

## “MR. SCALIA’S NEIGHBORHOOD”: A HOME FOR MINORITY RELIGIONS?

ANTONY BARONE KOLENC<sup>†</sup>

### INTRODUCTION

Justice Antonin Scalia may be the most outspoken and persuasive voice of the new conservative majority on the United States Supreme Court. With the departures of Chief Justice William Rehnquist and Justice Sandra Day O’Connor—replaced by Chief Justice John Roberts and Justice Samuel Alito—the strength of Scalia’s influence has grown, with some predicting that Scalia “may well command a majority of the Court in the very near future.”<sup>1</sup>

Legal scholars are bracing for a significant shift in the Court’s First Amendment Establishment Clause jurisprudence.<sup>2</sup> There, Justice Scalia has been a vocal critic for over two decades, arguing for the demise of the much-maligned *Lemon* test<sup>3</sup> and a greater tolerance for religion in the public arena. Scalia’s articulate vision in this area could be the opening shots in a “revolution in Establishment Clause jurisprudence—a wholesale rethinking of the constitutional relationship between church and state.”<sup>4</sup>

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<sup>†</sup> Antony B. Kolenc, Major, USAF (J.D., University of Florida College of Law) is an attorney with the United States Air Force Judge Advocate General’s Corps. The views expressed in this Article are those of the author and do not reflect the official policy or position of the U.S. Air Force, Department of Defense, or the U.S. Government.

<sup>1</sup> Thomas B. Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 N.W. U. L. REV. 1097, 1103 (2006).

<sup>2</sup> The Establishment Clause states that “Congress shall make no law respecting an establishment of religion.” U.S. CONST. amend. I.

<sup>3</sup> See generally Marcia S. Alembik, *The Future of the Lemon Test: A Sweeter Alternative for Establishment Clause Analysis*, 40 GA. L. REV. 1171, 1173–74 (2006) (discussing the history and future of the *Lemon* test).

<sup>4</sup> Colby, *supra* note 1, at 1098; see also Vikram Amar & Alan Brownstein, *How Will the Roberts Court Interpret the Establishment Clause?: The Consequences of a Shift Away from Justice O’Connor’s “Endorsement” Test for Government-Sponsored*

But Justice Scalia's relentless criticism in this area has caused his critics to fear the worst. Some accuse Scalia—a devout Roman Catholic—of “distorting the historical record in order to shoehorn his personal faith into civic life.”<sup>5</sup> Others allege he is playing politics by catering to the “agenda of the religious right,” and aiding “the Republican Party in its aggressive push to win the support” of key voters.<sup>6</sup> Most significantly, Scalia's detractors believe that if his brand of Establishment Clause jurisprudence carries the day, adherents of minority religions will “become potted plants, shunted to the side as marginal citizens. . . . What a scary, un-American place it would be, living in Scalia's America.”<sup>7</sup>

This Article will address these criticisms and examine how “scary” it would be living under Scalia's model of the Establishment Clause. Part I of the Article will briefly introduce Justice Scalia, the controversial cultural icon and acclaimed jurist. Part II will explore the philosophical divide that separates Scalia from his critics. Parts III through V—the lion's share of the Article—will answer the criticisms leveled against Scalia by comparing the freedoms that minority religions would enjoy under Scalia's approach with those under a “separationist” model. The Article will illustrate these differences by visiting a hypothetical town governed by Scalia's model of the Constitution: “Mr. Scalia's Neighborhood.”<sup>8</sup>

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*Displays of Religious Messages and Symbols*, FINDLAW, Oct. 27, 2006, [http://writ.lp.findlaw.com/commentary/20061027\\_brownstein.html](http://writ.lp.findlaw.com/commentary/20061027_brownstein.html) [hereinafter Amar & Brownstein, *How Will the Roberts Court Interpret the Establishment Clause?*] (predicting Alito's replacement of O'Connor will shift the Court to a “coercion” test in Establishment Clause cases).

<sup>5</sup> Robyn E. Blumner, *Scalia's Scary America*, ST. PETERSBURG TIMES, July 3, 2005, at 5P.

<sup>6</sup> See Colby, *supra* note 1, at 1138–39. Professor Erwin Chemerinsky (Irmas Professor of Public Interest Law, Legal Ethics, and Political Science at the University of Southern California), a self-defined “liberal” who is “not a fan of Justice Scalia's work on the Supreme Court,” has accused Scalia of bias and “reading into the Constitution his own conservative political values.” *Transcript of the University of Hawaii Law Review Symposium: Justice Scalia and the Religion Clauses*, 22 U. HAW. L. REV. 501, 502–03, 505 (2000) [hereinafter *Hawaii Transcript*].

<sup>7</sup> Blumner, *supra* note 5.

<sup>8</sup> The image of “Mr. Scalia's Neighborhood” is a (perhaps poor) spin-off of the beloved and long-running children's television show *Mr. Rogers' Neighborhood*, starring Fred Rogers, which is still broadcast on the Public Broadcasting System (“PBS”). See PBS Kids—Mister Rogers' Neighborhood Home Page, <http://pbskids.org/rogers> (last visited July 27, 2007).

## I. JUSTICE SCALIA: POP ICON AND (IN)FAMOUS JURIST

There can be no doubt that Justice Scalia has connected with the American public in a way virtually unparalleled in the history of the Supreme Court. His views on issues such as the judiciary, abortion, and affirmative action have won him the devotion and derision that embody America's modern cultural struggles. His uniquely devoted fans have created websites in his honor, extolling his conservative voice and offering him "worship."<sup>9</sup> His most cynical detractors, seeing him as mean-spirited and disingenuous, offer Americans the opportunity to express their hatred for Scalia even on the bumpers of their vehicles.<sup>10</sup>

But whether you love him or hate him, it is crucial to understand Justice Scalia and his influence on the Court in order to evaluate the direction in which he may take the Establishment Clause.

A. *Remarkable Man*

Antonin Scalia is "the embodiment of the American dream."<sup>11</sup> He hails from a strong immigrant Italian heritage.<sup>12</sup> An only child, Scalia was born in Trenton in 1936; he later moved from New Jersey to Queens, New York.<sup>13</sup> His immigrant father, Eugene Scalia, taught Romance languages at Brooklyn College, while his mother, Catherine—a second-generation citizen—taught in public school.<sup>14</sup> Raised Roman Catholic, Scalia attended Xavier High School in Manhattan, a premiere all-boys

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<sup>9</sup> See Robert Marquand, *High Court's Colorful Man in Black*, CHRISTIAN SCI. MONITOR, Mar. 3, 1998, at 1 (noting that Scalia is "the star of several Web sites" including the "Cult of Scalia," [www.members.aol.com/schwenkler/scalia](http://www.members.aol.com/schwenkler/scalia) (last visited Aug. 7, 2007)); see also NinoVille—An Antonin Scalia Reference Site, <http://www.joink.com/homes/users/ninoville/default.asp> (last visited July 31, 2007) (touting itself as "[a]n online resource for all things Scalia").

<sup>10</sup> See Impeach Antonin Scalia Sticker: CaféPress.com, [http://www.cafepress.com/buy/scalia/-/pv\\_design\\_prod/pg\\_1/p\\_storeid.9867150/pNo\\_9867150/id\\_3919112/opt/\\_fpt/\\_c\\_360/](http://www.cafepress.com/buy/scalia/-/pv_design_prod/pg_1/p_storeid.9867150/pNo_9867150/id_3919112/opt/_fpt/_c_360/) (last visited July 27, 2007) (advertising "Impeach Antonin Scalia" bumper stickers to "[l]et everyone know how much you hate Justice Scalia").

<sup>11</sup> 132 CONG. REC. H8328 (daily ed. Sept. 24, 1986) [hereinafter *Scalia Tribute*] (statement of Rep. Rodino during tribute to newly confirmed Justice Scalia).

<sup>12</sup> See Oyez—Antonin Scalia, [http://www.oyez.org/justices/justice/?justice=seaten/antonin\\_scalia](http://www.oyez.org/justices/justice/?justice=seaten/antonin_scalia) [hereinafter *Oyez Unofficial Biography*] (last visited July 27, 2007).

<sup>13</sup> See *id.*

<sup>14</sup> See *id.*

Jesuit school with an emphasis on military preparation.<sup>15</sup> At Georgetown University, after study abroad in Fribourg, Switzerland, Scalia graduated first in his class.<sup>16</sup>

Scalia next excelled at Harvard Law School, where he “quickly earned a reputation as an outstanding scholar and an impeccable legal intellectual,” as editor of the *Law Review*, a *magna cum laude* graduate, and a Sheldon Fellow (1960-61).<sup>17</sup> He taught at two law schools: the University of Virginia from 1967-71 and the University of Chicago from 1977-82, with stints as a visiting Professor of Law at Georgetown and Stanford.<sup>18</sup> His public service led him to highly visible positions in government, including work in President Nixon’s White House and President Ford’s Justice Department.<sup>19</sup> His career continued to blossom and his reputation grew for being a gifted and articulate conservative voice.<sup>20</sup>

In 1982, President Reagan appointed him to the U.S. Court of Appeals for the District of Columbia Circuit, where he served for four years until his nomination to the U.S. Supreme Court in 1986.<sup>21</sup> Scalia was confirmed unanimously by the U.S. Senate in 1986.<sup>22</sup> His reputation was such that even Senator Edward Kennedy—arguably the Senate’s most liberal member—described Scalia as “clearly in the mainstream of thought of our society,” someone who “has demonstrated a brilliant legal intellect and earned the respect—even the affection—of colleagues whose personal philosophies are far different from his own.”<sup>23</sup>

Scalia’s character and personality have won him the praise of those who know him. He is called “Nino” by his family and friends, according to whom he is “a man of warm good humor, a

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<sup>15</sup> *See id.*

<sup>16</sup> *See* Scalia Tribute, *supra* note 11; The Justices of the Supreme Court, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> [hereinafter Supreme Court Official Biography] (last visited July 29, 2007).

<sup>17</sup> Scalia Tribute, *supra* note 11; *see also* Jay Schlosser, *The Establishment Clause and Justice Scalia: What the Future Holds for Church and State*, 63 NOTRE DAME L. REV. 380, 385 (1988) (outlining Scalia’s background); Supreme Court Official Biography, *supra* note 16.

<sup>18</sup> *See* Supreme Court Official Biography, *supra* note 16.

<sup>19</sup> *See* Scalia Tribute, *supra* note 11.

<sup>20</sup> *See* Oyez Unofficial Biography, *supra* note 12.

<sup>21</sup> *See* Supreme Court Official Biography, *supra* note 16.

<sup>22</sup> *See* Scalia Tribute, *supra* note 11.

<sup>23</sup> 132 CONG. REC. S12832-01 (daily ed. Sept. 17, 1986) (statement of Sen. Kennedy).

family man, devoted to” Maureen, his wife of 47 years, and their nine children.<sup>24</sup> Scalia has been described as a “devout Roman Catholic,” and one of his children has even become a priest.<sup>25</sup> Furthermore, Scalia’s talents do not end at the four corners of a law book. As the only Justice who can “carry a tune,” he once “appeared in the opera in a costume worn by Placido Domingo.”<sup>26</sup> His down-to-earth attitude is demonstrated in his “zest for oldfashioned [sic] ‘sing-alongs’ and friendly poker games.”<sup>27</sup>

As a Supreme Court Justice, Scalia has been recognized for the quality of his “legal prose,” which is “uniquely musical and energetically argumentative.”<sup>28</sup> Even those who dislike his decisions concede his significance.<sup>29</sup> In his twenty years on the High Court, Scalia has earned himself many admirers<sup>30</sup> due to his legendary intellect<sup>31</sup> and a humor that is “scientifically proven,”<sup>32</sup> though not everyone appreciates his wit.<sup>33</sup>

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<sup>24</sup> Scalia Tribute, *supra* note 11; Oyez Unofficial Biography, *supra* note 12.

<sup>25</sup> Marquand, *supra* note 9 (“The Scalias worship at a suburban Virginia church known for its orthodox-minded congregation, one that recently erected a monument to unborn children.”); *see also* Ian Bishop, *Justice for All—This Year’s Grand Marshall: Supreme Court Justice Antonin Scalia*, N.Y. POST, Oct. 6, 2005, at 54.

<sup>26</sup> E.J. Dionne, Jr., Moderator, Remarks at the Pew Center Forum “Call for Reckoning” Conference, Session Three: Religion, Politics, and the Death Penalty (Jan. 25, 2002), <http://www.joink.com/homes/users/ninoville/pc1-25-02.asp> [hereinafter Dionne Remarks].

<sup>27</sup> Scalia Tribute, *supra* note 11.

<sup>28</sup> Dionne Remarks, *supra* note 26.

<sup>29</sup> *See id.* (“As somebody who has disagreed with him, I have to say that it is a shame that he is very intelligent, it’s a shame that he writes so well, it’s a shame that he is warm and charming . . .”).

<sup>30</sup> One such admirer is Senator Orrin Hatch (R. Utah), who has catalogued the many adjectives used to describe the jurist. *See* 152 CONG. REC. S10121–01, S10123 (daily ed. Sept. 26, 2006) (remarks of Sen. Hatch) [hereinafter Hatch Remarks] (“Some call [Scalia] outspoken, provocative, or fiery; others say he is aggressive, engaging, and articulate. One profile said he is colorful, controversial, and combative; another said he is testy, witty, and sarcastic.”); *cf.* Dionne Remarks, *supra* note 26 (“Justice Scalia has been described as principled, clear, consistent, forceful, wry, irreverent, sometimes scathing.”).

<sup>31</sup> *See* Hatch Remarks, *supra* note 30 (“One biography cites an unnamed Supreme Court observer noting that if the mind were muscle, Justice Scalia would be the Arnold Schwarzenegger of American jurisprudence.”).

<sup>32</sup> *See id.*

Justice Scalia is also a funny man. . . . Professor Jay Wexler at Boston University Law School examined transcripts of Supreme Court oral arguments, noting when they identified laughter. During the October 2004 term, Justice Scalia was way ahead of the laugh pack, good for slightly more than one laugh per session.

*Id.* Moreover, Scalia apparently is “[o]ne of the few people who can make fellow Justice Ruth Bader Ginsburg laugh (according to the justice herself).” Marquand,

*B. The Most Influential Jurist?*

Just how much has Scalia influenced the Court? As Professor Michael Dorf has noted, "Scalia is at the heart of a major shift on the court in how cases are presented and how legislative history is understood. . . . We used to start with history in thinking about interpreting law; now we start with language."<sup>34</sup> Liberal scholars recognize this shift as well: As Ronald Dworkin has playfully noted, "[w]e are all originalists now."<sup>35</sup>

Despite Scalia's unmitigated talent and influence, he has often been the passionate dissenter on the Court, unable to garner enough votes to support his positions. Even in dissent, however, his forcefulness and brilliance have changed how we think about the law.<sup>36</sup> And Justice Scalia's views have won a majority of the Court in key areas—for instance, the Court's Confrontation Clause jurisprudence recently charted a major change of course, building a new majority based on Scalia's consistent philosophy.<sup>37</sup>

Could a similar result happen in the context of the Establishment Clause?<sup>38</sup> Some already see the "writing on the

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*supra* note 9.

<sup>33</sup> Chemerinsky has faulted Scalia for using rhetoric that is "frequently sarcastic, and often filled with attacks on other Justices." *Hawaii Transcript*, *supra* note 6, at 503. According to Chemerinsky, Scalia sends "exactly the wrong message for law students and lawyers throughout the country." *Id.* Senator Hatch would answer that criticism this way: "[Scalia] uses wit, humor, logic, sarcasm, and the rest to expose the premises and implications of arguments, to assert and defend important principles, and to make the necessary application of those principles absolutely inescapable." Hatch Remarks, *supra* note 30.

<sup>34</sup> Marquand, *supra* note 9 (internal quotation marks omitted); *see also* Hatch Remarks, *supra* note 30 (claiming that the ways in which Scalia "asserts and defends [his principles] force us to confront, whether we like it or not, the issues most basic to a system of self-government based on the rule of law").

<sup>35</sup> Marquand, *supra* note 9 (internal quotation marks omitted).

<sup>36</sup> *See* Hatch Remarks, *supra* note 30 ("As . . . Harvard law professor John Manning writes, Justice Scalia has had a palpable effect on the way we talk and think about the issues of judicial power and practice.").

<sup>37</sup> *See* Justice Antonin Scalia, Remarks at The Woodrow Wilson International Center for Scholars: Constitutional Interpretation (Mar. 14, 2005), <http://www.joink.com/homes/users/ninoville/ww3-14-05.asp> [hereinafter Woodrow Remarks] (explaining that the two originalists had reversed a "Living Constitution Court [which] held that all that was necessary to comply with the Confrontation Clause was that the hearsay evidence which is introduced . . . has to bear indicia of reliability").

<sup>38</sup> *See* Christopher B. Harwood, *Evaluating the Supreme Court's Establishment Clause Jurisprudence in the Wake of Van Orden v. Perry and McCreary County v.*

wall” with a new 5-4 conservative majority.<sup>39</sup> If Scalia’s views eventually prevail, his detractors fear that minority religions will become marginal citizens who “should just shut up and thank their lucky stars that they’re allowed to stay [in America].”<sup>40</sup>

## II. UNDERSTANDING SCALIA’S VIEWS ON THE RELIGION CLAUSES

The vitriol aimed at Justice Scalia stems from two conflicting paradigms. Scalia’s critics believe his model of the Religion Clauses is bad for America because it “essentially read[s] these clauses out of the Constitution.”<sup>41</sup> According to Dean Kathleen Sullivan, Scalia would confine the clauses “to a limited ban on oaths, tithes, and explicit sectarian discrimination.”<sup>42</sup> Professor Erwin Chemerinsky believes Scalia would cry foul only “if the government literally established a church, or if the government coerced religious participation, or if the government preferred some religions over others.”<sup>43</sup> This part of the Article will contrast Scalia’s “textualist” model with that of the “living

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ACLU, 71 MO. L. REV. 317, 348–50 (2006) (predicting that after the addition of Roberts and Alito, “the Court is now comprised of five supporters of the accommodation approach” and noting that Chief Justice Roberts “co-authored two Supreme Court briefs in which he urged the Court to replace the *Lemon* test with an Establishment Clause test allowing for far more government support for religion,” and that Justice Alito “voted to uphold a public school policy that allowed for student-initiated, student-led prayer at high school graduation ceremonies”); *see also* Vincent Phillip Munoz, *Thou Shalt Not Post the Ten Commandments?* McCreary, Van Orden, and the Future of Religious Display Cases, 10 TEX. REV. L. & POL. 357, 396 (2006) (“President George W. Bush professed preference for Justices like Scalia and Thomas and that from their confirmation hearings both Chief Justice Roberts and Justice Alito would seem to sit closer to [them].”).

<sup>39</sup> *See* Munoz, *supra* note 38, at 396–97 (noting that because “neither Justice Scalia nor Justice Thomas would be the controlling member as each stands to the right of Justice Kennedy,” it is more likely that until another new Justice takes a seat on the Court, it will be the more liberal Justice Kennedy’s vote that will control the scope of Establishment Clause cases).

<sup>40</sup> Blunner, *supra* note 5.

<sup>41</sup> *Hawaii Transcript*, *supra* note 6, at 503 (remarks of Professor Chemerinsky). Dean Kathleen Sullivan fully agrees with that assessment. *See id.* at 519; *see also* Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 WASH. U. L.Q. 919, 921 (2004) (seeing as an argument for “the strict separation ideal” that “religious minorities will fare better when majoritarian government is kept far from religious life”).

<sup>42</sup> Kathleen M. Sullivan, *Justice Scalia and the Religion Clauses*, 22 U. HAW. L. REV. 449, 461 (2000).

<sup>43</sup> *Hawaii Transcript*, *supra* note 6, at 504 (noting Scalia’s dissent in *Lee v. Weisman*, 505 U.S. 577 (1992)).

constitution" approach, with a focus on interpreting the Religion Clauses.

A. *How to Interpret a Constitution*

Justice Scalia is a "textualist" who believes the Constitution should be interpreted reasonably, as one would do with any statute.<sup>44</sup> As he explains, "I don't care if the framers of the Constitution had some secret meaning in mind when they adopted its words. I take the words as they were promulgated to the people . . . ."<sup>45</sup> Scalia is also a champion of democracy rather than an elite reign of judges. He sees majority rule as a value judgment "put in place by the Constitution of the United States and by the political theory underlying it, which is self-government."<sup>46</sup>

As a textualist and majoritarian, Justice Scalia has made it his life's mission to assail the notion of a "living Constitution." Under this model, the Constitution is a "living" document intended to adapt and evolve from 18th century thought.<sup>47</sup> The job of judges is to interpret that flexible text so it may achieve the spirit of the Republic.<sup>48</sup> Scalia, however, rejects the idea that "legislator-judges" can impose their own values on the majority by re-interpreting a "living Constitution" from age to age. His

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<sup>44</sup> See ANTONIN SCALIA, A MATTER OF INTERPRETATION 23, 37–38 (1997) ("I am not a strict constructionist, and no one ought to be . . . . A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means.").

<sup>45</sup> Justice Antonin Scalia, Remarks at The Catholic University of America: A Theory of Constitution Interpretation (Oct. 18, 1996), <http://www.joink.com/homes/users/ninoville/cua10-18-96.asp> [hereinafter Catholic Remarks].

<sup>46</sup> *Hawaii Transcript*, *supra* note 6, at 513 (remarks of Professor Kelley, former Scalia law clerk).

<sup>47</sup> Professor Chemerinsky eloquently articulates this point:

[I]t is desirable to have a Constitution to safeguard our most precious values—values such as separation of powers, freedom of speech, or free exercise of religion, or the Establishment Clause, or privacy. That to serve these purposes the Constitution must evolve. It cannot be a static document. The Constitution, for so many reasons—technological changes, value changes, social needs—has to be an evolving document. We cannot be governed in the year 2000 by the values and choices of 1787 or 1791. That evolution should be by interpretation, not just by amendment.

*Id.* at 528.

<sup>48</sup> See *id.* at 527–28. Chemerinsky argues: "Why Justices rather than legislators? . . . I think society is better off with an institution largely immune from direct electoral pressures, deciding the meaning to give to the Constitution, and then protecting those values from majoritarian rule." *Id.* at 528.

principal concern is the danger to the majority, and a “living” document’s ability to evolve Americans out of their fundamental rights.<sup>49</sup> He also fears that a “living Constitution” will ruin the Supreme Court. Recalling the unanimous Senate vote in his favor just 20 years earlier, Scalia blamed the “living Constitution” approach for today’s highly political and contentious confirmation process.<sup>50</sup>

Although Justice Scalia thinks that both conservatives and liberals use the “living Constitution” theory to create new rights that reflect their political ideologies,<sup>51</sup> he is quick to point out that his own model will not always lead to a politically conservative result.<sup>52</sup> Indeed, he emphasizes that his view *prevents* him from imposing his values on society:

I have my rules that confine me. I know what I’m looking for. When I find it—the original meaning of the Constitution—I am handcuffed. . . . [E]ven though I don’t like to come out that way . . . . I cannot do all the mean conservative things I would like to do to this society. You got me.<sup>53</sup>

Not surprisingly, proponents of a “living Constitution” do not agree. Professor Thomas B. Colby argues that “originalism pretends to an apolitical objectivity that it cannot deliver” because “there is no single, objective original meaning that can be discerned from” the historical record.<sup>54</sup>

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<sup>49</sup> See Woodrow Remarks, *supra* note 37 (citing the Confrontation Clause as an example of taking away rights).

<sup>50</sup> See *id.* (“The American people have figured out what is going on. . . . [If] we’re picking [judges] to draw out of their own conscience and experience a new constitution with all sorts of new values to govern our society, then we should [choose] . . . people who agree with us, the majority . . .”).

<sup>51</sup> See Catholic Remarks, *supra* note 45 (“Conservatives are fully as prepared to create new rights under this evolutionist theory of the Constitution, as liberals are.”).

<sup>52</sup> In one humorous anecdote, Scalia revealed how his “originalist” views raised ire with his conservative wife: she hummed “You’re a Grand Old Flag” the morning after Scalia voted to allow flag burning as Free Speech in *Texas v. Johnson*, 491 U.S. 397 (1989). Katie Gazella, *Scalia Says to Focus on Original Meaning of Constitution*, U. MICH. REC. ONLINE, Nov. 24, 2004, [http://www.umich.edu/~urecord/0405/Nov22\\_04/13.shtml](http://www.umich.edu/~urecord/0405/Nov22_04/13.shtml).

<sup>53</sup> Woodrow Remarks, *supra* note 37.

<sup>54</sup> Colby, *supra* note 1, at 1138; see also Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861 (1989) (conceding that originalists can reach inconsistent conclusions); *Hawaii Transcript*, *supra* note 6, at 503 (“[Scalia] professes to be value-neutral in his judging, but is consistently imposing his own conservative values.”) (remarks of Professor Chemerinsky).

*B. Scalia's Paradigm of the Religion Clauses*

Justice Scalia's textualist and majoritarian views on constitutional interpretation drive the positions he takes on the Religion Clauses. He believes lawmakers—i.e., Congress—should be guided by moral values, since a good deal of the law derives from religious principles,<sup>55</sup> but that the law has “no room” for *judges* to inject their personal moral sentiments.<sup>56</sup> It is the will of the people—acting through their elected officials—that matters.<sup>57</sup> Indeed, Scalia would have no judicial objection if a majority of Americans abandoned *any* role for religion in public life.<sup>58</sup>

These views have led Justice Scalia to interpret the Free Exercise Clause in a way that has angered religious conservatives who, perhaps, misunderstand his underlying philosophy. As author of the Court's decision in *Employment Division v. Smith*<sup>59</sup>—the seminal case of modern Free Exercise interpretation—Scalia concluded that generally applicable laws have never been, and should not be, subjected to strict scrutiny even if they significantly interfere with deeply held religious beliefs. This is not the strict “religious accommodationist” approach many conservatives embrace.<sup>60</sup> Thus, Dean Sullivan

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<sup>55</sup> Dale Kuetter, *Scalia Lectures at Cornell: Justice, Morality, and the Law*, GAZETTE ONLINE (Iowa), May 7, 1999, [http://www.cornellcollege.edu/pre\\_law/documents/scalia\\_gazette.pdf](http://www.cornellcollege.edu/pre_law/documents/scalia_gazette.pdf).

<sup>56</sup> *Id.* For instance, “if a state were to permit abortion on demand, I would and could in good conscience vote against an attempt to invalidate that law,” despite Christianity's tradition opposing it, “for the same reason that I vote against invalidation of laws that contradict *Roe v. Wade*; namely, simply because the Constitution gives the federal government and, hence, me no power over the matter.” Justice Antonin Scalia, Remarks at the Pew Center Forum “Call for Reckoning” Conference, Session Three: Religion, Politics, and the Death Penalty (Jan. 25, 2002), <http://www.joink.com/homes/users/ninoville/pc1-25-02.asp>.

<sup>57</sup> See *Hawaii Transcript*, *supra* note 6, at 511, 513 (Professor William K. Kelley stating that Scalia has a deep respect for the “constitutional role of non-judicial actors” in America's democratic system).

<sup>58</sup> As Scalia commented during a speech on “Religious Freedom Day”: “The sign back here which says ‘Get Religion Out of Government’ can be imposed on the whole country. I have no problem with that philosophy being adopted democratically.” Americans United for Separation of Church and State, *Church-State Rulings Have Gone Too Far, Scalia Tells Va. Crowd*, Feb. 2003, [http://www.au.org/site/News2?page=NewsArticle&id=5453&news\\_iv\\_ctrl=0&abbr=cs\\_](http://www.au.org/site/News2?page=NewsArticle&id=5453&news_iv_ctrl=0&abbr=cs_) [hereinafter *Scalia Speech*].

<sup>59</sup> 494 U.S. 872, 885 (1990).

<sup>60</sup> Dean Kathleen M. Sullivan views “accommodationists” as protecting Free Exercise while weakly enforcing Establishment Clause limits. See *Hawaii*

argues that Scalia's majoritarian position towards religion is not "a view of religion that religionists ought to endorse."<sup>61</sup>

Scalia's model takes a more popular stance on the Establishment Clause, where religionists agree with his views. Scalia sees no bar to the government symbolically endorsing religion in general by placing "In God We Trust" on the currency or allowing non-sectarian prayer before public school events.<sup>62</sup> He has argued that the state cannot "favor Catholic[s], Protestants, Muslims, [or] Jews, but the tradition was never that the government had to be neutral between religiousness and non-religiousness."<sup>63</sup> Still, Scalia would not go as far as Justice Thomas, who advocates "un-incorporating" the Establishment Clause from the Fourteenth Amendment.<sup>64</sup> Thomas's position has merit,<sup>65</sup> but it is unlikely to ever win a majority of the

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*Transcript, supra* note 6, at 518 (citing Justice O'Connor as an example). Sullivan sees Souter as a separationist because of his strong intervention on both clauses, and Stevens and Ginsburg as "secularists" because of their weak enforcement of the Free Exercise Clause. *Id.* at 516–18. Scalia is an "assimilationis[t]"—"weak" on both clauses. *Id.* at 519–21.

<sup>61</sup> *Id.* at 520–22.

<sup>62</sup> Scalia Speech, *supra* note 58.

<sup>63</sup> *Id.* Scalia joined Rehnquist's plurality opinion in *Van Orden v. Perry*, 545 U.S. 677, 683–84 (2005), which put the issue this way: "Our institutions presuppose a Supreme Being, yet these institutions must not press religious observances upon their citizens. . . . [W]e [must] neither abdicate our responsibility to maintain a division between church and state nor evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage."

<sup>64</sup> See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45 (2004) (Thomas, J., concurring in the judgment) (arguing against incorporation since it was a federalism-based clause that allowed states to establish religions without interference). Scalia has never been a vocal proponent of un-incorporation, but he does agree with Thomas's facts: "[It] was adopted to prohibit such an establishment of religion at the federal level (and to protect state establishments of religion from federal interference)." *Lee v. Weisman*, 505 U.S. 577, 640–42 (1992) (Scalia, J., dissenting).

<sup>65</sup> See *Munoz, supra* note 38, at 388 ("Thomas is the only Justice who has offered an interpretation that appreciates the diversity of the Founders' disagreement about church and state and what that diversity implies about the Establishment Clause's original meaning."); see also Zachary N. Somers, Note, *The Mythical Wall of Separation: How the Supreme Court Has Amended the Constitution*, 2 GEO. J.L. & PUB. POL'Y 265, 266, 272–73 (2004) (recounting how states kept religious establishments through 1833, and concluding that "[t]he Establishment Clause, as it was originally understood by its framers and ratifiers, had a very limited dual purpose: to prohibit Congress from establishing a national church and to clarify that each state had a free hand in defining the meaning of establishment in its own laws and constitution.").

Court.<sup>66</sup> Although incorporation may have been adopted with little deliberation,<sup>67</sup> even conservative Justices like Scalia have not shown a willingness to fight that contentious battle.

Justice Scalia's views on the Establishment Clause have been blasted by proponents of a "living Constitution" who disagree with him. Professor Chemerinsky argues that Scalia's theory wrongly "assumes that there was unanimous practice at the time that the Constitution was written."<sup>68</sup> While Scalia would concede it is difficult to ascertain original meaning, he would counter that his theory was the "lesser evil" among possible alternatives.<sup>69</sup> Further, Dean Sullivan accuses Scalia of viewing religion as "a garden variety interest group, playing in the political process, just like any other interest group."<sup>70</sup> Her theory on democracy may be insightful, but Scalia would surely bristle at her notion that he views religion as a "garden variety

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<sup>66</sup> No other Justice has ever argued for un-incorporation. Even a dissenting Justice Stewart begrudgingly accepted it: "I accept too the proposition that the Fourteenth Amendment has somehow absorbed the Establishment Clause, although it is not without irony that a constitutional provision evidently designed to leave the States free to go their own way should now have become a restriction upon their autonomy." *Sch. Dist. v. Schempp*, 374 U.S. 203, 310 (1963) (Stewart, J., dissenting) (striking down by 8-1 vote the practice of opening the public school day with a passage from the Bible); see also James A. Campbell, Note, *Newdow Calls for a New Day in Establishment Clause Jurisprudence: Justice Thomas's "Actual Legal Coercion" Standard Provides the Necessary Renovation*, 39 AKRON L. REV. 541, 567-68 (2006) (discussing the argument for non-incorporation, but noting that "[t]his portion of Thomas's view has been ridiculed by many scholars despite its apparent validity").

<sup>67</sup> In *Cantwell v. Connecticut*, 310 U.S. 296, 303 & n.3 (1940), the Court first referenced absorption, yet the Court's only cite was to a non-Establishment-Clause case, *Schneider v. State*, 308 U.S. 147, 160 (1939). *Cantwell's* passing reference to absorption was later considered as "decisively settl[ing]" the issue. See *Schempp*, 374 U.S. at 215-16.

<sup>68</sup> *Hawaii Transcript*, *supra* note 6, at 507 ("I think you can make an equally plausible argument on either side with regard to free exercise or establishment, pointing to the practices that existed in 1791.").

<sup>69</sup> Scalia, *Originalism*, *supra* note 54, at 856-57; see also SCALIA, *supra* note 44, at 45 ("There is plenty of room for disagreement as to what original meaning was, and even more as to how that original meaning applies . . .").

<sup>70</sup> *Hawaii Transcript*, *supra* note 6, at 522. To Sullivan, "assimilationists" assume minority groups "will be able to fend for themselves in the political process despite [their] political disability." Sullivan, *supra* note 42, at 462. She believes the Framers would agree with separationists such as Justice Souter because he recognizes "religion is different from other kinds of interests." *Hawaii Transcript*, *supra* note 6, at 522.

interest group.”<sup>71</sup> And he does not allow critics’ caricatures of his views to go unaddressed.<sup>72</sup>

C. *Making Lemonade Out of Lemon: What Test Would Scalia Apply?*

Justice Scalia has been a life-long critic of the Court’s *Lemon* test, devised in 1971 and intended as a flexible and overarching analysis with which to evaluate Establishment Clause claims.<sup>73</sup> In particular, he has targeted the “purpose” prong of the test as being both unworkable<sup>74</sup> and illogical.<sup>75</sup> To Scalia, “it is virtually

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<sup>71</sup> Scalia has criticized the Court for treating religion as a “purely personal avocation that can be indulged entirely in secret, like pornography, in the privacy of one’s room.” *Lee v. Weisman*, 505 U.S. 577, 645–46 (1992) (Scalia, J., dissenting). Scalia would no doubt point out that he has passionately argued the opposite: a religion is specifically *not* a “garden variety” group because the plain text of the First Amendment gives it preferential treatment as the only protected class in the Constitution. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 766–67 (1995) (arguing private religious speech “receives *preferential* treatment under the Free Exercise Clause” and it would be “perverse” to give near-obscene speech more protection).

<sup>72</sup> *See Bd. of Educ. v. Grumet*, 512 U.S. 687, 748 (1994) (Scalia, J., dissenting) (“Contrary to the Court’s suggestion . . . I have always believed, and all my opinions are consistent with the view, that the Establishment Clause prohibits the favoring of one religion over others.”).

<sup>73</sup> As a professor, Justice Scalia criticized the Court’s use of the *Lemon* test. *See Antonin Scalia, On Making It Look Easy by Doing It Wrong: A Critical View of the Justice Department*, in *PRIVATE SCHOOLS AND THE PUBLIC GOOD* 175 (Edward McGlynn Gaffney, Jr. ed., 1981). Court-watchers predicted “a dramatic effect on the future of *Lemon*” with the addition of Justices Scalia and Kennedy to the Court. Schlosser, *supra* note 12, at 380. And from his first Establishment Clause case on the Court, Scalia pressed his attack to destroy *Lemon*. He accused the Court of a patchwork application of *Lemon* that had “made such a maze of the Establishment Clause that even the most conscientious governmental officials can only guess what motives will be held unconstitutional.” *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting).

<sup>74</sup> In *Edwards*, Justice Scalia argued for the complete abandonment of the “purpose” prong: “I think it time that we sacrifice some ‘flexibility’ for ‘clarity and predictability’ [by] abandoning *Lemon*’s purpose test—a test which exacerbates the tension between the Free Exercise and Establishment Clauses [and] has no basis in the language or history of the Amendment . . .” *Edwards*, 482 U.S. at 640; *see also* *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399 (1993) (Scalia, J., concurring in the judgment) (noting that the Court’s “intermittent use” of *Lemon* had produced a “strange Establishment Clause geometry of crooked lines and wavering shapes”).

<sup>75</sup> Scalia has argued that if legislators “set out resolutely” to promote or suppress religion “but ineptly adopted ordinances that failed to do so, I do not see how those laws could be said to” either prohibit or endorse religion. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 558–59 (1993) (Scalia, J., concurring in part). Scalia also believes the “purpose” prong is illogical because in

impossible to determine the singular 'motive' of a collective legislative body, and this Court has a long tradition of refraining from such inquiries."<sup>76</sup> His tactics to discard *Lemon* have enjoyed some success, but it has not come fast enough for his tastes.<sup>77</sup> Even though the *Lemon* test has enjoyed a recent revival in *McCreary County v. ACLU of Kentucky*,<sup>78</sup> its existence remains threatened.<sup>79</sup>

If *Lemon* were dismantled, what test would Justice Scalia use to replace it? It is not easy to articulate a test that does not sound like *Lemon*. There have been few suggestions, and better tests are difficult to devise—Scalia and other scholars reject a

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some cases "the legitimacy of a government action with a wholly secular effect would turn on the *misperception* of an imaginary observer that the government officials behind the action had the intent to advance religion." *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 901 (2005) (Scalia, J., dissenting). Justice Souter has admitted "the same government action may be constitutional if taken in the first instance and unconstitutional if it has a sectarian heritage," but he argued this was proper. *Id.* at 866 n.14 (majority opinion); *see also Edwards*, 482 U.S. at 615 ("We surely would not strike down a law providing money to feed the hungry or shelter the homeless if it could be demonstrated that, but for the religious beliefs of the legislators, the funds would not have been approved.").

<sup>76</sup> *Lukumi Babalu*, 508 U.S. at 558–59 (Scalia, J., concurring in part) (citations omitted). *But see McCreary*, 545 U.S. at 865 n.13 (arguing that Scalia's view makes it too easy to find "some secular purpose for almost any government action.").

<sup>77</sup> After *Lee v. Weisman*, Justice Scalia bemoaned the majority's revival of *Lemon*, comparing the test to a "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried." *Lamb's Chapel*, 508 U.S. at 398 (Scalia, J., concurring in the judgment).

<sup>78</sup> 545 U.S. 844, 901 (2005).

<sup>79</sup> *See* Symposium, *The Supreme Court and the Ten Commandments: Compounding the Establishment Clause Confusion*, 14 WM. & MARY BILL RTS. J. 33, 37–38 (2005) (discussing the *Lemon* test's revival in *McCreary*). For instance, in *Van Orden v. Perry*, 545 U.S. 677, 686 (2005), the plurality called *Lemon* "not useful in dealing with" passive religious displays. Justice Breyer similarly abandoned its use, rationalizing that "the Court has found no single mechanical formula that can accurately draw the constitutional line in every case." *Id.* at 699 (Breyer, J., concurring) (citing *Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) (Goldberg, J., concurring)); *see also McCreary*, 545 U.S. at 890 (Scalia, J., dissenting) ("[A] majority of the Justices on the current Court (including at least one Member of today's majority) have, in separate opinions, repudiated the brain-spun '*Lemon* test' that embodies the supposed principle of neutrality between religion and irreligion."); *Lamb's Chapel*, 508 U.S. at 400 n.\* (Scalia, J., concurring) (rationalizing his unavoidable prior use of *Lemon* because the Court lacked "a majority at that time to abandon *Lemon*"); *County of Allegheny v. ACLU*, 492 U.S. 573, 655–56 (1989) (Kennedy, J., dissenting in part) (recognizing the vulnerability of *Lemon*); Alembik, *supra* note 3, at 1192–96 (documenting confusion following the Court's conflicting decisions in *Van Orden* and *McCreary*, and noting that lower courts are "wondering whether to apply some version of the *Lemon* test or, alternatively, to wholly ignore the *Lemon* test in favor of a more particularized approach").

simple “neutrality” test because in their view it is harmful to religion and religious organizations.<sup>80</sup> The top contender for a time was Justice O’Connor’s “endorsement” test, which she articulated in *Lynch v. Donnelly*<sup>81</sup> and *County of Allegheny v. ACLU*.<sup>82</sup> This test dominated the landscape of lower court jurisprudence for two decades, but O’Connor’s conservative counterparts rejected her test because it disregarded history and ignored the tradition that government *could* constitutionally endorse “religion in general.”<sup>83</sup>

Conventional wisdom assumes that the most likely *Lemon* replacement under the new majority will be the “coercion” test, which sees the purpose of the Establishment Clause as the “protection of an individual’s religious liberty by preventing religious coercion.”<sup>84</sup> This test has garnered the support of those

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<sup>80</sup> See Patrick M. Garry, *Religious Freedom Deserves More than Neutrality: The Constitutional Argument for Nonpreferential Favoritism of Religion*, 57 FLA. L. REV. 1, 3, 8–9 (2005) (rejecting neutrality because it “prevents the state from accommodating particular religious practices or from flexibly dealing with the unique problems and needs of religion”); see also Carolyn A. Deverich, Comment, *Establishment Clause Jurisprudence and the Free Exercise Dilemma: A Structural Unitary-Accommodationist Argument for the Constitutionality of God in the Public Square*, 2006 BYU L. REV. 211, 222–25 (2006) (describing the tests the Court has used); see also *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring) (“I see no test-related substitute for the exercise of legal judgment. . . . While the Court’s prior tests provide useful guideposts—and might well lead to the same result the Court reaches today—no exact formula can dictate a resolution to such fact-intensive cases.” (citations omitted)); *Zelman v. Simmons-Harris*, 536 U.S. 639, 648–49 (2002) (articulating a rule by conservative justices that forbids the “‘effect’ of advancing or inhibiting religion” (quoting *Agostini v. Felton*, 521 U.S. 203, 223 (2002))); *Bd. of Educ. v. Grumet*, 512 U.S. 687, 751 (1994) (Scalia, J., dissenting) (“To replace *Lemon* with nothing is simply to announce that we are now so bold that we no longer feel the need even to pretend that our haphazard course . . . is governed by any principle.”).

<sup>81</sup> 65 U.S. 668, 688, 691–92 (1984) (O’Connor, J., concurring).

<sup>82</sup> 492 U.S. 573, 624–31 (1989) (O’Connor, J., concurring in part). Justice Blackmun—the de facto voice of the fractured *Allegheny* Court—extolled O’Connor’s test as a great analytical framework. See *id.* at 595–97 (plurality opinion).

<sup>83</sup> See *id.* at 670–74 (Kennedy, J., dissenting) (providing several examples of traditional government practices that would not endure scrutiny under an application of O’Connor’s endorsement test). To Scalia, O’Connor’s test was “not really an ‘endorsement test’ of any sort” because the government is permitted “to enact neutral policies that happen to benefit religion.” *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 763–64 (1995). Scalia also argued: “What a strange notion, that a Constitution which *itself* gives ‘religion in general’ preferential treatment (I refer to the Free Exercise Clause) forbids endorsement of religion in general.” *Lamb’s Chapel*, 508 U.S. at 400 (Scalia, J., concurring).

<sup>84</sup> Munoz, *supra* note 38, at 396. The rejection of “coercion” may be one thing that the Framers agreed upon. See *id.* at 388–89; see also *Sch. Dist. v. Schempp*, 374

seeking to restore a “balanced approach” towards religion.<sup>85</sup> Using that test, Scalia would “allow varying degrees of aid, endorsement, and promotion of religion in general and, in some cases, to specific religions so long as that aid does not involve governmental coercion of religious belief, practice, or participation.”<sup>86</sup> Justice Blackmun, on the other hand, has argued that such a test would “gut the core of the Establishment Clause.”<sup>87</sup>

There is no agreement among the conservative Justices on defining the “coercion” test. Justice Scalia’s version of the test is stated in characteristically historical terms, defining it only as “coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*.”<sup>88</sup> It differs in degree from Kennedy’s more “psychological” test:

I see no warrant for expanding the concept of coercion beyond acts backed by threat of penalty—a brand of coercion that, happily, is readily discernible to those of us who have made a career of reading the disciples of Blackstone rather than of

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U.S. 203, 316–17 (1963) (Stewart, J., dissenting) (arguing for a “coercion” standard but agreeing a different standard may apply for school-aged children).

<sup>85</sup> Justice Kennedy articulated this view in his *Allegheny* dissent:

[G]overnment may not coerce anyone to support or participate in any religion or its exercise [or] give direct benefits to religion in such a degree that it in fact “establishes a [state] religion or religious faith, or tends to do so.” . . . [I]t would be difficult indeed to establish a religion without some measure of more or less subtle coercion, be it in the form of taxation to supply the substantial benefits that would sustain a state-established faith, direct compulsion to observance, or governmental exhortation to religiosity that amounts in fact to proselytizing.

492 U.S. at 659–60 (Kennedy, J., dissenting) (quoting *Lynch v. Donnelly*, 465 U.S. 668 (1984)).

<sup>86</sup> Munoz, *supra* note 38, at 396 (supporting the coercion test); *see also* Campbell, *supra* note 66, at 580–91 (arguing for an “actual legal coercion” test and explaining how it can be used to allow for various government involvement in religion without violating the Establishment Clause).

<sup>87</sup> *Allegheny*, 492 U.S. at 604.

<sup>88</sup> *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting). As examples of this type of coercion, Scalia noted that in colonial America “only clergy of the official church could lawfully perform sacraments” and “all persons were required to attend church and observe the Sabbath, were tithed for the public support of Anglican ministers, and were taxed for the costs of building and repairing churches.” *Id.* at 641. In *Board of Education v. Grumet*, 512 U.S. 687, 751 (1994) (Scalia, J., dissenting), Scalia stated: “The foremost principle I would apply is fidelity to the longstanding traditions of our people, which surely provide the diversity of treatment that Justice O’Connor seeks, but do not leave us to our own devices.”

Freud. The Framers . . . understood that “[s]peech is not coercive; the listener may do as he likes.”<sup>89</sup>

Scalia’s view has been echoed by Justice Thomas in his proposal of an “actual legal coercion” test in *Elk Grove Unified School District v. Newdow*.<sup>90</sup> But even if Scalia’s framework persuades newcomers Roberts and Alito, Kennedy will still be a roadblock to the test’s full implementation. As this standoff plays itself out in coming years, conflicting paradigms—Scalia’s approach versus a “living Constitution” approach—will continue to define the Court’s tense Establishment Clause jurisprudence.

Having now laid this foundation, the next part of the Article will begin to address Scalia’s critics and evaluate just how much protection his interpretation of the Establishment Clause would provide. It will do so by exploring how it might feel to live in “Mr. Scalia’s Neighborhood.”

### III. MR. SCALIA’S NEIGHBORHOOD AS A SAFE HAVEN FOR MINORITY RELIGIONS

Imagine an America where Justice Scalia’s views on the Religion Clauses have garnered a solid majority on the Supreme Court, making them the law of the land. One critic has proclaimed that in this “scary” America, minority religions “would become potted plants, shunted to the side as marginal citizens.”<sup>91</sup> Another believes Scalia’s supposedly flawed philosophy would threaten “constitutional protections for all religious minorities.”<sup>92</sup> Still other scholars have argued that in such an America the Religion Clauses would simply be “read out” of the Constitution by Scalia, offering no real protection at all for minority religions.<sup>93</sup>

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<sup>89</sup> *Lee*, 505 U.S. at 642 (quoting *Am. Jewish Cong. v. Chicago*, 827 F.2d 120, 132 (7th Cir. 1987) (Easterbrook, J., dissenting)); see also *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 121 (2001) (Scalia, J., concurring) (arguing that “so-called ‘peer pressure,’ if it can even be considered coercion, is, when it arises from private activities, one of the attendant consequences of a freedom of association that is constitutionally protected” and noting that the Free Speech and Free Exercise Clauses protect the “compulsion of ideas—and the private right to exert and receive that compulsion (or to have one’s children receive it)”).

<sup>90</sup> Campbell, *supra* note 66, at 572 (“Thomas’s actual legal coercion test is the preferred solution . . .”).

<sup>91</sup> Blumner, *supra* note 5.

<sup>92</sup> Colby, *supra* note 1, at 1139.

<sup>93</sup> See *Hawaii Transcript*, *supra* note 6, at 519.

These critiques of Justice Scalia's model are typical: They tend to downplay the obvious fact that Scalia's reading of the First Amendment still provides crucial, overwhelming protection to adherents of minority religions.<sup>94</sup> In other words, rather than reading those clauses out of the Constitution, Scalia's approach provides a genuine safe haven for minority religions. His detractors may find these protections inconsequential, but this part of the Article will begin to demonstrate that minority religions are better off under Scalia's framework of the Religion Clauses than under a purely secular separationist approach.<sup>95</sup>

#### A. *Scalia's Record Regarding Minority Religions*

What constitutes a "minority" religion? Is it a religion that does not currently hold sway with the majority of citizens, or one that has *traditionally* not been in the majority? Should it be measured at the community level, making Christianity a minority religion in some places? Should we look inside majority religions at the minority denominations within? There are no easy answers to these questions, and scholars have struggled to find precision in this area.<sup>96</sup> This Article takes the position that a minority faith is any religion in a specific community—i.e., neighborhood, state, nation—distinctly underrepresented in comparison with other religions in that same community.<sup>97</sup> For example, Islam would be a minority religion when considering a nationwide act of Congress, but a majority religion in a primarily Islamic local community dominated by Muslim legislators.

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<sup>94</sup> Dean Sullivan does acknowledge Scalia and the rest of the Court "readily" protect religious practitioners from "the most egregious examples of forbidden government behavior toward religion." Sullivan, *supra* note 42, at 451.

<sup>95</sup> See Berg, *supra* note 41, at 983 (explaining why a separationist view can be harmful: "A government that cannot endorse any religious statement cannot explicitly endorse the religious justification for religious freedom. The ironic result, as Professor Smith points out, is [that] '[o]ur constitutional commitment to religious freedom has been disabled from acknowledging the principal historical justification for its existence.'").

<sup>96</sup> See *generally id.* at 941–60 (discussing many models to help define a "minority" religion, including one model that defines the American divide as separating the minority "orthodox" in various religions from the majority "non-orthodox").

<sup>97</sup> This definition is generally consistent with Professor Berg's position: "[A] minority-protection approach to the Religion Clauses should not rest on defining certain faiths as everywhere and always 'minorities,' as previous commentators have sought to do, and then asking what will be best for those groups." *Id.* at 961.

Justice Scalia's detractors often claim that the separationist view, which keeps government apart from religion, offers better protection for minority rights than Scalia's model<sup>98</sup>:

[T]he further that government keeps from religion, the better for minority faiths. . . . Prayers or other religious exercises chosen by the government will reflect the religious view of the majority and will impose pressure, subtle or overt, on those who dissent from that general sentiment. . . . [S]trict separationism, at least historically, has affirmed strong protection for the free exercise rights of adherents, a principle especially important for minority faiths.<sup>99</sup>

What Scalia's adversaries do *not* often say—but *do* imply—is that he dislikes non-traditional religions and would discriminate against them on the Court. When evaluating this suggestion, one should recall that Scalia himself hails from immigrant Italian roots and a minority religion, as Roman Catholicism has historically been subjected to blatant discrimination and outright persecution within Protestant America.<sup>100</sup>

While some characterize him as a tyrant of the majority, Justice Scalia's record reveals a man deeply concerned with the rights of practitioners of minority religions.<sup>101</sup> For instance, he

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<sup>98</sup> Dean Sullivan has argued that the Framers would agree with "separationist[s]" such as Justice Souter on the Religion Clauses, instead of Scalia's "assimilationist" approach. See *Hawaii Transcript*, *supra* note 6, at 522–23.

<sup>99</sup> Berg, *supra* note 41, at 937–38 (recounting the separationist argument). *But see id.* (recounting arguments stating that the separationist view "produces a secularized public square that is ultimately negative for Jews and other religious minorities," and that "monotheistic principles should receive endorsement from government because they form an essential foundation for the very principles of freedom and toleration that protect religious minorities").

<sup>100</sup> See *id.* at 949 (noting that "America 'was and still is a Protestant Empire,'" and that "dominant Protestantism is marked by 'an opposition to Roman Catholicism' and 'a dedication to convert the people of the United States to Protestantism'") (quoting Michael deHaven Newsom, *Common School Religion: Judicial Narratives in a Protestant Empire*, 11 S. CAL. INTERDISC. L.J. 219, 222–23 (2002)). Professor Berg illustrates this point by noting that "the Equal Access Act's provision that a group is not protected if 'nonschool persons . . . direct, conduct, control, or regularly attend' student meetings appears to exclude a Catholic student fellowship's celebration of mass, which must be conducted by a priest." *Id.* at 989 (quoting the Equal Access Act, 20 U.S.C. § 4071(c) (2000)).

<sup>101</sup> Scalia believes that "protecting individuals and minorities against impositions of the majority" is a proper role for judges and courts. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894–95 (1983). Dean Sullivan acknowledges that Justice Scalia is "going to strike you down if you discriminate selectively against religion." *Hawaii Transcript*, *supra* note 6, at 519.

wholeheartedly voted to protect the Free Exercise rights of the Santeria religion to sacrifice animals;<sup>102</sup> to defend the Free Speech rights of Jehovah's Witnesses to canvass door-to-door;<sup>103</sup> to require the fair treatment of a Seventh Day Adventist who was denied unemployment compensation for refusing to work on her Saturday Sabbath;<sup>104</sup> to allow the government to draw school district lines in order to benefit the religious enclave of Satmar Hasidim;<sup>105</sup> and to require the Internal Revenue Service to allow tax exemptions for payments to the Church of Scientology.<sup>106</sup> Indeed, when it comes to government targeting of religion, Scalia has proved himself a more vigilant guardian of minority religious rights than most of the Court, conservatives and liberals alike.<sup>107</sup>

Unlike his separationist foes, however, Justice Scalia would permit the majority to accommodate the religious practices of the minority. In *Board of Education v. Grumet*,<sup>108</sup> a fractured Court struck down a New York City school district plan drawn along the lines of the "religious enclave of Satmar Hasidim, practitioners of a strict form of Judaism." In a stinging dissent, Scalia argued that the Establishment Clause had been designed "to insure that no one powerful sect or combination of sects could

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<sup>102</sup> See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (Scalia, J., concurring in part) (striking down a facially neutral city ordinance that clearly targeted animal sacrifice practices unique to the Santeria religion, a mixture of Catholicism and voodoo—beliefs that were surely repugnant to Scalia as a devout Catholic).

<sup>103</sup> See *Watchtower Bible & Tract Soc'y v. Stratton*, 536 U.S. 150, 153, 171 (2002) (Scalia, J., concurring) (concurring in the Court's judgment to strike down on Free Speech grounds a small village's permit requirements regulating door-to-door canvassers).

<sup>104</sup> See *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 138–39 (1987).

<sup>105</sup> See *Bd. of Educ. v. Grumet*, 512 U.S. 687, 752 (1994) (Scalia, J., dissenting).

<sup>106</sup> See *Hernandez v. Comm'r*, 490 U.S. 680, 713 (1989) (O'Connor, J., dissenting) (joining the dissent due to the IRS's long tradition of exempting certain tax payments for other majority religions).

<sup>107</sup> See *Locke v. Davey*, 540 U.S. 712, 715 (2004) (upholding a state scholarship program that excluded generally applicable funding for degrees in devotional theology). In *Locke*, Scalia dissented, believing that "when the State withholds [a general] benefit from some individuals solely on the basis of religion, it violates the Free Exercise Clause no less than if it had imposed a special tax." *Id.* at 726–27 (Scalia, J., dissenting). Scalia argued: "The indignity of being singled out for special burdens on the basis of one's religious calling is so profound that the concrete harm produced can never be dismissed as insubstantial." *Id.* at 731. He also expressed confusion at the Court's focus on a lack of "animus toward religion" by the legislature, since Scalia "fail[ed] to see why" legislative motive matters. *Id.* at 732.

<sup>108</sup> 512 U.S. 687, 690 (1994).

use political or governmental power to punish dissenters.”<sup>109</sup> He faulted the majority for preventing New York from making a “characteristically and admirably American accommodation of the religious practices . . . of a tiny minority sect.”<sup>110</sup> Thus, in keeping with the Nation’s “best . . . traditions,” Scalia would allow special accommodations *because of* a group’s religion.<sup>111</sup>

In sum, it is unfair to accuse Scalia of sectarian partisanship in his jurisprudence. In many ways, Scalia has shown that his model provides more rights, pound-for-pound, than the separationist approach.

### B. *Crucial Free Exercise Protections*

Upon driving into Mr. Scalia’s Neighborhood, one might encounter a town bustling with the free practice of religion. The typical “small-town America” row of Christian houses of worship on “Church Street” might also include a Kingdom Hall of the Jehovah’s Witnesses, a Muslim mosque, or a Buddhist temple. Adherents of minority religions would find a level playing field from which to practice their faith and proselytize in the community. In other words, what one will *not* find in Mr. Scalia’s Neighborhood is a government rule that targets the free practice or belief of any minority religion; everyone would find this Neighborhood to be a safe haven.

To many, this opening scene may come as a surprise, considering the demonization of Justice Scalia as a zealot, but it is no heresy to recognize that Scalia has been a vigorous defender of the rights of minority religions in the Free Exercise arena.<sup>112</sup> He does not differentiate between Christians and the practitioners of voodoo or any other minority religion. Where Scalia has ruled against a religious sect’s Free Exercise claim,<sup>113</sup>

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<sup>109</sup> *Id.* at 732 (Scalia, J., dissenting) (quoting *Zorach v. Clauson*, 343 U.S. 306, 319 (1952) (Black, J., dissenting)).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 743–44. Scalia argued that “[t]he Constitution itself contains an accommodation of sorts” by exempting Quakers, Moravians, and Mennonites from the Oath or Affirmation requirement, which “was added to accommodate these minority religions and enable their members to serve in government.” *Id.* at 744.

<sup>112</sup> Even Dean Sullivan recognizes that “Justice Scalia is as robust a defender of free exercise rights as any Justice.” Sullivan, *supra* note 42, at 451.

<sup>113</sup> See *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 344 (1987) (upholding a prison’s refusal to allow gang members to form a Muslim prayer meeting), *superseded by statute*, Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (2000); see also *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 441–42,

it has involved religion-neutral rules that in no way targeted religious practice. But Scalia *has* fought against rules—such as O'Connor's "endorsement" test—that he believes unfairly punish majority religions by consigning them "to the status of least favored faiths so as to avoid any possible risk of offending members of minority religions."<sup>114</sup>

Religion-neutral laws of general applicability have been Justice Scalia's downfall in the eyes of some "religionist" conservatives and separationist liberals. He penned the seminal decision in *Employment Division v. Smith*, successfully winning over a majority of the Court to his view that judges should not apply strict scrutiny analysis to religion-neutral laws that substantially impact religious exercise.<sup>115</sup> Scalia's reasoning in *Smith* had nothing to do with the substance or sincerity of any particular religious practice, minority or majority<sup>116</sup>—he does apply strict scrutiny when government seeks to harm religion. Instead, Scalia's practical approach in *Smith* was based on his well-founded concern that applying strict scrutiny to *neutral* laws "would be courting anarchy [and] would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind."<sup>117</sup>

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453 (1988) (allowing a road through a National Forest traditionally used by Native Americans for religious purposes because one group's Free Exercise rights cannot divest the Government of the right to use its own land).

<sup>114</sup> *County of Allegheny v. ACLU*, 492 U.S. 573, 677 (1989) (Kennedy, J., dissenting). As one scholar puts it:

Current Establishment analysis inhibits the free exercise rights of those in the religious majority in order to protect members of religious minorities from unease. Such discriminatory treatment of the majority believer inherently favors the beliefs of the minority. Thus, current Establishment standards expect tolerance from the majority while failing to require it from the minority as well.

Campbell, *supra* note 66, at 589–91 (arguing that an actual legal coercion test would "restore respect for majority religions" in the face of the "intellectually fashionable and mainstream" trend of ignoring that majority rights are equally protected by the Establishment Clause); *see also* Berg, *supra* note 41, at 939 ("[I]f courts adopted a rule explicitly protecting minority religions alone, or more than larger faiths, this would itself fly in the face of the deeply ingrained principle that government should treat all religions equally.").

<sup>115</sup> 494 U.S. 872, 886 (1990).

<sup>116</sup> Scalia's view makes it clear that even the most unusual minority religion would receive a fair hearing from him. He has stated that "[r]epeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Id.* at 886–87.

<sup>117</sup> *Id.* at 888–89 (presenting a laundry list of key laws that would be

To his detractors, Scalia's refusal to apply strict scrutiny was a betrayal of minority religions.<sup>118</sup> Majority religions can lobby legislators to include religious exceptions to generally applicable laws, but minority religions wield less influence.<sup>119</sup> Scalia himself acknowledged that "leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in."<sup>120</sup> He weighed the alternatives and found this an "unavoidable consequence of democratic government [that] must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs."<sup>121</sup>

History has thus far vindicated Scalia's position: While minority religions are disadvantaged under *Smith* in theory, that risk has not materialized in reality.<sup>122</sup> Empirical evidence shows

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jeopardized and arguing that "precisely because we value and protect . . . religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order").

<sup>118</sup> Chemerinsky has argued that Scalia understands quite well the disadvantage of minority religions under his jurisprudence: "In other words, how can a religious minority get protection for its practices? Only by hoping that the religious majorities will provide them with legal protection." *Hawaii Transcript, supra* note 6, at 504.

<sup>119</sup> See Colby, *supra* note 1, at 1112 (arguing that *Smith*'s ostensibly neutral rule is "decidedly discriminatory in practice"); see also *Smith*, 494 U.S. at 893–94 (O'Connor, J., concurring) (disagreeing similarly).

<sup>120</sup> *Smith*, 494 U.S. at 890 (majority opinion).

<sup>121</sup> *Id.* Scalia's confidence in the democratic system is demonstrated by an anecdote told by Professor Van Dyke:

I asked Justice Scalia what he would do on the bench if he were faced with a situation where you had an act of Congress that prohibited sex-based discrimination but had no exemption for religious groups, and thus would require the Roman Catholic Church to have female priests. His answer was that (as a judge) he would be obliged to uphold the statute, based on his decision in *Smith*, but that (as a citizen) he would then lead a revolution to persuade Congress to amend the statute to add an exemption for religious organizations.

*Hawaii Transcript, supra* note 6, at 523.

<sup>122</sup> See Berg, *supra* note 41, at 966 (noting that "since *Smith*, courts have mandated exemptions" for many minority groups under the Free Exercise Clause or the Religious Freedom Restoration Act); see also *O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 1026 (10th Cir. 2004) (en banc) ("[U]nder RFRA, mere possibilities, based on limited evidence supplemented by speculation, are insufficient to counterbalance the certain burden on religious practice caused by a flat prohibition on *hoasca*."), *aff'd sub nom. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006); *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 178–79 (3d Cir. 2002) (exempting Orthodox Jews from a

that the post-*Smith* majority has been sensitive in its treatment of minority religions.<sup>123</sup> Even Dean Sullivan commented on the irony that Congress's "nearly unanimous passage" of the Religious Freedom Restoration Act to overrule *Smith* may have proved Scalia's "political premises correct: the religious lobby was able to achieve stunning political unanimity in passage of a law designed to force a greater number of and scope for religious exemptions."<sup>124</sup> And Scalia *has* respected the will of the majority to essentially overrule *Smith* and require the application of strict scrutiny to religion-neutral rules.<sup>125</sup> Despite any personal misgivings, Scalia must take comfort in the fact that the system worked as he believes it should—a democratically elected majority effected a change in this sensitive area without "legislator-judges" dictating a constitutional rule that would be nearly impossible to change in the future.

Do not be surprised, then, that Mr. Scalia's Neighborhood is considered a safe haven for the free practice of minority religions.

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borough order requiring the removal of religiously significant items used for demarcation from utility poles on borough property); FOP Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 367 (3d Cir. 1999) (exempting Sunni Muslim police officers from an internal department order requiring all officers to shave their beards); Horen v. Commonwealth, 479 S.E.2d 553, 750 (Va. Ct. App. 1997) (exempting a Native American couple from a state statute prohibiting the possession of wild bird parts based on their religious use of owl feathers).

<sup>123</sup> See Berg, *supra* note 41, at 966 ("Indeed, the most systematic regression analysis of religious freedom decisions, done by my colleague Greg Sisk and others, concludes that in lower federal courts from 1986 to 1995, 'the proposition that minority religions experience a significantly lower success rate was found to be without empirical support.'") (citing Gregory C. Sisk, *How Traditional and Minority Religions Fare in the Courts: Empirical Evidence from Religious Liberty Cases*, 76 U. COLO. L. REV. 1021 (2005)).

<sup>124</sup> Sullivan, *supra* note 42, at 462–63 (2000) (noting also "the frequency of executive and legislative exemptions for the religious practices of religious minorities"). Scalia had already pointed out in *Smith* that in several states a minority of Native American religious adherents had successfully lobbied for statutory exceptions to drug laws to accommodate their sacramental use of peyote. See *Smith*, 494 U.S. at 890.

<sup>125</sup> It is true that in *City of Boerne v. Flores*, 521 U.S. 507, 534–35 (1997), Scalia did vote to strike down the application of the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb (2000), to the states solely on federalism grounds. But in *Cutter v. Wilkinson*, 544 U.S. 709, 713–14 (2005), Scalia joined a unanimous Court in upholding a facial challenge against the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-1 (2000), which similarly mandates strict scrutiny of religion-neutral rules in prison settings. And in *Centro Espirita*, Scalia joined a unanimous court applying RFRA to the federal government's application of the Controlled Substances Act to the sacramental use of a prescribed drug by a small Indian sect.

Scalia's view of the Free Exercise Clause will always prevent a government dominated with members of majority religions from imposing restrictions meant to "coerce" or limit the practices or beliefs of minority religions.

*C. Protection from Genuine Establishments of Religion*

Another sight you will *not* see in a tour of Mr. Scalia's Neighborhood is a government-run or sponsored church of any sort. There will be no equivalent to the Church of England or government enforcement of *Shari'a* law.<sup>126</sup> In fact, no one will be able to claim to be the "government-preferred" church. Even if Mr. Scalia's Neighborhood were to exist in the Mormon-populated State of Utah, it would never have its town council chosen by the local Church of Jesus Christ of Latter Day Saints.<sup>127</sup> In short, this town will not coerce "participation or attendance at a religious activity," require "religious oaths to obtain government office or benefits," delegate "government power to religious groups," or expend "significant amounts of tax money to serve the cause of one religious faith."<sup>128</sup> Each of these actions would result in the prohibited "coercion" Scalia believes is at the heart of the Establishment Clause.<sup>129</sup>

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<sup>126</sup> *Shari'a* law, the legal and moral code of Islam based on the Qur'an and other Islamic texts, is the law of the land in Saudi Arabia and Iran. "Most Islamic fundamentalist groups insist that Muslim countries should be governed by *Shari'ah*." BRITANNICA CONCISE ENCYCLOPEDIA (2007), <http://www.britannica.com/ebc/article-9378409>.

<sup>127</sup> See *Bd. of Educ. v. Grumet*, 512 U.S. 687, 735–36 (1994) (Scalia, J., dissenting) (recognizing as invalid any "conferral of governmental power upon a religious institution *as such* (rather than upon American citizens who belong to the religious institution)").

<sup>128</sup> *County of Allegheny v. ACLU*, 492 U.S. 573, 660, 664 (1989) (Kennedy, J., concurring in part and dissenting in part); see also *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 840 (1995) ("The apprehensions of our predecessors involved the levying of taxes upon the public for the sole and exclusive purpose of establishing and supporting specific sects."). Justice Scalia accepts this prohibition:

[A]s some scholars have argued, by 1790 the term "establishment" had acquired an additional meaning—"financial support of religion generally, by public taxation"—that reflected the development of "general or multiple" establishments, not limited to a single church. But that would still be an establishment coerced by force of law.

*Lee v. Weisman*, 505 U.S. 577, 640–42 (1992) (Scalia, J., dissenting) (citation omitted).

<sup>129</sup> See *supra* notes 84–90 and accompanying text (discussing the "coercion" test).

For Justice Scalia's critics, these monumental historic achievements are, colloquially speaking, no big deal. The vitality of the First Amendment has so permeated American culture and society that the most powerful protections contained in the Establishment Clause seem to operate entirely under the radar. As Dean Sullivan has so eloquently put it, cases of official sectarianism "tend simply not to arise in this nation, even though fights over such official theocratic symbolism still persist elsewhere in the world."<sup>130</sup> The reason they "tend simply not to arise" is because the Establishment Clause exists and works, even under Justice Scalia's philosophy. Such freedoms do not come so easily to most of the world, however—in many nations, state persecution of religion is the norm, state-run religion is part of the culture, and criminal prosecution of proselytizers is common.

While these priceless freedoms may seem elementary, the fact that some have taken them for granted requires redress. Scalia's opponents are bold enough to accuse him of "reading the Establishment Clause out of the Constitution" while also acknowledging that his model would surely strike down state attempts to genuinely sponsor religion.<sup>131</sup> These core protections, however, are the heart of the Establishment Clause: They prevent the majority from impermissibly "coercing" minority religions. Mr. Scalia's Neighborhood would enforce these prohibitions vigorously.

#### D. *Protection of Private Religious Speech*

While approaching the town square in Mr. Scalia's Neighborhood, one will encounter next to the town hall and county courthouse a picket-fenced, brick-paved area known as "People's Park," which offers a place where private citizens—upon application for a permit—may display whatever non-commercial symbols they wish. Of course, neutral and objective size and décor criteria, unassociated with content, must be observed and the exhibit may only be displayed for seven days per permit. This week at "People's Park" there is quite a vivid spectrum of free speech, spanning from minority to majority

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<sup>130</sup> Sullivan, *supra* note 42, at 451.

<sup>131</sup> Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 88 (2002); *see also* Sullivan, *supra* note 42, at 451 (concluding that such cases would be easy cases that would "not divide the Justices"—including Scalia).

views. The local Knights of Columbus organization has erected a marble memorial to the unborn killed by abortion in the United States since its legalization. On the display reads an inscription: "They rest in God's tender care." Next to that memorial, the local evangelical churches have constructed a tribute to the Bible as the Word of God, with numerous biblical passages expressing the belief that no person can be "saved" without faith in Jesus Christ. Similarly, a Wiccan coven in the town has erected a stunning model of the earth above a lengthy prayer to its Goddess. Finally, the local Irish-American League has placed a display honoring great Irish-American athletes in amateur sports.

"People's Park" is one reason adherents of minority religions should prefer Scalia's model over the strict separationist approach of some "living Constitution" proponents. To a separationist, these private exhibits may be inappropriate because the town has provided a forum for religious messages in an area closely associated with government. The key concern would be potential confusion that some of the private messages are in fact perceived as government speech. Followers of minority religions should be wary of this separationist view, however, because it might prevent them from getting their own religious message out into the public square.

On the other hand, under Justice Scalia's model—followed by much of the Court—the "potential confusion" issue has little, if any, constitutional significance.<sup>132</sup> Instead, in a public forum, the government must now accommodate private religious speech whether it is spoken by adherents of minority or majority religions.<sup>133</sup> This simple rule places minority religions on par

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<sup>132</sup> To Scalia, *unintentional* confusion over private speech is irrelevant:

"[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." Petitioners assert, in effect, that that distinction disappears when the private speech is conducted too close to the symbols of government. But that, of course, must be merely a subpart of a more general principle: that the distinction disappears whenever private speech can be mistaken for government speech. That proposition cannot be accepted, at least where, as here, the government has not fostered or encouraged the mistake.

Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 765–66 (1995) (plurality opinion) (quoting Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990) (plurality opinion)).

<sup>133</sup> See *id.* at 757–60 (finding free speech violation where city refused to allow Ku Klux Klan to erect Latin cross in state-owned plaza used for "over a century" as a public forum for "both secular and religious" causes). Scalia argued in his plurality

with majority religions in expressing personal faith in any public forum.

Suppose, however, that a town councilman proposes new rules for the use of "People's Park." Perhaps he is offended by the Wiccan exhibit, although no one can say for sure. He proposes granting permits only to applicants with over 1,000 members who are also residents of the town. This facially neutral rule just so happens to exclude every religious and non-religious organization in the neighborhood except for the First Baptist Church and United Church of Christ. "This is just another one of those time, place, and manner things," the councilman explains. "It reserves this limited forum for our most represented speakers."

Justice Scalia's benevolence towards the majority would likely end here, despite the proposal's neutral wording. To Scalia, there *are* limits to "toleration" of private speech:

[G]iving sectarian religious speech preferential access to a forum close to the seat of government (or anywhere else for that matter) would violate the Establishment Clause (as well as the Free Speech Clause, since it would involve content discrimination). And one can conceive of a case in which a governmental entity manipulates its administration of a public forum close to the seat of government (or within a government building) in such a manner that only certain religious groups take advantage of it, creating an impression of endorsement *that is in fact accurate*.<sup>134</sup>

Under the councilman's proposal, the town's prime public forum would effectively be reserved for only one or two speakers, and both of them are Christian churches. This arrangement

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opinion that the Establishment Clause was "never meant, and has never been read by this Court, to serve as an impediment to purely *private* religious speech connected to the State only through its occurrence in a public forum." *Id.* at 767; *see also* *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 121 (2001) (Scalia, J., concurring) ("[R]eligious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms." (quoting *Capitol Square*, 515 U.S. at 770 (plurality opinion))); *Curry ex rel. Curry v. Sch. Dist.*, 452 F. Supp. 2d 723, 740 (E.D. Mich. 2006) (finding school violated student's right to speech by preventing him from selling religious card during class sales project). *But see* *Kaplan v. City of Burlington*, 891 F.2d 1024, 1029–30 (2d Cir. 1989) (rejecting, prior to *Capitol Square*, Jewish group's desire to raise menorah in public forum outside city hall because of forum's location near the seat of government).

<sup>134</sup> *Capitol Square*, 515 U.S. at 766 (plurality opinion).

would not survive close scrutiny under either Scalia's approach or a separationist model.

As a final consideration of private religious speech, suppose a minority religious group requests access for private speech outside the brick confines of "People's Park," in an area traditionally reserved only for government speech. Can this group, or any group, force the town to extend the park's rules throughout the entire square? Both Scalia and most courts would answer that question in the negative.<sup>135</sup> Scalia would likely find, as would the separationists, that it is the town's right to keep a non-public forum nonpublic, assuming no discrimination in the government's action.

Thus, in Mr. Scalia's Neighborhood *all* citizens would be free to engage in private religious speech in any public forum, subject to neutral "time, place, and manner" restrictions.<sup>136</sup> This is so because under Scalia's model there is no chance of government "coercion" by simply allowing private speech. And Scalia's approach—echoed by the current state of the Court's precedent—is more generous to minority religions than the typical separationist model.

### *E. Equal Access to Public Facilities and Aid*

#### 1. Access to Public Facilities

As you leave the town square in Mr. Scalia's Neighborhood, a quick turn on South Street will bring you to the local public high school. Although school is out, the building is still being used at this time. In a large conference hall a group of Muslim students meets to study the Qur'an and discuss their religious beliefs. The

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<sup>135</sup> See *Berry v. Dep't of Soc. Servs.*, 447 F.3d 642, 645–46 (9th Cir. 2006). The court rejected a federal employee's challenge to a policy that forbade his prayer meetings in the office conference room, a non-public forum. *Id.* ("[T]he public employer's interests in . . . maintaining the conference room as a nonpublic forum outweigh the resulting limitations on [an employee's] free exercise of his religion at work."); see also *Mehdi v. U.S. Postal Serv.*, 988 F. Supp. 721, 727 (S.D.N.Y. 1997) (rejecting claim to force United States Postal Service to place Muslim symbols in a post office, a non-public forum, where Christmas and Chanukah decorations were hung, because the United States Postal Service hung decorations for a nonreligious purpose: to promote business "by adorning its facilities with symbols of holidays which generate increased business").

<sup>136</sup> See *Berg*, *supra* note 41, at 987 ("Equal protection for private religious speech . . . can extend as well to minority and outsider views. Indeed, it may be particularly important for such views.").

district allows students to form clubs and use school facilities until six o'clock in the evening each night. These students are taking full advantage of those guidelines to communally express their beliefs. There is nothing unusual about this scene even by today's standards; this equal access to public facilities, however, has been achieved only through a series of cases where Justice Scalia has voted with near-unanimous majorities.<sup>137</sup>

Strict separationists would prevent these Muslim students from using public facilities for three reasons. First, this private use of the facilities could be mistaken for government speech, giving the false impression that the government is endorsing Islam.<sup>138</sup> Justices following Scalia's model, however, would see no problem with this "commonsense" type of endorsement as long as the religious group is one of many secular and religious groups permitted to use the facilities.<sup>139</sup> Second, some separationists would balk at the fact that the state is expending public funding to maintain these facilities, thus using tax dollars to support religion. Scalia will tolerate these minor expenditures as long as the nature of the benefits is permissible.<sup>140</sup> Finally, separationists dislike that this use is occurring in a public school. They believe impressionable youths may feel coerced into joining religious clubs if meetings are held at school. To this, Scalia would note that coercion from peers is not governed by the Establishment Clause—the only relevant "coercion" is "whether the government imposes pressure upon a student to participate in a religious activity[, considering] . . . the special circumstances that exist in a secondary school."<sup>141</sup>

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<sup>137</sup> See *Bd. of Educ. v. Mergens*, 496 U.S. 226, 232–34 (1990) (Scalia joining 8-1 majority finding that Christian club could meet in school after hours on equal footing with other clubs, in compliance with the Equal Access Act, 20 U.S.C. §§ 4071–74 (2000)); see also *Good News Club*, 533 U.S. at 102–03 (allowing Christian club to meet in school after hours); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 387, 394–395 (1993) (holding unanimously that church is allowed to access school property to show Christian lecture series).

<sup>138</sup> See *supra* Part III.D (discussing the "confusion" issue in the context of private speech).

<sup>139</sup> See *Mergens*, 496 U.S. at 261 (finding no constitutional violation where "membership in a religious club is one of many permissible ways for a student to further his or her own personal enrichment").

<sup>140</sup> See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 842–46 (1995) (upholding group's access to contractor, funded by student fees, to print religious newspaper because precedent allows the spending of tax money for such items as "electricity and heating or cooling costs" in the facility).

<sup>141</sup> *Mergens*, 496 U.S. at 259–62 (Kennedy, J., concurring in part) (finding no

Suppose, however, that the public school's devout principal wanted to limit after-school access *only* to religious clubs, or only to majority religion clubs. Here, Justice Scalia would have little problem striking down such a content-based rule as a violation of both the Free Speech and Establishment Clauses, for the same reasons he would prohibit the town from showing favoritism to religion by manipulating its public forums.<sup>142</sup> Thus, the possibility of persecution against minority religions is kept in check.

## 2. Access to Public Aid

It should be no surprise that private schools in Mr. Scalia's Neighborhood—religious and non-religious alike—might be allowed to receive generally applicable benefits intended for all students in town. For instance, public funding would be available for all students to purchase textbooks on key health issues, such as abstinence and sexually transmitted diseases. The same rules governing equal access to facilities also apply to access to public funding. If the town opens its aid to all students, it must treat minority religion schools on the same footing as any other secular or majority religion private school.

The separationist approach would not permit this aid for fear of providing parents an incentive to send children to religious schools, or due to concerns of excessive entanglement. In a series of cases, however, a majority of the Court—with Scalia's votes—has upheld this practice because, in these types of situations, the students' parents are not coerced to put their funds into religious schools.<sup>143</sup> The Court has explained that generally available aid

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impermissible establishment where school does not encourage or compel any student or employee participation).

<sup>142</sup> See *supra* note 134 and accompanying text; see also *Rosenberger*, 515 U.S. at 835 (noting that government must “ration or allocate the scarce resources on some acceptable neutral principle”).

<sup>143</sup> See *Zelman v. Simmons-Harris*, 536 U.S. 639, 645–46 (2002) (upholding Ohio school voucher program that allowed parents to use public vouchers to support private religious schools without restriction); *Mitchell v. Helms*, 530 U.S. 793, 801–02 (2000) (upholding federal aid program that allowed states to lend educational materials to both public and private schools as long as aid was “secular, neutral, and nonideological”); *Agostini v. Felton*, 521 U.S. 203, 209–10, 236–37 (1997) (overruling precedent that prevented public school teachers from entering religious school classrooms to provide “secular, neutral, and nonideological” “remedial education, guidance, and job counseling to eligible students”); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 3 (1993) (upholding district's provision of sign language interpreter to deaf student attending Catholic school); *Bowen v. Kendrick*, 487 U.S. 589, 593

does not “give aid recipients any incentive to modify their religious beliefs or practices in order to obtain those services.”<sup>144</sup> Also, “the constitutionality of a neutral educational aid program simply does not turn on whether and why . . . most recipients choose to use the aid at a religious school.”<sup>145</sup> In other words, government should not be prevented from granting neutral aid based on the actions of its private citizens.

These are yet more reasons why adherents of minority religions should prefer Scalia’s approach, with its greater rights and benefits, over the strict separationist model.

### 3. Forcing Government to Provide Generally Available Aid to Religion

Recently in *Mr. Scalia’s Neighborhood* the town council passed an ordinance to provide travel funding to all students in town who compete in distant competitions, such as spelling and math bees. The council specifically excluded funding for religious competitions, such as Bible bees. The local Catholic school in town benefits from the funds for its students to attend the math bees, but the principal has complained that the town should also provide funding for an out-of-town “Lives of the Saints Bee” next month.

A majority of the current Court—even some conservative Justices—would find no problem with the town’s decision not to fund religious bees. To them, the town should be free to spend its money as it wishes.<sup>146</sup> They see no discrimination against religion because religious schools are permitted to use the funding for secular events. Indeed, the separationists would likely argue that the religious schools should not be authorized *any* of the funding.

Justice Scalia, on the other hand, uses a stricter measuring stick to assess discrimination. He would no doubt find the town’s

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(1988) (upholding law allowing participation by religious groups in federal programs on adolescent sexuality).

<sup>144</sup> *Agostini*, 521 U.S. at 232; see also *Zobrest*, 509 U.S. at 10 (noting that federal statute “creates no financial incentive for parents to choose a sectarian school”).

<sup>145</sup> *Zelman*, 536 U.S. at 658 (upholding program where ninety-six percent of Ohio recipients were spending funds on private religious schools).

<sup>146</sup> See *Locke v. Davey*, 540 U.S. 712, 725–26 (2004) (upholding Washington State’s college scholarship program that specifically excluded generally applicable funding for degrees in devotional theology, with Scalia and Thomas dissenting due to the facial discrimination against religion).

program facially discriminatory against religion—it is no accident that the program does not subsidize travel for religious competitions *only*.<sup>147</sup> Unlike the situations where the town is simply choosing its own message, here it is targeting religion for disparate treatment merely because of a competition's religious content. Thus, in Mr. Scalia's Neighborhood the town council's program would be struck down.

Justice Scalia's position is double-edged, however. Having struck down the town council's program, the council may decide to fund only *public school* travel to out-of-town competitions. Under that facially neutral proposal, *all* private schools—religious and non-religious alike—would be cut out of the picture. Scalia would likely agree that such a neutral program would pass scrutiny; the town has the right to spend its money on publicly funded schools.

In some cases, then, Scalia's model—while fair and equal—could lead government officials to take actions that amount to *less* funding for religious programs across the board.<sup>148</sup> This may simply be the price that must be paid so that religious organizations are not singled out for disparate treatment.

#### F. Government Exemptions for Religious Organizations

Suppose the town council in Mr. Scalia's Neighborhood desires to aid local religious groups by passing a tax exemption for fees on vehicles registered to them. As always, minority religions would benefit equally with the majority. Separationists would strike such exemptions down as an impermissible support of religion—whether they involve a minority group or not.<sup>149</sup>

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<sup>147</sup> See *id.* at 728–29 (Scalia, J., dissenting) (arguing that Washington's program is facially discriminatory).

<sup>148</sup> For instance, in *Locke*, Justice Scalia suggested several potential solutions to Washington's dilemma:

[The state] could make the scholarships redeemable only at public universities (where it sets the curriculum), or only for select courses of study. . . . The State could also simply abandon the scholarship program altogether. If that seems a dear price to pay for freedom of conscience, it is only because the State has defined that freedom so broadly that it would be offended by a program with such an incidental, indirect religious effect.

540 U.S. at 729.

<sup>149</sup> See *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 44–45 (1989) (Scalia, J., dissenting) (dissenting from a fractured majority's striking down a tax break for religious periodicals due to conflicts with the Press, Speech, and Establishment Clauses).

This is the other side of a bad separationist coin: The town is free *not* to fund religious groups with generally available funds, but it is *not free* to exempt those religious groups from taxes that raise those very same funds.

Once again, Scalia's model provides better rights for minority religions. To him, tax exemptions for religious groups may at times be "constitutionally compelled."<sup>150</sup> His approach distinguishes an impermissible subsidy of religion with a permissible exemption where "the state merely refrains from diverting to its own uses income independently generated by the churches through voluntary contributions."<sup>151</sup> His arguments always rooted in history, Scalia has noted the unchallenged tradition of "benevolent neutrality" by government in granting tax exemptions to religious organizations in "all 50 States and the National Government before, during, and after the framing of the First Amendment's Religion Clauses, and . . . throughout the 200-year history of our Nation[,] . . . 'so long as none was favored over others and none suffered interference.'"<sup>152</sup>

A separationist undoubtedly would complain that such exemptions have the effect of advancing religion. Scalia would disagree: "[T]he *primary* effect of a tax exemption [i]s not to sponsor religious activity but to 'restric[t] the fiscal relationship between church and state' and to 'complement and reinforce the desired separation insulating each from the other.'"<sup>153</sup> To Scalia, such exemptions are forbidden only where government treats one sect differently than others.<sup>154</sup>

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<sup>150</sup> See *id.* at 40–41. Government may be required to aid a religious institution because of its religious affiliation, as with a mandated religious exemption to Title VII's prohibition on religious discrimination. See *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 329–30, 334 (1987) (finding no Establishment Clause problems with Title VII's religious exemption as an accommodation because "[t]here is ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference'" (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970))).

<sup>151</sup> See *Texas Monthly*, 489 U.S. at 43 (quoting Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development Part II: The Nonestablishment Principle*, 81 HARV. L. REV. 513, 553 (1968)).

<sup>152</sup> *Id.* at 35 (quoting *Walz*, 397 U.S. at 676–77).

<sup>153</sup> *Id.* at 43 (quoting *Walz*, 397 U.S. at 676).

<sup>154</sup> See *Hernandez v. Comm'r*, 490 U.S. 680, 712–13 (1989) (O'Connor, J., dissenting).

*G. Assessment: Is Mr. Scalia's Neighborhood a Safe Haven for Minority Religions?*

Two realities should now be clear. First, Justice Scalia's approach provides minority religions with all the fundamental protections of the Religion Clauses—and often includes more benefits for minority religions than would be available under a separationist model. Second, Scalia's view often coincides with the majority view of the Court, which is evidence that the strict separationist ideals advanced by some scholars are not persuasive enough to garner votes.

Justice Scalia is a friend to minority religions and would allow a broad range of religious freedom, practice, and accommodation that the more separationist-minded Justices would strike down as unconstitutional. This is primarily due to his belief in the permissibility of neutral government programs that do not “coerce” citizens through forced religious participation or taxation. In his neighborhood, adherents of minority religions would practice their beliefs freely without government persecution or coercion. They would not see their tax dollars spent in support of other religions, nor watch the town's power be handed over to other religious organizations to control. Minority religious groups would have equal free speech rights in public forums and equal access to public facilities. They would also benefit by receiving public funds from generally applicable programs, tax exemptions based on their status as religious groups, and in some cases, special accommodations for their minority beliefs.

In contrast, the experience of being in a separationist's neighborhood would be quite different for members of minority religions. To be sure, adherents would have full protection from encroachments on free exercise, the use of taxes to support religion, and improper delegation of government duties. But these faithful minority practitioners would also suffer key losses. They would be limited in their expression of private religious speech in some public forums near government functions. They would not have equal access to some public facilities, especially within the school setting. They would be prevented from receiving generally applicable funds available to similarly-situated secular groups, despite having similar expenses. They would have fewer exemptions from taxes, even if a majority

wanted to accommodate their minority beliefs in keeping with the noblest of American traditions.

In this light, critics' claims that Scalia would read the Religion Clauses out of the Constitution seem silly. There can be no doubt that Mr. Scalia's Neighborhood would be a safe haven for minority religions with regard to the precious religious freedoms at the heart of the Establishment Clause.

#### IV. COURTING CONTROVERSY: ACKNOWLEDGMENT AND SUPPORT OF RELIGION IN GENERAL

Thus far, this Article has focused on the vast breadth of benefits Justice Scalia's approach would provide to all religions. Unless our most cherished First Amendment protections mean nothing, Scalia surely has not read the Religion Clauses out of the Constitution. Controversy arises, however, when addressing the effects of government support and acknowledgment of religion. Scalia's detractors have focused most of the criticism there, targeting his views on religious displays and prayer. It should not be forgotten that those subscribing to *no* religion are also a minority "religious" group in America—this includes atheists, agnostics, and any other group that might not fit into the term "religion" as traditionally understood. This part of the Article will tackle the Establishment Clause's more abstract protections, and examine whether Mr. Scalia's Neighborhood would be the "scary" place some have predicted.<sup>155</sup>

##### A. *The Establishment Clause as a Vehicle to Prevent Feelings of Exclusion*

No one likes to feel left out, but is the Establishment Clause the vehicle with which to enforce feelings of inclusion in society? Some believe so. Professor Chemerinsky has argued, for instance, "I think that the point of the Establishment Clause is to keep people from different religions from feeling uncomfortable when one religion is expressed by the government in a formal government setting."<sup>156</sup> It makes sense that when government acknowledges religion in a meaningful way, those who sincerely adhere to an atheistic or other non-religious view of life may feel like outsiders. Similarly, when government acknowledges the

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<sup>155</sup> See *supra* notes 5–7 and accompanying text.

<sup>156</sup> *Hawaii Transcript*, *supra* note 6, at 505.

Nation's majority religions those who genuinely subscribe to less practiced religions may feel excluded.

Feelings of exclusion, even if experienced by only a minority of Americans, are by no means trivial. Professor Stephen Feldman has written a compelling portrait of the experience of being a religious outsider in American culture.<sup>157</sup> Feelings run deep, and the laudable desire to create an inclusive society where no one feels second-class is so powerful that many would gladly discard some of the Religion Clause freedoms Justice Scalia seeks to protect in order to maintain this inclusiveness. Indeed, much of the criticism aimed at Scalia's model focuses particularly on the possibility of atheists and followers of minority religions feeling like second-class citizens.<sup>158</sup> As one commentator put it, Scalia's message "to those faiths that are not included will be one of ostracism, if not contempt."<sup>159</sup>

To allegations of exclusion, Justice Scalia stands guilty as charged, as do we all. There is little doubt that some in society will feel left out under Scalia's approach if they practice a minority religion or no religion at all. The reality is that groups of Americans will *always* feel excluded when government addresses the unavoidable subject of religion. If one group—e.g.,

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<sup>157</sup> See Berg, *supra* note 41, at 926. Professor Berg cites to a "list of incidents that law professor Stephen Feldman recounts from his daily life as a Jew in Tulsa, Oklahoma." *Id.* Included in this list are well-intended but insensitive comments about Judaism from neighbors and friends and desires by his children to convert to Christianity in order to celebrate Christmas. See *id.* Berg concludes that "Professor Feldman's list makes an important point. It 'communicates the experience of being an outgroup member, the experience of cumulative frustration in coping' day after day with the actions and assumptions of the majority culture or the majority-elected government." *Id.* (quoting STEPHEN M. FELDMAN, PLEASE DON'T WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY OF THE SEPARATION OF CHURCH AND STATE 283 (1997)).

<sup>158</sup> See Amar & Brownstein, *How Will the Roberts Court Interpret the Establishment Clause?*, *supra* note 4; see also Vikram Amar & Alan Brownstein, *The Roberts Court and the Establishment Clause, Part Two: The Consequences of the Probable Shift from an "Endorsement" to a "Coercion" Test*, FINDLAW, Nov. 10, 2006, [http://writ.news.findlaw.com/commentary/20061110\\_brownstein.html](http://writ.news.findlaw.com/commentary/20061110_brownstein.html) [hereinafter Amar & Brownstein, *The Roberts Court and the Establishment Clause, Part Two*]. This "outsider" argument finds that members of minority religions have an interest in the state recognizing "that their religious beliefs are equally worthy of respect as the beliefs of other faiths . . . . Its concern is not about the state's own messages promoting religion, but about what religious activities the state is forcing private individuals to participate in or to espouse." Amar & Brownstein, *How Will the Roberts Court Interpret the Establishment Clause?*, *supra* note 4.

<sup>159</sup> Amar & Brownstein, *The Roberts Court and the Establishment Clause, Part Two*, *supra* note 158.

atheists—does not feel left out, then another group—e.g., Christians—will. The issue of feeling excluded must be viewed in the larger context of the Religion Clauses, and its relative harm must be measured against the alternatives.<sup>160</sup>

For instance, were the government to follow the strict separationist ideal, the overwhelming majority of the Nation<sup>161</sup>—including adherents of minority religions—would feel disfavored. When the government is not permitted to acknowledge religion in a meaningful way, religious Americans sincerely perceive government hostility towards them. Indeed, some of the Court's past jurisprudence has produced this exact effect: “[R]eligious Americans currently face what has been described as a culture of disbelief—a legal and political mindset that ‘belittles religious devotion, humiliates believers, and, even if indirectly, discourages religion as a serious activity.’”<sup>162</sup> This alienation applies equally to devout members of both majority and minority religions, and cannot be equitably cured by making an exception only for those in the minority.

The reality is that the Supreme Court has always recognized—and still claims—that there is a place for God and religion in public life. “As one of our Supreme Court opinions rightly observed, ‘We are a religious people whose institutions presuppose a Supreme Being.’”<sup>163</sup> How can a Nation whose very fabric is woven with the supposition of a Supreme Being reconcile its desire to make all citizens feel included, even those who reject this supposition? Whose feelings should the Court choose to

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<sup>160</sup> See *Hawaii Transcript*, *supra* note 6, at 511–12 (remarks of Professor Kelley). “[W]hat value ought we to give to the offense felt by some who do not get an accommodation when others do? . . . [I]t strikes me as really not the case that adherents of one faith are in any significant way harmed by the accommodation of beliefs of adherents of another.” *Id.*; see also Campbell, *supra* note 66, at 585 (“[O]ffended citizens are not directly harmed or prevented from believing and acting as their conscience dictates.”).

<sup>161</sup> See Deverich, *supra* note 80, at 212 (“[S]tatistics indicate that a relatively large percentage of Americans continue to view religion as a fundamental aspect of their lives . . . . Some polls indicate that approximately ninety percent of Americans believe in the existence of a god, seventy percent pray, and forty percent read the Bible every week.” (footnote numbers omitted)).

<sup>162</sup> *Id.* (internal punctuation omitted); see also Garry, *supra* note 80, at 28–33 (documenting specific examples of the blatant anti-religion hostility that has permeated much of academia and the judiciary since the 1960s).

<sup>163</sup> *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 889 (2005) (Scalia, J., dissenting) (quoting *Zorach v. Clauson*, 343 U.S. 306, 313 (1952)).

hurt, and why should Scalia's value choice prevail in this difficult decision?

Scalia's answer to these questions might be fourfold. First, American demographics lend themselves to this value choice. Traditionally, religion has played a crucial role in American life, and it was a driving force in the founding of the Nation. Even today, religion is a compelling cultural reality for the majority of the Nation, much more so than in other developed countries.<sup>164</sup> Second, "[t]hose who wrote the Constitution believed that morality was essential to the well-being of society and that encouragement of religion was the best way to foster morality."<sup>165</sup> In the words of President John Adams, "[o]ur Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other."<sup>166</sup> To tear religion from American government, then, is to undermine the foundation upon which the Nation was built.<sup>167</sup>

Third, Scalia would likely emphasize that feelings of exclusion are not the type of "coercion" from which the Establishment Clause protects.<sup>168</sup> Finally, and most importantly, this value choice was made by the Nation's Framers and is not for the courts to modify:

[T]here are legitimate *competing* interests: On the one hand, the interest of that minority in not feeling "excluded"; but on the other, the interest of the overwhelming majority of religious

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<sup>164</sup> See Deverich, *supra* note 80, at 212 (recounting statistical evidence and stating that "Americans rank among the highest of developed populations for church attendance and monetary contributions to religious institutions. Some polls indicate that approximately ninety percent of Americans believe in the existence of a god" (footnote numbers omitted)).

<sup>165</sup> *McCreary*, 545 U.S. at 887; see also Garry, *supra* note 80, at 17 (citing historian Rousas John Rushdoony's research concluding that 18th century America believed that the First Amendment existed to ensure "separation of a specific church from the state, not . . . the separation of all religion from the state," and that this belief stemmed from their understanding that "law was an expression of morality and that morality derives from religion").

<sup>166</sup> *McCreary*, 545 U.S. at 887–88.

<sup>167</sup> See *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting) (arguing that the Court's failure to recognize the state's right to "morally" legislate against homosexuality could result in many other laws being struck down); see also Garry, *supra* note 80, at 33–35 (explaining the crucial role religion plays in American culture and politics, and arguing that "[a] healthy democracy cannot survive without a social value system that supports the communal interests and bonds of that society").

<sup>168</sup> See *Lee v. Weisman*, 505 U.S. 577, 640–42 (1992) (Scalia, J., dissenting) (describing coercion by law or penalty).

believers in being able to give God thanks and supplication *as a people*, and with respect to our national endeavors. Our national tradition has resolved that conflict in favor of the majority.<sup>169</sup>

In other words, it is not Scalia's value choice at all; he is as much a prisoner to the Framers' choices as the rest of us until an overwhelming majority of Americans decides to make a new choice using the amendment method enshrined within the Constitution itself.

In sum, since the Court faces the reality that citizens will feel excluded no matter what course of action it takes, Scalia would not allow these feelings to drive the Court's decision.

### B. *Scalia's Case for Acknowledgment of Religion in General*

With regard to the Religion Clauses, the crux of the disagreement between Scalia and proponents of a "living Constitution" is whether to apply the Constitution's words as understood by its Framers or whether to apply an evolving standard to the limits of government acknowledgment and accommodation of religion. While Scalia would stick to tradition and historical practice, other Justices are willing to disagree about the past and apply the Establishment Clause in a way that they believe is best for today's society.

Adherents to minority religions should look favorably upon Justice Scalia's view that religion was never intended by the Framers "to be strictly excluded from the public forum."<sup>170</sup> To Scalia, "there is nothing unconstitutional in a State's favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments."<sup>171</sup> He bemoans "the demonstrably false principle that the government cannot favor religion over

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<sup>169</sup> *McCreary*, 545 U.S. at 900.

<sup>170</sup> *Id.* at 886 (stating that America differs from the French model of government, with a Constitution that requires France to be a "secular" Republic); see also Garry, *supra* note 80, at 16–17 (arguing from history that the Framers believed religion was essential to the success of secular government).

<sup>171</sup> *Van Orden v. Perry*, 545 U.S. 677, 692 (2005) (Scalia, J., concurring); see also *City of Elkhart v. Books*, 532 U.S. 1058, 1059–60 (2001) (Rehnquist, C.J., dissenting, joined by Scalia and Thomas) (dissenting from a denial of certiorari in a case involving "a 6-foot granite monument inscribed with the Ten Commandments" that had stood in front of the city's municipal building for 40 years prior to being challenged).

irreligion.”<sup>172</sup> For this reason, his views may foster feelings of exclusion in atheists; yet, those feelings are inevitable if the Nation’s institutions truly presuppose the existence of a Supreme Being.

Justice Scalia also believes that the Court is losing valuable credibility by ignoring this history and the current cultural reality.<sup>173</sup> While attacking Justice Souter’s claim that the Constitution “mandates governmental neutrality between religion and nonreligion,” Scalia complained, “Who says so? . . . Nothing stands behind the Court’s assertion that governmental affirmation of the society’s belief in God is unconstitutional except the Court’s own say-so, citing as support only the unsubstantiated say-so of earlier Courts going back no farther than the mid-20th century.”<sup>174</sup> The 20th century case to which Scalia referred is the seminal decision of *Everson v. Board of Education* in 1947.<sup>175</sup> That decision’s famous—or infamous—dictum about the history and purpose of the Establishment Clause has shaped the Court’s modern view.<sup>176</sup> Scalia and other

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<sup>172</sup> *McCreary*, 545 U.S. at 893.

<sup>173</sup> *See id.* at 892–93.

<sup>174</sup> *Id.* at 889–93 (internal quotation marks omitted) (arguing also that the Court is inconsistent in applying *Everson v. Board of Education*, 330 U.S. 1 (1947), because of “the instinct for self-preservation” and its recognition that it “cannot go too far down the road of an enforced neutrality that contradicts both historical fact and current practice without losing all that sustains it”).

<sup>175</sup> 330 U.S. at 17 (1947) (upholding state law funding transportation of children to school).

<sup>176</sup> The dictum reads as follows:

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

*Id.* at 15–16. Scalia has criticized the historical basis of this dictum: “A prominent commentator of the time remarked (after a thorough review of the evidence himself) that it appeared the Court had been sold . . . a bill of goods.” *McCreary*, 545 U.S. at 890 n.2 (internal quotation marks omitted).

scholars, however, argue that *Everson's* poor reasoning is the source of many modern historical errors.<sup>177</sup> They maintain that, prior to *Everson*, the Court had never subscribed to the "wall of separation" theory.<sup>178</sup>

The historical disagreements between key Justices on the Court have made this area of the law one of the most interesting to follow. While Justice Scalia and his "originalists" rest on historical practice, Justice Souter and his "separationists" poke holes in history and create enough doubt to sustain the Court's charted course begun in *Everson*.<sup>179</sup> History is on Scalia's side.<sup>180</sup> He and other conservative Justices have repeatedly outlined the official<sup>181</sup> acts by the Constitution's Framers that seem to compel the conclusion that they permitted government to encourage religion in general for the purpose of fostering morality.<sup>182</sup> These

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<sup>177</sup> See Somers, *supra* note 65, at 267–70 (tracing efforts to use courts to achieve interpretations repeatedly denied at ballot box, and arguing that "a metaphor, from a letter written by Thomas Jefferson more than ten years after the First Amendment was ratified, became the capstone of Establishment Clause jurisprudence" in the 1940s).

<sup>178</sup> See Deverich, *supra* note 80, at 222 n.69 (explaining that the Court "seemed uneasy with [Jefferson's strict separation] principle in some early cases when it declared that the United States is a 'Christian country' in *Vidal*, and a 'Christian nation' in the 1892 decision *Church of Holy Trinity v. United States*"); see also Garry, *supra* note 80, at 22 (noting that "the 'wall of separation' metaphor coined by Thomas Jefferson in 1802 had never appeared in Establishment Clause jurisprudence" before 1947, and that "Jefferson had used it not to diminish public support for religion generally, but to agree with the Baptists that the establishment of the Congregationalist Church in Connecticut should not threaten their religious beliefs").

<sup>179</sup> Professor Munoz acknowledges that Justice Souter's tactics have scored some points: "The fact that the Framers disagreed about the proper relationship between church and state necessarily means that the application of any one of their principles to modern church-state jurisprudence is bound to be partial." Munoz, *supra* note 38, at 387–88.

<sup>180</sup> See Somers, *supra* note 65, at 279–80 (outlining the official religious acts of Presidents Washington, Adams, and Madison); see also Deverich, *supra* note 80, at 217–21 (setting out the historical basis of the Establishment Clause, including the fact that early America did not readily accept Jefferson's "wall of separation" view); Garry, *supra* note 80, at 17–18 (outlining the historical precedents for some government support of religion in the 18th century).

<sup>181</sup> Justice Scalia has placed great significance on the fact that his historical examples are from official acts, and that his critics rely on the "unofficial" words of some Founders. See *McCreary*, 545 U.S. at 895–96 (criticizing Souter and Stevens's use of Madison's pre-Constitution Remonstrance Against Religious Assessments, "two letters written by Madison long after he was President, and the quasi-official inaction of Thomas Jefferson in refusing to issue a Thanksgiving Proclamation").

<sup>182</sup> See *id.* at 886–88 (extensively outlining the key historical evidence in summary fashion).

basic facts<sup>183</sup> have been acknowledged by “living Constitution” proponents, though discarded as a bad memory of the past.<sup>184</sup>

After considering all the evidence, adherents of minority religions should conclude that Scalia’s model is a good one. It follows the principle that “[g]overnment policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage.”<sup>185</sup> It also allows these religions to co-exist with a government that bears no official hostility towards all things religious. Those who practice no religion are regrettably placed in the position of toleration—they must recognize that America’s fundamental institutions are built upon presuppositions about religion with which they disagree. Yet they too may take comfort in the fact that, unlike many places in the world, America allows them the freedom to practice whatever view they like without fear of persecution, and with equal access to the full domain of free speech in which to persuade others to come around to their non-religious point of view.

### C. Applying Scalia’s Approach to Religious Displays

Returning to the town square of Mr. Scalia’s Neighborhood, one can observe, perhaps,<sup>186</sup> the most controversial aspects of

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<sup>183</sup> See *id.* at 880 (admitting that “the religion of concern to the Framers was not that of the monotheistic faiths generally, but Christianity in particular” and agreeing that the Framers probably meant the Establishment Clause to “exclude all rivalry among Christian sects”). And Souter isn’t the only Justice who has affirmed the historical argument. In *County of Allegheny v. ACLU*, Justice Blackmun acknowledged the accuracy of the originalist position when he stated: “Perhaps in the early days of the Republic these words were understood to protect only the diversity within Christianity, but today they are recognized as guaranteeing equality to ‘the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism.’” 492 U.S. 573, 590 (1989) (plurality opinion) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 52 (1985)).

<sup>184</sup> Justice Souter has conceded that evidence exists to support Scalia’s position, but that “a respectable body of opinion supported a considerably broader reading” of the Establishment Clause which was “enough to preclude fundamentally reexamining our settled law.” *Lee v. Weisman*, 505 U.S. 577, 626 (1992) (Souter, J., concurring).

<sup>185</sup> The Establishment Clause “permits government some latitude in recognizing and accommodating the central role religion plays in our society. Any approach less sensitive to our heritage would border on latent hostility toward religion . . .” *Allegheny*, 492 U.S. at 657 (Kennedy, J., dissenting in part) (citations omitted).

<sup>186</sup> I say “perhaps” because the town council may decide *not* to recognize religion in its public life. In such case, the town square would be totally devoid of government-related religious speech.

Scalia's model. A small footpath leading past "People's Park" ends at a ten-foot high, government-owned granite sculpture of the Ten Commandments, with each commandment fully inscribed from the King James translation of the Bible. No disclaimers or explanatory plaques accompany the display. Just beyond the Ten Commandments lies the heart of the town square: a center stage and grassy field where various bands provide summer concerts, and where speeches are often given by public officials. During December, a crèche and Chanukah menorah are displayed here by the town to honor the religious occasions. The town has chosen not to "pollute" the meaning of those holidays with the usual "Santa and Rudolph" displays one might find at the local mall.

Here the town is apparently proclaiming the Ten Commandments as government speech—something to honor. Likewise, the holiday displays of a crèche and menorah commemorate two major religious feasts, without the pretense that such days hold no religious significance. To separationists, the town is impermissibly encouraging religion or adherence to a religious moral code. But to Justice Scalia, this is no problem.

#### 1. The Ten Commandments Display

The Ten Commandments display at issue in the town square would be constitutional under Scalia's approach, but probably not under the current state of the law due to its prominent placement and lack of disclaimers.<sup>187</sup> In Scalia's view, displays of the Commandments simply acknowledge "the contribution that religion has made to our Nation's legal and governmental heritage."<sup>188</sup> To Scalia, honoring the Decalogue is equivalent to recognizing and tolerating widely held beliefs.<sup>189</sup> Two

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<sup>187</sup> See *McCreary*, 545 U.S. at 857–58 (striking down the display of the Ten Commandments at a Kentucky courthouse based on an illicit government purpose). But see *Van Orden v. Perry*, 545 U.S. 677, 691–92 (2005) (plurality opinion) (allowing a privately-placed display at the Texas capitol thanks to Justice Breyer's vote with the conservative members). The town-owned display in Mr. Scalia's Neighborhood stands alone with no disclaimers, differentiating it from the watered-down display that Justice Breyer found barely constitutional.

<sup>188</sup> *McCreary*, 545 U.S. at 906–07 (Scalia, J., dissenting) ("[T]he Ten Commandments are a foundation of the rule of law, and a symbol of the role that religion played, and continues to play, in our system of government.").

<sup>189</sup> Justice Scalia has noted that Christianity, Judaism, and Islam, which "account for 97.7% of all believers," all "believe that the Ten Commandments were given by God to Moses, and are divine prescriptions for a virtuous life. Publicly

refinements to the town square hypothetical should crystallize what life in Mr. Scalia's Neighborhood would be like under his model.

First, suppose members of the town council were to stand outside the Commandments display in their official capacities and suggest to passers-by that the display stands for the proposition that religion is important and the town's citizens should follow a moral code. This clear encouragement of the Commandments would not be an endorsement of a particular sect, nor does it coerce passers-by to participate in a religious activity, as Scalia understands the concept of "coercion."<sup>190</sup> At worst, it encourages people to be generally more religious or moral. Scalia would allow this as a permissible support of religion, in the same way that Presidents historically have promoted moral choices in our laws and encouraged Americans to pray.<sup>191</sup>

Next, suppose that the town's judge required convicted drunk drivers to spend a day studying the Ten Commandments display in the hope that some of those moral principles would sink in, resulting in a more moral neighborhood. While some might believe such punishment to be both ineffectual and harmless, Scalia would likely view such a penalty as exactly the type of "coercion" that is *not* permitted under the Establishment Clause.<sup>192</sup> Without the coercive penalty from the conviction, this might be a permissible encouragement of religion in general;

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honoring the Ten Commandments is thus indistinguishable, insofar as discriminating against other religions is concerned, from publicly honoring God." *Id.* at 894 (citations omitted). He also would find some Ten Commandment displays valid under the *Lemon* test because:

[W]hen the Ten Commandments appear alongside other documents of secular significance in a display devoted to the foundations of American law and government, the context communicates that the Ten Commandments are included, not to teach their binding nature as a religious text, but to show their unique contribution to the development of the legal system.

*Id.* at 905.

<sup>190</sup> Professor Munoz has explained that "[i]f Justice Kennedy controls the fifth vote, religious display cases will most likely be adjudicated according to the psychological coercion approach he delineated in *Lee v. Weisman*" instead of Scalia's more conservative approach. Munoz, *supra* note 38, at 396–97.

<sup>191</sup> See *McCreary*, 545 U.S. at 888–89 (citing current official religious practices by presidents, legislatures, and even the Supreme Court, which continues "to open with the prayer 'God save the United States and this Honorable Court.'").

<sup>192</sup> See *supra* notes 87–90 and accompanying text (discussing Scalia's view of "coercion").

with the penalty attached, it falls into an unconstitutional “coercion” by the government.

## 2. The Holiday Displays

The crèche and menorah—unpolluted by secular symbols—would also survive scrutiny under Scalia’s model, but not under the current law of the land.<sup>193</sup> For Scalia, using a crèche or menorah to acknowledge a major religious holiday is another acceptable recognition of religion in general. These would be considered part of “our Nation’s historic traditions of diversity and pluralism” permitting accommodation of “holidays with both cultural and religious aspects.”<sup>194</sup>

If the town council in Mr. Scalia’s Neighborhood were liberated from the Court’s current reasoning, it would be free to commemorate these religious holidays without necessarily polluting the scene with secular displays. This is so because the display is not an endorsement of the substance of a religion’s beliefs; instead, it simply recognizes the significance of those beliefs to its citizens. In other words, the town council’s display of a crèche, without more, does not declare its *belief* that Jesus is born the savior of the world; it merely appreciates that many of the town’s citizens celebrate this belief.

## 3. Assessing the Fairness of Scalia’s Model

Buddhists or atheists may feel excluded when they see the town acknowledging a majority’s holiday without “pollution” or disclaimer, but does this make them “marginal citizens?”<sup>195</sup> It seems that such rhetoric is overstated since the town is merely respecting the practices of many of its citizens. The same feelings could apply to Chinese Americans who stand by and watch the town celebrate Black Heritage Month with no similar celebration of Chinese heritage.

But to be fair and even-handed, should not the town council now celebrate *every* religious holiday with *every* religious group in the neighborhood? To Scalia, that choice would be totally up

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<sup>193</sup> See *County of Allegheny v. ACLU*, 492 U.S. 573, 601–02 (1989) (plurality opinion) (striking down crèche display set up by Catholic group at the county courthouse because it was not surrounded by secular symbols of the holiday).

<sup>194</sup> *Id.* at 678–79 (Kennedy, J., concurring in part and dissenting in part).

<sup>195</sup> See *supra* notes 5–7 and accompanying text (recounting criticisms of Scalia’s model).

to a majority of the town council. There are good secular reasons why a town might want to recognize a minority's religious holiday—one reason being the principle of “inclusiveness” for all its citizens. The Constitution would not force the government's hand, however, in the same way that it does not force the government to open up nonpublic forums for religious use.<sup>196</sup> Significantly, the council's decision to recognize a minority holiday is not a religious decision, but a secular one based on fostering inclusiveness or catering to constituents with political clout to garner such recognition. Even minority groups have demonstrated that they are capable of winning majority support for their causes.<sup>197</sup>

*D. Applying Scalia's Approach to Non-Sectarian Prayer*

In the town square of Mr. Scalia's Neighborhood, the Mayor, a devout Lutheran, gives a press conference about the town's efforts to stamp out homelessness and poverty. He begins by proclaiming: “Today we thank the Great Lord and Ruler of Nations for His continued blessings on our town, where we trust in God's care for all people and seek to treat others equitably according to God's will.” The Mayor then embarks on a description of the newly enacted plan to improve town services to

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<sup>196</sup> See *supra* Part III.D (discussing free speech attempts to force government action); see also *Lubavitch Chabad House, Inc. v. Pub. Bldg. Comm'n*, No. 88-C-8708, 1989 WL 157661, at \*5–6 (N.D. Ill. Dec. 11, 1989), *aff'd*, 917 F.2d 341 (1990) (rejecting Jewish group's attempt to force airport to place menorah next to Christmas tree display). In *Lubavitch*, the judge addressed the issue as one of forcing government to open new avenues of private religious speech at the airport: “I find that in its benevolence [the airport] has gone far enough to provide for solicitation as a part of free speech and expression. The one exception it places as a limitation on speech relates to the erection of structures. Structures, by their very nature, cannot easily be monitored . . .” *Id.* at \*4. The court found that the government's own speech in placing the Christmas trees was in accordance with the Establishment Clause, and that there was “no basis upon which the court [could] grant the type of relief requested by Lubavitch.” *Id.* at \*5.

<sup>197</sup> For instance, the political pressure on the town council to recognize a minority religion holiday would be little different than the town's decision to celebrate the birthday of Martin Luther King Jr. rather than that of Robert E. Lee. Even if African-Americans were a minority group in the neighborhood, it is likely that the town would celebrate King's holiday over that of the revered Civil War general. There is no doubt that some citizens with Southern-leaning tendencies would feel slighted by the town's ignoring General Lee, but then those citizens would need to take up their grievance with the town council and seek a political solution. And sometimes a citizen must simply recognize that not every worthy cause can be supported.

the poor. He concludes the press conference by inviting those present to bow their heads in prayer: "Lord, thank you for allowing us to live in this greatest Nation on earth with the many gifts that you provide us. Help us to care for those less fortunate and to bring your love and generosity to them. Amen."

#### 1. Government Prayer Outside the School Setting

Suffice it to say that no strict separationist would find this prayer constitutionally acceptable. Justice Scalia, however, believes the Constitution does not require all prayer be stricken from public life because there has been a "longstanding American tradition" of toleration when "[r]eligious men and women of almost all denominations have felt it necessary to acknowledge and beseech the blessing of God as a people, and not just as individuals."<sup>198</sup> For instance, this reasoning persuaded a majority of the Court to allow the prayers of legislative bodies.<sup>199</sup> Thus, Scalia would rely on historical practice to demonstrate that the original meaning of the Establishment Clause would not prevent the type of prayer offered by the Mayor. This is so because if religion and morality are intricately linked, then it seems plain that government can encourage its citizens to turn to religion in general without creating an impermissible establishment.

In this instance, the Mayor's reference to God as "great Lord and Ruler of Nations" is a direct quote from a speech made by President George Washington.<sup>200</sup> The Mayor invoked God in a non-sectarian way and encouraged those who would voluntarily listen to him—that is, without coercion—to turn to God and benefit society through the practice of moral principles. The fact that a Mayor gave a non-sectarian prayer should be beyond reproach considering that Presidents have led such prayers since the day the Nation elected its first Commander-in-Chief.<sup>201</sup>

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<sup>198</sup> *Lee v. Weisman*, 505 U.S. 577, 645 (1992) (Scalia, J., dissenting).

<sup>199</sup> Under the legislative prayer exception of *Marsh v. Chambers*, 463 U.S. 783, 792 (1983), a legislative body does not violate the Establishment Clause by invoking God's guidance because "it is simply a tolerable acknowledgment of beliefs widely held among the people of this country."

<sup>200</sup> See President George Washington, A Thanksgiving Day Proclamation (Oct. 3, 1789), <http://www.pilgrimhall.org/ThanxProc1789.htm> (calling it the "duty of all Nations to acknowledge the providence of almighty God, to obey his will, to be grateful for his benefits, and humbly to implore his protection").

<sup>201</sup> See President James Madison, A Thanksgiving Day Proclamation (Mar. 4,

Justice Scalia would easily classify this prayer as permissible government speech.

Suppose that a citizen belonging to a minority religion—perhaps the Baha'i faith—desired to give a non-sectarian opening prayer for the Mayor. Could that individual get an equal opportunity to say something similar to the Mayor's prayer? For the same reason no other citizen can force government to speak a certain message, here, the attempt to dictate his speech would be a question left for the sound discretion of the political branches.<sup>202</sup> To force the Mayor to allow a certain speech would infringe on the government's right to choose its own message.<sup>203</sup>

Under Scalia's model, this type of non-sectarian prayer would be as common or as uncommon as the government officials choosing to utter it desire. There is no doubt that some government offices would never say a religious word, while

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1815), <http://www.pilgrimhall.org/ThanxProc1789.htm> (calling God the "Divine Author of Every Good and Perfect Gift" and recommending "the second Thursday in April next be set apart as a day on which the people of every religious denomination may in their solemn assembles unite their hearts and their voices in a freewill offering to their Heavenly Benefactor"); see also President George W. Bush, State of the Union Address (Jan. 28, 2003), [http://www.c-span.org/executive/transcript.asp?cat=current\\_event&code=bush\\_admin&year=2003](http://www.c-span.org/executive/transcript.asp?cat=current_event&code=bush_admin&year=2003) ("The liberty we prize is not America's gift to the world, it is God's gift to humanity. . . . May He guide us now. And may God continue to bless the United States of America."); John F. Kennedy, Inaugural Address (Jan. 20, 1961), <http://www.jfklibrary.org/Historical+Resources/Archives/Reference+Desk/Speeches/JFK/003POF03Inaugural01201961.htm> ("[T]he rights of man come not from the generosity of the state but from the hand of God. . . . [L]et us go forth to lead the land we love, asking His blessing and His help, but knowing that here on earth God's work must truly be our own.").

<sup>202</sup> The Fourth Circuit dealt with this thorny issue in *Simpson v. Chesterfield County Board of Supervisors*, 404 F.3d 276, 279–80 (4th Cir. 2005), cert. denied, 546 U.S. 937 (2005), in which a Wiccan religious leader—claiming to be "monotheistic" due to her "belie[f] in the goddess"—challenged a county legislative prayer practice that had included religious leaders from various Judeo-Christian churches but had excluded her own request to lead an invocation before a town council meeting. Rejecting her claims, the Fourth Circuit relied entirely on *Marsh* in finding that this "government speech" that had been privatized to local clergy was permissibly limited to the non-sectarian Judeo-Christian speech desired by the government itself. *Id.* at 280–88. A Harvard Law Review article critical of *Simpson* argues that the Fourth Circuit misapplied Supreme Court precedent by not more fully considering the selection method as a potentially "impermissible motive" under the *Marsh* analysis. See Recent Case, *Simpson v. Chesterfield County Board of Supervisors*, 404 F.3d 276 (4th Cir.), cert. denied, 126 S. Ct. 426 (2005), 119 HARV. L. REV. 1223, 1226–30 (2006).

<sup>203</sup> See Elizabeth B. Halligan, Note, *Coercing Adults?: The Fourth Circuit and the Acceptability of Religious Expression in Government Settings*, 57 S.C. L. REV. 923, 933–42 (2006) (arguing that the Fourth Circuit uses *Marsh* differently than other circuits).

others might choose to encourage religion in a general way. For Scalia, where government chooses to participate in this inclusive way, there is no Constitutional hindrance. The lower courts generally follow this same principle.<sup>204</sup>

## 2. Public School Prayer

At another school in Mr. Scalia's Neighborhood, Mrs. Moore's fifth grade class starts each school day with the Pledge of Allegiance and a teacher-led non-sectarian prayer, as follows: "Dear God, thank you for this new day for us to learn and grow. Help each of us to be open to the wonders of your world. And may we treat each other and all your creatures with love and respect. Amen." Ratna, a young Hindu girl, sits quietly in the back of the classroom during this prayer, since she does not believe in a god who listens to prayer and cares about her particular day. Likewise, little Charlie chooses to opt out of the Pledge of Allegiance because he is a Jehovah's Witness, and swearing allegiance to anything but God would be blasphemous to him.

This classroom scene would not exist under today's precedent. A majority of the Court is concerned—in contrast to the Court's acceptance of legislative prayer—about allowing government-sponsored prayer in a school setting, including at graduation ceremonies. Justice Stewart perhaps articulated the most compelling argument to allow public prayer in school:

[A] compulsory state educational system so structures a child's life that if religious exercises are held to be an impermissible activity in schools, religion is placed at an artificial and state-created disadvantage. Viewed in this light, permission of such

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<sup>204</sup> See *Hinrichs v. Bosma*, 410 F. Supp. 2d 745, 757 (S.D. Ind. 2006) (rejecting plaintiff's request to stay permanent injunction pending appeal). In *Hinrichs*, the court confronted a situation envisioned by Justice Scalia where an Indiana legislator argued that *Marsh's* legislative prayer exception allowed him to repeatedly offer official government prayer that was pervasively Christian/sectarian in nature. *Id.* at 747–48. The court found that government officials could not use "official prayers to endorse or advance their own religious beliefs, which is the conclusion advocated by the Speaker." *Id.* at 757. The judge cited Scalia's *Lee* dissent that "'our constitutional tradition . . . [has] ruled out of order government-sponsored endorsement of religion . . . where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ).'" *Id.* (quoting *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting)).

exercises for those who want them is necessary if the schools are truly to be neutral in the matter of religion. And a refusal to permit religious exercises thus is seen, not as the realization of state neutrality, but rather as the establishment of a religion of secularism . . . .<sup>205</sup>

Stewart's position, however, has never won a majority of the modern Court. Instead, as Justice Kennedy has declared, "[i]t is a cornerstone principle of our Establishment Clause jurisprudence that 'it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.'"<sup>206</sup> Justice Scalia, however, disagrees and has argued that school prayer is a "tradition that is as old as public-school graduation ceremonies themselves, and that is a component of an even more longstanding American tradition of nonsectarian prayer to God at public celebrations generally."<sup>207</sup> Scalia's model would allow prayer at school ceremonies and in classrooms.<sup>208</sup> To him, the Framers "understood that 'speech is not coercive; the listener may do as he likes.'"<sup>209</sup> Both of these traditions have existed since the Nation's founding.

This demonstrates the difference between Justice Kennedy's version of the "coercion" test versus that used by the more

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<sup>205</sup> *Sch. Dist. v. Schempp*, 374 U.S. 203, 313 (1963) (Stewart, J., dissenting).

<sup>206</sup> *Lee*, 505 U.S. at 588 (referring to the principal's role in picking the clergy member to give the prayer and providing him with "[g]uidelines" to make the prayer non-sectarian). In *Lee*, Justice Kennedy wrote the opinion for a 5-4 majority striking down a Rhode Island school principal's action inviting a rabbi to offer non-sectarian invocation and benediction prayers at formal middle and high school graduations. *Id.* at 599.

<sup>207</sup> *Id.* at 632, 636 (Scalia, J., dissenting) (noting that prayer at graduation is "as traditional as any other parts of the [school] graduation program" (quoting HARRY C. MCKOWN, COMMENCEMENT ACTIVITIES 56 (1931))).

<sup>208</sup> Scalia finds no objection to a "[s]tate's . . . honoring God through public prayer and acknowledgment." *Van Orden v. Perry*, 545 U.S. 677, 692 (2005) (Scalia, J., concurring); see also *Bunting v. Mellen*, 541 U.S. 1019, 1022 (2004) (Scalia, J., dissenting) (criticizing denial of certiorari regarding Virginia Military Institute's "invocation of God" during dinner, implying that such a practice would be tolerated by the U.S. Constitution).

<sup>209</sup> *Lee*, 505 U.S. at 642 (quoting *Am. Jewish Cong. v. Chicago*, 827 F.2d 120, 132 (7th Cir. 1986) (Easterbrook, J., dissenting)). Lower courts have even found that government can officially criticize religious policies by private religious organizations. See *Catholic League for Religious & Civil Rights v. City & County of S.F.*, 464 F. Supp. 2d 938, 947-48 (N.D. Cal. 2006) (rejecting an Establishment Clause challenge to a city resolution condemning a Vatican statement that opposed gay adoption).

conservative Justices. He views graduation attendance as “obligatory” because of its “intangible benefits,” and he believes in the “subtle coercive” public and peer pressure on “students to stand as a group or, at least, maintain respectful silence during” prayer—a “coercion” that is “as real as any overt compulsion.”<sup>210</sup> This is not the kind of “coercion” Scalia accepts. He has ridiculed Kennedy’s reliance on “subtle coerc[ion]”—or, as he calls it, “ersatz, ‘peer-pressure’ psycho-coercion”—and pointed out that the same objection could be raised to the subtle coercion of “political orthodoxy” caused when students stand for the Pledge of Allegiance.<sup>211</sup> Moreover, Scalia has argued that “maintaining respect” for others’ religions is a “fundamental civic virtue” that public schools “can and should cultivate.”<sup>212</sup>

### 3. Assessing the Fairness of Scalia’s Model

What of the town’s citizens who disagree with the Mayor’s prayer? And what of Ratna, sitting alone while her friends pray to a god she does not acknowledge? Criticisms against Scalia’s model are strongest in the context of prayer because the listener sees more than mere acknowledgment of religion—when a state actor leads a prayer, the government seems directly engaged in religious practice. Does this make Mr. Scalia’s Neighborhood a “scary” place filled with “second-class citizens?”

To Scalia, the dilemma of these individuals is no different than that of little Charlie, who feels equally bad that his religion forbids him from swearing allegiance to a flag. One side effect of living in a democracy is the inevitable result that some may not feel fully included.<sup>213</sup> For Scalia, this is a tolerable price to pay in a system where freedom of religion is both protected and supported by government. Thus, his neighborhood would be no less inclusive than every school in America that recites the Pledge of Allegiance. If the Constitution can tolerate such a subtle “coercion” of political orthodoxy, it can equally tolerate the longer-standing tradition of invoking a Supreme Being who is presupposed in the Nation’s fundamental institutions.

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<sup>210</sup> *Lee*, 505 U.S. at 586, 588, 593–95.

<sup>211</sup> *Id.* at 638–42 (Scalia, J., dissenting).

<sup>212</sup> *Id.* at 638.

<sup>213</sup> *See supra* notes 158–68 and accompanying text (discussing the inevitable exclusion of some members whenever government must tolerate or reject religious practice).

## V. EYE OF THE STORM: SECTARIANISM VERSUS MONOTHEISM

We have seen thus far that Justice Scalia's model of the Religion Clauses would offer precious protections: free exercise of religion, equal access to public facilities and aid, a level playing field for private speech in public forums, freedom from penalty to practice any specific religion, and the list goes on. The last part of this Article also demonstrated that Scalia's approach allows government to acknowledge—and even encourage—the importance and practice of non-sectarian religion. This view does have one drawback: Inevitably, some will feel excluded. Scalia views this as a tolerable amount of “collateral damage,” if you will.

Up until now, the Article has avoided the topic of sectarianism. This final part will explore that controversial issue and what place, if any, sectarian preferences have in public life. In particular, it will examine where monotheism fits into the broad spectrum of government toleration or encouragement of religion.

A. *The Case Against Sectarianism*

Suppose the Mayor of Mr. Scalia's Neighborhood had chosen to take a different approach at his press conference, justifying his new civic program in this way: “Let this town follow the example of Jesus the Messiah, who has been the world's greatest example of compassion to the poor.” Suppose also that the Mayor concluded with this prayer: “Lord God, as compassionate Americans we should follow the example of our Lord Jesus and feed the poor in His holy name. Bless us and help us to accept His salvation, and to bring His forgiveness and redemption to those who are less fortunate. May this program allow us to spread the Good News of Christ to the poor of our town. We ask this through Christ, our Lord, Amen.”<sup>214</sup>

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<sup>214</sup> The Mayor's remarks resemble comments then-Governor George W. Bush made while proclaiming “Jesus Day” for Texas in 2000: “[P]eople of all religions recognize Jesus Christ as an example of love, compassion, sacrifice and service . . . . By volunteering . . . adults and youngsters follow Christ's message of love and service in thought and deed.” *Frontline: Jesus Factor* (PBS television broadcast Apr. 29, 2004), <http://www.pbs.org/wgbh/pages/frontline/shows/jesus/readings/jesusdaymemo.html>. President Bush's comments walk the fine line of not actually endorsing Christianity.

The Mayor's actions would pose a problem under Justice Scalia's model of the Establishment Clause. While Scalia believes the Constitution tolerates government support of religion in general, he and other originalists also claim that sectarian support is *not* constitutional.<sup>215</sup> Their objections are, predictably, based on historical considerations:

[O]ur constitutional tradition, from the Declaration of Independence and the first inaugural address of Washington, quoted earlier, down to the present day, has, with a few aberrations, ruled out of order government-sponsored endorsement of religion—even when no legal coercion is present, and indeed even when no ersatz, “peer-pressure” psycho-coercion is present—where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ).<sup>216</sup>

This is the one exception to the “coercion” test that Scalia will concede—even without “coercion,” sectarian endorsements are simply not permitted.

It is clear that Scalia would find the Mayor's official sectarian comments to be unacceptable. He would likewise not support official sectarian prayers at press conferences, high school graduation ceremonies, or other public events.<sup>217</sup> The Mayor's speech purports to represent the official purpose behind the town's program, which appears to be a sectarian purpose to promote Christianity throughout the neighborhood under the guise of a social program. Scalia might say that this is a worthy

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<sup>215</sup> See Somers, *supra* note 65, at 278 (arguing the meaning of the word “establishment” among the states equated to a “preference” for one sect over another); see also *Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188, 191–92 (5th Cir. 2006) (finding four school board prayers unconstitutional where “each contained a reference to ‘Jesus Christ’ or ‘God’ and ‘Lord’”); *Turner v. City Council*, No. 3:06CV23, 2006 U.S. Dist. LEXIS 56786, at \*14–16 (E. Dist. Va. Aug. 14, 2006) (rejecting councilmember's argument that he had right to use sectarian prayers at opening session of council meetings, finding that the city had the right and obligation to exercise its own government speech in a non-sectarian way).

<sup>216</sup> *Lee*, 505 U.S. at 641 (1992) (Scalia, J., dissenting) (citations and footnote numbers omitted).

<sup>217</sup> See *Wynne v. Town of Great Falls*, 376 F.3d 292, 300 (4th Cir. 2004) (striking down a legislative prayer simply because it was sectarian in nature, and interpreting *Marsh v. Chambers*, 463 U.S. 783 (1983), as turning on whether the prayer was sectarian, since the government cannot associate itself with one particular sect over others, and the prayers were pervasively sectarian).

cause for Catholic Charities, but it is not an appropriate role for government.

Justice Scalia's view would also apply to religious displays, such as the Decalogue monument in the town square. Scalia supports Ten Commandment displays in general, but he would apparently find unconstitutional a display that took a specific position on which version of "the Decalogue [w]as authoritative"—this would be the equivalent of an endorsement of a particular sect, taking "sides in a theological dispute."<sup>218</sup> Similarly, Scalia has agreed that the Establishment Clause would not "permit the permanent erection of a large Latin cross on the roof of city hall" or "in a public park," nor would it allow such a symbol to be printed on the "official county seal."<sup>219</sup> Presumably, this is due to the very specific association of the Latin cross with Christianity, specifically Roman Catholicism. Indeed, Justice Scalia has signed on to the belief that government may not prefer using passive symbols for the holidays of one particular faith but then *intentionally* ignore holidays of non-preferred faiths.<sup>220</sup> This would exhibit an impermissible preference for one sect over another.

Scalia's view on sectarianism can be further explored through three other examples. First, suppose a Taoist minority religious group in Mr. Scalia's Neighborhood requests that the town also display that religion's monument in the town square, just as the council has chosen to display the Ten Commandments. The Taoists argue that under a strict reading of Scalia's view above, the town is obligated to accept the monument in order not to prefer one sect over another. This argument would likely fail under Scalia's model and would suffer the same fate as attempts to force the town to open nonpublic forums for religious use,<sup>221</sup> or to force the Mayor to permit an individual to pray at a town function.<sup>222</sup> If the Decalogue is non-

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<sup>218</sup> *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 894 n.4 (2005) (Scalia, J., dissenting). *But see* Colby, *supra* note 1, at 1106–07 (arguing Scalia does not mean that official religious expression must convey a secular message).

<sup>219</sup> *County of Allegheny v. ACLU*, 492 U.S. 573, 661 (1989) (Kennedy, J., concurring in part and dissenting in part).

<sup>220</sup> *Id.* at 665 n.3.

<sup>221</sup> *See supra* note 135 and accompanying text (discussing free speech attempts to force government action).

<sup>222</sup> *See supra* note 196 and accompanying text (discussing attempts to force specific government prayer).

sectarian—as Scalia believes—then allowing its display does not constitute an intentional preference for Christianity over Taoism.<sup>223</sup> Thus, the town may evaluate the request and grant or deny it solely within its own discretion.

Second, suppose a member of the local Bible Society stood near the Christmas crèche display in the town square each day and explained to tourists that God gave Jesus Christ to the world to save it from its sins. This would be, as Scalia has suggested, the case of the “eager proselytizer” seeking “to use these [government] symbols for his own ends.”<sup>224</sup> This danger of private misuse would not be a matter for the Establishment Clause to resolve, since it would not involve government endorsement.

On the other hand, if the town council itself used the display to preach to passers-by about Jesus, Scalia would likely classify this government “effort to proselytize” as unconstitutional.<sup>225</sup> The difference here, of course, is that the town has gone beyond simply commemorating a holiday of great importance to its citizens, and has crossed a line by using a religious holiday as an opportunity to convert its citizens to a particular religion. This sort of government proselytization could not be characterized as simply encouraging religion over non-religion since the crèche and its proponents would be holding out one particular religion, Christianity, and pushing it on the people. Though mere speech is not “coercion,” it would fall into Scalia’s one exception to the “coercion” test: forbidding sectarian government endorsements.<sup>226</sup>

One might wonder, then, how Scalia would vote in *School District v. Schempp*,<sup>227</sup> where a state law required the reading of ten Bible verses before each school day, followed by the Lord’s Prayer, but allowed students who did not wish to participate to be excused upon written request. Bible-reading and the Lord’s Prayer are undoubtedly sectarian religious practices; this law,

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<sup>223</sup> See *Sumnum v. City of Ogden*, 152 F. Supp. 2d 1286, 1294, 1296–98 (D. Utah 2001) (rejecting religion of Sumnum’s argument that city must accept a Sumnum monument for display next to the Ten Commandments monument, finding non-sectarian purpose for Decalogue and rejecting attempt to force the city to adopt particular sectarian religious speech).

<sup>224</sup> *Allegheny*, 492 U.S. at 678.

<sup>225</sup> *Id.* at 664.

<sup>226</sup> *Lee v. Weisman*, 505 U.S. 577, 640–42 (1992) (Scalia, J., dissenting).

<sup>227</sup> 374 U.S. 203, 205–06 (1963).

however, may be viewed under Justice Stewart's approach as simply an accommodation for the majority of students who wish to start their school day off "right" through this communal practice. Under this model, the state is not attempting to promote religion, but simply tolerating the free exercise of religion. In all likelihood, Scalia would adopt Stewart's approach and perhaps suggest that the correct balance would be to simply allow non-participating students to spend the same amount of time reading from their own Scriptures or saying their own prayers.

Justice Scalia has articulated a consistent and vigorous approach to ridding sectarianism from public life, but his support for government encouragement of religion in general stands in stark contrast to his belief that avoiding sectarianism is at the heart of the Establishment Clause. Minority religions should take comfort in this, therefore, because Scalia's model would permit promotion of religion in general and equal access to public aid and benefits, but would not tolerate sectarian discrimination.

#### *B. The Case for Monotheism*

Suppose that Mr. Scalia's Neighborhood were governed by a Native American Mayor, who concluded his press conference with the following benediction: "And may the Great Spirit and all the spirits bless our endeavors to care for all the children of the gods." Could such a statement survive Justice Scalia's scrutiny, or would it be considered too sectarian?

Despite his opposition to sectarianism, Justice Scalia's controversial dissent in *McCreary* has earned him much derision. In that dissent, Scalia reconciled how the clearly monotheistic Ten Commandments could also be considered "non-sectarian" despite the many polytheists and atheists in the world. Scalia tackled this problem by asserting that the Constitution could tolerate a limited abstract "preference" for monotheistic religions as long as no particular monotheistic sect was singled out and no fundamental Establishment Clause violation were committed. It is important to note that Scalia started his discussion by recognizing that all of the fundamental rights protected under the Religion Clauses are applied evenhandedly to both monotheistic and non-monotheistic religions.<sup>228</sup> It is only in the

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<sup>228</sup> These are the basic rights discussed in Part III of this Article. Scalia makes

context of the more abstract “acknowledgment” arena that Scalia drew a distinction.

In Scalia’s view, the Constitution inevitably *must* tolerate the public acknowledgment of “God” even though some religions do not believe in one god only. It is simple logic:

[T]he principle that the government cannot favor one religion over another . . . is indeed a valid principle where public aid or assistance to religion is concerned, or where the free exercise of religion is at issue, but it necessarily applies in a more limited sense to public acknowledgment of the Creator. If religion in the public forum had to be entirely nondenominational, there could be no religion in the public forum at all. One cannot say the word “God,” or “the Almighty,” one cannot offer public supplication or thanksgiving, without contradicting the beliefs of some people that there are many gods, or that God or the gods pay no attention to human affairs. With respect to public acknowledgment of religious belief, it is entirely clear from our Nation’s historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists.<sup>229</sup>

These provocative—yet indisputable<sup>230</sup>—statements have raised a stir both on and off the Court. Justice Souter immediately took Scalia’s position to mean that “government

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clear that all of these rights are intact:

I must respond to Justice Stevens’ assertion that I would “marginaliz[e] the belief systems of more than 7 million Americans” who adhere to religions that are not monotheistic. . . . Surely that is a gross exaggeration. The beliefs of those citizens are entirely protected by the Free Exercise Clause, and by those aspects of the Establishment Clause that do not relate to government acknowledgment of the Creator.

*McCreary County v. ACLU of Ky.*, 545 U.S. 844, 899 (2005) (Scalia, J., dissenting).

<sup>229</sup> *Id.* at 893–94 (citations omitted) (pointing out also that Washington’s first Thanksgiving Proclamation was “scrupulously nondenominational—but it was monotheistic” and that the prayers approved in *Marsh* “were ‘in the Judeo-Christian tradition,’” and concluding that “[h]istorical practices thus demonstrate that there is a distance between the acknowledgment of a single Creator and the establishment of a religion”). *But see* Colby, *supra* note 1, at 1107 (defining “proselytize” to include actions that honor “God through official prayer and divine acknowledgment, when motivated by” a purpose to “foster religious practice”).

<sup>230</sup> Scalia rightly points out historical reality by asking

what other God (in the singular, and with a capital G) there is, other than ‘the God of monotheism.’ This is not necessarily the Christian God (though if it were, one would expect Christ regularly to be invoked, which He is not); but it is inescapably the God of monotheism.

*McCreary*, 545 U.S. at 894 n.3 (Scalia, J., dissenting).

should be free to approve the core beliefs of a favored religion over the tenets of others” and that “monotheism with Mosaic antecedents should be a touchstone of establishment interpretation.”<sup>231</sup> Others perceive a sinister plot to rewrite the Constitution so that “biblical monotheism” will always be the “favored religion of the United States Constitution.”<sup>232</sup> These detractors take Scalia’s position too far, however, when they suggest:

[I]t appears that, according to Justice Scalia’s view, the Establishment Clause affords greater protection only to the majority religious outlook (Judeo-Christianity) that was prevalent at the time of the framing. If ever the tables are turned, and the practitioners of other religions (or of no religion) achieve majority status in some communities . . . the Establishment Clause will not extend the same rights and powers to them that it extends to adherents of Judeo-Christianity.<sup>233</sup>

Surely that is not what Scalia meant, nor would that be a reasonable interpretation of the text. In his dissent, Scalia clarified that “[i]nvocation of God despite [polytheistic or atheistic] beliefs is permitted not because nonmonotheistic religions cease to be religions recognized by the Religion Clauses of the First Amendment, but because governmental invocation of God is not an establishment.”<sup>234</sup> His use of the word “disregard” was not intended to imply a disfavored status to polytheistic religions,<sup>235</sup> but simply to deal with the fact that, historically, public acknowledgments of religion by all three branches of both state and federal government have been in the monotheistic context. If that type of non-sectarian acknowledgment were not tolerated, there could be no acknowledgment of religion at all. If the tables were turned and a majority of a community were

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<sup>231</sup> *Id.* at 879–80 (majority opinion).

<sup>232</sup> Colby, *supra* note 1, at 1098.

<sup>233</sup> *Id.* at 1102.

<sup>234</sup> *McCreary*, 545 U.S. at 899–900 (Scalia, J., dissenting).

<sup>235</sup> See *supra* text accompanying note 229 (“With respect to public acknowledgment of religious belief, it is entirely clear from our Nation’s historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists.”). But see Munoz, *supra* note 38, at 389 (“[Scalia’s] use of the word ‘disregard’ suggests that the groups mentioned are not protected by the Establishment Clause or that they are protected differently than monotheists.”).

polytheistic, Scalia would equally find no problem with non-sectarian polytheistic acknowledgments of many gods.<sup>236</sup>

One may fault Scalia for a poor choice of words here, leading to the “unfortunate suggestion that the First Amendment offers a different level of protection for monotheists than it does for polytheists and atheists.”<sup>237</sup> If this were what Scalia really meant, it would be totally inconsistent with his prior statements on the Establishment Clause.<sup>238</sup> In any case, Scalia’s articulation of the issue, although technically accurate, is too controversial to win a majority of the Court. Justice Kennedy, for one, will not be voting along those lines.<sup>239</sup>

In Mr. Scalia’s Neighborhood, however, the Native American Mayor would be permitted to acknowledge religion in a non-sectarian way, despite the fact that his formulation was polytheistic in nature. Monotheists in the audience may perhaps feel uncomfortable—or even excluded—yet taken in the right spirit, they should appreciate that the Mayor is appealing to a higher power, whether it be one or many.

### C. *Postscript: Evolution Versus Intelligent Design*

A final word must be said about Scalia’s view on teaching religion in public school. The Northwest Ordinance, passed by the same Congress that proposed the First Amendment, has been cited as proof that “religion, morality, and knowledge” were appropriate subjects to be taught at schools.<sup>240</sup> Today the debate

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<sup>236</sup> Imagine a speech by a Hindu president ending with: “And may the gods bless America!”

<sup>237</sup> Munoz, *supra* note 38, at 389.

<sup>238</sup> *See id.* (noting such a suggestion would be “inconsistent with Justice Scalia’s own legal coercion approach,” and that “all non-coercive public acknowledgments of religion—whether monotheistic, polytheistic, or atheistic—would be constitutional”). “Thus understood, the Establishment Clause would no more disregard polytheistic religious acknowledgments than it would monotheistic ones.” *Id.*; *see also* Amar & Brownstein, *How Will the Roberts Court Interpret the Establishment Clause?*, *supra* note 4 (finding it “difficult to believe” that Scalia would say “that public acknowledgment of more denominational or sectarian beliefs would be unconstitutional . . . given his past support of the government’s display of even sectarian symbols”).

<sup>239</sup> Justice Kennedy took no part in the debate among Scalia, Souter, and Stevens in *McCreary*. Kennedy’s dissent went only so far as to agree with Justice Scalia’s argument that the display of the Ten Commandments did not violate the highly maligned *Lemon* test. *See McCreary*, 545 U.S. at 885, 900–12 (Kennedy, J., dissenting).

<sup>240</sup> *See Somers*, *supra* note 65, at 265 (citing Act of Aug. 7, 1789, 1 Stat. 50, 51

rages as to whether the theory of “intelligent design” can be referenced or taught as an alternative to evolution. Justice Scalia would not countenance the formal teaching of the Book of Genesis in school,<sup>241</sup> yet his open-mindedness would allow some exploration of other scientific theories beyond evolution to explain the origins of life.

For instance, in *Edwards v. Aguillard*,<sup>242</sup> Scalia found himself on the dissenting end of a 6-2 ruling that struck down a Louisiana law that required elementary and middle schools to teach evolution theory and “creation science” theory side by side, in order to promote “academic freedom”:

[T]he parties are sharply divided over what creation science consists of. Appellants insist that it is a collection of educationally valuable scientific data that has been censored from classrooms by an embarrassed scientific establishment. . . . [T]he statute itself *defines* “creation-science” as “the *scientific evidences* for creation and inferences from those *scientific evidences*.”<sup>243</sup>

Scalia felt it important that judges keep to their proper role in evaluating this type of statute.<sup>244</sup> He chastised the majority for creating a situation that repressed the views of scientists simply because of their personal religious beliefs.<sup>245</sup>

Those who adhere to minority religions should not worry that Scalia’s neighborhood would become a place where the Bible is taught as science. Clearly, such sectarian endorsement would not be permitted. If, however, scientifically supported alternatives to evolution exist, Scalia would likely allow such

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n.(a) (1789)) (internal quotation marks omitted).

<sup>241</sup> See *Edwards v. Aguillard*, 482 U.S. 578, 634 (1987) (Scalia, J., dissenting) (“Perhaps what the Louisiana Legislature has done is unconstitutional because there *is* no [scientific] evidence [of creationism], and the scheme they have established will amount to no more than a presentation of the Book of Genesis.”).

<sup>242</sup> *Id.* at 581 (majority opinion).

<sup>243</sup> *Id.* at 611 (Scalia, J., dissenting).

<sup>244</sup> Scalia noted that the view of judges “about creation science and evolution are (or should be) beside the point. Our task is not to judge the debate about teaching the origins of life, but to ascertain what the members of the Louisiana Legislature believed.” *Id.* at 621.

<sup>245</sup> See *id.* at 634 (opining that “the Court’s position is the repressive one[, as we cannot] say . . . that the scientific evidence for evolution is so conclusive that no one could be gullible enough to believe that there is any real scientific evidence to the contrary,” and calling the Court’s position “*Scopes-in-reverse*”).

programs regardless of whether religious people would or would not applaud them.<sup>246</sup>

#### CONCLUSION

Justice Scalia's model of the Religion Clauses is not worthy of the derision piled on it by separationists and proponents of a "living Constitution." Far from treating minority religion adherents as "second-class citizens," this approach provides to them fundamental religious freedoms and benefits unparalleled by the separationist model. Though not all will be satisfied with Scalia's model, the alternative theories provide far less freedom and just as much discomfort, both for adherents of minority religions and for the majority of Americans who practice their faith and wish no hostility from their government.

Regarding the more abstract protections of the Establishment Clause, Justice Scalia's approach allows for government to encourage religion in general, but not to favor one sect over another. Inevitably, any acknowledgment of God will be in the form of either monotheism or polytheism, but such generic invocations rise above sectarian endorsement.

Adherents of minority religions should conclude that Mr. Scalia's Neighborhood is really not all that "scary" a place to live after all. Their most cherished freedoms are preserved along with a great deal of flexibility to get their own religion's message out to the community, and any attempt by the majority to erect laws targeting or persecuting the minority will be soundly rejected by Justice Scalia and all who follow his model.

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<sup>246</sup> See *Tangipahoa Parish Bd. of Educ. v. Freiler*, 530 U.S. 1251, 1253–54 (2000) (Scalia, J., dissenting from denial of certiorari) (arguing that a brief disclaimer notice to be read prior to the beginning of a unit of study on evolution, recognizing that the school's teaching, which was "not intended to influence or dissuade . . . the Biblical version of Creation" or any other concept, would not violate the Constitution because its primary effect was "merely to advance freedom of thought," and further stating that "[w]e stand by in silence while a deeply divided Fifth Circuit bars a school district from even suggesting to students that other theories besides evolution—including, but not limited to, the Biblical theory of creation—are worthy of their consideration").