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 Jefferson

I. INTRODUCTION

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

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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.


12 Id.


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.

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. The analysis shows that the United States of America was born of a literal hatred for Catholics. 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, Justice Scalia’s position that he is “inclined to adhere closely to the plain meaning of a text,” even in the face of apparently contrary legislative history, 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.”

Despite the foregoing, Justice Scalia is also the foremost “originalist,” 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).
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”).
suited 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.
26 Of course, the effect of a governmental establishment of religion is that it tends to keep the religious majority from ever becoming “transient.”
27 Id. at n.1.
28 See U.S. CONST. amend. I (emphasis added).
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”).
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,” 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”) is no different than it is today. This conclusion also follows the technique Justice Scalia advocated in his District of Columbia v. Heller 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. 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.”

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:

(1) Settlement; fixed state.

32 2 J O H N A S H , T H E N E W A N D C O M P L E T E D I C T I O N A R Y O F T H E E N G L I S H L A N G U A G E (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.
35 Id. at 2790–91.
36 U.S. C O N S T , art. IV, § 3, cl. 2.
(2) Confirmation of something already done; ratification.
(3) Settled regulation; form; model . . .
(4) Foundation; fundamental principle . . .
(5) Allowance; income; salary.

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.” In its present tense, the verb “establish” is used five times: to “establish Justice,” “establish this Constitution,” “establish an uniform Rule of Naturalization,” “establish Post Offices and post Roads,” and “inferior Courts as the Congress may from time to time ordain and establish.” “Established” is used once: “Officers of the United States, whose Appointments . . . shall be established by Law.” 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.” 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
as interlarding the Pledge of Allegiance with “under God,” or choosing “In God we trust” to serve as the nation’s official motto, 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,” and “the protestant Succession as by law established” 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). 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. 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.”

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.

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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”?  

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.

Similarly, the word’s eighteenth century usage oft 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. 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).” Atheists did not profess faith, engage in worship, or have churches.

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.

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54 1 JOHNSON, supra note 37.
56 Id.
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.  

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.  

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.” In fact, all First Amendment rights embrace a concomitant negative of that right. Freedom of the press includes the right not to publish; “[f]reedom of association . . . plainly presupposes a freedom not to associate”; 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.

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58 2 JOHNSON, supra note 37.
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, 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 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 society. 66

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

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65 319 U.S. 624 (1943).
66 Id. at 645 (Murphy, J., concurring) (emphasis added).
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

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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.
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 every person and persons may, from byrne to byrne, and at all bymes hereafter, freely and fully have and enjoy 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’ 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.” 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.” Similarly, when New York amended its constitution in 1777, “the liberty of conscience” modified “the free exercise and enjoyment of religious profession and worship.” Although not one of the original thirteen colonies, Vermont also highlighted “the rights of conscience” in its free exercise clause. In the New Hampshire Constitution of 1784, “the RIGHTS OF CONSCIENCE” introduced the clauses pertaining to “religious worship.”

“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).

“The free exercise and enjoyment of religious profession and worship” was referenced as “liberty of conscience” in the South Carolina Constitution of 1790. 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.”

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.” Similarly, Elisha Williams wrote, “Every man has an equal Right to follow the Dictates of his own Conscience in the Affairs of Religion.”

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.” 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. For instance, when religious freedom was addressed in Virginia, there was commentary on “[f]reedom of conscience,” “liberty of conscience,” and “the free exercise of religion,

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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).
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).
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 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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{99}

Of course, the Framers did not ultimately include that phrase in the First Amendment’s text.\textsuperscript{100} However, that does not diminish the importance of how those statesmen conceptualized religious liberty. For example, in his famous letter to the Hebrew Congregation of Newport, Rhode Island, George Washington stated, “All possess alike liberty of conscience and immunities of citizenship.”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{103} James Madison, after having noted how the imprisonment of men “for publishing their religious sentiments” had rendered him “without common patience,”

\textsuperscript{97} 1 U.S. HOUSE JOURNAL, 1st Cong., 1st sess. 85 (Aug. 21, 1789) (emphasis added).
\textsuperscript{98} 1 U.S. SENATE JOURNAL, 1st Cong., 1st sess. 63 (Aug. 25, 1789) (emphasis added).
\textsuperscript{99} Id. at 70 (Sept. 3, 1789) (emphasis added).
\textsuperscript{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.”).
\textsuperscript{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.” 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.” 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.”

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

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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 despitful 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
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

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110 Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), in 8Jefferson, 1801–1806, supra note 1, at 311.
111McCreary 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.
male dominion. 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; (ii) throughout the colonies, denying the existence of God was a criminal offense; and (iii) any understanding of the natural world was rudimentary at best. Thus, with “disbelief in God . . . scarcely more plausible than disbelief in gravity” when the Constitution was being written, 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. 498 (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 CREEED 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, or Native Americans, whose religious beliefs the English settlers specifically came to alter. 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 . . . ,” 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 the form of Presidential oath prescribed by Art. II, §

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 ascendency. 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.

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.’... This claim, which has been parroted by numerous “authorities,” is apparently a complete myth. Not one of the contemporaneous accounts of the 1789 inaugural event indicate that President Washington, who had presided over the Constitutional Convention that created the oath, said anything except the words prescribed in Article II at either of his two inaugurations. Nor is there any reliable contemporaneous account that “so help me God” was uttered at any of the next twenty-four inaugurations. 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).
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

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127 See id.
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)).
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...
Thus, we see that laws implemented at the founding can be completely inconsistent with the principles of the Constitution as it is understood today. 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,” McCrory 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.


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, and it was present in a number of state constitutions. Washington himself, who presided at the Constitutional Convention, took a number of oaths ending in “so help me God,” such as the one to become a vestryman. 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. Thus, even if he had appended “so help me God” to


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.


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”).


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. 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.”

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.

In the 1780s, Virginia was one of the most powerful colonies in the fledgling nation. 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 punisher of the evil.’” The Framers specifically rejected this effort.

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.


151 Virginia Independent Chronicle, The Society of Western Gentlemen Revise the Constitution, reprinted in 9 The Documentary History of the Ratification of the
Another powerful colony, Pennsylvania, was where, in 1787, the delegates to the Federal Constitutional Convention met. 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 . . . .” The delegates to the Philadelphia Convention, however, did not follow that template. 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.”

In addition to the Federal Constitution excluding a religious test for office, the document had something previously unheard of: a clearly enunciated prohibition against such a test. 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.


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.”

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, which is the latter part of Chief Justice Marshall’s thirty-five year tenure. 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.

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

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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))).


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. 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. 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 hight [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. (continued)
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. Like the absence of “so help me God” in the presidential oath of office, the absence of government-sponsored religion ought to be probative, especially when one contemplates the warning given by the “Father of the Constitution”:

[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

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?  

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. In the Second Circuit, those words are no longer required, 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.

2. A Counter to Justice Scalia’s Approach

By May 12, 1790, President Washington filled the six Supreme Court justiceships created by the Judiciary Act of 1789. The bench

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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.\textsuperscript{175} Of these men, only Iredell spoke during the ratification debates about religion as it pertained to the federal government.\textsuperscript{176} Justice Iredell, whose tenure at the high court began nearly a decade before James Marshall’s appointment,\textsuperscript{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.”\textsuperscript{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?\textsuperscript{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,\textsuperscript{180} agreed

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\textsuperscript{175} Members of the Supreme Court, \textit{supra} note 166.

\textsuperscript{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.


\textsuperscript{177} See Members of the Supreme Court, \textit{supra} note 166.

\textsuperscript{178} James Iredell, Remarks at the Debate in North Carolina Ratifying Convention (July 30, 1788), in \textit{5 The Founders’ Constitution} 89, 90 (Philip B. Kurland & Ralph Lerner eds., 1987).

\textsuperscript{179} See discussion \textit{supra} Part III.B.

\textsuperscript{180} See, \textit{e.g.}, Luther Martin, Attorney-General of Maryland, Member of Constitutional Convention, Address to the House of Delegates of Maryland, \textit{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
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”).


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).


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.


possibility of establishing this influence, as a pillar of government, is totally precluded” in the United States.\footnote{Id. at 155.} 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.”\footnote{James Madison, Address to the Convention of Virginia (June 12, 1788), in 3 ELLIOT’S DEBATES, supra note 89, at 330.} 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.”\footnote{McCready County v. ACLU of Ky., 545 U.S. 844, 900 (2005) (Scalia, J., dissenting).}

It must be emphasized once more that these statements were made before the First Congress met or the Bill of Rights was even proposed.\footnote{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).} 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.\footnote{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.}

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 \textit{Marsh v.}
Chambers 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.”

One can begin by noting the suspect nature of the continued validity of Marsh. 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.” 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.” In other words, the Act covered the salaries of all congressional employees, including the congressmen. Thus, it was

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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).
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.”

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. Surely, if Madison had contended that legislative chaplains were constitutional, his words would have been prominently displayed throughout Chief Justice Burger’s majority opinion. However, Madison did not agree. Accordingly, he was relegated to a footnote, where the Chief Justice wrote, “Madison expressed doubts concerning the chaplaincy practice.”

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

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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.


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.\textsuperscript{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 . . . ”\textsuperscript{207} In view of such an unequivocal declaration, to say, “Madison expressed doubts,” is disingenuous at best.

2. \textit{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.\textsuperscript{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


\textsuperscript{207} Id.

\textsuperscript{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. 1, 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. XXXIV, 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,\textsuperscript{214} the Framers were certainly aware of that phrase, which they could readily have used as a template.\textsuperscript{215} Yet they did not do this.\textsuperscript{216} No religious test was ever required.\textsuperscript{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.”\textsuperscript{218}

Meanwhile, the members present:

\begin{quote}
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)
\end{quote}

\begin{footnotes}
\end{footnote}

\begin{footnote}{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.”).
\end{footnote}

\begin{footnote}{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.
\end{footnote}

\begin{footnote}{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.
\end{footnote}

\begin{footnote}{218} I Annals of Cong. 101 (Joseph Gales ed., 1834).
\end{footnote}
\end{footnotes}
in the presence of Almighty GOD, that I will support the Constitution of the United States. So help me God.”

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). Following the command of that article, the two references to God were removed. 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. 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.” 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.” 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 . . .”, 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{228} Additionally, there was still that tendency of elected officials to “raise constitutional ideals one day and turn their backs on them the next.”\textsuperscript{229}

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

\textsuperscript{226}Id. at 886–87 (Scalia, J., dissenting) (citations omitted).
\textsuperscript{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.
\textsuperscript{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.
\textsuperscript{229}Lee v. Weisman, 505 U.S. 577, 626 (1992) (Souter, J., concurring); see supra text accompanying note 201.
\textsuperscript{230}See 3 ANNALS OF CONG. 1416 (January 1, 1795) (providing the proclamation in which Washington declared “a Day of Thanksgiving and Prayer”).
\textsuperscript{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.\textsuperscript{232} Thus, there was no Establishment Clause to violate when President Washington issued this religious decree.

2. \textit{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.”\textsuperscript{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.”\textsuperscript{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 discouraged . . . .\textsuperscript{235}

\textsuperscript{232} See \textit{Bill of Rights}, supra note 193, at xxii.

\textsuperscript{233} John Adams, Proclamation (March 23, 1798), \textit{reprinted in} 1 \textit{James D. Richardson, A Compilation of the Messages and Papers of the Presidents, 1789–1897}, at 269 (Authority of Congress 1900) (1897).

\textsuperscript{234} John Adams, Proclamation (March 6, 1799), \textit{reprinted in} \textit{id.}, at 285.

\textsuperscript{235} \textit{Philadelphia Aurora}, May 9, 1788, \textit{reprinted in} \textit{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. 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.”

Thomas Jefferson, the nation’s third president, 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, was the result of his desire to explain why he would “not proclaim fastings & thanksgivings, as my predecessors did.” 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 meddling with religious institutions, their doctrines, discipline, or

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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.


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


242 PRESIDENTS OF THE UNITED STATES, supra note 236.

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


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”).

of his presidency. His successor concluded that the American people “dread” this sort of government-sponsored religious activity, and they will express their disapproval at the polls. 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.” The fourth president, known as “The Father of the Constitution,” specifically determined that such proclamations are “no[t] part of the trust delegated to political rulers.” And then the practice ended for almost half a century, until revived by the sixteenth president during the Civil War. 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, which formally put an end to the Revolutionary War. To govern part of this settlement, the Northwest Territory Ordinance was promulgated. 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”).
252 See supra text accompanying notes 245–46.
being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”  

One should immediately note that the Ordinance speaks of “religion,” not God. Nevertheless, the members of the First Congress believed in God and likely assumed “religion” incorporated belief in God. However, virtually all of those men also believed in Protestant Christianity and likely assumed the “religion” of the United States incorporated Protestant, as opposed to Catholic, tenets as well. 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. 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.

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

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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).


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')\textsuperscript{263} was part of the “articles of compact, between the original States and the people and States in the said territory.”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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

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

\textsuperscript{264} The Northwest Territorial Government (1787), in 2 Thorpe, supra note 72, at 960.

\textsuperscript{265} The Northwest Territorial Government, art. I (1787), in 2 id., at 961.

\textsuperscript{266} McCreary County, 545 U.S. at 887 (Scalia, J., dissenting).

owning other human beings. 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.”

In 1493, after Columbus’s “discovery” of America, Pope Alexander VI extended the slave trade to the New World with his Papal Bull, Inter caetera. This ecclesiastical sanction gave Europeans the authority, “[u]nder the cover of Christian morality, . . . to ship millions of slaves to the New World.”

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.” 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.” In fact, for nearly another century people contended that “the system of negro slavery . . . is a divine institution.” 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 of this Response, an understanding of these historical facts is crucial to any discussion of the legitimacy of slavery.

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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).


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


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)).


\(^{280}\) 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).
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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. Of those states, five discarded the Ordinance’s allusion to “religion” as being necessary for education as they came into existence. Moreover, three of those states had laws that specifically withdrew taxpayer support for religion. 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.” 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;


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, pmbl., in 5 id., at 2901; see, e.g., ILL. CONST. OF 1818, pmbl., 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, pmbl., 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.\textsuperscript{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.”\textsuperscript{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),\textsuperscript{291} is a testament to the Framers’ wisdom.\textsuperscript{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;\textsuperscript{293} and

\begin{footnotesize}
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\item[\textsuperscript{289}] Ohio Const. of 1802, art. VIII, § 3, in 5 id., at 2910.
\item[\textsuperscript{290}] McCreary County v. ACLU of Ky., 545 U.S. 844, 887 (2005) (Scalia, J., dissenting) (emphasis added).
\item[\textsuperscript{291}] See id. at 894–900 & n.3 (Scalia, J., dissenting).
\item[\textsuperscript{292}] U.S. Const. amend I.
\item[\textsuperscript{293}] See discussion supra Part III.C (analyzing Congress’s removal of references to God in oaths taken by state congresses).
\end{itemize}
\end{footnotesize}
(ii) Everyone who spoke on the subject agreed that the Constitution gave “not a particle of spiritual jurisdiction” and “not a shadow of right” to the federal government to involve itself at all in religious matters;

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.” Although Justice Scalia is undoubtedly correct when he stated that “the deity the Framers had in mind . . . is inescapably the God of monotheism,” 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.” 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).
[sic] others differ from them it is so far error.\textsuperscript{300} That God exists is no more “truth” than any other religious claim.\textsuperscript{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 beliefs\textsuperscript{302}—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 Independence\textsuperscript{303} and delegate to the Connecticut state ratifying convention,\textsuperscript{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.”\textsuperscript{305} Yet he abandoned his efforts after recognizing his preferred clause was “so difficult and dubious to get inserted.”\textsuperscript{306}

The anti-Federalist, Samuel,\textsuperscript{307} similarly wrote on January 10, 1788:

\begin{quote}
[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,
\end{quote}

\textsuperscript{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.”).
\textsuperscript{302} McCreary County, 545 U.S. at 885 (Scalia, J., dissenting).
\textsuperscript{303} See THE DECLARATION OF INDEPENDENCE (U.S. 1776), reprinted in 1 DOCUMENTS OF AMERICAN HISTORY, supra note 119, at 102.
\textsuperscript{305} Letter from William Williams to Mr. Babcock (Feb. 11, 1788), reprinted in ESSAYS ON THE CONSTITUTION, supra note 148, at 208.
\textsuperscript{306} Id.
that God will reject us, from that self government, we have obtained thro’ his divine interposition.\footnote{308 Id. at 195 (emphasis added) (footnote omitted).}

Samuel’s warning was discounted, as was that of Luther Martin (one of Maryland’s delegates to the Constitutional Convention\footnote{309 STANFIELD, supra note 304, at 5, tbl. III.} and attorney general of that state for three decades)\footnote{310 See id. at 51.}. 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.”\footnote{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. McCrory County v. ACLU of Ky., 545 U.S. 844, 894 (2005) (Scalia, J., dissenting).} 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,\footnote{312 STANFIELD, supra note 304, at 108.} wrote on this subject a week after James Madison first proposed a Bill of Rights in the First Congress.\footnote{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).} 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.”\footnote{314 Letter from Benjamin Rush to John Adams (June 15, 1789), in 1 LETTERS OF BENJAMIN RUSH, supra note 313, at 517.} 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.”\footnote{315 U.S. CONST. amend. I.} These were the words ratified by the states.\footnote{316 1 ANNALS OF CONG. 947–48 (Joseph Gales ed., 1834).}
Additionally, there is the voice of the people. In the election of 1800, Thomas Jefferson’s detractors attempted to use his views of religion as a reason to vote against him. 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!!?”

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).


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

Southeastern Pennsylvania v. Casey, 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.

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

In Dred Scott, the Supreme Court decided by a 7-2 majority that African Americans could not be United States citizens and that Congress could not prohibit slavery. This resulted in declaring the Missouri Compromise of 1820 unconstitutional. 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.

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.” According to Justice Scalia, this led to a Supreme Court “covered with dishonor and deprived of legitimacy.”

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

Like Justice Scalia, Chief Justice Taney was a Catholic. In fact, he was the only Catholic to serve on the Supreme Court in the institution’s first 100 years. 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. 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.”

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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.


333 *Id.* at 119.


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.”

A Catholic such as Justice Scalia ought to be especially cognizant of this notion because the antipathy towards Catholicism at the nation’s founding was extensive and profound. Statements such as Elisha Williams’, “Popery is so far from deserving the name of Religion, that it is rather a Conspiracy against it,” were so frequently heard that one historian referenced anti-Catholicism as “the deepest bias in the history of the American people.” 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.” 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. With that church having “attained a complete and unchallenged mastery over the affairs of men,” the Pope “assumed universal dominion in church and

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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).
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.\textsuperscript{344} Thus, King Alfonso V of Portugal was able to obtain “Cum diversas” by appropriately patronizing Pope Nicholas V.\textsuperscript{345} This papal bull authorized the King to send ships to Africa,\textsuperscript{346} thereby claiming the land and possessions of the native people for himself.\textsuperscript{347} Additionally, this religious edict allowed for the enslavement of that continent’s inhabitants,\textsuperscript{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.\textsuperscript{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.\textsuperscript{350} This was quite lucrative for the clergy, who accumulated great wealth.\textsuperscript{351} The zeal with which these men began

\begin{footnotes}
\item[344] \textit{James Bicheno, A Glance at the History of Christianity, and of English Nonconformity} 7–8 (Newbury, B. Fuller 1798).
\item[345] See Viotti da Costa, \textit{supra} note 269, at 45. In other sources “Cum diversas” is given as “Dum diversas.”
\item[346] “In the course of time the term [\textit{bulla}] 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, \textit{Bulls and Briefs, in The Catholic Encyclopedia} (Robert Appleton Company 3d ed. 1908) (1907), available at http://www.newadvent.org/cathen/03052b.htm.
\item[347] See Viotti da Costa, \textit{supra} note 269, at 45.
\item[348] See id. at 45–46.
\item[350] See generally \textit{Bicheno, supra} note 344 (claiming that the kingdoms of Europe became corrupt and “gave their power to the beast”).
\item[351] \textit{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.”).
\end{footnotes}
devoting themselves to their extensive holdings in property and material goods—combined with their support for such matters as slavery and the Inquisition—stimulated criticisms by men like Martin Luther, ultimately leading to the Protestant reformation in the early sixteenth century. 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.”

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. 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. In 1534, the monarch was declared “sole and supreme head of the church of England, next and immediately under Christ.”

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

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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.
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.
362 Id. at 191.
attempted to restore England to the Catholic faith. In so doing, she was responsible for the torture and execution of numerous Protestants, earning her the sobriquet, “Bloody Mary.” In the end, this terrible period of persecution was a lethal blow to English Catholicism.

Elizabeth, the product of Henry VIII’s union with Anne Boleyn, succeeded Mary in 1558. Elizabeth reigned for four and a half decades, during which time she returned the kingdom not only to Protestantism, but also to anti-Catholicism. Although Catholicism episodically made slight inroads back into British society under some of the Stuart monarchs between 1603 and 1688, Catholics became increasingly disenfranchised as the Church of England became increasingly powerful. Certain pieces

363 See id.
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 ABJURATION 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 (continued)
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.” Since 1688, when James II (the last English ruler to harbor pro-Catholic feelings) was defeated and exiled in the “Glorious Revolution,” 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.

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

\begin{quote}
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.\textsuperscript{378}
\end{quote}

\textbf{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.”\textsuperscript{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.”\textsuperscript{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,\textsuperscript{381} they had no compunction about persecuting Catholics in the land they settled.\textsuperscript{382} In centuries was revived, reinforced, and raised to higher virulence by the combination of Irish immigration, Irish political nationalism, and the Evangelical revival.”).

\textsuperscript{376} \textit{See} Act against Popery, 1700, 11 Wil. 3, cap. 4 (Eng.).
\textsuperscript{377} \textit{See} \textit{id}.  
\textsuperscript{378} \textit{BARTOLOME DE LAS CASAS, POPERY AND SLAVERY DISPLAY’D} 3 (Thomas Harris trans., London, printed for C. Corbett 4th ed. 1745).
\textsuperscript{379} \textit{SECOND CHARTER OF VIRGINIA} (1609), \textit{in} 7 Thorpe, \textit{supra} note 72, at 3802.  
\textsuperscript{380} \textit{See} \textit{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).  
\textsuperscript{381} \textit{See, e.g.}, \textit{CHESTER GILLIS, ROMAN CATHOLICISM IN AMERICA} 52 (1999).  
\textsuperscript{382} \textit{See} \textit{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 \textit{(continued)
fact, the land grant under which they came to the North American shores required that “all persons who sho’d pass in any voyage to the said country sho’d take the Oath of Supremacy, which was meant to exclude Papists from settling in America.”  

Not long after, they began banishing anyone ordained by papal authority and implemented a death sentence should such a person return despite banishment.

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), evidenced anti-Catholic bias. Williams wrote to the governor of Connecticut in 1660 of “the common enemy, the Romish wolf,” 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.”

William Penn is another early colonist famous for bringing religious freedom to the North American continent. Yet, in his “Select Works,” he wrote an entire thirty-seven page treatise titled, “A Seasonable Caveat Against Popery.” Penn wrote that Catholicism was unparalleled in its “stupid superstition,. . . brutish zeal,” and “inhuman and barbarous moniker because they “wanted to ‘purify’ the church of all traces of Roman Catholicism.”

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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.


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.” He further noted, “That religion hath proved the greatest thief in nature.” 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.” In 1679, when “Penn’s society was shot through with anti-Catholic prejudice,” he created a “test” for citizens to “secure your selves from Papists.” The test required individuals to state, “I do firmly believe, that the Present Communion of the Roman-Catholic Church is both Superstitious and Idolatrous.” Although official anti-Catholicism was suspended temporarily, it soon returned and Catholics “were barred from holding office after 1705.” That restriction lasted three quarters of a century.

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. 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. 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.” With such an icy welcome, the Calvert clan moved on to Maryland, where the famous “Act of Religious Toleration” was promulgated in 1649. Yet even in that setting, the tide of anti-

391 *Id.* at 88.
392 *Id.* at 83.
393 *Id.* at 88–89.
395 See *id.* at 133.
396 *Id.* at 133–34.
397 Catholics in Colonial America, *supra* note 343, at 373.
399 See Catholics in Colonial America, *supra* note 343, at 22.
400 See *id.*
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.”

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.”

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. When James II’s reign ended in 1688, “[n]o issue aroused the suspicions and ignited the passions . . . more than the fear of Roman Catholicism.” 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.” 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.”

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).” New Hampshire’s legislature also gave “liberty of conscience to all persons except Papists.” Similarly, Georgia’s Charter of 1732 exhibited an explicit “disregard” for Catholic rights: “[A]ll persons

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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.
406 Id.
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).
inhabiting...our...province...except papists shall have a free exercise of their religion.”

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. The book detailed many of the atrocities committed in the name of religion over the two centuries preceding its writing. However, the only atrocities narrated were those the Catholic Church perpetrated. It was “[n]o wonder that...there grew up a horror and detestation of the pope and the Romish Church.” For each person who left England to settle in the New World, “it was a part of his creed to hate the pope.”

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. He presented his vision of the new institution to New York society in a series of essays titled, *Remarks on our Intended COLLEGE*. In *Remarks*, he spoke of the need to respect religious diversity to avoid “a Nursery of

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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.
Animosity, Dissention and Disorder.  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.”  Although the new university would “be founded on the Plan of a general Toleration,” it would only “admit Persons of all protestant Denominations.”

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.”  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.”  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,” he was considered to harbor “rabid anti-Catholicism.”  One must wonder if an analogous “rabid” antipathy is evidenced in statements such as “the Establishment Clause . . . permits the disregard of devout atheists.”

At Harvard University, where Justice Scalia earned his law degree, 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

\[^{420}\text{LIVINGSTON, supra note 419, at 178.}\]
\[^{421}\text{Id. at 176.}\]
\[^{422}\text{See id. at 182–83.}\]
\[^{423}\text{Id. at 178 (emphasis added).}\]
\[^{424}\text{Id. at 183.}\]
\[^{425}\text{Employment Div. v. Smith, 494 U.S. 872, 877 (1990) (internal citations omitted).}\]
\[^{426}\text{LIVINGSTON, supra note 419, at 178.}\]
\[^{427}\text{McCAUGHEY, supra note 419, at 10.}\]
\[^{428}\text{McCreary County v. ACLU of Ky., 545 U.S. 844, 893 (2005) (Scalia, J., dissenting).}\]
\[^{429}\text{E.g., RICHARD A. BRISBIN, JR., JUSTICE ANTONIN SCALIA AND THE CONSERVATIVE REVIVAL 12 (1997).}\]
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.”

Dudley’s bequest is “the oldest endowed lecture at Harvard” and is highly regarded. 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.” It was not until 1911 that the authorities at Harvard saw fit to eliminate the blatant anti-Catholicism from the Dudleian lectureship. 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.

Containing the Freshest Advices Foreign and Domestick, New York Mercury, Sept. 23, 1754 (on file with author).

430 Charles H. Metzger, Catholics and the American Revolution: A Study in Religious Climate 7 (1962) (citation omitted) [hereinafter Catholics and the American Revolution].


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.

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.

The French and Indian War was actually just one component of the Seven Years War. This conflict (with theaters in Europe, India, Africa, and the Caribbean) was, in essence, the first World War, with Protestant England battling Catholic France. To the colonists, it was “a crusade against French papists” 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, the 1774 Articles of Association, the Declaration of the Causes and Necessity of Taking Up Arms, and in the Declaration of Independence itself.

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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.
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—to added to the “indoctrination of Puritan Morality” that existed in New England’s educational institutions:

Abhor that arrant whore of Rome,
And all her blasphemies,
And drink not of her cursed cup;
Obey not her decrees.\textsuperscript{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.”\textsuperscript{455} He opined that Catholicism “reduce[ed] . . . minds to a state of sordid ignorance and staring timidity” and chained human nature “in a cruel, shameful, and deplorable servitude.”\textsuperscript{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.”\textsuperscript{457} To Adams, Catholic beliefs were “nonsense and delusion” and “dangerous in society.”\textsuperscript{458} “[F]rom a pope down to priests and friars and confessors . . . [Catholics were] necessarily and essentially a sordid, stupid, and wretched herd . . . .”\textsuperscript{459}

Another pivotal revolutionary patriot was John Adams’ cousin, Samuel Adams. Referenced as the “Patriarch of Liberty”\textsuperscript{460} and the “Father of the American Revolution,”\textsuperscript{461} Samuel Adams was a leader of the Boston Tea Party\textsuperscript{462} and served in numerous official roles, including delegate to the Continental Congress, President of the Massachusetts State Senate, and Massachusetts governor.\textsuperscript{463} In addition to signing both the Declaration of Independence and the Articles of Confederation,\textsuperscript{464} he played a primary

\textsuperscript{454} \textit{Ford}, supra note 449, at 90. Ford’s history of the \textit{New England Primer} includes many facsimiles of original material appearing in the \textit{New England Primer}, including Rogers’ poem.

\textsuperscript{455} \textit{John Adams, A Dissertation on the Canon and Feudal Law} (1765), \textit{reprinted in The Political Writings of John Adams: Representative Selections} 12 (George A. Peek, Jr. ed., 1954).

\textsuperscript{456} \textit{Id.} at 5–6.

\textsuperscript{457} \textit{See id.} at 8–9.

\textsuperscript{458} \textit{See id.} at 9.

\textsuperscript{459} \textit{Id.} at 9–10.

\textsuperscript{460} Letter from Thomas Jefferson to Samuel Adams (Mar. 29, 1801), \textit{in 33 The Papers of Thomas Jefferson, 17 February to 30 April 1801}, at 487 (Barbara B. Oberg ed., 2006).

\textsuperscript{461} \textit{E.g., Mark Puls, Samuel Adams: Father of the American Revolution} 14 (2006).

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

\textsuperscript{463} \textit{E.g., id.} at 154–55, 212, 225.

\textsuperscript{464} \textit{E.g., id.} at 188, 208 (citation omitted).
role in protesting against the Stamp Act.\textsuperscript{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”\textsuperscript{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,\textsuperscript{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.”\textsuperscript{468} James Madison believed the worst form of government was rooted in the “Papal System.”\textsuperscript{469} William Livingston warned of “the sanguinary and antichristian Church of Rome.”\textsuperscript{470} Isaac Backus, a Baptist minister who was a fervid religious freedom advocate and a member of the Massachusetts ratifying convention,\textsuperscript{471} spoke of “Popery” as a “tyrannical way of worship.”\textsuperscript{472} In Thomas Paine’s extraordinarily popular pamphlet, \textit{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.”\textsuperscript{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

\textsuperscript{465} See, e.g., \textit{id.} at 47–48.
\textsuperscript{466} \textit{CATHOLICS IN COLONIAL AMERICA, supra} note 343, at 387.
\textsuperscript{467} See discussion \textit{supra} Part III.A.
\textsuperscript{470} \textit{WILLIAM LIVINGSTON, REMARKS ON OUR INTENDED COLLEGE IN NEW YORK—SHALL IT BE SECTARIAN OR UNSECTARIAN?} (Independent Reflector, Mar. 22, 1753), reprinted in \textit{5 ECCLESIASTICAL RECORDS: STATE OF NEW YORK} 3339 (1905).
\textsuperscript{472} Debates in the Convention of the Commonwealth of Massachusetts, on the Adoption of the Federal Constitution (Feb. 4, 1798), in 2 \textit{Eliot’s Debates, supra} note 89, at 149.
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

475 See discussion supra Part III.B.
479 Id.
foreign authority on earth has power to absolve them from the obligation of this oath.\footnote{481} Although this passage was ultimately rejected,\footnote{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.’”\footnote{483} In view of this pervasive anti-Catholicism, a profound fury arose when England passed its \textit{Act for making effectual Provision for the Government of the Province of Quebec, in North America}.\footnote{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.”\footnote{485} “Americans regarded [the Act] . . . as ‘intolerable.’”\footnote{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.”\footnote{487} Similarly, the Declaration and Resolves of the First Continental Congress reflected the Protestant colonists’ great concern for the “tyranny” erected in Quebec.\footnote{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.”\footnote{489} In an attempt to effectuate that repeal, the Continental Congress sought the support of the citizens of Britain, from

whom the colonists’ anti-Catholicism spawned.\textsuperscript{490} Fearful that Canada’s “daily swelling” of Catholic emigrants would reduce the “free Protestant Colonies to [a] state of slavery,”\textsuperscript{491} the colonists wrote an official address as “affectionate protestant brethren.”\textsuperscript{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.”\textsuperscript{493} They suggested that the people join “the ancient free Protestant Colonies”\textsuperscript{494} in railing against Parliament and the King, who supported the Catholics.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{497}

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

\textsuperscript{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.”).

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

\textsuperscript{492} See id. at 82, 100 (emphasis added).

\textsuperscript{493} Id. at 88.

\textsuperscript{494} Id. (emphasis added).

\textsuperscript{495} See id. at 100.

\textsuperscript{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.

despised the Papists, that they prominently displayed “No Popery” signs, 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.” They harbored the “traditional fear and hatred of the Roman Church and of the Catholic French in Canada,” 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.” As Melvin succinctly put it, “Hostility to the Catholic religion, was without any question, one of the causes of the American Revolution.”

Admittedly, the colonists had to temper their religious prejudices to persuade the French Canadians to support their war effort. Nonetheless, official anti-Catholicism existed at some point in the laws of every colony, often persisting long after the revolutionary period. One manner of its expression relates directly to Justice Scalia’s reliance on the Northwest Ordinance. 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

500 Id. at 59.
501 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)).
502 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.
503 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.
504 5 Thorpe, supra note 72, at 2599–614.
505 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

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 Justice\(^\text{511}\) (whom Justice Scalia referenced for support four times in District of Columbia v. Heller),\(^\text{512}\) bluntly stated he “wished that the Constitution had excluded Popish priests from offices.”\(^\text{513}\) Likewise, William Lancaster of North Carolina felt “Papists” and “Mahometans” should be disqualified from holding office.\(^\text{514}\) 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.”\(^\text{515}\)

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.”\(^\text{516}\) 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.\(^\text{517}\) 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

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\(^{511}\) 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.” This only increased when Catholic immigration exploded 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. Despite the fact that a number of other people were present, no one took any steps to stop the crime. 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.” As a result, “[t]he mob continued their outrages until daybreak.” Various theories abound as to the actual cause of the incident. However, it is clear “a deep rooted and wide spread prejudice exist[ed] in our community against the Catholic faith and its forms.”

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.” 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.” 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.

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

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.

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

Although the schools taught religious history and the evil of religious persecution, any mention of Catholicism was negative. The church and clergy were "pictures of greed for money," and "[t]he only persecutions that [were] fully described [were] Catholic persecutions of Protestants." 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," was that this abject undertaking revealed "fully to the eyes of mankind the spirit and temper of the papal religion."

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,” and as “slothful parasites living on the hard labor of the poor.” 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.”

In short, “[n]o theme in these schoolbooks before 1870 is more universal than anti-Catholicism,” and although “toleration in matters of religion [was] explicitly advocated as a desirable goal for the individual and the nation,” that claim would be “contradicted by the rest of the book and extend[d] only to Protestant sects.”

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 1840s when the Catholics of the era—much as the Atheists of today—sought to end governmental favoritism of a contrary majoritarian faith. Specifically, the Catholics objected to the public school system using the King James version of the Bible. Much as Monotheists currently contend that Atheists are trying to remove God from the public schools,

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539 Id. at 51.
540 Id. at 53.
541 Id. at 55.
542 Id.
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.
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 unpersuaded\(^{551}\) 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.\(^{553}\)

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\(^{548}\) 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.”

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, even though the Establishment Clause was designed to preclude government-fostered animosity. At least seventeen people were killed, and many churches and homes were destroyed.

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. After all, “[h]atred of Catholics . . . had been steadily growing in the United States for more than two centuries,” 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.” Thus, it is not surprising to learn of the anti-Catholic “Native American outburst of the 1840’s and the Know-Nothingsm of the 1850’s,” or that anti-Catholicism (as, once more, is the case with anti-Atheism today) “became a patriotic as well as religious concern.”

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

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554 Id.
557 Id.
559 Id. at 1.
560 Id.
561 Id.
562 Id. at 2.
terrible in its recorded deeds,” and Samuel F. B. Morse (of telegraph fame, who characterized Catholics as “the wily enemies of our liberties,” and contrasted “Popery . . . a naked, odious Despotism” with “Our religion, the Protestant religion”\(^{566}\)), 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-Nothings” 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).


\(^{566}\) 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).


\(^{572}\) Id. at 399.

\(^{573}\) Billington, supra note 558, at 386.
from whence they had come." Unified by hatred, the Know-Nothings triumphed in a series of political races. Only because of the internal divisions over the issue of slavery did they not become a major force in American politics.

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"), 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. 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.

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

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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.
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.\textsuperscript{581}

As the Catholic population grew in the nineteenth century,\textsuperscript{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,”\textsuperscript{583} was a prime contender to be the Republican Party nominee for the presidential election of 1876.\textsuperscript{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.”\textsuperscript{585} Although that concern was not the only reason Blaine lost his primary bid to Rutherford B. Hayes in that election,\textsuperscript{586} the fact is Hayes’ ultimate victory, in which he defeated Democratic candidate Samuel Tilden,\textsuperscript{587} resulted largely from “a winning combination of anti-Catholicism and a pro-pan-Protestant public school ideology.”\textsuperscript{588}

which has drawn together many of the best citizens of our land, and banded them in this Association.”\textsuperscript{581}

\textsuperscript{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.

\textsuperscript{582} See supra note 519 and accompanying text.

\textsuperscript{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.

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


\textsuperscript{586} See JAMES P. BOYD, LIFE AND PUBLIC SERVICES OF HON. JAMES G. BLAINE 528–29 (n.p., Publishers’ Union 1893).

\textsuperscript{587} SUMMERS, supra note 584, at 27–29.

\textsuperscript{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. 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. With many “Catholics in his own family,” “Blaine could not control the damage” that came in the wake of the insulting alliteration, which became an oft-repeated slogan during the campaign. Largely as a result of this matter, Blaine, a non-Catholic himself, lost his second presidential bid.

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” with little fear of backlash. When the Catholic Governor of New York, Al Smith, ran for the presidency in 1928, people questioned the propriety of a Catholic chief executive. To fight this religious prejudice, Smith relied on the Constitution: “I believe in the absolute separation of Church and State.”

Smith faced extreme bigotry, marked not only by burning crosses, 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.” Groups

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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.””

Despite the fact he was considered “a God-fearing man,” shouts of “‘[h]e’s a damned Catholic,’ and a volley of eggs and tomatoes” were met during the politicking. Not surprisingly, Smith lost.

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. Presumably, Justice Scalia, who was twenty-four years old and studying law at Harvard at the time, 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.”

Recognizing the significance of this religious issue, Kennedy chose to meet the anti-Catholic mobilization head-on. 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.”

E.g., Josephson & Josephson, supra note 597, at 392.

See id. at 397–400.

See, e.g., id. at 393–94.

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

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.

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

Although Kennedy barely squeaked by in his election against Richard Nixon,\textsuperscript{610} he soon developed enormous popularity that only increased with his tragic assassination in 1963.\textsuperscript{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 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.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{614} The controversy, he continued, “looks a lot like war and it has an ugly face.”\textsuperscript{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

\textsuperscript{609} John F. Kennedy, Senator, Address at the Greater Houston Ministerial Association Conference (Sept. 12, 1960), in \textit{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.” \textit{Id.}


\textsuperscript{611} See, \textit{e.g.}, Sabra Bissette Ledent, \textit{John F. Kennedy, in The Encyclopedia of American Political History} 617–18 (Paul Finkelman & Peter Wallenstein eds., 2001).


\textsuperscript{614} 146 CONG. REC. 3479 (2000).

\textsuperscript{615} \textit{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.”

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. 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.” 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?”

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.” The Constitution definitely does not “permit[ ] 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 of—is any claim made to the contrary.


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).