural father an interest in his relationship with his child.<sup>170</sup> Further, Justice

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<sup>163</sup> *Id.* at 124

<sup>164</sup> *Id.* at 125-130

<sup>165</sup> *Id.* at 130

<sup>166</sup> *Id.* at 132.

<sup>167</sup> *Id.* at 132-136.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 136-157.

Brennan found that the statute at issue prevented the putative father from establishing his paternity, but also prevented him from obtaining visitation rights.<sup>171</sup> This system, according to Justice Brennan, breeds a flaw that procedural due process is designed to correct.<sup>172</sup>

Justice White also dissented, opining that an unwed father who has demonstrated a commitment to his paternity through personal, financial or custodial responsibilities, has a protected interest in a relationship with the child.<sup>173</sup> In the immediate instance, Justice White found that the putative father did have such an interest and that the statute violated his due process rights because the putative father was denied any meaningful opportunity to establish his paternity.

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This case is, arguably, Justice Scalia's most obvious and outspoken view on how a family should operate and be structured. First, Justice Scalia found that Michael H. was looking to:

embrace[s] the sum of parental rights with respect to the rearing of a child, including the child's care; the right to the child's services and earnings; the right to direct the child's activities; the right to make decisions regarding the control, education, and health of the child; and the right, as well as the duty, to prepare the child for additional obligations, which includes the teaching of moral standards, religious beliefs, and elements of good citizenship.<sup>175</sup>

Further, Justice Scalia found that if the concept of family that Michael H was trying to establish was accepted, "...it will bear no resemblance to traditionally respected relationships..."<sup>176</sup> Justice Scalia also mocked the dissent's idea that Michael H. had a "freedom not to conform," by stating "[o]ne of them will pay a price for asserting that 'freedom'—Michael by being unable to act as a father of the child he has adulterously begotten, or Gerald by being unable to preserve the integrity

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<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 157-163.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 118-119

<sup>176</sup> *Id.* at 123 n. 3

of the traditional family unit he and Victoria have established.”<sup>177</sup> These theories clearly fall within the traditional Italian-American ideals of the sanctity of the family structure cited in Part II.

**G. Cruz v. New York**<sup>178</sup>

Jerry Cruz was murdered in March of 1982. The day after Jerry Cruz was murdered, the police spoke to Jerry Cruz’s brother, Norberto Cruz, about the murder. While Norberto Cruz knew nothing of his brother’s murder, Norberto Cruz told the police that one-year prior, Eulogio Cruz and Benjamin Cruz visited Jerry Cruz and Norberto Cruz (Eulogio and Benjamin were brothers, however, the pair bore no familial relation with Jerry and Norberto). Norberto Cruz told police that during this visit, Eulogio Cruz wore a bloodstained bandage around his arm. Further, Norberto Cruz told police that Eulogio Cruz stated that he and Benjamin Cruz had intended to rob a gas station in the Bronx, the attendant struggled and shot Eulogio Cruz in the arm. Benjamin Cruz then shot the attendant, killing him.<sup>179</sup>

The police found Benjamin Cruz and questioned him about the murder of Jerry Cruz. He denied being involved in that crime and became increasingly frustrated when the police seemed to be unwilling to believe him. In an apparent effort to prove he would admit to an act he was guilty of, Benjamin Cruz confessed to the murder of the gas station attendant. After an Assistant District Attorney was brought to the police station, Benjamin Cruz gave a detailed videotape confession, during which he admitted that he, Eulogio Cruz, Jerry Cruz and a fourth man had robbed the station.<sup>180</sup>

A grand jury indicted Eulogio and Benjamin Cruz for felony murder. The brothers were tried jointly. Eulogio objected to the use of Jerry’s videotaped confession, however it was

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<sup>177</sup> *Id.* at 130

<sup>178</sup> 481 U.S. 186 (1986)

<sup>179</sup> *Id.* at 188

<sup>180</sup> *Id.* at 188-189

admitted with a limiting instruction that it could only be used against Jerry. The jury found both men guilty and Euologio was subject to a sentence of fifteen years to life. Euologio appealed, but the appellate division affirmed the lower court's ruling.<sup>181</sup>

In writing the majority opinion, Justice Scalia, joined by Justice Brennan, Justice Marshall, Justice Blackmun, and Justice Stevens, discussed *Bruton v. United States*<sup>182</sup> in analyzing the question presented. In *Bruton*, the Court held that a defendant is deprived of rights under the Confrontation Clause if a confession by his codefendant is introduced at the joint trial. Moreover, the Court held that it was of no significance if the jury received a limiting instruction to consider it only in the confessor's case.<sup>183</sup> Justice Scalia then moved on to discuss how the Confrontation Clause works. This clause guarantees that defendants can confront the witnesses that testify against them. This guarantee includes the right to cross-examine witnesses. In a joint trial, Scalia stated, the confession of one defendant is not admissible against the codefendant unless the confessing defendant waives his rights under the Fifth Amendment in order to submit to cross-examination.<sup>184</sup> In *Burton*, the Court determined that limiting instructions to the jury were insufficient in this regard. The Court was split on a subsequent case where both defendants made confessions. In his concurrence in *Parker v. Randolph*, Justice Blackman proffered that the introduction of corroborating confessions could cause a harmless violation of the Confrontation Clause, however, there could be other cases in which the violation would be much more detrimental.<sup>185</sup>

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<sup>181</sup> *Id.* at 189

<sup>182</sup> 391 U.S. 123 (1968)

<sup>183</sup> 481 U.S. at 187-188

<sup>184</sup> *Id.* at 189-191

<sup>185</sup> 442 U.S. 62 (1979)



In the immediate case, the Court adopted Justice Blackmun's view from *Parker*, finding that there were plenty of statements that could cause a corroborating statement to be "devastating." The Court then argues that Cruz's confession was open to question because it depended on the acceptance of Norberto's testimony.<sup>186</sup> Further, the Court discovered an inverse relationship when two confessions "interlock":

A codefendant's confession will be relatively harmless if the incriminating story it tells is different from that which the defendant himself is alleged to have told, but enormously damaging if it confirms, in all essential respects, the defendant's alleged confession. It might be otherwise if the defendant were standing by his confession, in which case it could be said that the codefendant's confession does no more than support the defendant's very own case. But in the real world of criminal litigation, the defendant is seeking to avoid his confession—on the ground that it was not accurately reported, or that it was not really true when made.<sup>187</sup>

In conclusion, Justice Scalia and the majority held that the Confrontation Clause bars the admission, in joint trials, of non-testifying codefendants' confessions incriminating the defendant, even if the defendant's own confession is admitted. If the codefendant is unavailable, Justice Scalia found that a defendant's confession could be considered to assess whether a codefendant's statements are supported by an "indicia of reliability" to be admissible against him, despite the lack of opportunity for cross-examination.<sup>188</sup>

Justice White, joined by Chief Justice Rehnquist, Justice Powell, and Justice O'Connor, dissented, stating that the *Bruton* rule should not be extended to a case where a defendant's confession "interlocked" with a codefendant's confession.<sup>189</sup> In this matter, the codefendant's confession was essentially the same as the other defendant's confession and therefore could not incriminate either defendant any more than their own respective confessions.<sup>190</sup>

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<sup>186</sup> 481 U.S. at 191-192

<sup>187</sup> *Id.* at 192

<sup>188</sup> *Id.* at 193-194

<sup>189</sup> *Id.* at 194-195.

<sup>190</sup> *Id.*

In finding that the Confrontation Clause bars the admission of non-testifying codefendants' confessions incriminating the defendant in joint-trials, Justice Scalia could be applying a straightforward application of the law. Straightforwardness, as stated in Part II, is a feature of Italian-American culture. In a plain reading of the Confrontation Clause, the defendant has the right to face his accuser and subject him/her to cross-examination. It naturally follows that if a codefendant does not testify at trial, there is no opportunity to cross-examine the accuser. It is a simple, basic approach to reading the law. Similarly, this reading could allude to a strict adherence to code common amongst Italian-Americans. Here, Justice Scalia read the law and interpreted it for its basic meaning. Justice Scalia was unwilling to find an exception where one could be drawn.

#### **H. Florida v. Jaridines** <sup>191</sup>

In November of 2006, an anonymous tip was given to Miami Police that the Defendant's home was being used as a marijuana grow home. Approximately one month later, a few detectives and a trained drug-sniffing canine approached the home, while other officers and the DEA established a perimeter around the home. An officer accompanied the dog up to the front door of the defendant's home and the dog alerted the officer of contraband. After being informed of the dog's findings, a detective approached the home and smelled the scent of marijuana. The detective then prepared an affidavit and applied for a search warrant. A search was conducted after the warrant was granted and marijuana was found in the home. <sup>192</sup>

The trial court granted the defendant's motion to suppress the evidence. However, the decision was reversed in the Florida Third District Court of Appeal. The Florida Supreme Court found for the defendant and denied the state a motion for rehearing. <sup>193</sup> When the Supreme Court

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<sup>191</sup> 133 S.Ct. 1409 (2013)

<sup>192</sup> *Id.* at 1413

<sup>193</sup> *Id.*

granted certiorari, the scope was limited to the question of “whether the officers’ behavior was a search within the meaning of the Fourth Amendment.”<sup>194</sup>

The majority opinion was written by Justice Scalia and joined by Justice Thomas, Justice Ginsburg, Justice Sotomayor, and Justice Kagan. In the Supreme Court’s prior “dog sniff cases”, the Court took a liberal approach to determining what did and did not constitute a search.<sup>195</sup> In a 5-4 decision, the court affirmed the Florida Supreme Court’s decision and held that the government’s use of dogs to investigate the home and immediate surroundings is a search. The case was not divided along ideological lines; instead, the conservative justices were evenly split, featuring Justice Scalia and Justice Thomas joined three of the four liberal justices in the majority. Justice Breyer and Justice Kennedy joined the minority in the dissent.<sup>196</sup>

Justice Scalia, in writing the majority, did not focus on the right to privacy, which is generally analyzed in the modern day Fourth Amendment cases and relied upon by the concurring justices in this case.<sup>197</sup> Instead, Justice Scalia focused on citizen’s property rights, returning to the Court’s early jurisprudence. The Court stated that the Fourth Amendment’s core is comprised of “the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”<sup>198</sup> Justice Scalia cited precedent as early as 1765, tying the courts decision to common law trespass.<sup>199</sup> Further, Justice Scalia stated:

We therefore regard the area ‘immediately surrounding and associated with the home’—what our cases call the curtilage—as ‘part of the home itself for Fourth

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<sup>194</sup> *Id.* at 1414

<sup>195</sup> See *United States v. Place*, 462 U.S. 696 (1983) (exposure of respondent’s language to a trained canine did not constitute a search within the meaning of the Fourth Amendment); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (the fact that officers walk a narcotics-detection dog around the exterior of cars does not constitute a Fourth Amendment Search); *Illinois v. Caballes*, 543 U.S. 405 (2005) (a dog sniff during a lawful traffic stop reveals no information other than the location of a substance that an individual does not have the right to possess does not violate the Fourth Amendment)

<sup>196</sup> *Florida v. Jardines* 133 S.Ct. at 1411

<sup>197</sup> *Id.* at 1418

<sup>198</sup> *Id.* at 1414, citing *Silverman v. United States*, 365 U.S. 505 (1961)

<sup>199</sup> *Entick v. Carrington*, 2 Wils. K.B. 275, 95 Eng. Rep. 807 (K.B. 1765)

Amendment purposes.’... That principle has ancient and durable roots. Just as the distinction between the home and the open fields is ‘as old as the common law,’... so too is the identity of home and what Blackstone called the ‘curtilage or homestall,’ for the ‘house protects and privileges all its branches and appurtenants.’... This area around the home is ‘intimately linked to the home, both physically and psychologically,’ and is where ‘privacy expectations are most heightened.’<sup>200</sup>

Moreover, the Court stated that a doorbell or doorknocker is an invitation to the public to approach the home for various activities, such as to “trick-or-treat” or solicit for donations.<sup>201</sup> This invitation extends to the police where they have the right to ask residents for information.<sup>202</sup> The Court found, however, that this implicit license does not extend to activities such as a “visitor exploring the front path with a metal detector”<sup>203</sup> or allowing police officers to “peer into the house through binoculars with impunity”<sup>204</sup>, and would constitute a common law trespass. Therefore, the Court found that bringing a police dog into a home’s curtilage to search for incriminating evidence was an unreasonable search without a warrant.<sup>205</sup>

Justice Kagan, joined by Justice Ginsburg and Justice Sotomayor, wrote a concurring opinion. Justice Kagan took the position that both property and privacy rights are implicated in a case such as this, stating:

A stranger comes to the front door of your home carrying super-high-powered binoculars. He doesn't knock or say hello. Instead, he stands on the porch and uses the binoculars to peer through your windows, into your home's furthest corners. It doesn't take long (the binoculars are really very fine): In just a couple of minutes, his uncommon behavior allows him to learn details of your life you disclose to no one. Has your "visitor" trespassed on your property, exceeding the license you have granted to members of the public to, say, drop off the mail or distribute campaign flyers? Yes, he has. And has he also invaded your "reasonable expectation of privacy" by nosing into intimacies you sensibly thought protected from disclosure?

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<sup>200</sup> *Florida v. Jardines* 133 S.Ct. at 1414-1415

<sup>201</sup> *Id.* at 1415-1416

<sup>202</sup> *Id.* at 1416, *citing Kentucky v. King*, 131 S.Ct. 1849 (2011).

<sup>203</sup> *Id.* at 1416

<sup>204</sup> *Id.* at 1416 n.3

<sup>205</sup> *Id.* at 1417-1418

*Katz v. United States*, 389 U.S. 347, 380 (1967) (Harlan, J., concurring). Yes, of course, he has done that too.

That case is this case in every way that matters. <sup>206</sup>

Justice Kagan further concluded that it does not matter whether the detection is a device or a dog; when the device is not in general public use and is used to search a home, it violates a citizen's "minimal expectation of privacy." <sup>207</sup>

Justice Alito, joined by Chief Justice Roberts, Justice Kennedy and Justice Breyer, stated that the majority's opinion is "based on a putative rule of trespass law that is nowhere to be found in the annals of Anglo-American jurisprudence." <sup>208</sup> Justice Alito instead proffered that under the traditional law of trespassing, visitors are not trespassing if they "approach the door, pause long enough to see if someone is home, and (if not expressly invited to stay longer), leave ... a visitor who adheres to these limitations is not necessarily required to ring the doorbell, knock on the door, or attempt to speak with an occupant." <sup>209</sup>

In this case, Justice Scalia reverted back to citizen's property rights, as opposed to the reasonable expectation of privacy the courts had implemented for many years. That may be so because traditional Italian-Americans have a sense of place or comfort in their home or surroundings. This factor could include a sense in one's home and surrounding area. In that case, Justice Scalia's holding that bringing a police dog into a home's curtilage to search for evidence without a warrant rises to a Fourth Amendment unreasonable search consistent with traditional Italian-American beliefs.

### **I. United States v. Jones** <sup>210</sup>

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<sup>206</sup> *Id.* at 1418.

<sup>207</sup> *Id.* at 1419-1420.

<sup>208</sup> *Id.* at 1420.

<sup>209</sup> *Id.* at 1423.

<sup>210</sup> 132 S. Ct. 945 (2012)

Antoine Jones owned a nightclub in the Washington D.C. area, which was managed by Lawrence Maynard. In 2004, the FBI and DC Police Department began an investigation into the two individuals for possession and distribution of narcotics. Without a warrant, a global positioning system (GPS) was placed on Jones' vehicle. The GPS tracked Jones movement for twenty-four hours a day over the course of four weeks. In late 2005, Jones was arrested and his attorney immediately filed a motion to suppress the evidence obtained by the GPS. In late 2006, a federal jury deadlocked on conspiracy charges and acquitted Jones on various other charges. Jones was retried in 2007 and the jury found him guilty on conspiracy charges and possession.<sup>211</sup> The charges were significant enough for Jones to be sentenced to life in prison.<sup>212</sup> In 2010, the DC Appeals Court overturned the conviction, holding that the installation of the GPS was a search because it violated Jones' "reasonable expectation of privacy." In 2011, the Supreme Court grand certiorari.<sup>213</sup>

Justice Scalia wrote the majority opinion and was joined by Chief Justice Roberts, Justice Kennedy, Justice Thomas and Justice Sotomayor. The Court held that the "Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search' under the Fourth Amendment."<sup>214</sup> In authoring the majority opinion, Justice Scalia cited cases as far back as 1886<sup>215</sup>, arguing that a physical intrusion into a protected area was the basis for determining whether a search occurred under the Fourth Amendment. Scalia ceded that the majority of search and seizure cases since 1967 had shifted toward the "reasonable expectation of privacy" approach<sup>216</sup>, however, Scalia pointed to a few

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<sup>211</sup> *Id.* at 948

<sup>212</sup> *Id.* at 949

<sup>213</sup> *Id.* at 949

<sup>214</sup> *Id.*

<sup>215</sup> *Boyd v. United States*, 116 U.S. 616 (1886)

<sup>216</sup> *United States v. Jones*, 132 S. Ct. at 950

decisions post-1967 to argue that the “trespass” approach had not been completely abandoned.<sup>217</sup> Moreover, Justice Scalia stated that at a minimum, the Fourth Amendment must provide the same level of protection as it was intended when the Amendment was adopted.<sup>218</sup> Further, Scalia emphasized that the “trespass” approach does not necessarily exclude the “reasonable expectation of privacy” approach, since the “reasonable expectation” test is appropriate for situations where there is a transmission of electronic signals without a trespass.<sup>219</sup>

In the matter before the Court, Justice Scalia concluded that since the Government’s GPS was a trespass for the sole purpose of obtaining information, it constituted a search under the Fourth Amendment. Since the Court determined the GPS installation was considered a search, Justice Scalia refused to recognize any exceptions that would make the search reasonable, since the Government failed to submit an alternate theory in the lower courts.<sup>220</sup> The Court also left unanswered a broader question regarding the privacy implication of warrantless GPS installation absent a physical intrusion: “It may be that achieving the same result through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy, but the present case does not require us to answer that question.”<sup>221</sup>

In her concurring opinion, Justice Sotomayor disputed the constitutionality of warrantless GPS surveillance in the short as well as the long-term. Even during short-term GPS surveillance, Justice Sotomayor, the GPS can record every movement of the subject and thus, private destinations.<sup>222</sup> Further, Justice Sotomayor opined:

People disclose the phone numbers that they dial or text to their cellular providers, the URLs that they visit and the e-mail addresses with which they

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<sup>217</sup> See *Alderman v. United States*, 394 U.S. 165 (1969); *Soldal v. Cook County*, 506 U.S. 56 (1992); *United States v. Knotts*, 460 U.S. 276 (1983); *United States v. Karo*, 468 U.S. 705 (1984)

<sup>218</sup> *United States v. Jones*, 132 S. Ct. at 953.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 954.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 954-957.

correspond to their Internet service providers, and the books, groceries and medications they purchase to online retailers . . . I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection. <sup>223</sup>

Justice Alito also concurred, with Justice Ginsburg, Justice Breyer and Justice Kagan joining. According to Justice Alito, common-law property-based analysis of searches does not apply to electronic searches at issue in the immediate case. <sup>224</sup> Further, Justice Alito argued that society's expectation is that complete and long-term surveillance would not be undertaken. <sup>225</sup>

Justice Scalia's adherence to a set of rules can be seen throughout this opinion. Specifically, Justice Scalia focuses on a substantial number of historical decisions. Further, in analyzing the case, Justice Scalia points to decisions that hold the opposite of the "reasonable expectation of privacy" test that had dominated the privacy cases since 1967. Justice Scalia focuses on this historical approach because of his adherence to a code. Justice Scalia refused to deter from his belief and approach in a showing of independence from the prevalent view at the time of the opinion.

#### **J. Brown v. Entertainment Merchants Association** <sup>226</sup>

In 2005, the California Legislature passed AB 1179, which banned the sale of "violent" video games to anyone under the age of eighteen (18). <sup>227</sup> Further, the act required that there be a clear labeling of the game being violent, beyond the already mandatory ESRB rating system. <sup>228</sup> The law required a maximum \$1,000 fine for each infraction of the Act. <sup>229</sup> "Violent video games"

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<sup>223</sup> *Id.* at 957.

<sup>224</sup> *Id.* at 958-964.

<sup>225</sup> *Id.*

<sup>226</sup> 131 S.Ct. 2729 (2011)

<sup>227</sup> *Id.* at 2733, *citing* Cal. Civ. Code Ann. §§ 1746-1746.5 (West 2009)

<sup>228</sup> ESRB stands for the Entertainment Software Rating Board, which was established by the United States in 1994. The ESRB is a voluntary body that examines the content of video games before they are distributed and gives a rating on its content. Sellers of video games are required to check the age of customers who wish to purchase video games. *See* "ESRB Frequently Asked Questions", [esrb.com](http://esrb.com). Retrieved 10-6-2014.

<sup>229</sup> Cal. Civ. Code Ann. §§ 1746-1746.5 (West 2009)



were defined by a variation of the *Miller* test used by the US Supreme Court to determine when speech was not protected under the First Amendment.<sup>230</sup> The bill was signed into law by Governor Arnold Schwarzenegger in October of 2005<sup>231</sup> and was set to go into effect in January of 2006.

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Before the law went into effect, the Entertainment Merchants Association prepared a lawsuit to overturn the act, fearing that the “violent video game” definition would effect games that the ESRB system deemed suitable for children and that the law would ultimately harm the video game industry as a whole.<sup>233</sup> The Plaintiffs were granted a preliminary injunction in late 2005 by the United States District Court for the Northern District of California. In 2007, the United States District Court for the Northern District of California ruled for the Plaintiffs in 2007, holding (1) that the law violated the First Amendment and (2) that there was an insufficient showing of proof that video games caused violent behavior.<sup>234</sup>

Governor Schwarzenegger appealed the District Court’s ruling to the Ninth Circuit Court of Appeals, which affirmed the lower court’s ruling. Governor Schwarzenegger filed a writ of certiorari to the United States Supreme Court in 2009.<sup>235</sup> On June 27, 2011, the Supreme Court struck down the California law as unconstitutional on the basis of the First and Fourteenth Amendments. First, Justice Scalia, joined by Justice Kennedy, Justice Ginsburg, Justice Sotomayor, and Justice Kagan, held that video games should be afforded First Amendment Protection:

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<sup>230</sup> *Miller v. California*, 413 U.S. 15 (1973)

<sup>231</sup> Hoffman, Gene (September 27, 2010). "How the Wrong Decision in *Schwarzenegger v. EMA* Could Cripple Video Game Innovation". Xconomy.com. Retrieved 10-6-2014

<sup>232</sup> Thorsen, Tor (2005-10-07). "Schwarzenegger signs game-restriction bill". Gamespot. Retrieved 10-6-2014

<sup>233</sup> Thorsen.

<sup>234</sup> *Brown* 131 S. Ct. at 2733

<sup>235</sup> *Id.*

Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world). That suffices to confer First Amendment protection.<sup>236</sup>

Justice Scalia further noted that although states may pass laws to block obscene materials from being distributed to minors, “...speech about violence is not obscene.”<sup>237</sup> Justice Scalia went on to write that some violent video games are analogous to fairy tales and that even if videogames were without value to society, “...they are as much entitled to the protection of free speech as the best of literature.”<sup>238</sup>

Justice Scalia also held that the industry standard ESRB rating system was operating effectively to regulate the sales of violent video games to minors and the “filling the remaining modest gap in concerned-parents’ control can hardly be a compelling state interest.”<sup>239</sup> Further, the Court determined by the evidence presented, there were no compelling links between violent video games and violent acts of minors.<sup>240</sup> In fact, Justice Scalia cited a medical report that proffered cartoons like Looney Tunes generate the same effect in children as in games like Sonic the Hedgehog or imagery of guns.<sup>241</sup>

Justice Alito wrote a concurring opinion, joined by Chief Justice Roberts. Although Justice Alito agreed that California’s threshold requirement that guided what material would be covered was too broad, he felt that there was a potential double standard formed between violent and sexual

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<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 2735

<sup>238</sup> *Id.* at 2736, nt. 4, citing *Winters v. New York*, 333 U.S. 507, 510 (1948)

<sup>239</sup> *Id.* at 2741

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 2739

content regarding the threshold.<sup>242</sup> Further, Justice Alito questioned the idea that violent video games did not have an effect on children.<sup>243</sup>

Justice Thomas dissented, stating that the Founding Fathers “believed parents to have complete authority over their minor children and expected parents to direct the development of those children.”<sup>244</sup> Moreover, Justice Thomas opined that the intent of the First Amendment “does not include a right to speak to minors (or a right of minors to access speech) without going through the minors’ parents or guardians.”<sup>245</sup>

Justice Breyer also dissented in this case. Justice Breyer likened the sale of violent video games to minors to the sale of pornographic magazines to minors: “But what sense does it make to forbid selling to a 13-year-old boy a magazine with an image of a nude woman, while protecting a sale to that 13-year-old of an interactive video game in which he actively, but virtually, binds and gags the woman, then tortures and kills her?”<sup>246</sup> Moreover, Justice Breyer expressed concern that the self-regulated video game industry still allowed twenty (20) to fifty (50) percent of minors to purchase violent video games.<sup>247</sup>

As stated above, the parents dominate the traditional structure of Italian-American households. It flows naturally, then, that the children are submissive to their parents’ demands. In this case, Justice Scalia felt that the concerned parent’s interest in the video games their children play was not a compelling state interest.<sup>248</sup> In this way, Justice Scalia was unwilling to take control of the parents’ control/household and put it in the power of the state. Justice Scalia found

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<sup>242</sup> *Id.* at 2742-2751.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 2752.

<sup>245</sup> *Id.* at 2751.

<sup>246</sup> *Id.* at 2771.

<sup>247</sup> *Id.* at 2770.

<sup>248</sup> *Id.* at 2741

that this interest of the parents' was more appropriate in the parents' home, thereby conforming to the typical Italian-American mentality of keeping control in the father and mother's hands.

#### **IV. CONCLUSION**

Traditional Italian-American values can be seen in many of Justice Scalia's opinions. Some are obvious; some are more discreet. However, it is clear that originalism, in part, is related to the tendency that Italian-Americans follow their sense of a code. As can be seen throughout this paper, Justice Scalia rarely opines on exceptions to long-standing rules of law. Moreover, Justice Scalia often cites to and follows long-standing rules of law, much like most Italian-American stick to their "code", whether legal or not. Justice Scalia's originalism can certainly be perceived as a product of his Italian-American upbringing and heritage.

Further, in the analyzed opinions where Justice Scalia did not allude to a sense of code or adherence to tradition, a theme of strong family values can be derived from his writings. Justice Scalia can be seen deciding in favor of situations that uphold the structure of the family or preserve "family values". Although not directly attributable to originalism, preserving a strong structure and system can be compared to the concept of originalism that the Constitution is to be interpreted as written. The Constitution is to be preserved and upheld as an institution; much like an Italian-American family.

So long as Justice Scalia sits on the bench, he will always write his opinions and vote in connection with originalism. Through those beliefs, Justice Scalia alludes to his adherence to a code and his connection with family, which are prevalent features of Italian-American culture. It is reasonable to expect these themes will permeate through Justice Scalia's writing in the future. Further, Justice Scalia is a living embodiment of *rispetto*; he publically states his opinion and thereafter adopts a set of obligations to his code and sense of family.