

**QUESTION TO JUSTICE SCALIA: DOES THE
ESTABLISHMENT CLAUSE PERMIT THE DISREGARD OF
DEVOUT CATHOLICS?**

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It behoves every man who values liberty of conscience for himself, to resist invasions of it in the case of others; or their case may, by change of circumstances, become his own.

- Thomas Jefferson¹

I. INTRODUCTION

In June 2005, Justice Antonin Scalia contended that “the Establishment Clause . . . permits the disregard of devout atheists.”² This statement is extraordinary inasmuch as it appears to reverse an inexorable—albeit, at times, wandering—trend toward true equality.³ Thus, where individuals had previously been treated as less than equal on the basis of race (e.g., *Dred Scott v. Sandford*⁴), gender (e.g., *Bradwell v. State*⁵) and national origin (e.g., *Korematsu v. United States*⁶), those prior odious decisions are no longer good law.⁷ In his *McCreary County v. ACLU of Kentucky*⁸ dissent, it seems that Justice Scalia sought motion in the opposite direction: toward overturning equality in the one constitutional arena where the

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¹ Letter from Thomas Jefferson to Benjamin Rush (Apr. 21, 1803), in 8 THE WRITINGS OF THOMAS JEFFERSON, 1801–1806, at 224 (Paul Leicester Ford ed., New York, G.P. Putnam’s Sons 1897) (emphasis added) [hereinafter JEFFERSON, 1801–1806].

² *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 893 (2005) (Scalia, J., dissenting). Justice Scalia was joined by former Chief Justice Rehnquist, Justice Thomas, and Justice Kennedy. *Id.* at 885. However, Justice Kennedy did not join the portion of Justice Scalia’s dissent that contained these words. *Id.* at 885–93.

³ See *United States v. Virginia*, 518 U.S. 515, 557 (1996) (“A prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded.”).

⁴ 60 U.S. 393, 465–66 (1856).

⁵ 83 U.S. 130 (1872).

⁶ 323 U.S. 214, 223–24 (1944).

⁷ See, e.g., *Brown v. Board of Education*, 347 U.S. 483, 495 (1954) (*Dred Scott*); *United States v. Virginia*, 518 U.S. 515, 531–32 (1996) (*Bradwell*); *Adarand Constructors v. Peña*, 515 U.S. 200, 215 (1995) (signaling the Court’s approval of Congress’s agreement with the *Korematsu* dissenters’ positions and noting that the 1944 opinion “inexplicably” relied on discriminatory principles).

⁸ 545 U.S. 844 (2005). In *McCreary*, the Supreme Court decided whether the government could post the Ten Commandments on courthouse walls. See *id.*

Supreme Court had not previously proclaimed such a manifest animus toward minorities—religion.⁹

With his reputation for a prodigious intellect,¹⁰ one might infer that Justice Scalia rendered his *McCreary* dissent based on scholarly jurisprudence. On the other hand, as the Justice has written, “Intellectual honesty does not exclude a blinding intellectual bias.”¹¹ As the framers were well aware, this is especially true when religion is involved.¹² Thus, an individual’s spiritual views may at times affect the academic inquiry of even the most gifted intellectual. Perhaps that explains why a justice becomes indignant when his own religious view (that God exists),¹³ is left unsupported by government,¹⁴ but has no qualms contending that government may “disregard” those who adhere to an alternative religious philosophy. Accordingly, this article considers whether objective scholarship or personal religious bias underlay the Justice’s argument.

In delving into this question, the article is divided into three parts. The first considers the text of the Establishment Clause: “Congress shall make no law respecting an establishment of religion”¹⁵ Specifically, the wording of this phrase is analyzed to determine the validity of Justice Scalia’s contention that Atheists may be disregarded.

Because Justice Scalia, in *McCreary*, used historical events to support that contention,¹⁶ the second part examines those events. The analysis is

⁹ To be sure, the Court has previously made such statements as “we are a Christian people.” *Holy Trinity Church v. United States*, 143 U.S. 457, 471 (1892). Nevertheless, as “arrogant” as that statement may be (“[T]he Court takes a long step backwards to the days when Justice Brewer could arrogantly declare for the Court that ‘this is a Christian nation.’ Those days, I had thought, were forever put behind us” *Lynch v. Donnelly*, 465 U.S. 668, 717–18 (1984) (Brennan, J., dissenting) (citation omitted) (quoting *Holy Trinity Church*, 143 U.S. at 471)), the Court never suggested that other religious belief systems could be “disregarded” under the terms of the Constitution.

¹⁰ See S. EXEC. REP. NO. 19 (1986); 132 CONG. REC. S12,779 (1986).

¹¹ *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 127 S. Ct. 1534, 1556 (2007) (Scalia, J., dissenting).

¹² *Id.*

¹³ See MARTIN GARBUS, *COURTING DISASTER: THE SUPREME COURT AND THE UNMAKING OF AMERICAN LAW* 548–49 (2002) (labeling Justice Scalia as “[a] devout Catholic”).

¹⁴ See *Locke v. Davey*, 540 U.S. 712, 733 (2004) (Scalia, J., dissenting) (“Let there be no doubt: This case is about discrimination against a religious minority.”).

¹⁵ U.S. CONST. amend. I.

¹⁶ *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 884–94 (2005) (Scalia, J., dissenting).

driven by questioning the fairness with which these events were selected and whether they really stand for the proposition he claims.

Finally, the third and last part applies Justice Scalia's brand of analysis to his own religion: Catholicism.¹⁷ The analysis shows that the United States of America was born of a literal hatred for Catholics.¹⁸ Thus, does the Establishment Clause, under his approach, permit the disregard of the faith to which he adheres? If so, then his espousal of the view that Atheists can be "disregarded," while not espousing the same view against Catholics, may be nothing more than a marker of the Framers' wisdom in recognizing the immense power of religious prejudice.

II. DOES THE TEXT OF THE ESTABLISHMENT CLAUSE ALLOW THE GOVERNMENT TO "DISREGARD" ANY LAWFUL RELIGIOUS IDEOLOGY?

Perhaps no member of the Supreme Court is more associated with "textualism" than Justice Scalia. Although the legal field universally concurs that statutory analysis should always begin with the text,¹⁹ Justice Scalia's position that he is "inclined to adhere closely to the plain meaning of a text,"²⁰ even in the face of apparently contrary legislative history,²¹ is somewhat unique. In fact, his Supreme Court brethren have characterized him as believing "that we have a duty to enforce the statute as written even if fully convinced that every Member of the enacting Congress, as well as the President who signed the Act, intended a different result."²²

Despite the foregoing, Justice Scalia is also the foremost "originalist,"²³ which gives textualism less primacy in the realm of constitutional interpretation. In other words, he advocates for "the consideration of an enormous mass of material . . . a task sometimes better

¹⁷ See GARBUS, *supra* note 13.

¹⁸ See discussion *infra* Part IV.

¹⁹ *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 127 S. Ct. 1534, 1552 (2007) (Scalia, J., dissenting); see also *United States v. Gonzales*, 520 U.S. 1, 4 (1997) (stating that the first step to interpret a statute is to analyze the text).

²⁰ Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1184 (1989).

²¹ See, e.g., *United States v. Estate of Romani*, 523 U.S. 517, 536–37 (1998) (Scalia, J., concurring) (noting how he has "been critical of the Court's using the so-called legislative history of an enactment (hearings, committee reports, and floor debates) to determine [a text's] meaning").

²² *Conroy v. Aniskoff*, 507 U.S. 511, 518 n.12 (1993).

²³ See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 *passim* (1989).

suiting to the historian than the lawyer,” to determine the meaning of the Constitution’s provisions.²⁴ This can result in tension between the two approaches, especially when “tradition” can be read to suggest that the text does not reflect the Framers’ original intent.

How does Justice Scalia deal with this tension, and balance originalism and textualism when they are in conflict? If the case involves fundamental constitutional rights, it seems the answer depends upon the clarity of the given passage. Because he recognizes that “[t]he provisions of the Bill of Rights were designed to restrain transient majorities from impairing long-recognized personal liberties,”²⁵ he has argued for a “role of tradition in giving content only to *ambiguous* constitutional text.”²⁶ Accordingly, the necessary implication is that the Establishment Clause, which prohibits the government from acting in ways even “*respecting* an establishment of religion,”²⁷ must be “ambiguous constitutional text.” Otherwise, his *McCreary* claim that it is permissible “to give God thanks and supplication *as a people*” because it is part of “[o]ur national tradition”²⁸ would be inconsistent with his constitutional jurisprudence.

In analyzing whether this is correct, it should initially be noted that even though the First Amendment’s very first word, “Congress,” appears to be unambiguous, “tradition” has permitted an alteration of its meaning. Similarly, the word, “law,” is not limited to its unequivocal legal definition.²⁹ The First Amendment now constrains all governmental action “by whatever instruments or in whatever modes that action may be taken.”³⁰

That said, reinterpreting “Congress” and “law” serves to augment the First Amendment’s sweep *against* intrusive governmental activities. Consequently, protection of individual liberty interests is increased, rather

²⁴ *Id.* at 856–57.

²⁵ *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 95 (1990) (Scalia, J., dissenting). Of course, the effect of a governmental establishment of religion is that it tends to keep the religious majority from ever becoming “transient.”

²⁶ *Id.* at n.1.

²⁷ *See* U.S. CONST. amend. I (emphasis added).

²⁸ *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 900 (2005) (Scalia, J., dissenting).

²⁹ *See, e.g., Marsh v. Chambers*, 463 U.S. 783, 784, 786 (1983) (applying the First Amendment to a “Legislature’s practice of opening each legislative day with a prayer”).

³⁰ *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995) (citation omitted); *See also, Valley Forge Christian Coll. v. Ams. United for Separation of Church and State*, 454 U.S. 464, 511 (1982) (Brennan, J., dissenting) (holding that Congress is now “the Government as a whole, regardless of which branch is at work in a particular instance”).

than lessened. Thus, if any ambiguity exists in the remaining text, construing it as diminishing individual liberty would be against the “tradition” of reinterpreting the text to enhance personal freedoms.

But is there any ambiguity? “[S]hall make no” is certainly unambiguous. Stated as a negative of the mandatory “shall,”³¹ it demands that there will never be any law “respecting an establishment of religion.” The phrase is about as absolute as our language permits.

“Respecting” is clear as well. Its definition during the framing of the Constitution (i.e., “relating to, having a reference to”³²) is no different than it is today.³³ This conclusion also follows the technique Justice Scalia advocated in his *District of Columbia v. Heller*³⁴ majority opinion. There, he discerned the significance of “the people” in the Second Amendment by looking to all other uses of that phrase within the Constitution.³⁵ Article IV, Section 3 is the only other place the word “respecting” is used: “The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”³⁶ This comports perfectly with the definition just provided.

In view of the foregoing, if there is some ambiguity that permits disregarding a religious minority, it must be located within the phrase “an establishment of religion.” Assuming no reader finds difficulty with the article “an” or the preposition “of,” the issue boils down to two words: “establishment” and “religion.”

The word, “establishment,” is in numerous dictionaries from the colonial era:³⁷

(1) Settlement; fixed state.

³¹ Cf. *Pierce v. Underwood*, 487 U.S. 552, 569–70 (1988) (characterizing “shall” as “mandatory language”).

³² 2 JOHN ASH, *THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE* (2d ed., London 1795). Another definition, “[r]egarding with some degree of reverence,” was listed, but this obviously is not the definition being used in the First Amendment. *Id.*

³³ See, e.g., *CONCISE OXFORD ENGLISH DICTIONARY* 1225 (11th ed. 2004) (defining “respecting” as “with reference or regard to”).

³⁴ 128 S. Ct. 2783 (2008).

³⁵ *Id.* at 2790–91.

³⁶ U.S. CONST. art. IV, § 3, cl. 2.

³⁷ See, e.g., 1 JOHN ASH, *THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE* (2d ed., London 1795); 1 SAMUEL JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* (3d ed., London 1766).

- (2) Confirmation of something already done; ratification.
- (3) Settled regulation; form; model
- (4) Foundation; fundamental principle
- (5) Allowance; income; salary.³⁸

To select from among these, Justice Scalia's *Heller* methodology can be used again. "Establishment" appears only one other time in the Constitution. Article VII states, "The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the same."³⁹ In its present tense, the verb "establish" is used five times: to "establish Justice," "establish this Constitution,"⁴⁰ "establish an uniform Rule of Naturalization,"⁴¹ "establish Post Offices and post Roads,"⁴² and "inferior Courts as the Congress may from time to time ordain and establish."⁴³ "Established" is used once: "Officers of the United States, whose Appointments . . . shall be established by Law."⁴⁴ These usages are all consonant with the first four dictionary definitions listed, perhaps with a touch of "creation" as well. Employing this methodology, the word "establishment" in the First Amendment is synonymous with "any act of government that relates to creating or confirming a settled regulation or fundamental principle."

A further, and perhaps more nuanced, understanding can be obtained by examining other colonial examples in which the word was used. For instance, Alexander Hamilton defined "an *established* religion" as one "the civil authority engages not only to protect but to support."⁴⁵ Certainly, when the government posts the Ten Commandments on courthouse walls, as it had done in *McCreary*, it is not only protecting belief in God, but also it is actively supporting that belief as well. Likewise, when government engages in other questionable practices, such

³⁸ 1 JOHNSON, *supra* note 37.

³⁹ U.S. CONST. art. VII.

⁴⁰ U.S. CONST. pmbi.

⁴¹ U.S. CONST. art. I, § 8, cl. 4.

⁴² U.S. CONST. art. I, § 8, cl. 7.

⁴³ U.S. CONST. art. III, § 1.

⁴⁴ U.S. CONST. art. II, § 2, cl. 2.

⁴⁵ 1 ALEXANDER HAMILTON, *Remarks on the Quebec Bill*, in THE WORKS OF ALEXANDER HAMILTON 181, 187 (Henry Cabot Lodge ed. 1904) (emphasis added).

as interlarding the Pledge of Allegiance with “under God,”⁴⁶ or choosing “In God we trust” to serve as the nation’s official motto,⁴⁷ it is not merely protecting, but actively supporting the religious notion that a divine being exists.

Elsewhere, the colonists spoke of “the present happy *establishment* of the Protestant succession,”⁴⁸ and “the protestant Succession as by law *established*”⁴⁹ in describing their own religious favoritism. Additionally, in the Declaration of Independence, the colonists wrote of Parliament’s “*establishing* . . . an Arbitrary government” (referencing the Canadian Parliament’s Catholic rule).⁵⁰ These latter uses of the various forms of the word “establish” have the utmost relevance in this discussion because, as is seen below, “Protestantism” at the founding was functionally the same as “Monotheism” today.⁵¹ Thus, an “establishment” of religion can also be defined as favoring the religion subscribed to by the overwhelming majority of citizens, where the majority takes the governmental favoritism for granted and where those who adhere to alternative minority faiths are “political outsiders.”⁵²

In view of the foregoing, it seems difficult to argue that there is any significant lack of clarity in the Establishment Clause’s first eight words.

⁴⁶ 4 U.S.C. § 4 (2006).

⁴⁷ 36 U.S.C. § 302 (2006).

⁴⁸ JOHN CRUGER, JOURNAL OF THE FIRST CONGRESS OF THE AMERICAN COLONIES: IN OPPOSITION TO THE TYRANNICAL ACTS OF THE BRITISH PARLIAMENT, Held at New York, October 7, 1765, *reprinted in* 1 THE PEOPLE SHALL JUDGE, READINGS IN THE FORMATION OF AMERICAN POLICY at 151 (Univ. of Chi. Staff and Social Sciences eds., 1949) (emphasis added).

⁴⁹ The Trial of Henry Sacheverell, D.D. upon an Impeachment Before the House of Lords, for High Crimes and Misdemeanors: 9 Anne, A.D. 1710 (Dec. 13, 1709), *in* 15 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS 1, 2 (T.B. Howell ed., London, T.C. Hansard 1816) (emphasis added).

⁵⁰ THE DECLARATION OF INDEPENDENCE para. 22 (U.S. 1776) (emphasis added) (“For abolishing the free System of English Laws in a neighbouring Province, *establishing* therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies.” (emphasis added)).

⁵¹ See discussion *infra* Part III.E

⁵² Although obviously not a necessary criterion, it is noteworthy that Protestantism, like Monotheism, is not really *a* religion, but rather an aggregate of smaller, discrete subgroups. ERIC D. HIRSCH, JR. ET AL., THE NEW DICTIONARY OF CULTURAL LITERACY 106 (Houghton Mifflin Company 3d ed. 2002) (emphasis added).

Did Justice Scalia, therefore, rely on some ambiguity in the concept of “religion” to justify his conclusion that the Clause “permits the disregard of devout Atheists”?⁵³

Perhaps he did. Colonial dictionary definitions of religion certainly suggest that Atheism is excluded:

1. Virtue as founded upon reverence of God, and expectation of further rewards and punishments.
2. A system of divine faith and worship as opposite to others.⁵⁴

Similarly, the word’s eighteenth century usage often implied that the colonists did not have Atheism in mind when “religion” was used. Elisha Williams was one of the most highly respected individuals of the mid-eighteenth century and served as a Pastor, Rector of Yale College, and legislator in Connecticut.⁵⁵ He wrote that “the *civil* Authority have no Power to establish any Religion (*i.e.* any Professions of Faith, Modes of Worship, or Church Government).”⁵⁶ Atheists did not profess faith, engage in worship, or have churches.⁵⁷

On the other hand, constitutional definitions can be quite different from those employed colloquially. Especially in view of how the other clauses of the First Amendment have been interpreted, dictionary and general usage definitions are only part of the story. Using Samuel Johnson’s dictionary to analyze the Free Speech Clause, for example, would yield a jurisprudence at odds with that which now exists. It defined “speech” as:

1. The power of articulate utterance; the power of expressing thoughts by vocal words.

⁵³ *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 893 (2005) (Scalia, J., dissenting).

⁵⁴ 1 JOHNSON, *supra* note 37.

⁵⁵ ELISHA WILLIAMS, *THE ESSENTIAL RIGHTS AND LIBERTIES OF PROTESTANTS: A REASONABLE PLEA FOR THE LIBERTY OF CONSCIENCE, AND THE RIGHT OF PRIVATE JUDGMENT, IN MATTERS OF RELIGION, WITHOUT ANY CONTRoul FROM HUMAN AUTHORITY* 18 (Boston, S. Kneeland & T. Green 1744).

⁵⁶ *Id.*

⁵⁷ See MICHAEL MARTIN, *ATHEISM: A PHILOSOPHICAL JUSTIFICATION* 3 (1990).

2. Language; words considered as expressing thoughts.
3. Particular language as distinct from others.
4. Any thing spoken.
5. Talk; mention.
6. Oration; harangue.
7. Liberty to speak.⁵⁸

This set of definitions is obviously incomplete in a constitutional sense. Although the Framers chose the word “speech,” they really contemplated the word “expression.” Thus, “paintings, drawings, . . . engravings,” music, flag burning, photography, dance, sexual performances, nudity, and exposed buttocks—if they communicate ideas—are encompassed within the “free speech” right.⁵⁹

Moreover, not only does the constitutional definition of speech include far more than actual speaking, it even includes its complete opposite; that is, “the right to refrain from speaking at all.”⁶⁰ In fact, all First Amendment rights embrace a concomitant negative of that right. Freedom of the press includes the right not to publish;⁶¹ “[f]reedom of association . . . plainly presupposes a freedom not to associate”;⁶² and, as evidenced by the fact that many criticize the government without ever taking further action, the right “to petition the government for a redress of grievances” naturally encompasses a right not to do so.⁶³

⁵⁸ 2 JOHNSON, *supra* note 37.

⁵⁹ *Kaplan v. California*, 413 U.S. 115, 119–20 (1973) (“paintings, drawings, and engravings”); *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (music); *United States v. Eichman*, 496 U.S. 310, 318 (1990) (flag burning); *Regan v. Time, Inc.*, 468 U.S. 641, 647–48 (1984) (photography); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975) (dance); *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49–50 (1986) (sexual performances); *Jenkins v. Georgia*, 418 U.S. 153, 160–61 (1974) (nudity); *Erznoznik v. Jacksonville*, 422 U.S. 205, 206–07, 217–18 (1975) (exposed buttocks).

⁶⁰ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 645 (1943) (Murphy, J., concurring).

⁶¹ *Pell v. Procunier*, 417 U.S. 817, 821–22 (1974).

⁶² *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).

⁶³ *See McDonald v. Smith*, 472 U.S. 479, 482 (1985) (stating that the right to petition the government is “cut from the same cloth as the other guarantees of [the First] Amendment”).

Thus, even if one accepts that Justice Scalia is correct in limiting “religion” to belief centered upon a Monotheistic God,⁶⁴ the Framers’ placement of the religion clauses within the First Amendment suggests that the “negative right” was also intended to be embraced. In fact, Justice Murphy explicitly made this point in his *West Virginia State Board of Education v. Barnette*⁶⁵ concurrence. In its entirety, the “right to refrain” quotation is:

The right of freedom of thought *and of religion* as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all, except insofar as essential operations of government may require it for the preservation of an orderly society⁶⁶

Along these precise lines, the Supreme Court has consistently found that the freedom of religion, even if taken to mean the freedom to believe in God, also embraces the right to not hold that belief.⁶⁷

For those who argue that the “religion” in those cases—especially *Barnette*—relates only to the Free Exercise Clause and not to the

⁶⁴ See *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 893–94 (2005) (Scalia, J., dissenting).

⁶⁵ 319 U.S. 624 (1943).

⁶⁶ *Id.* at 645 (Murphy, J., concurring) (emphasis added).

⁶⁷ See *McCreary County*, 545 U.S. at 875 (“[G]overnment may not favor . . . religion over irreligion.”); *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 703 (1994) (“[A] principle at the heart of the Establishment Clause [is] that government should not prefer . . . religion to irreligion.”); *County of Allegheny v. ACLU of Greater Pittsburgh Chapter*, 492 U.S. 573, 610 (1989) (“A secular state establishes neither atheism nor religion as its official creed.”); *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 9 (1989) (“[G]overnment . . . may not place its prestige, coercive authority, or resources behind a . . . religious belief in general.”); *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 382 (1985) (“[G]overnment [must] maintain a course of neutrality . . . between religion and nonreligion.”); *Wallace v. Jaffree*, 472 U.S. 38, 52–53 (1985) (“[T]he Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.”); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (“The First Amendment mandates governmental neutrality between . . . religion and nonreligion.”); *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (“We repeat and again affirm that neither a State nor the Federal Government . . . can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.”); *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 18 (1947) (“Th[e First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers.”).

Establishment Clause, the construction of the First Amendment runs counter to that contention. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise *thereof*”⁶⁸ This structure mandates that the word “religion” have the same meaning for both clauses.⁶⁹ Thus, once the Framers’ intended meaning is ascertained for either clause, the meaning for the other clause is necessarily determined as well.

In light of this discussion, it is clear that “religion,” like “speech,” is shorthand for a more expansive concept, with the freedom of religion being equivalent to “liberty of conscience.”⁷⁰ This can be seen at least as far back as the mid-seventeenth century. Roger Williams spoke of “all the *liberty of conscience*, that I ever pleaded for” when he argued that no one may be “compelled from their own particular prayers or worship, *if they practice any*.”⁷¹ As might be expected, the same phrase was used in the Charter of Rhode Island and Providence Plantations.⁷² But it was hardly limited to Williams’ immediate sphere of influence. Rather, it also was used in the religious freedom provisions of the charters of North Carolina (1665),⁷³ New Hampshire (1680),⁷⁴ Massachusetts Bay (1691),⁷⁵ Pennsylvania (1701),⁷⁶ Delaware (1701),⁷⁷ and Georgia (1732).⁷⁸

⁶⁸ U.S. CONST. amend. I. (emphasis added).

⁶⁹ See *McCreary County*, 545 U.S. at 875.

⁷⁰ “Freedom of conscience” and “rights of conscience” were used as well.

⁷¹ Letter from Roger Williams to Town of Providence (Jan. 1655), in LETTERS OF ROGER WILLIAMS, 1632–1682, NOW FIRST COLLECTED, at 279 (John Russell Bartlett ed., 2009) (emphases added). The Supreme Court also quoted an excerpt from this language in *Abington School District v. Schempp*, 374 U.S. 203, 214 n.6 (1963).

⁷² CHARTER OF RHODE ISLAND AND PROVIDENCE PLANTATIONS (1663), in THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA, 3211, 3213 (Francis Newton Thorpe ed., 1909) [hereinafter Thorpe] (“[A]ll and everye person and persons may, from tyme to tyme, and at all tymes hereafter, freely and fullye have and enjoye his and their owne judgments *and consciences*, in matters of religious concernments.” (emphasis added)).

⁷³ CHARTER OF CAROLINA (1665), in 1 Thorpe, *supra* note 72, at 2771 (“But all and every such person and persons may, from time to time, and at all times, freely and quietly have and enjoy his and their judgments *and consciences* in matters of religion” (emphasis added)).

⁷⁴ THE COMBINATION OF THE INHABITANTS UPON THE PISCATAQUA RIVER FOR GOVERNMENT (1641), reprinted in 4 *id.*, at 2448 (“[I]n matters of Religion We do hereby will, require & com’and y^t *liberty of conscience* shall be allowed unto all protestants.” (emphasis added) (citing COMMISSION OF JOHN CUTT (1680))). The commission marked

(continued)

When the state constitutions replaced the colonial charters, this notion persisted. The Pennsylvania Constitution of 1776 prohibited a government that interferes with or controls “the *right of conscience* in the free exercise of religious worship.”⁷⁹ The famous passage of Virginia’s 1776 Bill of Rights stated that “all men are equally entitled to the free exercise of religion . . . according to *the dictates of conscience*.”⁸⁰ Similarly, when New York amended its constitution in 1777, “the *liberty of conscience*” modified “the free exercise and enjoyment of religious profession and worship.”⁸¹ Although not one of the original thirteen colonies, Vermont also highlighted “*the rights of conscience*” in its free exercise clause.⁸² In the New Hampshire Constitution of 1784, “the RIGHTS OF CONSCIENCE” introduced the clauses pertaining to “religious worship.”⁸³

“the formal beginning of constitutional government in New Hampshire.” *Id.* at 2446 (citation omitted).

⁷⁵ CHARTER OF MASSACHUSETTS BAY (1691), *in 3 id.*, at 1881 (“Wee Doe by these presents for vs Our heires and Successors Grant Establish and Ordaine that for ever hereafter there shall be a *liberty of Conscience* allowed in the Worshipp of God to all Christians (Except Papists) Inhabiting or which shall Inhabit or be Resident within our said Province or Territory.” (emphasis added)).

⁷⁶ CHARTER OF PRIVILEGES FOR PENNSYLVANIA (1701), *in 5 id.*, at 3077 (“BECAUSE no People can be truly happy, though under the greatest Enjoyment of Civil Liberties, if abridged of the *Freedom of their Consciences*, as to their Religious Profession and Worship.” (emphasis added)).

⁷⁷ CHARTER OF DELAWARE (1701), *in 1 id.*, at 557–58. Delaware, which originally existed under Pennsylvania law, used the same wording: “Because no People can be truly happy, though under the greatest Enjoyment of Civil Liberties, if abridged of *the Freedom of their Consciences*, as to their Religious Profession and Worship.” *Id.* at 558 (emphasis added).

⁷⁸ CHARTER OF GEORGIA (1732), *in 2 id.*, at 773 (“[F]orever hereafter, there shall be a *liberty of conscience* allowed in the worship of God.” (emphasis added)).

⁷⁹ PA. CONST. OF 1776, art. 2 (amended 1790), *in 5 id.*, at 3082 (emphasis added). In 1790, the state altered the phrasing to: “[N]o human authority can, in any case whatever, control or interfere with *the rights of conscience*; and that no preference shall ever be given, by law, to any religious establishments or modes of worship.” PA. CONST. OF 1790, art. IX, § 3, *in 5 id.*, at 3100 (emphasis added).

⁸⁰ VA. CONST. OF 1776, § 16, *in 7 id.*, at 3814 (emphasis added).

⁸¹ N.Y. CONST. OF 1777, art. XXXVIII, *in 5 id.*, at 2637 (emphasis added).

⁸² VT. CONST. OF 1777, ch. I, art. III, *in 6 id.*, at 3740 (emphasis added).

⁸³ N.H. CONST. OF 1784, pt. I, art. I, cls. IV–V, *in 4 id.*, at 2454 (emphasis added). The state used the same construction in its Constitution of 1792 as well. N.H. CONST. OF 1792, pt. I, art. IV, *in 4 id.*, at 2471.

“The free exercise and enjoyment of religious profession and worship” was referenced as “*liberty of conscience*” in the South Carolina Constitution of 1790.⁸⁴ Similarly, the Delaware Constitution of 1792 stated, “no power shall or ought to be vested in or assumed by any magistrate that shall in any case interfere with, or in any manner control, *the rights of conscience*, in the free exercise of religious worship.”⁸⁵

The era’s clergy also saw religion in this light. One pastor noted that “persecution *for conscience* is not only *unreasonable* in itself, but *ineffectual* also to the base purposes of a religious tyranny.”⁸⁶ Similarly, Elisha Williams wrote, “Every man has an equal Right to follow the *Dictates of his own Conscience* in the Affairs of Religion.”⁸⁷

The year before the Constitutional Convention took place, the Continental Congress agreed that citizens were granted “[t]he most perfect *freedom of conscience* and of worship.”⁸⁸ Although there was little talk of personal freedoms during the Convention’s sessions (focused, as its members were, on enumerating the new government’s powers), that was not the case in the state ratifying conventions. There, concern about the proposed federal government’s potential infringements of individual liberties was a major issue.⁸⁹ For instance, when religious freedom was addressed in Virginia, there was commentary on “[f]reedom of *conscience*,”⁹⁰ “*liberty of conscience*,”⁹¹ and “the free exercise of religion,

⁸⁴ S.C. CONST. OF 1790, art. VIII, § 1, *in 6 id.*, at 3264 (emphasis added).

⁸⁵ DEL. CONST. OF 1792, art. I, § 1, *in 1 id.*, at 568 (emphasis added).

⁸⁶ JOHN MELLEN, THE GREAT AND HAPPY DOCTRINE OF LIBERTY: A DISCOURSE, DELIVERED AT HANOVER, COMMONWEALTH OF MASSACHUSETTS, FEBRUARY 19, 1795, ON THE DAY OF PUBLIC THANKSGIVING AND PRAYER, APPOINTED BY THE PRESIDENT, TO BE OBSERVED THROUGHOUT ALL THE UNITED STATES OF AMERICA 19 (Boston, Samuel Hall 1795) (emphases added).

⁸⁷ WILLIAMS, *supra* note 55, at 7 (emphasis added).

⁸⁸ 30 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 275 (John C. Fitzpatrick ed., 1934) (emphasis added).

⁸⁹ See THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787 *passim* (Jonathan Elliot ed., Washington, Congress 1836) [hereinafter ELLIOT’S DEBATES].

⁹⁰ 3 *id.* at 211 (statement of James Monroe) (emphasis added) (“*Freedom of conscience* is enjoyed here in the fullest degree. Our states are not disturbed by a contrariety of religious opinions, and other causes of quarrels which other nations have.” (emphasis added)).

⁹¹ *Id.* at 635 (statement of James Innes) (emphasis added).

(continued)

according to the dictates of *conscience*.”⁹² Similarly, New Hampshire’s delegates associated “the *rights of conscience*” with “laws touching religion.”⁹³

Most importantly, the phrase “rights of conscience” was referenced multiple times as the First Congress crafted the First Amendment. In fact, when James Madison first introduced the Bill of Rights to Congress on June 8, 1789,⁹⁴ the “father of the Constitution”⁹⁵ proposed that “the full and equal *rights of conscience* . . . [shall not] in any manner, or on any pretext [be] infringed.”⁹⁶ The term lost none of its preeminence when Congress earnestly debated what would become the Bill of Rights two months later. For example, on Friday, August 21, 1789, the House of Representatives proposed, “No State shall infringe the right of trial by jury in criminal

Can it be said that *liberty of conscience* is in danger? I observe on the side of the Constitution those who have been champions of religious liberty . . . that Turks, Jews, Infidels, Christians, and all other sects, may be Presidents, and command the fleet and army, there being no test to be required.

Id. (emphasis added).

⁹² *Id.* at 659 (statement of George Wythe) (emphasis added).

⁹³ 1 *id.* at 326 (emphasis added).

⁹⁴ 1 ANNALS OF CONG. 450–53 (Joseph Gales ed. 1834).

⁹⁵ *Gonzales v. Raich*, 545 U.S. 1, 57 (2005) (O’Connor, J., dissenting) (referring to Madison as the “father of the Constitution”).

⁹⁶ 1 ANNALS OF CONG. 451 (Joseph Gales ed. 1834). The phrase can also be found in correspondences between the colonial statesmen. See, e.g., Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 25 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, at 428 (Paul H. Smith ed. 1998).

In Virginia I have seen the bill of rights violated in every instance where it has been opposed to a popular current. Notwithstanding the explicit provision contained in that instrument for the *rights of Conscience* it is well known that a religious establishment wd. have taken place in that State, if the legislative majority had found as they expected, a majority of the people in favor of the measure

Id. (emphasis added). Jefferson had been using the phrase as well. In his 1782 Notes on Virginia, he wrote, “[O]ur rulers can have no authority over such natural rights, only as we have submitted to them. The *rights of conscience* we never submitted, we could not submit.” Thomas Jefferson, Notes on the State of Virginia, in THE BASIC WRITINGS OF THOMAS JEFFERSON 157–58 (Philip S. Foner ed., 1944) (emphasis added) [hereinafter BASIC WRITINGS OF JEFFERSON].

cases; nor the *rights of conscience*; nor the freedom of speech or of the press.”⁹⁷ The Senate also integrated “*rights of conscience*” with religious establishment and free exercise: “Congress shall make no law establishing religion, or prohibiting the free exercise thereof; nor shall the *rights of conscience* be infringed.”⁹⁸ The Senate tried two more iterations on September 3: “Congress shall not make any law infringing the *rights of conscience*, or establishing any religious sect or society,” and “Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting the free exercise thereof, nor shall the *rights of conscience* be infringed.”⁹⁹

Of course, the Framers did not ultimately include that phrase in the First Amendment’s text.¹⁰⁰ However, that does not diminish the importance of how those statesmen conceptualized religious liberty. For example, in his famous letter to the Hebrew Congress of Newport, Rhode Island, George Washington stated, “All possess alike *liberty of conscience* and immunities of citizenship.”¹⁰¹ While presiding over the Senate as the Vice President, John Adams repeatedly used the phrase “*liberty of conscience*” when discussing “the liberty of thinking in matters of religion.”¹⁰² Just before making his oft-repeated claim that “it does me no injury for my neighbour to say there are twenty gods, or no god. It neither picks my pocket or breaks my leg,” Thomas Jefferson specified that “[t]he *rights of conscience* we never submitted, we could not submit.”¹⁰³ James Madison, after having noted how the imprisonment of men “for publishing their religious sentiments” had rendered him “without common patience,”

⁹⁷ 1 U.S. HOUSE JOURNAL, 1st Cong., 1st sess. 85 (Aug. 21, 1789) (emphasis added).

⁹⁸ 1 U.S. SENATE JOURNAL, 1st Cong., 1st sess. 63 (Aug. 25, 1789) (emphasis added).

⁹⁹ *Id.* at 70 (Sept. 3, 1789) (emphasis added).

¹⁰⁰ *Id.* (“On motion to adopt the third article proposed in the resolve of the House of Representatives, amended by striking out these words, ‘nor shall the rights of conscience be infringed:’ It passed in the affirmative.”).

¹⁰¹ Letter from George Washington to The Hebrew Congregation of Newport, Rhode Island (Aug. 1790) in PETER WIERNIK, HISTORY OF THE JEWS IN AMERICA: FROM THE PERIOD OF THE DISCOVERY OF THE NEW WORLD TO THE PRESENT TIME 99–101 (1912).

¹⁰² JOHN ADAMS, *Discourses on Davila*, in 6 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES: WITH A LIFE OF THE AUTHOR, NOTES AND ILLUSTRATIONS 227, 313 (Charles Francis Adams ed., Boston, Charles C. Little & James Brown 1851) (emphasis added).

¹⁰³ BASIC WRITINGS OF JEFFERSON, *supra* note 96, at 158 (emphasis added).

asked a friend “to pity me, and pray for *liberty of conscience* to all.”¹⁰⁴ To give but one more example, Thomas Paine used the phrase in discussing religious toleration and intolerance. In his *The Rights of Man*, Paine brilliantly wrote, “Both are despotisms. The one assumes to itself the right of with-holding *Liberty of Conscience*, and the other of granting it.”¹⁰⁵ In other words, as one scholar put it, “the discussions suggest that the framers viewed ‘free exercise of religion’ and ‘freedom of conscience’ as virtually interchangeable concepts.”¹⁰⁶

Does this include Atheism? Or is “freedom of conscience” limited to Justice Scalia’s “God of monotheism”?¹⁰⁷ After all, every state government criminalized the denial of God’s existence.¹⁰⁸ On the other

¹⁰⁴ Letter from James Madison to William Bradford, Jr. (Jan. 24, 1774), in 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON: FOURTH PRESIDENT OF THE UNITED STATES 12 (Order of Congress ed., Philadelphia, J. B. Lippincott & Co. 1865).

¹⁰⁵ THOMAS PAINE, *THE RIGHTS OF MAN* 67 (BiblioBazaar, LLC 2008) (1791) (emphasis added).

¹⁰⁶ Steven D. Smith, *What Does Religion Have to Do with Freedom of Conscience?*, 76 U. COLO. L. REV. 911, 912 (2005).

¹⁰⁷ *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 894 n.3 (2005) (Scalia, J., dissenting).

¹⁰⁸ See N.C. CONST. of 1776, art. XXXII, in 5 Thorpe, *supra* note 72, at 2793; Act for the Punishment of Divers Capital and Other Felonies (1784), 1 Conn. Pub. Stat. Laws 295, 296 n.6 (1808); Act Against Drunkenness, Blasphemy § 5 (1737), 1 Laws of Del. 174 (1797); Act to Punish Blasphemers, Swearers, Drunkards, and Sabbath-Breakers (1720), 1720 Md. Laws 733–34; R.I. GEN. LAWS § 11-11-6 (1956) (repealed 2004); Act for the More Effectual Suppressing of Blasphemy and Prophaneness (1703), Laws of S.C. 4 (Grimke 1790); *Hale v. Everett*, 53 N.H. 9, 206 (N.H. 1868) (stating blasphemy remained “an indictable offence at common law” in New Hampshire well past the mid-nineteenth century); *Commonwealth v. Kneeland*, 37 Mass. (20 Pick.) 206, 225 (Mass. 1838) (“[A] wilful denial of God . . . constitute[s] the offence intended to be prohibited and punished.”); *Updegraph v. Commonwealth*, 11 Serg. & Rawle 394, 406 (Pa. 1824) (“Denying the Being and Providence of God” was punished because it was considered “a wilful and spiteful attempt to subvert [society’s] religion” and “the sure forerunne[r] of anarchy, and finally of despotism.”); *People v. Ruggles*, 8 Johns. 290, 297 (N.Y. Sup. Ct. 1811) (“[W]icked and malicious words, writings and actions which go to vilify those gospels, continue, as at common law, to be an offense against the public peace and safety.”); LUCIUS Q. C. ELMER, *A DIGEST OF THE LAWS OF NEW JERSEY* 179 § 22 (Bridgeton, Elmer & Nixon, 3d ed. 1861) (1838) (stating that anyone convicted of “denying, cursing, or contumeliously reproaching His being or providence” in New Jersey was subject to a \$200 fine or twelve months of hard labor, or both, at the discretion of the court); LUCIUS Q. C. LAMAR, *A COMPILATION OF*
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hand, “[t]he first amendment to the Constitution . . . like the other amendments proposed and adopted at the same time, was not intended to limit the powers of the State governments in respect to their own citizens, but to operate upon the National government alone.”¹⁰⁹ Thus, the fact that each state could limit individual liberties does not imply that the new national government could also impose such limitations. Thomas Jefferson explained this concept in writing about another First Amendment freedom, “While we deny that Congress have a right to control the freedom of the press, we have ever asserted the right of the states, and their exclusive right, to do so.”¹¹⁰

In view of the foregoing, it would appear that Justice Scalia correctly asserted there is some ambiguity to the text. The word “religion” in the First Amendment could be a reference to “freedom of conscience” for all views regarding God (including that there is no God or that there are many gods), or it could have a more limited scope (such as referencing only “the God of monotheism”¹¹¹). Obviously, the latter interpretation is at odds with the basic notion of equality found in the Fifth and Fourteenth Amendments. Nonetheless, accepting *arguendo* that arbitrariness claim, this article will now review the “tradition” upon which Justice Scalia relied.

III. DID JUSTICE SCALIA FAIRLY CHOOSE AND ANALYZE “TRADITION” TO SUPPORT HIS CLAIMS?

Nearly half a century ago, concurring in the decision that ended daily Bible readings in public schools, Justice Brennan observed, “[T]he historical record is at best ambiguous, and statements can readily be found to support either side of the proposition.”¹¹² Thus, the fact that Justice Scalia was able to cull through the history of the colonial era and find examples of Monotheistic bias is no more surprising than the fact that (had he so chosen) he could also have found examples of white supremacy or of

THE LAWS OF THE STATE OF GEORGIA 566, 3rd Div. § 2 (n.p., T. S. Hannon 1821) (stating that “[d]enyng of God” was a crime under Georgia Penal Code, 1816, Third Division, § 2).

¹⁰⁹ *United States v. Cruikshank*, 92 U.S. 542, 552 (1875).

¹¹⁰ Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), *in* 8 JEFFERSON, 1801–1806, *supra* note 1, at 311.

¹¹¹ *McCreary County*, 545 U.S. at 894 n.3 (Scalia, J., dissenting). Because all of the state religious limitations excluded non-Christians, “the God of Christianity” would be more precise.

¹¹² *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 237 (1963) (Brennan, J., concurring).

male dominion.¹¹³ Especially in terms of belief in God, bias during the founding era is hardly unexpected. After all, (i) Atheists were absent from the political landscape;¹¹⁴ (ii) throughout the colonies, denying the existence of God was a criminal offense;¹¹⁵ and (iii) any understanding of the natural world was rudimentary at best.¹¹⁶ Thus, with “disbelief in God . . . scarcely more plausible than disbelief in gravity” when the Constitution was being written,¹¹⁷ finding that the Framers chose not to consider the religious views of Atheists is no more difficult to explain than finding that they chose not to consider the religious views of Zoroastrians,

¹¹³ Such racial and gender-based bigotry did not exist only during the late eighteenth century. A month after the thirty-ninth Congress passed the Fourteenth Amendment, those same legislators funded “colored only” schools in Washington, D.C. CONG. GLOBE, 36th Cong., 1st Sess. 380–81 (Jan. 23, 1866). Although the Nineteenth Amendment “gave” the right to vote to women in 1920 and broadened the Fourteenth Amendments “equal protection,” see generally Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 948 (2002), an all-male Supreme Court unanimously ruled in 1961 that women could be systematically excluded from juries unless they affirmatively register to serve. See *Hoyt v. Florida*, 368 U.S. 57, 58 (1961).

¹¹⁴ See JAMES TURNER, *WITHOUT GOD, WITHOUT CREED* 44 (1985) (“America does not seem to have harbored a single individual before the nineteenth century who disbelieved in God.”). It appears Atheists were not much of a political force for quite some time after the turn of the century, either. De Tocqueville noted a New York case in 1831 where “[t]he presiding judge remarked that he had not before been aware that there was a man living who did not believe in the existence of God” 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 406 (BiblioBazaar 2008) (1835).

¹¹⁵ 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND: A FACSIMILE OF THE FIRST EDITION OF 1765–1769*, at 59 (1979) (stating that under the common law of England “blasphemy against the Almighty, by denying his being . . . [was] punishable at common law by fine and imprisonment, or other infamous corporal punishment”). Laws against blasphemy could be found in every one of the thirteen original colonies. See sources cited *supra* note 108.

¹¹⁶ See GARRY WILLS, *UNDER GOD: RELIGION AND AMERICAN POLITICS* 350 (1990) (stating that “theology was the queen of the sciences” in the seventeenth century). The situation changed little over the next hundred years. See generally ALEXANDER HELLEMANS & BRYAN BUNCH, *THE TIMETABLES OF SCIENCE: A CHRONOLOGY OF THE MOST IMPORTANT PEOPLE AND EVENTS IN THE HISTORY OF SCIENCE* (1988). It is prudent, therefore, to recall Madison’s caution: “In framing a system which we wish to last for ages, we sh^d. not lose sight of the changes which ages will produce.” JAMES MADISON, *THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 167–68 (Gaillard Hunt & James Brown Scott eds., The Lawbook Exchange, LTD. 1999) (1920) [hereinafter *MADISON’S DEBATES*].

¹¹⁷ TURNER, *supra* note 114, at 44.

Santerians, Eskimos, and Aztecs. For that matter, the Framers did not consider the beliefs of Mormons, who did not come into being until 1830,¹¹⁸ or Native Americans, whose religious beliefs the English settlers specifically came to alter.¹¹⁹ Would Justice Scalia now disregard their adherents as well?

This section reviews the specific historical “facts” Justice Scalia used to reach his conclusion that by writing, “Congress shall make no law respecting an establishment of religion . . . ,”¹²⁰ the Framers intended to permit the “disregard” of American citizens who do not follow the majority’s Monotheistic religious faith. Not only are his chosen historical “facts” completely contrary to the Constitution’s principle of equality, but also, for each selection, other facts supporting that equality principle can just as readily be found.

A. *Justice Scalia’s Historical “Fact” #1: George Washington Added “So Help Me God” to His Inaugural Oath.*

1. *Analysis of Justice Scalia’s Approach*

For his first historical selection, Justice Scalia wrote: “George Washington added to the form of Presidential oath prescribed by Art. II, §

¹¹⁸ See JOSEPH SMITH, *THE BOOK OF MORMON* (Applewood Books 2009) (1830).

¹¹⁹ See FIRST CHARTER OF VIRGINIA (1606), in 1 DOCUMENTS OF AMERICAN HISTORY 8 (Henry Steele Commager ed., 9th ed., Appleton-Century-Crofts 1973) (1934) [hereinafter DOCUMENTS OF AMERICAN HISTORY] (stating its key goal was the “propagating of *Christian Religion*” to “the Infidels and Savages” who “as yet live in Darkness and miserable Ignorance of the true Knowledge and Worship of God”). Chief Justice John Marshall summarized this history as follows:

[T]he character and religion of [North America’s native] inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity.

Johnson v. M’Intosh, 21 U.S. 543, 573 (1823).

¹²⁰ U.S. CONST. amend. I. These are the first ten words of the First Amendment, which states in full, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” *Id.*

1, cl. 8, of the Constitution, the concluding words ‘so help me God.’”¹²¹ This claim, which has been parroted by numerous “authorities,” is apparently a complete myth. Not one of the contemporaneous accounts of the 1789 inaugural event¹²² indicate that President Washington, who had presided over the Constitutional Convention that created the oath,¹²³ said anything except the words prescribed in Article II at either of his two inaugurations.¹²⁴ Nor is there any reliable contemporaneous account that “so help me God” was uttered at any of the next twenty-four inaugurations.¹²⁵ Careful research reveals the only basis for contending George Washington unilaterally altered the Constitution’s prescribed text came from Washington Irving, who would have been six years old at the

¹²¹ *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 886 (2005) (Scalia, J., dissenting).

¹²² STEVEN MINTZ, *A HISTORY OF US: SOURCEBOOK AND INDEX: DOCUMENTS THAT SHAPED THE AMERICAN NATION* 88 (3d ed. 2002).

¹²³ WILLIAM M.S. RASMUSSEN & ROBERT S. TILTON, *GEORGE WASHINGTON: THE MAN BEHIND THE MYTHS?* 192 (1999).

¹²⁴ See George Washington, First Inaugural Address (Apr. 30, 1789) in JAMES D. RICHARDSON, *GEORGE WASHINGTON: A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS* 51–54 (2004); George Washington, Second Inaugural Address (Mar. 4, 1793) in RICHARDSON, *supra*, at 170 (2004).

¹²⁵ The first verifiable addition of “so help me God” to the presidential oath took place at the twenty-seventh inauguration, in 1881. See *Arthur Inaugurated*, WASH. POST, Sept. 23, 1881, at 1. At that twenty-seventh inauguration, Chester A. Arthur was assuming the presidency after his predecessor, James Garfield, died in office. *Id.* Of note is that even then the “so help me God” phrase appears not to have actually been part of the oath. President Arthur, the son of a Baptist minister, simply uttered, “I will, so help me God,” in response to the oath’s administration by Chief Justice Waite. *The New Administration*, NEW YORK TIMES, Sept. 23, 1881, at 5.

Noah Brooks, as a reporter for the *Sacramento Daily Union*, claimed that Abraham Lincoln added, “So help me God” to his oath in 1865. *LINCOLN OBSERVED: CIVIL WAR DISPATCHES OF NOAH BROOKS* 1, 169 (Michael Burlingame ed., 1998). However, Lincoln’s personal secretary, John Hay, referred to Brooks’ reporting as “rubbish . . . invent[ed] by the ream,” and the editor of his dispatches wrote that “Brooks dubiously ascribed his own Christian piety to the sixteenth president.” *Id.* at 11–12. With none of the myriad of other accounts of Lincoln’s second inauguration suggesting he used the “so help me God” language, *cf.*, *e.g.*, Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), in 1 *SPEECHES AND WRITINGS 1859–1865*, at 686–87 (Roy P. Basler ed., 1989), and with Brooks’ claim appearing shortly after people first contended that Washington added “so help me God,” see *infra* text accompanying note 127, the reliability of this assertion is highly questionable at best. Even if accurate, however, Lincoln’s 1865 inaugural still came seventy-six years after the one held for Washington in 1789.

time of the event.¹²⁶ Irving reportedly recalled the “so help me God” addition more than sixty years later when he was entering his eighth decade.¹²⁷

This lack of reliable historical support for the “so help me God” claim highlights another point concerning Justice Scalia’s approach to Religion Clause adjudication. Because George Washington supposedly added “so help me God” to his oath, Justice Scalia argued the Establishment Clause “permits the disregard of devout atheists.”¹²⁸ Yet we can be sure the Justice would never accept the converse; that is, because the first president did *not* add those words, it is proper to argue Atheists deserve inclusion. It is a rather biased study design that “permits the disregard” of evidence which does not comport with the designer’s thesis.

Justice Scalia also “disregarded” Washington’s repeated proclamations that every religious view deserves respect. Aware that “[r]eligious controversies are always productive of more acrimony and irreconcilable hatreds than those which spring from any other cause,”¹²⁹ Washington prided himself on his devotion to religious equality. He wrote, “I assure you very explicitly that in my opinion the conscientious scruples of *all men* should be treated with delicacy and tenderness”¹³⁰ Similarly, he claimed that “no one would be more zealous than myself to establish effectual barriers against . . . every species of religious persecution,”¹³¹ and that “it is our boast, that a man’s religious tenets will not forfeit the protection of the Laws, nor deprive him of the right of attaining and holding the highest Offices that are known in the United States.”¹³² As noted in his famous letter to the Hebrew Congregation of Newport, Rhode Island, Washington wrote, “*All* possess alike liberty of conscience and

¹²⁶ RUFUS WILMOT GRISWOLD, *THE REPUBLICAN COURT; OR, AMERICAN SOCIETY IN THE DAYS OF WASHINGTON* 141–42 (New York, D. Appleton & Co. 1855).

¹²⁷ *See id.*

¹²⁸ *See, e.g.,* *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 893 (2005) (Scalia, J., dissenting).

¹²⁹ Letter from George Washington to Edward Newenham (June 22, 1792), *available at* [http://memory.loc.gov/cgi-bin/query/r?ammem/mgw:@field\(DOCID+@lit\(gw320076\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/mgw:@field(DOCID+@lit(gw320076))).

¹³⁰ Letter from George Washington to the Quakers, *in* 13 *THE PENNSYLVANIA MAGAZINE OF HISTORY AND BIOGRAPHY*, pt. I, 246–47 (Philadelphia, The Historical Society of Pennsylvania Apr. 1889).

¹³¹ Letter from George Washington to the United Baptist Churches of Virginia (May 1789), *in* *WRITINGS* 738–39 (John H. Rhodehamel ed., Library of America 1997) (1893).

¹³² Letter from George Washington to the New Church in Baltimore (1793), *in* MINTZ, *supra* note 122, at 93.

immunities of citizenship. It is now no more that toleration is spoken of as if it were by the indulgence of one class of people that another enjoyed the exercise of their inherent natural rights.”¹³³

“[A]s John Bell pointed out in 1779, [Washington was] ‘a total stranger to religious prejudices.’”¹³⁴ Thus, the fact that he was willing to give thanks to God publicly and reference “divine Providence” in his public addresses was more likely a product of the times than a slight to Atheists. After all, the man owned, bought, and sold black people,¹³⁵ and he presided over the convention that gave rise to a constitution,¹³⁶ expressly permitting that practice to continue.¹³⁷ Surely, Washington would not embrace such a lack of respect for minority races were he alive today. Similarly, his failure to acknowledge Atheism at a time when denying God’s existence was a criminal offense¹³⁸ is hardly a reason to believe he would not apply “delicacy and tenderness” to Atheists’ rights in the present sociopolitical milieu.

Recognizing that Washington lived in an era when religious and racial bias was pervasive,¹³⁹ one would hope a Supreme Court justice would work toward eliminating such dated wrongs, not fostering them by relying upon unenlightened “tradition.” Perhaps this is appreciated best by recognizing that it was not until 1908 that the District of Columbia invalidated its blasphemy laws, which punished a first offense with a fine plus boring through the tongue; a second offense with a doubling of the fine plus burning the letter “B” into the forehead; and a third offense with

¹³³ Letter from George Washington to The Hebrew Congregation of Newport, Rhode Island (Aug. 1790), in 6 THE PAPERS OF GEORGE WASHINGTON 284, 285 (Mark A. Mastromarino et al. eds., 1996) (emphasis added). Strangely, Justice Scalia used this quote in his *McCreary* dissent. *McCreary*, 545 U.S. at 898 (Scalia, J., dissenting).

¹³⁴ Paul F. Boller, Jr., *George Washington and Religious Liberty*, ser. 3, 17 WM. & MARY Q. 486, 487 (1960) (quoting John Bell’s portrayal of Washington (1790) in WILLIAM SPOHN BAKER, CHARACTER PORTRAITS OF WASHINGTON 11, 12 [sic] (Philadelphia, Robert M. Lindsay 1887)).

¹³⁵ See HENRY WIENCEK, AN IMPERFECT GOD: GEORGE WASHINGTON, HIS SLAVES, AND THE CREATION OF AMERICA 120–21 (2003).

¹³⁶ See WILLIAM M.S. RASMUSSEN & ROBERT S. TILTON, GEORGE WASHINGTON: THE MAN BEHIND THE MYTHS? 192 (1999).

¹³⁷ See, e.g., U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. art. I, § 9, cl. 1; U.S. CONST. art. IV, § 2, cl. 3; U.S. CONST. art. V.

¹³⁸ See sources cited *supra* note 108.

¹³⁹ See sources cited *supra* notes 134–37.

death.¹⁴⁰ Thus, we see that laws implemented at the founding can be completely inconsistent with the principles of the Constitution as it is understood today.¹⁴¹ Recalling that the First Amendment's free speech clause follows on the heels of its religion clauses, it can hardly be denied that, if any private expression or belief is to be scrupulously protected by our government, it is expression or belief concerning opinions on religion and God.

¹⁴⁰ *District of Columbia v. Robinson*, 30 App. D.C. 283, 289 (D.C. Cir. 1908). Interestingly, the court in *Robinson* proclaimed that "Our Nation, and the States composing it, are Christian . . ." *Id.* at 287. The reason Justice Scalia chose to extend the reach of the Religion Clauses to "[t]he three most popular religions in the United States, Christianity, Judaism, and Islam," *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 894 (2005) (Scalia, J., dissenting), rather than following *Robinson's* Christianity-only limitation is obvious. The severe rebuke he would have faced by adhering fully to his thesis made true devotion to "tradition" unpalatable. Nevertheless, one must question why—when willing to cast history aside to include Jews and Muslims—he is unwilling to do so for the rest of the population.

¹⁴¹ Justice Souter previously noted this:

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.

Lee v. Weisman, 505 U.S. 577, 626 (1992) (Souter, J., concurring).

As a matter of historical fact, it was not even a year before the First Federal Congress violated the Constitution's provisions by enacting the Judiciary Act of 1789. *Marbury v. Madison*, 5 U.S. 137, 180 (1803). Congress also violated the separation of powers doctrine by giving legislative duties to the judiciary. *Hayburn's Case*, 2 U.S. 409, 411 (1792). While simultaneously writing the Bill of Rights, the identical lawmakers created legislation that under today's standards would be deemed unquestionably to violate the limits of the Eighth Amendment. Act of April 30, 1790, ch. IX, §§ 14–15, 1 Stat. 112, 115–16 (1790) (placing one who altered a court record at risk of being "whipped not exceeding thirty-nine stripes," and sentencing one convicted of "counterfeiting any certificate, indent, or other public security" to death).

For those who argue that disregarding Atheists differs from the aforementioned practices because "so help me God" has been used since the founding, *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983), is instructive. In *Chadha*, the Court ruled that legislative vetoes were unconstitutional, *id.* at 959, even though that same First Congress, which was "largely composed of the same men who authored Art. I and secured ratification of the Constitution, did not view the Constitution as forbidding a precursor of the modern day legislative veto." *Id.* at 984 n.18 (White, J., dissenting).

2. *A Counter to Justice Scalia's Approach*

When the Framers formulated the Constitution, “so help me God” was still being used in oaths throughout colonial society. For instance, the Continental Congress employed the phrase in a variety of oaths,¹⁴² and it was present in a number of state constitutions.¹⁴³ Washington himself, who presided at the Constitutional Convention,¹⁴⁴ took a number of oaths ending in “so help me God,” such as the one to become a vestryman.¹⁴⁵ Additionally, “he took the usual oath to his Majesty’s person and government, and then took and subscribed the adjuration oath and test, and then took the oath of surveyor” when he became Surveyor of Culpeper County, Virginia.¹⁴⁶ Thus, even if he had appended “so help me God” to

¹⁴² See, e.g., 5 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 435 (Worthington Chauncey Ford ed., 1906); 6 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 893–94 (Worthington Chauncey Ford ed., 1906); 10 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 69, 114–15 (Worthington Chauncey Ford ed., 1908); 22 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 86 (Gaillard Hunt ed., 1914); 29 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 799 (John C. Fitzpatrick ed., 1933).

¹⁴³ See, e.g., GA. CONST. OF 1777, arts. XIV, XV, XXIV, XXX, in 2 Thorpe, *supra* note 72, at 780–82; S.C. CONST. OF 1778, art. XXXVI, in 6 *id.*, at 3255.

¹⁴⁴ WILLIAM M.S. RASMUSSEN & ROBERT S. TILTON, *GEORGE WASHINGTON: THE MAN BEHIND THE MYTHS?* 192 (1999).

¹⁴⁵ 2 BISHOP MEADE, *OLD CHURCHES, MINISTERS AND FAMILIES OF VIRGINIA* 41–42 (Philadelphia, J. B. Lippincott Co. 1857) (stating that “So help me God” concluded “the tests required of vestrymen at that period of England’s history”).

¹⁴⁶ Edward D. Neill, *The Ancestry and Earlier Life of George Washington*, in 16 THE PENNSYLVANIA MAGAZINE OF HISTORY AND BIOGRAPHY 273–74 (Philadelphia, The Historical Society of Pennsylvania 1892). Washington became the Surveyor at age 17, on July 20, 1749. See *id.* See also 1 DOUGLAS SOUTHALL FREEMAN, *GEORGE WASHINGTON: A BIOGRAPHY* 234 (1948) (noting that Washington “was directed to swear allegiance to the person and government of the King, . . . declai[m] all allegiance to the issue of James II, . . . [profess] “non-belief in transubstantiation, and finally [take] the special oath of Surveyor”). The Oath of Allegiance went as follows:

I, A. B., do sincerely promise and swear that I will be faithful and bear true allegiance to his Majesty King George the Second, so help me God.

The Oath of Abjuration ended similarly:

I, A. B., do swear that I do from my heart abhor, detest, and abjure, as impious and heretical, that damnable doctrine and position that Princes excommunicate or deprived by the Pope, or any authority of the See of

(continued)

the presidential oath of office, which he almost certainly did not, the fact remains that the Convention specifically left it out.¹⁴⁷

This fact is important, especially because some people criticized the absence of the phrase during the debates prior to the Constitution's ratification. One commentator wrote, "[T]he framers of this new constitution did not even think it necessary that the president should believe that there is a God, although they require an oath of him."¹⁴⁸

Alexander Hamilton noted his answer to such objections:

Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. *No qualification* of wealth, of birth, *of religious faith*, or of civil profession, is permitted to fetter the judgment, or to disappoint the inclination of the people.¹⁴⁹

In the 1780s, Virginia was one of the most powerful colonies in the fledgling nation.¹⁵⁰ There, the Society of Western Gentlemen sought to revise the Constitution by including a "[r]eligious test . . . required for officeholding, affirming 'a belief in the one only true God, who is the rewarder of the good, and the punishment of the evil.'"¹⁵¹ The Framers specifically rejected this effort.¹⁵²

Rome, may be deposed or murdered by their subjects or any other whatsoever. And I do declare that no foreign Prince, Prelate, Person, State, or Potentate, hath, or ought to have, any jurisdiction, power, superiority, pre-eminence, or authority, ecclesiastical or spiritual, within this realm. So help me God.

2 MEADE, *supra* note 145, at 41.

¹⁴⁷ See U.S. CONST. art. II, § 1, cl. 8 (excluding "so help me God" from the oath).

¹⁴⁸ Letter from Agrippa to the Massachusetts Convention (Feb. 5, 1788), *reprinted in* ESSAYS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787–1788, at 121 (Paul Leicester Ford ed., Brooklyn, Historical Printing Club 1892) [hereinafter ESSAYS ON THE CONSTITUTION].

¹⁴⁹ THE FEDERALIST NO. 57 (Alexander Hamilton), *reprinted in* THE FEDERALIST AND OTHER CONSTITUTIONAL PAPERS 315 (E. H. Scott ed., Chicago, Scott, Foresman & Co. 1898) [hereinafter Scott] (emphasis added). There is some controversy as to whether Madison or Hamilton wrote FEDERALIST NO. 57.

¹⁵⁰ See JACK N. RAKOVE, JAMES MADISON AND THE CREATION OF THE AMERICAN REPUBLIC 14 (Oscar Handlin ed., 2d ed. 1996).

¹⁵¹ Virginia Independent Chronicle, *The Society of Western Gentlemen Revise the Constitution*, *reprinted in* 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE
(continued)

Another powerful colony, Pennsylvania,¹⁵³ was where, in 1787, the delegates to the Federal Constitutional Convention met.¹⁵⁴ At that time, Pennsylvania's original constitution of 1776 was in effect, requiring each of the state's legislators to take an oath that began, "I do believe in one God, the creator and governor of the universe . . ." ¹⁵⁵ The delegates to the Philadelphia Convention, however, did not follow that template.¹⁵⁶ On the contrary, when the State's legislators revised the state constitution in 1790, they followed the Convention's lead, eliminating this requirement "by a great majority."¹⁵⁷

In addition to the Federal Constitution excluding a religious test for office,¹⁵⁸ the document had something previously unheard of: a clearly enunciated prohibition against such a test.¹⁵⁹ This makes Justice Scalia's allusion to the "so help me God" story more telling. To use that story (even if unaware that it is a myth) to argue that the Bill of Rights "permits the disregard" of a religious minority suggests the Justice had a significant bias in his approach to the nation's history. To do so in the face of clear evidence showing the Framers specifically considered and rejected the requirement of belief in God confirms that suggestion.

CONSTITUTION: VIRGINIA 769, 771 (John P. Kaminski & Gaspare J. Saladino eds., 1990) [hereinafter Kaminski & Saladino].

¹⁵² See U.S. CONST. art. VI, cl. 3 ("[N]o religious Test shall ever be required as a Qualification to any Office of public Trust under the United States."). Additionally rejected was the Society's attempt to have the Constitution include a Declaration of Rights that claimed, "the duty of worshipping Almighty God . . . is . . . incumbent on all mankind." Compare Kaminski & Saladino, *supra* note 151, at 772 (stating the Society's proposed change), with U.S. CONST. (omitting such words and phrases).

¹⁵³ RAKOVE, *supra* note 150, at 14.

¹⁵⁴ *Id.* at 61, 87.

¹⁵⁵ PA. CONST. OF 1776, § 10, in 5 Thorpe, *supra* note 72, at 3085.

¹⁵⁶ See PA. CONST. OF 1790, in 5 *id.*, at 3092.

¹⁵⁷ Letter from Thomas Jefferson to Albert Gallatin (June 16, 1787), in 10 THE WRITINGS OF THOMAS JEFFERSON, 1816–1826, at 92 (Paul Leicester Ford ed., New York, G.P. Putnam's Sons 1899) [hereinafter JEFFERSON, 1816–1826] ("[T]he Pennsylvania legislature, . . . on a proposition to make the belief in God a necessary qualification for office, rejected it by a great majority, although assuredly there was not a single atheist in their body.").

¹⁵⁸ See discussion *supra* Part III.A.2. Cf., e.g., U.S. CONST. art. VI, cl. 3.

¹⁵⁹ See U.S. CONST. art. VI, cl. 3.

B. Justice Scalia's Historical "Fact" #2: Since the Days of John Marshall, the Supreme Court's Opening "Prayer" Has Included, "God Save the United States and This Honorable Court"

1. Analysis of Justice Scalia's Approach

Justice Scalia's second historical item pertains to the words used to open sessions of the Supreme Court. According to the Justice:

The Supreme Court under John Marshall opened its sessions with the prayer, "God save the United States and this Honorable Court."¹⁶⁰

Stated in that manner, it sounds as though the practice dates back virtually to the founding. However, the citation trail Justice Scalia provided goes back only to 1827,¹⁶¹ which is the latter part of Chief Justice Marshall's thirty-five year tenure.¹⁶² Thus, the religious cry at issue may have been a late edition resulting merely from personal desire trumping constitutional duty, perhaps bolstered by the persistent objections of a vocal few who disapproved of the Constitution's secular nature.¹⁶³

In fact, the practice may not have been initiated until well after 1827. The source for this contention is a book of recollections written three

¹⁶⁰ *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 886 (2005) (Scalia, J., dissenting) (quoting 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 469 (rev. ed. 1926)).

¹⁶¹ *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 29 (2004) (Rehnquist, C.J., concurring in judgment) ("Our Court Marshal's opening proclamation concludes with the words 'God save the United States and this honorable Court.' The language goes back at least as far as 1827." (quoting OLIVER HAMPTON SMITH, *EARLY INDIANA TRIALS AND SKETCHES: REMINISCENCES* 137 (Cincinnati, Moore, Wilstach, Keys & Co. 1858))).

¹⁶² 1 *THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS* 283 (Leon Friedman & Fred L. Israel eds., 1978) (stating John Marshall served as Chief Justice from 1801-1835).

¹⁶³ *See, e.g.*, Timothy Dwight, President of Yale College, Address at Yale College (July 23, 1812), *reprinted in* PROCEEDINGS OF THE FIFTH NATIONAL REFORM CONVENTION, TO AID IN MAINTAINING THE CHRISTIAN FEATURES OF THE AMERICAN GOVERNMENT, AND SECURING A RELIGIOUS AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, HELD IN PITTSBURGH, FEBRUARY 4, 5, 1874, at 44 (Philadelphia, Christian Statesmen Association 1874) ("We formed our Constitution without any acknowledgement of God; without any recognition of his mercies to us, as a people, of his government, or even of his existence. The Convention, by which it was formed, never asked, even once, his direction, or his blessing upon their labours. Thus we commenced our national existence, under the present system, without God.").

decades after the alleged fact.¹⁶⁴ In other words, the authority for the claim that the Supreme Court's routine was imbued with Monotheism may be as flawed as the authority behind the claim that 'so help me God' was spatchcocked into the presidential inaugural oath.¹⁶⁵ Thus, the "evidence"

¹⁶⁴ See SMITH, *supra* note 161, at 137. This book contains reminiscences of the author. Smith describes the book's contents in an introductory note "To the Reader" as "sketches . . . originally published in the Indianapolis Daily Journal," which were subsequently "revised and corrected by the author." *Id.* at *Introduction*.

He included a dispatch dated "Thursday Morning, September 10, 1857," which recounted his recollection of a Supreme Court session he witnessed. It was filled with excessively descriptive language that may lead one reasonably to doubt its accuracy. *Id.* at 137–38. For instance, one excerpt read:

I had long heard of Chief Justice Marshall; had cited his opinions as of the highest authority; had read his life of Gen. Washington; and there he sat before me, aged and venerable. He was above the common height [sic]; his features strongly marked; an eye that spoke the high order of his intellect. He wore a short cue, black coat, breeches buckled at the knee, long black-silk stockings, and shoes with fine buckles.

Id. at 138.

Smith recounted the "God save the United States and this honorable court" language from that Supreme Court Session in his dispatch. *Id.* at 137. In other words, the source of the claim that John Marshall's Court used those words in 1827 is a reminiscence written thirty years after the event and one that was "revised and corrected" subsequent to its three-decades-after-the-fact original publication. *Id.* at *Introduction*. The cry was also one of a myriad of embellishments, which the author likely added for effect. Additionally, 1827 was thirty-six years after the United States ratified the First Amendment, prohibiting such establishment of religion. See U.S. CONST. amend. I.

¹⁶⁵ It is worth noting that both of these claims were first made within a five-year window, from 1854–1858. See SMITH, *supra* note 161, at 137 (contending in 1858 that the Supreme Court used the "God Save the United States" language before opening a Supreme Court session in 1857); GRISWOLD, *supra* note 126, at 141–42 (contending in 1854 when the book was first published that Washington had altered the presidential oath to include "so help me God"). After the appearance of Griswold's book, others rapidly published books making the claim that "so help me God" was added to the presidential oath at the first inauguration. See, e.g., CAROLINE MATILDA KIRKLAND, MEMOIRS OF WASHINGTON 438 (New York, D. Appleton & Co. 1857); 4 WASHINGTON IRVING, LIFE OF GEORGE WASHINGTON 116 (1901) (1857); SMITH, *supra* note 161, at 137.

This five-year window is strikingly similar to the time span during which "God" made an appearance in multiple federal governmental venues almost exactly one century later. See, e.g., Act of April 17, 1952, Pub. L. No. 82-324, 66 Stat. 64 (1952) (codified as amended at 36 U.S.C. § 119 (2006)) (establishing a National Day of Prayer); U.S.

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Justice Scalia presented assures us only that the religious cry was instituted almost seven decades after the Establishment Clause's ratification.

Again, what Justice Scalia did not address is noteworthy. Even if the claim regarding Chief Justice John Marshall is accurate and the religious cry was added at the beginning of his Chief Justiceship, the Court existed for more than a decade before then. There is no evidence that Monotheism was being espoused as part of the Supreme Court's routine for any of the three Chief Justices who preceded Chief Justice Marshall.¹⁶⁶ Like the absence of "so help me God" in the presidential oath of office,¹⁶⁷ the absence of government-sponsored religion ought to be probative, especially when one contemplates the warning given by the "Father of the Constitution":¹⁶⁸

[I]t is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of the noblest characteristics of the late revolution. The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences by denying the principle. We revere this lesson too much soon to forget it. Who does not see that the same authority which can establish Christianity, in exclusion of all other religions, may establish, with the

ARCHITECT OF THE CAPITOL, THE PRAYER ROOM IN THE UNITED STATES CAPITOL, ser. 84th Cong., 1st Sess. H. Doc. No. 234 (1956); Act of June 14, 1954, Pub. L. No. 83-396, 68 Stat. 249 (1954) (codified as amended at 4 U.S.C. § 4 (2006)) (adding "under God" to the Pledge of Allegiance); Act of July 11, 1955, Pub. L. No. 84-140, 69 Stat. 290 (1955) (codified as amended at 31 U.S.C. § 5112 (2006)) (mandating the inscription of "In God We Trust" on all coins and currency); Act of July 30, 1956, Pub. L. No. 84-851, 70 Stat. 732 (1956) (codified as amended at 36 U.S.C. § 302 (2006)) (establishing "In God We Trust" as the national motto).

¹⁶⁶ See Supreme Court of the U.S., Members of the Supreme Court of the United States, <http://www.supremecourtus.gov/about/members.pdf> (last visited January 5, 2010) [hereinafter Members of the Supreme Court]. Moreover, there is also bias in the argument's design. Why is the *potential* "fact" that the religious cry was used under John Marshall more important than the *potential* "fact" that those words were not used under the earlier three chief justices, John Jay, John Rutledge, or Oliver Ellsworth? *Id.*

¹⁶⁷ See discussion *supra* Part III.A.

¹⁶⁸ *Gonzales v. Raich*, 545 U.S. 1, 57 (2005) (O'Connor, J., dissenting) (referring to Madison as the "father of the Constitution").

same ease, any particular sect of Christians, in exclusion of all other sects?¹⁶⁹

Likewise, who does not see that the same authority that can establish Monotheism in exclusion of Atheism and Polytheism can establish Christianity in exclusion of all other religions?

One last note regarding the Supreme Court's "God save the United States and this Honorable Court" opening: this "prayer" is not employed universally.¹⁷⁰ In the Second Circuit, those words are no longer required,¹⁷¹ apparently having been eliminated after the 9/11 tragedy. Although the reason for this change was not made public, the judges in that Court of Appeals surely saw in the terrorists' hijackings the dangers that arise from actions in the name of God. James Madison's prescient work is again on point. When speaking of Patrick Henry's Bill to Establish a Provision for Teachers of the Christian Religion, Madison wrote:

Distant as it may be, in its present form, from the inquisition, it differs from it only in degree. The one is the first step, the other the last, in the career of intolerance.¹⁷²

2. *A Counter to Justice Scalia's Approach*

By May 12, 1790, President Washington filled the six Supreme Court justiceships¹⁷³ created by the Judiciary Act of 1789.¹⁷⁴ The bench

¹⁶⁹ James Madison, *A Memorial and Remonstrance on the Religious Rights of Man*, [hereinafter Madison], reprinted in MARY C. SEGARS & TED G. JELEN, *A WALL OF SEPARATION?: DEBATING THE PUBLIC ROLE OF RELIGION* 132, 133 (1998). Jefferson said essentially the same thing: "It behooves every man who values liberty of conscience for himself, to resist invasions of it in the case of others; or their case may, by change of circumstances, become his own." Letter from Thomas Jefferson to Doctor Benjamin Rush, in *BASIC WRITINGS OF JEFFERSON*, *supra* note 96, at 660.

¹⁷⁰ See *infra* text accompanying notes 171–72; see also Letter from Roseann B. MacKechnie, Office of the Clerk, Second Circuit Court of Appeals, to Michael Newdow (Aug. 29, 2006) [hereinafter MacKechnie Letter].

¹⁷¹ MacKechnie Letter, *supra* note 170 ("Judges of the United States Court of Appeals for the Second Circuit. Hear ye! Hear ye! Hear ye! All persons having business before this, a stated term of the United States Court of Appeals for the Second Circuit, Draw near, give your attention, and ye shall be heard.").

¹⁷² Madison, *supra* note 169, reprinted in SEGARS & JELEN, *supra* note 169, at 132, 135 (emphases omitted).

¹⁷³ See *Members of the Supreme Court*, *supra* note 166.

¹⁷⁴ Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73 (1789) (amended by 28 U.S.C. 321 (1926)).

consisted of Chief Justice John Jay and Associate Justices James Wilson, William Cushing, John Blair, John Rutledge, and James Iredell.¹⁷⁵ Of these men, only Iredell spoke during the ratification debates about religion as it pertained to the federal government.¹⁷⁶ Justice Iredell, whose tenure at the high court began nearly a decade before James Marshall's appointment,¹⁷⁷ stated:

If any future Congress should pass an act concerning the religion of the country, it would be an act which they are not authorized to pass, by the Constitution, and which the people would not obey. Every one would ask, "Who authorized the government to pass such an act? It is not warranted by the Constitution, and is barefaced usurpation."¹⁷⁸

Why ignore this pronouncement, especially when (i) there does not appear to be a single instance from the founding era whereby someone contended the federal government had any power whatsoever to involve itself with religion; and (ii) many others echoed Iredell's conviction?¹⁷⁹ To be sure, some people decried the arrangement that existed, i.e., that Congress had no power to "pass an act concerning the religion of the country." However, all who weighed in, including its detractors,¹⁸⁰ agreed

¹⁷⁵ Members of the Supreme Court, *supra* note 166.

¹⁷⁶ Referencing the "rights of conscience," Wilson spoke in a similarly protective manner:

[W]e are told, that there is no security for the rights of conscience. I ask the honorable gentleman, what part of this system puts it in the power of Congress to attack those rights? When there is no power to attack, it is idle to prepare the means of defense.

James Wilson, Remarks at the Pennsylvania Convention (Dec. 4, 1787), *reprinted in* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: PENNSYLVANIA 471 (Merrill Jensen ed., 1976) (alteration omitted).

¹⁷⁷ See Members of the Supreme Court, *supra* note 166.

¹⁷⁸ James Iredell, Remarks at the Debate in North Carolina Ratifying Convention (July 30, 1788), in 5 THE FOUNDERS' CONSTITUTION 89, 90 (Philip B. Kurland & Ralph Lerner eds., 1987).

¹⁷⁹ See discussion *supra* Part III.B.

¹⁸⁰ See, e.g., Luther Martin, Attorney-General of Maryland, Member of Constitutional Convention, Address to the House of Delegates of Maryland, in 1 ELLIOT'S DEBATES, *supra* note 89, at 385–86 (noting disdainfully that the Constitution fails to acknowledge "a belief of the existence of a Deity, and of a state of future rewards and punishments, . . . and that, in
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that the Constitution precluded federal governmental activity within this arena, even before the First Amendment was added.

Richard Dobbs Spaight, who, like Iredell, was also at the North Carolina ratifying convention and who was subsequently elected governor of North Carolina,¹⁸¹ put the matter succinctly: “As to the subject of religion, . . . [n]o power is given to the general government to interfere with it at all. Any act of Congress on this subject would be a usurpation.”¹⁸² In neighboring Virginia, Governor Edmund Randolph¹⁸³ expressed a similar opinion during that state’s ratifying convention. Randolph—destined to become the nation’s first Attorney General¹⁸⁴—stated that “no power is given expressly to Congress over religion.”¹⁸⁵

For those unimpressed with such lesser-known statesmen as Iredell, Spaight, and Randolph, perhaps the words of Alexander Hamilton are persuasive. In Federalist #69, Hamilton examined the differences between the King of England and the United States President. He noted that the King was “the supreme head and governor of the National Church.”¹⁸⁶ By contrast, the President “has no particle of spiritual jurisdiction.”¹⁸⁷ Another well-known colonist was Noah Webster.¹⁸⁸ In his pamphlet, “A Citizen of America,” Webster wrote, “In some nations, legislators have derived much of their power from the influence of religion,” which he referred to “as tyrannical as a military force.”¹⁸⁹ He assured the reader that “the

a Christian country, it would be at least decent to hold out some distinction between the professors of Christianity and downright infidelity or paganism”).

¹⁸¹ JAMES V. MARSHALL, THE UNITED STATES MANUAL OF BIOGRAPHY AND HISTORY: COMPRISING LIVES OF THE PRESIDENTS AND VICE PRESIDENTS OF THE UNITED STATES, AND THE CABINET OFFICERS, FROM THE ADOPTION OF THE CONSTITUTION TO THE PRESENT DAY 181 (Philadelphia, James B. Smith & Co. 1856).

¹⁸² Richard Dobbs Spaight, Address to the Convention of North Carolina (July 30, 1788), in 4 ELLIOT’S DEBATES, *supra* note 89, at 208.

¹⁸³ 13–15 REPORT OF THE VIRGINIA STATE LIBRARY 45 (1917).

¹⁸⁴ JOHN J. RANDOLPH, EDMOND RANDOLPH: A BIOGRAPHY 27 (1975).

¹⁸⁵ John J. Randolph, Governor of Virginia, Address to The Virginia Convention (June 10, 1788), in Kaminski & Saladino, *supra* note 151, at 1100.

¹⁸⁶ THE FEDERALIST NO. 69 (Alexander Hamilton), *reprinted in* Scott, *supra* note 149, at 383.

¹⁸⁷ *Id.*

¹⁸⁸ See HARLOW GILES UNGER, THE LIFE AND TIMES OF AN AMERICAN PATRIOT xi–xii (1998).

¹⁸⁹ Noah Webster, *A Citizen of America*, in THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION, pt. 1, 129, 154–55 (Bernard Bailyn ed., 1993).

possibility of establishing this influence, as a pillar of government, is totally precluded” in the United States.¹⁹⁰ James Madison provided a similar expression of absolutism on this matter: “There is not a shadow of right in the general government to intermeddle with religion. Its least interference with it, would be a most flagrant usurpation.”¹⁹¹ Clearly, these statements are as unambiguous as they are definitive. Nowhere among them is even a hint that this new federal government had the slightest authority “to give God thanks and supplication.”¹⁹²

It must be emphasized once more that these statements were made *before* the First Congress met or the Bill of Rights was even proposed.¹⁹³ To conclude authority exists for the Monotheistic preferences Justice Scalia finds permissible, one must argue the words, “Congress shall make no law respecting an establishment of religion” somehow *increases* the power of the federal government to intrude into religious affairs. This, obviously, is pure sophistry.¹⁹⁴

C. Justice Scalia’s Historical “Fact” #3: The First Congress Instituted Legislative Prayer.

1. Analysis of Justice Scalia’s Approach

Justice Scalia’s next point pertained to the legislative prayer the Supreme Court upheld more than a quarter century ago in *Marsh v.*

¹⁹⁰ *Id.* at 155.

¹⁹¹ James Madison, Address to the Convention of Virginia (June 12, 1788), in 3 ELLIOT’S DEBATES, *supra* note 89, at 330.

¹⁹² *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 900 (2005) (Scalia, J., dissenting).

¹⁹³ See discussion *supra* Part III.B.2 (referencing the dates of the statements); 1 ANNALS OF CONG. (Joseph Gales ed., 1834) (recording the first session of Congress, which occurred on March 4, 1789); THE BILL OF RIGHTS AND THE STATES: THE COLONIAL AND REVOLUTIONARY ORIGINS OF AMERICAN LIBERTIES 438 (Patrick T. Conley & John P. Kaminski eds., 1992) [hereinafter BILL OF RIGHTS] (stating James Madison introduced the Bill of Rights to Congress on June 8, 1789).

¹⁹⁴ In fact, some argued there was no reason to have religion clauses at all in the Bill of Rights. See, e.g., 1 ANNALS OF CONG. 757 (Joseph Gales ed., 1834) (recording Roger Sherman saying that such clauses were “altogether unnecessary, inasmuch as Congress had no authority whatever delegated to them by the constitution to make religious establishments”). “Sherman was the only member of the Continental Congress who signed all four of the great state papers: the Association of 1774, the Declaration of Independence, the Articles of Confederation, and the Constitution.” THE ARCHITECT OF THE CAPITOL, ROGER SHERMAN, <http://www.aoc.gov/cc/art/nsh/sherman.cfm>.

*Chambers*¹⁹⁵ stating, “The First Congress instituted the practice of beginning its legislative sessions with a prayer. The same week that Congress submitted the *Establishment Clause* as part of the *Bill of Rights* for ratification by the States, it enacted legislation providing for paid chaplains in the House and Senate.”¹⁹⁶

One can begin by noting the suspect nature of the continued validity of *Marsh*.¹⁹⁷ The high Court subsequently stated that “the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer.”¹⁹⁸ Paying chaplains to lead both houses of Congress in prayer prior to every legislative session surely meets the definition of affirmative sponsorship.

Even without that latter statement, *Marsh* deserves to be questioned. Although it was decided under the Establishment Clause, the majority opinion discussed the meaning and purposes of the Clause a grand total of zero times. Of course, that is not surprising; it is impossible to abide by the Establishment Clause’s principles and yet still conclude that such legislative prayers are constitutional. Thus, the majority could come to its Monotheism-based ruling only by avoiding a discussion of those principles.

In writing that “Congress . . . enacted legislation providing for paid chaplains in the House and Senate,” Justice Scalia neglected to mention the “legislation” was titled “*An Act for allowing Compensation to the Members of the Senate and House of Representatives of the United States, and to the Officers of both Houses.*”¹⁹⁹ In other words, the Act covered the salaries of all congressional employees, including the congressmen.²⁰⁰ Thus, it was

¹⁹⁵ 463 U.S. 783 (1983).

¹⁹⁶ *McCreary County*, 545 U.S. at 886 (Scalia, J., dissenting) (citations omitted) (citing *Marsh*, 463 U.S. at 787–88).

¹⁹⁷ *Marsh* is unlikely to be overruled for some time because standing is limited to members of Congress, *Newdow v. Eagen*, 309 F. Supp. 2d 29, 34–35 (D.D.C. 2004), and any member of Congress who would bring such a challenge is likely to lose standing during the pendency of the litigation (because he or she would become an *ex*-member of Congress).

¹⁹⁸ *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000).

¹⁹⁹ Act of Sept. 22, 1789, ch. 17, 1 Stat. 70 (1789) (codified as amended at 2 U.S.C. § 31 (2006)).

²⁰⁰ *Id.* Section 1 of the act required paying Senators six dollars per day of attending the Senate and “six dollars for every twenty miles” for usual travel to and from Congress. *Id.* Section 2 increased these allowances to seven dollars. § 2, 1 Stat. at 70–71. Section 3 provided six dollars per day and per twenty miles to each Representative. § 3, 1 Stat. at 71.

(continued)

not as if the legislators were voting specifically on funding chaplains. They were voting on funding Congress, and, just as it is today, it would have been political suicide in 1789 to interfere with the passage of such a broad bill to challenge the payment of chaplains. As has been noted, “like other politicians, [the Framers] could raise constitutional ideals one day and turn their backs on them the next.”²⁰¹

Unfortunately, politicians are not the only ones capable of turning their backs on constitutional ideals. Especially when the matter concerns religion, judges are also willing to ignore constitutional mandates. Perhaps most telling in terms of jurisprudential integrity is how the *Marsh* majority dealt with the sentiments of “the Father of the Constitution,” James Madison.²⁰² Surely, if Madison had contended that legislative chaplains were constitutional, his words would have been prominently displayed throughout Chief Justice Burger’s majority opinion.²⁰³ However, Madison did not agree.²⁰⁴ Accordingly, he was relegated to a footnote, where the Chief Justice wrote, “Madison expressed doubts concerning the chaplaincy practice.”²⁰⁵

That characterization of Madison’s words is rather interesting. Our premier founding father wrote:

Is the appointment of Chaplains to the two Houses of Congress consistent with the Constitution, and with the pure principle of religious freedom?

In strictness the answer on both points must be in the negative. The Constitution of the U. S. forbids everything like an establishment of a national religion. The law appointing Chaplains establishes a religious worship for the national representatives, to be performed by Ministers of religion, elected by a majority of them; and these are to

The salary for the chaplains, the Secretary of the Senate, and the Clerk of the House were provided in Section 4. § 4, 1 Stat. at 71. The latter two were paid “fifteen hundred dollars per annum each,” and each chaplain would get “five hundred dollars per annum.” *Id.* Section 5 provided for daily payments of four dollars to the sergeant at arms, three dollars to the doorkeepers, and two dollars to the assistant doorkeepers. § 5, 1 Stat. at 71.

²⁰¹ *Lee v. Weisman*, 505 U.S. 577, 626 (1992) (Souter, J., concurring).

²⁰² *Gonzales v. Raich*, 545 U.S. 1, 57 (2005) (O’Connor, J., dissenting) (referring to Madison as the “father of the Constitution”).

²⁰³ *See Marsh*, 463 U.S. at 791 n.12.

²⁰⁴ *See id.*

²⁰⁵ *Id.*

be paid out of the national taxes. Does not this involve the principle of a national establishment, applicable to a provision for a religious worship for the Constituent as well as of the representative Body, approved by the majority, and conducted by Ministers of religion paid by the entire nation.²⁰⁶

He followed this by writing, “The establishment of the chaplainship to Congs is a palpable violation of equal rights, as well as of Constitutional principles”²⁰⁷ In view of such an unequivocal declaration, to say, “Madison expressed doubts,” is disingenuous at best.

2. *A Counter to Justice Scalia’s Approach*

Article VI, clause 3 of the Constitution states:

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.²⁰⁸

This, in and of itself, is of enormous probative value in relation to Justice Scalia’s claim. There were eleven state constitutions in effect when the

²⁰⁶ James Madison, *Monopolies. Perpetuities. Corporations. Ecclesiastical Endowments.*, in MADISON’S “DETACHED MEMORANDA” (Elizabeth Fleet ed.), in ser. 3, 3 WM. & MARY Q. 534, 558 (1946).

²⁰⁷ *Id.*

²⁰⁸ U.S. CONST. art. VI, cl. 3.

Federal Constitution was created.²⁰⁹ Nine of these had religious tests for office.²¹⁰ Yet the Federal Constitution specifically prohibited such tests.²¹¹

The Constitutional Convention took place in Pennsylvania,²¹² where state officials had to subscribe to an oath that began, “I do believe in one God, the creator and governor of the universe”²¹³ With eight of the fifty-five men who participated in the convention being from

²⁰⁹ See JAMES MCCLELLAN, *LIBERTY, ORDER, AND JUSTICE: AN INTRODUCTION TO THE CONSTITUTIONAL PRINCIPLES OF AMERICAN GOVERNMENT* 144–46 (3d ed., Liberty Fund, Inc. 2000) (1989). Connecticut and Rhode Island were governed by Royal Charters during the eighteenth century. *Id.* (stating Rhode Island and Connecticut retained their charter governments, which were equivalent to “constitutions”); see also 1 THOMAS WILLIAMS BICKNELL, *THE HISTORY OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS* 290–98 (1920) (labeling the Rhode Island and Connecticut charters as “Royal Charters”). It was not until 1818 that Connecticut created its first constitution. CONN. CONST. OF 1818, in 1 Thorpe, *supra* note 72, at 536. Rhode Island created its first constitution in 1842. R.I. CONST. OF 1842, in 6 *id.*, at 3222.

²¹⁰ See DEL. CONST. OF 1776, art. 22, cl. 3, in 1 *id.*, at 566; GA. CONST. OF 1777, art. VI, in 2 *id.*, at 779; MD. CONST. OF 1776, art. LV, in 3 *id.*, at 1700; MASS. CONST. OF 1780, ch. VI, art. I, in 3 *id.*, at 1908; N.H. CONST. OF 1784, pt. II, in 4 *id.*, at 2460–62; N.J. CONST. OF 1776, art. XIX, in 5 *id.*, at 2597–98; N.C. CONST. OF 1776, art. XXXII, in 5 *id.*, at 2793; PA. CONST. OF 1776, § 10, in 5 *id.*, at 3085; S.C. CONST. OF 1778, art. III, XII, XIII, in 6 *id.*, at 3249–50, 3252. Although New York and Virginia did not have explicit constitutional provisions with religious test oaths, both had clear Christian references. Article XXXV of the New York Constitution of 1777 stated that the statutes in effect “shall be and continue the law of this State.” N.Y. CONST. OF 1777, art. XXXV, in 5 *id.*, at 2635. One such statute, passed April 1, 1778, required oaths to be administered either by “laying the hand on, and kissing the gospels,” or having “hand or hands uplifted [and] swear[ing] by the everliving God.” 1778 N.Y. Laws 49. In Virginia, the Bill of Rights noted that “it is the mutual duty of all to practice Christian forbearance.” VA. CONST. OF 1776, § 16, in 7 Thorpe, at 3814. Additionally, Vermont, which was “to be admitted a member of the United States” in February 1791, see *ADMISSION OF THE STATE OF VERMONT (1791)*, in 6 *id.*, at 3761, had a constitution at the time of the framing of the Federal Constitution that also tended to “establish” religion. See VT. CONST. OF 1786, art. XII, in 6 *id.*, at 3757 (requiring its elected representatives to “believe in one God, the Creator and Governor of the Universe, the rewarder of the good, and punisher of the wicked. And you do acknowledge the scriptures of the Old and New Testament to be given by divine inspiration; and own and profess the Protestant religion”).

²¹¹ U.S. CONST. art. VI, cl. 3.

²¹² RAKOVE, *supra* note 150, at 61, 87.

²¹³ PA. CONST. OF 1776, § 10, in 5 Thorpe, *supra* note 72, at 3085.

Pennsylvania,²¹⁴ the Framers were certainly aware of that phrase, which they could readily have used as a template.²¹⁵ Yet they did not do this.²¹⁶ No religious test was ever required.²¹⁷

The obligation to “be bound by Oath or Affirmation, to support this Constitution” was applicable to the members of the First Federal Congress. Thus, in the House of Representatives on Monday, April 6, 1789, it was “*Ordered*, That leave be given to bring in a bill to regulate the taking the oath or affirmation prescribed by the sixth article of the Constitution; and that Messrs. WHITE, MADISON, TRUMBULL, GILMAN, AND CADWALADER, do prepare and bring in the same.”²¹⁸

Meanwhile, the members present:

Resolved, That the form of the oath to be taken by the members of this House, as required by the third clause of the sixth article of the Constitution of Government of the United States, be as followeth, to wit: “I, A B, a Representative of the United States in the Congress thereof, do solemnly swear (or affirm, as the case may be)

²¹⁴ See generally JOSEPH C. MORTON, SHAPERS OF THE GREAT DEBATE AT THE CONSTITUTIONAL CONVENTION OF 1787: A BIOGRAPHICAL DICTIONARY (2006).

²¹⁵ The Framers certainly contemplated requiring a belief in God. See, e.g., Oliver Ellsworth, *The Landholder*, VII, CONNECTICUT COURANT, Dec. 17, 1787, No. 1195, reprinted in ESSAYS ON THE CONSTITUTION, *supra* note 148, at 169 (stating “the least exceptionable” alternative to the test oath clause would be to require “all persons appointed to office to declare, at the time of their admission, their belief in the being of a God, and in the divine authority of the scriptures”); Rev. Mr. Shute, Address to the Convention of Massachusetts (Jan. 30, 1788), in 2 ELLIOT’S DEBATES, *supra* note 89, at 119 (“Col. JONES (of Bristol) thought, that the rulers ought to believe in God or Christ, [because] . . . a person could not be a good man without being a good Christian.”).

²¹⁶ See U.S. CONST. art. VI, cl. 3. As stated previously, it was Pennsylvania that followed the lead of the federal scheme, eliminating the declaration of a belief in God from their oath. See *supra* text accompanying notes 153–57; PA. CONST. OF 1790, in 5 Thorpe, *supra* note 72, at 3092.

²¹⁷ See U.S. CONST. art. VI, cl. 3. As one renowned legal authority noted, Article VI, clause 3 is the only place in the entire body of the Constitution where the word “ever” is used. See Kenneth W. Starr, *The Relationship of Church and State: The Views of the Founding Fathers*, THE 1987 SUPREME COURT HISTORICAL SOCIETY YEARBOOK, 1987, at 37.

²¹⁸ 1 ANNALS OF CONG. 101 (Joseph Gales ed., 1834).

*in the presence of Almighty GOD, that I will support the Constitution of the United States. So help me God.*²¹⁹

Although there is no record of the committee's deliberations regarding the bill that created the final oath, there is record that the deliberations were made pursuant to "the third clause of the sixth article of the Constitution" (i.e., the article containing the "no religious test" language).²²⁰ Following the command of that article, *the two references to God were removed.*²²¹ Passed by both houses of Congress, and then signed into law by President Washington on June 1, 1789, the official congressional oath is contained *in the very first statute our federal government created.*²²² Its final wording was, "I, A. B. do solemnly swear or affirm (as the case may be) that I will support the Constitution of the United States."²²³ Not only that, but the statute also stated that "the members of the several State legislatures . . . and all executive and judicial officers of the several States . . . shall . . . take the same oath or affirmation."²²⁴ In other words, this godless oath, which began as a godly oath but was made godless by the deliberate removal of the original two references to God, was not only taken thenceforth by the members of the House and Senate of the federal government, but also by every legislative, executive, and judicial branch officer in every state! Justice Scalia, who has proclaimed, "I have relied primarily upon official acts and official proclamations of the United States or of the component branches of its Government . . .,"²²⁵ left out this incredibly relevant and powerful legislative enactment. This strongly suggests religious myopia drove his scholarship, rather than devotion to unbiased history.

D. Justice Scalia's Historical "Fact" #4: At Congress's Request, George Washington Proclaimed "A Day of Public Thanksgiving and Prayer" to "Almighty God"

1. Analysis of Justice Scalia's Approach

Justice Scalia next wrote:

²¹⁹ *Id.* (emphases added).

²²⁰ *Id.*

²²¹ See James Madison, Address to the Convention of Virginia (June 12, 1788), in 3 ELLIOT'S DEBATES, *supra* note 89, at 330.

²²² See Act of June 1, 1789, ch. 1, § 1, 1 Stat. 23–24 (1789).

²²³ § 1, 1 Stat. at 23.

²²⁴ § 1, 1 Stat. at 23–24.

²²⁵ *McCreary County*, 545 U.S. at 895 (Scalia, J., dissenting).

The day after the First Amendment was proposed, the same Congress that had proposed it requested the President to proclaim “a day of public thanksgiving and prayer, to be observed, by acknowledging, with grateful hearts, the many and signal favours of Almighty God.” President Washington offered the first Thanksgiving Proclamation shortly thereafter, devoting November 26, 1789, on behalf of the American people “to the service of that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be,” thus beginning a tradition of offering gratitude to God that continues today.²²⁶

Justice Scalia left out pertinent information regarding the origin of this “tradition of offering gratitude to God.” First, it was illegal to be an Atheist at the time of the founding.²²⁷ Thus, no one who might have protested the “disregard” of his or her beliefs could have done so without being subject to criminal prosecution.²²⁸ Additionally, there was still that tendency of elected officials to “raise constitutional ideals one day and turn their backs on them the next.”²²⁹

During Washington’s eight years in office, he made a religious proclamation such as this only one other time.²³⁰ It is strange to label a practice not replicated seventy-five percent of the time as a “tradition.”²³¹ Once more, the bias inherent in Justice Scalia’s analysis is apparent. Why

²²⁶ *Id.* at 886–87 (Scalia, J., dissenting) (citations omitted).

²²⁷ See sources cited *supra* note 108. Additionally, Madison’s caution that “[i]n framing a system which we wish to last for ages, we should not lose sight of the changes which ages will produce,” MADISON’S DEBATES, *supra* note 116, at 167–68, should be kept in mind.

²²⁸ See, e.g., *People v. Ruggles*, 8 Johns. 290 (1811) (providing an example to demonstrate that a blasphemous statement could subject an individual to criminal prosecution). As noted previously, there seem not to have been any Atheists around. See *supra* text accompanying note 114.

²²⁹ *Lee v. Weisman*, 505 U.S. 577, 626 (1992) (Souter, J., concurring); see *supra* text accompanying note 201.

²³⁰ See 3 ANNALS OF CONG. 1416 (January 1, 1795) (providing the proclamation in which Washington declared “a Day of Thanksgiving and Prayer”).

²³¹ Cf. 15 THE AMERICAN CYCLOPAEDIA: A POPULAR DICTIONARY OF GENERAL KNOWLEDGE 684 (George Ripley & Charles A. Dana eds., New York, D. Appleton & Co. 1883) [hereinafter AMERICAN CYCLOPAEDIA] (stating Washington made the first two Thanksgiving proclamations in 1789 and 1795 and implying Madison made the next in 1815).

is the fact that Congress and President Washington chose to *not* have official days of Thanksgiving during six of those years insignificant, especially when the “precedent” was already set forth in the first year? This absence of Thanksgiving proclamations is certainly noteworthy. Additionally, the First Amendment had not been ratified yet.²³² Thus, there was no Establishment Clause to violate when President Washington issued this religious decree.

2. *A Counter to Justice Scalia’s Approach*

President John Adams exhorted the citizenry in 1798 to observe “a day of solemn humiliation, fasting, and prayer . . . [to] acknowledge before God the manifold sins and transgressions with which we are justly chargeable as individuals and as a nation, beseeching Him at the same time, of His infinite grace.”²³³ The following year, Adams proclaimed another “day of solemn humiliation, fasting, and prayer” for “the citizens . . . [to] call to mind our numerous offenses against the Most High God, confess them before Him with the sincerest penitence, [and] implore His pardoning mercy, through the Great Mediator and Redeemer, for our past transgressions.”²³⁴

With President Adams lacking the adoration that was bestowed upon Washington, these attempts to impose religious activities were severely criticized. A leading newspaper of the day, the Philadelphia Aurora, explained this:

Because there is nothing in the constitution giving authority to proclaim fasts . . . Because prayer, fasting, and humiliation are matters of religion and conscience, with which government has nothing to do . . . And Because we consider a connection between state and church affairs as dangerous to religious and political freedom and that, therefore, every approach towards it should be discouraged²³⁵

²³² See BILL OF RIGHTS, *supra* note 193, at xxii.

²³³ John Adams, Proclamation (March 23, 1798), *reprinted in* 1 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, at 269 (Authority of Congress 1900) (1897).

²³⁴ John Adams, Proclamation (March 6, 1799), *reprinted in* 1 *id.*, at 285.

²³⁵ PHILADELPHIA AURORA, May 9, 1788, *reprinted in* RICHARD N. ROSENFELD, AMERICAN AURORA: A DEMOCRATIC-REPUBLICAN RETURNS: THE SUPPRESSED HISTORY OF
(*continued*)

Importantly, the public agreed. Adams became the one and only president in the first forty years of our nation's history who failed to secure a second term of office.²³⁶ He later acknowledged that his religious exhortations caused this failure: "The National Fast, recommended by me turned me out of office This principle is at the bottom of the unpopularity of national Fasts and Thanksgiving. Nothing is more dreaded than the National Government meddling with Religion."²³⁷

Thomas Jefferson, the nation's third president,²³⁸ concurred with the populace in this regard. In fact, his famous letter to the Danbury Baptists, which contained the "wall of separation between church and State" metaphor,²³⁹ was the result of his desire to explain why he would "not proclaim fastings & thanksgivings, as my predecessors did."²⁴⁰ He also explained this in a letter to Rev. Samuel Miller:

I consider the Government of the U.S. as interdicted by the Constitution of the United States from intermeddling with religious institutions, their doctrines, discipline, or

OUR NATION'S BEGINNING AND THE HEROIC NEWSPAPER THAT TRIED TO REPORT IT 113 (1998) (ellipses in original).

²³⁶ See PRESIDENTS OF THE UNITED STATES: CONTAINING TWENTY-FIVE BIOGRAPHIES AND TWENTY-FIVE ARTISTIC PHOTOGRAVURES REPRODUCED FROM THE ORIGINAL PAINTINGS IN THE WHITE HOUSE (1906) [hereinafter PRESIDENTS OF THE UNITED STATES].

²³⁷ Letter from John Adams to Benjamin Rush (June 12, 1812), in OLD FAMILY LETTERS, ser. A, 391, 392–93 (Alexander Biddle ed., Philadelphia, J. B. Lippincott Co. 1892) [hereinafter OLD FAMILY LETTERS]. Interestingly, in contrast to Justice Scalia's claim that the Framers of the Federal Constitution were willing to "disregard" the rights of Atheists, Adams noted in that letter:

A general Suspicion prevailed that the Presbyterian Church was ambitious and aimed at an Establishment as a National Church. I was represented as a Presbyterian and at the head of this political and ecclesiastical Project. The secret whispers ran through them [all the sects] "Let us have Jefferson, Madison, Burr, any body, whether they be Philosophers, Deists, or even Atheists, rather than a Presbyterian President."

Id. (emphasis added).

²³⁸ PRESIDENTS OF THE UNITED STATES, *supra* note 236.

²³⁹ Letter from Thomas Jefferson to Danbury Baptists (Jan. 1, 1802), in THE ESSENTIAL JEFFERSON 59 (Jean M. Yarbrough ed., 2006).

²⁴⁰ Letter from Thomas Jefferson to the Attorney General, Levi Lincoln, (Jan. 1, 1802), in 8 JEFFERSON, 1801–1806, *supra* note 1, at 129.

exercises But it is only proposed that I should *recommend*, not prescribe a day of fasting & prayer. That is, that I should *indirectly* assume to the U. S. an authority over religious exercises which the Constitution has directly precluded them from.

. . . [E]very one must act according to the dictates of his own reason, & mine tells me that civil powers alone have been given to the President of the US. and no authority to direct the religious exercises of his constituents.²⁴¹

Although Madison, Jefferson's successor,²⁴² succumbed to political pressures by proclaiming days of Thanksgiving during his presidency,²⁴³ he later acknowledged the extra-constitutional nature of such an act. Writing after his retirement from politics, he stated clearly that "[r]eligious proclamations by the Executive recommending thanksgivings & fasts . . . imply a religious agency, making no part of the trust delegated to political rulers."²⁴⁴

Although governors and other officials declared days of Thanksgiving after Madison's proclamation in April 1815,²⁴⁵ it appears that not one of the next eleven presidents followed suit. In fact, it was not until the Civil War when President Lincoln in 1863 issued a Thanksgiving Proclamation to "the blessings of fruitful fields and healthful skies . . . [i]n the midst of a civil war of unequalled magnitude and severity" that another president would engage in such activity.²⁴⁶

In summary, this Thanksgiving "tradition" was not much of a tradition at all. Washington made such proclamations only twice in the eight years

²⁴¹ Letter from Thomas Jefferson to Rev. Samuel Miller (January 23, 1808), in 11 THE WORKS OF THOMAS JEFFERSON 7–9 (Paul Leicester Ford ed., New York, G.P. Putnam's Sons 1905) (emphasis added).

²⁴² PRESIDENTS OF THE UNITED STATES, *supra* note 236.

²⁴³ See 15 AMERICAN CYCLOPAEDIA, *supra* note 231, at 684.

²⁴⁴ James Madison, *Monopolies. Perpetuities. Corporations. Ecclesiastical Endowments.*, in MADISON'S "DETACHED MEMORANDA" (Elizabeth Fleet ed.), in ser. 3, 3 WM. & MARY Q. 534, 560 (1946).

²⁴⁵ See 15 AMERICAN CYCLOPAEDIA, *supra* note 231, at 684. At least one of those governors refused, on religious freedom grounds, to issue such a proclamation. See *id.* ("[I]n 1857, [Virginia's] Gov. Wise . . . publicly declined, because [he was] unauthorized to interfere in religious matters").

²⁴⁶ Act of Oct. 3, 1863, 13 Stat. 735 (1863).

of his presidency.²⁴⁷ His successor concluded that the American people “dread” this sort of government-sponsored religious activity, and they will express their disapproval at the polls.²⁴⁸ The next president refused to issue a similar proclamation and made it a point to announce publicly his belief that doing so would violate the First Amendment’s “wall of separation between church and state.”²⁴⁹ The fourth president, known as “The Father of the Constitution,”²⁵⁰ specifically determined that such proclamations are “no[t] part of the trust delegated to political rulers.”²⁵¹ And then the practice ended for almost half a century, until revived by the sixteenth president during the Civil War.²⁵² Thus, although there may well be a “tradition” now of giving thanks to a Supreme Being, it certainly was not chiseled into American culture until well after those who created our government were no longer able to protect their work.

E. Justice Scalia’s Historical “Fact” #5: The Northwest Territory Ordinance of 1787 Spoke of “Religion, Morality, and Knowledge, Being Necessary to Good Government and the Happiness of Mankind”

1. Analysis of Justice Scalia’s Approach

The British ceded a vast expanse of land as part of the Treaty of Paris of 1783,²⁵³ which formally put an end to the Revolutionary War.²⁵⁴ To govern part of this settlement, the Northwest Territory Ordinance was promulgated.²⁵⁵ Justice Scalia referenced this as further proof that the Establishment Clause permits the disregard of devout Atheists: “The [First] Congress also reenacted the Northwest Territory Ordinance of 1787, 1 Stat. 50, Article III of which provided: ‘Religion, morality, and knowledge,

²⁴⁷ Cf. 15 AMERICAN CYCLOPAEDIA, *supra* note 231, at 684 (stating Washington made the first two Thanksgiving proclamations in 1789 and 1795, and implying Madison made the next in 1815).

²⁴⁸ See Letter from John Adams to Benjamin Rush (June 12, 1812), in OLD FAMILY LETTERS, *supra* note 237, at 392–93.

²⁴⁹ See *supra* text accompanying notes 239–41.

²⁵⁰ *Gonzales v. Raich*, 545 U.S. 1, 57 (2005) (O’Connor, J., dissenting) (referring to Madison as the “father of the Constitution”).

²⁵¹ See James Madison, *Monopolies. Perpetuities. Corporations. Ecclesiastical Endowments.*, in MADISON’S “DETACHED MEMORANDA” (Elizabeth Fleet ed.), in ser. 3, 3 WM. & MARY Q. 534, 560 (1946).

²⁵² See *supra* text accompanying notes 245–46.

²⁵³ Treaty of Paris of 1783, U.S.–Gr. Brit., Sept. 3, 1783, 8 Stat. 80.

²⁵⁴ *United States v. Maine*, 475 U.S. 89, 91 & n.3 (1986).

²⁵⁵ See *Wallace v. Jaffree*, 472 U.S. 38, 100 (1985) (Rehnquist, J., dissenting).

being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”²⁵⁶

One should immediately note that the Ordinance speaks of “religion,” not God.²⁵⁷ Nevertheless, the members of the First Congress believed in God and likely assumed “religion” incorporated belief in God.²⁵⁸ However, virtually all of those men also believed in *Protestant Christianity*²⁵⁹ and likely assumed the “religion” of the United States incorporated Protestant, as opposed to Catholic, tenets as well.²⁶⁰ Yet there is nothing in the text of the Ordinance limiting “religion” to either Monotheism or Protestantism. In fact, the Northwest Ordinance specifically noted that “extending the fundamental principles of civil and religious liberty” was one of its purposes.²⁶¹ The Supreme Court has repeatedly read the nation’s history and tradition in accordance with that notion. As a result, a constitutional definition of “religion” (i.e., “freedom of conscience”), encompasses the conviction that God does not exist.²⁶²

Additionally, the phrase Justice Scalia selected (“[r]eligion, morality, and knowledge, [are] necessary to good government and the happiness of

²⁵⁶ *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 887 (2005) (Scalia, J., dissenting) (citation omitted). These words in the Northwest Ordinance were followed by:

The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights and liberty they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

THE NORTHWEST TERRITORIAL GOVERNMENT (1787), in 2 Thorpe, *supra* note 72, at 961. Knowing how egregiously Native Americans were subsequently treated, the authoritative nature of the Ordinance is certainly suspect.

²⁵⁷ Act of Aug. 7, 1789, ch. 8, 1 Stat. 50 (1789).

²⁵⁸ See DEREK H. DAVIS, *RELIGION AND THE CONTINENTAL CONGRESS* xii (2000); See, e.g., Act of Sept. 22, 1789, ch. 17, 1 Stat. 70 (1789) (codified as amended at 2 U.S.C. § 31 (2006)) (showing the First Congress authorized payments for chaplains).

²⁵⁹ Cf. DAVIS, *supra* note 258, at xii.

²⁶⁰ See *supra* text accompanying notes 48–52 (discussing Massachusetts’ 1780 Bill of Rights, with its Protestant version of the Northwest Ordinance passage provided by Justice Scalia).

²⁶¹ THE NORTHWEST TERRITORIAL GOVERNMENT (1787), in 2 Thorpe, *supra* note 72, at 960. Unsurprisingly, this passage was “disregarded” by Justice Scalia.

²⁶² See sources cited *supra* note 67.

mankind”²⁶³) was part of the “articles of compact, between the original States and the people and States in the said territory.”²⁶⁴ The first statement made in those articles was “[n]o person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship or religious sentiments, in the said territory.”²⁶⁵ Atheists who demean themselves in a peaceable and orderly manner are certainly “persons” under this scheme, which indicates their “religious sentiments” should be respected. Thus, it can certainly be argued that Atheists were not “disregarded” in the Northwest Territory, especially because the Framers considered it a “molestation” for government to establish an exclusionary religious ideology.

The phrase selected by Justice Scalia also pertained to “schools and the means of education.”²⁶⁶ If the Northwest Territory Ordinance had the import that he ascribes to it, then teacher-led prayer and Bible-reading in the public schools would be constitutional. The Supreme Court has already determined they are not.²⁶⁷

An inspection of the “morality” associated with the “religion” referenced in the Northwest Ordinance is also warranted. While the sponsors were voting for the Ordinance’s passage, while President Washington was signing it into law, and while they were all thanking Divine Providence and attending church, they were buying, selling, and

²⁶³ *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 887 (2005) (Scalia, J., dissenting) (citation omitted).

²⁶⁴ THE NORTHWEST TERRITORIAL GOVERNMENT (1787), in 2 Thorpe, *supra* note 72, at 960.

²⁶⁵ THE NORTHWEST TERRITORIAL GOVERNMENT, art. I (1787), in 2 *id.*, at 961.

²⁶⁶ *McCreary County*, 545 U.S. at 887 (Scalia, J., dissenting).

²⁶⁷ See, e.g., *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 205 (1963) (teacher-led Bible readings); *Engel v. Vitale*, 370 U.S. 421, 424, 430 (1962) (“voluntary” teacher-led prayers). Justice Stewart was the lone dissenter in both cases. *Schempp*, 374 U.S. at 308; *Engel*, 370 U.S. at 444. In fact, for every Supreme Court case in which the government’s introduction of religion into the public schools was the issue, it ruled the challenged act unconstitutional. *Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290, 294, 317 (2000) (having prayer at football games); *Lee v. Weisman*, 505 U.S. 577, 598–99 (1992) (having graduation prayer); *Edwards v. Aguillard*, 482 U.S. 578, 580–82 (1987) (teaching of “creation science”); *Wallace v. Jaffree*, 472 U.S. 38, 60–61 (1985) (reminding students of a prayer option); *Stone v. Graham*, 449 U.S. 39, 39–40 (1980) (posting of Ten Commandments); *Epperson v. Arkansas*, 393 U.S. 97, 98, 109 (1968) (prohibiting the teaching of evolution); *Schempp*, 374 U.S. at 205; *Engel*, 370 U.S. at 424; *McCullum v. Bd. of Educ.*, 333 U.S. 203, 231 (1948) (public schools provided as setting for religious teachers).

owning other human beings.²⁶⁸ This practice had its roots in Pope Nicholas V's fifteenth century papal bulls, which authorized the Portuguese to capture African natives and "reduce their persons to perpetual slavery."²⁶⁹ In 1493, after Columbus's "discovery" of America,²⁷⁰ Pope Alexander VI extended the slave trade to the New World with his Papal Bull, *Inter caetera*.²⁷¹ This ecclesiastical sanction gave Europeans the authority, "[u]nder the cover of Christian morality, . . . to ship millions of slaves to the New World."²⁷²

European colonists understood the foregoing. Accordingly, men such as Massachusetts' Chief Justice William Cushing in 1783 spoke out against "the doctrine of slavery and *the right of Christians* to hold Africans in perpetual servitude, and sell and treat them as we do our horses and cattle."²⁷³ Yet when the Constitution was ratified, it was still argued that "the SLAVE-TRADE is perfectly consonant to the principles of the Law of Nature, the Mosaic Dispensation, and the Christian Law, as delineated to us in the Sacred Writings of the Word of God."²⁷⁴ In fact, for nearly another century people contended that "the system of negro slavery . . . is a divine institution."²⁷⁵ Is the Fourteenth Amendment all that prevents Justice Scalia from using this "history" and "tradition" to maintain the evils of slavery?

Aside from these other matters relating to the Northwest Ordinance, there is its actual history. Although a full exegesis is far beyond the scope

²⁶⁸ See Act of Aug. 7, 1789, ch. 8, 1 Stat. 50–53 (1789) (stating the dates Congress and President Washington signed the law); DAVID BRION DAVIS, *THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770–1823*, at 164–212 (2d ed., Oxford University Press 1999) (1975) (discussing several prominent figures' involvement in the slave trade, including President Washington).

²⁶⁹ Emilia Viotti da Costa, *The Portuguese-African Slave Trade: A Lesson in Colonialism*, 12 *LATIN AM. PERSP.* 41, 45 (1985).

²⁷⁰ See SAMUEL ELIOT MORISON, *ADMIRAL OF THE OCEAN SEA: A LIFE OF CHRISTOPHER COLUMBUS 156* (Read Books 2007) (1942).

²⁷¹ H. Vander Linden, *Alexander VI. and the Demarcation of the Maritime and Colonial Domains of Spain and Portugal, 1493–1494*, 22 *AM. HIST. REV.* 1, 1–20 (1916); Viotti da Costa, *supra* note 269, at 56.

²⁷² Viotti da Costa, *supra* note 269, at 56.

²⁷³ The Quock Walker Case, Mass. (1783), reprinted in 1 *DOCUMENTS OF AMERICAN HISTORY*, *supra* note 119, at 110 (emphasis added).

²⁷⁴ RAYMUND HARRIS, *SCRIPTURAL RESEARCHES ON THE LICITNESS OF THE SLAVE-TRADE, SHEWING ITS CONFORMITY* vii (London, n.d. 1788).

²⁷⁵ See, e.g., *Watson v. Jones*, 80 U.S. 679, 691 (1871).

of this article, some relevant details demonstrate the impropriety of using the Ordinance's passage for the purpose claimed. To begin with, the Continental Congress passed the Ordinance first under the Articles of Confederation,²⁷⁶ which did not have the respect for full religious diversity embodied in the Constitution.²⁷⁷ The 1789 First Federal Congress simply rubberstamped what was already in place.²⁷⁸ It is not as if they carefully formulated or debated the ordinance's various provisions.

Moreover, we know who did formulate those provisions: Manasseh Cutler, a Massachusetts minister.²⁷⁹ At a time when the Confederation was deeply in debt,²⁸⁰ Cutler orchestrated the purchase of a huge amount of the territorial land, which offered the Congressional Congress a way to cancel much of its financial shortfall.²⁸¹ Cutler held such sway over the legislators that he was able to "demand" that every township have "an educated ministry."²⁸² When he "repeatedly threatened to go home without completing the purchase," those representing the cash-strapped fledgling nation, "unanimous[ly] vote[d] . . . in favor of the sale on his terms."²⁸³ Thus, it appears the Framers incorporated the paragraph Justice Scalia highlighted for fiscal and political, not religious, reasons.

What most strongly counsels against Justice Scalia's claim regarding the "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind"²⁸⁴ language is the eventual effect (or lack thereof) of those words. The Northwest Territory Ordinance

²⁷⁶ See THE NORTHWEST TERRITORIAL GOVERNMENT (1787), in 2 Thorpe, *supra* note 72, at 957 (stating "[t]he Congress of the *Confederation*" passed the Ordinance on July 13, 1787) (emphasis added).

²⁷⁷ Unlike the Constitution—which is barren in terms of godly references—the Articles of Confederation specifically alluded to "the Great Governor of the World." ARTICLES OF CONFEDERATION, *reprinted in* 1 DOCUMENTS OF AMERICAN HISTORY, *supra* note 119, at 115.

²⁷⁸ See *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 887 (2005) (Scalia, J., dissenting) ("The [First] Congress also *reenacted* the Northwest Territory Ordinance of 1787." (emphasis added)).

²⁷⁹ Rev. A.P. Peabody, *Manasseh Cutler*, 46 NEW ENGLANDER & YALE REV. 319, 319, 326–27 (1887), available at <http://digital.library.cornell.edu/cgi/t/text/text-idx?c=nwng;idno=nwng0046-4>.

²⁸⁰ See *id.* at 324.

²⁸¹ *Id.* at 328.

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 887 (2005) (Scalia, J., dissenting).

existed as a guide for the formation of six states that would arise within its boundaries: Ohio, Indiana, Illinois, Michigan, Wisconsin, and part of Minnesota.²⁸⁵ Of those states, five discarded the Ordinance's allusion to "religion" as being necessary for education as they came into existence.²⁸⁶ Moreover, three of those states had laws that specifically withdrew taxpayer support for religion.²⁸⁷

Only Ohio continued to use the "[r]eligion, morality, and . . . education" language, and it did so with multiple caveats. For instance, it added the phrase "not inconsistent with the rights of conscience" to the provision stating "the means of instruction shall forever be encouraged by legislative provision."²⁸⁸ Furthermore, immediately preceding Justice Scalia's highlighted words in the State's 1802 constitution was:

that no human authority can, in any case whatever, control or interfere with the rights of conscience; that no man shall be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent;

²⁸⁵ See 1 WILLIAM W. FREEHLING, *THE ROAD TO DISUNION: SECESSIONISTS AT BAY, 1776–1854*, at 138 (1990) (stating the territory included areas that became the states of "Illinois, Indiana, Ohio, Michigan, and Wisconsin"); 15 William Anderson & Albert J. Lobb, *A History of the Constitution of Minnesota* 9 (1921) (explaining the territory included a large portion of what became Minnesota).

²⁸⁶ See Ill. Const. of 1818, in 2 Thorpe, *supra* note 72, at 972–85; IND. CONST. OF 1816, art. IX, in 2 *id.*, at 1068–69; MICH. CONST. OF 1835, art. X, in 4 *id.*, at 1939; MINN. CONST. OF 1857, art. VIII, in 4 *id.*, at 2008–11; WIS. CONST. OF 1848, art. X, in 7 *id.*, at 4091–92.

²⁸⁷ See MICH. CONST. OF 1835, art. 1, § 5, in 4 *id.*, at 1931 ("No money shall be drawn from the treasury for the benefit of religious societies, or theological or religious seminaries."); MINN. CONST. OF 1857, art. I, § 16, in 4 *id.*, at 1993 ("[N]or shall any money be drawn from the treasury for the benefit of any religious societies, or religious or theological seminaries."); WIS. CONST. OF 1848, art. I, § 18, in 7 *id.*, at 4079 (prohibiting funds drawn "from the treasury for the benefit of religious societies, or religious, or theological seminaries").

²⁸⁸ OHIO CONST. OF 1802, art. VIII, § 3, in 5 *id.*, at 2910. Additionally, Ohio, like most states at the time, did not include a reference to any divinity in the preamble to its constitution. OHIO CONST. OF 1802, pmb., in 5 *id.*, at 2901; see, e.g., ILL. CONST. OF 1818, pmb., in 2 *id.*, at 972; MICH. CONST. OF 1835, in 4 *id.*, at 1930. The State did not add it until 1851, OHIO CONST. OF 1851, pmb., in 5 *id.*, at 2913, at which time it also inserted the restriction that "no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state." OHIO CONST. OF 1851, art. VI, § 2, in 5 *id.*, at 2925.

and that no preference shall ever be given by law to any religious society or mode of worship, and no religious test shall be required, as a qualification to any office of trust or profit.²⁸⁹

The Ohio legislators—like those of the federal Congress—could easily have added “except a belief in God” if that was what they felt was appropriate.

In view of the foregoing, reading Article III of the Northwest Ordinance to contend that our history “permits the disregard of devout Atheists” is a remarkable stretch.

2. *A Counter to Justice Scalia’s Approach*

A counter to Justice Scalia’s historical fact #5 is Justice Scalia’s fact #6—“the *Establishment Clause* permits . . . the disregard of devout Atheists,” because “the *First Amendment* itself accords religion (and no other manner of belief) special constitutional protection.”²⁹⁰

This is the exact point of the First Amendment. The Framers understood that religious beliefs are divisive and potent enough to blind even the brightest individuals, and therefore, special constitutional protection is needed in this subject area. Justice Scalia’s attempt to limit this protection only to a subset of religious belief (i.e., Monotheism, which is his own religious belief),²⁹¹ is a testament to the Framers’ wisdom.²⁹²

In addition to the evidence provided above, which includes the following:

- (i) The very first act of Congress signed into law by President Washington involved *the affirmative removal of the two references to God* in the oath that was to be taken by every member of Congress, along with every legislative, executive and judicial officer in every state,²⁹³ and

²⁸⁹ OHIO CONST. OF 1802, art. VIII, § 3, *in 5 id.*, at 2910.

²⁹⁰ *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 887 (2005) (Scalia, J., dissenting) (emphasis added).

²⁹¹ *See id.* at 894–900 & n.3 (Scalia, J., dissenting).

²⁹² U.S. CONST. amend I.

²⁹³ *See discussion supra* Part III.C (analyzing Congress’s removal of references to God in oaths taken by state congresses).

- (ii) *Everyone* who spoke on the subject agreed that the Constitution gave “not a particle of spiritual jurisdiction”²⁹⁴ and “not a shadow of right”²⁹⁵ to the federal government to involve itself at all in religious matters.²⁹⁶

there is the fact that the Framers repeatedly referred to the freedom under discussion not just as “freedom of religion,” but also as “freedom of conscience.”²⁹⁷ Although Justice Scalia is undoubtedly correct when he stated that “‘the deity the Framers had in mind’ . . . is *inescapably* the God of monotheism,”²⁹⁸ he takes a huge and unjustified leap by arguing that “religion” in the First Amendment is limited to the affirmative belief in that deity.

The phrase “freedom of conscience”—with its notion that every individual’s opinions are protected, especially those concerning God and religion,—epitomizes the founding of our nation. Undoubtedly, there were some who, after discussing religion in such principled terms, believed as Justice Scalia does (i.e., that limitations of this freedom are reasonable when applied to those who do not agree with their own religious tenets). But that is the reason an Establishment Clause is needed. As Madison wrote, “[T]hat the Civil Magistrate is a competent Judge of Religious truth . . . is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages.”²⁹⁹ Benjamin Franklin expressed the same sentiment at the conclusion of the Constitutional Convention, as he encouraged his colleagues to sign the document: “Most men indeed as well as most sects in Religion, think themselves in possession of all truth, and that wherever

²⁹⁴ THE FEDERALIST NO. 69 (Alexander Hamilton), *reprinted in* Scott, *supra* note 149, at 383.

²⁹⁵ James Madison, Address to the Convention of Virginia (June 12, 1788), *in* 3 ELLIOT’S DEBATES, *supra* note 89, at 330.

²⁹⁶ See discussion *supra* Part III.B (analyzing the federal government’s involvement in religious matters).

²⁹⁷ See *supra* text accompanying notes 106–10.

²⁹⁸ *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 893–94 n.3 (2005) (Scalia, J., dissenting) (citation omitted) (alteration in original).

²⁹⁹ JAMES MADISON, A Memorial and Remonstrance, Address to the Honorable the General Assembly of the Commonwealth of Virginia, *in* THE COMPLETE MADISON: HIS BASIC WRITINGS 302 (Saul K. Padover ed., 1971).

[sic] others differ from them it is so far error.”³⁰⁰ That God exists is no more “truth” than any other religious claim.³⁰¹

An extraordinary aspect of Justice Scalia’s argument—beyond that he, as a Justice of the Supreme Court, has consciously chosen to interpret the Constitution in a manner that excludes people on the basis of their religious beliefs³⁰²—is that the history he so deftly uses to bolster his claim is filled with evidence that this view was considered and rejected. William Williams, a signer of the Declaration of Independence³⁰³ and delegate to the Connecticut state ratifying convention,³⁰⁴ stated he wished to have the Constitution’s Preamble include that Americans hold “a firm belief of the being and perfections of the one living and true God, the creator and supreme Governour of the world.”³⁰⁵ Yet he abandoned his efforts after recognizing his preferred clause was “so difficult and dubious to get inserted.”³⁰⁶

The anti-Federalist, Samuel,³⁰⁷ similarly wrote on January 10, 1788:

[A]ll religion is expressly rejected, from the Constitution. Was there ever any State or kingdom, that could subsist, without adopting some system of religion? Not so much as to own the being, and government of a Deity; or any acknowledgment of him! or having any revelation from him! Should we adopt such a rejection of religion as this, the words of Samuel to Saul, will literally apply to *us*,—*Because thou hast rejected the word of the Lord, he hath also rejected thee from being king.* We may justly expect,

³⁰⁰ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 642 (Max Farrand ed., rev. ed., Yale University 1966) (1911).

³⁰¹ See JOHN LELAND, *The Rights of Conscience*, in THE WRITINGS OF THE LATE ELDER JOHN 185 (L. F. Greene ed., New York, G.W. Wood 1845) (“Truth disdains the aid of law for its defence—it will stand upon its own merit It is error, and error alone, that needs human support.”).

³⁰² *McCreary County*, 545 U.S. at 885 (Scalia, J., dissenting).

³⁰³ See THE DECLARATION OF INDEPENDENCE (U.S. 1776), reprinted in 1 DOCUMENTS OF AMERICAN HISTORY, *supra* note 119, at 102.

³⁰⁴ JACK R. STANFIELD, AMERICA’S FOUNDING FATHERS: WHO ARE THEY? THUMBNAIL SKETCHES OF 164 PATRIOTS 30 (2001).

³⁰⁵ Letter from William Williams to Mr. Babcock (Feb. 11, 1788), reprinted in ESSAYS ON THE CONSTITUTION, *supra* note 148, at 208.

³⁰⁶ *Id.*

³⁰⁷ Samuel, *Essay by Samuel*, reprinted in 3 THE COMPLETE ANTI-FEDERALIST 191, 191 (Herbert J. Storing ed., 2007).

that God will reject us, from that self government, we have obtained thro' his divine interposition.³⁰⁸

Samuel's warning was discounted, as was that of Luther Martin (one of Maryland's delegates to the Constitutional Convention³⁰⁹ and attorney general of that state for three decades).³¹⁰ Martin argued, "[I]n a Christian country, it would be at least decent to hold out some distinction between the professors of Christianity and downright infidelity or paganism."³¹¹

After the Constitution was signed, debated, and ratified, further attempts to incorporate a divine reference were rejected still. For instance, the renowned physician and statesman, Benjamin Rush,³¹² wrote on this subject a week after James Madison first proposed a Bill of Rights in the First Congress.³¹³ In a letter addressed to John Adams, Vice President of the United States, and therefore President of the Senate, Rush penned, "Many pious people wish the name of the Supreme Being had been introduced somewhere in the new Constitution. Perhaps an acknowledgement may be made of his goodness or of his providence in the proposed amendments."³¹⁴ Yet rather than acknowledging a deity, the First Congress enhanced the secular nature of the Constitution through the First Amendment: "Congress shall make no law respecting an establishment of religion."³¹⁵ These were the words ratified by the states.³¹⁶

³⁰⁸ *Id.* at 195 (emphasis added) (footnote omitted).

³⁰⁹ STANFIELD, *supra* note 304, at 5, tbl. III.

³¹⁰ *See id.* at 51.

³¹¹ Luther Martin, Attorney-General of Maryland, Member of Constitutional Convention, Address to the House of Delegates of Maryland, in 1 ELLIOT'S DEBATES, *supra* note 89, at 386. The reference to "a Christian country" has been repeatedly echoed since. *See, e.g.*, Holy Trinity Church v. United States, 143 U.S. 457, 471 (1892). One wonders why, except for the knowledge that anti-Atheistic sentiment is widely accepted, whereas anti-Jewish and anti-Muslim sentiment is immediately and loudly chastised, Justice Scalia decided to grant the protections of the Establishment Clause to these religious minorities. *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 894 (2005) (Scalia, J., dissenting).

³¹² STANFIELD, *supra* note 304, at 108.

³¹³ *See* Letter from Benjamin Rush to John Adams (June 15, 1789), in 1 LETTERS OF BENJAMIN RUSH, 1761–1792, at 516 (L. H. Butterfield ed., 1951); BILL OF RIGHTS, *supra* note 193, at 438 (stating James Madison introduced the Bill of Rights to Congress on June 8, 1789).

³¹⁴ Letter from Benjamin Rush to John Adams (June 15, 1789), in 1 LETTERS OF BENJAMIN RUSH, *supra* note 313, at 517.

³¹⁵ U.S. CONST. amend. I.

³¹⁶ 1 ANNALS OF CONG. 947–48 (Joseph Gales ed., 1834).

Additionally, there is the voice of the people. In the election of 1800,³¹⁷ Thomas Jefferson's detractors attempted to use his views of religion³¹⁸ as a reason to vote against him.³¹⁹ In fact, two of the nation's premier newspapers, the *Gazette of the United States* and the *Daily Advertiser*, published the following advertisement almost daily in September and October of 1800:

THE GRAND QUESTION STATED.

At the present solemn and momentous
epoch, the only question to be asked by every
American, laying his hand on his heart,
is 'Shall I continue in allegiance to
GOD – AND A RELIGIOUS
PRESIDENT;
or impiously declare for
JEFFERSON – AND NO GOD!!!'³²⁰

If those were the two choices, the people chose "Jefferson – And No God!!!"

Ironically, Justice Scalia's analysis and conclusion mirrors one that he has eloquently and poignantly lamented. In *Planned Parenthood of*

³¹⁷ See *supra* text accompanying notes 236–38 (noting that John Adams attributed his failure to be reelected to his call for a National Fast).

³¹⁸ See, e.g., Letter from Thomas Jefferson to Ezra Styles (June 25, 1819), in 15 THE WRITINGS OF THOMAS JEFFERSON 202, 203 (Andrew A. Lipscomb ed., 1903) ("I am of a sect by myself, as far as I know."); Letter from Thomas Jefferson to John Adams (April 11, 1823), in ALF J. MAPP, JR., THE FAITHS OF OUR FATHERS: WHAT AMERICA'S FOUNDERS REALLY BELIEVED 19 (2003) ("[T]he day will come when the mystical generation of Jesus, by the Supreme Being as His Father, in the womb of a virgin, will be classed with the fable of the generation of Minerva in the brain of Jupiter."). Jefferson's views were rather insulting to a large proportion of the religious Christians of his day. See James H. Hutson & Thomas Jefferson, *Thomas Jefferson's Letter to the Danbury Baptists: A Controversy Rejoined*, ser. 3, 56 WM. & MARY Q. 775, 781 (1999).

³¹⁹ See Hutson & Jefferson, *supra* note 318, at 781.

³²⁰ EDWARD J. LARSON, A MAGNIFICENT CATASTROPHE: THE TUMULTUOUS ELECTION OF 1800, AMERICA'S FIRST PRESIDENTIAL CAMPAIGN 173 (2007); JAMES L. GOLDEN & ALAN L. GOLDEN, THOMAS JEFFERSON AND THE RHETORIC OF VIRTUE 270 (2002).

Southeastern Pennsylvania v. Casey,³²¹ Justice Scalia spoke of a decision that will always tarnish the Supreme Court's jurisprudence:

There comes vividly to mind a portrait by Emanuel Leutze that hangs in the Harvard Law School: Roger Brooke Taney, painted in 1859, the 82d year of his life, the 24th of his Chief Justiceship, the second after his opinion in *Dred Scott*. He is all in black, sitting in a shadowed red armchair, left hand resting upon a pad of paper in his lap, right hand hanging limply, almost lifelessly, beside the inner arm of the chair. He sits facing the viewer and staring straight out.³²²

The passage continues by alluding to the “profound sadness and disillusionment” on Chief Justice Taney’s face.³²³ Justice Scalia suggested this expression was because “the lustre of his great Chief Justiceship came to be eclipsed by *Dred Scott*.”³²⁴

In *Dred Scott*, the Supreme Court decided by a 7-2 majority³²⁵ that African Americans could not be United States citizens and that Congress could not prohibit slavery.³²⁶ This resulted in declaring the Missouri Compromise of 1820 unconstitutional.³²⁷ To reach this conclusion, Chief Justice Taney opted out of honoring and upholding the Constitution’s magnificent principle of equality. Instead, he looked to the nation’s history during the founding era and chose to read into the document the contemporaneous examples he could find of racial prejudice and bigotry.³²⁸ He concluded the “true intent and meaning when [the Constitution] was adopted” was for African Americans to be “considered as a subordinate and inferior class of beings.”³²⁹ According to Justice Scalia, this led to a Supreme Court “covered with dishonor and deprived of legitimacy.”³³⁰

³²¹ 505 U.S. 833 (1992).

³²² *Id.* at 1001 (Scalia, J., dissenting). In fact, a small plaque with Justice Scalia’s words now hangs beside the portrait.

³²³ *Id.* at 1002.

³²⁴ *Id.*

³²⁵ *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

³²⁶ *See id.* at 452–54.

³²⁷ *See id.*

³²⁸ *See Dred Scott*, 60 U.S. 393.

³²⁹ *Id.* at 404–05.

³³⁰ *Planned Parenthood v. Casey*, 505 U.S. 833, 998 (1992) (Scalia, J., dissenting).

Yet, in his *McCreary* dissent, Justice Scalia used precisely the same methodology employed by the former Chief Justice.³³¹

Like Justice Scalia, Chief Justice Taney was a Catholic.³³² In fact, he was the only Catholic to serve on the Supreme Court in the institution's first 100 years.³³³ That both of these men would choose to interpret the Constitution to exclude population subsets from its protections is especially noteworthy. Catholics, like African Americans and Atheists, have also existed for an extended period as a despised and disenfranchised American minority.³³⁴ In fact, one can employ the same methodology as Chief Justice Taney and Justice Scalia (i.e., picking and choosing historical tidbits), and reach a similarly odious and discriminatory conclusion that permits the disregard of devout Catholics.

IV. THE ESTABLISHMENT CLAUSE PERMITS THE DISREGARD OF DEVOUT CATHOLICS

Justices often have a choice when they consider past prejudicial practices: either they can label the practices as “tradition” and allow the status quo to persist, or they can uphold the basic principles underlying the Constitution's magnificence. As Justice Thomas wrote prior to his appointment to the Supreme Court: “[T]he strength of those universal principles of equality and liberty provides the means for resolving contradictions between principle and practice.”³³⁵

³³¹ See *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 886–89 (2005) (Scalia, J., dissenting). In *Zuni Public School District No. 89 v. Department of Education*, 127 S. Ct. 1534 (2007), Justice Scalia criticized a similar search through the historical record when he discussed the decision of *Holy Trinity Church v. United States*, 143 U.S. 457 (1892). In *Zuni*, he wrote that the earlier court's contention that “this is a Christian nation,” *id.* at 471, was made by the “elevation of judge-supposed legislative intent over clear statutory text.” *Zuni*, 127 S. Ct. at 1551 (Scalia, J., dissenting). To be sure, Justice Scalia distinguished between statutes and constitutional provisions. See *id.* at 1551–55. Nonetheless, his pronouncement that “[t]o be governed by legislated text rather than legislators' intentions is what it means to be ‘a Government of laws, not of men,’” *id.* at 1557, would be equally laudable in either situation.

³³² THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789–1993, at 117 (Clare Cushman ed., 1993).

³³³ *Id.* at 119.

³³⁴ 2 THE CAMBRIDGE HISTORY OF LAW IN AMERICA: THE LONG NINETEENTH CENTURY, 1789–1920, at 430 (Michael Grossberg & Christopher Tomlins eds., 2008) [hereinafter CAMBRIDGE HISTORY OF LAW].

³³⁵ Clarence Thomas, *Toward a “Plain Reading” of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 20 HOW. L.J. 983, 994 (1987).

One would hope Justices would take the latter path based on righteousness alone. Another reason individuals should stand up for equality is that without it, they can become victims of the “disregard” they advocate. As Jefferson made clear, “It behoves every man who values liberty of conscience for himself, to resist invasions of it in the case of others; or their case may, by change of circumstances, become his own.”³³⁶

A Catholic such as Justice Scalia³³⁷ ought to be especially cognizant of this notion because the antipathy towards Catholicism at the nation’s founding was extensive and profound.³³⁸ Statements such as Elisha Williams’, “*Popery* is so far from deserving the name of *Religion*, that it is rather a Conspiracy against it,”³³⁹ were so frequently heard that one historian referenced anti-Catholicism as “the deepest bias in the history of the American people.”³⁴⁰ Thus, “as of January 31, 2006, when Justice Alito was sworn in, a majority of the Justices sitting on the Court . . . profess and practice a faith that many prominent Founding Fathers believed cannot coexist with liberty or free government.”³⁴¹ In other words, the approach Justice Scalia took in his *McCreary* dissent could easily be used to relegate him and his Catholic brethren to the second-class status he so facilely imposes upon Atheists.

A. *The Pre-Colonial Development of Anti-Catholicism*

Prior to the Protestant Reformation, Christianity (at least in Western Europe) was essentially synonymous with Roman Catholicism.³⁴² With that church having “attained a complete and unchallenged mastery over the affairs of men,”³⁴³ the Pope “assumed universal dominion in church and

³³⁶ Letter from Thomas Jefferson to Benjamin Rush (Apr. 21, 1803), in 8 JEFFERSON, 1801–1806, *supra* note 1, at 224.

³³⁷ See GARBUS, *supra* note 13 (labeling Justice Scalia as “[a] devout Catholic”).

³³⁸ See 2 CAMBRIDGE HISTORY OF LAW, *supra* note 334, at 430.

³³⁹ WILLIAMS, *supra* note 55, at 40; see also *infra* text accompanying note 505 (detailing how statutes depriving Catholics of basic liberties were, at one time or another, in existence in every colony).

³⁴⁰ JOHN TRACY ELLIS, AMERICAN CATHOLICISM 151 (Daniel J. Boorstin ed., 2d rev. ed., 1969) [hereinafter AMERICAN CATHOLICISM].

³⁴¹ Law, Lawyers, the Court, and Catholicism, <http://www.jknirp.com/lawlaw.htm> (Jan. 31, 2007).

³⁴² JACQUES BARZUN, FROM DAWN TO DECADENCE: 500 YEARS OF WESTERN CULTURAL LIFE, 1500 TO THE PRESENT 3–4 (2000).

³⁴³ JOHN TRACY ELLIS, CATHOLICS IN COLONIAL AMERICA 4 (1965) [hereinafter CATHOLICS IN COLONIAL AMERICA].

state.”³⁴⁴ Thus, King Alfonso V of Portugal was able to obtain “Cum diversas” by appropriately patronizing Pope Nicholas V.³⁴⁵ This papal bull authorized the King to send ships to Africa,³⁴⁶ thereby claiming the land and possessions of the native people for himself.³⁴⁷ Additionally, this religious edict allowed for the enslavement of that continent’s inhabitants,³⁴⁸ which likely led to the birth of slavery in North America. Such papal authority likewise gave Ferdinand and Isabella the “right” to send Columbus to the New World (where he would claim all the land that he discovered for the Spanish crown), and ultimately led to the atrocities of the Spanish Inquisition.³⁴⁹

The desire of the European rulers to obtain the benefits of the Pope’s powers ensured that they would enforce the obligation of their citizens to tithe to the church.³⁵⁰ This was quite lucrative for the clergy, who accumulated great wealth.³⁵¹ The zeal with which these men began

³⁴⁴ JAMES BICHENO, A GLANCE AT THE HISTORY OF CHRISTIANITY, AND OF ENGLISH NONCONFORMITY 7–8 (Newbury, B. Fuller 1798).

³⁴⁵ See Viotti da Costa, *supra* note 269, at 45. In other sources “Cum diversas” is given as “Dum diversas.”

³⁴⁶ “In the course of time the term [*bull*] came to be applied to the leaden seals with which papal and royal documents were authenticated in the early Middle Ages, and . . . was eventually attached to the document itself.” Herbert Thurston, *Bulls and Briefs*, in THE CATHOLIC ENCYCLOPEDIA (Robert Appleton Company 3d ed. 1908) (1907), available at <http://www.newadvent.org/cathen/03052b.htm>.

³⁴⁷ See Viotti da Costa, *supra* note 269, at 45.

³⁴⁸ See *id.* at 45–46.

³⁴⁹ See JAMES RESTON, JR., DOGS OF GOD: COLUMBUS, THE INQUISITION, AND THE DEFEAT OF THE MOORS 60–61 (Anchor Books 2006) (2005).

On November 1, 1478, Pope Sixtus IV issued his bull *Exigit sincere devotionis*. It authorized the Catholic kings to appoint inquisitors in Castile for the purpose of expunging heresy that was rampant throughout the land Of particular interest to Ferdinand was the provision in the pope’s bull which authorized the crown to fine the culprits [i.e., the non-Christians] and confiscate their holdings, and to deposit the sizable proceeds into the hardpressed royal treasury.

Id.

³⁵⁰ See generally BICHENO, *supra* note 344 (claiming that the kingdoms of Europe became corrupt and “gave their power to the beast”).

³⁵¹ Cf. *id.* at 8 (“The priests were every thing, and the people nothing. All freedom of enquiry and all liberty of worship and of church government, were lost; and the church, which bore the name of Christ, was become a deformed and ravenous monster.”).

devoting themselves to their extensive holdings in property and material goods³⁵²—combined with their support for such matters as slavery³⁵³ and the Inquisition³⁵⁴—stimulated criticisms by men like Martin Luther, ultimately leading to the Protestant reformation in the early sixteenth century.³⁵⁵ Certain populations began to question, challenge, and deny the power and authority of the Pope: “Now tyranny and corruption, idolatry and superstition universally prevailed, and all the kingdoms of Europe, which the barbarous nations had erected on the ruins of the western empire, gave their power to the beast. Bloody laws were enacted to suppress all freedom of enquiry and liberty of worship.”³⁵⁶

Although the rulers of some European nations supported this popular uprising, the British monarchy remained loyal to Rome. In fact, Henry VIII was dubbed “Defender of the Faith” for his epistle to the Pope and condemnation of Luther’s anti-Catholic protestations.³⁵⁷ However, when Pope Clement VIII would not annul Henry’s marriage to Catherine of Aragon (so he could marry Anne Boleyn), papal power was legally repudiated.³⁵⁸ In 1534, the monarch was declared “sole and supreme head of the church of England, next and immediately under Christ.”³⁵⁹

The result was a British empire officially estranged from the Catholic Church.³⁶⁰ However, in 1553, after Henry VIII’s death and Edward VI’s six-year reign,³⁶¹ Mary I (the only child of Henry VIII’s union with Catherine³⁶²), ascended to the throne.³⁶³ A staunch disciple herself, Mary

³⁵² *See id.*

³⁵³ *See supra* text accompanying notes 270–69.

³⁵⁴ *See supra* note 349 and accompanying text.

³⁵⁵ *See* MADELEINE GRAY, *THE PROTESTANT REFORMATION: BELIEFS AND PRACTICES* 1 (2003) (“By [Martin Luther’s] courageous and public opposition to Papal indulgences . . . he initiated the movement which we know as the Protestant Reformation.”).

³⁵⁶ BICHENO, *supra* note 344, at 7.

³⁵⁷ *See* Virginia Murphy, *The Literature and Propaganda of Henry VIII’s First Divorce*, in *THE REIGN OF HENRY VIII: POLITICS, POLICY AND PIETY* 145 (Diarmaid MacCulloch ed., 1995).

³⁵⁸ *See* JOSEPHUS NELSON LARNED, *SEVENTY CENTURIES OF THE LIFE OF MANKIND* 85 (1907).

³⁵⁹ BICHENO, *supra* note 344, at 10.

³⁶⁰ *See* LARNED, *supra* note 358, at 86.

³⁶¹ *See* Neville Williams, *The Tudors*, in *THE LIVES OF THE KINGS & QUEENS OF ENGLAND* 185 (Antonia Fraser ed., University of California Press 1998) (1975). Edward was Henry VIII’s son with his third wife, Jane Seymour. *Id.*

³⁶² *Id.* at 191.

attempted to restore England to the Catholic faith.³⁶⁴ In so doing, she was responsible for the torture and execution of numerous Protestants, earning her the sobriquet, “Bloody Mary.”³⁶⁵ In the end, this terrible period of persecution was a lethal blow to English Catholicism.³⁶⁶

Elizabeth, the product of Henry VIII’s union with Anne Boleyn, succeeded Mary in 1558.³⁶⁷ Elizabeth reigned for four and a half decades, during which time she returned the kingdom not only to Protestantism, but also to anti-Catholicism.³⁶⁸ Although Catholicism episodically made slight inroads back into British society under some of the Stuart monarchs between 1603 and 1688,³⁶⁹ Catholics became increasingly disenfranchised as the Church of England became increasingly powerful.³⁷⁰ Certain pieces

³⁶³ *See id.*

³⁶⁴ *See* THOMAS D. MCGONIGLE & JAMES F. QUIGLEY, *A HISTORY OF THE CHRISTIAN TRADITION: FROM THE REFORMATION TO THE PRESENT* 13 (1996).

³⁶⁵ *See id.* (“Mary’s persecution of leading Protestants, which included the execution of Thomas Cranmer and four other bishops, alienated many of the English people.”); JASPER RIDLEY, *BLOODY MARY’S MARTYRS* 1 (2001) (“In England in the reign of Queen Mary Tudor, . . . 283 Protestants martyrs—227 men and 56 women—were burned alive.”).

³⁶⁶ *See* RIDLEY, *supra* note 365 (“[Bloody Mary’s] Roman Catholic co-religionists still suffer, at least in some respects, because of what she did to the martyrs [She] is indirectly responsible for the hatred of ‘Papists’ felt by the Protestants in Northern Ireland today.”).

³⁶⁷ *See* Williams, *supra* note 361, at 198.

³⁶⁸ *See* MCGONIGLE & QUIGLEY, *supra* note 364 (“As Mary had persecuted and executed Protestants, Elizabeth now did the same with Catholics.”). One example of this anti-Catholicism is the litany used during the Elizabethan period: “From the tyranny of the Bishop of Rome and all his detestable enormities, good Lord, deliver us.” PATRICK MCGRATH, *PAPISTS AND PURITANS UNDER ELIZABETH I*, 12–13 (1967).

³⁶⁹ *Cf.* DAVID HUME, *4 THE HISTORY OF ENGLAND FROM THE INVASION OF JULIUS CAESAR TO THE ABDICATION OF JAMES THE SECOND, 1688*, at 410 (Boston, Phillips, Sampson, and Company 1853) (1850) (recounting objection of James I to “a more rigorous execution of the laws against Popish recusants”); *5 id.*, at 9–10 (characterizing Charles I as “extremely adverse” to Puritan zealotry in Parliament); *6 id.*, at 83–85 (asserting the Catholic leanings of Charles II). King James II openly practiced the Catholic faith, even sending an emissary to Rome in the hopes of regaining admittance into the Catholic Church. *Id.* at 286.

³⁷⁰ *See, e.g.*, ALEXANDRA WALSHAM, *CHARITABLE HATRED: TOLERANCE AND INTOLERANCE IN ENGLAND, 1500–1700*, at 7 (2006); MARTIN PUGH, *BRITAIN SINCE 1789: A CONCISE HISTORY* 11–12 (1999) (“Anglicanism enjoyed the advantages of huge accumulated wealth, the support of almost all the political elite, and a good deal of
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of legislation demonstrate this, such as the 1672 “Act for preventing Dangers which may happen from Popish Recusants” and the 1678 act “disabling papists from sitting in either house of Parliament.”³⁷¹ Since 1688,³⁷² when James II (the last English ruler to harbor pro-Catholic feelings) was defeated and exiled in the “Glorious Revolution,”³⁷³ the official rule of the Protestant Church of England has been uninterrupted, as has been the second-class status of those of the Catholic faith. Accordingly, to this day, the King or Queen of England is not allowed to be, become, or marry a Catholic.³⁷⁴

With the governmental establishment of this Protestant religion (along with Protestant versus Catholic conflicts such as the St. Bartholomew’s Day Massacre, the Thirty Years War, etc., practically defining the history of the European continent), anti-Catholicism became a fixture of British society.³⁷⁵ Not atypical of the era was Parliament’s “Act against Popery,”

discriminatory legislation. As a result of the struggle with the Stuart Kings, parliament had passed [legislation] . . . which decreed that the King must be an Anglican . . .”).

³⁷¹ See 1672, 25 Car. 2, c. 2 (Eng.); 1678, 30 Car. 2, stat. 2, cap. 1 (Eng.).

³⁷² See, e.g., 1700 & 1701, 12 & 13 Wil. 3, c. 2 (Eng.) (requiring anyone coming into possession of the Crown to be a member of the Anglican Church).

³⁷³ JONATHAN HART, *EMPIRES & COLONIES* 117 (2008) (“William of Orange became King of England in 1688 (deposing James II, who was the last Catholic king of England . . .”). See JAMES E. BRADLEY, *RELIGION, REVOLUTION, AND ENGLISH RADICALISM: NONCONFORMITY IN EIGHTEENTH-CENTURY POLITICS AND SOCIETY* 146 (1990).

³⁷⁴ RIDLEY, *supra* note 365; see also 1688, 1 W. & M., Sess. 2, c. 2 (Eng.). This restriction is actually part of the 1689 English Bill of Rights:

And whereas it hath beene found by Experience that it is inconsistent with the Safety and Welfaire of this Protestant Kingdome to be governed by a Popish Prince or by any King or Queene marrying a Papist the said Lords Spirituall and Temporall and Commons doe further pray that it may be enacted That all and every person and persons that is are or shall be reconciled to or shall hold Communion with the See or Church of Rome or shall professe the Popish Religion or shall marry a Papist shall be excluded and be for ever uncapeable to inherit possesse or enjoy the Crowne and Government of this Realme

Id.

³⁷⁵ See, e.g., D.G. PAZ, *POPULAR ANTI-CATHOLICISM IN MID-VICTORIAN ENGLAND* 49 (1992) (“[T]he traditional English anti-Catholic mythology of the sixteenth and seventeenth

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passed in 1700, which granted a 100 pound sterling reward for helping convict a “popish bishop, priest or Jesuit” of Catholic proselytizing.³⁷⁶ Other provisions of the Act included stiff penalties for teaching Catholic tenets to children, even in foreign lands.³⁷⁷ As was later written:

Could a *Protestant* People ever experience a more bitter Enemy than this, who is at War with both our Souls and Bodies; and has vowed never to sheath the Sword till they have destroyed them both, were it in their Power: For, *Popery*, the Religion of the Pretender, is, a *Catholic* Sham, cheating those that are enticed by it, both of their Senses, Consciences, and Souls.³⁷⁸

B. Anti-Catholicism Among the Early Colonists

Reflecting the foregoing state of affairs, those who left England to settle America arrived with a strong anti-Catholic bias. As soon as Jamestown was established, it was decreed, “[W]e should be loath that any Person should be permitted to pass that we suspected to affect the Superstitions of the Church of Rome.”³⁷⁹ Twice each day, the captain of the guard led those settlers in a prayer specifically referring to Catholics as “the scum & dregs of the earth.”³⁸⁰

The Pilgrims and Puritans who came to Massachusetts also despised Catholics. Although they were escaping their own religious oppression when they began their westward migration in 1620,³⁸¹ they had no compunction about persecuting Catholics in the land they settled.³⁸² In

centuries was revived, reinforced, and raised to higher virulence by the combination of Irish immigration, Irish political nationalism, and the Evangelical revival.”).

³⁷⁶ See Act against Popery, 1700, 11 Wil. 3, cap. 4 (Eng.).

³⁷⁷ See *id.*

³⁷⁸ BARTOLOME DE LAS CASAS, *POPERY AND SLAVERY DISPLAY'D* 3 (Thomas Harris trans., London, printed for C. Corbett 4th ed. 1745).

³⁷⁹ SECOND CHARTER OF VIRGINIA (1609), in 7 Thorpe, *supra* note 72, at 3802.

³⁸⁰ See A Prayer Duly Said Morning and Evening upon the Court of Guard, Either by the Captain of the Watch Himself, or by Some One of His Principal Officers, in 3 TRACTS AND OTHER PAPERS RELATING PRINCIPALLY TO THE ORIGIN, SETTLEMENT, AND PROGRESS OF THE COLONIES IN NORTH AMERICA, FROM THE DISCOVERY OF THE COUNTRY TO THE YEAR 1776, at 67 (Peter Force ed., Washington, Wm. Q. Force 1844).

³⁸¹ See, e.g., CHESTER GILLIS, *ROMAN CATHOLICISM IN AMERICA* 52 (1999).

³⁸² See *id.* (“While the founding of the British colonies in North America was tied to concerns about religion, most of the colonies quickly established a set of laws and regulations regarding religious worship and practice.”). The “Puritans” received their

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fact, the land grant under which they came to the North American shores required that “all persons who sho^d pass in any voiage to the said country sho^d take the *Oath of Supremacy*, which was meant to exclude Papists from settling in America.”³⁸³ Not long after, they began banishing anyone ordained by papal authority and implemented a death sentence should such a person return despite banishment.³⁸⁴

Even Roger Williams, perhaps the staunchest defender of religious liberty among the early colonists (and who employed the famous “wall of separation” metaphor more than 150 years before Thomas Jefferson),³⁸⁵ evidenced anti-Catholic bias. Williams wrote to the governor of Connecticut in 1660 of “the common enemy, the Romish wolf,”³⁸⁶ warning “that that whore will shortly appear so extremely loathsome, in her drunkenness, bestialities, &c. [sic], that her bewitched paramours will tear her flesh, and burn her with fire unquenchable.”³⁸⁷

William Penn is another early colonist famous for bringing religious freedom to the North American continent.³⁸⁸ Yet, in his “Select Works,” he wrote an entire thirty-seven page treatise titled, “A Seasonable Caveat Against Popery.”³⁸⁹ Penn wrote that Catholicism was unparalleled in its “stupid superstition, . . . brutish zeal,”³⁹⁰ and “inhuman and barbarous

moniker because they “wanted to ‘purify’ the church of all traces of Roman Catholicism.”
Id.

³⁸³ THOMAS BISHOP, REPORT OF THE RIGHT REVEREND DR. SHERLOCK ON THE CHURCH IN THE COLONIES (1759), *reprinted in 7 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW-YORK* 361 (E. B. O’Callaghan ed., Albany, Weed, Parsons and Company 1856).

³⁸⁴ See “Anti-Priest Law of May 26, 1647,” *reprinted in DOCUMENTS OF AMERICAN CATHOLIC HISTORY* 111–12 (John Tracy Ellis ed., 1962) (hereafter “DOCUMENTS (Ellis)”).

³⁸⁵ See TIMOTHY L. HALL, SEPARATING CHURCH AND STATE: ROGER WILLIAMS AND RELIGIOUS LIBERTY 82–83 (1998). “Williams’ argument was that ‘a moral virtue, a moral fidelity, ability and honesty’ was accessible to both Christians and non-Christians and could form the basis of a stable society.” *Id.* at 82.

³⁸⁶ Letter from Roger Williams to John Winthrop (Feb. 6, 1660), *in 6 PUBLICATIONS OF THE NARRAGANSETT CLUB* 309 (John Russell Bartlett ed., 1874).

³⁸⁷ Letter from Roger Williams to John Winthrop (Sept. 8, 1660), *in 6 id.* at 311.

³⁸⁸ *But see* JAMES H. HUTSON, FORGOTTEN FEATURES OF THE FOUNDING: THE RECOVERY OF RELIGIOUS THEMES IN THE EARLY AMERICAN REPUBLIC 137 (2003).

³⁸⁹ WILLIAM PENN, *A Seasonable Caveat Against Popery*, *in 3 THE SELECT WORKS OF WILLIAM PENN IN FIVE VOLUMES* 53–89 (3d ed. 1782). This treatise is incongruently situated after “The Great Case of Liberty of Conscience.”

³⁹⁰ *Id.* at 56.

inventions and cruelties.”³⁹¹ He further noted, “That religion hath proved the greatest thief in nature.”³⁹² His treatise concluded by claiming that “to embrace that old, bloody, apostatized church again, with all her slavish, as well as ridiculous superstition, is a crime so offensive to God, and intolerable to men, as the time hastens.”³⁹³ In 1679, when “Penn’s society was shot through with anti-Catholic prejudice,”³⁹⁴ he created a “test” for citizens to “secure your selves from *Papists*.”³⁹⁵ The test required individuals to state, “I do firmly believe, that the Present Communion of the Roman-Catholic Church is *both Superstitious and Idolatrous*.”³⁹⁶ Although official anti-Catholicism was suspended temporarily, it soon returned and Catholics “were barred from holding office after 1705.”³⁹⁷ That restriction lasted three quarters of a century.³⁹⁸

For Catholics, Maryland promised to be the locale where they finally would have religious freedom and respect. This is because the Calverts, the only Catholics to secure a royal charter, founded it.³⁹⁹ The land covered by that charter was originally part of a grant made to the Virginia Company, but the Virginians were strictly Protestant and not particularly inclined to share property with the Papists.⁴⁰⁰ In fact, the Virginia Council celebrated the segregation: “Among the many blessings and favors for which we are bound to bless God . . . there is none whereby it hath been made more happy than . . . that no papists have been suffered to settle their abode amongst us.”⁴⁰¹ With such an icy welcome, the Calvert clan moved on to Maryland, where the famous “Act of Religious Toleration” was promulgated in 1649.⁴⁰² Yet even in that setting, the tide of anti-

³⁹¹ *Id.* at 88.

³⁹² *Id.* at 83.

³⁹³ *Id.* at 88–89.

³⁹⁴ Andrew R. Murphy, *Introduction* to ANDREW MURPHY & WILLIAM PENN, THE POLITICAL WRITINGS OF WILLIAM PENN, at xxii (2002).

³⁹⁵ *See id.* at 133.

³⁹⁶ *Id.* at 133–34.

³⁹⁷ CATHOLICS IN COLONIAL AMERICA, *supra* note 343, at 373.

³⁹⁸ *See id.* at 372. Although Catholics regained the right to hold some public offices in 1776, they remained excluded from the legislature for another ten years. *See* Ralph E. Pyle & James D. Davidson, *The Origins of Religious Stratification in Colonial America*, 42 J. FOR SCI. STUDY RELIGION 57, 67 (2003).

³⁹⁹ *See* CATHOLICS IN COLONIAL AMERICA, *supra* note 343, at 22.

⁴⁰⁰ *See id.*

⁴⁰¹ *See* *Torcaso v. Watkins*, 367 U.S. 488, 491 n.4 (1961).

⁴⁰² *See* AMERICAN CATHOLICISM, *supra* note 340, at 23, 26.

Catholicism could not be suppressed. A mere five years after the Act, the Protestant majority passed a statute stating, “[N]one who profess and Exercise the Popish Religion Commonly known by the Name of the Roman Catholick Religion can be protected in this Province by the Lawes of England.”⁴⁰³ The result was that “the Catholics of Maryland were cut off from all participation in public life, to say nothing of the enactments against their religious services and the law that forbade them to have schools for Catholic instruction of their children.”⁴⁰⁴

A similar sequence of events transpired in New York. Although New York had a Catholic governor in 1682, another policy of official anti-Catholicism took hold shortly thereafter.⁴⁰⁵ When James II’s reign ended in 1688,⁴⁰⁶ “[n]o issue aroused the suspicions and ignited the passions . . . more than the fear of Roman Catholicism.”⁴⁰⁷ A Dutch minister commented in 1741 on the remarkable diversity of religion in what previously was New Amsterdam by saying, “[T]here is here perfect freedom of conscience for all, *except Papists*.”⁴⁰⁸ In fact, New York “followed all the familiar English penal legislation against Catholics, a series of laws from which they were not entirely freed until 1806.”⁴⁰⁹

New York was not alone in granting liberty of conscience to all “except Papists.” The Massachusetts Charter of 1691 guaranteed “a liberty of Conscience . . . in the Worshipp [sic] of God to all Christians (*Except Papists*).”⁴¹⁰ New Hampshire’s legislature also gave “liberty of conscience to all persons *except Papists*.”⁴¹¹ Similarly, Georgia’s Charter of 1732 exhibited an explicit “disregard” for Catholic rights: “[A]ll persons

⁴⁰³ “Disfranchisement of Catholics in Maryland, Oct. 20, 1654,” *reprinted in* DOCUMENTS (Ellis), *supra* note 384, at 114.

⁴⁰⁴ AMERICAN CATHOLICISM, *supra* note 340, at 27.

⁴⁰⁵ See “New York’s Grant of Religious Toleration, Oct. 31, 1683,” *reprinted in* DOCUMENTS (Ellis), *supra* note 384, at 116.

⁴⁰⁶ *Id.*

⁴⁰⁷ Randall Balmer, *Traitors and Papists: The Religious Dimensions of Leisler’s Rebellion*, 70 NEW YORK HIST. 341, 344 (1989).

⁴⁰⁸ See Milton M. Klein, *Shaping the American Tradition: The Microcosm of Colonial New York*, 59 NEW YORK HIST. 173, 190 (1978) (emphasis added).

⁴⁰⁹ AMERICAN CATHOLICISM, *supra* note 340, at 31.

⁴¹⁰ See CHARTER OF MASSACHUSETTS BAY (1691), in 3 Thorpe, *supra* note 72, at 1881 (emphasis added).

⁴¹¹ See CHARLES B. KINNEY, JR., *CHURCH & STATE: THE STRUGGLE FOR SEPARATION IN NEW HAMPSHIRE, 1630–1990*, at 35 (1955).

inhabiting . . . our . . . province . . . *except papists* shall have a free exercise of their religion.”⁴¹²

During this era, John Foxe’s *Acts and Monuments* appeared. Otherwise known as the *Book of Martyrs*, this immensely popular book was second only to the Bible in the homes of the early colonists.⁴¹³ The book detailed many of the atrocities committed in the name of religion over the two centuries preceding its writing.⁴¹⁴ However, the only atrocities narrated were those the Catholic Church perpetrated.⁴¹⁵ It was “[n]o wonder that . . . there grew up a horror and detestation of the pope and the Romish Church.”⁴¹⁶ For each person who left England to settle in the New World, “it was a part of his creed to hate the pope.”⁴¹⁷

This view did not belong to only the lay public. Institutions of higher learning perpetuated anti-Catholic prejudice, even when striving to cultivate respect for religious diversity and toleration. The founding of Kings College (now Columbia University) in New York is a prime illustration. William Livingston, a highly respected politician, who later became New Jersey’s governor and who represented that state at the Constitutional Convention, was instrumental in that endeavor.⁴¹⁸ He presented his vision of the new institution to New York society in a series of essays titled, *Remarks on our Intended COLLEGE*.⁴¹⁹ In *Remarks*, he spoke of the need to respect religious diversity to avoid “a Nursery of

⁴¹² CHARTER OF GEORGIA (1732), in 2 Thorpe, *supra* note 72, at 773 (emphasis added).

⁴¹³ See 1 DOUGLAS CAMPBELL, *THE PURITAN IN HOLLAND, ENGLAND, AND AMERICA* 442 (New York, Harper & Brothers 1892) (“[T]he common people had almost no reading matter except the Bible and Foxe’s ‘Book of Martyrs.’”).

⁴¹⁴ *Id.*

⁴¹⁵ *Id.* at 443.

⁴¹⁶ *Id.*

⁴¹⁷ See *id.* at 444.

⁴¹⁸ See ROBERT K. WRIGHT, JR. & MORRIS J. MACGREGOR, JR., *SOLDIER-STATESMEN OF THE CONSTITUTION* 103 (1987), available at <http://history.army.mil/books/RevWar/ss/livingston.htm>.

⁴¹⁹ See WILLIAM LIVINGSTON, *THE INDEPENDENT REFLECTOR OR WEEKLY ESSAYS ON SUNDRY IMPORTANT SUBJECTS MORE PARTICULARLY ADAPTED TO THE PROVINCE OF NEW-YORK* 171 (Milton M. Klein ed., 1963). *Remarks* was published without the author’s name in *The Independent Reflector* in early 1753; it is assumed that Livingston wrote the essays. See ROBERT A. MCCAUGHEY, *STAND, COLUMBIA: A HISTORY OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK, 1754–2004*, at 16 (2003) (discussing the identity of the essayist of “Remarks on our Intended COLLEGE”).

Animosity, Dissent and Disorder.”⁴²⁰ Simultaneously, he noted there was an effort during King James II’s reign “to poison the Nation, by filling the Universities with popish and popishly-affected Tutors . . . [which might] have introduc’d and establish’d, the sanguinary and antichristian Church of *Rome*.”⁴²¹ Although the new university would “be founded on the Plan of a general Toleration,”⁴²² it would only “admit *Persons of all protestant Denominations*.”⁴²³

It is easy to see how this brand of religious intolerance is analogous to that exhibited by Justice Scalia. Livingston’s intentions were virtuous when he noted that “it is inconsistent with good Policy, to give any religious Profession the Ascendency over others.”⁴²⁴ Likewise, Justice Scalia’s intentions were sound when he wrote that “government may not . . . lend its power to one or the other side in controversies over religious authority or dogma.”⁴²⁵ Yet both allowed their righteous and principled views to falter in the face of their personal prejudices. When Livingston wrote, “I should always . . . exclude *Papists* from the common and equal Benefits of Society,”⁴²⁶ he was considered to harbor “rabid anti-Catholicism.”⁴²⁷ One must wonder if an analogous “rabid” antipathy is evidenced in statements such as “the *Establishment Clause* . . . permits the disregard of devout atheists.”⁴²⁸

At Harvard University, where Justice Scalia earned his law degree,⁴²⁹ anti-Catholic bias was also explicitly espoused, courtesy of the esteemed Chief Justice of the Massachusetts Supreme Court, Paul Dudley:

In his last will [Dudley] earmarked the sum of one hundred pounds sterling for an annual lecture or sermon to the students of his American alma mater[, Harvard], and designated four topics to be in rotation the subject of the discourses. In the third of the four topics sentiments of

⁴²⁰ LIVINGSTON, *supra* note 419, at 178.

⁴²¹ *Id.* at 176.

⁴²² *See id.* at 182–83.

⁴²³ *Id.* at 178 (emphasis added).

⁴²⁴ *Id.* at 183.

⁴²⁵ *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) (internal citations omitted).

⁴²⁶ LIVINGSTON, *supra* note 419, at 178.

⁴²⁷ McCAUGHEY, *supra* note 419, at 10.

⁴²⁸ *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 893 (2005) (Scalia, J., dissenting).

⁴²⁹ *E.g.*, RICHARD A. BRISBIN, JR., JUSTICE ANTONIN SCALIA AND THE CONSERVATIVE REVIVAL 12 (1997).

Dudley towards Catholics and their creed are etched with uncommon exactitude, for this address was for “detecting, convicting and exposing the idolatry, errors and superstitions of the Romish church.”⁴³⁰

Dudley’s bequest is “the oldest endowed lecture at Harvard” and is highly regarded.⁴³¹ The “lecture against popery” was singled out by none other than John Adams as a “fine institution . . . [that] was certainly intended by that wise and excellent man, as an eternal memento of the wisdom and goodness of the very principles that settled America.”⁴³² It was not until 1911 that the authorities at Harvard saw fit to eliminate the blatant anti-Catholicism from the Dudleian lectureship.⁴³³ This history certainly supports the “disregard” of Justice Scalia’s religion.

C. *Anti-Catholicism in the Founding Era*

The Protestants’ hatred for Catholics did not die out during our country’s formation. On the contrary, the sectarian divide between these two Christian belief systems continued in full force. For example, the following essay appeared on the front page of *The New York Mercury* in 1754.⁴³⁴ This was at the onset of the French and Indian War, which decided whether the colonists would “be ruled by the French or English, Catholics or Protestants.”⁴³⁵

⁴³⁰ CHARLES H. METZGER, CATHOLICS AND THE AMERICAN REVOLUTION: A STUDY IN RELIGIOUS CLIMATE 7 (1962) (citation omitted) [hereinafter CATHOLICS AND THE AMERICAN REVOLUTION].

⁴³¹ See Dudleian Lecture at Harvard University, Minutes of Trustees, 1830–1984, <http://www.hds.harvard.edu/library/bms/bms00523.html> (last visited on Dec. 27, 2009).

⁴³² JOHN ADAMS, ON THE CANON AND THE FEUDAL LAW (1765), reprinted in 3 CHARLES FRANCIS ADAMS, THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES: WITH A LIFE OF THE AUTHOR, NOTES AND ILLUSTRATIONS 454 (Boston, Little, Brown, and Co. 1865).

⁴³³ See William A. Graham, Dean, Harvard Divinity Sch., Introductory Remarks at the Harvard Divinity School Dudleian Lecture: Memory, Salvation, and Perdition (Mar. 17 2005), available at http://www.hds.harvard.edu/news/events_online/dudleian_2005.html (commenting on a May 31, 1911 meeting between Harvard University authorities to remove the anti-Catholic sentiment from the lectureship).

⁴³⁴ *Containing the Freshest Advices Foreign and Domestick*, NEW YORK MERCURY, Sept. 23, 1754 (on file with author).

⁴³⁵ JACOB K. NEFF, THE ARMY AND NAVY OF AMERICA, at iii (Applewood Books 2009) (1853).

Their national Religion is POPERY—an impious, an absurd, persecuting, blood feeding Religion; a Religion as disgraceful to human Understandings, as it is injurious to the sacred Ties of social Benevolence *It is a Religion chiefly calculated to support the tyrannical Power, and the insatiable Avarice of their Clergy, and as opposite to true Christianity, as any one Thing can be opposite to another*

POPERY is the great Friend to arbitrary Government, which is that of France. With very few Exceptions it may be said, That Papists are the most ignorant, slavish Herd of Bigots.⁴³⁶

The essay continued by noting, “We, *My Countrymen*, are the Sons of noble Freedom, born under a Constitution which secures *to every Protestant*, the sacred, the invaluable Privilege of choosing and enjoying his own religious Worship, his Civil Liberty and Property”⁴³⁷

The French and Indian War was actually just one component of the Seven Years War.⁴³⁸ This conflict (with theaters in Europe, India, Africa, and the Caribbean) was, in essence, the first World War, with Protestant England battling Catholic France.⁴³⁹ To the colonists, it was “a crusade against French papists”⁴⁴⁰ and set the religious stage for the colonists’ repeated declarations of Protestantism in the build-up to the Revolutionary War. This intentional religious distinction was echoed in the 1765 Resolutions of the Stamp Act Congress,⁴⁴¹ the 1774 Articles of Association,⁴⁴² the Declaration of the Causes and Necessity of Taking Up Arms,⁴⁴³ and in the Declaration of Independence itself.⁴⁴⁴

⁴³⁶ *Containing the Freshest Advices Foreign and Domestick*, *supra* note 434.

⁴³⁷ *Id.*

⁴³⁸ See, e.g., JONATHAN R. DULL, *THE FRENCH NAVY AND THE SEVEN YEAR’S WAR*, at xi (2005). Although there were numerous other combatants, the conflict between Great Britain and France was “[t]he most important link between the wars in Europe and North America.” See *id.*

⁴³⁹ *Id.*

⁴⁴⁰ CATHOLICS AND THE AMERICAN REVOLUTION, *supra* note 430, at 5–6.

⁴⁴¹ Resolutions of the Continental Congress, Oct. 19, 1765, http://avalon.law.yale.edu/18th_century/resolu65.asp (deeming the colonists to be “inviolably attached to the present happy establishment of the Protestant succession”).

⁴⁴² See 1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 75–80 (Worthington Chauncey Ford ed., 1904) (highlighting the “*free Protestant colonies*”
(continued)

The favored status of Protestantism was apparent within state constitutions as well. In 1776, North Carolina prohibited anyone who denied “the truth of the Protestant religion” from holding office or occupying a position “in the civil department.”⁴⁴⁵ New Jersey flatly denied civil rights to any non-Protestant inhabitant.⁴⁴⁶ When Georgia created its constitution a year later, its representatives were restricted to those “of the Protestant [sic] religion.”⁴⁴⁷ The South Carolina Constitution of 1778 stated, “The Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State.”⁴⁴⁸

Schools favored Protestantism, too. This was evident from the pages of *The New England Primer*, which was used continuously in classrooms for more than 150 years.⁴⁴⁹ Reading the book, students saw the popular depiction of a Protestant named John Rogers⁴⁵⁰ being burned at the stake during Queen Mary’s reign.⁴⁵¹ A poem Rogers wrote—coupled with the drawing⁴⁵²—added to the “indoctrination of Puritan Morality” that existed in New England’s educational institutions.⁴⁵³

Abhor that arrant whore of Rome,

And all her blasphemies,

concerns about the “wicked ministry” being established in Canada). The Articles were signed by George Washington and John Adams, among others. *Id.*

⁴⁴³ DECLARATION OF THE CAUSES AND NECESSITY OF TAKING UP ARMS (July 6, 1775), reprinted in 1 DOCUMENTS OF AMERICAN HISTORY, *supra* note 119, at 92 (describing Quebec’s Catholic government as a “despotism” dangerous to the very existence of English Protestants).

⁴⁴⁴ The passage of the Quebec Act was one of the “Injuries and Usurpations” of King George III listed in the Declaration of Independence. See THE DECLARATION OF INDEPENDENCE (U.S. 1776).

⁴⁴⁵ N.C. CONST. of 1776, art. XXXII, in 5 Thorpe, *supra* note 72, at 2793.

⁴⁴⁶ N.J. CONST. of 1776, art. XIX, in 5 *id.*, at 2597 (emphasis added).

⁴⁴⁷ GA. CONST. of 1777, art. VI, in 2 *id.*, at 779 (emphasis added).

⁴⁴⁸ S.C. CONST. of 1778, art. XXXVIII, in 6 *id.*, at 3255 (emphasis added).

⁴⁴⁹ See, e.g., PAUL LEICESTER FORD, THE NEW-ENGLAND PRIMER: A HISTORY OF ITS ORIGIN AND DEVELOPMENT 15–16, 19 (New York, Dodd, Mead and Company 1897). The book was first published around 1690. See *id.* at 16–17.

⁴⁵⁰ *Id.* at 251.

⁴⁵¹ See *id.* at 36.

⁴⁵² See FORD, *supra* note 449, at 32.

⁴⁵³ John P. Frank & Robert F. Munro, *The Original Understanding of “Equal Protection of the Laws”*, 50 COLUM. L. REV. 131, 154 (1950).

And drink not of her cursed cup;

Obey not her decrees.⁴⁵⁴

Anti-Catholicism was so widespread that respected statesmen had no compunction about publicly denigrating “papists.” John Adams took pride in the fact that Roman Catholics in Massachusetts were “as rare as a comet or an earthquake.”⁴⁵⁵ He opined that Catholicism “reduc[ed] . . . minds to a state of sordid ignorance and staring timidity” and chained human nature “in a cruel, shameful, and deplorable servitude.”⁴⁵⁶ Accordingly, he wrote that no one would want to live among people devoted to “the man of sin, the whore of Babylon, the mystery of iniquity, [and] a great and detestable system of fraud, violence, and usurpation.”⁴⁵⁷ To Adams, Catholic beliefs were “nonsense and delusion” and “dangerous in society.”⁴⁵⁸ “[F]rom a pope down to priests and friars and confessors . . . [Catholics were] necessarily and essentially a sordid, stupid, and wretched herd”⁴⁵⁹

Another pivotal revolutionary patriot was John Adams’ cousin, Samuel Adams. Referenced as the “Patriarch of Liberty”⁴⁶⁰ and the “Father of the American Revolution,”⁴⁶¹ Samuel Adams was a leader of the Boston Tea Party⁴⁶² and served in numerous official roles, including delegate to the Continental Congress, President of the Massachusetts State Senate, and Massachusetts governor.⁴⁶³ In addition to signing both the Declaration of Independence and the Articles of Confederation,⁴⁶⁴ he played a primary

⁴⁵⁴ FORD, *supra* note 449, at 90. Ford’s history of the *New England Primer* includes many facsimiles of original material appearing in the *New England Primer*, including Rogers’ poem.

⁴⁵⁵ JOHN ADAMS, A DISSERTATION ON THE CANON AND FEUDAL LAW (1765), *reprinted in* THE POLITICAL WRITINGS OF JOHN ADAMS: REPRESENTATIVE SELECTIONS 12 (George A. Peek, Jr. ed., 1954).

⁴⁵⁶ *Id.* at 5–6.

⁴⁵⁷ *See id.* at 8–9.

⁴⁵⁸ *See id.* at 9.

⁴⁵⁹ *Id.* at 9–10.

⁴⁶⁰ Letter from Thomas Jefferson to Samuel Adams (Mar. 29, 1801), *in* 33 THE PAPERS OF THOMAS JEFFERSON, 17 FEBRUARY TO 30 APRIL 1801, at 487 (Barbara B. Oberg ed., 2006).

⁴⁶¹ *E.g.*, MARK PULS, SAMUEL ADAMS: FATHER OF THE AMERICAN REVOLUTION 14 (2006).

⁴⁶² *See, e.g., id.* at 140–47 (outlining the history of the Boston Tea Party and Samuel Adams’ involvement).

⁴⁶³ *E.g., id.* at 154–55, 212, 225.

⁴⁶⁴ *E.g., id.* at 188, 208 (citation omitted).

role in protesting against the Stamp Act.⁴⁶⁵ In view of that resume, his 1768 statement that “much more is to be dreaded from the growth of popery in America, than from the Stamp Act or any other acts destructive of civil rights”⁴⁶⁶ attests to the depth of the ill will towards the “Romish” religion.

The Adams’ were hardly alone in these feelings. Other Framers, who generally are regarded as the most noble, forthright, and dedicated to religious liberty,⁴⁶⁷ expressed unabashed anti-Catholicism as well. Thomas Jefferson equated “Jesuitism” with “bigotry” and characterized the Jesuit restoration as “a retrograde step from light towards darkness.”⁴⁶⁸ James Madison believed the worst form of government was rooted in the “Papal System.”⁴⁶⁹ William Livingston warned of “the sanguinary and antichristian Church of Rome.”⁴⁷⁰ Isaac Backus, a Baptist minister who was a fervid religious freedom advocate and a member of the Massachusetts ratifying convention,⁴⁷¹ spoke of “Popery” as a “tyrannical way of worship.”⁴⁷² In Thomas Paine’s extraordinarily popular pamphlet, *Common Sense*, he used the ultimate insult in his effort to rally others to condemn England’s King George III: “[M]onarchy in every instance is the Popery of Government.”⁴⁷³ Even Benjamin Franklin, while attempting to muster support for a militia, wrote glowingly of how prior patriots had “made so glorious a Stand for our Religion and Liberties, when invaded by

⁴⁶⁵ See, e.g., *id.* at 47–48.

⁴⁶⁶ CATHOLICS IN COLONIAL AMERICA, *supra* note 343, at 387.

⁴⁶⁷ See discussion *supra* Part III.A.

⁴⁶⁸ See Letter from Thomas Jefferson to John Adams (Aug. 1, 1816), in 15 THE WRITINGS OF THOMAS JEFFERSON 58 (Andrew A. Lipscomb ed., 1903).

⁴⁶⁹ Letter from James Madison to Rev. Adams (1832), in THE COMPLETE MADISON: HIS BASIC WRITINGS 311 (Saul K. Padover ed., Kraus Reprint Co. 1971) (1953).

⁴⁷⁰ WILLIAM LIVINGSTON, REMARKS ON OUR INTENDED COLLEGE IN NEW YORK—SHALL IT BE SECTARIAN OR UNSECTARIAN? (*Independent Reflector*, Mar. 22, 1753), reprinted in 5 ECCLESIASTICAL RECORDS: STATE OF NEW YORK 3339 (1905).

⁴⁷¹ See STEVEN WALDMAN, FOUNDING FAITH: PROVIDENCE, POLITICS, AND THE BIRTH OF RELIGIOUS FREEDOM IN AMERICA 52–55, 134 (2008).

⁴⁷² Debates in the Convention of the Commonwealth of Massachusetts, on the Adoption of the Federal Constitution (Feb. 4, 1798), in 2 ELLIOT’S DEBATES, *supra* note 89, at 149.

⁴⁷³ THOMAS PAINE, COMMON SENSE 76 (Isaac Kramnick ed., Penguin Books 1983) (1776).

a powerful *French* Army, join'd by *Irish* Catholicks, under a bigotted *Popish* King!"⁴⁷⁴

Because Justice Scalia highlighted the John Marshall Court in his *McCreary* dissent,⁴⁷⁵ the historical record of the Court's first Chief Justice, John Jay,⁴⁷⁶ has special relevance. Jay, who objected to opening the First Continental Congress with prayer,⁴⁷⁷ "was widely known for his suspicion of all things Catholic."⁴⁷⁸ He "carried his suspicion of Catholicism into the sessions of the state convention which drafted the New York Constitution of 1777."⁴⁷⁹ In fact, he attempted to have the right to the free exercise of religion open to all, "*except the professors of the religion of the Church of Rome.*"⁴⁸⁰ Those individuals, according to Jay:

[O]ught not to hold lands in, or be admitted to a participation of the civil rights enjoyed by the members of this State, until such time as the said professors shall appear in the Supreme Court of the State, and there most solemnly swear that they verily believe in their consciences that no pope, priest, or foreign authority on earth has power to absolve the subjects of this State from their allegiance to the same. And farther, that they renounce, and believe to be false and wicked, the dangerous and damnable doctrine that the pope, or any other earthly authority, has power to absolve men from sins described in, and prohibited by, the Holy Gospel of Jesus Christ; and, particularly, that no pope, priest, or

⁴⁷⁴ See BENJAMIN FRANKLIN, *PLAIN TRUTH: OR, SERIOUS CONSIDERATIONS ON THE PRESENT STATE OF THE CITY OF PHILADELPHIA, AND PROVINCE OF PENNSYLVANIA* (Nov. 14, 1747), reprinted in 2 *THE WRITINGS OF BENJAMIN FRANKLIN, 1722–1750*, at 351–52 (Albert Henry Smith ed., 1970) (1907).

⁴⁷⁵ See discussion *supra* Part III.B.

⁴⁷⁶ *E.g.*, WALTER STAHR, *JOHN JAY: FOUNDING FATHER* 271–73 (2005).

⁴⁷⁷ See 1 *JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789*, at 26 n.1 (Worthington Chauncey Ford ed., 1904).

⁴⁷⁸ RICHARD B. MORRIS, *THE PEACEMAKERS: THE GREAT POWERS AND AMERICAN INDEPENDENCE* 298 (1965).

⁴⁷⁹ *Id.*

⁴⁸⁰ 1 HENRY FLANDERS, *THE LIVES AND TIMES OF THE CHIEF JUSTICES OF THE SUPREME COURT OF THE UNITED STATES* 212 (Philadelphia, Lippincott, Grambo & Co. 1855).

foreign authority on earth has power to absolve them from the obligation of this oath.⁴⁸¹

Although this passage was ultimately rejected,⁴⁸² Jay nevertheless was successful in infusing the document with his brand of religious discrimination by “persuad[ing] his colleagues to require naturalized persons to renounce ‘all allegiance’ to ‘every foreign king, prince, potentate, and state, in all matters, ecclesiastical as well as civil.’”⁴⁸³

In view of this pervasive anti-Catholicism, a profound fury arose when England passed its *Act for making effectual Provision for the Government of the Province of Quebec, in North America*.⁴⁸⁴ Otherwise known as the Quebec Act, this legislation “establish[ed] an absolute government and the Roman Catholic religion, throughout those vast regions that border on the westerly and northerly boundaries of *the free protestant English settlements*.”⁴⁸⁵ “Americans regarded [the Act] . . . as ‘intolerable.’”⁴⁸⁶ For example, the leaders of Suffolk County, Massachusetts felt “obliged to take all proper measure for [their] security” because the Act was extremely dangerous to Protestants “and to the civil rights and liberties of all America.”⁴⁸⁷ Similarly, the Declaration and Resolves of the First Continental Congress reflected the Protestant colonists’ great concern for the “tyranny” erected in Quebec.⁴⁸⁸

John Adams echoed these sentiments. He wrote that the act was “dangerous to the interests of the *Protestant* religion and of these Colonies, and ought to be repealed.”⁴⁸⁹ In an attempt to effectuate that repeal, the Continental Congress sought the support of the citizens of Britain, from

⁴⁸¹ *Id.*

⁴⁸² *Id.*

⁴⁸³ MORRIS, *supra* note 478.

⁴⁸⁴ See THE QUEBEC ACT (June 22, 1774), *reprinted in* DOCUMENTS OF AMERICAN HISTORY, *supra* note 119, at 74–76 (setting forth an edited version of the Quebec Act).

⁴⁸⁵ WILLS, *supra* note 116, at 361 (emphasis added).

⁴⁸⁶ See THE QUEBEC ACT (June 22, 1774), *reprinted in* DOCUMENTS OF AMERICAN HISTORY, *supra* note 119, at 74.

⁴⁸⁷ Suffolk Resolves 3 (1774), <http://www.nps.gov/mima/forteachers/upload/TheSuffolkResolves.pdf> (written in Suffolk County, Massachusetts, on September 9, 1774).

⁴⁸⁸ DECLARATION AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS (Oct. 14, 1774), *reprinted in* DOCUMENTS OF AMERICAN HISTORY, *supra* note 119, at 84.

⁴⁸⁹ John Adams, Original Draught of the Declaration of Rights and of Grievances, Made by the Congress of 1774 (1774), *in* 2 CHARLES FRANCIS ADAMS, *supra* note 432, at 540.

whom the colonists' anti-Catholicism spawned.⁴⁹⁰ Fearful that Canada's "daily swelling" of Catholic emigrants would reduce the "free Protestant Colonies to [a] state of slavery,"⁴⁹¹ the colonists wrote an official address as "affectionate *protestant* brethren."⁴⁹² The document reminded the people of Great Britain that Catholicism had "deluged your island in blood, and dispersed impiety, bigotry, persecution, murder and rebellion through every part of the world."⁴⁹³ They suggested that the people join "the ancient free *Protestant* Colonies"⁴⁹⁴ in railing against Parliament and the King, who supported the Catholics.⁴⁹⁵

The colonists' indignation over the Quebec Act was so strong and universal that some scholars argued it was among the most important factors galvanizing colonial support for the Revolutionary War.⁴⁹⁶ In fact, James Melvin claimed that the "principal cause" of the American Revolution "was the bigoted rage of the American Puritan and Presbyterian ministers at the concession of full religious liberty and equality to Catholics of French Canada."⁴⁹⁷

It is not difficult to appreciate how England's official recognition of Catholicism in Canada could spur a colonial revolt. The colonists so

⁴⁹⁰ See 1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 82 (Worthington Chauncey Ford ed., 1904). In England, Catholics were so despised they were even "disabled" from purchasing property. WILLIAM BLACKSTONE, *OF TITLE BY PURCHASE, AND FIRST BY ESCHEAT*, reprinted in 2 BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 242 (Wayne Morrison ed., 2001) ("Papists, lastly, and persons professing the popish religion . . . are by statute . . . disabled to purchase any lands, rents, or hereditaments; and all estates made to their use, or in trust for them, are void.").

⁴⁹¹ See 1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 88 (Worthington Chauncey Ford ed., 1904).

⁴⁹² See *id.* at 82, 100 (emphasis added).

⁴⁹³ *Id.* at 88.

⁴⁹⁴ *Id.* (emphasis added).

⁴⁹⁵ See *id.* at 100.

⁴⁹⁶ *E.g.*, CATHOLICS IN COLONIAL AMERICA, *supra* note 343, at 392 (noting that historians agree that the Quebec Act "constituted one of the major causes for the armed rebellion against British rule"). The passage of the Quebec Act was listed as one of the "Injuries and Usurpations" in the Declaration of Independence. See *supra* text accompanying note 444.

⁴⁹⁷ CHARLES H. METZGER, THE QUEBEC ACT: A PRIMARY CAUSE OF THE AMERICAN REVOLUTION 2 (1936) (quoting Cardinal Gasquet in 1912 in *Tablet*, a London periodical).

despised the Papists, that they prominently displayed “No Popery” signs,⁴⁹⁸ and had as “a regular colonial custom at the time of the Revolution that the Pope and the Devil were religiously burned on Guy Fawkes Day.”⁴⁹⁹ They harbored the “traditional fear and hatred of the Roman Church and of the Catholic French in Canada,”⁵⁰⁰ and their “pre-revolutionary literature [wa]s filled with denunciations of the . . . act of the British government, recognizing the Roman Catholic religion in the province of Quebec.”⁵⁰¹ As Melvin succinctly put it, “Hostility to the Catholic religion, was without any question, one of the causes of the American Revolution.”⁵⁰²

Admittedly, the colonists had to temper their religious prejudices to persuade the French Canadians to support their war effort.⁵⁰³ Nonetheless, official anti-Catholicism existed at some point in the laws of every colony,⁵⁰⁴ often persisting long after the revolutionary period.⁵⁰⁵ One manner of its expression relates directly to Justice Scalia’s reliance on the Northwest Ordinance.⁵⁰⁶ Justice Scalia cited the following sentence to show that Atheists can be “disregarded”: “Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be

⁴⁹⁸ American Archives, Account of the Meetings, <http://lincoln.lib.niu.edu/cgi-bin/amarch/getdoc.pl?var/lib/philologic/databases/amarch/.2045> (last visited Dec. 29, 2009).

⁴⁹⁹ See C. H. Van Tyne, *The Influence of the Clergy, and of Religious and Sectarian Forces on the American Revolution*, 19 AM. HIST. REV. 44, 60 (1913).

⁵⁰⁰ *Id.*

⁵⁰¹ *Id.* at 59.

⁵⁰² See METZGER, *supra* note 497, at 2 (citing Andrew A. Melvin, *Introduction to THE JOURNAL OF JAMES MELVIN, PRIVATE SOLDIER IN ARNOLD’S EXPEDITION AGAINST QUEBEC IN THE YEAR 1775*, at 19 (Andrew A. Melvin ed., 1902)).

⁵⁰³ See Richard H. Clarke, *A Noted Pioneer Convert of New England: Rev. John Thayer, 1785–1815*, 29 AM. CATH. Q. REV. 138, 150 (1904). George Washington’s general order of November 5, 1775 rebuked the “childish custom of burning the effigy of the Pope . . . at a time when we are soliciting and have already obtained the friendship and alliance of the people of Canada.” *Id.*

⁵⁰⁴ See discussion *supra* Parts IV.B–IV.C; see also Pyle & Davidson, *supra* note 398, at 66–68 (including a tabulated listing of the religious limitations throughout colonial America). In Connecticut, officeholders were required to take anti-Catholic oaths from 1662–1818, and everyone but Catholics were tolerated from 1689–1818. *Id.* at 68. Delaware excluded Catholics as representatives from 1734–1776. *Id.* at 67. Through 1789, only Protestants could vote or hold public office in Rhode Island. *Id.* at 68.

⁵⁰⁵ 5 Thorpe, *supra* note 72, at 2599–614.

⁵⁰⁶ See discussion *supra* Part III.E.

encouraged.”⁵⁰⁷ That verbiage is remarkably similar to the Massachusetts Bill of Rights of 1780: “[T]he several towns . . . and other bodies—politic or religious societies . . . [should provide for] the support and maintenance of public *Protestant* teachers of piety, religion, and morality.”⁵⁰⁸ Could Catholics also be “disregarded” then? The words in the Bill of Rights of Massachusetts, which was the second oldest colony, are at least as probative as the words of an ordinance controlling a largely unsettled, recently acquired territorial area.

When the statesmen of Massachusetts convened to consider ratifying the Federal Constitution eight years later, Amos Singletary worried that “a Papist, or an Infidel, was as eligible” as Protestant Christians to participate in government.⁵⁰⁹ Major T. Lusk “shuddered at the idea that Roman Catholics, Papists, and Pagans might be introduced into office, and that Popery and the Inquisition may be established in America.”⁵¹⁰ In

⁵⁰⁷ *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 887 (2005) (Scalia, J., dissenting).

⁵⁰⁸ MASS. CONST. of 1780, pt. I, art. III, in 3 Thorpe, *supra* note 72, at 1890 (emphasis added).

⁵⁰⁹ Debates in the Convention of the Commonwealth of Massachusetts, on the Adoption of the Federal Constitution (Jan. 19, 1788), in 2 ELLIOT’S DEBATES, *supra* note 89, at 44.

⁵¹⁰ Debates in the Convention of the Commonwealth of Massachusetts, on the Adoption of the Federal Constitution (Feb. 4, 1788), in 2 ELLIOT’S DEBATES, *supra* note 89, at 148. This quote and the last are not unique in placing Atheists and Catholics together among the religious minorities the Protestant majority deemed appropriate to “disregard” throughout our history. For instance, in 1701, the Protestants in Maryland were equally concerned that their fellow colonists might be “abandoned to Atheism and Infidelity” or “draw[n] over . . . to Popish Superstition and Idolatry.” See CHARTER OF THE SOCIETY FOR THE PROPAGATION OF THE GOSPEL IN FOREIGN PARTS (June 16, 1701), *reprinted in* 2 JAMES S. M. ANDERSON, THE HISTORY OF THE CHURCH OF ENGLAND, IN THE COLONIES AND FOREIGN DEPENDENCIES OF THE BRITISH EMPIRE 630, 752 (London, Gilbert & Rivington 1848). When John Adams noted, “The National Fast recommended by me turned me out of office Nothing is more dreaded than the National Government meddling with Religion,” Catholics and Atheists were among the minority religious groups he specified. See Letter from John Adams to Dr. Benjamin Rush (June 12, 1812), in OLD FAMILY LETTERS, *supra* note 237, at 392, 393. Even as late as the 1860s, American Protestants were blaming society’s ills on “atheists and infidels, communists and papists.” See NAT’L REFORM ASS’N, PROCEEDINGS OF THE NATIONAL CONVENTION TO SECURE THE RELIGIOUS AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES 5 (Philadelphia, Jas. B. Rodgers Co. 1872); *infra* notes 577–79 and accompanying text.

Pennsylvania, James Wilson, a future Supreme Court Justice⁵¹¹ (whom Justice Scalia referenced for support four times in *District of Columbia v. Heller*),⁵¹² bluntly stated he “wished that the Constitution had excluded Popish priests from offices.”⁵¹³ Likewise, William Lancaster of North Carolina felt “Papists” and “Mahometans” should be disqualified from holding office.⁵¹⁴ In short, even after the assistance of two Catholic countries during the Revolutionary War, France and Spain, “hatred and suspicion of Catholicism [remained] deep and widespread among Americans.”⁵¹⁵

D. The Persistence of Anti-Catholicism

Although Justice Scalia’s analysis focused mainly on the actions of the colonists during the founding of the nation, he wrote, “Nor have the views of our people on this matter significantly changed.”⁵¹⁶ He seems to be suggesting that the persistence of religious bigotry into the late eighteenth century further justifies “the disregard” of Atheists today. Therefore, it is both pertinent and instructive to note that the general prejudice against Catholics lasted until very recently.

As the new nation took hold, Catholics comprised less than one percent of the population.⁵¹⁷ With no significant political base, the people professing this faith remained a despised minority long after 1789. In 1827, “there were thirty religious newspapers engaged in vilifying the

⁵¹¹ *E.g.*, GUSTAVUS MYERS, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 151 (1912) (“[T]he most energetic, dominating member of the Supreme Court from 1789 to 1798 was James Wilson.”).

⁵¹² See 128 S. Ct. 2783, 2792–93, 2817, 2820 (2008).

⁵¹³ Debates in the Convention of the State of North Carolina, on the Adoption of the Federal Constitution (July 30, 1788), in 4 ELLIOT’S DEBATES, *supra* note 89, at 212.

⁵¹⁴ See *id.* at 215.

⁵¹⁵ See CATHOLICS IN COLONIAL AMERICA, *supra* note 343, at 443.

⁵¹⁶ *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 888 (Scalia, J., dissenting). Of course, “the views of our people,” which in this realm is more accurately stated as “the prejudices of our people,” are irrelevant for Establishment Clause purposes. “[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.” *Westside Cmty. Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990).

⁵¹⁷ See AMERICAN CATHOLICISM, *supra* note 340, at 21 (“Even as late as 1785, when the new United States contained nearly four million people, there were scarcely more than 25,000 Catholics.”). This is barely over one-half of one percent.

Catholic church.”⁵¹⁸ This only increased when Catholic immigration exploded⁵¹⁹ and bigotry’s ugly face became starkly apparent.

A prime example was when the Ursuline Convent in Charlestown, Massachusetts was looted and burned by a mob in 1834.⁵²⁰ Despite the fact that a number of other people were present, no one took any steps to stop the crime.⁵²¹ Moreover, numerous fire companies arrived to put out the fire, but they were “overruled by the great number of persons assembled . . . for the apparent purpose of encouraging and aiding the work of destruction.”⁵²² As a result, “[t]he mob continued their outrages until daybreak.”⁵²³ Various theories abound as to the actual cause of the incident.⁵²⁴ However, it is clear “a deep rooted and wide spread prejudice exist[ed] in our community against the Catholic faith and its forms.”⁵²⁵

This prejudice remained in the nation’s schools, as well. “Even prior to the arrival of the first waves of Catholic immigrants in the 1830s, the teaching of general knowledge was frequently a veiled (and sometimes hardly veiled) means of teaching against Catholicism.”⁵²⁶ In fact, the argument that giving aid to religious schools violated the Establishment Clause was not made until it was “a useful tool in the nativist campaign against Catholicism.”⁵²⁷ Tensions between Protestants and Catholics only intensified as “the huge influx of poor, non-Protestant immigrants” put pressure on the government to provide public education.⁵²⁸

⁵¹⁸ ROBERT LECKIE, *AMERICAN AND CATHOLIC* 104 (1970).

⁵¹⁹ See DANIEL J. TICHENOR, *DIVIDING LINES: THE POLITICS OF IMMIGRATION CONTROL IN AMERICA* 56 (2002) (“Surges of xenophobia accompanied robust immigration, with Catholic newcomers the most frequent targets of nativist hostility. The U.S. Catholic population grew sharply in the decades before the Civil War, thanks to Irish and German inflows.”).

⁵²⁰ *Burning of the Ursuline Convent at Charlestown*, *BALTIMORE PATRIOT*, Aug. 16, 1834 (on file with author).

⁵²¹ See *id.*

⁵²² *Id.*

⁵²³ *Atrocious Outrages*, *FARMER’S GAZETTE*, Aug. 22, 1834 (on file with author).

⁵²⁴ See, e.g. *id.*; *Burning of the Ursuline Convent at Charlestown*, *supra* note 520.

⁵²⁵ *Atrocious Outrages*, *supra* note 523.

⁵²⁶ TRACY FESSENDEN, *CULTURE AND REDEMPTION: RELIGION, THE SECULAR, AND AMERICAN LITERATURE* 67 (2007).

⁵²⁷ STEPHEN L. CARTER, *THE DISSENT OF THE GOVERNED: A MEDITATION ON LAW, RELIGION, AND LOYALTY* 128 (1998).

⁵²⁸ Robert P. Murphy, *The Origins of the Public School*, 48 *FREEMAN* 403, 403–04 (1998).

Anti-Catholicism was universal in the nation's classrooms between 1776 and the Civil War."⁵²⁹

In this period true religion is patently limited to Protestantism. Catholicism is depicted not only as a false religion, but as a positive danger to the state; it subverts good government, sound morals, and education. Condemnation is usually vociferous when dealing directly with the Roman Catholic religion, and in the treatment of Catholic countries as well.⁵³⁰

Citing example after example, the author of this passage noted that Catholicism "[wa]s regarded as a gigantic hoax and conspiracy."⁵³¹

Although the schools taught religious history and the evil of religious persecution,⁵³² any mention of Catholicism was negative. The church and clergy were "pictured as greedy for money,"⁵³³ and "[t]he only persecutions that [were] fully described [were] Catholic persecutions of Protestants."⁵³⁴ A "typical description" of the Inquisition, which was "mentioned in many Readers and in all of the Geographies until near the end of the [nineteenth] century,"⁵³⁵ was that this abject undertaking revealed "fully to the eyes of mankind the spirit and temper of the papal religion."⁵³⁶

These were the depictions which confronted the children of Catholic parents when they sent their young ones to the schools. Priests were described as being filled with "hypocrisy, personal immorality, and greed,"⁵³⁷ and as "slothful parasites living on the hard labor of the poor."⁵³⁸ In text after text, "[b]y a curious juxtaposition of clauses used to describe the people of Catholic countries, the reader [wa]s left with the impression

⁵²⁹ See RUTH MILLER ELSON, *GUARDIANS OF TRADITION: AMERICAN SCHOOLBOOKS OF THE NINETEENTH CENTURY* 46 (1964).

⁵³⁰ *Id.* at 47.

⁵³¹ *Id.* at 48.

⁵³² See generally *id.* at 41–44 (discussing the evolution of American schoolbooks' treatment of religion through the nineteenth century).

⁵³³ *Id.* at 48.

⁵³⁴ *Id.* at 49.

⁵³⁵ *Id.*

⁵³⁶ See J. L. BLAKE, *THE HISTORICAL READER* 230 (Rochester, Hoyt, Porter, & Co. 1832).

⁵³⁷ See ELSON, *supra* note 529, at 50.

⁵³⁸ *Id.*

that the Roman Catholic religion induces both ignorance and indolence.”⁵³⁹ In short, “[n]o theme in these schoolbooks before 1870 is more universal than anti-Catholicism,”⁵⁴⁰ and although “toleration in matters of religion [wa]s explicitly advocated as a desirable goal for the individual and the nation,”⁵⁴¹ that claim would be “contradicted by the rest of the book and exten[d] only to Protestant sects.”⁵⁴²

It was in this environment that the stage was set for a horrific episode known now as the Philadelphia Bible Riots. It occurred in the 1840s⁵⁴³ when the Catholics of the era—much as the Atheists of today⁵⁴⁴—sought to end governmental favoritism of a contrary majoritarian faith.⁵⁴⁵ Specifically, the Catholics objected to the public school system using the King James version of the Bible.⁵⁴⁶ Much as Monotheists currently contend that Atheists are trying to remove God from the public schools,⁵⁴⁷

⁵³⁹ *Id.* at 51.

⁵⁴⁰ *Id.* at 53.

⁵⁴¹ *Id.* at 55.

⁵⁴² *Id.*

⁵⁴³ *E.g.*, Vincent P. Lannie & Bernard C. Diethorn, *For the Honor and Glory of God: The Philadelphia Bible Riots of 1840*, 8 HIST. EDUC. Q. 44, 72–78 (1968).

⁵⁴⁴ *See, e.g.*, *Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437 (7th Cir. 1992) (challenging the constitutionality of a school district’s policy that required reciting the words “under God,” during a teacher-led recitation of the Pledge of Allegiance).

⁵⁴⁵ *See generally* Lannie & Diethorn, *supra* note 543, at 45–46 (discussing the Catholic population’s frustration with the education of their children in public, Protestant schools).

⁵⁴⁶ *See id.* at 49. Without trivializing the importance Protestants and Catholics place on the differences between their respective versions of the Bible, both versions are ultimately translations of the same original text. The basic religious notions found in the King James Bible are nowhere near as contrary to Catholic beliefs as clearly Monotheistic dogma is to the beliefs of an Atheist. This is noteworthy because it demonstrates a common occurrence: groups recognize the unfairness of “disregarding” others when they are being disregarded, but fail to see the discrimination once they have acquired the power to disregard. *Cf.* *Engel v. Vitale*, 370 U.S. 421, 427 (1962) (noting the “unfortunate fact of history” that the people who opposed establishing the Church of England established their own religion as the official religion of their colonies once they “found themselves sufficiently in control”). Notably, there was no distinction between private and public schools until the 1840s, when public funds no longer supported Catholic schools. Murphy, *supra* note 528, at 403.

⁵⁴⁷ *See, e.g.*, 149 CONG. REC. 6120 (2003) (statement of Rep. Renzi) (complaining of attempts by “hippie generation judges [to] impose their own sterile secular beliefs on the American people . . . by removing God from [the] classroom”).

the Protestant majority characterized the Catholic objection as “an insidious papist plot to remove the Bible from the public schools.”⁵⁴⁸

The Catholic counter to the Protestants’ contention that they were “tramp[ing] on *our* Bible”⁵⁴⁹ is similar to the arguments of today’s Atheists: they simply wanted to be treated equally.

Catholics desired the same freedom of conscience that others claimed for themselves. Protestants could very well teach their Biblical precepts in their churches and meeting houses. But “they should not make so exceptional a version [the King James Bible] a portion of the public creed; nor should they at all unite religious instruction with public education, which in this case necessarily assumes a sectarian hue.”⁵⁵⁰

The Protestant majority, largely organized under the so-called “Native American Movement,” was unpersuaded⁵⁵¹ and continued to assert that “the whole affair [was] a Catholic device to exclude the Bible from the schools and undermine the Christian, that is Protestant, and republican institutions of the United States.”⁵⁵² Consequently, a group of more than eighty ministers formed the American Protestant Association in 1842.⁵⁵³

⁵⁴⁸ See Lannie & Diethorn, *supra* note 543, at 51.

⁵⁴⁹ *Id.*

⁵⁵⁰ *Id.* at 52 (quoting CATHOLIC HERALD, Dec. 16, 1841). This debate and the debate surrounding the words “under God” in the Pledge of Allegiance in public schools are extraordinarily symmetrical. “Children were humiliated because of their religious faith . . . by some teachers in front of their fellow students,” and Protestants were urged to “guard against the assaults of papists on our free institutions . . .” Lannie & Diethorn, *supra* note 543, at 55. After all, “most Americans wanted Protestant public schools and . . . Catholics were not forced to attend these schools. In a republican country, it was a well-known fact that the majority always rules and that the minority must accept the majority decision.” *Id.* at 59. Interestingly, even then people recognized that “as long as the Bible remained in the schools there would always be religious controversy of one kind or another. As a result, [it was] recommended that the Scriptures be excluded ‘altogether from our system of scholastic instruction, with which they have no legitimate connection.’” *Id.* at 61 (quoting CATHOLIC HERALD, Feb. 16, 1843). In the 1840s, Protestants were ready to sacrifice others’ religious freedom. See *id.* at 54 (quoting CATHOLIC HERALD, Jan. 20, 1842). Today it is Monotheists.

⁵⁵¹ See John J. Kane, *Protestant-Catholic Tensions*, 16 AM. SOC. REV. 663, 663–64 (1951).

⁵⁵² Lannie & Diethorn, *supra* note 543, at 59.

⁵⁵³ *Id.* at 61.

The goal was to increase “circulation of books and tracts designed to expose the errors of popery.”⁵⁵⁴

Catholics of that era (as is the case for Atheists today) viewed the public school system (i.e., the government) as showing unequal respect for their religious views. As a result, tensions grew until the situation erupted into open warfare. In the United States, mobs of Catholics and Protestants attacked one another in the name of their respective religious callings,⁵⁵⁵ even though the Establishment Clause was designed to preclude government-fostered animosity.⁵⁵⁶ At least seventeen people were killed, and many churches and homes were destroyed.⁵⁵⁷

One might imagine that this gruesome sequence of events would be instructive for future generations. Yet in no way did the animus of the Protestant majority toward Catholics abate after the Bible Riots ended.⁵⁵⁸ After all, “[h]atred of Catholics . . . had been steadily growing in the United States for more than two centuries,”⁵⁵⁹ and “the American people [were] steeped in antipapal prejudice . . . well grounded before the first English settlement and . . . fostered by the events of the entire colonial period.”⁵⁶⁰ Thus, it is not surprising to learn of the anti-Catholic “Native American outburst of the 1840’s and the Know-Nothingism of the 1850’s,”⁵⁶¹ or that anti-Catholicism (as, once more, is the case with anti-Atheism today) “became a patriotic as well as religious concern.”⁵⁶²

Numerous respected individuals, such as Lyman Beecher (the father of Harriet Beecher Stowe,⁵⁶³ who spoke of Catholicism as “enslaving and

⁵⁵⁴ *Id.*

⁵⁵⁵ See Tracy Fessenden, *The Nineteenth-Century Bible Wars and the Separation of Church and State*, 74 *CHURCH HIST.* 784, 791 (2005).

⁵⁵⁶ See, e.g., Winton E. Yerby III, Comment, *Towards Religious Neutrality in the Public School Curriculum*, 56 *U. CHI. L. REV.* 899, 917–19 (1989).

⁵⁵⁷ *Id.*

⁵⁵⁸ See RAY ALLEN BILLINGTON, *THE PROTESTANT CRUSADE, 1800–1860: A STUDY OF THE ORIGINS OF AMERICAN NATIVISM* 238 (Quadrangle Books 1964) (1938) (citing the ongoing war with Mexico, a Catholic nation, and Catholics in the army being forced to attend Protestant religious services as examples of continued religious discrimination against the Catholics).

⁵⁵⁹ *Id.* at 1.

⁵⁶⁰ *Id.*

⁵⁶¹ *Id.*

⁵⁶² *Id.* at 2.

⁵⁶³ E.g., JOAN D. HEDRICK, *HARRIET BEECHER STOWE: A LIFE* 3 (1994).

terrible in its recorded deeds”⁵⁶⁴), and Samuel F. B. Morse (of telegraph fame, who characterized Catholics as “the wily enemies of our liberties,”⁵⁶⁵ and contrasted “Popery . . . a naked, odious Despotism”⁵⁶⁶ with “Our religion, the Protestant religion”⁵⁶⁷), were intent on maintaining the thunderous anti-Catholic rhetoric. That rhetoric only increased when New York’s Archbishop John Hughes spoke in 1850 at St. Patrick’s Cathedral, claiming that the Roman Catholic Church was planning “to convert all Pagan nations, and all Protestant nations . . . for our mission [is] to convert the world.”⁵⁶⁸ Protestant leaders argued in response that the Church of Rome “is a pure despotism; . . . a bad caricature of Christianity; . . . [and] far more heathen than Christian;”⁵⁶⁹ that “Catholicism is, and it ever has been, a bigoted, a persecuting, and a superstitious religion;”⁵⁷⁰ and that it is “a fraudulent conspiracy against the interests of God and humanity,”⁵⁷¹ which “now exists to subvert the most important and fundamental principles of the constitution of these United States and of every particular state in this Union.”⁵⁷²

Anti-Catholicism continued over the next decade as the “Know-Nothing” movement took root. Those within this exceedingly popular faction (which, in actuality, “was really a No-Popery party”),⁵⁷³ believed “that Papists should be barred from every office in the national, state, and local governments and, if possible, driven back to the priest-ridden lands

⁵⁶⁴ LYMAN BEECHER, A PLEA FOR THE WEST 134 (Cincinnati, Truman & Smith 1835).

⁵⁶⁵ See, e.g., ANTHONY FELDMAN & PETER FORD, SCIENTISTS & INVENTORS 122–27 (1979). See SAMUEL F. B. MORSE, FOREIGN CONSPIRACY AGAINST THE LIBERTIES OF THE UNITED STATES 64 (7th ed., New York, American and Foreign Christian Union 1855).

⁵⁶⁶ MORSE, *supra* note 565, at 96.

⁵⁶⁷ *Id.* at 97.

⁵⁶⁸ See BILLINGTON, *supra* note 558, at 290–91.

⁵⁶⁹ Nicholas Murray, Address at the Broadway Tabernacle (Jan. 15, 1851), in ANTI-CATHOLICISM IN AMERICA, 1841–1851: THREE SERMONS 342 (1977).

⁵⁷⁰ Richard Pike, Minister, Sermon at the Third Religious Society in Dorchester Church (July 16 & 30, 1854), in RICHARD PIKE, ROMANISM: A SERMON PREACHED IN THE CHURCH OF THE THIRD RELIGIOUS SOCIETY IN DORCHESTER, JULY 16 AND 30, at 10 (Boston, Crosby, Nichols, and Company 1854).

⁵⁷¹ EDWARD BEECHER, THE PAPAL CONSPIRACY EXPOSED, AND PROTESTANTISM DEFENDED, IN THE LIGHT OF REASON, HISTORY, AND SCRIPTURE 29 (Boston, Stearns & Co. 1855). Edward Beecher, Lyman Beecher’s son, understood the United States to be a Protestant Nation. *Id.* at 14.

⁵⁷² *Id.* at 399.

⁵⁷³ BILLINGTON, *supra* note 558, at 386.

from whence they had come.”⁵⁷⁴ Unified by hatred, the Know-Nothings triumphed in a series of political races.⁵⁷⁵ Only because of the internal divisions over the issue of slavery did they not become a major force in American politics.⁵⁷⁶

With continued denigration of Catholicism (such as that given in an 1859 book which asserted that the Catholic Church “has deluged the world with its floods of crimes—incest, perjuries, murders, extortions, concubinage, avarice, assassinations, tyranny, immoralities, and bloody persecutions”⁵⁷⁷), it was not long before a new Protestant organization came to the forefront. This one would come to be known as the National Reform Association, which eventually had as its president the Honorable William Strong, Associate Justice of the United States Supreme Court.⁵⁷⁸ Justice Strong, while serving in his judicial capacity, presided over a national convention that sought to have the Constitution reflect that:

- (1) A nation is the creature of God.
- (2) It is clothed with authority derived from God.
- (3) It owes allegiance to Jesus Christ, the appointed Ruler of nations.
- (4) It is subject to the authority of the Bible, the special revelation of moral law.⁵⁷⁹

Although the protections were written in terms of Christianity generally,⁵⁸⁰ no Catholics were included among the Association’s many founders and the General Secretary’s address to the Convention included the following:

⁵⁷⁴ *Id.*

⁵⁷⁵ *Id.* at 387. The Know-Nothings may have become a major political force in America if the issue of slavery had not divided the party. *See id.* at 430.

⁵⁷⁶ *Id.*

⁵⁷⁷ POPE, OR PRESIDENT? STARTLING DISCLOSURES OF ROMANISM AS REVEALED BY ITS OWN WRITERS 9 (New York, R. L. Delisser 1859).

⁵⁷⁸ *See, e.g.,* NAT’L REFORM ASS’N, *supra* note 510, at 1 (“In the absence of Justice Strong, of Washington, President of the National Association, the Convention was called to order by one of the Vice-Presidents . . .”).

⁵⁷⁹ *Id.*

⁵⁸⁰ *See id.* at 5 (“It was the attack of enemies of our common Christianity upon the Christian features of our national life that struck the alarm, and sounded the rallying cry
(continued)

No thoughtful citizen can be ignorant of the assault made upon every religious act and observance in our national life. Avowed *atheists and infidels, communists and papists*, uniting like Herod and Pilate, have been plotting and working for years to expel religion from our schools, and turn our Sabbath into a holiday for revelry and parade.⁵⁸¹

As the Catholic population grew in the nineteenth century,⁵⁸² anti-Catholicism became a key aspect of the nation's presidential races. For instance, Speaker of the House James Blaine, the author of the "Blaine Amendment,"⁵⁸³ was a prime contender to be the Republican Party nominee for the presidential election of 1876.⁵⁸⁴ A concern was that his mother was a Catholic, and "[i]f, in an era when nativism was strong, Blaine could be proved to belong to the Catholic Church, his career would be irretrievably ruined."⁵⁸⁵ Although that concern was not the only reason Blaine lost his primary bid to Rutherford B. Hayes in that election,⁵⁸⁶ the fact is Hayes' ultimate victory, in which he defeated Democratic candidate Samuel Tilden,⁵⁸⁷ resulted largely from "a winning combination of anti-Catholicism and a pro-pan-Protestant public school ideology."⁵⁸⁸

which has drawn together many of the best citizens of our land, and banded them in this Association.").

⁵⁸¹ *Id.* (emphasis added). This quote is another example wherein the Protestant majority has placed Atheists and Catholics together among those who can be "disregarded." See *supra* note 546 and accompanying text.

⁵⁸² See *supra* note 519 and accompanying text.

⁵⁸³ See JAMES W. FRASER, *BETWEEN CHURCH AND STATE: RELIGION AND PUBLIC EDUCATION IN A MULTICULTURAL AMERICA* 106–07 (1999). The proposed "Blaine Amendment" would have prohibited any governmental funds to be used for religious teaching in the public schools. This was a major concern because Catholics—largely in response to the continued use of the King James version of the Bible—had developed a strong network of religious schools, and Protestants were upset by "the use of tax dollars to support Catholic parochial schools." See *id.* at 107.

⁵⁸⁴ See MARK WAHLGREN SUMMERS, *RUM, ROMANISM, & REBELLION: THE MAKING OF A PRESIDENT, 1884*, at 185 (2000).

⁵⁸⁵ Sister Marie Carolyn Klinkhamer, *The Blaine Amendment of 1875: Private Motives for Political Action*, 42 *CATH. HIST. REV.* 15, 28–29 (1956).

⁵⁸⁶ See JAMES P. BOYD, *LIFE AND PUBLIC SERVICES OF HON. JAMES. G. BLAINE* 528–29 (n.p., Publishers' Union 1893).

⁵⁸⁷ SUMMERS, *supra* note 584, at 27–29.

⁵⁸⁸ FRASER, *supra* note 583, at 107.

Anti-Catholicism was also part of the election of 1884. Blaine garnered the Republican nomination that year and was favored to win against his Democratic opponent, Grover Cleveland.⁵⁸⁹ However, Blaine's lead evaporated when he failed to respond to a minister's comment, "Rum, Romanism, and Rebellion," at one of his own campaign events.⁵⁹⁰ With many "Catholics in his own family,"⁵⁹¹ "Blaine could not control the damage" that came in the wake of the insulting alliteration,⁵⁹² which became an oft-repeated slogan during the campaign.⁵⁹³ Largely as a result of this matter, Blaine, a non-Catholic himself, lost his second presidential bid.⁵⁹⁴

The founding era prejudice against Catholics persisted into the twentieth century. Authors referenced "the Roman passion for universal domination" and characterized Catholicism as a "revolting piece of stage work, [where] . . . men were brought into superstitious obedience"⁵⁹⁵ with little fear of backlash.⁵⁹⁶ When the Catholic Governor of New York, Al Smith, ran for the presidency in 1928, people questioned the propriety of a Catholic chief executive.⁵⁹⁷ To fight this religious prejudice, Smith relied on the Constitution: "I believe in the absolute separation of Church and State."⁵⁹⁸

Smith faced extreme bigotry, marked not only by burning crosses,⁵⁹⁹ but also by the assistant attorney general of the United States urging a convention of Methodist ministers "to enlist the 600,000 members of their church in Ohio in the war against Smith, the Roman Catholic."⁶⁰⁰ Groups

⁵⁸⁹ See SUMMERS, *supra* note 584, at 162–63, 289.

⁵⁹⁰ See *id.* at 283.

⁵⁹¹ *Id.* at 284.

⁵⁹² *Id.* at 283.

⁵⁹³ See *id.* at 285.

⁵⁹⁴ See *id.* at 285, 287; see also Klinkhamer, *supra* note 585, at 29–30 (discussing Blaine's unknown religious affiliation).

⁵⁹⁵ JOHN JAY CHAPMAN, NOTES ON RELIGION 6 (1915).

⁵⁹⁶ *Id.* at 7.

⁵⁹⁷ See MATTHEW JOSEPHSON & HANNAH JOSEPHSON, AL SMITH: HERO OF THE CITIES 357–359 (1969). Interestingly, as is the case with Atheists today, it was "the Bible belt" that a Catholic feared in the 1920s. *Id.* at 360 (quoting Franklin D. Roosevelt's advice to the Democratic candidate).

⁵⁹⁸ *Id.* at 365–66.

⁵⁹⁹ *Id.* at 380–81, 387.

⁶⁰⁰ *Id.* at 382. This might be considered in light of the religious myopia demonstrated by Alberto Gonzalez, while serving as Attorney General for President George W. Bush. In
(continued)

such as the Fellowship Forum sought to raise the fears of Protestants that “the Roman Catholic church in the United States [was engaged in an] effort to ‘make America Catholic.’”⁶⁰¹ Despite the fact he was considered “a God-fearing man,”⁶⁰² shouts of “[h]e’s a damned Catholic,” and a volley of eggs and tomatoes” were met during the politicking.⁶⁰³ Not surprisingly, Smith lost.⁶⁰⁴

It was not until 1960, nearly two full centuries after the secular Constitution was written, that John F. Kennedy overcame the nation’s deeply embedded anti-Catholic religious bigotry and reached the Oval Office.⁶⁰⁵ Presumably, Justice Scalia, who was twenty-four years old and studying law at Harvard at the time,⁶⁰⁶ is aware that religion was a major issue during Kennedy’s campaign. Polls showed that one out of every four voters would refuse to vote for a Catholic even if he were “generally well-qualified.”⁶⁰⁷ Recognizing the significance of this religious issue, Kennedy chose to meet the anti-Catholic mobilization head-on.⁶⁰⁸ In a speech to a Protestant group in Texas, he stated: I believe in an America where the separation of church and state is absolute . . . Finally, I believe in an

announcing a new “First Freedom Project,” dedicated “to even greater enforcement of religious rights *for all Americans*,” Alberto Gonzalez acknowledged, “Religious liberty is not confined to . . . the followers of one set of beliefs. It is a *universal right . . . for all people*.” Alberto R. Gonzales, U.S. Attorney Gen., Dep’t of Justice, Prepared Remarks made at the Meeting of the Executive Committee of the Southern Baptist Convention (Feb. 20, 2007), *available at* www.justice.gov/archive/ag/speeches/./ag_speech_070220.html (emphases added). Yet, while pledging to counter the bigot who would “impose his views on others,” he began his announcement with “Most Americans believe in God” and concluded it with “May God bless you all, may He continue to guide and watch over you, and may He continue to bless the United States of America.” *Id.*

⁶⁰¹ FELLOWSHIP FORUM, PROOF OF ROME’S POLITICAL MEDDLING IN AMERICA 7 (1927).

⁶⁰² *E.g.*, JOSEPHSON & JOSEPHSON, *supra* note 597, at 392.

⁶⁰³ *Id.* at 391.

⁶⁰⁴ *See id.* at 397–400.

⁶⁰⁵ *See, e.g., id.* at 393–94.

⁶⁰⁶ *See, e.g.*, BRISBIN, JR., *supra* note 429, at 15 (stating Antonin Scalia was a top student at Harvard Law School between 1957 and 1960).

⁶⁰⁷ *E.g.*, GEORGE H. GALLUP, 3 THE GALLUP POLL: PUBLIC OPINION, 1935–1971, at 1574 (William P. Hansen & Fred L. Israel eds., 1972) (September 1958 poll). The same poll showed that three out of every four voters would refuse to vote for a “generally well-qualified” Atheist. *Id.* at 1576.

⁶⁰⁸ W. H. Lawrence, *Kennedy Assures Texas Ministers of Independence*, N.Y. TIMES, Sept. 13, 1960, at 1.

America where religious intolerance will someday end—where all men and all churches are treated as equal.”⁶⁰⁹

Although Kennedy barely squeaked by in his election against Richard Nixon,⁶¹⁰ he soon developed enormous popularity that only increased with his tragic assassination in 1963.⁶¹¹ After Kennedy’s term, one might expect that our society’s anti-Catholic bias would finally have been extinguished. Yet remnants still exist, even among academics academics and at the highest levels of government. In a 1974 article, for instance, a Brigham Young University professor examined the backgrounds of America’s intellectuals and concluded that, unlike Protestants and Jews, “Roman Catholics are extremely low producers of scientists and scholars.”⁶¹²

Just a decade ago, anti-Catholicism raised its head again. In the nation’s Congress, after more than two centuries of exclusively Protestant chaplains, a Catholic was finally named to the post in the House of Representatives.⁶¹³ The resulting hostility was so great that Speaker of the House Denny Hastert stated, “[I]n all my years in this Congress, I have never seen a more cynical and more destructive political campaign.”⁶¹⁴ The controversy, he continued, “looks a lot like war and it has an ugly face.”⁶¹⁵

V. CONCLUSION

In reviewing the history of the religion clauses of the Constitution, one can take two paths. One supports the basic ideal underlying our

⁶⁰⁹ John F. Kennedy, Senator, Address at the Greater Houston Ministerial Association Conference (Sept. 12, 1960), *in Id.* at 22. Then-Senator Kennedy also stated, “I would not look with favor upon a President working to subvert the First Amendment’s guarantees of religious liberty.” *Id.*

⁶¹⁰ *E.g.*, ALICE V. MCGILLIVRAY, RICHARD M. SCAMMON & RHODES COOK, AMERICA AT THE POLLS, 1960–2000: JOHN F. KENNEDY TO GEORGE W. BUSH: A HANDBOOK OF AMERICAN PRESIDENTIAL ELECTION STATISTICS 1 (Alice V. McGillivray & Richard M. Scammon eds., 2001).

⁶¹¹ *See, e.g.*, Sabra Bissette Ledent, *John F. Kennedy*, *in* THE ENCYCLOPEDIA OF AMERICAN POLITICAL HISTORY 617–18 (Paul Finkelman & Peter Wallenstein eds., 2001).

⁶¹² Kenneth R. Hardy, *Social Origins of American Scientists and Scholars*, 185 SCIENCE 497, 505 (1974).

⁶¹³ *See* Hanna Rosin, *Priest Adjusts to Call of the House*, WASH. POST, Aug. 29, 2000, at A15.

⁶¹⁴ 146 CONG. REC. 3479 (2000).

⁶¹⁵ *Id.*

constitutional framework: equality, which is inclusive and is based on respect for all religious opinions. The other leads to exclusion by advocating for one or more non-universal religious views. The first reflects the Framers' goals for guaranteeing liberty to all. The other guarantees liberty only to those who muster the political might to use the state's machinery to advocate for their religious beliefs. The first exists to protect every individual. The other focuses on the fact that the white, male, property-owning Framers believed in God, and thus concludes that the magnificent document they created "permits the disregard" of religious minorities with alternative beliefs.

Why would anyone choose that latter path? Why go out of the way to "permit the disregard" of a minority when such a notion is nowhere to be found within the text of the Constitution, and a historical reading can as readily and more nobly support the equality principle? What sort of American patriot, citizen, or public servant would work towards such an end?

Presumably, Justice Scalia did not write his *McCreary* dissent with a conscious intention to discriminate. On the contrary, one can feel confident that the Justice acted with what he believes is a noble goal that stemmed from his intellectual honesty. However, "[i]ntellectual honesty does not exclude a blinding intellectual bias."⁶¹⁶

If the academic literature is any guide, a blinding intellectual bias is precisely what led to Justice Scalia's *McCreary* opinion. As of this writing, twelve academicians have written law review articles commenting on the "permits the disregard" quote as it relates to Establishment Clause principles.⁶¹⁷ *Not one* has supported Justice Scalia's claim. On the

⁶¹⁶ *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 117 (2007) (Scalia, J., dissenting).

⁶¹⁷ See Mary Jean Dolan, *Why Monuments are Government Speech: The Hard Case of Pleasant Grove City v. Summum*, 58 CATH. U. L. REV. 7, 8 (2008); Amit Patel, *The Orthodoxy Opening Predicament: The Crumbling Wall of Separation Between Church and State*, 83 U. DET. MERCY L. REV. 195, 223 (2006); Steven G. Gey, *Vestiges of the Establishment Clause*, 5 FIRST AMEND. L. REV. 1, 54 (2006); Laura S. Underkuffler, *Through a Glass Darkly: Van Orden, McCreary, and the Dangers of Transparency in Establishment Clause Jurisprudence*, 5 FIRST AMEND. L. REV. 59, 72 (2006); Christopher L. Eisgruber, *Justice Stevens, Religious Freedom, and the Value of Equal Membership*, 74 FORDHAM L. REV. 2177, 2184 (2006); Jay D. Wexler, *Too Much, Too Little: Religion in the Public Schools*, 6 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 107, 111 (2006); Thomas B. Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 NW. U. L. REV. 1097, (continued)

contrary, one finds Justice's viewpoint described as "overt, invidious discrimination" and a "strain of religious bigotry."⁶¹⁸ Is it not disappointing to acknowledge that a Justice is willing to "repudiate the idea that all . . . are entitled to equal concern and respect under the Constitution"?⁶¹⁹

It is time for all members of the United States Supreme Court to understand that this nation has no "subordinate and inferior class of beings."⁶²⁰ The Constitution definitely does not "permi[t] the disregard of devout Atheists" or of any other "class of beings" defined by religious, racial, ethnic, or similar qualities. The only thing that marvelous document permits the disregard of—no, demands the disregard of⁶²¹—is any claim made to the contrary.

1113 (2006); Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725, 755 (2006); Richard M. Esenberg, *You Cannot Lose If You Choose Not to Play: Toward a More Modest Establishment Clause*, 12 ROGER WILLIAMS U. L. REV. 1, 15 (2006); Vincent Phillip Munoz, *Thou Shalt Not Post the Ten Commandments? McCreary, Van Orden, and the Future of Religious Display Cases*, 10 TEX. REV. L. & POL. 357, 373 (2006); Edward J. Eberle, *Religion in the Classroom in Germany and the United States*, 81 TUL. L. REV. 67, 91 (2006); Garrett Epps, *Some Animals Are More Equal than Others: The Rehnquist Court and "Majority Religion"*, 21 WASH. U. J.L. & POL'Y 323, 343 (2006).

⁶¹⁸ Edward J. Eberle, *Religion in the Classroom in Germany and the United States*, 81 TUL. L. REV. 67, 91 (2006); Steven G. Gey, *Vestiges of the Establishment Clause*, 5 FIRST AMEND. L. REV. 1, 54 (2006).

⁶¹⁹ See Christopher L. Eisgruber, *Justice Stevens, Religious Freedom, and the Value of Equal Membership*, 74 FORDHAM L. REV. 2177, 2184 (2006).

⁶²⁰ *Dred Scott v. Sanford*, 60 U.S. 393, 404–05 (1856).

⁶²¹ "Government being, among other purposes, instituted to protect the persons and consciences of men from oppression it certainly is the duty of rulers, not only to abstain from it themselves, but, according to their stations, to prevent it in others." Letter from George Washington, President, to Religious Society Called Quakers (Oct. 1789), in 12 THE WRITINGS OF GEORGE WASHINGTON 168 (Jared Sparks ed., Boston, Ferdinand Andrews 1838).

