Breaking and Bending Originalism: *Scalia v. Souter* in the Enduring Debate over the Original Meaning of the Religion Clauses

An Honors Thesis for the Department of Political Science

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Table of Contents

I: Introduction: Scalia, Souter, and Originalism in Contemporary Religion Clause Jurisprudence 1

II: “Faint-Hearted Originalist”: Justice Scalia and the Abandonment of Original Meaning.........10

III: “More to go on”: Justice Souter, Substantive Neutrality, and the Alternative to Scalian Originalism 34

IV: Conclusion: Scalia v. Souter in the Search for Original Meaning 55

I. Introduction: Scalia, Souter, and Originalism in Contemporary Religion Clause Jurisprudence

Throughout the history of First Amendment Religion Clause jurisprudence, the justices of the Supreme Court have frequently turned to the Founders to validate their interpretation of these clauses. Though some scholars have argued that there can be no single "founding view" of the Establishment and Free Exercise Clauses,[1] the justices themselves often look to the Framers for authority on how to interpret the Constitution. Justices on both sides of the ideological spectrum have turned to the Founding era to justify a particular outcome in Religion Clause cases. The justices' use of history has spanned the gamut of sources, from the writings and correspondence of both major and obscure Founders to the records of the Constitutional Convention; from state constitutions to the records of the First Congress[2]; and even a more general view of the actions taken by political actors throughout history.[3]

This Thesis aims to expound upon the justices' use of history in Religion Clause opinions using current members of the Supreme Court as case studies. I will focus specifically on the opinions of two justices, Antonin Scalia, a self-proclaimed originalist, and David Souter, who, among the current members of the Court, most extensively uses the Founders to support his opinions.[4] On the modern Court, these justices rely on history most frequently and most substantively in adjudicating Religion Clause cases.[5]

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[1] See*, e.g.,* Vincent Phillip Muñoz, *God and the Founders: Madison, Washington, and Jefferson* (New York: Cambridge University Press, 2009 [forthcoming]).

[2] Mark David Hall, "Jeffersonian Walls and Madisonian Lines: The Supreme Court's Use of History in Religion Clause Cases," *Oregon Law Review* 85 (2006)*,* 567-568.

[3] *Elk Grove Unified School District v. Newdow,* 542 U.S. 1, 35 (2004) (O'Connor, J. concurring in the judgment).

[4] As of this writing, Chief Justice John Roberts and Justice Samuel Alito had neither participated in or written opinions in any major case implicating the Religion Clauses.

[5] As of 2006, Justice Scalia, for example, had written 14 Religion Clause opinions, referred to history in 45 percent of those opinions, or 71 individual times, for an average of 5.1 references to the Founders per opinion. Souter, the more reliably liberal vote of the two, had written 12 Religion Clause opinions as of 2006, referring to history 67 percent of the time, with 104 individual references, for an average of 8.7 references per opinion. Scalia is also among the Court's most prolific writers and speakers on the subject of originalism outside of his Court opinions. For the modern Supreme Court, Scalia and Souter reference the Supreme Court much more frequently than any other

Scalia and Souter's consistent, and consistently strong, reliance on history to adjudicate these cases demonstrates their clear belief in the relevance of Founding era evidence in Religion Clause interpretation. Yet just as consistently, Scalia and Souter reach different conclusions regarding church-state separation, both while arguing, implicitly and explicitly, that history provides definitive, or at least authoritative, answers to these constitutional questions.

The answers that history provides these justices lead to two very different views of the proper separation of church and state. Scalia's reading of history leads him to an approach in religion cases that the scholars Philip Kurland and Douglas Laycock, not to mention Justice Souter, term "formal neutrality."[6] Essentially a requirement that government remain "legally" neutral toward religion, formal neutrality prevents the state from enacting any legally coercive policies or classifications that would result from granting any benefit to, or imposing any burden on, religious believers by threat of legal penalty. Under formal neutrality, the state refuses to exempt religious believers who are burdened by generally applicable laws, while allowing state endorsement of religion over irreligion.

Souter's reading of history, alternatively, leads him to espouse an approach to religious neutrality that Laycock, and Souter himself, call "substantive neutrality." Substantive neutrality requires more of the state than formal neutrality in that it attempts to maximize individual liberty for religious believers while simultaneously separating of church and state. Souter aims to insulate religion and government from one another by building a Jeffersonian "wall of

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member, liberal or conservative. The next most prolific citer of the Founders is Justice Clarence Thomas, who in his 8 Religion Clause opinions has only referenced history 23 times, or 2.9 times per opinion on average. Hall, 573-574.

[6] This Thesis will differentiate between two types of religious neutrality, formal and substantive, which will each be discussed in turn. In addition, I will use the term "legal neutrality" to refer to formal neutrality's requirement that laws not legally burden or benefit religious believers. Finally, I use the term "religious neutrality" to refer to any type of governmental "neutrality" toward religion, including both formal and substantive neutrality.

separation" that the Court recognized in *Everson v. Board of Education of Ewing,* where it incorporated the Establishment Clause in 1947.[7]

Methodology

Historical analysis has appeared in both Establishment and Free Exercise Clause cases, and I will discuss both in this Thesis. The vast majority of Religion Clause cases involving historical evidence tend to implicate the Establishment Clause, but Justice Souter in particular has sought a shift in that trend.[8] While both justices have written extensive opinions in both types of cases, in the interest of brevity I will examine in detail only a select few, so as to best illustrate their contrasting uses of history. In particular, I will discuss those cases in which each jurist includes a detailed historical analysis, as opposed to a mere discrete reference to the Founders, such as those Hall counts in his study.[9]

Among Establishment Clause cases, I will consider the public school graduation prayer case, *Lee v. Weisman.* In *Lee,* the Court banned the offering of a nonsectarian invocation by a rabbi at a public middle school graduation ceremony, finding it constituted an unconstitutional establishment of religion.[10] Both Justice Scalia and Justice Souter delivered opinions on opposite sides of the case, and Justice Souter's concurrence offers his most detailed inquiry into the original meaning of the Establishment Clause. Justice Scalia's dissent offers a direct counter of

[7] "In the words of Jefferson, the clause against establishment of religion by law was intended to erect a 'wall of separation' between church and state." *Everson v. Board of Education of Ewing,* 330 U.S. 1, 16 (1947).

[8] "The curious absence of history from our free-exercise decisions creates a stark contrast with our cases under the Establishment Clause, where historical analysis has been so prominent." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 575 (1993) (Souter, J., concurring in part and concurring in the judgment).

[9] Hall identifies each reference to individual Founder or historical event as a separate citation of history in a Supreme Court opinion: "Having determined the relevant pool of cases, I carefully read each opinion and quantified distinct appeals to different Founders, documents, and events. In most instances, the number of appeals was clear…" "Jeffersonian Lines and Madisonian Walls," 566.

[10] In *Lee,* the Court affirmed the District and Circuit Court rulings, which had invalidated public school graduation prayers on the grounds that they subtly used governmental power to (psychologically) coerce religious activity: "The [District] court determined that the practice of including invocations and benedictions, even so-called nonsectarian ones, in public school graduations creates an identification of governmental power with religious practice, endorses religion, and violates the Establishment Clause…. We…now affirm." *Lee v. Weisman,* 505 U.S. 577, 585-586 (1992).

Souter's historical arguments. As a whole, *Lee* offers extensive opportunity for comparison and contrast. I also discuss *McCreary County v. American Civil Liberties Union of Kentucky,* in which Souter delivered the opinion of the Court striking down displays of the Ten Commandments in courthouses as having a primarily religious purpose and thus unconstitutionally establishing religion.[11] Scalia's reading of history, conversely, would have upheld the displays as constitutional public recognition of religion. In *McCreary,* the Court for the first time fully adopts Souter's detailed historical analysis of the Religion Clauses and his assessment of the historical evidence for religious "neutrality."[12] The case also features a true debate between Justice Souter's majority opinion and Justice Scalia's dissent, in which each openly accuses the other of misinterpreting history.

I will also look at three major Free Exercise cases in order to demonstrate in what manner each of these jurists balance the opposing requirements of both clauses. Writing for the Court, Justice Scalia offers his most detailed Free Exercise opinion in *Employment Division, Department of Human Resources of Oregon v. Smith,* the infamous "peyote" case. In *Smith,* the Court held that members of the Native American Church could be denied unemployment benefits after being terminated from their jobs as drug counselors for having consumed the illegal hallucinogenic peyote during a religious ceremony.[13] Justice Scalia writes that "the right of religious free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[14] I will also look at Justice Scalia's opinion

[11] *McCreary County v. American Civil Liberties Union of Kentucky,* 545 U.S. 844, 859-861 (2005).
[12] *McCreary County v. ACLU,* 875-880.
[13] *Employment Division, Department of Human Resources of Oregon v. Smith,* 494 U.S. 872, 876-882 (1992).
[14] Ibid., 879, quoting *United States v. Lee,* 455 U.S. 252, 263, n. 3 (1982) (Stevens, J., concurring in the judgment).

in *City of Boerne v. Flores, Archbishop of San Antonio,* where he writes to debate with Justice Sandra Day O'Connor over the original meaning of the Free Exercise Clause.

Justice Souter's answer to Scalia's *Smith* rationale appears in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*. There the Court unanimously struck down a Florida ordinance banning animal sacrifice that burdened members of the Santeria faith.[15] Concurring, Justice Souter sought to highlight the uniqueness of that case and distinguish it from *Smith*. Souter agreed that the city ordinance directly burdened the Santeria religion, but went further in launching a full frontal assault on the *Smith* rule, because, in part, it failed to address the historical understanding of the Free Exercise Clause. In other words, *Hialeah* did not address the core issue of original meaning, because, as Souter argued, the Court should still rethink *Smith* altogether. Accordingly, Justice Souter offers historical evidence regarding the original meaning of the Free Exercise Clause and proposes overturning the *Smith* rule.

This study will not attempt to evaluate the historical accuracy of the opinions of either Justice Scalia or Justice Souter. Rather, I aim to dissect each justice's significant Religion Clause opinions to determine his specific adjudicative approach. I will then offer a comparison of these methodologies in an attempt to determine what contributes such divergent outcomes despite the common history cited. I will ultimately evaluate the merits of each approach within the context of originalism as defined by Scalia himself. I will contend that while originalism is indeed difficult to apply, originalist justices such as Scalia ought to make a good-faith effort to meet at least minimum standards of evidence of the variety that Souter employs.

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[15] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 534.

I do not deny that originalism may be the single most correct or legitimate method of constitutional interpretation.[16] It could also be a complete sham. I leave such debate for other scholars. I aim only to compare and contrast the historical approaches taken by Scalia and Souter and explain what accounts for their consistently different outcomes. After this inquiry, I question

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[16] While the history and intellectual debate surrounding originalism as a doctrine of constitutional interpretation is beyond the full scope of this Thesis, for the purposes of this discussion it is helpful to briefly offer a definition and some background on originalism itself. I will define "originalism" as a method of constitutional adjudication that holds that judges deciding constitutional cases should engage in a review or analysis of the history or background surrounding the provision in question, and that, implicitly or explicitly, this history is in some measure binding upon the judge. One of the most famous defenses of traditional originalism was delivered in a 1987 speech to the Federalist Society by then-U.S. Attorney General Edwin Meese. Meese's speech delineated how the Reagan Justice Department approached matters of constitutional interpretation, namely a version of originalism that Meese called "a jurisprudence of original intention." Edwin Meese, III, "Address before the D.C. Chapter of the Federalist Society Lawyers Division," in Sanford Levinson and Seven Mailloux, eds., *Interpreting Law and Literature: A Hermeneutic Reader* (Evanston, IL: Northwestern University Press, 1988): "In the main, a jurisprudence that seeks to be faithful to our Constitution—a jurisprudence of original intention, as I have called it—is not difficult to describe. Where the language of the Constitution is specific, it must be obeyed. Where there is demonstrable consensus among the framers and ratifiers as to a principle stated or implied by the Constitution, it should be followed as well. Where there is ambiguity as to the precise meaning or reach of a constitutional provision, it should be interpreted and applied in a manner so as to at least not contradict the text of the Constitution itself." *Id.,* 29. For Meese, the premise of constitutional interpretation stems from the fact that the Framers produced a written document, the Constitution. "The very presumption of a written document is that it conveys meaning," and that its meaning is explicit by virtue of it being written down. *Id*., 27. In the same vein, John Harrison of the University of Virginia writes that the "binding content of a legal text is found in its semantic meaning," and that "the governing content is the *original* semantic meaning." "On the Hypotheses that Lie at the Foundations of Originalism," *Harvard Journal of Law and Public Policy* 31 (2008), 476.

Meese is countered intellectually by Justice William Brennan, who flatly rejects the entire originalist assumption that the Constitution is fundamentally knowable. Brennan contends that it is somewhat presumptuous to attempt to discern the intentions of the Founders. Originalism attempts deference to the Founding Fathers, but in actuality this approach is fundamentally flawed: Disagreement among the Founders alone makes it nearly impossible to discern a single original intention. Thus, for Brennan, originalism "is a view that feigns self-effacing deference to the specific judgments of those who forged our original social compact. But in truth it is little more than arrogance cloaked as humility. It is arrogant to pretend that from our vantage we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions." William J. Brennan, Jr., "The Constitution of the United States: Contemporary Ratification," in Levinson and Mailloux, eds., *Interpreting Law and Literature*, 15.

Brennan's non-originalism runs deeper than a simple critique of the basic presumption that underlies originalism to extend to a wholly different approach to constitutional interpretation. Brennan believes that the Constitution's meaning was not fixed at the time of its ratification, but rather that "…the ultimate question must be, what to the words of the text mean in our time?" *Id.,* 17. For Brennan, "The Constitution embodies the aspiration to social justice, brotherhood and human dignity that brought this nation into being." *Id.,* 13. The document itself is "the lodestar for our aspirations," the framework by which American society seeks to realize its founding principles. *Id.,* 13. Yet each generation, in Brennan's view, is entitled to interpret that document to meet its contemporary needs: "Interpretation must account for the transformative purpose of the text." *Id.*, 18. That is, the Framers of the Constitution and the subsequent amendments "had no desire to enshrine the status quo." *Id.* They understood that times would change, society would progress, and that the principles it did enshrine, that "the Constitution is a sublime oration on the dignity of man, a bold commitment by a people to the ideal of libertarian dignity protected through law," would be the only aspect that remained constant. *Id.*

whether originalism, as applied by these justices, describes their approaches at all. I conclude that Justice Scalia fails to meet his own burden for what constitutes an originalist analysis. On the other hand, Justice Souter, though by no means perfectly, at least endeavors to satisfy the originalist burden.

Chapter 2 will encompass my discussion of Justice Antonin Scalia, the most prolific self-proclaimed originalist on the Court. I will offer a treatment of Justice Scalia's most prominent Establishment and Free Exercise Clause opinions, specifically *Lee, McCreary County,* and *Smith,* and appraise his application of originalism (or lack thereof) in each. I will also look at Justice Scalia's own writings beyond the Court to glean further insight into his methods and process of constitutional interpretation. I conclude that Justice Scalia "cherry-picks" historical evidence that is narrowly tailored to the specific facts of the case, but does not seek to fully determine the broader original meaning. I will also argue that Scalia reads the Establishment and Free Exercise Clauses separately, rather than as expressing unified principles of religious liberty, in order to separate his originalist approach to Establishment from a decidedly nonoriginalist approach to Free Exercise. Despite Scalia's consistency within the framework of his evidence in Establishment Clause cases, his approach overall is completely nonsensical given his expressed vision of true originalism. This is most exemplified by his failure to make an originalist defense of formal neutrality in *Smith*.

I will conduct a similar analysis of Justice David Souter in Chapter 3. My treatment of Souter will rely almost exclusively on his written Supreme Court opinions, for, unlike Scalia, Souter is a bit more reserved in his public comments on the subject of constitutional interpretation. I will discuss how Justice Souter's approach belies a concern for the substantive outcome of the case, an interpretation he reaches based on determining the original meaning of

the First Amendment. He undertakes an historical analysis of the Religion Clauses in order to both suggest Justice Scalia's errors in historical interpretation, as well as to give some theoretical legitimacy to his own arguments. His *de novo* review of the historical evidence (and other scholarship about the historical evidence) surrounding the Religion Clauses leads him to assert that the two clauses should be read together as expressing a general theory of religious liberty. History thus supports, for Souter, a "substantive neutrality" test in matters of Religion Clause jurisprudence, a conclusion that flows from a reading of the two clauses as intertwined. Yet despite his departure from Scalia, Souter is still an originalist—in fact, an originalist strict separationist—whose vision of neutrality aims to maximally separate government and religion in order to allow religious practice to flourish untainted by government benefits or burdens. Furthermore, Souter's approach offers a broader range of evidence than does Scalia, with the aim of more fully explicating the theoretical original meaning of the Religion Clauses as the Founders would have understood them.

Chapter 4 will consist of a comparison of these justices' originalist arguments. More specifically, I will attempt to evaluate how a similar, indeed in some cases the same, body of historical evidence can lead two justices to opposite conclusions on the merits of a particular case. I suggest that their differences, despite commonalities among their evidence, stem both from subtle substantive differences in their choice of historical evidence, as well as from their disagreement over what specific evidence is even relevant to a particular case. I will then evaluate whether each justice's evidence adequately supports his position using Scalia's own framework for originalism.

Finally, I will discuss whether, given these disagreements over evidence, their disagreement calls into question the legitimacy, or at least the efficacy, of originalism as a

constitutional interpretative method. Given that the evidence Scalia tends to introduce is inconsistent with his self-professed originalist methodology, describing his approach as truly "originalist" is somewhat disingenuous. I contend originalism itself requires a broader historical analysis, and this contention certainly comports with Scalia's *professed* originalism and Souter's attempts at *applied* originalism. Souter's approach, though it too features disadvantages, at least represents a genuine attempt to discern the original meaning of the Clauses by examining a broader range of evidence. Determining what "the Founders" held the original meaning to be requires *both* an evaluation of their actions *and* their beliefs. Of the two justices, only Souter makes any good-faith effort to discern that meaning.

The use of history and the authority of the Founders is not a weapon available only to the jurisprudential arsenal of traditional conservative originalists, but can also serve to legitimize the substantive neutrality of more moderate and liberal jurists as well as to critically examine originalism itself. If originalism is to be vindicated as a form of constitutional exegesis for the Religion Clauses, so-called originalist justices must espouse Souter's method, or even expand upon it to at least make a serious attempt to examine the broader historical context of the First Amendment. Ironically, Scalia, the self-proclaimed originalist, may not be a true originalist at all, even under his own standard. Souter, conversely, the strict separationist, espouses at least a good-faith attempt to discover the true original meaning of the Religion Clauses, striving to meet the high standard set by his sometimes hypocritical colleague.

II. “Faint-Hearted Originalist”: Justice Scalia and the Abandonment of Original Meaning

For Justice Antonin Scalia “Originalism is…the librarian who talks too softly.”[17] In a 1988 speech he later revised into a law review article, Justice Scalia offers his view on constitutional interpretation as a dichotomy of originalism versus nonoriginalism, a dichotomy of a well-intentioned attempt to reach a standard of constitutional interpretation versus a disingenuous attempt to create judge-made law. But, as we will discuss, in a display of sheer laziness, hypocrisy, or perhaps both, Scalia fails to fulfill his own criteria for what constitutes sound originalist jurisprudence.

Scalia argues strongly in favor of originalism by contrasting it with its opposite, “nonoriginalism.” Scalia points out that “It would be hard to count on the fingers of both and the toes of both feet, yea, been on the hairs of one’s youthful head, the opinions that have in fact been rendered not on the basis of what the Constitution originally meant, but on the basis of what the judges currently thought it to mean.”[18] In Scalia’s analysis,

> Nonoriginalist opinions have almost always had the decency to lie, or at least to dissemble, about what they were doing—either ignoring strong evidence of original intent that contradicted the minimal recited evidence of an original intent congenial to the court’s desires, or else not discussing original intent at all, speaking in terms of broad constitutional generalities with no pretense of historical support.[19]

Scalia thus accuses nonoriginalist judges of molding the historical evidence to meet their desired outcomes, or ignoring history altogether in order to reach a desired result. For Scalia, these approaches are outside the province of courts, and matters of constitutional generalities or “societal values” should be determined by the legislature, which “would seem a much more

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[17] Antonin Scalia, “Originalism: The Lesser Evil,” *University of Cincinnati Law Review* 57 (1989), 864.
[18] Scalia, “Originalism,” 852.
[19] Ibid.

appropriate expositor of social values, and *its* determination that a statute is compatible with the Constitution should…prevail."[20]

In discussing originalism itself, Scalia identifies two major practical defects. The first is in correctly applying originalism to actual cases:

> …what *is* true is that it is often exceedingly difficult to plumb the original understanding of an ancient text. Properly done, the task requires the consideration of an enormous mass of material—in the case of the Constitution and its Amendments, for example, to mention only one element, the records of the ratifying debates in all the states. Even beyond that, it requires an evaluation of the reliability of that material…[21]

Scalia concludes the schedule of oral arguments and opinion writing in the modern Supreme Court "does not present the ideal environment for entirely accurate historical inquiry."[22] The other defect is that in its "undiluted form," originalism may present the nation with the reality of upholding practices that may not be considered acceptable in modern society.[23] For example, Scalia suggests that pure originalism would likely result in upholding public lashing or branding as a punishment for certain crimes, despite the Eighth Amendment prohibition on cruel and unusual punishment. The public in modern times would likely find these practices barbaric despite their consistency with the original intent of the Constitution. Scalia thus dismisses this problem as a practical reality that originalists must simply accept: "…I am confident that public flogging and hand-branding would not be sustained by our courts, and any espousal of originalism as a practical theory of exegesis must somehow come to terms with that reality."[24]

[20] Ibid., 854.
[21] Ibid., 856.
[22] Ibid., 861.
[23] Ibid.
[24] Ibid.

He thus describes himself as a "faint-hearted originalist" in some respects, as he admits that even he would not uphold flogging as a valid punishment for crime.[25]

While Scalia identifies major defects with both originalism and nonoriginalism, he ultimately argues that he prefers originalism to nonoriginalism.[26] He claims that he "take[s] the need for theoretical legitimacy seriously, and even if one assumes (as many nonoriginalists do not even bother to do) that the Constitution was originally *meant* to expound evolving rather than permanent values, …I see no basis for believing that supervision of the evolution would have been committed to the courts." More importantly, Scalia suggests that originalism is most consistent with democracy. Setting aside the argument that courts should not be the protectors of contemporary societal values, "[a] democratic society does not, by and large, need constitutional guarantees to insure that its laws will reflect 'current values.' Elections take care of that quite well."[27] Moreover, "Originalism does not aggravate the principal weakness of the system [of judicial review], for it establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself. And the principal defect of that approach—that historical research is always difficult and sometimes inconclusive—will, unlike nonoriginalism, lead to a more moderate…result."[28] Thus, originalism, despite its defects, is for Scalia the most moderate and reasonable approach.

Justice Scalia does not limit his defense of originalism to any particular area of constitutional interpretation, and thus it implicitly applies to all of his jurisprudence, including the Religion Clauses. As I will discuss below, Scalia's opinions in Establishment Clause cases

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[25] Ibid., 864.

[26] Specifically, as we will see, Scalia's brand of originalism focuses not just on the text of the constitutional provision, but also on the traditions and "heritage" of political leaders and American society from the Founding to the present: "...the Establishment Clause must be construed in light of the '[g]overnment policies of accommodation, acknowledgment, and support for religion [that] are an accepted part of our political and cultural heritage,'" *Lee v. Weisman*, 631 (Scalia, J., dissenting).

[27] Scalia, "Originalism," 862.

[28] Ibid., 864.

tend to include his most rigorous (by his own standards) historical analysis. By contrast, his most consequential Religion Clause opinions, particularly his Free Exercise Clause opinion in *Smith,* fail to rely on the Framers or history at all.

Formal Neutrality in Establishment Clause Cases: Lee and *McCreary*

Justice Scalia's originalist Establishment Clause jurisprudence is most typified by his opinions in *Lee* and *McCreary.* In these cases we see his approach to original meaning and the types of sources he turns to as evidence for the original meaning—namely, the certain official acts of political figures from the Founding era to the present offer strong evidence that some categories of government endorsement of religion are permissible. Provided that government remains formally neutral in matters of religion, some public acknowledgment of religion, he contends, is consistent with the traditional original understanding of the Establishment Clause.

As he does for his general interpretative theory in his law review article, Scalia immediately establishes himself as an originalist in religion cases in his dissent in *Lee.* At the outset, Scalia writes, "…the Establishment Clause must be construed in light of the '[g]overnment policies of accommodation, acknowledgment, and support for religion [that] are an accepted part of our political and cultural heritage'."[29] That is, Scalia's dissent is predicated almost entirely on the notion that the opinion of the Court, which invalidated a nonsectarian prayer at a middle school graduation ceremony, "is conspicuously bereft of any reference to history."[30] For Scalia, historical analysis (i.e., originalism), is particularly appropriate for religion cases: "Justice Holmes' aphorism that 'a page of history is worth a volume of logic' applies with particular force to our Establishment Clause jurisprudence. As we have recognized, our

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[29] *Lee v. Weisman*, 631 (Scalia, J., dissenting), quoting *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part).
[30] *Lee v. Weisman,* 631 (Scalia, J., dissenting).

interpretation of the Establishment Clause should 'compor[t] with what history reveals was the contemporaneous understanding of its guarantees'."[31]

Having reviewed his own credentials as an originalist, Scalia proceeds into his historical analysis of the graduation-prayer case. In his view, longstanding public traditions that recognize religion, including school graduation ceremonies, are consistent with the Establishment Clause: "In holding that the Establishment Clause prohibits invocations and benedictions at public school graduation ceremonies, the Court…lays waste a tradition that is as old as public school graduation ceremonies themselves, and that is a component of an even more longstanding American tradition of nonsectarian prayer to God at public celebrations generally."[32]

Here Justice Scalia turns to Justice Brennan, who was a major opponent of originalism,[33] to justify his belief that historical evidence, in particular historical *practice* (tradition) is relevant to the interpretation of the Establishment Clause: "'The existence from the beginning of the Nation's life of a practice, [while] not conclusive of its constitutionality…[,] is a fact of considerable import in the interpretation' of the Establishment Clause."[34] Implicit in his use of this quotation is Scalia's admission that he will not attempt to discern the theoretical original meaning of the Establishment Clause, but will instead assess the meaning of the clause based on historical *practice*. While Brennan's opinion admits, and Scalia's citation may imply, that such historical tradition is not dispositive in constitutional interpretation, if Scalia is to remain consistent with his own standards of originalism, he must lend determinative weight to his evaluation of this historical evidence.

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[31] Ibid., 632 (Scalia, J., dissenting), quoting *Lynch v. Donnelly,* 465 U.S. 668, 673 (1984).
[32] *Lee v. Weisman*, 631-632 (Scalia, J., dissenting).
[33] See note 16 above.
[34] *Lee v. Weisman*, 632-633 (Scalia, J., dissenting), quoting *Walz v. Tax Commission of New York City,* 397 U.S. 664, 681 (1970) (Brennan, J., concurring).

Scalia's historical analysis thus invokes the actions of both Founding-era and modern leaders to suggest that public prayer has always been a major part of American public life. His approach establishes a standard for Establishment Clause jurisprudence based upon national traditions that were historically established and are contemporarily preserved. Such a standard, it seems, adheres to the following model: If X Founder endorsed or performed public religious act Y, and Z official still endorses or performs Y, then there is a presumption that Y is constitutional. If an early president or member of the First Congress participated in the drafting of the First Amendment and publicly prayed, offered proclamations of prayer or thanksgiving, or introduced legislation endorsing religion, it follows that that individual Founder's actions in office represent the original understanding of the Religion Clauses.

With this standard implicit in his opinion, Scalia's dissent in *Lee* proceeds to cite those actions of the Founders that he suggests legitimize public prayer. Citing the Declaration of Independence's reference to the "Supreme Judge of the world" and its "firm reliance on the protection of divine Providence," Scalia attempts to ground public religious appellations in the very founding of the United States.[35] Public prayer by presidents on the occasion of their inaugurals has been also, according to Scalia, a feature of American political life: "In his first Inaugural address, after swearing his oath of office on a Bible, George Washington deliberately made a prayer a part of his first official act as President."[36] Scalia further points out that Presidents Thomas Jefferson and James Madison appealed to God in their inaugural addresses.[37] Even President George H.W. Bush, "continuing the tradition established by President

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[35] *Lee v. Weisman*, 633 (Scalia, J., dissenting).
[36] Ibid.
[37] Ibid., 634 (Scalia, J., dissenting).

Washington, asked those attending his inauguration to bow their heads, and made a prayer his first official act as President."[38]

Other official acts, such as Thanksgiving Proclamations by the President, the tradition of congressional chaplains, and the Supreme Court's own practice of opening sessions with "God save the United States and this Honorable Court,"[39] provide Scalia with further evidence that public religious actions by government officials in all three branches are a longstanding national tradition. He also contends that graduation ceremonies themselves constitute a special form of public religious ceremony: "In addition to this tradition of prayer at public ceremonies [inaugurals, congressional sessions, Court sessions, etc.], there exists a more specific tradition of invocations and benedictions at public school graduation exercises."[40] Scalia discusses the first recorded high school graduation ceremony held at the Norwich Free Academy in Connecticut in 1868, holding that "the invocation and benediction have long been recognized to be 'as traditional as any other parts of the [school] graduation program and are widely established'."[41]

Justice Scalia's historical analysis of the Establishment Clause ends there. It is noteworthy that he engaged in no global analysis of the clause's original meaning, but rather kept his analysis fact-specific: prayer is an established and traditional part of the political history of public ceremonies. He contends not that the theoretical original understanding of the Establishment Clause entertained the notion of pubic prayers, but rather that because major individual Founders began their presidential terms with prayers, that Congress has long employed chaplains, and that the Court itself begins each session with a supplication to God, "the Founders" must have believed these actions comported with the Constitutional prohibition

[38] Ibid.
[39] Ibid., 634-635 (Scalia, J., dissenting).
[40] Ibid., 635 (Scalia, J., dissenting).
[41] Ibid., 636 (Scalia, J., dissenting).

on establishments. Moreover, by showing that modern presidents such as President Bush have continued the Washingtonian prayer tradition at their inaugurations, Scalia aims to establish that such prayers are now indispensible parts of our historical constitutional fabric.

Scalia offers a similar analysis in *McCreary.* The *McCreary* case involved the presence of Ten Commandments displays on the walls of two Kentucky county courthouses. The counties argued that the "Commandments are Kentucky's 'precedent legal code'," and that they were part of a larger display of documents supporting that assertion.[42] The Supreme Court, in an opinion authored by Justice Souter, affirmed a lower court ruling striking down the displays as having a primarily religious purpose.[43] While the Court's opinion turns on a determination of the legislative purpose of the county statute authorizing the displays, Souter undertakes a lengthy and detailed analysis of the purpose of the Establishment Clause, which he concludes mandates "governmental neutrality."[44] Souter's opinion responds directly to Scalia's dissent, which Souter argues fails "to consider the full range of evidence showing what the Framers believed."[45] I will discuss Souter's disagreement with Scalia's dissent in the next chapter.

Justice Scalia's dissent in *McCreary* considers the same variety of evidence to which his opinion in *Lee* turned to—namely, the official acts of government officials that somehow endorse religion. In *McCreary,* Scalia first notes that George Washington added the words "so help me God" to the presidential oath of office.[46] As in *Lee,* he also points to the Supreme Court's recognition of God at the beginning of each session, the Congress's practice of beginning sessions with a prayer, the Congress's provision for paid legislative chaplains (passed, Scalia notes, the same week as the First Amendment was submitted to the States for ratification),

[42] *McCreary County v. ACLU,* 853.
[43] Ibid., 857-858.
[44] Ibid., 876.
[45] Ibid., 877.
[46] Ibid., 886 (Scalia, J., dissenting).

Congress's request for President Washington to declare a day of thanksgiving the day after the First Amendment was proposed, Washington's Thanksgiving proclamation shortly thereafter, and the First Congress's enactment of the Northwest Territory Ordinance, which held that religion, among other things, was a factor in Congress's funding of schools and education.[47] References to God in Washington's Farewell Address, Jefferson's Second Inaugural Address, and Madison's First Inaugural Address provide other Founding Era evidence for Scalia's contention.[48] He also points out that the Virginia Statute for Religious Freedom, despite its strict separationist enactment, begins with the words "Whereas Almighty God hath created the mind free…"[49]

Scalia uses these examples to establish that early government leaders had a definite understanding of the First Amendment, specifically that it permitted public acknowledgment of religion: "These actions of our First President and Congress and the Marshall Court were not idiosyncratic; they reflected the beliefs of the period."[50] That is, while in *Lee* he acknowledged that the official acts of Founding-era leaders are not entirely dispositive of constitutional meaning,[51] he clearly believes that the evidence heavily suggests that because these Founders did not find constitutional issues (or were not concerned with any constitutional issues their actions raised) with their public religious expressions, that the original understanding of the First Amendment was that the Establishment Clause did not prohibit such expressions.

Scalia's next contention is that, against this historical backdrop, the American people continue to publicly acknowledge faith:

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[47] Ibid., 886-887 (Scalia, J., dissenting).
[48] Ibid., 887-888 (Scalia, J., dissenting).
[49] Ibid., 896 (Scalia, J., dissenting).
[50] Ibid., 887 (Scalia, J., dissenting).
[51] See note 34 above.

> Nor have the views of our people on this matter significantly changed. Presidents continue to conclude the Presidential oath with the words "so help me God." Our legislatures, state and national, continue to open their sessions with prayer led by official chaplains. The sessions of this Court continue to open with the prayer "God save the United States and this Honorable Court." Invocation of the Almighty by our public figures, at all levels of government, remains commonplace. Our coinage bears the motto, "IN GOD WE TRUST." And our Pledge of Allegiance contains the acknowledgment that we are a Nation "under God." As one of our Supreme Court opinions rightly observed, "We are a religious people whose institutions presuppose a Supreme Being."[52]

For Scalia history and tradition are sufficient evidence of constitutionality:

> With all of this reality (and much more) staring it in the face, how can the Court *possibly* assert that the 'First Amendment mandates governmental neutrality between…religion and nonreligion,' and that '[m]anifesting a purpose to favor…adherence to religion generally,' is unconstitutional? 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.[53]

Scalia also rejects the idea that the Establishment Clause requires government "neutrality" toward religion, pointing to precedents of the Court that openly advance religion: "I have catalogued elsewhere the variety of circumstances in which this Court…has approved government action 'undertaken with the specific intention of improving the position of

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[52] *McCreary County v. ACLU*, 888-889 (Scalia, J., dissenting), quoting *Zorach v. Clauson,* 343 U.S. 306, 313 (1952).

[53] Ibid., 889 (Scalia, J., dissenting) [internal citations omitted].

religion'."[54] For Scalia, history, tradition, and precedent all fully support government acknowledgement, and in some cases, advancement of religion.

Formal Neutrality in the Free Exercise Clause

As Justice Scalia points out in *Edwards v. Aguillard,* there is an inherent tension between the Court's Establishment and Free Exercise Clause jurisprudence. Sometimes, he writes, the Court has advanced religion, in contradiction of *Lemon*'s second prong that government neither "advances nor inhibits religion,"[55] particularly in cases where the First Amendment may require it. Interestingly though, as discussed below, despite his professed respect for precedent and original meaning, Justice Scalia's most groundbreaking Free Exercise Clause opinion, *Smith,* actually *opposes* judicial accommodation of religion, with any reference to history strikingly absent. He does undertake a historical analysis in a Free Exercise Clause case four years later in *City of Boerne v. Flores,* but there he aims only to discredit Justice Sandra Day O'Connor's dissent, rather than offer his own new historical evidence.

Justice Scalia's most significant contribution to Free Exercise Clause jurisprudence, and indeed Religion Clause jurisprudence overall, has been his opinion in *Smith*. *Smith* concerned two members of the Native American Church who had ingested the hallucinogenic drug peyote, a drug illegal in the State of Oregon, during the course of a religious ceremony and were subsequently fired from their jobs at a drug rehabilitation organization.[56] The plaintiffs were further denied unemployment benefits by the state for having been "discharged for work-related

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[54] Ibid., 891 (Scalia, J., dissenting), citing *Edwards v. Aguillard,* 482 U.S. 578, 616 (1987) (Scalia, J., dissenting). In the *Aguillard* case, Scalia points to the Court's approval of tax deductions for religious education, aid to religious schools, tax exemptions for church properties, and textbook loans to religious school (*Edwards v. Aguillard,* 616). See also*, Edwards v. Aguillard*, 616-618, discussing the Court's willingness to advance religion when required by the Free Exercise Clause (including unemployment benefits, and compulsory school attendance).

[55] *Lemon v. Kurtzman,* 403 U.S. 602, 612 (1971).

[56] *Employment Division, Department of Human Resources of Oregon v. Smith*, 874.

'misconduct'."[57] An Oregon court overturned the Employment Division's determination, holding that the plaintiffs' Free Exercise had been violated. The Oregon Supreme Court upheld that decision, citing *Sherbert v. Verner*,[58] where the Supreme Court ruled that religious believers are exempt from a generally applicable law when that law unduly burdens a believer's right to engage in religious practice.

The Supreme Court, in a majority opinion authored by Scalia, reversed the Oregon Supreme Court's ruling and denied granting an exemption from generally applicable law that incidentally burdened a religious practice, and determined that this finding does not violate the Free Exercise Clause: "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[59]

Scalia's decision effectively overturned the *Sherbert* case, in which the Court held that "any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate'."[60] *Smith* removes the compelling interest portion of the *Sherbert* test on the grounds that if laws are generally applicable, they may constitutionally burden religious believers. The Court's Free Exercise jurisprudence, Scalia writes, has "consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[61]

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[57] Ibid.
[58] *Sherbert v. Verner,* 374 U.S. 398 (1963).
[59] *Employment Division, Department of Human Resources of Oregon v. Smith*, 878-879.
[60] *Sherbert v. Verner,* 403, quoting *NAACP v. Button,* 371 U.S. 415, 438 (1963).
[61] *Employment Division, Department of Human Resources of Oregon v. Smith,* 494 U.S. 872, 879 (1990), quoting *United States v. Lee,* 264, n. 3 (1982) (Steven, J., concurring in the judgment).

Scalia, whose brand of originalism at least nominally adheres to the doctrine of *stare decisis*,[62] seems quick to overturn *Sherbert*, and does not investigate, analyze, parse, or otherwise reference any other historical evidence regarding the original meaning of the Free Exercise Clause and its lack of protection for religious exemptions from generally applicable laws. Instead he looks to other Court precedents, arguing that the cases that the petitioners cite to favor exemptions applied only to unemployment benefits in civil cases.[63] He points out that the "conduct at issue [in these cases] was not prohibited by law," holding that because the state has the power to regulate the use of peyote, and the power to deny unemployment benefits for misconduct associated with breaking the law, there has been no breach of the Free Exercise Clause.[64]

Scalia cites older Free Exercise Clause cases to support his claim. Citing the *Gobitis* case, in which the Court held that schools could compel students, over the objection of Jehovah's Witnesses, to recite the Pledge of Allegiance:

> Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions

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[62] Scalia, "Originalism," 861.

[63] *Employment Division, Department of Human Resources of Oregon v. Smith,* 494 U.S. 872, 876 (1990). See also, *Sherbert v. Verner, Thomas v. Review Board of Indiana Employment Security Division,* 450 U.S. 707 (1981), and *Hobbie v. Unemployment Appeals Commission of Florida,* 480 U.S. 136 (1987), all holding that the government cannot condition unemployment benefits on an individual's "willingness to forgo conduct required by his religion," *Smith,* 376. Also, in *Smith,* Scalia writes, "We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation," 872 U.S. 872, 883. While it seems incomprehensible to me that the Framers would have limited the scope of free exercise to cases of whether or not the state must extend unemployment benefits to religious believers who, as in *Sherbert,* were religiously barred from working on certain days of the week. Nevertheless, some scholars have pointed out that the Framers *did* specifically address and reject some exemptions, particularly those from military service, in other areas of the drafting of the Bill of Rights. See Muñoz, "The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress," *Harvard Journal of Law & Public Policy* 31 (2008). Other scholars, such as Michael McConnell, still support the exemptions reading of the Free Exercise Clause (see "The Origins and Historical Understanding of Free Exercise of Religion," *Harvard Law Review* 103 [1990]), but none of these scholars even suggests, let alone seriously contends, that the original meaning of the Free Exercise Clause was limited only to matters relating to unemployment.

[64] *Employment Division, Department of Human Resources of Oregon v. Smith*, 876.

> which contradict the relevant concerns of a political society does not relive the citizen from the discharge of political responsibilities.[65]

Here Scalia also returns to the belief-action distinction articulated in the Court's first landmark Free Exercise case, *Reynolds v. United States,* where the Court held that the state could constitutionally prohibit the practice of polygamy:

> "Laws," we said, "are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices… Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect permit every citizen to become a law unto himself."[66]

In both *Gobitis* and *Reynolds,* and thus in *Smith,* Scalia argues, the State prescribed or prohibited conduct that was within its power to regulate. The laws regulated actions only, were generally applicable, and, while they incidentally burdened religious believers, did not single out any religious tradition for a benefit or burden. Because these conditions are met, "The government's ability to enforce generally applicable prohibitions of socially harmful conduct…'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development'."[67]

The only major Free Exercise Clause case in which Justice Scalia discusses the history of the First Amendment is the *Boerne* case. In that case, the Court held that the Religious Freedom Restoration Act of 1993 (RFRA), which Congress had enacted in response to the *Smith* opinion,

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[65] *Employment Division, Department of Human Resources of Oregon v. Smith*, 879, quoting *Minersville School District Board of Education v. Gobitis,* 310 U.S. 586, 594-595 (1940).

[66] *Employment Division, Department of Human Resources of Oregon v. Smith*, 879, quoting *Reynolds v. United States*, 166-167 (1879).

[67] *Employment Division, Department of Human Resources of Oregon v. Smith*, 885, quoting *Lyng v. Northwest Indian Cemetery Protective Association,* 485 U.S. 439, 451 (1988) (holding that the Free Exercise Clause does not prohibit the government from continuing construction projects on federal land historically used for Native American spiritual rituals).

exceeded Congress's power to enforce the First Amendment against the states under Section 5 of the Fourteenth Amendment.[68] Congress's purpose in enacting RFRA had included, among other things, "to restore the compelling interest test as set forth in Sherbert v. Verner…and to guarantee its application in all cases where free exercise of religion is substantially burdened."[69] The Court held that

> It is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference. Congress' discretion is not unlimited, however, and the courts retain the power…to determine if Congress has exceeded its authority under the Constitution. Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.[70]

Thus, the Court struck down RFRA as unconstitutionally exceeding congressional enforcement power, effectively upholding the *Smith* decision.

Justice O'Connor dissented from the Court's opinion in *Boerne,* arguing that the history of the Free Exercise Clause required exemptions. Citing McConnell, O'Connor looks to early colonial documents, such as Lord Baltimore's act of toleration in Maryland and the Rhode Island Charter of 1663, to demonstrate colonial Americans' respect for "free exercise" and "liberty of conscience."[71] She then turns to the early state constitutions and the Northwest Ordinance, pointing out that all of these offered some variation of their own free exercise clause. For example, the New York Constitution of 1777 held,

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[68] *City of Boerne v. Flores, Archbishop of San Antonio,* 521 U.S. 507, 512 (1997).
[69] Ibid., 515.
[70] Ibid., 536.
[71] Ibid., 551 (O'Connor, J., dissenting).

> [T]he free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind: *Provided,* That the liberty of conscience, hereby granted, *shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.*[72]

O'Connor's subsequent analysis discusses the state free exercise clauses and their "provisos," determined what activities would not be excused by the right of free exercise. O'Connor concludes that the very inclusion of the provisos suggests that if it were constitutionally permissible for generally applicable laws to burden religious believers, "Such…proviso[s] would have been superfluous. Instead, these documents make sense only if the right to free exercise was viewed as generally superior to ordinary legislation, to be overridden only when necessary to secure important government purposes."[73]

Thus, O'Connor believes that the proper Free Exercise Clause jurisprudence would require the Court to balance, as in *Sherbert,* a compelling state interest against the right of free exercise. To suggest that individual Founders as well as the state constitutions supported exemptions, she quotes James Madison's Memorial and Remonstrance against Religious Assessments: "[t]he Religion…of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate."[74] Citing both George Mason and James Madison's proposals for the free exercise provision of the Virginia Declaration of Rights, O'Connor writes that "…it is telling that *both* Mason's and Madison's

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[72] Ibid., 553 (O'Connor, J., dissenting).
[73] Ibid., 554-555 (O'Connor, J., dissenting). O'Connor writes, "The language used in these state constitutional provisions…strongly suggests that, around the time of the drafting of the Bill of Rights, it was generally accepted that the right to 'free exercise' required, where possible, accommodation of religious practice. If not—and if the Court was correct in *Smith* that generally applicable laws are enforceable regardless of religious conscience—there would have been no need for these documents to specify…that rights of conscience should not be "construed as to excuse acts of licentiousness, or justify practices in consistent with the peace or safety of [the] State." Id., 554-555.
[74] Ibid., 561 (O'Connor, J., dissenting).

formulations envision that, when there was a conflict, a person's interest in freely practicing his religion was to be balanced against state interests."[75] That is, unlike in *Smith*, where generally applicable neutral laws trumped religious scruples, O'Connor in *Boerne* determines that history supports the conclusion that free exercise must allow exemptions generally applicable laws unless the compelling state interest of preserving the peace required that such exemptions be denied.

Scalia's concurrence in *Boerne* reads O'Connor's history very differently. Rather than review the history himself, Scalia simply argues that O'Connor's evidence supports *Smith*, not exemptions. In particular, he suggests that the "provisos" O'Connor cites as "superfluous" in state free exercise clauses prove *precisely* that the early states opposed exemptions from generally applicable laws: "At the time these provisos were enacted, keeping 'peace' and 'order' seems to have meant, precisely, obeying the laws."[76] Scalia turns not to the drafting of those provisos to support his case, but rather the dictionary definition of "peace" at the time of their adoption: "Even as late as 1828, when Noah Webster published his American Dictionary of the English Language, he gave as one of the meanings of 'peace': '8. Public tranquility; that quiet, order, and security which is guaranteed by the laws…"[77] Looking at the contemporary meaning of the word "peace," Scalia, quoting Hamburger, concludes that "'…the disturb-the-peace

[75] Ibid., 556. As cited by O'Connor, Mason's proposal held that "all men should enjoy the fullest toleration in the exercise of religion…unless, under the colour of religion, any man disturb the peace, the happiness, or safety of society." Id., 555. Madison's proposal, though believing that free exercise was an affirmative "right" rather than merely a privilege subject to "toleration" by the state, was similar: "all men are equally entitled to the full and free exercise of [religion], according to the dictates of conscience…unless, under color of religion the preservation of equal liberty, and the existence of the State be manifestly endangered." Id., 556.
[76] Ibid., 540 (Scalia, J., concurring in part).
[77] Ibid., 540-541 (Scalia, J., concurring in part).

caveats apparently permitted government to deny religious freedom, not merely in the event of violence or force, but, more generally, upon the occurrence of illegal actions'."[78]

Scalia further suggests that O'Connor's references to Madison are irrelevant, since the Memorial and Remonstrance "does not argue that the assessment would violate the 'free exercise' provision in the Virginia Declaration of Rights…rather, the pamphlet argues that the assessment wrongly placed civil society ahead of personal religious belief and, thus, should not be approved by the legislators."[79] He also points out that George Washington's support for free exercise in his letter to a group of Quakers did not extend to constitutional protections, but merely his "'wish and desire' that religion be accommodated."[80] For Scalia, Thomas Jefferson is the only Founder cited by O'Connor whose writings suggest that "the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises"; he quickly counters this, however, by citing McConnell to assert that "it is quite clear that Jefferson did not in fact espouse the broad principle of affirmative accommodation advocated by [O'Connor]."[81]

For Scalia, the provisos in the state constitutions and the writings of the Founders, the very evidence cited by O'Connor, lead to the conclusion that "Religious exercise shall be permitted *so long as it does not violate general laws governing conduct.*"[82] The history, as evidenced by both the actions of Founders "does nothing to undermine the conclusion we reached in *Smith.*"[83]

Synthesizing Formal Neutrality in Scalia's Jurisprudence

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[78] Ibid., 541 (Scalia, J., concurring in part). See also, Phillip A. Hamburger, "A Constitutional Right of Religious Exemption: An Historical Perspective," *George Washington Law Review* 60 (1992).
[79] *City of Boerne v. Flores,* 542 (Scalia, J., concurring in part).
[80] Ibid.
[81] Ibid.
[82] Ibid., 539 (Scalia, J., concurring in part).
[83] Ibid., 544.

Looking at Justice Scalia's Establishment and Free Exercise Clause cases together suggest an interpretation of the Religion Clauses that adheres to a principle scholars refer to as "formal neutrality." Essentially a requirement of "legal" neutrality, formal neutrality prohibits government classification on the basis of religion and prohibits the government from assigning any direct legal burdens or conferring any direct benefits on the basis of religion.[84] The concept of formal neutrality, as articulated by Philip Kurland, holds that "The freedom [Free Exercise] and separation [Establishment] clauses should be read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or impose a burden."[85]

The cases discussed in this chapter squarely reflect Kurland's definition. For the Establishment Clause, Scalia in *Lee* railed against the Court's adoption of a "psychological coercion" test in striking down graduation prayer. He writes instead, "The coercion that was a hallmark of historical establishments of religion was a coercion of religious orthodoxy and of financial support *by force of law and threat of penalty.*"[86] In fact, appealing further to history, Scalia suggests that legal coercion is *precisely* what the Establishment Clause was written to protect against:

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[84] Legislatures, however, may allow religious exemptions, although they are not constitutionally required to do so: "[T]o say that a non-discriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may be fairly said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs," *Employment Division, Department of Human Resources of Oregon v. Smith,* 890. See also, *City of Boerne v. Flores,* 539 (Scalia, J., concurring in part).

[85] Philip B. Kurland, "Of Church and State and the Supreme Court," *University of Chicago Law Review* 29 (1961), 96.

[86] *Lee v. Weisman*, 640 (Scalia, J., dissenting).

> Typically, attendance at the state church was required; only clergy of the official church could lawfully perform sacraments; and dissenters, if tolerated, faced an array of civil disabilities. Thus, for example, in the Colony of Virginia, where the Church of England had been established, ministers were required by law to conform to the doctrine and rites of the Church of England; and all persons were required to attend church and observe the Sabbath, were tithed for the public support of Anglican ministers, and were taxed for the costs of building and repairing churches. The Establishment Clause was adopted to prohibit such an establishment of religion…[87]

While he concedes that legal coercion alone is less restrictive than American history would suggest is prohibited by the Constitution,[88] when no single religious tradition is coerced to accept the tenets of another, or when there is no legal penalty for nonbelief, nonsectarian government endorsement is acceptable: "…there is simply no support for the proposition that [an] officially sponsored nondenominational invocation and benediction…—with no one legally coerced to recite them—violated the Constitution of the United States."[89]

In *McCreary,* Scalia takes as given that religion has a place in the public square and that history defines the scope of the acceptability of public religious expression. However, in this case, he goes beyond his dissent in *Lee* to suggest that religious expression does not need to be *entirely* nondenominational to pass constitutional muster under Establishment Clause: "With respect to public acknowledgment of religious belief, it is entirely clear from our Nation's

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[87] *Lee v. Weisman*, 640-641 (Scalia, J., dissenting). See also, Leonard Levy, *The Establishment Clause: Religion and the First Amendment* (Chapel Hill: University of North Carolina Press, 1994), 1-4.

[88] "…I will further concede 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—even when no legal coercion is present, and indeed when no ersatz, 'peer-pressure' psycho-coercion is present—where 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)," *Lee v. Weisman*, 641 (Scalia, J., dissenting).

[89] *Lee v. Weisman*, 641-642 (Scalia, J., dissenting).

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. The Thanksgiving Proclamation issued by George Washington at the insistence of the First Congress was scrupulously nondenominational—but it was monotheistic."[90] For Scalia, such public recognition of monotheism fully comports with the requirements of the Establishment Clause, because it does not advance or deny some privilege to any religious group[91]: "In *Marsh v. Chambers,* we said that the fact that the particular prayers offered in the Nebraska Legislature were 'in the Judeo-Christian tradition' posed no additional problem, because 'there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief'."[92] Thus, Scalia's Establishment Clause positions are fully consistent with the principle of formal neutrality: public religious expression, in the form of *nonsectarian* prayer or a nondenominational Ten Commandments display, or any other public religious endorsement that does not grant a legal privilege or impose a legal burden on any dissenting religious believer, is perfectly constitutional and supported by history.[93]

Scalia's decision in *Smith* also demonstrates his willingness to embrace formal neutrality, albeit without so much as the same historical analysis he offers in his Establishment Clause cases. In denying the religiously scrupulous exemptions from generally applicable laws, the government maintains its obligation to not confer any kind of legal benefit (an exemption from a criminal law would almost certainly be considered a "legal benefit") upon religious believers.

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[90] *McCreary County v. ACLU*, 893 (Scalia, J., dissenting).

[91] Justice Souter suggests that the Framers themselves would be appalled at Scalia's conclusion that monotheism should be a "touchstone of establishment interpretation. Even on originalist critiques of existing precedent there is, it seems, no escape from interpretative consequences that would surprise the Framers." *McCreary County v. ACLU,* 880.

[92] *McCreary County v. ACLU*, 893-894 (Scalia, J., dissenting), quoting *Marsh v. Chambers,* 463 U.S. 783, 793-795 (1983) (upholding public prayer at the opening of state legislative sessions).

[93] For further discussion of the principle of formal neutrality as envisioned by the Framers, see Muñoz*, God and the Founders.*

Nor does denying an exemption, in Scalia's view, unconstitutionally penalize religious believers, because the statutes are "across-the-board criminal prohibitions on a particular form of conduct."[94]

Conclusion

Justice Scalia's Religion Clause jurisprudence fits squarely into the framework of formal neutrality. In Justice Scalia's thought, without classifying citizens on the basis of religion, without affording benefits to one denomination over another, and without assigning direct legal penalties upon any religious group, religious expression in the public square and religious endorsement by the government can be permissible.

While Justice Scalia's interpretation of the Religion Clauses does seem to follow a consistent principle, they do not seem to fully comport with his understanding of originalism. Scalia himself advocated for a rigorous historical analysis in his article on originalism, demonstrating how much historical evidence Chief Justice William Howard Taft failed to consider when drafting *Myers v. United States*.[95] Scalia's analysis describes how Taft's opinion only haphazardly treated the history of executive power in the United States, even citing evidence that Scalia suggests lacked the foundation to even be considered relevant.[96] Yet given Scalia's assessment of the Court's workload, he concedes that such historical deficiencies are inevitable for the Court.

Alternatively, Scalia posits that the best way to interpret the Constitution within these limitations is simply to look to the plain meaning of the text. Scalia writes, "Many, if not most, of the provisions of the Constitution do not make sense except as they are given meaning by the

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[94] *Employment Division, Department of Human Resources of Oregon v. Smith*, 884.
[95] 272 U.S. 52 (1926) (holding that congressional attempts to restrict presidential removal of executive officers was unconstitutional).
[96] Scalia, "Originalism," 856-860.

historical background in which they were adopted."[97] Sometimes, however, as in the case of the Religion Clauses, the meaning is not self-evident: "…it is often exceedingly difficult to plumb the original understanding of an ancient text."[98] Because of this difficulty, at least in terms of Religion Clause jurisprudence, the meaning must be determined in light of traditional historical practices that shed light on the original understanding: "[T]he meaning of the Clause is to be determined by reference to historical *practices* and understandings."[99] Thus, determining how the Framers understood the text, by examining how they acted in light of the clauses they drafted, for Scalia, overcomes the difficulty of interpreting the plain meaning of the "ancient text."

While, as discussed previously, he believes that the demands of the Supreme Court to hear arguments and produce opinions, and the lack of training of the justices themselves as historians, Scalia clearly says that a rigorous historical analysis is the best means of discerning the original meaning of a constitutional provision. Yet in his own opinions, Scalia seems willing to forego such an analysis, citing, as in *Lee* and *McCreary* historical *practice* as dispositive of historical *understanding,* and for citing *only* selective Court precedent in eliminating exemptions from burdensome laws for religious believers. Despite the questionable depth of Scalia's analysis, his sense of history does lead him to a formal-neutral understanding of the Religion Clauses. In the next chapter, we will conduct a similar analysis of the jurisprudence of Justice David Souter, whose Religion Clause opinions, complete with his historical analysis, frequently lead him to conclusions directly opposed to those of Justice Scalia. Looking at Souter's cases

[97] Scalia, "Is There an Unwritten Constitution?" *Harvard Journal of Law & Public Policy* 12 (1989), 1.
[98] Scalia, "Originalism," 856.
[99] *Lee v. Weisman*, 631 (Scalia, J., dissenting), quoting *County of Allegheny v. ACLU*, 670 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part) [emphasis added]. See also*,* Scalia, "Is There an Unwritten Constitution?," 1-2.

will give us a sense of where historical analysis can lead Religion Clause jurisprudence on the modern Supreme Court.

III. "More to go on": Justice Souter, Substantive Neutrality, and the Alternative to Scalian Originalism

Rarely in scholarly discussions of "originalism" does Justice David Souter's name appear. Souter has seldom been described as an originalist.[100] He does not seem to describe himself as an originalist in Religion Clause jurisprudence (or any other body of law) either. In fact, at his own confirmation hearings, Souter told the Senate Judiciary Committee that he had "never done any personal research on the issue of the original meaning on the establishment clause."[101] Yet Justice Souter has been the most consistent and prolific citer of history in Religion Clause jurisprudence on the contemporary court, citing history over 100 times, including 41 references to James Madison alone, over the course of 12 Religion Clause opinions.[102] Because Justice Souter is typically regarded as part of the liberal wing of the modern Supreme Court, his reliance on history more than any other justice is particularly striking.

Despite all the evidence that he is in fact an originalist, Souter routinely escapes such a description. This is likely because originalism is an interpretative methodology typically associated with conservatives, such as Justice Scalia and Justice Thomas. With the exception of Souter, such reliance on historical evidence also seems generally limited to conservatives, who believe that the meaning of the constitutional text is fixed in time and should not reflect evolving societal standards.[103] Thus, given his propensity for historical analysis, it is even more striking

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[100] Muñoz describes Souter as an originalist on at least two occasions. First, with regard to the Free Exercise Clause, Muñoz points out that it was Souter who decried the absence of history from the Court's Free Exercise jurisprudence: "In 1993 Justice David Souter called for a reconsideration of *Smith,* in part because that case failed to consider the original meaning of the Free Exercise Clause," "The Original Meaning of the Free Exercise Clause," 1087. The second instance appears in his forthcoming book: "In two non-majority opinions in the 1990s, Justice Souter established himself as the leading originalist, strict separationist member of the Rehnquist Court," *God and the Founders*, 19.

[101] Senate Committee on the Judiciary, Hearings on the Nomination of David H. Souter to be Associate Justice of the Supreme Court of the United States, *Hearings Before the Committee on the Judiciary United States Senate*, 101st Cong., 2nd Sess., 14 September 1990, 154.

[102] Hall, 574.

[103] For Scalia, for example, originalism embodies a repudiation of the notion that the Constitution was intended to reflect "current societal values": "The Constitution that I interpret and apply is not living but dead—or, as I prefer to

that Justice Souter has emerged as one of the most consistent defenders of strict separationism on the modern court. Is he, then, simply a liberal originalist? I submit that Souter is indeed a liberal originalist. His opinions aim to discern the plain meaning of the First Amendment, in accordance with Scalia's conception of what originalist adjudication entails. Souter's broader reading of history, however, leads him to conclusions about original meaning that espouse a strict separationist position on Establishment Clause cases and an accommodating position on Free Exercise Clause cases in comparison to Scalia's opinions.

Souter's opinions, backed by his *de novo* historical evaluations, reflect a doctrine of church-state relations known as "substantive neutrality." This concept, "generally require[s] government to accommodate religious differences by exempting religious practices from formally neutral laws."[104] Substantive neutrality, like formal neutrality, applies to both Establishment Clause and Free Exercise Clause cases, and also represents an intellectual and legal attempt to read the two clauses in unison to both separate church and state and to protect the individual right of free exercise.

In order to demonstrate the unified approach to religion cases that Souter's version of substantive neutrality embraces, I will analyze his Establishment Clause and Free Exercise Clause cases separately and show that neutrality is a concept relevant to both provisions. While Souter has participated in many Court decisions on the Religion Clauses, I will focus most

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put it, enduring. It means today not what current society (much less the Court) thinks it ought to mean, but what it meant when it was adopted." "God's Justice and Ours," *First Things* (May 2002): 17.

[104] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 562 (Souter, J., concurring in part, and concurring in the judgment). See also, generally*,* Douglas Laycock, "Formal, Substantive, and Disaggregated Neutrality toward Religion," *DePaul Law Review* 39 (1990). Laycock summarizes substantive neutrality as a principle that "religion is to be left as wholly to private choice as anything can be. It should proceed as unaffected by government as possible. Government should not interfere with our beliefs about religion either by coercion or by persuasion." "Formal, Substantive, and Disaggregated Neutrality," 1002. This includes, but is not limited to, exemptions from facially neutral and generally applicable laws. Laycock describes, for example, how a substantively neutral prohibition law would exempt sacramental wine so as to minimally impact the ability of Catholics or Jews to engage in their religious ceremonies.

heavily on those opinions that strongly rely on history and the Founders. These cases are both illustrative of Souter's substantive neutrality position and typically feature direct responses to Justice Scalia's opinions, which will aid in our comparison of Scalia and Souter in Chapter 4.

History and Souter's Establishment Clause Jurisprudence

With regard to religious establishments, Souter offers his most detailed and well known parsing of history his concurring opinion in *Lee* and in his much more recent opinion for the Court in *McCreary.* These two cases are highly expository of Souter's position on government neutrality and, comprising one of his earliest and most recent Establishment Clause cases respectively, they demonstrate clearly his consistency over time. I will also briefly treat his opinion in *Rosenberger v. Rector and Visitors of the University of Virginia,* where Souter discussed the history of establishments in dissenting from the Court's decision to uphold state funding of religious student publications at the University of Virginia. Together these cases clearly establish his commitment to the strict separationist precedent set in *Everson.*

Lee challenged the constitutionality of nonsectarian prayer at public school graduation ceremonies under the First Amendment. The plaintiff argued that by inviting a rabbi to offer a nonsectarian prayer at her middle school graduation the school district violated the Establishment Clause. The District Court and Appeals Court agreed and enjoined the school district from allowing prayers to be offered at public school graduation ceremonies.

Writing for the Court, Justice Anthony Kennedy affirmed the Court of Appeals' ruling on the grounds that state coercion of any kind of religious activity violates the Establishment Clause. Justice Kennedy's opinion turns on his rejection of a sense of *psychological* coercion of

religious activity.[105] That is, while there is no legal or otherwise concrete penalty for not participating in the religious activity in question—in this case, that a diploma will not be denied because a student did not attend the graduation ceremony—there is still an unspoken or psychological compulsion to attend the ceremony and therefore to participate in the prayer.[106]

Kennedy's opinion only refers to the Founders in passing, specifically to qualify the Court's opinion. Kennedy briefly invokes Madison's Memorial and Remonstrance to point out that the Establishment Clause exists to protect religion from government, just as it does to protect government from the influence of religion.[107] Kennedy's reference to history ends there, and the lynchpin of the remainder of his opinion is his psychological coercion argument. Rather than examine the meaning and purpose of the Establishment Clause, Kennedy simply concludes that government cannot compel individuals to choose between their religious belief (or lack thereof) and some real or perceived benefit such as attending a school graduation ceremony.

Concurring, Souter points out that while he agreed with the Court's opinion barring prayer at public school graduation ceremonies, the Court failed to analyze two major unresolved issues of Establishment Clause jurisprudence. First, he addresses the question of so-called "nonpreferential aid,"[108] which Kennedy's opinion fails to fully discredit under the

[105] "Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma." *Lee v. Weisman,* 505 U.S. 577, 586 (1992).

[106] "The undeniable fact," Kennedy writes, "is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion." *Lee v. Weisman*, 593.

[107] "James Madison, the principal author of the Bill of Rights, did not rest his opposition to a religious establishment on the sole ground of its effect on the minority. A principal ground for his view was: '[E]xperience witnesseth that ecclesiastical establishment, instead of maintaining the purity and efficacy of Religion, have had a contrary operation'." *Lee v. Weisman*, 590.

[108] The Court in *Wallace v. Jaffree,* 472 U.S. 38 (1985), struck down an Alabama statute calling for daily moments of silence in public school classrooms on grounds that the First Amendment protects the right of nonbelievers to be allowed not to pray. Justice William Rehnquist, however, filed a dissent that parsed the history of the First Amendment to conclude that the Establishment Clause protected "nonpreferential aid" to religion, that is, state support for religion that did not show "preference among religious sects or denominations… …nor did [the

Establishment Clause,[109] and second, he addresses the question of whether coercion was required at all for the state to violate the Establishment Clause, as the majority held.[110] Unlike Kennedy, Souter takes special care to evaluate the history in search of the meaning of the Establishment Clause in reaching his conclusions. Instead of narrowing Establishment Clause jurisprudence to cases of "coercion," Souter suggests that the Court ought to adhere strictly to the precedent set in *Everson,*[111] arguing that despite alternative views articulated both by Scalia's dissenting opinion in *Lee,* and then-Associate Justice William Rehnquist's dissenting opinion in *Wallace v. Jaffree,* the *Everson* standard began a "line of precedent from where there is no adequate historical case to depart."[112]

On the question of nonpreferential aid, Souter makes his historical case by looking at records from the First Congress's drafting of the First Amendment. He does not coldly dismiss Justice Rehnquist's argument in *Wallace,* but instead acknowledges the nonpreferentialist position as having made a valid, though hardly compelling case: "While the case has been made

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Establishment Clause] prohibit the Federal Government from providing nondiscriminatory aid to religion." *Wallace v. Jaffree*, 106 (Rehnquist, J., dissenting).

[109] Justice Kennedy's opinion is explicitly limited to questions of prayer at public school graduation ceremonies and state action that is psychologically coercive: "But these matters, often questions of accommodation of religion, are not before us. The sole question presented is whether a religious exercise may be conducted at a graduation ceremony in circumstances where, as we have found, young graduates who object are induced to conform. No holding by this Court suggests that a school can persuade or compel a student to participate in a religious exercise," *Lee v. Weisman*, 599.

[110] *Lee v. Weisman*, 609 (Souter, J., concurring).

[111] In *Everson,* the Court, despite upholding the reimbursement for the bus fares of students whose parents sent them to parochial schools, articulated an unequivocally strict-separationist interpretation of the Establishment Clause: "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance, or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa.*" *Everson v. Board of Education of Ewing,* 330 U.S. 1, 15-16 (1947). The historical foundation for this ruling, was Jefferson's Letter to the Danbury Baptists, in which he declared that the First Amendment was intended to "erect 'a wall of separation between church and state,'" *Everson v. Board of Education,* 16. See also*,* Thomas Jefferson to the Danbury Baptist Association, January 1, 1802, in *The Founders' Constitution* Vol. 5*,* eds. Phillip B. Kurland and Ralph Lerner (Chicago: University of Chicago Press, 1987), 96.

[112] *Lee v. Weisman*, 610 (Souter, J., concurring).

for this position, it is not so convincing as to warrant reconsideration of our settled law; indeed, I find in the history of the Clause's textual development a more powerful argument supporting the Court's jurisprudence following *Everson*."[113]

Souter turns first to the drafting of the First Amendment, demonstrating that Congress considered and rejected language in the First Amendment that would have explicitly permitted nonpreferential aid. He points out that the House of Representatives at one point adopted the sweeping language of Samuel Livermore, that "Congress shall make no laws touching religion, or infringing the rights of conscience,"[114] but also recognizes that this language was far broader than the Court recognized the First Amendment to reach.[115] The House tailored the First Amendment once more before sending it to the Senate. There, language holding that "Congress shall make no law establishing One Religious Sect or Society in preference to others, nor shall the rights of conscience be infringed," was adopted.[116] This language would have explicitly endorsed future government nonpreferential aid to religion, forever possibly forestalling much future debate on that question. However, the Senate later rejected that wording in favor of a

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[113] Ibid., 612 (Souter, J., concurring). It is also appropriate to point out at this point that Souter in *Lee* commits himself fully to the *Everson* standard of strict separation. Though *Everson* ultimately upheld the law in question, the majority's strict separationist standard, buttressed by Jefferson's "wall of separation," is the standard that Souter adheres to throughout his Establishment Clause jurisprudence. See*, McCreary County v. ACLU,* "The importance of neutrality as an interpretative guide is no less true now than it was when the Court broached the principle in *Everson v. Board of Ed. of Ewing...,*" 545 U.S. 844, 874 (2005); "It 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 [an Ohio school voucher law]," *Zelman v. Simmons-Harris,* 536 U.S. 639, 688 (2002) (Souter, J., dissenting); *Board of Education of Kiryas Joel Village School District v. Grumet,* 512 U.S. 687, 697 (1994) (Opinion of Souter, J.); "…the direct support of religious activity thus strikes at what we have repeatedly held to be the heart of the prohibition on establishment. *Everson* 330 U.S., at 15-16…," *Rosenberger v. Rector and Visitors of the University of Virginia,* 515 U.S. 819, 873-874 (1995) (Souter, J., dissenting); "Although the First Amendments Religion Clauses have not been read to mandate absolute governmental neutrality toward religion…the Establishment Clause requires neutrality as a general rule, *e.g., Everson v. Board of Ed. of Ewing,* 330 U.S. 1, 18 (1947)," *Van Orden v. Perry,* 545 U.S. 677, 737 (2005) (Souter, J., dissenting); "We have 'previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as [Jefferson's] Virginia statute [for Religious Freedom],' *Everson v. Board of Ed. of Ewing,* 330 U.S. 1, 13 (1947)," *Mitchell v. Helms,* 530 U.S. 793, 870 n. 1 (2000) (Souter, J., dissenting).

[114] *Lee v. Weisman,* 505 U.S. 577, 612 (1992) (Souter, J., concurring).

[115] Ibid., 613 (Souter, J., concurring).

[116] Ibid.

narrower clause: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion."[117] Ultimately, the House and Senate could not agree on the language of the First Amendment until the conference committee, where all of the final language of the Establishment and Free Exercise clause was produced: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[118] Because the Framers flatly rejected a version of the clause that would have allowed for nonpreferential aid, Souter concludes that nonpreferential aid is forbidden: "[H]istory neither contradicts nor warrants reconsideration of the settled principle that the Establishment Clause forbids support for religion in general no less than support for one religion or some."[119]

Souter's rejection of nonpreferential aid in *Lee* is noteworthy because it raises an issue that does not appear in the majority opinion. To be sure, the language of Justice Kennedy's opinion is at times sweepingly strict separationist,[120] but concludes by limiting its findings to the facts of the case involving public school graduation ceremonies and other forms of state action that coerce religious believers. The opinion, therefore, does not simply neglect to explicitly prohibit nonpreferential aid to religion, but chooses not to raise the issue at all. There appears to be, therefore, no compelling reason for Justice Souter to raise the issue in concurrence. He must therefore believe that the nonpreferential aid debate was relevant to elucidating the original meaning of the Establishment Clause. This is further supported by his suggestion that he raises the point in order to defend the Courts strict-separationist precedents such as *Everson* from assault: "The challengers argue that, as originally understood by the Framers, '[t]he Establishment Clause did not require government neutrality between religion and irreligion, nor

[117] Ibid., 613-614 (Souter, J., concurring).
[118] Ibid., 614 (Souter, J., concurring).
[119] Ibid., 616 (Souter, J., concurring).
[120] "The First Amendment Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State," *Lee v. Weisman,* 589.

did it prohibit the Federal Government from providing nondiscriminatory aid to religion'."[121] This opinion, alongside his later opinions in *Rosenberger* and *McCreary,* serve to convincingly illustrate his consistently expansive view of Religion Clause protections.[122]

Souter's position rejects Justice Rehnquist's dissent in *Wallace* endorsing nonpreferential aid. Like Souter, Rehnquist pursues a historical analysis of the drafting of the First Amendment, but bases his interpretation of the proceedings on the actions of both the Congress and the executive after the passage of the First Amendment. Rehnquist argues that by virtue of its providing for the support of land grants for religious schools in the Northwest Territories and its encouragement of a Thanksgiving proclamation from the president, the same First Congress that undertook the First Amendment just days earlier was demonstrating its understanding of the Religion Clauses.[123] He also suggests that actions by presidents, including Washington, Adams, and Madison's Thanksgiving proclamations, and Jefferson's support for a treaty with the Kaskaskia Indians that included support for the Catholic Church, all further demonstrated that the leading Founders did not entirely oppose government support for religious activity.[124] Nevertheless, Souter also points out that much of the nonpreferentialist debate presumes that the Framers were incapable of violating the Constitution. While they may have carefully drafted the language of the Establishment Clause, they were not incapable of undertaking action that contradicted the Constitution. Moreover, executive actions cannot be expected to in any way reveal legislative intent.[125]

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[121] Ibid., 612 (Souter, J., concurring).
[122] "Now, as in the early Republic, 'religion & Govt. will both exist in greater purity, the less they are mixed together,'" *Lee v. Weisman*, 627 (Souter, J., concurring), quoting James Madison to Edward Livingston (July 10, 1822), in *The Founders' Constitution* Vol. 5 (Chicago: University of Chicago Press, 2000), 106.
[123] *Wallace v. Jaffree,* 100-103 (1985) (Rehnquist, J., dissenting).
[124] Ibid., 103-104 (1985) (Rehnquist, J., dissenting).
[125] "To be sure, the leaders of the young Republic engaged in some of the practices that separationists like Jefferson and Madison criticized. The First Congress did hire institutional chaplains…and Presidents Washington and Adams unapologetically marked days of 'public thanksgiving and prayer…" For Souter, "those practices prove, at best, that

Justice Souter's other major noteworthy contention is that coercion is not required at all for the state to violate the Establishment Clause. In fact, before delving into any historical analysis, he indicates that government coercion of any kind can *never* violate the Establishment Clause; rather, "…laws that coerce nonadherents to 'support or participate in any religion or its exercise'…would virtually by definition violate their right to religious *free exercise.*"[126] The Free Exercise Clause, not the Establishment Clause, was the means by which the Framers expected to protect religious believers from government coercion. According to Douglas Laycock, whom Souter also cites in his opinion, any other reading would render the First Amendment inherently redundant: "Religious coercion by the government violates the free exercise clause. Coercion to observe someone else's religion is as much a free exercise violation as is coercion to abandon my own. If coercion is also an element of the establishment clause, establishment adds nothing to free exercise."[127] Citing Madison's Memorial and Remonstrance,[128] Souter refuses to accept that either clause is simply ornamental to the First Amendment, holding that "without compelling evidence to the contrary, we should presume that the Framers meant the [Establishment] Clause to stand for something more than [supporters of the coercion test] attribute to it."[129]

In his dissenting opinion in *Rosenberger,* Souter again undertakes a historical analysis to espouse a strict-separationist view. In *Rosenberger,* the Court upheld state support of a religious student publication at the University of Virginia on free speech grounds. However, Souter

the Framers simply did not share a common understanding of the Establishment Clause, and, at worst, that they, like other politicians, could raise constitutional ideals one day and turn their backs on them the next." *Lee v. Weisman*, 626 (Souter, J., concurring).

[126] *Lee v. Weisman,* 621 (Souter, J., concurring) [internal citations omitted; emphasis added].

[127] Douglas Laycock, "'Nonpreferential' Aid to Religion: A False Claim about Original Intent," *William & Mary Law Review* 27 (1986), 922.

[128] While it is true that the Memorial and Remonstrance predates the Constitution, Souter relies on the fact that Madison's argument includes the exact phrase "Free exercise of Religion," particularly that all citizens of a political entity are "to be considered as retaining an 'equal title to the free exercise of Religion according to the dictates of Conscience'." See James Madison, Memorial and Remonstrance against Religious Assessments, in *The Founders' Constitution* Vol. 5*,* eds. Phillip B. Kurland and Ralph Lerner (Chicago: University of Chicago Press, 1987), 84.

[129] *Lee v. Weisman*, 621 (Souter, J., concurring).

dissents, holding the state support of the religious publication amounted to unconstitutional establishment. Here Souter turns to Madison's Memorial and Remonstrance and Jefferson's Virginia Statute to highlight that not only is direct support for religious activity a deviation from precedent,[130] but also that government support for religion in the form of taxes, as UVA's funding of the publication indeed amounted to, was one of the Founders' most fundamental concerns in promoting disestablishment:

> Using public funds for the direct subsidization of preaching the word is categorically forbidden under the Establishment Clause, and if the Clause was meant to accomplish nothing else, it was meant to bar this use of public money. Evidence on the subject antedates even the Bill of Rights itself, as may be seen in the writings of Madison, whose authority on questions about the meaning of the Establishment Clause are well settled.[131]

Madison's writings specifically remonstrated against the levying of taxes for the support of religious activity: "Who does not see that…the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?"[132] Souter thus concludes that the state's financial sponsorship patently violates the very purpose of the Establishment Clause: "The University exercises the power of the State to compel a student to pay [the activities fee]…and the use of any part of it for the direct support of religious activity thus strikes at what we have repeatedly held to be at the heart of the prohibition on Establishment."[133]

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[130] "The Court today, for the first time, approves direct funding of core religious activities by an arm of the State. It does so however, only after erroneous treatment of some familiar principles of law implementing the First Amendment's Establishment and Speech Clauses, and by viewing the very funds in question as beyond the reach of the Establishment Clause's funding restrictions as such," *Rosenberger v. Rector and Visitors of the University of Virginia*, 863 (Souter, J., dissenting).

[131] Ibid., 868 (Souter, J., dissenting).

[132] *Rosenberger v. Rector and Visitors of the University of Virginia,* 868, quoting Madison, Memorial and Remonstrance.

[133] *Rosenberger v. Rector and Visitors of the University of Virginia*, 873-874 (Souter, J., dissenting).

Souter's historical analyses were first adopted by the full Court in *McCreary,* one of two cases on the subject of public displays of the Ten Commandments that the Court handed down on the same day in 2005. The *McCreary* case involved displays of the Ten Commandments on the walls of courthouses in Kentucky. Although these displays were part of a larger display about "The Foundations of American Law and Government," the Court found that this display and its predecessors, all of which appealed to the common religious influences of the legal documents on display, failed to espouse a secular purpose: "The judges in the majority [on the Sixth Circuit Court of Appeals, whose judgment the Court affirmed] understood the identical displays to emphasize a 'single religious influence, with no mention of any other religious or secular influences,' and they took the very history of the litigation as evidence of the Counties' religious objective."[134]

As in *Lee,* Souter continues to argue that the purpose of the Religion Clauses is to ensure government "neutrality" in matters of religion: "The touchstone of our analysis is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion'."[135] Moreover, as the Court's precedents have acknowledged, the clause requires neutrality in order to prevent "divisiveness" in matters of religion: "By 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 messages to adherents that they are insiders, favored members…'."[136]

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[134] *McCreary County v. ACLU,* 858.
[135] Ibid., 860.
[136] Ibid. The Court articulated the goal of preventing divisiveness in *Santa Fe Independent School District v. Doe,* holding that public prayer before football games "encourages divisiveness along religious lines in a public school setting, a result at odds with the Establishment Clause," 530 U.S. 290, 311 (2000). In *Lynch v. Donnelly,* the Court had previously held that the potential for divisiveness was not enough to trigger a violation of the Establishment Clause: "…this Court has not held that political divisiveness alone can serve to invalidate otherwise permissible conduct," 645 U.S. 684 (1984).

Neutrality, of course, does not settle all matters of religion, but Souter points out that it is an important first step that the Framers sought: "To be sure, given its generality as a principle, an appeal to neutrality alone cannot possibly lay every issue to rest, or tell us what issues on the margins are substantial enough for constitutional significance, a point that has been clear from the founding era to modern times. [...] But invoking neutrality is a prudent way of keeping sight of something the Framers of the First Amendment thought important."[137]

Souter's opinion thus turns to a direct response to Scalia's dissent, which seeks to defend nonpreferential aid to religion—such as public Ten Commandments displays—on historical grounds. Scalia looks to the actions of the First Congress and early presidents, as he does in *Lee*. Souter directly answers Scalia, arguing that he selectively interprets history: "[T]he dissent's argument for original understanding is flawed from the outset by its failure to consider the full range of evidence showing what the Framers believed."[138] Souter, citing his own concurrence in *Lee,* points out "The very language of the Establishment Clause represented a significant departure from early drafts that merely prohibited a single national religion, and the final language instead extended [the] prohibition to state support for 'religion' in general."[139] In order to more directly counter Scalia, Souter appealed to "the writings and practices of figures no less influential than Thomas Jefferson and James Madison."[140] Madison, according to Souter, "whom the dissent claims as supporting its thesis, criticized Virginia's general assessment tax not just because it require people to donate 'three pence' to religion, but because it 'is itself a signal of persecution. It degrades from the equal rank of Citizens all those whose opinions in Religion do

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[137] *McCreary County v. ACLU,* 876.
[138] Ibid., 877.
[139] Ibid., 878.
[140] Ibid., 878.

not bend to those of the Legislative authority'."[141] Government sponsored displays of the Ten Commandments that are supported by taxpayer dollars amount to the same kind of degradation.

The Establishment Clause, therefore, as Souter has consistently held throughout his tenure on the Court, does not permit nonpreferential aid to, or nonsectarian endorsement of, religion. Assessing the history of the Establishment Clause's development, as well as the same evidence as Scalia, Souter held, "The fair inference is that there was no common understanding about the limits of the establishment prohibition, and the dissent's conclusion that its narrower view was the original understanding stretches the evidence beyond its tensile capacity."[142] For Souter, history cannot always provide conclusive answers to all Establishment Clause questions. However, unlike for Scalia, for Souter the available historical evidence strongly supports a presumption that the original meaning was one of strict separation.

In the other Ten Commandments case, *Van Orden v. Perry*,[143] the Court upheld a Ten Commandments display on the grounds of the Texas State Capitol, largely on the grounds that the display had existed on the building grounds for over 40 years without incident.[144] The Court's judgment, delivered by Chief Justice Rehnquist, was "driven both by the nature of the monument and by our nation's history."[145] For Rehnquist, the nature of the monument was inherently passive and that the petitioner himself failed to take offense to the display for years before filing suit.[146] The monument was also the gift of a secular organization, for a secular

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[141] Ibid. [internal citations omitted].
[142] Ibid., 879 [internal citations omitted]. For further discussion on the Founders' disagreement on the original meaning of the Religion Clauses, see Muñoz, *God and the Founders*. Muñoz argues that the use of originalism in "church-state jurisprudence has led to the assumption that because the religion clauses of the First Amendment must each have one original meaning, the Founders more generally shared a uniform understanding of the proper relationship between church and state." *God and the Founders*, 3. Rather, "the leading Founders disagreed about the meaning of religious freedom and how church and state ought to be separated." *God and the Founders*, 3.
[143] *Van Orden v. Perry,* 545 U.S. 677 (2005).
[144] Ibid., 682, 691.
[145] Ibid., 686.
[146] Ibid., 691.

purpose. Furthermore, "Texas has treated its Capitol grounds monuments as representing the several strands in the State's political and legal history,"[147] since it exists in the context of "17 other and 21 historical markers commemorating the 'people, ideals, and events that compose Texan identity'."[148] Justice Stephen Breyer, the swing vote in *Van Orden* and *McCreary,* decided that the display in *Van Orden* "serv[ed] a mixed but primarily nonreligious purpose, not primarily 'advanc[ing]' or 'inhibiti[ing]' religion,"[149] given its background. In *McCreary,* Breyer joined Souter's opinion, signaling his concurrence that the Ten Commandments display in that case served a more demonstrably religious purpose.

Justice Souter's *Van Orden* dissent does not make the thorough appeal to history that his previous opinions do, though he continues his strict separationist view. Perhaps he believed the facts of the *McCreary* case, which was handed down the same day as *Van Orden*, more readily lent themselves to some kind of historical analysis. Souter believes that the display is patently religious rather than historical, and that the context of the display on the Texas capitol grounds fails to withstand scrutiny: "17 monuments with no common appearance, history, or esthetic role scattered over 22 acres is not a museum, and anyone strolling around the lawn would surely take each memorial on its own terms without any dawning sense that some purpose held the miscellany together more coherently than fortuity and the edge of the grass."[150]

Substantive Neutrality and the Free Exercise Clause

The Court generally analyzes the Religion Clauses separately, with clear distinctions between "Establishment Clause cases" and "Free Exercise Clause cases." Such bifurcation eases the analysis, particularly for originalist justices, since it allows for discussions of the differing

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[147] Ibid.
[148] Ibid., 681.
[149] Ibid., 703 (Breyer, J., concurring in judgment).
[150] Ibid., 742-743 (Souter, J., dissenting).

goals of the clauses separately. It also enables justices, such as Scalia, to posit different standards for each clause: for example, allowing public prayer in Establishment Clause cases based on the practices of the Framers, while denying exemptions in Free Exercise Clause cases, based not on history at all, but on a vague commitment to an amorphous sense of law and order.

In his confirmation hearings, Souter recognized the inherent tension between the Establishment and Free Exercise Clauses as a "problem for the Court to deal with."[151] Justice Souter's jurisprudence thus aims to synthesize the two clauses, as he believes the Founders intended: "The First Amendment forbids not just laws 'respecting an establishment of religion,' but also those 'prohibiting the free exercise thereof'."[152] Reading the clauses together necessarily implies that government must meet the demands of both clauses and balance the competing interests—separation versus individual freedom—accordingly. As previously discussed, Souter believes government coercion to be an element a Free Exercise violation, not an Establishment Clause violation, as both the majority (Kennedy) and the minority (Scalia) in *Lee* argue. Souter suggests that precedent and history presuppose that "a literal application of the coercion test would render the Establishment Clause a virtual nullity."[153] We must instead assume that both clauses are to be taken as complementary and that each has meaning: "While one may argue that the Framers meant the Establishment Clause simply to ornament the First Amendment, that must be a reading of last resort. Without compelling evidence to the contrary, we should presume that the Framers meant the Clause to stand for something more than petitioners attribute to it."[154]

Souter's analysis of the Free Exercise Clause is scattered throughout his Establishment Clause opinions, including *Lee,* but his most succinct rendition is found in *Hialeah,* where he

[151] Senate Committee on the Judiciary, 148.
[152] *Lee v. Weisman*, 621 (Souter, J., concurring).
[153] Ibid. (Souter, J., concurring).
[154] Ibid. (Souter, J., concurring).

questions the Court's opinion *Smith.* In *Hialeah,* Justice Souter agreed with the Court that the law violated the Free Exercise Clause, but wrote separately to critique the *Smith* rule as a whole. Specifically, Souter condemns the *Smith* test's definition of neutrality:

> Though *Smith* used the term 'neutrality' without a modifier, the rule it announced plainly assumes that free-exercise neutrality is of the formal sort. Distinguishing between laws whose 'object' is to prohibit religious exercise and those that prohibit religious exercise as an 'incidental effect,' *Smith* placed only the former within the reaches of the Free Exercise Clause; the latter, laws that satisfy formal neutrality, *Smith* would subject to no free-exercise scrutiny at all, even when they prohibit religious exercise in application.[155]

Thus, Souter openly opposes the Court's formally neutral stance in matters of religion. It is unacceptable that laws that do not target any religion (that is, are "generally applicable") but may incidentally burden some religious practice, pass constitutional muster.[156]

Instead, Souter hopes to adopt the position of the dissenters in *Smith,* a position he terms "substantive neutrality."[157] Souter writes, "The rule these Justices saw as flowing from free-exercise neutrality, in contrast to the *Smith* rule, 'requir[es] the government to justify *any* substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest'."[158]

While Souter undertakes a detailed review of the Court's Free Exercise Clause precedents and concludes that the *Smith* rule is inconsistent with the Court's case law,[159] he also, as he does

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[155] *Church of the Lukumi Babalu Aye v. Hialeah*, 562 (Souter, J, concurring in part and concurring in the judgment).

[156] See *Church of the Lukumi Babalu Aye v. Hialeah*, 563 (Souter, J, concurring in part and concurring in the judgment).

[157] Ibid., 562 (Souter, J, concurring in part and concurring in the judgment).

[158] Ibid., 563 (Souter, J, concurring in part and concurring in the judgment), quoting *Employment Division, Department of Human Resources of Oregon v. Smith*, 894 (opinion of O'Connor, J.).

[159] "While the tension on which I rely exists within the body of our extant case law, a rereading of that case law will not, of course, mark the limits of any enquiry directed to reexamining the *Smith* rule, which should be reviewed in light not only of the precedent on which it was rested but also of the text of the Free Exercise Clause and its

in his Establishment Clause cases, turns, at least in part, to historical evidence to ground his opposition to the rule. Looking at the text alone, Souter concludes, "The Clause draws no distinction between laws whose object is to prohibit religious exercise and laws with that effect, on its face seemingly applying to both."[160] He also notes the Court's failure to review the history of the Free Exercise Clause since its very earliest Free Exercise Clause cases toward the end of the nineteenth century.[161] While he declines to undertake a full analysis himself in this case,[162] he invokes the scholarship of others, including Michael McConnell,[163] to conclude that

> There appears to be a strong argument from the Clause's development in the First Congress, from its origins in the post-Revolution state constitutions and the pre-Revolution colonial charters, and from the philosophy of rights to which the Framers adhered, that the clause was originally understood to preserve a right to engage in activities necessary to fulfill one's duty to one's God, unless those activities threatened the rights of others or the serious needs of the State. If, as this scholarship suggests, the Free Exercise Clause's original "purpose [was] to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority," *School Dist. Of Abington v. Schempp,* 374 U.S., at 223, then there would be powerful reason to interpret the Clause to accord with its natural reading, as applying to all laws prohibiting religious free exercise in fact, not just at those aimed at its prohibition, and to hold the neutrality

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origins," *Church of the Lukumi Babalu Aye v. Hialeah*, 574 (Souter, J, concurring in part and concurring in the judgment).

[160] Ibid. (Souter, J, concurring in the judgment).

[161] Ibid., 574-575 (1993) (Souter, J, concurring in part and concurring in the judgment).

[162] "This is not the place to explore the history that a century of free-exercise opinions have overlooked…," *Church of the Lukumi Babalu Aye v. Hialeah,* 575 (Souter, J, concurring in part and concurring in the judgment).

[163] See Michael W. McConnell, "The Origins and Historical Understanding of Free Exercise of Religion," tracing the development of the Free Exercise Clause and arguing that the Free Exercise Clause requires exemptions from laws of general applicability for religious believers who are burdened by such laws: "Without overstating the force of the evidence…it is possible to say that the modern doctrine of exemptions is more consistent with the original understanding than is a position that leads only to the facial neutrality of legislation." "Origins and Historical Understanding," 1512.

needed to implement such a purpose to be the *substantive neutrality of our pre-*Smith *cases, not the formal neutrality sufficient for constitutionality under* Smith.[164]

By pointing to McConnell's discussion of the development of the Free Exercise Clause in the First Congress, Souter declares his understanding of the Free Exercise Clause to require substantive neutrality. In writing that the "Free Exercise Clause's original 'purpose [was] to secure religious liberty in the individual," Souter implies that the Court should not construe the Clause narrowly as to protect only against laws that openly discriminate against religious believers. Rather, "our common notion of neutrality is broad enough to cover not merely what might be called formal neutrality…but also what might be called substantive neutrality, which, in addition to demanding a secular object, would generally require government to accommodate religious differences by exempting religious practices from formally neutral laws."[165]

Thus, Souter seems to adopt a tone of Madisonian thought in matters of free exercise in finding that a citizen's duty to his God supersedes his duties to the state.[166] Substantive neutrality involves ensuring that the state does not trample on the *individual* right of religious free exercise. The *Smith* rule (formal neutrality) ensures that government may not *target* religious practices, but substantive neutrality ensures that government actions do not have the *effect* of burdening religious belief.

Substantive Neutrality in All Religion Clause Cases

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[164] *Church of the Lukumi Babalu Aye v. Hialeah*, 575-576 (Souter, J, concurring in part and concurring in the judgment) [emphasis added]. See also McConnell, "Origins and Historical Understanding of Free Exercise of Religion."

[165] Ibid., 561-562 (1993) (Souter, J, concurring in part and concurring in the judgment)

[166] See Madison, Memorial and Remonstrance. Madison writes that being a subject of God precedes membership in the state: "It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the General Authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no mans right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance."

Though he first uses the term “substantive neutrality” in a Free Exercise Clause case, Justice Souter’s conception of substantive neutrality is not limited to Free Exercise Clause analysis. Rather, his jurisprudence aims to balance the Free Exercise and Establishment Clauses by interpreting them within the context of one another and not simply as separate constitutional provisions. Under this approach, Justice Souter requires a different standard of scrutiny for state action in Establishment Clause cases than does Justice Kennedy or Justice Rehnquist, and aims to offer more judicial protection for religious believers than does Justice Scalia.[167] That is, formal neutrality fails to adequately protect religious liberty, the coercion and endorsement tests fail to adequately keep government out of the lives of religious individuals, *and* laws must not foster divisiveness along religious lines. While the Court’s cases have acknowledged all of these tests, at no point have they unified them to produce a unified, coherent, and balanced level of scrutiny for Religion Clause cases.

Substantive neutrality, as this unified standard, would ensure that government remains permissibly separate from religion under the Establishment Clause while accommodating the individual liberty required by the Free Exercise Clause. Specifically, the Free Exercise Clause may, under some circumstances, trump the restrictions of the Establishment Clause. While Justice Souter is ultimately a strict separationist in his Establishment Clause jurisprudence, he acknowledges that state accommodation of religion may in fact be permissible under some circumstances: “Whatever else may define the scope of accommodation permissible under the Establishment Clause, one requirement is clear: accommodation must lift a discernable burden

[167] For more discussion of Justice Souter and substantive neutrality generally, see Liza Weiman Hanks, “Justice Souter: Defining ‘Substantive Neutrality’ in an Age of Religious Politics,” *Stanford Law Review* 48 (1996). “Under his analysis, all challenged actions are subjected to the same level of constitutional scrutiny. Whether a law specifically aims at religious practice, or has only incidental effects upon it, is constitutionally irrelevant; similarly, whether a law intends to accommodate religious belief or incidentally involves government in religious practices is constitutionally irrelevant. What is relevant is whether or not such laws violate the principles of voluntarism, neutrality, and nondivisiveness in either form or effect.” *Id.*, 925.

on the free exercise of religion."[168] Under this standard, government may offer a benefit to religion only if some government provision tends to actively burden religion. For Souter, the graduation prayer in *Lee* "crossed the line from permissible accommodation to unconstitutional establishment,"[169] since *disallowing* the prayer would not have actively burdened religious believers. Conversely, in *Hialeah,* the animal sacrifice statute at issue not only burdened a major religious practice of the Santeria religion, but also directly targeted that religion. Allowing practitioners of Santeria to sacrifice animals in accordance with their faith would not be a constitutionally invalid establishment of Santeria, but rather a constitutionally mandated accommodation under the Free Exercise Clause.

Justice Souter's position in most of these cases aims to ground his reasoning for substantive neutrality in the history of the Religion Clauses. Justice Souter's use of history in religion cases squarely indicates his originalist tendency to determine the meaning of the text of the Establishment and Free Exercise Clauses. By looking to the Founders thoughts and practices, and particularly by repeatedly reaffirming the Court's first major originalist strict separationist holding in *Everson,* he aims to bring greater historical legitimacy to the Court's Establishment Clause jurisprudence than he believes Justice Scalia is able to offer.[170] Simultaneously, he seeks to introduce the historical meaning of free exercise into the Court's jurisprudence altogether. Souter himself writes, "[W]hether or not one considers the original designs of the Clause binding, the interpretative significance of those designs surely ranks in the hierarchy of issues to be explored…"[171] These "designs" include evidence of pre-Revolutionary theories proffered by the Founders, the drafting of the Religion Clauses, Founding-era state constitutions, and other

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[168] *Lee v. Weisman*, 629 (Souter, J., concurring).
[169] Ibid.
[170] See note 138 above.
[171] *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 577 (Souter, J., concurring in part and concurring in the judgment).

documents and information. By undertaking this analysis, Souter engages in a sincere attempt to discover the broader original meaning.

IV. Conclusion: Scalia v. Souter in the Search for Original Meaning

In the previous two chapters, we exposed and evaluated the jurisprudential decisionmaking of Justice Scalia and Justice Souter with regard to the Religion Clauses. In nearly every significant case, Scalia and Souter ruled on opposite sides. Nevertheless, both of these justices employed similar, though not identical, methods in their analysis of the constitutionality of the statutes in question. This chapter aims to explore what accounts for the differences in outcomes between these two jurists, given the similarities between their approaches to the history. Presumably, originalism, having discerned the objective original meaning of the text, would produce reliably replicable results in repeated analyses. That is, if multiple justices evaluate the history correctly, they should feel compelled to rule the same way. Why then, do Scalia and Souter differ? In this chapter, I will answer this question by laying out the choices each justice makes in terms of which historical facts to cite and analyze, as well as by evaluating the success of each in terms of making a complete analysis.

Ideologically, it is well established that Justice Scalia is a conservative.[172] His Establishment Clause cases, as demonstrated in Chapter 2, tend toward accommodation of religious belief and a tolerance for public expression of religion.[173] On the Free Exercise Clause, he prefers the generally conservative position of denying exemptions from generally applicable laws that burden religious believers (formal neutrality).[174] Justice Souter, on the other hand, leans toward greater liberalism in Religion Clause cases. He tends toward stricter separation on

[172] George Kannar, "The Constitutional Catechism of Antonin Scalia," *Yale Law Journal* 99 (1990), 1299.
[173] See note 54 above.
[174] Laycock implies that formal neutrality is simpler to apply than the alternative, substantive neutrality, because substantive neutrality "requires judgments about the relative significance of various encouragements and discouragements to religion." "Formal, Substantive, and Disaggregated Neutrality," 1004. This lack of "judgment calls" in applying formal neutrality most closely resembles the conservative judicial philosophy that aims to avoid the Court's second-guessing of elected legislatures in constitutional cases. See Scalia, "Originalism," 854.

Establishment Clause cases, proscribing state endorsements of religion.[175] Simultaneously, he believes that the individual liberty of Free Exercise must be protected from infringement by the state, specifically by strict scrutiny (substantive neutrality) in judicial review of cases where generally applicable and facially neutral laws burden a religious practice.[176]

There are only subtle differences between the methodologies that Scalia and Souter employ within the broader originalist framework. For Scalia, the raw text of the clauses, with the original meaning expounded by the official actions of the Founders and those political leaders that have followed them are essential to the interpretation of the Constitution.[177] Souter, on the other hand, aims to present a different kind of analysis, tracing the history of the drafting of the clauses, including the intellectual precursors to the drafting (i.e., Madison's Memorial and Remonstrance, Jefferson's Virginia Statute for Religious Freedom, and Jefferson's Letter to the Danbury Baptist Association) rather than focusing only on the practices of the individual Founders. The nuances end there. On the whole, both justices undertake classic textual originalist analyses that explicitly seek to elucidate the original understanding the Founders had of the First Amendment Religion Clauses. The deviation between their outcomes, therefore, must result from the substance of the history each dissects.

Scalia's choice of facts unabashedly focuses on the official acts that the Founders and early leaders of the federal government undertook to publicly acknowledge religion. Responding to the Court's (Justice Souter's) and Justice John Paul Stevens's criticisms in *McCreary* and *Van Orden* that he focuses on "mere 'proclamations and statements' of the Founders,"[178] Scalia retorts,

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[175] See note 119 above.
[176] See note 164 above.
[177] *McCreary County v. ACLU,* 895 (Scalia, J., dissenting).
[178] Ibid.

> I have relied primarily upon *official acts and official proclamations* of the United States or of the component branches of its Government, including the First Congress's beginning of the tradition of legislative prayer to God, its appointment of congressional chaplains, its legislative proposal of a Thanksgiving Proclamation, and its reenactment of the Northwest Ordinance; our first President's issuance of a Thanksgiving Proclamation; and invocation of God at the opening sessions of the Supreme Court.[179]

For Scalia, these citations are enough to satisfy his inquiry into the original understanding of the Establishment Clause: "What is more probative of the meaning of the Establishment Clause than the actions of the very Congress that proposed it, and of the first President charged with observing it?"[180]

Scalia does not simply reaffirm his commitment to probing the actions of the First Congress and President Washington, but also expressly dismisses Souter's and Stevens's more detailed analysis as patently irrelevant:

> The Court and JUSTICE STEVENS…appeal to no official or even quasi-official action in support of their view of the Establishment Clause—only James Madison's Memorial and Remonstrance Against Religious Assessments, written before the Federal Constitution had even been proposed, two letters written by James Madison long after he was President, and the quasi-official *inaction* of Thomas Jefferson in refusing to issue a Thanksgiving Proclamation. The Madison Memorial and Remonstrance, dealing as it does with enforced contribution to religion rather than public acknowledgement of God, is irrelevant; one of the letters is utterly ambiguous as to the point at issue here, and should not be read to contradict Madison's statements in the first inaugural address,

[179] Ibid. [emphasis added]
[180] Ibid., 896-897 (Scalia, J., dissenting).

> quoted earlier; even the other letter does not disapprove public acknowledgment of God, unless one posits (what Madison's own actions as President would contradict) that reference to God contradicts "the equality of *all* religious sects."[181]

For Scalia, therefore, Souter's inquest into the history of the Establishment Clause fails to capture the true understanding of the Founders. Although Madison was the chief drafter of the Clause in the First Congress, because his writings either did not apply specifically to the facts at hand (as for the Memorial and Remonstrance), or because they did not reflect any official state action (as for his letters), Scalia suggests that they simply do not reflect how the Founders generally understood the Clause. Madison's general theories surrounding the separation of church and state, for Scalia, are not relevant to whether or not public officials can acknowledge a deity.

Scalia's approach to adjudication does not at all comport with his professed originalist methodology. What his opinion fails to consider, is that a public religious act might still be objectively unconstitutional, even if a Founder engaged in it.[182] That is, simply because James Madison or George Washington were both involved in writing the Constitution, acted as major public officials in the early United States, and may have engaged in certain public religious activities, does not mean that Madison and Washington were not capable of violating the Constitution that they composed. Scalia offers the "practice" of the Founders as a shortcut for the full originalist analysis that he believes the reality of the Supreme Court impedes, but fails to consider that the Founders were human and that their actions as individual political actors may not necessarily have squared with their own beliefs as constitutional drafters.

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[181] Ibid., 895-896.
[182] Souter does, however, make this point in *Lee.* See note 125 above.

Moreover, simply because the true originalist evidence would be too vast to adequately introduce, discuss, and analyze, does not mean that the shortcut Scalia offers fills the void. Rather, it suggests a sort of academic laziness on Scalia's part. Because "[n]owadays, of course, the Supreme Court does not give itself as much time to decide cases as was customary in [the 1920s],"[183] Scalia's approach thus suggests that mere time constraints render any attempt at a full historical exposition pointless, or a poor use of time at best. In this sense, his practical methodology all but ignores his asserted originalist theory.

Thus, because Scalia's technique lends determinative weight to the *actions* officials of the Founding generation may have performed, and given the actions he offers as evidence, this approach produces a clear prejudice toward more tolerance for public religious observance. Moreover, this commitment to both the text of the clause ("[Words] have meaning enough…"[184]) and tradition and historical practice ("the meaning of the Clause is to be determined by reference to historical *practices* and understandings"[185]) does not leave Justice Scalia with much breathing room to examine the broader history of the Religion Clauses anyway.[186] Even less evident, given this approach, is the *need* for any deeper historical inquiry: If a few Founders prayed in public, then public prayer must be constitutional. Scalia insists we need look no further.

In a further display of irony, Scalia's Free Exercise Clause opinion in *Smith* fails to cite history in detail at all. In a phrase he once addressed to others, it "is conspicuously bereft of any

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[183] Scalia, "Originalism," 860.
[184] Scalia, "Originalism," 856.
[185] *Lee v. Weisman*, 631 (Scalia, J., dissenting), quoting *County of Allegheny v. ACLU*, 670 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part) [emphasis added]. See also, Scalia, "Is There an Unwritten Constitution?"
[186] Kannar argues that Justice Scalia does not, generally speaking, find full historical analysis useful in constitutional interpretation: "History in the usual originalist sense is little, if any, help," "Constitutional Catechism of Antonin Scalia," 1305. Rather, the history of *language,* that is, a history of the *text* is more helpful: "Fortunately, according to Scalia, there is also an 'unwritten constitution' from which one may seek guidance, a 'history of meaning in the words contained in the Constitution without which the Constitution itself is meaningless.' The study of language can thus supplement, if not displace, the problematic and time-consuming study of history in constitutional cases, and the study of words' conventional, 'ordinary' meanings can provide an alternative to ad hoc 'policy' assessments for interpreting the Constitution whenever history fails." *Id.*, 1305-1306.

reference to history."[187] This implies either that he simply is inconsistent in his application of originalism, that he recognizes that the original meaning of the Free Exercise Clause simply did not embrace the formal neutrality standard he proffers in *Smith,* or that he simply does not believe original meaning is at issue at all in *Smith.*

Scalia's opinion in *Boerne* offers a cursory analysis that at least attempts to discredit O'Connor's historical evidence. However, his analysis in *Boerne* cannot fully exonerate him for his failures in *Smith.* In the first place, in *Lee* Scalia had specifically highlighted the importance of history to Establishment Clause interpretation.[188] He makes no such assertion about Free Exercise Clause interpretation. Moreover, in *Boerne,* Scalia suggests that *Smith,* and Free Exercise Clause jurisprudence altogether, was never really about the original meaning of the Free Exercise Clause anyway, thus implicitly explaining why he chose not to undertake the historical analysis in *Smith*: "The issue presented by *Smith* is, quite simply, whether the people, through their elected representatives, or rather this Court, shall control the outcome of those concrete cases…. It shall be the people."[189] For Scalia, the legislatures are better equipped than the Court to determine whether religious believers should receive exemptions from generally applicable laws. Whether or not the original meaning of the First Amendment required exemptions, though Scalia contends it did not, was not the primary inquiry.

Boerne also fails to fully undertake the kind of *original* historical analysis that Scalia's Establishment Clause opinions, and Souter's religion case opinions, generally espouse. In *Boerne,* Scalia by his own admission limits his historical discussion to the very evidence that

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[187] *Lee v. Weisman*, 631 (Scalia, J., dissenting).
[188] See note 31 above.
[189] *City of Boerne v. Flores,* 544 (Scalia, J., concurring in part).

Justice O'Connor had presented, and simply aims to turn her evidence on its head.[190] Simultaneously, he fails to address Souter's historical evidence in *Hialeah* at all. Souter's *Hialeah* opinion, like O'Connor's *Boerne* opinion, directly challenges *Smith*. In *Hialeah,* Souter offers evidence similar to O'Connor's *Boerne* opinion, but Scalia declines to engage Souter. Thus, in failing to address Souter and in opposing O'Connor, Scalia offers no new evidence of his own of any kind beyond the dictionary definition of "disturbing the peace." The dearth of history in *Smith* and the failure to include his own evidence in *Boerne* suggests Scalia's unwillingness to apply a full originalist analysis to Free Exercise Clause cases.

Toward True Originalism: Adjudicating Religion Clause Cases under Scalia's Standard

Any true originalist analysis must include a survey of the evidence of what the Founders thought prior to the drafting, since their principles of religious liberty are the ideals that informed the drafting. Obviously, since Justice Scalia unambiguously repudiates Justice Souter's historical analysis in Establishment Clause cases, the latter's choice of historical facts contrasts sharply with that of the former. Rather than rely on historical practice, Souter's review of the history aims to delve a bit deeper into the history to discern the original understanding. In writing "[W]hether or not one considers the original designs of the Clause binding, the interpretative significance of those designs surely ranks in the hierarchy of issues to be explored…,"[191] Souter implies that the beliefs of the Founders *before* the actual drafting are indeed relevant. The "original designs" of the Establishment Clause are surely found in the pre-First Amendment era. Looking to the theoretical understanding of the Founders, particularly Madison and Jefferson, as

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[190] "I have limited this response to the new items of 'historical evidence' brought forward by today's dissent….The historical evidence marshaled by the dissent cannot fairly be said to demonstrate the correctness of *Smith,* but it is more supportive of that conclusion than destructive of it." *City of Boerne v. Flores,* 543-544 (Scalia, J., concurring in part).

[191] *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 577 (Souter, J., concurring in part and concurring in the judgment).

well as the very drafting of the Establishment Clause in the First Congress, is for Souter essential to determining its original understanding.

Souter himself contrasts his approach with Scalia's in *McCreary,* by pointing out that Scalia's methodology is fundamentally self-limiting: "[T]he dissent's argument for the original understanding is flawed from the outset by its failure to consider the full range of evidence showing what the Framers believed."[192] Souter concedes that Scalia's interpretation of the history may be factually correct, but that it fails to account for any evidence beyond individual Framers' public religious expressions. Referring to Scalia's citing of Washington's Farewell Address, Souter writes, "The dissent is certainly correct in putting forward evidence that some of the Framers thought some endorsement of religion was compatible with the establishment ban…"[193] He then discounts Scalia's analysis by reiterating Scalia's failure to broaden his evidence:

> Surely if expressions like these from Washington and his contemporaries were all we had to go on, there would be a good case that the neutrality principle has the effect of broadening the ban on establishment beyond the Framers' understanding of it…*But the fact is that we do have more to go on*, for there is also evidence supporting the proposition that the Framers intended the Establishment Clause to require governmental neutrality in matters of religion...[194]

Souter therefore discredits the limitations Scalia puts on the scope of his own evidence. Yes, official actions of individual Founders are valid evidence, but *other* valid evidence also exists. Souter thus insists that his own broader analysis of the historical evidence surrounding the Religion Clauses offers at least a more compelling historical case for his decision.

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[192] *McCreary County v. ACLU*, 877.
[193] Ibid.
[194] Ibid., 877-878 [emphasis added].

Ironically, Souter undertakes, or at least attempts to undertake, the very sort of analysis that Scalia suggests would constitute a proper, or fully originalist, constitutional exegesis. Scalia himself points out that a truly complete originalist interpretation would require fully expounding the meaning of the text:

> Properly done, the task requires the consideration of an enormous mass of material—in the case of the Constitution and its Amendments for example, to mention only one element, the records of the ratifying debates in all the states. Even beyond that, it requires an evaluation of the reliability of that material… And further still, it requires immersing oneself in the political and intellectual atmosphere of the time—somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day. It is…a task sometimes better suited to the historian than the lawyer.[195]

Of course, as already discussed, Scalia believes that the Court's schedule would not permit justices to undertake such a monumental task in each opinion. Nevertheless, it seems that Souter prefers to make the attempt, albeit impossible by Scalia's standards, that Scalia would claim to overcome by focusing on text and tradition rather than textual development.[196] Thus, Souter simply undertakes the sort of true historical analysis that Scalia believes is thwarted only the Court's workload.

Since both of these justices lend great weight to historical analysis, it seems, *prima facie,* that both ground their jurisprudence in the same body of historical evidence. Logically, then, both justices would reach the same conclusions on Religion Clause cases, presuming, of course,

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[195] Scalia, "Originalism," 856-857.

[196] Souter's opinion in *Lee* reflects this same preference for drawing his own conclusions about the history of the religion clauses, "…*I find* in the history of the Clause's textual development a more powerful argument supporting the Court's jurisprudence following *Everson," Lee v. Weisman*, 612 (Souter, J., concurring) [emphasis added].

that their historical accounts are factually correct and consistent with one another. One difference that leads to their almost polar opposite standards for religion cases, namely formal versus substantive neutrality, is therefore rather subtle: Where Scalia looks to the history of the *meaning* of the text and the *practical* understanding of the founding generation (including both actions and contemporary dictionary definitions), Souter looks to the history of the *development* of the text, and the *theoretical* understanding of the Framers.

These differences seemingly call into question the legitimacy of originalism itself, or at least of the overall probative value originalism has for constitutional explication. If each justice analyzes factually correct history, then it should follow that both justices will reach the same conclusion based on originalist arguments. Given the Founders' own disagreement on the meaning of the First Amendment,[197] justices citing history would have to cite *exactly* the same evidence in order to reach the same conclusion. Clearly Scalia and Souter choose different types, and different substantive forms, of historical evidence, although all do reference prominent founders from the same time period.

These differences are simply the nature of historical analysis. Just as the Founders disagreed on the meaning of the text itself, the justices are free to disagree on which evidence most supports that meaning. As discussed, for example, Scalia does not believe, as Souter does, that Madison's Memorial and Remonstrance Against Religious Assessments, which condemns the evils of compulsory financial support for religious institutions, is at all germane to the question of whether government can publicly acknowledge the existence of God.[198] Another study may choose to breakdown the types of arguments each justice might find relevant for each kind of case, but taken on the aggregate, Scalia and Souter simply disagree on which pieces of

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[197] See note 142 above.
[198] See note 181 above.

evidence are most relevant to the originalist exposition of the meaning of the Establishment Clause.

Presupposing this sort of evidentiary "cherry picking," the question remains whether or not each justice adequately demonstrates that the Founders supported his position. Clearly each believes the other's analysis to lack *something.* Scalia believes that the scope of Souter's evidence is so broad as to rely on irrelevant information, while Souter believes that Scalia's analysis is too narrow to paint a complete picture of the historical context. Despite these irreconcilable differences, both justices, within the framework of their own historical arguments, successfully demonstrate what they set out to prove (namely their version of neutrality) while failing to fully discredit the other's approach to the history.

Scalia's reliance on the "official actions" of Founding era leaders is narrowly tailored to demonstrate that governmental neutrality is met in each case: In *Lee,* that nonsectarian public prayer is constitutionally sound, and in *McCreary* that government can likewise publicly acknowledge God without running afoul of the Establishment Clause. Such acknowledgement may encompass Thanksgiving Proclamations, legislative chaplains, prayer at presidential inaugurations, prayer at public school graduations, and posting the Ten Commandments in courthouses. In Scalia's words, "The history and tradition of our Nation are replete with public ceremonies featuring prayers of thanksgiving and petition."[199] In fact, he suggests that the Founders "knew that nothing, absolutely nothing, is so inclined to foster among religious believers of various faiths a toleration—no, an affection—for one another than voluntarily joining in prayer together, to the God whom they all worship and seek."[200] Because the Founders that Scalia cites all undertook actions that endorsed religion, and because they, as he argues,

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[199] *Lee v. Weisman*, 633 (Scalia, J., dissenting).
[200] Ibid., 646 (Scalia, J., dissenting).

found public good in public prayer, nonsectarian government recognition of religion passes constitutional muster.

Souter's historical arguments are, it seems, intentionally broader. By discussing both Madison and Jefferson's historical beliefs about separation of church and state, including the Memorial and Remonstrance and the Virginia Statute for Religious Freedom, Souter harkens back to Court's originalist strict separationist definition of the Establishment Clause in *Everson.*[201] In *Everson* the Court had relied on the Memorial and Remonstrance and the Virginia Statute, as well as Jefferson's letter to the Danbury Baptists, to conclude, "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."[202] In his consistent reaffirming of *Everson,* Souter implicitly offers his assent to the *Everson* Court's choice of historical evidence. In conducting his own historical analysis that relies on the same evidence as *Everson*, in addition to, as in *Lee,* evidence from the First Congress's debates on the Establishment Clause,[203] Souter expands the scope of analysis far beyond the scope of Scalia's analysis. Souter simply uses more evidence, and different evidence, than does Scalia.

Neither justice's approach offers a complete picture of the original meaning of the Religion Clauses. Scalia's approach has the benefit of being narrowly tailored to parallel the very questions he is trying to answer. That is, for example, in the public prayer case, he offers evidence of official actions by political leaders that suggest they understood the Establishment Clause to allow public acknowledgement of religion. However, this approach has the drawback of, as Souter correctly identifies, failing to consider the "full range of evidence."

[201] *Everson v. Board of Education of Ewing,* 330 U.S. 1, 12-18 (1947).
[202] Ibid., 18.
[203] See *Lee v. Weisman*, 612-615 (Souter, J., concurring).

Souter's approach, alternatively, has the clear and distinct advantage of including a wider "range of evidence" than Scalia's. Looking to what the Founders *thought* and communicated to one another as well as what the Founders *did* in their official political capacities, at the very least does nothing to detract from the goal of discerning original meaning. In fact, the broader the range of evidence considered, the more information will be available to determine the true original meaning, which is the very goal of originalism.[204] As already discussed, this, initially, seems like an attempt to meet the extraordinarily high standard that even Scalia himself sets for true originalism. Souter's approach, however, has the disadvantage of, being, perhaps, *too* ambitious. In citing evidence that encompasses theory beyond the facts of the case at hand, Souter opens himself to the sorts of criticisms regarding relevance that Scalia levies against him. Further, Souter's approach, though indeed assessing a wider range of evidence, faces a similar problem of narrowness that Scalia faces. While Souter offers *more* evidence than does Scalia, his broader approach also necessarily overlooks an even wider body of evidence, including such evidence as ratification debates, evidence from more accommodationist Founders like Patrick Henry, or even the same "official action" types of evidence that Scalia introduces.

Justices Scalia and Souter's opinions both, under Scalia's standards of pure originalism, fail to fully expound the historical evidence available for interpreting the Religion Clauses. Scalia, however, fails to even make the effort to fulfill his own vision of a truly originalist opinion. Even his critiques of Souter's evidence are completely illogical. They amount to

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[204] To be sure, pre-drafting evidence, such as Madison and Jefferson's writings, are the very kinds that the modern scholarly debate centers on (though certainly nothing precludes legal and historical academics from being wrong). For scholarship citing historical evidence beyond the official actions of Founding-era public officials, see generally, Robert L. Cord, "Church-State Separation: Restoring the 'No Preference' Doctrine of the First Amendment," *Harvard Journal of Law & Public Policy* 9 (1986); Hamburger, "A Constitutional Right of Religious Exemption"; Laycock, "Nonpreferential Aid"; Muñoz, "The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation," *University of Pennsylvania Journal of Constitutional Law* 8 (2006); Muñoz, "The Original Meaning of the Free Exercise Clause"; Muñoz, *God and the Founders*; McConnell, "Free Exercise Revisionism and the *Smith* Decision," *University of Chicago Law Review* 57 (1990); McConnell, "The Origins and Historical Understanding of the Free Exercise of Religion."

criticizing his counterpart for simply evaluating *more* evidence than he does. Instead of meeting the challenge and undertaking a true originalist opinion consistent with his professed constitutional principles, Scalia, in practice, ultimately allows Souter to use his approach against him.

Of course even Souter's analysis cannot possibly evaluate all the evidence. Indeed, the brewing scholarly debates surrounding originalism broadly, and the original meaning of the Religion Clauses specifically, only further complicate the legitimacy of either justice's historical arguments. Yet that these justices fail to produce academically airtight histories of the Religion Clauses, and that they are both self-aware of the limitations of their research, hardly discounts the validity of their attempts. Both justices clearly give a large measure of primacy to the history of the Establishment and Free Exercise Clauses in constitutional adjudication. Accordingly, attempting to expound upon the history of the clauses, particularly by looking to the Founders, offers their conclusions some theoretical legitimacy and carries the authority of the very individuals who wrote, ratified, and executed the original Constitution.

Nevertheless, it remains evident that a general reliance on history will not always produce uniform results. The Founders themselves differed in their approach to religion, and the United States Supreme Court is certainly no different. To be sure, ideological differences contribute to the outcome of any Supreme Court case, and one need look no further changes in jurisprudence that coincide with changes in personnel on the Court.[205] Yet beyond the ideological differences, Justices Scalia and Souter demonstrate that even method matters, even when evaluating a similar

[205] *See,* e.g., *Agostini v. Felton,* 521 U.S. 203 (1997), which upheld by a 5-4 vote that a federally funded program that provided supplemental or remedial instruction to religious school students on the premises of their sectarian school. *Agostini* overturned *Aguilar v. Felton,* 473 U.S. 402 (1985), which just twelve years before had overturned by a 5-4 vote a similar scheme as an unconstitutional establishment of religion. Between 1985 and 1997, Chief Justice Warren Burger, and Justices Harry Blackmun, William Brennan, Thurgood Marshall, Lewis Powell, and Byron White had each been replaced on the Court by Justices Stephen Breyer, Antonin Scalia, David Souter, Clarence Thomas, Anthony Kennedy, and Ruth Bader Ginsburg, respectively.

body of evidence. Scalia's approach to text and tradition is internally consistent with his case-by-case assessments, but fail to meet his more global vision of originalist exposition. Souter's support for the substantive neutrality standard, by contrast, stems from a very different, and indeed a stronger reading of history. Thus, Souter strongly demonstrates that the historical basis of originalism is not limited to conservative accommodationism, but can in fact be a tool for both legitimizing substantive neutrality and for critically examining other originalist approaches to Religion Clause cases.

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