

# A CONSTITUTIONAL HIERARCHY OF RELIGIONS? JUSTICE SCALIA, THE TEN COMMANDMENTS, AND THE FUTURE OF THE ESTABLISHMENT CLAUSE

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## INTRODUCTION

In June of 2005, the Supreme Court issued much-anticipated decisions in a pair of cases challenging the posting of the Ten Commandments on government property. A sharply divided Court produced a total of ten different opinions in the two cases, articulating a dizzying array of widely divergent interpretations of the Establishment Clause. The bottom line was a split decision: in *Van Orden v. Perry*,<sup>1</sup> the Court sanctioned a longstanding Ten Commandments monument on the grounds of the Texas State Capitol, but in *McCreary County v. ACLU*,<sup>2</sup> the Court refused to countenance two recent Ten Commandments displays on the walls of Kentucky county courthouses. The outcomes were ultimately dictated by a single vote—that of Justice Breyer, the only Justice to vote with the majority in both cases.

Justice Breyer wrote separately in *Van Orden* to explain his thinking.<sup>3</sup> Much attention will surely be paid to Justice Breyer’s enigmatic concur-

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<sup>1</sup> 125 S. Ct. 2854 (2005).

<sup>2</sup> 125 S. Ct. 2722 (2005).

<sup>3</sup> *Van Orden*, 125 S. Ct. at 2868 (Breyer, J., concurring in the judgment). In a nutshell, Justice Breyer eschewed reliance on doctrinal tests to resolve difficult Establishment Clause cases, claiming instead that there is “no test-related substitute for the exercise of legal judgment”—that is, judgment de-

rence, both because it represents the current governing rule,<sup>4</sup> and because it is fascinating (and profoundly unsatisfying) in its own right.<sup>5</sup>

Although Justice Breyer's opinion will likely garner most of the attention, it is neither the most shocking opinion of the lot, nor the one that, in the long run, has the potential to be the most important. Those distinctions belong to the opinion of Justice Scalia, whose dissent in *McCreary County* may represent the beginnings of a revolution in Establishment Clause jurisprudence—a wholesale rethinking of the constitutional relationship between church and state. According to Justice Scalia's dissent, Ten Commandments monuments are constitutional because the Establishment Clause permits the government to favor religion over nonreligion (but not vice versa), and, in the context of governmental religious expression, to favor Judeo-Christian monotheism over all other religions (but not vice versa). In other words, in Justice Scalia's opinion, biblical monotheism is now, has always been, and will always be, the favored religion of the United States Constitution.

To understand the revolutionary nature of Justice Scalia's opinion, consider three hypothetical cases:

Case 1: A rural Tennessee town populated primarily by devout Christians erects a massive Ten Commandments monument in the center of the town square with the express purpose of publicly honoring and expressing a communal belief in the biblical God. A local Hindu family

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signed to “reflect and remain faithful to the underlying purposes of the Clause[,]” with proper consideration of “context and consequences measured in light of those purposes.” *Id.* at 2869. Focusing primarily on the alleged intent of the Framers to avoid religious divisiveness, Justice Breyer distinguished between the Texas and Kentucky monuments largely on the grounds that the historical and physical context of the Texas monument indicate that it was intended to, and did, convey a primarily secular message, whereas the context surrounding the adoption and display of the Kentucky monuments betrayed “the substantially religious objectives of those who mounted them, and the effect of this readily apparent objective on those who view them.” *Id.* at 2871. In particular, Justice Breyer focused on the fact that the Texas monument had stood for over forty years before it prompted a legal challenge, whereas the Kentucky monuments were recently erected in a climate of religious divisiveness. “[I]n today’s world, in a Nation of so many different religious and comparable nonreligious fundamental beliefs, a more contemporary state effort to focus attention upon a religious text is certainly likely to prove divisive in a way that this longstanding, pre-existing monument has not.” *Id.*

<sup>4</sup> “When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.’” *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

<sup>5</sup> Initial reactions to the Breyer concurrence by legal academics have not been positive. My colleague, Ira Lupu, has noted that the opinion’s “Breyerian pragmatism . . . cannot be squared with any theory of equal religious liberty in America.” Posting of Ira Lupu to SCOTUSblog, [http://www.scotusblog.com/discussion/archives/2005/06/proof\\_of\\_secular.html](http://www.scotusblog.com/discussion/archives/2005/06/proof_of_secular.html) (June 27, 2005, 12:34 EST). Other scholars have been even more harsh. *See, e.g.*, Posting of Eric Muller to SCOTUSblog, [http://www.scotusblog.com/discussion/archives/2005/06/justice\\_breyers.html](http://www.scotusblog.com/discussion/archives/2005/06/justice_breyers.html) (June 27, 2005, 14:24 EST) (criticizing “the foolishness and naïveté of Justice Breyer’s outcome-determinative concurrence”).

feels offended and alienated by the monument—especially by its stark proclamation, endorsed by the government and carved in stone, that “thou shalt have no other gods before me” and that “thou shalt not bow down thyself to . . . nor serve” any “graven image”—and immediately files a lawsuit seeking to have the monument removed.

Case 2: A diverse suburb in Silicon Valley, California, with a majority population of first- and second-generation Asian immigrants, erects a monument on the steps of the town statehouse depicting sculptures of Vishnu and Buddha and proclaiming that one must live a good life in order to break the cycle of reincarnation and attain enlightenment. Believing that this governmentally sanctioned monument contradicts and disdains their devoutly held religious beliefs, a local Christian family quickly files suit seeking to have the monument removed.

Case 3: A university town in Wisconsin erects a stone monument in the county courthouse that boldly proclaims: “There is No God. All Laws Come from Mankind Alone.” A local Catholic family takes great offense and immediately files suit, seeking the monument’s removal.

Under the Court’s traditional Establishment Clause jurisprudence, these would all be easy cases. All three monuments would violate the core constitutional mandate of government neutrality in religious matters. The Court has determined the central meaning of the Establishment Clause to be that

[g]overnment in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.<sup>6</sup>

Each of my hypothetical monuments runs afoul of this principle: the first promotes traditional Western religions; the second promotes certain traditional Eastern religions; and the third promotes nonreligion. The government can do none of those things.

A narrow majority of the Court still adheres to this view. This was the explicit ground for the majority’s decision to order the removal of Kentucky’s Ten Commandments monuments in *McCreary County*. Justice Souter, speaking for a majority of the Court that included Justices Stevens, O’Connor, Ginsburg, and Breyer, reiterated that the requirement of neutrality among religions and between religion and nonreligion is “the touch-

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<sup>6</sup> *Epperson v. Arkansas*, 393 U.S. 97, 103–04 (1968).

stone” of the Establishment Clause inquiry.<sup>7</sup> Thus, the government may not take action that has the purpose or effect of inhibiting or advancing a particular religion or set of religions, or religion generally.<sup>8</sup> “When the government acts with the ostensible and predominant purpose of advancing religion,” explained Justice Souter, “it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government’s ostensible object is to take sides.”<sup>9</sup> Such was the case with the Kentucky monuments. The monuments were not, on their face, neutral. Rather, “[t]hey proclaim[ed] the existence of a monotheistic god (no other gods). They regulate[d] details of religious observation (no graven images, no sabbath breaking, no vain oath swearing). And they unmistakably rest[ed] even the universally accepted prohibitions (as against murder, theft, and the like) on the sanction of the divinity . . . .”<sup>10</sup> They were erected for the impermissible purpose of promulgating and celebrating a particular religious message.<sup>11</sup> As such, they were not neutral and could not withstand constitutional scrutiny.

Even the Court’s more conservative Justices, who would allow the government greater leeway in religious expression and symbolism cases than would the Court’s recent majority, have traditionally embraced an understanding of the Establishment Clause pursuant to which all of my hypo-

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<sup>7</sup> *McCreary County*, 125 S. Ct. at 2733.

<sup>8</sup> *See id.* at 2732–33.

<sup>9</sup> *Id.* at 2733 (citations and internal quotation marks omitted); *see also id.* at 2747 (O’Connor, J., concurring); *Van Orden v. Perry*, 125 S. Ct. 2854, 2875–76 (2005) (Stevens, J., dissenting). The Court’s “‘purpose’ requirement aims at preventing the relevant governmental decisionmaker . . . from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters.” *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 335 (1987).

<sup>10</sup> *McCreary County*, 125 S. Ct. at 2738. The text of the monuments read:

Thou shalt have no other gods before me.

Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water underneath the earth: Thou shalt not bow down thyself to them, nor serve them: for I the LORD thy God am a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate me.

Thou shalt not take the name of the LORD thy God in vain: for the LORD will not hold him guiltless that taketh his name in vain.

Remember the sabbath day, to keep it holy.

Honour thy father and thy mother: that thy days may be long upon the land which the LORD thy God giveth thee.

Thou shalt not kill.

Thou shalt not commit adultery.

Thou shalt not steal.

Thou shalt not bear false witness against thy neighbour.

Thou shalt not covet thy neighbour’s house, thou shalt not covet th[y] neighbor’s wife, nor his manservant, nor his maidservant, nor his ox, nor his ass, nor anything that is th[y] neighbour’s.

*Id.* at 2730–31.

<sup>11</sup> *See id.* at 2737–41.

thetical monuments would be unconstitutional. They, too, have accepted the neutrality mandate, though they have argued that “requiring government to avoid any action that acknowledges or aids religion . . . [cannot] in fairness be viewed as serving the goal of neutrality.”<sup>12</sup> They view the neutrality mandate as a more flexible one, “permit[ing] government some latitude in recognizing and accommodating the central role religion plays in our society.”<sup>13</sup> Still, they have long adhered to the view that the government may employ monuments and symbols only if they further secular purposes; government may not act “to proselytize on behalf of a particular religion” or religions or nonreligion, as each of my hypothetical monuments surely does.<sup>14</sup>

Until now, only Justice Thomas had disagreed.<sup>15</sup> In recent years, he has suggested that the Establishment Clause (and its requirement of neutrality) does not apply to the states at all, and therefore, the states are free to favor particular religions as they please, so long as they do not run afoul of the Free Exercise Clause.<sup>16</sup> He has also suggested, as an alternative argument, that even if the Establishment Clause applies to the states, it prevents only the legal coercion of religious practices; it does not prohibit the government from expressing a preference for, or a belief in, a particular religion or nonreligion.<sup>17</sup> On either of those readings, the aforementioned hypothetical cases are still easy ones; they just come out the other way. None of the monuments violates the Establishment Clause, either because that clause does not bind state or local governments, or because it reaches only overtly coercive government action.

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<sup>12</sup> *County of Allegheny v. ACLU*, 492 U.S. 573, 657–58 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part, joined by Chief Justice Rehnquist, Justice White, and Justice Scalia).

<sup>13</sup> *Id.* at 657.

<sup>14</sup> *Id.* at 661; *see also id.* at 660 (arguing that the Establishment Clause precludes “governmental exhortation to religiosity that amounts in fact to proselytizing”). Thus, Justice Kennedy has conceded that the Establishment Clause “forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall.” *Id.* at 661. Of course, the Court’s more conservative Justices, including Justice Kennedy, have voted to uphold government displays of religious symbols like the Ten Commandments, but—with the exception of Justice Scalia’s opinion in *McCreary County*—they have done so only on the grounds that the particular monument at issue does not, in their opinion, seek to proselytize or advance religion, but rather seeks only to recognize our nation’s religious heritage. *See, e.g., id.* at 663–67 (relying on *Lynch v. Donnelly*, 465 U.S. 668 (1984)); *id.* at 678–79; *Van Orden*, 125 S. Ct. at 2861–64 (Rehnquist, C.J., plurality opinion). The Ten Commandments monument in my hypothetical Case 1, by contrast, was erected for the purpose of honoring and worshiping God.

<sup>15</sup> The only other partial modern exception to the neutrality rule was then-Justice Rehnquist’s solo dissent in *Wallace v. Jaffree*, 472 U.S. 38, 91–111 (1985), in which he argued that the government could prefer religion over nonreligion, but conceded that it could not prefer one religion or group of religions over another. Rehnquist did not mention this theory again after his *Jaffree* dissent, and he appeared (at least prior to joining Justice Scalia in *McCreary County*) to have abandoned it. *See* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 145 (1992).

<sup>16</sup> *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49–51 (2004) (Thomas, J., concurring in the judgment).

<sup>17</sup> *See id.* at 2331–33; *Van Orden*, 125 S. Ct. at 2865 (Thomas, J., concurring).

Thus, until the Spring of 2005, the one thing that all of the Justices could seemingly agree upon was that, whatever the proper legal rule, all three of my hypothetical cases must come out the same way. Either government neutrality is required, in which case all three monuments are unconstitutional, or government neutrality is not required, in which case the courts must defer to democratic majorities and all three monuments are constitutional. Either way, the proper resolution of the Establishment Clause question does not turn on *which* religion (or lack thereof) the government chooses to endorse; all religions are entitled to equal status under the Constitution. That much, at least, seemed to be beyond serious dispute.

Not anymore. Justice Scalia's dissent in *McCreary County* has upset that long-settled consensus. Relying primarily on history, Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, has staked out a position pursuant to which the first of my hypothetical monuments (the one advancing Western religions) would be constitutional, whereas the other two monuments (the ones advancing Eastern religions and atheism) would be unconstitutional. In other words, the outcome depends upon *which* religion the government is supporting. The Establishment Clause affords greater protection to the believers of some religions (Christianity, Judaism, Islam) than others (Hinduism, Buddhism, no religion, everything else). Turning traditional constitutional law on its head, Justice Scalia's approach treats the Establishment Clause in the context of governmental religious expression neither as a mandate for equality, nor as a vehicle for protection of the minority against the tyranny of the majority, but rather as a mechanism for protecting the majority and the majority alone. And not just that: it appears that, according to Justice Scalia's view, the Establishment Clause affords greater protection only to the majority religious outlook (Judeo-Christianity) that was prevalent at the time of the framing. If ever the tables are turned, and the practitioners of other religions (or of no religion) achieve majority status in some communities (as imagined in my hypothetical Cases 2 and 3), the Establishment Clause will not extend the same rights and powers to them that it extends to adherents of Judeo-Christianity. To Justice Scalia, biblical monotheism is and always shall be the preferred religion of the American Constitution.

The importance of Justice Scalia's revolutionary opinion should not be underestimated. While Justice Breyer wrote his controlling opinion only for himself (and it is difficult to imagine other Justices joining in his largely idiosyncratic views), Justice Scalia secured the votes of two other Justices, with perhaps more votes to come as the Court undergoes its first personnel changes in more than a decade. With Justice O'Connor (one of the Justices in the five-to-four majority in *McCreary County*) already retired, Justice Stevens (another member of the *McCreary County* majority) recently celebrating his eighty-sixth birthday, and President Bush having declared his in-

tention to appoint Justices in the mold of Justices Scalia and Thomas,<sup>18</sup> Justice Scalia's view may well command a majority of the Court in the very near future.<sup>19</sup> As such, his opinion demands particularly close scrutiny.

This Article represents a first look at, and an initial criticism of, his reasoning. Part I examines Justice Scalia's dissent in some detail, attempting to ascertain its meaning and implications. Part II critiques the dissent on three principal grounds. First, in Part II.A, I argue that Justice Scalia's reasoning is based on a misguided conception of inclusiveness and of minority rights, wrongly suggesting that an equality norm that protects approximately eighty-five percent of Americans, at the expense of the other fifteen percent, is somehow constitutionally acceptable. Second, in Part II.B, I argue that Justice Scalia's defense of his rule on the ground of a perceived need for doctrinal consistency rings hollow, both because his own rule manifestly does not achieve the consistency that he seeks, and because it is misguided to insist, in the name of consistency, that the Court's traditional neutrality mandate is somehow "discredited" by the Court's pragmatic refusal to immediately extend it to the full extent of its logical reach. Finally, in Part II.C, I take issue with Justice Scalia's use of history. I argue that Justice Scalia's rule cannot be defended on originalist grounds because, although it aligns almost perfectly with the political preferences of the Republican Party, it is both theoretically bankrupt and demonstrably not mandated by, nor even supported by, the historical evidence of the original meaning of the First Amendment on which it is purportedly based. In that respect, Justice Scalia's dissent stands as a stark example of the inability of originalism to produce in practice—even when practiced by its most able disciples—a genuine apolitical constitutionalism.

#### I. THE MEANING OF JUSTICE SCALIA'S DISSENT: CONSTITUTIONALLY PREFERRED RELIGIONS

Justice Scalia's dissent is set out in three parts. Parts II and III are comparatively less interesting, as they are dedicated to the proposition that, even if one accepts the Court's existing body of Establishment Clause jurisprudence—including the neutrality mandate—the Kentucky counties' Ten Commandments monuments are still constitutional.<sup>20</sup> Justice Scalia argues that, in context, it is clear that the counties displayed the Commandments "not to teach their binding nature as a religious text, but to show their

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<sup>18</sup> See Todd S. Purdum, *Court in Transition: The Overview*, N.Y. TIMES, July 20, 2005, at A1.

<sup>19</sup> President Bush's first successful Supreme Court appointment, Chief Justice Roberts, replaced one of the Justices who joined Justice Scalia's dissent: Chief Justice Rehnquist. As such, that appointment cannot have brought Justice Scalia's view any closer to achieving majority status. President Bush's second appointment—of Justice Alito to replace Justice O'Connor—may well tell a different story, though it is too early to know for sure. If President Bush were able to make a third appointment, that appointment could potentially provide a fifth vote for Justice Scalia's position.

<sup>20</sup> See *McCreary County v. ACLU*, 125 S. Ct. 2722, 2757–64 (2005) (Scalia, J., dissenting).

unique contribution to the development of the legal system.”<sup>21</sup> Accordingly, their display does not materially advance or favor religion, nor was it intended to do so.<sup>22</sup>

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<sup>21</sup> *Id.* at 2759.

<sup>22</sup> This argument is, frankly, hard to swallow. Even if, Justice Souter’s compelling evidence to the contrary notwithstanding, Justice Scalia were correct about the legislative purpose—that the Kentucky counties erected the Ten Commandments monuments as nothing more than “a symbol of the role that religion played, and continues to play, in our system of government,” *id.* at 2760—why should that matter? What purpose, other than the advancement or promotion of religion, is served by emphasizing the alleged religious foundations of our law and government? One could argue that there is a legitimate, secular legislative purpose in ensuring historical accuracy—in avoiding what Justice Scalia terms “a revisionist agenda of secularization” that rewrites American history to whitewash it of all religious influence. *Id.* at 2763. But that argument is, in this context, fatally undercut by American history itself. The Kentucky counties included in their displays a declaration that “the Ten Commandments have profoundly influenced the formation of . . . our country” and “provide the moral background of the Declaration of Independence.” See *id.* at 2731 (majority opinion). But, as Justice Souter correctly noted, the Ten Commandments are the quintessential expression of the notion that law comes from God, whereas the Declaration of Independence is the best known expression of the profoundly different—and at the time, revolutionary—notion that the legitimacy of law and government comes not from above, but rather “from the consent of the governed.” *Id.* at 2740–41; see also Paul Finkelman, *The Ten Commandments on the Courthouse Lawn and Elsewhere*, 73 *FORDHAM L. REV.* 1477, 1510 (2005). Indeed, the entire American system of government was a direct product of the Enlightenment, a philosophical movement characterized by an emphasis on reason rather than faith. See, e.g., Charles Fried, *Philosophy Matters*, 111 *HARV. L. REV.* 1739, 1742 (1998). Many of the most important players in the drafting of the Declaration and the Constitution and in the framing of our nation were Deists, whose Enlightenment-inspired religious beliefs often rejected the God of the Bible and of the Ten Commandments altogether. See FRANK LAMBERT, *THE FOUNDING FATHERS AND THE PLACE OF RELIGION IN AMERICA* 160–61, 178 (2003); *infra* Part II.C. In historian Frank Lambert’s words,

[t]he significance of the Enlightenment and Deism for the birth of the American republic, and especially the relationship between church and state within it, can hardly be overstated. In brief, the United States was conceived not in an Age of Faith such as that of the Puritan Fathers but in an Age of Reason . . . . The Founders thought that people should be free to seek religious truth guided only by reason and the dictates of their consciences, and they determined that a secular state, supporting no religion but protecting all, best served that end.

*Id.* at 161–62. See generally Finkelman, *supra*, at 1500–16; Steven K. Greene, *The Fount of Everything Just and Right?: The Ten Commandments as a Source of American Law*, 14 *J.L. & RELIGION* 525 (2000).

By the same token, in *McCreary County*, the claim posted next to the Kentucky monuments that the Ten Commandments are “codified in Kentucky’s civil and criminal laws,” *McCreary County*, 125 S. Ct. at 2729 (internal quotations omitted), is simply false. The Ten Commandments manifestly are *not* codified in American law, and many of them—such as those prohibiting the worship of other gods and the making and serving of graven images—could not possibly be enforced without making a mockery of the First Amendment. See Finkelman, *supra*, at 1518–19; Marci Hamilton, *The Ten Commandments and American Law: Why Some Christians’ Claims to Legal Hegemony Are Not Consistent with the Historical Record*, *FINDLAW*, Sept. 11, 2003, <http://writ.news.findlaw.com/hamilton/20030911.html>. Only two of the Ten Commandments—the prohibitions against killing and stealing—are actually codified in current law (though with exceptions and defenses not reflected in the biblical text). And, of course, far from being the unique province of the Bible, those prohibitions are universal. Literally every civilized society on Earth prohibits murder and theft, regardless of whether it embraces or traces its legal and cultural roots to the Ten Commandments. See Harold J. Berman, *Law and Logos*, 44 *DEPAUL L. REV.* 143, 159 (1994); Hamilton, *supra*.

In this argument, Justice Scalia was joined not only by Chief Justice Rehnquist and Justice Thomas, but also by Justice Kennedy, which is not surprising, as Justice Scalia's discussion here does little more than recount the standard conservative line in religious symbolism cases, to which Justice Kennedy has long adhered.<sup>23</sup>

But Justice Scalia offered Parts II and III of his dissent only as an alternative argument for sustaining the constitutionality of the Ten Commandments monuments. His primary argument is contained in Part I, which lost the support of Justice Kennedy but held on to the votes of Chief Justice Rehnquist and Justice Thomas. Part I is anything but a rehashing of the standard conservative mantra. It is, instead, an all-out assault on the venerable principle of neutrality, the constitutional foundation upon which both liberals and conservatives alike had stood steadfast for generations. It proceeds in two phases: first, as a rejection of the notion that the government must remain neutral as between religion and nonreligion; and second, as a rejection of the notion that, when it comes to religious symbolism and governmental expression of religious beliefs, the government must remain neutral as between different religions.

Justice Scalia begins this assault by canvassing the early history of the Republic, noting many instances in which governmental actors invoked religion, from George Washington's adding the words "so help me God" to the Presidential oath, to the First Congress's practice of opening legislative sessions with a prayer, to the early Presidents' Thanksgiving Proclamations.<sup>24</sup> Justice Scalia questions how, in light of this history, the Court can possibly conclude that the Establishment Clause mandates neutrality between religion and nonreligion and forbids the government from manifesting a purpose to favor religion generally:

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Accordingly, if there is any "revisionist agenda"—to use Justice Scalia's phrase—at work here, it would seem to be in service of vastly overstating the role of religion and of the Ten Commandments in the founding of our nation and our legal system. As such, it is difficult to give credence to the argument that there was any legitimate motivation for these monuments other than the advancement of religion.

<sup>23</sup> See, e.g., *Van Orden v. Perry*, 125 S. Ct. 2854, 2858–64 (2005) (Rehnquist, C.J., plurality opinion) (arguing that the Texas Ten Commandments monument is constitutional because it simply acknowledges the role played by the Ten Commandments in our nation's heritage); *County of Allegheny v. ACLU*, 492 U.S. 573, 655–79 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (arguing that the display of a creche in a county courthouse was constitutional because it simply recognized the role that religion plays in our history and society, and did not seek to endorse or proselytize on behalf of a particular religion); see also *City of Elkhart v. Books*, 532 U.S. 1058, 1059–63 (2001) (Rehnquist, C.J., dissenting from the denial of certiorari) (arguing that monuments depicting the Ten Commandments are constitutional because the Ten Commandments have a secular significance as a major contributor to our legal codes); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (upholding public display of a nativity scene on the ground that the government had a secular purpose for erecting the display—depicting the historical origins of the Christmas holiday—and that the display did not materially advance religion).

<sup>24</sup> See *McCreary County*, 125 S. Ct. at 2748–50 (Scalia, J., dissenting).

Who says so? Surely not the words of the Constitution. Surely not the history and traditions that reflect our society's constant understanding of those words. Surely not even the current sense of our society, recently reflected in an Act of Congress adopted unanimously by the Senate and with only 5 nays in the House of Representatives, criticizing a Court of Appeals opinion that had held "under God" in the Pledge of Allegiance unconstitutional.<sup>25</sup>

Rather, says Justice Scalia, the mandate for governmental neutrality between religion and nonreligion is the product of nothing more than "the Court's own say-so."<sup>26</sup>

Turning to the principle of neutrality between religions, Justice Scalia declares, "[t]hat is indeed a valid principle where public aid or assistance to religion is concerned, or where the free exercise of religion is at issue, but it necessarily applies in a more limited sense to public acknowledgment of the Creator."<sup>27</sup> This is so because:

[i]f religion in the public forum had to be entirely nondenominational, there could be no religion in the public forum at all. One cannot say the word "God," or "the Almighty," one cannot offer public supplication or thanksgiving, without contradicting the beliefs of some people that there are many gods, or that God or the gods pay no attention to human affairs.<sup>28</sup>

In light of the long historical pedigree of official acknowledgment of God, that cannot, says Justice Scalia, be the law. Rather, "[w]ith respect to public acknowledgment of religious belief," the Constitution permits the government to favor Judeo-Christian monotheism; "it is entirely clear from our Nation's historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists."<sup>29</sup>

In a footnote, Justice Scalia goes on to add:

This is not to say that a display of the Ten Commandments could never constitute an impermissible endorsement of a particular religious view. The Establishment Clause would prohibit, for example, governmental endorsement of a particular version of the Decalogue as authoritative. Here the display of the Ten Commandments alongside eight secular documents, and the plaque's explanation for their inclusion, make clear that they were not posted to take sides in a theological dispute.<sup>30</sup>

At first blush, this passage might be taken to suggest that official religious expression—even in support of monotheism—violates the Establishment Clause unless it is intended to convey a secular, rather than a religious,

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<sup>25</sup> *Id.* at 2750 (citations omitted).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 2752.

<sup>28</sup> *Id.* at 2752–53.

<sup>29</sup> *Id.* at 2753.

<sup>30</sup> *Id.* at 2753 n.4.

message. One might also get that impression from the brief summary of his position that Justice Scalia offered in *Van Orden*, the Texas Ten Commandments case decided on the same day. In that case, after joining Chief Justice Rehnquist's plurality opinion upholding the Texas monument on the ground that it conveyed a secular message, Justice Scalia added a separate concurrence referencing his *McCreary County* dissent:

I would prefer to reach the same result by adopting an Establishment Clause jurisprudence that is in accord with our Nation's past and present practices, and that can be consistently applied—the central relevant feature of which is that there is nothing unconstitutional in a State's favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments.<sup>31</sup>

This apparent proscription against proselytizing might again suggest that governmental acknowledgments of the divine are unconstitutional unless they are motivated by secular concerns and convey a secular message.

But that is clearly not what Justice Scalia means to say, as he makes perfectly clear when he declares that “even an *exclusive* purpose to foster or assist religious practice is not necessarily invalidating.”<sup>32</sup> An exclusive purpose to foster religious practice is, of course, a nonsecular purpose, and actions such as honoring God through official prayer and divine acknowledgment, when motivated by that purpose, are a form of proselytization, yet Justice Scalia is willing to tolerate them. Indeed, at oral argument in *Van Orden*, Justice Scalia left no room for doubt that he believes that Ten Commandments monuments are constitutional despite the fact that they convey a religious, rather than a secular, message:

It's not a secular message. I mean, if you're watering it down to say that the only reason it's okay is it sends nothing but a secular message, I can't agree with you. I think the message [that the Ten Commandments monument] sends is that law is—and our institutions come from God. And if you don't think it conveys that message, I just think you're kidding yourself.<sup>33</sup>

What Justice Scalia appears instead to be saying is that the government is free to endorse Judeo-Christian monotheism, so long as it does not endorse any particular sect or belief within that broad tent. Endorsing “God” is permissible, but endorsing “Jesus Christ” is not, as the latter endorsement takes sides in a theological dispute about the true nature of the monotheistic God.<sup>34</sup> In other words, the government can proselytize in the sense of en-

<sup>31</sup> *Van Orden v. Perry*, 125 S. Ct. 2854, 2864 (2005) (Scalia, J., concurring).

<sup>32</sup> *McCreary County*, 125 S. Ct. at 2758 (Scalia, J., dissenting).

<sup>33</sup> Transcript of Oral Argument at 29, *Van Orden*, 125 S. Ct. 2854 (No. 03-1500), available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/03-1500.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03-1500.pdf) (question from Justice Scalia); see also *id.* at 16 (acknowledging that a Ten Commandments monument conveys “a profound religious message,” rather than a secular one).

<sup>34</sup> See also *McCreary County*, 125 S. Ct. at 2753 (Scalia, J., dissenting) (“Publicly honoring the Ten Commandments is thus indistinguishable, insofar as discriminating against other religions is concerned,

couraging and endorsing Western monotheism generally, but it may not encourage or endorse one form of Judeo-Christian monotheism over another.<sup>35</sup>

That conclusion is, according to Justice Scalia, mandated by American history: “*All* of the actions of Washington and the First Congress upon which I have relied, virtually all Thanksgiving Proclamations throughout our history, and *all* the other examples of our Government’s favoring religion that I have cited, have invoked God, but not Jesus Christ.”<sup>36</sup> From this near-unanimity of historical sources, Justice Scalia argues, one can discern an original understanding that the Constitution permits broad, nonsectarian invocations of God, but does not permit narrow endorsements of particular, disputed monotheistic beliefs.<sup>37</sup>

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from publicly honoring God. Both practices are recognized across such a broad and diverse range of the population—from Christians to Muslims—that they cannot be reasonably understood as a government endorsement of a particular religious viewpoint.”); *id.* (citing *Marsh v. Chambers*, 463 U.S. 783 (1983), for the proposition that legislative prayer “in the Judeo-Christian tradition” is constitutional so long as it does not “proselytize or advance any one . . . faith or belief”).

<sup>35</sup> One wonders how, if this is indeed the rule, a Ten Commandments monument could possibly be constitutional, given that there are a number of different versions of the Decalogue, each endorsed by different religious sects, and the differences between the versions reflect deep doctrinal disputes. See *Van Orden*, 125 S. Ct. at 2879–80 & nn.15–16 (Stevens, J., dissenting) (noting important distinctions between Catholic, Protestant, and Jewish versions of the Ten Commandments). A governmental Ten Commandments monument that includes text must necessarily choose one version over the others, thus endorsing one religious interpretation over the others. Justice Scalia glosses over this problem in a footnote by proclaiming, based only on his own personal knowledge and experience, that most religious adherents would not recognize this problem. See *McCreary County*, 125 S. Ct. at 2762 n.12 (Scalia, J., dissenting).

<sup>36</sup> *McCreary County*, 125 S. Ct. at 2755 (Scalia, J., dissenting) (footnote omitted).

<sup>37</sup> This conclusion did not come entirely out of the blue. Justice Scalia had been hinting at, and perhaps building toward, it for some time. He had previously expressed concern with the Court’s mandate that the government may not prefer religion over nonreligion. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 638 (1992) (Scalia, J., dissenting) (noting “the government’s interest in fostering respect for religion generally”); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 29–30 (1989) (Scalia, J., dissenting) (criticizing the Court’s “bold but unsupported assertion (given such realities as the text of the Declaration of Independence, the national Thanksgiving Day proclaimed by every President since Lincoln, the inscriptions on our coins, the words of our Pledge of Allegiance, the invocation with which sessions of our Court are opened and, come to think of it, the discriminatory protection of freedom of religion in the Constitution) that government may not ‘convey a message of endorsement of religion’”). In particular, he had long been a champion of the notion that the government may affirmatively “accommodate” religion, even when the Free Exercise Clause does not demand it, without running afoul of the Establishment Clause. See *Bd. of Educ. v. Grumet*, 512 U.S. 687, 743–45 (1994) (Scalia, J., dissenting); *Texas Monthly*, 489 U.S. at 38–40 (Scalia, J., dissenting); *Edwards v. Aguillard*, 482 U.S. 578, 615–18, 635 (1987) (Scalia, J., dissenting). But prior to *McCreary County* he had always attempted to square that notion with the neutrality mandate. See *Grumet*, 512 U.S. at 741 (Scalia, J., dissenting) (acknowledging the “neutrality demanded by the religion clauses”); *id.* at 743 (viewing legislative accommodation of religion as “‘a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference’” (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 669 (1970))); *Texas Monthly*, 489 U.S. at 34 (Scalia, J., dissenting) (advocating a “distinction between an unlawful attempt to favor religion” and a lawful “attempt to guard against the latent dangers of government hostility to religion”); *id.* at 40 (arguing that legislative accommodations of religion must maintain “the necessary neutrality” and secular purpose, and conceding that the Constitution will not tolerate it “when accommodation slides over into

But what about official invocations of atheism, nontheistic religion, non-Judeo-Christian monotheism, or polytheism? What if the Judeo-Christians find themselves in the minority in a particular community, and the new atheistic or polytheistic majority chooses to officially acknowledge its preferred beliefs? Does the Constitution permit that? Justice Scalia does not directly confront this question, but he leaves little doubt that his answer is no. He is not endorsing a principle that, when it comes to governmental invocations of religion, majority (or even super-majority) rules. If that were his position, then he would have permitted, rather than precluded, sectarian, Christian monuments. He is instead endorsing a narrow, historically based exception to the principle of neutrality between religions that applies only to the types of generic Judeo-Christian governmental statements and endorsements that were prevalent around the time of the framing.<sup>38</sup>

This much is clear from the language of his dissent. He concludes that the historical record demonstrates only that “the Establishment Clause permits th[e] disregard of polytheists[,] . . . believers in unconcerned deities, [and] . . . devout atheists.”<sup>39</sup> His choice of words here (and throughout his dissent) is important. He does not say that the Constitution permits the dis-

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promotion, and neutrality into favoritism”); *Aguillard*, 482 U.S. at 616 (Scalia, J., dissenting) (accepting the mandate “that governmental ‘neutrality’ toward religion is the preeminent goal of the First Amendment”); *id.* at 618 (noting that accommodation may not “devolve into ‘an unlawful fostering of religion’”).

Similarly, Justice Scalia had previously hinted that he views government endorsement of nonsectarian monotheism (but not Christianity) as constitutionally permissible. See *Weisman*, 505 U.S. at 641 (Scalia, J., dissenting) (declaring “that our constitutional tradition, from the Declaration of Independence and the first inaugural address of Washington . . . has, with a few aberrations, ruled out of order government-sponsored endorsement of religion . . . where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ)”; Transcript of Oral Argument at 12, *Lee v. Weisman*, 505 U.S. 577 (1992) (No. 90-1014) (question from Justice Scalia) (“You cite Thanksgiving proclamations, you cite the God save the United States. I mean we don’t say Jesus Christ save the United States and this Honorable Court. And I don’t think that would be in accord with our religious freedom tradition—or, In Jesus Christ We Trust on the coins. We wouldn’t put that in there, would we?”); Ira C. Lupo, *To Control Faction and Protect Liberty: A General Theory of the Religion Clauses*, 7 J. CONTEMP. L. ISSUES 357, 363 (1996) (noting that, at oral argument in *Lee v. Weisman*, Justice Scalia expressed skepticism that the Constitution would permit the use of the phrase “In Jesus Christ We Trust,” rather than “In God We Trust,” on our coins). But despite these hints, prior to *McCreary County*, Justice Scalia had never explicitly stated that the government may depart from the principle of neutrality between religions in order to endorse biblical monotheism. To the contrary, he had categorically insisted: “I have always believed, and all my opinions are consistent with the view, that the Establishment Clause prohibits the favoring of one religion over others.” *Grumet*, 512 U.S. at 748 (Scalia, J., dissenting).

<sup>38</sup> Justice Scalia has long advocated the notion that “the meaning of the [Establishment] Clause is to be determined by reference to historical practices and understandings,” and therefore that practices that were common in the early years of the Republic must necessarily be constitutional. *Weisman*, 505 U.S. at 631–36 (Scalia, J., dissenting) (internal quotation marks omitted); see also *Grumet*, 512 U.S. at 751 (Scalia, J., dissenting) (“The foremost principle I would apply is fidelity to the longstanding traditions of our people . . .”).

<sup>39</sup> *McCreary County*, 125 S. Ct. at 2753 (Scalia, J., dissenting).

regard of religious minorities (after all, it does *not*, in his opinion, permit the disregard of Jews and Muslims); he says that the Constitution permits the disregard of the adherents of certain, specified species of faith (or lack thereof): polytheists, believers in unconcerned deities, and atheists. He forthrightly concedes that, although these persons “are entirely protected by the Free Exercise Clause, and by those aspects of the Establishment Clause that do not relate to government acknowledgment of the Creator,” they are not protected by the aspects of the Establishment Clause that relate to governmental acknowledgment of God.<sup>40</sup> It is the substance of their religious beliefs, not their minority status, that disqualifies them from protection. Historically, persons holding these beliefs have been disregarded by the government; as such, the government can continue to disregard them today. Since there is no comparable historical record of official governmental invocations of atheism or polytheism, the Constitution would not permit the disregard of believers in monotheism.<sup>41</sup>

Justice Scalia goes on to say that “governmental invocation of God is not an establishment.”<sup>42</sup> Here again, his words are instructive. He does not make the broad and neutral claim that the Establishment Clause tolerates all governmental proclamations about the existence of a god or gods or the lack thereof (after all, it does *not*, in his opinion, tolerate invocations of Christ). Rather, he makes the narrow and one-sided claim that “governmental *invocation of God* is not an establishment.”<sup>43</sup> In other words, the exception to the requirement of governmental neutrality between religions applies only to “public acknowledgment of the Creator”—not to all public expression of community sentiments regarding the existence or nonexistence of one or more gods.<sup>44</sup> Governmental invocation of God is not an establishment, but governmental rejection of God, or governmental invocation of Zeus or Vishnu or of polytheism generally *is* an establish-

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<sup>40</sup> *Id.* at 2756.

<sup>41</sup> Admittedly, there are passages in Justice Scalia’s dissent that focus on the fact that polytheists and atheists are in the minority—thus perhaps suggesting that the law would treat them differently if their ranks were to swell. *See, e.g., id.* at 2753. Most notably, Justice Scalia explains that “in the context of public acknowledgments of God,” the “interest of th[e] minority in not feeling ‘excluded’” must yield to “the interest of the overwhelming majority of religious believers in being able to give God thanks and supplication *as a people*” because “[o]ur national tradition has resolved that conflict in favor of the majority.” *Id.* But even here, Justice Scalia emphasizes the national history of invoking the biblical God, rather than a national history of majority rule.

<sup>42</sup> *Id.* *See also id.* at 2753 (“Historical practices thus demonstrate that there is a distance between the acknowledgment of a single Creator and the establishment of a religion.”).

<sup>43</sup> *See also id.* at 2750 (rejecting “the Courts’ assertion that governmental affirmation of the society’s belief in God is unconstitutional”).

<sup>44</sup> *Id.* at 2752. For another example of his conspicuously one-sided language, note that Justice Scalia rejects “the demonstrably false principle that the government cannot favor religion over irreligion,” *id.*, notwithstanding the fact that the majority had articulated that principle to apply evenhandedly: “the touchstone for our analysis is the principle that the First Amendment mandates governmental neutrality between . . . religion and nonreligion,” *id.* at 2733 (majority opinion).

ment, as it—just like governmental invocation of Christ—cannot claim the sanction of two centuries of historical acquiescence.

Thus, returning to the hypothetical cases proposed at the outset of this Article, on Justice Scalia's view, we can expect divergent results. The first monument—a Ten Commandments display erected for the declared purpose of publicly honoring and expressing a communal belief in the biblical God—would be constitutional, so long as it did not endorse any particular Judeo-Christian sect. That a local Hindu family might feel alienated by the monument is of no matter, for “the Establishment Clause permits this disregard of polytheists.”<sup>45</sup>

The second monument—depicting sculptures of Vishnu and Buddha, and proclaiming that one must live a good life in order to break the cycle of reincarnation and attain enlightenment—and the third monument—proclaiming: “There is No God. All Laws Come from Mankind Alone”—would meet with a different result. Neither of these monuments proselytizes for a particular faith. The third monument declares a government endorsement of nonreligion. The second monument depicts figures from two different faiths (Hinduism and Buddhism) and offers a general statement about the path to enlightenment that might appeal to the practitioners of a number of Eastern religions, including Hinduism, Buddhism, Jainism, and Sikhism.<sup>46</sup> In that sense, it is not unlike the Ten Commandments monuments: inclusive of the beliefs of a majority of the local population, but offensive and alienating to a minority. But when the local Christians (or Jews or Muslims) in the minority are offended, their offense *does* matter, and their interests, unlike the Hindu family challenging the first monument, *are* constitutionally protected.

## II. CRITIQUING JUSTICE SCALIA'S APPROACH

In interpreting the Constitution's other religion clause—the Free Exercise Clause—Justice Scalia has championed the notion of formal neutrality. With his opinion for the Court in *Employment Division v. Smith*,<sup>47</sup> Justice

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<sup>45</sup> *Id.* at 2753 (Scalia, J., dissenting). I apologize for the gross distortion of Hindu theology that may result from referring to Hindus as “polytheists.” See Brief of Amici Curiae the Hindu Am. Found. & Others at 8–9, *Van Orden v. Perry*, 125 S. Ct. 2854 (2005) (No. 03-1500) (“Hinduism propounds a theology of pantheistic monotheism, recognizing that God can be called many names and may take many forms, and that the means or ways to salvation are many.”). But see *Van Orden*, 125 S. Ct. at 2881 (Stevens, J., dissenting) (referring to Hinduism as a “polytheistic sect”). Regardless of the proper categorization of Hindu theology, it is clear that Hindus do not worship the God of the Ten Commandments, and that Justice Scalia thus believes that the Establishment Clause permits the government to disregard their interests and beliefs.

<sup>46</sup> See generally KAREN FARRINGTON, *HISTORICAL ATLAS OF RELIGIONS* 140–41, 144–45, 154–55, 164 (2002); ROBERT POLLOCK, *THE EVERYTHING WORLD'S RELIGION BOOK: DISCOVER THE BELIEFS, TRADITIONS, AND CULTURES OF ANCIENT AND MODERN RELIGIONS* 97–98, 114–15, 169–71, 182–84 (2002).

<sup>47</sup> 494 U.S. 872 (1990).

Scalia revolutionized the law of religious freedom by holding that “the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).”<sup>48</sup>

That rule is ostensibly neutral.<sup>49</sup> Formally, it treats all religions the same way; the adherents of any religion, whether they are Christians or Zoroastrians, may not practice their faith when doing so is inconsistent with a generally applicable state or federal law. But of course, as Justice Scalia admitted, the political branches will be far more likely to pass generally applicable laws that interfere with the practice of minority religions than to enact laws that criminalize acts essential to the practice of majority religions. That is to say, “leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in.”<sup>50</sup> For that reason, many commentators have criticized Justice Scalia’s opinion in *Smith* for championing an empty formalism that is neutral in theory, but decidedly discriminatory in practice.<sup>51</sup>

But at least *Smith* pretended to official neutrality. In his *McCreary County* dissent, by contrast, Justice Scalia has done away with the fig leaf of formal neutrality altogether. The government is free to favor religion over nonreligion and, in the context of symbolism and endorsement, to favor majority religions over minority religions—and it may do so explicitly and facially. What is more, this rule is permanently skewed in favor of Judeo-Christian monotheism. Under Justice Scalia’s free exercise jurisprudence, if Christians ever become a minority (unlikely nationally anytime soon, but surely possible locally in many places), they will have no recourse when they find themselves to be the victims of majoritarian, generally applicable laws that impair their ability to worship according to the dictates of their faith. What’s good for the goose is good for the gander. But under Justice Scalia’s new establishment jurisprudence, Christians can rest assured that, no matter what happens, they will never have to endure the alienation of government-sponsored proclamations of religious truths antithetical to their own faith. There is no requirement of governmental neu-

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<sup>48</sup> *Id.* at 879 (internal quotation marks omitted). See generally Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1133–36 (1990); *id.* at 1111 (“The *Smith* decision is undoubtedly the most important development in the law of religious freedom in decades.”).

<sup>49</sup> See also *Locke v. Davey*, 540 U.S. 712, 726 (2004) (Scalia, J., dissenting) (championing neutrality as the touchstone of the Free Exercise Clause).

<sup>50</sup> *Smith*, 494 U.S. at 890.

<sup>51</sup> See, e.g., Stephen L. Carter, *The Resurrection of Religious Freedom?*, 107 HARV. L. REV. 118, 122–23 (1993); James D. Gordon, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91, 108 (1991); McConnell, *supra* note 15, at 139 (arguing that *Smith* “introduces a bias in favor of mainstream over nonmainstream religions”); McConnell, *supra* note 48, at 1133–36 (arguing that the *Smith* rule is not, in practice, neutral between religions).

trality, formal or otherwise; rather, there is an express constitutional preference for certain religions.

If Justice Scalia's approach becomes the law, it will represent the single greatest sea change in the history of the Establishment Clause. The principle of governmental neutrality among religions and between religion and nonreligion has been a central tenet of the Court's Establishment Clause jurisprudence for more than half a century—in essence, from the very beginning.<sup>52</sup> All of the Justices have predicated their core understanding of the religion clauses on the view that the government cannot “constitutionally pass laws or impose requirements which aid all religions as against nonbelievers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.”<sup>53</sup> Yet Justice Scalia would cast that decades-old cardinal understanding aside in one fell swoop.

Before Justice Scalia's opinion, virtually everyone was operating within the neutrality paradigm.<sup>54</sup> The point of disagreement was over

<sup>52</sup> One can find loose language in nineteenth-century opinions suggesting a constitutional preference for Christianity, rather than a constitutional mandate for religious neutrality. *See, e.g.*, *Church of the Holy Trinity v. United States*, 143 U.S. 457, 470–71 (1892). But those cases did not consider the impact or the meaning of the Establishment Clause. When the Court first confronted the meaning of the Establishment Clause, it arrived immediately at the mandate for governmental neutrality. The Court first articulated the neutrality principle in *Everson v. Board of Education*, 330 U.S. 1, 15–16 (1947). *Everson* is often referred to as the Court's first Establishment Clause decision. *See, e.g.*, Diarmuid F. O'Scannlain, *Catholic Lawyers in an Age of Secularism*, 43 CATH. LAW. 1, 9 (2004). That is not precisely true; the Court first decided an Establishment Clause case in 1899. *See* Michael W. McConnell, *The Supreme Court's Earliest Church-State Cases: Windows on Religious-Cultural-Political Conflict in the Early Republic*, 37 TULSA L. REV. 7 (2001). “Strictly speaking, several Establishment Clause flavored cases were presented to the Court before *Everson*, but in each instance the Court narrowed its holding and decided the case [largely] on non-Establishment Clause grounds.” Charles G. Warren, Comment, *No Need to Stand on Ceremony*, 54 MERCER L. REV. 1669, 1674 n.14 (2003). *Everson* was the first case to incorporate the Establishment Clause against the states, *see* John C. Jeffries Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 294 n.74 (2001), and it represents the beginning of the Court's modern understanding of religious freedom, *see* Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 CATH. LAW. 25, 49 (2000). In other words, “*Everson* provided the Court's first serious attempt to explain the principle of nonestablishment.” Jesse H. Choper, *A Century of Religious Freedom*, 88 CAL. L. REV. 1709, 1717 (2000).

<sup>53</sup> *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (striking down a Maryland constitutional provision requiring state officeholders to declare a belief in the existence of God).

<sup>54</sup> To be sure, there have been academic calls to reject the neutrality principle. *See, e.g.*, Gabriel A. Moens, *The Menace of Neutrality in Religion*, 2004 B.Y.U. L. REV. 535. But, with the exception of Chief Justice Rehnquist, who once offered a partial challenge to the principle in a solo dissent that he quickly abandoned, *see supra* note 15, the Justices have all endorsed the neutrality mandate for over half a century.

I hasten to add that the neutrality paradigm is, of course, no panacea. The notion of neutrality means different things to different people, and there has been a great deal of discussion among academics and judges about the extent to which it is inadequate, manipulable, incapable of deciding hard cases, or even incoherent. *See, e.g.*, Alan E. Brownstein, *Interpreting the Religion Clauses in Terms of Liberty, Equality, and Free Speech Values—A Critical Analysis of “Neutrality Theory” and Charitable Choice*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 243, 244–56 (1999) (arguing that the emphasis on neutrality

whether the Court's current understanding of the scope of the neutrality mandate—that is to say, the Court's working definition of neutrality—was, in effect, either too hostile toward religion<sup>55</sup> or too supportive of majority religions.<sup>56</sup> To be sure, there has been a major shift to the right in Establishment Clause jurisprudence over the course of the last quarter century. But that shift has occurred entirely within the neutrality paradigm. Indeed, it has been a *triumph* of the neutrality principle.

Traditionally, neutrality has competed with the alternative Establishment Clause metaphor of strict separation between church and state. The Court invoked both metaphors in its very first modern Establishment Clause decision,<sup>57</sup> and it continues to do so today.<sup>58</sup> In the more liberal pre-Reagan era, whenever the two metaphors seemed to come up against one another—as might be the case when, for instance, religious schools ask for equal ac-

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undervalues the positive role that the government should be playing in advancing religious liberty and equality); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 994 (1990) (noting that we can “agree on the principle of neutrality without having agreed on anything at all”); Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U. L. REV. 146 (1986) (suggesting that strict neutrality may not always be adequate to protect religious liberty); Frank S. Ravitch, *A Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause*, 38 GA. L. REV. 489, 493 (2004) (concluding that “[t]here is no independent neutral truth or baseline to which [claims of neutrality] can be tethered”); John T. Valauri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 U. PITT. L. REV. 83, 92 (1986) (“The conceptual complexity, formality, and ambiguity of neutrality are interrelated and mutually reinforcing. They make the concept abstract and incomplete.”); *Mitchell v. Helms*, 530 U.S. 793, 878–84 (2000) (Souter, J., dissenting) (noting that the Court has employed the term “neutrality” in Establishment Clause cases in a number of senses); *Bd. of Educ. v. Allen*, 392 U.S. 236, 249 (1968) (Harlan, J., concurring) (“Neutrality is, however, a coat of many colors.”). But however open ended and imperfect this principle may be, the Court has understood it to reflect the core of the Establishment Clause for half a century.

<sup>55</sup> See, e.g., *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 305–06 (1963) (Goldberg, J., concurring) (“The fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief. . . . It is said, and I agree, that the attitude of government toward religion must be one of neutrality. But untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.”).

<sup>56</sup> See, e.g., Daan Braveman, *The Establishment Clause and the Course of Religious Neutrality*, 45 MD. L. REV. 352 (1986).

<sup>57</sup> See *Everson*, 330 U.S. at 16 (“In the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between Church and State.’”); *id.* at 15 (“The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can . . . pass laws which aid one religion, aid all religions, or prefer one religion over another.”).

<sup>58</sup> In last Term’s Ten Commandments cases, the wall of separation metaphor was invoked both by those who would uphold the monuments, see *Van Orden v. Perry*, 125 S. Ct. 2854, 2859 (2005) (Rehnquist, C.J., plurality opinion) (noting that the Establishment Clause “demand[s] a separation between church and state”), and those who would strike them down, see *id.* at 2875 (Stevens, J., dissenting) (noting that the religion clauses “erect a wall of separation between church and state”).

cess to government-funded financial support for teachers—the separationist metaphor typically won out. The Court was willing to treat religious institutions differently than similarly situated secular institutions in order to maintain the separation of church and state and to avoid direct government funding of religious proselytization.<sup>59</sup> (The Court did not view that willingness as a repudiation of the neutrality principle, but rather as an implementation of a broader notion of neutrality that focused on total noninterference with religious institutions as the touchstone of governmental neutrality.)<sup>60</sup>

In the last twenty-five years, however, the Court has steered a 180-degree turn. Neutrality—defined more narrowly as the equal treatment of religious and secular institutions and expression—has become the central focus of the Court’s Establishment Clause jurisprudence, driving notions of separation of church and state to the constitutional periphery. Today, when the two metaphors appear to collide, neutrality generally trumps, even if it leads to significantly more governmental funding of religious activities.<sup>61</sup> Thus, for instance, the Court has held that it would not violate the Establishment Clause for a public university to fund sectarian, proselytizing religious newspapers with generally available student activities fees that are also used to support a wide variety of nonreligious expression,<sup>62</sup> or for a local government to include private religious schools on the list of eligible recipients of publicly funded school vouchers.<sup>63</sup> The key to all of these cases has been the demand for strict governmental neutrality; the Court explicitly

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<sup>59</sup> See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (striking down state funding of private-school teacher salaries because much of the money went to teachers in religious schools).

<sup>60</sup> See Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 45 (1997) (“In the Court’s view, separation is and always has been a means of maximizing religious liberty, of minimizing government interference with religion, and thus, of implementing neutrality among faiths and between faith and disbelief.”); *id.* at 48 (“In the no-aid theory, the baseline is government inactivity, because doing nothing neither helps nor hurts religion. Any government aid to religion is a departure from that baseline, and thus a departure from neutrality.”).

<sup>61</sup> See Steven K. Green, *Locke v. Davey and the Limits to Neutrality Theory*, 77 TEMPLE L. REV. 913, 914 (2004) (noting that the principle that “neutrality or equal treatment should prevail over separationist considerations” has predominated in the last two decades); *id.* at 933–42 (tracing the history of the neutrality/separation dichotomy); Ira C. Lupu & Robert W. Tuttle, *Zelman’s Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917, 918 (2003) (noting that “norms of non-Establishment have been tending sharply toward the paradigm of Neutrality and away from the metaphorical wall of church-state separation”); Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 246 (1993) (“The apparent successor to separationism is some version of religious neutrality, or equal religious liberty.”); *id.* at 256 (noting the “strong trend away from the separationist ethos of religion-state relations that prevailed in the liberal culture after the end of the second World War,” in favor of “a neutrality-based view”); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 873–84 (1995) (Souter, J., dissenting) (tracing the development of neutrality principles in Establishment Clause jurisprudence).

<sup>62</sup> *Rosenberger*, 515 U.S. 819 (majority opinion).

<sup>63</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

based its holdings on the fact that the challenged programs were facially neutral toward religion.<sup>64</sup>

The strict neutrality principle has ascended over the vehement dissent of the Court's more liberal Justices, who decry the breakdown of the wall of separation and the attendant increase in government financial support for religious activities.<sup>65</sup> But these Justices could, one would have thought, at least have taken some solace in the fact that, while strict neutrality promotes some forms of religion in the public sphere, it precludes others. Neutrality may lead to more government funding of religious activities through generally available funds, but it also precludes government-sponsored religious expression. After all, as Justice Scalia put it, "[o]ne cannot say the word 'God,' or 'the Almighty,' one cannot offer public supplication or thanksgiving, without contradicting the beliefs of some people."<sup>66</sup> Leading commentators from across the political spectrum have therefore recognized that the recent triumph of the strict version of the neutrality principle necessarily renders unconstitutional most forms of governmental religious expression.<sup>67</sup> As Professor Ira Lupu has explained, the ascendancy of the strict neutrality principle "should result in the least-favored religion getting exactly as much protection as the most-favored religion. A community that sponsors a Christmas display should be constitutionally obliged, for example, to devote equal time and resources to the holy days of Eastern religions to which some of its residents adhere."<sup>68</sup> Religious conservatives who champion

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<sup>64</sup> See, e.g., *id.* at 653 (grounding decision in the fact that "the Ohio program is neutral in all respects toward religion"); *Mitchell v. Helms*, 530 U.S. 793, 809–14 (2000) (Thomas, J., plurality opinion); cf. *Rosenberger*, 515 U.S. at 839 (declaring that it would not violate the Establishment Clause for the University to open its student activities funds to religious publishers on equal terms with secular ones because "the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse"). But see *Locke v. Davey*, 540 U.S. 712 (2004) (permitting over the dissent of Justices Scalia and Thomas, but not requiring, a state government to exempt religious studies from the scope of a taxpayer-funded college scholarship program in order to maintain a wall of separation between public money and sectarian proselytizing).

<sup>65</sup> See, e.g., *Zelman*, 536 U.S. at 686–717 (Souter, J., dissenting); *Rosenberger*, 515 U.S. at 863–99 (Souter, J., dissenting).

<sup>66</sup> *McCreary County v. ACLU*, 125 S. Ct. 2722, 2752–53 (2005) (Scalia, J., dissenting).

<sup>67</sup> See, e.g., Ira C. Lupu, *Government Messages and Government Money: Santa Fe, Mitchell v. Helms, and the Arc of the Establishment Clause*, 42 WM. & MARY L. REV. 771, 816–17 (2001) ("By contrast, government-sponsored religious messages can never achieve the status of neutrality among religions. . . . [B]ecause government cannot possibly be evenhanded in its distribution of respect, endorsement, and support, the only sensible constitutional solution for the twenty-first century is some form of separationist principle designed to keep government from taking positions on matters of religious faith, celebration, and observance." (footnote omitted)); Michael W. McConnell, *State Action and the Supreme Court's Emerging Consensus on the Line Between Establishment and Private Religious Expression*, 28 PEPP. L. REV. 681, 682 (2001) (noting that the modern, neutrality-based trend in Establishment Clause cases necessarily implies that "[i]f religious activity is instigated [or] encouraged . . . by the government, the government's acts are unconstitutional").

<sup>68</sup> Lupu, *supra* note 61, at 277 (footnote omitted).

neutrality in order to obtain its benefits in funding cases must therefore also accept its costs in religious expression cases.

But Justice Scalia has found a way to have his cake and eat it too. His approach offers all of the advantages (from the standpoint of those who seek a greater role for Judeo-Christian religion in the public sphere) of the neutrality principle, but none of the costs. Justice Scalia was willing to provide a crucial fifth vote for strict neutrality when it helped religious conservatives in the funding cases.<sup>69</sup> And, as previously noted, he has been the leader of the Court's move to formal neutrality as the touchstone of free exercise jurisprudence, a move that has the effect of favoring majority religions at the expense of minority religions. But now Justice Scalia has turned around and rejected the neutrality principle in those circumstances in which it would operate against the interests of religious conservatives. He refuses to accept the costs of the consistent application of the very principle that he has himself relied upon for decades to bring about major conservative changes in the jurisprudence of the religion clauses.<sup>70</sup>

#### *A. Inclusiveness?*

How does Justice Scalia justify this radical and seemingly unprincipled approach? To begin with, his opinion is pervaded with a false—and, to many Americans, no doubt insulting—rhetoric of inclusiveness. He appears at some level to recognize that governmental endorsement of religious beliefs that are not universally shared is inconsistent with the values underlying the Establishment Clause. But he concludes that official honoring of God nonetheless does not present serious Establishment Clause concerns because generic invocations of God reflect the views of just about everyone:

The three most popular religions in the United States, Christianity, Judaism, and Islam—which combined account for 97.7% of all believers—are monotheistic. All of them, moreover (Islam included), believe that the Ten Commandments were given by God to Moses, and are divine prescriptions for a virtuous life. Publicly honoring the Ten Commandments is thus indistinguishable, insofar as discriminating against other religions is concerned, from publicly honoring God. Both practices are recognized across such a broad and diverse range of the population—from Christians to Muslims—that they can-

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<sup>69</sup> See, e.g., *Zelman*, 536 U.S. at 639 (majority opinion) (upholding school voucher program by 5-4 vote, with Justice Scalia in the majority); *Rosenberger*, 515 U.S. at 819 (majority opinion) (concluding by 5-4 vote, with Justice Scalia in the majority, that funding of religious expression on equal terms with secular expression would not violate the Establishment Clause).

<sup>70</sup> Cf. McConnell, *supra* note 15, at 166 (noting that, if Justice Scalia wants to be logically consistent, he should, in light of his Free Exercise jurisprudence, read the Establishment Clause as precluding all “government action that singles out religion for favorable treatment”).

not be reasonably understood as a government endorsement of a particular religious viewpoint.<sup>71</sup>

This claim that the Ten Commandments are universal because they “are recognized across . . . a broad and diverse range of the population—from Christians to Muslims”—because, as Justice Scalia later says, they “are recognized by Judaism, Christianity, and Islam alike”<sup>72</sup>—is reminiscent of the scene in *The Blues Brothers* in which Jake and Elwood enter a rural bar and ask what kind of music they have there. The bartender responds, “Oh we got both kinds. We got Country, and Western.”<sup>73</sup> Justice Scalia is doing the same thing here—suggesting that the Ten Commandments do not unconstitutionally alienate because they are recognized by all three kinds of religion: Christianity, Judaism, and Islam.

It may well be true that adherents to a variety of faiths, be they Catholics, Southern Baptists, Orthodox Jews, or Sunni Muslims, would all agree that a Ten Commandments monument is an inclusive memorial that does not endorse any particular faith.<sup>74</sup> But the same cannot be said of atheists or Buddhists or Wiccans. They would surely understand the government’s actions to be an endorsement of a particular religious viewpoint profoundly different from their own. In claiming inclusiveness, Justice Scalia is simply glossing over these people, as if they do not exist at all. Indeed, his statistic that the three principal Judeo-Christian religions account for 97.7% of all *believers* leaves the twenty-nine million American adults who do not profess to follow any religion out of the denominator altogether.<sup>75</sup>

When he does acknowledge the existence of the sixteen percent of Americans who are non-Judeo-Christians,<sup>76</sup> Justice Scalia takes a fundamentally counter-constitutional approach to their interests. He concludes that “the Establishment Clause permits th[e] disregard of polytheists[.] . . . believers in unconcerned deities, [and] . . . devout atheists.”<sup>77</sup> After all, he explains

in the context of public acknowledgments of God there are legitimate *competing* interests: On the one hand, the interest of that minority in not feeling “excluded”; but on the other, the interest of the overwhelming majority of religious believers in being able to give God thanks and supplication *as a peo-*

<sup>71</sup> *McCreary County*, 125 S. Ct. at 2753 (Scalia, J., dissenting) (citations omitted).

<sup>72</sup> *Id.* at 2762.

<sup>73</sup> THE BLUES BROTHERS (Universal Studios 1980).

<sup>74</sup> *But see supra* note 35.

<sup>75</sup> See U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES tbl.67 (124th ed. 2004), available at <http://www.census.gov/prod/2004pubs/04statab/pop.pdf>. This brings to mind the first President Bush’s alleged declaration: “I don’t know that atheists should be considered as citizens, nor should they be considered patriots. This is one nation under God.” Jennifer Spevacek, *Atheist Drops by to Waive the Flag*, WASH. TIMES, July 27, 1989, at A4.

<sup>76</sup> See U.S. DEPT. OF COMMERCE, *supra* note 75, at tbl.67.

<sup>77</sup> *McCreary County*, 125 S. Ct. at 2753 (Scalia, J., dissenting).

ple, and with respect to our national endeavors. Our national tradition has resolved that conflict in favor of the majority.<sup>78</sup>

This is a truly remarkable approach to constitutional law. Our traditional understanding of constitutionalism focuses, of course, on the need for the judiciary to protect the minority from the tyranny of the majority.<sup>79</sup> But here, Justice Scalia seeks to protect the majority from the inconvenience of having to respect the rights of the minority. And he does so on the basis of the fact that, historically, the majority has often engaged in this type of discriminatory behavior.

Imagine if this reasoning had been employed in *Brown v. Board of Education*:

In the context of segregation in public schools there are legitimate *competing* interests: On the one hand, the interest of that minority in not feeling “inferior”; but on the other, the interest of the overwhelming majority of Kansans in being able to educate their children in the presence of members of their own race alone. Our national tradition has resolved that conflict in favor of the majority.

What a sad Constitution that would be.

Or, to make the analogy in some respects even more apt, imagine a law that provides that everyone but those of Arab ancestry can fly on airplanes or serve as law enforcement officers. Such a law would be largely inclusive—protecting over ninety-nine percent of the population—and would not take sides in the longstanding and divisive rift between the major races in this country.<sup>80</sup> But it would nonetheless run afoul of our most basic notions of constitutional justice and fairness. Ninety-nine (let alone eighty-four) percent inclusiveness is a constitutionally meaningless concept. Yet Justice Scalia’s opinion in *McCreary County* takes just that approach.

It is no answer to dub these analogies inapt on the theory that the Equal Protection Clause is explicitly concerned with the equal treatment of the races, whereas the Establishment Clause is not a mandate for the equal treatment of religions. After all, government neutrality has been the heart of the Establishment Clause for decades, and Justice Scalia fully accepts the

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<sup>78</sup> *Id.* at 2756; see also Transcript of Oral Argument at 16–17, *Van Orden v. Perry*, 125 S. Ct. 2854 (2005) (No. 03-1500) (question from Justice Scalia) (“It is a profound religious message, but it’s a profound religious message believed in by the vast majority of the American people, just as belief in monotheism is shared by a vast majority of the American people. And our traditions show that there is nothing wrong with the government reflecting that. I mean, we’re a tolerant society religiously, but just as the majority has to be tolerant of minority views in matters of religion, it seems to me the minority has to be tolerant of the majority’s ability to express its belief that government comes from God, which is what this is about. . . . [T]urn your eyes away if it’s such a big deal to you.”).

<sup>79</sup> See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

<sup>80</sup> Cf. Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151 (1996) (noting that Justice Harlan’s dissent in *Plessy v. Ferguson*, 163 U.S. 537 (1896), which is famed for its progressive vision of equality between African Americans and whites, contains dicta describing the Chinese as an inferior race).

view that, absent the exception he intends to create for governmental endorsement of monotheism, the Constitution mandates the equal treatment of all religions.<sup>81</sup>

Nor is it an answer to say that the adherents to minority religions or to no religion suffer no significant harm when the majority chooses to publicly express an official communal belief in the biblical God.<sup>82</sup> Justice Scalia's dismissive characterization of the minority adherents' interest as "not feeling 'excluded'"<sup>83</sup> is reminiscent of his argument in dissent in *Lee v. Weisman* that students who do not believe in the biblical God suffer only a "minimal inconvenience" when exposed to official, government-led Judeo-Christian prayer at a public junior high school graduation ceremony.<sup>84</sup> In *Weisman*, Justice Scalia appeared oblivious to the fact that, for a nonbeliever or a practitioner of a non-Judeo-Christian religion, the harm of having either to participate in a prayer that runs counter to one's core religious beliefs or to be stared at and ostracized for not doing so is a very serious one—especially to a teenager trying to fit in and find acceptance in a world in which she is already an outsider. And here, Justice Scalia seems blind to the fact that nonmonotheists suffer serious alienation when their government erects and endorses "as a people" a religious monument that explicitly rejects and condemns nonmonotheists' deeply held beliefs and practices. Even Justice Thomas candidly acknowledged "the honest and deeply felt offense [a nonbeliever] takes from th[is] government conduct."<sup>85</sup>

There can be no mistaking the fact that Justice Scalia's approach is not inclusive in any meaningful constitutional sense. His rule would create an explicitly unequal playing field in which the religious majority alone is entitled to constitutional protection from significant governmentally imposed

<sup>81</sup> See *McCreary County*, 125 S. Ct. at 2752 (Scalia, J., dissenting) (declaring that "the principle that the government cannot favor one religion over another" is "indeed a valid principle where public aid or assistance to religion is concerned, or where the free exercise of religion is at issue"); cf. Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673 (2002); Michael Stokes Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Litigation*, 61 NOTRE DAME L. REV. 311 (1986). On the similarity between laws favoring majority religions and laws favoring majority races, see Gary J. Simson, *Laws Intentionally Favoring Mainstream Religions: An Unhelpful Comparison to Race*, 79 CORNELL L. REV. 514 (1994).

<sup>82</sup> The same argument was, of course, made about segregation. See *Plessy*, 163 U.S. at 551 ("We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.").

<sup>83</sup> See also Transcript of Oral Argument at 17, *Van Orden*, 125 S. Ct. 2854 (question from Justice Scalia) ("[T]urn your eyes away if it's such a big deal to you.").

<sup>84</sup> 505 U.S. 577, 646 (1992) (Scalia, J., dissenting).

<sup>85</sup> *Van Orden v. Perry*, 125 S. Ct. 2854, 2867 (2005) (Thomas, J., concurring); see also, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) ("Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.").

harms. The Constitution would afford greater protection to the adherents to certain preferred religions, and would allow the government to endorse and advance those religions, but not others. This would represent a complete rethinking of the very nature of our country—of the role that religion plays in government, and of the rights of religious minorities.

Explaining her decision to join the *McCreary County* majority and to reject Justice Scalia's approach, Justice O'Connor offered a poignant challenge:

At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish. . . . Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?<sup>86</sup>

Why indeed? Unconvincing claims of inclusiveness aside, how does Justice Scalia justify his attempt to radically restructure the fabric of our constitutional order? His reasoning is based, he explains, on two concerns: (1) the need for greater consistency in Establishment Clause doctrine; and (2) the historical evidence of the original meaning of the Establishment Clause.<sup>87</sup>

#### *B. Consistency?*

He begins with consistency. "What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority," he argues, "is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle. That is what prevents judges from ruling now this way, now that—thumbs up or thumbs down—as their personal preferences dictate."<sup>88</sup> The Court's Establishment Clause jurisprudence is not, says Justice Scalia, characterized by such a grounding in consistent principle.<sup>89</sup>

Although one might question Justice Scalia's premise that absolute consistency is necessarily the ultimate goal of constitutional decisionmaking,<sup>90</sup> it is difficult to disagree with the basic point that the Court's establishment jurisprudence wants for doctrinal coherence. Over the last few decades, the Court has employed a potpourri of doctrinal tests to resolve Establishment Clause disputes, bouncing back and forth from one test to an-

<sup>86</sup> *McCreary County*, 125 S. Ct. at 2746 (O'Connor, J., concurring).

<sup>87</sup> *Id.* at 2748–57 (Scalia, J., dissenting).

<sup>88</sup> *Id.* at 2751.

<sup>89</sup> *See id.* at 2751–52, 2756 n.8.

<sup>90</sup> Cf. Christopher J. Peters, *Foolish Consistency: On Equality, Integrity and Justice in Stare Decisis*, 105 *YALE L.J.* 2031 (1996) (arguing that consistency is important in law only when it serves the underlying goal of justice).

other with little or no explanation, often failing to achieve a majority for the use or proper application of any one test in any particular case.<sup>91</sup> All of those tests, however, proclaim fidelity to the neutrality principle.<sup>92</sup> The dispute is over how best to implement that principle doctrinally.

But Justice Scalia is making a deeper point: that the Court has not even been consistent with regard to the very existence of the neutrality principle. Although the Court has frequently trumpeted and applied that principle, there have been a number of cases in which the Justices have approved governmental action that does not appear to be neutral toward religion. “[W]hen the government relieves churches from the obligation to pay property taxes, when it allows students to absent themselves from public school to take religious classes, and when it exempts religious organizations from generally applicable prohibitions of religious discrimination, it surely means to bestow a benefit on religious practice—but we have approved it.”<sup>93</sup> Indeed, the Court has even upheld the Nebraska legislature’s practice of paying a chaplain to conduct a prayer at the opening of legislative sessions—a practice that would seem to be the very opposite of governmental neutrality.<sup>94</sup>

Justice Scalia is surely correct when he notes that a few of the Court’s decisions—particularly *Marsh v. Chambers*, which sanctioned legislative prayer—seem irreconcilable with a mandate for genuine governmental neutrality toward religion.<sup>95</sup> But if the goal is, as Justice Scalia claims, a single consistently applied principle, his own approach, ironically, does not provide one. In his view, neutrality (at least between religions) is the touch-

<sup>91</sup> See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring) (noting that the Court’s “Establishment Clause jurisprudence is in hopeless disarray”); Kent Greenawalt, *Quo Vadis: The Status and Prospects of “Tests” Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 323 (noting that the Court’s jurisprudence in this area is “in nearly total disarray” and that “a student of the Supreme Court’s jurisprudence [cannot] formulate any general tests that a majority of the Justices clearly support”). “As exciting as this state of affairs is for those who welcome uncertainty and change, it is disquieting for lawyers and clients, for judges who must decide . . . establishment claims, and for Supreme Court Justices who aspire to stable principles of adjudication.” *Id.*

<sup>92</sup> See Moens, *supra* note 54, at 550.

<sup>93</sup> *McCreary County*, 125 S. Ct. at 2751 (Scalia, J., dissenting) (citing *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (upholding an exemption for churches from a federal prohibition against religious discrimination by employers); *Walz v. Tax Comm’n*, 397 U.S. 664 (1970) (upholding a property tax exemption for church property); *Zorach v. Clauson*, 343 U.S. 306 (1952) (upholding a law permitting students to leave public schools during the school day to receive religious education at church)).

<sup>94</sup> See *id.* at 2752 (citing *Marsh v. Chambers*, 463 U.S. 783 (1983)).

<sup>95</sup> It should be noted, however, that in three of the four cases cited by Justice Scalia, the Court at least purported (whether convincingly or not) to rest its decision on the neutrality mandate. In *Walz* and *Amos*, the Court interpreted the neutrality principle as a call for “benevolent neutrality”—“permit[ting] religious exercise to exist without sponsorship and without interference.” *Walz*, 397 U.S. at 669; see also *Amos*, 483 U.S. at 334. In *Zorach*, the Court declared that refusing to allow students to leave school to receive religious instruction “would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.” *Zorach*, 343 U.S. at 314.

stone “where public aid or assistance to religion is concerned,” but it is not required when the government acknowledges or endorses God.<sup>96</sup> In other words, a different test applies to governmental expression cases than to all other Establishment Clause cases. That would seem to be a tacit admission that the Establishment Clause, as the majority put it, “lacks the comfort of categorical absolutes”<sup>97</sup>—a notion that Justice Scalia had earlier mocked as a “lovely euphemism” for a concession that the Court has committed the unforgivable sin of failing to employ a single, consistent principle across the spectrum of establishment cases.<sup>98</sup>

Every bit as much as the majority’s, then, Justice Scalia’s proposed rule fails to provide the consistent principle that he seeks. Indeed, if we are after a consistent jurisprudence that purges the personal, political preferences of individual judges from the process of judging, we should be highly skeptical of a proposed rule that seems to employ the neutrality principle only when doing so favors the political interests of religious conservatives.

At a more fundamental level, it is surprising that Justice Scalia would suggest that the Court’s failure to extend the neutrality principle to its full logical reach necessitates abandoning that principle altogether (at least as it applies to neutrality between religion and nonreligion and, in matters of governmental endorsement, to neutrality between monotheism and other religions). To Justice Scalia, the rule of neutrality “is discredited because the Court has not had the courage (or the foolhardiness) to apply the neutrality principle consistently.”<sup>99</sup> The reason, he says, for the Court’s “occasionally ignoring the neutrality principle” is

the instinct for self-preservation, and the recognition that the Court, which “has no influence over either the sword or the purse,” cannot go too far down the road of an enforced neutrality that contradicts both historical fact and current practice without losing all that sustains it: the willingness of the people to accept its interpretation of the Constitution as definitive, in preference to the contrary interpretation of the democratically elected branches.<sup>100</sup>

There is surely some truth to that observation. The Court’s outlier opinions sanctioning non-neutral governmental actions may well have been motivated by a fear of the backlash that could result from the full enforcement of the neutrality principle. That same fear might also explain the Court’s recent decision to duck the Pledge of Allegiance case on standing grounds,<sup>101</sup> thus avoiding having to grapple with the fact that, far from being

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<sup>96</sup> *McCreary County*, 125 S. Ct. at 2752 (Scalia, J., dissenting).

<sup>97</sup> *Id.* at 2733 n.10 (majority opinion).

<sup>98</sup> *Id.* at 2751 (Scalia, J., dissenting).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 2752 (quoting THE FEDERALIST NO. 78 (Alexander Hamilton)).

<sup>101</sup> See *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1 (2004) (declining to reach the merits of a constitutional challenge to the use of the phrase “under God” in the Pledge of Allegiance on the

neutral toward religion, the words “under God” were inserted into the Pledge during the post-war Red Scare era for the express purpose of encouraging religious devotion and promoting the notion that ours is a religious nation.<sup>102</sup> Indeed, one wonders whether the seemingly reluctant willingness of some of the Court’s more liberal Justices to invoke the notion of “ceremonial deism”—the idea that certain religious expressions, such as “so help me God” in the Presidential oath and “In God We Trust” on our currency, have, through rote repetition and general ubiquity, lost their religious significance to the point that they no longer endorse religion<sup>103</sup>—is less the product of a genuine belief in the truth of that notion than the product of the fear that the nation may not tolerate striking down these emotionally popular but comparatively benign violations of the neutrality principle.

But so what? Why is the very existence of the neutrality principle fatally “discredited” by the fact that, political realities being what they are, the Court seemingly does not have the courage or the naiveté to apply it to the full extent of its logical reach? There have been many instances in American history in which the Court has failed to fully employ or enforce fundamental constitutional principles out of concern for the consequences. Consider, for instance, *Brown v. Board of Education II*,<sup>104</sup> in which the Court famously allowed the southern states to drag their feet on the pace of desegregation—thus emasculating the first *Brown* decision and permitting another decade of widespread racial segregation—out of a fear that a demand for timely compliance would prompt a violent backlash.<sup>105</sup> Along the same lines is *Naim v. Naim*,<sup>106</sup> in which the Court, at the insistence of Justice Frankfurter, dismissed on trumped-up technical grounds a case involving the constitutionality of Virginia’s antimiscegenation statute—a statute that was clearly unconstitutional under the reasoning of *Brown*. Fearing

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ground that the father who brought the lawsuit did not have standing to represent the interests of his daughter, over whom he did not have parental custody).

<sup>102</sup> The House Report accompanying the bill explained:

At this moment of our history the principles underlying our American Government and the American way of life are under attack by a system whose philosophy is at direct odds with our own. Our American Government is founded on the . . . belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp. The inclusion of God in our pledge therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator. At the same time it would serve to deny the atheistic and materialistic concepts of communism . . .

H.R. REP. NO. 83-1693, at 1–2 (1954), *reprinted in* 1954 U.S.C.C.A.N. 2339, 2340. Upon signing the act, President Eisenhower declared: “From this day forward, the millions of our school children will daily proclaim in every city and town, every village and rural schoolhouse, the dedication of our Nation and our people to the Almighty.” 100 CONG. REC. 8618 (1954).

<sup>103</sup> *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting).

<sup>104</sup> 349 U.S. 294 (1955).

<sup>105</sup> *See* MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 314–16 (2004).

<sup>106</sup> 350 U.S. 891 (1955) (per curiam); *see also Naim v. Naim*, 350 U.S. 985 (1956).

that the South would not accept a decision striking such a strong emotional chord so soon after the original *Brown* decision, the Court balked, allowing the vile ban on interracial marriage to persist for a dozen more years.<sup>107</sup> One might agree or disagree with the Court's decision to preference practical considerations over principle in these cases, but it is another thing altogether to suggest that that pragmatic decision "discredits" the underlying principle itself—discredits, that is, *Brown v. Board of Education*<sup>108</sup> and the Court's original conclusion that racial segregation is incompatible with the Equal Protection Clause.

To the same effect, consider the many McCarthy Era First Amendment cases in which the Court shied away from protecting the free speech and association rights of Communists out of fear of political backlash from a paranoid Congress and a frenzied populace.<sup>109</sup> Those cases may be said to "discredit" a number of things, including, perhaps, the Court itself, but they surely do not discredit the notion that the First Amendment protects political dissenters.

The sad fact is that sometimes genuine equality for scorned minorities and full enforcement of unpopular rights are politically unpalatable. And sometimes the Court has chosen to bow to that fact, even at the expense of doctrinal purity.<sup>110</sup> The possible ideal of complete judicial independence is tempered by the reality that the Court depends upon Congress for its budget, on the President to enforce its decisions, and on public acceptance of its decisions for its institutional legitimacy. Fears of jurisdiction stripping, impeachment, widespread disobedience and the like have sometimes tempered the full reach of constitutional ideals. That may not be satisfying, but it is and has always been a reality of our constitutional scheme. To suggest that a principle protecting unpopular minorities or enforcing unpopular rights must be abandoned solely because the Court has feared to extend it immediately to its logical extreme is to impose a perverse heckler's veto and to reject a great bulk of modern constitutional liberty.

The logical course of action when faced with a large body of consistent, principled cases and a few outliers is not to reject the general rule, but

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<sup>107</sup> See Del Dickson, *State Court Defiance and the Limits of Supreme Court Authority: Williams v. Georgia Revisited*, 103 YALE L.J. 1423, 1475–76 (1994); Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 243 (1991). The Court did not strike down Virginia's statute until 1967. See *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>108</sup> 347 U.S. 483 (1954).

<sup>109</sup> See Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437, 1463–64 (2001) (citing, inter alia, *Barenblatt v. United States*, 360 U.S. 109 (1959) (affirming the power of the House Un-American Activities Committee), and *Uphaus v. Wyman*, 360 U.S. 72 (1959) (upholding the preempted authority of the states to prosecute subversive activity aimed at state institutions)).

<sup>110</sup> See generally *id.*

rather to overrule the outliers,<sup>111</sup> or, if that is not politically feasible, to confine them to their facts.<sup>112</sup> Indeed, rejecting the general rule altogether would not seem to serve Justice Scalia's professed goals at all. If it is apparent and genuine apolitical judicial decisionmaking that Justice Scalia is after, his proposed solution would be an odd way to go about obtaining it. To paraphrase another Justice Scalia dissent,<sup>113</sup> one would not expect to read the sentence "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" in an opinion calling for the abandonment of the one principle that has been at the heart of the Court's Establishment Clause jurisprudence for more than half a century.

### C. *Originalism?*

Which brings us to the heart of the matter. Even if Justice Scalia is correct that consistency demands a new rule for Establishment Clause cases, why this one? There is a nearly infinite number of possible rules that the Court could adopt. Why settle on the facially convoluted, tongue-twister of a notion that the government may favor religion over nonreligion, but may not favor nonreligion over religion,<sup>114</sup> and must be neutral between the various religions, except that it can acknowledge and endorse God, but only through nonsectarian invocations of the monotheistic God of the Bible? To ask Justice Scalia's question, "Who says so? Surely not the words of the Constitution."<sup>115</sup>

Surely not. Nor is this rule dictated by precedent, given that the Court has consistently rejected it. Rather, claims Justice Scalia, this rule is mandated by history. One can determine the meaning of the Establishment Clause by looking to historical practice to determine what the framing generation understood the clause to permit and to prohibit.

History reveals that, in the nascent years of the Republic, Presidents, Congress, and even the Supreme Court publicly invoked God.<sup>116</sup> As such, says Justice Scalia, we know that governmental invocations and endorse-

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<sup>111</sup> See *Van Orden v. Perry*, 125 S. Ct. 2854, 2883 n.22 (2005) (Stevens, J., dissenting) (calling for the overruling of *Marsh v. Chambers* because legislative prayer is inconsistent with the neutrality principle).

<sup>112</sup> See *McCreary County v. ACLU*, 125 S. Ct. 2722, 2733 n.10 (2005) (majority opinion) (treating legislative prayer dismissively as a unique deviation from the general rule without elaboration).

<sup>113</sup> Cf. *Planned Parenthood v. Casey*, 505 U.S. 833, 984–85 (1992) (Scalia, J., dissenting) ("Liberty finds no refuge in a jurisprudence of doubt." One might have feared to encounter this august and sonorous phrase in an opinion defending the real *Roe v. Wade*, rather than the revised version fabricated today by the authors of the joint opinion.)

<sup>114</sup> See also *Bd. of Educ. v. Grumet*, 512 U.S. 687, 736 (1994) (Scalia, J., dissenting) (declaring that "disfavoring of religion is positively antagonistic to the purposes of the Religion Clauses").

<sup>115</sup> *McCreary County*, 125 S. Ct. at 2750 (Scalia, J., dissenting).

<sup>116</sup> See *id.* at 2748–50.

ments of God do not violate the Establishment Clause.<sup>117</sup> But at the same time, virtually every one of those early invocations was of a generic God; the Framers publicly endorsed “God,” but not “Jesus Christ.” As such, he says, we can further deduce that the Establishment Clause permits only broad, nonsectarian invocations of God; it precludes narrow endorsements of particular, disputed monotheistic beliefs.<sup>118</sup>

Justice Scalia derives these conclusions from the originalist premise that the Establishment Clause must have the exact same meaning and scope today that it had in the eighteenth century. Of course, that premise is open to question.<sup>119</sup> But let us accept it, if only for the sake of argument.<sup>120</sup> Even so, Justice Scalia’s conclusions do not follow from his evidence.

To begin with, it does not necessarily follow from the fact that many early Presidents and Congresses engaged in religious prayer and blessing that the Establishment Clause was generally understood to allow official invocations of the divine. Governmental statements and actions in the decades immediately after ratification are useful data points, but they are not always the best indicia of original meaning.

That is especially true here. Many of Justice Scalia’s sources are speeches made by public officials. But “when public officials deliver public speeches, we recognize that their words are not exclusively a transmission from *the* government because those oratories have embedded within them the inherently personal views of the speaker as an individual member of the polity.”<sup>121</sup> Today, when President Bush closes a speech with “God bless the United States,” we understand him to be conveying his personal religious views and prayers—which he is surely entitled to do, even when he speaks in his official capacity—not the official views of the institution of the presidency, or of the national government. The same was true of Presidents Washington and Adams, upon whose speeches Justice Scalia relies. As such, the content of those speeches tells us little about whether the government is permitted to endorse religion.

What is more, Justice Scalia is selectively drawing upon the historical record to give the appearance of a historical consensus that did not exist. He holds out as unambiguous evidence of a universally understood original meaning actions that, in fact, many of the Framers themselves strongly con-

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<sup>117</sup> See *id.* at 2850.

<sup>118</sup> See *id.* at 2755.

<sup>119</sup> See, e.g., Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court’s Quest for Original Meaning*, 52 UCLA L. REV. 217, 226–34 (2004) (noting some of the many potential faults of originalism).

<sup>120</sup> While I am willing to accept Justice Scalia’s originalist premise *arguendo*, ultimately, the fact that Justice Scalia’s dissent fails to achieve the alleged benefits of originalism might well provide a powerful reason not to adopt his methodology in the first place. That is to say, the hash that ends up being made of the historical record here by one of the brightest and most talented of originalist judges might tell us something about the desirability and the viability of originalism as a constitutional theory.

<sup>121</sup> *Van Orden v. Perry*, 125 S. Ct. 2854, 2883 (2005) (Stevens, J., dissenting).

demned as unconstitutional.<sup>122</sup> For instance, James Madison—who originally proposed the Establishment Clause—fought the First Congress’s decision to hire a legislative chaplain,<sup>123</sup> and condemned it as “a palpable violation of . . . Constitutional principles.”<sup>124</sup> Similarly, Thomas Jefferson refused to issue Thanksgiving prayers because he understood them to violate the Establishment Clause’s prohibition against governmental “recommendation” of religion.<sup>125</sup> Madison also refused during his early years in office to issue calls for Thanksgiving prayer. Later, during the politically contentious War of 1812, he did issue such calls, but he subsequently confessed that his doing so had violated the Constitution.<sup>126</sup>

As Justice Souter has previously explained,

in the face of the separationist dissent, [governmental actions of the type relied upon by Justice Scalia] prove, at best, that the Framers simply did not share a common understanding of the Establishment Clause, and, at worst, that they, like other politicians, could raise constitutional ideals one day and turn their backs on them the next.<sup>127</sup>

The fact that sometimes even the Framers did not have the political will to follow the Constitution does not provide the government with license to continue to do so today. Indeed, a constitutionalism that derives current meaning solely from the governmental actions in the years immediately following ratification would, in many instances, be wholly unacceptable. Among other things, it would allow the government to criminalize political dissent and to mandate racial segregation.<sup>128</sup>

Once we expand our search for the original meaning beyond Justice Scalia’s often dubious sources—beyond, that is, the statements and actions of the government officials in the years *after* the ratification of the First

<sup>122</sup> See *Lee v. Weisman*, 505 U.S. 577, 623–26 (1992) (Souter, J., concurring).

<sup>123</sup> See Letter from J. Madison to E. Livingston (July 10, 1822), *reprinted in* 5 *THE FOUNDERS’ CONSTITUTION* 105 (Philip B. Kurland & Ralph Lerner eds., 1987).

<sup>124</sup> JAMES MADISON, *DETACHED MEMORANDA* 558 (Elizabeth Fleet ed., 1946).

<sup>125</sup> Letter from Thomas Jefferson to Rev. S. Miller (Jan. 23, 1808), *reprinted in* 5 *THE FOUNDERS’ CONSTITUTION*, *supra* note 123, at 98–99.

<sup>126</sup> See *MADISON*, *supra* note 124, at 560; see also 1 *ANNALS OF CONG.* 915 (1789) (noting that Representative Thomas Tucker voted against the congressional resolution urging President Washington to issue a Thanksgiving proclamation on the ground that “it is a religious matter, and, as such, is proscribed to us”).

<sup>127</sup> *Weisman*, 505 U.S. at 626 (Souter, J., concurring).

<sup>128</sup> See *id.* (“Ten years after proposing the First Amendment, Congress passed the Alien and Sedition Acts, measures patently unconstitutional by modern standards. If the early Congress’s political actions were determinative, and not merely relevant, evidence of constitutional meaning, we would have to gut our current First Amendment doctrine to make room for political censorship.”); *Van Orden v. Perry*, 125 S. Ct. 2854, 2885 n.27 (2005) (Stevens, J., dissenting) (“To adopt such an interpretive approach would misguidedly give authoritative weight to the fact that the Congress that passed the Fourteenth Amendment also enacted laws that tolerated segregation, and the fact that the Congress that passed the First Amendment also enacted laws, such as the Alien and Sedition Act, that indisputably violated our present understanding of the First Amendment.”).

Amendment—the history paints a very different picture. As others have persuasively demonstrated, and I will not retread that ground here, the text, historical antecedents, drafting history, and debate surrounding the adoption of the Establishment Clause all provide compelling, though perhaps not conclusive, evidence that the clause was intended and originally understood to preclude government preference for particular religions or for religion over nonreligion, as the Court has long understood.<sup>129</sup> Justice Scalia ignores this voluminous evidence.

In any event, even assuming that Justice Scalia's sources are the best indicia of the original meaning of the Establishment Clause, those sources still do not mandate Justice Scalia's rule—in particular, his conclusion that the government may endorse generic monotheism but not generic or sectarian Christianity. Why should it matter that the framing generation preferred to refer to the divine using certain terms—"Almighty God," "the Creator," "that Almighty Being," etc.—rather than others? Justice Scalia's historical sources do not, for instance, include references to "Merciful God" or the "Supreme Being." Does that mean that the Establishment Clause forbids the government to use those terms? Surely not. But then why does the absence of official endorsements of "Jesus Christ" or the "Holy Trinity" indicate that *those* endorsements are precluded by the Establishment Clause? Evidence that the framing generation routinely engaged in certain practices might, in some circumstances, tell us what the Constitution permits. But, as a matter of common sense, that argument has little traction in reverse. Evidence that the framing generation did not engage in certain practices is a particularly bad measure of what the Constitution prohibits, absent both concrete indicia of the reasons why the Framers chose not to engage in those practices and some theoretical explanation for why the Constitution would prohibit those practices, while permitting others.<sup>130</sup> Justice Scalia has provided neither. Rather, he seems to assume that the mere fact that the Framers did not choose sectarian words is itself sufficient to establish that the Constitution does not allow their use. But that cannot possibly be true.

To begin with, the particular words chosen by the framing generation can illuminate constitutional meaning only if that choice was a conscious reflection of the conventional understanding of the limits of the constitutional prohibition at issue—only if, that is, the fact that the Framers chose

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<sup>129</sup> See, e.g., *Weisman*, 505 U.S. at 612–16 (Souter, J., concurring); LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 91–119 (1986); Douglas Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875 (1986).

<sup>130</sup> Cf. *Printz v. United States*, 521 U.S. 898, 949 (1997) (Stevens, J., dissenting) ("While we have indicated that the express consideration and resolution of difficult constitutional issues by the First Congress in particular provides contemporaneous and weighty evidence of the Constitution's meaning . . . , we have never suggested that the failure of the early Congresses to address the scope of federal power in a particular area or to exercise a particular authority was an argument against its existence." (citations and internal quotation marks omitted)).

those words can fairly be taken to indicate that they believed that the Constitution did not allow them to choose others.

By way of analogy, during the Adams Administration, one finds a great many persons who were highly critical of President Adams, but virtually none who were critical of former President Washington.<sup>131</sup> It would be nonsensical to take that fact as conclusive evidence that the Framers understood the First Amendment to permit criticism of the current President but to preclude criticism of former Presidents. The lack of criticism of Washington tells us a great deal about the esteem in which he was held by his contemporaries—and perhaps also about the social conventions of the era. It tells us nothing about the meaning of the First Amendment.

The same is true here. Justice Scalia has given us no evidence that the mere fact that the Framers preferred “Almighty God” to “Jesus Christ” indicates that they felt that they had no constitutional choice in the matter. The closest that he comes is a footnote that could be read as an unsupported suggestion that if the Framers thought that they could invoke the Christian God, rather than simply the generic God of monotheism, “one would expect Christ regularly to be invoked, which He is not.”<sup>132</sup>

But there are many equally or more plausible explanations for the Framers’ choice of words. For one thing, they may have eschewed invoking Christ not because they felt that they were precluded from doing so, but rather because they did not believe in Christ. While there is no scholarly consensus, many historians have concluded that Jefferson, Washington, Madison, Adams, and a great many other leading lights of the framing generation were Deists, rather than Christians.<sup>133</sup> In this regard, it is especially egregious for Justice Scalia to rely on their statements as evidence that the Constitution permits explicit endorsement of the biblical God. In endorsing

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<sup>131</sup> See, e.g., DAVID MCCULLOUGH, JOHN ADAMS 484, 532–34 (2001).

<sup>132</sup> *McCreary County v. ACLU*, 125 S. Ct. 2722, 2753 n.3 (2005) (Scalia, J., dissenting). Justice Scalia’s only evidence that the government cannot favor Christians over Jews and Muslims is the fact that George Washington wrote a letter to a Jewish congregation in Rhode Island in which he assured the Jews that “[a]ll possess alike liberty of conscience and immunities of citizenship. It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights.” 6 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 285 (W.W. Abbott ed., 1996). But that quotation is about free exercise of religion; it says nothing about whether the government can endorse religion. And, in any event, it says that “all possess alike liberty,” not just all Judeo-Christian monotheists.

<sup>133</sup> See, e.g., *McCreary County*, 125 S. Ct. at 2745 n.26; LAMBERT, *supra* note 22, at 161; Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 837, 875–76 (1995). Deism was “a religious perspective spawned by the Enlightenment, a European philosophy that emphasized reason over revelation as the best guide for human progress, and nature over Scripture as the clearest window onto God.” LAMBERT, *supra* note 21, at 159–60. Deists denied the divinity of Christ and viewed many Christian beliefs as “superstitions.” *Id.* at 160–61, 178.

a generic “God,” the Deist Framers may not have been invoking the God of the Bible at all.<sup>134</sup>

Or perhaps the framing generation’s use of broader terms to invoke the divine was simply the convention of the era, rather than a reaction to perceived constitutional constraints. Indeed, similar references permeate the major pre-Constitutional documents that were not, of course, constrained by the not-yet-existent Establishment Clause. The Declaration of Independence, for instance, refers to the “Creator.” The Articles of Confederation refer to the “Great Governor of the World.”<sup>135</sup> Jefferson’s Bill for Establishing Religious Freedom of 1779 refers to “Almighty God.”<sup>136</sup> And Madison’s famous “Memorial and Remonstrance Against Religious Assessments, 1785” refers to “the Creator” and “the Supreme Lawgiver of the Universe.”<sup>137</sup>

Or perhaps the decision to employ broad, nonsectarian terms was simply a political one, made out of either a genuine respect for religious minorities or a shrewd desire to avoid alienating voters. The fact that no President has ever criticized NASCAR for not being a real sport says nothing about whether the Constitution would permit the President to do so.

Justice Scalia has provided no evidence to support a conclusion that the Framers chose broad words not for one of these (or a hundred other) reasons, but rather because of a perceived constitutional necessity. Without such evidence, Justice Scalia’s sources simply cannot sustain the rule that he would derive from them.

Justice Scalia has also failed to provide any theoretical justification for his conclusion that the Constitution allows broad invocations of monotheism, but not narrow invocations of Christianity. One cannot conclude from the fact that the Framers did *X* but not *Y* that the Constitution permits *X* but not *Y*, unless one can articulate a principled rule that explains why, in light of the text and purpose of the constitutional provision at issue, *X* would be permissible, but *Y* would not. To return to the example of political criticism during the Adams administration, one cannot infer from the fact that the

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<sup>134</sup> See LAMBERT, *supra* note 22, at 172, 174, 178 (noting that Deists did not believe in a vengeful God who interfered in the affairs of men, and believed that the Bible, “far from containing divine truth, is a mixture of sound moral instruction and errors and superstitions” and should not be treated as God’s word); cf. Finkelman, *supra* note 22, at 1509 (“The primary author of the Declaration, Thomas Jefferson, was a deist, and his references to a supreme being are clearly not references to the God of the Bible. Rather, they are invocations of enlightenment notions of natural rights.”). As such, Justice Scalia’s claim that, by invoking “God (in the singular, and with a capital G),” the Framers must necessarily have been invoking the biblical God and endorsing the Ten Commandments, *McCreary County*, 125 S. Ct. at 2753 n.3, ignores the existence of one of the principal religions of the framing era.

<sup>135</sup> ARTICLES OF CONFEDERATION art. XIII.

<sup>136</sup> Thomas Jefferson, *A Bill for Establishing Religious Freedom, 1779*, reprinted in 5 THE FOUNDERS’ CONSTITUTION, *supra* note 123, at 77.

<sup>137</sup> James Madison, *Memorial and Remonstrance Against Religious Assessments, 1785*, reprinted in 5 THE FOUNDERS’ CONSTITUTION, *supra* note 123, at 82.

framing generation criticized Adams but not Washington that the First Amendment allows criticism of current but not former Presidents, because there is nothing in the text of the Free Speech Clause that would support such a distinction, and the distinction would in no way advance the values underlying the guarantee of freedom of speech.

The same is true here. There is no basis in the text of the Establishment Clause for Justice Scalia's distinction, and, save for his mistaken claims of inclusiveness, he has provided absolutely no theoretical explanation of how allowing the government to endorse monotheism, but not allowing the government to endorse any specific sect of monotheism (or any other set of religious beliefs), can be said to advance any notion of religious liberty protected by that clause. If the purpose of the Establishment Clause is to protect religious minorities, then why protect some minorities, but not others? If the purpose of the Clause is to avoid formal coercion of religious practices, but not to interfere with the ability of a majority of the people to acknowledge and give thanks to their God through the mechanism of their government, then why preclude them from acknowledging the Christian God that the vast majority of them worship? The only possible underlying constitutional purpose that might be advanced by Justice Scalia's rule would be a purpose to promote and protect biblical monotheism generally, but to treat all of its various sects—but not any other religious groups—equally. A purpose, that is, to prefer Islam to Hinduism, but not Christianity to Islam. But Justice Scalia has provided absolutely no evidence that this was the impetus behind, or the value underlying, the Constitution's religion clauses, and to the best of my knowledge no legal scholar or historian has ever so posited.<sup>138</sup>

In sum, it requires an enormous and unjustifiable leap of faith to interpret the framing generation's broad invocations of God as conclusive evidence that the Constitution allows such invocations, but does not allow more narrow endorsements of particular sects of Judeo-Christian monotheism.

If one were determined to derive a constitutional rule from the fact that early government actors frequently invoked God, a few possibilities come to mind. First, one could conclude that the government is free to endorse whatever religion it wants. That is to say, these actions could be read as an indication that the Establishment Clause does not bar governmental proclamation and acknowledgment of religion. But that rule would seem to run contrary to the very point of the religion clauses: to protect religious minorities. The historical evidence is overwhelming that one of the primary

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<sup>138</sup> Indeed, if this is the underlying purpose of the Establishment Clause, then why does Justice Scalia continue to endorse the proposition that, when it comes to government funding, the Constitution necessitates the equal treatment of *all* religions?

purposes of the First Amendment was the protection of minority religions through the guarantee that the government would treat all religions alike.<sup>139</sup>

Alternatively, one could take these invocations as an indication that the Establishment Clause permits the government to endorse only nonsectarian Christianity. That was, after all, the religion actually being invoked and supported in Justice Scalia's historical examples,<sup>140</sup> and there is absolutely no evidence that the speakers chose broad words out of a perceived constitutional mandate to be solicitous of other forms of monotheism. As Justice Stevens explains in his *Van Orden* dissent, some members of the framing generation apparently understood the Establishment Clause to protect only Christians.<sup>141</sup> In Joseph Story's opinion,

[p]robably at the time of the adoption of the constitution, and of the [First] amendment . . . , the general, if not the universal sentiment in America was, that christianity ought to receive encouragement from the state. . . . An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.<sup>142</sup>

According to Story, the “real object of the amendment was, not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating christianity; but to exclude all rivalry among christian sects.”<sup>143</sup> But this interpretation also fails to protect all religious minorities. And it runs afoul of the substantial contrary evidence that the Framers sought to ensure the equal treatment of *all* religions, even non-Christian (and indeed even non-Judeo-Christian) ones.<sup>144</sup>

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<sup>139</sup> See, e.g., Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 WASH. U. L.Q. 919, 932–34 (2004); McConnell, *supra* note 48, at 1130–31; Underkuffler-Freund, *supra* note 133, at 874–961. To take just one example, the amendments proposed by Virginia, North Carolina, New York, and Rhode Island as precursors to the Establishment Clause all provided that no particular “religious sect or society ought to be favored or established by law in preference to others.” 3 JONATHAN ELLIOT, *DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 659 (Ayer Co. 1988) (1888); 4 *id.* at 244; 1 *id.* at 328, 334. In Madison's words, “[a]mong the features peculiar to the political system of the United States is the perfect equality of rights which it secures to every religious sect.” Letter from James Madison to Dr. de la Motta (Aug., 1820), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON, 1816–1828, at 178, 179 (Phillip R. Fendall ed., Philadelphia, J.B. Lippincott & Co. 1867).

<sup>140</sup> Unless the speakers were endorsing Deism, a religion that does not embrace the God of the Bible and the Ten Commandments at all.

<sup>141</sup> See *Van Orden v. Perry*, 125 S. Ct. 2854, 2885–87 (2005) (Stevens, J., dissenting).

<sup>142</sup> JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1874, at 593 (1851) (footnote omitted).

<sup>143</sup> *Id.* § 1877, at 594.

<sup>144</sup> For instance, Jefferson recounts evidence that, during the debate over Virginia's Act for Establishing Religious Freedom—a major precursor to the Establishment Clause—“a great majority . . . meant to comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and the Mohometan, the Hindoo, and Infidel of every denomination.” 1 THE WRITINGS OF THOMAS JEFFERSON 67 (Albert E. Bergh ed., 1907). In the North Carolina ratification debate, James Iredell discussed Article VI, clause 3, which prohibits religious tests for public office: “[I]t is objected that the people of Amer-

In light of the constitutional purpose to protect religious minorities and majorities alike, if one were determined to engage in the mystical practice of reading tea leaves to ascertain constitutional meaning from the words that the Framers did not say, Justice Scalia's sources might better be taken to suggest an original understanding that the government cannot engage in acknowledgment or endorsement of disputed religious principles. That would better explain why they tended to invoke God in terms broad enough to be acceptable to all of the principal religious minorities of the day, even Deists and Jews. And unlike Justice Scalia's rule, it would establish a principle of liberty that accords with the underlying purpose of the Establishment Clause, rather than simply articulating an abstract description of the framing generation's actions at a level of generality so specific as to be utterly devoid of principle. It would also have the advantage of according with the bulk of the other historical evidence of original meaning, with more than a half century of precedent, and with notions of genuine religious equality.

Of course, today, that rule would produce a different result. There is far wider and deeper religious diversity in this country today than there was in the eighteenth century, to the point that governmental acknowledgment or endorsement of religion is no longer possible without alienating and dismissing the views of millions of Americans.

Finally, there is yet another reason why the history does not support Justice Scalia's proposed rule. Justice Scalia asserts that, of the early historical sources upon which he has relied, only one constitutes a narrow governmental endorsement of Christianity—President Adams's 1798 Thanksgiving proclamation asking God for absolution “through the Redeemer of the World.”<sup>145</sup> That one exception would seem, on its own, to disprove the rule. If the decision to use broad terms was the product not of a free choice to prefer those terms, but rather of a universal understanding that the Establishment Clause precluded endorsement of Christianity over other forms of monotheism, then why did Adams feel entitled to endorse Christianity, and why wasn't there an outcry and controversy when he—the President of the United States—did so in such a public fashion?<sup>146</sup>

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ica may perhaps choose representatives who have no religion at all, and that Pagans and Mahometans may be admitted into offices. But how is it possible to exclude any set of men, without taking away that principle of religious freedom which we ourselves so warmly contend for?” 4 ELLIOT, *supra* note 139, at 197; *see also, e.g.*, James Madison, *Memorial and Remonstrance Against Religious Assessments, 1785*, in *THE COMPLETE MADISON* 299–301 (S. Padover ed., 1953) (“Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?”); Underkuffler-Freund, *supra* note 133, at 926–27 (quoting similar statements in the Massachusetts ratification convention); Letter from J. Madison to E. Livingston, *supra* note 123, at 105 (noting “the equality of *all* religious sects in the eye of the Constitution”).

<sup>145</sup> *McCreary County v. ACLU*, 125 S. Ct. 2722, 2755 & n.5 (2005) (Scalia, J., dissenting).

<sup>146</sup> As noted above, there *was* a dispute and outcry among the framing generation as to whether the government was permitted to endorse religion at all. But Justice Scalia points to no indication in the his-

But in any event, Justice Scalia is simply wrong when he asserts that, this one exception aside, “all [of] the other examples of our Government’s favoring religion that [he] cited,” and in particular “[a]ll of the actions of . . . the First Congress upon which [he] relied, . . . invoked God, but not Jesus Christ.”<sup>147</sup> That is demonstrably false.

In Justice Scalia’s own words, he “relied primarily upon official acts and official proclamations of the United States or of the component branches of its Government, including the First Congress’s beginning of the tradition of legislative prayer to God, [and] its appointment of congressional chaplains.”<sup>148</sup> But the First Congress did not just begin a tradition of “legislative prayer to God;” it began a tradition of legislative prayer to Jesus Christ. That is to say, the practice of appointing congressional chaplains has not endorsed generic monotheism; it has endorsed Christianity. Every single one of the 121 congressional chaplains in American history has been an ordained Christian minister.<sup>149</sup> And from the very beginning, their prayers have been overtly Christian in nature. For instance, Bishop William White, who served as Senate Chaplain from 1790 to 1800, explained his typical practice in that post:

My practice, in the presence of each house of congress, was in the following series: the Lord’s prayer; the collect Ash Wednesday; that for peace; that for grace; the prayer for the President of the United States; the prayer for Congress; the prayer for all conditions of men; the general thanksgiving; St. Chrysostom’s Prayer; the grace of the Lord Jesus Christ, etc.<sup>150</sup>

What is more, the congressional chaplains did not just conduct Christian prayers at the opening of sessions of Congress. They also held Sunday Christian church services in the Capitol Building—services that were open to and widely attended by the general public.<sup>151</sup>

Indeed, Justice Scalia so mischaracterizes the history that he errs even in declaring that only one of the early presidential Thanksgiving proclamations—the one issued by President Adams in 1798—invoked Jesus Christ rather than a generic God.<sup>152</sup> In fact, during his presidency, Adams issued

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torical record that endorsements of Christianity rather than monotheism produced any greater outcry or controversy.

<sup>147</sup> *McCreary County*, 125 S. Ct. at 2755 (Scalia, J., dissenting).

<sup>148</sup> *Id.* at 2754.

<sup>149</sup> See MILDRED AMER, HOUSE AND SENATE CHAPLAINS (2005), available at <http://www.senate.gov/reference/resources/pdf/RS20427.pdf>.

<sup>150</sup> Letter from Bishop William White to Reverend Henry D. Johns (Dec. 29, 1830), reprinted in BIRD WILSON, MEMOIR OF THE LIFE OF THE RIGHT REVEREND WILLIAM WHITE, D.D., BISHOP OF THE PROTESTANT EPISCOPAL CHURCH OF THE STATE OF PENNSYLVANIA 322 (1939).

<sup>151</sup> See 1 ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 499–501 (1950); Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2105 (1996).

<sup>152</sup> See *McCreary County*, 125 S. Ct. at 2755 & n.5 (Scalia, J., dissenting) (declaring that “virtually all Thanksgiving Proclamations throughout our history . . . have invoked God, but not Jesus Christ,” and

two Thanksgiving proclamations, *both* of which were of a decidedly Christian nature. Adams's second proclamation, issued just a year after the one noted by Justice Scalia, explicitly invoked the Christian Trinity and asked all Americans to

call to mind our numerous offenses against the Most High God, confess them before Him with the sincerest penitence, implore His pardoning mercy, through the Great Mediator and Redeemer, for our past transgressions, and that through the grace of His Holy Spirit we may be disposed and enabled to yield a more suitable obedience to His righteous requisitions in time to come.<sup>153</sup>

This proclamation was written for the President by the Reverend Ashbel Green, the Chaplain of the House of Representatives. In his autobiography, Reverend Green explained that the proclamation's undeniably Christian character was both intentional and obvious:

To remove the complaint which I knew the religious community of our country had made, namely, that the proclamation[s] [of President Washington] calling them to the duty of thanksgiving or fasting lacked a decidedly Christian spirit, I resolved to write one of an evangelical character which should not be liable to this objection, and to take the risk of its being objected or altered by the President. This I accordingly did, and my draught was published with only the alteration of two or three words not at all affecting the religious character of my production. The commendation bestowed on this proclamation by the pious people of our country was ardent and general. It was of course supposed that the President had written it himself, and I said and did nothing to undeceive them. Indeed the sanction given it by the President made it virtually his own act.<sup>154</sup>

As such, the reference to Christ in Adams's first Thanksgiving Proclamation of 1798 was not, as Justice Scalia alleges, a lone exception to an otherwise pervasive practice. To the contrary, the first twenty-five years of the Republic saw only four presidential Thanksgiving Proclamations (two by Washington and two by Adams),<sup>155</sup> half of which were overtly Christian.

Another early data point that Justice Scalia conspicuously did not mention is the joint resolution of the First Congress that "after the oath [of office] shall have been administered to the President, he, attended by the Vice-President, and members of the Senate, and House of Representatives,

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claiming that "[t]he two exceptions are the March 23, 1798 proclamation of John Adams, which asks God 'freely to remit all our offenses' 'through the Redeemer of the World,' and the November 17, 1972 proclamation of Richard Nixon, which stated, 'From Moses at the Red Sea to Jesus preparing to feed the multitudes, the Scriptures summon us to words and deeds of gratitude, even before divine blessings are fully perceived'" (citations omitted).

<sup>153</sup> See John Adams, Thanksgiving Day Proclamation (Nov. 28, 1799), available at <http://www.pilgrimhall.org/ThanxProc1789.htm>.

<sup>154</sup> ASHBEL GREEN & JOSEPH H. JONES, THE LIFE OF ASHBEL GREEN 270-71 (1849); see also *id.* at 554.

<sup>155</sup> See Pilgrim Hall Museum, Presidential Thanksgiving Proclamations 1789-1815, <http://www.pilgrimhall.org/ThanxProc1789.htm> (last visited Jan 28, 2006).

[shall] proceed to St. Paul's Chapel, to hear divine service, to be performed by the chaplain of Congress."<sup>156</sup> In accordance with this resolution, George Washington walked to St. Paul's with members of Congress immediately after being sworn in as President.<sup>157</sup> At the ensuing church service, the Senate Chaplain read prayers from the *Book of Common Prayer*,<sup>158</sup> an Episcopalian prayer book that is composed exclusively of prayers to Jesus Christ.<sup>159</sup> As one historian has explained, "[i]t is to be noted that this was not a service provided by an Episcopal church to which senators and representatives were invited, but an official service carefully arranged for by both houses of Congress and conducted by their duly elected chaplain."<sup>160</sup>

Clearly, many of the official actions of the framing generation invoked and endorsed the Christian God, not just the biblical God.<sup>161</sup> There is, accordingly, simply no rational way to derive Justice Scalia's proposed rule from the historical sources on which he purports to rely.<sup>162</sup>

The fact that Justice Scalia would preclude governmental endorsement of and favoritism toward Christianity should be at least somewhat comforting to those who value religious liberty and nonestablishment. It appears that, while he may be at ease with the monotheistic majority using the government to acknowledge and pray as a people to a generic God, Justice Scalia is uncomfortable with the notion that the Constitution would allow the government to engage in blatant Christian religious expression and endorsement, such as erecting a giant cross on the Capitol Building or placing Jesus Christ on the dollar bill. But the problem for Justice Scalia is that he

<sup>156</sup> Epstein, *supra* note 151, at 2106–07; *see also* STOKES, *supra* note 151, at 485.

<sup>157</sup> *See* Epstein, *supra* note 151, at 2107.

<sup>158</sup> *See id.*

<sup>159</sup> *See* BOOK OF COMMON PRAYER (1789), available at [http://justus.anglican.org/resources/bcp/1789/BCP\\_1789.htm](http://justus.anglican.org/resources/bcp/1789/BCP_1789.htm).

<sup>160</sup> STOKES, *supra* note 151, at 485.

<sup>161</sup> These actions of the early Presidents and Congresses—usually but not exclusively choosing to endorse God in general terms—are not entirely inconsistent with a rule that the government cannot endorse controversial religious views, so long as we are willing to acknowledge the obvious truths that not all of the Framers were on the same page regarding the exact contours of the establishment principle, and that sometimes even the framing generation did not always scrupulously enforce the Constitution to its full extent. After all, even when the government did engage in actions that supported Christianity alone, it still evinced a desire to be inclusive, at least among Christians. Thus, when the Congress agreed to appoint chaplains, it provided that the House and Senate chaplains must be of different denominations, and that the two chaplains must alternate weekly between the two houses of Congress. *See id.* at 456.

<sup>162</sup> Indeed, if these sources do lead to the conclusion that the government need not be neutral between religions (so long as it is neutral between monotheistic sects), then why does that rule extend only to the government's acknowledgment of the divine? Why do these sources not establish a broader principle of constitutionally preferred monotheism that undermines the mandate for neutrality among all religions in funding and other cases as well? Justice Scalia points to no evidence from the framing era that shows that the Framers intended to treat acknowledgment cases differently from other cases. *Cf.* Lupu, *supra* note 67, at 775–79 (arguing that the framing generation did not yet conceive of acknowledgment cases as presenting establishment concerns).

claims to derive his rule (and, in particular, its crucial stopping point) solely from historical practices, yet the historical practices do not support the proposed rule. And at that point, he has nothing to fall back on—neither a coherent theoretical defense of his position, nor an underlying constitutional value or principle that his position can be said to serve. He offers neither, because neither can be found. When it is stripped of its faulty originalist dressing, his rule is exposed as nothing more than a personal vision of the proper relationship between church and state, untethered to text, history, theory, equality, or precedent.

#### CONCLUSION

To its champions, the chief benefit of an originalist mode of constitutional interpretation is its ability to decide cases without reference to the personal policy preferences of the judges.<sup>163</sup> An originalist judge can, the argument goes, determine constitutional meaning by looking to the objective historical record, rather than to his or her own subjective political values. There are many scholars who argue that this benefit is illusory: because the historical sources invariably point in more than one direction, they fail to constrain judges from reaching their preferred political result.<sup>164</sup> That is to say, because there is no single, objective original meaning that can be discerned from the incomplete and often contradictory historical record, originalism pretends to an apolitical objectivity that it cannot deliver.<sup>165</sup>

Justice Scalia's dissent in *McCreary County* may well become Exhibit A in support of that conclusion.<sup>166</sup> Justice Scalia claims, and I trust that he genuinely believes, that history compels the conclusion that the Establishment Clause allows the government to prefer religion over nonreligion (but not vice versa) and to prefer Judeo-Christian religions over all other religions in the category of cases that is now at the forefront of the culture wars.<sup>167</sup> This rule neatly mirrors the political agenda of the religious right.

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<sup>163</sup> See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA* 7, 143–53 (1990); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863–64 (1989).

<sup>164</sup> See Smith, *supra* note 119, at 230.

<sup>165</sup> For an argument that this is particularly true with regard to Establishment Clause issues, see Frank Guliuzza III, *The Practical Perils of an Original Intent-Based Judicial Philosophy: Originalism and the Church-State Test Case*, 42 DRAKE L. REV. 343 (1993). See also Ravitch, *supra* note 54, at 556–57.

<sup>166</sup> See, e.g., Posting of Jack M. Balkin to Balkinization, <http://balkin.blogspot.com/2005/06/justice-scalia-puts-his-cards-on-table.html> (June 27, 2005, 12:53 EST).

<sup>167</sup> See David Cole, *Faith and Funding: Toward an Expressivist Model of the Establishment Clause*, 75 S. CAL. L. REV. 559, 584–85 (2002) (arguing that “Establishment Clause concerns are most acutely presented in modern America by official religious messages”); Jeffrey Gettleman, *Alabama's Top Judge Defiant on Commandments' Display*, N.Y. TIMES, Aug. 21, 2003, at A1 (describing the efforts of Alabama's Judge Roy Moore and his supporters to preserve a Ten Commandments monument in the Alabama Supreme Court).

At the same time, Justice Scalia has concluded that history establishes that our Constitution does not prefer Christians over Jews, which benefits the Republican Party in its aggressive push to win the support of Jewish voters,<sup>168</sup> or over Muslims, which benefits the President in his crucial attempts during the War on Terror to convince the Muslim world that the United States respects Islam and is not waging war against it.<sup>169</sup> This interpretation of the Establishment Clause aligns almost perfectly with the political preferences of the Republican Party, but it is both theoretically bankrupt and demonstrably not mandated by, nor even supported by, the multifaceted historical evidence of the original meaning of the First Amendment on which it is ostensibly based. The fact that Justice Scalia, surely one of the most intellectually gifted judges of our time, and surely one of the most articulate, careful, and compelling champions of originalism ever to pick up a pen, has produced an opinion that mistakenly claims a historical mandate for what appears in reality to be a purely political conclusion raises serious questions about the promise of originalism as a workable, neutral constitutional theory.

Although Justice Scalia's opinion has the potential to catalyze a revolution in Establishment Clause jurisprudence, one hopes that the Court's new Justices will recognize the flaws in Justice Scalia's theory, and will stay the course in preserving constitutional protections for all religious minorities.

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<sup>168</sup> See Matthew E. Berger, *Bush Names New Liaison to Jewish Community*, JERUSALEM POST, June 2, 2005, at 6 (noting "the Republican Party's push to make inroads into the Jewish community").

<sup>169</sup> See Editorial, *World to the Wise*, BOSTON GLOBE, Dec. 16, 2002, at A18 ("Ominously, the U.S. war on terrorism met opposition by majorities in virtually every Muslim society, even allies such as Turkey and Pakistan and even in countries outside the affected region such as Indonesia and Senegal. This suggests that, despite the Bush administration's protestations to the contrary, much of the Muslim world still equates the war on terrorism with a war on Islam. The United States must redouble actions that distinguish the two.").

