The Life and Jurisprudence of Justice Scalia

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I. Introduction

Although a public figure of prominence, intrigue, and even infamy, Justice Antonin Scalia is similar to an “average Joe.” While countless scholars, critics, and supporters have spent considerable time discussing and dissecting Scalia’s opinions and personality, he is not an enigma. Conversely, Antonin Scalia is simply a product of his environment. His heritage, upbringing, religious beliefs, and education have shaped him not only personally, but also professionally. While many choose to separate their personal and professional personas, Justice Scalia has melded the two, and his background has greatly influenced his jurisprudence as a Supreme Court Justice. Scalia’s immigrant background, coupled with his devout Catholicism and Jesuit education, can be seen in almost every opinion he drafts. When closely examining Scalia’s personal history and tenure on the Court, it becomes clear: “Whatever he may represent politically, Justice Scalia is also an individual in whom constitutional theory and personal identity fuse.”¹ This paper will discuss how Justice Scalia’s jurisprudence is a direct reflection of his upbringing, education, and religious beliefs.

II. Biography

A. Early Life

Scalia’s background is best described in two words: Italian Catholic. He is the product of the quintessential immigrant experience in the northeast, but with certain deviations that strongly influenced the Supreme Court Justice. Antonin Scalia was born on March 11, 1936 at Mercer Hospital in Trenton, New Jersey.² He was the only child of his parents Salvatore Eugene Scalia

² Id. at 11.
and Catherine Panaro. Scalia’s father was only seventeen years old when he came through Ellis Island from Sicily in 1920. Salvatore Scalia moved to Trenton, like many other Italian immigrants, because he knew other Italians who emigrated there. Salvatore, however, defied the traditional Italian ways of speaking only Italian and interacting exclusively with other immigrants. He was the gifted son of his family; he learned English quickly and was determined to be a college professor. Salvatore received his Bachelors degree at Rutgers University, and a Masters from Columbia University. He eventually fulfilled his “American Dream,” earned his Ph.D., and became a professor at Brooklyn College, commuting from Trenton to New York City to carry out this goal.

Scalia’s mother Catherine was also a Trenton-native from Italian decent. Her parents, Pasquale and Maria Panaro, came to New York City in 1904 before moving to Trenton. Catherine was their oldest child and was a teacher. The Panaro family lived in a row home on North Broad Street in Trenton, which doubled as a tailor shop, dry cleaner, and saloon. Antonin’s parents married, when Salvatore was 25 and Catherine was 23. Salvatore was awarded a fellowship from Columbia and the couple went to the University of Rome and Florence where Salvatore studied. It was in Florence that the Justice was conceived in 1935.
He would be the couple’s only child. After Antonin was born, the Scalia family had a fairly transient life. They lived with Salvatore’s parents for a year, the Panaro aunts, and then in a room apartment up the street. Like many immigrants seeking to assimilate in the United States, the family spoke English and Antonin did not speak Italian with his family. In never learning Italian, Scalia noted that “It is the shame of my life...I regret that I disappointed my father in that regard.” After moving around in Trenton, even living with a Trenton High School teacher for a period, the Scalia family moved to Elmhurst, Queens when Antonin was six years old, in order to accommodate Salvatore’s commute to teach at Brooklyn College. In Queens, Scalia attended P.S. 13 in Elmhurst for elementary school, but had weekly “release time” to attend Catholic education classes on Wednesday afternoons. The Scalia’s home was full of books, which fostered intellectualism and placed Scalia at an advantage compared to other immigrants living in the neighborhood. Moreover, Scalia’s parents had extremely high expectations for their child’s academic performance, and their household was “small and intense.” If Antonin Scalia brought home an “A”, his father inquired why he didn’t bring home an “A+”. All of these factors had a great impact on Scalia and shaped him early in life to become both the deeply religious and intelligent man that he is today.

B. The Tension Between the Scalias and the Panaros

17 Id. at 14.
18 Id. at 14.
19 Id. at 14.
20 Id. at 19 (quoting Author Interview with Antonin Scalia, June 28, 2008).
21 Id. at 15, 19.
22 Id. at 19.
23 Id. at 18.
24 Id. at 20.
25 Id. at 20.
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The boisterous, yet rules-oriented Justice is the product of a similarly juxtaposed family dynamic. The biographer of Scalia noted that, "Scalia’s father was as restrained as the Panaro’s were energetic. As the Panaros socialized around town, Scalia’s father had his head in a book."26 His mother’s family was the "restless Panaro side."27 From that clan, Justice Scalia “picked up a knack for levity and the good timing of a storyteller, along with a sense of showmanship and the gestures of comical exaggeration. He also found his first legal and political model in Vince, a lawyer uncle."28 Scalia’s father was “scholarly [and] taught Antonin to value the words of a text and appreciate cast-iron rules akin to those found in Dante’s orderly universe of sin and suffering. His father’s diligence and strict code of integrity impressed the boy.”29

The tension between these two sides of the family created a tension within the Justice. Antonin Scalia’s Aunt described the teenaged-boy as “bull-headed. . . When he wanted to do something, and his parents [did not want him to do it], you had to give him a very, very good argument about why he could not do it. . . You couldn’t say to him, ‘Because I said so.’ We call it in Italian a capo tosta. He had a hard head. You couldn’t dissuade him. He knew what he wanted—even when he was little.”30 This tension can even be seen today as the Justice asks tough questions on the bench, but does so with a unique sense of humor and jovial nature.

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26 Id. at 13.  
27 Id. at 17.  
28 Id.  
29 Id.  
30 Id. at 20 (quoting Author Interview with Lenora Panaro, September 11, 2008).
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Scalia failed the entrance exam to attend Regis High School, a Jesuit school on the Upper East Side.\textsuperscript{31} Instead, he received a full scholarship to Xavier High School on 16th Street in Lower Manhattan, which was also an all-boys Jesuit-run school.\textsuperscript{32} Xavier also had a mandatory ROTC program for all students, and each class began with a prayer.\textsuperscript{33} He was considered an “exemplary Catholic” and even thought of becoming a priest.\textsuperscript{34} He was partially dissuaded from a religious life because he was an only child and wanted to carry-on the family name.\textsuperscript{35} Scalia also said, “I did not hear the call.”\textsuperscript{36}

Scalia graduated first in his class at Xavier.\textsuperscript{37} He was rejected from his first choice college, Princeton University. Scalia later stated that, “I was an Italian boy from Queens, not quite the Princeton type.”\textsuperscript{38} He went to his second choice, another Jesuit institution, Georgetown University.\textsuperscript{39} Georgetown reinforced Scalia’s Catholic beliefs and conservatism. He also traveled abroad, like his father, to Switzerland and Italy.\textsuperscript{40} He graduated first in his class. In his valedictorian speech, Scalia told his classmates that they are “leaders of real, a true, a Catholic intellectualism.”\textsuperscript{41} An event of particular importance that truly shaped Scalia occurred during his final set of exams at Georgetown. Scalia was asked what he believed was the most significant event in history.\textsuperscript{42} After racking his brain for an appropriate answer, he answered that it was the Battle of Waterloo.\textsuperscript{43} His professor sharply disagreed, and declared that the most important
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event in history was the Incarnation.-scalia reflected that, “It was the last lesson I learned at Georgetown: not to separate your religious life from your intellectual life. They’re not separate.”- As seen in Scalia’s jurisprudence, this notion has remained with the Justice.

D. Law School

Scalia was accepted to Harvard Law.- He joined the St. Thomas More Society of fellow Catholic law students.- He was also a member of the Law Review.- While at Harvard, Scalia met his wife, Maureen McCarthy, who was also Catholic.- She was studying at Radcliffe and the two immediately hit it off on a blind date.- Scalia summered at Foley and Lardner in Milwaukee after his second year.- He was ultimately convinced, however, to join Jones Day in Cleveland upon graduation.- He graduated Magna Cum Laude.-

E. Legal Career

Scalia remained at Jones Day for six years,- but left this prestigious firm job just as he was being considered for partner.- When asked why he left the firm at this important watershed in his career, Scalia retorted, “Because I was about to become partner!”- Although some speculated that Scalia left his position at Jones Day because he would not make partner, these rumors have been dispelled.- Partners at Jones Day insisted that Scalia “was very highly

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44 Id.
45 Id. (quoting Author Interview with Antonin Scalia, January 28, 2008).
46 Id. at 26.
47 Id. at 27.
48 Id. at 28.
49 Id. at 30.
50 Id.
51 Id. at 29.
52 Id. at 30.
53 Id. at 28.
54 Id. at 37.
55 Id. at 34.
56 Id. at 37.
57 Id. at 38.
regarded...He deliberately made the choice himself to move to teaching." Scalia had set a goal of being a professor, like his father. He was torn between teaching positions at Cornell University and the University of Virginia, but ultimately chose the latter—much to the dismay of his wife Maureen, who had already purchased winter coats for their growing family. After only four years of teaching at the University of Virginia, Scalia once again changed jobs, this time moving to Washington, DC to be the general counsel of the Office of Telecommunications Policy. After only one year in this position, from 1971-1972, Scalia transitioned to a role as Chairman of the U.S. Administrative Conference, from 1972-1974. Scalia’s government work was amidst the Watergate scandal, and although he believed he would only stay in government for a couple of years, “the thrill of the executive branch, even in the turbulence of Watergate, seized Scalia.” As vacancies grew following the scandal, Nixon advisors were seeking someone to assume the role of Assistant Attorney General.

Scalia proved to be the perfect candidate for the Assistant Attorney General position. Jon Rose, who spearheaded the search, was seeking someone “who could command the respect of staff lawyers” and who could “handle the stress” amidst Watergate. Scalia’s first introductions with Nixon aides went very well, and they noted that they liked Scalia immediately, because of his “intellectual ability, his sense of humor, [and] his family story.”

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58 Id. (quoting transcript of witnesses before the Senate Judiciary Committee hearing on Antonin Scalia’s nomination for Supreme Court, August 6, 1986).
59 Id. at 37.
60 Id.
61 Id. at 38.
63 Biskupic, supra note 1, at 38.
64 Id.
65 Id.
66 Id.
67 Id. (quoting interview with Jonathan Rose, February 8, 2007).
ruled that President Nixon had to turn over the Oval Office tapes, and the House Judiciary Committee passed its first article of impeachment, which charged Nixon obstruction of justice for his attempt to cover up the Watergate burglary.68 The Watergate investigation uncovered incriminating transcripts of Nixon ordering a stop to the investigation of the Watergate burglary, and Nixon shortly thereafter announced his resignation.69 Ford ultimately assumed the Presidency, and he continued with Scalia’s nomination to the Office of Legal Counsel as the Assistant Attorney General.70 The Senate confirmed Scalia on August 22, 1974.71 Scalia’s first assignment in this role was to write an opinion determining whether Nixon owned the tapes and documents the special prosecutor was seeking.72 Scalia wrote, “By custom and tradition, the files of the White House Office belong to the President in whose Administration they are accumulated. It has been the invariable practice, at the end of an Administration, for the outgoing President or his estate to authorize the depository or deposition to be made of such files.”73 Even in his first opinion, before he assumed the bench, Scalia emphasized custom, tradition, and the deferential guard of executive power. Scalia remained in this position in the Office of Legal Counsel until 1977, when he returned to academia to teach at the University of Chicago after being passed over as replacement for Justice Douglas on the Supreme Court, who was instead replaced by Justice Stevens.74

F. The University of Chicago and The Federalist Society

Scalia’s supervisor at the Office of Legal Counsel suggested that he teach at the University of Chicago. Although Scalia very much enjoyed “[mixing] it up with students and

68 Id. at 39-40.
69 Id. at 40.
70 Id.
71 Id.
72 Id. at 42.
73 Id. (quoting a first draft of his opinion distributed to Assistant Attorney General Carla Hills on September 3, 1974).
74 Id. at 60-61.
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[getting] arguments going[,] he was annoyed that "too many students... had turned to law 'to save the world.'" He noted that, "[t]here are far better ways to save the world... than become a lawyer." Scalia was also "a relatively lonely voice of defiant conservatism." However, he found company amongst two law students, Lee Liberman and David McIntosh, who wanted to create conservative debate forums at the University of Chicago. They found themselves in the minority at law school, with most student organizations falling on the left. In the wake of Reagan's election to the Presidency, the students wanted to create a forum for other like-minded conservatives—both on the campus at the University of Chicago, and beyond. They named their organization the Federalist Society, named after the Federalist papers written by Alexander Hamilton, James Madison, and John Jay. As an ideologically aligned partner in the conservative movement, Scalia served as the faculty advisor for the Federalist Society, and the group "offered an environment for a range of conservatives and libertarians, drawing in those opposed to abortion and busing, along with free-market thinkers who were uninterested in a social policy agenda." Neither Scalia nor its student founders could have predicted that the Federalist Society would popularize and give momentum to conservative thinking and the originalist interpretation of the Constitution. Scalia noted that, "We thought we were just planting a flower among the weeds of academic liberalism. It turned out to be an oak."

During his tenure at the University of Chicago, Scalia was presented a number of professional opportunities with the federal government. Following Reagan's election to the

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75 Id. at 66 (quoting an Author Interview with Antonin Scalia, May 1, 2008).
76 Id.
77 Id.
78 Id. at 71.
79 Id. at 75.
80 Id.
81 Id. at 76.
82 Id. at 78.
83 Id. at 79.
Presidency, Scalia had his eye on the position of solicitor general in the administration. In early 1981, Scalia was on the short list for the position, and he flew to Washington, DC to meet with the Attorney General, who would make the final choice. Despite his desire to leave Chicago and obtain this coveted position, Scalia was rejected. Decades later, Scalia admitted, “I was bitterly disappointed. I never forgot it.” In the spring of 1982, after Scalia lost the solicitor general position, he was offered a seat on the U.S. Court of Appeals for the Seventh Circuit in Chicago, which he declined. Scalia was both holding out for a position on the federal appeals court for the District of Columbia Circuit and was eager to leave Chicago. Simply put, “The University of Chicago’s Hype Park neighborhood was not a good match for the Scalías. They thought their children’s school not academically rigorous enough. They found their neighborhood Catholic parish too liberal and drove into downtown Chicago in search of a more conservative place to worship. Born, reared, and educated on the East Coast, they were not happy in Chicago.” Scalia’s wait paid off, and in 1982 President Reagan offered him a position on the D.C. Circuit.

G. The D.C. Circuit Years

Scalia’s time on the D.C. Circuit laid the groundwork for his demeanor, habits, and jurisprudence on the Supreme Court. He was only forty-six years old when he joined the D.C. Circuit in 1982, but he unabashedly conflicted with judges who were older and more
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experienced. However, even when he departed substantively on the law and his approach to Constitutional interpretation, he was nonetheless well-liked. Justice Ginsberg sat on the D.C. Circuit at the same time as Scalia, and noted that, "He made himself the centerpiece. He was very jovial, thinking himself very clever and full of himself. But nothing that was obnoxious. It was quite pleasant." Later, the two would become close friends, celebrating New Years Eve annually and taking family vacations together. Despite their ideological differences, Ginsburg admitted she was "fascinated by him because he was so intelligent and so amusing. ..You could still resist his position, but you still had to like him."

This sentiment was felt by most, as Scalia was fairly easygoing with his clerks and used them as sounding boards for his decisions. Given Scalia’s lively opinions and love for the text, instilled by his father, he devoted much time to drafting his opinions and he had an "interest in getting the words just right." Scalia said in an interview that, "I like the intellectual endeavor. I like playing with ideas and words and analyzing the meaning of statutes." Some of the other judge’s clerks, however, were frustrated by Scalia’s approach, and dubbed him "the Ninopath," because of his unwillingness to bend in his drafting process. Scalia’s own clerk, former student and Federalist Society founder Lee Silberman, stated that he was “tireless in chasing down and eliminating bad dicta from his colleagues’ opinions” and eliminating any phrases or words that “could potentially broaden the reach of a ruling.”

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93 Id.
94 Id.
95 Id.
96 Id. at 89.
97 Id.
98 Id.
99 Id.
100 Id.
101 Id. at 90.
102 Id. at 91.
103 Id.
In terms of substantive law, Scalia practiced what he preached as a professor, faculty advisor to a conservative student group, and former Justice Department and Executive Branch employee. He read individual rights narrowly and protested race-based and sex-based policies and practices to compensate for past discrimination. Scalia also made it clear that he wanted judges to “engage in less judicial review of federal regulators’ actions.” He wanted to create additional hurdles for consumer and special interest groups to bring their grievances to court, and he wanted judges to shift their method of statutory interpretation by focusing only on the text and not the legislative history of committee reports. Some critics accused Scalia of catering his opinions in a “conscious effort to appeal to President Reagan’s far-right aides” in anticipation of gaining a Supreme Court nomination. Scalia remained on the D.C. Circuit for four years, from 1982-1986, when he would be elevated to the country’s highest court.

H. Supreme Court Appointment and Confirmation

Scalia had some notable advantages helping him in his appointment to the Supreme Court, which ultimately led to an easy approval and unanimous confirmation by the Senate. In his confirmation hearing, Scalia was supported by his entire family, including his nine children and wife Maureen. He had image of wholesomeness and family loyalty working in his favor throughout his confirmation. Additionally, the highly contentious confirmation of Justice Rehnquist just a week prior to Scalia’s hearing was viewed as, at least in part, the reason the confirmation committee took it easy on Scalia. Additionally, insiders in Washington strongly supported Scalia, with Patrick Buchanan noting, “I would lean to Scalia for the first seat [of
Reagan’s second term. He is an Italian-American, a Roman Catholic, who would be the first Italian ever nominated—a tremendous achievement for what is America’s largest ethnic minority, not yet fully assimilated into the melting pot—a minority which provides the GOP its crucial margins of victory in New Jersey, Connecticut, and New York.”

Even then—Democratic Senator Joseph Biden proclaimed that, “There is a significant distinction between this nominee [and Rehnquist.] One is that this nominee has demonstrated through his career that he has an intellectual flexibility. He is not a rigid man.” Of course, Biden later stated that, “The vote I most regret casting out of all the ones I ever cast was voting for [Scalia].”

Ultimately, on September 17, Constitution Day, the Senate unanimously confirmed Scalia, by 98-0. It is fairly safe to say that this breezy confirmation process was not an omen of the support Scalia would receive on the Supreme Court, where he often “argu[ed] in vain” against other justices in reaching decisions. Paradoxically, one of the most controversial Supreme Court Justices did not face such controversy in his confirmation to this role.

III. Jurisprudential Approach

Scalia’s jurisprudence is highly influenced by his education and background. This is particularly true given that there is no explicit directive within the Constitution that “mandates that the Supreme Court don a historical straightjacket” and read the Constitution in light of its original meaning and text. Scalia’s approach to constitutional interpretation, which emphasizes its original meaning and plain text, therefore must be found outside the Constitution. Given

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112 Id. at 106.
113 Id. at 121.
114 Id.
115 Id.
116 Id. at 132.
117 David M. Zlotnick, Justice Scalia and His Critics: An Exploration of Scalia’s Fidelity to His Constitutional Methodology, 42 EMORY L.J. 1377, 1382 (1999) (citing Cass Sunstein, Justice Scalia’s Democratic Formalism, 107 YALE L.J. 529, 562 (1997)).
118 Id. at 1383
that as early as high school, Scalia had established his academic prowess, his high regard and respect for his Catholic faith, and his rule-oriented nature, it is likely that Scalia's jurisprudence was influenced by his upbringing and education.  

Scalia is self-proclaimed as having an "original meaning", rather than an "original intent", approach to constitutional interpretation. This means that he seeks to determine the original meaning of the text, not the draftmen's intentions behind the text. According to Scalia, the "Constitution should be interpreted in terms of the original understanding of its framers." Scalia has also stated that "Judges should be restricted to the text in front of them. According to my judicial philosophy, I feel bound not by what I think the tradition is, but by what the text and tradition say. The Constitution is an anchor. I don't need it to create change. It's a rock to hold onto." Scalia explains that when the plain meaning of text is not clear or dispositive, he can turn to the original meaning or understanding of the Constitution because it "establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself." Scalia adheres to this approach to ensure that judges are not inserting their personal beliefs into constitutional interpretation. Scalia fears that "judicial abuse of discretion poses a grave danger to our democratic institutions and to the primacy of the written Constitution."
In order to carry out this philosophy, Scalia approaches cases by first examining “the text of the document and what it meant to the society that adopted it.” When determining the meaning of various laws and statutes, Scalia believes that “judges should look solely at the text of a law and related statutes, rather than at the artifacts of the legislative process.” Scalia has even been known to utilize the dictionary that was published at the time when a statute was enacted in order to determine its meaning. He is dismissive of “congressional reports that accompany[y] a bill to the floor as merely the work of staff and not representative of a sense of Congress.” In practicing originalism, Scalia still honors the concept of stare decisis. However, when precedent conflicts with the plain meaning or original understanding of the constitution, precedent is not “law of the same order as the primary sources of constitutional interpretation.” When Scalia believes that precedent has been wrongly decided or reasoned in error, he favors overruling it. However, Scalia has strong convictions regarding separation of powers, and he does not believe judges should freely overturn the acts of the legislature. He believes that allowing unelected judges to overturn the legislative acts of an elected majority is “fundamentally inconsistent with democracy.” However, “Scalia has applied varying standards for when judges should defer to a legislature.” While he believes that judges should

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127 Biskurpic, supra note 1, at 118.
128 Id. at 93.
129 Collins, supra note 125, at 1051 (quoting Tennessee v. Lane, 541 U.S. 509, 559 (2009) (Scalia, J., dissenting) (citing the definition of “enforce” as found in two separate dictionaries published in 1860, the time at which the Fourteenth Amendment was adopted).
130 Biskurpic, supra note 1, at 93.
132 Gerhardt, supra note 123, at 32 (citing Robert A. Burt, Precedent and Authority in Antonin Scalia’s Jurisprudence, 12 CARDOZO L. REV. 1685, 1689 (1991)).
133 Id. at 33.
134 Zlotnick, supra note 117, at 1383-84.
135 Id. at 1383.
136 Biskurpic, supra note 1 at 355.
defer to legislatures regarding the death penalty, gay rights, and abortion, he has not accepted deference regarding gun rights and affirmative action.\textsuperscript{137}

Scalia's methodology tends to yield bright line tests, which are easy to apply.\textsuperscript{138} The desire for these rules likely stems from Scalia's education at a military high school, which was highly structured and rigid.\textsuperscript{139} Scalia seeks these tests because it keeps judges restrained and from inserting their personal views into decisions. He believes that broad tests have two positive results: (1) it constrains judges by limiting their discretion; and (2) it enables the courts to achieve predictability in their decisions, which he asserts is "an essential requirement of justice and actually enhances protection of individual rights by providing 'a solid shield of a firm, clear principle[.]'"\textsuperscript{140}

Many have criticized Justice Scalia for departing from this approach when it will not allow him to achieve conservative goals.\textsuperscript{141} Some find it dubious that "the original meaning of the Constitution and the Republican platform are remarkably similar."\textsuperscript{142} Although Scalia cautions that originalism is not perfect, he claims that, "whatever our problems are, they pale next to the problems of the idea of the 'Living Constitution.'"\textsuperscript{143}

It is also important to note that although not a jurisprudential approach per se, the straightforward and even sarcastic tone of his opinions has become one of Scalia's most famous contributions on the bench. Even Scalia's critics acknowledge that, "he has a great flair for

\textsuperscript{137} Id.
\textsuperscript{138} Gerhardt, \textit{supra} note 123 at 34.
\textsuperscript{139} Biskurpic, \textit{supra} note 1 at 21.
\textsuperscript{140} Gerhardt, \textit{supra} note 123, at 35 (citing Antonin Scalia, \textit{The Rule of Law as a Law of Rules}, 56 U. CHI. L. REV. 1175, 1185 (1989)).
\textsuperscript{141} Biskurpic, \textit{supra} note 1 at 9.
\textsuperscript{142} Chemerinsky, \textit{supra} note 121, at 392.
\textsuperscript{143} Biskurpic, \textit{supra} note 1 at 7.
language and does not mince words when he disagrees with a position” and that his opinion are “among the most entertaining to read.”

Many of Scalia’s decisions are in conformity with his conservative ideals, particularly First Amendment cases. However, Scalia does adhere to his originalist approach, even when it yields more liberal results. The sections below will discuss his jurisprudential style in the context of different areas of Constitutional law and how Scalia conforms—or in some cases, departs—from his proclaimed jurisprudential styles. When departing from his stated jurisprudential approach, it is clear that Scalia’s background and religious beliefs are driving his decisions.

IV. Cases Supporting Scalia’s Jurisprudential Style

This section will discuss the main areas in which Scalia adheres to his proclaimed jurisprudential approach: the Fourth Amendment, the First Amendment’s Establishment Clause, statutory interpretation, and judicial restraint from disturbing legislative acts. Scalia’s Fourth Amendment jurisprudence in his majority opinions in *Kyllo* and *Jardines* demonstrates his loyalty to the plain text of the Fourth Amendment. Scalia’s dissent in *Lee v. Weisman* shows his narrow interpretation of the First Amendment and his desire to lower the wall between church and state and make clear, easy-to-apply rules. Meanwhile, his dissent in *Edwards v. Aguillard* is emblematic of his proclaimed approach to statutory interpretation by ignoring legislative history and instead giving deference to the political process. Lastly, Scalia’s dissent in *U.S. v. Windsor* shows his adherence to judicial restraint and deferring to the legislative process.

A. Fourth Amendment Cases: Unusual Company

Scalia’s Fourth Amendment jurisprudence is consistent with his “originalist” approach, but it often leaves him in usual company on the Court, deciding cases in this area with more

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144 Chemerinsky, *supra* note 121, at 398.
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liberal Justices. Because the Fourth Amendment gives explicit protection of “people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[,]” Scalia gives great deference to the sanctity of the home and the right of individuals to “retreat into his home and there be free unreasonable governmental intrusion.” This deference typically results in greater protection of criminal defendants, which runs afoul of Scalia’s conservative ideals. Despite this, Scalia remains faithful to the original text of the Fourth Amendment in his jurisprudence in this area of constitutional law.

Scalia’s majority opinion in the recent case of Florida v. Jardines demonstrates his commitment to the original meaning and plain text of the Constitution. In Jardines, the Miami-Dade Police Department acted on an anonymous tip indicating that marijuana was being grown in the home of Joelis Jardines. One month after receiving the tip, officers brought a narcotics-sniffing canine to investigate the home. The officers could not see inside the home because the blinds were drawn, so they brought the dog onto the porch to see if the dog would alert to the presence of narcotics. Ultimately, the dog gave a positive alert, and the Detective obtained a warrant based on the dog’s response. The search pursuant to the warrant uncovered the presence of marijuana plants, which Jardines sought to suppress at trial, claiming that the use of a canine on his porch was an unreasonable search under the Fourth Amendment. The trial court granted Jardines’ motion to suppress, but the Florida Third District Court of Appeal reversed.

The Florida Supreme Court affirmed the trial court’s decision to suppress the marijuana plants,

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145 U.S. CONST. amend. IV.
147 133 S.Ct. 1409 (2013).
148 Id. at 1413
149 Id.
150 Id.
151 Id.
152 Id.
153 Id.
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holding that “the use of the trained narcotic dog to investigate Jardines’ home was a Fourth Amendment search unsupported by probable cause, rendering invalid the warrant based upon information gathered in that search.” The Supreme Court granted certiorari to determine the limited issue of whether bringing a narcotics dog on to a porch constituted a search under the Fourth Amendment.

In his majority opinion, Scalia emphasizes the plain text of the Fourth Amendment, noting that “[t]he Fourth Amendment ‘indicates with some precision the places and things encompassed by its protections’: persons, houses, papers, and effects.” He further notes that investigations conducted within “open fields” are permitted because “such fields are not enumerated in the Amendment’s text.” Rather than analyzing the decision under the reasonable expectation of privacy standard under Katz, Scalia rests his decision on the standard articulated in Jones and the plain text of the Fourth Amendment: because the officers obtained information by physically intruding into a protected area of the house—namely, the curtilage—their search is rendered unreasonable under the Fourth Amendment.

Justices Thomas, Kagan, Ginsburg, and Sotomayor concurred in the judgment, with Justice Kagan filing a separate concurring opinion, in which Ginsburg and Sotomayor joined. Chief Justice Roberts and Justices Alito, Kennedy, and Breyer, Scalia’s typically conservative colleagues,

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154 Id.
155 Id. at 1414.
156 Id. (quoting Oliver supra note 144, at 176).
157 Id. (citing Hester v. United States, 265 U.S. 57 (1924)).
158 In Katz v. United States, 389 U.S. 347 (1967), the Court extended Fourth Amendment protection when an individual’s “reasonable expectation of privacy” is violated, even if there is no physical intrusion of a constitutionally protected area. The Court has made clear that “Katz . . . add[s] to the baseline, [but] it does not subtract anything from the [Fourth] Amendment’s protections when the Government does engage in [a] physical intrusion of a constitutionally protected area.” Jardines, supra note 145, at 1414 (internal quotation omitted).
159 United States v. Jones, 132 S.Ct. 945 (2012) (holding that when “the Government obtains information by physically intruding [on persons, houses, papers, or effects], a search within the original meaning of the Fourth Amendment has undoubtedly occurred.”).
160 Jardines, supra note 145, at 1414.
161 The concurring opinion notes that the concurring Justices would have reached the same result even if they decided the case under the Katz reasonable expectation of privacy standard. See id.
dissented.\textsuperscript{162} \textit{Jardines} demonstrates that Scalia will remain faithful to the original meaning and text of the Constitution, even if he finds himself in unusual company in the decision. This decision does not achieve a conservative agenda, and it is emblematic of Scalia’s faithfulness to his “originalist” jurisprudence.

Another Fourth Amendment case, \textit{Kyllo v. United States},\textsuperscript{163} shows Scalia’s commitment to Constitutional originalism. Scalia once again wrote for the majority and was joined by Justices Souter, Thomas, Ginsburg, and Breyer.\textsuperscript{164} \textit{Kyllo} also involved in-home cultivation of marijuana plants, which typically requires high-intensity heat lamps.\textsuperscript{165} Agent Elliott of the United States Department of Interior suspected that Danny Kyllo was growing marijuana in his home in Florence, Oregon and used an Agema Thermovision 210 thermal imaging device to scan Kyllo’s home for infrared radiation.\textsuperscript{166} This radiation cannot be seen with the naked eye, and the device “converts radiation into images based on relative warmth[,]” with black indicating cool temperatures, white indicating hot, and grey noting relative differences in temperatures.\textsuperscript{167} Scalia notes that in this regard, the thermal device “operates somewhat like a video camera showing heat images”\textsuperscript{168} from within the home. The scan of Kyllo’s home showed that certain areas were relatively hotter than others, with the roof of the garage emanating the most heat.\textsuperscript{169} Based on this finding, as well as anonymous tips and utility bills, Agent Elliott obtained a warrant to search the home, which uncovered the presence of an indoor growing scheme,

\begin{footnotesize}
\begin{enumerate}
  \item The dissent emphasizes that implicit licenses allow visitors to enter a home’s curtilage, including the porch, and that canine dogs are ubiquitous and have been used in law enforcement for centuries. \textit{id.} at 1420-21.
  \item 533 U.S. 27 (2001).
  \item \textit{id.} at 29.
  \item \textit{id.}
  \item \textit{id.}
  \item \textit{id.} at 29-30.
  \item \textit{id.} at 30.
  \item \textit{id.}
\end{enumerate}
\end{footnotesize}
involving more than 100 marijuana plants. Kyllo, like Jardines, sought to suppress the plants at his trial, which the District Court denied. Although a divided panel for the Ninth Circuit originally reversed the trial court’s determination, it withdrew its opinion and affirmed the District Court, holding that there was no subjective expectation of privacy because Kyllo did not attempt to conceal the heat emanating from his home. The Ninth Circuit also found that there was no objective expectation of privacy because the thermal imaging device did not expose any intimate details of the home. The Supreme Court granted certiorari, and Scalia delivered the opinion of the Court, finding that the use of the thermal imaging device constituted an unreasonable search under the Fourth Amendment.

Scalia once again gives great deference to the sanctity of the home and the great protection afforded to it explicitly by the Fourth Amendment. Scalia notes that “obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical ‘intrusion into a constitutionally protected area’ constitutes a search—at least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.” Although the thermal imaging device was limited to obtaining information regarding the heat escaping the house, Scalia insists that “[t]he Fourth Amendment’s protection of the home has never been tied to measurement of the quality or quantity of information obtained.” Scalia protects the home from government intrusion because the Fourth Amendment explicitly dictates that “all details [from the home] are intimate

\[\text{id.}\]

\[\text{id.}\]

\[\text{id. at 31.}\]

\[\text{id.}\]

\[\text{id. at 34-35.}\]

\[\text{id. at 34.}\]

\[\text{id. at 37.}\]
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details, because the entire area is held safe from prying government eyes."^{177} At the end of his opinion, Scalia reverts to the original meaning of the Fourth Amendment when it was enacted. He notes that, "we must take the long view, from the original meaning of the Fourth Amendment forward."^{178} In culminating his opinion, Scalia quotes *Carroll v. United States*,^{179} in a separate paragraph, to further emphasize the original interpretation of the Fourth Amendment: "The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens."^{180}

These Fourth Amendment decisions cut against arguments that Scalia will abandon his jurisprudential style in order to achieve conservative ideals. In these decisions, Scalia’s opinions are joined by more liberal justices, who seek to protect the individual rights of criminal defendants. Scalia, however, is unwavering in his originalist approach, and focuses on the Fourth Amendment’s explicit protection of the home from unreasonable government searches.

**B. First Amendment Jurisprudence: Originalism Favors Lowering the Wall Between Church and State**

It is undisputed that Justice Scalia is a devout Catholic and that his faith plays an important part in his professional life. He believes that the wall between church and state should be lowered in order to "allow greater support for religion."^{181} In fact, "when it [comes] down to it, he believe[s] almost no government action would violate the Establishment Clause, short of outright coercing religious participation."^{182} Accordingly, Scalia very narrowly interprets both the Establishment Clause and Free Exercise Clause, and "leaves little room for judicial

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^{177} *Id*
^{178} *Id* at 40.
^{179} 267 U.S. 132, 149 (1925).
^{180} *Kyllo, supra* note 161, at 40.
^{181} *Biskurpic, supra* note 1, at 139.
^{182} *Id*
This belief, according to Scalia, is supported by the plain text of the Establishment Clause, which states that, “Congress shall make no law respecting the establishment of religion.” 183 It seems that Scalia takes these words quite literally, and that “little will ever violate the Establishment Clause.” 185 One of Scalia’s critics noted that under Scalia’s approach, the Establishment Clause would only be violated “by the government creating its own church, or by force of law requiring religious practices, or by favoring some religions over others.” 186 This arguably ignores the importance in preventing the “government from using its power to influence and advance religion or a particular religion.” 187 However, Scalia remains faithful to his jurisprudence in interpreting the First Amendment. Scalia’s adherence to the text, coupled with his deference to history, led to his fervent dissent in Lee v. Weisman, 188 in which he lambasted the majority for their holding that having a clerical member offering a prayer as part of a public school’s graduation runs afoul of the Religion Clauses of the First Amendment. 189

In Lee v. Weisman, Daniel Weisman objected to the use of ceremonial prayer at his daughter’s public school graduation in Providence, Rhode Island. 190 The principal of the school, Robert E. Lee, invited a rabbi to deliver prayers at the graduation, in conformity with the custom of Providence public schools. 191 Prior to the graduation ceremony, Principal Lee provided the rabbi with a pamphlet entitled “Guidelines for Civic Occasions,” which emphasized the importance of nonsectarian services being both inclusive and sensitive to the diversity of...
religious beliefs of those attending.\textsuperscript{192} Despite this, the District Court found held that this use of prayer in public school graduations violated the Establishment Clause, and the Court enjoined the practice.\textsuperscript{193} The District Court applied the \textit{Lemon} test\textsuperscript{194} and found that the practice of prayer at public school graduations violated the Establishment Clause.\textsuperscript{195} On appeal, the First Circuit affirmed.\textsuperscript{196} The Court granted certiorari and ultimately affirmed.

The majority opinion was written by Justice Kennedy and joined by Blackmun, Stevens, O'Connor, and Souter.\textsuperscript{197} Justices Souter and Blackmun filed concurring opinions, and Justices O'Connor and Stevens joined Justice Souter's concurrence.\textsuperscript{198} Justice Scalia wrote the dissent, and was joined by Justices Rehnquist, White, and Thomas.\textsuperscript{199} The majority emphasized that 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 party of a religious program carried on by government.'"\textsuperscript{200} The majority also emphasized how students may feel pressured to join in the prayer and follow their teachers.\textsuperscript{201} This state-sponsored worship was ultimately deemed an unconstitutional violation of the Establishment Clause.

Scalia began his dissent by summarizing his jurisprudence: "the meaning of the [Establishment] Clause is to be determined by reference to historical practices and
understandings.” 202 He criticized the majority for failing to reference history in reaching its decision. 203 Scalia, in Part I of his opinion, undertakes a lengthy historical analysis, focusing on how the “history and tradition of our Nation are replete with public ceremonies featuring prayers.” 204 In more scathing terms, Scalia concludes that “there is simply no support for the proposition that the officially sponsored nondenominational invocation and benediction read by [the] Rabbi...—with no one legally coerced to recite them—violated the Constitution of the United States. To the contrary, they are so characteristically American they could have come from the pen of George Washington or Abraham Lincoln himself.” 205 In Scalia’s view, a narrow reading of the Establishment Clause coupled with the historical record supports a finding that nondenominational prayer at graduation ceremonies does not run afoul of the Establishment Clause.

Scalia also sharply criticizes the majority’s finding that the inclusion of prayer in the graduation coerces student participation. 206 In accordance with his jurisprudence, Scalia essentially mocks the majority for its definition of coercion, which expands the word’s meaning beyond the dictionary definition. 207 Scalia notes that he sees “no warrant for expanding the concept of coercion beyond acts backed by threat of penalty—a brand of coercion that, happily, is readily discernible to those of us who have made a career of reading the disciples of Blackstone rather than of Freud.” 208 Scalia’s dissent in Lee v. Weisman exemplifies Scalia’s narrow and consistent interpretation of the First Amendment’s Establishment Clause. It also

202 Id. at 631.
203 Id.
204 Id. at 633.
205 Id. at 641-42.
206 Id. at 637.
207 Id. at 642.
208 Id.
demonstrates Scalia’s preference for majority rules, deference to the government, and plain, dictionary meaning of words.209

C. Statutory Interpretation: It Means What It Says

Justice Scalia takes a firm stand in his jurisprudence regarding statutory interpretation: he has deep suspicions of examining legislative history, including committee reports and hearings, to determine the meaning of the statute.210 Scalia once stated that, “Our task, as I see it, is not to enter the minds of the Members of Congress—who need have nothing in mind in order for their votes to be both lawful and effective—but rather to give fair and reasonable meaning to the text of the United States Code, adopted by various Congresses at various times.”211 Scalia’s dissent in Edwards v. Aguillard212 reflects this approach in statutory interpretation, as he gives little weight to the legislative history and instead focuses his interpretation on the text of the statute at issue.

Edwards v. Aguillard involved Louisiana’s “Creationism Act”, which forbade the teaching of the theory of evolution in public schools, unless it is accompanied by teaching the theory of “creation science.”213 The Creationism Act did not require the teaching of either theory unless one was taught, and parents, teachers, and religious leaders challenged the constitutionality of the Act, claiming it violated the Establishment Clause of the First Amendment.214 The District Court held that the Act violated the Establishment Clause because “there can be no valid secular reason for prohibiting the teaching of evolution, a theory historically opposed by some religious denominations.”215 The Court of Appeals affirmed,

209 Biskurpic, supra note 1, at 140.
210 Id. at 146.
211 Id. at 146-47.
213 Id.
214 Id.
215 Id. at 582.
finding that the “Legislature’s actual intent was ‘to discredit evolution by counterbalancing its teaching at every turn with the teaching of creationism, a religious belief.”’ 216 The Supreme Court granted certiorari and affirmed. 217

Justice Brennan delivered the opinion of the Court, and Justices Marshall, Blackmun, Powell and Stevens joined in the opinion. 218 Justice Powell delivered a concurring opinion, in which Justice O’Connor joined. 219 Justices Scalia dissented, and his fellow conservative, Justice Rehnquist, joined in his dissent. 220 The majority applied the three-part Lemon 221 test, but also focused substantially on the legislative history surrounding the enactment of the law. Brennan noted that “[i]t is clear from the legislative history that the purpose of the legislative sponsor, Senator Bill Keith, was to narrow the science curriculum.” 222 Moreover, Brennan found that because Senator Keith noted in the legislative hearings that he preferred “that neither [creationism nor evolution] be taught[,]” the proclaimed propose to provide a “comprehensive scientific education” was completely undermined by such statements. 223 The majority further emphasized the legislative history and statements made throughout the hearings. It noted that “[t]he legislative history documents that the Act’s primary purpose was to change the science curriculum of public schools in order to provide a persuasive advantage to a particular religious doctrine that rejects the factual basis of evolution in its entirety.” 224 The majority also determined that the legislation sought to make the science curriculum reflect an “endorsement of a religious view that is antagonistic to the theory of evolution” primarily because Senator Keith

216 Id.
217 Id.
218 Id. at 579.
219 Id.
220 Id.
221 See supra note 194.
222 Aguillard, supra note 212, at 587.
223 Id.
224 Id. at 592.
emphasized that "scientific evidence supporting his religious views should be included in the public school curriculum to redress the fact that the theory of evolution incidentally coincided with what he characterized as religious beliefs antithetical to his own."  

Scalia vehemently dissented in the Court’s decision and criticized the majority for guessing at the meaning of the Act by “impugning the motives of its supporters.” He asserts that, “what the statute means and what it requires are of rather little concern to the Court” and that the Court “finds it necessary to consider only the motives of the legislators who supported the [Act].” Scalia concluded that “[t]he people of Louisiana, including those who are Christian fundamentalists, are quite entitled, as a secular matter, to have whatever scientific evidence there may be against evolution presented in their schools[.]” While this shows adherence to his jurisprudential approach, Scalia’s biographer noted that this reference implied Scalia’s desire that creationism be on “equal footing” with the theory of evolution, which is in conformity with his religious beliefs. In summary, Scalia’s dissent in *Aguillard* is both aligned with his disdain for legislative history in statutory interpretation and with his personal belief that that the wall between church and state should be lowered.

### D. Judicial Restraint: Deference to the Legislature & *U.S. v. Windsor*

Scalia has strong beliefs regarding the separation of powers and judicial restraint. He believes that courts’ proper role is only to protect individual rights from government intrusion, and that judges should never become entangled in policy disputes. Moreover, Scalia believes that the “main danger in judicial interpretation of the Constitution...is that the judges will

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225 *Id.* at 592-93.
226 *Id.* at 611.
227 *Id.* at 612.
228 Biskurpic, *supra* note 1, at 139.
229 *Id.*
mistake their own predilections for the law. Avoiding this error is the hardest part of being a conscientious judge." Scalia’s recent opinion in *U.S. v. Windsor* demonstrates Scalia’s fear of judicial activism and disturbing legislative action. In *Windsor*, Edith Windsor challenged Section 3 of the Defense of Marriage Act (DOMA), which prohibited her from claiming an estate tax exemption when she inherited her same-sex spouse’s estate following her death in 2009. Consequently, Windsor paid $363,053 in estate taxes that she would not have been required to pay if she were married to an opposite-sex partner. Windsor challenged DOMA, arguing that it violated equal protection under the Fifth Amendment. While the suit was pending, the Attorney General opted not to defend the constitutionality of Section 3 of DOMA, and the Bipartisan Legal Advisory Group (BLAG) intervened to defend the legislation. The District Court found DOMA unconstitutional, and the Second Circuit affirmed. Justice Kennedy wrote for the majority, and Justices Ginsberg, Breyer, Sotomayor, and Kagan joined his opinion. Justice Roberts filed a dissent, as did Justice Scalia, which was partially joined by Justice Thomas. Justice Alito also filed a dissent, joined in part by Justice Thomas. After deciding the procedural issues of whether BLAG had the standing to appeal the case, the majority held that DOMA was unconstitutional and violated the Fifth Amendment’s Equal Protection guarantees.

Scalia’s dissent disagreed with the majority’s holding—both on procedural and substantive grounds. Scalia begins his opinion by noting that the Court has no power to decide the case on standing grounds alone, and even if it did, it has no constitutional authority to strike

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231 Gerhardt, supra note 123, at 29.
233 Id. at 2679.
234 Id.
235 Id.
236 Id.
237 Id. at 2697.
down a democratically adopted piece of legislation. He argues that the Court is “hungry... to tell everyone its view of the legal question at the heart of this case.” He further points out that Windsor won at both the District Court and Federal Appeals level, and that therefore she suffers no injury to be remedied by the Court. Scalia asserts that it is “jaw-dropping” for the Court to assert its “judicial supremacy over the people’s Representatives in Congress and Executive.”

Scalia then outlines his belief of judicial power, arguing that judges should only incidentally determine a law’s constitutionality when it is necessary to resolve a dispute. After explaining why the Court does not have power to decide this case, Scalia also sets forth his beliefs regarding same-sex marriage. He asserts that the “Constitution neither requires nor forbids our society to approve of same-sex marriage, much as it neither requires nor forbids us to approve of no-fault divorce, polygamy, or the consumption of alcohol.” He notes that “to defend traditional marriage is not to condemn, demean, or humiliate those who would prefer other arrangements[.]” He further attacks the majority for “formally declaring anyone opposed to same-sex marriage an enemy of human decency” and for making the issue seem “black-and-white[.]” Scalia concludes by noting that “[s]ome will rejoice in today’s decision and some will despair at it; that is the nature of a controversy that matter so much to so many. But the Court has cheated both sides, robbing the winners of an honest victory, and the losers of the peace that comes from a fair defeat. We owed both of them better. I dissent.”

238 Id. at 2697-98.
239 Id. at 2698.
240 Id.
241 Id.
242 Id. at 2699.
243 Id. at 2707.
244 Id. at 2708.
245 Id. at 2710, 2711.
246 Id. at 2711.
Scalia's opinion is consistent with his jurisprudential approach of exercising judicial restraint and refraining from overturning democratic legislation. His opinion also has tones similar to his opinion in *Lawrence v. Texas*,\(^{247}\) which shows a strong conviction for judicial restraint, but also includes tones of sarcasm and anger towards the majority for affording greater rights to homosexuals. This anger and vehemence in cases involving extension of rights to same-sex individuals seems to have "a way of under-cutting his assertion of a principled approach to the law irrespective of what was at stake in the case."\(^{248}\) It has even been noted that, "Cases in which Scalia believes that elite judges or professors are trying to dismantle the moral position of ‘the people’ bring out a particular vituperativeness. . . and leave the unavoidable impression that he speaking not only for originalism but also for his own selective notion of the vox populi."\(^{249}\) Regardless of whether Scalia’s tone undermines his credibility in this area, it is clear that he strictly adheres to his jurisprudence and avoids entangling himself and the Court in overturning democratically enacted policies—whether he agrees with them or not.

V. Departing from Originalism—Achieving Conservative Results Without Regard for the Text

This section discusses the areas of law and decisions where Scalia has departed from his originalist and textualist approaches. While adherence to stare decisis offers part of the explanation of Scalia’s departure from his jurisprudential approach, it cannot be ignored that the result in each of the decisions discussed below achieve conservative results—namely, reduced protection for minority religions and races, upholding long-standing tradition, and strict enforcement of drug laws.

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\(^{247}\) 539 U.S. 558 (2003) (where Scalia noted that "Today’s opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the homosexual agenda, by which I mean the agenda promoted by some homosexual activities directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct.").

\(^{248}\) Biskupic, *supra* note 1, at 227.

\(^{249}\) *Id.*
A. Free Exercise and Employment Division v. Smith

In examining Scalia’s majority opinion in Employment Division v. Smith, it is, at first blush, in conformity with Scalia’s jurisprudence of reading the First Amendment narrowly and lacking accommodation of minority religions. However, in closely examining the holding, it is clear that Scalia had to look beyond the plain text of the Free Exercise Clause, and therefore departs from his jurisprudence. Smith presented the issue of whether the Free Exercise Clause permits Oregon to include the religious use of peyote within its criminal prohibition of the drug, and in doing so, can deny unemployment benefits to persons fired from their jobs because of religious use of the drug. Scalia wrote the majority opinion, and was joined by Justices Rehnquist, White, Stevens, and Kennedy. Justice O’Connor filed a concurrence and in which Parts I and II Brennan, Marshall, and Blackmun joined. Justice Blackmun filed a dissenting opinion, in which Brennan and Marshall joined. The Respondents claimed that Sherbert v. Verner set forth the appropriate standard of review in the case: strict scrutiny. However, Scalia noted that the Court has “never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.” In so concluding, Scalia applied rational basis review and determined that Sherbert should be confined to the context of employment cases.

In reaching his decision, Scalia abandons his textualist approach and fails to recognize the flaws of leaving decisions of Free Exercise to the political process. The Free Exercise Clause quite clearly provides that, “Congress shall make no law . . . prohibiting the free exercise [of religion.]” It seems to then follow that a law prohibiting Native Americans from ingesting...
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Peyote as part of their religion would be in violation of the plain text of the First Amendment. However, Scalia seems to impute a word into the Fourth Amendment’s text: Congress shall make no law intentionally prohibiting the free exercise of religion. This approach clearly contradicts his originalist approach by looking beyond the text and original meaning of the Constitution. Moreover, although Scalia typically emphasizes that judges should refrain from interrupting a legislature’s enactment, and that decisions should be left to lawmakers, not judges, this approach in practice may fall short in the context of Free Exercise. Religious minorities are unlikely to be adequately represented in the political process, and therefore their interests may be ignored completely. Additionally, the First Amendment’s Free Exercise Clause originally was meant to protect religious minorities from freely exercising their respective religions. Scalia neglects this original understanding and instead reads the work “intentionally” into the text of the First Amendment, thus demonstrating a departure from his originalist jurisprudential approach.

B. The Commerce Clause and Gonzalez v. Raich

Before examining Scalia’s approach to the Commerce Clause and Necessary and Proper Clause in Gonzalez v. Raich, it is important to examine the historical understanding of these constitutional provisions. At the time the Constitution was adopted, “the initial conception...was that the powers of the federal government were to be few and defined.” Early Supreme Court cases in this area conformed to this approach. Therefore, “if Scalia were to adhere to the meaning of the Constitution’s text when it was written, he would follow this relatively

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256 Collins, supra note 125, at 1062 (citing Marbury v. Madison, 5 U.S. 137 (1803)).  
257 See id. (noting that “in the early Civil Rights Cases, the government did not defend the passage of a broad law that regulated individual actors’ conduct under a Commerce Clause theory because Congress’ power under this Clause had not been contemplated for use in this manner.”)
narrow interpretation of commerce power. It was not until the decision in *Gibbons v. Ogden* that the Commerce Clause was interpreted more broadly, allowing for regulation of water that only partially affects intrastate matters. The more modern interpretation of the Commerce Clause did not emerge until the Court’s decision in *NLRB v. Jones & Laughlin Steel, Corp.* in 1937. This watershed decision established a broad interpretation of interstate commerce, and the majority established three categories under which Congress can regulate interstate commerce: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce and persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce. However, because this interpretation did not emerge until 1937, it cannot be said to be the original meaning intended by the Constitution’s Framers. Therefore, if Scalia were to remain faithful to his jurisprudential approach, he would reject this interpretation.

Scalia seems to follow an originalist, and therefore narrow and limited, understanding of the Commerce Clause in his decision in *United States v. Lopez*. However, Scalia departs from originalism and a narrow interpretation of the Commerce Clause in his *Gonzalez v. Raich* concurrence. *Raich* involved California’s Compassionate Use Act, which authorized limited marijuana use for medical use. The Respondents were California residents who used marijuana, prescribed by their physicians, to treat medical conditions. The Drug Enforcement

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258 *Id.* at 1062-63.
259 *Id.* at 1062.
260 *Id.*
262 *Collins, supra* note 125, at 1062.
263 *Raich, supra* note 253, at 1.
264 *Raich, supra* note 255, at 1.
265 *Id.*
Agency (DEA) seized the Respondent’s marijuana plants, and they challenged the Controlled Substances Act (CSA) as an unconstitutional violation of Congress’ Commerce Clause power.\(^{266}\) The issue presented was whether “the power vested in Congress by Article I, § 8, of the Constitution. . . includes the power to prohibit the local cultivation and use of marijuana in compliance with California law.”\(^{267}\) Stevens wrote the majority, and was joined by Justices, Kennedy, Souter, Ginsburg, and Breyer. Justices O’Connor, Rehnquist and Thomas dissented. Scalia wrote the concurring opinion.\(^{268}\) The majority held that Congress’ Commerce Clause authority includes the power to prohibit the local cultivation and use of marijuana in compliance with California law.\(^{269}\) In his concurrence, Scalia agreed with the majority’s holding, and asserted that “Congress may not regulate certainly ‘purely local’ activity within the States based solely on the attenuated effect that such activity may have in the interstate market.”\(^{270}\) However, he only one page later claims that “marijuana that is grown at home and possessed for personal use is never more than an instant from the interstate-market.”\(^{271}\) This is precisely the type of local activity in California that may have an attenuated effect on the interstate market, and it contradicts Scalia’s opinion in \textit{Lopez}.\(^{272}\) More importantly, Scalia’s concurrence contradicts his adherence to a narrow interpretation of Constitutional provisions and violates his originalist approach. His reliance upon a broad reading of “necessary” in the necessary and proper clause does not comport with “the definition [of the word] that would have been found in a dictionary of that time.”\(^{273}\) This is demonstrated by the majority in \textit{McCulloch} “explicitly reject[ing] the
ordinary meaning of the term necessary and instead determined that it should be interpreted to include more than the powers that are ‘indispensable to the existence of a granted power.’\textsuperscript{274}

Therefore, Scalia’s concurrence “allows for an even broader grant of congressional power than through the Commerce power alone . . . [and] he departs from his jurisprudence by finding a broad congressional power to regulate the intrastate growth and sale consumption of marijuana for medical use.”\textsuperscript{275} Even when challenged on this issue at a Federalist Society, Scalia cannot reconcile his approach in this case with his jurisprudential style of originalism and his earlier decision in \textit{Lopez}. When attendee Leonard Leo asked Scalia how he reconciles his differing opinion in \textit{Raich}, Scalia said, “[o]h no . . . get another question.”\textsuperscript{276} This has led many to conclude that Scalia sided with the majority to achieve a conservative goal—namely, opposition to the legalization of marijuana.\textsuperscript{277} Regardless of his true motivation in reaching this decision, Scalia certainly departed from his typical jurisprudential approach and adopted a broad reading of the Constitution in this case.

\textbf{C. Equal Protection and Substantive Due Process Cases}

In the area of equal protection and substantive due process, Scalia also takes an extremely narrow interpretation and at times abandons his jurisprudential approach. Scalia emphasizes in his Equal Protection jurisprudence that the Equal Protection Clause “should be read as it was understood when enacted following the Civil War.”\textsuperscript{278} He also believes that when enacted, the Equal Protection Clause did not apply to women, because otherwise the “Nineteenth Amendment would have been superfluous.”\textsuperscript{279} Scalia contends that to apply the Equal Protection Clause to

\textsuperscript{274} Id.
\textsuperscript{275} Id. at 1067.
\textsuperscript{276} Biskupic, \textit{supra} note 1, at 9.
\textsuperscript{277} Id.
\textsuperscript{278} Collins, \textit{supra} note 125, at 1052.
\textsuperscript{279} Id. at 1053-54 (citing SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW at 47).
classes other than race would be to advance a “Living Constitution,” which he clearly does not support.\textsuperscript{280} He further argues that Equal Protection only protects individuals from “a denial of equal protection of the laws and does not guarantee specific rights.”\textsuperscript{281} However, he cannot conclude what constitutes a violation of equal protection. Instead, he claims that a violation of equal protection “remains subject to interpretation[,]” which contradicts his view that the Constitution should be interpreted as it was meant when the amendment was adopted.\textsuperscript{282} A true originalist “would provide the answer by determining the original meaning of the words when they were adopted without subjective interpretation.”\textsuperscript{283} Scalia further believes that substantive due process is a concept invented by the Court in order to create new liberties under a “Living Constitution.”\textsuperscript{284} These beliefs impacted Scalia’s concurring opinion in \textit{Adarand Constructors}, in which he looks outside the meaning of the Constitution to determine what is a permissible understanding of due process and equal protection.

Scalia’s concurring opinion in \textit{Adarand Constructors v. Pena}\textsuperscript{285} demonstrates his departure from originalism, perhaps to yield a conservative result. \textit{Pena} is a case in which Adarand Constructors challenged a United States Department of Transportation program that favored firms that awarded subcontracts to businesses owned by minorities.\textsuperscript{286} Adarand was a white-owned Colorado Springs firm that lost a bid for a guardrail project, despite the fact that it submitted the lowest bid.\textsuperscript{287} Instead, a Hispanic company with a higher bid won under the Department of Transportation’s “disadvantaged business enterprises” program that “presumed

\textsuperscript{280} Id. at 1054.
\textsuperscript{281} Id.
\textsuperscript{282} Id.
\textsuperscript{283} Id. (citing \textit{Michael H. v. Gerald D.}, 491 U.S. 110, 123 (1989)).
\textsuperscript{284} Id. at 1054
\textsuperscript{286} Biskupic, \textit{supra} note 1, at 177.
\textsuperscript{287} Id.
minorities were socially and economically disadvantaged. The majority first undertakes an analysis of the differences and similarities between the Fifth Amendment and Fourteenth Amendment equal protection standards, and ultimately concludes that, "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest scrutiny." In articulating that strict scrutiny is the appropriate standard to apply to this racially-based policy, the Court remanded the case to apply strict scrutiny.

Scalia’s concurrence, although only a paragraph in length, fervently emphasized that nothing could justify affirmative action and this favorable treatment of minorities at the expense of others. Scalia said that, “in my view, government can never have a ‘compelling interest’ in discriminating on the basis of race in order to ‘make up’ for past racial discrimination in the opposite direction.” He then writes his now famous line that, “under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution[...].” This viewpoint is justified by Scalia’s jurisprudential belief that Equal Protection only protects “denial of equal protection of the laws” and not the guarantee of specific rights. However, because Scalia cannot articulate what constitutes equal protection of the law, he inserts his own subjective interpretation—in this case, that even “[t]o pursue the concept of racial entitlement...is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege, and race hatred. In the eyes of government, we are just one race here. It is American.”

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288 Id.
289 Adarand Construction, supra note 283, at 224.
290 Id. at 238-39.
291 Id. at 239.
292 Id.
293 Id.
basis in reaching the decision, it seems that Scalia is inserting his own interpretation of the Equal Protection and Due Process Clauses under the Fourteenth and Fifth Amendments. Accordingly, this decision demonstrates Scalia’s willingness to depart from originalism and insert his personal beliefs.

D. The Eighth Amendment and *Atkins v. Virginia*

Scalia claims that the originalist approach demands that the Court interpret the Eighth Amendment’s ban on cruel and unusual punishment as what it meant when adopted by the Framers. However, this approach is undercut by Scalia’s additional undertaking of determining what are society’s “evolving standards of decency.” This standard requires courts to determine the “new values of a dynamic electorate” and it seems to “contradict Scalia’s theory of interpretation.” Scalia’s adoption of this “evolving standard is in direct opposition to his originalist philosophy of constitutional interpretation.” Scalia’s dissent in *Atkins v. Virginia,* demonstrates his abandonment of originalism and utilization of the “national consensus” of cruel and unusual punishment.

*Atkins v. Virginia* held that the execution of mentally handicapped criminals constitutes cruel and unusual punishment prohibited by the Eighth Amendment. Justice Stevens wrote for the majority, and was joined by Justices O’Connor, Kennedy, Souter, Ginsburg, and Breyer. Justice Rehnquist filed a concurring opinion, while Justice Scalia’s dissent was joined by Justice Thomas only. Scalia noted in his dissent that under the Eighth Amendment, “a punishment is ‘cruel and unusual’ if it falls within one of two categories: ‘these modes or acts of punishment

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294 Collins, *supra* note 125, at 1057.
295 *Id.*
296 *Id.* at 1058.
297 *Id.*
300 *Atkins, supra* note 296, at 304.
that had been considered cruel and unusual at the time that the Bill of Rights was adopted”\textsuperscript{301} and “modes of punishment that are consistent with modern ‘standards of decency,’ as evinced by objective indicia, the most important of which is legislation enacted by the country’s legislatures.”\textsuperscript{302} This approach of examining a contemporary national consensus is antithetical to an original understanding jurisprudence. Importantly, nowhere in the Constitution does it say that the Eighth Amendment must be examined through a lens of a national consensus.\textsuperscript{303} Accordingly, it appears that Scalia is abandoning his originalist approach in examining the Eighth Amendment in order to achieve a conservative result that allows for the death penalty in more circumstances.

E. U.S. v. Virginia: History, Not Text, is Dispositive

Scalia’s dissent in \textit{U.S. v. Virginia}\textsuperscript{304} demonstrates that he is willing to over-emphasize the importance of history when the text does not explicitly allow for a conservative result. Virginia Military Institution (VMI) was the only single-sex, all-male public institution, with a mission to train men in leadership in military service and civilian life.\textsuperscript{305} The federal government challenged VMI’s admission policy of only allowing men to attend, claiming that the Equal Protection Clause of the Fourteenth Amendment precludes Virginia from exclusively admitting men to the unique educational opportunities at VMI.\textsuperscript{306} After a six-day trial, involving expert testimony that determined that women would enhance the training program at VMI, the District Court ruled in VMI’s favor and rejected the Equal Protection challenge.\textsuperscript{307} The Court of Appeals for the Fourth Circuit disagreed, and held that Virginia cannot justify this admission policy in

\textsuperscript{301} Id. at 339 (quoting \textit{Ford v. Wainwright}, 477 U.S. 399, 405 (1986)).
\textsuperscript{302} Id. at 339-40 (quoting \textit{Penry v. Lynaugh}, 492 U.S. 302, 330-31 (1989)).
\textsuperscript{303} Collins, supra note 125, at 1059.
\textsuperscript{304} 518 U.S. 515 (1996).
\textsuperscript{305} Id. at 515.
\textsuperscript{306} Id. at 519.
\textsuperscript{307} Id. at 523.
light of Equal Protection guarantees. After VMI created a parallel program for women, the District Court determined that the remedial plan met the requirements of Equal Protection. A divided panel for the Fourth Circuit affirmed the District Court’s approval of the remedial plan. The Supreme Court granted certiorari to determine the issue of whether excluding women from VMI denies women equal protection of the law under the Fourteenth Amendment, and held that categorical denial of women from the educational opportunities at VMI constitutes a denial equal protection to women.

Justice Scalia was the lone dissenter in the case, with Justice Ginsburg writing for the majority, and joined by Justices Stevens, O’Connor, Kennedy, Souter, and Breyer. Justice Rehnquist filed a concurring opinion, while Justice Thomas did not partake in the decision. While the majority focused on history, it did so in a way that emphasized that, “our Nation has had a long and unfortunate history of sex discrimination.” Ginsburg wrote that, “Through a century plus three decades more of that history, women did not count among voters composing “We the people”; not until 1920 did women gain a constitutional right to the franchise.” The majority also emphasized that the remedial program for women is not comparable to the education a woman could receive at VMI. The majority applied intermediate scrutiny in analyzing VMI’s admissions policy. In holding that VMI’s admission policy violates Equal Protection, Justice Ginsburg concludes that “There is no reason to believe that the admission of

308 Id. at 524-25.
309 Id. at 526-27.
310 Id. at 527.
311 Id. at 528.
312 Id. at 518.
313 Id. at 531.
314 Id.
315 Id. at 551.
316 Id.
women capable of all the activities required of VMI cadets would destroy the Institute rather than enhance its capacity to serve the ‘more perfect Union.’”

Scalia, conversely, focused on a different aspect of history: he scolds the Court for “shut[ting] down an institution that has served the people of the Commonwealth of Virginia with pride and distinction for other a century and a half.” He alleged that the majority applied a heightened level of scrutiny rather than intermediate scrutiny, and therefore struck down VMI’s admission practice impermissibly. Scalia further notes that “the function of this Court is to preserve our society’s values regarding... equal protection, not to revise them; to prevent backsliding from the degree of restriction the Constitution imposed upon democratic government, not to prescribe, on our own authority, progressively higher degrees.” However, past tradition and practice alone does not have an authoritative claim, requiring absolute and uncritical adherence. This is especially true if past practices were “pernicious or otherwise inconsistent with what a tolerable order requires.” Additionally, what constitutes a violation of Equal Protection, in Justice Scalia’s eyes, is subject to interpretation. Scalia’s dissent, therefore, exemplifies a willingness to tweak his jurisprudential style in order to achieve conservative and traditional results.

It should not be overlooked, however, that Scalia does adhere, at least in semantics, to his typical jurisprudence. Scalia notes that “change is forced upon Virginia, and reversion to single-sex education is prohibited nationwide, not by democratic processes but by order of this...
He also states that "when a practice is not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down." However, in reality, Scalia does not focus on the original meaning or text of the Equal Protection Clause and instead rests his justifications for upholding VMI's admission policy on history alone. This demonstrates a departure from true originalism and advances a theory of upholding laws and practices based solely on their historical importance. This approach reflects an ambiguous and even incomplete vision of social change guided only by tradition, rather than the text or meaning of the Constitution.

VI. Looking to the Future: The First Amendment and the Affordable Care Act—A Potential Pickle for Scalia

In examining Scalia's family background, his jurisprudential approach, and many of his decisions as an Associate Justice on the Supreme Court, it is evident that his deeply and sincerely-held religious beliefs have influenced both his personal and professional life. Scalia's First Amendment jurisprudence can best be described as giving the narrowest possible reading to both the Free Exercise and Establishment Clauses and reluctant to making exceptions to minority religions. This approach, however, may place Scalia in a predicament—both religiously and jurisprudentially—since the Supreme Court took certiorari on a current split among the Federal Circuit courts. Currently, a number of Circuits are split on the issue of whether for-profit, secular corporations must comply with the Affordable Care Act's ("ACA") birth control mandate, which requires coverage of a variety of types of female contraception, without cost-

324 U.S. v. Virginia, supra note 304, at 570.
325 Id. at 568 (quoting Rutan v. Republican Party of Ill., 497 U.S. 62, 95 (Scalia, J., dissenting)).
326 Broughton, supra note 321, at 77.
327 See supra note 181.
sharing with the patient. While certain religious employers are exempt from this coverage, the government will not allow commercial corporations to opt-out of coverage on religious grounds.

Given Justice Scalia's opinion in *Smith*, it seems that the birth control mandate under the ACA is another example of a neutral, generally applicable law, and it need not accommodate religious exemptions, much like the Oregon law prohibiting the use of peyote. However, because Scalia is a devout Catholic who believes that one's professional and religious identities are a single entity, it will be interesting to see how Justice Scalia votes on this issue that will likely hit close to home. Moreover, Scalia will have to fight against his jurisprudence of deferring to legislatures and avoiding judicial activism if he finds the birth control mandate unconstitutional. Scalia's decision on this may demonstrate which trumps—his jurisprudence or his religious beliefs.

**VII. Conclusion**

It is clear that Justice Scalia's background has greatly influenced his jurisprudence. His focus on the text is derived from his father's reverence to the written word in teaching romance languages at Brooklyn College, while his tendency to prefer easy-to-apply and rigid rules is the result of his military high school. Even Scalia's personality on the bench is reflective of his father's intensity and his mother's more jovial and restless nature. Scalia, like most, is truly the product of his environment.

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329 Id.
330 Id.
331 See supra note 250.
332 See supra note 45.
333 Biskupic, supra note 1, at 210.
334 See supra note 30.
The Life and Jurisprudence of Justice Scalia
By: Lauren Brophy

In examining his jurisprudence, it is clear that Scalia is faithful to his jurisprudence more than he is not. However, when departing from originalism, he follows “Scalia-ism,” which yields a conservative result and usually has a fiery tone. His colleague Justice Ginsburg has noted that “Scalia-ism” “sometimes does go overboard. . . . It would be better if he dropped things like ‘This opinion is not to be taking seriously.’ He might have been more influential here if he did that.” 335 Love him or hate him, Scalia has profoundly impacted the Supreme Court and when “newspaper columnists [are] looking for scraps of color” to write about, they invariably turn to Justice Antonin Scalia. 336

335 Biskupic, supra note 1, at 354.
336 Id. at 359.