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Establishment Clause and Justice Scalia: What the Future Holds for Church and State

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The Establishment Clause and Justice Scalia: What the Future Holds for Church and State.

One of the most difficult problems faced by the Supreme Court today is alleviating the tension between the establishment clause and the free exercise clause of the first amendment.[1] A statute passed to ensure the right to freely exercise one's religious beliefs arguably establishes religion. Yet if that same statute is struck down by a court, the court arguably interferes with one's right to the free exercise of religious beliefs. Clearly, this puts the court in a difficult situation.[2] This note will focus on the establishment clause in its discussion of this situation.

In *Lemon v. Kurtzman*,[3] the Supreme Court promulgated a three-prong test to determine if a violation of the establishment clause has occurred. Although still used by the Court today, the *Lemon* test has been highly criticized as being unpredictable and unclear in its application[4] and the Court has split on the continued use of the test.[5] The recent appointments of Justice Antonin Scalia and Justice Anthony Kennedy could have a dramatic effect on the future of *Lemon*.

This note will attempt to provide some insight into the jurisprudential philosophy of Justice Scalia in this area of the first amendment. Part I will briefly discuss the history of the Court's treatment of the establishment clause. Part II will outline the general jurisprudential philosophy of Justice Scalia, concentrating on the main doctrines that form the basis of his philosophy. Part III will attempt to unfold Justice Scalia's views in the area of establishment of religion. Part IV will conclude that Justice Scalia's distaste for the unpredictability of the *Lemon* test will further di-

1 *See* Walz v. Tax Comm'n of New York City, 397 U.S. 664, 668-69 (1970) (if either clause were "expanded to a logical extreme," it "would tend to clash with the other"). *See also Developments in the Law: Religion and the State*, 100 HARV. L. REV. 1606, 1717-1722 (1987) [hereinafter cited as *Developments*]; Choper, *The Religion Clauses of the 1st Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980).

2 Scholars have suggested alleviating this tension between the clauses by asserting the priority of the free exercise clause over the establishment clause. *See, e.g.*, Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development: Part I. The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1389 (1967) (stating the conflict requires a value judgment to see which clause will prevail—"the one premised on a vital civil right [free exercise], or the one premised on an outmoded eighteenth century political theory [establishment]"); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-7, at 833 (1978) (giving preference to the free exercise clause because it "is the natural result of tolerating religion as broadly as possible rather than thwarting at all costs even the faintest appearance of establishment"). *But see* Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579 (stressing equal readings of both clauses because of the separate and independent values of each clause).

3 403 U.S. 602 (1971). *See infra* notes 8-10 and accompanying text.

4 *See* Edwards v. Aguillard, 107 S. Ct. 2573, 2607 (1987) (Scalia, J., dissenting); Wallace v. Jaffree, 472 U.S. 38, 89, 91, 108 (1985) (Burger, C.J., White, J., and Rehnquist, J., dissenting); Comm. for Public Educ. and Religious Liberty v. Regan, 444 U.S. 646, 662 (1980); *Developments*, *supra* note 1, at 1680 (the *Lemon* "test has become a hindrance to a more clearly articulated view of the establishment clause"). *But see* Cox, *The Lemon Test Soured: The Supreme Court's New Establishment Clause Analysis*, 37 VANDERBILT L. REV. 1175, 1198 (Oct. 1984) (arguing the need for the flexibility of *Lemon* to keep from infringing on free exercise rights).

5 *See infra* notes 31-38 and accompanying text.

vide the Court and put the future of the *Lemon* test in the hands of the newest appointee to the Court, Justice Kennedy.[6]

I. The Establishment Clause: A Brief History

The first amendment to the United States Constitution prohibits the government from passing any law "respecting the establishment of religion."[7] In 1971, the Supreme Court, in *Lemon v. Kurtzman*,[8] established a three-prong test to handle cases that dealt with the establishment of religion. To pass an establishment clause challenge: (1) a statute must have a secular purpose; (2) its principal or primary effect must neither advance nor inhibit religion; and (3) the statute must not foster an excessive government entanglement with religion.[9] The Court has used this test for seventeen years in every case dealing with the establishment clause, with one exception.[10] Although the meaning of the prongs has fluctuated, the literal language of the test has not changed since its inception.[11]

For many years, the *Lemon* test has been highly criticized by commentators as not ensuring the values the establishment clause was intended to protect.[12] Even members of the Court have begun to question

6 Justice Kennedy was unamimously confirmed by the Senate in February 9, 1988. 56 U.S.L.W. 2436 (1988).

7 U.S. CONST. amend. I. What this phrase actually means has been a continuing source of controversy among legal scholars. *See* Everson v. Bd. of Educ., 330 U.S. 1, 15-16 (1947) ("a wall of separation between church and state", (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878))); Zorach v. Clauson, 343 U.S. 306, 312 (1952) (the establishment clause "does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other"); Beschle, *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor*, 62 NOTRE DAME L. REV. 151 (1987) ("liberal neutrality"). The history of the relationship between church and state in the courts is long and complex. This section of the note in no way purports to be a complete history of the Court's treatment of the establishment clause. It simply attempts to give the reader some background into areas of importance for a clearer understanding of Justice Scalia's philosophy.

8 403 U.S. 602 (1971). In *Lemon*, the Court used the new test to invalidate two school plans that reimbursed non-public schools for such things as teachers' salaries, textbooks and instruction materials because they failed to pass the excessive entanglement clause of the test. *Id.* at 607.

9 *Id.* at 612-13. The prongs were actually laid out first in different cases but finally brought together by the *Lemon* Court (the secular purpose and primary effect prongs, *see* School District of Abington Township v. Schempp, 374 U.S. 203, 222 (1963); the excessive entanglement prong, *see* Walz v. Tax Comm'n of New York City, 397 U.S. 664, 674 (1970)).

10 *See* Wallace v. Jaffree, 472 U.S. 38, 63 (O'Connor, J., concurring). The one exception being Marsh v. Chambers, 463 U.S. 783 (1983) (The Court rejected a challenge to first amendment for having a chaplain say invocation before the Nebraska legislature because of the historical tradition of such an activity.) *See also* Cox, *supra* note 4, for a good discussion of the consequences of not using *Lemon*.

11 *See* Scalia, *On Making It Look Easy By Doing It Wrong: A Critical View of the Justice Department*, in PRIVATE SCHOOLS AND THE PUBLIC GOOD 175 (1981) ("the three-part test has not been consistently followed since 1971"). *See also* the changing interpretation of the primary effects test to "a" primary effect (Comm. for Public Educ. and Religious Liberty v. Nyquist, Comm'r of Educ. of New York, 413 U.S. 756, 773 (1973)) then back to "the" primary effect (Mueller v. Allen, 463 U.S. 388, 396 (1983)); the use of history and tradition in the analysis of the secular purpose of the creche in the city Christmas display (Lynch v. Donnelly, 465 U.S. 688 (1984); *see infra* note 14); for a good discussion of this use of history in *Lynch*, *see* Cox, *supra* note 4, at 1190-98 (arguing the Court did not really apply the *Lemon* test but simply used a historical analysis to uphold the validity of the Christmas display). For the most recent case in which the Court employs the original language of the *Lemon* test, *see* Edwards v. Aguillard, 107 S. Ct. 2573, 2577 (1987).

12 *See supra* note 4.

the continued use of the test.[13] Despite the constant criticism of the test, the Court continues to use it when dealing with establishment questions. Before the retirement of Justice Powell and Chief Justice Burger, the *Lemon* test had support from the majority of the Court. However, the addition of the two new members to the Court may result in the abandonment or reformation of *Lemon*.

In *Lynch V. Donnelly*,[14] Justice O'Connor's concurring opinion promulgated an alternative to the *Lemon* test. Although the reformation of the test appears slight, there are some differences that could be important to religious jurisprudence. However, Justice O'Connor has failed, at this point, to convince a majority of the Court to follow her views. O'Connor's test asks: (1) whether the government *intends* to convey a message of endorsement of religion; (2) whether the government *does* convey a message of endorsement of religion; and (3) whether there is an excessive entanglement between government and religion.[15]

A. Lemon *v. Justice O'Connor*

Under *Lemon's* secular purpose test the Court must find a secular purpose of some type for the government action in question.[16] Under O'Connor's more rigid test the court must find that the government actually intended to endorse a religious belief. Rather than having courts search for a secular purpose within a statute, O'Connor's approach would have the courts searching for an intention to endorse religion. This changes the focus of analysis and allows deference to the legislature in the absence of an intent to endorse religion. O'Connor's approach has been interpreted in different ways.[17] It would seem, however, through her application of the test,[18] that the correct interpretation would be to invalidate a statute only if the main purpose for passing the statute were an intent to endorse or favor a religious belief. Therefore,

13 *See infra* note 4, and *supra* notes 31-36 and accompanying text for the views of several Justices on the Court.

14 465 U.S. 668 (1984). The Court applied the *Lemon* test and held that a city Christmas display with a creche did not violate the establishment clause. The Court found that celebrating a holiday such as Christmas by depicting the origins of the holiday was a legitimate secular purpose. Additionally, any benefit to religion was "indirect, remote and incidental". Finally, there was no evidence of any contact between church and state concerning the display. *Id.* at 680-685.

15 *Id.* at 687-692 (O'Connor, J., concurring).

16 There have been arguments both that this prong can be easily applied and that it is too vague to apply. *See* Cox, *supra* note 4, at 1180-81 (arguing the simplicity of the test). *But see Edwards*, 107 S. Ct. at 2607 (1987) (Scalia, J., dissenting) (arguing the prong "sacrifices clarity and predictability for flexibility") (quoting Comm. for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646, 662 (1980)).

17 *See* Simpson, *Lemon Reconstituted: Justice O'Connor's Proposed Modifications of the Lemon Test for Establishment Clause Violations*, 1986 B.Y.U. L. REV. 465, 471 (arguing that if any improper purpose is found then the statute is unconstitutional; also arguing that O'Connor misapplied her own test in *Lynch*, *id.* at n. 38); Beschle, *supra* note 7, at 187 (arguing O'Connor's misapplication of her own test). *But see Lynch*, 465 U.S. at 692 (O'Connor, J., concurring); *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring). It is difficult to see how one can misapply one's own recently promulgated test. Despite the fact that some commentators may say Justice O'Connor's test is vague, her application of it gives clear meaning to how she feels the test should be interpreted.

18 *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring) and *Wallace*, 472 U.S. at 70 (O'Connor, J., concurring).

O'Connor's test would allow legislation that had some religious basis to pass the Court's analysis.[19]

The "primary effects" prong of the *Lemon* test has been considerably more difficult for the Court to apply.[20] In applying the test the Court has looked to the effect the statute has on religion. On the other hand, with Justice O'Connor's test, the Court would look to the message the statute conveys.[21] This would allow the Court to consider the message the government is conveying to members of minority religions, a major criticism of the *Lemon* test.[22] In *Wallace v. Jaffree*,[23] Justice O'Connor further added to this "message" prong of her test by viewing it through the eyes of an "objective observer," thus allowing courts to see the message conveyed to both majority and minority religious groups.[24]

The excessive entanglement prong of *Lemon* and O'Connor's tests are very similar. The only difference is that Justice O'Connor seems to limit her test to "institutional entanglement"[25] while the Court in applying *Lemon* has also considered political divisiveness as a factor.[26] Interestingly, in *Aguilar v. Felton*,[27] Justice O'Connor questioned the validity of the excessive entanglement clause altogether, and came close to abandoning it and limiting the test to two prongs.[28]

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19 *Wallace*, 472 U.S. at 70 (O'Connor, J., concurring) (stating "[t]he endorsement test does not preclude government from acknowledging religion or from taking religion into account in making law and policy").

20 *See* Beschle, *supra* note 7, at 171; Developments, *supra* note 1; and Comment, *Grand Rapids School District v. Ball and Aguilar v. Felton: Confusion in Applying Lemon v. Kurtzman's Effects and Entanglement Tests*, 50 ALBANY L. REV. 811, 827 (1986) (arguing a Catch-22 situation because a statute cannot satisfy the effects prong without creating an excessive entanglement).

21 *Wallace*, 472 U.S. at 69 (O'Connor, J., concurring).

22 *See* L. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 611 (1985). Although Justice O'Connor feels that her test allows the Court to consider the message conveyed to minorities (*see Wallace*, 472 U.S. at 69, 70 (O'Connor, J., concurring); *Lynch*, 465 U.S. at 688, 692 (O'Connor, J., concurring)), some commentators believe the Court needs to go even further in considering the viewpoints of minority religions (*see Developments*, *supra* note 1, at 1646-47 (arguing that the O'Connor test reaches the same result as *Lemon* and there is a need to consider it through the eyes of the minority religious groups to apply correctly)).

23 472 U.S. 38 (1985). *See infra* notes 32-36 and accompanying text.

24 *Wallace*, 472 U.S. at 76 (O'Connor, J., concurring). By looking at the statute through the eyes of an objective observer one can consider if nonadherents (minority religions) to a religious practice see themselves as outsiders and, in addition, if adherents (majority religions) to a religious practice see themselves as insiders or favored members of society. For Justice O'Connor's continuing application of the objective observer aspect of her test *see* Witters v. Washington Department of Services for the Blind, 474 U.S. 481, 493 (1986) (O'Connor, J., concurring) and Thorton v. Caldor, 472 U.S. 703, 711 (1985) (O'Connor, J., concurring).

25 *Lynch*, 465 U.S. at 689 (O'Connor, J., concurring) (stating that determining political divisiveness "is simply too speculative an enterprise"; the inquiry should focus "on the character of the government activity that might cause such divisiveness, not on the divisiveness itself").

26 *See Lemon*, 403 U.S. at 622; Comm. for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 794 (1973); Meek v. Pittenger, 421 U.S. 349, 372 (1975).

27 473 U.S. 402 (1985). The Court struck down a New York program which paid the salaries for some employees to teach in parochial schools, under state regulation, because it feared excessive entanglement in the future. The Court determined the New York plan would require constant state monitoring to ensure no religious beliefs were intentionally or unintentionally advanced. Additionally, public and parochial schools would be working together in resolving administrative matters thus increasing entanglement between church and state. *Id.* at 408-414.

28 *Id.* at 430 (O'Connor, J., concurring). Justice O'Connor stated, "If a statute lacks a purpose or effect of advancing or endorsing religion, I would not invalidate it merely because it requires some ongoing cooperation between church and state or some state supervision to ensure that state

While Justice O'Connor's approach differs only slightly from *Lemon*, it does allow the court to use more of an accommodating approach to church-state relations than does the approach allowed by *Lemon*.[29] Justice O'Connor is not alone in her reconsideration of the long-standing *Lemon* test. A number of scholars have tried to develop different approaches to handle the establishment problem.[30] Although other Justices on the Court have questioned the continued use of *Lemon*, Justice O'Connor remains the only Justice to enunciate a viable alternative to the test.

B. *Division of the Court*

Wallace v. Jaffree[31] clearly illustrates the split among the Justices concerning *Lemon*. Justice Stevens, writing the majority opinion in *Wallace*, used *Lemon* to declare unconstitutional an Alabama statute providing for a one-minute period of silence in public schools "for meditation or voluntary prayer".[32] Justice Powell concurred, expressing his views on the continuing validity of *Lemon*.[33] Justice O'Connor restated her reformation of *Lemon* in a concurrence.[34] In dissent, Chief Justice Burger, Justice White, and Justice Rehnquist expressed their dissatisfaction with the *Lemon* test.[35] Justice Rehnquist, the most adamant of the group, stated that the purpose and effect clauses of *Lemon* were in "no way based on either the language or intent of the drafters."[36]

At that time the Court was split at five to four. Since then Justice Powell and Chief Justice Burger have retired, thus taking one from each side of the argument and leaving the Court at four to three in favor of the *Lemon* test. Chief Justice Burger was replaced by Justice Rehnquist and his position was filled by Justice Scalia.[37] Justice Powell was replaced by Justice Kennedy.[38] If Justice Kennedy and Justice Scalia oppose *Lemon*,

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funds do not advance religion." *Id.* However, Justice O'Connor has not advanced this notion in any of her opinions since *Aguillar*.

29 Beschle, *supra* note 6, at 176 (stating "[l]iberal neutrality [essentially Justice O'Connor's approach] will often tolerate, if not require, contact and cooperation between government and religion").

30 *See, e.g.*, Comment, *supra* note 20 (proposing an "impermissible relations" test); *Developments*, *supra* note 1, at 1648 (proposing a consideration from the minority religions, viewpoint of the message conveyed); Beschele, *supra* note 7 (proposing a "liberal neutrality" approach), and Cox, *supra* note 4 (proposing a combination of *Lemon* and a historical approach).

31 472 U.S. 38 (1985).

32 *Id.* at 56.

33 *Id.* at 62. Justice Powell noted that the *Lemon* test is the only test for establishment concerns that the Court has ever adopted and added that the test "identifies standards that have proved useful in analyzing case after case both in our decisions and in those of other courts." *Id.* at 63.

34 *Id.* at 67-84. *See supra* notes 24-25 and accompanying text.

35 *Id.* at 85-114. Chief Justice Burger stated that the court's use of *Lemon* "suggests a naive preoccupation with an easy, bright-line approach for addressing constitutional issues" and cautioned that *Lemon* only provided "signposts," not a strict per se rule. *Id.* at 89. Justice White called for a reconsideration of *Lemon*. *Id.* at 91. Justice Rehnquist stated that because the *Lemon* test is "difficult to apply and yields unprincipled results, I see little use in it" and that it "has produced only consistent unpredictability." *Id.* at 112.

36 *Id.* at 108 (stating that it has the same historical deficiencies as the "wall of separation" concept, *see supra* note 7 and accompanying text).

37 Justice Antonin Scalia was nominated by President Reagan, affirmed by the Senate, and appointed to the court in 1986. 56 U.S.L.W. 2168 (1986).

38 *See supra* note 6.

the Court could announce a new standard to guide establishment cases in the near future. The remainder of this note will focus on Justice Scalia's jurisprudential views, and will suggest for which side of the *Lemon* debate his vote will be cast in the future.

II. Justice Scalia's Jurisprudential Philosophy

Justice Antonin Scalia's nomination and appointment to the Supreme Court in 1986 came after a distinguished four years on the Circuit Court for the District of Columbia.[39] Justice Scalia graduated Magna Cum Laude from Harvard Law School in 1960. Before being appointed to the circuit court Justice Scalia taught law at the University of Chicago and the University of Virginia.

There are three major areas of the law which comprise most of Justice Scalia's legal writing and which help formulate much of his philosophy: administrative law, statutory interpretation, and first amendment freedom of the press concerns.[40] Several fundamental beliefs become apparent upon close examination of Justice Scalia's work.

A. *Justice Scalia's Beliefs*

Justice Scalia stongly believes in the narrow role of the Court in the judicial process. A strong advocate of judicial restraint, Justice Scalia has consistently criticized the Court for becoming too "active".[41] Justice Scalia believes the Court has become too powerful in the past years for three major reasons. First, he believes that law schools place undue emphasis on policy arguments when discussing rules of law set by precedent. This, he believes, has forced the judiciary to make rulings which make "social sense".[42] This is good practice for law schools, for legislators, and for the people, but for the judiciary it is "entirely unwork-

39 Justice Scalia was appointed to the Circuit Court for the District of Columbia in August of 1982. *Nomination of Judge Antonin Scalia: Hearings before the Committee on the Judiciary, U.S. Senate*, S. Hrg. 99-1064,, 99th Cong., 2nd Session 1, 1-2 (1986) [hereinafter *Hearings*].

40 *See* Note, *The Appellate Jurisprudence of Justice Antonin Scalia*, 54 U. OF CHIC. L. REV. 705, 705 (Spr. 1987). (Administrative law: *see* Center for Auto Safety v. N.H.T.S.A., 793 F.2d 1322 (D.C. Cir. 1986) (Scalia, J., dissenting); Community Nutrition Institute v. Block, 698 F.2d 1239 (D.C. Cir. 1983) (Scalia, J., concurring in part); Scalia, *The Legislative Veto: A False Remedy for System Overload*, 3 REGULATION 19 (Nov.-Dec. 1979). Statutory Interpretation: *see* United States v. Hansen, 772 F.2d 940 (D.C. Cir. 1985); Illinois Commerce Com'n v. I.C.C., 749 F.2d 875 (D.C. Cir. 1984); Gott v. Walters, 756 F.2d 902 (D.C. Cir. 1985), *vacated and remanded*, 791 F.2d 172 (D.C. Cir. 1986) (en banc). First amendment: *see infra* notes 62-65 and accompanying text.)

41 *See* Chaney v. Heckler, 718 F.2d 1174, 1197 (Scalia, J., dissenting) (D.C. Cir. 1983), *rev'd.*, 470 U.S. 821 (1985) (urging judicial restraint in review of administrative agencies); *Hearings*, *supra* note 39, at 267 ("Justice Scalia is a strong advocate of judicial restraint—limiting the role of courts in our society and restricting access to the courts."); Scalia, THE JUDGES ARE COMING, *reprinted in* 126 Cong. Rec. 18920-22 (1980) (Extensions of Remarks: Judicial Malpractice) (stating three reasons why the Court's power has increased and facilitated the emergence of the "judge-legislator" (*see infra* notes 41-49 and accompanying text)) [hereinafter 126 *Cong. Rec.*].

42 126 *Cong. Rec.* at 18921, col. 3 (stating "[b]ecause opinions differ widely about predictable social effects and, for that matter, about their desirability, policy analysis is a jurisprudential foundation of shifting sand").

able".[43] Justice Scalia feels that this new attitude in law schools has fostered the emergence of the "judge-legislator".[44]

A second reason Justice Scalia puts forth for the increase in the Court's power is the lenience with which the judiciary has interpreted the doctrine of standing.[45] Justice Scalia believes the Court has broadened the standing requirement too far, so as to change the role of the Court from a protector of individual or minority rights[46] to a protector of the "public at large".[47] Liberalizing standing requirements allows anyone who has suffered injury to bring a case; not limiting that right, as in the past, to persons who have suffered an injury different from that suffered by the public at large.[48]

A third reason given by Justice Scalia for the increased power of the Court is the vagueness of legislative enactments.[49] Justice Scalia believes that because of the political nature of Congress and representatives' efforts to please their constituents, Congress has become increasingly vague when enacting legislation.[50] Because of this lack of clarity in any given act, numerous disputes arise as to its meaning which only the courts can resolve. Therefore, the Court must try to interpret this vague statute and is essentially determining what the law is instead of having Congress do so through more clearly drafted legislation.

Justice Scalia's strong belief in judicial restraint inevitably leads to his commitment to the separation of powers doctrine.[51] This is evidenced in his writings and in articles about him.[52] If the Court refuses to

43 *Id.* at 18921, col. 3-18922, col. 1. (Instead of asking what makes social sense, the judiciary should ask "what is the common understanding?" and adhere to precedents.) *Id.* at 18921, col. 3.

44 *Id.* at 18922, col. 1.

45 *Id.* at 18922, col. 1. *See also* Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983) (Scalia argues that by limiting the people who can bring a suit before the Court the doctrine of separation of powers can be advanced because people who do not suffer an injury different from the public at large will have to turn to the other branches for protection. Thus, the Court can maintain its role of protecting minority rights.) The standing doctrine basically defines who has the right or power to bring a case before the Court.

46 *See* Scalia, *supra* note 46, at 894-95 (arguing the role of the court is "protecting individuals and minorities against impositions of the majority" and that judicial intervention should be limited to such cases).

47 126 *Cong. Rec.*, *supra* note 41, at 18922, col. 1 (arguing that Congress has given the Court the executive function of seeing that the laws are faithfully executed "by providing for judicial review at the instance of persons who are no more affected by the action in question than any member of the public").

48 *See* United Presbyterian Church v. Reagan, 738 F.2d 1375, 1378-81 (D.C. Cir. 1984) (Scalia indicating his reluctance to ease standing requirements).

49 126 *Cong. Rec.*, *supra* note 41, at 18922, col. 1-2 ("But Congress has increased judicial power even more by what it has not done . . . it has repeatedly failed to give anything but the vaguest content to the laws."). *See also* Ollman v. Evans, 750 F.2d 970, 1038 (D.C. Cir. 1984) (Scalia, J., dissenting) (questioning the subjectivity and lack of a mechanism to measure "how much defamation is a decent amount;" showing his emphasis on the need for clarity in the law), *cert. denied*, 471 U.S. 1127 (1985); *Edwards*, 107 S. Ct. at 2607 (1987) (Scalia, J., dissenting).

50 126 *Cong. Rec.*, *supra* note 41, at 18922, col. 2 (stating politicians do not have the "political stomach" to enact legislation with sufficient clarity).

51 By restraining the action taken by the Court, the other branches are forced to perform their functions under the Constitution. For instance, if the Court restrains from interpreting a vague law the legislature must make this law more specific in order to accomplish their goals, thus performing the legislative function granted to them under article one of the Constitution.

52 *See* Chapple and Kraus, *Rehnquist-Scalia Combined Effect May Far Exceed Current Predictions*, NAT'L. L. J., vol. 9, p. 24, col. 4, Sept. 15, 1986 ("Each [Chief Justice Rehnquist and Justice Scalia] has asserted his belief in the separation of powers and his abhorrence of judicial activism."); Scalia, *supra*

interpret statutes that are unclear until some guidance is given by the legislature, it can put more of the impetus on the legislature to make the laws, advancing the separation of powers doctrine. In addition, if the Court limits its ability to review administrative agencies, Justice Scalia believes the legislature and the executive can maintain the separation of powers originally intended by the Constitution.[53] In accordance with this, Justice Scalia gives great deference to the legislature when it enacts a statute or regulation that will advance this strong separation of powers system that he envisions.[54]

An interesting area of Justice Scalia's jurisprudence involves the view he holds regarding Constitutional interpretation. His views place him somewhere between an "original intent" interpretist and a "living constitution" interpretist, leaning towards the former.[55] However, he prefers to use the term "original meaning" rather than "original intent".[56] In addition, his clarification varies depending on the area of the constitution to which he refers.[57] He places heavy reliance on the intent of the framers[58] and the legislative history behind the enactment of that part of the Constitution affecting the case in question.[59] In addition to

note 45 (urging the Court to restrain from expanding the standing doctrine so as to return to the separation of powers notion originally intended by the Constitution).

53 Justice Scalia stated: "We [the Court] are not the only public officials endowed with intelligence and worthy of trust, and our system of laws has committed the relative evaluation of public health concerns to others." *Chaney*, 718 F.2d at 1197 (Scalia, J., dissenting).

54 *See Chapple and Kraus*, *supra* note 52, p. 26, col. 7; Note, *supra* note 39, at 709 (citing Justice Scalia's opinion in Center For Auto Safety v. NHTSA, 793 F.2d 1322, 1343, 1344, 1345 (D.C. Cir. 1986): "a court should defer to the political mechanisms by which that society acts"); Scalia, *supra* note 10, at 182 ("I would prefer to ground the preferential treatment of federal statutes in the educational policy field upon the deference generally to be accorded constitutional determinations of the national Congress . . . "). *See also infra* note 65 and accompanying text.

55 *See Hearings*, *supra* note 39, at 48-49 (Senator Joe Biden's questioning in the nomination proceedings elicited this response from Justice Scalia: "[A]s I said earlier, I have not developed a full constitutional matrix. You are right, though, in suspecting me to be more inclined to the original meaning than I am to a phrase like 'living constitution'."). *Id.* at 49. Living constitutionalists believe that the Constitution should expand and contract so as to more accurately reflect the views of the current society. On the other hand, original intent interpretists feel the Constitution should retain the intent the framers had when constructing it. For a good discussion of the two theories see Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987); Powell, *The Original Understanding of OriginalIntent*, 98 HARV. L. REV. 885 (1985); Pollack, *Constitutional Interpretation as Political Choice*, 48 U. PITT. L. REV. 989 (1987); Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

56 *See Hearings*, *supra* note 39, at 48-49, 193. Justice Scalia defines original meaning as the "most probable meaning of the words" found by "assessing the meaning that would reasonably have been conveyed to a citizen at the time the law was enacted, as modified by the relationship of the statute to later enactments similarly interpreted." *Id.* at 193. Thus instead of looking to the intent that the framers had when writing that part of the Constitution he would look to the meaning conveyed to the people at that time. He would use the same type of "original meaning" analysis when interpreting statutes. *Id.*

57 *See Hearings*, *supra* note 39, at 49 ("There are some provisions of the Constitution that may have a certain amount of evolutionary content within them.") *See also supra* note 64 and accompanying text.

58 This note will continue to use the intent of the framers noting that "intent" to Justice Scalia means "original meaning".

59 *See* Berger, *Benno Schmidt vs. Rehnquist and Scalia*, 47 OHIO ST. L. J. 709, 712 (1986); Scalia, *supra* note 45; *Twenty-Fifth Amendment Proposals Aired in Senate Hearings; Association Position Favors No Change*, 61 ABA J. 599, 604 (May 1975) ("intent of the Constitution itself must stand").

placing an emphasis on history when interpreting,[60] he trusts and has a strong desire to maintain the status quo. He believes that long-standing views in society should be given deference even if contrary to newly passed legislation.[61]

B. *Justice Scalia and the First Amendment*

Justice Scalia has been reluctant, and feels the Court should be hesitant, to create new rights when dealing with the Constitution in general, and when dealing with the first amendment in particular.[62] He feels that the Court should hesitate to create new rights in the Constitution because of the difficulty in changing the Constitution through the political process.[63] However, he realizes that references must be made to the changing times when analyzing the first amendment.[64] No new rights should be created, but rather the meaning of those rights should change with the times. The new rights should be products of the legislative or political process.[65]

In sum, we see that Justice Scalia holds strong beliefs in several areas: separation of powers, judicial restraint, and original meaning. These beliefs continue throughout Justice Scalia's jurisprudence and guide him in evaluating all areas of the law. The next section of this note will attempt to foresee Justice Scalia's religious jurisprudence through the application of these strongly held beliefs.

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60 Although he would rely heavily on the legislative history in interpreting a statute he would not place the same reliance on legislative committee reports. Lauter, *Scalia Sticks to Basics at Senate Judiciary Hearing*, NAT'L. L. J., vol. 8, p. 4, col. 2, Aug. 18, 1986.

61 *See* 126 Cong. Rec., *supra* note 41, at 18922, col.1 (stating "I do not care how analytically consistent with analogous precedents such a holding might be, nor how socially desirable in the judge's view. If it contradicts a long and continuing understanding of society . . . it is quite simply wrong."); *Hearings*, *supra* note 39, at 205. Thus, it seems he would rather declare new legislation unconstitutional than to upset the long-standing tradition of society or the Court. *See* In Agency Holding Corp. v. Malley-Duff and Associates, 107 S. Ct. 2759, 2771 (1987) (Scalia, J., concurring), Justice Scalia followed a long-standing case-made rule of applying a state statute of limitations when there is congressional silence even though he felt it was the wrong approach in that case. In addition, he criticized the majority for not following it and for adopting a different statute of limitations. *Id.* at 2772.

62 *See* In Re Reporters Committee For Freedom of the Press, 773 F.2d 1325, 1336 (D.C. Cir. 1985) [hereinafter *In Re Reporters*]; *Ollman*, 750 F.2d at 1037 ("It is difficult to see what valid concern remains that has not already been addressed by first amendment doctrine and that therefore requires some constitutional evolving . . . ."). Cases and articles also show his reluctance to expand the protection of the media in first amendment cases. *See e.g. Ollman*, 750 F.2d 970; Arkansas Writers' Project, Inc. v. Ragland, 107 S. Ct. 1722 (1987) (Scalia, J., dissenting); *Scalia Decisions in Court of Appeals Show That New Justice is No Friend of News Media*, 10 NEWS MEDIA AND THE LAW 3 (Fall 1986). *But see Some Surprises in Scalia's First Months on High Court*, L. A. Daily J., Feb. 6, 1987, p. 4 col. 3 (suggesting that Justice Scalia has not been as unfriendly to the media as originally thought).

63 *In Re Reporters*, 773 F.2d at 1336.

64 *See* 126 Cong. Rec., *supra* note 41, at 18922, col. 1 (Justice Scalia states that first amendment freedoms, along with some other Bill of Rights' freedoms, are meaningless without reference to the times. "Does the 'free exercise of religion,' for example, permit human sacrifice? Surely not—but only because the term is to be given meaning by the traditions and understandings of 20th-Century American rather than 15th-Century Polynesian society."). *See infra* note 56 and accompanying text for his general belief that some areas of the Constitution must expand with the times.

65 *Ollman*, 750 F.2d at 1038, ("The identification of modern problems' to be remedied is quintessentially legislative rather than judicial business—largely because it is such a subjective judgment and that the remedies are to be sought through democratic change rather than through judicial pronouncement that the Constitution now prohibits what it did not prohibit before.").

III. The Establishment Clause and Justice Scalia

Justice Scalia has authored only one opinion interpreting the establishment clause, a dissent, in *Edwards v. Aguillard*.[66] His stinging dissent in *Edwards* provides a strong foundation for discerning his religious jurisprudence in the area of religious establishment and the *Lemon* test.

Justice Scalia, abiding by his own emphasis on clarity,[67] pulls no punches in discussing the *Lemon* test in his dissent. He states:

> 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." Abandoning *Lemon's* purpose test . . . would be a good place to start.[68]

Scalia believes that the purpose prong has no basis in the history or text of the first amendment language.[69] In his dissent in *Edwards*, he states that even if the purpose prong is used, the statute's secular purpose would survive its application.[70] He calls for judicial deference to the legislature when a secular purpose is articulated in the legislative history of the act.[71]

How far would Justice Scalia go before finding a violation of the establishment clause? He states that as long as the legislature had "a sincere belief" that there was a secular purpose behind the act he would declare it constitutional.[72] Although he calls for the abandonment of the purpose prong altogether, it seems possible he can be convinced to follow Justice O'Connor's reformation of the purpose prong.[73] This refor-

66 107 S. Ct. 2573 (1987). The Court stuck down a Louisana statute requiring teaching of creationism if evolution was taught, on the grounds that there was no secular purpose.

67 *See supra* notes 49-50 and accompanying text. *See also* O'Connor v. Ortega, 107 S. Ct. 1492, 1505 (1987) (Scalia, J., concurring) ("I . . . object to the formulation of a standard so devoid of content that it produces rather than eliminates uncertainty in this field."); Johnson v. Transp. Agency, 107 S. Ct. 1442, 1465 (1987) (Scalia, J., dissenting) (Scalia begans his dissent stating, "[w]ith a clarity which, had it not proven unavailing, one might well recommend as a model of statutory draftmanship Title VII of the Civil Rights Act of 1964 declares . . . ").

68 *Edwards*, 107 S. Ct. at 2607 (citations omitted).

69 *Edwards*, at 107 S. Ct. at 2605. Justice Scalia emphasized the need to base interpretation of the Constitution on the language, history and text of the Constitution. *See* American Trucking Association v. Scheimer, 107 S. Ct. 2829, 2851 (1987) (Scalia, J., dissenting) ("I do not believe that test can be derived from the Constitution."); Tyler Pipe Industries v. Washington Dept. of Revenue, 107 S. Ct. 2810, 2823 (1987) (Scalia, J., concurring) (stating the Court has gone as far in the commerce clause so as to depart from the textual meaning of the Constitution). Other justices and scholars assert that there is no basis for the *Lemon* test in general in the history or text of the first amendment, *see Wallace*, 472 U.S. at 91-92 (Rehnquist, J., dissenting); *Lynch*, 465 U.S. at 689 (O'Connor, J., concurring); *Choper*, *supra* note 1, at 678-680; Kurland, *The Irrelevance of the Constitution: The Religious Clause of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3, 17-23 (1978-79).

70 *Edwards*, 107 S. Ct. at 2593.

71 *Id.* at 2596. For Justice Scalia's views on deference *see supra* note 53 and accompanying text. *See also* CTS Corp. v. Dynamics Corp. of America, 107 S. Ct. 1637, 1653 (1987) (Scalia, J., concurring) (stating that if a state's corporation law is not discriminatory it should survive commerce clause scrutiny; "[b]eyond that, it is for Congress to prescribe its validity").

72 *Edwards*, 107 S. Ct. at 2593. (Scalja states he would find this "sincere belief" to be sufficient "regardless of whether that purpose is likely to be achieved by the provision they enacted.")

73 *See supra* notes 16-19 and accompanying text. For other first amendment areas of jurisprudential agreement between Scalia and O'Connor *see* Rankin v. McPherson, 107 S. Ct. 2891 (1987) (Scalia, J., dissenting) (Scalia is joined by O'Connor in criticizing the majority of the Court for expansion of the definition of "public concern" in protection of speech cases. *Id.* at 2901-02.); Tash-

mation would allow judicial deference because it would require the party challenging the statute to show the legislature's intent to advance religion in order to prove a violation. Without such a showing, the Court would defer to the legislature and would presume that the statute did not endorse or advance religion unconstitutionally.[74] This would also advance Justice Scalia's views on separation of powers[75] and judicial restraint.[76] Additionally, Justice O'Connor's approach seems to have a strong basis in the language of the first amendment[77] because of the prohibiting nature of her test and the parallel prohibiting language of the first amendment.[78]

Justice O'Connor's second prong also seems to parallel the beliefs expressed by Justice Scalia. This prong requires that the statute convey a message endorsing religion through the eyes of an objective observer.[79] Although some commentators disagree,[80] Justice O'Connor believes that this allows the Court to view the effects on minority religions.[81] Justice Scalia's view, that the Court's narrow role is to protect minority interests,[82] seems to be advanced by this reformation of the effects test. This would return the Court to its proper role, as Justice Scalia sees it, and thus would protect the minority religious followers from powerful major-

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jian v. Republican Party of Connecticut, 107 S. Ct. 544 (1986) (Scalia, J., dissenting) (Scalia is joined by O'Connor in arguing against the application of freedom of association protection to "casual contacts." *Id.* at 560.)

74 *See infra* note 87 and accompanying text for circumstances when the government may or must endorse or advance religion.

75 For his views on separation of powers *see supra* notes 52-54 and accompanying text. *See also* Immigration and Naturalization Service v. Cardoza-Fonseca, 107 S. Ct. 1207, 1224 (1987) (Scalia, J., concurring) ("Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent.").

76 For Justice Scalia's views on judicial restraint *see supra* notes 41-50 and accompanying text. *See also* Booth v. Maryland, 107 S. Ct. 2529, 2542 (1987) (Scalia, J., dissenting) (stating whether to base the death penalty solely on moral guilt "is a question to be decided through the democratic process of a free people, and not by the decrees of this Court").

77 *See Wallace*, 472 U.S. at 69 (O'Connor, J., concurring) (stating the goal in formulating a test "should be to frame a principle for constitutional adjudication that is not only grounded in the history and language of the first amendment, but one that is also capable of consistent application to the relevant problems.' Last Term, I proposed a refinement of the *Lemon* test with this goal in mind.") (citation omitted) (referring to her refinement in *Lynch*, *see supra* notes 14-30 and accompanying text)). *See also* Developments, *supra* note 1, at 1647 ("Justice O'Connor has recently reformulated the *Lemon* test in an effort better to achieve the establishment clause's core purpose . . . "). *But see* Paulsen, *Religion, Equality and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 352-353 (1986) (arguing that Justice O'Connor's approach will take the Court further from the history behind the first amendment because it relies on political status rights rather than religious status rights).

78 Justice O'Connor's purpose prong states that legislatures can *pass no law* with the intent to endorse religion. The first amendment states Congress shall *make no law* respecting an establishment of religion. On the other hand the current *Lemon* test says the legislatures *must have* a secular purpose in enacting a law. This is a significant difference because the language changes the focus of the Court's inquiry. The first amendment language and O'Connor's test allows the Court to focus on the evil (endorsing/establishing religion) and if no evil is found, the constitutionality is presumed. Therefore, more church and state intermingling will be tolerated by the Court and more reliance will be placed on Congress to abide by the Constitution. On the other hand, the *Lemon* test forces the Court to find a valid motivation behind the legislative action (a secular purpose) or strike down the legislation. Thus, in borderline cases, less intermingling will be allowed by the Court.

79 *See supra* notes 20-24 and accompanying text.

80 *See supra* note 22.

81 *See supra* notes 23-24 and accompanying text.

82 *See supra* notes 46-47 and accompanying text.

ity religions. Although this prong does not have a strong basis in the language of the first amendment, the fact that Justice Scalia believes the first amendment needs to change with the times to retain its meaning[83] would allow him to adopt it. With the development of numerous minority religions and the extremist positions of many of these religions, the protection of their views become more and more vital to their continued existence.[84] Therefore, adoption of the second prong of Justice O'Connor's test seems to be consistent with Justice Scalia's beliefs.

The final prong of *Lemon*, no excessive entanglement,[85] has been limited to "institutional entanglement" by Justice O'Connor. In fact, in one case she questioned the continued use of this prong and stated she would not hesitate to uphold a law even though it requires some entanglement.[86] It seems, from his dissent in *Edwards*, that Justice Scalia feels the same way. He realizes that in some situations government may actually have to advance religion.[87] It seems likely that he would take a position similar to that taken by Justice O'Connor in upholding a statute despite some entanglement. Under his beliefs of separation of powers and judicial restraint he would defer to the legislature if no clear case of entanglement is shown.

One may argue that none of these prongs have any basis in the language of the first amendment and that Justice Scalia would like to see total abandonment of the *Lemon* test. Remembering his emphasis on the status quo,[88] however, he would probably prefer a reformulation of the *Lemon* test.[89] In adopting Justice O'Connor's test he will be able to provide the clarity and predictability that he values so highly when dealing with the law.

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83 *See supra* note 64 and accompanying text.

84 The extremist position of some minority religions is of such importance to their beliefs that the slightest infringement on those beliefs may have a dramatic effect on the continued existence of their religion. The Court, as protector of minority rights, must assure that these minority beliefs are not infringed on by the majority. (For example *see* Int'l Society For Krishna Consciousness v. Barber, 650 F.2d 430 (2d Cir. 1981) (holding that the Krishna practice of sankirtan is deserving of protection under the first amendment); McMurdie V. Doutt, 468 F. Supp. 766 (N.D. Ohio 1979) (allowing first amendment protection of solicitation of funding and lecturing by The Unification Church (Moonies)).

85 *See supra* notes 25-28 and accompanying text.

86 *See supra* note 28.

87 *Edwards*, 107 S. Ct. at 2595 (stating three situations where advancement may be necessary: (1) a state may have to advance religion in an attempt to prevent inhibiting religion; (2) advancement may be required by the free exercise clause; (3) voluntary governmental accommodation). *See also* Scalia, *supra* note 11, at 174.

88 *See supra* note 61 and accompanying text.

89 The *Lemon* test has stood for seventeen years and undoubtedly would be considered long-standing case doctrine which should not be completely abandoned but rather reformed to meet with the proper views of the first amendment's establishment clause.

IV. Conclusion

In *Edwards v. Aguillard*, Justice Scalia plainly and firmly rejected the first prong of the *Lemon* test. His strong beliefs in separation of powers, judicial restraint, and the intent of the framers will most likely lead him in a direction similar to that of Justice O'Connor's. This leaves the Court in a four to four stalemate in deciding the continued use of the now articulated *Lemon* test. Therefore, the jurisprudential views of the newest appointee to the court, Justice Kennedy, will be the decisive factor for the future of *Lemon*. If the *Lemon* test is discarded there is a strong possibility that the replacement test will allow much more intermingling between church and state.[90]

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90 *See supra* note 29. *See also* Marcotte, *New Kid on the Block; Scalia Seen as a Charming Conservative With Ability to Effect Compromises*, 72 ABA J. 20 (Aug. 1, 1986) (stating that Justice Scalia has a tolerant view of government and church relations).