

BRINGING SCALIA’S DECALOGUE DISSENT DOWN FROM THE MOUNTAIN

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I. INTRODUCTION

Like many of Justice Antonin Scalia’s opinions, his dissent in the Ten Commandments case, *McCreary County v. ACLU*,¹ emitted its share of thunder and lightning—and clouds, apparently.² Some profess to see in the dissent a proposition that is simply not there. That proposition is Scalia’s “remarkable”³ and “shocking,”⁴ intention to embed in the Establishment Clause an illiberal and ahistorical preference for monotheistic religions. Scalia’s crabbed Establishment Clause, it is claimed, would permit the government to acknowledge only monotheistic religions, and would forbid it from acknowledging polytheistic religions or atheism.⁵ Has Scalia, the icon of judicial restraint, become Scalia the monotheistic activist? Reading Scalia’s *McCreary County* dissent in this way highlights the perennial dispute between the Justice and his academic critics—whether Scalia’s constitutional methodology of original meaning reliably delivers on its promise of restrained, non-political judging.⁶ It also facilitates tarring Scalia as a hypocrite and Republican shill.⁷ Unfortunately, to read Scalia’s dissent as such

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¹ 545 U.S. 844 (2005). The companion case to *McCreary County* was *Van Orden v. Perry*, which concerned a Texas Ten Commandments monument. *See* 545 U.S. 677 (2005).

² *See Exodus* 19:16 (“On the morning of the third day there were thunders and lightnings, and a thick cloud upon the mountain, and a very loud trumpet blast, so that all the people who were in the camp trembled.”).

³ *See McCreary County*, 545 U.S. at 879.

⁴ *See* Thomas B. Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 NW. U. L. REV. 1097, 1098 (2006).

⁵ *Id.* at 1102.

⁶ *See, e.g.,* Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385, 389–99 (2000) (criticizing Scalia’s originalist methodology for failing to provide the “value-free” judging it promises); George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1303–08 (1990) (discussing Scalia’s approach to originalism, and his detractors).

⁷ *See, e.g.,* Chemerinsky, *supra* note 6, at 391–92 (asserting that the results of Scalia’s originalist method “lead[] one to believe that the original meaning of the Constitution and the Republican platform are remarkably similar”); Colby, *supra* note 4, at 1139 (arguing that Scalia’s “interpretation of the Establishment Clause [in *McCreary County*] aligns almost perfectly with the political preferences of the Republican Party”).

is both to misread it and to obscure what his methodology can add to the Establishment Clause interpretation debate.

Scalia's dissent provides his fullest discussion yet of how he would apply the Establishment Clause to government religious symbolism. However, his interpretative method in *McCreary County* is consistent with his approach in other cases where he has used original meaning and tradition to apply ambiguous constitutional provisions. In those cases, the sweep of tradition as reflected in legislation or other official actions serves as an interpretive grid, an intelligible background against which to measure constitutional limitations on governmental power. This methodology, as Scalia admits, raises numerous difficulties—perhaps the most daunting of which is selecting the appropriate level of generality for defining a relevant tradition. His “original-meaning-plus-tradition” method is thus not mechanical and certainly not foolproof. Scalia's use of this method invites the criticism, among others, that he does not apply the method correctly or consistently.⁸

For purposes of this Article, what is significant is that Scalia's interpretative approach is a hermeneutic of restraint, calibrated to avoid projecting substantive outcomes into the Constitution. Scalia uses tradition to validate traditional practices, where constitutional text or precedent do not impel striking them down. However, his approach leaves open the development of tradition by deference to representative bodies. Thus, reading Scalia's *McCreary County* dissent against the backdrop of his constitutional methodology shows it is unlikely that he is engaging in “monotheistic activism.” A better reading is that the government's persistent acknowledgment of a generalized monotheism—especially through symbolic expressions such as our national motto, our Pledge of Allegiance, and (as Scalia argues in *McCreary County*) Ten Commandments displays—provides merely a baseline against which to interpret the Establishment Clause. Moreover, that baseline does not freeze a preference for monotheism into the Establishment Clause itself, but rather defers to representative bodies the development of our traditions to include specific monotheistic religions, non-monotheistic religions, or atheism—or to end the tradition by opting for no government acknowledgment of religion at all.

In Part II, this Article reads Scalia's *McCreary County* dissent within the context of the other Justices' opinions, and in the larger context of Scalia's jurisprudence of tradition. Part II.A sets the dissent against Justice Souter's majority opinion in *McCreary County* and Justice Stevens's dissent in *Van Orden v. Perry*.⁹ It argues that—certain rhetorical excesses notwithstanding—Scalia is merely proposing a tradition of monotheistic symbolism as a baseline against which to measure government religious acknowledgments. Part II.B reinforces that reading by assessing Scalia's use of tradition in other contexts. Tradition, for Scalia, emerges as a tool of judicial restraint that reads open-textured constitutional provisions against an intelligible historical background and that tends to validate

⁸ See *infra* Part III.

⁹ 545 U.S. 677, 707–35 (2005) (Stevens, J., dissenting).

longstanding practices in the absence of a plainly contrary command of the Constitution or precedent. While tradition may potentially supply an independent reason for striking down a law, that positive function of tradition is limited by the practical exigencies of Scalia's jurisprudence. Moreover, in the area where tradition would most readily justify invalidating laws—the Due Process Clause—Scalia rejects the idea that any divergence from historical practices leads to automatic invalidation. Scalia's traditionalism in the First Amendment context is even more restrained. Historical practices alone (or their absence) would justify invalidating a law only if they *clearly* manifest a common understanding that a specific governmental action was unconstitutional. However, the mere fact that certain practices were engaged in is typically insufficient to infer a constitutional prohibition of other practices. In sum, Scalia has not treated tradition as exhausting the meaning of constitutional guarantees, nor has he frozen constitutional guarantees around the kernel of tradition and thereby stifled any development in the law. He simply defers that development to representative bodies.

Having contextualized Scalia's dissent, Part III specifically addresses the primary criticism of the dissent: that Scalia is projecting an exclusive preference for monotheism into the Establishment Clause. Building on Part II, this Part concludes that Scalia's deployment of tradition is not adapted to projecting his own policy choices—such as an alleged “preference for monotheistic religions”—into the Constitution. Instead, Scalia is using the prevalence of generalized monotheistic language as an intelligible baseline against which to assess the Ten Commandments displays. That baseline certainly makes this case easy for Scalia, but it does not commit him to striking down other acknowledgments simply because they diverge from monotheism. Scalia's treatment of the distinctively Christian elements in the historical record is better explained quite apart from speculation about his own religious or political preferences. More likely, Scalia is articulating the relevant tradition at the proper level of abstraction to assess what he views as simply a monotheistic religious display.

In sum, the Article concludes that Scalia's constitutional methodology generally, and his use of tradition specifically, are not some form of manipulation designed to achieve personal or political aims. Instead, Scalia is using tradition in the same manner as in other areas—to establish an objective baseline for assessing the constitutionality of modern laws.

II. THE DISSENT IN CONTEXT

A. *The Conversation Among Scalia, Souter, and Stevens*

To understand Scalia's interpretation of the Establishment Clause in *McCreary County*—and whether it is fair to paint him as a monotheistic activist—one should read his dissent as a dissent. Reading it against Justice Souter's *McCreary County* majority opinion and against Justice Stevens's *Van Orden*

dissent reveals a conversation about several overlapping doctrinal issues.¹⁰ These are: (1) the overall function of “neutrality” in the Court’s Establishment Clause jurisprudence; (2) the interaction of neutrality with the Court’s religious symbolism precedents; (3) the characterization of the Ten Commandments displays at issue in these cases; and (4) the interaction of neutrality with the historical record. This section contrasts Souter’s and Stevens’s views on these issues with Scalia’s, seeking a clearer picture of the claims made by Scalia’s dissent. The following section fleshes out that picture by reference to Scalia’s general use of tradition in constitutional analysis.

Neutrality is the master principle for both Souter’s and Stevens’s opinions. Souter writes that the “touchstone” for analyzing whether a law has a “secular legislative purpose” is “the principle that the ‘First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.’”¹¹ Neutrality is the central conceit of the Court’s Establishment Clause jurisprudence and also the basic theme of the American history of church-state relationships. Not only has neutrality “provided a good sense of direction” for interpreting the Establishment Clause, but it also “responds to one of the major concerns that prompted adoption of the Religion Clauses”—the prevention of religiously based “civic divisiveness.”¹² Governmental neutrality is “an objective of the Establishment Clause” and simultaneously furnishes a “sensible standard for applying” it.¹³ Neutrality thus encompasses the Establishment Clause on all sides; it is both the goal toward which it strives and the roadmap for getting there. Stevens also finds neutrality woven into the Establishment Clause’s genetic material. Neutrality is the “first and most fundamental” principle for interpreting the “wall of separation between church and state” erected by the Religion Clauses.¹⁴ Not flinching before criticisms that the “wall” metaphor is meaningless, Stevens asserts that the wall’s contours are discerned chiefly by the principle that “the Establishment Clause demands religious neutrality—government may not exercise a preference for one religious faith over another.”¹⁵ Thus, for both Souter and Stevens, neutrality provides an interpretative key for applying the

¹⁰ The most relevant portions of those opinions are Part IV of Souter’s opinion for the Court in *McCreary County v. ACLU*, 545 U.S. 844, 874–81 (2005), Part I of Scalia’s *McCreary County* dissent, *id.* at 885–900 (Scalia, J., dissenting), and Parts I and III of Stevens’s *Van Orden* dissent, 545 U.S. at 708–12, 722–35 (Stevens, J., dissenting). Other portions of those opinions will be noted where relevant.

¹¹ *McCreary County*, 545 U.S. at 860 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 53 (1985); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947)).

¹² *Id.* at 876.

¹³ *Id.*

¹⁴ *Van Orden*, 545 U.S. at 709 (Stevens, J., dissenting).

¹⁵ *Id.* For a general criticism of the “wall of separation” metaphor, see DANIEL L. DREISBACH, *THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE* (2002).

Establishment Clause. It comes as no surprise, then, that both Justices find that the Ten Commandments displays are clear-cut violations of the Constitution.

Souter and Stevens must then reconcile a rigorous commitment to neutrality with the Court's religious symbolism jurisprudence, principally the two crèche cases (*County of Allegheny v. ACLU*¹⁶ and *Lynch v. Donnelly*¹⁷) and the legislative prayer case (*Marsh v. Chambers*).¹⁸ The Justices handle this delicate matter by reading the precedents narrowly and by characterizing the Ten Commandments displays as far outside the precedent. For instance, Stevens reads the crèche cases to mean that government may "acknowledg[e] the religious beliefs and practices of the American people" by recognizing religious symbols that have "become an important feature of a familiar landscape or a reminder of an important event in the history of a community."¹⁹ However, Stevens would overrule *Marsh*, finding legislative prayer a violation of neutrality.²⁰ The symbolism precedents create more discomfort for Souter, leading him to drop the following footnote that Scalia will seize on as demonstrating the capriciousness of the neutrality principle itself:

At least since *Everson v. Board of Ed. of Ewing*, it has been clear that Establishment Clause doctrine lacks the comfort of categorical absolutes. In special instances we have found good reason to hold governmental action legitimate even where its manifest purpose was presumably religious. No such reasons present themselves here.²¹

Later in his opinion, Souter creates further nuance by disclaiming any intention to hold that "a sacred text can never be integrated constitutionally into a governmental display on the subject of law, or American history," provided the display would not "strike an observer as evidence that that [government] was violating neutrality in religion."²² However, at bottom, both Souter and Stevens read the Court's religious symbolism precedent through the lens of neutrality. Neither doubts for a moment, as Scalia does in his dissent, that neutrality should apply to government religious symbolism just as readily as it does to other areas of Establishment Clause jurisprudence.

Any difficulty with the religious symbolism precedent is facilitated by the way Souter and Stevens characterize the Ten Commandments displays at issue in *McCreary County* and *Van Orden*. Both Justices see the displays as going beyond

¹⁶ 492 U.S. 573 (1989).

¹⁷ 465 U.S. 668 (1984).

¹⁸ 463 U.S. 783 (1983).

¹⁹ *Van Orden*, 545 U.S. at 711 (Stevens, J., dissenting).

²⁰ *Id.* at 723 n.22.

²¹ *McCreary County v. ACLU*, 545 U.S. 844, 859 n.10 (2005) (citing *Marsh*, 463 U.S. 783 (holding legislative prayer did not violate the Constitution)) (other citation omitted).

²² *Id.* at 874.

the typical government “acknowledgment” of religious history or sentiments.²³ To the contrary, they interpret the displays as an official adoption of the specific precepts of the Ten Commandments by the governments of Texas and McCreary County, Kentucky.²⁴ For instance, in distinguishing them from “‘the inclusion of a crèche or a menorah’ in a holiday display,” Souter characterizes the purpose of the displays as “subjecting individual lives to religious influence,” as “insistently call[ing] for religious action on the part of citizens,” and as “urg[ing] citizens to act in prescribed ways as a personal response to divine authority.”²⁵ Stevens is even more explicit. Part II of his *Van Orden* dissent explains why Texas—by placing the monument on capitol grounds in “a large park containing 17 monuments and 21 historical markers”²⁶—is explicitly instructing its citizens to adopt the Decalogue’s theology and moral precepts.²⁷ Texas is not only “prescribing a compelled code of conduct from one God, namely a Judeo-Christian God,” but also, by choosing either the Catholic or Protestant or Jewish formulation of the text, “tell[ing] the observer that the State supports this side of the doctrinal religious debate.”²⁸ Whether they correctly understand the message sent by the Ten Commandments displays (which, of course, is disputed by other Justices in both cases), their interpretation makes easy work of distinguishing the displays from a Christmas crèche, a Hanukkah menorah, or even a legislative prayer.

Finally, the Justices must address how neutrality engages with the broader American history of church-state relationships, and also with the narrower history of governmental religious acknowledgments. This becomes the key ground for their disagreement with Scalia.²⁹ For both Souter and Stevens, the lessons history teaches about the scope of the Establishment Clause are sufficiently ambiguous that they must be pitched at a relatively high level of generality.³⁰ Neutrality

²³ *McCreary County*, 545 U.S. at 877 n.24; *Van Orden*, 545 U.S. at 712 (Stevens, J., dissenting).

²⁴ *McCreary County*, 545 U.S. at 869; *Van Orden*, 545 U.S. at 718 (Stevens, J., dissenting).

²⁵ *McCreary County*, 545 U.S. at 877 n.24 (quoting *id.* at 905 (Scalia, J., dissenting)).

²⁶ *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring).

²⁷ *Id.* at 718 (Stevens, J., dissenting).

²⁸ *Id.* at 718 & nn.15–17. A comparison may clarify the Justices’ understanding of the displays. In *Allegheny*, the crèche at issue included the familiar trope of the angel announcing “Glory to God in the Highest!” See *County of Allegheny v. ACLU*, 492 U.S. 579, 580 & n.5 (1989) (describing the crèche and origin of the angel’s greeting in the Christian scriptures). Following their interpretation of the Ten Commandments displays, Souter and Stevens would understand in *Allegheny* that the government was itself announcing—through the voice of the angel, so to speak—“Glory to God in the Highest!” To be fair, this seems to approximate the interpretative stance the Court took in *Allegheny*. See *id.* at 598 (“‘Glory to God in the Highest!’ says the angel in the crèche—Glory to God because of the birth of Jesus. This praise to God in Christian terms is indisputably religious—indeed sectarian—just as it is when said in the Gospel or in a church service.”).

²⁹ See *infra* notes 30–35 and accompanying text.

³⁰ See, e.g., *McCreary County*, 545 U.S. at 875 (observing that “[t]here is no simple answer” to the meaning of the Establishment Clause and that “issues of interpreting inexact

emerges from a “sense of the past” as a necessary (but not always sufficient) guide to the Establishment Clause, since the Establishment Clause grew out of the desires “of the Framers and the citizens of their time” to avoid the kinds of religious conflicts they knew so well from English and continental history, and from their own colonial experiences.³¹ The views of significant Framers, such as James Madison and Thomas Jefferson, provide general guideposts but are themselves ambiguous. Their private opinions cast confusing shadows over their official acts.³² In Souter’s and Stevens’s understanding, our history of official religious acknowledgments is somehow both too inconclusive to furnish a reliable background, and too one-sidedly Christian to serve modern purposes.³³ The Justices manage to pick out of this historical miasma the overarching value of official “neutrality” to guide the application of the Establishment Clause to

Establishment Clause language . . . arise from the tension of competing values”); *id.* (“[T]rade-offs [in interpreting the Clause] are inevitable, and an elegant interpretative rule to draw the line in all the multifarious situations is not to be had.”); *Van Orden*, 545 U.S. at 731 (Stevens, J., dissenting) (“As the widely divergent views espoused by the leaders of our founding era plainly reveal, the historical record of the preincorporation Establishment Clause is too indeterminate to serve as an interpretive North Star.”); *id.* (stating that, given the inconclusiveness of historical record, the Establishment Clause must be interpreted “not by merely asking what those words meant to observers at the time of the founding, but instead by deriving from the Clause’s text and history the broad principles that remain valid today”).

³¹ *McCreary County*, 545 U.S. at 876 (reasoning from the framing generation’s experience with religious divisiveness that “[a] sense of the past thus points to governmental neutrality” as an interpretive guide to the Establishment Clause, but that “given its generality as a principle, an appeal to neutrality alone cannot possibly lay every issue to rest”); *Van Orden*, 545 U.S. at 725–26 (Stevens, J., dissenting) (tracing origins of neutrality from “separationist impulses” gleaned from colonial experiences of religious oppression, such as the fact that “[n]ot insignificant numbers of colonists came to this country with memories of religious persecution by monarchs on the other side of the Atlantic”).

³² *See, e.g., McCreary County*, 545 U.S. at 878 (“The historical record . . . is complicated beyond the dissent’s account by the writings and practices of figures no less influential than Thomas Jefferson and James Madison.”); *Van Orden*, 545 U.S. at 724 (Stevens, J., dissenting) (arguing that the majority opinion and Scalia’s *McCreary County* dissent “disregard the substantial debates that took place regarding the constitutionality of the early proclamations and acts they cite”).

³³ *See, e.g., McCreary County*, 545 U.S. at 879–80 (claiming that the historical record supports the “fair inference . . . that there was no common understanding about the limits of the establishment prohibition,” but also that “history shows that the religion of concern to the Framers was not that of the monotheistic faiths generally, but Christianity in particular”); *Van Orden*, 545 U.S. at 724, 726 (Stevens, J., dissenting) (claiming that it is “misleading” to present certain Framers’ religious statements “as a unified historical narrative,” but also that “many of the Framers understood the word ‘religion’ in the Establishment Clause to encompass only the various sects of Christianity”).

problems such as the Ten Commandments displays.³⁴ Neutrality therefore emerges as both the principal original animating feature of the Establishment Clause, as well as the principle that the Court's case law has managed to tease out of a clause that was once significantly animated by a desire to prostrate every religion except Protestant Christianity.³⁵ This appears to be the historical metaphysics that informs Souter's and Stevens's opinions.

Scalia's dissent can be fairly analyzed only against these views. That is because Scalia is primarily concerned with contesting their understanding (which is now the Court's understanding) of how neutrality functions in the Court's Establishment Clause jurisprudence. Whereas Souter and Stevens distill neutrality as the organizing principle of the Establishment Clause, Scalia views it as one among other complimentary and sometimes competing principles. Whereas Souter and Stevens assess American historical practices through the lens of a univocal command of neutrality, Scalia discerns the contours of the Establishment Clause primarily through the lens of longstanding American practices of public religious acknowledgment. Whereas Souter and Stevens view the Establishment Clause as itself embodying an evolving, judicially applied tradition of neutrality, Scalia sees the Establishment Clause as a distinct limitation on government action whose contours emerge from both founding-era understandings and subsequent traditions reflected in laws and official practices. Between these approaches lies a gulf that cannot be explained merely by divergent interpretations of historical materials. Here instead are deep disagreements about how the Establishment Clause—and hence the courts—function in shaping the resolution of church-state issues. Admittedly, Scalia's dissent does represent a fundamentally different approach to interpreting the Establishment Clause. Nevertheless, to label that difference as simply Scalia's desire to write a preference for monotheism into the Establishment Clause is to caricature his dissent. Such a characterization also misses the real conversation that is taking place among the Justices.

What is Scalia's view on the place of neutrality within the Court's jurisprudence? Scalia regards as sheer *ipse dixit* the Court's enshrinement of neutrality as the Establishment Clause's master key—a key that falsifies both the Court's own jurisprudence and the larger history of American church-state

³⁴ See, e.g., *McCreary County*, 545 U.S. at 876 (finding support for the neutrality principle in the fact that “[t]he Framers and the citizens of their time intended not only to protect the integrity of individual conscience in religious matters, but [also] to guard against the civic divisiveness that follows when the Government weighs in on one side of religious debate” (citation omitted)); *id.* at 878 (finding support for the neutrality principle in deletion of the word “national” during the drafting of the Establishment Clause); *Van Orden*, 545 U.S. at 733–34 (Stevens, J., dissenting) (finding the neutrality principle “firmly rooted in our Nation’s history and our Constitution’s text,” and explaining that “we are not bound by the Framers’ expectations [but] . . . by the legal principles they enshrined in our Constitution”).

³⁵ See *McCreary County*, 545 U.S. at 874 (“The importance of neutrality as an interpretative guide is no less true now than it was when the Court broached the principle in *Everson*” (citing *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947))).

relationships.³⁶ Scalia traces this defect to the cavalier approach to history taken in *Everson v. Board of Education*,³⁷ which inaugurated modern Establishment Clause jurisprudence.³⁸ *Everson's* historiography, of course, has been criticized since virtually the day it appeared in the United States Reports.³⁹ Scalia's point is that the *McCreary County* Court has finally taken *Everson* at its word and enshrined as legal rule *Everson's* absolutist rhetoric about the Establishment Clause's meaning. If the Establishment Clause means neutrality, and neutrality means not preferring religion to "nonreligion," then the state cannot use religious symbolism. In Scalia's view, this analysis is simplistic and wrong.⁴⁰

The Court's own precedent should cast doubt on such an approach, and that is where Scalia focuses sharp attacks. He argues that the overall tenor of the Court's case law is incompatible with a one-size-fits-all principle of government "neutrality," understood as a rigorous evenhandedness between "religion and nonreligion."⁴¹ Scalia points to the Court's approval of legislative accommodations for religious practices, tax exemptions for church property, and released-time programs for religious education.⁴² Central to his attack is *Marsh*,⁴³ which upheld

³⁶ See, e.g., *id.* at 889 (Scalia, J., dissenting) (arguing that the Court's broad invocations of neutrality are supported only by "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").

³⁷ 330 U.S. 1 (1947).

³⁸ *McCreary County*, 545 U.S. at 890 n.2 (observing that the "fountainhead of this jurisprudence, *Everson*" based its broad neutrality formulation "on a review of historical evidence that focused on the debate leading up to the passage of the Virginia Bill for Religious Liberty" (citing *Everson*, 330 U.S. at 11–13)). In that footnote, Scalia cites Edward S. Corwin's criticism that, in its *Everson* historiography, "it appeared the Court had been 'sold . . . a bill of goods.'" *Id.* (quoting Edward S. Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROBS. 3, 16 (1949)).

³⁹ For instance, one of *Everson's* most notable early critics, the theologian and political theorist John Courtney Murray, wrote in 1949 that "the absolutism of the *Everson* and *McCullum* doctrine of separation of church and state is unsupported, and unsupportable, by valid evidence and reasoning—historical, political, or legal—or on any sound theory of values, religious or social." John Courtney Murray, *Law or Prepossessions?*, 14 LAW & CONTEMP. PROBS. 23, 40 (1949); see also GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 1–13, 86–88, 91–92, 114–15 (1987); ROBERT L. CORD, SEPARATION OF CHURCH AND STATE 8 (1982); DREIBACH, *supra* note 15, at 100–04; Corwin, *supra* note 38, at 16; Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2107–09 (2003). *But cf.* THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 207–08 (1986).

⁴⁰ See *McCreary County*, 545 U.S. at 893 (Scalia, J., dissenting).

⁴¹ *Id.* at 889 (citation and internal quotation marks omitted).

⁴² See *id.* at 891 (citing *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 338 (1987); *Walz v. Tax Comm'n*, 397 U.S. 664, 673 (1970); *Zorach v. Clauson*, 343 U.S. 306, 308 (1952)).

⁴³ *Marsh v. Chambers*, 463 U.S. 783 (1983).

Nebraska's practice of opening its legislative sessions with prayers as "a tolerable acknowledgment of beliefs widely held among people of this country."⁴⁴ Scalia holds up *Marsh* as exhibit A for the proposition that the Court has never really embraced the full implications of what it said about neutrality in *Everson*, particularly when it comes to symbolic government acknowledgments of widely shared religious sentiments.⁴⁵ In other words, incautious dicta in *Everson* cannot be elevated to the cardinal principle of the Establishment Clause without entirely falsifying the Court's approach to legislative prayer in *Marsh* and to religious symbolism in *Lynch* and *Allegheny*. Nor can *Marsh* be confined to its facts and quarantined from the rest of the Court's case law. Interestingly, given the importance of tradition to his jurisprudence, Scalia explicitly rejects "antiquity of the practice at issue" as a reason for upholding legislative prayer.⁴⁶ He explains the Court's unwillingness to cleave to neutrality as a form of institutional timidity, or as evidence that neutrality is not as deeply rooted in the Constitution as the Court now claims.⁴⁷

However, Scalia does not stop there. He turns from the generalized neutrality as between religion and nonreligion, to the narrower neutrality as between one religion and another.⁴⁸ Here Scalia is at his most controversial level, but it is also here that the core of his rationale emerges. As the controlling ratio of his opinion, this helps contextualize the foray through the history of religious acknowledgments that begins his dissent. It also clarifies Scalia's disagreements with Souter's and Stevens's historical methodology. Therefore it is worth paying close attention to what Scalia says here—and what he does not say.

The nub of Scalia's dissent is that even the narrower form of neutrality between different religions must apply "in a more limited sense" to governmental "acknowledgment of the Creator."⁴⁹ A rigorous evenhandedness between one religion and another religion is indeed required—Scalia claims without explaining why—when the government gives financial assistance to religion or passes laws that affect religious practice.⁵⁰ Nevertheless, the same iron law cannot apply to government acknowledgments of religion for the simple reason that it would stamp

⁴⁴ *McCreary County*, 545 U.S. at 892, 894 (Scalia, J., dissenting) (citing *Marsh*, 463 U.S. at 792).

⁴⁵ *See id.* at 892 ("Indeed, we have even approved (post-*Lemon*) government-led prayer to God.").

⁴⁶ *Id.* (reasoning that "antiquity of the practice at issue . . . is hardly a good reason for letting an unconstitutional practice continue" (citation omitted)).

⁴⁷ *See id.* ("What, then, could be the genuine 'good reason' for occasionally ignoring the neutrality principle? I suggest it is the instinct for self-preservation . . .").

⁴⁸ *See id.* at 893 (observing that the Court's opinion additionally "suggests that the posting of the Ten Commandments violates the principle that the government cannot favor one religion over another").

⁴⁹ *Id.*

⁵⁰ *Id.* (citing *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 532–33 (1993)); *see infra* notes 188–190 and accompanying text.

them out altogether.⁵¹ He sets forth this reasoning in the most controversial passage from the dissent:

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.⁵²

Scalia’s jibe about “disregarding” polytheists, deists, and atheists⁵³ should not obscure his point, which he summarizes more placidly in the next paragraph: “Historical practices thus demonstrate that there is a distance between the acknowledgment of a single Creator and the establishment of a religion.”⁵⁴

Scalia rounds out this argument by explaining why government “acknowledgment of a single Creator” through a Ten Commandments display fits squarely within *Marsh*’s approval of “a tolerable acknowledgment of beliefs widely held among the people of this country.”⁵⁵ In supporting that position, Scalia asserts that the vast majority of religious believers in the United States—i.e., the 97.7% of whom are Christians, Jews, or Muslims—believe in “a single Creator” and recognize the Ten Commandments as a religious text reflective of that belief.⁵⁶

Scalia’s rhetorical flourishes aside, his main point here is narrow. He does not reject neutrality altogether but instead denies that it should rigorously apply to government religious acknowledgments. He discards neutrality in this area, not only in light of the Court’s own precedents, but more fundamentally in light of a persistent tradition of public religious acknowledgment by American government. This requires Scalia to do two things that underscore the differences between his approach and that of Souter and Stevens. He must characterize the symbolic import of Ten Commandments displays at issue and then situate those displays within a tradition of historical practices that will help him assess whether the Establishment Clause permits them.

Scalia understands the messages of the Ten Commandments display in a way fundamentally different from Souter and Stevens. Whereas they see the displays as government-backed commands,⁵⁷ Scalia characterizes them as “a public

⁵¹ *McCreary County*, 545 U.S. at 893 (Scalia, J., dissenting).

⁵² *Id.*

⁵³ See *infra* notes 240–243 and accompanying text.

⁵⁴ *McCreary County*, 545 U.S. at 894 (Scalia, J., dissenting).

⁵⁵ *Id.* (quoting *Marsh v. Chambers*, 463 U.S. 783, 792 (1983)).

⁵⁶ *Id.*

⁵⁷ See *supra* notes 23–28 and accompanying text.

acknowledgment of religious belief,”⁵⁸ “the acknowledgment of a single Creator,”⁵⁹ “public [or governmental] acknowledgment of God,”⁶⁰ “government invocation of monotheism,”⁶¹ and “governmental affirmation of society’s belief in God.”⁶² He analogizes the displays to public religious expressions such as the oath-taking formula “so help me God,”⁶³ the court-opening formula “God save . . . this honorable Court,”⁶⁴ our pledge-taking formula “a Nation under God,”⁶⁵ and our national motto, “In God We Trust.”⁶⁶ Finally, he links the displays with public religious proclamations such as legislative prayers, officially designated “day[s] of thanksgiving and prayer,”⁶⁷ and explicit religious language in presidential addresses.⁶⁸ While Scalia agrees that the displays discriminate against non-monotheistic religions and atheism, he argues that this is a harm no different in kind and no greater in degree than other public expressions inflict when they “publicly honor[] God” (and refrain from honoring any particular god or gods, or affirming that there is no god).⁶⁹

Scalia thus treats the Ten Commandments display as an integrated symbol. This sharply contrasts with Souter and Stevens, who view the Ten Commandments as ten government-backed prescriptions⁷⁰ (as if it were a sign outside a government building advising people to “Keep Off The Grass! Don’t Feed the Pigeons!”). Scalia explicitly rejects that interpretation, retorting that “[t]he observer would no more think himself ‘called upon to act’ in conformance with the Commandments than he would think himself called upon to think and act like William Bradford because of the courthouse posting of the Mayflower Compact.”⁷¹ When called on to explain the symbolic meaning of the display, Scalia keeps to a high level of generality, suggesting that the displays “testif[y] to the popular understanding that the 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.”⁷²

⁵⁸ *McCreary County*, 545 U.S. at 893 (Scalia, J., dissenting).

⁵⁹ *Id.* at 894.

⁶⁰ *Id.* at 896.

⁶¹ *Id.* at 897.

⁶² *Id.* at 889.

⁶³ *Id.* at 886, 888.

⁶⁴ *Id.*

⁶⁵ *Id.* at 889.

⁶⁶ *Id.* at 888–89, 895 (emphasis omitted).

⁶⁷ *Id.* at 886.

⁶⁸ *Id.* at 886–88, 895.

⁶⁹ *Id.* at 893–94.

⁷⁰ *See Van Orden v. Perry*, 545 U.S. 677, 718 (2005) (Stevens, J., dissenting); *McCreary County*, 545 U.S. at 869.

⁷¹ *McCreary County*, 545 U.S. at 905 n.10 (Scalia, J., dissenting).

⁷² *Id.* at 907. Elsewhere, Scalia argues that the displays represent “[t]he acknowledgment of the contribution that religion in general, and the Ten Commandments in particular, have made to our Nation’s legal and governmental heritage.” *Id.* at 905. He also refers approvingly to the *Van Orden* plurality’s interpretation that the display has

Scalia's reading of the Ten Commandments display as a unified symbol—and not as a government command to follow the individual commandments or to adopt their theological premises—enables him to place the displays within the holdings of *Marsh* and *Lynch*, and within the Court's general zone of tolerance for acknowledgments of broad-based religious sentiments.

We now have the framework for assessing the most controversial part of Scalia's argument: his use of history to interpret the Establishment Clause. Generally speaking, Scalia cannot intend his historical catalogue simply to demonstrate that similar religious invocations have a venerable pedigree and continue to season the nation's public rhetoric. After all, Scalia explicitly rejects "antiquity" as a reason for upholding unconstitutional practices.⁷³ While the Court has recognized widespread public religious sentiment and has even afforded it some constitutional significance,⁷⁴ Scalia's dissent transcends that approach to history. In *McCreary*, Scalia begins to construct a constitutional methodology for assessing American historical religious phenomena in the context of the Establishment Clause. Three passages from his dissent illustrate that method. First, following his historical catalogue, Scalia asks incredulously how the Court "can . . . possibly assert" that the Establishment Clause demands government neutrality towards religion as a general rule:

Who says so? Surely not the words of the Constitution. Surely not the history and traditions that reflect our society's constant understanding of those words. Surely not even the current sense of our society, recently reflected in an Act of Congress adopted *unanimously* by the Senate and with only five nays in the House of Representatives . . . criticizing a Court of Appeals opinion that had held "under God" in the Pledge of Allegiance unconstitutional.⁷⁵

Second, in a passage already noted, Scalia summarizes his approach to assessing government religious acknowledgments under the Establishment Clause: "Historical practices thus demonstrate that there is a distance between the acknowledgment of a single Creator and the establishment of a religion. The former is, as *Marsh v. Chambers* put it, 'a tolerable acknowledgment of beliefs widely held among the people of this country.'"⁷⁶

"undeniable historical meaning' as a symbol of the religious foundations of law." *Id.* at 905 n.10 (citing *Van Orden*, 545 U.S. at 690).

⁷³ *McCreary County*, 545 U.S. at 892.

⁷⁴ *See, e.g., Zorach v. Clauson*, 343 U.S. 306, 313–14 (1952) (explaining that when legislatures act to accommodate religious belief or practice, they "follow[] the best of our traditions").

⁷⁵ *McCreary County*, 545 U.S. at 889 (Scalia, J., dissenting).

⁷⁶ *Id.* at 894 (quoting *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (Brennan, J., dissenting)).

Third, in response to Stevens's criticism of his use of history, Scalia clarifies his method with the following:

But I have not relied upon (as [Justice Stevens] and the Court in this case do) mere "proclamations and statements" of the Founders. I have relied primarily upon official acts and official proclamations of the United States or of the component branches of its Government The only mere "proclamations and statements" of the Founders I have relied upon were statements of Founders who occupied federal office, and spoke in at least a quasi-official capacity

It is no answer for Justice Stevens to say that the understanding that these official and quasi-official actions reflect was not "enshrined in the Constitution's text." The Establishment Clause, upon which Justice Stevens would rely, *was* enshrined in the Constitution's text, and these official actions show *what it meant*.⁷⁷

From these passages emerges Scalia's methodology for using history to interpret and apply the Establishment Clause. Principally, Scalia relies on the overall sweep of certain historical practices as an interpretive grid against which to measure a textually inconclusive constitutional provision. He also attempts to pitch the relevant historical practices at a level of generality that can shed light on the particular issue involved. While one should place this method in the context of Scalia's jurisprudence,⁷⁸ some limited conclusions can be drawn about it from *McCreary County* itself.

First, because Scalia self-consciously confines his interpretive palette to official uses of religious language, Scalia is clearly not mounting an "original intent" argument. Instead, he takes official language itself as probative of a relevant historical practice against which to measure the Ten Commandments displays. Of course, relying on the language in which official pronouncements are formulated still requires some interpretation of text and context, but since we do not have here a strict "original intent" approach, Scalia would not need to delve into the theological intent or expectations of its authors (or ratifiers). To the contrary, Scalia is interested in the shared political significance of religious language rather than "which God" the authors had in mind (Deist? Christian? Judeo-Christian? All of them?) or "which religions" the ratifiers saw benefited by such pronouncements (Christianity? Protestant Christianity? "Judeo-Christianity"?). Interpreting the Establishment Clause thus is consistent with Scalia's general approach to constitutional interpretation, which is less a strict "original intent" than an "original meaning" approach informed by relevant traditional practices.⁷⁹

⁷⁷ *Id.* at 895–96 (quoting *Van Orden*, 545 U.S. at 724 (Stevens, J., dissenting)).

⁷⁸ See *infra* Part II.B.

⁷⁹ See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (1997) (rejecting "original intent" methodology, but explaining that he

Second, Scalia is not using historical materials to liquidate a “meaning” from the Establishment Clause. Souter and Stevens are doing just that, which explains why they find an impracticable level of ambiguity in the historical record and settle on “neutrality” as the generalized but indeterminate “meaning” of the Establishment Clause.⁸⁰ If one requires that historical materials furnish people’s expectations about how open-textured constitutional language applies to a specific situation—i.e., a “what would James Madison do?” approach—this will lead one inevitably to conclude that the historical record is intolerably ambiguous. That may well be a compelling criticism of “original intent” methodology, but the important point is that Scalia explicitly denies he follows that approach.⁸¹ Instead, he claims to be measuring ambiguous constitutional language against a set of historical practices that are—if appropriately defined and characterized—supposed to clarify the application of that language to the modern practice at issue.⁸² Thus, it is an error to see Scalia’s historical catalogue in the first part of his dissent as an (inevitably incomplete) thesis called “The Framers’ Attitudes Toward Government Use of Religious Language,” or as purporting to unravel all the ambiguities of that subject.⁸³ Scalia is using the historical materials for an altogether narrower and more modest purpose.

Third, Scalia’s method leads him to characterize the historical materials in a particular way if they are to have any usefulness. As already discussed, Scalia understands the Ten Commandments displays as unified symbols whose message is pitched at a fairly high level of generality. In context, they are better understood as saying “Monotheistic religion has had an important impact on our public heritage of law and morality,” rather than “You should become a Christian (or a

consults Framers’ writings “not because they were Framers and therefore their intent is authoritative and must be the law; but rather because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood”); *see also* Kannar, *supra* note 6, at 1306–07 (explaining that Scalia draws a sharp distinction between his original meaning approach and an original intent approach, and concluding that Scalia’s method is “a profoundly positivist and textualist vision, inclined not only to minimize the role in constitutional interpretation of policy or the general contemplation of contemporary morals, but at times the Framers’ actual intent, even when that intent is knowable”); David M. Zlotnick, *Justice Scalia and His Critics: An Exploration of Scalia’s Fidelity to His Constitutional Methodology*, 48 EMORY L.J. 1377, 1393 (1999) (explaining that “[w]hile Scalia’s motives are similar to those of the proponents of ‘original intent,’ Scalia’s focus on the Framers’ end product rather than their pre- or post-drafting debates has significant implications for how he implements his originalism,” and that “[u]nlike many versions of originalism, Scalia’s approach does not use the statements and writings of individual drafters as authoritative sources for the meaning of the text”). On Scalia’s supplementation of original meaning with tradition, *see infra* Part II.B.

⁸⁰ *See supra* note 30 and accompanying text.

⁸¹ *See supra* note 79.

⁸² *See infra* Part II.B.

⁸³ *See* *McCreary County v. ACLU*, 545 U.S. at 844, 885–89 (2005) (Scalia, J., dissenting).

Jew) and follow these rules.”⁸⁴ Scalia may be wrong about that matter of interpretation, but the point is that Scalia must tease from the historical materials the relevant tradition against which to measure displays, understood as such. How he uses history for that purpose is analogous to how he treats the Court’s symbolism precedents—i.e., finding that the displays’ religious acknowledgment “is surely no more of a step toward establishment of religion than was the practice of legislative prayer we approved in *Marsh v. Chambers*, and it seems to be on par with the inclusion of a crèche or a menorah in a ‘Holiday’ display that incorporates other secular symbols.”⁸⁵ Scalia is using historical materials in a similar way. He wants an analogue to the disputed government practice in order to have some intelligible standard against which to judge it.

The next Part discusses in more depth how Scalia’s understanding of tradition informs this inquiry, but for now it is enough to point out that his method naturally leads him to be selective about the historical materials. Scalia understands the Ten Commandments displays as a symbolic affirmation, or acknowledgment, of the historical interrelationship among law, morality, and religion. The displays’ religious content, in Scalia’s view, is better described as a generalized monotheism rather than a specific adoption of the moral commands themselves or of any of the theological traditions that have embraced them. Scalia’s characterization of the displays leads him to search the historical record for analogous governmental affirmations (and, as seen in the next section, for any traditions rejecting such affirmations). It will be no surprise to any student of American political and religious history that Scalia easily finds a rich vein of relevant materials in presidential inaugural addresses, in thanksgiving proclamations, and in a variety of national symbols. Such materials are particularly helpful to Scalia’s argument because, not only do they demonstrate a persistent tradition of government religious language, but they also lack any consistent counter-tradition in which laws or other official practices have explicitly rejected using such language on constitutional grounds. The exceptional nature of Jefferson’s refusal (at least at the federal level; Jefferson was willing to deploy religious language at the state level) simply proves the point.⁸⁶

Nevertheless, does Scalia ignore or minimize the explicitly Christian content of the historical materials in order to make his case for monotheism look better than it does? This is a central feature in the case against Scalia—charging that he manufactures a historical record to avoid concluding that our traditions of religious symbolism are not broadly “monotheistic” but narrowly Christian. Properly evaluating these claims requires a more complete development of the role tradition plays in Scalia’s jurisprudence,⁸⁷ but a basic point can be noted here. Given

⁸⁴ See *supra* notes 57–69 and accompanying text.

⁸⁵ *McCreary County*, 545 U.S. at 905 (Scalia, J., dissenting) (citations omitted).

⁸⁶ See, e.g., DREISBACH, *supra* note 15, at 27, 59, 63–64 (attributing Jefferson’s aversion to designating days of thanksgiving and fasting, in part, to his understanding of the First Amendment constraints peculiar to the federal government, and noting that, while governor of Virginia in 1779, Jefferson proclaimed days of thanksgiving and prayer).

⁸⁷ See *infra* Part II.B.

Scalia's historical method, it is not clear why a tradition of Christian religious acknowledgment is relevant to his inquiry. After all, Scalia has identified the symbolic import of the Ten Commandments displays, rightly or wrongly, with a generalized monotheism and not with a particular theological tradition, whether Jewish or Christian or Protestant Christian. If, hypothetically, there were a tradition of Christian religious acknowledgments alongside, or intertwined with, a tradition of generalized monotheistic acknowledgment, it is not clear why that would hurt Scalia's case. If all Scalia is doing is measuring a "monotheistic" religious display against our traditions of religious acknowledgments, he should be able to claim plausibly that the display fits within at least one, or part of one, of our traditions.

But is that all Scalia is doing? In a later passage, Scalia responds to Stevens's criticism that some Founders thought the Establishment Clause protected only Christianity:

I am at a loss to see how this helps [Justice Stevens's] case, except by providing a cloud of obfuscating smoke. (Since most thought the Clause permitted government invocation of monotheism, and some others thought it permitted government invocation of Christianity, [Stevens] proposes that it be construed not to permit any government invocation of religion at all.)⁸⁸

Scalia might have stopped here, content to show that Stevens's narrower reading of tradition, even if correct, would not necessarily invalidate a Ten Commandments display. Nevertheless, Scalia goes on to remark that, "[a]t any rate, those narrower views of the Establishment Clause were *as clearly rejected* as the more expansive ones."⁸⁹ In support of that claim, Scalia remarks that the vast majority of the materials he relied on "have invoked God, but not Jesus Christ."⁹⁰

What should one make of these comments by Scalia? Up to that point in his dissent, he seems content to have identified a tradition of generalized monotheism in our historical practices—one more than sufficient, in his view, to validate the Ten Commandments displays. Then, in response to Stevens's criticism that he has resisted following tradition where it actually leads (that is, to a tradition of "exclusively Christian" government acknowledgments), Scalia says that any tradition of "Christian acknowledgments" has been "clearly rejected." Does Scalia mean that, if government today wanted symbolically to acknowledge Christianity, then Scalia would strike down that practice simply based on his view of the content of our traditions? Or is Scalia saying something far more modest about the role of our traditions in interpreting the Establishment Clause? Answering these questions requires a look at the broader approach Scalia takes to using tradition in constitutional interpretation.

⁸⁸ *McCreary County*, 545 U.S. at 897 (Scalia, J., dissenting).

⁸⁹ *Id.* (emphasis added).

⁹⁰ *Id.*

B. The Role of Tradition in Scalia's Constitutional Jurisprudence

Traditions reflected in longstanding and persisting government practice generally tell Scalia what a constitutional provision was not originally designed to do. The function of a constitutional limitation, in Scalia's view, is to place a supermajority restraint on what ensuing "transient majorities" can accomplish by ordinary political processes.⁹¹ In that scheme, tradition provides a relatively objective historical standard by which a court can flesh out the boundaries of a constitutional limitation on government power. Tradition for Scalia thus acts as an adjunct to original meaning. The history of particular governmental practices provides an amplified commentary on a common original understanding of constitutional guarantees. This section of the Article explicates this understanding of tradition in Scalia's jurisprudence. It does not comprehensively assess Scalia's traditionalism;⁹² nor does it join the extensive academic commentary on traditionalism as a form of constitutional interpretation.⁹³ Instead, it takes the measure of Scalia's use of tradition in order to gauge, in the final section, the precise question about tradition posed by his *McCreary County* dissent: is Scalia using tradition to embed in the Establishment Clause an exclusive preference for monotheism in government religious acknowledgments?⁹⁴

Scalia's use of tradition must be understood in connection with his view of the function of constitutional limitations on governmental power. Such limitations are generally not intended to embed in the Constitution a guarantee that laws will reflect current societal (or, *a fortiori*, judicial) preferences. For Scalia, ordinary political processes ensure that laws reflect current values. However, constitutional guarantees, including those securing individual rights, serve the opposite function of "prevent[ing] the law from reflecting certain *changes* in original values that the society adopting the Constitution thinks fundamentally undesirable."⁹⁵ That

⁹¹ A.C. Pritchard & Todd Zywicki, *Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation*, 77 N.C. L. REV. 409, 418–29 (1999).

⁹² See, e.g., J. Richard Broughton, *The Jurisprudence of Tradition and Justice Scalia's Unwritten Constitution*, 103 W. VA. L. REV. 19, 38–67 (2000) (discussing Justice Scalia's jurisprudence of tradition by contrasting original meaning—which Justice Scalia supports—with search for intent, which he considers futile); Pritchard & Zywicki, *supra* note 91, at 418–29 (presenting "Justice Scalia's Majoritarian Theory of Tradition" as squaring tradition with democracy).

⁹³ See generally J.M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613 (1990); Rebecca L. Brown, *Tradition and Insight*, 103 YALE L.J. 177 (1993); Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029 (1990); David Luban, *Legal Traditionalism*, 43 STAN. L. REV. 1035 (1991); Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665; Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation,"* 58 S. CAL. L. REV. 551 (1985); David A. Strauss, *Tradition, Precedent, and Justice Scalia*, 12 CARDOZO L. REV. 1699 (1991).

⁹⁴ See *infra* Part III.

⁹⁵ Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989). In that passage, Scalia does recognize the possibility of amending the Constitution to

understanding informs Scalia's most expansive discussion, in *Rutan v. Republican Party of Illinois*, of the relationship between the Bill of Rights and "tradition":

The provisions of the Bill of Rights were designed to restrain transient majorities from impairing long-recognized personal liberties. They did not create by implication novel individual rights overturning accepted political norms. Thus, when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down. Such a venerable and accepted tradition is not to be laid on the examining table and scrutinized for its conformity to some abstract principle of First Amendment adjudication devised by this Court. To the contrary, such traditions are themselves the stuff out of which the Court's principles are to be formed. They are, in these uncertain areas, the very points of reference by which the legitimacy or illegitimacy of *other* practices are to be figured out. When it appears that the latest "rule," or "three-part test," or "balancing test" devised by the Court has placed us on a collision course with such a landmark practice, it is the former that must be recalculated by us, and not the latter that must be abandoned by our citizens.⁹⁶

This passage sheds considerable light on Scalia's use of tradition. First, tradition helps Scalia interpret constitutional guarantees when the text is not determinative. As Scalia explains in his dissent in *McIntyre v. Ohio Elections Commission*, "[w]here the meaning of a constitutional text (such as the 'freedom of speech') is unclear, the widespread and long-accepted practices of the American people are the best indication of what fundamental beliefs it was intended to enshrine."⁹⁷ Second, tradition subsequent to adoption of a constitutional provision does not create a "meaning" independent of the constitutional limitation itself. Instead, tradition has merely a "validating" or "clarifying"⁹⁸ function with regard

"update" its guarantees, but asserts that constitutional limitations also serve to "require the society to devote to the subject the long and hard consideration required for a constitutional amendment before those particular values can be cast aside." *Id.*

⁹⁶ 497 U.S. 62, 95–96 (1990) (Scalia, J., dissenting) (footnote omitted); *see also* SCALIA, *supra* note 79, at 40 (explaining that the "whole purpose [of a constitution] is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away").

⁹⁷ 514 U.S. 334, 378 (1995) (Scalia, J., dissenting); *see also* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 1000 (1992) (Scalia, J., concurring and dissenting) (complaining that the Court "ignore[s] a long and clear tradition clarifying an ambiguous text," as it did with respect to the Establishment Clause in *Lee v. Weisman*, 505 U.S. 577 (1972)).

⁹⁸ *See Casey*, 505 U.S. at 980 n.1, 1000 (Scalia, J., concurring and dissenting).

to the text, and thus “cannot alter the core meaning of a constitutional guarantee.”⁹⁹ Third, as the concrete expression of “tradition,” Scalia has in mind longstanding practices recognized chiefly in state or federal laws, and also in court decisions or in analogous official practices.¹⁰⁰ As Professors Pritchard and Zywicki explain in their assessment of Scalia’s traditionalism, “[l]egislative tradition is paramount in Scalia’s hierarchy of sources of tradition.”¹⁰¹ Scalia views such products of representative political processes as concretely reflecting the people’s ongoing resolution of “the basic policy decisions governing society.”¹⁰² A longstanding and consistent pattern of such resolutions thus gives Scalia an objective benchmark against which to discern a common understanding of the limits imposed by the Constitution on political processes. In a sense, Scalia’s hermeneutic of tradition projects the original understanding of a constitutional provision across time, amplifying it by reading consistent and widely accepted governmental practices as a sort of running commentary on citizens’ understanding of the Constitution.¹⁰³

The key aspect of Scalia’s *Rutan* discussion is that it highlights the largely negative and restraining character tradition plays in constitutional interpretation.¹⁰⁴ With some additional nuances discussed below, tradition’s core function is to map out areas in which constitutional limitations were not designed to restrain the policy preferences of majorities. This idea is implicit in the relationship between tradition and constitutional guarantees. To one side are the “long-recognized personal liberties” that a supermajority removes from a future majority’s reach by protecting them in constitutional guarantees.¹⁰⁵ To the other side are the “accepted political norms” that are excluded from the Constitution’s purview and left to

⁹⁹ *McIntyre*, 514 U.S. at 378 (Scalia, J., dissenting).

¹⁰⁰ See, e.g., Pritchard & Zywicki, *supra* note 91, at 420 (“[T]radition’ for Scalia is more accurately characterized simply as ‘history’: a collection of facts regarding past patterns of legislative regulation, rather than an ongoing source of wisdom and contextual understanding.”).

¹⁰¹ *Id.* at 421; see also *id.* at 424 (“Legislative tradition is seen as the *best* evidence of political consensus.”).

¹⁰² *Id.* at 419 (quoting *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting)).

¹⁰³ For instance, Scalia observes that, in the face of a thin or ambiguous record of original understanding, a “most weighty” indication of constitutional meaning appears in:

the widespread and longstanding traditions of our people. Principles of liberty fundamental enough to have been embodied within constitutional guarantees are not readily erased from the Nation’s consciousness. A governmental practice that has become general throughout the United States, and particularly one that has the validation of long, accepted usage, bears a strong presumption of constitutionality.

McIntyre, 514 U.S. at 375 (Scalia, J., dissenting).

¹⁰⁴ See *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 95–96 (1990) (Scalia, J., dissenting).

¹⁰⁵ *Id.* at 95.

ordinary political processes.¹⁰⁶ For Scalia, tradition helps discern those “accepted political norms” that lie outside constitutional limitations and thus outside the judiciary’s reach.¹⁰⁷ For example, in *McIntyre*, Scalia used a “universal and long-established American legislative practice” of election disclosure requirements to discern the kind of practices the First Amendment did not reach and thus left to ordinary legislation.¹⁰⁸ In *Michael H. v. Gerald D.*, Scalia relied on a longstanding legislative tradition—one curtailing an adulterous biological father’s ability to establish parental rights in opposition to the husband and wife—to find that the Due Process Clause did not overturn California’s traditional policy.¹⁰⁹ Tradition thus places an outer limit on the constitutional limitations themselves and, by necessary implication, on the judiciary’s power to strike down laws on the basis of those limitations.

Tradition and judicial restraint are closely linked for Scalia. His explanation of how tradition functions in constitutional interpretation presupposes that broad constitutional theories cannot override a persistent line of policy resolutions by representative bodies. This comes through plainly in *Rutan*, where Scalia explains that “traditions are themselves the stuff out of which the Court’s principles are to be formed,” and that, therefore, any constitutional “test” devised by the Court must be “recalculated” if it will disrupt a “landmark practice.”¹¹⁰ His dissent in *United States v. Virginia* similarly reaffirms that “whatever abstract tests we may choose to devise, they cannot supersede—and indeed ought to be crafted *so as to reflect*—those constant and unbroken national traditions that embody the people’s understanding of ambiguous constitutional texts.”¹¹¹ The other side of this coin is Scalia’s readiness to defer to the resolutions reached by the political process. For instance, again in *Rutan*, Scalia’s deference to a tradition of governmental political patronage goes hand-in-hand with his deference to “the choice between the desirable mix of merit and patronage principles in widely varying federal, state, and local political contexts.”¹¹² Additionally, in *Cruzan v. Director, Missouri Department of Health*, Scalia affirms that “reasonable and humane limits . . . [on] requiring an individual to preserve his own life” are ensured, not by the judicially derived substance of the Due Process Clause, but rather by the political safeguards inherent in the Equal Protection Clause, “which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me.”¹¹³

¹⁰⁶ *Id.* at 95–96.

¹⁰⁷ *Id.* at 85–95.

¹⁰⁸ *McIntyre*, 514 U.S. at 375–77 (Scalia, J., dissenting).

¹⁰⁹ 491 U.S. 110, 121–30 (1989).

¹¹⁰ 497 U.S. at 96 (Scalia, J., dissenting). Scalia further explains in that opinion that “[t]he order of precedence is that a constitutional theory must be wrong if its application contradicts a clear constitutional tradition; not that a clear constitutional tradition must be wrong if it does not conform to the current constitutional theory.” *Id.* at 97 n.2.

¹¹¹ 518 U.S. 515, 568 (1996) (Scalia, J., dissenting).

¹¹² 497 U.S. at 94 (Scalia, J., dissenting).

¹¹³ 497 U.S. 261, 300 (1989) (Scalia, J., concurring). Elsewhere in *Cruzan*, Scalia explains that “even when it is demonstrated by clear and convincing evidence that a patient

Professors Pritchard and Zywicki highlight this restraining role of tradition, observing that “tradition aids [Scalia’s] constitutional theory by restraining judges from substituting their own policy preferences for those of democratically elected legislatures.”¹¹⁴ Indeed, “[w]hen neither text nor tradition recognizes a claimed right, Scalia defers to the decisions reached by legislative majorities.”¹¹⁵

Scalia’s use of tradition seems calibrated to uphold long-recognized practices (and their modern analogues), at least where constitutional text does not unambiguously invalidate them. Tradition would establish an objective baseline of constitutionality against which to measure future practices. Reinforcing this view is Scalia’s understanding of the Court’s institutional role. In his *Virginia* dissent, for instance, he asserts that “the function of this Court is to *preserve* our society’s values . . . not to *revise* them; to prevent backsliding from the degree of restriction the Constitution imposed on democratic government, not to prescribe, on our own authority, progressively higher degrees.”¹¹⁶ This view does not exclude the possibility that tradition could positively inform the substance of a constitutional guarantee, thus empowering judges to invalidate counter-traditional practices. Tradition might justify striking down laws, and would not always simply justify refraining from striking them down. This possibility most clearly appears in Scalia’s *McIntyre* dissent, where he discusses an “easy” case for the originalist.¹¹⁷ Strictly speaking, Scalia’s discussion concerns practices contemporaneous with the framing to discern original meaning, but his reasoning applies with equal force to tradition proper (that is, to a *post*-adoption tradition of government practices).

In *McIntyre*, Scalia identifies the “easy” originalist case for upholding a practice as one where “government conduct that is claimed to violate the Bill of Rights or the Fourteenth Amendment is shown, upon investigation, to have been engaged in without objection at the very time the Bill of Rights or the Fourteenth Amendment was adopted.”¹¹⁸ For Scalia, this explains why laws against obscenity and libel are untouched by the First Amendment—“they existed and were universally approved in 1791.”¹¹⁹ At the opposite extreme lies the case “where the government conduct at issue was *not* engaged in at the time of adoption, and there is ample evidence that the *reason* it was not engaged in is that it was thought to violate the right embodied in the constitutional guarantee.”¹²⁰ Scalia would thus invalidate modern use of “[r]acks and thumbscrews,” since, although well-known at the founding, they “were not in use because they were regarded as cruel

no longer wishes certain measures to be taken to preserve his or her life, it is up to the citizens of Missouri to decide, through their elected representatives, whether that wish will be honored.” *Id.* at 293.

¹¹⁴ Pritchard & Zywicki, *supra* note 91, at 420 (citing Scalia, *supra* note 95, at 863).

¹¹⁵ *Id.* at 421.

¹¹⁶ 518 U.S. at 568 (Scalia, J., dissenting).

¹¹⁷ *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 379–81, 385 (1995) (Scalia, J., dissenting).

¹¹⁸ *Id.* at 372.

¹¹⁹ *Id.*

¹²⁰ *Id.*

punishments.”¹²¹ The difficult originalist case, Scalia explains, lies between these extremes: where founding-era evidence discloses neither a shared constitutional approval nor disapproval of a particular practice.¹²² Such a case demands, over and above historical analysis, a delicate judgment “as to whether the government action under challenge is consonant with the concept of the protected freedom . . . that existed when the constitutional protection was accorded.”¹²³

In these difficult cases, post-adoption tradition can help clarify original meaning.¹²⁴ For Scalia, using post-adoption tradition to interpret an indeterminate text is no different from using contemporaneous practice to determine original meaning. After all, as already noted, Scalia treats tradition as simply an adjunct to original meaning.¹²⁵ Theoretically this means tradition can project meaning into the Constitution and justify striking down a counter-traditional law. Admittedly, in *McIntyre*, a post-adoption tradition leads Scalia not to invalidate the law under the First Amendment.¹²⁶ Nevertheless, his reasoning is premised on the idea that he would have invalidated that same law, if he had located a tradition showing the First Amendment *protected* the kind of expression at issue.¹²⁷

Thus, Scalia's traditionalism could result in either upholding or invalidating a law under the Constitution. Said another way, tradition potentially has both a negative function (simply saying what a constitutional limitation was not designed to do) and a positive function (saying affirmatively what kind of protection the provision was supposed to afford). While the negative function is congenial to Scalia's overall philosophy of judicial restraint, the positive function is theoretically compatible with his use of tradition. Indeed, as discussed below, in some cases Scalia explicitly foresees the possibility of striking down laws on the basis of tradition. However, this is theory and not practice. A closer look at the practical implications of Scalia's traditionalism reveals that the negative role of tradition is far more prominent a feature of his jurisprudence.

¹²¹ *Id.*

¹²² *Id.* at 375 (identifying “[t]he most difficult case for determining the meaning of the Constitution” as one where “[n]o accepted existence of governmental restrictions of the sort at issue here demonstrates their constitutionality, but neither can their nonexistence clearly be attributed to constitutional objections”).

¹²³ *Id.*; see also SCALIA, *supra* note 79, at 45 (explaining that in difficult cases, where original meaning is either ambiguous or must be applied to “new and unforeseen phenomena,” “the Court must follow the trajectory of the [constitutional guarantee at issue], so to speak, to determine what it requires—and assuredly that enterprise is not entirely cut-and-dried but requires the exercise of judgment”).

¹²⁴ *McIntyre*, 514 U.S. at 375 (Scalia, J., dissenting); see also *supra* note 98 and accompanying text.

¹²⁵ See *supra* notes 96–103 and accompanying text.

¹²⁶ See *McIntyre*, 514 U.S. at 375–76 (Scalia, J., dissenting). The tradition Scalia identifies in *McIntyre* as providing a reason for upholding Ohio's election disclosure requirement was one approving such requirements, dating only from the late-nineteenth century but since adopted virtually unanimously by the states. *Id.*

¹²⁷ *Id.* at 379.

The positive aspect of Scalia's traditionalism seems very difficult to activate, particularly when relying on the fact that particular practices were not historically engaged in. The absence of a particular governmental practice, either in the founding era or extending beyond it, is simply not enough. Instead, the "nonexistence" of a practice must "clearly be attributed to constitutional objections" in order to flower into an affirmative constitutional prohibition.¹²⁸ As Scalia explains in *McIntyre* with regard to more modern restrictions on anonymous electioneering, "[q]uite obviously, not every restriction upon expression that did not exist in 1791 or in 1868 is *ipso facto* unconstitutional."¹²⁹ Scalia thus raises a high barrier against the Court inferring, from government non-engagement in a practice, a common understanding of a constitutional prohibition on that practice. In *McIntyre*, Scalia might have been willing to infer such a prohibition from the prevalence of anonymous pamphleting in founding-era politics,¹³⁰ but his identification of a widespread post-adoption tradition of election disclosure requirements resolved the ambiguity of original meaning the other way. The implicit obstacles in Scalia's method against using tradition to invest positive meaning in the Constitution lead Professors Pritchard and Zywicki to remark that "Scalia's argument is a one-way ratchet: A practice of regulation proves the constitutional power to regulate, but an absence of regulation is ambiguous because it provides no evidence as to whether the government has the (previously unexercised) *power* to regulate."¹³¹

That is somewhat overstated because Scalia recognizes that the nonexistence of a practice (whether at the founding or, by extension, in post-adoption tradition) could imply a common understanding of a constitutional limitation on government power.¹³² Nevertheless, the point is practically sound and is illuminated by examining Scalia's use of tradition in interpreting the Due Process Clause. In that area, the constitutional text invests tradition with a plainly normative power—for Scalia, traditional practices are, by definition, "due" process.¹³³ But even here, Scalia rejects using tradition to freeze constitutional provisions around the kernel of tradition. Instead, tradition only provides a constitutional baseline against which practices diverging from tradition can be measured.

¹²⁸ *Id.* at 375.

¹²⁹ *Id.* at 373.

¹³⁰ *See id.* at 375. More precisely, Scalia would have required "further evidence of common practice in 1868, since I doubt that the Fourteenth Amendment time-warped the post-Civil War States back to the Revolution." *Id.*

¹³¹ Pritchard & Zywicki, *supra* note 91, at 424–25; *see also* Broughton, *supra* note 92, at 58 ("Justice Scalia's use of tradition as the 'primary determinant of what the Constitution means' tends to produce two practical results: it tends to favor republican (though Scalia most often refers to them as 'democratic') outcomes adopted in the political branches, and it tends to circumscribe judicial review." (citation omitted)).

¹³² *See McIntyre*, 514 U.S. at 378 (Scalia, J., dissenting) ("[P]ost-adoption tradition cannot alter the core meaning of a constitutional guarantee.").

¹³³ *Schad v. Arizona*, 501 U.S. 624, 650 (1991) (Scalia, J., dissenting).

Scalia's opinions suggest that tradition plays a consistent interpretative role across the entire Bill of Rights.¹³⁴ However, tradition's impact will vary, implicitly, since tradition supplements textual meaning and the definiteness of different constitutional texts obviously varies. The Due Process Clause is where tradition would have greatest impact on determining original meaning, since for Scalia, "[i]t is precisely the historical practices that *define* what is 'due.'"¹³⁵ In Scalia's jurisprudence, this holds for both procedural and substantive due process.¹³⁶ Because Scalia equates "due process" with the "law of the land" contemporaneous with adoption of the Due Process Clause, the guarantees of the Due Process Clause are anchored to settled historical practices.¹³⁷ For instance, personal service on a defendant physically present in the forum is, by definition, process "due" under the Due Process Clause because such process is part of settled historical usage against which any modern development must be measured.¹³⁸ Or, again, a state's refusal to afford an adulterous biological father the right to obtain parental rights in opposition to the husband and wife cannot, by definition, violate substantive due process, given "a societal tradition of enacting laws *denying* the [biological father's] interest."¹³⁹

Tradition in Scalia's due process jurisprudence is not simply an adjunct to original meaning—it is the substance of original meaning itself. Consequently, tradition would here seem best positioned to give Scalia a reason to strike down a counter-traditional law. Furthermore, if one wanted to catch Scalia shaping a constitutional guarantee around tradition—freezing the Constitution in the past, so to speak, and leaving no room for development—it would logically be here, where tradition and original meaning coalesce. But that is not what one finds. As Scalia's due process opinions tell us explicitly, traditional practices merely serve as an objective benchmark against which to measure the constitutionality of modern practices. Therefore, traditional practices would obviously validate similar modern practices (particularly if the traditional practices had persistent post-adoption

¹³⁴ See, e.g., case cited *supra* note 96 and accompanying text.

¹³⁵ *Schad*, 501 U.S. at 650 (Scalia, J., dissenting).

¹³⁶ See, e.g., *Burnham v. Superior Court of Cal.*, 495 U.S. 604, 619 (1990) (Scalia, J., plurality) ("The short of the matter is that jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.'"); *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) (Scalia, J., plurality) ("In an attempt to limit and guide interpretation of the [Due Process] Clause, we have insisted not merely that the interest denominated as a 'liberty' be 'fundamental' (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society.").

¹³⁷ See, e.g., *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 28–31 (1991) (Scalia, J., concurring) (explaining the original meaning of "due process").

¹³⁸ See *Burnham*, 495 U.S. at 610–16, 619 (holding that "jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice'").

¹³⁹ *Michael H.*, 491 U.S. at 122 n.2.

usage), but they would not automatically invalidate every departure from tradition. They would simply provide an objective standard for comparison. Indeed, as will be seen, Scalia even allows that a settled modern consensus might justify the invalidation of traditional practices.

In his *Pacific Mutual Life Insurance Co. v. Haslip* concurrence, Scalia lays out his view of “the proper role of history in a due process analysis”:

If the government chooses to *follow* a historically approved procedure, it necessarily *provides* due process, but if it chooses to *depart* from historical practice, it does not necessarily *deny* due process. The remaining business, of course, was to develop a test for determining *when* a departure from historical practice denies due process.¹⁴⁰

Scalia draws this framework from the Court’s 1884 decision in *Hurtado v. California*.¹⁴¹ In two opinions, Scalia has quoted the following language from *Hurtado* approvingly.¹⁴²

[A] process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country; *but it by no means follows, that nothing else can be due process of law.* . . . [T]o hold that such a characteristic [i.e., that a particular process has been “immemorially the actual law of the land”] is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and the Persians.¹⁴³

In *Haslip*, Scalia criticizes the Court for departing from this historically grounded due process standard and substituting a malleable “fundamental fairness” standard that has become progressively decoupled from historical practices.¹⁴⁴ He emphasizes that his own approach is not the Court’s, but instead the one, stemming from *Hurtado* and reaffirmed by Justice Cardozo in *Snyder v. Massachusetts*,¹⁴⁵ that “no procedure firmly rooted in the practices of our people can be so

¹⁴⁰ 499 U.S. at 31–32 (Scalia, J., concurring).

¹⁴¹ 110 U.S. 516, 527–29 (1884).

¹⁴² See *Haslip*, 499 U.S. at 31 (Scalia, J., concurring); *Burnham*, 495 U.S. at 619 (Scalia, J., plurality).

¹⁴³ *Hurtado*, 110 U.S. at 528–29 (emphasis added). In *Haslip*, following the quoted language, Scalia explained that “*Hurtado*, then, clarified the proper role of history in a due process analysis.” 499 U.S. at 31 (Scalia, J., concurring).

¹⁴⁴ *Haslip*, 499 U.S. at 31–36 (Scalia, J., concurring).

¹⁴⁵ 291 U.S. 97 (1934).

'fundamentally unfair' as to deny due process of law."¹⁴⁶ Scalia qualifies even that last statement by explaining that "firmly rooted practices" can nonetheless be invalidated by other constitutional provisions that, unlike the Due Process Clause, "might be thought to have some counter-historical content."¹⁴⁷ Finally, Scalia ends his concurrence with the striking concession that an evolving consensus of legislative or judicial practice could "purge[] a historically approved practice from our national life," thereby "permit[ting] this Court to announce [under the Due Process Clause] that it is no longer in accord with the law of the land."¹⁴⁸

Thus, even in the area where tradition most decisively impacts original meaning—due process—tradition for Scalia does not freeze the content of the constitutional guarantee. As Judge Michael McConnell observes with respect to Scalia's traditionalism, "[a] jurisprudence grounded in text and tradition is not hostile to social change, but it assigns the responsibility to determine the pace and direction of change to representative bodies."¹⁴⁹ To be sure, tradition furnishes an important benchmark against which to assess the constitutionality of modern practices (in this case, whether they provide "due process of law"). Modern practices identical, or closely analogous, to settled historical practices will be upheld, but, importantly, modern practices that diverge from settled historical usage will not be automatically invalidated on that basis alone. The language from *Hurtado* that Scalia is fond of quoting harshly dismisses such an approach as "stamp[ing] upon our jurisprudence the unchangeableness attributed to the laws of the Medes and the Persians."¹⁵⁰ Historical practices instead provide the raw materials for evaluating the divergent practices—a practice which Scalia admits is fraught with difficult judgments, but which plainly does not amount to automatic invalidation. In fact, Scalia is even willing to posit some evolutionary content to the Due Process Clause, should a definitive national consensus develop rejecting settled historical practice.¹⁵¹

¹⁴⁶ *Haslip*, 499 U.S. at 38 (Scalia, J., concurring) (citing *Snyder*, 291 U.S. at 105). For a good discussion of the evolution of the historical due process standard, see McConnell, *supra* note 93, at 694–95.

¹⁴⁷ *Haslip*, 499 U.S. at 38 (Scalia, J., concurring). Scalia offers the Equal Protection Clause as an example of a provision that "might be thought to have some counter-historical content." *Id.*

¹⁴⁸ *Id.* at 39. Scalia did not need to take such a step in *Haslip*, since the practice at issue there—common-law assessments of punitive damages—was "far from a fossil, or even an endangered species. They are (regrettably to many) vigorously alive." *Id.*

¹⁴⁹ McConnell, *supra* note 93, at 686 (citing *Burnham v. Superior Court of Cal.*, 495 U.S. 604, 627 (1990)).

¹⁵⁰ *Haslip*, 499 U.S. at 31 (Scalia, J., concurring) (quoting *Hurtado v. California*, 110 U.S. 516, 529 (1884)).

¹⁵¹ *Cf.* McConnell, *supra* note 93, at 671 (observing, with reference to the similar due process approach in *Washington v. Glucksberg*, that the Court "implied that even a traditional norm could come to violate substantive due process if it is subsequently abandoned or rejected by a new stable consensus" (citing *Washington v. Glucksberg*, 521 U.S. 702, 714–18 (1997))).

Furthermore, there is every reason to think that this is Scalia's approach in the area of substantive due process. In *Michael H.*, for instance, although Scalia rejects recognition of the biological father's counter-traditional claim under the substantive component of due process, he explicitly says he would defer to a counter-traditional legislative policy.¹⁵² "It is," as Scalia says, "a question of legislative policy and not constitutional law whether California will allow the presumed parenthood of a couple desiring to retain a child conceived within and born into their marriage to be rebutted."¹⁵³ In *Cruzan*, despite finding determinative for due process purposes the longstanding tradition of anti-suicide laws, Scalia would defer to ordinary political process for resolving increasingly complex end-of-life issues.¹⁵⁴ Implicitly affirming that there exist "reasonable and humane limits that ought not to be exceeded in requiring an individual to preserve his own life," Scalia entrusts the setting of such limits to democratic majorities constrained "to accept for themselves and their loved ones what they impose on you and me."¹⁵⁵ Finally, in *Lawrence v. Texas*, Scalia's dissent would have rejected finding a right to homosexual sodomy rooted in substantive due process, but at the same time would have raised no constitutional opposition to counter-traditional legislation through ordinary political processes.¹⁵⁶ Since "[s]ocial perceptions of sexual and other morality change over time, and [since] every group has the right to persuade its fellow citizens that its view of such matters is the best," Scalia explains that he "would no more *require* a State to criminalize homosexual acts—or, for that matter, display *any* moral disapprobation of them—than [he] would *forbid* it to do so."¹⁵⁷

As with procedural due process, then, so with substantive. Tradition acts as a constitutional benchmark for evaluating modern practices, but does not commit the judiciary to striking down laws simply because they diverge from historical practices. Judge McConnell explains that the effect of this historical use of tradition in the substantive due process area

is to allow the democratic, decentralized institutions of the country to continue to ponder the issue, and to adapt to changing mores and national experience. The Court's [substantive due process] approach thus leaves

¹⁵² See *Michael H. v. Gerald D.*, 491 U.S. 110, 129–30 (1989).

¹⁵³ *Id.*

¹⁵⁴ *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 293 (Scalia, J., concurring).

¹⁵⁵ *Id.* at 300; see also *id.* at 292–93 (explaining that "the States have begun to grapple" with "the difficult, indeed agonizing, questions that are presented by the constantly increasing power of science to keep the human body alive for longer than any reasonable person would want to inhabit it," and professing concern that the Court is "poised to confuse that enterprise" by "requiring [the legislative debate] to be conducted against a background of federal constitutional imperatives that are unknown because they are being newly crafted from Term to Term").

¹⁵⁶ See 539 U.S. 558, 603–04 (2003) (Scalia, J., dissenting).

¹⁵⁷ *Id.* at 603.

social change and experimentation to the political branches, and reserves to the courts the task of enforcing traditional and enduring principles of justice.¹⁵⁸

Scalia's approach thus casts the Due Process Clause—as the prime exemplar of tradition at work in constitutional interpretation—in a primarily negative role. “Its function,” as Scalia explains in *Haslip*, “is negative, not affirmative, and it carries no mandate for particular measures of reform.”¹⁵⁹

It should be noted that tradition will have a less dramatic impact on other constitutional guarantees than on the Due Process Clause. For Scalia, historical practices themselves are the yardstick for due process.¹⁶⁰ The text of the Due Process Clause itself points to tradition and, logically, there can be for Scalia no original meaning of “due process” separable from historically settled usage. By contrast, other constitutional guarantees are not simply empty vessels for tradition. For example, Scalia sees the Equal Protection Clause as having “counter-historical” content—that is, as designed to invalidate certain historical practices that might otherwise claim the status of tradition.¹⁶¹ Other constitutional guarantees likewise have their own normative content that would trump incompatible subsequent practices.¹⁶² This is how Scalia views the First Amendment. As already seen, Scalia developed his theory of tradition largely in *Rutan* and *McIntyre*, both cases dealing with the impact of the Free Speech Clause on governmental practices restricting expression. In those opinions, Scalia cast “freedom of speech” as an

¹⁵⁸ McConnell, *supra* note 93, at 672. Judge McConnell is there addressing the Court's substantive due process approach in *Washington v. Glucksberg*, 521 U.S. 702, 716–36 (1997), but he closely associates that approach with Scalia's own historical method, *see, e.g.*, McConnell, *supra* note 93, at 671 n.47 (observing that “one of the most important aspects of the *Glucksberg* decision” is the majority's acceptance of Scalia's methodology in *Michael H.* (citing *Michael H.*, 491 U.S. at 121–24)).

¹⁵⁹ *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 39 (1991) (Scalia, J., concurring) (quoting *Ownbey v. Morgan*, 256 U.S. 94, 112 (1921)).

¹⁶⁰ Scalia uses historical practices to measure due process without exhausting the content of the Due Process Clause by limiting “due process” to those historical practices only. *See supra* note 138 and accompanying text.

¹⁶¹ *See Haslip*, 499 U.S. at 38 (Scalia, J., concurring) (“The Equal Protection Clause and other provisions of the Constitution, unlike the Due Process Clause, are not an explicit invocation of the ‘law of the land,’ and might be thought to have some counter-historical content.”). Of course, Scalia's insistence that the Equal Protection Clause has an unambiguous textual meaning that clearly invalidates both affirmative action and racial segregation is a controversial point. *See, e.g.*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520–28 (1989) (Scalia, J., dissenting). That controversy is not over Scalia's traditionalism per se, but over how he applies his traditionalism in the Equal Protection Clause context and is therefore beyond the scope of this Article.

¹⁶² *See, e.g., Haslip*, 499 U.S. at 38 (Scalia, J., concurring) (explaining further that “the principle I apply today does not reject our cases holding that procedures demanded by the Bill of Rights—which extends against the States only *through* the Due Process Clause—must be provided despite historical practices to the contrary”).

ambiguous concept whose original meaning needs clarification from either contemporaneous practices or post-adoption tradition, but, unlike “due process,” “freedom of speech” is not reducible to historical practices. For example, in *McIntyre*, Scalia explained that a “postadoption tradition” of anti-flag-desecration laws “cannot alter the core meaning” of the Free Speech Clause—i.e., that “the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”¹⁶³

With a guarantee like the Free Speech Clause, then, tradition will emphatically play a “clarifying” or “validating” role.¹⁶⁴ Whether we are dealing with contemporaneous or post-adoption practices, tradition glosses original meaning. Contrast this with the Due Process Clause, where contemporaneous understandings of “historical practices” or “the law of the land” determine the content of due process (with, presumably, a post-adoption continuation of such practices confirming that original content). With due process, traditional practices straightforwardly project meaning into the Constitution, providing a stand-alone reason for invalidating a counter-traditional law.¹⁶⁵ By contrast, with freedom of speech, traditional practices shed light on original meaning, but do not determine it.¹⁶⁶ There is, by definition, a core of original meaning that tradition could not contradict. This is not to say that traditional practices could not, under the Free Speech Clause, provide an independent reason for invalidating a law. Scalia never denies that, and the possibility is implicit in *McIntyre*. But, in practice, Scalia would be less likely to use tradition in this way under the Free Speech Clause than he would under the Due Process Clause.¹⁶⁷ Scalia’s *McIntyre* dissent in particular reveals the implicit obstacles to using tradition as its own justification for invalidating a law.¹⁶⁸ There, tradition appears better adapted to mapping out areas committed to resolution by ordinary political processes than to projecting judicially enforceable content into the Constitution. This aspect of Scalia’s traditionalism will be crucial when considering his use of tradition to interpret another textually ambiguous clause in the First Amendment—the Establishment Clause. It will also answer whether Scalia’s critics have fairly censured him for projecting an exclusive preference for monotheism into the Establishment Clause.

¹⁶³ *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 377–78 (1995) (Scalia, J., dissenting) (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)).

¹⁶⁴ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 898, 1000 (1992) (Scalia, J., concurring and dissenting); see also *supra* note 98 and accompanying text.

¹⁶⁵ *Schad v. Arizona*, 501 U.S. 624, 650 (1991) (Scalia, J., dissenting).

¹⁶⁶ *McIntyre*, 514 U.S. at 378 (Scalia, J., dissenting).

¹⁶⁷ Moreover, as noted, even in the due process area, divergence from historical practices does not result in automatic invalidation. See *supra* notes 140–159 and accompanying text.

¹⁶⁸ See *McIntyre*, 514 U.S. at 371–78; see also *supra* notes 147–148 and accompanying text.

III. THE DISSENT AND THE CRITICS: IS SCALIA A MONOTHEISTIC ACTIVIST?

Having placed Scalia's dissent in its larger jurisprudential context, we can now ask whether his critics hit home. Criticisms of his dissent come from Souter's and Stevens's direct replies to Scalia in *McCreary County*¹⁶⁹ and *Van Orden*,¹⁷⁰ and also from legal scholars.¹⁷¹ To judge from the critics' tone, something more is at stake than the resolution of a doctrinal issue. Souter's majority opinion in *McCreary County* deems Scalia's dissent "a surprise," delivering the "remarkable view" that "government should be free to approve the core beliefs of a favored religion over the tenets of others, a view that should certainly trouble anyone who prizes religious liberty."¹⁷² Souter invokes the "St. Bartholomew's Day massacre and the treatment of heretics in early Massachusetts" as specters of religious violence counseling modern respect for the principle of neutrality.¹⁷³ Stevens's *Van Orden* dissent accuses Scalia of "marginalizing the belief systems of more than 7 million Americans by deeming them unworthy of the special protections he offers monotheists under the Establishment Clause."¹⁷⁴ Among academic commentators, the most prominent rejoinders to Scalia thus far up the ante. Professor Jack Balkin characterizes Scalia's Establishment Clause as only "requir[ing] neutrality among *monotheistic religions that believe in a personal God who cares about and who intervenes in the affairs of humankind*, and in particular, among Christianity (and its various sects), Judaism, and Islam."¹⁷⁵ Professor Thomas Colby believes that Scalia's dissent may portend "a wholesale rethinking of the constitutional relationship between church and state,"¹⁷⁶ and that it launches "an all-out assault on the venerable principle of neutrality, the constitutional foundation upon which both liberals and conservatives alike had stood steadfast for generations."¹⁷⁷ Colby goes further, warning that Scalia's approach would "represent the single greatest sea change in the history of the Establishment Clause,"¹⁷⁸ and even that it "would represent a complete rethinking of the very nature of our country—of the role that religion plays in government, and of the rights of religious minorities."¹⁷⁹ Are these criticisms overstated? Are they wrong? This Part addresses those questions. As will be explained, such criticisms boil down to the notion that Scalia would violently overturn the bedrock principle of neutrality in Establishment Clause

¹⁶⁹ *McCreary County v. ACLU*, 545 U.S. 844, at 850–81 (2005).

¹⁷⁰ *Van Orden v. Perry*, 545 U.S. 677, 707–36 (2005) (Stevens, J., dissenting).

¹⁷¹ See, e.g., *infra* notes 175–179 and accompanying text.

¹⁷² *McCreary County*, 545 U.S. at 879–80.

¹⁷³ *Id.* at 881.

¹⁷⁴ *Van Orden*, 545 U.S. at 719 n.18 (Stevens, J., dissenting).

¹⁷⁵ See Posting of Jack Balkin to Balkinization Blog, Justice Scalia Puts His Cards on the Table, <http://balkin.blogspot.com/2005/06/justice-scalia-puts-his-cards-on-table.html> (June 27, 2005, 12:53 EST).

¹⁷⁶ Colby, *supra* note 4, at 1098.

¹⁷⁷ *Id.* at 1105.

¹⁷⁸ *Id.* at 1113.

¹⁷⁹ *Id.* at 1121.

jurisprudence, and replace it with a principle that exclusively favors monotheistic religions. The particular instrument Scalia would use to inaugurate this revolution is tradition. Having explored Scalia's use of tradition in the previous section, this Part can now ask whether that is in fact what Scalia is attempting to do.

There are two interlocking parts to the overall criticism of Scalia's dissent. First is his "rejection" of a broad neutrality principle and his substitution (at least in the area of government religious acknowledgments) of a preference for monotheistic religions. The second part is more important, but a word needs to be said about the first. It is simply overstated to say that Establishment Clause jurisprudence has always operated under a consistent, overarching principle of neutrality, and that Scalia "would cast that decades-old cardinal understanding aside in one fell swoop."¹⁸⁰ It is more accurate to say that the Court has consistently paid lip-service to various formulations of neutrality, but has had to constantly adjust, refine, or even jettison the principle in certain areas of its Establishment Clause jurisprudence.¹⁸¹ The inherent difficulties in the concept of neutrality have led Professor Frank Ravitch, a noted Religion Clause scholar, to conclude that "neutrality, whether formal or substantive, does not exist."¹⁸² Nowhere is the gulf between neutrality and actual practice more palpable than with

¹⁸⁰ *Id.* at 1113.

¹⁸¹ On neutrality and its variations in Religion Clause jurisprudence, see Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 *IND. L.J.* 1, 8–24 (2000) (describing development of the neutrality doctrine); Carl H. Esbeck, *A Constitutional Case for Government Cooperation with Faith-Based Social Service Providers*, 46 *EMORY L.J.* 1, 20–39 (1997) (same); Patrick M. Garry, *Religious Freedom Deserves More than Neutrality: The Constitutional Argument for Nonpreferential Favoritism of Religion*, 57 *FLA. L. REV.* 1, 3–15 (2005) (same); Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 *EMORY L.J.* 43, 46–73 (1997) (describing the "no-aid" and "nondiscrimination" versions of neutrality, but arguing that the essential goal of both separation and neutrality is the "goal of minimizing government influence on religious choices"); Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 *VILL. L. REV.* 37, 65–72 (2002) (describing development of the neutrality doctrine); Ira C. Lupu, *The Lingering Death of Separationism*, 62 *GEO. WASH. L. REV.* 230, 237–46 (1994) (describing abandonment of strict separationism for "some version of religious neutrality, or equal religious liberty").

¹⁸² Frank S. Ravitch, *A Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause*, 38 *GA. L. REV.* 489, 492 (2004). Professor Ravitch reasons that "[c]laims of neutrality cannot be proven" because "[t]here is no independent neutral truth or baseline to which they can be tethered." *Id.* at 493. Therefore, "any baseline to which we attach neutrality is not neutral; claims of neutrality built on these baselines are by their nature not neutral." *Id.* Ravitch echoes Professor Steven Smith's provocative thesis that "the quest for neutrality . . . is an attempt to grasp at an illusion." STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* 96 (2005); see also STEVEN D. SMITH, *GETTING OVER EQUALITY: A CRITICAL DIAGNOSIS OF RELIGIOUS FREEDOM IN AMERICA* 103–15 (2001) (critiquing the neutrality principle).

government religious symbolism.¹⁸³ Professor Ira Lupu correctly observes that “government-sponsored religious messages can never achieve the status of neutrality among religions,”¹⁸⁴ presumably meaning that all religious symbols are unconstitutional and rigorous adherence to neutrality would make religious symbolism cases easy. However, the “endorsement” test the Court has settled on for these cases is, far from being a neutrality-based standard, one that is inherently non-neutral in that it focuses on the perceptions of exclusion felt by religious “outsiders.”¹⁸⁵ As Judge McConnell observes, “there is no ‘neutral’ position, outside the culture, from which to make this assessment.”¹⁸⁶ The sheer existence of the endorsement test in religious symbolism cases—one that appears to be

¹⁸³ On the relationship of the Court’s approach to government religious symbolism and the neutrality principle, see generally Robin Charlow, *The Elusive Meaning of Religious Equality*, 83 WASH. U. L.Q. 1529, 1561 & n.130 (2005) (suggesting that the Court simply avoids applying the neutrality principle in religious symbolism cases); Steven G. Gey, “*Under God*,” *the Pledge of Allegiance, and Other Constitutional Trivia*, 81 N.C. L. REV. 1865, 1880–84 (2003) (arguing that the inclusion of the phrase “under God” in the Pledge is not trivial and therefore unconstitutional); Kenneth Karst, *Justice O’Connor and the Substance of Equal Citizenship*, 55 SUP. CT. REV. 357, 376–402 (2003) (equating Justice O’Connor’s concern with exclusion felt from government religious symbols with a concern for racial equality); Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 177 (2004) (“[T]he right to religious liberty is a right to government neutrality. That is why litigants can object to government-sponsored religious symbols even though plaintiffs in such cases are not ‘unduly burdened.’”); Arnold H. Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O’Connor’s Insight*, 64 N.C. L. REV. 1049, 1049–51 (1986) (arguing that government neutrality toward religion can be achieved through application of Justice O’Connor’s “advance or inhibit” test); Ira C. Lupu, *Government Messages and Government Money: Santa Fe, Mitchell v. Helms, and the Arc of the Establishment Clause*, 42 WM. & MARY L. REV. 771, 816 (2001) (“[G]overnment-sponsored religious messages can never achieve the status of neutrality among religions.”); Toni M. Massaro, *Religious Freedom and “Accommodationist Neutrality”: A Non-Neutral Critique*, 84 OR. L. REV. 935, 949–63 (2005) (discussing incompatibility between neutrality and government use of religious symbols); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 147–57, 148 (1992) (criticizing the “endorsement test” used for religious symbolism cases and remarking that “[w]hether a particular governmental action appears to endorse or disapprove religion depends on the presuppositions of the observer, and there is no ‘neutral’ position, outside the culture, from which to make this assessment”); Gabriel A. Moens, *The Menace of Neutrality in Religion*, 2004 BYU L. REV. 535, 574 (arguing that the neutrality principle should be rejected because it “fails to achieve true neutrality and often trivializes religion’s role in public life”); Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1844–48 (2004) (advocating a decentralized approach to the Religion clauses).

¹⁸⁴ Lupu, *supra* note 183, at 816.

¹⁸⁵ See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573, 598–602 (1989); *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring).

¹⁸⁶ McConnell, *supra* note 183, at 148.

bleeding into other areas¹⁸⁷—is itself a refutation of the claim that the Establishment Clause lives under an all-encompassing regime of neutrality. Of course, these dissonances were present at the inception of the Court’s modern jurisprudence. In *Everson*, the Court invoked a sweeping formulation of neutrality,¹⁸⁸ but then immediately pared it back to resolve a parochial school funding issue without falling into complete contradiction.¹⁸⁹ The *Everson* majority’s refusal to extend absolute neutrality to its logical separationist end-point provoked the dissent to accuse it of subverting neutrality altogether.¹⁹⁰ This was the thrust of Justice Jackson’s famous quip that the Court, like Lord Byron’s Julia, “whispering ‘I will ne’er consent,’—consented.”¹⁹¹

It is, in short, untenable to claim that “[b]efore Justice Scalia’s opinion, virtually everyone was operating within the neutrality paradigm,”¹⁹² without dropping a telling footnote that describes the deep academic and judicial disagreements about the utility of neutrality—in other words, to what extent neutrality is “inadequate, manipulable, incapable of deciding hard cases, or even incoherent.”¹⁹³ This explains why the Court itself has had to soften neutrality with

¹⁸⁷ See, e.g., *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005) (reasoning that “[b]y showing a purpose to favor religion, the government ‘sends the . . . message to . . . nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members’” (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309–10 (2000) (internal quotation marks omitted))).

¹⁸⁸ See *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947) (reasoning that the Establishment Clause means, inter alia, that “[n]either [state nor federal government] can pass laws which aid one religion, aid all religions, or prefer one religion over another,” and that “[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions”).

¹⁸⁹ See *id.* at 17 (“[W]e cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools.”). As Professor Keith Werhan observes, “*Everson*’s easy statement of the neutrality principle disguised its enduring difficulty, for the principle has proven far easier to state than to apply in contested cases. *Everson* itself serves as an example.” Keith Werhan, *Navigating the New Neutrality: School Vouchers, the Pledge, and the Limits of a Purposive Establishment Clause*, 41 BRANDEIS L.J. 603, 604 (2003).

¹⁹⁰ See 330 U.S. at 58–59 (Rutledge, J., dissenting) (arguing that the policy excluding children in religious schools from participation in transportation reimbursements “entails hardship . . . [b]ut it does not make the state *unneutral* to withhold what the Constitution forbids it to give. On the contrary it is only by observing the prohibition rigidly that the state can maintain its *neutrality* and avoid partisanship in the dissensions inevitable when sect opposes sect over demands for public moneys to further religious education, teaching or training in any form or degree, directly or indirectly.” (emphases added)).

¹⁹¹ *Id.* at 19 (Jackson, J., dissenting).

¹⁹² Colby, *supra* note 4, at 1113.

¹⁹³ *Id.* at 1113 & n.54 (noting “that the neutrality paradigm is, of course, no panacea” and that “neutrality means different things to different people, and there has been a great

formulations such as “benevolent neutrality,”¹⁹⁴ which critics quickly labeled a counterfeit of genuine neutrality. This also explains why prominent Religion Clause scholars, such as Professors Douglas Laycock and Frank Ravitch, have felt impelled to construct refinements such as “substantive neutrality” or “facilitation” tests.¹⁹⁵ Perhaps most tellingly, this is why the opposing sides in the most prominent anti-establishment case in a decade—the school voucher case, *Zelman v. Swimmun-Harris*—were worlds apart on the outcome, while both claiming the mantle of neutrality.¹⁹⁶ No one will likely say it better than Professor Laycock: “Those who think neutrality is meaningless have a point. We can agree on the principle of neutrality without having agreed on anything at all.”¹⁹⁷

What Scalia is proposing to do with neutrality is entirely predictable. There is nothing revolutionary about it. Scalia is simply unwilling to allow abstract jurisprudential guideposts to override long-established public practices, especially where constitutional text or precedent does not clearly invalidate them. As he explained in *Rutan*, “a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic . . . is not to be laid on the

deal of discussion among academics and judges about the extent to which it is inadequate, manipulable, incapable of deciding hard cases, or even incoherent”).

¹⁹⁴ See, e.g., *Walz v. Tax Comm’n*, 397 U.S. 664, 669 (1970) (observing that “[t]he course of constitutional neutrality in this area cannot be an absolutely straight line” and that “[s]hort of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference”); *id.* at 711 (Douglas, J., dissenting) (“The [property tax] exemptions provided here insofar as welfare projects are concerned may have the ring of neutrality. But subsidies either through direct grant or tax exemption for sectarian causes, whether carried on by church *qua* church or by church *qua* welfare agency, must be treated differently, lest we in time allow the church *qua* church to be on the public payroll, which, I fear, is imminent.”).

¹⁹⁵ See Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001 (1990) (proposing as “substantive neutrality” the principle that “the religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance”). See generally Ravitch, *supra* note 182, at 504–06, 544–49 (critiquing Laycock’s formulation of neutrality as valuable but non-neutral and proposing a related “facilitation test”).

¹⁹⁶ Compare 536 U.S. 639, 653 (2002) (approving the Ohio voucher program because it is “neutral in all respects toward religion”), with *id.* at 688, 696–98 (Souter, J., dissenting) (arguing that the majority has “ignor[ed] the meaning of neutrality and private choice themselves” in order to validate the voucher scheme, and describing his understanding of neutrality). See also Ravitch, *supra* note 182, at 506–07, 513–23 (describing the difficulty with applying neutrality in *Zelman*). Tellingly, Justice Souter begins his dissent in *Zelman* by quoting the absolutist “no tax” language in *Everson*, claiming that “[t]he Court has never in so many words repudiated this statement,” and concluding that “[i]t is only by ignoring *Everson* that the majority can claim to rest on traditional law in its invocation of neutral aid provisions and private choice to sanction the Ohio law.” *Zelman*, 536 U.S. at 686–88 (Souter, J., dissenting).

¹⁹⁷ Laycock, *supra* note 195, at 994.

examining table and scrutinized for its conformity to some abstract principle of First Amendment adjudication devised by this Court.”¹⁹⁸ To the contrary, the order of priority is the reverse: public practices reflecting a persistent, widespread common understanding of constitutional guarantees are themselves the raw material for the Court’s principles of adjudication—the “very points of reference by which the legitimacy or illegitimacy of *other* practices are to be figured out.”¹⁹⁹ Judge McConnell captures this distinction when he explains that the “moral philosophic approach” to constitutional interpretation of a jurist like Souter “is deductive and theoretical, deriving specific prescriptions from more general theoretical propositions,” whereas the “traditionalist approach” of a jurist like Scalia “is inductive and experiential . . . , reason[ing] up from concrete cases and circumstances.”²⁰⁰ Thus, Scalia’s core disagreement with his critics is not primarily over the relative importance of neutrality as an Establishment Clause principle, but really over the function of any such overarching principle in constitutional methodology. Scalia reads such abstract principles against the available background of relevant tradition, and not (as Souter and Stevens do) the other way around.

This different interpretative methodology explains another aspect of Scalia’s dissent that has drawn sharp criticism. In his dissent, Scalia admits that some form of neutrality is “indeed a valid principle where public aid or assistance to religion is concerned, or where the free exercise of religion is at issue.”²⁰¹ Critics have asked why Scalia accepts neutrality as valid in these areas, but would discard it in the area of governmental religious symbolism. Indeed, why not jettison neutrality across the board, ask the critics, and allow government to channel funds selectively to favored monotheistic religions?²⁰² This criticism confuses Scalia’s approach with Souter’s and Stevens’s, which read neutrality as an overarching theoretical command of the Establishment Clause. Scalia, by contrast, shapes the principles of Establishment Clause adjudication around the intelligible contours of long-accepted public practices. Scalia does not elaborate in *McCreary County* why this approach might lead to accepting neutrality in one area and not in another, but it is not difficult to imagine why. As to public funding of religion, our nation’s common understanding of the evils of religious establishments was shaped significantly by eighteenth-century controversies over compelled funding of

¹⁹⁸ *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 95–96 (1990) (Scalia, J., dissenting); *see also* *United States v. Virginia*, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting) (“[W]hatever abstract tests we may choose to devise, they cannot supersede—and indeed ought to be crafted *so as to reflect*—those constant and unbroken national traditions that embody the people’s understanding of ambiguous constitutional texts.”).

¹⁹⁹ *Rutan*, 497 U.S. at 96 (Scalia, J., dissenting); *see supra* note 96 and accompanying text.

²⁰⁰ McConnell, *supra* note 93, at 672.

²⁰¹ *McCreary County v. ACLU*, 545 U.S. 844, 893 (2005) (Scalia, J., dissenting) (citing *Zelman*, 536 U.S. at 652; *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 532–33 (1993); *id.* at 557–58 (Scalia, J., concurring)).

²⁰² *See, e.g., Colby*, *supra* note 4, at 1112.

churches and nineteenth-century controversies over funding of religious schools.²⁰³ Whether we have drawn the correct constitutional lessons from these controversies is open to serious question, but it is evident why the historical record might lead a traditionalist like Scalia to infer some principle of evenhandedness for religious funding issues. The same can be said, even more forcefully, for free exercise principles and neutrality. The historical record shows that the Free Exercise Clause was understood, at the very least, to ban laws that were explicitly non-neutral with regard to religious belief and practice.²⁰⁴ The only controversy in that area is whether free exercise also impacts laws that simply have a disparate impact on religion.²⁰⁵ One can choose to explain Scalia's differing approach to these discrete areas as mere hypocrisy. A fairer explanation—fairer because it takes into account Scalia's overall methodology—is that Scalia draws a different lesson from our public traditions of religious acknowledgement. Because the neutrality principle falsifies those traditions, it cannot override them.

The core of the case against Scalia concerns how he would allegedly use traditions of religious acknowledgment. Scalia, it is said, would not merely deploy those traditions negatively but positively.²⁰⁶ He would embed in the Establishment Clause a preference for religious acknowledgments of a certain theological stripe, thereby excluding recognition of other forms of religion. According to the critics, Scalia would derive the theological content of this tradition from Framers' expectations about what "religion" they meant to enshrine in the Establishment

²⁰³ See, e.g., Laycock, *supra* note 181, at 48–50 (observing that "[f]inancing of churches was the central church-state issue of the 1780s, and was the immediate background to the adoption of the Establishment Clause in 1791," and that "[t]he other great controversy that gave prominence to the no-funding principle was the nineteenth century dispute over common schools").

²⁰⁴ See, e.g., Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106, 1108, 1114 (1994) (explaining that the original Free Exercise Clause "[a]t most . . . prevented the federal government from passing laws targeting religion *qua* religion" and that "even if the [Clause] could be read as an expression of individual rights, it would prohibit only those laws that directly targeted religion"); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1418 (1990) (explaining that one view of the Free Exercise Clause, at its core, forbids laws that directly target religious conduct for unfavorable treatment).

²⁰⁵ Compare Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1137–41 (1990) ("[W]hen . . . regulations [and laws] . . . do have a substantial impact on the press or on religion, they raise a serious claim for exemption."), with Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 917–47 (1992) ("Americans did not, however, authorize or acknowledge a general constitutional right of religious exemption from civil laws.").

²⁰⁶ See *supra* notes 104–09, 128–33 and accompanying text (distinguishing negative and positive uses of tradition in Scalia's jurisprudence).

Clause.²⁰⁷ For instance, on Souter's reading, "[Scalia's] dissent says that the deity the Framers had in mind was the God of monotheism."²⁰⁸ Stevens agrees, but adds that Scalia has misconstrued the historical record. The material Scalia reads as giving "specially preferred constitutional status to all monotheistic religions" would "just as strongly support[] a preference for Christianity."²⁰⁹ Stevens claims that "many of the Framers understood the word 'religion' in the Establishment Clause to encompass only the various sects of Christianity."²¹⁰ Professor Colby advances this case even more forcefully: Scalia's Establishment Clause would "permit[] the government . . . , in the context of governmental religious expression, to favor Judeo-Christian monotheism over all other religions (but not vice versa)."²¹¹ Scalia's mishandling of tradition would mean, he claims, that "biblical monotheism is now, has always been, and will always be, the favored religion of the United States Constitution."²¹²

These criticisms were not snatched from thin air. There are a few passages in Scalia's dissent that, if read out of context and divorced from Scalia's interpretative methodology and overall jurisprudence, might support the critics' reading.²¹³ But properly assessing the tail requires taking account of the dog. Scalia's general approach to using tradition in constitutional interpretation, as described above, is incompatible with the view that, in *McCreary*, he would use tradition to embed a particular and exclusive theological content in the Establishment Clause. Scalia's traditionalism is far better adapted to negative uses—ruling that constitutional guarantees do not extend to certain practices—than to the positive use of providing independent reasons for finding practices unconstitutional. Tradition is for Scalia a backstop, not a plan for action. Indeed, the typical criticisms of Scalia's traditionalism lament that he defers too much to majorities and refuses to deploy tradition as an evolving standard for ongoing judicial enforcement.²¹⁴ There is, in short, a critical difference in Scalia's

²⁰⁷ See, e.g., *McCreary County v. ACLU*, 545 U.S. 844, 877 (2005); *Van Orden v. Perry*, 545 U.S. 677, 728–29 (2005) (Stevens, J., dissenting).

²⁰⁸ *McCreary County*, 545 U.S. at 879.

²⁰⁹ *Van Orden*, 545 U.S. at 729 (Stevens, J., dissenting).

²¹⁰ *Id.* at 726.

²¹¹ Colby, *supra* note 4, at 1098.

²¹² *Id.*

²¹³ See *infra* notes 58–69 and accompanying text.

²¹⁴ See, e.g., Balkin, *supra* note 93, at 1620 (claiming that through his use of tradition in *Michael H.*, "Justice Scalia tried to write 1950's white middle class theories of the family into the Constitution—thus establishing the hegemony of Ozzie and Harriet, if you will"); Brown, *supra* note 93, at 202 (characterizing Scalia's use of tradition as "a thinly-veiled effort to cut off all possibility of progressive interpretation of the past"); Strauss, *supra* note 93, at 1708 (observing that "Justice Scalia's traditionalism . . . is highly majoritarian" and consequently, "[u]nless the Constitution is clear, a majority can make any practice constitutional just by sustaining it for a time"); Zlotnick, *supra* note 79, at 1394 ("[L]ike his semantic textualism, Scalia's 'historical practices' approach more often results in no protection for a modern practice, either because that practice was condemned under the religious or moral precepts of that earlier time, or because the modern situation

methodology between saying, “tradition means the government may elect to do, or not do, this,” and saying, “tradition alone means the government may never do this.” The critics of Scalia’s Ten Commandments dissent have cast him as a jurist looking to tradition for the power to strike down laws, but the role sits uncomfortably on his shoulders.²¹⁵

Due process is where tradition is best situated to provide Scalia a stand-alone reason for finding a current practice unconstitutional.²¹⁶ Settled historical usages define what process is “due,” and thus a modern practice, opposed to historical practices, cries out for invalidation. Even here, Scalia would not use tradition automatically to invalidate every practice that diverges from the traditional baseline. Recall Scalia’s own formulation of his due process analysis: “If the government chooses to *follow* a historically approved procedure, it necessarily *provides* due process, but if it chooses to *depart* from historical practice, it does not necessarily *deny* due process.”²¹⁷

What if this paradigm were applied to Scalia’s use of tradition to interpret the Establishment Clause? This would require an assumption contrary to the fact that the Establishment Clause interacts with traditional practices exactly as the Due Process Clause does—in other words, that historically settled usage alone *defines* the content of the Establishment Clause. But, for purposes of argument, transposing Scalia’s due process traditionalism would result in this analysis of a religious symbolism case under the Establishment Clause: “If the government chooses to *follow* a historically approved [practice of religious acknowledgment], it necessarily [acts in conformity with the Establishment Clause], but if it chooses to *depart* from historical practice, it does not necessarily [violate the Establishment Clause.]”²¹⁸

So, even supposing that the Establishment Clause is the empty vessel for tradition that the Due Process Clause is, Scalia would still refrain from using tradition to capture and freeze the meaning of the Establishment Clause. “Historically approved practices”—in this case a particular tradition of government religious acknowledgments—would provide a backdrop for the reach of the Establishment Clause, but the character of historical acknowledgments would not capture the Establishment Clause in its entirety. Any divergence from our traditions of religious acknowledgement would not mean automatic invalidation. Nor would Scalia’s use of tradition necessarily prohibit today’s majorities from

was unknown to the Framers.” (footnotes omitted)); *id.* at 1397 (“Scalia’s threshold for departing from originalism is so high that, while theoretically possible, its conditions rarely, if ever, will occur.”); *cf.* McConnell, *supra* note 93, at 672 (describing a traditionalism like Scalia’s as “allow[ing] the democratic, decentralized institutions of the country to continue to ponder the issue, and to adapt to changing mores and national experience,” and as “leav[ing] social change and experimentation to the political branches”).

²¹⁵ See *supra* notes 175-79 and accompanying text.

²¹⁶ See *supra* notes 132-133 and accompanying text.

²¹⁷ *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 31-32 (1991) (Scalia, J., concurring).

²¹⁸ *Id.*

altering our practices of government religious acknowledgment. As Judge McConnell explained, such a traditionalism would, to the contrary, “allow the democratic, decentralized institutions of the country to continue to ponder the issue, and to adapt to changing mores and national experience,” and would “leave[] social change and experimentation to the political branches.”²¹⁹

It is true that, on this view, historical practices alone could theoretically justify striking down a contrary modern practice or religious acknowledgments. If historical practices set a baseline, it follows that some modern practices might fall below it. But how likely is it that Scalia’s traditionalism will result in striking down a modern practice? After all, even in due process, Scalia adopts the view that, simply because a current practice lacks “the sanction of settled usage[,] . . . it by no means follows that nothing else can be due process of law.”²²⁰ Thus, while departing from historical practices could deny due process, “by no means” does every departure *automatically* deny it.²²¹ The likelihood that tradition alone will invalidate a law becomes clearer when we consider Scalia’s use of tradition outside the context of due process.

Scalia treats the Establishment Clause like the Free Speech Clause, as a constitutional provision that, while not reducible to historical practices, nonetheless benefits from historical clarification.²²² The upshot is that First Amendment traditions are even less likely than due process traditions to justify, on their own strength, striking down laws. Religious and speech traditions are better adapted to negative and restraining uses, merely clarifying the limits of constitutional guarantees.²²³ This becomes evident, as already seen, in Scalia’s *McIntyre* dissent.²²⁴ There, to justify invalidating modern election disclosure requirements based on tradition alone, Scalia would have required far more than the mere absence of similar laws during the founding era, and even more than the founding-era prevalence of ostensibly contrary practices (such as anonymous

²¹⁹ McConnell, *supra* note 93, at 672.

²²⁰ *Haslip*, 499 U.S. at 31 (Scalia, J., concurring) (quoting *Hurtado v. California*, 110 U.S. 516, 528 (1884)).

²²¹ *Id.* at 31–32.

²²² *See, e.g., Lee v. Weisman*, 505 U.S. 577, 632–33 (1991) (Scalia, J., dissenting) (stating that history illuminates how the Framers thought the Establishment Clause should apply to contemporaneous practices and that a practice existing at that time should be viewed with importance in interpreting the Establishment Clause (citing *Marsh v. Chambers*, 463 U.S. 783, 790 (1983); *Walz v. Tax Comm’n*, 397 U.S. 664, 681 (1970) (Brennan, J., concurring))).

²²³ *See, e.g., Zlotnick, supra* note 79, at 1394 (observing that while “Scalia’s originalism sometimes defends a historic practice now under attack,” his approach “more often results in no protection for a modern practice”). Of course, by “no protection for a modern practice,” Professor Zlotnick could have just as easily said “a limitation on a constitutional guarantee that shows the Constitution neither forbids nor denies the modern practice.” Whatever the verbal formulation, the bottom line is that Scalia’s traditionalism is better adapted to saying what practices the Constitution defers to representative bodies, than to saying what practices the Constitution categorically forbids (or requires).

²²⁴ *See supra* notes 98–99 and accompanying text.

electioneering).²²⁵ Instead, Scalia would have demanded that the “nonexistence [of election disclosure laws] clearly be attributed to constitutional objections.”²²⁶ This erects a high barrier against using tradition alone to invalidate laws under the Free Speech Clause. The historical absence of a governmental practice—or the existence of different practices—does not imply, in and of itself, that the Constitution was understood to forbid the practice.²²⁷ Rather, Scalia would require evidence clearly showing a practice was not engaged in because of a common understanding that it was unconstitutional.²²⁸ Not engaging in the practice—or, again, engaging in different practices—because of political calculus, personal preferences, or because the kinds of lawmaking at issue had not occurred to anyone at the time,²²⁹ would not merit the inference of a constitutional understanding about the practice. This leads Professors Pritchard and Zywicki to deem Scalia’s traditionalism a “one-way ratchet”—that is, a method that tends to use tradition negatively (to say what practices ambiguous constitutional guarantees do not restrain) and not positively (to say what practices ambiguous constitutional guarantees forbid).²³⁰

Can one understand Scalia’s use of tradition in *McCreary County* as an application of these general principles? There is a strong case for answering yes. First, notice how Scalia frames the basic legal issue when he concludes that “[h]istorical practices . . . demonstrate that there is a distance between the acknowledgment of a single Creator and the establishment of a religion.”²³¹ This narrow formulation suggests a correspondingly narrow (and negative) use of

²²⁵ See, e.g., *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 374 (1995) (Scalia, J., dissenting) (arguing that Justice Thomas’s concurrence “recounts other pre- and post-Revolution examples of defense of anonymity in the name of ‘freedom of the press,’ but not a single one involves the context of restrictions imposed in connection with a free, democratic election, which is all that is at issue here”); *id.* (characterizing “the sum total of the historical evidence marshaled by the concurrence for the principle of *constitutional entitlement* to anonymous electioneering” as “partisan claims in the debate on ratification (which was *almost* like an election) that a viewpoint-based restriction on anonymity by newspaper editors violates freedom of speech”).

²²⁶ *Id.* at 375.

²²⁷ *Id.* at 374.

²²⁸ See *id.* at 375 (noting that the nonexistence of a tradition of government prohibition of anonymous electioneering could not be “clearly attributed to constitutional objections”).

²²⁹ See *id.* at 374 (observing that “[t]he issue of a governmental prohibition upon anonymous electioneering in particular . . . simply never arose,” given that “[t]he idea of close government regulation of the electoral process is a more modern phenomenon, arriving in this country in the late 1800’s”).

²³⁰ See Pritchard & Zywicki, *supra* note 91, at 424–25.

²³¹ *McCreary County v. ACLU*, 545 U.S. 844, 894 (2005) (Scalia, J., dissenting). Later, Scalia restates this point as “[i]nvocation of God despite [non-monotheistic Americans’] beliefs is permitted not because nonmonotheistic religions cease to be recognized by the religion clauses of the First Amendment, but because governmental invocation of God is not an establishment.” *Id.* at 899–900.

tradition. Saying that “the acknowledgment of a single Creator”²³² or “governmental invocation of God”²³³ is “not an establishment”²³⁴ (or “distant” from an establishment) confines Scalia’s conclusion to the case at hand. It suggests he is deploying “historical practices” merely as a baseline for comparison with the Ten Commandments displays, and not as a vehicle to define the Establishment Clause exhaustively. Scalia constructs a public record of monotheistic religious acknowledgments as a reference point for evaluating monotheistic displays.²³⁵ Nevertheless, saying that these displays fall within our settled public practices of religious acknowledgments is a far cry from saying that those settled public practices exhaustively define and prospectively delimit all that the Establishment Clause would ever allow. To do so, as Scalia has remarked in the due process context, would “stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and the Persians.”²³⁶

Second, Scalia’s treatment of neutrality sheds light on what he is doing with tradition. In the Religion Clauses as elsewhere, Scalia subordinates constitutional theory to settled usages that reflect a common understanding of constitutional guarantees.²³⁷ Scalia thus refuses to deploy “neutrality” to strike down governmental religious symbolism that falls within tradition. This is why Scalia reasons that neutrality between religions must “necessarily appl[y] in a more limited sense to public acknowledgment of the Creator.”²³⁸ Scalia has identified a settled public practice of acknowledging God, and he does not accept that a “neutrality” principle latent in the Establishment Clause must now scour that practice from public life.²³⁹ Scalia recognizes that even the blindest invocation of “God” or “the Almighty” necessarily violates neutrality with respect to atheists or polytheists, but this supports rather than undermines his resolve not to use neutrality in a blunt fashion.²⁴⁰ Importantly, he speaks of “monotheists” versus “atheists and polytheists” simply because he has already characterized the Ten Commandments display as plainly monotheistic.²⁴¹ It is only in that sense that

²³² *Id.* at 894.

²³³ *Id.* at 900.

²³⁴ *Id.*

²³⁵ *See id.* at 894 (“Publicly honoring the Ten Commandments is thus indistinguishable, insofar as discriminating against other religions is concerned, from publicly honoring God.”).

²³⁶ *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 31 (1991) (Scalia, J., concurring) (quoting *Hurtado v. California*, 110 U.S. 516, 528 (1884)); *see supra* notes 140–148 and accompanying text.

²³⁷ *See supra* notes 73–77 and accompanying text. As Scalia remarks in his *Lee v. Weisman* dissent, “[o]ur Religion Clause jurisprudence has become bedeviled (so to speak) by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long-accepted constitutional traditions.” 505 U.S. 577, 644 (1991) (Scalia, J., dissenting).

²³⁸ *McCreary County*, 545 U.S. at 893 (Scalia, J., dissenting).

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *See supra* notes 52–56 and accompanying text.

Scalia then claims that “the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists.”²⁴² However, Scalia speaks only in terms of what the Establishment Clause permits, and not in terms of what it commands. His rhetoric is equally compatible with the conclusion that, in a case concerning different religious symbolism, the Establishment Clause would also “permit” the “disregard” of devout monotheists in favor of polytheists or atheists. It does not follow from Scalia’s statements that he is projecting an exclusively monotheistic tradition into the Establishment Clause. Taking Scalia’s tart rhetoric out of context makes for effective sound-bites, but it does not do justice to what Scalia is saying.²⁴³

Third, Scalia’s characterization of the Ten Commandments displays as simply “acknowledg[ing] a single Creator”²⁴⁴ clarifies his focus on monotheism. Monotheism turns out to be crucial to Scalia’s dissent, but not for the reasons his critics believe. Of course, Scalia’s understanding of the display as a “monotheistic acknowledgment” usefully allows him to place it within *Marsh*’s “tolerable acknowledgment of beliefs widely held among the people of this country.”²⁴⁵ However, that characterization also has implications for tradition. For if the question is whether a monotheistic acknowledgement violates our traditions, then

²⁴² *McCreary County*, 545 U.S. at 893 (Scalia, J., dissenting).

²⁴³ It does even less justice to Scalia’s point to change the quotation from “the Establishment Clause permits *this* disregard of polytheists, [etc.],” *id.* at 893 (emphasis added), to “the Establishment Clause permits *th[e]* disregard of polytheists,” Colby, *supra* note 4, at 1109 (emphases added) (alteration in original). The two statements have strikingly different implications. The actual quotation suggests that the Establishment Clause permits a limited form of “disregard” for non-monotheistic sensibilities, while recognizing an entire panoply of constitutional “regard” for non-monotheists in other contexts. The altered quote suggests that Scalia thinks the Establishment Clause permits majorities to ride roughshod over non-monotheists’ rights in any context. Because Scalia’s “choice of words here (and throughout his dissent) is important,” Colby, *supra* note 4, at 1109, it bears noting that, later in his dissent, Scalia explicitly *rejects* the notion that “non-monotheistic religions cease to be religions recognized by the religion clauses of the First Amendment,” *McCreary County*, 545 U.S. at 899–900 (Scalia, J., dissenting).

²⁴⁴ *McCreary County*, 545 U.S. at 894 (Scalia, J., dissenting).

²⁴⁵ *Id.* at 892, 894 (quoting *Marsh v. Chambers*, 463 U.S. 783, 792 (1983)). Incidentally, Scalia’s statements that “[t]he three most popular religions in the United States, Christianity, Judaism, and Islam—which combined account for 97.7% of all believers—are monotheistic” and also “believe that the Ten Commandments were given by God to Moses, and are divine prescriptions for a virtuous life,” *id.* at 894, are made with direct reference to the quoted statement in *Marsh*. In other words, Scalia uses statistics to locate the displays within *Marsh*’s “tolerable acknowledgment of beliefs widely held among the people of this country.” *Id.* at 892, 894. Scalia is simply not making an argument, as critics claim, that grounds the displays’ constitutionality on some vague standard of “inclusiveness,” and it consequently falls flat to level the accusation that “[i]n claiming inclusiveness, Justice Scalia is simply glossing over [atheists or Buddhists or Wiccans], as if they do not exist at all,” Colby, *supra* note 4, at 1118.

it makes sense to compare apples to apples and ask whether we have in fact historically engaged in analogously monotheistic public utterances. To answer yes, based on evidence such as presidential inaugural addresses and public mottoes, is not the same thing as saying: “A theology of monotheism is written into the Establishment Clause.” It is also different from saying, “Religious acknowledgments that deviate from a generalized monotheism automatically violate the Establishment Clause.” Admittedly, Scalia never spells any of this out, but he does drop a footnote giving a specific example of how a Ten Commandments display would violate the Establishment Clause.²⁴⁶ Scalia explains that the Establishment Clause “would prohibit . . . governmental endorsement of a particular version of the Decalogue as authoritative.”²⁴⁷ It is telling that, when pressed to identify an actual constitutional violation, Scalia does not alter the theological content of the religious display (saying, for instance, “If the government displayed the Sermon on the Mount or a passage from the Qur’an, *that* would violate the Clause”), but instead changes the use the government makes of the display. The Establishment Clause is violated, not by one theological content over another, but by a governmental deployment of text that ventures into the core of historical religious establishments: official promulgation of doctrine.²⁴⁸

Fourth, and most importantly, Scalia’s approach to tradition explains how he treats the historical record of public religious acknowledgments. Tradition for Scalia, it must be recalled, is an adjunct to original meaning. Scalia, of course, rejects using original intent in both constitutional and statutory interpretation. He refuses to plumb the private motives or expectations of Framers, and instead seeks the public, commonly held understanding of constitutional guarantees contemporaneous with their drafting, promulgation, and ratification.²⁴⁹ Historical practices, whether contemporaneous or post-adoption, aid Scalia only insofar as they clarify that original, public understanding of the constitutional guarantee. Consequently, when using tradition to interpret the Constitution, Scalia tries to reconstruct a record of public practices from which to infer a common understanding about the reach of constitutional guarantees. The important axiom is that Scalia is not using tradition to discern the Framers’ original intent behind the Establishment Clause, whether that intent is characterized as what “religion” the Framers “had in mind” when drafting the Religion Clauses, what forms of Christianity the Framers adhered to or hoped to benefit through the Religion Clauses, or what Framers privately thought about government use of religious language.

Scalia’s critics have failed to make this critical distinction between original meaning and original intent. For instance, Souter and Stevens criticize Scalia for a

²⁴⁶ See *McCreary County*, 545 U.S. at 894 n.4 (Scalia, J., dissenting).

²⁴⁷ *Id.*

²⁴⁸ See, e.g., McConnell, *supra* note 39, at 2131–36 (describing as a central element of the founding-era understanding of an establishment of religion the government’s “control over doctrine and liturgy”).

²⁴⁹ See *supra* notes 96–103 and accompanying text.

treatment of the historical record selectively privileging monotheistic utterances and ignoring the Framers' tacit preferences for either Christianity or Deism.²⁵⁰ Professor Colby likewise accuses Scalia of making a "hash" of history by "selectively drawing upon the historical record to give the appearance of a historical consensus that did not exist"—specifically, by ignoring certain Framers' reservations about government religious language and glossing over explicitly Christian content in some founding-era practices.²⁵¹ These criticisms simply fail to address what Scalia, according to his own methodology, is doing with the historical record. Because Scalia is not using tradition to discover original intent, it is irrelevant whether Framers like Madison or Jefferson had private or idiosyncratic reservations about using public religious language. From the viewpoint of original meaning, the important point is that critics can point to precious little public disagreement about the common official deployment of religious utterances.²⁵²

It is one thing to claim there was "a dispute and outcry among the framing generation" about government religious language, but it is another thing to support that claim with public evidence.²⁵³ The kind of "dispute and outcry" that would

²⁵⁰ See, e.g., *McCreary County*, 545 U.S. at 876–81; *Van Orden v. Perry*, 545 U.S. 677, 724–29 (2005) (Stevens, J., dissenting).

²⁵¹ Colby, *supra* note 4, at 1127 & n.120.

²⁵² *Id.* at 1128. For instance, it is telling that in the 1822 letter of Madison to Edward Livingston—often cited to show a divergence of founding-era opinion on the constitutionality of executive thanksgiving proclamations—Madison admits that "[w]hilst I was honored with the Executive Trust I found it necessary on more than one occasion to follow the example of predecessors" in making such proclamations. *Id.* at 1128 & n.123 (citing Letter from James Madison to Edward Livingston (July 10, 1822), reprinted in 5 THE FOUNDERS' CONSTITUTION 105, 105 (Philip B. Kurland & Ralph Lerner eds., 1987)). Madison adds, in his own defense, that he "was always careful to make the Proclamations absolutely indiscriminate, and merely recommendatory." *Id.* In other words, the very evidence showing Madison's private opinion about his actions as President demonstrates, given Madison's inconsistent public actions, a very different common understanding about the limits of the Establishment Clause. Why, in short, would Madison have found it "necessary on more than one occasion" to issue such proclamations, unless the common understanding was that the Establishment Clause did not bar them (indeed, so much so, that Madison felt political pressure to issue them)? The only public dissent from this view that Scalia's critics point to is evidence such as Jefferson's decision not to issue thanksgiving proclamations, and the vote of one representative against a congressional resolution urging Washington to issue a thanksgiving proclamation. See, e.g., *id.* at 1128 nn.125 & 126. This is flimsy material upon which to base a claim that the original public understanding substantially diverged about whether the Establishment Clause permitted executive thanksgiving proclamations. It rather confirms the opposite: the widely held understanding was that the proclamations presented no constitutional question.

²⁵³ See, e.g., *id.* at 1127–28 & nn.123–25, 1134 n.146 (citing JAMES MADISON, DETACHED MEMORANDA 558 (Elizabeth Fleet ed., 1946); Letter from Thomas Jefferson to Rev. S. Miller (Jan. 23, 1808), reprinted in 5 THE FOUNDERS' CONSTITUTION, *supra* note 252, at 98, 98–99; Letter from James Madison, *supra* note 252, at 105). Justice Souter relies on similar materials in his *McCreary County* majority opinion to support the

count in Scalia's traditionalism is one that impacted the pattern of public religious language, or, better yet, one that coalesced into a tangible counter-tradition of laws and practices. Private reservations or official inaction derived from personal interpretation or political scruples scarcely reflect a commonly held public understanding of constitutional meaning. To the contrary, virtually every indication of founding-era practices points to a common understanding that public religious acknowledgments did not present a question of constitutional magnitude.²⁵⁴ Moreover, there appears to be no evidence whatsoever reflecting a public understanding going the other way—i.e., that government religious utterances were avoided because they were commonly thought to violate the Establishment Clause.²⁵⁵ Historian and Religion Clause scholar Thomas Curry notes there was substantial agreement in the founding generation—even between Baptists and Congregationalists, who disagreed violently about tax-supported churches—regarding the propriety of “Sabbath laws, appointment of chaplains, and designation of days of prayer.”²⁵⁶ Curry remarks that, in 1789, such religious acknowledgments “caused no conflict at either the state or federal level.”²⁵⁷ As for

conclusion that “there was no common understanding about the limits of the establishment prohibition.” 545 U.S. at 879. In the letter to Reverend Miller cited above, Jefferson himself makes the point quite nicely about the difference between private and public actions. See Letter from Thomas Jefferson, *supra*, at 99. At the end of the letter, Jefferson “express[es] . . . satisfaction that you have been so good as to give me an opportunity of explaining myself in a *private letter*, in which I could give my reasons more in detail than might have been done in a *public answer*.” *Id.* (emphasis added).

²⁵⁴ See, e.g., Lupu, *supra* note 183, at 775–79; see also CURRY, *supra* note 39, at 218 (describing the first Congress’s “many involvements with religion” and remarking that “[c]ustoms like days of prayer and thanksgiving appeared not so much matters of religion as part of the common coin of civilized living”); *id.* at 218–19 (“Even Baptists and Congregationalists, so sharply at odds with each other on tax support for churches, shared many common attitudes about such non-disputed Church-State matters as Sabbath laws, appointment of chaplains, and designation of days of prayer. Eventually, these would become subjects of controversy. In 1798, however, they caused no conflict at all at either the state or federal level.”); JOHN WITTE, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES 76 (2000) (observing that “it is rather clear that the First Session of Congress had little compunction about confirming and continuing the Continental Congress’s tradition of supporting chaplains, prayers, Thanksgiving Day proclamations, and religious education, . . . [as well as its] practice of including religion clauses in its treaties, condoning the American edition of the Bible, funding chaplains in the military, and celebrating religious services officiated by religious chaplains,” and suggesting that “[t]he ease with which Congress passed such laws does give some guidance on what forms of religious support the First Congress might have condoned”).

²⁵⁵ Cf. McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 375 (1995) (Scalia, J., dissenting) (requiring that the “nonexistence [of election disclosure laws] clearly be attributed to constitutional objections” in order to infer a constitutional prohibition); see also *supra* note 108 and accompanying text.

²⁵⁶ CURRY, *supra* note 39, at 218–19.

²⁵⁷ *Id.* at 219.

Madison and Jefferson, each held idiosyncratic opinions about church-state relationships that were out-of-step with commonly held views.²⁵⁸ Evidence of what they thought privately about religious invocations actually supports the existence of a common understanding that contradicted their views. Moreover, when drafting and debating the Religion Clauses, Madison willingly suspended his private views of church-state relationships in favor of more politically expedient measures that would command broader support.²⁵⁹ As Professor Gerard Bradley explains, “[t]he

²⁵⁸ See, e.g., *id.* at 205 (observing that, while Madison would have supported more far-reaching alterations in church-state relationships, “[r]epeatedly, in his correspondence, as well as in his speeches, [Madison] asserted that he sought achievable amendments that would eschew controversy and gain ratification”); DREISBACH, *supra* note 15, at 27 (“Critics had castigated Jefferson for departing from the practice of his presidential predecessors and virtually all state chief executives, who routinely designated days for prayer, fasting, and thanksgiving.”); 2 JAMES HITCHCOCK, *THE SUPREME COURT AND RELIGION IN AMERICAN LIFE: FROM “HIGHER LAW” TO “SECTARIAN SCRUPLES”* 22–30 (2004) (generally describing Madison’s and Jefferson’s views on church-state relations, and arguing that Madison’s “separationist position, like Jefferson’s, was not shared widely enough to make it politically safe to adhere to in all its fullness”); *id.* (observing that “Jefferson’s and Madison’s separationism was a relatively new development, emerging from the Enlightenment of the eighteenth century,” and that “Jefferson’s and Madison’s positions did not command a consensus in their own day”); WITTE, *supra* note 254, at 48, 68–70, 74, 77 (explaining that Madison unsuccessfully pressed the minority position that protection of religious liberties should be guaranteed in the Constitution against the states themselves). Professor Gerard Bradley discusses a particularly instructive letter from Madison to Jefferson on October 17, 1788, in which Madison explained to Jefferson that, to be effective, rights secured in the Bill of Rights must hew closely to the public’s general sentiments. See BRADLEY, *supra* note 39, at 72. Madison wrote that he was opposed to “absolute restrictions” being placed in the Bill of Rights “in cases that are doubtful, or where emergencies may overrule them,” since such restrictions, “however strongly marked on paper will never be regarded when opposed to the decided sense of the public, and after repeated violations in extraordinary cases they will lose even their ordinary efficacy.” Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in* 5 *THE WRITINGS OF JAMES MADISON* 271, 274 (Gaillard Hunt ed., 1904). Since, as Professor Bradley explains, “Madison divorced a federal bill of rights from his own latitudinal views” of church-state relationships, such a letter confirms the view that Madison did not even attempt to lodge his own views in the Religion Clauses. BRADLEY, *supra* note 39, at 72 (citation omitted); see Letter from James Madison, *supra*.

²⁵⁹ See, e.g., BRADLEY, *supra* note 39, at 72 (characterizing Madison’s church-state opinions as “quite alien to the sense of the community,” and explaining that, consequently, “Madison divorced a federal bill of rights from his own latitudinal views”); CURRY, *supra* note 39, at 205 (stating Madison “sought achievable amendments that would eschew controversy and gain ratification of three-fourths of the states”). Professor Bradley goes on to explain that “the distance between the First Amendment and Madison’s personal philosophy is not hard to locate. His was a highly specific political enterprise with no room for unorthodox views—his own or anyone else’s.” BRADLEY, *supra* note 39, at 88.

truth is that Madison's personal philosophy, whatever it may have been, has nothing to do with the meaning of the Establishment Clause."²⁶⁰

Much the same can be said for the notions that certain Framers had Christianity "in mind" when they approved the Religion Clauses, or that, because many Framers held deistic ideas, they could not have meant to privilege the Judeo-Christian monotheism reflected in a Ten Commandments display.²⁶¹ These two arguments are often made against government religious acknowledgments, but they are, of course, incompatible with each other. A coterie of deist Framers would not have imposed through the Constitution an exclusivist Christianity that would have been politically and theologically unpalatable to any respectable deist.²⁶² In any event, Scalia's interpretative approach would see these claims as irrelevant. As already noted, Scalia is not using tradition to plumb the personal theological convictions of Madison, Jefferson, Washington, Story,²⁶³ or anyone else, whether

²⁶⁰ BRADLEY, *supra* note 39, at 87; *see also id.* at 86 (arguing that "[t]he historical fallacy with the most severe consequences is the implication that to the extent Madison 'authored' or 'sponsored' the Establishment Clause, it represents what Madison personally believed was the proper alignment of church and state").

²⁶¹ *See supra* notes 207–212 and accompanying text; *see also* Colby, *supra* note 4, at 1126–29.

²⁶² On the multifaceted deism of prominent Framers, *see generally* DAVID L. HOLMES, *THE FAITHS OF THE FOUNDING FATHERS* 49–108 (2006); Avery Cardinal Dulles, *The Deist Minimum*, 149 *FIRST THINGS* 25, 26–27 (2005). While one should speak of a spectrum of deist beliefs, and while not every deist in the founding era was hostile to orthodox Christianity, deism in any form differed fundamentally from the tenets of traditional Christianity. As David Holmes explains, even so-called "Christian" deists "replaced the Judeo-Christian explanation of existence with a religion far more oriented to reason and nature than to the Hebrew Bible, Christian Testament, and Christian creeds." HOLMES, *supra*, at 44. *See generally id.* at 39–48.

²⁶³ A passage from Justice Story's *Commentaries on the Constitution of the United States* is typically held up to show that the common understanding of the founding era extended constitutional protections only to Christian sects. *See, e.g.,* Van Orden v. Perry, 545 U.S. 677, 727 (2005) (Stevens, J., dissenting). Story did indeed write that the "real object" of the Establishment Clause was "not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects." JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 991, at 700 (Ronald D. Rotunda & John E. Nowak eds., 1987). However, he wrote that sentence to reject what he considered the false claim that the First Amendment was "[a]n attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference." *Id.* § 988, at 700. He also admitted that, while Christians would naturally want the government "to foster, and encourage [Christianity]," the "real difficulty lies in ascertaining the limits, to which government may rightfully go in fostering and encouraging religion." *Id.* §§ 986–87, at 699. Furthermore, Story recognized that "the duty of supporting religion, and especially the Christian religion, is very different from the right to force the consciences of other men, or to punish them for worshipping God in the manner, which, they believe, their accountability to him requires." *Id.* § 990, at 700–01. For the inviolability of the conscience, and for the proposition that "[t]he rights of conscience are, indeed, beyond the just reach of any human power," Story cited none other

deist or Christian.²⁶⁴ Rather, Scalia takes the language of public religious utterances as itself relevant to how people commonly understood the Establishment Clause.²⁶⁵ He is constructing a public record, not a Founders' biography. The conclusion he draws from the general range of such utterances is unremarkable: that the common understanding must have been, at the very least, that generalized monotheistic language (such as "God" or "Providence" or "Almighty Being") did not present a constitutional problem when deployed officially by the federal government.²⁶⁶ Again, Scalia uses that conclusion merely as a baseline for determining the constitutionality of a Ten Commandments display. It is, of course, evident that Scalia's construal of the display is strikingly different from Souter's and Stevens's.²⁶⁷ But the point is not whether Scalia is correct about that, but rather about his use of tradition to reach that conclusion. His method here is perfectly consistent with his negative use of tradition in other areas, deploying historical practices to demarcate the current practices the Establishment Clause does not reach.

A special word needs to be said about the claim that Scalia glosses over the Christian character of certain founding-era practices (such as Christian language in certain presidential addresses or Christian worship services conducted by

than Madison and Locke. *Id.* § 990, at 701. Story's chain of reasoning led him to conclude that, in the Religion Clauses, "it was deemed advisable to exclude from the national government all power to act upon the subject" and that "[t]he only security was in extirpating the power [to create a religious establishment]." *Id.* § 992, at 702. Story's conclusion to this part of his *Commentaries* deserves quotation in full:

Thus, the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions; and the Catholic and the Protestant, the Calvinist and the Arminian, the Jew and the Infidel, may sit down at the common table of the national councils, without any inquisition into their faith, or mode of worship.

Id. § 992, at 702–03. While this Article is not the place for a complete exposition of Justice Story's understanding of the Religion Clauses, simply reading his comments in context reveals his thought to be far from the "Christian nation" stereotype with which he is often labeled. *See also id.* § 213, at 161 (explaining that the Establishment Clause "seems to prohibit any laws, which shall recognize, found, confirm, or patronize any particular religion, or form of religion, whether permanent or temporary, whether already existing, or to arise in the future").

²⁶⁴ *See, e.g.,* SCALIA, *supra* note 79, at 38 (explaining that Scalia consults Framers' writings "not because they were Framers and therefore their intent is authoritative and must be the law; but rather because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood"); *see also supra* note 79 and accompanying text.

²⁶⁵ *See* *McCreary County v. ACLU*, 545 U.S. 844, 897 (2005) (Scalia, J., dissenting).

²⁶⁶ *See, e.g.,* CURRY, *supra* note 39, at 218 (remarking that "[c]ustoms like days of prayer and thanksgiving appeared not so much matters of religion as part of the common coin of civilized living").

²⁶⁷ *See supra* notes 23–28 and accompanying text.

congressional chaplains). The notion is that Scalia conveniently ignores where the real originalist evidence would lead—to an exclusive constitutional preference not for “monotheism” but for Christianity.²⁶⁸ This again shows a failure to understand Scalia’s method. Such criticisms would have much greater force if Scalia understood himself to be constructing the definitive theological history of founding-era religious invocations. However, Scalia does not understand himself as a historian, but as a judge tasked with interpreting the reach of constitutional language.²⁶⁹ Thus, his treatment of the historical material goes only so far as to answer the question before the Court. Having located a sizeable deposit of religious language of a “generally monotheistic” character, Scalia’s interpretative method does not require him to scavenge the rest of the historical record for evidence of more particularized theologies. What Scalia documents is more than enough to allow him to dispose of the case. If it is true that Scalia has overlooked or minimized certain instances of Christian utterances, he would likely be the first to admit that, as a non-historian, he may have oversimplified the monotheistic character of our traditions.²⁷⁰ Nevertheless, that would not change the fact that, for Scalia, our traditions are nonetheless capacious enough to validate the generalized acknowledgment of “a single Creator” he detects in the Ten Commandments display.²⁷¹

In assessing Scalia’s treatment of the distinctively “Christian” historical elements, one must also take into account the level of generality at which Scalia pitches tradition. Much has been written about this aspect of Scalia’s traditionalism, but suffice it here to say that the interpretative use Scalia makes of historical practices leads him to define them at a level of abstraction as close as possible to the law or practice at issue.²⁷² The most controversial and well-known example of this is Scalia’s definition of the relevant tradition in *Michael H. California* law presumptively barred a biological father’s parental visitation rights, where his child was born into another existing marriage.²⁷³ To measure this law

²⁶⁸ See, e.g., *Van Orden*, 545 U.S. at 729 (Stevens, J., dissenting); Colby, *supra* note 4, at 1135–37.

²⁶⁹ See, e.g., Scalia, *supra* note 95, at 857 (admitting that the originalist judge’s task is one “sometimes better suited to the historian than the lawyer”).

²⁷⁰ See, e.g., *id.* at 856 (recognizing that “it is often exceedingly difficult to plumb the original understanding of an ancient text,” since “[p]roperly done, the task requires the consideration of an enormous mass of material . . . an evaluation of the reliability of that material . . . [a]nd further still, it requires immersing oneself in the political and intellectual atmosphere of the time”).

²⁷¹ *McCreary County v. ACLU*, 545 U.S. 844, 894 (2005) (Scalia, J., dissenting).

²⁷² The paradigm instance of this appears in the infamous “footnote 6” of Scalia’s opinion in *Michael H. See Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989); see also Balkin, *supra* note 93, at 1615–17 (criticizing Scalia’s specificity in defining relevant tradition in *Michael H.*); McConnell, *supra* note 93, at 671 & n.47 (describing *Glucksberg*’s adoption of Scalia’s substantive due process methodology from *Michael H.* (citing *Washington v. Glucksberg*, 521 U.S. 702, 721–22 (1997))).

²⁷³ 491 U.S. at 115.

against due process, Scalia sought a tradition in positive law either recognizing or curtailing a biological father's parental rights in that specific situation.²⁷⁴ He rejected Justice Brennan's alternate method of asking, at a much higher level of generality, whether our traditions recognize "parenthood."²⁷⁵ For Scalia, the proper level of generality was one that allowed him to compare California's specific policy choice with the most closely analogous policy choices made throughout our history.²⁷⁶ Commenting on this kind of historical methodology, Judge McConnell explains that "[a]lry generalities like 'the right to be left alone,' or to make choices 'central to personal dignity and autonomy, . . . are too imprecise to support legal analysis" and hence to "determine whether any such traditions exist, or if they exist, what might be included within them."²⁷⁷

Scalia's concern for exactness in calibrating the generality of tradition clarifies how he treats the historical record in *McCreary County*. Having defined the Ten Commandments display as akin to "acknowledging a single Creator," Scalia then constructs a public record of religious acknowledgments calculated to give him a precise standard for comparison.²⁷⁸ In other words, Scalia wants to compare apples to apples—governmental policy choices that correspond as precisely as the historical record allows to the policy choice made in erecting a Ten Commandments display. Scalia, then, would presumably pass over instances of more theologically specific religious language—such as explicitly Christian references—than the usual references to "the Supreme Being" or "Divine Providence." This explains Scalia's almost casual rejoinder to Stevens that "[s]ince most thought the Clause permitted government invocation of monotheism, and some others thought it permitted government invocation of Christianity, [Justice Stevens] proposes that it be construed not to permit any government invocation at all."²⁷⁹ Indeed, this *a fortiori* argument is Scalia's basic response to the charge of minimizing the Christian character of the historical materials: if there were, so to speak, intertwining traditions of both Christian and monotheistic acknowledgments, then how could an acknowledgment like the Ten Commandments displays—which falls within the broader of those traditions—possibly violate the Establishment Clause?

²⁷⁴ See *id.* at 123.

²⁷⁵ See *id.* at 130.

²⁷⁶ Compare *id.* at 127 & n.6 (Scalia, J., plurality) ("We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."), with *id.* at 137 (Brennan, J., dissenting) (focusing on the definition of "parenthood").

²⁷⁷ McConnell, *supra* note 93, at 671. Judge McConnell argues that the Court's "[a]cceptance" of Scalia's method of specificity in substantive due process "is one of the most important aspects of the *Glucksberg* decision." *Id.* at 671 n.47; see *Glucksberg*, 521 U.S. at 721 (insisting that the Court's historical inquiry be based on "a 'careful description' of the asserted fundamental liberty interest" (citations omitted)).

²⁷⁸ *McCreary County v. ACLU*, 545 U.S. 844, 894 (2005) (Scalia, J., dissenting).

²⁷⁹ *Id.* at 897.

Having situated Scalia's dissent within his traditionalism, we can now assess those "difficult" passages where Scalia has been understood as saying that the Establishment Clause permits nothing other than acknowledgments of generalized monotheism. On this view, specific acknowledgments of Christianity, Judaism, or Islam—and, by extension, any non-monotheistic religion—would violate the Establishment Clause, precisely because of their theological content.²⁸⁰ Scalia's critics have seized on these passages and read his entire dissent in light of them.²⁸¹ Concentrated in fewer than three pages, these passages respond to Stevens's claim that a truly principled originalism would recognize the inconvenient truth that

many of the Founders who are often cited as authoritative expositors of the Constitution's original meaning understood the Establishment Clause to stand for a *narrower* proposition than the plurality, for whatever reason, is willing to accept. Namely, many of the Framers understood the word "religion" in the Establishment Clause to encompass only the various sects of Christianity.²⁸²

Stevens later reiterates this point in direct reply to Scalia's dissent, asserting that "[t]he original understanding of the type of 'religion' that qualified for constitutional protection under the Establishment Clause likely did not include those followers of Judaism and Islam who are among the preferred 'monotheistic' religions Justice Scalia has embraced in his *McCreary County* opinion."²⁸³ Stevens flatly claims that evidence for the Establishment Clause's original meaning "just as strongly supports a preference for Christianity as it does a preference for monotheism."²⁸⁴ Finally, Stevens derides the founding generation *in toto* as "men who championed our 'Christian nation' [and] men who had no cause to view anti-Semitism or contempt for atheists as problems worthy of civic concern."²⁸⁵ Since Stevens does not cite a single source for these sweeping claims, they are perhaps better understood as rhetoric, buttressing the argument that Scalia has culled from the historical materials only what is most palatable to (some) modern sensibilities.

²⁸⁰ See *supra* notes 11–15 and accompanying text (discussing the use of neutrality in Justices Souter's and Stevens's opinions).

²⁸¹ See, e.g., Colby, *supra* note 4, *passim*; Balkin, *supra* note 93, *passim*.

²⁸² Van Orden v. Perry, 545 U.S. 677, 726 (2005) (Stevens, J., dissenting).

²⁸³ *Id.*

²⁸⁴ *Id.* at 728.

²⁸⁵ *Id.* Again, one wonders how these universalist claims are consistent with the widely accepted historical view that many prominent founders held, to some degree, deistic views of Christianity. Those founders, including Jefferson, Madison, Franklin, Adams, Monroe, and perhaps even Washington, would have been perplexed by the very notion of a "Christian nation," not to mention horrified by the accusation that they had somehow tried to embed that idea, by invisible ink as it were, in the Constitution's Religion Clauses. See HOLMES, *supra* note 262, at 40–49.

In any event, the controversial passages in Scalia's dissent are a direct²⁸⁶ response to Stevens's philippic, and should be read as such.

The most problematic of Scalia's responses is his claim that "those narrower views of the Establishment Clause were as clearly rejected as the more expansive ones."²⁸⁷ The key term here is "rejected." Does Scalia mean that the common understanding of the Establishment Clause "rejected" the notion that government could acknowledge any but the generalized monotheism uttered by prominent founders? Scalia's comments immediately following might support that reading, since he emphasizes the fact that every example of Framers' religious language "invoked God, but not Jesus Christ."²⁸⁸ Scalia then cites George Washington's letter to the Hebrew Congregation of Newport, Rhode Island, in which Washington clearly contemplates that our "liberty of conscience and immunities of citizenship" extend to non-Christians.²⁸⁹ That evidence appears to stand for the uncontroversial proposition that the protections offered by the Religion Clauses were not limited to Christians.²⁹⁰ So, what is Scalia getting at in his response to Stevens, and, specifically, what does he mean that our common understanding "rejected" both the "narrower" and "more expansive" views of the Establishment Clause that Stevens articulates? Again, two things help clarify Scalia's sometimes unwieldy rhetoric: the particular context of his comments, and his overall approach to using tradition in constitutional interpretation.

First, context indicates that Scalia is saying only that our traditions have "rejected" Stevens's "broader" and "narrower" views of the Establishment Clause. The "broader" view, held for instance by Thomas Jefferson, was that the Establishment Clause categorically forbids government religious language.²⁹¹ In response, Scalia argues that Jefferson's idiosyncratic view was "plainly rejected"

²⁸⁶ See, e.g., *McCreary County v. UCL*A, 545 U.S. 844, 897 (2005) (Scalia, J., dissenting) (responding directly to Stevens's claim that "some in the founding generation thought that the Religion Clauses of the First Amendment should have a *narrower* meaning, protecting only the Christian religion or perhaps only Protestantism").

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.* (quoting Letter from George Washington to the Hebrew Congregation of Newport, R.I. (Aug. 18, 1790), reprinted in 6 *THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES* 284, 285 (Dorothy Twohig et al. eds., 1996)).

²⁹⁰ Cf. STORY, *supra* note 263, § 992, at 702–03 (affirming that, under the Religion Clauses, "the Catholic and the Protestant, the Calvinist and the Arminian, the Jew and the Infidel, may sit down at the common table of the national councils, without any inquisition into their faith, or mode of worship").

²⁹¹ See *Van Orden v. Perry*, 545 U.S. 677, 724 (2005) (Stevens, J., dissenting) ("Notably absent from [the plurality's] historical snapshot is the fact that Thomas Jefferson refused to issue the Thanksgiving proclamations that Washington had so readily embraced based on the argument that to do so would violate the Establishment Clause." (citations omitted)).

in common public understanding of the time.²⁹² By the same token, the “narrower” view described by Stevens is that “the word ‘religion’ in the Establishment Clause . . . encompass[ed] only the various sects of Christianity,” and that, consequently, the original Establishment Clause offered “protection” only to Christians and not to “followers of Judaism and Islam.”²⁹³ Scalia responds directly to that claim by arguing that “*those* narrower views . . . were as clearly rejected as the more expansive ones.”²⁹⁴ Thus, Scalia is saying that tradition has “clearly rejected” the narrower view that the Establishment Clause protects only Christian sects.²⁹⁵ This makes sense of the examples Scalia includes to support that statement. Washington’s letter to the Newport Hebrew Congregation confirms that Washington understood the Religion Clauses as offering protection to non-Christians.²⁹⁶ Additionally, the examples of public religious language demonstrate that common understanding permitted recognition of religious belief more broadly than Christianity proper. Notice what Scalia does not say. He does not say that, simply because our tradition rejected the “narrower” view of the Establishment Clause, the Clause therefore mandates a particular theology of government religious pronouncements. Careful attention to context shows that Scalia is responding to the stark polarities in Stevens’s opinion and is not positing a specific theological content for the Establishment Clause itself.

Nevertheless, it is true that Scalia’s statements are not as transparent as they ought to be. Only by considering his broader traditionalism does Scalia’s meaning become clear. How does Scalia’s general approach to tradition help interpret these passages? The answer is fairly straightforward. If Scalia is doing what the critics claim—embedding a preference for generic monotheism in the Establishment Clause—then he is going beyond using tradition negatively and is proposing to use it positively. In other words, Scalia would allegedly use a record of historical practices (monotheistic acknowledgements) and the non-existence or rarity of other practices (explicitly Christian acknowledgments) to infer a constitutional prohibition on religious acknowledgments that diverge from the historical norm. However, we have already seen what high barriers Scalia’s own jurisprudence raises against this positive use of tradition in the First Amendment context.²⁹⁷ As explained in *McIntyre*, what Scalia would need to demonstrate is not merely the non-existence of Christian acknowledgments, but instead, that the non-existence or

²⁹² *McCreary County*, 545 U.S. at 896 (Scalia, J., dissenting) (“There were doubtless some who thought [the Clause] should have a broader meaning, but those views were plainly rejected.”).

²⁹³ *Van Orden*, 545 U.S. at 726, 728 (Stevens, J., dissenting).

²⁹⁴ *McCreary County*, 545 U.S. at 897 (Scalia, J., dissenting) (emphasis added). The antecedent of “those” is the statement, earlier in the paragraph, that “some in the founding generation thought that the Religion Clauses . . . should have a *narrower* meaning, protecting only the Christian religion or perhaps only Protestantism.” *Id.*

²⁹⁵ *See id.*

²⁹⁶ *Id.* at 898 (citing Letter from George Washington, *supra* note 289, at 285).

²⁹⁷ *See supra* notes 128–131 and accompanying text.

rarity of Christian acknowledgments clearly implies a common understanding that such acknowledgments were constitutionally forbidden.²⁹⁸

Scalia does not even attempt to make such a case in his *McCreary County* dissent. By comparison to the careful sifting of historical evidence in *McIntyre*, Scalia's treatment of the historical record in *McCreary County* is almost cursory.²⁹⁹ Why? Because *McCreary County* is an easy case for Scalia.³⁰⁰ His parsing of the historical record easily reveals a tradition of religious acknowledgments wide enough to contain the Ten Commandments display. Scalia's handling of the distinctively Christian elements in that record seems more like a counter-argument than an independent historical inquiry. That is, Scalia's remarks about the relative absence of Christian language (compared to the more prevalent monotheistic language)³⁰¹ seem calculated merely to dismiss Stevens's arguments about originalism. Scalia is not constructing a record dense enough to prove that Christian language would necessarily violate the Establishment Clause. Nor would Scalia's methodology be satisfied merely by pointing to the historical prevalence of generically monotheistic language. One would still need to draw the negative inference from such evidence that Christian language was commonly understood to be constitutionally outlawed. Just as Scalia recognized in the Free Speech context that "[q]uite obviously, not every restriction upon expression that did not exist in 1791 or in 1868 is *ipso facto* unconstitutional,"³⁰² it is equally true that not every form of government religious expression that was not commonplace in 1791 or 1868 is *ipso facto* unconstitutional. Scalia's conclusions about Christian language are, in a word, tentative, because Scalia is merely rebutting the claim that an original understanding of the Establishment Clause necessarily privileges Christianity (or Protestant Christianity) and prostrates all other religions. That, too, for Scalia is a claim easily dismissed. The limited effort he gives to dealing with the Christian evidence is enough for that purpose. But Scalia makes scarcely a start on the harder task of inferring a tradition constitutionally forbidding Christian acknowledgments, and that is a good reason for concluding that Scalia's dissent does nothing of the kind.³⁰³

²⁹⁸ See *supra* notes 128–131 and accompanying text; see also *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 375 (1995) (Scalia, J., dissenting).

²⁹⁹ See *McCreary County*, 545 U.S. at 886–89 (Scalia, J., dissenting).

³⁰⁰ See *supra* notes 117–118 and accompanying text.

³⁰¹ See *supra* notes 268–271 and accompanying text.

³⁰² *McIntyre*, 514 U.S. at 373 (Scalia, J., dissenting).

³⁰³ Much the same can be said for Scalia's comments about tradition in his *Lee v. Weisman* dissent. See 505 U.S. 577, 641 (1991) (Scalia, J., dissenting). There Scalia "concedes" that "our constitutional tradition, from the Declaration of Independence and the first inaugural address of Washington . . . down to the present day, has, with a few aberrations . . . ruled out of order government-sponsored endorsement of religion . . . where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ)." *Id.* These comments sound, more than anything in *McCreary County*, like a statement about the positive content of religious

It should be said that the critics' case against Scalia goes further than this. Not only is he supposed to be using tradition to embed monotheism in the Establishment Clause, but he is also supposed to be limiting any further development of the Establishment Clause (what this Article has referred to as "freezing" the Establishment Clause around monotheism). If it is unlikely Scalia is doing the first, it is straining credibility to the breaking point to believe he is doing the second. Even in the due process area, Scalia does not do this with tradition. As explained in *Haslip*, Scalia would not regard every divergence from historical practices as an automatic violation of due process.³⁰⁴ Rather, he would simply use those historical practices as a touchstone for measuring the constitutionality of divergent modern practices.³⁰⁵ Thus, even if Scalia in *McCreary County* is at his most aggressive in deploying tradition, even then he would not be poised to do what the critics claim.³⁰⁶ At most, Scalia would be saying that religious acknowledgments that diverge from historical standards (for instance, a Christian symbol, or Islamic language, or a Buddhist text) would not be the easy Establishment Clause cases that a generic monotheism presents. What "test" Scalia might devise to assess these harder cases he does not say, and it is beyond the scope of this Article to devise one.³⁰⁷ Nevertheless, the point is that even a more stringent analysis would not equal automatic invalidation. More fundamentally, a different analysis would not be the fruit of some blind, ahistorical, or politically motivated preference for "generic monotheism."³⁰⁸ Instead, it would stem from the same methodological exigencies that inform all of Scalia's traditionalism. This does not make Scalia a religious bigot. It makes him a principled jurist.

In sum, a careful reading of Scalia's dissent, in light of his overall traditionalism, indicates that Scalia uses tradition in *McCreary County* just as he typically does elsewhere: negatively. Traditional practices serve as an objective baseline for measuring the constitutionality of modern practices, and not as a

tradition. The problem is that, in *Lee*, Scalia appears to be granting these premises merely for the sake of argument, much as, earlier in the same paragraph, he had "acknowledge[d] for the sake of argument" the claims of "some scholars" that by 1790 the term "establishment" had acquired a broader meaning. *Id.* Regardless, *Lee* was just as easy a case for Scalia as *McCreary County*, and he comes nowhere close in either opinion to marshalling the historical evidence to support a positive inference from tradition that any religious acknowledgment, other than generalized monotheism, is unconstitutional. It thus makes little sense to read either opinion as flying in the face of a historical methodology that Scalia has worked out carefully elsewhere.

³⁰⁴ See *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 38 (1991) (Scalia, J., concurring); see also *supra* notes 134–159 and accompanying text.

³⁰⁵ See *id.*; see also *supra* notes 95–103 and accompanying text.

³⁰⁶ See, e.g., Colby, *supra* note 4, at 1098.

³⁰⁷ Cf. *Haslip*, 499 U.S. at 33–34 (Scalia, J., concurring) (discussing the Court's difficulties in formulating and applying a "fundamental fairness" standard to assess departures from historical practices under the Due Process Clause).

³⁰⁸ See, e.g., Colby, *supra* note 4, at 1139 (speculating that Scalia's "preference" for a generic monotheism arises out of a political desire to support the Bush administration's "war on terror").

pretext to project substantive outcomes into the Constitution. Scalia is no more using tradition to embed monotheism in the Establishment Clause than he was using tradition in *Michael H.* to embed the “nuclear family” in the Due Process Clause,³⁰⁹ and no more than he was using tradition in *Rutan* to embed the patronage system in the Free Speech Clause.³¹⁰ Scalia uses tradition in these cases not to confine the law’s development behind a wall of traditionalism, but instead to restrain the judiciary from embedding its own evolutionary charter in the Constitution. Scalia’s traditionalism defers that development to representative government. If tradition confines anyone in this process, it is Scalia himself. To paraphrase Jaroslav Pelikan, Scalia’s tradition is the living constitutionalism of the dead, not the dead constitutionalism of the living.³¹¹

IV. CONCLUSION

Scalia’s dissent in *McCreary County* may well turn out to be important and controversial, but not for the reasons that legal scholars have so far identified. A close reading of the dissent—in light of Scalia’s overall approach to using tradition in constitutional interpretation—shows that Scalia is not using tradition to propose an Establishment Clause hardwired by the founders for monotheistic religions. Tradition does not typically serve that kind of positive function in Scalia’s jurisprudence, and it does not do so in *McCreary County*. Instead, tradition serves as a tool of judicial restraint, precisely to avoid imprinting the judiciary’s own views indelibly onto constitutional guarantees. Moreover, traditional practices for Scalia merely provide a historical baseline for understanding constitutional provisions—they do not freeze the Constitution in place around those traditions.

Far from stifling the ongoing development of our traditions of religious symbolism, Scalia’s traditionalism simply defers from courts to representative bodies the mechanism for developing tradition. Seen that way, his approach to religious symbolism in *McCreary County* meshes with his approach to free exercise accommodations in his equally controversial opinion in *Employment Division, Department of Human Resources v. Smith*, the Oregon peyote case.³¹² Scalia’s *McCreary County* dissent thus fills out his general approach to the Religion Clauses. He searches for relatively clear judicial rules, while seeking to withdraw courts from the business of assessing different forms of religious expression or of weighing the relative merits of religious and secular interests. In *McCreary County*, tradition is the tool Scalia uses for those purposes.

The debate in *McCreary County* among Scalia, Souter, and Stevens fundamentally concerns the proper use of history to interpret the Establishment

³⁰⁹ See *supra* note 139 and accompanying text. *But see supra* note 214.

³¹⁰ See *supra* note 112 and accompanying text.

³¹¹ See Jaroslav Pelikan, THE VINDICATION OF TRADITION 65 (1984) (“Tradition is the living faith of the dead; traditionalism is the dead faith of the living.”).

³¹² See 494 U.S. 872, 874–90 (1990); see also sources cited *supra* note 205 and accompanying text.

Clause. At bottom, Scalia's traditionalism may represent his attempt to inject a measure of historical restraint into the Establishment Clause's interpretation. Ever since beginning its Establishment Clause project in 1947, the Court has not only been plagued with bad historical research but, more fundamentally, it has been deeply confused over precisely what questions history was supposed to answer about the Establishment Clause. Scalia's traditionalism in *McCreary County* proposes a historical orientation to the Establishment Clause strikingly different from the usual one. The Establishment Clause would not serve, as it does for Souter and Stevens, as an invitation for the Court to superintend the ongoing development of our traditions of church and state according to the Justices' best lights. Rather, in Scalia's view, the Establishment Clause places an intelligible historical backdrop, grounded in actual practices, against which to assess the modern development of church-state relationships. Regardless of whether Scalia's assessment of our traditions is compelling in this particular case, the view he seems to take of the relationship between history and the Establishment Clause could reorient and clarify the way history is used to interpret the Establishment Clause. Therefore, quite apart from its problematic interpretation by legal scholars, Scalia's Ten Commandments dissent is worth understanding on its own merits. However, doing that requires clearing away misinterpretations of Scalia's approach. This Article has attempted both tasks, simultaneously.

It will not suffice to read the entirety of Scalia's dissent through the prism of a few passages that are both ambiguous and contentious. However, read in light of his traditionalism, it becomes evident that Scalia proposes an essentially restrained approach to using history to interpret the Establishment Clause. Not only does this approach have the merit of inviting judges to formulate clearer standards for establishment issues, but it also acts to confine the discretion of judges according to the intelligible pattern of our historical practices. Those would be no small benefits in an area of jurisprudence as plagued with confusion and incoherence from its modern rebirth as the Establishment Clause.