ABSTRACT

Religious Liberty Through the Lens of Textualism and a Living Constitution: The First Amendment Establishment Clause Interpretations of Justices William Brennan, Jr. and Antonin Scalia

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This paper examines how the jurisprudential visions of United States Supreme Court Justices William Brennan, Jr. and Antonin Scalia guide their interpretations of the First Amendment Establishment Clause. The paper begins by examining Establishment Clause basics, the United States legal system and judicial philosophies, and Establishment Clause jurisprudential history. The elusive search for a standard Establishment Clause interpretation in modern jurisprudence is examined through an analysis of the linear historical view and the practitioner's categorical view. It is argued that the single most important factor in determining an overall jurisprudential philosophy is ones method of interpretation. Accordingly, the primary methods of constitutional interpretation, originalism, textualism and the Living Constitution method are examined. Justice Brennan's and Justice Scalia's jurisprudential visions are examined generally, and in the context of their Establishment Clause jurisprudence. The paper concludes that both justices have consistently applied their widely different but principled jurisprudential visions when interpreting the Establishment Clause.

Religious Liberty Through the Lens of Textualism and a Living Constitution: The First Amendment Establishment Clause Interpretations of Justices William Brennan, Jr. and Antonin Scalia

by

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CHAPTER ONE

Introduction

A little over two centuries ago, America's Founding Fathers christened a grand experiment in self-government known today as the United States of America. This new republic was founded upon the principles of a representative democracy in which sovereignty was reserved exclusively to the people who governed themselves through representatives. This novel government was anchored by a written Constitution and the accompanying Bill of Rights, which enumerated the limitations of the new federal government and articulated specific rights reserved to the people. Embodied within these few pages were all the limitations of governmental power and guarantees of liberty needed to launch arguably the most successful governmental system ever assembled through the design and intellect of mankind. Undoubtedly, two of the most significant of the several enumerated constitutional provisions within this revolutionary document, now the world's oldest written constitution still in use, are its structural limitation on religious establishment and guarantee of religious freedom. The intent, interpretation, and application of one of these two provisions, the Establishment Clause, which directs the relationship between government and religion within the context of United States legal system, is the subject of this paper.

The U.S. Constitution was designed to strike a balance between the power of the federal government to provide safety and order, and the protection of the people's individual liberties. While the principles designed to achieve this balance were penned in the late eighteenth century, in practice the balancing act is very much an ongoing process

The balance between the liberties reserved to the sphere of religion, the authority reserved to the sphere of government, and more crucially, the overlap, is governed by the religion clauses of the First Amendment. Because of the inherent significance of politics and religion, and the passions that always surround them, the interpretation of the Constitution's religious clauses have been especially prone to conflict.

When these two issues, government and religion, are combined and shifted from the realm of public discourse to the universe of the United States legal system, they form the basis of what may very well be the most divisive, controversial and notoriously divergent area of law emerging from the courts both today and in recent history. Such is the stuff behind the deceptively simple term church and state jurisprudence. As Alexis de Tocqueville noted two centuries ago, "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."[1] The interpretation of the Constitution and all its provisions--including the Establishment Clause--is primarily the function of the judiciary, and the final word in our hierarchical federal court system comes from the United States Supreme Court. It is therefore inevitable that we look to the Highest Court for an interpretation of the religion clauses. Unfortunately, the Court's answer to the question, "what do the religion clauses mean" has been, and continues to be, disappointing. Former Chief Justice Burger provided one of the best summaries of the Court's interpretation of the clauses in a 1970 Opinion:

> The general principle deducible from the First Amendment and all that has been said by the Court is this: That we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will

[1]Alexis de Tocqueville, *Democracy in America* (New York: Doubleday, 1969), 292.

> permit religious exercise to exist without sponsorship and without interference.[2]

Chief Justice Burger was forced to explain the religion clauses in such generality because at the time there existed no consensus on the Court as to their proper interpretation within useful specificity. Notable changes within the composition of Court since 1970 notwithstanding, there has been little progress towards consensus over the last three and a half decades.

The Constitution's mandate for the proper relationship between religion and the government is deceptively simple. The two religion clauses of the First Amendment are comprised of a mere sixteen words: "Congress shall make no law respecting an establishment of religion, or prohibiting the Free Exercise thereof."[3] Nonetheless, the courts' attempts at interpreting the clauses can--and do--fill entire shelves in our nation's law libraries. To the great misfortune of the law librarian, the Courts' failure to develop a cohesive and generally acceptable method of interpreting and applying the religion clause principles have only encouraged an almost incomprehensible amount of scholarly writing on the same subject representing even more, if possible, divergent opinions than those represented in judicial opinions.

While neither of the two religion clauses has escaped controversy, the interpretation of the Establishment Clause has been especially prone to debate. Religious freedom, within generally accepted limits, has been a foundational theme of our nation predating both the Constitution and Bill of Rights, therefore the Court's interpretation of the Free Exercise Clause has been relatively consistent; the debate has centered primarily

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[2]*Walz v Tax Commission*, 397 U.S. 664, 669 (1970).

[3]United States Constitution, Amendment I.

on the *application* of religious freedom to various situations.[4] Conversely, the exact meaning of the Establishment Clause of the First Amendment, that "Congress shall make no law respecting an establishment of religion," has been the subject of seemingly endless controversy and debate. With no common ground on even a definition, one is left to imagine the paltry state of affairs surrounding the Court's application of the Establishment Clause.

The purpose of this paper is to explore the Supreme Court's conflicting interpretations of the First Amendment Establishment Clause in the last half-century, specifically through the jurisprudential views of United States Supreme Court Justices William Brennan and Antonin Scalia. These two intellectual giants and outspoken jurists developed particularly well defined jurisprudential visions, and each vigorously defend conflicting methods of constitutional interpretations. This paper advances the proposition that the two Justices' divergent jurisprudential philosophies, and particularly their competing methods of constitutional interpretation, are key to understanding their clashing interpretations of the Establishment Clause. It will be argued when their respective jurisprudential visions are examined and understood, Justice Brennan and Justice Scalia's consistently opposing views on how to interpret the two religion clauses are both predictable and, in their own ways, principled.

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[4]No constitutional provision is entirely without controversy, and the Free Exercise Clause has had its share of cases go before the Supreme Court. One of the most controversial was *Employment Division v. Smith* (1990) in which the Court abandoned the requirement that government demonstrate a "compelling interest" before encroaching upon an individual's right of freedom in favor of the lower standard of a mere "generally applicable" law. This decision sparked sweeping legislative action, including the proposal of constitutional amendments to preserve the religious liberty many perceived *Smith* to have eliminated. Nonetheless, Free Exercise cases have all been about how *much* freedom the clause grants, and unlike the Establishment Clause, the basic definition (or intent) of "Free Exercise" has not been the subject of vast debate.

Justices Brennan and Scalia, who are fairly representative of the polarized scholarly and legal community as a whole regarding church-state issues, both profess to strive for the same goal in deciding legal issues controlled by the religion clauses: to correctly balance democratic governmental authority with the guarantee of religious liberty according to the dictates of the Constitution. However, they nearly always come to different conclusions on what this "correct" balance is. This paper will examine their comprehensive jurisprudential theories and outline how they have led the two men, and with them the two competing camps of separationists and accommodationists, towards distinctly different interpretations of the same religious clauses.

The last half-century has witnessed significant confusion in the Supreme Court concerning church-state issues. Balancing line tests have been developed, used, and abandoned; broader legal concepts have been formulated but none have gained a clear consensus; sharply divided courts have issued decisions with scathing dissents; and even majority blocs often issue multiple concurring opinions which seem to suggest that agreement was mere coincidence, considering those who arrived at the same holding did so via vastly different routes. In such a conflicting legal climate, a reexamination of competing church-state philosophies is warranted, and no two better apologists for the two prevalent competing ideologies exist than Justice Brennan and Justice Scalia.

Justice William Brennan, Jr. and Justice Antonin Scalia served together on the United States Supreme Court between 1986 and 1990. During the four years they served together they represented the intellectual heavy-lifters of the Court's liberal and conservative wings respectively. However, the impact Brennan left, and the influence Scalia still wields, far eclipses their short overlapping tenure. Justices Brennan and

Scalia, more so than any other Justices in modern history, represent divergent jurisprudential visions that are both articulate and rooted in differing values and viewpoints about the relation between government and the governed. In a nutshell, Justice Brennan's jurisprudential vision can be described as a pursuit of individual dignity, while Justice Scalia's jurisprudential vision is a defense of democracy. The importance of Justice Brennan's emphasis on dignity and Justice Scalia's concern for democracy can not be overemphasized; it is absolutely crucial to understanding not only their jurisprudential philosophy, but their respective interpretations of the Establishment Clause as well.

This paper will examine the constitutional battles of Justice Brennan and Scalia over the interpretation of the Establishment Clause within the context of their respective jurisprudential philosophies. Readers will soon discover the author's preference for Justice Scalia's approach to law in general, constitutional interpretation in particular, and application of the law in cases raising Establishment Clause issues. However, this paper will strive for balance and fairness by fairly presenting the views of the two justices, primarily through the words they wrote in their published opinions and scholarly writings, and by reserving commentary for the concluding chapter.

Over the course of many years, both in research conducted for this paper, graduate work, and during and since law school, this author has had many opportunities to read the opinions of Justices Brennan and Scalia with an eye for their respective interpretations of the Constitution and the religion clauses in particular. The most striking observation is in how profoundly these two intellectual giants and legal scholars differ on interpreting the very same constitutional provisions. Both Harvard Law School

graduates and devout Catholics, the two Justices developed sharply different jurisprudential visions, and used their position on the Court to advance what can accurately be described as competing legal philosophies. Nowhere within their bodies of work have their views been more divergent than in their Establishment Clause jurisprudence. It is therefore appropriate that their interpretations of the Establishment Clause be examined within the context of their overall jurisprudential visions.

This thesis is divided into three parts: Part One, consisting of chapters two and three, will outline the controversy over the interpretation of the Establishment Clause, Part Two, comprised of chapters four through five, examines the significance of constitutional interpretation and legal philosophy in creating a jurisprudential vision, and Part Three looks at the relationship between jurisprudential vision and a jurist's interpretation of the Establishment Clause.

Chapter two is an introduction to church-state studies in general and the related ongoing conflict in the United States over the intent, interpretation and application of the First Amendment Establishment Clause. Part One of this chapter will address the preliminary but crucial matter of whether the Free Exercise and Establishment Clauses should be read as distinct constitutional provisions or as one clause, and introduces and defines the prevailing church and state theories of accommodationism and separationism. Part Two briefly introduces the United States legal system and explains the context under which the Establishment Clause will be examined. Also addressed in this section are several jurisprudential doctrines which necessarily affect a jurist's views on particular constitutional provisions, including the Establishment Clause. Part Three is a brief

review of the historical origins of the Establishment Clause and its interpretation by the Court, and a defense of historical analysis itself.

Because a historical analysis of the Establishment Clause and its role in United States judicial decisions over the years reveals shifting interpretations, Chapter Three will address the elusive search for a standard Establishment Clause interpretation. Part One will outline the linear historical view most academics adopt to follow the Supreme Court's evolving Establishment Clause jurisprudence. Part Two addresses the practitioner's categorical approach towards understanding the court's varied interpretations of the Establishment Clause. Part three argues that both approaches to understanding the current Establishment Clause jurisprudence must be understood and addressed when dealing with an Establishment Clause issue.

Chapter Four will introduce the most significant factor in determining a jurist's jurisprudential vision, and therefore his views on the Establishment Clause: his method of constitutional interpretation. Part One will briefly define the two basic approaches to constitutional interpretation, originalism and nonoriginalism. Additionally, Justice Scalia's refinement of the classic originalist interpretation method, textualism, will also be defined and examined. Part Two and Three will outline the various arguments both supporting and critiquing the Living Constitution and Originalist interpretive method respectively.

Chapter Five will examine the jurisprudential visions of Justices William Brennan and Antonin Scalia with special attention to their methods of Constitutional interpretation. Part One will provide biographic background on both Justices with an eye towards determining what early influences shaped their respective judicial philosophies.

Factors such as the two Justices' upbringing, education, life experiences, and religious convictions will be examined in an effort to understand how they developed their unique jurisprudential visions. Part Two will focus on Justice Scalia, and attempt to explain his jurisprudential vision with emphasis on his textualist method of Constitutional interpretation. Justice Scalia's influence and contributions to the Supreme Court and the legal profession in general, as well as his view on church-state relations, will be examined and addressed. Part Three will concentrate on Justice Brennan and his emphasis on a "living constitution" method of Constitutional interpretation. Likewise, Justice Brennan's influence and contributions to the Supreme Court and the legal profession in general, as well as his view on church-state relations, will be examined and addressed.

Chapter Six will trace and explain the Establishment Clause interpretations of both Justice Brennan and Justice Scalia. Close attention will be paid to both Justices' views concerning what constitutes a violation of the Establishment Clause of the First Amendment. Part One will address Justice Brennan's evolving views on the Establishment Clause, tracing his slide towards strict separationism as a method of ensuring individual dignity. Also addressed is Justice Brennan's Court victories in the 1960's, '70's and early '80's for separationism in every area but ceremonial deism cases, and increasing defeats as the Rehnquist Court came into its own in the late 1980's and 1990 when he retired from the bench. Part Two will examine the Establishment Clause views of Justice Scalia, beginning with his vociferous dissent in his first Establishment Clause case and continuing with his consistent criticism of the various "balancing tests" proposed by the other members of the Court. Also addressed is Justice Scalia's

preference for an Establishment Clause interpretation based on tradition and reflecting democratic values. Special attention will be given to Justice Scalia's recent concurring and dissenting remarks in the two recent Establishment Clause cases released in 2005 involving the display of the Ten Commandments. Finally, Part Three will briefly outline how Justices Brennan and Scalia's respective jurisprudential philosophies also determined their Free Exercise Clause interpretations.

In the concluding chpater, this thesis will argue that the method of constitutional interpretation used by a jurist is the most significant aspect in defining their overall jurisprudential vision. Likewise, a jurist's jurisprudential vision is the primary factor responsible for determining how they will rule in an Establishment Clause case. This thesis will also argue that Justice Scalia's and Justice Brennan's respective jurisprudential visions, and especially their competing methods of interpretation, predetermined their respective interpretations of the Establishment Clause. This thesis will conclude that the primary lesson to be learned from a study of Justices Brennan and Scalia's Establishment Clause jurisprudence is that a universal Establishment Clause interpretation is impossible if the Court can not reach a majority consensus on what the purpose of the Establishment Clause is. Finally, this thesis will set concern for hubris aside and suggest its own model for interpreting the Establishment Clause.

CHAPTER TWO

The Intersection of Church and State in the United States

Establishment Clause Basics and Background

Before examining the nuances of Justices Brennan and Scalia's respective views on how the Establishment Clause should be interpreted and applied, it is helpful--indeed necessary--to first provide a brief background on the clause itself. Accordingly, this chapter will first define the Establishment Clause, arguing it is a stand-alone clause with both a separate function and purpose from the Free Exercise Clause. Second, in an effort to provide context for the thesis as a whole, an overview in church and state theory, American law and jurisprudential philosophy, and United States Establishment Clause history, will be presented.

Religion Clause, or Clauses?

The church-state debate in the United States is primarily centered on the religion clauses of the First Amendment; the Free Exercise and Establishment Clause. However, controversy emerges at even the most basic level, since there are divergent opinions on whether the two clauses should be understood as separate in function or twin components of a unified expression mandating religious liberty. Furthermore, while the majority of scholars and jurists accept the two clauses as separate, even if only for practical reasons, there is significant debate over the functions and interaction of the two clauses. The standard view, and one could argue it is overly simplistic, is that the two clauses work both together and against each other in a marvelous system of synergy and tension.

On the one hand the "religion clauses work in tandem to preserve a single ideal, religious freedom," but on the other, courts frequently maintain they are required to balance the "competing objectives" of the two clauses, forcing them to "choose, in some measure, between burdening free exercise or promoting establishment."[5] Those who adhere to the latter clauses in conflict view interpret the Establishment Clause and the Free Exercise Clause as "essentially in direct conflict," and therefore deem it necessary for the Supreme Court to develop a "balancing test" to balance the two competing interests of the Religion Clauses.[6] However, a more logical interpretation is that the two clauses are indeed wholly separate in function, and therefore never in conflict or "tension." This assumption is supported by both ideological and practical arguments.

Ideological Grounds for Separating the Clauses. The editors of Aspen Publisher's church and state law textbook took an unusual track in the organization of their work. Declaring that "one of the chief reasons why the Supreme Court's case law on religion has been so inconsistent and shifting is that for years the Court treated these two First Amendment concepts in isolation from each other, labeling cases as 'Free Exercise Clause cases' or 'Establishment Clause cases.'"[7] Concluding that the two clauses must be understood as working together for the same objective, they accordingly arranged the cases with free exercise and establishment rulings mixed together. Whether

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[5]"Chapter 16: Government and Religious Freedom," in *LexisNexis Constitutional Law Outline,* Http://www.lexisnexis.com/lawschool/resource/summaries/html/conlaw/conlaw16.htm. (Last checked May 1, 2004).

[6]Barry Lynn, "The Sad State of Free Exercise in the Courts," in *The Bill of Rights: Original Meaning and Current Understanding*, ed. Eugene W. Hickok, Jr., ed. (Charlottesville: University Press of Virginia, 1991), 70.

[7]Michael McConnell, John Garvey, and Thomas Berg, *Religion and the Constitution* (New York: Aspen Publishers, 2002), xviii.

the law students who use their text are less confused when learning church and state law is hard to objectively determine, but the author of this paper found their text to be oddly organized and immensely confusing.

Combining the two clauses works ideologically only if they do not have separate functions and goals. If, indeed, the two clauses were really designed to seek the same objective, say the amorphous "religious liberty," then courts should interpret the two clauses in unison. However, equating the clauses as two means to the same objective seems to be merely a policy argument, not a legal principle. Furthermore, this view is not rooted in sound interpretation of the clauses themselves. Quite possibly, the two clauses may be as different in function as positive and negative.

The Free Exercise Clause is most accurately described as a guarantee of an individual right. Freedom of religion, often termed freedom of conscience in the Eighteenth Century, was long a part of the American experiment, and the passage of the Free Exercise Clause resulted in little debate in the First Congress, that group which was responsible for the passage of the Bill of Rights. Likewise the Free Exercise Clause's meaning or intent throughout U.S. judicial history has been relatively undisputed, especially in comparison the Establishment Clause. Indeed, Religious freedom is so deeply rooted in American history that many view the Free Exercise Clause not merely as a limit on the government, but a positive freedom. Like robust speech and an open press, religious freedom is to be "positively encouraged" by the government as a vital contributor to the public good.[8]

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[8]James Reichley, "Religion and the Constitution," in *This Constitution from Ratification to the Bill of Rights* (Congressional Quarterly, Inc, 1998), 212.

In stark contrast, the Establishment Clause is not a positive individual right, but rather a negative structural limit of the government's authority. Respected legal scholar Carl Esbeck has noted that the Establishment Clause was not designed to protect an individual right; in other words, there is no "right" to protection from religious coercion.[9] Despite the modern tendency to think of every provision in the Bill of Rights as a guarantee of a personal right, the Establishment Clause is solely an institutional structure provision that applies a negative, or restraint, on government authority. Its function is that of a boundary keeper, and as such may be best understood by what it does not do. It does not protect people from other people, protect minority religions from majority religions, protect government from churches, nor protect the non-religious from the religious.[10] Rather, the sole purpose of the Establishment Clause is to limit the government from improperly aligning with religion.[11] Under such an understanding, the Establishment Clause's role in promoting religious liberty is only indirect.[12]

When the proper functions of the two clauses are clearly delineated and understood, the often referenced "tension" or clauses-in-conflict principle is proved to be a fallacy.[13] Dean Kathleen Sullivan, in her widely used Constitutional Law Casebook,

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[9]Carl Esbeck, "Differentiating the Free Exercise and Establishment Clauses," *Journal of Church and State* 42 (2000): 315. Professor Esbeck's cogently argued article is the best ideological defense of the position that the two religion clauses are separate in function and therefore not in tension with each other.

[10]*Ibid*., 324.

[11]Professor Esbeck was aware that those most ardent expositors of the separationist viewpoint tend to disagree with his theory that the Establishment Clause is limited in function to restraining the government. He acknowledged that "secular modernists are prone to assume that religious ideologies are more intolerant and violent than secular ideologies. Thus they assume that the Establishment Clause is there to protect them from the excesses of government." *Ibid*., 325.

[12]"By delimiting and qualifying government sovereignty, structure often redounds to further secure personal rights." *Ibid.*, 322.

[13]Unfortunately, the Supreme Court itself has characterized the clauses as in conflict: "These two

teaches students of the law that "the two clauses . . . protect overlapping values, but they often exert conflicting pressures."[14] However, a closer review of the distinct functions of the two clauses will reveal that neither is subordinate nor instrumental to the other, but rather the two are quite different in their designed roles. Since there is no tension, courts are not really required to "balance one against the other."[15]

Practical Grounds for Separating the Clauses. Convincing ideological arguments notwithstanding, one cannot ignore the strong practicality of separating the two religion clauses. Not only has the Supreme Court always distinguished between the two clauses in its rulings, but an understanding of the American legal system, specifically issues of judiciability, demand a separation of Free Exercise and Establishment cases.[16]

In one of the most recent Free Exercise Clause rulings released by the Supreme Court, the idea of a "balance" between the two clauses was implicitly contradicted when the Court declared that there are "some state actions permitted by the Establishment Clause that are not required by the Free Exercise Clause."[17] Thus, there is clearly not an equal balance between the "competing interests" of the two clauses, and a good argument can be made that there are actually no competing interests at all in most cases. Thus, the

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clauses, the Establishment Clause and the Free Exercise Clause, are frequently in tension." *Tilton v Richardson*, 403 U.S. 672, 677 (1971).

[14]Kathleen Sullivan and Gerald Gunther, *First Amendment Law* (New York: Foundation Press, 1999), 459. *See also* the LexisNexis outline, *supra* note 1.

[15]Esbeck, *supra* note 5 at 323.

[16]Article III, section 2 of the United States Constitution limits judicial jurisdiction to "cases and controversies." This constitutional limitation has led courts to accept only "judiciable" cases, or those cases which are appropriate for judicial determination. Issues of judiciability include several legal doctrines which essentially describe problems cases which courts generally will not take up. These doctrines include standing, mootness, ripeness, declaratory judgments, and political opinions.

[17]*Locke v. Davey*, 124 S.Ct. 1307, 1311 (2004) (holding that a Washington state law that denied funding to devotional theology students did not violate the Free Exercise Clause).

clauses should be viewed as separate in function, and not two halves of a singular equation used to reach a proper balance. Moreover, while the complainant in *Locke v. Davey* alleged an Establishment Clause violation as well as Free Exercise violation, the Court adjudicated the case based solely on the Free Exercise Clause. As a matter of practicality, the Court has always distinguished between the two clauses.

While academics are free to discuss the merits of combining the two clauses into one coherent principle intent on reaching an "ideal" level of religious liberty, practicing lawyers know that for their client to have standing there must be an injury that is redressible by law. When the client's religious views are the subject of discrimination by the government, they have a claim only through the Free Exercise Clause.[18] Conversely, when a client believes they have suffered harm due to the government establishing religion, they have a claim only through the Establishment Clause. Since the causes of action, remedies at law, and all the precedent explaining the interaction between religion and the government in United States legal system differentiates between Free Exercise cases and Establishment cases, a practicing attorney would be wise to also differentiate between the two.

It is also worth brief mention that there are some who view the Establishment Clause in conflict with the Free Speech Clause as well as the Free Exercise Clause. Many who advocate a strict separation of church and state desire the Establishment Clause to override the interests protected by the Free Speech Clause when the speech in question is religious in nature. However, the Court has not adopted this view, as is

[18]An argument could be made that when the state takes a position on an issue that leads to "religious discrimination," it has de facto become "excessively entangled" with religion or has taken an action that has the "primary effect" of either advancing or inhibiting religion, and therefore it has violated the Establishment Clause. However, this has never been considered a particularly good argument, and has

evidenced by the "unbroken line of victories" in the 1980's and 1990's for religious speech, a reference to multiple cases in which Free Speech Clause claims trumped alleged violations of the Establishment Clause.[19] For the purposes of this paper, it is enough to simply note that those who hold to this view have failed to point to anything in the Constitution that says that when an apparent conflict in the clauses is found the Establishment Clause must carry the day. Moreover, basic logic would suggest the Framers did not intend to place contradictory clauses in the First Amendment. For all the above reasons, this paper rejects the clauses in conflict view, and will address the Establishment Clause alone, as a separate and distinct principle in United States constitutional law.

United States Church and State Theory: Accomodationism v. Separationism

With regard to the Establishment Clause, church and state theory in the United States is defined by the competing theories of accommodationism and separationism. In the simplest of terms, scholars and jurists have defined their views and divided themselves into two distinct camps when debating the meaning of the Establishment clause: separationists and accommodationists. Separationists read a "broad" interpretation into the Establishment Clause, concluding the clause mandates near complete separation of church and state. Conversely, accommodationists take a "narrow" view of the clause and advocate that it disallows an established church, but nevertheless allows for some government accommodation of religion on a nonpreferential basis.

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never been accepted by the Supreme Court.

[19]Carl Esbeck, "Myths, Miscues and Misconceptions: No-Aid Separation and the Establishment Clause," 13 *ND J.L. Ethics & Pub Pol'y* 285, 298 (1999).

While this is a snapshot of the church and state debate in the United States, it is by no means representative of church and state theory as a whole.

Church-State Theory. While the debate in the United States is framed as accomodationists versus separationists, church and state theory may better be understood as a spectrum of possible relationships, with complete union of government and religion on one end, complete separation of the two on the opposite far end, and an entire host of possible relationships between the two extremes. See Figure 1 below.

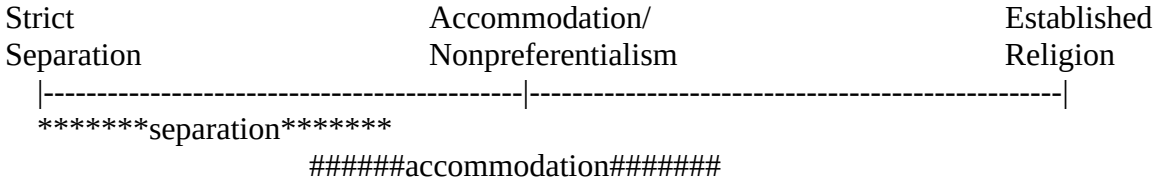

Fig. 1 Church-State Theory Continuum

There are three specific issues that should be addressed concerning the spectrum of possible church-state relationships illustrated above. First, it should be noted that in the full spectrum, the accommodationist position could be considered the centralist position. However since at the time of the framing of the First Amendment the dominant position was that there should not be an established national church, the debate in the United States is focus on only half of the full spectrum, placing accommodation at the opposing end from separation, with some as of yet un-reached and un-agreed upon compromise position as the midpoint.

Second, because it is a sliding scale, there is no set boundary between the two views. Indeed, there is actually significant overlap in some areas, especially pertaining to government aid distributed under principles of “neutrality.” Thus, a mild separationist

and a mild accomodationist may actually be separated more by rhetoric than by principle. For example, advocates of a mild view of both accommodation and separation could agree that government aid to religious organizations providing non-sectarian social services would be acceptable while tax dollars attributed directly to clergy salaries would be impermissible. Likewise, holders of a mild view of both theories could agree that the motto "In God We Trust" on U.S. currency is acceptable either as a proper accommodation or as an example of *de minimus* ceremonial deism, while requiring public school children to recite a specific religious creed would be unacceptable.

Third, it is common for Americans, especially those advocating strict separation, to simply conclude that the closer one moves toward absolute separation the more religious freedom is achieved. However, one need only look to any of several European models to see that disestablishment is not a requirement for, nor a guarantee of, religious toleration.[20] Thus, if the measure of true religious liberty is how well the adherents of minority religions are accepted, the American model of disestablishment does not hold a monopoly on the achievement of religious freedom.

Separationism. While the American debate tends to frame separation as the opposite of accommodation, this simplistic either-or dichotomy is hardly representative of the highly nuanced theory on church-state relations. For example, Professor Paul Webber defines separationist views as points along the spectrum, or "varieties of

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[20]On this subject one scholar has noted that: "In the United States, Americans tend to see freedom of religion as a product of separation of church and state, but in Europe, the former does not necessarily depend on the latter. As Peder Eidberg notes in his article on the history of church and state in Norway, 'No country has a more deeply entrenched Protestant state church than Norway, but in few lands do nonconformists enjoy more freedom.'" Derek Davis, ed. *Religious Liberty in Northern Europe in the Twenty-First Century* (Waco: Baylor University, 2000), 8.

separation," of which he defines five.[21] However, for the sake of simplicity and clarity this paper will focus on the traditional view of separation most often advocated by its apologists, and best defined by Justice Black's majority opinion in *Everson v. Board of Education*.[22]

For approximately the first 150 years of its existence, the Supreme Court had allowed significant government accommodation of religion without recognition of a possible conflict with the Establishment Clause, but in the 1947 watershed case *Everson v. Board of Education*, the Court established an interpretation of the Establishment Clause that was staunchly separationist. Justice Black, writing for the court, presents the most recognized and accepted separationist view:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws, which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbelief, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by laws was intended to erect "a wall of separation" between church and State.[23]

This case is seminal in church-state law in the United States for several reasons, not the least of which was because it was the first time that the Court expressly undertook the

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[21]1) Structural separation is when the government and clerical offices are separate, unlike Saudi Arabia, for example. 2) Absolute separation is the theory advocated by Justice Black in the Everson case (see text above.) 3) Transvaluing separation is when the government discourages all religious activity, such as in the old Soviet regime. 4) Supportive separation is what is commonly referred to today as accommodation, the government is allowed to grant some support to religion. 5) Equal separation is separation of church and state but without being hostile to religion. Paul Weber, *Equal Separation* (New York: Greenwood Press, 1990), 2.

[22]*Everson v. Board of Education*, 330 U.S. 1 (1947).

[23]*Everson*, 330 U.S. at 15.

task of interpreting the language of the Establishment Clause. Also, *Everson* was the device used to incorporate the Establishment Clause to the states through the Fourteenth Amendment, and it was the first time the Court expressly stated that it could prohibit nonpreferential aid to religion.[24] However, the case was most significant for its unprecedented "lavish use of separationist rhetoric in both the majority and minority opinions."[25]

True to the wall metaphor constitutionalized in *Everson*, separationists seek to erect a wall between church and state. However, as evidenced in *Everson*, which ruled government funding of busing for religious schools was not unconstitutional, absolute separation is simply not possible. Thus, the best definition of a realistic separationist is one "who would maximize separation at every turn."[26]

There are many, indeed quite possibly the majority, of both scholars and jurists who hold to some form of a separationist interpretation of the Establishment Clause. Their view and supporting arguments are more fully addressed in following sections of this paper.

Accomodationism or Nonpreferentialism. Only a few years after the *Everson* decision, Justice Douglas summarized the accommodationist viewpoint in his majority opinion in *Zorach v. Clauson* as such:

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We

[24]Michael Malbin, *Religion and Politics, The Intentions of the Authors of the First Amendment* (Washington, DC: AEIPP, 1978), 2.

[25]Daniel Dreisbach, "Everson and the Command of History," in *Everson Revisited: Religion, Education and Law at the Crossroads* (Lanham, MD: Rowman & Littlefield, 1997), 24.

[26]Arnold Loewy, "The Positive Reality and Normative Virtues of a 'Neutral' Establishment Clause," 41 *Brandeis L.J.* 533, 534. (2003).

> sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would prefer those who believe in no religion over those who do believe.[27]

More recently, former Chief Justice William Rehnquist attacked the *Everson* strict separationist interpretation of the Establishment Clause in his dissent in the 1985 case *Wallace v. Jaffree,* and in doing so articulated the classic nonpreferential accomodationist position:

> It is impossible to build a sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly forty years.[28]
>
> . . . .
>
> As its history abundantly shows, however, nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion, nor does the Clause prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means.[29]

However, the Court's most succinct explanation of the accomodationist position is found in a 1984 case, *Lynch v. Donnelly*: "Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."[30]

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[27]*Zorach v. Clauson,* 343 U.S. 306, 313 (1952).

[28]*Wallace v. Jaffree*, 472 U.S. 38 (1985), 92.

[29]*Ibid*., 113.

[30]*Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

In addition to select jurists, there are also accomodationist scholars who advocate the view. For example, Daniel Dreisbach writes "[t]he Framers saw no contradiction in a 'separation of church and state' and government encouragement of religion."[31] William Marnel uses the often-quoted phrase "the prohibition of an established church meant freedom for religion, not freedom from religion."[32] Walter Berns even sees a protection of accommodation in the Establishment Clause language; "In forbidding laws respecting the establishment of religion, [the First Congress] was careful to avoid language that would also forbid aid, including financial aid, to religion on a nondiscriminatory basis."[33]

Like the separationists, those advocating accommodation can be poignant in their rhetoric. Former Chief Justice Warren Burger wrote, "Some extremists see the risk of an 'establishment' or 'state' church looming up when any state action benefits one or all religions."[34] It is doubtful that most separationists consider themselves extremists, but such is the nature of the debate over the meaning of the Establishment Clause in the United States today.

United States Legal System and Philosophy

Church and state theory put into practice in the United States is done so through the mechanism of the legal system. It is therefore useful to briefly examine a few basic

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[31]Daniel Dreisbach, *Real Threat and Mere Shadow* (Westchester, IL: Crossway Books, 1987), 50.

[32]William Marnel, *The First Amendment* (Garden City, NY: Doubleday 1964), 92.

[33]Walter Berns, *The First Amendment and the Future of American Democracy* (New York: Basic Books, 1976), 31.

[34]Warren Burger, "Forward" in Arlin Adams and Charles Emmerich, *A Nation Dedicated to Religious Liberty* (Philadelphia: University of Pennsylvania Press, 1990), xiii.

definitions and foundational legal principles in an effort to better understand the universe that is the American legal system.

Defining Law. If it is possible to define the concept of law in one short phrase perhaps "governmental social control" is as good a definition as any.[35] In very general terms, law is the vehicle by which a civilized society creates and maintains order. It is commonly held that the purpose of law is to "do justice," or secure expectations. Citizens in a society under the law organize their lives based upon the expectation that if they act within the confines of the law, the government will not interfere with their activities and will protect them from harm and abuse. There are two principles that are considered foundational for law to secure expectations: law must be pre-established and known, and impartial tribunals are necessary to ensure the power of law is exercised fairly.

Types of Law in the United States. Within the United States legal system there are five broad categories of law: 1) Constitutional law, to which the other four types of law are subject, is the highest form of law and it outlines the powers and limits of the government; 2) Statutory law is that law created by a legislative body; 3) Common law is that created by judicial decision or "discovered" by judges; 4) Administrative law is law administered by the executive branch but supervised by the courts; and 5) International law is law accepted by independent nations as binding.[36] The subject of this paper, the Establishment Clause, falls under the category of constitutional law.

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[35]Donald Black, *The Behavior of Law* (San Diego: Academic Press, 1976), 2.

[36]Charles Bahmueller, "Law," in *U.S. Court Cases*, Vol. I, Ed. The Editors of Salem Press (Pasadena: Salem Press, 1988), 16.

The United States Constitution is a social contract whereby the people of the United States maintained sovereignty, but delegated certain powers to the federal government.[37] The primary purpose of constitutional law is to ensure that the government does not abuse its powers or violate rights reserved to the people. Constitutional law is founded upon two general principles: Institutional principles outline the expressly enumerated powers delegated to the various branches of the government, and Rights principles, by which individuals are guaranteed freedom from government restraint on their liberties.[38]

Jurisprudential Doctrines

Jurisprudence is quite simply the term applied to a jurist's conception of the proper principles employed to justify a legal decision. It is the philosophy of law which seeks to answer the fundamental questions about law which have been asked for generations. A jurist's jurisprudential philosophy is the conceptual mechanism by which legal concepts are defined and clarified, legal doctrines are critiqued, and presuppositions are exposed. A jurisprudential philosophy attempts to discover and solidify the limits of discretion when applying legal rules, it prioritizes legal principles, and it searches for ways to make the application of law consistent. Jurisprudential philosophies are shaped by a jurist's background and experience, and in turn these philosophies influence constitutional law. Advocating a particular jurisprudential philosophy for others to follow both now and in the future is what this paper terms "jurisprudential vision."

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[37]Constitutional law principles also apply to the various state constitutions, which outline the powers and limitations of the applicable state government.

[38]Ronald C. Kahun, "Constitutional Law," in *U.S. Court Cases,* Vol. I, ed. The Editors of Salem Press (Pasadena, CA: Salem Press, 1988), 34.

While a jurist's perspective on the proper interpretation of the Establishment Clause is most obviously colored by his or her church-state theory, whether it be an accomodationist or separationist tilt, there are several other factors that fall under the general heading of jurisprudential philosophy which also contribute, albeit in more subtle ways, towards how one interprets the Clause. Most often, a jurist's philosophy is simplistically categorized into the either-or terms of "conservative" or "liberal." However, these labels are arguably useful on only the most general of levels.

For the purposes of this paper, a conservative is defined as one who's political and cultural views are considered by most as traditional, who would desire social continuity, resist change and seek to preserve the intellectual, political and cultural traditions of earlier generations. Often conservatives will believe in a transcendent moral order and recognize the limitations of human reason. By contrast, a modern liberal (as opposed to a classic liberal) is one whose political and cultural views are considered by most to be progressive. Liberals often advocate for social change through activist political, legislative and judicial agendas. Such changes are usually justified in the name of fairness, justice or some sense of social equality.[39]

It is worthy of note that the conservative and liberal labels are largely subjective and nearly always freighted with political party affiliations. While the labels may have some use in defining broad policy objectives, pigeonholing a thoughtful jurist as either a conservative or a liberal is largely unhelpful in understanding the nuanced intricacies of a carefully crafted jurisprudential vision. Accordingly, this paper will focus several

[39]Adapted from: "Additional Glossary for Student Conference," (Acton Institute, 1996).

specific factors, commonly termed jurisprudential doctrines, that form the most prevalent portions of a comprehensive legal philosophy.

Methods of Interpretation. Methods of interpretation, addressed extensively in chapter three, will necessarily affect any jurist's jurisprudential philosophy. Very briefly, the two ends of the interpretive spectrum are "originalists," who believe a judge should look for the original intent of the law being interpreted, and "non-interpretists," who, as the name implies, believe they are not constrained to merely interpret the original intent of the body who wrote the law under consideration.

While historically, as well as statistically, the accomodationist position has been adopted by the more conservative originalists while the more liberal interpreters often accept a separationist view of the Establishment Clause, there are no hard and fast rules. Indeed, it was Hugo Black, known for his positivist interpretation style and absolute literalist interpretation of the First Amendment, who penned the sweeping separationist language in *Everson*.[40] However, it is worthy of note that of the most recent Court to issue an Establishment Clause ruling, the most originalist justices, former Chief Justice Rehnquist, and Justices Scalia and Thomas, have all consistently been accommodationist

[40]Justice Hugo Black may be the perfect example of how various terserary influences may combine to shape a jurist's view on the proper church and state relationship and Establishment Clause interpretation. Black's judicial deference and literalist interpretation of the First Amendment prompted him to read the religious clauses that start "Congress shall make no law respecting an establishment . . . ." as meaning the government can literally make no law with regard to anything religious. In other words, there must be an impregnable wall of separation between religion and the government. However, one recent scholar in a widely acclaimed book on the history of separation in the United States devoted an entire section to explaining how Black's cultural and political surrounding colored his religion clause jurisprudence. Philip Hamburger noted that Black had shared ideas with liberal theologians, secularists, nativists and the Ku Klux Klan which all culminated in a distinct anti-Catholic bias. This alliance was understood, not formal, and more a reflection of the culture of the day than any strong political ideologies. Nevertheless, the shared agenda of the Progressives, Protestant nativists and the Klan was an antieccesiastical bias through which the solution adopted by Black was separation of church and state. Philip Hamburger, *Separation of Church and State* (Cambridge. MA: Harvard University Press, 2002), 422-34.

in their reasoning, while the Court's staunchest separationists, Justices Stevens and Ginsburg, are also known for their broad, flexible interpretive methodologies.

Role of the Judiciary: Judicial Activism v. Judicial Restraint. Judicial activism and judicial restraint also play a part in the interpretation of the Establishment Clause. In the most basic of terms, judicial activism versus judicial restraint is a debate over whether courts can and should correct injustices, or should refrain from legislating from the bench. It is important to distinguish judicial activism from the active but appropriate enforcement of the Constitution's limitations on governmental power.[41] For example, the Rehnquist Court has been disparaged as "activist" because it frequently struck down acts created by Congress and signed into law by the executive when it believed such acts exceeded constitutional authority. However, declaring that not every problem has a federal solution, and declining to settle moral disagreements by judicial decree, is actually judicial restraint.[42] A jurist who declines to answer policy issues personally, but rather defers to the more democratic bodies of government, would rightly be termed a non-activist.

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[41]The debate has also been framed as judicial activism v. judicial deference, with deference defined as a judge who "believes his judicial responsibility is to defer to the judgments of the other branches of the government." Derek Davis, *Original Intent* (Buffalo, NY: Prometheus Books, 1991), 17. Under this analytical framework, a jurist who does nothing but properly strike down unconstitutional legislative acts or executive decrees would be considered "activist." This is not the definition of an activist jurist as used in this paper. Rather, an activist judge is one with a propensity to make law rather than interpret it.

[42]For example, the Rehnquist Court was criticized for striking down a federal law that banned guns near schools because it exceeded Congress's Commerce Clause powers. *See United State v. Lopez*, 517 U.S. 549 (1995). However, what the Court did in this case was, according to one scholar, relocate the policy dispute from the judicial arena back to the legislative arena where it belonged--an exercise of judicial restraint and humility. Richard Garnett, "Hail to the Chief? Right On," *Legal Affairs*, (March/April 2005), 36. By contrast, the Court in *Stenberg v. Carhart*, 530 U.S. 914 (2000) nullified state laws outlawing partial birth abortion, and in doing so they insulated the position of one side of the policy dispute from democratic debate and legislative dialogue based on the philosophy that judges know best. This is an example of judicial activism and judicial arrogance. *Ibid.*

It did not escape the attention of legal scholar A. James Reichley that the height of the separtionist reign in the Court's religion clause jurisprudence, the 1960's and 1970's, corresponded with "a school of legal philosophers known generally as judicial activists."[43] These "noninterpretists," so termed because they do not believe the Court is limited to just interpreting the text of the Constitution, generally considered original intent unknowable and declared that courts should simply draw on a general sense of where society stands; the "general culture."[44] However, as Reichly pointed out, the Court's strict separationist position of that era was not based on the general culture, as polls clearly showed Americans disapproved of the Court's separationist rulings. It is also hardly coincidental that beginning in the mid 1980's --subsequent to several President Reagan appointees joining the Court, Rehnquist's ascension to Chief Justice, and a distinctive shift towards a conservative, anti-activist position -- the Court also adopted a more accomodationist position on Establishment Clause issues. See the chart in Appendix A.

Federalism: States Rights v. National Uniformity. Closely associated with the activist/restraint distinction is the theory of states rights versus federal uniformity. Generally, accommodation meshes well with a philosophy of deference to states rights. After all, the central tenant of the accomodationist position is that the Establishment Clause restriction originally limited only the creation of a national church, leaving the individual states to deal with church and state issues as they saw fit. Again, in the most general terms, separationism, interpreted as protecting individuals from oppressive

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[43]Reichley, *supra* note 4 at 213.

[44]*Ibid.*, quoting Professor Lawrence Friedman, a strong proponent of the noninterpretist theory.

majoritarian religions who have hijacked the political process, seems to go hand in hand with a philosophy of federal uniformity. Those unconcerned with states rights would argue the Court is obligated to step in and impose justice by ensuring religious freedom, just as it did, for example, in ensuring racial equality. While the Free Exercise Clause would be more on point in the area of guaranteeing an individual right, some separationists grab the authority of both Clauses by attributing to the Establishment Clause a positive rights element via the federal uniformity doctrine.

Prioritizing Fundamental Principles: Democracy v. Individual Rights. The democracy versus individual rights debate is often linked with the states rights and methods of interpretation arguments as a component of the conservative/ liberal distinction. Justice Scalia, the most vocal supporter of a democratic approach on the current Court, noted that "it is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is."[45] Thus, Scalia is in line with most accomodationists when he defers to an originalist (or textualist) interpretation of the Constitution, and ascribes deference to the majority and their elected officials in areas where there is no clear constitutional violation. Those concerned more with individual rights, such as former Justice Brennan, feel compelled to view the Constitution with "flexibility" to address modern social problems, and have no hesitation in striking down laws supported by the majority in order to protect the rights of the minority and the individual. Thus, a separtionist position meshes well with jurists who accept a "holistic vision of the constitutional text and the value it supports," that

[45]Antonin Scalia, *A Matter of Interpretation* (Princeton, NJ: Princeton University Press, 1997), 22.

value, of course, being religious freedom for every individual without fear of government coercion, which they believe can be obtained only through strict separation.[46]

Religion's Role in the Public Square: Coming Full Circle. Finally, when considering how a person's church-state philosophy affects their Establishment Clause jurisprudence, we have seemingly come full circle; should the government accommodate, adapt to, or allow religion in the marketplace of ideas, or is the danger of co-mingling so great that religion and government must be separated into their respective spheres never to excessively entangle? In other words, a person's church-state theory impacts his or her view on how to interpret the Establishment Clause just as much as the Establishment Clause guides their view of what the proper relationship between church and state is. Jurists today are faced with the same dilemma the Framers faced in 1787: how can a nation reconcile the desire to foster the broad social and moral support religion provides with the reality of cultural and religious pluralism and the quintessential American belief in the rights of individual conscience?[47] The Framers punted on this issue, leaving it to the states.[48] But since incorporation of the Establishment Clause in 1947, it has fallen squarely at the feet of the Supreme Court to determine what the legal relationship between the church and state in the United States was, is, and should be. But the question remains as to whether the Establishment Clause guides the Justice's rulings in church and

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[46]Alan Brownstein, "The Souter Dissent: Correct but Inadequate," in *Church-State Relations in Crisis: Debating Neutrality* (Lanham, MD: Rowman & Littlefield, 2000), 153.

[47]Reichley, *supra* note 4 at 203.

[48]Reichly notes that while the Framers "avoided the topic of religion," the reason was "neither hostility nor indifference, but that they had not yet developed a conceptual means for relating religion to public life in a free society." *Ibid.*

state cases, or their personal church and state philosophy guides their interpretation of the Establishment Clause.

Establishment Clause History: Colonial Era to the Modern Era

Establishment Clause History

It has been stated, and accurately so, that "if there has been one constant in the confused arena of church-state law, it is that jurists and commentators--regardless of their legal opinion--consistently have appealed to history to buttress their respective interpretations of the First Amendment ban on religious establishment."[49] The Supreme Court has also relied heavily on history in its reasoning supporting its interpretation of the religion clauses. Justice Rutledge's comments in his dissent in *Everson* are as appropriate to the Court's position today as they were in 1947: "No provision of the Constitution is more closely tied or given content by its generating history than the religious clause of the First Amendment."[50] However, Rutledge went on to describe a history based "particularly" upon Madison, Jefferson and the Virginia disestablishment experience, just like Black's majority opinion.[51]

In short, both accomodationists and separationists support their respective views based upon a historical analysis, but as can be seen clearly when comparing the *Everson*

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[49]Dreisbach, *supra* note 23 at 26.

[50]*Everson*, 330 U.S. at 33 (Rutledge, J., dissenting).

[51]After linking the religion clauses to their "generating history" Rutledge went on to describe this history as "not only Madison's authorship and the proceedings before the First Congress, but also the long and intensive struggle for religious freedom in America, more especially in Virginia, of which the Amendment was a direct culmination. In the documents of the times, particularly of Madison, who was leader in the Virginia struggle before he became the Amendment's sponsor, but also in the writings of Jefferson and others and in the issues which engendered them is to be found irrefutable confirmation of the Amendment's sweeping content." *Ibid*., 33-34.

majority and dissenting opinions with the Douglas opinion in *Zorach* or Rehnquists' dissent in *Jaffre,* the two sides reach entirely different conclusions after supposedly reviewing the same historical events. Just as there are two main views on what no establishment means, there are two distinct histories of the Establishment Clause: the "standard" history set forth by *Everson,* and the more recent challenging history advocated by critics of the standard interpretation.

Interestingly, the two versions of America's church-state and Establishment Clause history both contain elements of gradual evolution punctuated by a radical shift. However, they differ significantly on what era the shift occurred and what the shift established. Since the two versions of history are the same during the colonial period and up through the Revolution, this period will be briefly addressed first followed by the two versions of history from the Framing of the Constitution and Bill of Rights up to the present.

Colonial Era: Historical Agreement. While what is most celebrated in America today is its post-Revolution political inventions, such as a workable republic with a written constitution, the New World initially adopted nearly all of the customs of the old world. Of course, the "prevailing pattern in Europe from which the early Americans colonists came was one of close cooperation between state and church in the maintenance of religious as well as political orthodoxy."[52] While a national establishment was the model of the day, Americans in large numbers came to the New World precisely for religious freedom. While there is considerable debate on whether the primary reason for traversing the great ocean was God, Gold, or Glory, one can not ignore that in nearly

[52]Robert Miller and Ronald Flowers, *Toward Benevolent Neutrality: Church , State, and the Supreme Court*, 5th ed. (Waco, TX: Baylor University Press, 1996), 1.

every "statement of purpose, appeal for settlers, and charter issued, missionary and other religious purposes were given a prominent position."[53]

Whether desiring to purify the established state church of the mother country or more radically separate from it and start their own, most of the new colonies set up mini-establishments. Of the original thirteen colonies only William Penn's Pennsylvania and Delaware and Roger Williams's Rhode Island never had an established church.[54] In sum, "with few exceptions, those who fled religious persecution were no more tolerant of religious dissenters than those from whom they had fled. Thus established churches became the order of the day in early America."[55]

While there were many colonial leaders writing of religious liberty, "their consensus as to religious freedom was firmly embedded in a Christian and Protestant worldview."[56] Thus, religious freedom and multiple establishments--all Christian and all Protestant (except in Maryland)--could exist side by side without a recognizable conflict.[57]

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[53]*Ibid.*

[54]*Ibid*., 2.

[55]Robert Cord, *Separation of Church and State* (New York: Lambeth, 1982), 3.

[56]Thomas Curry, *The First Freedoms* (New York: Oxford University Press, 1986), 79. Curry goes on to explain that : "Colonial writers proclaimed liberty of conscience but they grounded that liberty in the unexamined assumption that the legal systems of the time would uphold and maintain a Christian and Protestant State." *Ibid*.

[57]Leonard Levy, *The Establishment Clause* (New York: Collier MacMillan, 1986), 14. Levy noted that multiple establishments were the dissenter's solution through the close of the "seventeenth century." Ibid. Other accomodationist historians, such as Hamburger, would argue that dissenters were satisfied with such equal treatment for many years after this point.

It is unquestioned that "the Revolution triggered a long pent-up movement for disestablishment of religion in several of the states."[58] Beginning in 1776, most of the newly declared states rewrote their state constitutions and included disestablishment as well as freedom of conscience provisions. The New England states of Connecticut and Massachusetts did not rewrite their constitutions, and they were also the two longest holdouts on disestablishment; Massachusetts did not disestablish its Congregational church until 1833. However, the reasons for disestablishment and what exactly disestablishment meant are still subject to debate. Scholar Alan Heimert has argued that to understand the intellectual thought of the Revolutionary period it is necessary to explore the mind of the preceding generation, which was shaped by the Great Awakening of the 1740's.[59] Heimert challenged the traditional history, which states enlightenment rationalism was the prevailing intellectual force of the day, instead arguing that Evangelical Calvinism was just as significant, as it too shattered social assumptions and ushered in new ethical and political commitment based on liberty, equality and democracy.[60] Thus, it is at this point that the two histories begin to diverge. The traditional history points to the Revolutionary era up through the Framing of the Constitution and Bill of Rights as the point in time where the United States shifted from a benevolent union of religion and government to the more enlightened position of separating the two spheres completely.

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[58]*Ibid*., 27.

[59]Alan Heimert, *Religion and the American Mind* (Cambridge, MA: Harvard University Press, 1968), 1.

[60]*Ibid.*

The Standard History: Revolution to the Bill of Rights. The standard history, the view espoused in *Everson*, is that by the time of the framing of the Establishment Clause in 1791, Jefferson and Madison's views were that of the entire nation, absolute separation was the freedom desired by the religious dissenters, and, accordingly, separation was the principle protected by the religious provisions drafted by the First Congress. Constitutional scholar Lawrence Tribe summarized the significance of this standard history quite accurately when he stated: "Whether the Black-Rutledge version is accurate has been disputed vigorously off the Court . . . what is indisputable is that, with remarkable consensus, later Courts accepted the perspective of these Justices as historical truth."[61]

The standard history looks to the relatively short time period from the Revolution to the Framing of the Constitution and Bill of Rights as the transition period wherein the old paradigm in which religion "served as the glue of the social and political order" gave way to a new paradigm where an enlightened leadership finally accepted the idea that "both religion and government might function best if constitutionally separated from one another."[62] Thus, the standard history places a major shift in church and state ideology between 1776 and 1791. The prevailing thought from colonial times through the Revolution, which was marked with repeated calls for national days of prayer and fasting and governmental evocation for divine assistance, was that the government needed religion to preserve moral order. However, by 1791 the framers of the First Amendment

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[61]Lawrence Tribe, *American Constitutional Law*, 2nd Ed. (New York: Foundation Press, 1988), 1160.

[62]Derek Davis, *Religion and the Continental Congress* (New York: Oxford University Press, 2000), 64.

religion clauses had come to realize, along with America as a whole, that social order could only be maintained if religion was kept separate from the new government. Since this shift had fully occurred by 1791, the Supreme Court merely recognized this history and reflected it in the *Everson* decision of 1947.

There were some immediate critics of the *Everson* court's interpretation of history,[63] but the Court more or less accepted the historical analysis until Rehnquist's dissent in *Jaffree* nearly four decades later. Indeed, as the chart in Appendix A. illustrates, the *Everson* standard history and the separationist position it supported dominated the Court's Establishment Clause jurisprudence for nearly a half-century. Only relatively recently, beginning in force in the mid 1980's, have credible historical works been published to challenge this standard history of the Establishment Clause.[64]

A Challenge to the Standard History: Revolution to the Bill of Rights. Professor Philip Hamburger is one of the most recent historians to challenge the standard history, which he notes "has some of the qualities of a myth."[65] While his five hundred page tome is one of the best pieces of modern scholarship to challenge the standard history, his reason for writing it is nearly as interesting as the work itself. Without prior interest in

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[63]Daniel Driesbach has written a comprehensive and insightful article on the competing views of history since Everson. *See* Driesbach, *supra* note 21. He lists the major supporters and critics of the Everson standard history from the 1940's to the present.

[64]It is commonly acknowledged that the first notable modern piece of scholarship to fully reanalyze the history of the Establishment Clause and make a strong argument for an accomodationist interpretation was Robert Cord's *Separation of Church and State* published in 1982. "*Separation of Church and State* is perhaps the most discussed and referenced study of the last two decades exploring the historical understanding of the constitutional provisions governing church state relations." Dreisbach, *supra* note 21 at 39. Rehnquist's 1985 *Wallace* dissent is said to have drawn its arguments directly from Cord's book.

[65]Hamburger, *supra* note 36 at 3. The significance of Hamburgers book in the recent debate over the meaning of the Establishment Clause can not be overemphasized. Of the five Establishment Clause cases to be released by the Supreme Court since Hamburger's book was published in 2002, four have cited his work. *See Van Orden v. Perry*, 125 S.Ct. 2854 (2005); *Cutter v. Wilkerson*, 125 S.Ct. 2113 (2005); *Elk*

church and state issues, he was browsing through some "18th century pamphlets and newspapers" one day and realized these original documents revealed that separation was not the accepted American view of that era as espoused by "the standard accounts of constitutional history."[66] However, Hamburger was not the first to notice glaring historical inaccuracies with the standard history of the Establishment clause. Following are only a few of the problems associated with the standard history.

First, the standard history is based on selective history. The standard history generally looks only to Madison, Jefferson and the Virginia experience, and therefore overlooks a host of other relevant historical evidence which suggests the framers had something other than strict separation in mind when they drafted the Establishment Clause.[67] Additionally, there is no evidence that the First Amendment was designed to follow the personal views of Jefferson or Madison, or the Virginia experience in general.[68] Moreover, even conceding that Madison, Jefferson and the Virginia experience are significant, the standard history attributes strict separation to them far too easily. Madison made proclamations of days of thanksgiving as president, and Jefferson signed several treaties allowing government tax moneys to support Catholic priests who were ministering to Native Americans, thus suggesting neither wanted absolute separation, but rather something more nuanced.[69]

Grove v. Newdow, 542 U.S. 1 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

[66]Hamburger, *supra* note 36 at xii.

[67]Dreisbach, *supra* note 21 at 27.

[68]*Ibid*., 28.

[69]"the traditional interpretation of Madison and Jefferson is historically faulty if not virtually unfounded." Cord, *supra* note 51 at 47.

Second, the omission of the debates on the First Amendment. While separationists consistently look to Madison and his Detached Memoranda for illumination on what the Establishment Clause means, they tend to ignore his statements at the debates over the First Amendment text itself. Madison's first suggested proposal was for a prohibition of a "national religion" and was only later changed in the various House, Senate and Joint Committee debates.[70] This evidence suggests Madison intended a narrow, not broad, separationist position and is therefore largely ignored or discounted in the standard history. This has prompted critics of the standard history to note that "Madison's views have always been thought important, just his views before, after and anytime but when he was explaining what he meant to the First Congress."[71]

Third, the wall metaphor is too simplistic and inaccurate. Philip Hamburger, drawing extensively from work by Daniel Dreisbach, has noted that Jefferson's wall metaphor has come to define religious liberty in America and has therefore eclipsed the actual language of the Constitution.[72] The wall metaphor, advocating a strict form of separation, infers much more than disestablishment, which is the actual language of the text. Moreover, Jefferson's views on separation were apparently not even accepted by

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[70]Malbin, *supra* note 20 at 9. Malbin's book is was one of the first to comprehensivly examine the First Congress debates over the language of the religion clauses and is still one of the best examinations of the subject. For an accurate but brief summary of the debates, Reichley outlines four key events in the chronology from first suggestion to final language: 1) Madison's original bill called for no National establishment but applied freedom of conscience to both the federal government and states, 2) objections, primarily from Federalist New Englanders from states with established churches encouraged Madison to reword the amendment to apply to the Federal government only, 3) the Senate passed an even more watered down version that would have allowed direct federal government support of religion, just no meddling in theology, and 4) the Joint Conference Committee adopted the Fisher Ames language, which was tougher than the Senate version, but crafted primarily to protect the state establishments. Reichley, supra note 4 at 204-05.

[71]Michael McConnell, "The Origins of the Religion Clauses of the Constitution: Coercion, The Lost Element of Establishment," 27 *Wm and Mary L. Rev*. 933, 937 (1986).

[72]Hamburger, *supra* note 36 at 1.

the Danbury Baptists, the very group he wrote his now famous letter to advocating a "wall of separation."[73]

Fourth, key historical facts are ignored. By focusing only on Madison and Jefferson's views, and even then only selectively, the standard history ignores other key events during the framing era that would suggest something other than strict separation was desired. Scholar Michael McConnel noted that:

> Exponents of strict separation are embarrassed by the many breaches in the wall of separation countenanced by those who adopted the first amendment: the appointment of congressional chaplains, the provision in the Northwest Ordinance for religious education, the resolutions calling upon the President to proclaim days of prayer and thanksgiving, the Indian treaties under which Congress paid the salaries of priests and clergy, and so on.[74]

The Silent Era: 1791 to 1947. Ironically, after the brisk Congressional debate over the two religion clauses in the First Congress, neither were subject to any significant governmental debate again until the Supreme Court took up the challenge of interpreting the Establishment Clause in the *Everson* case of 1947. Thus, while the period between 1791 and 1947 was reasonably quiet from the Court's standpoint, significant social and cultural changes in America during this period would have immense effect on how the Court would eventually interpret the Establishment Clause.

Since the Establishment Clause was not yet incorporated to the states, only a few cases regarding government and religion interaction made it to the Court prior to 1947. As evidenced in Appendix A, only three cases raising a federal establishment claim came

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[73]*Ibid*., 9.

[74]McConnell, *supra* note 67 at 937.

before the Court prior to 1947, and in all three the Court found no Establishment Clause violation.[75]

While the standard history views the silent years as inconsequential, arguing that separation was established at the framing of the Constitution, critics of the standard history see this period as fostering the social and cultural evolution in America that eventually produced the declaration of separation in 1947. Professor Philip Hamburger concluded that separation only became popular in the mid nineteenth century when nativists, theological liberals, and secularists, all united by their common anti-Catholic bias, joined forces to define "Americanism" as requiring separation of church and state.[76] Scholars are in relative agreement that from colonial times until the mid twentieth century, America operated under a mild form of "*de facto* Protestant establishment."[77] Not until the Catholics started to demand equal treatment did the majority of Americans start to look to separation as a means of preserving their American identity.[78]

Despite the standard history, which states that the Establishment Clause has always been understood as mandating separation, the historical evidence from the silent years strongly suggests almost no one understood the constitution to require separation.

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[75]*Bradfield v. Roberts*, 175 U.S. 291 (1899) (federal money for a hospital run by Catholic nuns was constitutional); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (Government law hurting religious schools by requiring all students attend public schools was found to be unconstitutional); *Cochran v. Board of Education*, 281 U.S. 370 (1930) (government funds to buy textbooks for religious school students was found constitutional).

[76]Hamburger, *supra* note 36 at 9.

[77]Stephen Monsma, "The Wrong Road Taken," in *Everson Revisited: Religion, Education and Law at the Crossroads* (New York: Rowman & Littlefield, 1997), 123; Terry Eastland, *Religious Liberty in the Supreme Court* (Ethics and Public Policy Center, 1993), 10; Levy, supra note 53 at 10.

[78]Historian Robert Handy noted that "not until American Catholicism began to grow in size did 'strict separation' become a Protestant constitutional doctrine." Robert Handy, *Undermined Establishment* (Princeton, NJ: Princeton University Press. 1991), 47.

In fact, theological liberals and secularists proposed several amendments in the 1870's, and nativists proposed the 1875 Blaine Amendment, all designed to prevent tax dollars from going to religious schools precisely because the common wisdom of the day recognized that the existing Establishment Clause did not guarantee the separation desired.[79]

Moreover, the legal hornbooks of the day reflected the bar's and court's understanding of the Establishment Clause in strikingly non-separationist terms. For example, Thomas Cooley's *General Principles of Constitutional Law*, published in 1898, defined Establishment of Religion as "the setting up or recognition of a state church . . . . It was never intended by the Constitution that the government should be prohibited from recognizing religion . . . ."[80] Henry Campbell's *Handbook on American Constitutional Law*, published in 1910, notes that the Establishment Clause does not prevent the government from the "recognition of the fact that the great mass of American People are adherents to the Christian religion," and "public recognition and encouragement of

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[79]Hamburger, *supra* note 36 at 279.

[80]Thomas Cooley, *General Principles of Constitutional law* (New York: Little Brown and Co., 1898), 224. Cooley's 1898 Constitutional Law hornbook first noted that the two religion clauses applied to the federal government only, and then went on to describe what the Establishment Clause did and did not require:

> By establishment of religion is meant the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others. It was never intended by the constitution that government should be prohibited from recognizing religion, or that religious worship should never be provided for in cases where a proper recognition of Divine Providence in the working of government might seem to require it, and where it might be done without drawing any invidious distinctions between different religious beliefs, organizations, or sects. The Christian religion was always recognized in the administration of the common law; and so far as that law continues to be the law of the land, the fundamental principles of that religion must continue to be recognized in the same cases and to the same extent as formerly.

Ibid. at 224-25. It is worthy of note that this description fits the classic accommodationist/nonpreferentialist view in that it shows the Establishment Clause limits only a national church or the preference of one particular religion.

religion" is allowed.[81] Thus, the historical evidence suggests that up to the first part of the twentieth century, the consensus was that the Establishment Clause did not mandate separation.

The Modern Era: 1947 to Present. Since Accomodationists believe that separation was never the design of the Establishment Clause, the major paradigm shift for their theory occurs in 1947 with the staunchly separationist *Everson* ruling. As already apparent by its frequent reference up to this point, the *Everson* ruling is foundational in Establishment Clause jurisprudence, and as such it is universally recognized as having "opened the modern era of church-state jurisprudence."[82] For adherents of the standard history, the *Everson* court got it right: the Establishment Clause had since its creation in 1791 always mandated separation of church and state. However, for the accomodationists, who disagree with the standard history, *Everson* got it wrong: the text, history and original intent of the Establishment Clause demonstrate that it should never have been interpreted so broadly as to require separation, rather the government may properly accommodate religion.

The answer as to why *Everson* ushered in the modern age of Establishment Clause jurisprudence is quite simple; it was the case that incorporated the clause to the states. Prior to the New Deal age, there was little federal intrusion into the lives of American citizens that needed to be limited. Thus, the real question is: why did this significant judicial shift in church-state jurisprudence occur in the mid 1900's? Again, it

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[81]*Henry Campbell Black*, Handbook of American Constitutional Law, 3rd Ed. (St. Paul: West Publishing, 1910), 527. Black went on to explain that: "there is no violation of religious liberty in the public recognition of religion, or in the observance of religious forms and ceremonies in public transactions and exercises, provided that no constraint is put upon the conscience of any individual." *Ibid*. at 529.

[82]Gerald Bradley, quoted in Dreisbach, supra note 21 at 23. Terry Eastland also defined the church state rulings from the 1940's to present as the "modern cases." Eastland, supra note 73 at 1.

is necessary to examine the history of American social and cultural evolution to discover the answer. Steven Monsma has observed that by the turn of the twentieth century, religious diversity, liberalization of the mainline Protestant denominations and secularization among the intellectual elite were all ideologies gaining ground.[83] Likewise, Terry Eastland points to some of the same social attributes of the era, specifically religious diversity, the rise of secularism, the expansion of interest group litigation, and "a more activist federal judiciary."[84] Thus, the social, cultural and political ideologies that had been evolving throughout the silent years all came to a head in 1947. The Court was faced with three options: 1) continue to allow the "symbolic manifestations" of the dying *de facto* Protestant establishment to remain, 2) mandate that accommodation of religion must be nonpreferential, or 3) mandate a complete separation of church and state. The *Everson* court chose the third.

Unfortunately, the Court's interpretation and application of Establishment Clause precedent since 1947 has been phenomenally inconsistent. As outlined in the following section, the Court has applied several tests and general theories through out the modern era and still has not achieved anything resembling a consistent, unified interpretation. Having not achieved the objective of settled law, one is forced to consider if historical analysis has any relevance.

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[83]Monsma, *supra* note 73 at 123. As the title of Monsma's article suggests, (The Wrong Road Taken) he believed that the Everson court faced a dilemma in 1947: how to handle the de facto Protestant establishment in public schools. The court could have chosen a neutral position, but instead they chose separation, and traded one de facto establishment for another, that of secularism. Monsma laments that the Everson court chose the wrong road. *Ibid.*

[84]Eastland, *supra* note 73 at 10.

Relevance of a Historical Analysis of the Establishment Clause

In the post-Warren Court age of "living Constitution" jurisprudence, where constitutional rights never envisioned by the framers are routinely created based on little more than mere penumbras, why bother looking for the true history or original intent of the Establishment Clause?[85] What possible value is there in examining the historical origins of the Establishment Clause? The practical answer, of course, is that historical analysis is of utmost relevance because both accomodationists and separationists rely extensively on history as the foundation of their respective interpretations.[86] The more compelling ideological reason is that legal principles drawn from accurate historical analysis of the text under interpretation add objectivity and legitimacy to decisions. The inverse of this principle is also true, which prompted Hamburger to conclude that "precisely because of its history--both its lack of constitutional authority and its development in response to prejudice--the idea of separation should, at best, be viewed with suspicion," and not bolstered with special legitimacy because of bad history.[87]

The use of history in Supreme Court rulings has received checkered reviews. The great Justice Oliver Wendell Holmes declared that "a page of history is worth a volume

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[85]See Hamburger, *supra* note 36 at 483.

[86]As already referenced, the Court in Everson based its entire justification of a separationist interpretation of the Establishment Clause on history. Thirty-eight years later Rehnquist ushered in the accommodationist shift by challenging this history in his dissent in Jaffree. Since then history has played a key role in nearly every Establishment clause case addressed. Even after the adoption of bright line tests such as Lemon, history was the sole foundation of *Marsh v. Chambers* in 1983 and figured prominently in the 1994 *Kyras Joel v. Grumet* decision and *Rosenbuger v. Virginia* in 1995. *Rosenburger* is a legal historian's dream case in that Justice Thomas in a concurring opinion outlines a classic critique to the standard history while Justice Souter in a dissent advocates the classic separationist history. Rarely are the two competing histories so clearly articulated in the same case. Quite recently, the Thomas plurality opinion in *Mitchell v. Helms* (2000) drew upon recent scholarship and actually made the accusation that the Court's 20th century separationist positions were based not on ideas from Jefferson and Madison, but rather on anti-Catholic bigotry.

[87]*Ibid*., 21.

of logic."[88] However, it may fairly be stated that bad history is worse than no history at all. One of the most quoted law review articles on the subject of judicial use of history is Philip Kurland's critique of "law office history," which he describes as the "picking and choosing [of]statements and events favorable to [the desired] cause."[89] While all would agree that selective historical analysis is counterproductive, some critical of all originalist interpretive methods may see no need for any historical research at all. Nonetheless the history of the Establishment Clause is worth examining simply because "good" history, i.e., fully inclusive history, will shed light on any constitutional interpretation. Moreover, good history is necessary to recognize faulty premises, based on bad history, that are in need of correction.

It has been said that history "provides perspective and context for constitutional questions."[90] Additionally, relying on history relieves the judiciary of criticism and provides extra legitimacy by providing an ostensibly objective foundation, as opposed to cynically concluding rulings are based on a judge's personal presuppositions or biases. In an area that draws as much attention and passion as religion, judicial opinion authors will naturally want to say, for example, that they are following Jefferson's lead as opposed to being viewed as hostile to religion themselves.

Given that historical analysis is a worthwhile endeavor in Establishment Clause interpretation, the real question becomes what must a court do with a legal precedent based on a misreading of history? In the matter at hand, it should be obvious that

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[88]*New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

[89]Philip Kurland, "The Origins of the Religion Clauses of the Constitution," 27 *Wm. and Mary L. Rev*. 839, 842 (1986).

[90]Dreisbach, *supra* note 21 at 42.

"insofar as the Court relied on an erroneous version of 'history' to construct church-state doctrine, its legal analysis lacks merit and legitimacy."[91] In short, *stari decisis* should not perpetuate illegitimate legal principles.

This cursory review of church and state theory, the Establishment Clause basics addressed, and the brief overview of United States legal philosophy in general provided in this chapter are useful if not necessary precursors to a more in-depth examination of Justices Brennan and Scalia's interpretation of the Establishment Clause. However, the history of the Establishment Clause, especially the conflicting views on its "correct" history, is particularly significant for understanding how a particular jurisprudential vision will effect ones' interpretation of the Clause. As discussed in later chapters, both the version of the Establishment Clause history adopted, as well as the more basic issue of the importance attributed to a historical understanding of a constitutional provision, are crucial elements in the adoption of an Establishment Clause interpretation.

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[91] *Ibid*., 44.

CHAPTER THREE

The Elusive Search for a Standard Establishment Clause Interpretation in Modern Jurisprudence

As discussed in the previous chapter, not only are there two competing theories on the proper relationship between church and state, but also two competing versions of Establishment Clause history. The unfortunate result of this discord on even the most basic of levels is a body of Establishment Clause case law with little discernible precedent. As a result, there have been many attempts at locating the elusive pattern in the Court's Establishment Clause jurisprudence. To this end, there are two basic approaches, the chronological approach, and the categorical approach. Generally, scholars, and especially historians, seem to gravitate toward the chronological or linear/historical approach. This theory advocates that there has always been, and continues to be, a universal interpretation for the Establishment Clause, but for a variety of reasons the Court's standard has evolved over the years. The varied Establishment Clause holdings throughout the modern era are a result of this evolution.

The opposing approach, promoted primarily by practicing attorneys and authors of the materials used to train and assist them, divides Establishment Clause cases into subject matter categories with little regard for linear evolution. This approach is based on the theory that there may, or may not be, a universal Establishment Clause interpretation; however, it doesn't really matter in the real world. The key is to find and draw precedent from the case nearest in factual similarity to the issue at hand with little

or no regard for the most recent theory espoused by the Supreme Court--unless the recent case is also factually on point.

The Academic's Linear Historical View: Search for a Universal Standard

Scholars, law students, and most lower courts want desperately to find the elusive universal standard for Establishment Clause interpretation. Scholars desire a neat, theoretical approach to ensure law's consistent, predictable application. Law students want a simple formula to place in their outlines before faced with the dreaded Constitutional Law exam hypothetical. And lower courts, bound by the Supreme Court's interpretation of the Constitution, would like to know just what that interpretation is they are bound to uphold. Since every Supreme Court Establishment Clause decision purports to interpret the Clause, everyone lower in the judicial chain is left to figure out what the standard is--no small task considering the inconsistency of the Supreme Court's case holdings themselves. One method of rectifying this inconsistency is to follow the Court's evolution in Establishment Clause interpretive standards over the years. In the Modern era, there have been five different major Establishment Clause standards used by the Court

"Strict" Separation Theory: The Standard that Was

Whether historically correct or not, the irrefutable fact is that following the *Everson* decision in 1947, the Court operated under a universal Establishment Clause standard of separation.[1] Separationist attorney and scholar Leo Pfeffer concluded that the

[1]*Everson* "clearly and unambiguously interpreted the First Amendment as insisting upon a radical separation of church and state." Stephen Monsma, "The Wrong Road Taken," in *Everson Revisited: Religion, Education and Law at the Crossroads* (New York: Rowman & Littlefield, 1997), 125.

Everson ruling outlined the Court's first attempt at an interpretive "rule or test" and this rule was the "no aid, absolute or wall or separation" test.[2] This standard of separation established three principles, first, no-aid to religion was stated in absolute terms. Second, the government was not allowed to take part in any of the affairs of religion, and "visa versa." Finally, the "wall" metaphor was constitutionalized.[3]

The Court fairly consistently held to this strict separation standard in the Establishment clause cases following *Everson*, such as *McCollum v. Board or Education* (1948) and *Engle v Vitale* (1964).[4] The only exception to this strict separation standard was the child benefit theory, which held that the government could aid children so long as they, and not the religious organization, were the direct beneficiaries.[5]

There are many scholars who agree with and defend the separation standard. Some who advocate a separationist view argue that it developed out of two historic movements, both predating the framing of the constitution: the enlightenment and the disestablishment movement.[6] Historian Leonard Levy concluded that the framers believed "an establishment of religion had come to mean government support, primarily

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[2]Leo Pfeffer, *God Caesar, and The Constitution* (Boston: Beacon Press, 1975), 37.

[3]Monsma, *supra* note 1 at 125.

[4]*McCollum v. Board of Ed.*, 333 U.S. 203 (1948); *Engel v. Vitale*, 370 U.S. 421 (1962).

[5]Jeffery Stiltner, "Rethinking the Wall of Separation: Zobrest v. Catalina Foothills District- Is this the End of Lemon?" 23 *Capital University L. Rev*. 823, 826 (1994).

[6]The enlightenment movement dates back at least to the mid 1600's and the disestablishment movement began in America during the colonial period as the various sects tried to escape paying taxes to their rivals. Albert Menendez and Edd Doerr, "Another Look at the Separation Issue," *Liberty* (Sept/Oct 1999), 20.

financial, for religion generally," and therefore the Establishment Clause never allowed for any accommodation.[7]

Separationist scholars can become quite outspoken about their theory, and are quick to criticize advocates of other Establishment Clause theories, especially accommodationists. Levy notes that the nonpreferentialists "developed a plausible but fundamentally defective interpretation" and are quick to "rely on a few historical facts which, when taken out of context, seem to provide patronistic lineage to their views."[8] He concludes that nonpreferentialisim is "but prose for those who think that religion needs to be patronized and promoted by government."[9] Author Marvin Frankel does not sugarcoat his views on accommodationism when he writes that strict separation could only be "opposed by sincere bigots, by opportunist hucksters, and by those whose faith is too weak to tolerate the threat of different convictions."[10]

Staunch defense from select jurists and scholars aside, the separation standard is more of a theory than a bright line rule, and the Court soon began to look for objective tests to help define just exactly what separation meant. These tests eventually culminated in the *Lemon* test. It is important to note that while *Lemon* replaced absolute separation as the universal standard, the *Everson* articulation of separation has never been expressly overruled. Indeed, *Lemon* was merely an attempt to define the *Everson* separation standard.

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[7]Leonard Levy, *Original Intent and the Framers' Constitution* (New York: MacMillian, 1988), 185.

[8]*Ibid*., 91.

[9]*Ibid.*, 118.

[10]Marvin Frankel, *Faith and Freedom: Religious Liberty in America* (New York: Hill and Wang, 1994), 21.

The Lemon Test: 1971 - Present

The *Everson* separation standard articulated the principle of "secular purpose" as a requirement to pass Establishment Clause muster. In 1961, the Court added the "primary effect" standard in *McGowan v. Maryland*.[11] In the1963 case *School District of Abington Township v. Schempp*, the Court combined the two, finding Establishment Clause violations to have occurred when a government practice lacked "secular legislative purpose" or had a "primary effect" that either advanced or inhibited religion.[12] Seven years later, in *Walz v. Tax Commission*, the court added "excessive entanglement" to its list of Establishment Clause violation indicators.[13] After over two decades of confusion, the Court was anxious to find a "bright line" test it could use to determine if a government statute violated the Establishment Clause.

The much-anticipated guideline came in the form of the three-prong *Lemon* test devised in the 1971 case *Lemon v. Kurtzman*.[14] The *Lemon* case involved two state statutes which provided state aid to religious schools: a Pennsylvania law to reimbursed public school teachers who taught in sectarian schools, and a Rhode Island law that authorized a salary supplement to teachers of non-public schools.[15] The Court devised a three-part test, using a combination of the tests from *Schempp* and *Walz*, to determine if the statutes violated the Establishment clause. The test was essentially this: first, the law must have a "secular purpose," second, it must neither "advance or inhibit" religion, and

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[11]*McGowan v. Maryland*, 366 U.S. 420 (1961).

[12]*Abington Township v Schemmp*, 374 U.S. 203, 222 (1963).

[13]*Walz v. Tax Commission*, 397 U.S. 664, 674 (1970).

[14]*Lemon v. Kurtzman*, 403 U.S. 602 (1971).

[15]*Lemon*, 403 U.S at 606-07.

third, it must not foster "excessive entanglement" between government and religion.[16] If a statute failed to pass any one of these three prongs of the *Lemon* test, it violated the Establishment Clause and was therefore unconstitutional.[17]

The application history of the *Lemon* test over the last three decades has been sporadic at best. The test was used religiously for the first two decades after its creation with only a few minor exceptions. See Group C in the list of cases in Appendix A. However, while never officially abandoned, the *Lemon* test has been either strongly criticized by members of the Court, or ignored altogether in the last decade of Establishment Clause decisions. See Groups D and E in Appendix A.

Criticism of *Lemon* has been robust. By the mid 1990's many believed that "the *Lemon* test, designed to separate government activity from religion, had completely lost its utility."[18] Church-state scholar Carl Esbeck also criticized the *Lemon* test, writing: "on many persuasive grounds--it is mechanistic, unnecessarily hostile to religion, internally contradictory, insensitive to opposing governmental interests, and mindlessly tied to both Religious Clauses."[19] Additionally, the Court's inconstancy in using the *Lemon* test has only compounded criticism, prompting one legal scholar to note, "legislators are forced to read the Court's mind with respect to the constitutionality of

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[16]*Ibid.,* 612-13.

[17]In *Lemon v. Kurtman*, the Pennsylvania and Rhode Island statutes were struck down after they failed the "excessive entanglement" prong of the newly formed *Lemon* Test.

[18]Thomas Skousen, "The *Lemon* in *Smith v. Mobile County*: Protecting Pluralism and General Education," 69 *B.Y.U. Education and Law Journal* 69 (1997).

[19]Quoted in Stiltner, *supra* note 5 at 838.

legislation. In an area where predictability is needed, this is an unfortunate situation for everyone."[20]

One of the primary assaults against the *Lemon* test is that it is overtly separationist in both its application and results.[21] One critic has linked *Lemon* to *Everson*, characterizing them as the "Twin Pillars of Separationism."[22] Additionally, the *Lemon* test, while invalidating laws for *religious* intent, effect, and excessive entanglement, has never clearly defined "religion." Moreover, many believe the *Lemon* test has at the very least favored the secular, if not been openly hostile towards religion. One scholar raises the point that if secularism is a religion, "the court has made a stark endorsement for the religion of secular humanism."[23]

The test is simply not clear enough to be a "bright line" test, and as a "consensus locating mechanism" the test fails to recognize the special place religion has traditionally held in America. By "protecting the least common denominator of religious beliefs, the courts dilute the values and beliefs of the preceding generation."[24] Regardless of the separationist versus accommodationist argument, nearly all legal scholars who have

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[20]Kristin Engstrom, "Establishment Clause Jurisprudence: The Souring of *Lemon* and the Search for a New Test," 27 *Pacific Law Journal* 122 (1995). Another scholar noted that "the apparent pattern evident in post Lemon decisions is inconsistency." Frank Guliuzza III, "The Thomas Plurality Opinion: Yet Another Definition of Neutrality," in *Church-State Relations in Crisis: Debating Neutrality,* ed. Stephen Monsma (New York: Rowman and Littlefield, 2002), 53.

[21]"…the *Lemon* test provided the basis for a strong 'separationist' rather than 'neutral' or 'accommodationist' approach to Establishment Clause decisions." David Schultz and Christopher Smith, *The Jurisprudential Vision of Justice Antonin Scalia* (New York: Rowman & Littlefield, 1996), 107.

[22]Guliuzza, supra note 20 at 55. Guliuzza stated that while *Everson's* rhetoric advocated strict separation, *Lemon* was used to enforce "soft separation." *Ibid.*, 56.

[23]Skousen, *supra* note 18 at 97.

[24]*Ibid*., 71.

analyzed the Court's Establishment Clause jurisprudence since *Lemon* would conclude, "The decisions have been *ad hoc*; holdings are all over the map."[25]

Given the turnover and the resulting shift towards the conservative in the Supreme Court since *Lemon*, perhaps it is not surprising that "the sharpest criticism has come from the Court itself."[26] Of the most recent Court to issue an Establishment Clause decision, a majority of the members disapproved of *Lemon*.[27] Former Chief Justice Rehnquist was one of the first as well as one of the most critical. Rehnquist's views on the ineffectiveness of the *Lemon* test are clearly disclosed in his dissent in the 1985 case *Wallace v. Jaffree*: "the *Lemon* test has no more grounding in the history of the First Amendment than does the wall theory upon which it rests."[28] Furthermore, he concluded, "If a constitutional theory has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results, I see little use in it."[29]

However, for pure stylistic prose, Justice Scalia's criticism of *Lemon* is hard to surpass. In the 1992 case *Lee v. Weisman*, the Court held that prayer at a high school graduation ceremony was a violation of the Establishment Clause. However, the majority opinion, written by Justice Kennedy, ignored *Lemon* in its reasoning. Scalia noted in his

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[25]*Ibid*., 70.

[26]Stiltner, *supra* note 5 at 836.

[27]Justices Scalia and Thomas in *Lamb's Chapel v. Center Moriches*, 508 U.S. 384, 398-400 (1993); Justice Kennedy in *County of Allegheny v Pittsburgh ACLU*, 493 U.S. 573, 655-57 (1989); Justice O'Connor in *Latter Day Saints v. Amos*, 483 U.S. 327, 346-49 (1987); and Justice Rehnquist in *Wallace v. Jaffree*, 472 U.S. 38, 107-113 (1985). 2005 saw the death of Chief Justice Rehnquist and the resignation of Justice O'Connor. The new Court containing their replacements has, as of the date of this paper, not yet issued an Establishment Clause decision.

[28]*Wallace*, 472 U.S. at 110.

[29]*Ibid.*, 112.

dissent "[t]he court today demonstrates the irrelevance of *Lemon* by essentially ignoring it, and the interment of that case may be the one happy byproduct of the Court's otherwise lamentable decision."[30] A few years later the Court determined that equal use of government facilities to religious groups did not violate the Establishment Clause, but in reaching this conclusion, Justice White dredged up the old *Lemon* test. Scalia felt compelled to write a concurring opinion to again air his disdain for *Lemon*, and his criticism is classic Scalia prose:

> 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. Its most recent burial, only last Term, was, to be sure, not fully six-feet under: our decision in *Lee v. Weisman*, conspicuously avoided using the supposed "test" but also declined the invitation to repudiate it. Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart . . . . 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. . . . Sometimes, we take a middle course, calling its three prongs "no more than helpful signposts. . . ." Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.[31]

Scalia was not alone in his belief that *Lemon* had met its demise in the mid 1990s; several

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[30]*Lee v. Weisman*, 505 U.S. 577, 644 (1992).

[31]*Lambs Chapel*, 508 U.S. at 398 (citations omitted).

legal scholars wrote law articles that proclaimed *Lemon* dead.[32] Academics and jurists alike are still calling for its internment.[33]

The *Lemon* test did go through a slight overhaul in 1997 when the Court, in *Agostini v. Felton*, modified the test by combining the "primary effect" prong and the "excessive entanglement" prong.[34] Thus in *Agostini*, the test was only the "purpose" prong and a modified version of the "primary effects" prong. However, the original three-prong *Lemon* test has never been expressly overruled, and the two-prong *Agostini* test has not received universal acceptance.[35] What has received considerable attention from both academia and the courts are the several alternative tests suggested by swing-vote Justices.

O'Connor's Endorsement Test: 1984 - Present

Although not the radical abandonment of separationism endorsed by Rehnquist, Justice O'Connor has also been critical of the failings of the *Lemon* test, and has suggested a replacement commonly referred to as the Endorsement test. O'Connor first coined the phrase "endorsement" in *Lynch v. Donnelly* (1984) as an improvement to the

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[32]*See, e.g.* Jeffery Stiltner, supra note 5; Michael Paulson, "Religion in the Public Schools after *Lee v. Wiseman*: *Lemon* is Dead," 43 *Case W. Res*. 795 (1993). To his later embarrassment, Professor Paulson unequivocally declared: "The Lemon Test is dead and gone. It has not been applied by the Court as the test of constitutionality in any of the last four major Establishment Clause cases and Weisman reveals that the test has few, if any, supporters remaining on the Court." *Ibid.*, 862.

[33]Frank Guliuzza wrote that while the Court moved in the right direction by using a theory of neutrality in the 2000 case *Mitchell v. Helms*, the plurality's only failure was in not clarifying the Court's "Establishment Clause chaos" by expressly overturning *Lemon*. Giliuzza, *supra* note 20 at 54.

[34]*Agostini v. Felton*, 117 S. Ct. 1997 (1997).

[35]It is worthy of note that in the recent *Cutter* case, the Supreme Court, while not relying on it, nevertheless defined the *Lemon* test in its original three-prong format. *Cutter v. Wilkerson*, 125 S.Ct. 2113 (2005).

Lemon test;[36] her purpose was to redefine the effect prong of *Lemon* to communicate a message of government endorsement or disapproval of religion.[37] The next year, in *Wallace v. Jaffree,* she desired to further revise *Lemon* by combining the purpose and effect prongs into a single endorsement test which would then be linked with *Lemon's* third prong (excessive entanglement.)[38] O'Connor further explained her Endorsement test in *County of Allegheny v. ACLU,* stating it avoided the inflexibility of the *Lemon* test by recognizing that some government accommodation of religion furthers Free Exercise without violating the Establishment Clause.[39]

Although the *Lemon* test was mentioned, at least in passing, in the 1993 case *Lambs Chapel v. Center Moriches School Dist*., Justices Rehnquist, Blackmun, Stevens, White, and Souter joined O'Connor in using the Endorsement test to uphold the use of public school buildings for civic purposes, including religious, during the after school hours.[40] O'Connor again proposed her Endorsement test in a concurring opinion in the 1995 case *Capitol Square Review Advisory Board v. Pinette,* this time joined by the often separationist-leaning Justices Souter and Breyer, who agreed the Endorsement test "captures the fundamental requirement of the Establishment Clause."[41]

It is commonly accepted that, like much of O'Connor's jurisprudence, her Endorsement test was designed to find the common ground between two bitterly

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[36]*Lynch v. Donnely*, 465 U.S. 668, 691 (1984).

[37]Stiltner, *supra* note 5 at 841.

[38]*Wallace*, 472 U.S. 38.

[39]Engstrom, *supra* note 20 at 136.

[40]*Lambs Chapel*, 508 U.S. at 384..

[41]*Capitol Square v. Pinete*, 115 S. Ct. 2440, 2452 (1995).

entrenched polar opposites. The Endorsement test has been described as her proposed solution to the stalemate between nonpreferential accomodationists and the no-aid-to-religion separationist doctrines.[42] However, the Endorsement test is not without its detractors. Justice Scalia, long a critic of O'Connor's wishy-washy middle position, wrote in his majority opinion for the Court in *Capitol Square v. Pinette*:

> We must note, to begin with, that it is not really an "endorsement test" of any sort, much less the "endorsement test" which appears in our more recent Establishment Clause jurisprudence, that petitioners urge upon us. "Endorsement" connotes an expression or demonstration of approval or support. Our cases have accordingly equated "endorsement" with "promotion" or "favoritism." We find it peculiar to say that government "promotes" or "favors" a religious display by giving it the same access to a public forum that all other displays enjoy. And as a matter of Establishment Clause jurisprudence, we have consistently held that it is no violation for government to enact neutral policies that happen to benefit religion.[43]

Likewise, academics have also pointed out problems with O'Connor's test, declaring that it is "inconstant" in that it waffles between "worldview" and "secular belief" versions of neutrality by declaring that the government can not discriminate based on worldview, whether it be religious or not, but that government funding of only secular belief passes the test for neutrality.[44] Thus, while O'Connor's desire to find common ground between the two sides of the debate is admirable, her solution has failed to actually end, or even mitigate, the debate.

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[42]Gregory Hamilton, "The O'Connor Concurring Opinion: Interpretive Determinism and Neutrality Pitfalls," in *Church-State Relations in Crisis: Debating Neutrality*, ed. Stephen Monsma (New York: Rowman and Littlefield, 2002), 111. Hamilton agrees with O'Connor's middle ground, declaring both accommodation and separation as dangerous extremes. *Ibid.*

[43]*Capitol Square*, 115 S. Ct. at 2447. (citations omitted).

[44]Julia Stronks, "The O'Connor Concurring Opinion: Accommodation as Jurisprudence," in *Church -State Relations in Crisis: Debating Neutrality*, ed. Stephen Monsma (New York: Rowman and Littlefield, 2002), 127.

Kennedy's Coercion Test: 1989 - Present

While Justice O'Connor's Endorsement test has been labeled as the middle ground between the two competing theories of accommodation and separation, another Justice commonly thought to be a "middle of the roader" has not accepted O'Connor's suggested replacement for *Lemon*. Justice Kennedy expressed dissatisfaction with *Lemon* in the 1989 case *Allegheny v. Pittsburgh ACLU*, but neither could he accept the Endorsement test.[45] Instead, he suggested his own Establishment Clause standard commonly termed the Coercion test. Under his test, the government does not violate the Establishment Clause unless it either provides direct aid in a manner that would tend to establish a state church, or coerces people to indirectly support or participate in a religion against their will.[46] Kennedy explained, "absent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal."[47] This test, he believed, would preserve such traditional American practices as congressional prayer and Presidential Thanksgiving Proclamations, practices that could be found unconstitutional with a literal application of O'Connor's Endorsement test.[48]

Kennedy expanded his Coercion test when he wrote for the majority in the 1992 case *Lee v. Weisman*. In the *Lee* case, which found nonsectarian prayers at graduation ceremonies a violation of the Establishment Clause, Kennedy discovered "mental coercion" would cause a government action to fail his test, writing "[t]his pressure [of

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[45]*Allegheny*, 492 U.S. at 668-69 (1989).

[46]*Ibid.*

[47]*Ibid.*, 662.

[48]Engstrom, *supra* note 20 at 138.

enduring a prayer], though subtle and indirect, can be as real as any overt compulsion."[49] Even after suggesting his Coercion test, Kennedy was reluctant to completely abandon *Lemon*, writing that it served as a "helpful signpost."[50] However, the mere fact that he created the Coercion test clearly implied he believed *Lemon*, by itself, to be insufficient in determining a violation of the Establishment Clause.

Again, while the Coercion test won the day in *Lee*, it was not without its critics. Justice Scalia blasted the Kennedy Coercion test and the Court for adopting it by writing: "As its instrument of destruction, the bulldozer of its social engineering, the Court invents a boundless and boundlessly manipuable test of psychological coercion."[51] Scalia went on to note that while the Court had strayed into subjective areas before in Establishment Clause jurisprudence, such as when it required special rules for Christmas decorations in *Allegheny*, "interior decorating is a rock-hard science compared to psychology practiced by amateurs."[52] He concluded by noting: "[w]e indeed live in a vulgar age. But surely 'our social conventions' have not coerced to the point that anyone who does not stand on a chair and shout obscenities can reasonably be deemed to have assented to everything said in his presence."[53] Thus, Kennedy, too, failed to find a universal Establishment Clause standard.

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[49]*Lee*, 505 U.S. at 592.

[50]*Allegheny*, 492 U.S. at 656.

[51]*Lee*, 505 U.S. at 577.

[52]*Ibid*., 636.

[53]*Ibid.*, 637.

The Neutrality Theory: the Standard that Almost Was

Several of the Court's most recent Establishment Clause rulings have declined to use a bright-line test such as the *Lemon*, Endorsement, or Coercion tests, but have instead relied more on a general theory: Neutrality. While neutrality has been a theme throughout Establishment Clause jurisprudence, even given lip service in *Everson*, it has been the primary "standard" used by the Court in the twenty-first century. The modern version of Neutrality, as it is understood by the majority on the Court and applied in *Mitchell v. Helms* (2000) and *Zelman v. Simmons-Harris* (2002), defines Neutrality as evenhandedness, or not favoring one religion over the other, not favoring religion over non-religion, and vise versa.[54] There has been much discussion over whether this new version of Neutrality is just one more voice in the argument or is the magic, universal Establishment Clause standard that will end the debate once and for all. Unfortunately, the fact that both the separationists and the accomodationists on the Court have used the term to define their respective views in the 2005 Ten Commandment cases suggests that "Neutrality" is not the solution to the current debate.

While Neutrality has suddenly become *en vogue* in the last few years, it is hardly a new concept in Establishment Clause jurisprudence. Professor Monsma notes that "since the 1980's a line of reasoning has been developing on the Supreme Court that is moving slowly and hesitantly in the direction of general neutrality or evenhandedness."[55] In the 1981 case *Widmar v Vincent*, the Court declared that an "equal access policy would

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[54]*Mitchell v. Helms*, 530 U.S. 793, (2000); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

[55]Monsma, *supra* note 1 at 142.

[not] be incompatible with this Court's Establishment Clause cases."[56] In the 1995 case *Capitol Square v. Pinnette*, the Court noted that "It is no violation for the government to enact neutral policies that happen to benefit religion."[57] Later that same year in *Rosenburger v. University of Virginia*, Justice Kennedy relied exclusively on a theory of neutrality when announcing the Courts ruling:

> A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion . . . . We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhandedness policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.[58]

However, it was in the 2000 case *Mitchell v. Helms* that the Neutrality standard was elevated to the point that some, including those on the Court, wondered if it would become the new universal Establishment Clause standard.

Proponents of the Neutrality standard, and there are many in recent years, are pleased with the direction the Court is headed. It cannot be denied that neutrality is a shift away from separation and towards a mild form of accommodation. Thus, the strongest criticism has come from those who adhere to the separationist viewpoint. The advocates of the old standard history and strict separationist theory are sticking to their story. Frederick Gedicks felt compelled to clarify that "not only has the separation of church and state not been eclipsed by religious neutrality, but separation is actually the more fundamental Establishment Clause value."[59] However, recent Supreme Court

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[56]*Widmar v. Vincent*, 454 U.S 271 (1981).

[57]*Capitol Square*, 515 U.S. at 753.

[58]*Rosenburger v. University of Virginia*, 515 U.S. 819 (1995).

[59]Frederick Gedicks, "A Two Track Theory of the Establishment Clause," 43 *B.C. L. Rev*. 1071, 1076 (2002).

jurisprudence would seem to suggest this separationist argument is the losing side in the ideological battle. Of even greater concern for the hard-line separationist is the possibility that the new Neutrality principle may gain enough popularity to become a universal Establishment Clause standard.

Justice Souter, in his vigorous dissent in *Mitchell v. Helms*, not only reiterated the old Madison/Jefferson/Virginia standard history and separationist arguments, but also expressed fear that Justice Thomas's version of Neutrality could become a "Grand Unified Theory" of Establishment Clause jurisprudence.[60] Separationist apologists writing shortly after the *Mitchell* decision was released could not agree more, and struggled to out do each other in their predictions of gloom and doom on the religious liberty front. Professor Erwin Chemerinsky stated that the Thomas plurality decision in *Mitchell* was a "radical break" from past settled establishment clause jurisprudence, that it "essentially would read the establishment clause out of the constitution," and it would "obliterate any remnants of a wall separating church and state."[61] In a genuine state of fear, Chemerinsky notes that "what is so frightening is that it is only one vote away from becoming the law of the land."[62]

Likewise, separationist scholar Derek Davis also lamented the direction *Mitchell* was taking the Court. He declared that Neutral funding would only "rearrange the nature of discrimination" with the end result being the "substantial funding of programs that

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[60]*Mitchel*l, 530 U.S. at 713. (Souter dissenting).

[61]Erwin Chemerinsky, "Neutrality in Establishment Clause Interpretation: A Potentially Radical Right Turn," in *Church-State Relations in Crisis: Debating Neutrality*, ed. Stephen Monsma (New York: Rowman and Littlefield, 2002), 220.

[62]*Ibid*. While Thomas wrote the plurality opinion of the Court, it was one vote short of becoming the majority opinion.

attract participation by 'acceptable' religions with minority groups left out, an inherently discriminatory situation."[63] He also expressed fear of the apparent shift away from a separationist view, noting that there "can be little doubt that church and state are soon to be joined at the hip in our culture."[64] And also like Chemerinsky, what he was most fearful of was a universal Establishment Clause standard of Neutrality, which he believed was a real possibility since a likely Bush appointee to the Court would mean "today's plurality will become tomorrow's majority."[65]

The predictions of an end of religious liberty should Neutrality become the universal Establishment Clause standard are both hyperbolic and premature. In his classic book on the Establishment Clause, separationist apologist Leonard Levy criticized "passionate separationists who see every exception [to strict separation] as a disaster [and] tend to run around like Chicken Little, screaming 'the wall is falling, the wall is falling.'"[66] Sensationalism aside, the fear of a universal standard of Neutrality is also premature. As already noted, the Thomas ruling in *Mitchell* was a plurality opinion, not a majority opinion. Scholar Gregory Hamilton noted that the four justices of the plurality *nearly* pulled off a "coup d'tant by changing the discussion from "how high or low the wall should be, to whether or not a wall should exist at all."[67] Hamilton noted with relief

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[63]Derek Davis, "The Thomas Plurality Opinion: The Subtle Dangers of the Neutrality Theory Unleashed," in *Church-State Relations in Crisis: Debating Neutrality*, ed. Stephen Monsma (Rowman and Littlefield, 2002), 85-87.

[64]*Ibid.* at 94.

[65]*Ibid.* Since Professor Davis wrote these words, President George W. Bush has indeed been granted the opportunity to appoint two new justices to the Supreme Court.

[66]Leonard Levy, *The Establishment Clause* (New York: Collier MacMillan, 1986), 240.

[67]Gregory Hamilton, "The O'Connor Concurring Opinion: Interpretive Determinism and Neutrality Pitfalls," in *Church-State Relations in Crisis: Debating Neutrality*, ed. Stephen Monsma (New York: Rowman and Littlefield, 2002), 103-04.

that O'Connor "canceled the victory celebration" of the accomodationists by not joining them to make a majority, but instead wrote a separate concurring opinion disagreeing with the Neutrality standard advocated by the plurality.[68]

While Neutrality was used in *Zelman* two years after *Mitchell*, it was a more mild form that retained the direct vs. indirect aid distinction. Furthermore, the version of Neutrality that is commonly understood as "evenhandedness" has been used by the Court exclusively in government aid to religious organization cases. Indeed, the most popular form of "Neutrality" advocated recently by scholars applies only to neutral application of government aid to both secular and religious organizations. In such cases, neutral aid would neither endorse nor discriminate against religion, but any government support for religious symbols or ceremony, even if neutrally applied, would still be considered a violation of the Establishment Clause.[69]

This relatively new view of Neutrality, which allows government aid to religious organizations but does not allow government recognition of religious symbolism and ceremony, is often advocated by former strict separationists who now recognize that the old no-aid separationism was patently discriminatory.[70] The new view of Neutrality, termed "purposive neutrality" by one scholar, is designed to ensure that a government accomodation of religion neither purposefully endorses or prefers religion, nor

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[68]*Ibid.*

[69]Eugene Volokh, "Equal Treatment is Not Establishment," 13 *ND J.L. Ethics & Pub Pol'y* 341 (1999).

[70]Douglas Laycock, Testimony before the House Committee on the Judiciary, Subcommittee on the Constitution, June 7, 2001. http://www.house.gov/judiciary/laycock_060701.htm (Last checked July 9, 2001) (stating that he had changed his position concerning no-aid separationism and now supported charitable choice programs).

discriminates against religion.[71] Under this theory, a neutral purpose, for example fostering education by giving government aid to both secular and religious schools, is acceptable because the government action neither prefers nor discriminates against religion, even if a tertiary effect is the aiding of a religious organization. The alternative, to not give aid to certain organizations who promote a neutral government interest only because they are religious, is to promote viewpoint discrimination. In aid cases, the result is a religious organization is on equal footing with a secular organization in competing for government money: classic neutrality defined as "evenhandedness."

However, purposive neutrality allows government accomodation of religion only in aid cases, as those who hold to this theory argue that *any* government support of religious symbols or ceremony necessarily demonstrates a purpose of endorsing or preferring religion.[72] By contrast, an accomodationist would view neutrality in symbolism and ceremony cases as allowing government recognition of various religions on a nonpreferential basis. As long as minority religion symbolism and ceremony is not suppressed, the government need not mandate a naked public square.

While several of the Court's recent Establishment Clause rulings lend some support to this purposive neutrality theory, the most recent Establishment Clause cases, the Ten Commandment cases of 2005, suggest the Court has not completely adopted the aid versus symbolism distinction when defining Neutrality. Indeed, the various factions on the Court made it clear that Neutrality, appealed to by all, varied greatly in definition among its members. Former Chief Justice Rehnquist spoke of Neutrality in strikingly

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[71]Keith Werhan, "Navigating the New Neutrality: School Vouchers, the Pledge, and the Limits of a Purposive Establishment Clause," 41 *Brandeis L.J.* 603 (2003).

[72]Eugene Volokh, supra note 69 at 345.

nonpreferentialist and accommodationist terms, while Justice Souter and Justice Stevens both attempted to redefine Neutrality "broadly" so as to prevent any government recognition of religion.[73] Thus, at the moment, the most one can say for Neutrality is that it is the universal standard that almost was. While the broad principle of neutrality will surely remain in the Establishment Clause interpretation debate, only time will tell if Neutrality the standard peaked in *Mitchell* or is yet to become the magic, universal solution.

The Results of the Court's Evolving and Multiple Establishment Clause Jurisprudential Standards

In the quest for discovering the universal Establishment Clause standard, what is the fairest conclusion that can be drawn from a linear examination of the Court's Establishment Clause jurisprudence? Answer: there is no universal standard for interpreting the Establishment Clause, and the High Court's case law on the subject is nothing short of chaos. Indeed, the words of choice when describing Establishment Clause case law are "chaos" and "muddled." It has been written that for decades observers have wished for a decision to "bring order out of the chaos of the Court's

[73]Former Chief Justice Rehnquist, writing the opinion of the Court in *Van Orden*, appealed to "Neutrality" as a guiding principle, noting that "disabling the government from in some ways recognizing our religious heritage" amounted to "hostility to religion," which he determined "could undermine the very neutrality the Establishment Clause requires." *Van Orden v. Perry*, 125 S.Ct. 2854, 2860 (2005). However, in his dissent in the same case, Justice Stevens wrote that his "broad understanding of the neutrality principle" mandated the classic separationist position, and, taking a swipe at Rehnquist's nonpreferentialist position, stated that "government promotion of orthodoxy is not saved by the aggregation of several orthodoxies under the state's banner." *Ibid*., 2875-76. In other words, Stevens' view of the Neutrality standard does not interpret neutrality to allow government support of non-religion and religion generally on a nonpreferential basis. Rather, Stevens' interpretation of neutrality would allow government to recognize and support non-religion only. Likewise, Justice Souter, in McCreary County, wrote that neutrality is the "touchstone" of all Establishment Clause inquiry, but defined the neutrality standard as equivalent to "religious tolerance," and declared that even government "adherence to religion generally" violates the standard. *McCreary County v. ACLU*, 125 S.Ct. 2722, 2732-33 (2005).

establishment clause . . . decisions."[74] Other scholars surmise that "the Court's rulings on the establishment clause . . . have produced a disconcerting muddle,"[75] or, have "led to fifty years of muddled church-state law."[76] While it is arguably the academician's job to criticize the Court's inconsistencies, scholars are not the only group who fail to find meaningful instruction from the Supreme Court on how to interpret and apply the Establishment Clause. Some of the harshest criticism originates from lower courts that have the unenviable job of applying the Supreme Court's muddled chaos.

If there is anyone who should be able to understand the Supreme Court's constitutional interpretations it would be the brilliant jurists who have risen to the level of Federal Circuit Court judges. Yet the Fifth Circuit noted that:

> When we view the deceptively simple words of the Establishment Clause through the prism of Supreme Court cases interpreting them, the view is not crystal clear. Indeed, when the Supreme Court itself admits that it "can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law," as a Circuit Court bound by the High Court's commandments we must proceed with fear and trembling.[77]

In yet another case, the same court noted that the Court's "Establishment Clause jurisprudence is less than pellucid."[78] The Fifth Circuit has in recent years been so unsure of the Establishment Clause standard that it has adhered to a better-safe-than-sorry

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[74]Clarke Chochran, "Neutrality and Public Policy: Hidden Public Policy Traps in Mitchell v. Helms," in *Church-State Relations in Crisis: Debating Neutrality*, ed. Stephen Monsma (New York: Rowman and Littlefield, 2002), at 223.

[75]James Reichley, "Religion and the Constitution," in *This Constitution from Ratification to the Bill of Rights* (Congressional Quarterly, Inc, 1998), 209.

[76]Monsma, *supra* note 1 at 123.

[77]*Helms v. Piccard*, 151 F.3d 347, 355-56 (Fifth Cir. 1998) (quoting *Lemon*, 403 U.S. at 612). It should be noted that for all the Fifth Circuit's fear and trembling as they approached this case, they still got it wrong. The Supreme Court overturned the Fifth Circuit Court's ruling in *Mitchell v. Helms*, 530 U.S. 793 (2000).

[78]*Doe v Santa Fe*, 168 F.3d 806, 814 (Fifth Cir. 1999).

strategy and run every Establishment Clause case they receive through all three Supreme Court bright-line tests, the *Lemon*, Endorsement and Coercion tests.[79] The Ninth Circuit adopted this same strategy in the high profile *Newdow* Pledge of Allegiance case, noting that "[o]ver the last three decades the Supreme Court has used three tests to analyze alleged violations of the Establishment Clause."[80] However, just to make things more interesting, the Sixth Circuit recently declared that despite the fact that "recent Supreme Court justices have expressed reservations regarding the test set forth in *Lemon* . . . this Court, as an intermediate federal court, is bound to follow the *Lemon* test until the Supreme Court explicitly overrules or abandons it."[81] Thus, not only do the lower courts have trouble making sense of the Supreme Court's Establishment Clause reasoning, they are also split on just what the law is that they are bound to follow.

While the Supreme Court Establishment Clause jurisprudence has clearly evolved over time, there seems to be no current standard primarily because the Court has failed to clearly overrule or abandon previous tests before adopting newer ones. This has led active lawyers, and those who train them, to find meaning in the muddled chaos by looking narrowly at individual holdings in distinct factual categories.

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[79]*Doe v. Santa Fe*, 168 F.3d 806, 814 (Fifth Cir. 1999); *Tangipahoa Parish v. Freiler*, 185 F.3d 337 (1999).

[80]*Newdow v. United States*, 292 F3d 597 (Ninth Cir. 2002).

[81]*ACLU of Kentucky v. McCreary County*, 2003 U.S. App. LEXIS 25606 (Sixth Cir.). A honest look at recent Supreme Court Establishment Clause Jurisprudence, *see* Appendix A, should lead the unbiased person to seriously consider the possibility that the Court *has* abandoned *Lemon*.

Practitioner's Categorical Approach: The Lawyers Practical Search for Applicable Precedent

While legal historians focus primarily on linear chronology when looking for defining trends in an evolving jurisprudence, active lawyers are trained to look for precedent.[82] Legal historians and scholars concentrate on the big picture: what are the driving forces both internally and externally that are affecting the Court's evolving jurisprudence in a particular area. Active lawyers look at a legal issue much more narrowly: they first identify the proper precedent based on cases with a similar factual situation, and then look only for the most recent case precedent based on the narrow category they have identified as relevant.[83] While this thesis will concentrate primarily on a historical analysis of Justices Brennan and Scalia's influence on the Court's evolving Establishment Clause interpretation, it is useful to briefly review the practitioner's categorical view. See Appendix B.

Both active practitioners and law school professors tend to only briefly consider the theory of law in a particular area while concentrating on the more specific and technical aspects. In an area such as the Establishment Clause, with a long line of contradictory holdings as precedent, the only efficient way to make sense of the muddled chaos is to narrow the level of generalization and divide up the case law into factual categories from which to draw recognizable precedent. However, this categorical

[82]Very generally, precedent is defined as "a previously decided case which is recognizable as authority for the disposition of future cases." Barons Law Dictionary, 382 (1996). This concept is also known as *stare decisis*. The Lawyers job is to "analogize" his case to rulings that support his position and "distinguish" those decisions harmful to his argument.

[83]The first step in legal research is to generate search terms based on the facts of the issue you are trying to find the law on. Starting with your "set of facts," you are to generate a list of terms that will first be a "random list of words that seem relevant to the issue," later narrowed into "a set of categories." Amy Sloan, *Basic Legal Research*, (New York: Aspen, 2000), 15. Only after you have found cases "on point", that is similar in facts and legal situation, do you move to a linear inquiry of determining if the precedent

approach has a downside: if a broad area of law really is evolving, the change may be easily missed if one is focused on too narrow of a fact situation.

Practitioners in Training (Law School Students)

Several generalizations can be drawn from the Law School's approach to explaining the Court's Establishment Clause muddled chaos. First, broad church and state theory is reserved to trite introductory squibs while the bulk of attention is focused on dividing up the case law into categories sufficiently narrow enough to yield recognizable precedent. Second, the need to organize and outline emphasizes clear bright-line tests, such as the three-prong *Lemon* test, while explaining broader concepts such as Neutrality, becomes difficult. Third, it is both costly and arduous to update legal texts, and thus they often reflect dated views. Finally, "The Law" explained in law school texts is without doubt colored by the ideologies and premises held by the text's authors.

For example, Foundation Press's Constitutional Law casebook, edited by Dean Sullivan and Gerald Gunther of Stanford Law School, is typical of the standard Con Law text in its treatment of the Religion Clauses.[84] The Religion Clauses are the very last chapter (frequently not reached in basic Con Law courses), and this chapter is divided into three sections: a very basic overview, Free Exercise Clause cases, and Establishment

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found is still "good law, meaning it has not been changed or invalidated since it was published." *Ibid.*, 118.

[84]Kathleen Sullivan and Gerald Gunther, eds., *Constitutional Law*, 14th ed. (New York: Foundation Press, 2001).

Clause cases.[85] The section on the Establishment Clause is divided into three fact-based categories: government enshrinement of official beliefs, financial aid to religious institutions, and legislative accommodation of religion.[86] These three categories are further divided into seven subcategorizes that themselves fall into two factual scenarios, church and state issues in schools, and outside of schools.[87] Likewise, Erwin Chemerinsky's Constitutional Law case book, published by Aspen, also has three main categories of Establishment Clause Cases: religious speech, religion and government activity, and government aid to religion.[88] Again, these categories are further divided into nine subcategorizes based on factual situations such as access to school facilities, school prayer, and aid to organizations other than schools.[89] If there is a lesson, it is that while law school instructors disagree on what the relevant categories may be, they all agree that in order to make sense of the Establishment Clause case law one simply must identify narrow, factually-specific categories.

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[85]*Ibid.*, xx. In this author's experience, the religion clauses were not selected as part of his first year basic Con Law course, and time ran out before reaching the religion clauses in his advanced con law course. In most law schools, the First Amendment or even the Religion Clauses themselves are the topic of an elective course. However, it is a shame that the religion clauses seem to be short-changed in required law courses.

[86]*Ibid.*, xxi.

[87]Five of the seven subcategories deal with schools: Under official beliefs category are, 1) released time, 2) school prayer, 3) religion in public school curriculum, and under the financial aid category are 4) aid to parochial school since Everson, and 5) aid to higher education. Ibid. at xxi. The other two are separate categories precisely because they do not involve schools: "Religious symbolism outside of the school context" and Religious inclusion in Public Subsidy Schemes" not involving schools. *Ibid.* at xxi. Sullivan and Gunther include one other sub-category just to present the great separationist case Everson. *Ibid*.

[88]Erwin Chemerinsky, *Constitutional Law* (New York: Aspen, 2001), xxix.

[89]Religious speech category is divided into: 1) access to school facilities, 2) student's receipt of government funds, 3) student -delivered prayer. Under Government activities are 4) school activities (further divided into released time, school prayers and Bible reading, and curricular decisions), 5) legislative chaplains. The Government Aid category is divided into 6) aid to parochial elementary and secondary schools, 7) tax exemptions to religious organizations, 8) aid to religious colleges and 9) aid to religious organizations other than schools. *Ibid*., xxix-xxx.

By looking more at categories and less at recent linear developments, the case books tend to overemphasize the dated but easier to understand bright-line tests, especially the *Lemon* test. Since most of the "categories" have not had factually similar cases go before the Court since the 1970's or 1980's the controlling "precedent" for that category is seemingly the old *Lemon* test.[90] This principle is taught despite the clear trend away from *Lemon* in the last decade, see Appendix A, and may be due in part to author bias. For example Chemerinsky, boldly asserts that *Lemon* is the only standard his students need concern themselves with.[91] Likewise, the Sullivan and Gunther text has done a poor job of presenting the debate over the meaning of the religion clauses in a balanced manner.[92]

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[90]For example, of Sullivan's seven subcategories, five of the representative case setting forth the "precedent" for that category were from the mid 1980's while only two were from the 1990's, despite the fact her book was in its 14th edition published in 2001.

[91]Chemerinsky stated to his readers: "Indeed, the primary test used for the Establishment Clause [is] *Lemon v. Kurtzman*, 403 U.S. 602 (1971)." Chemerinsky, *supra* note 88 at 1238. Indeed, Chemerinsky devotes an entire section to the Lemon test, but only briefly mentions the other standards used by the Supreme Court. *Ibid*., 1278. Chemerinsky would have his readers believe that *Lemon* is the standard for Establishment Clause interpretation with only a few minor deviations here and there. How the Federal Circuit Courts recognize that there are at least three competing tests currently used by the Supreme Court while noted Constitutional law expert Erwin Chemerinsky misses this fact is puzzling indeed.

[92] Sullivan and Gunther present the standard separationist history as "the dominant view" and only tersely mention nonpreferentialism, which they label as "a minority view." Sullivan, *supra* note 84, 1435-36. They, like Chemerinsky, would have their students believe that *Lemon* is the current Supreme Court standard and separationism is the "majority" theory of church-state relations in the United States today. It is noteworthy that both Chemerinsky and Sullivan are ardent ideological separationists. Chemerinsky has written that from 1947 to the 1980's the Court was "unquestionably committed to separation," but in recent decades the "most conservative justices" have, regrettably in his view, urged change. Chemerinsky, *supra* note 88 at 211-12. Chemerinsky also opines that any departure from separation, such as Thomas's Neutrality in *Mitchell*, would be "radical and unprecedented" and result in the obliteration of "any remnants of a wall separating church and state." *Ibid*., 220. Dean Sullivan is even more radical in her strict separationist ideology. She has blatantly stated that the Establishment Clause mandates a secular government even if the result is hostility to religion. Sullivan's interpretation of the Establishment Clause has been called "extreme," and rightfully so. *See* Carl Esbeck, *supra* note 5 at 331. Professor Esbeck noted that there are "extreme voices" who "claim" the Establishment Clause mandates a "new secular order" and sites as examples of this extremist position Kathleen Sullivan and her article "Religion and a Liberal Democracy." *Ibid*. While law journal articles and academic books designed to foster debate are the appropriate places to argue a particular viewpoint, Chemerinsky and Sullivan's biased presentation of Establishment Clause jurisprudence in basic Constitutional Law casebooks is reprehensible. When annotating a textbook for first year law students, one should educate impressionable minds with "The Law" concerning the subject. To use a bully platform to advance a particular ideological agenda is shameful.

In addition to law school casebooks, law school blackletter outlines and practitioner hornbooks also promote a primarily, if not exclusively, categorical approach to understanding the Establishment Clause jurisprudence. Precisely because law school outlines cut out all the irrelevant (from an exam-taking standpoint) theory and neatly organize just the relevant black letter law, these popular outlines seem to focus almost exclusively on a categorical approach to explaining Establishment Clause jurisprudence and fail to touch on the Supreme Court's evolving theories and changing standards. Unfortunately, these simple outline formats also overemphasize the easily outlined three-prong *Lemon* test.[93]

The common thread in all of the law school outlines is that students are led to believe that the purpose of the Establishment Clause is to separate church and state, history supports this view, the *Lemon* test, while recently criticized, is still the only test the student need concern themselves in learning, and that the only way to study the High

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[93]For example, the most popular of law school outlines, the Emanuel series, divides Establishment clause cases in to ten categories, with several subcategorizes. Steven Emanuel, *Constitutional Law*, 20th Ed., (New York: Aspen, 2002), xxii. When describing the background of the Establishment Clause, Emanuel states that "the basic purpose of the Establishment Clause is, in the words of Thomas Jefferson, to erect 'a wall of separation between church and state.'" *Ibid*., 627. The book then declares that "the modern Court applies a three-fold test to determine whether governmental action violates the Establishment Clause. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971)." *Ibid.*, 628.

The Casenotes series does not fare much better in its outline. While not discussing the various competing theories at all, the Casenote outline has a brief introduction that is primarily a recitation of the standard separationist view of history, noting that "In Virginia, Madison and Jefferson played leading roles in disestablishing the state church and laid the foundations for the separation of church and state in the later-formed United States." Gary Goodpaster, *Constitutional Law* (Santa Monica, CA: Casenotes Publishing, 1997), 14-2. The book then outlines six categories of Establishment Clause cases with no reference to linear history or evolving standards of Establishment clause jurisprudence. It devotes subsections only to the "*Everson* no aid formula" and "the *Lemon* formula." *Ibid*., 14-2, 14-3.

The Thomas-West Black Letter Series is equally inadequate in its summary of Establishment clause cases. Giving absolutely no background in history or theory, the Black Letter outline immediately jumps into its series of three categories and thirteen subcategories after matter-of-factly stating that "the courts have employed a three-fold test . . . " citing to *Lemon* and outlining its three requirements. Jerome Barron and Thomas Dienes, *Constitutional Law*, 6th ed. (St. Paul: Thomson West, 2003), 370. The book, merely in passing, acknowledges that other tests have been suggested in recent years, but fails to describe them. *Ibid*.

Court's Establishment Clause jurisprudence is by looking at narrowly tailored factual categories.

Practitioners in Action (Lawyers Secondary Sources)

Additionally, common practitioner's guides are often outdated, biased towards the *Lemon* test and the separationist viewpoint, and devoid of attention to a chronological view of the Supreme Court's Establishment Clause Jurisprudence. When faced with a legal issue a lawyer is unfamiliar with, often the very first place to begin research is the American Jurisprudence legal encyclopedia, commonly referred to as Am Jur. This multi-volume source with detailed index is good at explaining the basics. It is therefore a perfect place to examine what the conventional wisdom is regarding the Establishment Clause. Its entry on the Establishment Clause informs the reader that "the idea of the founding fathers, embodied in this guarantee, was that church and state be kept separate."[94] Am. Jur.'s following sections set the ideological framework from which the authors were working, which includes sections devoted to the "wall of separation between church and state," "the Lemon test," and several sections outlining eighteen factual categories in which the religion clauses are often applied.[95]

Observations from the Categorical Approach

As seen in this brief overview of legal resources for both practitioners in training and practitioners in action, the search for applicable Establishment Clause precedent has led to categorization of the Supreme Court's jurisprudence on the subject. The

[94]16A Am Jur 2d, § 417 (1998).

[95]*Ibid.*, §§ 418, 419, and 432-449.

Establishment Clause is treated quite differently than the Free Exercise Clause, which is almost universally explained linearly. Since the *Smith* case overturned the old *Sherbert* test, *Smith* is the most recent and therefore controlling universal standard applicable to every factual category raising a Free Exercise claim.[96] In contrast, the muddled chaos that is Establishment Clause jurisprudence can only be justified, or so it seems, by dividing and subdividing the cases into narrow enough categories to find uniformity.

But is this categorical approach the best way to decipher the Supreme Court's Establishment Clause case law? The Categorical approach advocated in law school texts and practitioner's guides seem to lock certain categories into decades old jurisprudential philosophies not accepted by the current Court. The simplistic outline formats of these secondary resources also tend to give short shrift to the broad picture, such as the competing histories and theories behind the Establishment Clause. They also tend to favor bright-line tests, like the dated three-prong *Lemon* test and fail to adequately explain more nuanced theories like Neutrality. However, perhaps their most significant failure is in purporting to present "The Law." While it is generally understood that academic writing in books, journals and law reviews are colored by the author's view, usually clearly stated in the opening thesis, casebooks, outlines, hornbooks and legal encyclopedias are supposed to be viewpoint-neutral. To their reader's detriment, many of these sources purporting to explain the Establishment Clause are, unfortunately, packed with author bias.

[96] *Employment Division v. Smith*, 484 U.S. 872 (1990); *Sherbert v. Verner*, 374 U.S. 398 (1963).

Lesson Learned: Neither Linear no Categorical Approach is Sufficient on Its Own

The crucial lesson to be learned from a linear or chronological approach to understanding the Supreme Court's Establishment Clause jurisprudence is quite simply that the Court's reasoning has changed or evolved over the years. As a visual aid to a linear study of this subject, Appendix A lists all the major Establishment Clause cases of the modern era, the test or theory used to decide the case, and whether or not an Establishment Clause violation was found. The cases have also been divided into five groups representing eras of consistent reasoning or time periods of transition.

Prior to the modern era, ushered in by the incorporation of the Establishment Clause to the states by *Everson* in 1947, there were only a few federal Establishment Clause cases, represented in Appendix A as Group A. All were decided using an accommodationist premise, and the Court found no Establishment Clause violation in any case of this era.

There was a distinct shift, at least in rhetoric, with the Everson case in 1947, and the cases that followed up to 1971 mark a period of the Court's search for a standard by which to apply the theory of separation. Group B cases were decided using multiple theories and standards, several of which would eventually be combined into the *Lemon* test. The result, however, was a near even split at four violations found to six cases where no Establishment Clause violation was found.

Group C, beginning with the *Lemon* case of 1971 and extending to the mid 1980's, is the most consistent period in modern Establishment Clause jurisprudence. The *Lemon* test was used almost exclusively during this period with the one noticeable exception of the *Marsh v. Chambers* legislative chaplain case. With *Lemon* as the

universal standard, the Court's holdings were also predictable. The violation ratio of twelve to six shows that *Lemon* yielded an Establishment Clause violation twice as often as it found no violation.

Group D contains the seven Establishment Clause cases decided in the half decade between the mid 1980's and 1990, and represents a transitional period in the Supreme Court's Establishment Clause jurisprudence. Just one year earlier Associate Justice Rehnquist penned his famous *Wallace* dissent challenging the standard history and separationist theory. While the *Lemon* test was still used, it was becoming increasingly criticized. The case holdings also demonstrate this era to be a period of transition, as the 3 to 4 violation ratio suggests a near even split on whether the government actions were violating the Establishment Clause, with hints of more change to come.

Group E represents the cases from the 1990's to present. The most significant revelation from this group is the downfall of *Lemon*. *Lemon* was relied on twice--once in 1990 and once again in 2005--and was mentioned in passing in only a few other cases during this period. Other tests, such as the Endorsement and Coercion tests were tried and abandoned. The Court also began to decide cases based on the broader concept or theory of Neutrality as opposed to a bright-line test. The results are also striking; the violation ratio of 2:5, or four Establishment Clause violations to ten cases where no violation was found, represents the most lopsided era of the five listed in the chart from a holdings standpoint.

The Categorical Approach

Appendix B lists eleven factual categories in which Establishment Clause claims typically arise.[97] While there are many different possible categories and subcategorizes that can be used when dividing up Establishment Clause cases by their factual issues, the eleven categories listed in Appendix B are sufficient to represent the lessons that must be learned from the Categorical approach. The primary lesson that must be learned is simply that in the United States legal system, case precedent is crucial, and such precedent is determined based on a prior opinion's factual similarity to the issue at hand. Since there is no consistency among the Supreme Court's Establishment Clause jurisprudence as a whole, lawyers feel compelled to draw applicable precedent from narrowly defined factual categories.

Despite the fact that Appendix A shows a distinct trend towards a more accommodationist Court and an abandonment of bright-lines tests, a brief review of the categories in Appendix B reveals that the bulk of the Court's new jurisprudence has been limited to only a few categories. Indeed, the seven cases decided in this century have all been in only three categories; religion in public education, government aid to church-related schools, and religious symbols on public property. Other categories, such as tax exemption, Sunday work laws, and religion in labor relations have not had cases go before the Court since the 1980's. However, a practicing attorney would be ill advised to consider the law "settled" in the categories in which the Court has not spoken in decades.

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[97]The majority of these categories are taken from the Miller and Flowers case book, *Towards Benevolent Neutrality*. Robert Miller and Ronald Flowers, *Toward Benevolent Neutrality: Church , State, and the Supreme Court*, 5th ed. (Waco: Baylor University Press, 1996).

Problems with a Singular Approach

This thesis concentrates on the linear, chronological approach to understanding the Establishment Clause and its current interpretation and application, with specific attention devoted to the contributions of Justices Brennan and Scalia to this evolving body of jurisprudence. However, factually based precedent cannot be ignored. While it is readily apparent that the Court has changed its philosophy regarding Establishment Clause interpretation over the last decade and a half, it is equally clear that past case precedent is still binding to some extent. for example, if an Establishment Clause challenge is made to a public school policy questioning evolution, the 1987 case *Edwards v. Aguillard* would have direct and controlling precedental value, even though it was decided decades ago when a different Court was applying a different standard in Establishment Clause cases.[98] Today the question remains, does the *Edwards* case stand as precedent because the Court has "settled" this particular issue when it comes to Establishment Clause claims? Or has there simply been no other case that the Court has taken up on this issue even though they have moved away from the *Lemon* test and separationist theory considerably since the mid 1980s? Clearly the Court has moved towards a theory of Neutrality and away from the *Lemon* test and its separationist leanings. However, it is also clear that recent cases that have relied on the Neutrality theory have dealt with government aid to schools and equal access to facilities, and not the more sensitive category of government recognition of religious dogma in public

[98]The Court has heard two cases directly "on point"--that is with a very similar fact pattern, on the evolution issue. In the 1968 case *Epperson v. Arkansas*, the Court struck down a law that prevented the teaching of evolution in public schools. In the 1985 case *Edwards v. Aguillard*, the Court struck down a law that required creationism be taught whenever evolution is taught because it failed the "secular purpose" prong of the *Lemon* test.

schools. Thus, one must not totally ignore precedent by adopting an exclusively linear interpretation of the Court's Establishment Clause jurisprudence.

Likewise, there are problems with a purely categorical approach.[99] Accordingly, a competent lawyer cannot ignore the current shift in the Court's general jurisprudence in all Establishment Clause cases. To look only within a narrow category of factual situations is both myopic and dangerous.

As evidenced by the preceding, there are a variety of factors that play into how a jurist interprets the Establishment Clause: whether the religion clauses are two distinct clauses or not; general church and state theory; basic legal principles; jurisprudential doctrines; and whether an evolving linear view of Establishment Clause precedent or a categorical view should dominate. However, it is generally true that a jurist's method of constitutional interpretation and corresponding jurisprudential vision is the primary factor that determines their view on the meaning of the Establishment Clause. Accordingly, the following two chapters address methods of constitutional interpretation generally, and the interpretive methodologies advocated by Justices' Brennan and Scalia in particular.

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[99] The danger of a solely categorical approach is most clearly seen in the category in which the *Lemon* test was created, government aid to religious schools. Ironically, this is the category in which *Lemon* has most clearly been eliminated as the standard for interpreting the Establishment Clause. *Mitchell v. Helms* (2000) and *Zelman v. Simmons-Harris* (2002) have firmly established Neutrality as the standard in such government aid cases. If *Lemon* has been abandoned within the factual category it was created for, certainly one would be well advised to consider its possible disuse in other categories as well.

CHAPTER FOUR

Methods of Constitutional Interpretation

One wills at the beginning the result; one finds the principle afterwards; such is the genesis of all juridical construction.
- Saleilles

The preceding quote by Saleilles reflects a cynical view of how judges interpret law and, unfortunately, falls within a long tradition of disparaging lawyers and the practice of law in general. However, those who still recognize the sanctity of the rule of law will recognize that articulate and principled methods do exist for correctly interpreting law, including our most cherished charter the Constitution. This chapter will first introduce and define constitutional interpretation, differentiating between general theory and practical methodologies. Next, the chapter will examine the two most common methods of constitutional interpretation, termed herein as Originalism and the Living Constitution method. Finally, this chapter will briefly outline the primary arguments both for and against the two theories in an attempt to explain why and how each method is chosen and applied by jurists generally, and Justices Brennan and Scalia specifically.

Constitutional Interpretation: General Theory and Practical Methodologies

There is no shortage of debate or scholarly writing on the subject of constitutional interpretation. Ranked "[t]he central dispute in constitutional theory" of the modern era

by noted Constitutional authority John Hart Ely,[1] it could arguably be said it has been the central area of contention in constitutional law ever since *Marbury*.[2] In the simplest of terms, constitutional interpretation is the process by which the judicial branch construes the Constitution. This is significant, of course, because the Constitution is the supreme law of the land and it proscribes any government act, whether federal, state or local, that is inconsistent with its provisions. Thus, every legal question depends, either directly or indirectly, upon an interpretation of the Constitution. Both the importance and complexity of constitutional interpretation is illuminated upon review of the nature of the Constitution itself: it is the supreme law, therefore its provisions trump all other law; it is comprehensive, therefore its provisions are implicated in every legal issue; it is written, therefore its provisions must be construed in a manner that gives it supreme and comprehensive effect; it is a relatively brief document, but it must be interpreted to apply in any case or controversy--even in situations not explicitly anticipated by its text or framers.[3] Needless to say, there is much at stake in the debate over how to legitimately interpret the Constitution.

For the sake of simplicity and clarity, scholars often frame complex arguments into two distinct and opposing views; in the field of constitutional interpretation the two main views of the current debate, representing opposite ends of the interpretive spectrum, are often termed the "Originalist" method and the "Living Constitution" method. Simply

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[1]John Hart Ely, "Constitutional Interpretivism: Its Allure and Impossibility," 53 *Indiana L. J.* 399 (1978).

[2]*Marbury v. Madison*, 5 U.S. 137 (1803), is the United States Supreme Court case in which the Court ruled that it had the power to review acts of Congress and if they were found in violation of the Constitution, to declare the acts void. This power is known as judicial review.

[3]See generally Phillip Bobbitt, "Constitutional Interpretation," in Kermit Hall, ed., *The Oxford Companion to the Supreme Court of the United States* (New York: Oxford University Press, 1992), 184.

stated, advocates of the originalist theory believe the original meaning of the Constitution can be discerned from its text and framer intent, and this original understanding should be used to adjudicate all modern cases. Proponents of the living constitution theory, on the other hand, believe original meaning is either indiscernible or unimportant, and instead prefer a Constitution full of life and capable of meeting the needs of a changing society. Such is the contemporary debate over constitutional interpretation framed in the simplest of terms.

However, it must be noted that there are many levels to the debate, and other terms are also commonly used to help define and describe competing theories on constitutional interpretation as well as practical applications of interpretive methodologies. Adopting terminology crafted by Ely, this debate over whether the Supreme Court is bound at all by the text and the intention behind the text as it strives to ascribe meaning to the Constitution is framed by the labels interpretivism and noninterpretivism.[4] Interpretivism is the idea that jurists are bound by the four corners of the Constitution, and can legitimately ascertain its meaning only through actual interpretation bound by the text and the original intent behind the text.

Noninterpretivism, on the other hand, questions whether jurists are bound to the text and its meaning at all. Indeed, noninterpretivist theory has been defined as the belief that it is not only appropriate for jurists to look beyond the text and its intent in ascribing meaning to the Constitution, but it is actually "necessary for judges to infuse the

[4]John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980).

Constitution with contemporary conceptions of justice," thus, the "inquiry is not so much what the Constitution means as what it should mean."[5]

The theories of interpretivism and noninterpretivism attempt to answer the lofty question of which interpretive methodology jurists may legitimately utilize in executing their duty to determine the meaning of the Constitution. However, these terms are not entirely useful in comprehensively describing the interpretive component of a jurisprudential vision, considering that "most judges fall between the polar extremes of interpretivism and noninterpretivism, seeking some pragmatic position for the resolution of the cases and controversies that come before them."[6] Few would argue that absolutely no consideration should be given to interpreting the text of the Constitution or the intent behind it. Thus, the more traditional debate over constitutional interpretation centers on just how strictly a jurist must adhere to the text and original intent. Obviously, both strict construction and loose construction are merely forms of interpretivism. For the purposes of this chapter, it is sufficient to note that those who adopt originalist methodologies generally find only interpretivist theory legitimate when ascribing meaning to constitutional provisions, while those adopting the living constitution methodology accept both interpretivist and noninterpretivist theory.

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[5]Gary McDowell, "Interpretivism and Noniterpretivism," in Kermit Hall, ed., *The Oxford Companion to the Supreme Court of the United States* (New York: Oxford University Press, 1992), 436.

[6]*Ibid.,* 437. This is not to say that the terms are completely without use in describing an individual's jurisprudential theory. Professor Dreisbach defined interpretivist judges as those who would "confine themselves to enforcing values or norms that are express or clearly implicit in the written constitution," while noninterpretivist judges are those who "go beyond the set references found within . . . the constitution and enforce extraconstitutional values and norms such as those offered by sociological inquiry, popular morality, or prevailing theories of justice." Daniel Dreisbach, *Real Threat and Mere Shadow*, (Westchester, IL: Crossway Books, 1987), 23.

On a far more practical level, one must not forget that jurists are charged not just with developing an interpretive philosophy, but also with actually construing the various provisions of the Constitution. As such, interpretive theory is applied through a variety of modes of interpretation. While the actual applications of interpretive methodology could be described in a variety of different ways, Professor Phillip Bobbitt has outlined six separate modes of interpretation that form an accurate representation of the full spectrum: historical, textual, structural, doctrinal, ethical and prudential.[7] While the details of the practical side of interpreting constitutional provisions are no doubt fascinating, it is sufficient for the purposes of this chapter to note that those who hold to an originalist philosophy typically place greatest emphasis on the first three of Professor Bobbitt's modes, while those adopting the living constitution philosophy would emphasize the latter three.[8]

In sum, while admittedly of some limited use, the debate over interpretivist and noninterpretivist theory is generally too abstract for purposes of examining the interpretive methodology component of a jurist's overall jurisprudential philosophy. Similarly, a detailed examination of the various modes of practical interpretation

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[7]Professor Bobbitt defined his six interpretive modes as follows: 1) Historical looks to the original intent of the framers; 2) Textual looks to the meaning of the words themselves often as they would be interpreted in contemporary times; 3) Structural looks to meaning inferred from the broad principles established in the Constitution; 4) Doctrinal looks to past court rulings of precedent; 5) Ethical looks to deriving meaning from the "moral ethos of the American people"; and 6) Prudential looks to balancing the costs and benefits of implementing a particular policy in ascribing meaning to a constitutional provision. Philip Bobbitt, *supra* note 3, 184-85.

[8]While there are no hard and fast rules, ascertaining meaning through the modes of historical, textual and structural interpretive methods fit with interpretivist theory and are often used by those holding to an originalist philosophy. Likewise, doctrinal, ethical and prudential methodologies generally fit a noninterpretivist theory and are modes commonly accepted by those who hold to a loving constitution philosophy. However, exceptions to the rule abound as it is common, for example, for an originalist to adopt the doctrinal mode and look to precedent when interpreting the Constitution, or for a living constitutionalist to adopt the structural mode.

commonly used to interpret individual constitutional provisions is beyond the scope of this paper. Therefore, the following section will define and explain the two primary interpretive methodologies advocated by jurists today; the originalism and the living constitution method.

Constitutional Interpretation: The Primary Methodologies Defined

The Living Constitution Method

Advocates of the Living Constitution method believe the Constitution is an "unwritten document" in that it can and should be constantly judicially reinterpreted and rewritten to meet the changing needs of an evolving society. As the name commonly attached to this theory suggests, its adherents see the Constitution as full of life, flexible, and easily adapted to the individual views of those sitting on the Court. It is not a dead, static document whose meaning is permanently fixed to the archaic views of its rich, white, male framers now dead for nearly two hundred years.

The term "Living Constitution" was first used in the title of a 1927 book authored by Howard Lee McBain, but this now prevalent theory was not adopted by the mainstream legal world until more recent times.[9] Writing in 1989, one Supreme Court justice remarked that the living constitution theory, or "nonoriginalism," had only recently "come out of the closet, and put itself forward overtly as an intellectually legitimate devise."[10]

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[9]Howard Lee McBain, *The Living Constitution: A Consideration of the Realities and Legends of our Fundamental Law* (1927), cited in Timothy Sandefur, "Liberal Originalism: A Past for the Future," 27 *Harv. J. L. & Pub. Pol'y* 489, 507 fn 94.

[10]Antonin Scalia, "Originalism: The Lesser Evil," 57 *U. Cin. L. Rev*. 849, 852 (1989).

As the alternative label "nonoriginalism" suggests, the living constitution theory is most easily defined by what it is not: it is not originalism. Indeed, the living constitution theory rejects the very core values of originalist theory; constraint to the text, deference to history and original intent, and pursuit of democratic rule of the majority and rule of law. To the contrary, the living constitution interpretive method presupposes that the "legitimacy of constitutional law rests in the discretionary power of the justices," who are free to adapt the malleable Constitution to meet the needs of our current and ever changing society.[11] Key tenants within the living constitution theory include several bold assertions: that an active judiciary stands as the best bulwark against majority tyranny; the notion that each generation must come to terms with the ruling document in light of existing realities; the belief that judges make bad historians; and the firm conviction that neither the antiquated text nor the intent behind it should hamstring a modern judiciary from doing its job of "administer[ing] justice . . . based on an understanding of present circumstances."[12]

Justice Brennan's name and legacy is inseparably linked to the living constitution Constitutional interpretive method. As discussed more fully in the following sections, Justice Brennan was the living Constitution method's strongest supporter and most articulate apologist. In explaining why he adopted the flexible living constitution method, Justice Brennan stated: "Like every text worth reading, [the Constitution] is not crystalline. The phrasing is broad and the limitations of its provisions are not clearly marked. Its majestic generalities and ennobling pronouncements are both luminous and

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[11]Kermit Hall, ed., *Major Problems in American History*, Vol. 2 (Lexington, MA: DC Heath and Co., 1992), 549.

[12]*Ibid.*, 549-50.

obscure. This ambiguity of course call forth interpretation, the interaction of the reader and the text."[13]

Originalist Interpretive Method

The primary opposing view to the living constitution method on how to properly interpret the Constitution is adherence to originalism. In the simplest of terms, originalist theory holds that the text and the original intent behind the words found in the Constitution bind subsequent generations. Former United States Attorney General Edwin Meese, III defined this interpretive method as an approach to interpretation that is "rooted in the text of the Constitution as illuminated by those who drafted, proposed, and ratified it."[14] General Meese succinctly described how traditional originalist theory would be used to interpret the Constitution as follows:

> Where the language of the Constitution is specific, it must be obeyed. Where there is a demonstrable consensus among the Framers and ratifiers as to a principle stated or implied by the Constitution, it should be followed. Where there is ambiguity as to the precise meaning or reach of a constitutional provision, it should be interpreted as applied in a manner so as to at least not contradict the text of the Constitution.[15]

At the heart of the originalist method is the core belief that absent deference to original framer intent, judges would simply interpret the Constitution in a manner that

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[13]Justice William Brennan, 1985 speech, in Kermit Hall, ed., *Major Problems in American History*, Vol. 2 (Lexington, MA: DC Heath and Co., 1992), 558.

[14]Edwin Meese III, 1985 speech, in Kermit Hall, ed., *Major Problems in American History*, Vol. 2 (Lexington, MA: DC Heath and Co., 1992), 554. General Meese quoted Justice Joseph Story from his famous Commentary of the Constitution of the United States, in which the eminent jurist explained that "[t]he first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms, and the intentions of the parties." *Ibid.*

[15]*Ibid.*

would substitute their own personal views and policy for the will of the majority.[16] This tenant often drives adherents of originalism to criticize jurists who do not accept and apply their method for "legislating from the bench." Of course, another key tenant of the method is that original intent is both knowable and valuable in interpreting the Constitution. In sum, originalism is guided by the twin principles that legitimate authority in a democracy must rest on majority rule, and that the Constitution, as a written document, can only legitimately be interpreted through deference to the words and the original purposes behind them.

Textualism

A subtle but significant distinction exists between the classic originalist interpretive method and the methodology advocated by Justice Scalia, which he terms Textualism. Justice Scalia has described himself as a "faint-hearted originalist."[17] To this end, Scalia's textualism--still a form of originalism--breaks with traditional originalist methodology only in that he would give no *special* significance to framer intent. Traditional originalists distinguish between framer "intention" and historical "understanding," and hold that the former, when discernable, is preferred to the latter, although both are useful.[18] Scalia, however, argues that a textualist should not be

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[16]*Ibid.*, 549. Gary McDowell has summarized the core value of originalism as follows: "the search for original intention in interpretation is the very essence of the idea of the rule of law; it is the line that separates the act of judging from the act of legislating." Gary McDowell, "Original Intent," in Kermit Hall, ed., *The Oxford Companion to the Supreme Court of the United States* (New York: Oxford University Press, 1992), 613.

[17]Antonin Scalia, *supra* note 10, 864.

[18]Jack Rakove explains that "intention . . . connotes purpose and forethought. and it is accordingly best applied to those actors whose decisions produced the constitutional language whose meaning is at issue: the Framers at the Federal Convention or the members of the First Congress." By contrast, the broader "understanding" includes "impressions and interpretations of the Constitution formed by its original readers--the citizens, polemicists and the convention delegates who participated one way or

concerned with original intent, stating: "It is the *law* that governs, not the intent of the lawgiver."[19] Justice Scalia would make no distinction between framer intent and any other historical understanding that will help elucidate the text itself. In his words:

> I will consult the writings of some men who happened to be delegates to the Constitutional Convention-Hamilton's and Madison's writings in the Federalist, for example. I do so, however, not because they were Framers and therefore their intent is authoritative and must be the law; but rather because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood. Thus I give equal weight to Jay's pieces in the Federalist, and to Jefferson's writings, even though neither of them was a Framer. What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.[20]

Thus, Scalia *does* consult original writings, he just simply does not consider original intent to be as, or more, authoritative than the text itself. This distinction is crucial to Justice Scalia, and at his Senate confirmation hearings, he strained to explain this difference to the committee by distinguishing his view, which he termed "original meanings" from the traditional "original intent" philosophy.[21]

Lest anyone mistake Justice Scalia's criticism of standard original intent theory as advocating a more liberal method of interpretation, he has emphatically and frequently stated his adamant disdain for the evolving or "Living Constitution" theory, and expressed his dismay over the vast number of people who hold to this view, explaining its dangers in no uncertain terms:

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another in ratification." Jack Rakove, *Original Meanings* (New York: Knopf, 1986), 8. Scalia ignores this distinction.

[19]Antonin Scalia, *A Matter of Interpretation*, (Princeton, NJ: Princeton University Press, 1997), 17.

[20]*Ibid.*, 38.

[21]Hearing on the Nomination of Judge Antonin Scalia, 99th Cong. 1st sess., 1986.

> The American people have been converted to belief in The Living Constitution; a 'morphing' document that means, from age to age, what it ought to mean. And with that conversion has inevitably come the new phenomenon of selecting and confirming federal judges, at all levels, on the basis of their views regarding a whole series of proposals for constitutional evolution. If the courts are free to write the Constitution anew they will, by God, write it the way the majority wants; the appointment and confirmation process will see to that. This, of course, is the end of the Bill of Rights, whose meaning will be committed to the very body it was meant to protect against: the majority. By trying to make the Constitution do everything that needs doing from age to age, we shall have caused it to do nothing at all.[22]

Thus, Scalia's textulism is best understood as merely a refinement of the standard originalist interpretive theory.

It has been said that Justice Scalia's textualist interpretive theory fits with his overall jurisprudential philosophy of "democratic formalism."[23] Indeed, Textualism is democratic in that it allows policy-latent judgment calls to be made by the democratic branches, and it is certainly formalistic in that it favors the objective meaning of the text over the subjective motivations of a particular law's authors. While textualism is certainly an interpretivist theory, it is not literalism, in that textualism recognizes that context is necessary in determining meaning. Likewise, textualism in not necessarily bound by strict construction, in that it mandates that words be given their ordinary meaning and the interpreter is not necessarily bound by framer intent.

The current debate over how to best interpret the constitution is both ongoing and extensive. The following two sections briefly present a few of the most prevalent arguments both for and against the two main interpretive methodologies of originalism and the living constitution approach.

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[22]Scalia, *supra* note 19, 47.

[23]Cass Sunstein, "Justice Scalia's Democratic Formalism," 107 *Yale L. J.* 529 (1997).

The Living Constitution Interpretive Methodology: The Arguments

The living constitution method has many supporters in the field of academia, including noted constitutional historian and author Leonard Levy,[24] but there has never been a more ardent apologist for the living constitution method then former Justice William Brennan. Responding to then Attorney General Edwin Meese's call for a return to judicial adjudication based upon framer original intent,[25] Justice Brennan devoted an entire speech to outlining the fallacies of such an approach. In this address, Justice Brennan supported the living constitution method by first claiming that framer intent can never really be known, noting that the only thing that can be "gleaned" from historical records is that "the Framers themselves did not agree about the application or meaning of particular constitutional provisions."[26] Moreover, Brennan concluded, even if original meaning could somehow be determined, the world has evolved and modern men are far wiser. According to Brennan, "the ultimate question must be, what do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs."[27]

For Brennan, an originalist approach was not only impractical--in that it would require judges to discover a framer intent he believed was indiscernible--but more

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[24]Levy writes, "the Constitution is not a static document whose meaning is fixed timelessly. So long as the Curt relies on the text itself and the principles and purposes embodied in the text, the Constitution can legitimately grow in meaning, like the Magna Carta." Leonard Levy, *The Establishment Clause: Religion and the First Amendment* (New York: Collier MacMillian, 1986), 149.

[25]See the description of General Meese's speech advocating original intent described in the following section.

[26]William Brennan, 1985 speech, *supra* note 13, 559.

[27]*Ibid*., at 561.

significantly, he believed a return to original meanings would undo many decades of progressive, judicial-initiated growth in the areas of human dignity and individual rights, and would plunge America back into the civil-rights dark-ages of the framers.

While the living constitution theory has been criticized for being more of a critique of originalism than viable interpretive methodology itself,[28] scholars and jurists who advocate this method have outlined several arguments in favor of a Living Constitution. For example, the most heralded argument in favor of the living constitution theory is that it is flexible. Professor Levy summarized the flexibility of the living constitution theory as follows: "[i]n a sense the text, whether Constitution or Talmud, is always unfinished even as it is perpetual; and subsequent teachers or judges must expound its meaning. Their exposition can be a legitimate extension of the original, because the text fixes not only a system but an ongoing process."[29] Likewise, the flexibility of the living constitution is championed because it allows jurists to "do justice,"[30] and yields a Constitution sufficiently adaptable to "cope" with modern problems.[31]

Advocates of the living constitution method also assert that their interpretive methodology provides protection from majoritarian tyranny, the greatest danger they

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[28]Justice Scalia has written that the most notable practical problem with the nonoriginalist interpretive methodology is that there is no consensus on a viable alternative to originalism: "As the name 'nonoriginalism' suggests . . . it represents agreement on nothing except what is the wrong approach." Scalia, *supra* note 10, 855.

[29]Leonard Levy, *Original Intent and the Framers' Constitution* (New York: MacMillan 1988), 388.

[30]Kermit Hall noted that those who advocate the living constitution theory believe it is the duty of a judge to "administer justice," and judges should not be restrained by history. Hall, *supra* note 11, 550.

[31]Justice Brennan has argued that "the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs." Justice Brennan's 1985 speech, *supra* note 13, 561.

believe the modern judiciary is tasked with combating. To support this claim, living constitutionalists argue that an "active judiciary stands as the best bulwark against majority tyranny."[32] Additionally, many non-originalists firmly believe that "courts must depart from original intent in order to protect fundamental rights."[33] Thus, advocates of the living constitution method typically believe that only their interpretive methodology can, and will, protect civil rights/individual rights/fundamental rights.

Without question, the majority of the published arguments for a living constitution interpretive methodology consist primarily of criticism of the theory it means to replace--originalism.[34] Of the many criticisms of originalism, the most prevalent is that original intent is impossible, or at least too difficult, to discern and therefore ultimately useless in interpreting the Constitution. In support of this claim, arguments have been made that judges make poor historians,[35] and that historical records pertaining to the Constitution are ambiguous, incomplete or unreliable.[36] Additionally, some

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[32]*Ibid.*, 549.

[33]William Michael, "The Original Understanding of Original Intent: A Textualist Analysis," 26 *Ohio N. U. L. Rev*. 201, 203 (2000). For a list of scholarly works advocating this position, see *Ibid*., fn 10.

[34]Some of the criticism of originalism is quite vehement. For example, Justice Brennan described the originalist interpretive methodology as "a view that feigns self-effacing deference to the specific judgments of those who forged our original social compact. But in truth, it is little more than arrogance cloaked as humility. It is arrogant to pretend from our vantage we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions." Brennan, 1985 speech, *supra* note 13, 559.

[35]Kermit hall writes that "non-originalists" hold the position that "justices are ill equipped to deal with the past." Hall, *supra* note 11, 549. Historian Leonard Levy has written that judges "do not look at the past as historians are supposed to. Judges do not try to understand the past on its own terms, for its own sake and as if they did not know how things turned out. Judges always *use* history. They turn to it only because they think it might help decide some issue posed in a case . . . . In short, judges exploit history by making it serve the present and by making it yield results that are not historically founded." Levy, *supra* note 28, 313. Professor Haig Bosmajian has noted that judges often "look back at the same history and interpret it differently." Haig Bosmajian, "Is a Page of History Worth a Volume of Logic?" *Journal of Church and State* 38 (Spring 1996): 407. See also the previous discussion on the relevance of history in examining the meaning of the Establishment Clause, *infra* Chapter one.

[36]Kermit Hall writes that "[e]ven if [judges] were exceedingly accurate historians, the non-originalists conclude, the documentary records with which they must work are often ambiguous and

originalist critics argue that originalism fails to answer the question of just whose history is to be examined,[37] and fail to admit that history is often unreliable.[38]

Advocates of the living constitution method also criticize originalism because it is, in their view, too rigid and inflexible to meet the modern needs of American society, especially the development of new rights;[39] because its proclaimed deference to democracy is really nothing more than placation of majoritarian politics;[40] and, on the practical side, they argue nonoriginalist interpretations are now so embedded in current constitutional precedent that it would be impossible to go back to the old originalist

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incomplete." Hall, *supra* note 11, 549-50. Scholar William Michael notes that one non-originalist declared that original intent is unworkable because the historical record consists of "inconsistent, ambiguous, and unreflective intentions of the large group of independent persons who participated in the drafting or ratifying of the Constitution." Michael, *supra* note 32, 203. However, it is Justice Brennan who most articulately critiques the reliability of the Constitution's historical record, noting that the "records . . . provide sparse or ambiguous evidence of the original intention." He adds: "Typically, all that can be gleaned is that the Framers themselves did not agree about the application or meaning of particular constitutional provisions, and hid their differences in cloaks of generality." Brennan, 1985 speech, *supra* note 13, 559.

[37]Haig Bosmajian argues that "it is not always clear whose history is being relied upon by the justices." Bosmajian, *supra* note 34, 407. Justice Brennan elaborated: "Indeed, it is far from clear whose intention is relevant--that of the drafters. the congressional disputants, or the ratifiers in the states?" Brennan, 1985 speech, *supra* note 13, 559.

[38]Professor Bosmajian notes that "in some instances the history contains false information," and that "even if there is no false information in the judicial opinion, history is distorted by the omission of relevant information." Bosmajian, *supra* note 34, 407. Justice Brennan voiced concern over the fact that the evidence has gone stale in history dating back more than 200 years, writing that "our distance of two centuries cannot but work as prism refracting all we perceive." Brennan, 1985 Speech, *supra* note 13, 559.

[39]Professor Cass Sunstein writes that if the judiciary was rigidly locked into the "moral principles" held by the founding generation, America's commitment to liberty would be considered "illegitimate and fatally undemocratic." Cass Sunstein, *supra* note 22, 564. Justice Brennan laments that the static nature of originalism disfavors the discovery of new rights: "A position that upholds constitutional claims only if they were within the specific contemplation of the Framers in effect establishes a presumption of resolving textual ambiguities against the claim of constitutional right. Those who would restrict claims of right to the values of 1789 specifically articulated in the Constitution turn a blind eye to social progress and eschew adoption of overarching principles to changes of social circumstances." Brennan, 1985 Speech, *supra* note 13, 560.

[40]Professor Sunstein opines that Justice Scalia's democratic formalism form of originalism misidentifies democracy as only that which emerges from majoritarian politics. However, Sunstein argues, true democracy "comes equipped with its own internal morality." Moreover, Sunstein notes, democracy implies the greater good as its goal, but that this goal is not always obtained by the majority will. Sunstein, supra note 22, 562.

methodology.[41] Finally, while not openly advocated by a majority of nonoriginalists, a select few have argued that originalist interpretation should be rejected because the framer's Constitution is unwise and seriously flawed.[42]

Originalist Interpretive Method: The Arguments

While now more than two decades old, one of the most articulate explanations and cogent defenses of the originalist interpretive method was presented by former Attorney General Meese in a 1985 speech to the American Bar Association. In this speech, General Meese addressed the most prevalent criticism of originalism, its practicality, by declaring that historical documents on the framing of the Constitution are abundant and framer original intent is discoverable.[43] Meese defended the substantive theory of originalism by noting that our Constitution "has been written down" and "[t]he presumption of a written document is that it conveys meaning." and defined originalism

[41]Professor Sunstein argues that there would be disastrous practical consequences in overturning all the landmark constitutional cases decided using nonoriginalist interpretive methods. As examples, Sunstein lists cases banning segregation is schools, upholding affirmative action, supporting equal protection and notes that an originalist theory would uphold that "compulsory school prayer is constitutionally acceptable." *Ibid.*, 564.

[42]Former Justice Thurgood Marshall, commenting on the commemoration of the Constitution's bicentennial in 1987, boldly asserted that such commemoration was unwise because it may "invite [the] complacent belief" that the framer's document actually provided "the more perfect union" Americans now enjoy. He explained his view as follows: "I do not believe that the meaning of the Constitution was forever 'fixed' at the Philadelphia Convention. Nor do I find the wisdom, foresight and sense of justice exhibited by the Framers particularly profound. To the contrary, the government they devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for individual freedoms and human rights, we hold as fundamental today." Thurgood Marshall, "The Constitution's Bicentennial: Commemorating the Wrong Document?" 40 *Vanderbilt L. Rev*. 1337 (1987). Justice Marshall added: "I plan to celebrate the Bicentennial of the Constitution as a living document, including the Bill of Rights and the other amendments protecting individual freedoms and human rights." *Ibid.*

[43]Edwin Meese III, 1985 speech, *supra* note 14, 552. Meese stated: in short, the Constitution is not buried in the mists of time." *Ibid.*

as an approach that "is rooted in the text of the Constitution as illuminated by those who drafted, proposed, and ratified it."[44]

Meese did not deny that an originalist approach to interpretation would make it more difficult for the judiciary to solve many of society's current ills; rather he maintained that the Constitution does not grant unelected judges the power to become a mini-legislature and make social policy as they see fit in the first place. General Meese also stated that a return to originalism would not really "undo" the great civil rights progress of recent decades as feared by living constitutionalists. Rather, he argued that many of the so-called great modern "corrections" based on newly created rights fashioned from a Living Constitution could have also been reached through an original intent interpretive method.[45] Taking a jab at the legacy of living constitutionalists such as Justice Brennan, Meese noted that "it is amazing how much of what passes for social and political progress is really the undoing of old judicial mistakes."[46]

While there are fewer academics that hold the more conservative originalist view, there are a significant number of active judges who hold to this philosophy, most notable of which is none other than the recently deceased former Chief Justice of the United States Supreme Court, William Rehnquist. Chief Justice Rehnquist stated in no uncertain terms that he followed an originalist interpretive methodology when he declared: "Any

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[44]*Ibid.*, 554.

[45]The classic example of this is Herbert Wechsler's theory that the decision reached in *Brown v. Bd. of Ed*., 347 U.S. 483 (1954), could have been better supported through "neutral principles" of constitutional law. Specifically, segregation should have been struck down based on a violation of the First Amendment freedom of assembly and association clause. Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," 73 *Harv. L. Rev*. 1 (1959).

[46]Hall, *supra* note 11, 555.

deviation from [the Framer's] intentions frustrates the permanence of that charter."[47] Originalists, such as Chief Justice Rehnquist, have outlined several arguments to support their interpretive theory.

Just as there are arguments for the living constitution method of constitutional interpretation, there are also arguments for originalism. Originalists assert that simple logic demands that a written constitution be interpreted to have original meaning. To support this claim, they argue that simple logic demands that a written Constitution be interpreted to have original meaning.[48] Additionally, those supporting the originalist interpretive methodology argue that only originalism is theoretically legitimate;[49] that it is demanded by the document itself;[50] and, on a practical level, that originalism is the least dangerous method available for interpreting constitutional provisions.[51]

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[47]*Wallace v. Jaffree*, 472 U.S. 38, 113 (1985).

[48]Scholar William Michael notes that "to ascertain the meaning of the law presupposes the law has meaning." Michael, *supra* note 32, 217. General Meese argued that "[t]he presumption of a written document is that it conveys meaning," adding that the "text [the framers] chose meant something. The point is, the meaning of the constitution can be known." Meese, 1985 Speech, *supra* note 14, 552-53.

[49]Justice Scalia notes that interpreting the Constitution via originalist methodologies is without theoretical fault. Scalia, *supra* note 10, 856. Additionally, Scalia notes that, unlike nonoriginalist interpretive methodologies, originalism is theoretically consistent with judicial review. For judicial review to be legitimate and the Constitution to be superior to all other laws, the great document must have a "fixed meaning ascertainable through the usual devises familiar with those learned in the law." *Ibid.*, 854.

[50]Scholar William Michael has assembled an articulate defense of the proposition that the text of the Constitution itself demands that it be interpreted true to its original understandings and courts be bound by original intent. Michael states that Article I, which says "all" legislative power is reserved for the legislative branch "negates the idea of any residual lawmaking authority in the judiciary." Michael, *supra* note 32, 208. Michael argues that Article V, which established the amendment process, demonstrates that the framers did not intend for the judiciary to change or make laws. *Ibid.*, 229. Michael also makes a fine argument that the democratic and republican principles imbued within the Constitution mandate that courts interpret the document in accordance with its original intent. Article IV, section four guarantees a "republican form of government." Michael argues that republican government requires majorities to govern, except in those rare and clearly defined instances whet the Constitution itself protects the minority from the majority. *Ibid.*, 222-23.

[51]Justice Scalia admits that originalism has minor practical problems, writing: "Its greatest defect, in my view, is the difficulty of applying it correctly." Scalia, *supra* note 10, 856. However, Scalia insists that theoretically, originalism is far superior to nonoriginalism, and he takes the "need for theoretical

Supporters of originalist interpretive methodologies also bolster their arguments by pointing out the weaknesses of nonoriginalist theory. Chief among their critiques is that a living constitution approach leads to interpretive results that are subjective, too discretionary and unpredictable.[52] Additionally, originalists assert that nonoriginalist interpretive theory is theoretically illegitimate, and leads to the undemocratic and dangerous problem of legislating from the bench.[53] However, when all else fails, some outspoken originalists have been known to simply label advocates of the living constitution interpretive philosophy "idiots."[54]

The debate over originalist vs. a living constitution approach towards interpreting the Constitution is without question ongoing and robust. It is worthy of note that the two competing methodologies are so far apart because they differ on the most basic of principles: the purpose of the judicial branch. Originalists presuppose that it is the role of

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legitimacy seriously." *Ibid*., 862. Practically, originalism is also superior as it mitigates the most prevalent danger in Constitutional interpretation: "that the judges will mistake their own predilections for the law." *Ibid.*, 863.

[52]Professor Sunstein condenses Justice Scalia's critique of nonoriginalist interpretive theory to just two points: 1) it lacks legitimacy, and 2) it is too discretionary and leads to unpredictability. Sunstein, *supra* note 22, 537. Justice Scalia elaborates, writing that "[p]erhaps the most glaring defect of Living Constitutionalism, next to its incompatibility with the whole antievolutionary purpose of a constitution, is that there is no agreement, and no chance of agreement, upon what is to be the guiding principle of the evolution." Scalia, *supra* note 19, 44-45.

[53]General Meese noted that judges who look outside the Constitution always look inside themselves and nowhere else. Meese, 1985 speech, *supra* note 14, 556. Commenting on the problem of divorcing the text and original intent from consideration in interpreting the Constitution, Justice Scalia wrote: "It is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is." Scalia, *supra* note 19, 22.

[54]"People who believe the Constitution would break if it did not change with society are 'idiots,' Supreme Court Justice Antonin Scalia says." Jonathan Ewing, Associated Press, "Far From the High Court, a Blistering Opinion," *The Philadelphia Inquirer*, 15 February 2006, A02. According to this AP report, Justice Scalia described his judicial philosophy in a speech given in Puerto Rico as adherence to the plain text of the Constitution "as it was originally written and intended. It's called originalism." *Ibid.* Justice Scalia also criticized those who believe in the "living constitution," which he described as "the argument of flexibility" which advocates that the Constitution "has to change with society, like a living organism." Scalia then added: "But you would have to be an idiot to believe that. The Constitution is not a living organism. It is a legal document. It says some things and doesn't say other things." *Ibid.*

the judiciary to accurately interpret and apply the law contained within the four corners of our written Constitution. In stark contrast, adherents of the living constitution method presuppose that it is the duty of the judicial branch to "do justice" for our modern society, unencumbered by antiquated framer intent. Considering the two sides have vastly different ideas of what the judiciary is tasked with doing, it should come as no surprise that there is little agreement on the method by which this duty should be carried out.

It is also clear from this brief examination of the two primary constitutional interpretive theories that both Justice Brennan and Justice Scalia are two of the most articulate and strongest defenders of their respective methods of constitutional interpretation. As discussed more fully in the next chapter, it is equally clear that the method of interpretation each chose is foundational to their overall legal philosophy and, it is argued in this paper, pivotal to their respective jurisprudential visions and therefore crucial to their Establishment Clause interpretations.

CHAPTER FIVE

The Jurisprudential Visions of Justices William Brennan and Antonin Scalia

This chapter will examine how a jurist's constitutional interpretive method affects his or her overall jurisprudential vision through an examination of the background and writings of two of the most visionary Supreme Court Justices of the last half century, former Justice William Brennan and Justice Antonin Scalia. Both have clearly expressed and ably defended their respective, and competing, jurisprudential visions; both wish to establish a universal model for the Court to follow; and both place their particular view of the "correct" constitutional interpretation method at the center of their overall jurisprudential vision.

This chapter will argue that the chosen method of constitutional interpretation is likely the most significant vehicle by which jurists can advance their particular jurisprudential vision, and it is therefore valuable to inquire into how and why a particular method is selected. This chapter further proposes that there are at least two notably different reasons for how such methods are selected: a conscious choice based upon principle, or a practical adoption of a certain method as the most effective means to a desired end. The chapter will demonstrate the varying effects of external factors such as religion, education, and childhood experiences on a jurist's selection of an interpretive method. It will be argued that Justice Scalia's textualist interpretive methodology drives his jurisprudential vision of upholding the rule of law and reserving policy issues for the democratic branches of government, while Justice Brennan's jurisprudential vision of

promoting individual rights and upholding the dignity of humanity led him to select the more flexible living constitution interpretive methodology. Finally, the chapter will conclude that the role of a jurist's constitutional interpretation method ranges from essentially *becoming* their jurisprudencial philosophy, to nothing more than a pragmatic tool used to reach a desired end.

Given the enormous imprint Justice Brennan has made on our judicial landscape, and the sizable influence Justice Scalia is still wielding, it is altogether fitting that such an examination be made into how each developed his respective constitutional interpretation methods as well as the role these methods play in their overall jurisprudential visions.

Background on Justices Brennan and Scalia

Justice Brennan and Justice Scalia are often pitted against each other as intellectual adversaries with opposing philosophies and conflicting views on the direction the Court should be moving. There is significant truth to the presumption that the two justices' judicial philosophies differ to the extent of being oppositional. Nonetheless, the purpose of the next two sections is to briefly outline just how similar the two jurists' early upbringings and roads to the High Court really were.

Justice Antonin Scalia

Justice Scalia, a Reagan appointee to the Supreme Court in 1986, was supposed to be an "intellectual lodestar who would pull the Court to the right."[1] As a Washington insider under both the Nixon and Ford administrations, he knew how to play the game; many commentators predicted his "intellect and charm would help forge a conservative

[1]Autumn Fox, "An Eagle Soaring: The Jurisprudence of Justice Antonin Scalia," 19 *Campbell L. Rev. 223* (1997).

consensus."[2] However, many of these same commentators later called him "the court's most publicly confrontational justice" who has "no interest in consensus building," but instead "revels in dissent."[3] Furthermore, some critics have opined his "embittered rhetoric and sarcastic humor" drive the other Justices away.[4] Praised by many and criticized by more, Scalia has most certainly brought his vision of textualism, respect for the rule of law, and advocation of judicial restraint in policy areas to the forefront of legal scholarly attention. As one pundit wrote, "Love him or hate him, Antonin Scalia demands attention."[5]

Antonin Gregory Scalia was born in Trenton, New Jersey on March 11, 1936 to an upper-middle class Roman Catholic Family.[6] He was raised in New York City where his father was a professor of Romance Literature at Brooklyn College. He was educated at Catholic Xavier High School, and graduated valedictorian.[7] He received his Bachelors degree in 1957 from Georgetown University, also as the valedictorian,

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[2]David O'Brien, "Scathing Scalia: Justice Should Tone Down Criticism of Brethren on Court," *The Dallas Morning News*, July 21, 1996.

[3]*Ibid*. Another journalist noted that "[w]hen President Reagan chose him for the Court in 1986, Scalia, then an appellate judge, was known as an unswerving conservative and a witty charmer. Some analysts thought he would be the right-wing version of Justice William Brennan, the gregarious, liberal playmaker and conciliator who served from 1956 to 1990. He proved to be the opposite of Brennan: Rather than brokering compromises, Scalia fought over minutiae." Joan Biskupic, "No Shades of Gray for Scalia." *USA Today*. 18 Sept., 2002.

[4]O'Brian, supra note 2. Biskupic summarized Scalia's tenure on the Court as follows: "No one cuts a swath quite like Scalia, the uncompromising conservative whose biting opinions and occasional jabs at other justices have created a cult following for his writings and shaped debates over how courts should view the Constitution." Biskupic, *supra* note 3.

[5]Fox, *supra* note 1, at 224.

[6]Richard Brisbin, *Justice Antonin Scalia and the Conservative Revival* (Baltimore, MD: John Hopkins University Press, 1997), 11.

[7]David Schultz and Christopher Smith, *The Jurisprudential Vision of Justice Antonin Scalia* (New York: Rowman & Littlefield. 1996), xiii.

attended the University of Fribourg in Switzerland, and in 1960 he graduated magna cum laude from Harvard Law School.[8]

After he left Harvard Law, Scalia accepted a position with a large Cleveland law firm where he practiced law from 1960 to1967, after which he accepted a faculty position at the University of Virginia School of Law. In 1971 he was chosen by President Nixon to serve as general counsel in the Office of Telecommunications Policy, and shortly thereafter, became chairman of the Administrative Conference of the United States. In 1974 he accepted an appointment by President Ford as Assistant Attorney General in charge of the Office of Legal Counsel. When the Ford administration came to a close in 1977, Scalia took a position with the University of Chicago Law School where he taught until President Reagan nominated him to fill a vacancy on the U.S. Court of Appeals for the District of Columbia Circuit in 1982.[9] In 1986, Reagan promoted Justice William Rehnquist to Chief Justice, and nominated Scalia to the vacancy in the Supreme Court. The Senate unanimously confirmed his appointment,[10]over the objections of several policy organizations who were opposed to Scalia's conservative record.[11]

While talk of Justice Scalia's legacy is premature, many have recognized that he has already left an indelible mark on the Court, and he continues to lobby for the

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[8]Brisbin, *supra* note 6, at 12.

[9]*Ibid*. at 16-23.

[10]Congressional Record-Senate, September 17, 1986, S12842.

[11]Americans United put out a press release dated August 6, 1986 titled "Church-State Views Disqualify Scalia for Supreme Court" in which they wrote "Scalia's hostility to church-state separation makes him an unacceptable candidate for the nation's highest court." Americans United Press Release, August 6, 1986. Scalia was also opposed by "civil rights groups and feminist organizations." James Leahy, *Supreme Court Justices Who Voted With the Government: Nine Who Favored the State Over Individual Liberties* (London: McFarland & Co., Inc., 1999), 301. Nonetheless, Scalia's brief two-day hearing was described as "tepid" and "cordial." *Ibid.* Hardly a beginning that would predict the controversy constantly surrounding Scalia in his later years on the Court.

acceptance of his jurisprudential vision: a Court that looks to the original meaning of the text when interpreting the Constitution. Some note he has been at least partly successful, writing: "Scalia has overseen--some say single-handedly--a basic shift in the court's underlying approach to law and the Constitution."[12] Michael Dorf of Columbia University characterized the shift this way: "We used to start with history in thinking about interpreting law: now we start with language."[13] Justice Scalia's goal is simply to ensure the Court uses the correct means--specifically textualism--to reach its ends.

Justice William Brennan

Justice Brennan, who joined the Court in 1956 and served for nearly 34 years, was the "driving force of its liberal wing, hero of liberals throughout the nation and scourge of conservatives who protested what they viewed as his judicial activism."[14] It has been said that while he was "never the Chief Justice in title, [he] essentially led the Supreme Court for most of his thirty-four years there."[15] He has been called a "diminutive, gregarious man," and unlike Scalia was known for his "skill at forging coalitions with his fellow justices."[16] During his three plus decades on the Court, Brennan noted that he served with 22 Justices, and was amazed himself at the "mass" of his opinions; 461 majority opinions, 425 dissents, and 474 other opinions.[17]

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[12]Robert Marquand, "The High Court's Colorful Man in Black," *The Christian Science Monitor*, 3 March, 1998.

[13]*Ibid.*

[14]Ruth Marcus and Al Kamen, "Jurist, 84, Forged Coalitions in Drafting Landmark Decisions Over 34 Years, *The Washington Post*, 21 July, 1990, A1.

[15]Eric Neisser, ed. *Recapturing the Spirit*, (New York: Madison House, 1991), 8.

[16]Marcus and Kamen, *supra* note 16, at A1.

[17]William Brennan in E. Joshua Rosenkranz and Bernard Schwartz, ed. *Reason and Passion:*

William J. Brennan Jr. was born on April 25, 1906 in Newark New Jersey to Irish immigrant parents.[18] Brennan was an honors student at the University of Pennsylvania, graduating in 1928, and received his legal training from Harvard Law School, graduating in the top ten percent of his class in 1931.[19] After admission to the bar, Brennan joined the Newark law firm Pitney, Hardin & Skinner, where he practiced law until he entered service in the army during World War II, serving as a Major on the staff of the Under Secretary of War until 1945. After the war, he resumed his law practice in Newark, specializing in labor law, representing the business side, until being nominated for the New Jersey Superior court in 1949 and then to the New Jersey State Supreme Court in 1952, both appointments made by republican governors.[20]

Brennan was an unlikely replacement for retiring Justice Minton. But 1956 was an election year and the charges have been made that Brennan's was a political appointment designed to help Eisenhower win both the Catholic vote and New Jersey, a key "swing industrial state."[21] Regardless, Brennan seemed a safe choice; an "able, reasonable young moderate . . . . If he was a Democrat, he did not appear to be a particularly liberal or offensive one" considering he had reached the position he had in

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Justice Brennan's Enduring Influence, (New York: W. W. Norton & Co. 1997), 17.

[18]Richard Leahy, *Freedom Fighters of the United States Supreme Court: Nine Who Championed Individual Liberty* (London: McFarland & Co., Inc., 1996), 262.

[19]*Ibid*. However, Leahy noted that Brennan did not seem destined for greatness as a law student. At the time of his nomination to the Supreme Court, the Harvard movers-and-shakers admitted they did not even remember their classmate Brennan. Then sitting Justice Felix Frankfurter also did not remember Brennan, who attended Harvard when he was an instructor there. Moreover, while Brennan finished law school strong, his grades were described as "mediocre" his first two years. *Ibid.*

[20]*Ibid*.

[21]David Halberstram, "The Common Man as Uncommon Man" in Rosenkranz and Schwartz, *supra* note 17, at 23.

New Jersey by being "vouched" for by respected Republicans.[22] Later, Eisenhower was reported to be "shocked to discover that he had appointed a liberal to the court."[23] Brennan retired from the Court on July 20, 1990, at age 84, and died seven years later on July 24, 1997, at age 91.[24]

Brennan's mark on the High Court, and therefore our nation, is unmistakable. It has been said, "his most enduring legacy was the application of almost all of the protections of the Bill of Rights to state, county and local governments."[25] However, Brennan himself had even loftier ambitions. Upon his retirement, he remarked: "It is my hope that the Court during my years of service has built a legacy of interpreting the constitution and federal laws to make them responsive to the needs of the people whom they were intended to benefit and protect."[26] Asked what his favorite case was, he responded that, like his children, he could not chose one favorite, but high on his list of accomplishments was his role in "protecting and promoting individual rights and human dignity."[27] Brennan's goal was simply to reach, by whatever means, what he thought was the correct end: human dignity and the protection of individual rights.

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[22]*Ibid*. Indeed, Senator Joseph McCarthy was the only Senator to oppose Brennan's nomination to the High Court. Leahy, supra note 18, at 266.

[23]Leahy, *supra* note 18, at 266.

[24]Supreme Court Justices Biographies, Cornell Law School web site. http://www.law.cornell.edu/cgi-bin/foliocgi.exe/Justices.

[25]Neisser, *supra* note 15, at 8. On a more personal note, Neisser added: "Many of us who chose the law profession in the 1960's did so because of Justice Brennan's assurance that the law, and in particular constitutional law, can be a positive force for social change. He did not fail us." *Ibid*., at 10. In short, Brennan's liberal legacy is unmistakable. His "radically egalitarian jurisprudence" enticed an "entire generation" to look to him for guidance. Peter Irons, *Brennan vs. Rehnquist: The Battle for the Constitution*. (New York: Alfred A. Knopf, 1994) 323, 328.

[26]Marcus and Kamen, *supra* note 14, at A1.

[27]William Brennan, in Rosenkranz and Schwartz, *supra* note 17, at 18.

In sum, Justices Brennan and Scalia appear on the surface to have more in common than not; both were born into immigrant families in New Jersey, both were raised in the Catholic tradition, both attended reputable east coast universities, both were trained in the legal profession at Harvard Law, and both were appointed to the High Court by a Republican President. Yet the fact remains that the two justices developed jurisprudential philosophies that were decidedly different. The remainder of this chapter explores the reasons why two jurists with such seemingly similar beginnings matured to advocate opposing jurisprudential visions.

Developing an Interpretive Methodology.

Justice Scalia's Influences

Justice Scalia's jurisprudential vision is shaped by his views on textualism more than any other aspect of his general legal philosophy. Notre Dame Law Professor Douglas Kmiec said of Scalia, "he is the Justice who works the hardest to construct a coherent theory of constitutional interpretation that does not change from case to case."[28] Since his theory of textualism is the most pervasive thread that runs through all of his legal opinions, it is appropriate to examine why, or perhaps more appropriately how he chose textualism. While a variety of factors no doubt contributed to the formation of Scalia's jurisprudential vision, his religion, parental influence, and education deserve special attention.

[28]Marquand, *supra* note 12.

Religious Influences. It is no secret that Scalia is by all accounts a devout Catholic.[29] While much has been written on the influence of a judge's personal religious views on their professional work, Scalia seems to defy common wisdom on how a Catholic should think. According to one scholar, Protestants should show deference to the text, as they do with their own Scriptures while Catholics should care less about text and more about unwritten traditions.[30] Scalia does not fit this generalization, and another scholar has offered explanation as to why: Scalia's unique religious education.

Author George Kannar stated that "it would be surprising" if the Catholic background of the then sitting three Catholic justices (Brennan, Scalia and Kennedy) "were to be without significance for their behavior on the Supreme Court."[31] He then argued that it was Scalia's pre-Vatican II Roman Catholic education that explains why he seemingly ignores the High Catholic thought of natural law and moral choices in favor of pragmatic formalism and the text.[32] Since Scalia, typical of sitting Supreme Court jurists, has not elaborated on his upbringing or revealed his personal beliefs, Kannar examines the testimony of Scalia's Catholic peers.

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[29]While Scalia attempts to keep his personal life separate from his job on the Court, his religious affiliation is frequently the subject of public commentary. In April of 2006, Scalia made national news when he was confronted by a newspaper reporter while exiting a church and questioned on his impartiality on church-state issues. Scalia dismissed the accusation of impropriety, noting that it was none of his critics business what he did in his personal life. "Open to interpretation," *Washington Post*, 3 April, 2006. On a less critical note, one biographer wrote that Scalia's marriage, which produced nine children, was "enriched" by he and his wife's "deep faith in Catholicism." Leahy, *supra* note 11, at 299.

[30]Sanford Levinson, "The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices," 39 *DePaul L. Rev*. 1047 (1990).

[31]George Kannar, "The Constitutional Catechism of Antonin Scalia," 99 *Yale L. Jour*. 1311 (1990).

[32]*Ibid*. at 1312.

Religious historian Gary Wills has stated that the experience of growing up Catholic in pre-Vatican II America was like inhabiting "a world of quaint legalisms," to which Kannar connected Scalia's "quaint," legalistic theory of textualism.[33] Kannar noted that "in Scalia's generation, traditional Catholic education and traditional legal education thus conspired to promote strong respect for the 'rules laid down.'"[34] Another Catholic of Scalia's generation, Mary McCarthy, wrote that Catholic education forced the learning of a special language and Catholics tended to place special emphasis on words.[35] As to why the Higher Catholic thought did not seem to influence Scalia, Kannar points to another Queens-raised, Italian-American Roman Catholic, Mario Cuomo, who stated that Catholicism in urban New York at that time was closer to the "peasant roots of its practitioners than the high intellectual traditions of Catholic theology and philosophy."[36]

While to a lesser degree than in the past, Catholics are still faced with the stigma that their private beliefs will interfere with their public duties. The fear is usually manifested in two ways, first that a Catholic judge will be subservient to the instructions of his clerical leaders, and second, that Catholicism would make a judge more likely to "override positive law in furtherance of moral commands."[37] Just as Scalia was graduating from Harvard Law in the 1960's, Presidential candidate John F. Kennedy was

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[33]*Ibid*. at 1314.

[34]*Ibid*. at 1315.

[35]*Ibid*. McCarthy noted that not only does the patterns of religious training emphasize terms, but that Catholic culture does as well, citing the Catholic tradition of giving their children names based on personal qualities of various saints. *Ibid*. at 1316.

[36]*Ibid.* at 1315.

[37]Donald Beschle, "Catechism or Imagination: Is Justice Scalia's Judicial Style Typically Catholic?" 37 *Villanova L. Rev.* 1331 (1992). As to the question asked in the title of Beschle's article, he concludes that Scalia's views are not typically Catholic. *Ibid*.

dealing with this same stigma. JFK promised America that he believed in a system where "no religious body seeks to impose its will directly or indirectly upon the general populus or the public acts of its officials."[38]

Catholics were forced to "take special pains to distance themselves from their Church, to distinguish their public from their private selves."[39] The argument can be made that Scalia's ridged, formalistic textualism aids in proving that he has eradicated any personal, Catholic or otherwise, preferences in favor of a strict, formalist philosophy that demonstrates he is not under the subordination of the Pope, and is not likely to vote according to his religious moral commands. Whether Scalia specifically chose textualism to solely avoid these common criticisms is doubtful, but the legal theory he espouses as well as his voting record certainly should dispel all fear that he is a pawn of his religion.[40]

The Early Years: Parental Influence and Education. It is axiomatic that people's upbringing will have an influence on their worldview and impact their philosophy as an adult, but a special significance can be attributed to the influence of Scalia's father on the later Justice's adherence to a textual interpretation of the Constitution. Justice Scalia's father, S. Eugene Scalia, was a Brooklyn College professor of romance literature and a specialist in, as well as critic of, the fine art of literary translation.[41] Thus, it can be said

[38]Kannar, *supra* note 31, at 1317. JFK made his promise to subordinate personal morality for public commands to a group of Baptist ministers in Houston, TX on September 12, 1960. *Ibid*.

[39]*Ibid*. at 1318, quoting Mario Cuomo.

[40]Scalia has frequently voted against the wishes of the Vatican and his own Bishops on cases involving capitol punishment. *See, e.g.*, *Atkins v. Virginia*, 536 U.S. 304 (2002).

[41]Kannar, *supra* note 31, at 1316.

that for Scalia, "the importance of literalism was--literally--brought home" and most likely discussed around the dining room table.[42]

It has also been noted that Scalia was "raised in the psychological security and academic rationality of a bourgeois Roman Catholic family," and thus "had the life of an exceptional child of the East Coast Roman Catholic intelligentsia."[43] If Scalia's social and cultural identity truly are factors that eventually lead to his constitutional theory, it should be noted that Scalia was raised in a home where rebellion was best done with the written word. Despite his immigrant roots, young Antonin was insulated from economic uncertainty facing the working-class America in the post World War II years, he was isolated from nativist hostility by attending insulated catholic schools, and he matured before the onset of the political activism of the civil rights movement and Vietnam War era.[44] In short, he had less opportunity to relate to the downtrodden masses in need of "human dignity" than Justice Brennan.

Scalia biographer Richard Brisbin, unpersuaded that social and religious influences served as the foundation for Justice Scalia's textualist jurisprudence, proposed his own theory: Justice Scalia's jurisprudential vision can be attributed to his education in law at Harvard. Brisbin notes that in the late 1950's several notable Harvard faculty members began to formulate an argument to counter Legal Realism, a theory from the

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[42]*Ibid.* Kannar examined some of the scholarly writing of the elder Scalia and discovered, "like son, like father," the first professor Scalia believed that "to avoid destroying 'what is unique' in reading any text, 'literalness is . . . essential.'"[42] This leads Kannar to conclude that "'words' must have been drawn especially sharply for Antonin Scalia; and the fundamental importance of preferring strict fidelity over loose interpretive 'translation' must have been strongly emphasized." *Ibid*. at 1317.

[43]Brisbin, *supra* note 6, at 11.

[44]*Ibid.* Scalia's father was born in Sicily and immigrated to the U.S. His mother was born in the U.S. to parents who immigrated from Italy. Leahy, supra note 11, at 299.

1920's and 1930's that all negative aspects of the law should be pragmatically changed.[45] Critics of Legal Realism fashioned a new jurisprudencial methodology, termed Reasoned Elaboration, based on the early work of Felix Frankfurter. This new methodology proposed that the elected representatives were responsible for maintaining democratic consensus, and attempted to curtail the "remedial judicial action of the [Legal] Realists through procedural rules encouraging judicial passivity in policy conflicts."[46] Also, at approximately this same time, Herbert Wechsler published his now classic work on Neutral Principles.[47]

Brisbin argues that, as a top student at Harvard Law from 1957 to 1960, Scalia was sure to have heard and ruminated over all of these various legal ideologies. Moreover, citing a private letter he received from Justice Scalia in 1995, Brisbin concludes "[e]vidence exists that Scalia accepted many of the jurisprudencial precepts taught by the Reasoned Elaberationists on the Harvard faculty."[48]

In short, while speculation, strong arguments can be made that Justice Scalia chose the constitutional interpretive method of originalist textualism in part because of influences stemming from his religion, parental influences, early education, and legal education. However, it should not be ignored that other factors within his jurisprudential

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[45]Brisbin, *supra* note 6, at 14. Legal realism was heavily policy-oriented and based on the same norms as New Deal liberal political thought. *Ibid*. It is worthy of note that Brennan was at Harvard Law during the height of the Legal Realism movement. For an excellent overview of the legal realism movement, although sympathetic to its philosophy, *see* William Fisher III, Morton Horwitz, and Thomas Reed, *American Legal Realism* (New York: Oxford University Press, 1993).

[46]Brisbin, *supra* note 6, at 15.

[47]Herbert Wechsler, "Toward Neutral Principles of Constitutional Law" 73 *Harv. L. Rev.* 1 (1959).

[48]Brisbin, *supra* note 6, at 15.

vision, specifically his advocacy of the rule of law, judicial restraint, and deference to the democratic branches on policy issues, closely complement his choice of textualism.

Justice Brennan's Influences

Like Justice Scalia, Justice Brennan is nearly synonymous with the constitutional interpretive philosophy he so strongly advocated, in Brennan's case the "Living Constitution" method. However, unlike Justice Scalia, it is hard to make the argument that factors early in Justice Brennan's life caused him to develop a single and principled methodology for interpreting the Constitution. Rather, it seems more likely that Justice Brennan developed a social philosophy that mandated he "do good," which he defined as advocating human dignity and individual rights, and he subsequently simply chose the Living Constitution interpretive method because it more often than not was a useful tool to help him reach his desired ends.

Religious Influences. Like Scalia, Justice Brennan was raised a Catholic and faced the same prejudices.[49] Since Brennan entered public service before the groundbreaking work of JFK in the early 1960's, he no doubt was conscious of the additional scrutiny his religion would draw. Unlike Justice Scalia, Brennan made no effort to follow a ridged and formalistic jurisprudence that would demonstrate his independence from religious influences. In fact, Brennan's proclivity to decide issues through the use of moral and value judgments forced Kannar to state that "if any of the Catholic Justices has adhered to a Thomastic analytic construct in approaching moral issues, it is easier to make the case that his name is Brennan, not Scalia."[50]

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[49]Beschle, *supra* note 37, at 1331.

[50]Kannar, *supra* note 31, at 1312.

However, it soon became apparent that it was Brennan's voting record, not his jurisprudence, that most clearly demonstrated he was not a puppet of the Church. Brennan's views on issues such as obscenity,[51] school prayer,[52] access to X-rated movies,[53] contraception,[54] and abortion,[55] among others, were clearly contrary to the teachings of the Church. Brennan's opinions were, however, completely compatible with his own notions of morality, which boiled down to concern for human dignity and individual rights. Towards the end of his legal career, Justice Brennan stated that his personal religion never interfered with his duties on the Court.[56]

The Early Years. Although Justice Brennan was raised by immigrant parents in a Catholic household in the New York City metro area, like Scalia, it may still be said that Brennan was born into a completely different world than his younger colleague. Brennan's parents were certainly not East Coast intelligentsia, but rather his father worked as a blue-collar coal stoker in Trenton and later Newark. The elder Brennan later became an officer in the union that represented coal workers, and later still a local reform politician in Newark. As a youth, Justice Brennan saw his father and his neighbors struggle through life with little more that ambition and willingness to work, he witnessed

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[51]*Roth v. United States*, 354 U.S. 476 (1957).

[52]*Abington School District v. Schempp*, 374 U.S. 203 (1963).

[53]*Paris Adult Theatre v. Slaton*, 413 U.S. 49 (1973)

[54]*Griswold v. Connecticut*, 381 U.S. 479 (1965).

[55]*Roe v. Wade*, 410 U.S. 113 (1973).

[56]In an interview in 1986, Justice Brennan stated that he dealt with this issue early on at his confirmation hearings. Brennan recounted: "I had settled it in my mind that I had an obligation under the Constitution which could not be influenced by any of my religious principles. As a Roma Catholic I might do as a private citizen what a Roman Catholic does, and that is one thing, but to the extent that that conflicts with what I think the Constitution means or requires, then my religious beliefs have to give way. And, as I say, I settled that in my mind and that took care of it." William Brennan, "A Life on the Court,"

men he knew crippled through work accidents, and he witnessed (and possible experienced) discrimination against his own people in an era when signs such as "No Irish Need Apply" and "No Dogs or Irish Allowed" were common.[57]

Few would argue that these early years did not shape the political views and social values of young Brennan. While not a "cruel life," it is fair to say it was "hard enough," and Brennan never forgot where he came from nor did he forget the frailty and aspirations of the common man when he reached the bench of the highest court in the land.[58]

It should be noted than in addition to coming from a different social and economic class than Scalia, Brennan also was born to a different generation. Brennan served in World War II, and lived through the postwar years in America marked by increased affluence and confidence, which subsequently led to the rise of issues pertaining to social and economic justice.[59] Brennan was also on the Court during the height of the Civil Rights movement. In short, Brennan's background led to the belief that the role of democracy was to seek to free all people of fear, promote toleration, and broaden civil liberties.[60]

New York Times Magazine. 5 October, 1986.

[57]David Halberstram in Rosenkranz and Schwartz, *supra* note 17, at 28. One biographer noted that a "turning point" in Brennan's life occurred in 1916 when the Jurist was only a ten year old boy when he witnessed his father being carried into his house, bleeding, after being beaten by police in a union battle. Thus, for Brennan the Supreme Court Justice, a "police beating would never be abstract." Leahy, *supra* note 18, at 259.

[58]Halberstram in Rosenkranz and Schwartz, *supra* note 17, at 29.

[59]*Ibid*.

[60]David Marion, *The Jurisprudence of Justice William J. Brennan, Jr.*, (New York: Rowman & Littlefield, 1997), 5.

It must also be noted that the years Brennan attended Harvard Law, the late 1920's and early 1930's, corresponded with the height of the Legal Realism movement.[61] As discussed above, Legal Realism was a precursor to the New Deal social thought and advocated pragmatic changes to laws deemed socially ill advised. Brennan could not have "easily avoided discussions of the merits of sociological jurisprudence, which elevated the social good above attention to language and/or precedent."[62] It should not be ignored that during the first three decades of Brennan's life, American thought was dominated by the arguments of "figures such as Woodrow Wilson, Oliver Wendell Holmes, Benjamin Cardozo, and Franklin Roosevelt."[63] As an extra-curricular activity, Brennan became a member of the Harvard Legal Aid Society.[64]

It can not be said with certainty that the above examined factors related to Brennan's religion and early years forced him into consciously choosing the constitutional interpretive method of a Living Constitution. Rather, the evidence seems to illuminate how the young Brennan began to develop a worldview that ultimately found him duty-bound to protect human dignity and individual rights, especially among minorities and those most constrained by majoritarian oppression. Choosing a Constitutional interpretive method was seemingly secondary to Brennan.

The preceding sections discussed the variety of influences which led Justices Brennan and Scalia to develop their respective jurisprudential visions, chief among these

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[61]Brisbin, *supra* note 6, at 14.

[62]Marion, *supra* note 60, at 6.

[63]*Ibid*. David Marion devotes several pages to arguing that Brennan's ultimate jurisprudence was founded upon the thoughts of these four men, and was ultimately crafted to correct the failings of the New Deal's reliance upon progressive legislation. *Ibid*. at 6-11.

[64]Leahy, *supra* note 18, at 262.

influences being the selection of a constitutional interpretive methodology. The following two sections examine and attempt to explain the two jurisprudential visions themselves.

Justice Scalia: Jurisprudential Vision Driven by Textualism

Commentators critical of Justice Scalia's jurisprudential philosophy, including those who simply fail to examine his methodologies in any detail, often summarize Scalia's work on the Court in simplistic terms, attributing to him an essentially politically motivated agenda. For example, Scalia has been labeled the "[s]pokesman for the conservative majority" and charged with advocating rulings that "de-emphasize individual liberty from state regulation, narrow the power of the federal government, and expand the power of the executive branch."[65] Another author included Scalia in his list of shame as one of nine U.S. Supreme Court Justices most notable for favoring government over individual rights.[66] However, a closer examination of Justice Scalia's jurisprudential vision reveals a highly developed and principled philosophy that advocates democratic deference and determinacy of law, primarily through the vehicle of a textualist interpretation of the Constitution.

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[65]Daniel Farber and Suzanna Sherry, *Desperately Seeking Certainty*, (Chicago: University of Chicago Press, 2002), 31.

[66]James Leahy, after the success of his previous book *Freedom Fighters*, penned a follow up in which he listed the Justices who were, in his view, the exact opposite of freedom fighters. He selected Scalia as a Justice who does not champion individual rights from government encroachment, but rather tends to side with the state. James Leahy, *Supreme Court Justices Who Voted With the Government: Nine Who Favored the State Over Individual Rights*, *supra* note 11. Scalia's voting record on the Court has been described as "support[ing] the national Republican party's political aims." Farber and Sherry, *supra* note 65, at 291. Farber and Sherry, commenting on Scalia's writings style, that his "frankness appears more like the rhetoric of a militant political activist" from the "recently revived conservative movement." *Ibid.*, at ix.

Championing Determinacy of Law and Deference to Democracy

As previously discussed, Scalia's jurisprudential vision is anchored in his originalist methodology of Constitutional interpretation termed textualism. The following sections illustrate how Scalia's textualist methodology serves as the vehicle for promoting two other principles foundational to his overall jurisprudential vision: deference to democracy and determinacy of law. Indeed, it may be said that Scalia is every bit as concerned that jurists exercise judicial restraint by deferring to the democratic majority on policy issues, and that the Court respect and promote the determinacy of law, as he is with promoting originalist interpretation.

Democratic Deference. Integral to Scalia's philosophy of justice is the idea that, under a democratic form of government, the people are ruled by the law itself, not by the men charged with giving the law meaning. He has stated, "[i]t is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is."[67] Additionally, Scalia has consistently argued that under our democratic form of government, "value judgments" are the sole responsibility of the democratically elected branches of the government and are not legal matters for a group of nine lawyers to decide.[68] An examination of Scalia's work on the High Court reveals his commitment to judicial restraint and deference to the democratic branches of government. While a comprehensive examination of the jurist's work product is beyond the scale of this paper, Scalia's jurisprudential vision, as applied in the areas of separation

[67]Antonin Scalia, *A matter of Interpretation* (Princeton, NJ: Princeton University Press, 1997), 22.

[68]*Planned Parenthood v. Casey*, 112 S.Ct. 2791, 2875 (1992).

of powers, First Amendment rights, criminal law, and unenumerated rights, clearly illustrate his commitment to democracy as well as determinacy of law.

The separation of powers doctrine is the constitutional principle that prohibits one branch of government from infringing upon or exercising powers belonging to another branch.[69] Scalia was the lone dissenter in two key separation of powers cases, *Morrison v. Olson*, (1988) and *Mistretta v. United States* (1989). In *Morrison*, the majority opinion, written by Chief Justice Rehnquist, utilized a functionalist interpretation and declared that a congressional act allowing the judicial branch to appoint special prosecutors to investigate federal crimes was not a violation of the doctrine of separation of powers.[70] In dissent, Scalia argued that the text of the constitution and legal tradition required a finding that Congress usurped authority belonging to the executive branch in violation of the doctrine of separation of powers.[71] In making his argument, Scalia stated that "it is the proud boast of our democracy that we have 'a government of laws and not of men.'"[72] In *Mistretta*, the majority again took a flexible view of the doctrine of separation of powers and ruled that it was constitutional for the legislative branch to delegate criminal sentencing legislation to an independent sentencing commission

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[69]*Barron's Law Dictionary*, (Barron's Educational Series, Inc. 1996). The principle has been considered by the Supreme Court as a "bulwark against tyranny" that prevents one branch of government from imposing its unchecked will." *United States v. Brown*, 381 U.S. 437, 443 (1965).

[70]*Morrison v. Olson*, 487 U.S. 654 (1988). A "functionalist" interpretation of the separation of powers doctrine has been defined as simply looking for a disruption in the actual balance of powers, and allows for a non-ridged line between the spheres of the differing branches. Fox and McAllister, *supra* note 1, at 243. Scalia's interpretation is described as a "formalist" view, in that he prefers clear lines and three distinct branches of government. *Ibid.*

[71]*Morrison*, 487 U.S at 697.

[72]*Ibid.* Scalia continued his lament: "Evidently, the governing standard is to be what might be called the unfettered wisdom of a majority of this Court." *Ibid.*, at 712.

composed of members of the judiciary branch.[73] Again in dissent, Scalia conceded the pragmatic benefit of creating what he termed a "junior-varsity Congress" to do its work by crafting sentencing guidelines, but nonetheless warned "in the long run the improvision of a constitutional structure on the basis of perceived utility will be disastrous."[74] Likewise, for Scalia, expediency is no excuse for allowing a mere five of nine Justices the power to remake the Constitution in the manner they find it may function best.

Scalia's First Amendment freedom of speech jurisprudence often defies the simplistic "conservative" or "liberal" label. In *Barnes v. Glen Theater*, the majority upheld an Indiana law banning nude dancing as an acceptable constitutional limitation on the right to freedom of expression.[75] Scalia agreed, but wrote separately to denounce the majority's use of a "balancing test" that found the type of "speech" at issue was a "low level" speech and therefore subject to government regulation.[76] Rather, Scalia preferred that the law be upheld because it was a generally applicable law not specifically directed at inhibiting expression, and therefore never merited First Amendment protection in the first place.[77] However, *In R.A.V. v. City of St. Paul*, Scalia, writing for the majority,

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[73]*Mistretta v. United States*, 488 U.S. 361 (1989).

[74]*Ibid.,* 427.

[75]*Barnes v. Glen Theater*, 501 U.S. 560 (1991).

[76]*Ibid.* The government law mandated that dancers wear "pasties" and a G-string." *Ibid*., at 563.

[77]*Ibid.,* 572. Scalia argued generally applicable law that does not directly target speech, will not violate the Free Speech Clause of the First Amendment. Scalia noted that the Indiana law prevented public nudity, not expression through dance, and therefore was a generally applicable law not directly targeting free speech. *Ibid.,* at 573. Noting that "balancing tests" have no use in interpreting constitutional provisions, Scalia criticized the element of whether the speech "offended" the public, stating: "the purpose of Indiana's nudity law would be violated . . . if 60,000 fully consenting adults crowded into the Hoosier Dome to display their genitals to one another, even if there were not an offended innocent in the crowd." *Ibid*. at 575.

struck down a city ordinance prohibiting hate speech because it also prohibited otherwise permissible speech based on viewpoint discrimination.[78] Scalia reasoned that the text of the First Amendment guarantee of freedom of speech, as well as the Court's legal traditions developed over the years interpreting this provision, trumped St. Paul's well-meaning ordinance, no doubt passed by the democratically elected local government with full approval of its citizens.

Justice Scalia also maintains his adherence to promotion of democracy in criminal law cases, most notably in death penalty law. In a rare defense of his views in the popular press, Scalia noted that he consistently upholds capital punishment because it was permitted when the Eighth Amendment was adopted and therefore it must also be permitted today. Scalia did not deny that the American system allows for "evolving standards of decency," but clarified that the instrument of this evolution must be the democratically elected legislature, and not the nine lawyers on the Court.[79] In the recent case *Roper v. Simmons* (2005), Justice Scalia filed a dissent when the Court held that the Eighth Amendment prohibits the execution of individuals less than eighteen years of age. Expressing his dismay with the majority, which ruled that the Eighth Amendment changed meaning due to "the evolving standards of decency," Scalia summarized:

> The Court says in so many words that what our people's laws say about the issue does not, in the last analysis, matter: '[I]n the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the

[78]*RAV. v. City of St. Paul*, 112 S.Ct. 2709 (1992). The ordinance prohibited the "expression" of burning a cross if it constituted hate-speech directed at certain racial, religious and gender groups. *Ibid.* An examination of the entire case suggests the ordinance failed not because it banned fighting words, but because it banned fighting words directed only at certain groups, thereby constituting viewpoint discrimination.

[79]Antonin Scalia, "God's Justice and Ours: Capital Punishment." *First Things*, May 1, 2002, 17.

> Eighth Amendment.' The Court thus proclaims itself sole arbiter of our Nation's moral standards.[80]

Thus, Scalia disagreed that a slim majority of nine lawyers on the Court could and should determine the evolving moral standards of the nation.

Scalia has long been criticized for his reluctance to expand unenumerated or "fundamental" rights.[81] These rights are not expressly stated in the Constitution, hence the term "uneneumerated rights," but the Supreme Court, at various times, has held that "some liberties are so important that they are deemed to be 'fundamental rights.'"[82] Regarding the unenumerated right to an abortion, established under the now infamous *Roe v. Wade* (1973)[83] decision, Scalia has consistently voiced his disapproval, arguing that the life of a fetus is a "value judgment" best left to the democratically elected officials.[84] Similarly, writing on the proposed fundamental right to die, Scalia again stated that such value judgments should be left to the democratic branches. In *Cruzan v.*

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[80]*Roper v. Simmons*, 125 S.Ct. 1183, 1217 (2005).

[81]For example, Scalia biographer Richard Brisbin wrote that Scalia "has refused to experiment and develop fundamental rights, and has called for judicial passivity when the text and legal tradition do not provide for a clear statement of a right or liberty." Brisbin, *supra* note 6, at 289.

[82]Erwin Chemerinsky, *Constitutional Law*, Aspen Publishing (New York: 2001), 695. Examples of "fundamental rights" include the right to procreate, to an abortion, sexual activity, health care decisions and the right to travel. *Ibid.* These rights, created by the Court under the auspices of the Due Process Clauses of the Fourteenth and Fifth Amendments and/or the Equal Protection Clause of the Fourteenth Amendment, are "substantive" liberties in that they protect the substance of the created "right" from government regulation. Ibid. A substantive due process right differs from a "procedural" due process right in that the latter simply ensures that judicial procedures are fairly carried out. Brisbin, *supra* note 6 at 268. Also, once a liberty has been deemed "fundamental," it can not be proscribed or regulated by the government absent a "compelling reason," i.e., it must pass "strict scrutiny" in the same manner as an enumerated Constitutional right such as the right to freedom of assembly or speech. Chemerinsky, *supra*, at 695.

[83]*Roe*, 410 U.S. at 113.

[84]*Casey*, 112 S.Ct. at 2875. Criticizing the Court's judicial activism, Scalia remarked that "the Imperial Judiciary lives," and that its ruling created a "Nietzschean vision of us unelected, life-tenured judges--leading a Volk ." *Ibid.*, at 2884.

Missouri (1990), the majority, over a vigorous dissent by Justice Brennan, ruled that the State has an interest in protecting the life of the terminally ill even if they wish to die.[85] While Scalia agreed with the ruling for the State, he could not accept the Court's analysis and bluntly stated: "federal courts have no business in the field. [When] a patient no longer wished certain measures to be taken to preserve her life, it is up to the citizens . . . to decide through their elected representatives, whether the wish will be honored."[86]

Justice Scalia has made his view on the role of the judiciary very clear; in short, he believes judges "should not be in the business of making policy decisions; rather they interpret."[87] Scalia's deference to the democratic branches on political issues and advocacy of judicial restraint allows him to limit his work to what he terms lawyers work, and absolves him from the obligation of solving all of society's ills. Even when a law may not reflect good policy, Scalia has stated the judiciary's role in no uncertain terms: "Congress can enact foolish statutes as well as wise ones, and it is not for the courts to decide which is which and rewrite the former."[88] In Scalia's view, only when the Court exercises judicial restraint will policy making be left to the elected representatives, thereby promoting democracy.

Rule of Law. Justice Scalia has written that "[i]n a democratic system, of course, the general rule of law has special claim to preference over personal discretion to do justice since it is the normal product of that branch of government most responsive to the

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[85]*Cruzan .v Missouri*, 110 S.Ct. 2841 (1990).

[86]*Ibid.*, at 2859.

[87]Beschle, *supra* note 37, at 1338.

[88]Scalia, *supra* note 76, at 20.

people."[89] Accordingly, Scalia's adherence to the "Rule of Law" is directly related to his general deference to democratic forces: because "the law" as it is written was ratified by the people, the judiciary must follow the rule of law.

Rule of Law, or determinacy of law, is often summarized by the axiom "rule by law, not by men."[90] However, more completely defined, the legal principle stands for the twin mandate that: 1) laws must be clear, predictable, and fairly enforced; and 2) the power of the sovereign, including the independent judiciary, must be checked by establishing the law as the final word.[91] Because Scalia's strict adherence to the rule of law values neutral principles, clear rules, and discourages judicial discretion to "do justice," his jurisprudential philosophy has been compared to "pre-realist formalism" and positivism.[92] Nevertheless, Scalia's notion of the rule of law is uniquely his own, carefully crafted, and artfully defended.[93]

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[89]Antonin Scalia, "The Rule of Law as a Law of Rules," 56 *U. Chi. L. Rev.* 1175, 1176 (1989).

[90]As the name suggests, the doctrine of determinacy of law describes laws that are fixed and generally known, i.e., determinable, as opposed to law that is in flux due to constant reinterpretation by the judiciary.

[91]Eric Segall, "Justice Scalia, Critical Legal Studies, and the Rule of Law," 62 *Geo. Wash. L. Rev.* 991, 993-997 (1994).

[92]*Ibid.*, at 1002. Professors Farber and Sherry have argued that "[a]s a formalist, Scalia is preoccupied with minimalizing judicial discretion and making the enterprise of judging as value neutral as possible," and even maintain that "Scalia is seemingly a formalist first and an originalist second: he cares more about constraining judges than about obeying the framers." Farber and Sherry, *supra* note 73 at 29. Formalism has been defined at the post-Civil War legal thought that started with the "assumption that law is a closed, logical system. Judges do not make law: they merely declare the law which, in some Platonic sense, already exists. The judicial function has nothing to do with the adaptation of the rules of law to changing conditions; it is restricted to the discovery of what the true rules of law are and indeed always have been." Grant Gilmore, *The Ages of American Law* (New Haven, CT: Yale University Press, 1977), 62. Farber and Sherry lament that Scalia's neo-formalism has had so much success that the term "formalism," which has since the times of the great legal realists Oliver Wendell Holmes and Benjamin Cardozo been "something of an insult in legal debate," may now be legitimate again. Farber and Sherry, *supra* note 65, at 37.

[93]Scalia's most complete defense of his view of the rule of law is likely a speech given at Harvard Law titled "The Rule of Law as a Law of Rules," and subsequently published in the Chicago Law Review. See *supra*, note 89. In this speech Scalia noted three practical reasons for adhering to the rule of law: 1)

Scalia has long been a critic of the Court's use of balancing tests and propensity for making moral judgment calls, declaring that "[a]ll I urge is that those modes of analysis be avoided where possible."[94] In place of moral pronouncements, Scalia advocates that "the Rule of Law, the law of rules, be extended as far as the nature of the question allows."[95] Because Scalia finds "predictability" in law absolutely foundational, he has gone as far as stating, "[t]here are times when even a bad rule is better than no rule at all."[96] Of course, Scalia's adherence to the rule of law is also closely linked to his textualist method of interpretation. In an address on the Rule of Law, Scalia remarked that "when one does not have a solid textual anchor or an established social norm from which to derive the general rule, its pronouncements appear uncomfortably like legislation."[97] Likewise, in a shot aimed directly at Brennan's insistence on judicial activism and constitutional flexibility, Scalia remarked, "a rule of law that binds neither by text nor by any particular, identifiable tradition is no rule at all."[98]

A brief examination of some of Scalia's work on the Court reinforces the argument that his jurisprudential vision strongly embraces adherence to the rule of law.

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equality is the key to justice, and ad-hoc judicial discretion based rulings are inherently without equality; 2) Predictability, noting that only by announcing and following clear rules can the judiciary hedge itself in; and 3) Boldness, because following clear laws will embolden a judge to stand up to popular will. Scalia, *supra* note 89, at 1178-1180. Additionally, Scalia also argued that the rule of law should be followed for compelling theoretical reasons as well. Specifically, judges are charged with interpreting law, not becoming finders of fact. *Ibid.*

[94]*Ibid.*, at 1187. Scalia stated that judges who use balancing tests no longer interpret the law, rather they have conceded there is no "correct" interpretation and have taken on the duties of a jury to find facts that would weigh one way or the other. *Ibid.*, at 1182.

[95]*Ibid*.

[96]*Ibid.*, at 1179.

[97]*Ibid*., at 1185.

[98]*Michael H. v. Gerald D*., 491 U.S. 110, 128 (1989). Scalia , writing for the majority, penned these words as a counter-argument to Brennan's vigorous dissent.

In the area of separation of powers, Scalia blasted the Court for "replac[ing] the clear constitutional prescription that the executive power belongs to the President with a 'balancing test.'"[99] In *Barnes v. Glen Theater*, Scalia again rejects the use of balancing tests, preferring to rely on a careful reading of text, history and tradition in interpreting the free speech clause of the First Amendment.[100] Similarly, Scalia objected to the creation of a new substantive right for protecting the speech of government employees in *Walters v. Churchill*.[101] In *Walters*, Scalia found O'Connor's fact-laden balancing test to have created "intolerable legal uncertainty" because it failed to define a clear line between protected and unprotected government employee speech.[102]

In criminal law cases, Scalia consistently upholds the rule of law. In *Roper*, he declared that the majority's decision made a "mockery" of Hamilton's assurance in Federalist No. 78 that the judiciary was "bound down by strict rules and precedents."[103] Notably, his strict adherence to the rule of law often produced results that are contrary to simplistic notions of conservative ideology, which is widely considered to require a

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[99]*Morrison*, 487 U.S. at 711. Scalia concludes his dissent in grand fashion by declaring that, after the Court adopted the "unfettered wisdom of the majority" of the Court as their "governing standard," what was left was "not only not the government of laws that the Constitution established; it is not a government of laws at all." *Ibid*., at 712.

[100]Scalia closely examined the text of the statute banning nude dancing, and the "history and tradition" of Indiana's law prohibiting public nudity, and determined that Indiana's laws against public nudity from 1831 to the present were always and continued to be generally applicable laws. *Barnes*, 501 U.S. at 573. Additionally, his formalistic, or rule of law based theory, mandated that he not extend freedom of expression to cover nude dancing, but rather find that generally applicable laws don't even raise a Free Speech issue. *Ibid.*, at 576.

[101]*Waters v. Churchill*, 114 S.Ct. 1878 (1994). In *Waters*, Justice O'Connor created a procedural hearing process where claims of free speech violations were heard to weigh the harmfulness of the speech in question.

[102]*Ibid.*, at 1898.

[103]*Roper*, 125 S.Ct. at 1217 (quoting Alexander Hamilton from *The Federalists Papers, No. 78*). Scalia soundly criticized the majority for basing its ruling on the indefinable and amorphous "evolving standards of decency." *Ibid.*

"tough on crime" stance. However, in *Crawford v. Washington*, Scalia limited the state's ability to prosecute while strengthening the rights of the accused.[104] Scalia also sided with criminal defendants and against the government in *Jones v. Thomas*,[105] *Coy v. Iowa*,[106] and *Arizona v. Hicks*.[107]

Predictably, Scalia reserves some of his most poignant rule of law arguments for cases involving the creation of unenumerated "fundamental" rights. As to the right to abortion, Scalia has flatly stated that "[the] Constitution contains no right to abortion."[108] In *Casey*, he stated it was "not reasoned judgment that support's the Court's decision; only personal predilection."[109] In *Michael H.*, Scalia both supported his reliance on "legal tradition" and criticized Brennan's use of "general tradition," writing: "Although assuredly having the virtue (if it be that) of leaving judges free to decide as they think best when the unanticipated occurs, a rule of law that binds neither by text nor by any

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[104]*Crawford v. Washington*, 541 U.S. 36 (2004). Justice Scalia's ruling abrogated the old rule in *Ohio v. Roberts*, 448 U.S. 56 (1980), which merely required that the State prove the out-of-court testimony was reliable. Rather, Scalia, in interpreting the text of the Sixth Amendment Confrontation Clause, relied on tradition and clear rules to find the provision required that testimonial statements by unavailable witnesses are barred from admissibility at trial unless the defendant had prior opportunity to cross-examine the witness. *Ibid.*

[105]*Jones v. Thomas*, 491 U.S. 376 (1989) (arguing in dissent that double jeopardy prevented the defendant's life sentence).

[106]*Coy v. Iowa*, 487 U.S. 1012 (1988) (holding that the Confrontation Clause prevented child-witnesses from testifying via closed-circuit television).

[107]*Arizona v. Hicks*, 480 U.S. 321 (1987) (holding that the police violated the defendant's Fourth Amendment right to be free from unreasonable searches when he moved a piece of stereo equipment slightly to look for a serial number).

[108]*Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 520 (1990).

[109]*Casey*, 112 S.Ct. at 2875. As to O'Connor's middle-position "undue burden test," Scalia assailed it as "doubtful in application as it is unprincipled in origin," and labeled it no more than a "shell game" designed to "conceal raw judicial policy choices" on what was essentially a political issue. *Ibid*., at 2876.

particular, identifiable tradition is no rule at all."[110] In *United State v. Carlton*, Scalia impugned the entire concept of creating unenumerated, fundamental rights, declaring that it is an "oxymoron" to talk of "substantive due process rights as the text of the Due Process Clause guarantees only procedural due process."[111] Accordingly, it is clear that Scalia highly values the principle of the rule of law in his overall jurisprudential vision.

Justice as the Means or Process (Regardless of the End)

Justice Scalia's deference to democratic will, adherence to the rule of law, and above all else, strict devotion to the text of the Constitution has created a rather rigid, formalistic jurisprudential philosophy that often yields surprising results for a "conservative," but highly principled and predictable results nonetheless once his jurisprudential vision is examined and understood. In the end, it may be inferred that Scalia's formalistic adherence to the rule of law and text actually becomes, to him, the pursuit of justice. Put another way, to Scalia, a pragmatic end does not justify the means; rather, properly following the correct procedure *is* the end itself.

Scalia's principled approach is not missed by biographers, who have written, "for all his strongly held views, Justice Scalia nonetheless still seems to be driven by his methodology commitments rather than a desire to reach particular results."[112] However, Scalia's commitment to textualism and neutral principles rather than traditional political viewpoints often surprises and confuses political and legal pundits who track and analyze

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[110]*Michael H.*, 491 at 127 n.6.

[111]*United States v. Carlton*, 114 S.Ct. 2018, 2027 (1994).

[112]Kannar, *supra* note 31, at 1299.

his voting record.[113] Even Scalia's most vocal critics, who label him as too politically conservative, admit that "in scattered cases dealing with such issues as flag burning, the Confrontation clause, and mandatory drug testing, Scalia has parted company with the conservative bloc and joined liberals in affirming specific Bill of Rights protections."[114] Indeed, Scalia's record does show that he will, unlike Brennan, follow the proper process of originalist interpretation even if it leads to an end he may not personally agree with.[115]

In the flag burning case, *Texas v. Johnson*, Scalia not only joined the majority opinion striking down Texas' ban on burning flags authored by Brennan, but in the 5-4 vote it could be said he *gave* Brennan the majority.[116] Scalia's commitment to proper constitutional interpretation regardless of the outcome can also be seen in the Confrontation clause case of *Maryland v. Craig*, in which he again sided with Brennan and the liberals, this time in dissent.[117] The majority opinion allowed young children to testify outside the presence of an accused abuser, a policy that Scalia admitted was a

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[113]Kannar writes, "For Justice Scalia, more than for most other constitutional thinkers, a priori interpretive commitments tend to lead to unexpected outcomes." *Ibid*.

[114]Shultz and Smith, *supra* note 7, at 206.

[115]At least one author, although critical of Scalia's jurisprudence as a whole, admitted that while "Scalia's formalism often leads to majoritarian results, this is a result of the methodology based upon his conception of the rule of law and the appropriate relationships between the judicial and elected branches of government, not simply the result of a desire to reach particular conservative results in specific cases." Segall, *supra* note 91, at 1019-20.

[116]*Texas v. Johnson*, 491 U.S. 397 (1989). Justice Scalia told an anecdote about this case in a speech I had the privilege of attending. After the decision was announced and everyone realized Scalia's defection pushed the 5-4 vote the "liberal" direction, he was forced to face the wrath of conservatives over this very politically charged issue. However, he was surprised at just how close to home the cost of his commitment to the text of the First Amendment would be received. As he told the story, the day after *Texas v. Johnson* was announced, he came down to breakfast where he was greeted by his dear wife with a cold shoulder and the most burnt piece of toast he had ever seen. His first scolding came that morning as she said, (I paraphrase) "since you like burnt flags so much, I thought you might like burnt toast as well.) Antonin Scalia, Acton Institute Speech, 1998.

[117]*Maryland v. Craig*, 497 U.S. 836 (1990).

"reasonable enough procedure."[118] However, the Sixth Amendment clearly stated that "in *all* criminal procedures" the accused has the right to confront the accuser. For Scalia, the original meaning of the text could not be more clear. Writing later of the case, Scalia noted that he had "no doubt that society is, as a whole, happy and pleased with what my court decided. But we should not pretend that the decision did not eliminate a liberty that previously existed."[119] To be sure Scalia had no desire to traumatize little children; however, he was well aware of the danger of allowing the ends to justify the means, and was quite willing to allow the Rule of Law to trump "popular" ends. Thus, Scalia's philosophy of law often leads to decidedly "unconservative" results; such has aiding the down-and-out criminal defendant,[120]and punishing the wealthy and the powerful.[121]

Of course, the cornerstone of Scalia's jurisprudential vision, as well as his notion of justice, is his commitment to textual interpretation. Criticizing the 1892 case *Church of the Holy Trinity v. United States*,[122] in which the court obviously skirted the clear meaning of the text in favor of a more desirable end, Scalia noted that while the Court's interpretation

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[118]Scalia, *supra* note 67, at 43.

[119]*Ibid*., at 44.

[120]See footnotes 104 through 107 and accompanying text.

[121]*Pacific Mutual Life v. Haslip*, 499 U.S. 1, 24 (1991) (relying on legal tradition to find that large punitive rewards are acceptable).

[122]*Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892). In *Church of the Holy Trinity*, the Supreme Court admitted that the church violated the text of an act prohibiting the importation of an alien to perform service for pay in the United States when it contracted with an Englishman to come to New York City to be its rector and pastor. Nonetheless, the Court declined to enforce the immigration act in this situation, writing: "While there is great force to this reasoning, we cannot think congress intended to denounce with penalties a transaction like that in the present case. It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *Ibid.*, at 458-59.

> produced a desirable result; and it may even be (though I doubt it) that it produced the unexpressed result actually intended by congress, [r]egardless, the decision is wrong because it failed to follow the text. The text is the law, and it is the text that must be observed.[123]

Thus Justice Scalia's adherence to textualism, democracy and the rule of law are all part and parcel to his overall theory of justice where the end does *not* justify the means.

Justice Brennan: Jurisprudential Vision Supported by a Living Constitution

Championing Individual Rights and Human Dignity

It is no secret that Justice Brennan is often labeled a liberal, and it would be hard to argue that this label is not largely accurate. One Brennan biographer noted that it did not take long after his appointment to the Court for Brennan to "signal his sympathy with a liberal form of judicial activism."[124] An examination of his work on the bench inspired another biographer to state that "[a]s a collection, Brennan's judicial works quite clearly take a well-defined political stand. Their stance is that of a political liberal on any reasonable understanding of the term."[125] However, as argued in the following sections, Brennan's jurisprudential vision was far more nuanced and principled than the label "liberal" connotes. Justice Brennan described his jurisprudential vision when, upon his retirement from the Court, he summarized the Court's role, what he believed the Constitution stood for, and how it should be interpreted:

> [O]ur Constitution is a charter of human rights and human dignity . . . . Just as notions of dignity have changed with time, so too has our charter. Some

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[123]Scalia, *supra* note 67, at 22.

[124]Marion, *supra* note 60, at 4.

[125]Frank Michelman, *Brennan and Democracy* (Princeton, NJ: Princeton University Press, 1999), 64. Michelman noted that "liberal" is a "much-abused term" and therefore defined his use of the word to describe those "for whom the language of individual rights -- voluntary association, pluralism, toleration, separation, privacy, free speech, the career open to talents, and so on -- is simply inescapable." *Ibid.* at 65

> may disagree with my perspective, but I have approached my responsibility to interpret the Constitution the only way I could--as a twentieth-century American concerned about what the Constitution and the Bill of Rights mean to us in our time. Only from this perspective was the Court able to erect some of liberty's most enduring moments.[126]

Thus, it can fairly be said that Justice Brennan's jurisprudential vision included a Court that was active in pursuing justice and, most significantly, defined justice as reaching the correct end of safeguarding, by any means, the principles of individual rights and human dignity.[127]

Judicial Activism and Promoting Individual Rights. It is not disputed that Justice Brennan advocated judicial activism. He has been called "our generation's model 'activist' constitutional judge, and indeed American history's activist judge without peer except for the early great Chief Justice, John Marshall."[128] Other scholars have stated: "His willingness to cast judges as active participants in the process of adjusting the meaning of the Constitution to suit the times is the hallmark of his jurisprudence."[129] Brennan believed an active judiciary was essential because he witnessed the failings of the elected representatives, during the pre-Civil Rights years, to ensure human dignity and individual rights for all. Therefore, he believed, it was ultimately up to the Supreme Court to interpret the Constitution to meet the changing needs of society. In his words,

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[126]Brennan in Rosenkranz and Schwartz, *supra* note 17, at 18.

[127]In Brennan's own words, his greatest accomplishment on the Court was the "panopy of opinions protecting and promoting individual rights and human dignity." *Ibid.*

[128]Michelman, *supra* note 125, at 5. John Marshall has often been, and I would argue wrongly so, labeled as an activist judge. David Marion devotes an entire chapter towards explaining how activist judges such as Brennan have incorrectly used the work of Founders such as Marshall and Madison to support their theories. *See* Chapter 5, "Brennan's Madison and Marshall: A case Study in Deciphering Language and Thought," in Michelman, *supra* note 125, at 137ff.

[129]Marion, *supra* note 60, at 26.

"Faith in democracy is one thing, but blind faith is another." Thus, he concluded, in direct contradiction to Justice Scalia's view, that judges are more reliable at protecting rights than the popular majority.[130] Significantly, Brennan's belief that the Court should follow an activist track was supported primarily by his adherence to a living constitution interpretive theory. In Brennan's view, "[i]t is the very purpose of the Constitution -- and particularly the Bill of Rights -- to declare certain values transcendent, beyond the reach of temporary political majorities."[131]

Justice Brennan's philosophy of judicial activism in the pursuit of individual liberty is clearly seen in many of his opinions, including *Freedman v. Maryland,* a 1965 case dealing with a state motion-picture censorship statute.[132] Brennan, writing for the majority, stated without reservation that "only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression."[133] He left little doubt that he believed that only the judiciary was capable of properly ensuring individual rights and fundamental liberties.

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[130]William Brennan, "The Constitution of the United States: Contemporary Ratification," 27 *South Texas L. Rev*. 433 (1986). Justice Brennan clearly outlined his distrust of the democratically elected branches to safeguard individual liberties and human dignity in a 1985 speech, declaring: "The view that all that matters of substantive policy should be resolved through the majoritarian process has appeal under some circumstances, but I think it ultimately will not do. Unabashed enshrinement of majority will would permit the imposition of a social caste system or wholesale confiscation of property so long as a majority of the authorized legislative body, fairly elected, approved." Brennan, 1985 speech in Kermit Hall, ed., *Major Problems in American History*, Vol. 2 (Lexington, MA: DC Heath and Co., 1992), at 560.

[131]Brennan, in Hall, *supra* at 560. Of course, to Brennan, the restrictions on the democratically elected government were not limited to those found in the text of the Constitution. He boldly declared: "Each generation has the choice to overrule or add the fundamental principles enunciated by the Framers." *Ibid*.

[132]*Freedman v. Maryland*, 380 U.S. 51, 58 (1965).

[133]*Ibid*.

Brennan's greatest fear, a restrained judiciary that deferred to history, tradition, and majoritarian opinion at the expense of personal liberties, was realized in cases such as *Michael H. v. Gerald D.*[134] In *Michael H*, Justice Scalia wrote the majority decision in which the Court ruled that history and tradition did not allow the extension of substantive due process rights to an unmarried father.[135] Justice Brennan, of course, vigorously dissented. In caustic prose that could have been rivaled by only Scalia himself, Brennan summarized the damage done by the Court: "In construing the Fourteenth Amendment to offer shelter only to those interests specifically protected by the historical practice . . . the plurality ignores the kind of society in which our Constitution exists."[136] Brennan continued, stating the Constitution as interpreted by Scalia was "stagnant" and "archaic . . . steeped in the prejudices and superstitions of a time long past."[137] Scalia had committed the worst judicial blunder Brennan could imagine; he failed to realize that "times change" and "that sometimes a practice or rule outlives its foundations."[138] Forced to dissent in a case where Scalia's textualist interpretation carried the day, a

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[134]*Michael H.*, 491 U.S. at 110.

[135]Scalia opened his opinion by noting that the "facts of this case are, we must hope, extraordinary." *Ibid*. at 113. California had a law that a child born to a married woman living with her husband is presumed to be a child of that marriage. Michael H. claimed he was the biological father of a child born to Carol D., who was married to Gerald D. Michael H claimed his adulterous affair with Carol D. produced the child, and he had the fundamental right to a relationship with his biological child. The Court disagreed.

[136]*Ibid*. at 141.

[137]*Ibid.* Unhappy with the Court's unwillingness to create a new right, out of the nebulous "liberty" interests implied in the Constitution, Brennan wrote: "In a community such as ours, 'liberty' must include the freedom not to conform. The plurality today squashes this freedom by requiring specific approval from history before protecting anything in the name of liberty." *Ibid.*

[138]*Ibid*.

disheartened Brennan could only lament, "I cannot accept an interpretive method that does such violence to the charter that I am bound by oath to uphold."[139]

However, Justice Brennan's jurisprudential vision fostered activism not merely as a power grab for the Court, but rather because Brennan recognized that an activist Court was the most effective means of securing fundamental liberties and individual rights. Brennan was committed to a "society in which personal liberty is sacred."[140] Brennan biographer Frank Michelman concluded Brennan's philosophy could be summarized as follows: "Individuals are what matter in the end."[141] Author David Marion opined that Brennan was committed to "freeing people from the constraints of 'collective' society . . . so that they may define themselves in the image of their own choosing."[142] A brief review of Brennan's work on the Court, in the representative areas of unenumerated rights, access to the courts, and free speech, illustrates his uncompromising commitment to promoting individual rights.

Individual Rights. Brennan's commitment to individual rights is most obviously seen in his penchant for creating new "fundamental" rights not expressly stated in the text of the Constitution. As noted above, Brennan vigorously dissented when the Court refused to extend substantive due process rights to unmarried fathers in *Michael H.*[143] However, Brennan was frequently given the opportunity to successfully outline new

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[139]*Ibid*.

[140]Michelman, *supra* note 125 at 121.

[141]*Ibid*. at 133.

[142]Marion, *supra* note 60 at viii-ix. Marion further defined Brennan's commitment to individual rights as follows: "By the time of his retirement in 1990, he had crafted a rights-oriented jurisprudence that reflected the modern conviction that every person should be able to experience the fullest possible control over their way of life and thereby, gain the greatest possible pleasure from their own existence." *Ibid* at 5.

[143]See *supra* note 135 and accompanying text.

fundamental rights. In *Shapero v. Thompson* (1969), Brennan wrote for the Court when it created the fundamental right to travel, declaring that "the nature of our Federal Union and constitutional concepts of personal liberty unite to require that all citizens be free to travel."[144] In *Eisenstadt v. Baired* (1972), Brennan extended the right to privacy, established in the landmark case *Griswold v. Connecticut*, (1965),[145] to individuals.[146]

However, two cases in particular, in which Brennan wrote in dissent, highlight his commitment to the creation of fundamental liberties that empower the individual. In *Maher v Roe* (1977), the Court limited *Roe v. Wade's* right to abortion by declaring that the government is not constitutionally required to fund abortions through its Medicaid program.[147] In dissent, Brennan wrote that the Court's ruling would force indigent women to "bear children they would not otherwise choose to have," and this was contrary to his interpretation of the Constitution, which guaranteed the "fundamental right of a pregnant woman to be free to decide whether to have an abortion."[148] In his last year on the bench, Brennan also dissented in *Cruzan v. Missouri* (1990), when the Court refused

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[144]*Shapero v. Thompson*, 394 U.S. 618, 629 (1969). In *Shapero*, a one-year residence requirement for obtaining welfare benefits was challenged. In creating a new right based on the Equal Protection Clause, Brennan declared: "Since the classification here touches on the fundamental right to interstate movement, its constitutionality must be judged by the stricter standard, the waiting period requirement clearly violates the Equal Protection Clause." *Ibid.*

[145]*Griswold v. Connecticut*, 381 U.S. 479 (1965). *Griswald* granted the right to privacy to married couples seeking contraceptives.

[146]*Eisenstadt v. Baird*, 405 U.S. 438 (1972). Brennan wrote that "the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matter fundamentally affecting a person as the decision whether to bear or beget a child." *Ibid* at 453. Note Brennan's emphasis of "individual." It has not escaped the attention of legal scholars that Brennan's expansion of the right to privacy to individuals was a "crucial step toward *Roe*." David Souter in Rosenkranz and Schwartz, *supra* note 19, at 307.

[147]*Maher v. Roe*, 432 U.S. 464 (1977).

[148]*Ibid*, at 483-484.

to recognize the right to die.[149] Brennan believed that an individual's liberty interest to be free from unwanted medical treatment was fundamental, and lamented that the Court's ruling, which denied Nancy Cruzan's wish to die, ignored "her will" and "her values."[150] Thus, it may be fairly stated that Brennan placed individual rights above life itself.

Brennan also fostered individual rights through interpreting the Constitution in a manner that guaranteed citizens access to the courts. In *Baker v. Carr* (1962), likely his most famous opinion, Brennan declared that the political question doctrine of judiciability did not prevent the Court from ruling that the Equal Protection Clause required state legislatures actually be representative of the citizens they represent.[151] In *Bivens v. Six Unknown Federal Agents* (1971), Brennan relaxed the sovereign immunity doctrine to allow individuals the right to collect damages from federal agents who violated their Fourth Amendment rights in the course of performing their official duties.[152] In *Colorado River Water Conserv. Dist. v. U.S.* (1976), Brennan narrowed the abstention doctrine to allow individual more unrestrained access to federal courts.[153]

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[149]*Cruzan v. Missouri*, 497 U.S. 261 (1990).

[150]*Ibid*. at 330. Brennan boldly asserted that "the state's general interest in life must accede to Nancy Cruzan's particularized and intense interest in self-determination in her choice of medical treatment." *Ibid.* at 314.

[151]*Baker v. Carr*, 396 U.S. 186 (1962). Tennessee's apportionment act gave rural voting districts more representation in the state legislature than urban districts, which contained higher percentages of racial minority citizens. Brennan wrote the majority opinion, which held that Tennessee's apportionment issue was not precluded from the Court's review as a nonjudiciable political question. A political question is an issue that the courts will usually refuse to address based on the notion that it would be more appropriately decided in a different branch of the government. Brennan's majority opinion, a classic example of an activist ruling, spurred Justice Harlan to write in dissent: "Those who consider the continuing national respect for the Court's authority depends in large measure upon its wise exercise of self-restraint and discipline in constitutional adjudication, will view the decision with concern." *Ibid.* at 339-340.

[152]*Bivins v. Six Unnamed Federal Agents*, 403 U.S. 388 (1971).

[153]*Colorado River Water Conserv. Dist. v. U.S.*, 424 U.S. 800 (1976). The abstention doctrine, based on federalism, sends litigants who appeal first to federal courts back to the state courts when the issue

Thus, Brennan consistently promoted individual liberties through narrowing long-held legal doctrines that tended to keep certain issues out of reach of the High Court.

Finally, Justice Brennan's commitment to individual rights can also be seen in his defense of and desire to bolster already enumerated individual rights such as the First Amendment's guarantee of freedom of speech. In *CBS v. Democratic National Committee* (1973), the Court ruled that a commercial network could refuse to air a political ad.[154] In dissent, Brennan wrote that "[t]he First Amendment values of individual self-fulfillment through expression and individual participation in public debate are central to our concept of liberty."[155] In the landmark ruling *New York Times v. Sullivan* (1964), Brennan greatly expanded the First Amendment guarantee of freedom of expression by requiring public officials prove actual malice before prevailing in a libel case.[156] In a highly controversial ruling, Brennan authored the majority opinion in *Texas v. Johnson* (1989), which expanded the free speech clause to include protection from criminal prosecution for burning an American flag in political protest.[157] Brennan wrote: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive

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involves a state statute which was not addressed by the state's highest court. Kermit Hall, Ed. *The Oxford Companion to the Supreme Court of the United States* (New York: Oxford University Press, 1002), 6.

[154]*CBS v. Democratic National Convention*, 412 U.S. 94 (1973).

[155]*Ibid.* at 201.

[156]*New York Times v. Sullivan*, 376 U.S. 254 (1964). Sullivan was a Commissioner in Montgomery, Alabama during a civil rights demonstration in the 1960's. The *New York Times* published an editorial that contained falsities about Mr. Sullivan. Sullivan sued for libel. Justice Brennan wrote that the Court considered the case "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Ibid*. at 264.

[157]*Texas v. Johnson*, 491 U.S. 397 (1989).

or disagreeable."[158] While Brennan's commitment to the promotion of individual rights is profound, so was his commitment to furthering his notion of human dignity.

Human Dignity. Unlike Scalia's formalistic commitment to the rule of law and the text of the Constitution, Brennan's jurisprudential vision placed high value on what he termed the "everyday human dramas" that lay behind the carefully crafted legal issues presented to the High Court.[159] To Brennan, "[a]t the heart of each drama was a person who cried out for nothing more than common human dignity."[160] Brennan's commitment to human dignity is evidenced in his opinions, such as *Greene v. County School Board* (1968), when he enforced the *Brown v. Board of Education* mandate to racially integrate schools.[161] In *Frontiero v. Richardson* (1973), Brennan managed to obtain intermediate scrutiny in gender discrimination cases, thereby protecting the dignity of the historically oppressed female gender.[162]

However, it is in Brennan's writings on capital punishment that his commitment to human dignity is most evident. After retiring from the Court, Brennan lamented that the "[o]ne area of Supreme Court law" that more than any other "besmirches the constitutional vision of human dignity" was the still constitutional death penalty.[163] In

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[158]*Ibid.* at 414.

[159]Brennan, in Rosenkranz and Schwartz, *supra* note 17, at 18.

[160]*Ibid*. at 19. Brennan added, after referring to a list of cases in which he was successful in protecting the individual: "In each case our Constitution intervened to provide the cloak of dignity." *Ibid*.

[161]*Green v. County School Board*, 391 U.S. 430 (1964). Brennan, in an effort to ensure the dignity of racial minorities, wrote that the burden on the school board was to "come forward with a plan that promises realistically to work, and promises realistically to work *now*." *Ibid*. at 438-39.

[162]*Frontiero v. Richardson*, 411 U.S. 677 (1973). Brennan desired to strike a blow against the "attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." *Ibid*. at 684.

[163]Brennan, in Rosenkranz and Schwartz, *supra* note 17, at 19-20.

Brennan's view, "[e]ven the most vile murderer does not release the state from its constitutional obligation to respect human dignity."[164] In *Furman v. Georgia* (1972), Brennan wrote in a concurring opinion that, in his view, the Eighth Amendment prohibition of cruel and unusual punishment would always render a death sentence unconstitutional, declaring that "death stands condemned as fatally offensive to human dignity."[165]

As evident as Brennan's commitment to promoting human dignity is in his written opinions, this principle is stressed even more forcefully in his many speeches and scholarly writings. At the end of his professional career, Brennan concluded his greatest legacy were those cases, in which he participated in, that promoted "human dignity."[166] In his often quoted 1985 speech on interpreting the Constitution, Brennan repeatedly defended his view of a living constitution interpretive method because it promoted human dignity. Brennan stated that "the vision of human dignity embodied [in the constitution] is deeply moving. It is timeless. It has inspired Americans for two centuries and will continue to inspire as it continues to evolve."[167] To Brennan, "[t]here is no worse injustice than to strip a man of his dignity."[168]

Brennan declared the Constitution "a sublime oration on the dignity of man, a bold commitment by the people to the ideal of libertarian dignity protected through

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[164]*Ibid.*, at 20.

[165]*Furman v. Georgia*, 408 U.S. 238, 305 (1972).

[166]Brennan, in Rosenkranz and Schwartz, *supra* note 17, at 18.

[167]Brennan, in Hall, *supra* note 130, at 566. Brennan defined human dignity as simply "liberty and justice for all," and declared that this notion is "entrenched in our Constitution." *Ibid.*

[168]*Ibid.* at 563.

law."[169] Specifically singling out the "Bill of Rights and the Civil War Amendments," Brennan noted that our great charter "is a sparkling vision of the supremacy of the human dignity over every individual."[170] However, absolutely key to Brennan's jurisprudential vision was the principle that neither the Constitution nor human dignity are fixed in time. Brennan stated in no uncertain terms that "[j]ust as notions of human dignity have changed with time, so too has our charter."[171] Indeed, for Brennan, it is precisely because America's "notions of human dignity" have evolved over the years that it is necessary to utilize a living constitution interpretive methodology to ensure the Constitution remains a relevant and workable document.

Justice as the Right End (Regardless of Means)

Criticizing those who place end results above formalistic procedures, Justice Scalia wrote that activist judges will do anything to make

> the Constitution mean what it *ough*t to mean . . . . If it is good, it is so. Never mind the text that we are supposedly construing; we will smuggle these new rights in, if all else fails, under the Due Process Clause (which, as I have described, is textually incapable of containing them). Moreover, what the constitution meant yesterday it does not mean today.[172]

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[169] *Ibid.* at 562.

[170] *Ibid.* Brennan noted that in addition to the obvious legal issues, such a death penalty cases, the Constitution's guarantees of human dignity apply to the "principle of 'one person, one vote,'" which affirms the "essential dignity of every citizen in the right to equal participation in the democratic process." *Ibid* at 563. The creation of the new fundamental right to government entitlements "affirms the essential dignity of the least fortunate among us." *Ibid.* Likewise, bolstering of equal protection law "ensures that gender has no bearing on claims of human dignity." *Ibid.* at 564. Turning philosophical, Brennan concluded that "[i]f we are to be a shining city upon a hill, it will be because of our ceaseless pursuit of the constitutional ideal of human dignity." *Ibid.* at 565.

[171] Brennan, in Rosenkranz and Schwartz, *supra* note 17, at 18.

[172] Scalia, *supra* note 67, at 39-40.

Obviously Scalia wrote these sarcastic remarks as a criticism of the Living Constitution interpretive methodology. However, it is doubtful whether Brennan would have found them insulting. While he may have preferred a different tone, there is little in Scalia's characterization on a flexible interpretive methodology that Brennan would have disagreed with.

Admirers of Brennan describe his "ends justify the means" philosophy in a more polite manner. In an admitted "tribute" to Brennan, Bernard Schwartz wrote, "The Brennan jurisprudence was in large part based upon rejection of the formal logic and case law that stood in the way of giving effect to the Justice's scale of values. Once Brennan determined what the desired end should be, he never had difficulty in fashioning the legal means to achieve that end."[173] Scholars more critical of Brennan have more bluntly stated, "If a strong dose of judicial activism was needed to achieve this goal [respect for libertarian dignity], then for Brennan the end clearly justified the means."[174]

Indeed Brennan's preference for achieving the desired results regardless of how he reached them, within reason, is evident throughout his legal writings, such as in his affirmative action decisions. Brennan wrote the majority opinion for both *United Steelworkers v. Weber*[175] and *Johnson v. Transportation Agency, Santa Clara County.*[176] In both cases white males complained they were injured by policies that were designed to

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[173]Bernard Schwartz, *supra* note 17, at 40.

[174]Marion, *supra* note 60, at 30. David Marion, in writing of Brennan's broad philosophical views, also stated: "In many respects, the fixation with addressing immediate needs and preferences in the context of rights-based jurisprudence that characterizes Brennan's legal writing represents one form of the trumping of institutional and cultural 'means' by an appeal to the abstract 'ends' of modernity." *Ibid* at 106.

[175]*United Steelworkers v. Weber*, 443 U.S. 193 (1979).

[176]*Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987).

aid minorities, and in both cases Brennan found that the ends of the affirmative action policies to be desirable, and thus constitutional. In *Johnson*, Brennan concluded that there existed an assumption that the government does not wish to impose unusually harsh regulations on private businesses. However, this "assumption" was not at all consistent with his opinions in other race-related cases such as *Katzenbach v. McClung*[177] and *Heart of Atlanta Motel v. United States*,[178] where the court assumed government discriminatory intent. For Brennan, reaching the correct end included protecting the rights of those historically discriminated against -- those whose human dignity was most oppressed by the majority -- and he was not about to let precedent, text, democratically established policy or the rule of law stand in his way.

However, the strongest evidence that Brennan was willing to use suspect means as long as it furthered his goal of achieving the right ends is seen in his willingness to use whatever constitutional interpretive method would work best for the problem he was faced with at the time. Unlike Scalia, Brennan was more than willing to abandon his preferred interpretive methodology and adopt other interpretive methods, even the same methods he usually criticized, if they would further his goals. Brennan is well known for his criticism of history, tradition, and original intent, and yet in several cases he appealed to just those factors when it was to his to his advantage to do so.

After a caustic rebuke of Scalia for his reliance on legal tradition in *Michael H.*, Brennan himself appealed to tradition in his dissent in *Cruzan*, stating: "The right to be free from medical attention without consent, to determine what shall be done with one's

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[177] *Katzenbach v. McClung*, 379 U.S. 294 (1964).

[178] *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

own body, *is* deeply rooted in this Nation's traditions."[179] In *Frontiero v. Richardson*, Brennan based his decision to invalidate an armed services gender discrimination policy, in part, upon congressional "unhappiness with sexual discrimination."[180] Brennan's unusual reliance on congressional original intent in *Frontiero* can be justified with the whole body of his judicial writing only by noting that it served his ends in that particular case.

Brennan also, on more than one occasion, relied on originalist interpretive methods and the historical rulings. He appealed to the history of Chief Justice John Marshall's *Marbury* in *United States v. Raines*,[181] *Baker v. Carr*,[182] and *Bivens v. Six Unknown Named Narcotics Agents*.[183] He also appealed to Marshall's historic decision of *McCulloch* in *Paul v. Davis*[184] and *United States v. Leon*.[185] Most notably, he also appealed to framer original intent, specifically a carefully selected quote from James Madison, in *Leon*.[186]

However, Justice Brennan's strongest appeal to history, and the strongest evidence that he resorted to use of any interpretive method to achieve his desired ends, is found in a part concurrence and part dissent he wrote in the 1970 voting rights case

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[179]*Cruzan*, 497 U.S. at 305.

[180]*Frontiero v. Richardson*, 411 U.S. 677 (1973).

[181]*United States v. Raines*, 362 U.S. 17, 20 (1960).

[182]*Baker v. Carr*, 369 U.S. 186, 208 (1962).

[183]*Bivens v. Six Unknown Named Narcotics Agents*, 403 U.S. 388, 397 (1971).

[184]*Paul v. Davis*, 424 U.S. 693, 732 (1976).

[185]*United States v. Leon*, 468 U.S. 897, 932 (1984).

[186]*Ibid*. at 930.

Oregon v. Mitchell.[187] Brennan dissented because he wished the Court would have allowed Congress to enforce voting rights to eighteen year olds at the state and local level.[188] In his fifty-two page dissent, Brennan examined the meaning of the Fourteenth Amendment, including an extensive historical analysis that attempted to discern framer original intent. Brennan confidently declared that the framers had intentionally "left to future interpreters of their Amendment the task of resolving in accordance with future needs the issues they left unresolved."[189] Thus, Brennan had discovered in history and framer intent not only the authorization, but more amazingly the affirmative *duty* to interpret the Constitution anew to meet the changing needs of society.[190]

Brennan's distaste for constitutional interpretation based on tradition, history and framer original intent is legendary, and yet in *Cruzan* he appealed to tradition, in *Baker* and several other cases he appealed to history, and in *Mitchell* he even appealed to framer original intent, a practice he more frequently denounced as "in truth little more than arrogance cloaked as humility."[191] And yet it can be said Brennan is consistent: Brennan consistently used whatever interpretive means would help him reach his goal of obtaining the correct ends. While this usually entailed using the flexible Living Constitution method, he was open to utilizing whatever worked.

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[187]*Oregon v. Mitchell*, 400 U.S. 112 (1970).

[188]*Ibid*.

[189]*Ibid*. at 275.

[190]*Mitchell* and a few other notable exceptions aside, Brennan is much more famous for his disdain for constitutional interpretation based on tradition, history and original intent. For example, in *Michael H*., Brennan noted that Scalia's reliance on tradition was "misguided" because it "ignores the good reasons for limiting the role of 'tradition' in interpreting the Constitution's deliberately capacious language." *Michael H*., 491 U.S. at 140.

[191]Brennan, in Hall, *supra* note 130, at 559.

Conclusion

Without question the method of constitutional interpretation judges employ in adjudicating cases is foundational to their overall jurisprudential vision. A strong argument can be made that for some judges external factors, such as religion, parental influence and education, have a direct bearing on their conscious and principled choice of a single interpretive method, which, in turn drives their entire jurisprudential philosophy. For other judges, a choice of an interpretive method may be far more a matter of practicality. However, even in the latter case, the selection of an interpretive method that will enable the Constitution to be interpreted in a manner that it remains responsive to an evolving society could also be considered a "principled" choice.

It may be argued of Justice Scalia that external experiences gained in his days before becoming a judge influenced his principled adoption of textualism, and this interpretive method has now become the basis of his entire legal philosophy and jurisprudential vision. In stark contrast, the evidence seems to demonstrate that Justice Brennan first developed a social philosophy that demanded he use the law to safeguard individual rights and human dignity, and then quite simply chose to utilize the Living Constitution interpretive method because it was most often the most convenient tool to help him achieve his judicial goals.

While both men seem to be most often identified with, and inseparably linked to, the political labels "conservative" and "liberal," it must not be forgotten that each has built a comprehensive and principled jurisprudential vision. While their respective methods for constitutional interpretation remains the cornerstone of their overall visions, their jurisprudential philosophies also contain other significant legal principles. One can

not fully appreciate Scalia's principled approach of textualism without also understanding the doctrine of the Rule of Law this interpretive method supports. Also, a textualist interpretation aligns well with principles of judicial restraint and deference to the democratic branches of government in situations containing value judgments. Likewise, Brennan's Living Constitution interpretive method is indelibly linked to his theory of justice, which requires judicial activism and allows the judiciary to form the value judgments necessary to promote individual rights and human dignity. Thus, the entirety of Brennan's jurisprudential vision primarily promotes the pursuit of "just" ends, which are to be reached by any means that can be argued to be legitimate.

CHAPTER SIX

Justices Brennan and Scalia's Establishment Clause Interpretation

Even a cursory examination of the Establishment Clause case voting records of Justices Brennan and Scalia reveals the stark contrast between what the two jurists consider a violation of the Establishment Clause. Of the thirty-one Establishment Clause cases that came before the Court while Justice Brennan was seated, Brennan voted to find an Establishment Clause violation twenty-five times and found the government action did not violate the Clause only six times. For a more detailed examination of the individual cases Justice Brennan found to have either violated the Establishment Clause or been constitutionally acceptable, see Appendix C. Expressed in terms of a percentage, Brennan voted to find the government violated the Establishment Clause 80% of the time the issue came before him.

By contrast, of the twenty-one Establishment Clause cases Justice Scalia has been a part of from his appointment to the High Court through 2005, he has voted twenty times to find the government action did not violate the Establishment Clause, while voting only once to find a violation of the Clause. See Appendix C for a breakdown of Justice Scalia's Establishment Clause voting record. Accordingly, Justice Scalia's voting record reveals he has found the government violated the Establishment Clause in less than 5% of the cases to come before him, and found the government action at issue did not amount to an Establishment Clause violation in a full 95% of the cases in which he has participated. Accordingly, the stark contrast in teh two jurist's voting record mirrors the contrast in thier respective jurisprudential philosophies. While not the only indicator of thier

interpretations of teh Establishment Clause, thier voting records are certainly illuminating.[1] In short, the two jurists came to completely different conclusions on the meaning of the Constitutional mandate that "Congress shall make no law respecting the establishment of religion."[2]

With such a blatantly asymmetrical voting record, it is tempting to simply conclude, if one is already a critic of Brennan, that he must have possessed an attitude of hostility towards religion in the public square. Likewise, critics of Justice Scalia may surmise that his voting record demonstrates he has no regard for the principle of separation of church and state and would prefer a government strongly influenced by religious forces. As noted in previous chapters, Brennan is often labeled a liberal, while Scalia is by all accounts ideologically conservative. In a political sense, the two Justice's respective voting records could be said to simply reflect these simplistic political/ ideological labels. Nonetheless, it is the purpose of this final chapter to argue that, despite their admittedly skewed voting records, both Justice Brennan and Justice Scalia have articulated and followed very principled Establishment Clause interpretations. Both Justices have approached Establishment Clause issues by applying their preferred method of interpretation and have reached conclusions guided by their respective jurisprudential

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[1]The votes referenced in the text above as a finding of an Establishment Clause violation include both the Jurist's agreement with a Court that found an Establishment Clause violation as well as a dissent when the Court found no violation. It is also worthy of note that Justice Scalia would have a perfect record of never voting to find a government law violated the Establishment Clause were it not for the unusual case of *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680 (1989). The issue in *Hernandez* was a rule formulated by the IRS that disallowed tax-exempt charitable contribution status to payments made to the Church of Scientology for "auditing" sessions. The IRS viewed the payments not a "charitable contributions," but rather payment in exchange for a service. Hernandez filed suit claiming the IRS policy violated the Free Exercise and Establishment Clause. The Court ruled the IRS rule did not violate the Constitution. Scalia did not write separately, but joined Justice O'Connor's dissent, which stated that the IRS rule violated the Establishment Clause because it clearly "discriminates against the Church of Scientology." *Ibid*. at 713.

[2]United States Constitution, Amendment I.

visions. They have not, as cynics suggest, simply attempted to advocate their respective ideological positions or personal religious beliefs in Establishment Clause cases.

Justice Brennan and the Establishment Clause

Developing an Initial Theory: Balancing Separation with Accommodation

Leading up to Schempp. In his first Establishment Clause case upon reaching the Supreme Court, Justice Brennan found himself in the unenviable position of dissenting in a case in which the majority opinion was authored by Chief Justice Warren. In *Braunfeld v. Brown* (1961), the Court upheld Philadelphia's mandatory Sunday closing laws.[3] The Court reasoned that the government had a secular reason for mandating a day of rest and the blue law resulted in only an indirect, and therefore permissible, burden on religious freedom.[4] Justice Brennan wrote a dissent, in which he argued that while the law was facially neutral (it did not target any particular religious group), in practice it forced religious minorities to surrender their individual right to the free exercise of their religion.[5]

A year later, in *Engel v. Vitale*, Brennan found himself siding with the majority, which held that state sponsored prayer in public schools violated the Establishment Clause.[6] Choosing not to write separately, Brennan joined the majority opinion written

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[3]*Braunfeld v. Brown*, 366 U.S. 599 (1961). The Court found that the law, which required Orthodox Jews to close their stores on Sundays even though their religious belief also compelled they close on Saturdays, did not violate the Establishment Clause.

[4]*Ibid*.

[5]*Ibid.* at 613. Brennan framed the issue as whether the "State may put an individual to a choice between his business and his religion." *Ibid*. at 611.

[6]*Engel v. Vitale*, 370 U.S. 421 (1962).

by Justice Black, who again cited the "wall of separation" just as he had in the landmark *Everson* ruling several years earlier. Public outcry against the Court's ruling in *Engel* was quick and vehement.[7] Brennan learned early that church and state matters were a volatile issue with the public at large. Perhaps this realization prompted him to spend significant effort explaining his position in the next case in which he voted to strike down a law as a violation of the Establishment Clause.

Abington Township v. Schempp. In *Abington Township v. Schempp* (1963), the Court found that a Pennsylvania law requiring Bible reading in public Schools violated the Establishment Clause.[8] The Court, with only Justice Stewart in dissent, strengthened the wall of separation and established a test in which the "purpose and primary effect" of a law was examined in Establishment Clause analysis.[9] No doubt recognizing the Court's ruling was contrary to the prevailing public opinion, Justice Brennan wrote a seventy-four page concurring opinion in *Schempp*, a full three times longer than the majority opinion. In this concurrence, Brennan articulated his Establishment Clause interpretation, penned a standard he desired the Court to follow when applying the Establishment Clause to government laws, and outlined his theory on how the Court could balance separation and accommodation.

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[7]Historians note that both Catholic and Protestant leaders joined together to voice their disapproval, as well as elected officials from both political parties. Cardinal McIntyre called the decision "scandalizing," Evangelist Billy Graham said he was "shocked and disappointed," and Alabama representative George Andrews complained that the Court had "driven God out" of the schools. Peter Irons, *Brennan vs. Rehnquist: The Battle for the Constitution*, (New York: Alfred A. Knopf, 1994), 120.

[8]*Abington Township v. Schempp*, 374 U.S. 203 (1963). The companion case, *Murray v. Curlett*, struck down a law that required the recitation of the Lord's Prayer.

[9] *Ibid*., at 222.

Brennan's method of interpreting the Establishment clause was none other than his Living Constitution methodology. Declining to follow an originalist interpretation, Brennan noted that "an awareness of history and an application of the aims of the founding fathers do not always resolve concrete problems."[10] Brennan expressed his discomfort with the majority opinion, which relied heavily on history, noting that recorded history is often ambiguous. True to his Living Constitution methodology, he also noted that America had changed significantly since the founding era, and therefore "any views of the eighteenth century as to whether the exercises [at issue] are an 'establishment' offer little aid to a decision."[11] He concluded: "whatever Jefferson and Madison would have thought of Bible reading or the recital of the Lord's Prayer in what few public schools existed in their day, our use of the history of their time must limit itself to broad purposes, not specific practices."[12] As such, Justice Brennan's Establishment Clause jurisprudence, as articulated in *Schempp*, is one of the clearest examples of his Living Constitution interpretive methodology put to practice. Noting that American society had changed, he was compelled to reject an originalist view of the Establishment Clause, electing instead to interpret the Clause with flexibility. In his words, "too literal a quest for the advice of the Founding Fathers . . . is often futile."[13]

While not bound by original intent, Brennan linked his Establishment Clause standard to the broad principles he believed the Clause had always stood for. Therefore,

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[10]*Ibid*, at 234.

[11]*Ibid*., at 238.

[12]*Ibid.*, at 241.

[13]*Ibid.*, at 237. Brennan further stated that "an awareness of history and an appreciation of the aims of the Founding Fathers do not always resolve concrete problems." *Ibid.*, at 234.

he wrote that a law violates the Establishment Clause only when the government activity poses "dangers -- as much to the church as to the state -- which the framers feared would subvert religious liberty and the strength of a system of secular government."[14] Accordingly, at this time, Brennan believed that not all government laws accommodating religion violated the Constitution, but rather:

> What the Framers meant to foreclose, and what our decisions under the establishment clause have forbidden, are those involvements of religious with the secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve government ends, where secular means would suffice.[15]

Brennan's concurrence in *Schempp* is most noticeable for its attempt to balance the seemingly competing principles of separation and accommodation. In a retreat from the majority opinion's "wall of separation" rhetoric, Justice Brennan denied that the Establishment Clause required "every vestige, however slight, of cooperation or accommodation between religion and government" be ruled unconstitutional. Rather, Brennan penned a fairly lengthy laundry list of examples of what he would consider proper government accommodation of religion, identifying at least four categories of government actions that would not violate the Constitution.[16] First, Brennan would allow accommodation in those instances where the Establishment Clause would conflict with an individual's Free Exercise right. Brennan's examples included military and prison

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[14]*Ibid.*, at 295.

[15]*Ibid*., at 294-95.

[16]In a more detailed examination, Author Kristen Engstrom has identified six categories of Establishment Clause cases that would allow accommodation under Brennan's Schempp concurrence: 1) Clauses in conflict cases, 2) religious exercise in legislative bodies, 3) scripture in academic settings, 4) tax exemptions to religious organizations, 5) incidental benefits through welfare programs, and 6) ceremonial deism cases. Kristin Engstrom, "Establishment Clause Jurisprudence: The Souring of Lemon and the Search for a New Test," 27 *Pacific L. J.* 121, 147-49 (1995).

chaplains, draft exemptions to ministers and conscientious objectors, and the relaxing of mandatory school attendance.[17] Government accommodation was warranted in these cases because it was the government who deprived the individuals of their free exercise rights in the first place. Thus, Brennan advocated that greater accommodation should be allowed in those unique circumstances where individuals are historically restricted from practicing religious expression -- the rare situation where promotion of human dignity actually demands government accommodation of religion.

Second, Brennan would allow accommodation in situations where devotional practices are acceptable because they are either academic in nature or non-coercive. Brennan opined that teaching scripture and religion in academic settings is not only constitutionally acceptable but necessary for good history and literature instruction.[18] Likewise, Brennan would allow legislative prayers and chaplains because legislators are adults, and they are unlikely to fear coercion if they were to simply exclude themselves from the prayer.[19] In short, legislators are, or should be, mature enough to tolerate a brief prayer without it becoming an affront to their dignity.[20]

Third, Brennan would also find constitutional some instances of government funding that benefited religion. He noted that it was acceptable to continue the longstanding tradition of tax exemptions for charitable contributions to religious organizations, was allowable for empty state owned property to be used for religious

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[17]*Schempp*, 374 U.S. at 296-299.

[18]*Ibid.*, at 300.

[19]*Ibid.*, at 299-300.

[20]It must be noted that Brennan changes his mind on this particular point in the future. See the discussion of *Marsh v. Chambers, infra.*

meetings on a temporary basis, and acceptable for incidental benefits obtained through welfare programs to benefit religious citizens.[21] Finally, Brennan noted that some forms of what are best described as ceremonial deism are allowable under the Establishment Clause, including: Sunday closing laws, the motto "In God we trust," and the mention of God in the pledge of allegiance. According to Brennan, these accommodations are "interwoven . . . so deeply into the fabric of our civil polity" that they no longer present an affront to a religious minority's dignity.[22] Thus, Brennan imagined minor religious symbols and practices to have lost their pervasive sectarian meaning and to have become cultural; a part of our American heritage. Therefore, their continued practice did not violate the Establishment Clause.

Justice Brennan's Establishment Clause standard, as articulated in *Schempp*, was more a statement of broad, general standards for balancing accommodation and separation than a bright-line rule, such as the *Lemon* test adopted several years later. Brennan crafted his standard with flexibility in mind and based on a Living Constitution interpretive methodology. In addition to interpreting the Clause to fit contemporary needs, his application of the Clause carefully accounts for recognition of the individual right to free exercise of religion and the promotion of human dignity. Justice Brennan put this standard to use throughout the following decades primarily in cases which determined whether government funds to religious organization violated the Establishment Clause

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[21]Brennan noted that an even-handedness definition of neutrality required that religious charities be placed on the same ground as secular charities, and that people fired for refusing to work on the Sabbath could receive welfare program benefits. *Ibid*., at 300-303.

[22]*Ibid.*, at 303.

Brennan's early views on government aid to religion. Not long after his concurrence in *Schempp*, Justice Brennan joined with the Court in *Board of Education v. Allen* (1968) and *Walz v. Tax Commission* (1970), holding that government laws providing aid to religious organizations survived Establishment Clause challenge.[23] In *Allen*, Brennan joined the Court in upholding a New York law that allowed the government to provide text books to parochial school children because it furthered a secular end.[24] In *Walz*, Brennan penned a separate concurring opinion, agreeing with the Court that a property tax exemption for churches did not violate the Establishment Clause, but advocated his standard first outlined in *Schempp*.[25] Brennan reasoned that religious property tax exemptions, applied equally to all religions, were constitutional because religious organizations contribute to their community and "uniquely contribute to the pluralism of American society by their religious activities."[26] As such, religious organizations as a whole, with none endorsed above another, actually promote human dignity and therefore should not be burdened by government.

However, Brennan also found that government aid to religion that furthered sectarian aims was impermissible. In *Lemon v. Kurtzman* (1971), Brennan concurred with the majority not only in finding that government payment of teachers at sectarian

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[23]*Board of Education v. Allen*, 392 U.S 236 (1968); *Walz v. Tax Commission*, 397 U.S. 664 (1970).

[24]*Allen*, 392 U.S. at 236.

[25]The majority decision, authored by Chief Justice Burger, began by noting that the religion clauses were imprecisely written and that the Court's religion clause jurisprudence was inconsistent. He went on to write that what was needed was a "benevolent neutrality." *Walz*, 397 U.S. at 669. He also added the "excessive entanglement" language that would eventually become the third prong of the *Lemon* test." *Ibid*., at 674.

[26]*Ibid*., at 689. Brennan again advocated a Living Constitution interpretation of the Clause by stating that history is "not conclusive" of whether a practice is constitutional, but is nonetheless instructive. *Ibid*., at 681.

schools violated the Establishment Clause, but also in the adoption of the three-part *Lemon* test.[27] While an understatement, it has been succinctly stated that "Justice Brennan embraced the *Lemon* test and defended it from attacks by the Court's accomodationists."[28] In *Tilton v. Richardson* (1971), a case decided the same day as *Lemon*, the Court held that a federal program that provided construction grants for religious institutions of higher learning did not violate the Establishment Clause.[29] Brennan was compelled to dissent, writing that the goals of secular education and sectarian instruction were so intertwined at religious colleges that the grants could not be said to promote only secular ends.[30] A few years later, Brennan dissented again in *Roemer v. Maryland* (1976), when the Court held a Maryland statute that gave grants to religious colleges was constitutional.[31] Brennan wrote that the law should have been found unconstitutional because the funds were given to the college in "unmarked purpose," and such general subsidies were not permissible because, quoting his standard in *Schempp*, they "'tend to promote that type of interdependence between religion and state which the First Amendment was designed to prevent.'"[32] Thus, Brennan continued to apply the broad principles that balanced accommodation and separation, which he outlined in *Schempp*, up through the early 1980's, even after the Court's

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[27]*Lemon v. Kurtzman*, 403 U.S. 602 (1971).

[28]Peter Irons, *Brennan vs. Rehnquist: The Battle for the Constitution* (New York: Alfred A. Knopf, 1994), 122.

[29]*Tilton v.Richardson*, 403 U.S. 672 (1971).

[30]*Tilton*, 403 U.S. at 660-61. Finding that "the dangers of entanglement" were not "insubstantial," Brennan argued the law should be held to violate the Establishment Clause. *Ibid*., at 661.

[31]*Roemer v. Maryland*, 426 U.S. 736 (1976). The law gave money based on the number of students not pursuing theological degrees.

[32]*Ibid.*, at 771 (quoting *Schempp*, 374 U.S. at 236 (1963)).

wholesale adoption of the *Lemon* test. However, the particularly hard-core accomodationist ruling in *Marsh v. Chambers* (1983) pushed Brennan to reexamine his own belief that the Establishment Clause permitted limited accommodation of religion.

Brennan Becomes a Strict Separationsist: Marsh v. Chambers

In his dissent in a1983 ruling upholding legislative prayer, Justice Brennan's interpretive flexibility was poignantly demonstrated when he candidly admitted that "after much reflection, I have come to the conclusion that I was wrong [in *Schempp*]. I now believe that the practice of official invocational prayer . . . is unconstitutional."[33] Brennan's change of heart went well beyond legislative prayers, and it soon became obvious that he had "moved firmly to the Separationist camp."[34]

In *Marsh*, the majority abandoned the *Lemon* test and, relying primarily on history, held that Nebraska's legislative prayers did not violate the Establishment Clause because such prayers had "become part of the fabric of our society."[35] Justice Brennan, in dissent, criticized the Court for adopting an originalist interpretation of the Establishment Clause, articulated a new four-part standard for Establishment Clause analysis, and defended strict separation as the best, if not only, means of protecting individual rights and promoting human dignity in a religiously pluralistic society.

In his dissent, Justice Brennan first vehemently attacked the Court for ignoring the *Lemon* balancing test and relying exclusively on history to find legislative prayers

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[33]*Marsh v. Chambers*, 463 U.S.783, 796 (1983).

[34]Irons, *supra* note 29, at 122.

[35]*Marsh*, 463 U.S. at 792. The Court concluded that "[t]o invoke Devine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Ibid.*

were constitutional. Justice Brennan found that the "unique history" surrounding legislative prayers did not save it from violating the Establishment Clause.[36] He called the majority's reliance on originalism "misguided" because the Constitution is "not a static document whose meaning of every detail is fixed for all time by the life experience of the Framer."[37] Touting his Living Constitution theory, Brennan unapologetically stated that "[o]ur primary task must be to translate 'the majestic generalities of the Bill of Rights, conceived as part of a pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century.'"[38] Applying his flexible interpretive methodology to the Establishment Clause, Brennan noted that the "inherent adaptability of the Constitution and its amendments is particularly important with respect to the Establishment Clause."[39]

After criticizing the majority for relying only on history and original intent, Justice Brennan outlined his new four-part test for determining the purpose of the Establishment Clause, and therefore his new test for determining the constitutionality of an Establishment Clause issue. First, the Clause was designed to "guarantee the individual right to conscience."[40] Thus, Brennan imbued the Establishment Clause with a substantive right for individuals to be free from "coercion" and the "require[ment]" to

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[36]*Ibid.*, at 795.

[37]*Ibid.*, at 816. Brennan added that the use of history is valuable only for finding "broad purposes, not specific practices." *Ibi*d.

[38]*Ibid*., at 816-17.

[39]*Ibid*., at 817. Taking one last swipe at originalism, Brennan concluded that "members of the First Congress should be treated, not as sacred figures whose every action must be emulated, but as the authors of a document meant to last for the ages. Indeed, a proper respect for the Framers themselves forbids us to give so static and lifeless a meaning to their work. To my mind, the Court's focus here on a narrow piece of history is, in a fundamental sense, a betrayal of the lessons of history." *Ibid.*

[40]*Ibid.*, at 803.

support religion.[41] Second, Brennan stated the Establishment Clause mandates "separation and neutrality" to "keep the state from interfering in the essential autonomy of religious life, either by taking upon itself the decision of religious issues, or by unduly involving itself in the supervision of religious institutions or officials."[42] Third, the Clause was meant to "prevent the trivialization and degradation of religion by too close an attachment to the organs of government."[43]

Justice Brennan's fourth and final principle defining the Establishment Clause notes that religious issues are to be removed from the democratic forces that decide other politically-charged issues. Brennan noted that "separation and neutrality help assure the essentially religious issues, precisely because of their importance and sensitivity, not become the occasion for battle in the political arena."[44] Admitting that "most issues" are debated in the public square with a clear winner and loser, Brennan nevertheless stated that "matters that are essentially religious" are not subject to democratic debate because "the Establishment Clause seeks that there should be no political battles, and that no American should at any point feel alienated from his government because that government has declared or acted upon some 'official' or 'authorized' point of view on a matter of religion."[45] Thus, it is Brennan's concern for promoting human dignity that led him to declare that the Establishment Clause required the government to ensure no one, especially a religious minority, felt "alienated."

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[41]*Ibid*.

[42]*Ibid.*, at 803-04.

[43]*Ibid.*, at 804.

[44]*Ibid.*, at 805.

[45]*Ibid*., 805-06.

While both Justice Brennan's old standard in *Schempp* and his later standard in *Marsh* were born of his Living Constitution interpretive methodology, rejected reliance on original intent and history, and upheld a flexible application of the Establishment Clause in order to address contemporary issues, the switch indicated a clear shift toward a strict separationist position. Brennan defended his new strict separationist position by acknowledging that "[t]he argument is made occasionally that strict separation of religion and state robs the nation of its spiritual identity," but quickly added: "I believe quite the contrary."[46] Brennan moved to the strict separationist position because he believed that, in a modern pluralistic society, the "guarantee" of an "individual right of conscience" would not allow many of the minor accommodations he found acceptable in *Schempp*. Additionally, Brennan's eternal quest to provide every individual with human dignity directed him down a path toward strict separation because the accommodations he originally found acceptable he later recognized spawned political battles in which someone could feel "alienated."[47] Brennan's concern for a flexible interpretation of the Establishment Clause, along with his promotion of individual rights and preservation of human dignity, can also clearly be seen in his post-*Marsh* cases, which can be categorized into three general areas: government funding of religion, devotional issues, and ceremonial deism concerns.

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[46]*Ibid*., at 821.

[47]Brennan stated that "The Establishment Clause embodies a judgment, born of a long and turbulent history, that, in our society religion 'must be a private matter for the individual, and family, and the institutions of private choice.'" *Ibid*., at 802 (citing *Lemon*).

Brennan's Record on The Establishment Clause Post-Marsh.

Government Funding of Religion Victories. During Brennan's tenure on the High Court after *Marsh*, he was largely successful in striking down government laws that funneled taxpayer money to religious institutions. As the senior Justice in the majority Justice Brennan assigned himself to write two Establishment Clause case opinions on the subject of government funding of religiously affiliated schools in 1985. Justice Brennan applied the *Lemon* test in *Grand Rapids School District v. Ball* (1985) and *Aguilar v. Felton* (1985), and used the opportunity to rebuke state legislatures who continued to create programs to fund parochial schools. The only Catholic Justice on the Court at the time, Justice Brennan found that the government violated the "primary effect" prong of the *Lemon* test in *Ball*, and the "excessive entanglement" prong in *Felton*. In both cases, Justice Brennan demonstrated his preference for a flexible interpretation of the Establishment Clause by relying on the *Lemon* balancing test, and stressed the purpose of the Clause was to secure individual rights to worship and preserve the dignity of religious minorities.

In *Ball*, Justice Brennan and the majority found that a school district's shared-time and community education programs violated the Establishment Clause because they had the "primary or principle effect of advancing religion."[48] Justice Brennan noted that while "providing for the education of schoolchildren is surely a praiseworthy cause," such a "secular purpose" cannot "validate government aid to parochial schools" when this

[48]*Grand Rapids School District v. Ball*, 473 U.S. 373, 397 (1985). The school district's Shared time program used taxpayer funds to rent religious school classrooms and have public school teachers teach parochial school children during the regular school hours. The community education program used taxpayer money to teach voluntary courses after school hours. *Ibid.*

aid "has the effect of promoting a single religion or religion generally."[49] Thus, by holding that the Establishment Clause prohibits government support for "religion generally," Brennan advocated a decidedly strict separationist position. Brennan came to this conclusion because the dignity of religious minorities demanded it,[50] and because he believed the Establishment Clause guaranteed the "individual" right of every citizen to worship or decline to worship as they saw fit.[51]

In *Felton*, Justice Brennan and the majority held that a New York City law that reimbursed public school employees for teaching low-income and special needs children in parochial schools violated the Establishment Clause because it excessively entangling government and religion.[52] Justice Brennan was again concerned with the dignity of those who would be in the religious minority, noting that "when the state becomes enmeshed with a given denomination in matters of religious significance, the freedom of religious belief of those who are not adherents of that denomination suffers."[53] Accordingly, he concluded the New York City law violated the Establishment Clause because it fostered the "excessive entanglement of church and state in the administration

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[49]*Ibid.*, at 382.

[50]Brennan wrote that religion can "serve powerfully to divide societies and to exclude those whose beliefs are not in accord with particular religions and sects that have from time to time achieved dominance." *Ibid*., at 382. Brennan's Establishment Clause opinions frequently reflect his concern for the protection of the human dignity of oppressed minorities, even religious minorities.

[51]Justice Brennan wrote that the solution to the problem of religious majorities oppressing religious minorities was the Establishment Clause mandate that "the right of every individual to worship according to the dictates of conscience while requiring the government to maintain a course of neutrality among religions, and between religion and non-religion." *Ibid.*

[52]*Aguilar v. Felton*, 472 U.S. 402 (1985).

[53]*Ibid.*, at 409.

of the [funding] benefits."[54] As evidenced by *Ball* and *Felton*, in the mid 1980's Brennan was quite successful in persuading the Court to pursue a strict separationist position in government funding cases.[55]

Devotional Issues. In the area of government endorsement of devotional creeds or practices, Brennan was mostly successful in advancing his strict separationist interpretation of the Establishment Clause. In *Stone v. Graham* (1980), Brennan sided with the majority who found that a Kentucky law that required the posting of the Ten Commandments in every public school classroom was unconstitutional.[56] The majority decision, which found the law violated the first prong of the *Lemon* test because it did not have a secular purpose, apparently was sufficiently reasoned that Brennan elected not to write separately. Brennan authored the majority opinion in *Edwards v. Aguillard* (1987), in which the Court found the Louisiana "Creationism Act," which prevented the teaching of evolution in public schools unless the theory of creationism was also taught, was unconstitutional.[57] Justice Brennan found the act violated the first prong of the *Lemon* test in that it had no secular purpose.[58] Ever concerned with the dignity of the minority, Brennan noted that "the state exerts great authority and coercive power through

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[54]*Ibid.*, at 414.

[55]A little over a decade later, after Brennan had left the Court, both *Ball* and *Felton* were expressly overturned by *Agostini v. Felton*, 521 U.S. 203 (1997). However, at the time, Brennan was largely successful in this area. *See also Texas Monthly v. Bullock*, 489 U.S. 1 (1989) (Justice Brennan writing the majority decision in which a Texas law exempting religious writings from sales tax was held to be government sponsorship of religion and therefore a violation of the Establishment Clause).

[56]*Stone v. Graham*, 449 U.S. 39 (1980).

[57]*Edwards v. Aguillard*, 482 U.S. 578 (1987).

[58]*Ibid*., at 597. Justice Brennan closely examined the legislative history behind the Louisiana act and determined: "The preeminent purpose of the Louisiana Legislature was clearly to advance the religious viewpoint that a supernatural being created humankind." *Ibid.*, at 591.

mandatory attendance requirements, and because of the students' emulation of teachers as role models and the Children's susceptibility to peer pressure" the Creationism Act violated the Establishment Clause. Of course, Brennan was unable to convince the Court that all government support of a devotional practice, no matter how minor, violated the Establishment Clause, as evidence by his dissent in the legislative prayer case *Marsh*.[59]

Ceremonial deism defeats. Justice Brennan's greatest failure to advance a strict separationist interpretation of the Establishment Clause is seen in the area of ceremonial deism cases.[60] His dissents in two Christmas decoration cases, *Lynch v. Donnelly* (1984) and *Allegheny v. ACLU* (1989), highlight Justice Brennan's adherence to a strict form of separationsism, and his inability to convince the Court to follow his lead in banning trivial government accommodation of religion. In *Lynch*, a Pawtucket, Rhode Island practice of displaying Christmas symbols was found constitutional.[61] Writing in dissent, Justice Brennan argued that the longstanding history of allowing the state to display Christmas symbols should not save the practice.[62] Again, voicing his concern for the dignity of the minority, Justice Brennan explained that he would have found the practice unconstitutional because the Christmas displays were "a coercive, though perhaps small,

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[59]See *supra* note 37 and accompanying text.

[60]Ceremonial deism is generally those practices that are of religious origin but have lost much of their religious meaning over many years of acceptance in American culture and have therefore become largely ceremonial in nature.

[61]*Lynch v. Donnelly*, 465 U.S. 668, (1984). As it did in *Marsh*, the Court relied primarily on history to support its holding that the practice did not violate the Establishment Clause: "The City, like the Congresses and Presidents, however, has principally taken note of a significant historical religious event long celebrated in the Western World. The crèche in the display depicts the historical origins of this traditional event long recognized as a National Holiday." *Ibid*., at 680.

[62]Brennan wrote: "Nothing in the history of such practices . . . obscures or diminishes the plain fact that Pawtucket's action amounts to an impermissible governmental endorsement of a particular faith." *Ibid*., at 695. Brennan, true to form, criticized originalist reasoning. In doing so, he pointed out the problems of relying on history by noting that "the intent of the Framers with respect to the public display of

step toward establishing the sectarian preferences of the majority at the expense of the minority."[63]

Likewise, Justice Brennan also dissented to the Court's acceptance of government sponsored Christmas decorations in *Allegheny*.[64] Criticizing the plurality's explanation that displaying religious symbols from several different faiths made the practice acceptable, Justice Brennan wrote that the displays were "not a benign or beneficent celebration of pluralism: it is instead an interference in religious matters precluded by the Establishment Clause."[65]

Brennan, again the champion of individual liberties and dignity, firmly believed strict separation between church and state was the only way to promote these principles in a pluralistic society. In short, whether writing for the majority or voicing frustration in a dissent, Justice Brennan consistently advocated a strict separtionist position from his 1983 *Marsh* dissent up through the end of his tenure on the Court.[66] However, it was his consistent application of a flexible, Living Constitution interpretation of the

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nativity scenes is virtually impossible to discern." *Ibid.*, at 720.

[63]*Ibid.*, at 725.

[64]*Allegheny v. ACLU*, 492 U.S. 573 (1989). Representative of the general disarray in the Court's Establishment Clause jurisprudence, Allegheny had no majority decision, but rather all nine Justices wrote separately. In the plurality decision, the Court held that Pittsburgh's display of a nativity scene was unconstitutional but a display of a menorah, along with other seasonal decorations, was acceptable. Justice Brennan concurred with the Court that the nativity scene violated the Establishment Clause, but dissented with the judgment of the Court finding the menorah was constitutional.

[65]*Ibid.*, at 645. Brennan further noted that "Many religious faiths are hostile to each other," and therefore concluded that respect for individual rights and dignity mandated separation, not government endorsement of multiple faiths. Thus, Brennan concluded that "the display of an object that retains a specifically Christian [or other] religious meaning is incompatible with the separation of church and state demanded by our Constitution." *Ibid*., 637.

[66]Brennan could be called a separationist's separationist. Professor Strossen noted that it was "significant" that fellow law professor Dick Howard, who was known for his "separationist inclination," had said that Justice Brennan "wrote opinions which are as separationist in their language as any I can think of." Nadine Strossen, "Justice Brennan and the Religion Clauses," 11 *Pace L. Rev*. 491, 502 (1991).

Establishment Clause, along with his desire to promote individual liberties and human dignity, that prompted him to conclude the Establishment Clause mandated strict separation. Not surprisingly, Justice Scalia's adherences to a textualist interpretation of the Establishment Clause, as well as his adherence to the rule of law and deference to the democratic forces on policy issues, have led him to a completely different conclusion.

Justice Scalia and the Establishment Clause

Attacking Strict Separation: The Early Scathing Dissents

Opening with a Big Bang: Edwards. Justice Scalia first outlined his Establishment Clause jurisprudence in a trenchant dissent to the Court's majority opinion, authored by Justice Brennan, in *Edwards v. Aguillard* (1987).[67] Far from easing into the fray, Justice Scalia, in his first term on the High Court, took on veteran Justice Brennan, strict separationism and the *Lemon* test, and established a foundation of interpreting the Establishment Clause through textualism with an eye towards promoting the rule of law and deference to democratically established value judgments. Unlike Justice Brennan, Justice Scalia's interpretation of the Establishment Clause did not evolve over time. He has consistently, from his first Establishment Clause case in 1987 to his most recent in 2005, argued that the Clause should be interpreted via textualism, and such interpretation leads to results that can be characterized as nonpreferential accomodationism.

As described in the preceding section, *Aguillard* involved a Louisiana statute that mandated balanced treatment of creation science and evolution in the Louisiana public schools. Justice Brennan, writing for the Court, found the law unconstitutional because it

[67] *Edwards v. Aguillard*, 482 U.S. 578 (1987).

lacked "secular purpose," and therefore failed the first prong of the Lemon test resulting in an Establishment Clause violation.[68] While much of Scalia's dissent was devoted to first arguing that the state law at issue did have a secular purpose and therefore should have passed the *Lemon* test, he also struck his first blow in what would be a long fight to eliminate the three-part test altogether, and even more significantly, briefly outlined how the Establishment Clause should be interpreted in all cases. Justice Scalia concluded:

> the first prong of *Lemon* is defensible. I think, only if the text of the Establishment Clause demands it. That surely is not the case. The Clause states that "Congress shall make no law respecting an establishment of religion." One could argue, I suppose, that any time Congress acts with the *intent* of advancing religion, it has enacted a "law respecting an establishment of religion."; but far from being an unavoidable reading, it is quite an unnatural one. . . . It is, in short, far from am inevitable reading of the Establishment Clause that it forbids all government action intended to advance religion; and if not inevitable, any reading with such untoward consequences must be wrong.

The full impact of this short statement must not be overlooked. First, Justice Scalia plainly states that adjudication of any Establishment Clause issue begins with properly interpreting the Clause. Second, the meaning of the Clause is not determined by any balancing test, but rather by the "text" itself, which he quotes, almost as if he was unsure if Brennan forgot what it was he was interpreting. Third, he concludes that a strict separationist position could only result from an "unnatural" reading of the Establishment Clause. Fourth, he advances an accomodationist position by stating that the Establishment Clause allows the government, in some instances, to "advance religion." And finally, Justice Scalia marks his entrance into Establishment Clause jurisprudence in his first term on the Court by boldly asserting that Brennan's Establishment Clause interpretation "must be wrong."

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[68] *Ibid.*, at 597. Justice Brennan found the Louisiana legislature sought to "employ symbolic and financial support of government to achieve a religious purpose." *Ibid.*

In addition to advancing a textualist interpretation of the Establishment Clause, Justice Scalia also advocated the application of two other principles key to his overall jurisprudential vision: deference to democratic value judgments and adherence to the rule of law. Chastising the Court for its activist proclivity towards reversing value judgments made by the democratically elected branches, Scalia noted:

> Whenever we are called upon to judge the constitutionality of an act of a state legislature, we must have "due regard to the fact that this Court is not exercising a primary judgment but is sitting in judgment upon those who have also taken the oath to observe the Constitution and who have responsibility for carrying on government."[69]

Accordingly, Justice Scalia would have the Court defer to legislative judgments that did not expressly violate the Constitution, and not assume the legislature had unconstitutional motives. Justice Scalia also argued for adherence to the rule of law. Calling for the end of the *Lemon* test, or at least an abolishment of its first prong, Justice Scalia's criticism of his predecessors and new colleges' inconsistent Establishment Clause jurisprudence was nothing short of harsh: "In the past we have attempted to justify our embarrassing Establishment Clause jurisprudence on the ground that it 'sacrifices clarity and predictability for flexibility.' I think it time that we sacrifice some 'flexibility' for 'clarity and predictability.'"[70] Thus, in his first Establishment Clause case, Justice Scalia advocated a textualist interpretation of the Clause, deference to democratic value judgments, and adherence to precise rules not open to subjective interpretation.

Lamenting Separationist Interpretations. As clearly seen in the chart in Appendix A, Scalia joined the Court in the mid 1980's when the *Lemon* test was considered the

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[69]*Ibid.*, at 618 (citations omitted).

[70]*Ibid.*, 640. Scalia added: "Abandoning *Lemon's* purpose test-a test that exacerbates the tension between the Free Exercise and Establishment Clauses; has no basis in the language or history of the Amendment, and, as today's decision shows, has wonderfully flexible consequences-would be a good place to start." *Ibid.*

controlling law in Establishment Clause jurisprudence and separationist interpretations, led by Justice Brennan, dominated the Court's case law. This environment gave Justice Scalia opportunity to dissent in a fair number of Establishment Clause cases. In *Texas Monthly v. Bullock*, (1989), the Court used the *Lemon* test to find a Texas law exempting religious publications from state sales tax violated the Establishment Clause. Scalia wrote a scathing dissent which began, "As a judicial demolition project, today's decision is impressive."[71] Scalia again applied the interpretive methodology of textualism and reliance on originalist methodologies to interpret the text, and concluded the tax exemption was constitutional, writing: "I dissent because I find no basis in the text of the Constitution, the decisions of the court, or the tradition of our people for disproving this longstanding and widespread practice."[72]

Justice Scalia also wrote a dissent in *Lee v. Weisman* (1992), a case in which the Court found prayers at middle school graduation ceremonies were unconstitutional.[73] The *Lee* case came at a time in which many predicted the Court would abandon the *Lemon* test so criticized by the majority of the justices on the Rehnquist Court in the previous several Establishment Clause cases.[74] But in a 5 to 4 decision, the Court found the nonsectarian prayers offered by guest speakers at high school graduation ceremonies violated the Establishment Clause. Justice Kennedy wrote the majority opinion,

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[71]*Texas Monthly v. Bullock*, 489 U.S. 1, 29 (1989).

[72]*Ibid.*, at 33.

[73]*Lee v. Weisman*, 505 U.S. 577 (1992).

[74]The United States Justice Department expressly called for the Court to overturn Lemon. Court historians have noted that "Warren Court holdovers William Brennan and Thurgood Marshall, the court's strictest separationists, had retired and been replaced by more conservative Republican appointees, Davis Souter and Clarence Thomas." David Schultz and Christopher Smith, *The Jurisprudential Vision of Antonin Scalia* (London: Rowman & Littlefield, 1996), 116. Accordingly, many, and possibly even Justice Scalia, believed *Lemon* could finally be disposed of.

mentioning *Lemon*, but relying more on his new coercion test. Justice Scalia wrote a stinging dissent, which criticized the coercion test and reiterated his reliance on original meaning and historical traditions in interpreting the text of the Establishment Clause, his preference for non-subjective principles, and his deference to the will of the people:

> As its instrument of destruction, the bulldozer of its social engineering, the Court invents a boundless, and boundlessly manipulable, test of psychological coercion. 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.[75]

Lamenting that the Court declined to follow clear rules, rather electing to determine if a citizen felt "coerced," Scalia sarcastically remarks that "interior decorating is a rock-hard science compared to psychology practiced by amateurs," a reference to his prior criticism of the Court for determining the constitutionality of government sponsored Christmas decorations based on their arrangement.[76] Scalia concluded his dissent in *Lee* by praising the insignificant reference to the *Lemon* test, but nonetheless clearly expressed his objections to Justice Kennedy's replacement:

> The Court today demonstrates the irrelevance of *Lemon* by essentially ignoring it, and the interment of that case may be the one happy byproduct of the Court's otherwise lamentable decision. 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.[77]

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[75]*Lee,* 505 U.S. at 632.

[76]*Ibid*., 636. Scalia elaborated on his disdain for the new "coercion" test, which declared public prayers at graduation ceremonies unconstitutional because someone in the audience may feel coerced into sitting through the prayer thereby giving the impression that they agreed with it, by declaring: "We indeed live in a vulgar age. But surely 'our social conventions' have not coarsened to the point that anyone who does not stand on his chair and shout obscenities can reasonably be deemed to have assented to anything said in his presence." *Ibid.*, 637.

[77]*Ibid.,* 644.

Justice Scalia also wrote a dissent in *Kiryas Joel Village School District v. Grumet* (1994), where the Court found that a New York school district formed primarily to encompass a particular religious group was a violation of the Establishment Clause.[78] Writing for the majority, Justice Souter mentioned *Lemon* only in two "see also" citations, prompting Justice O'Connor to write a separate concurring opinion calling for an end to the *Lemon* test and the adoption of her endorsement test. In his dissent, joined by Chief Justice Rehnquist and Justice Thomas, Scalia criticized the majority ruling, the *Lemon* test, and O'Connor's suggested replacement, her endorsement test.

Again noting that all Establishment Clause issues essential boil down to a proper interpretation of the Clause, Scalia wrote, "Once this Court has abandoned text and history as guides, nothing prevents it from calling religious toleration the establishment of religion."[79] As to the *Lemon* test and its replacement, he agreed with O'Connor that *Lemon* should be abandoned, but clarified, "[u]nlike Justice O'Connor, however, I would not replace *Lemon* with nothing, and let case law 'evolve' into a series of situation-specific rules." Rather, Scalia summarized the interpretive method he believed should be used in Establishment Clause cases as such: "The foremost principle I would apply is fidelity to the longstanding traditions of our people, which surely provide the diversity of treatment that Justice O'Connor seeks, but do not leave us to our own devises."[80] Accordingly, Scalia's originalist interpretation of the Clause results in an interpretation that defers to the practices of the people and upholds the rule of law.

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[78]*Kiryas Joel v. Grumet*, 114 S.Ct. 2481 (1994).

[79]*Ibid*., at 2506.

[80]*Ibid.,* 2515.

Justice Scalia also disagreed with the holding of the Court in *Allegneny v. ACLU* (1989) and *Hernandez v. Commissioner* (1989), but elected to simply join dissents authored by other Justices.[81] However, as time progressed, the Court collectively moved towards a more accomodationist position, and Scalia found himself more often than not concurring with the Court. However, because Scalia had a jurisprudential vision to advance, he often wrote separately in concurrence to outline his view on how the Establishment Clause should be interpreted.

Adding to the Court's Shift Towards Accomodationism

In *Lamb's Chapel v. Center of Moriches*, (1993) a unanimous Court determined that the government cannot discriminate against religious organizations by banning them from the use of public school facilities after school hours.[82] However, in so ruling, Justice White dredged up *Lemon* for use in the majority opinion, even though the Court's previous two Establishment Clause decisions had not relied on the tri-part test. While he agreed with the ruling, Justice Scalia wrote a separate concurring opinion primarily to attack the *Lemon* test. Using his strongest language yet, and exercising a little literary license, Scalia wrote, "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

[81]*Hernandez v. Commissioner*, 490 U.S. 680 (1989) and *Allegneny v. ACLU*, (1989), 492 U.S. 573 (1989). In *Hernandez*, The Court, using *Lemon*, found that a law disallowing tax deductible status to donations given to Scientologists was constitutional. Scalia joined a dissent by Justice O'Connor that found the law specifically singled out one religious group for disproportionate treatment and therefore violated the Establishment Clause. This is the only case in which Scalia found the government violated the Establishment Clause. In *Allegheny County v. Pittsburgh ACLU*, with only a passing reference to *Lemon*, the Court found a stand-alone nativity scene and Christian cross inside a courthouse was unconstitutional, but a menorah outside on a public building was constitutional. Scalia joined a dissent/concurrence by Justice Kennedy that criticized the use of the *Lemon* test, declaring that it "reflects an unjustifiable hostility toward religion," and therefore all of the religious decorations were acceptable. *Allegheny*, 492 U.S. at 655.

[82]*Lamb's Chapel v. Center Moriches School District*, 508 U.S. 384 (1993).

our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District."[83] His call for the final and permanent demise of *Lemon* was obvious. However, he did not suggest an alternative fact-intensive balancing test as a replacement, like Kennedy's coercion test or O'Connor's endorsement test. Instead, he again advocated for consistent application of the "Rule of Law" as determined through the text, history and tradition.[84]

In addition to his concurrence in *Lamb's Chapel*, the late 1980's and early 1990's was a transition period that saw an ever increasing number of Establishment Clause cases in which the government action withstood constitutional scrutiny. Accordingly, Justice Scalia had reason to join the majority decision. In *Latter Day Saints v. Amos* (1987) and *Bowen v. Kenderick* (1988), the Court found the government action at issue constitutional because it passed the *Lemon* test.[85] In the 1990's, Justice Scalia joined the Court in

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[83]*Ibid.*, 398. Scalia continued: "[*Lemon's*] most recent burial, only last Term, was, to be sure, not fully six-feet under: our decision in *Lee v. Weisman*, conspicuously avoided using the supposed 'test' but also declined the invitation to repudiate it. Over the years, however, no fewer than five of the current justices have, in their own opinions, personally driven pencils through the creatures heart (the author of today's opinion repeatedly), and a sixth has joined an opinion doing so." *Ibid.*

[84]One Scholar noted that "Nowhere is Scalia's preference for the rule of law more clearly evidenced than in his First Amendment Establishment Clause jurisprudence," citing to Lamb's Chapel. Autumn Fox, "An Eagle Souring: The Jurisprudence of Justice Antonin Scalia," 19 *Campbell L. Rev.* 223, 238 (1997). Scalia noted the problem with *Lemon*, and the Court's intermittent use of it, was its flexibility, which provided no concrete principles and flaunted the rule of law: "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 practices it forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely. Sometimes we take a middle course, calling its three prongs 'no more than helpful signposts." Such a docile and useful monster is worth keeping around, at least in somnolent state; one never knows when one might need him." *Lamb's Chapel*, 508 U.S. at 399 (citations omitted).

[85]In *Latter Day Saints v. Amos*, 483 U.S. 327 (1987), the Court found that an exemption for religious institutions which allowed religious based employment discrimination was constitutional. Justice White, applying the *Lemon* test, wrote the opinion of the court in which Scalia joined without comment. Interestingly, in this case it was Justice O'Connor who wrote a separate concurrence to point out the defects of the *Lemon* test, and to promote her endorsement test. Scalia's choice of remaining silent on the *Lemon* issue rather than joining O'Connor's concurrence is worth note. Given his clear dislike of *Lemon* and outspoken nature, it is notable that he chose to remain silent rather then endorse Justice O'Connor's endorsement test.

upholding government accommodation of religion in public schools, without comment, in *Board of Education v. Mergans*, (1990) and *Zorbrest v. Catalina Foothills*, (1993).[86] In the former, the Court used *Lemon*, but in the latter, the tri-part test was ignored, signaling a trend Scalia no doubt approved of. The mid 1990's also saw the first, and up to this point the only, case in which Justice Scalia was given the responsibility of writing for the Court in an Establishment Clause case.

First (and Only) Attempt at a Majority Establishment Clause Opinion

In the 1995 case *Capitol Square v. Pinette*, Justice Scalia was given the task of writing for the Court. By a vote of 7 to 2, the Court held that free speech rights allowed the Ku Klux Klan to place a cross on government property without fear that it would be construed as a government endorsement of religion.[87] However, the outspoken Scalia was unable to garner even four other Justices to join in his reasoning to form a majority, and therefore had to settle for writing only the plurality decision. Justice Scalia, not surprisingly, did not use the *Lemon* test in his majority opinion, but instead presented an

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In *Bowen v. Kendrick*, 487 U.S. 589 (1988), by a vote of 5 to 4 the Court upheld a law providing government funds to religious agencies who dealt with pregnancy-related concerns (as long as they did not provide abortions.) Chief Justice Rehnquist wrote the majority opinion in which the *Lemon* test was used. Scalia, again, remained silent on the *Lemon* test.

[86]*Board of Education v. Mergens* 496 U.S. 226 (1990). In *Mergens*, the Court, by a vote of 8 to 1, found that discriminating against after-school clubs in public schools based on religion was unconstitutional and accommodating them passed the scrutiny of the *Lemon* test. Scalia joined Kennedy's concurring opinion which criticized O'Connor's use of her Endorsement test in the majority opinion, and introduced what would become Kennedy's Coercion test alternative. *Ibid.*, 260-62.

In *Zobrest v. Catalina Foothills*, 509 U.S. 1 (1993), Chief Justice Rehnquist wrote for the majority in the 5 to 4 decision that found a public school district must provide a sign-language interpreter for a child at a Catholic school. Justice Scalia joined the opinion of the Court, which did not use the *Lemon* test. This abandonment of *Lemon* led one scholar to conclude, "While the Court did not explicitly overturn *Lemon*, the Court's silence as to *Lemon* indicates that it is no longer the controlling test in Establishment Clause cases." Jeffrey Stiltner, "Rethinking the Wall of Separation: Zobrest v. Catalina Foothills School District - Is this the End of Lemon?" 23 *Capital U. L. Rev*. 820, 824 (1994).

[87]*Capitol Square v. Pinette*, 515 U.S. 753, 115 S.Ct. 2440 (1995).

argument based on textualism, history, tradition, and generally applicable laws in a line of reasoning that applied specifically to the facts of the case, in which the government action challenged under the Establishment Clause was found an acceptable endorsement of private religious speech in a public forum. Accordingly, Justice Scalia's opinion has limited applicability to Establishment Clause cases in general.[88]

In *Capitol Square*, a hybrid free speech and Establishment Clause case, Justice Scalia held that "[r]eligious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms."[89] If case facts meet these two factually specific categories, "purely private" speech and "traditional public or designated forum," there is no Establishment Clause violation; case closed.[90]

However, Justice Scalia's opinion also contains several of the same general themes that run through all of his Establishment Clause opinions. Scalia attacked Justice O'Connor's endorsement test, which he believed was the recipient of too much acceptance from the Court in resent cases, because he believed it led to unnecessary preclusion of government activity that merely happened to benefit religion. Further criticizing the test, he wrote:

> We must note, to begin with, that it is not really an "endorsement test" of any sort, much less the "endorsement test" which appears in our more recent Establishment Clause jurisprudence, that petitioners urge upon us. "Endorsement"

[88]One scholar has termed Scalia's holding in *Capitol Square* a "per se rule" because it is so factually specific that if another case with the same facts were to come along, it to would be per se constitutional under Scalia's reasoning. David Goldberger, "Capitol Square and Advisory Board v. Pinette: Beware of Justice Scalia's Per Se Rule," 6 *George Mason Law Review* 1 (1997).

[89]*Capitol Square*, 115 S.Ct. at 2450.

[90]David Goldberger, *supra* note 89, at 8. Goldberger opines that "Scalia may well have developed the per se rule because he wishes to accomplish his broader goal of greatly diminishing the role of the courts as enforcers of the Establishment Clause." *Ibid* at 2.

> connotes an expression or demonstration of approval or support. Our cases have accordingly equated "endorsement" with "promotion" or "favoritism." We find it peculiar to say that government "promotes" or "favors" a religious display by giving it the same access to a public forum that all other displays enjoy. And as a matter of Establishment Clause jurisprudence, we have consistently held that it is no violation for government to enact neutral policies that happen to benefit religion.[91]

Also in his *Capitol Square* opinion, Justice Scalia, in a passionate defense of what he believed to be the correct interpretation of the Establishment Clause, strongly criticized not only Justice O'Connor, but also the views held by a number of other justices, shedding some light on why his one shot at writing a majority opinion in an Establishment Clause case ended up becoming a plurality opinion:

> The contrary view, most strongly espoused by Justice Stevens, but endorsed by Justice Souter and Justice O'Connor as well, exiles private religious speech to a realm of less-protected expression heretofore inhabited only by sexually explicit displays and commercial speech. It will be a sad day when this Court casts piety in with pornography, and finds the First Amendment more hospitable to private expletives than to private prayers. This would be merely bizarre were religious speech simply *as* protected by the Constitution as other forms of private speech; but it is outright perverse when one considers that private religious expression receives preferential treatment under the Free Exercise Clause.[92]

Noticeably absent from Scalia's list of viewpoints to criticize is the *Lemon* test. Daring never to evoke even the name *Lemon* in *Capitol Square*, perhaps Justice Scalia wished not to risk conjuring the ghoul up from the grave, happy to leave it a full six feet under.

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[91] *Capitol Square*, 115 S. Ct. 2440 (1995), at 2447. (citations omitted).

[92] *Ibid.*, at 2449. Justice Scalia's terse criticism of reasoning he does not agree with has drawn criticism itself. Indeed, Justice Scalia's rhetoric, while always entertaining, may detract from his usually well-reasoned arguments. An admitted critic of Justice Scalia, Professor Erwin Chemerinsky uses Justice Scalia as an example of how lawyers should not act and, apparently, believes Scalia's lack of tact renders his opinions less forceful. Chemerinsky wrote: "I believe Justice Scalia's opinions are often disingenuous and his rhetoric frequently mean. I say disingenuous because he professes to be value-neutral in his judging, but is consistently imposing his own conservative values. Justice Scalia purports to be following a constitutional philosophy he calls 'original meaning,' but does so only if it gets the conservative results he wants. I am very critical of the rhetoric that he uses on the Court because it is frequently sarcastic, and often filled with attacks on other justices." Erwin Chemerinsky, "Symposium: Justice Scalia and the Religion Clauses," 22 *Hawaii L. Rev.* 501, 503 (2000).

After *Capitol Square*, a full decade passed before Justice Scalia again wrote in an Establishment Clause case. For reason's unknown, the outspoken Jurist concurred with the majority in five cases without writing separately: *Rosenburger v. University of Virginia*, (1995),[93] *Agastoni v. Felton*, (1997),[94] *Mitchell v Helms*, (2000),[95] *Zelman v. Simmons-Harris*, (2002),[96] and *Cutter v. Wilkinson*, (2005).[97] However, it is worthy of note that in each of these five cases the Court declined to use the *Lemon* test and found the government action at issue did not violate the Establishment Clause. Also during this ten-year period, it is notable that the Court found an Establishment Clause violation only once, in *Santa Fe v. Doe*.[98] Justice Scalia joined Chief Justice Rehnquist's dissent in

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[93]*Rosenburger v. University of Virginia*, 515 U.S. 819 (1995). In *Rosenberger*, the Court found that a government-sponsored school could not withhold funds from a religious, student-run newspaper while providing funds to similar secular publications. Justice Scalia joined the majority opinion, authored by Justice Kennedy, which found the practice constitutional based on the concept of neutrality.

[94]*Agostini v. Felton*, 521 U.S. 203 (1997). In *Agostini*, Justice O'Connor wrote the majority opinion overturning Justice Brennan's 1985 ruling *Aguilar v. Felton*, which used the *Lemon* test to find government paid remedial teachers sent to religious schools violated the Establishment Clause. In *Agostini* the Court found this same practice did not endorse religion, and was therefore not unconstitutional. Scalia joined the majority opinion without further comment, even though Justice O'Connor applied her endorsement test, which Scalia found objectionable.

[95]*Mitchell v Helms*, 530 U.S. 793 (2000). In *Mitchell*, the Court ruled that it was permissible for the government to loan educational material and equipment to religious schools because such aid did not amount to governmental indoctrination or advancement of religion. This ruling overruled portions of *Meek v. Pittenger* and *Wolman v. Walter*, two cases from the 1970 where the Court had used the Lemon test to find similar programs violated the Establishment Clause. Justice Brennan had written concurring opinions in both cases.

[96]*Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). In *Zelman*, the Court held that vouchers for private education, including at religious schools, did not violate the Establishment Clause.

[97]*Cutter v. Wilkinson*, 125 S.Ct. 2113 (2005). In *Cutter*, a unanimous Court, in an opinion written by Justice Ginsberg, found that a congressional act increasing the level of protection of prisoner's religious rights did not violate the Establishment Clause. In her opening sentence, Justice Ginsberg, who leans heavily toward separationism, noted that "This Court has long recognized that the government may . . . accommodate religious practices . . . without violating the Establishment Clause." *Ibid.*, at 2117.

[98]*Santa Fe v. Doe*, 530 U.S. 290 (2000). In *Santa Fe*, the Court found that student-initiated prayers at high school football games violated the Establishment Clause. The Court based it reasoning on several factors, including Kennedy's coercion test, O'Connor's endorsement test, and even dredged up the old *Lemon* test. Surprisingly, Justice Scalia declined to write separately, and simply signed on to Chief Justice Rehnquist's dissent.

Santa Fe, but did not write separately. However, Justice Scalia's silence on the subject of the Establishment Clause, indeed on the subject of the proper relationship between religion and government generally, came to an abrupt end only several years into the twenty-first century.

Scalia on the Establishment Clause in the Twenty-First Century

Speaking out too soon: extra curricular activities. As a rule, Supreme Court Justices normally try to keep their private lives and personal opinions to themselves, including their opinions on religious issues. Justice Scalia has not been entirely successful in keeping his personal opinions on religious issues out of the public eye. In 2002, after leaders in the Roman Catholic Church made a statement concerning the Church's official position on capitol punishment, Scalia again came under fire for being both a Catholic and a Supreme Court Justice. In a rare move, Justice Scalia addressed the issue of religion and judicial independence in an open article and following response published in *First Things*. Scalia stated that, because of his adherence to textualist interpretation and the rule of law, no one need worry that he would allow his personal religious views cloud his judgment on legal issues that came before the Court. Scalia went a step further and declared that judges true to both their faith and the law would resign "rather than simply ignoring duly enacted, constitutional laws" that were contrary to their religious faith.[99]

Justice Scalia again found himself in the spotlight in 2003 when he made a public speech at a Religious Freedom Day rally in Fredericksburg Virginia, stating that he

[99]Scalia, "God's Justice and Our's: Capitol Punishment," *First Things* (May 1, 2002), 17. Scalia added that it would be better for a judge to "lead a revolution" than bend the laws to fit his own personal beliefs. *Ibid.*

believed that the judicial branch had "gone overboard in keeping God out of government."[100] Justice Scalia stated that the Supreme Court and other lower courts have misinterpreted the "wall between church and state," and gave as an example the recent ruling from a California federal court that found the Pledge of Allegiance violated the Establishment Clause because it contained the phrase "one nation under God."[101] At the time he made these remarks, the Pledge case was working its way through the federal appellate court system. In October of 2003, Justice Scalia recused himself from *Elk Grove v. Newdow*, (2004).[102] The controversy had far wider-ranging effects, as it gave reason for militant separationist groups, like Americans United for Separation of Church and State, to call for Scalia to step aside from all other future church-state cases, including the two Ten Commandment cases that were on their way to the High Court.[103] However, Justice Scalia did not recuse himself in the two Ten Commandment Establishment Clause cases the Court addressed in 2005, nor did he remain silent on Establishment Clause issues, instead writing a lengthy dissent in one case and a separate concurrence in the other.

Textualism demands accommodation: the Ten Commandment cases. In 2005, the Court released rulings in two companion cases, *McCreary County v. ACLU* (2005) and *Van Orden v. Perry* (2005), both dealing with a display of the Ten Commandments on

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[100]Associate Press, "Justice Scalia: Courts Go Overboard on Church-State Separation." January 12, 2003 at http://www.foxnews.com0.3566.75306.00.html.

[101]*Ibid.*

[102]*Elk Grove v. Newdow*, 542 U.S. 1 (2004). In *Elk Grove*, the Court held that Mr. Newdow lacked standing to challenge the Pledge of Allegiance and never addressed his Establishment Clause claim.

[103]The Rev. Barry Lynn stated that "Scalia sounds like a TV preacher, not a Supreme Court Justice." Gina Holland, Associate Press "Scalia Not Out of All Religion Cases." October 19, 2003 at http://news.findlaw.com/ap_stories/a/w/1154/10-19-2003/2.

government property. In *McCreary County*, the Court held by a 5 to 4 margin that the display of the Decalogue in a county courthouse in Kentucky violated the Establishment Clause.[104] In *Van Orden*, the Court, again by a 5 to 4 vote, held that a monument of the Ten Commandments displayed on the grounds of the Texas State Capitol did not violate the Establishment Clause.[105] Justice Breyer provided the swing vote on the divided Court that resolved each case. In *Van Orden*, Justice Breyer concurred in judgment only, declaring that there is "no test-related substitute for the exercise of legal judgment" in the difficult Establishment Clause decisions, and therefore each fact-specific case must be decided based not upon concrete rules, but rather the totality of the circumstances.[106] In the Texas case, Breyer found the fact that the monument had gone "unchallenged" for forty years and that its setting suggested a historical, as opposed to a devotional, purpose, rendered the monument a "predominantly secular message" and therefore constitutional.[107]

Justice Scalia wrote a short concurrence in which he stated the plurality opinion "accurately reflects" the Court's Establishment Clause jurisprudence that the Court applied some of the time.[108] However, he would have preferred that the Court establish a

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[104]*McCreary County v. ACLU*, 125 S.Ct. 2722 (2005).

[105]*Van Orden v. Perry*, 125 S.Ct. 2854 (2005). In The opinion of the Court, authored by Chief Justice Rehnquist, the monument was found to be constitutional because of the nation's long-standing history of accommodating such vestiges of ceremonial deism, and because "disabling the government from in some ways recognizing our religious heritage" would "evince hostility to religion." Ibid., at 2859. Notably, Rehnquist stated that "whatever may be the fate of the Lemon test in the scheme of Establishment Clause jurisprudence, we think it not useful" in this case. *Ibid.*, at 2861.

[106]*Ibid*, at 2868. Justice Breyer concluded that "[w]hile the Court's prior tests provide useful guideposts . . . no exact formula can dictate a resolution to such fact-intensive cases." *Ibid.*

[107]*Ibid.*, at 2869-70. Justice Breyer found that the monument's context, length of time it had gone unchallenged, and its trivial ceremonial deism status were all facts that weighed in favor of finding it constitutional, while the 10 Commandment display in the Kentucky Courthouse was not.

single Establishment Clause interpretation "in accord" with the history and tradition of the nation that could be "consistently applied."[109] Scalia then stated what he believed that standard should be: "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."[110]

In *McCreary County*, the Court held that a display of historical documents, which included the Ten Commandments, on the wall of a Kentucky courthouse failed the "secular purpose" prong of the *Lemon* test and therefore violated the Establishment Clause.[111] Justice Souter, writing for the majority, first defended the *Lemon* test, then determined that the display's evolution and legislative history were factors the Court must examine and weigh as it determines whether or not the state legislature has a sufficient "secular purpose" in hanging the religious document on government property.[112] Souter concluded the display lacked sufficient secular purpose, and therefore failed to pass Establishment Clause muster. In short, Souter's decision spurned an originalist interpretation of the Establishment Clause, revived the *Lemon* test and its subjective, ad-hoc weighing of factors based on the totality of the circumstances, and ignored the stated intentions of the democratically elected legislature and instead ruled

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[108]*Ibid.*, at 2864.

[109]*Ibid.*

[110]*Ibid.*

[111]*McCreary*, 125 S.Ct. at 2722.

[112]The Court found that the states first display lacked any secular purpose, the second display, which added other historical documents, which were pervasively religious, also lacked secular purpose, and the states third attempt at displaying the Ten Commandments along with other secular documents was an obvious sham and therefore still unconstitutional in light of the "evolution" of the display. *Ibid.*, 2737-2741.

that the Court would decide what the true purpose of the display was. It is hard to image an opinion more likely to elicit a trenchant dissent from Justice Scalia.

Justice Scalia began his dissent in *McCreary County* by going back to the basics. Summarizing church and state theory, he noted there are two basic models; the United States model where the government may accommodate religion, and the French model, where the government must remain secular.[113] Scalia then defended an originalist interpretation of the Establishment Clause, which he noted supports an accomodationist view of the Clause, citing a long laundry list of historic governmental accommodations of religion by the framers and contemporaries of the First Congress who wrote and passed the Establishment Clause as part of the Bill of Rights.[114] Scalia then noted that current public opinion concerning religion in the public square has not changed since the founding era.[115] Scalia concluded his examination of church and state theory by noting that a separationist interpretation of the Establishment Clause is wrong for three reasons: 1) the text does not require separation, 2) history and tradition (originalist reasoning) does not prohibit the government from favoring religion generally, and 3) not even the Living

[113]Scalia noted that the French Model had its origin with Napoleon who spread it around Europe. *Ibid*., 2749. It is significant that Justice Scalia writes of only two models: an accommodationist model and the French secular model. Scalia does not recognize the American separationist position. See Figure 1 in Chapter One.

[114]Scalia lists such practices as "so help me God" added to the Presidential Oath by President Washington, the First Congress's practice of opening with prayer, hiring a chaplain, and declaring days of thanksgiving and prayer, and the evocation of God by the first several presidents, including Jefferson and Madison. *Ibid.*

[115]Scalia noted that President's continue to swear to God; legislatures continue to pray and employ chaplains; the national motto and pledge of allegiance still reference God. *Ibid.*

Constitutionists old favorite "the current sense of our society" demands strict separation.[116]

Having criticized the majority decision for declining to apply originalist methodologies in interpreting the Establishment Clause, Scalia next criticizes the Court for its inconsistency and failure to adhere to principles of the rule of law. Scalia declared that "what distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle."[117] However, Scalia lamented, the majority in *McCreary County* admitted it did not follow set principles when it declared there are no "categorical absolutes" in Establishment Clause cases.[118] Scalia countered that there are special categories in Establishment Clause jurisprudence in which clear principles have been consistently applied, listing as examples public aid to religious institutions must be done on a nonpreferential basis, but religious expression in a public forum can never be "entirely nondenominational."[119]

Scalia also devotes a considerable portion of his dissent to countering the

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[116]*Ibid*., at 2750. Scalia criticizes the Court for interpreting the Establishment Clause based only on post-Everson case precedent, stating: "Nothing stands behind the Court's assertion that government affirmation of the society's belief in God is unconstitutional except the Court's own say-so, citing as support only the unsubstantiated say-so of earlier Court's going back no farther than the mid-20th century. And, moreover, it is a thoroughly discredited say-so." *Ibid*., at 2750.

[117]*Ibid*., at 2751.

[118]*Ibid.*

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[119]*Ibid.*, at 2753. Scalia noted that public expression cases, whenever anyone said anything it would likely be contrary to someone else's religious belief, therefore it could never be "nondenominational." Scalia then went on to add some very controversial language , in which he noted that history reveals that acknowledgment of a single creator was never held to be an Establishment Clause violation, and that history also permits the government "disregard of polytheists, believers in unconcerned deities, and atheists in religious expression in the public forum." Ibid. Thus, Scalia reasoned, because the Ten Commandments are recognized by the monotheistic religions of Christianity, Judaism and Islam, their public display can not be considered an endorsement of a particular religious viewpoint.

arguments Justice Stevens raised in his dissent in *Van Orden*, where the Court found the display of the Ten Commandments was constitutional. Justice Stevens, the member of the Court who most closely follows Justice Brennan's philosophy of Living Constitution interpretive methodologies and strict separationism, had critiqued Scalia's reliance on history and text. Stevens pointed to alternative historical evidence, such the private correspondence of Madison and Jefferson, which showed some founders desired separation, and noted the absence of reference to God in the text of the Constitution, which he also interpreted to support a separtionist interpretation of the Clause. Scalia defended his use of history by noting he relied solely on "official acts and official proclamations of the United States" to inform his view on what the text means, and not the unofficial, private statements of selected men, as did Stevens.[120] Scalia then provided a lesson in textual interpretation by noting that "The Establishment Clause, upon which Justice Stevens would rely, *was* enshrined in the Constitution's text, and these official actions show *what it meant*."[121] Thus, Scalia explained that he relies on the text, and looks to originalist evidence only to aid in determining the meaning of the text.

Scalia also dismissed Stevens' call for abandoning original intent interpretation in favor of adapting the Constitution to modern "democratic aspirations" by simply noting that he has discredited the "Living Constitution theory" elseware, citing to his 1989 law review article on the rule of law.[122] Finally, Justice Scalia criticized Stevens' judicial activist stance by questioning why Stevens would believe "democratic aspirations" could

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[120] *Ibid.*, at 2754.

[121] *Ibid.* (emphasis in original).

[122] *Ibid.*, at 2756.

be found in the Supreme Court's slim majority view of what the Establishment Clause "ought to mean," rather than in the democratically adopted laws of current society.[123]

Thus, in his most recent Establishment Clause opinion, the opinion in which the examination of his jurisprudence in this paper concludes, Justice Scalia advanced the very same themes he argued in his first Establishment Clause opinion, the 1987 case *Edwards v. Aguilard*. First, the Establishment Clause must be interpreted through textualism whereby the text of the Clause controls but its meaning is derived by careful examination of originalist evidence, i.e., history and tradition. Second, the doctrine of the rule of law demands that clear principles on how the Clause is to be utilized be identified and consistently applied. Finally, in matters that boil down to a value judgment, deference must be given to the choices made by the democratic branches of the government. Accordingly, the same principles that form the basis of Justice Scalia's jurisprudential vision consistently guide his Establishment Clause jurisprudence.

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[123]*Ibid.*, at 2756-57. Justice Scalia noted that "Justice Stevens fails to realize" that "our national tradition has resolved . . . conflict in the favor of the majority." *Ibid.*

CHAPTER SEVEN

Conclusion

The intersection of church and state in the United States

Before meaningful direction can be gleaned from Establishment Clause jurisprudence of Justices Brennan and Scalia, a brief review of the factors and principles behind both the Clause and the two jurists' judicial visions is useful. While not universally accepted, it has been argued in this paper that the two religion clauses have significantly different functions and therefore should be addressed separately, even when both issues are raised in a single case. In the world of Establishment Clause theory, the two competing sides can, on the most general level, be divided into the self-defining camps of separationists and accomodationists. In addition to separationist or accomodationist theory, several basic jurisprudential doctrines, such as the role of the judiciary, individual rights vs. deference to democracy, and functionalism vs. formalism, will also necessarily affect a jurist's views on particular the Establishment Clause.

Much effort has been expended in this paper to support the argument that the single most important legal doctrine that will affect a jurist's Establishment Clause jurisprudence is his or her constitutional interpretive methodology. Supporting the premise that the most significant factor in determining a jurist's jurisprudential vision, and therefore his or her views on the Establishment Clause is the method of constitutional interpretation utilized, several chapters have been devoted to examining jurisprudential philosophy generally, and the visions of Justices Brennan and Scalia specifically. Crucial to understanding basic jurisprudential philosophy is an appreciation of the theory and

arguments behind the two primary methods of constitutional interpretation, originalism and the Living Constitution method. As discussed in detail above, Justice Brennan personified devotion to the classic Living Constitution interpretive methodology, which places flexibility and adaptability to modern society's problems as the primary concerns when interpreting a constitutional provision. In contrast, Justice Scalia's textualist interpretive method, a refinement of the standard originalist interpretive method, looks primarily to the text of the provision to be interpreted and sacrifices flexibility for predictability.

It is patently obvious that Justice Brennan and Justice Scalia developed and advocated decidedly differing interpretive methodologies. Indeed, their respective jurisprudential visions differ to the extent that they can accurately be described as competing. In an attempt to understand how the two justices developed such different legal philosophies, the biographic backgrounds of both Justices were examined. It was argued that the two Justices' upbringing, education, life experiences, and religious convictions may all legitimately be considered factors that contributed to the development of their unique jurisprudential visions. However, considerable effort was expended to advance the theory that both Justice Scalia and Justice Brennan have developed and utilized highly principled jurisprudential visions in which the selected methods of interpretation were foundational. Moreover, both Justices consistently applied, in every constitutional issue to come before them their respective visions.

It was argued that Justice Scalia's jurisprudential vision is dominated by his textualist interpretive methodology. However, closely related to his textualism is his desire to advance the rule of law, and curb judicial activism while advancing deference to

democratic forces on value judgment issues. In like manner, the keystone of Justice Brennan's jurisprudential vision was his Living Constitution interpretive methodology. However, Justice Brennan was even more concerned with advancing his version of justice, which required the strong defense of individual rights and the furtherance of human dignity, than he was in remaining faithful to his interpretive methodology. Conversely, Justice Scalia's concern for the rule of law leads him to prefer formalism and strict textualist interpretation over pragmatism.

In the preceding chapter, the Establishment Clause jurisprudence of Justices Brennan and Scalia was examined in detail. It was argued that, despite their impressively unbalanced voting records, both Justices interpreted the Clause through their respective jurisprudential visions and came to principled, but opposite results. However, the differing results follow naturally from the two Justices competing jurisprudential visions, and are not the result of political, ideological or personal religious preferences imposed by the justices into their work on the High Court. While Justice Brennan developed an ever increasing separationist viewpoint during his time on the Court, he reached this ultimate conclusion by consistently interpreting the Establishment Clause through a Living Constitution methodology, which he believed required the Clause to guarantee a substantive right to be free from religious coercion by the majority. Justice Scalia, on the other hand, strongly argues for an accomodationist interpretation of the Establishment Clause, but he has reached this conclusion because his textualist interpretive methodology requires the Clause be interpreted in a manner that is limited, consistent, and defers to the democratic branches on value judgments. Accordingly, both justices

base their respective interpretations of the Establishment Clause on highly developed and principles jurisprudential philosophies.

Free Exercise Jurisprudence

While beyond the scope of this paper, it is quite interesting, and certainly significant, that both Justice Brennan's and Justice Scalia's Free Exercise jurisprudence also follow the clear model established by their respective jurisprudential visions, and quite possibly in a manner even more obvious than their Establishment Clause jurisprudence. Beginning with his 1963 case Sherbert v. Verner, Justice Brennan pushed the Court to interpret the Free Exercise Clause as a guarantee of an individual right with teeth.[1] Brennan's *Sherbert* standard was a two-part balancing test that favored the individual over the state. Moreover, Brennan consistently interpreted the Clause to promote human dignity, noting that the First Amendment guarantee of religious freedom attained a "level of freedom and dignity that had no parallel in history."[2] In dissent, Justice Brennan lamented the Court's toleration of religious restrictions for prisoners, noting that denying religious minorities the "opportunity to affirm membership in a spiritual community" would "extinguish an inmate's last source of hope for dignity and redemption."[3]

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[1]*Sherbert v. Verner*, 347 U.S. 398 (1963). In Sherbert, the Court found that discharging an employee for not working on their Sabbath violated the Free Exercise Clause. In doing so, Justice Brennan established a two-part test: a government must 1) have a compelling reason for the law, and 2) the law must be the least restrictive means of meeting that compelling interest before the government action restricting free exercise for religion can survive. The two-part *Sherbert* test remained the standard for interpreting the Free Exercise Clause from 1963 until 1990 when it was replaced by the generally applicable law standard in Justice Scalia's *Employment Division v. Smith*.

[2]*Goldman v. Weinberger*, 475 U.S. 503, 513-14 (1986).

[3]*O'Lone v. Shabazz*, 482 U.S. 342, 355 (1987).

Likewise, Justice Scalia applied his textualism, concern for the rule of law and deference to the democratic branches in his most notable Free Exercise Clause case. In *Employment Division v. Smith*, (1990), Scalia declared that a state legislature's denial of unemployment benefits to Native American's who ingested peyote was constitutional, and denied the Free Exercise right violation claim.[4] In *Smith*, Scalia stated: "It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself."[5] Thus, both Justice Brennan and Justice Scalia have consistently applied their overall jurisprudential visions to both of the First Amendment religion clauses.

Lessons Learned

By all honest standards, the current Establishment Clause jurisprudence from the High Court is a failure. It is not as though the Supreme Court has never before faced complex and emotionally charged issues in the course of its interpretation and application of the United States Constitution. Just within the last half century the Court has essentially settled the once contentious problems of balancing internal security and the First Amendment liberties that plagued the Court during the McCarthy era. And one could hardly find a topic more closely linked to the hot-button topics of morality and values than defining obscenity, but even this issue no longer makes frequent appearances before the Court as it once did. Even Free Exercise, after spawning a huge public outcry

[4]*Employment Division v. Smith*, 494 U.S. 872 (1990).

[5]*Ibid.*, at 890.

over a decade ago following the *Smith* decision and the Congressional response in the Form of the Religious Freedom Restoration Act, is now the subject of relatively little debate. While it is true that some, if not many, disagree with the *Smith* standard, it is nevertheless universally recognized as *the* current Free Exercise Clause standard. However, there is one constitutional issue has consistently eluded a solution: The Establishment Clause.

One must query what explains the Court's colossal failure in this one area of constitutional law? Why has the Court succeeded in settling such contentious issues as segregation, obscenity, and differentiating between protected expression and incitement to violence, but has so miserably failed to end the controversy over the relationship between church and state? The answer seems to be that the Court has simply failed to provide reasoning sufficient to convince Americans that they have settled this area of law--reasoning sufficient enough to make all sides give up the battle and except the universal standard even if they are unhappy with the Court's holding. The old adage is true; the Executive has the power of the sword, the Legislature has the power of the purse, but the Court has only the power of persuasion.

If the Court has failed to convince the bar and the public that it has found the answer to the Establishment Clause question, the next logical question is why? One possible explanation is that it has not convinced itself that it knows the answer. A historical analysis reveals that contentious issues, which were the subject of internal debate within the Court, were often eventually worked out when one side won the upper-hand--whether it is through threats of Court packing, more natural changes in Court personnel over time, or through one side's successful persuasion. The argument can also

be made that the Court changes along with (though usually lagging behind) the popular opinion of the day. Yet for decades, the Court has consistently been polarized over the interpretation of the Establishment Clause and its application to a modern and diverse society with neither side winning the debate.

The Court's division mirrors the ideological division outside the judicial branch on the emotionally charged issue of defining the proper relationship between church and state. After editing a book containing ten articles on the Court's varying Establishment Clause opinions in *Mitchell v. Helms* , authored by strict separationists, strong accomodationists as well as several scholars falling somewhere in between, Professor Monsma posed the question in his conclusion, "why continuing disagreement among rational persons of goodwill?"[6] Indeed Monsma's book is one of the finest collections of scholarship by knowledgeable and articulate experts in the field of constitutional law and church and state studies, and yet there were as many different conclusions as there were articles. Can the debate that has so far yielded far more heat than light ever yield a solution similar to the one the Court has managed in other areas, such as in its Free Speech clause jurisprudence? This author is convinced that a universal Establishment Clause standard or "solution" is unlikely in the near future.

It is not pessimism but realism that leads to the conclusion that, barring a major ideological shift in both the current Court and America itself, the Establishment Clause issue will not be settled any time soon. The reason is simple: there must be common ground from which both sides can start the debate, and, even more important, a common direction in which to head. The Establishment debate contains neither. The heated

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[6]Steven Monsma, ed., *Church-State Relations in Crisis: Debating Neutrality* (New York: Rowman and Littlefield, 2000), 267.

debate over the history and meaning of the Establishment Clause only proves there is little common ground between the two sides. Additionally, unlike the now settled Free Speech Clause issues where the two sides desired to move in the same direction--towards greater freedom of speech--but simply disagreed on how to draw the new lines, accomodationists and separationists want to interpret the Establishment Clause to move in opposing directions.

The recent Court contained justices operating with foundationally different worldviews concerning the intersection of government and religion. The liberal end of the Court operated under a strict separationist paradigm; they believed it was their duty to ensure all aspects of religion are removed from the government's sphere of authority and only in this completely religious-free territory can America find common ground.[7] Conversely, the three justices labeled as the most conservative on the Court during the latest Establishment Clause cases operated under an accomodationist paradigm; they advocated that all religious and non-religious systems of belief are competing for a spot in modern American society, and government must accommodate religion on a nonprefferential basis and not discriminate against it by endorsing secularism.[8] Yet another faction of the Court, those traditionally termed swing voters, wish to find some middle ground between these two opposite philosophical positions.[9]

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[7]In the five most recent Establishment Clause cases, Justices Stevens, Souter and Ginsburg dissented in the four cases where the Court found no Establishment Clause violation and joined the Court in the one case that found a violation.

[8]Chief Justice Rehnquist, and Justices Scalia and Thomas were commonly labeled as the most conservative members of the Rehnquist court, and all dissented in *Santa Fe v. Doe*, (2000) and *McCreary County v. ACLU*, (2005), the only two cases in the last decade and a half to find an Establishment Clause violation.

[9]Justice O'Connor and Kennedy have both suggested their own tests, which attempt to find a middle position. Considering all the Establishment Clause cases since the 1990's, Justice Breyer would be considered a swing-vote as well. Breyer joined the accomodationists in *Good News Club*, and O'Connor's

Given the recent Court's divergent philosophical views on the proper relationship between church and state, and the fact that not only have the Justices failed to find common ground on which to begin debate but they are actually trying to move the current case law in completely opposite directions, a universal Establishment Clause standard is unlikely. Barring an accepted universal standard for interpreting and applying the Establishment Clause, the creation of principled categories with uniform standards would seem to be the next best method for correcting the current Establishment Clause chaos.

A Proposed Solution: Principled Categories of Establishment Clause Issues with Uniform Standards

Lessons from First Amendment Speech Jurisprudence. The Court faced similar problems in the past when it was forced to reconcile differing ideologies in its interpretation of the Free Speech clause. The Court eventually decided to adopt formal categories of speech and apply different standards of protection to each, in effect abandoning a universal Free Speech standard for several principled categories with uniform standards. A similar approach to the Establishment Clause would be a practical and viable solution to the current chaos.

Like the religion clauses, the Free Speech Clause could never realistically be applied as an absolute. Despite Justice Black's "faith in the absolutism of the First Amendment," even he balanced legitimate state interests with protected speech by

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middle position in Mitchell, while siding with the separationists in *Zelman* and *Santa Fe*. Justice Breyer was also the deciding vote in the two Ten Commandment cases of 2005, voting with the separationists in one concurring in result with the accomodationists in the other.

drawing a distinction between speech and action.[10] Thus, the real issue in Speech Clause jurisprudence is how to determine what speech the government can legitimately regulate or prohibit despite the First Amendment requirement that "Congress shall make no law . . . abridging the freedom of speech." After a rather lively debate between a balancing versus a category approach, the latter categorical approach was adopted by the Court in 1947. In *Chaplinsky v. New Hampshire*, the Court stated:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous and the insulting or 'fighting words'--those which by their very utterance inflict injury or tend to incite an immediate breach of peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly out-weighed by the social interest in order and morality.[11]

Thus, the court in this one landmark case outlined the future of Speech Clause jurisprudence, which has now been divided into several "classes" and subcategorizes, for over half a century.

Free Speech issues are typically divided into three distinct "classes," full-value speech, low-value speech and unprotected speech. Within these classes are several subcategories expressly recognized by the Court and with their own uniform standard. High-value speech, such as political speech and religious speech receives the highest level of protection under the First Amendment, with the Court applying a standard of strict scrutiny.[12] As noted above in *Chaplinsky*, there are also several categories of

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[10]Jerome Barron and Thomas Dienes, First Amendment Law in a Nutshell, (St. Paul, MN: West, 2000), 23.

[11]*Chaplinscky v. New Hampshire*, 315 U.S. 568, 572 (1942).

[12]Weaver and Lively, *supra* note 109, at 13.

speech that fall under the class of unprotected Speech. While several of these categories listed in *Chaplinsky* have since been moved to the "low-value" class, there are still several categories of speech which the current Court will not protect under the First Amendment. Illegal conduct, such as bribery, perjury and counsel to murder have always been considered beyond the pale and are so uncontroversial as to not merit litigation.

Another category, excitement to violence, has been extensively litigated in the past. Once a topic of hot debate by none other than legal giants Oliver Wendell Holmes and Learned Hand, the issue has now essentially been "settled" with the *Brandonburg* case in 1969. In *Brandonburg*, the Court established a two prong test: speech is unprotected if it 1) incites to imminent lawless action, and 2) is likely to produce such action.[13]

Also under the class of unprotected speech is the ever problematic sub-category of obscenity. Despite the amusing, if not workable, "I know it when I see it" standard, the Court has essentially settled this category as well with a three prong uniform standard outlined in a 1973 case. In *Miller v. California*, the Court adopted a community standard to define obscenity, which asks if the average person, by contemporary community standards, would find the purported speech: 1) prurient, 2) patently offensive, and 3) lacking of serious scientific or artistic merit.[14]

Currently the most contentious class or speech is the "low-value" category. However the Court has recently settled many issues in this class as well through the recognition of principles categories and the application of uniform standards within those

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[13]*Brandonburg v. Ohio*, 395 U.S. 444 (1969).

[14]*Miller v. California*, 413 U.S. 15 (1973).

categories. For example, in the sub-category of libel, the Court has developed two standards, the common law absolute non-protection of libel against private persons and the protected but low value standard set forth in the *New York Times v. Sullivan* case for public figures. Under *Sullivan*, speech is protected unless the public figure can prove actual malice.[15]

Another sub-category falling under the classification of low-value speech is commercial speech. Once simply not protected by the First Amendment at all, since 1980 the Court has applied a four part uniform standard, which requires: 1) the speech be truthful, 2) government interest prohibiting it must be substantial, 3) the restriction must directly advance the government interest, and 4) the restriction must be no more extensive than necessary.[16] Thus the interpretation of the Free Speech Clause and its application to commercial speech, like the other categories and sub-categories described previously, has been essentially settled by the Court through the use of uniform standards applicable only to the narrowly defined but principled categories.

Finding Categories and Applying Uniform Standards. There is certainly a lesson that could be drawn from the Court's Free Speech Clause jurisprudence and applied to its Establishment Clause Jurisprudence. Since a universal Establishment Clause standard seems unlikely due to deep ideological rifts in the Court, perhaps the Court could formally recognize a few of the categories that practicing lawyers are already operating under and apply uniform standards. These standards need not be identical for every category, but uniform within a recognized category.

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[15]*New York Times v. Sullivan*, 376 U.S. 254 (1964).

[16]Central Hudson Gas v. Public Service, 447 U.S. 557 (1980).

For example, the Court has in resent years adopted the standard of Neutrality or evenhandedness in Establishment Clause cases dealing with government aid to religious schools. The Court could declare this a distinct category, declare the old balancing tests like *Lemon* not applicable, and firmly establish Neutrality as the uniform standard for this particular category.

The Court has noted that it is "particularly vigilant" in monitoring compliance with the Establishment Clause in school settings with young, impressionable children where the state typically exerts "great authority and coercive power" over students through mandatory attendance requirements.[17] Perhaps the Court could declare direct government recognition of deific creeds and prayers in public elementary and secondary schools as requiring a more separationist solution and provide a uniform standard that may resemble the prongs *Lemon* test, and which would be applicable only to this category.[18]

If local community standards determine what is protected speech and what is obscenity, why cannot community standards prevail for what is an accepted display of religious symbolism in the local public square? In a democracy, there will always be some who disagree on where the line should be drawn between protected speech and obscenity, or permissible accommodation of religious and cultural symbolism and prohibited endorsement of a particular religion. However, such lines may better be drawn locally than by nine un-elected and out-of-touch lawyers in Washington, D.C.

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[17]*Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987).

[18]When faced with the realization that nonpreferential neutrality would mandate that elementary children be subject to Christian, Jewish, Muslim. Buddhist, etc. "prayers" in order to maintain evenhandedness, perhaps even most of the accomodationists would concede that something closer to separation may be better in school settings.

Much like political speech, which has earned high-value classification based on its historical position as the primary object of protection, perhaps some establishment issues should also be adjudicated with history and tradition as the primary standard. Such was the holding in the legislative prayer case *Marsh v. Chambers*, and perhaps other issues, such as the motto on coins, presidential proclamations and inscriptions in public buildings, should also be included in a recognized category of historically recognized ceremonial deism. Based on America's long standing traditions and culture, such religious recognitions would rightly be accommodated. A uniform standard of accommodation could be applied to this principled category without mandating the same standard be applied universally for all Establishment Clause cases.

In short, while adopting a principled interpretation of the Establishment Clause and consistently applying such a universal standard in all cases, as Justice Brennan did and Justice Scalia does, may be the preferable way to address establishment issues, it is workable only when a majority of the Court will also adopt the same view. Such is not now the case, nor has it been the case since the separationists dominated the Court in the 1970's and early 1980's. Given the current climate of the Court, perhaps principled categories with uniform standards for each category would be a preferable route than the multiple universal standards advocated by the varying members of the Court, resulting in the indecipherable, muddled mess that is the current Establishment Clause jurisprudence.

APPENDICES

APPENDIX A

Supreme Court Establishment Clause Cases by Year

CASE	TEST/THEORY	VIOLATION	
Bradfield v. Roberts, 175 U.S. 291 (1899)	Accom	NO	
Pierce v. Society of Sisters, 268 U.S. 510 (1925)	Accom	NO	**A**
Cochran v. Board of Ed., 281 U.S. 370 (1930)	Accom/Child Ben	NO	

Group A: Pre-Incorporation Period, 1791 - 1947. Accommodation prevalent.
Violations Found: 0 No. Violations: 3 Violation Ratio: 0:3

Establishment Clause incorporated to the states

Everson v. Board of Ed., 330 U.S. 1 (1947)	Strict Sep	NO	
McCollum v. Board of Ed., 333 U.S. 203 (1948)	Strict Sep	YES	
Zorach v. Clauson, 343 U.S. 306 (1952)	Accom	NO	
McGowan v. Maryland, 366 U.S. 420 (1961)	History/Sec Purp	NO	
Braunfeld v. Brown, 366 U.S. 599 (1961)	History/Sec Purp	NO	**B**
Engel v. Vitale, 370 U.S. 421 (1962)	Strict Sepa	YES	
Abington v. Schempp, 374 U.S. 203 (1963)	Strict Sep/(Lem)	YES	
Epperson v. Arkansas, 393 U.S. 97 (1968)	Strict Sep/Neut	YES	
Board of Ed. v. Allen, 392 U.S. 236 (1968)	Child Ben/Sec Purp	NO	
Walz v. Tax Commission, 397 U.S. 664 (1970)	History/Neut	NO	

Group B: Early Post-Incorporation Period (Everson to Lemon), 1947 - 1971. Separation rhetoric but near even split.
Violations Found: 4 No. Violations: 6 Violation Ratio: 2:3

Glossary:				
	Accom	= Accommodation	Neut	= Neutrality
	Child Ben	= Child Benefit	Strict Sep	= Strict Separation
	Endors	= Endorsement	Sec Purp	= Secular Purpose

Lemon Test Era

Lemon v. Kurtzman, 403 U.S. 602 (1971)	Lemon	YES	
Tilton v. Richardson, 403 U.S. 672 (1971)	Lemon	NO	
PEARL v. Nyquist, 413 U.S. 756 (1973)	Lemon	YES	
Meek v. Pittenger, 421 U.S. 349 (1975)	Lemon	YES	
Roemer v. MD, 426 U.S. 736 (1975)	Lemon	NO	
Wolman v. Walter, 433 U.S. 229 (1977)	Lemon	YES	
NLRB v. Bish. of Chicago, 440 U.S. 490 (1979)	Lemon	YES	
PEARL v. Regan, 444 U.S. 646 (1980)	Lemon	NO	
Stone v. Graham, 449 U.S. 39 (1980)	Lemon	YES	
Larkin v. Grendel's Den, 459 U.S. 116 (1982)	Lemon	YES	**C**
Larson v. Valente, 456 U.S. 228 (1982)	Lemon	YES	
Mueller v. Allen, 463 U.S. 388 (1983)	Lemon (signpost)	NO	
Marsh v. Chambers, 463 U.S. 783 (1983)	History/Accom	NO	
Lynch v. Donnely, 465, U.S. 668 (1984)	Lemon/History	NO	
Wallace v. Jaffree, 472, U.S. 38 (1985)	Lemon	YES	
Thorton v. Caldor, Inc., 472 U.S. 703 (1985)	Lemon	YES	
Grand Rapids v. Ball, 473 U.S. 373 (1985)	Lemon	YES	
Aguilar v. Felton 473, U.S. 402 (1985)	Lemon	YES	

Group C: Separationist Period (Lemon to Mid-1980's) Lemon is universal test; separation theory dominated.
Violations Found: 12 No. Violations: 6 Violation Ratio: 2:1

Witters v. Washington, 474 U.S. 481 (1986)	Lemon	NO	
Edwards v. Aguillard, 482 U.S. 578 (1987)	Lemon	YES	
Latter Day Saints v. Amos, 483 U.S. 327 (1987)	Lemon/Neut	NO	
Bowen v. Kendrick, 487 U.S. 589 (1988)	Lemon/Neut	NO	**D**
Texas Monthly v. Bullock, 489 U.S. 1 (1989)	Lemon	YES	
Hernandez v. IRS, 490 U.S. 680 (1989)	Lemon	NO	
Allegheny County v. ACLU, 492 U.S. 573 (1989)	Lemon/History	YES/no	

Group D: Transition Period, Mid 1980's 1986 - 1990 Lemon challenged; near even split.
Violations Found: 3 No. Violations: 4 Violation Ratio: 3:4

Westside Schools v. Mergans, 496 U.S. 226 (1990)	Lemon used	NO	
Lee v. Weisman, 505 U.S. 577 (1992)	Coercion	YES	
Zobrest v. Catalina Foothills, 509 U.S. 1 (1993)	Neutrality	NO	
Lamb's Chapel v. Moriches, 508 U.S. 384 (1993)	Lemon?/Neut	NO	
Kiryas Joel v. Grumet, 512 U.S. 687 (1994)	Neutrality	YES	
Capitol Square v. Pinette, 515 U.S. 753 (1995)	Endors/Neut	NO	
Rosenburger v. U. of Virginia, 515 U.S. 819 (1995)	Neutrality	NO	**E**
Agostini v. Felton, 521 U.S. 203 (1997)	Endors/Neut	NO	
Santa Fe ISD v. Doe, 530 U.S. 290 (2000)	Lemon/Endors/Coercion	YES	
Mitchell v. Helms, 530 U.S. 793 (2000)	Neutrality	NO	
Good News Club v. Milford, 533 U.S. 98 (2001)	Neutrality	NO	
Zelman v. Simmons-Harris, 536 U.S. 639 (2002)	Neutrality	NO	
Cutter v. Wilkinson, 125 S.Ct. 2113 (2005)	Accom	NO	
McCreary County v. ACLU, 125 S.Ct. 2722 (2005)	Neut/Lemon	YES	
Van Orden v. Perry, 125 S.Ct. 2854 (2005)	Accom/History	NO	

Group E: 1990's to Present, 1990 - 2005. Multiple tests used; Neutrality theory dominates; few violations
Violations Found: 4 No. Violations: 11 Violation Ratio: 2:5.5

APPENDIX B

Establishment Clause Cases by Category

A. Standing To Sue:
Flast v. Cohen, 392 U.S. 83 (1968)
Valley Forge Christ. College v. Americans United, 454 U.S. 464 (1982)
Bender v. Williamsport, 475 U.S. 534 (1986)

B. Tax Exemption To Religious Institutions:
Walz v. Tax Commission of the City of New York, 397 U.S.664 (1970)
Texas Monthly v. Bullock, 489 U.S. 1 (1989)
Hernandez v. Commissioner of Internal Revenue, 490 U.S.680 (1989)
Davis v. United States, 495 U.S.472 (1990)

C. Sunday Work:
McGowan v. Maryland, 366 U.S. 420 (1961)
Braunfeld v. Brown, 366 U.S. 599 (1961)
Thornton v. Caldor, 472 U.S. 703 (1985)

D. Religion And Labor Relations:
NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979)
Latter-day Saints v. Amos, 483 U.S. 327 (1987)

E. Religious Institution Functioning As A Government Agency:
Larkin v. Grendel's Den, 459 U.S. 116 (1982)
Kiryas Joel v. Grumet, 512 U.S. 687 (1994)

F. Unequal Government Treatment Of Religious Groups:
Larson v. Valente, 456 U.S. 228 (1982)
Cutter v. Wilkerson, 125 S.Ct. 2113 (2005)

G. Legislative Chaplains:
Marsh v. Chambers, 463 U.S. 783 (1983)

H. Religious Symbols On Public Property:
Lynch v. Donnelly, 465 U.S. 668 (1984)
Allegheny County v. ACLU of Pittsburgh, 492 U.S. 573 (1989)
Capitol Square v. Pinette, 515 U.S. 753 (1995)
McCreary County v. ACLU, 125 S.Ct. 2722 (2005)
Van Orden v. Perry, 125 S.Ct. 2854 (2005)

I. Government Aid To Religious Institutions Or Vocations:

Bradfield v. Roberts, 175 U.S.291 (1899)
Witters v. Washington Dept for the Blind, 474 U.S. 481 (1986)
Bowen v. Kendrick, 487 U.S. 589 (1988)
Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993)

J. Religion And Public Education:

McCollum v. Board of Education, 333 U.S. 203 (1948)
Zorach v. Clauson, 343 U.S. 306 (1952)
Engel v. Vitale, 370 U.S. 421 (1962)
Abington Township School District v. Schempp, 374 U.S. 203 (1963)
Epperson v. Arkansas, 393 U.S. 97 (1968)
Stone v. Graham, 449 U.S. 39 (1980)
Wallace v. Jaffree, 472 U.S. 38 (1985)
Edwards v. Aguillard, 482 U.S. 578 (1987)
Westside Comm. Schools v. Mergens, 496 U.S. 226 (1990)
Lee v. Weisman, 505 U.S. 577 (1992)
Lamb's Chapel v. Center Moriches, 508 U.S. 384 (1993)
Rosenberger v. University of Virginia, 515 U.S. 819 (1995)
Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000)
Good News Club v. Milford Central School, 533 U.S. 98 (2001)

K. Government Aid To Church-Related Schools

Pierce v. Society of Sisters, 268 U.S. 510 (1925)
Cochran v. Board of Education, 281 U.S. 370 (1930)
Everson v. Board of Education, 330 U.S. 1 (1947)
Board of Education v. Allen, 392 U.S. 236 (1968)
Lemon v. Kurtzman, 403 U.S. 602 (1971)
Tilton v. Richardson, 403 U.S. 672 (1971)
Committee for Pub. Ed. v. Nyquist, 413 U.S. 756 (1973)
Meek v. Pittinger, 421 U.S. 349 (1975)
Roemer v. Maryland Public Works Board, 426 U.S. 736 (1976)
Wolman v. Walter, 433 U.S. 229 (1977)
Committee for Public Education v. Regan, 444 U.S. 646 (1980)
Mueller v. Allen, 463 U.S. 388 (1983)
Aguilar v. Felton, 473 U.S. 402 (1985)
Grand Rapids School District v. Ball, 473 U.S. 373 (1985)
Witters v. Washington, 474 U.S.481 (1986)
Zobrest v. Catalina School District, 509 U.S. 1 (1993)
Agostini v. Felton, 521 U.S.203 (1997)
Mitchell v. Helms, 530 U.S. 793 (2000)
Zelman v. Simmons-Harris, 536 U.S. 639 (2002)

APPENDIX C

Brennan and Scalia Votes in Establishment Clause Cases

Establishment Clause Case	Establishment Violation	Brennan conc./diss.	Scalia conc./diss.
(Brennan Joins Court in March of 1957)			
1960's			
Braunfeld v. Brown (1961)	No	**C/D**	-
McGowan v. Maryland (1961)	No	c	-
Engel v. Vitale (1962)	Yes	c	-
Abington v. Schempp (1963)	Yes	**C**	-
Board of Education v. Allen (1968)	No	c	-
Epperson v. Arkansas (1968)	Yes	c	-
1970's			
Walz v. Tax Commission (1970)	No	**C**	-
Lemon v. Kurtzman (1971)	Yes	**C**	-
Tilton v. Richardson (1971)	No	**D**	-
PEARL v. Nyquist (1973)	Yes	**C**	-
Meek v. Pittenger (1975)	Yes/No	**C/D**	-
Roemer v. Maryland (1976)	No	**D**	-
Wolman v. Walter (1977)	Yes/No	**C/D**	-
1980's			
Stone v. Graham (1980)	Yes	c	-
PEARL v. Regan (1980)	No	d	-
Larkin v. Grendel's Den (1982)	Yes	c	-
Larson v. Valente (1982)	Yes	**MO**	-
Marsh v. Chambers (1983)	No	**D**	-
Mueller v. Allen (1983)	No	**D**	-
Lynch v. Donnelly (1984)	No	**D**	-
Thornton v. Caldor (1985)	Yes	c	-
Aguilar v. Felton (1985)	Yes	**MO**	-
Wallace v. Jaffree (1985)	Yes	c	-
Grand Rapids School v. Ball (1985)	Yes	**MO**	-
Witters v. Washington (1986)	No	c	-

Chart Key:

Establishment Violation:	Yes =	The Court ruled the issue challenged violated the Establishment Clause
	No =	The Court ruled there was no Establishment Clause violation
Justice concur/dissent:	MO =	The Justice wrote the Majority Opinion
	C =	The Justice wrote a Concurring Opinion
	c =	The Justice joined a concurring opinion
	D =	The Justice wrote a Dissenting Opinion
	d =	The Justice joined a dissenting opinion

Establishment Clause Case	Establishment Violation	Brennan conc./diss.	Scalia conc./diss.
1980's (continued)			
(Scalia Joins the Court in September of 1986)			
Edwards v. Aguillard (1987)	Yes	**MO**	**D**
Church of Jesus Christ LDS v. Amos (1987)	No	**C**	c
Bowen v. Kendrick (1988)	No	d	c
Allegeny County v. ACLU of Pittsburg (1989)	Yes/No	**C/D**	d/c
Texas Monthly v. Bullock (1989)	Yes	**MO**	**D**
Hernandez v. Comm. of Internal Revenue (1989)	No	-	d
1990's			
Board of Education v. Mergens (1990)	No	c	c
(Brennan Retires from the Court in July of 1990)			
Lee v. Weisman (1992)	Yes	-	**D**
Lamb's Chapel v. Center Moriches (1993)	No	-	**C**
Zobrest v. Catalina Foothills School (1993)	No	-	c
Kiryas Joel v. Grumet (1994)	Yes	-	**D**
Capitol Square Review v. Pinette (1995)	No	-	**MO**
Rosenburger v. University of Virginia (1995)	No	-	c
Agostini v. Felton (1997)	No	-	c
2000's			
Santa Fe ISD v. Doe (2000)	Yes	-	d
Mitchell v. Helms (2000)	No	-	c
Good News Club v. Milford (2001)	No	-	**C**
Zelman v. Simmons-Harris (2002)	No	-	c
Cutter v. Wilkinson (2005)	No	-	c
McCreary v. ACLU (2005)	Yes	-	**D**
Van Orden v. Perry (2005)	No	-	**C**

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Baker v. Carr, 396 U.S. 186 (1962) (Brennan)

Barnes v. Glen Theater, 501 U.S. 560 (1991) (Scalia, concurring)

Braunfeld v. Brown, 366 U.S. 599 (1961) (Brennan, dissenting)

Capitol Square Review v. Pinette, 515 U.S. 753, (1995) (Scalia)

CBS v. Democratic National Convention, 412 U.S. 94 (1973) (Brennan, dissenting)

Church of Jesus Christ LDS v. Amos, (1987) (Brennan, concurring)

Colorado River Water Conserve. Dist. v. U.S., 424 U.S. 800 (1976) (Brennan)

Coy v. Iowa, 487 U.S. 1012 (1988) (Scalia)

Crawford v. Washington, 541 U.S. 36. (2004) (Scalia)

Cruzan v. Missouri, 110 S.Ct. 2841 (1990) (Brennan, dissenting; Scalia, concurring)

Edwards v. Aguillard, 482 U.S. 578 (1987) (Brennan; Scalia, dissenting)

Eisenstadt v. Baird, 405 U.S. 438 (1972) (Brennan)

Employment Div. of Oregon v. Smith, 484 U.S. 872 (1990) (Scalia)

Freedman v. Maryland, 380 U.S. 51 (1965) (Brennan)

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Green v. County School Board, 391 U.S. 430 (1964) (Brennan)

Goldman v. Weinberger, 475 U.S. 503 (1986) (Brennan, dissenting)

Grand Rapids School District v. Ball, 473 U.S. 373 (1985) (Brennan)

Jones v. Thomas, 491 U.S. 376 (1989) (Brennan, dissenting; Scalia, dissenting)

Kiryas Joel v. Grumet, 114 S.Ct. 2481 (1994) (Scalia, dissenting)

Lamb's Chapel v. Center Moriches, 508 U.S. 384 (1993) (Scalia, dissenting)

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Oregon v. Mitchell, 400 U.S. 112 (1970) (Brennan, dissenting)

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Paris Adult Theatre v. Slaton, 413 U.S.49 (1973) (Brennan, dissenting)

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RAV. v. City of St. Paul, (1992) (Scalia)

Roemer v. Maryland, 426 U.S. 736 (1976) (Brennan, dissenting)

Roper v. Simmons, 125 S.Ct. 1183 (2005) (Scalia, dissenting)

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Stenberg v. Carhart, 530 U.S. 914 (2000) (Scalia, dissenting)

Texas Monthly v. Bullock, 489 U.S. 1 (1989) (Brennan; Scalia, dissenting)

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