

The Purpose-Driven Justice: Antonin Scalia

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The Supreme Court and Religious Liberty

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**Justice Scalia's Theory of Interpretation:
'Text-and-tradition'**

“Where the meaning of a constitutional text (such as ‘the freedom of speech’) is unclear, the widespread and long-accepted practices of the American people are the best indication of what fundamental beliefs it was intended to enshrine. Even if I were to close my eyes to practice, however, and were to be guided exclusively by deductive analysis from our case law, I would reach the same result.”

– *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 378 (1995)

Justice Antonin Scalia is the Supreme Court's most outspoken originalist (alongside the quieter Clarence Thomas). Originalists call for a return to the Constitution's original meaning and a rollback of “activist” court decisions that they believe have distorted the Framers' design.

Within the general rubric of originalism, Scalia is a “textualist-and-traditionalist.” The first prong of this compound approach involves always looking to the text of the Constitution (or law) in order to find its meaning. But the meaning of those words is not to be understood in terms of present-day definitional shifts or adaptations; instead, the words should be understood as the Framers understood them, at that time, when the words were written. Ralph A. Rossum, *Antonin Scalia's Jurisprudence* 1 (University Press of Kansas 2006).

According to Rossum, Scalia's “original meaning” approach “accords primacy to the text of the constitution or the statute being interpreted, and then declares it to be the duty of the judge to apply that text when it is clear.” *Id.* When the text is not clear, the second prong of the “textualist-and-traditionalist” approach comes in to play. At this

stage, the judge must determine “the specific legal tradition flowing from that text (i.e. what it meant to the society that adopted it).” *Id.* Picking up and carrying both pieces of “text and tradition” is where the “heavy lifting” of originalist jurisprudence takes place, and working through this process forms a substantial part of Scalia’s more than 600 Supreme Court opinions. Scalia describes the laborious process of textual originalism:

“It is often exceedingly difficult to plumb the original understanding of an ancient text. Properly done, the task requires the consideration of an enormous amount of material – in the case of the Constitution and its Amendments, for example, to mention only one element, the records of the ratifying debates in all states. Even beyond that, it requires an evaluation of the reliability of that material ... And further still, it requires immersing oneself in the political and intellectual atmosphere of the time – somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day.” Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 856-7. (1989).

According to Scalia, it is critical that the judge **not** interpose his own personal meaning – or some erroneous modern-day meaning – on the text. *Id.* at 849. Rather, it is the judge’s job to discern the true, accurate and original meaning of the text – and apply it accordingly. *Id.* Nonetheless, the second prong of “text-and-tradition” necessarily invokes a particular set of values – what Scalia selects as “traditional” values and what version of history he chooses to accept. Analyzing the content of Scalia’s opinions demonstrates that his judgments – as much as they are a result of a particular standard of scrutiny or an originalist approach to jurisprudence – are based on his values. This paper

will detail how value-framing – as it is employed in social science – can be used to show the influence of values on Scalia’s jurisprudence.

Scalia’s originalist philosophy stands in stark contrast to the “living constitution” approach, which holds that the meaning of the law “grows and changes from age to age, in order to meet the needs of a changing society,” and that a judge’s role is “to determine those needs and ‘find’ that changing law.” Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 38 (Princeton U. Press 1997). Thus, Scalia is highly suspicious of recent intellectual fads and trends – and their influence on the law, language and culture. *Locke v. Davey*, 540 U.S. 712, 733 (2004) (Scalia, J., dissenting). To the extent that such trends are projected on the law and the U.S. Constitution, Scalia sees it as his duty to prevent these ideas from altering or distorting the true and original meaning of the constitution. When the Court engages in this type of “progressive” jurisprudence, Scalia calls out the majority in no uncertain terms:

“As its instrument of destruction, the bulldozer of its social engineering, the Court invents a boundless, and boundlessly manipulable, test of psychological coercion, which promises to do for the Establishment Clause what the Durham rule did for the insanity defense. Today’s opinion [banning benedictions at high school graduation ceremonies] shows more forcefully than volumes of argumentation why our Nation’s protection, that fortress which is our Constitution, cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court, but must have deep foundations in the historic practices of our people.” *Lee v. Weisman*, 505 U.S. 577, 631-632 (1992) (Scalia, J., dissenting).

‘Text-and-tradition’ – step by step

Taken together, Scalia’s “textualist-and-traditionalist” approach to originalism could involve up to five major steps, depending on the level of complexity – or ambiguity – of the text involved: (1) determining the plain meaning of the words in the document; (2) ascertaining the historical meaning of the words; (3) consulting the writings of the Framers to discern their design in the constitution; (4) reviewing the historical record to determine if a particular practice or tradition actually constitutes a *bona fide* American tradition; (5) delving back further to the English forerunners who laid the groundwork for the American tradition. (Each of these steps will be explained in detail below.)

Additionally, since Scalia is usually writing for the dissent rather than the majority, he frequently makes sharp barbs at his colleagues with whom he disagrees. And finally, amid the sometimes tedious textualist exercises and sharp attacks, Scalia often injects humor and irony into his writing, making his opinions lively and highly quotable. The basic elements of Scalia’s originalist method are further explained as follows:

Plain meaning: In his opinions, Scalia frequently cites dictionaries and explores the etymology of words – particularly the complex Latin-based words borrowed into English – to determine their meaning.

Historical meaning: Since the meaning of words naturally changes over time, modern dictionaries may provide a misleading definition of a word contained in the Constitution or Bill of Rights. Therefore, Scalia often turns to dictionaries of the Founding era to find

out how the Framers understood the words they were using in the late-18th century, and thus what they likely intended the words to mean in the text of the Constitution.

Writings of the Framers (and rejection of legislative history): Scalia often consults – and cites – the Federalist to find out what the Framers had in mind when they were drafting the constitution. “He studies the Framers, and especially The Federalist, not to find out what the Framers and their contemporaries, either individually or collectively, would have done if faced with a specific modern constitutional issue but rather to understand (given the words they used) how the framers designed the Constitution to work and, on that basis, to ascertain how, institutionally, they intended for that issue to be addressed.” Rossum, *supra*, at 47.

Seemingly contradictorily, Scalia rejects the reading of legislative history to determine the meaning of a law or legislative intent. Because the legislative history is filled with the contradictory voices of legislative debate and compromise, Scalia believes the record will not accurately reflect the meaning of the words ultimately decided upon, and codified in the law. *Id.* at 37. Scalia contends that incorporating legislative history into jurisprudence is “an ill-advised deviation from the venerable principle that if the language of a statute is clear, that language must be given effect – at least in the absence of a patent absurdity. Judges interpret laws rather than reconstruct legislators’ intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent.” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452-453 (1987).

The seeming contradiction between Scalia's consultation of constitutional history and his rejection of legislative history is resolved through the difference between text and intent. Similar to the objective theory of contracts, Scalia looks to the objective meaning of the words on the page, and not to the subjective intent of the parties. This principle applies to both legislation and the constitution. As Scalia explained during his confirmation hearings, "if somebody should discover that the secret intent of the Framers was quite different from what the words seem to connote, it would not make any difference. The starting point, in any case, is the text of the document and what it meant to the society that adopted it." *Nomination of Judge Antonin Scalia, Hearings before the S. Comm. of the Judiciary*, 99th Cong. (1986), 108. (Compare with Learned Hand's famous explanation of the objective theory of contracts: "A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort." *Hotchkiss v. National City Bank*, 200 F. 287, 293 (D.N.Y. 1911).

American traditions (and rejection of foreign law and traditions): America's longstanding traditions – at least as he interprets them – are the most important guiding principle for Scalia, when the plain meaning and other sources fail. Scalia repeatedly hammers home the importance of American tradition in his decisions, and he assails other

justices for suddenly discovering “new” tradition, according to the modes of the day. *Locke*, 540 U.S. at 733. For Scalia, “the widespread and longstanding traditions of our people are indication of the most weighty sort” when confronting questions involving fundamental constitutional liberty: “Principles of liberty fundamental enough to have been embodied within constitutional guarantees are not readily erased from the Nation’s consciousness. A governmental practice that has become general throughout the United States, and particularly one that has the validation of long, accepted usage, bears a strong presumption of constitutionality.” *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 375 (1995).

Other justices sometimes look abroad to gauge the development of issues such as “cruel and unusual punishment,” the death penalty, and homosexuality. Scalia vociferously rejects the practice of “borrowing” from foreign traditions, and he reminds his colleagues that “we must never forget that it is a Constitution for the United States of America that we are expounding.” *Atkins v. Virginia*, 536 U.S. 304, 348 (2002). In the context of sexual mores, Scalia warned: “The Court’s discussion of these foreign views is meaningless dicta – dangerous dicta ... since this Court should not impose foreign moods, fads, or fashions on Americans.” *Lawrence v. Texas*, 539 U.S. 558, 598 (2003).

The English common law tradition (but rejection of common law policy-making):

When a much more thorough analysis of an issue is required, Scalia delves deep into the wellspring of the common law. In such instances, Scalia cites early English cases and liberally quotes Sir Edward Coke, William Blackstone and even Shakespeare. For example, in exploring why the Confrontation Clause was included in the Sixth

Amendment, Scalia recounted the 1603 trial of Sir Walter Raleigh (*Crawford v. Washington*, 541 U.S. 36, 44 (2004)); in determining whether the use of a thermal imaging device to scan a home for drug cultivation constitutes an unreasonable search, Scalia reached back to the landmark 1765 English case, *Entick v. Carrington* (*Kyllo v. United States*, 533 U.S. 27, 32 (2001)); and in determining whether the Eighth Amendment prohibition against cruel and unusual punishment meant to include proportionality in sentencing, Scalia compared the Magna Carta (1215) with the English Declaration of Rights of 1689 (*Harmelin v. Mich.*, 501 U.S. 957, 966 (1991)). Scalia steps with ease in and out of the English Renaissance, the American founding period and modern times. He is the renaissance man of the Court.

Alongside his affection for the English legal tradition, Scalia is staunchly opposed to the practice of judicial policy-making, which arose out of the English common law system. English judges, “unconstrained by statutes or a written constitution, exercised the ‘exhilarating’ function of making law.” Scalia, *A Matter of Interpretation* at 7. Grafted on to the Anglo-American legal tradition, law students and judges, “having drunk at this intoxicating well,” have become addicted to the rush of “devising, out of the brilliance of one’s own mind, those laws that ought to govern mankind. How exciting!” *Id.* Thus, at times Scalia appears to be both the greatest proponent and opponent of the Anglo-American common law tradition, depending on the situation. Rossum, *supra*, at 60.

Attacks on colleagues: Scalia applies little restraint in lashing out at his colleagues on the Court when he perceives them to be engaging in illegitimate, nonoriginalist jurisprudence. Former Justice David Souter was often at the hard end of Scalia’s kicking

boot: “Justice Souter not only does not adopt the logical assumption, he does not even give the New York Legislature the benefit of the doubt. The following is the level of his analysis ...” – so Scalia begins in a sustained verbal attack on Souter – whose arguments Scalia goes on to characterize as “facile” and “weak.” *Bd. of Educ. v. Grumet*, 512 U.S. 687, 737 (1994). In a religious liberty case, Scalia characterized former Justice John Paul Stevens’s majority opinion as a mere “straw man argument,” and provided little “except by providing a cloud of obfuscating smoke ... and more smoke.” *McCreary County v. ACLU*, 545 U.S. 844, 897 (2005). And in an abortion-related case, Scalia suggested that former Justice Sandra Day O’Connor was “irrational” and “cannot be taken seriously.” *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 532 (1989). These attacks have earned Scalia the moniker as the Court’s bully. Souter, in response to Scalia’s attack, characterized Scalia as “a gladiator making a last stand against the lions ... but he thrusts at lions of his own imagining.” *Grumet*, 512 U.S. at 708.

Humor and irony. Along with the sour, Scalia dishes out the sweet. He often uses irony to expose what he believes to be the folly of his colleagues, and sometimes he quips just for the fun of it: “All the provisions of the Bill of Rights set forth the rights of individual men and women – not, for example, of trees or polar bears” (*Citizens United v. FEC*, 558 U.S. 310, 391 (2010)); “When it has come to determining what areas fall beyond our Article III authority to adjudicate, this Court’s practice, from the earliest days of the Republic to the present, has been more reminiscent of Hannibal than of Hamlet” (*Vieth v. Jubelirer*, 124 S. Ct. 1769, 1790 (2004)); “That it would be unreasonable to stop, for brief inquiry, young men who scatter in panic upon the mere sighting of the police is not self-

evident, and arguably contradicts proverbial common sense. See Proverbs 28:1 – ‘The wicked flee when no man pursueth.’ (*Cal. v. Hodari D.*, 499 U.S. 621, 624 (1991)). The one-liners and extended irony can be found in almost every Scalia-penned opinion, making him one of the liveliest writers on the Court.

In summary, if Scalia’s textualist-originalist approach could be boiled down to one word, it would be simply that: the word. The rest is window-dressing. Or, as Rossum sums up Scalia’s philosophy, “The law should be understood to mean what it says and say what it means.” Rossum, *supra*, at 41.

‘Text-and-tradition’ from a value perspective:

How values influence Scalia’s theory of interpretation

“The Court must be living in another world. Day by day, case by case, it is busy designing a Constitution for a country I do not recognize.”
– *Bd. of County Comm’rs v. Umbehr*, 518 U.S. 668, 711 (1996) (Scalia, J., dissenting)

Scalia forswears the imposition of a judge’s personal predilections upon the judicial process (Scalia, *Originalism*, 57 U. CIN. L. REV. at 849), yet his opinions are fraught with value-laden statements that are indicative of his own value-preferences. Just as the legal process requires the framing of issues, Scalia’s own framing of the law can be systematically analyzed from a value-based perspective. Linguists and social scientists use value analysis to assess the perspective and sometimes the origin of written texts and speeches. A value, in this context, is defined as a cognitive tool through which people establish their preferences, assess events and interpret the world. S.J. Ball-Rokeach, Gerard J. Power, K. Kendall Guthrie & H. Ross Waring, *Value-Framing Abortion in the*

United States: An Application of Media System Dependency Theory, 2 INT’L J. OF PUB. OPINION RES. 3, 250-268 (1990).

Even Scalia’s favorite source for his originalism, the oft-quoted Federalist, has been subject to value analysis. Indeed, leading scholars in the field have applied value analysis to deduce – or at least theorize – the authorship of the unidentified Federalist Papers. Milton Rokeach, Robert Homaint, and Louis Pkinner, *A Value Analysis of the Disputed Federalist Papers*, 16 J. OF PERSONALITY & SOC. PSYCHOL. 2, 245-250 (1970). “Research has shown that it is not only possible by content analysis to describe in reliable, quantitative terms the value systems underlying various political writings, but also to identify the specific values that account for major differences in political ideology.” *Id.* at 245. In their analysis of the Federalist Papers, the authors applied 24 different value categories, such as “honor,” “justice,” “logic” and “equality.” Those specific detailed categories were then grouped into two primary categories: “idealized end-states of existence” and “idealized modes of behavior.” *Id.*

Similarly, in Rokeach’s abortion study, the detailed specific values were grouped into two primary categories – “terminal values” and “instrumental values” – which are defined as follows: Terminal values are “‘desired end-states of existence’ (e.g. Wisdom, Freedom, Family Security, Equality) and instrumental values are defined as ‘preferred modes of conduct’ (e.g. being Responsible, Loving, Broadminded, or Capable). Ball-Rokeach, Power, Guthrie & Waring, *supra*, at 255. Value-framing involves both quantitative and qualitative (content) analysis. By applying this methodology, “the value-frame concept highlights the central evaluative function of values in peoples’ and societies’ belief systems.” *Id.*

Legal opinions and judges are not immune from value analysis merely because the judge asserts lack of bias or strict adherence to a particular legal method or philosophy. Scalia's writings are especially susceptible to a value analysis due to his "text-and-tradition" method – the "tradition" half of the equation necessarily invoking a particular set of values. In Scalia's case, those values invariably hearken back to a pre-1960s America – the America of Scalia's formative years and the America that Scalia laments he no longer recognizes. *Umbehr*, 518 U.S. at 711. It is no coincidence that Scalia happened to have selected a judicial method that inevitably leads back to a set of values that he approves. Scalia was born into an America of particular values and traditions – ones that Scalia cherishes, and that he believes the liberal activist Courts of the 1960s, 70s and beyond have "bulldozed." *Lee v. Weisman*, 505 U.S. 577, 632 (1992) (Scalia, J., dissenting). In this earlier version of America, it would be unthinkable that "freedom of choice" would mean license to terminate an unborn life; that the First Amendment's guarantee of religious liberty would mean stripping Christian values and symbols from all facets of public life; that the rights of law-abiding Americans would be secondary to informing criminal suspects of their right to remain silent and the right to an attorney. *Miranda v. Ariz.*, 384 U.S. 436, 460 (1966). These are the misguided values that an "undemocratic" Court has imposed on America. *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989). Scalia re-asserts his traditional construct of values over and over again in his opinions. For example, in the context of same-sex education, he opined:

"Much of the Court's opinion is devoted to deprecating the closed-mindedness of our forebears with regard to women's education, and even with regard to the treatment of women in areas that have nothing to do with education. Closed

minded they were – as every age is, including our own, with regard to matters it cannot guess, because it simply does not consider them debatable.” *United States v. Virginia*, 518 U.S. 515, 566 (1996).

Scalia both embraces and rejects the application of values in jurisprudence. As often as he invokes traditional values, he warns of the danger of injecting values into the judicial process. “Now the main danger in judicial interpretation of the Constitution – or, for that matter, in judicial interpretation of any law – is that the judges will mistake their own predilections for the law. Avoiding this error is the hardest part of being a conscientious judge; perhaps no conscientious judge ever succeeds entirely.” *Scalia*, 57 U. CIN. L. REV. at 863.

Scalia’s solution to this problem is originalism, textualism and traditionalism. But these methods inevitably lead him back to a particular set of values – whether it be the values of the Framers or those of some other earlier period in American history. Scalia not coincidentally embraces these values, while rejecting the shifting, “trendy” values of the present age. *Locke v. Davey*, 540 U.S. 712, 733 (2004) (Scalia, J., dissenting). Scalia thus emerges as the most ardent defender of what he regards as true American values; and he sees it as his duty to act as a “counterbalance” to an out-of-control liberal Court. *Virginia*, 518 U.S. at 567. Skillfully inverting the labels, Scalia brands his liberal opponents on the Court as “illiberal” in their undemocratic imposition of new values on society:

“This most illiberal Court, which has embarked on a course of inscribing one after another of the current preferences of the society (and in some cases only the counter-majoritarian preferences of the society’s law-trained elite) into our Basic Law. Today it enshrines the notion that no substantial educational value is

to be served by an all-men's military academy – so that the decision by the people of Virginia to maintain such an institution denies equal protection to women who cannot attend that institution but can attend others. Since it is entirely clear that the Constitution of the United States – the old one – takes no sides in this educational debate, I dissent.” *U.S. v. Virginia*, 518 U.S. at 567.

In the value-frame of instrumental values or “idealized modes of behavior” (Rokeach, *supra*), Scalia could add a sub-category to one of the 24 value categories applied in the Federalist analysis: **Confrontational** – or “adversarial,” as a state of being – possibly falling under one of the Rokeach-applied categories of “ambitious,” “capable,” or “energetic.” Antonin Scalia embodies the image of a zealous advocate, the tireless “gladiator” who lives for the next fight. See *Grumet*, 512 U.S. at 708 (Souter, J., writing for the Court). Indeed, Scalia cites his revival of the Sixth Amendment’s Confrontation Clause as one of his greatest achievements during his tenure on the Court: “Sometimes, originalism does prevail, as in *Crawford v. Washington*, a thoroughly originalist Supreme court opinion that brought the Confrontation Clause back to its moorings after twenty-four years adrift in the Sea of Evolutionism had reduced it to nothing more than a guarantee that hearsay accusations would bear unspecified ‘indicia of reliability.’” Antonin Scalia, Preface to *Originalism: A Quarter-Century of Debate*, at 18. Also see *Crawford v. Washington*, 541 U.S. 36 (2004). Scalia joyfully defended the Confrontation Clause again four years after *Crawford*, and he prevailed again. “The U.S. Constitution guarantees one way to challenge or verify the results of a forensic test: confrontation. The United States Supreme Court does not have license to suspend the Confrontation Clause when a preferable trial strategy is available.” *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) (Scalia, J., writing for the Court.) Scalia had the opportunity to use various

forms of the word “confront” 57 times in *Crawford*, and 66 times in *Melendez-Diaz*. The virtue of confrontation is instrumental for Scalia.

Scalia’s seemingly contradictory attitude toward values – at once professing a detached approach to the law, followed by clearly enunciated value-based pronouncements in his legal opinions – is a characteristic phenomenon in value-analysis, as it is applied in social science. Indeed, ambiguity is a standard component of value-framing, and the best studies account for ambiguity. Angeliki A. Kanavou, *How Peace Agreements Are Derailed: The Evolution of Values in Cyprus*, 43 J. OF PEACE RES. 3, 279 (2006). Two conflicting value judgments often stand side-by-side. Furthermore, subjecting Scalia to a value-analysis is not intended to impugn his ability as a justice or the seriousness with which he takes his legal task. Nonetheless, the influence of values is inescapable; and in Scalia’s case, the importance of values is far too plainly obvious to ignore.

If it were somehow taboo for a conservative justice to openly acknowledge the role of values in jurisprudence, the “progressive” side does not always appear so constrained. For example, Professor Chemerinsky urges that Justice Ruth Bader Ginsburg retire from the Court after the completion of the current term in June. Why? “Only by resigning this summer can she ensure that a Democratic president will be able to choose a successor who shares her views and **values.**” Erwin Chemerinsky, *Much Depends on Ginsburg*, L.A. Times, Mar. 15, 2014 (emphasis added), <http://www.latimes.com/opinion/commentary/la-oe-chemerinsky-ginsburg-should-resign-20140316,0,6883426.story#ixzz2wRz20ChA>

From the political right, Ronald Reagan openly appointed Scalia to the bench for the very purpose of helping to restore traditional values and re-igniting the image of America as “a shining city on a hill – a beacon of liberty.” Steven G. Calabresi, *Originalism: A Quarter-Century of Debate* 18 (Regnery Publishing 2007). In Reagan’s speech introducing Scalia to the Court, Reagan orated, “This is a time of renewal in the great constitutional system that our forefathers gave us – a good time to reflect on the inspired wisdom we call our Constitution, a time to remember that the Founding Fathers gave careful thought to the role of the Supreme Court ... And that’s why the judiciary must be independent. And that is why it must exercise restraint.” Ronald Reagan, *The Investiture of Chief Justice William H. Rehnquist and Associate Justice Antonin Scalia at the White House*, (Sept. 26, 1986), <http://www.fed-soc.org/resources/page/the-great-debate-president-ronald-reagan-september-26-1986>

“Judicial restraint,” for Reagan, meant a rollback the activism of the Warren and Burger courts – and especially the despised *Roe v. Wade* case legalizing abortion. See Calabresi, *supra*, at 95. For his part, Scalia has made every effort to remain true to his patron: He continually argues for the repeal of *Roe* and consistently advocates conservative positions favored by Reagan. Perhaps unintendedly bolstering his own enduring role as Reagan’s representative on the Court, Scalia upholds the political patronage system “in promoting political stability and facilitating the social and political integration of previously powerless groups.” *Rutan v. Republican Party*, 497 U.S. 62, 103 (1990). Scalia dismissed the majority view in that case, which struck down Illinois’ patronage system, as a “naïve vision of politics and an inadequate appreciation of the

systemic effects of patronage.” *Id.* Similarly, it would also be naïve to hold that values do not play a substantial role in jurisprudence, regardless of how “objective” a judge claims to be.

In asserting his role as objective arbiter, Scalia boasts that if confronted with an outcome that conflicted with his own beliefs – because his originalist method led him to the conflicting decision – he would go against his own grain and follow the original text. Rossum, *supra*, at 32. He cites flag-burning as one such instance in which he personally disagrees that the First Amendment’s freedom of speech should extend to flag-burning, but he nonetheless sided with the majority to uphold it. *Tex. v. Johnson*, 491 U.S. 397 (1989). In Rökkach’s value-frame analysis of the Federalist papers, flag-burning – or respect for the flag – would likely fall under the category of “idealized modes of behavior” rather than “idealized end-states of existence.” Thus, Scalia does not severely compromise his core values by upholding flag-burning: He can throw that issue under the bus and walk away relatively uninjured. Or he can use the issue to prove to his detractors that he lives up to his judicial principles – following the logic even though he ends up with a result with which he personally disagrees. But abortion and religion, unlike mere offensive speech, represent core values of end-state existence – for which there can be no compromise.

In one of his most criticized majority opinions, Scalia denied two Native Americans the constitutional right to use peyote as part of their religious practice. *Employment Div. v. Smith*, 494 U.S. 872 (1990). No judicial exemption for free-exercise. Yet, if it were the 1920s and the prohibition regime were in place, it would be inconceivable that Scalia would not grant a judicial exception for Catholics taking the

Eucharist. This nears the ultimate end-state existence in the Rokkach value-frame. *See* Rossum, *supra*, at 136 (“Scalia has danced around the issue of the use of sacramental wine in Christian services.”)

In the Hobby Lobby case, the owners of a corporation want to exempt their company from the requirement to provide certain contraception services for employees. Contraception is an issue fraught with conflicting values. Contraception is only one or two steps removed from abortion – which strikes at the ultimate end-state existence value-frame. This is not flag-burning, or some other distasteful form of behavior from which a conservative justice could “avert his eyes.” *Cohen v. Cal.*, 403 U.S. 15, 21 (1971). Thus, in the Hobby Lobby case, regardless of what form of scrutiny is applied – and regardless of how many steps of the originalist process are applied – it is almost certain from a value-frame standpoint that Scalia will side with Hobby Lobby.

Justice Scalia’s Theory of Precedent:

Loose adherence

“I do not myself believe in rigid adherence to *stare decisis* in constitutional cases; but I do believe that we should be consistent rather than manipulative in invoking the doctrine.” – *Lawrence v. Texas*, 539 U.S. 558, 587 (2003) (Scalia, J., dissenting).

For all of his seeming rigidity as a textual-originalist, Scalia is pragmatic when it comes to the doctrine of *stare decisis*. He has no qualms overturning cases he believes were wrongly decided or unconstitutional. Nor does he see it as weakening the Court or the rule of law by backtracking on bad decisions: “As far as I am aware, the public is not under the illusion that we are infallible. I see little harm in admitting that we made a

mistake ... And I see much to be gained by reaffirming for the people the wonderful reality that they govern themselves – which means that ‘the powers not delegated to the United States by the Constitution’ that the people adopted, ‘nor prohibited . . . to the States’ by that Constitution, ‘are reserved to the States respectively, or to the people.’” *Dickerson v. United States*, 530 U.S. 428, 464-465 (2000) (Scalia, J., dissenting).

Indeed, it would be difficult for Justice Scalia to expound a theory of strict adherence to precedent, since he was appointed to the Court, in part, for the very purpose of overturning *Roe v. Wade* and turning back the abortion tide. See Reagan, *supra*; Calabresi, *supra*, at 97; Ball-Rokeach, *supra*, at 264. Scalia would overturn precedent in a variety of contexts. He frequently expresses hostility toward the world-famous *Miranda* rule (i.e., “You have a right to remain silent ...”) *Dickerson*, 530 U.S. at 444. And it is likely that if given the opportunity, Scalia would overturn much of the Establishment Clause jurisprudence that he believes has unjustifiably pushed religion out of public life. “I heartily agree that these cases, so hostile to our national tradition of accommodation, should be overruled at the earliest opportunity.” *Bd. of Educ. v. Grumet*, 512 U.S. 687, 750 (1994) (Scalia, J., dissenting). Also see *McCreary County v. ACLU*, 545 U.S. 844 at 889 (2005) (Scalia, J., dissenting).

As a general rule, the Supreme Court will not depart from precedent absent a “special justification.” *Dickerson*, 530 U.S. at 428 (Rehnquist, C.J., writing for the Court). At least at this broad level, Scalia agrees. *Id.* at 461 (Scalia, J., dissenting). The issue is what constitutes sufficient “justification.” Justification, for Scalia, hearkens back to his “text-and-tradition” approach to originalism: If a prior Court has departed, in Scalia’s view, from the original meaning of the text or the tradition it embodies, Scalia

will overrule. Even longstanding precedent is not exempt from Scalia's laser. For example, he believes the Court has been mistaken in its reading of the negative Commerce Clause since 1873. Rossum, *supra*, at 97. But Scalia has had no success in convincing the Court of his position on this issue. *Id.*

In his pursuit of *stare "un-decisis,"* Scalia is most vehement in his quest to overturn the despised *Roe*, and he lashes out at his fellow justices – even while they are slowly whittling away at *Roe* – for failing to go all the way and overruling it outright. “Having contrived an opportunity to reconsider the *Roe* framework, and then having discarded that framework, the plurality finds the testing provision unobjectionable because it ‘permissibly furthers the State’s interest in protecting potential human life.’ This newly minted standard is circular and totally meaningless.” *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 554 (1989).

For Scalia, *Roe v. Wade* not only fails to meet every level of his “text-and-tradition” originalist method, but it also violates the Court’s prime directive in justiciability – not to stray into political questions, which are most properly suited for the elected branches of government. The Court’s continued stance as the ultimate arbiter of the abortion question “needlessly prolongs this Court’s self-awarded sovereignty over a field where it has little proper business since the answers to most of the cruel questions posed are political and not juridical – a sovereignty which therefore quite properly, but to the great damage of the Court, makes it the object of the sort of organized public pressure that political institutions in a democracy ought to receive.” *Id.* at 554.

In brief, Scalia's theory of *stare decisis* is this: If a Court holding is not supported by the text of the constitution – or the original traditions flowing from it – that holding should not be supported.

Precedent in religious liberty cases

“As to the Court's invocation of the *Lemon* test: Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. ... The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely.” – *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399 (1993) (Scalia, J., concurring)

In Scalia's horror parlance, if given the opportunity, he would drive a stake through the heart of much of the Court's Establishment Clause jurisprudence, fill the demon's mouth with sand, then staple it shut. *Id.* Scalia is adamantly opposed to all of the Court's various tests applied to the Establishment Clause, and he refuses to join any opinion that uses one of these tests, especially the *Lemon* test, and also the “endorsement” test, and the “coercion” test. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring); and *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (Scalia, J., dissenting). All of these tests, according to Scalia, lack textual basis, lack historical basis, and therefore must not be applied. The Court's application of the coercion test to strike down benedictions at high school graduations

Scalia called a “jurisprudential disaster” (*Weisman*, 505 U.S. at 644); the endorsement test emerges from a “strange notion” (*Lamb’s Chapel*, 508 U.S. at 400); and the *Lemon* test needs to be buried “fully six feet under” *Id.* at 398. This is Scalia’s philosophy on *stare decisis* with regard to Establishment Clause issues.

Indeed, the Court’s various formulations for testing the Establishment Clause have produced a long line of conflicting decisions on issues ranging from religious symbols on public property, holiday displays and especially issues relating to religion in public schools. Russell L. Weaver and Donald E. Lively, *Understanding the First Amendment* 297 (LexisNexis 4th ed. 2012). Consequently, the Court’s conflicting rulings have left the lower courts with little clear guidance on the issue. *Id.* On this opinion, Scalia can easily join: “For my part, I agree with the long list of constitutional scholars who have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced.” *Lamb’s Chapel* 508 U.S. at 399.

A key obstacle for Scalia in turning back the tide of Establishment cases that “bedevil” him are the Court’s own procedural rules for such challenges. See *Weisman*, 505 U.S. at 644. Normally, citizens may not challenge a federal law based on taxpayer status alone. But the rule of *Flast v. Cohen* lowers the bar and allows taxpayers to challenge laws implicating the Establishment Clause, without requiring them to meet the other standard standing hurdles. *Flast v. Cohen*, 392 U.S. 83 (1968). Thus, it is *Flast* which provides the standing basis for most of the Establishment Clause cases that force Scalia into the dissenting position. *Flast* is therefore the gateway weapon for the ACLU and its allies who seek to remove religion from the public square. For this reason, Scalia

has his sights aimed squarely at *Flast*, and he would strike it down it at the first opportunity. “*Flast* is an anomaly in our jurisprudence, irreconcilable with the Article III restrictions on federal judicial power that our opinions have established. I would repudiate that misguided decision and enforce the Constitution.” *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1449 (2011) (Scalia, J., dissenting).

Because Scalia has been unable to persuade a majority of the justices of his reading of the Establishment Clause, he has never written for the Court in any case addressing the Clause. Rossum, *supra*, at 129. Thus, Scalia has not had the opportunity to apply his *stare un-decisis* knife on Establishment Clause precedent. With regard to the Free Exercise Clause, Scalia’s big opportunity came in *Employment Division v. Smith*. There, writing for the Court in a 5-4 plurality, Scalia gutted the 27-year precedent of *Sherbert v. Verner* and applied a rational basis standard – rather than “compelling interest” – to the Free exercise Clause. In that case, Scalia refused two Native Americans an exemption from Oregon’s drug laws for the purpose of using peyote during religious ceremonies. *Employment Div v. Smith*, 494 U.S. 872, 890 (1990). This time, Scalia found himself at the receiving end of his colleagues’ pen with regard to his treatment of precedent:

“This distorted view of our precedents leads the majority to conclude that strict scrutiny of a state law burdening the free exercise of religion is a ‘luxury’ that a well-ordered society cannot afford, and that the repression of minority religions is an ‘unavoidable consequence of democratic government.’ I do not believe the Founders thought their dearly bought freedom from religious persecution a ‘luxury,’ but an essential element of liberty – and they could not have thought religious intolerance ‘unavoidable,’ for they drafted the Religion Clauses precisely in order to avoid that intolerance.” *Smith*, 494 U.S. at 908-909

(Blackmun, J., dissenting).

Congress agreed with Blackmun, and in response to the *Smith* decision passed the Religious Freedom Restoration Act, which re-instituted the *Sherbert* “compelling interest” test. “Laws ‘neutral’ toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise,” the law’s preamble states, repudiating *Smith* by name. 42 USCS § 2000bb. (See Scalia’s response to RFRA in his hypothetical Hobby Lobby opinion.)

From judicial restraint to activism

Although Scalia has been frustrated in his attempts to overturn *Roe* and reverse the Court’s dominant Establishment Clause jurisprudence, he has successfully and dramatically changed the law in other areas. Along with his conservative confederates on the Court, Scalia voted to incorporate the Second Amendment and declare gun ownership a fundamental, individual right – upending an understanding of the Second Amendment dating back to the Founding period. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3120 (2010) and *District of Columbia v. Heller*, 554 U.S. 570, 677 (2008). In the area of criminal procedure, Scalia has worked to erode the “so-called” *Miranda* rule – which he calls “unacceptable as a matter of straightforward constitutional interpretation in the *Marbury* tradition.” *Dickerson*, 530 U.S. at 450. In the area of civil procedure, Scalia joined a narrow majority in shredding a half-century of federal pleading standards. *Ashcroft v. Iqbal*, 556 U.S. 662, 669 (2009). And perhaps most controversially, Scalia joined with the same narrow majority of the Court in declaring that corporations possess the same First Amendment free speech rights as individuals, and in doing so “blazing

through a body of case law.” *Citizens United v. FEC*, 558 U.S. 310, 395 (2010) (Stevens, J., dissenting).

Ironically, while Scalia was appointed to the bench with the mandate of “judicial restraint” (Reagan, *supra.*), Scalia has taken part in a revolution on the Court, overturning case after case and upending precedent after precedent. So, as Scalia brands his liberal opponents on the Court as “illiberal” (*Virginia*, 518 U.S. at 567), the terms “judicial activism” and “judicial restraint” have been turned on their heads. As Scalia accuses his opponents on the Court of being “Orwellian” (*Dickerson*, 530 U.S. at 461), he redefines the terms to mean their opposite. As one newspaper editorial observed in response to the *McDonald* ruling:

“The situation shows, yet again, that the concepts of judicial activism and judicial restraint are moving targets. While only the most conservative – or perhaps radically conservative – legal theorists would support unincorporation (or partial incorporation) of the Establishment Clause, the conservative majority on the Supreme Court effected the incorporation of the Second Amendment. Thus, a conservative court can become an activist court in order to achieve its own particular ends, just as earlier liberal courts have done the same.” *Guns and Religion: Where and When Constitutional Rights Apply*, Santa Barbara Independent, July 29, 2010, <http://www.independent.com/news/2010/jul/29/guns-and-religion/>

For Scalia, *stare decisis* is really not the core issue at all for the Court. The real issue for him is proper textual interpretation – whether that interpretation was made 100 years ago or in the current Court session. If the Court got it wrong then, it’s just as wrong now. Again turning the argument on his opponents, Scalia asserts that the liberal, nonoriginalists on the Court are even less committed to *stare decisis* than he is, because

they are so eager to fill their sails with whatever prevailing winds of change that blow with popular political culture:

“Even if one assumes (as many nonoriginalists do not even bother to do) that the Constitution was originally meant to expound evolving rather than permanent values, as I discussed earlier I see no basis for believing that supervision of the evolution would have been committed to the courts. At an even more general theoretical level, originalism seems to me more compatible with the nature and purpose of a Constitution in a democratic system. A democratic society does not, by and large, need constitutional guarantees to insure that its laws will reflect ‘current values.’ Elections take care of that quite well.” Scalia, 57 U. CIN. L. REV. 849, 861-2.

Justice Scalia’s position on religious liberty:

Accommodation—constriction—expansion

“When a legislature acts to accommodate religion, particularly a minority sect, ‘it follows the best of our traditions.’”

– *Bd. of Educ. v. Grumet*, 512 U.S. 687 (1994) (Scalia, J., dissenting, quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952))

“An individual’s religious beliefs do not excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate.”

– *Employment Div. v. Smith*, 494 U.S. 872, 878 (1990) (Scalia, J., writing for the Court).

At the broadest level, Justice Scalia takes an accommodationist view toward the Establishment Clause, while he has been less willing to accommodate Free Exercise claims – although his views in that regard have loosened in recent years. As an accommodationist, Scalia’s positions lead him toward the inclusion of a non-denominational, Judeo-Christian outlook in the public sphere. In the area of free exercise, Scalia has been less willing to accommodate religious practices outside of the Judeo-Christian tradition, but in recent cases Scalia has shown a willingness to expand accommodation of free-exercise to minority groups. Compare *Smith* 494 U.S. 872 to *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 557 (1993) (Scalia, J., concurring).

In his originalist framework, Scalia’s approach to the Religion Clauses amounts to the maxim: “no preferences, no privileges and no penalties.” Rossum, *supra*, 128. This reading leads to a narrow construction of both clauses. “For Scalia, an establishment of religion means preferring one religion over others by giving it along official status, by providing its members with special privileges, by imposing burdens on those who are not its members, or by granting it financial support not available on a nondiscriminatory basis to other religions.” *Id.* Therefore, laws effecting such impermissible ends should be struck down.

On the free-exercise side of the equation, Scalia declared that “the free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all governmental regulation of religious beliefs as such. The government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false,

impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma.”

Smith, 494 U.S. at 877 (1990).

Scalia’s narrow reading of the clauses leads to a logical tension between the two. Rossum, *supra*, 128. Negotiating the push-and-pull in the clauses can lead to some complex rhetorical gymnastics – what Scalia himself acknowledges is something like navigating “the narrow channel between the Scylla (of what the Free Exercise Clause demands) and the Charybdis (of what the Establishment Clause forbids) through which any state or federal action must pass in order to survive constitutional scrutiny.” *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 42 (1989) (Scalia, J., dissenting).

Applying his “text-and-tradition” approach, Scalia attempts to harmonize the tension in the clauses by referring back to “the longstanding traditions of our people” – which allow for the accommodation of diverse beliefs in public life. *Bd. of Educ. v. Grumet*, 512 U.S. 687, 751 (1994) (Scalia, J., dissenting). The bottom line is this: “No religion should be preferred to any other religion, and that no person should enjoy privileges or suffer penalties because of his religious beliefs.” Rossum, *supra*, at 128.

Despite his professed originalism, Scalia has never questioned the Establishment Clause’s incorporation to the states via the Fourteenth Amendment, although the clause was originally designed, in part, to protect the state religious establishments that still existed at the time of the founding. Scalia’s fellow originalist on the Court, Clarence Thomas, is the only justice who urges against incorporation. *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1 (2004) (Thomas, J., concurring).

Scalia's position on each prong of the Religious Liberty Clause is further detailed as follows:

The Establishment Clause

By a most narrow literal reading, the Establishment Clause merely prevents the federal government from establishing an official church. But the word "respecting" an establishment of religion requires something more than simply preventing Congress from declaring a national church. With this in mind, Scalia interprets an establishment of religion to mean preferring one religion over others by giving it alone official status. Rossum, *supra*, at 128. "Contrary to the Court's suggestion, I do not think that the Establishment Clause prohibits formally established 'state' churches and nothing more. I have always believed, and all my opinions are consistent with the view, that the Establishment Clause prohibits the favoring of one religion over others." *Grumet*, 512 U.S. at 748.

Thus, if viewed along a continuum, Scalia is willing to allow the state to involve itself in religious matters – up to a certain point. The rub is just how far to push or pull from either end of the establishment continuum. If one advocates strict separation – taken to its logical conclusion, this would mean rubbing out all references to religion in the public square. On the other hand, if one allows state involvement – pushed too far up the scale, this could result in a fusion between church and state, exactly what the Founders were trying to prevent. Scalia has pushed for the accommodation Judeo-Christian values and institutions further up the scale than any justice on the Court, except possibly Thomas.

Scalia has rejected nearly all of the Court's theories with regard to the Establishment Clause, among them (1) that the government must be **neutral** with regard to religion; (2) that government may not favor religion over irreligion; and (3) that government may not pass laws with any **intent** favorable to religion. Scalia's rejection of these concepts is detailed as follows:

Neutrality. The Court majority considers neutrality a core element of religious liberty. As Justice Souter stated, "The touchstone for our analysis is the principle that the First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." *McCreary County v. ACLU*, 545 U.S. 844 (2005) (Souter, J., writing for the Court).

Returning to text-and-tradition, Scalia pointed out the absence of the word "neutrality" in the text of the First Amendment: "Governmental 'neutrality between religion and nonreligion? Who says so? Surely not the words of the Constitution. Surely not the history and traditions that reflect our society's constant understanding of those words. Surely not even the current sense of our society, recently reflected in an Act of Congress criticizing a Court of Appeals opinion that had held 'under God' in the Pledge of Allegiance unconstitutional." *McCreary*, 545 U.S. at 889 (Scalia, J., dissenting). Scalia went on to cite numerous other instances throughout history in which Congress and the president acknowledged God or a Creator. "With all of this reality (and much more) staring it in the face, how can the Court possibly assert that 'the First Amendment mandates governmental neutrality between religion and nonreligion?'" *Id.* Thus, in

resolving the issue in that case, Scalia would have permitted McCearry County to display a copy of the Ten Commandments in the county courthouse.

No endorsement. Justice Sandra Day O’Connor advanced the “endorsement” test as a means of *respecting* no establishment: “The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person’s standing in the political community. The government violates this prohibition if it endorses or disapproves of religion.” *County of Allegheny v. ACLU*, 492 U.S. 573, 625 (1989) (O’Connor, J., concurring).

Scalia rejects this reading if it means that government cannot favor religion over nonreligion: “The Court’s oft repeated assertion that the government cannot favor religious practice is false.” *McCreary*, 545 U.S. at 885 (2005). Scalia. *Id.* He went on to cite numerous forms of government endorsement, including the national motto, “In God We Trust,” the Pledge of Allegiance (with the words, “under God,”), and a 1787 Act of Congress which states, “Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.” *Id.* at 887. The untextual imposition of the endorsement test – which results in the elimination of such acknowledgements in public life, amounts to a “judicial demolition project.” *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 29 (1989).

Favoritism. If government endorses religion, then favoritism and coercion are the next evils to follow, according to O’Connor. “Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an

accompanying message to adherents that they are insiders, favored members of the political community.” *County of Allegheny*, supra, at 625.

Scalia recognizes the legitimate dangers in this scenario – “on the one hand, the interest of that minority in not feeling ‘excluded’; but on the other, the interest of the overwhelming majority of religious believers in being able to give God thanks and supplication as a people, and with respect to our national endeavors.” *McCreary*, 545 U.S. at 900. For Scalia, his test-and-tradition method resolves the conflict: “Our national tradition has resolved that conflict in favor of the majority. It is not for this Court to change [this] disposition.” *Id.*

Similarly, in *Texas Monthly*, Scalia viewed the scales as tipped in favor the state law providing tax exemptions to religious publications, because the policy did not favor one religion over the other. “It is not always easy to determine when accommodation slides over into promotion, and neutrality into favoritism, but the withholding of a tax upon the dissemination of religious materials is not even a close case. ... If there is any close question, it is not whether the exemption is permitted, but whether it is constitutionally compelled in order to avoid interference with the dissemination of religious ideas.” 489 U.S. at 40.

Coercion. Compelled religious practice or belief is one of the central evils the Establishment Clause is intended to prevent. “It is beyond dispute that, at a minimum, the Constitution guarantees that 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.” *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (Kennedy, J.

writing for the Court.) Scalia does not disagree with this general idea, but he believes the Court-fabricated coercion test has produced the wrong results – as in the *Weisman* case, prohibiting benedictions at high school graduation ceremonies.

“The Court invents a boundless, and boundlessly manipulable, test of psychological coercion, which promises to do for the Establishment Clause what the Durham rule did for the insanity defense. Today’s opinion shows more forcefully than volumes of argumentation why our Nation’s protection, that fortress which is our Constitution, cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court, but must have deep foundations in the historic practices of our people. ... Unfortunately, however, the Court has replaced *Lemon* with its psycho-coercion test, which suffers the double disability of having no roots whatever in our people’s historic practice, and being as infinitely expandable as the reasons for psychotherapy itself.

Weisman, 505 U.S. at 644 (Scalia, J., dissenting).

Purpose v. effects. The first prong of the *Lemon* test requires that legislation have a secular purpose. *Lemon*, 403 U.S. at 606. Scalia argues that the legislative intent is irrelevant, and that it is the effect of the legislation that matters: “Those responsible for the adoption of the Religion Clauses would surely regard it as a bitter irony that the religious values they designed those Clauses to protect have now become so distasteful to this Court that if they constitute anything more than a subordinate motive for government action they will invalidate it.” *McCreary* 545 U.S. at 902.

Applying the effects test in *Texas Monthly*, Scalia would have found no Establishment Clause violation in the Texas law providing a tax exemption for religious publications.

“The exemption did not have the primary effect of sponsoring religious activity ... although tax exemptions may have the same economic effect as state subsidies, for

Establishment Clause purposes such indirect economic benefit is significantly different.
489 U.S. at 34.

In other Establishment Clause cases, Scalia would have upheld, based on his effects test, a Louisiana law that required the teaching of creationism alongside evolution (*Edwards v. Aguillard*, 482 U.S. 578, 610 (1987) (Scalia, J., dissenting)); he joined the Court in striking down a school policy that prohibited religious groups from meeting on school property, but he disagreed with the Court's reasoning because it factored in the endorsement test (*Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 400 (1993) (Scalia, J., concurring); and as with benedictions at high school graduation ceremonies, he would allow student-led, student-initiated prayer at football games. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 318 (2000) (Scalia, J., joining with the dissent).

Scalia neatly summarized his Establishment Clause philosophy in a brief concurrence upholding the constitutionality of the Ten Commandments on the Texas state capitol's grounds: "I would prefer to reach the same result by adopting an Establishment Clause jurisprudence that is in accord with our Nation's past and present practices, and that can be consistently applied – the central relevant feature of which is that there is nothing unconstitutional in a State's favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments." *Van Orden v. Perry*, 545 U.S. 677, 692 (2005) (Scalia, J., concurring).

The Free Exercise Clause

“To make an individual’s obligation to obey such a law contingent upon the law’s coincidence with his religious beliefs, except where the state’s interest is ‘compelling’ – permitting him, by virtue of his beliefs, to become a law unto himself – contradicts both constitutional tradition and common sense.”

– *Employment Div. v. Smith*, 494 U.S. 872 (1990) (Scalia, J., writing for the Court).

“It’s a demonstration that you can make an exception without the sky falling ... I understand RFRA to be – to say there can be an exception to all Federal statutes where someone makes a religious objection to compliance and, in the judgment of the court, there’s not a compelling State interest in the Government going ahead with the statute. So, you know, whatever the scheme was under the drug laws, it seems to me it’s subject to this new legislation.”

– Oral argument of Justice Scalia, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (No. 04-1084), Trans. LEXIS 48, 6-7 (2005).

Justice Scalia’s thinking in the area of free exercise represents a rare and fascinating evolution in his jurisprudence. In *Smith* – also a rare instance of Scalia writing for the Court in a religious liberty case – Scalia took a hard line against a religious practice that violated the state’s controlled substance law. Fifteen years later, Scalia changed his tune in *O Centro Espirita*, in which Scalia was willing to entertain a non-mainstream religious practice. Of course, Congress had essentially overruled Scalia with the Religious Freedom Restoration Act – commanding the Court how to analyze such cases (at least in the context of federal cases, but not state cases, as the Court has interpreted RFRA. *City of Boerne v. Flores*, 521 U.S. 507 (1997)). But Scalia’s “sky-not-falling” comments in oral arguments seemed to indicate a real change of heart. Would he rule differently today in *Smith*?

In *Smith*, Scalia declared that generally applicable laws that incidentally burden religious practice are not subject to a conscientious exception or a judicial exemption. “An individual’s religious beliefs do not excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate ... Conscientious scruples do not, in the course of the long struggle for religious toleration, relieve the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.” *Smith*, 494 U.S. at 878.

In his analysis, Scalia cited *Reynolds v. United States*, a sensational 1879 case in which the Court said “No” to a free-exercise exception for polygamy and upheld the Utah Territory’s ban on the practice: “Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. ... Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.” *Reynolds v. United States*, 98 U.S. 145, 166 (1878) (Waite, C.J., writing for the Court).

Scalia said the same principle applies to drug prohibition: “The government’s ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, cannot depend on measuring the effects of a governmental action on a religious objector’s spiritual development ... The right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes)

conduct that his religion prescribes (or proscribes)” *Smith*, 494 U.S. at 884, 879 (citing *United States v. Lee*, 455 U.S. 252, 263 (1982) (Stevens, J., concurring in the judgment)).

In ruling for the state, Scalia departed from the standard the Court set in the 1963 case, *Sherbert v. Verner*, in which the Court granted a conscientious objection to a Seventh Day Adventist who refused to work on Saturday – recognized as the Sabbath for Adventists – and on that basis had been denied unemployment compensation. The Court found that the state lacked a “compelling interest” and determined that the state, in denying unemployment benefits, “substantially infringed” upon the Adventist’s free exercise of religion. *Sherbert*, 374 U.S. at 398. In *Smith*, Scalia isolated *Sherbert*, and said it would not be applied beyond unemployment compensation contests.

Incensed by the *Smith* ruling, Congress passed the Religious Freedom Restoration Act (RFRA) of 1993. The law reinstated the *Sherbert* “compelling interest” standard for laws that “burden religious exercise without compelling justification ... The compelling interest test as set forth in [*Sherbert*] is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.” 42 USCS § 2000bb. (The law also seems to confuse the “compelling interest” test, as applied in *Sherbert*, with basic strict scrutiny. This issue will be addressed in Scalia’s hypothetical Hobby Lobby opinion.)

Following RFRA’s enactment, the Court was confronted with a set of facts very similar to *Smith* in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). That case involved a Brazilian church that uses hoasca, a hallucinogenic tea, as part of its religious services. The case involved an interpretation of the federal Controlled Substance Act rather than a state law, as in *Smith*, therefore RFRA attached.

The Court applied the “compelling interest” test (not strict scrutiny) and found no such interest on the government’s part in failing to grant a religious exemption to the church. *O Centro*, 546 U.S. at 423 (2006). Scalia joined a unanimous Court in ruling for the church. RFRA’s legislatively imposed standard of scrutiny, although a rebuke to Scalia’s *Smith* decision, nonetheless comports with Scalia’s originalist principle that it is the role of the legislative branch, not the unelected Court, to provide such an exemption to a generally applicable law. As Scalia said in a case involving same-sex education, “The virtue of a democratic system with a First Amendment is that it readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly. That system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution. So to counterbalance the Court’s criticism of our ancestors, let me say a word in their praise: They left us free to change.” *United States v. Virginia*, 518 U.S. 515, 567 (1996).

In other cases subsequent to *Smith*, Scalia has sided with minority religious groups against both legislative and judicial attempts to curtail their free exercise. In a case involving the Santeria religion, Scalia concurred with the Court in striking down a municipal ordinance aimed at halting the group’s use of animal sacrifice. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993). In its judgment, the Court concluded that the city’s ordinance failed the neutrality test, and the ordinance did not constitute a “generally applicable law” because it proscribed only conduct motivated by religious belief. *Id.* at 545. Scalia quibbled with the Court’s application of the “neutrality” principle, of which he has scruples, and said the law simply failed for lack of general applicability. *Id.* at 557. Striking down the law on the basis of lack of general

applicability places the *Lukumi* case within the ambit of what is left of the *Smith* decision, i.e., “the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).” *Smith*, 494 U.S. at 879 (quoted in *Lukumi*, 508 U.S. at 531, Kennedy, J. writing for the Court).

In a subsequent case, Scalia made a passionate appeal for a small, orthodox Jewish sect in New York. The state legislature had allowed the group to essentially create its own school district by drawing its boundaries based on village of Kiryas Joel – which was itself created to include only members of the Satmar Hasidic sect. *Bd. of Educ. v. Grumet*, 512 U.S. 687, 691 (1994) (Souter, J., writing for the Court). The Court struck down the law that created the school district on the basis of violation of the Establishment Clause. Scalia dissented, asserting that the New York law creating the school district for the Satmars was a constitutionally permissible accommodation. And moreover, by failing to accommodate the Satmars, the Court burdened their religious practice and burdened them as a people – thus treading on the Free Exercise Clause. Scalia acerbically noted how differently the Court may have treated the Satmars if they had been deemed sufficiently diverse and multicultural: “I have little doubt that Justice Souter would laud this humanitarian legislation if all of the distinctiveness of the students of Kiryas Joel were attributable to the fact that their parents were nonreligious commune dwellers, or American Indians, or gypsies. The creation of a special, one-culture school district for the benefit of those children would pose no problem. The neutrality demanded by the Religion Clauses requires the same indulgence towards cultural characteristics that are accompanied by religious belief.” *Id.* at 741.

Free exercise and “no establishment” bumped into one another again in *Locke v. Davey*. In that case, the Court ruled that Washington State could constitutionally deny state scholarship funding for a college student majoring in divinity. The plaintiff, Joshua Davey, argued that the denial violated his free exercise right. But the Court held that the denial was justified based on Washington’s own strict “no establishment” policy, embodied in the state constitution. Chief Justice Rehnquist, writing for the Court, noted that the Establishment Clause and the Free Exercise Clause occasionally overlap and potentially conflict. “Yet we have long said that there is room for play in the joints between them. In other words, there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.” *Locke v. Davey*, 540 U.S. 712, 718 (2004). Thus, Davey could have permissibly pursued his divinity degree by the standards of the First Amendment of the Bill of Rights. But here, the Court upheld Washington’s “state’s right” to maintain more stringent separation between church and state than what is required by the First Amendment.

Scalia dissented, arguing that the state scholarship program, by excluding those who wish to pursue a divinity degree, facially discriminates against religion. *Locke*, 540 U.S. at 726 (Scalia, J., dissenting). The state therefore impermissibly discriminated against Davey based on his religious belief and practice. *Id.* “When the State makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured; and when the State withholds that benefit from some individuals solely on the basis of religion, it violates the Free Exercise Clause no less than if it had imposed a special tax. That is precisely what the State of Washington has done here.” *Id.* at 727.

Scalia’s dissent in *Locke* is a classic example of his “no preferences and no penalties” approach to the Free Exercise Clause. Rossum, *supra*, at 138. Here, the state could have shown no preferences in awarding scholarships, but instead it imposed a penalty. “Even if there were some threshold quantum-of-harm requirement, surely Davey has satisfied it. The First Amendment, after all, guarantees free exercise of religion, and when the State exacts a financial penalty of almost \$3,000 for religious exercise – whether by tax or by forfeiture of an otherwise available benefit – religious practice is anything but free.” *Id.* at 731.

Scalia also argued that the state policy, by discriminating on the basis of religion, violated the core right of conscience that underlies the First Amendment. *Id.* at 730. “The indignity of being singled out for special burdens on the basis of one’s religious calling is so profound that the concrete harm produced can never be dismissed as insubstantial.” *Id.* The state argued, on the other hand, that it would violate taxpayers’ freedom of conscience by forcing them to fund religious instruction. To this assertion, Scalia mused, “Today’s holding is limited to training the clergy, but its logic is readily extendible, and there are plenty of directions to go. What next? Will we deny priests and nuns their prescription-drug benefits on the ground that taxpayers’ freedom of conscience forbids medicating the clergy at public expense? This may seem fanciful, but ... when the public’s freedom of conscience is invoked to justify denial of equal treatment, benevolent motives shade into indifference and ultimately into repression.” *Id.* at 734.

Scalia’s musings about prescription drug benefits and “taxpayer conscience” captures two critical factual elements of *Sebelius v. Hobby Lobby Inc.*, now pending before the Court. In that case, a corporation seeks an exemption from the federal

requirement to provide certain contraception benefits as part of the company's employee health care coverage plan. The case promises to put all of Scalia's free-exercise principles to the test (and possibly in collision with one another): his presumption in favor of generally applicable laws that only incidentally burden religion; his disfavor of judicial exemptions in lieu of legislative accommodation, and his evolving and increasing willingness to entertain claims of conscience by religious minorities. And perhaps more importantly, the case invokes Scalia's core values in the category of "idealized end-states of existence" – life and death and the abortion issue. How Scalia tackles these issues may provide insight into one of the Court's most fascinating minds.