2016

Justice Scalia, the Establishment Clause, and Christian Privilege

Caroline Mala Corbin
University of Miami School of Law, ccorbin@law.miami.edu

JUSTICE SCALIA, THE ESTABLISHMENT CLAUSE, AND CHRISTIAN PRIVILEGE

Caroline Mala Corbin*

INTRODUCTION

Justice Scalia had an unusual take on the Establishment Clause. From its earliest Establishment Clause cases, the Supreme Court has held that the Clause forbids the government from first, favoring one or some religions over others, and second, favoring religion over secular counterparts.[1] Although Justice Scalia was not alone in questioning the second principle, he was uniquely vehement in challenging the first. In particular, he maintained that given the history and traditions of this country, the government could, consistent with the Constitution, express a preference for Christianity. Moreover, he tended to dismiss the idea that favoring one religion would undermine a main goal of the Establishment Clause, which is to protect religious minorities. Instead, he thought that the government's failure to favor Christianity expressed hostility to religion.

I want to suggest that Justice Scalia's view of the Establishment Clause exemplifies Christian privilege. In this analysis, I borrow from critical race studies and its analysis of white privilege. I do not mean to equate race and religion, which are obviously different and have very different histories in the United States. (Of course, they are not completely distinct either, as race and religion often overlap and intersect.)[2] Rather, I argue that insights from critical race studies can help illuminate Justice Scalia's relationship with the Establishment Clause.

---

* Professor of Law, University of Miami School of Law. I would like to thank Jean Phillip Shami for research assistance as well as the staff of the *First Amendment Law Review* for the invitation to their wonderful symposium..

[1] *See, e.g.*, Thomas B. Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 NW. U.L. REV. 1097, 1113 (2006) ("The principle of governmental neutrality among religions and between religion and nonreligion has been a central tenet of the Court's Establishment Clause jurisprudence for more than half a century [ ] in essence, from the very beginning.").

[2] For example, because most Muslims in the United States are not white, hostility towards Muslims may have a racial component. *See, e.g.*, *Section 1: A Demographic Portrait of Muslim Americans*, PEW RESEARCH CTR. (Aug. 30, 2011), http://www.people-press.org/2011/08/30/section-1-a-demographic-portrait-of-muslim-americans/ (finding that only 30% of U.S. Muslims identify as white).

Part I presents Justice Scalia's view of the Establishment Clause. Part II explores white privilege and white fragility and identifies three key insights. First, whites enjoy certain unearned privileges, including the fact that whiteness is the unstated racial norm. Second, these privileges are often invisible to those who possess them. Third, the loss of this privileged position is often experienced as hostility. Part III maps these insights onto Justice Scalia's Establishment Clause jurisprudence as well as his originalist theory of constitutional interpretation more generally.

I. JUSTICE SCALIA'S ESTABLISHMENT CLAUSE JURISPRUDENCE

In one of its early Establishment Clause cases, the Supreme Court explained that the Establishment Clause bars the government from favoring one religion over another, and from favoring religion over its secular counterpart: "[T]he First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."[3] These principles have been regularly reinforced in Establishment Clause decisions over the years.[4]

Justice Scalia disagreed with both. He repeatedly argued that the Establishment Clause does not bar the state from preferring religion over nonreligion. Thus, he proclaimed that "there is nothing unconstitutional in a State's favoring religion

[3] Epperson v. Arkansas, 393 U.S. 97, 104 (1968); *see also* McCreary Cty. v. ACLU of Ky., 545 U.S. 844, 860 (2005) ("The touchstone for our analysis is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'").

[4] *See, e.g.*, *McCreary Cty.*, 545 U.S. at 860 ("[T]he 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."); Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 703 (1994) ("[A] principle at the heart of the Establishment Clause [is] that government should not prefer one religion to another, or religion to irreligion."); Lee v. Weisman, 505 U.S. 577, 609–10 (1992) (Souter, J., concurring) ("Forty-five years ago, this Court announced a basic principle of constitutional law from which it has not strayed: the Establishment Clause forbids not only state practices that 'aid one religion . . . or prefer one religion over another,' but also those that 'aid all religions.'"); *id.* at 627 ("While the Establishment Clause's concept of neutrality is not self-revealing, our recent cases have invested it with specific content: the State may not favor or endorse either religion generally over nonreligion or one religion over others.").

generally"[5] and that "the Court's oft repeated assertion that the government cannot favor religious practice is false."[6]

On this question, Justice Scalia was not alone.[7] Chief Justice Rehnquist, for example, argued that the Founders never expressed concern about whether the federal government might aid all religions evenhandedly.[8] In fact, in religion clause scholarship, whether religion is special and merits special treatment is a perennial debate.[9]

However, the disagreement about whether it is unconstitutional to favor all religions does not extend to the question of whether the Establishment Clause permits favoring one or some religions over others. On that score, there is much less dispute. The same Supreme Court case that incorporated the Establishment Clause also held that "[t]he 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government . . . can pass laws which . . . prefer one religion over another."[10] This proposition has been acknowledged in most Establishment Clause decisions

---

[5] Van Orden v. Perry, 545 U.S. 677, 692 (2005) (Scalia, J., concurring).

[6] *McCreary Cty.*, 545 U.S. at 885 (Scalia, J., dissenting). Justice Scalia then lists numerous examples of historical religious practices and concludes: "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." *Id.* at 889 (internal citations omitted).

[7] Justice Thomas has his own idiosyncratic views. He maintains that the Establishment Clause does not apply to the states and therefore cannot serve as a limit on their religious activities. *See, e.g.*, Town of Greece v. Gallaway, 134 S. Ct 1811, 1835 (2014) (Thomas, J., concurring in judgment) ("As I have explained before, the text and history of the [Establishment] Clause 'resis[t] incorporation' against the States . . . . If the Establishment Clause is not incorporated, then it has no application here, where only municipal action is at issue.").

[8] Wallace v. Jaffree, 472 U.S. 38, 99 (1985) (Rehnquist, J., dissenting).

[9] *Compare* Andrew Koppelman, *Is It Fair to Give Religion Special Treatment?*, 2006 U. ILL. L. REV. 571 (2006), *and* Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 3 (2000), *with* Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245 (1994), *and* Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1365 (2012).

[10] Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947).

since then.[11] Typical is *Larson v. Valente*,[12] which states unequivocally: "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."[13]

Even when upholding programs and practices that have the effect of favoring some religions over others, the Supreme Court justifies that benefit as indirect or unintentional. Thus, a voucher program in which over 96% of government funds ended up at (mostly Catholic) religious schools[14] did not violate the Establishment Clause because it was the parents, not the government, that chose where to direct the money.[15] A legislative prayer program where the vast majority of invited chaplains gave Christian prayers did not violate the Establishment Clause because almost all the town's congregations were Christian and no one was intentionally excluded.[16] Meanwhile, the Court permitted Texas to display a Ten Commandments monolith on the State Capitol grounds despite its undeniably religious content[17] because the Court maintained that the government's aims were historical, not religious.[18] In other words, despite some questionable holdings, the Court has generally insisted that the

---

[11] *See, e.g.*, Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 8–9 (1989) ("It is part of our settled jurisprudence that 'the Establishment Clause prohibits government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization.'"); Cty. of Allegheny v. ACLU, 492 U.S. 573, 605 (1989) ("Whatever else the Establishment Clause may mean . . . it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed . . . .").

[12] 456 U.S. 228 (1982).

[13] *Id.* at 244.

[14] Zelman v. Simmons-Harris, 536 U.S. 639, 681 (2002) ("96 percent of students in the program attend religious schools.").

[15] *See id.* at 646.

[16] Town of Greece v. Galloway, 134 S. Ct. 1811, 1817 (2014) ("Although most of the prayer givers were Christian, this fact reflected only the predominantly Christian identity of the town's congregations, rather than an official policy or practice of discriminating against minority faiths."); *id.* at 1831 (2014) (Alito, J., concurring) (conceding that that intentionally discriminating against minority religions would violate the Establishment Clause).

[17] Van Orden v. Perry, 545 U.S. 677, 690 (2005) ("Of course, the Ten Commandments are religious—they were so viewed at their inception and so remain.").

[18] *Id.* at 689 (finding that display of Ten Commandments meant to acknowledge "the role the Decalogue plays in America's heritage . . .").

government cannot intentionally favor or advance particular faiths.[19]

Justice Scalia, however, disagreed. As far as Justice Scalia was concerned, the principle that the government can never favor one religion over another is "demonstrably false."[20] Granted, sometimes the government may not single out a religion for special favor, such as cases involving government funding.[21] Indeed, in one dissent Justice Scalia even wrote that "I have always believed, and all my opinions are consistent with the view, that the Establishment Clause prohibits the favoring of one religion over others."[22] But when it comes to the state revering God or the Ten Commandments, the Establishment Clause is no bar. "[T]here is nothing unconstitutional in a State[] . . . honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments."[23] On the contrary, preferring Christianity (or perhaps Judeo-Christianity) is inevitable:

> If religion in the public forum had to be entirely nondenominational, there could be no religion in the public forum at all. One cannot say the word "God," or "the Almighty," one cannot offer public supplication or thanksgiving, without contradicting the beliefs of some people that there are many gods, or that God or the gods pay no attention to human affairs. With respect to public acknowledgment of religious belief, it is entirely clear from our Nation's historical practices that the Establishment Clause permits this disregard of

---

[19] *Town of Greece,* 134 S. Ct. at 1824 (noting that a pattern of prayers that proselytized Christianity or denigrated other religions would be unconstitutional).
[20] McCreary Cty. v. ACLU of Ky., 545 U.S. 844, 893 (2005) (Scalia, J., dissenting) ("Besides appealing to the demonstrably false principle that the government cannot favor religion over irreligion, today's opinion suggests that the posting of the Ten Commandments violates the principle that the government cannot favor one religion over another.").
[21] *See id.* at 893 ("[The Establishment Clause bars preferring one religion over others] is indeed a valid principle where public aid or assistance to religion is concerned . . . or where the free exercise of religion is at issue . . . but it necessarily applies in a more limited sense to public acknowledgment of the Creator.") (citations omitted).
[22] Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 748 (1994) (Scalia, J., dissenting).
[23] Van Orden v. Perry, 545 U.S. 677, 692 (2005) (Scalia, J., concurring).

> polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists.[24]

In short, the government cannot thank God without favoring some religions, and therefore it cannot avoid disregarding "polytheists," "believers in unconcerned deities," "devout atheists," and anyone else who does not share a belief in the Judeo-Christian God.[25]

As to whether the Establishment Clause allows the state to honor God in the first place, Justice Scalia's answer is clear: of course it does, because these acknowledgements, and this type of favoritism, dates to the founding of our country. According to Justice Scalia, "the meaning of the [Establishment] Clause is to be determined by reference to historical practices and understandings."[26] Thus, the touchstone for the Establishment Clause is the country's history—"our interpretation of the Establishment Clause should compor[t] with what history reveals was the contemporaneous understanding of its guarantees"[27]—and traditions—"[t]he foremost principle I would apply is fidelity to the longstanding traditions of our people."[28]

This approach reflects the originalist theory of constitutional interpretation Justice Scalia espoused. In a nutshell, originalists believe we should understand the Constitution in the same way as the founding generation, and if they thought a government action was constitutional, then so

---

[24] *McCreary Cty.*, 545 U.S. at 893 (Scalia, J., dissenting).

[25] *See infra* notes 91-96, 116-121 and accompanying text (describing how "Judeo-Christian" is often really just Christian).

[26] Lee v. Weisman, 505 U.S. 577, 631 (1992) (Scalia, J., dissenting) ("[T]he 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.' . . . [T]he meaning of the Clause is to be determined by reference to historical practices and understandings.").

[27] *Lee*, 505 U.S. at 632 (Scalia, J., dissenting) (quoting Lynch v. Donnelly, 465 U.S. 688, 673 (1984)); *id.* at 631 ("[A] test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause.") (quoting Cty. of Allegheny v. ACLU, 492 U.S. 573, 657 (1989)).

[28] *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist.*, 512 U.S. at 751 (Scalia, J., dissenting); *see also Van Orden*, 545 U.S. at 692 ("I would prefer to reach the same result by adoptin Establishment Clause jurisprudence that is in accord with our Nation's past and present practices . . . .").

should we.[29] In other words, as Justice Scalia has written, "the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers."[30]

Proponents argue that originalism is more democratic because it ensures that the meaning of the Constitution is determined by the supermajority that approved the Constitution rather than nine unelected judges.[31] They also claim that by forcing judges to uncover the objective, fixed meaning of the Constitution, originalism prevents judges from infusing it with their own personal views.[32] As Scalia argued: "[O]ur Nation's protection, that fortress which is our Constitution, cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court, but must have deep foundations in the historic practices of our people."[33]

Justice Scalia's view of the Establishment Clause, which is itself a reflection of his originalist theory of constitutional interpretation, reflects a certain privileged viewpoint. More particularly, both at a general (originalism) and a specific (the Establishment Clause allows state preference for Judeo-

---

[29] Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385 (2000) ("Justice Scalia's unique contribution to constitutional theory has been his jurisprudence of 'original meaning.' His central idea is that the meaning of the Constitution is fixed and that it is discoverable by looking at the text and the practices at the time the Constitution was written.").

[30] *Lee*, 505 U.S. at 632 (Scalia, J., dissenting) (quoting Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 294 (1963)). Justice Scalia later clarified that original or public meaning equates to the founding generation's understanding and not the founding framers' intent. *See, e.g.*, Chemerinsky, *supra* note 29, at 390 (quoting ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (Amy Gutmann ed., 1997)) ("What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended."); *see also* Mark Tushnet, *Heller and the New Originalism*, 69 OHIO ST. L.J. 609, 609–11 (2008) (comparing "old originalism" and "new originalism"). Either way, the understanding dates to the founding era.

[31] *See, e.g.*, Ilya Somin, *"Active Liberty" and Judicial Power: What Should Courts Do to Promote Democracy? Active Liberty: Interpreting Our Democratic Constitution by Stephen Breyer*, 100 NW. U.L. REV. 1827, 1859 (2006) ("[T]he original meaning version of originalism ha[s] the virtue of supermajority endorsement, which makes it more likely that [it is] the product of broad democratic participation.").

[32] Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989) ("Now the main danger in judicial interpretation of the Constitution—or, for that matter, in judicial interpretation of any law—is that the judges will mistake their own predilections for the law.").

[33] Lee v. Weisman, 505 U.S. 577, 632 (1992) (Scalia, J., dissenting).

Christianity) level, it is one made possible by white/Christian privilege.

II. PRIVILEGE DEFINED

Among the first to explore white privilege was Peggy McIntosh in her essay, *White Privilege: Unpacking the Invisible Knapsack*.[34] She describes white privilege as "an invisible package of unearned assets that I can count on cashing in each day, but about which I was 'meant' to remain oblivious."[35] Others have observed that white privilege "is best described as myriad advantages that White people enjoy on a daily basis that racial minorities do not."[36]

This Part highlights three key characteristics of white privilege. First, among the many unearned advantages that whites enjoy is that whiteness and white experience is the unstated norm. Second, these privileges are often invisible to those who benefit from them. Third, white privilege tends to breed white fragility. Consequently, attempts to change the status quo to a more equitable system is often experienced at hostility by those used to a system of privilege.

A. Unearned Benefits

In her groundbreaking essay, Peggy McIntosh lists dozens of concrete examples of white privilege.[37] Some of these benefits are generally positive and should be available to everyone,[38] while

---

[34] Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack, in* BEYOND HEROES AND HOLIDAYS 79 (Enid Lee et al. eds., 1998).

[35] *Id.* ("White privilege is like an invisible weightless knapsack of special provisions, maps, passports, codebooks, visas, clothes, tools and blank checks."). *Cf.* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1713 (1993) ("In ways so embedded that it is rarely apparent, the set of assumptions, privileges, and benefits that accompany the status of being white have become a valuable asset that whites sought to protect and that those who passed sought to attain.").

[36] Ashleigh Shelby Rosette & Tracy L. Dumas, *The Hair Dilemma: Conform to Mainstream Expectations or Emphasize Racial Identity*, 14 DUKE J. GENDER L. & POL'Y 407, 418 (2007).

[37] McIntosh, *supra* note 34, at 79–80.

[38] *Id.* at 81 ("Some, like the expectation that neighbors will be decent to you, or that your race will not count against you in court, should be the norm in a just society.").

others are negative and "give license to be ignorant, oblivious, arrogant and destructive."[39] They include:

- "If a traffic cop pulls me over . . . I can be sure I haven't been singled out because of my race."[40]
- "Whether I use checks, credit cards or cash, I can count on my skin color not to work against the appearance of my financial reliability."[41]
- "I can choose blemish cover or bandages in 'flesh' color and have them more or less match my skin."[42]
- "I can turn on the television or open to the front page of the paper and see people of my race widely represented."[43]
- "When I am told about our national heritage or about 'civilization,' I am shown that people of my color made it what it is."[44]
- "I can remain oblivious of the language and customs of persons of color . . . without . . . any penalty for such oblivion."[45]

All of these are advantages that white people enjoy for no other reason than their whiteness.[46] They are unearned. White people are treated differently than people of color for the exact same behavior. The first example alludes to the well-documented fact that the police stop non-whites for conduct they ignore in whites.[47] At the same time, study after study has shown that

---

[39] *Id.* ("Others, like the privilege to ignore less powerful people, distort the humanity of the holders as well as the ignored group.").
[40] *Id.* at 80.
[41] *Id.*
[42] *Id.*
[43] *Id.* ("I can easily buy posters, postcards, picture books, greeting cards, dolls, toys, and children's magazines featuring people of my race.").
[44] *Id.*
[45] *Id.*
[46] Stephanie M. Wildman, *The Persistence of White Privilege*, 18 WASH. U. J.L. & POL'Y 245, 246 (2005) ("Peggy McIntosh's widely acknowledged definition of white privilege emphasizes the benefit that privilege bestows upon the individual holder.").
[47] Although African-Americans are obviously not the only minority group, they are the one most studied. *See, e.g.*, Sharon LeFraniere & Andrew W. Lehrer, *The Disproportionate Risks of Driving While Black*, N.Y. TIMES (Oct. 24, 2015), https://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html (documenting that police are more likely to stop and use force against black drivers).

whites are rated as more accomplished for the exact same performance, including evaluations based on identical resumes[48] and legal writing samples.[49]

In addition, our structures are designed with white people in mind. "Characteristics of the privileged group define the societal norm."[50] As a very mundane example, "flesh" colored crayons, "nude" stockings, and "invisible" Band-Aids have, until very recently, only met their vaunted criteria for white people. More generally, the white experience and the white perspective is the default one. This unstated norm informs our history, our culture, our politics, and even our holidays.[51] U.S. history classes, as McIntosh points out, are often the history of white Americans.[52] If you turn on the TV, open the newspaper, or buy a children's book, you encounter the stories of white people.[53] "Everywhere we look, we see our own racial image reflected back to us—in our heroes and heroines, in standards of beauty, . . . in our textbooks and historical memory, in the media,

---

[48] *See* Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 997–98 (2004) (finding that resumes with African-American names are fifty percent less likely to receive callback interviews than identical ones with white names).

[49] Debra Cassens Weiss, *Partners in Study Gave Legal Memo a Lower Rating When Told Author Wasn't White*, ABA J. (Apr. 21, 2014), http://www.abajournal.com/news/article/hypothetical_legal_memo_demonstrates_unconscious_biases. These are just the tip of the iceberg. *See, e.g.*, David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CALIF. L. REV. 493, 509 (1996) ("As study after study demonstrates, there are still a substantial number of whites who hold (consciously or unconsciously) discriminatory and/or stereotypical views about blacks.").

[50] Wildman, *supra* note 46, at 247; *see also* Sylvia A. Law, *White Privilege and Affirmative Action*, 32 AKRON L. REV. 603, 604 (1999) ("White privilege is the pervasive, structural, and generally invisible assumption that white people define a norm and Black people are 'other,' dangerous, and inferior.") (footnote omitted).

[51] This is not a complete list, either. For example, people are measured against white standards as well. *See, e.g.*, Wildman, *supra* note 46, at 247 ("[I]ndividual members of society are judged against characteristics held by the privileged.").

[52] McIntosh, *supra* note 34, at 80.

[53] *See, e.g.*, Dashka Slater, *The Uncomfortable Truth About Children's Books*, MOTHER JONES (Sept.-Oct. 2016), http://www.motherjones.com/media/2016/08/diversity-childrens-books-slavery-twitter (noting that within five years, more than half of U.S. children under five will have a nonwhite parent, yet only 14% of children's books feature a black, Latino, Asian, or Native American main character); Scott Collins, *More Diversity in Film & TV? New Report Says Women and Minorities Are Actually Falling Behind*, L.A. TIMES (Feb. 25, 2016), http://www.latimes.com/entertainment/tv/showtracker/la-et-st-diversity-film-tv-ucla-report-minorities-20160224-story.html (reporting that although 38% of US population, people of color only account for 8.1% of lead actors in scripted broadcast TV shows).

in religious iconography including the image of god himself . . . ."[54] Indeed, how else to explain Columbus Day as a federal holiday and the elevation of Christopher Columbus as the "discoverer" of the United States?

Because white norms and values are society's norms and values, whites may ignore all others. Although people of color need to understand the dominant white culture, many white people can go their whole lives without learning about nonwhite cultures. "Most white people have no experience of a genuine cultural pluralism, one in which whites' perspectives, behavioral expectations, and values are not taken to be the standard from which all other cultural norms deviate."[55]

In sum, white privilege attempts to capture the idea that all kinds of benefits attach to being white, one of which is that whiteness is the unstated norm in American society.

B. Invisibility

A key component of white privilege is that it is often invisible to those who benefit from it. White people do not realize that their whiteness confers benefits,[56] including the benefit of having whiteness as the societal norm: whites tend "not to think about . . . [how] norms, behaviors, experiences, or perspectives . . . are white-specific."[57]

One result is that white people fail to understand that their perspective is not the one true objective perspective but one of many, specifically, a white perspective. "Whites are taught to see their perspectives as objective and representative of reality."[58] Because whites believe their own point of view is universal, they do not learn other points of view. Instead, "we use ourselves and our experiences as the reference point for everyone. 'I'm not followed around in the store by a guard. What makes you think

---

[54] Robin DiAngelo, *White Fragility*, 3 INT'L J. CRITICAL PEDAGOGY 54, 62 (2011).
[55] Barbara J. Flagg, *"Was Blind, but Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 979 (1993).
[56] This description obviously does not apply to every single white person in the United States, but it does apply to many.
[57] Flagg, *supra* note 55, at 957. Flagg calls this phenomenon "transparency." *Id.* I will use "invisibility" instead since it captures the way it is invisible to most whites.
[58] DiAngelo, *supra* note 54, at 59.

you are?'"[59] Or, "I'm not offended by that joke, therefore it is not offensive."[60]

Another result is that white people are so oblivious to the privileged position that their race confers that most of the time they do not even think of themselves as raced.[61] Other people have race. White people just are.[62] "The most striking characteristic of whites' consciousness of whiteness is that most of the time we don't have any."[63] Barbara Flagg goes so far as to say that this obliviousness is a "defining characteristic of whiteness: to be white is not to think about it."[64]

Perhaps this exercise will demonstrate this phenomenon: Pick five words to describe yourself. Did you include your race? "When people are asked to describe themselves in a few words, Black people invariably note their race and white people almost never do. Surveys tell us that virtually all Black people notice the importance of race several times a day."[65] This tendency is widespread. If you are reading a white author's novel, odds are that descriptions of white people do not include their race, but descriptions of nonwhite people do. "White people rarely contemplate the fact of our whiteness—it is the norm, the given. It is a privilege to not have to think about race."[66]

In sum, whiteness is such the predominant norm, and the world is so tailored to the needs and values of white people, that white people can go through life unaware that whiteness is the default. Indeed, the world is so normed to whiteness that white people may not even think of themselves in racial terms. Of

---

[59] FRANCES E. KENDALL, UNDERSTANDING WHITE PRIVILEGE 71 (Lee Anne Bell ed., 2006).
[60] *Id.*
[61] Flagg, *supra* note 55, at 969 ("[T]he white person has an everyday option not to think of herself in racial terms at all.").
[62] *Id.* at 971 ("Whiteness is the racial norm. In this culture the black person, not the white, is the one who is different."); *see also* DiAngelo, *supra* note 54, at 59 ("White people are just people. . . . [Yet] people of color, who are never just people but always most particularly black people, Asian people, etc., can only represent their own racialized experiences.").
[63] Flagg, *supra* note 55, at 957.
[64] *Id.* at 969 ("[T]he white person has an everyday option not to think of herself in racial terms at all. In fact, whites appear to pursue that option so habitually that it may be a defining characteristic of whiteness: to be white is not to think about it.").
[65] Sylvia A. Law, *White Privilege and Affirmative Action*, 32 AKRON L. REV. 603, 604 (1999) (citations omitted).
[66] *Id.* at 604–05 (citations omitted).

course, whiteness itself does not need to be invisible in order for white privileges to be. That is, even white people aware of their race may not fully understand all the benefits that flow from that fact, including how whiteness is the default norm. "[W]hite privilege remains largely unacknowledged. [Consequently,] [t]he existence of white privilege allows white people of good will—many with antiracist views—to benefit from the privileged white norms."[67]

C. White Fragility

"White fragility" is the term used to describe how whites get very upset when their unearned racial advantages are pointed out, and practically apoplectic when they are taken away.[68] Robin DiAngelo, the academic who coined the phrase, defines it as "a state in which even a minimum amount of racial stress becomes intolerable, triggering a range of defensive moves."[69] For example, a challenge to their objectivity, such as "[s]uggesting that a white person's viewpoint comes from a racialized frame of reference"[70] can unduly disturb them. Moreover, changes in the status quo designed to move to greater equality is experienced as hostile targeting of whites.[71]

There are different causes of the great distress. One of them is simply that these issues are new and uncomfortable. "White people in North America live in a social environment that protects and insulates them from race-based stress. . . . This insulated environment of racial privilege builds white expectations for racial comfort while at the same time lowering the ability to tolerate racial stress."[72] Although people of color

---

[67] Margalynne J. Armstrong & Stephanie M. Wildman, *Teaching Race/Teaching Whiteness: Transforming Colorblindness to Color Insight*, 86 N.C. L. REV. 635, 645 (2008).

[68] Again, this general description does not apply to all white people. *See supra* note 56. Nonetheless, the intensity with which this generalization is denied might itself demonstrate white fragility.

[69] DiAngelo, *supra* note 54, at 54 (coining the term "White Fragility" in an academic article).

[70] *Id.* at 57.

[71] *Cf.* Rhonesha Byng, *Arkansas Town Responds To Controversial "Anti-Racist Is A Code Word for Anti-White" Sign*, HUFF. POST (Nov. 7, 2013), http://www.huffingtonpost.com/2013/11/07/harrison-arkansas-antiracist-code-word-antiwhite_n_4227769.html.

[72] DiAngelo, *supra* note 54, at 55.

are used to engaging with racial issues, white people are not. Thus, they have a hard time with race as a topic of conversation and are "at a loss for how to respond in constructive ways."[73]

Exacerbating this discomfort is the simplistic view of racism often held by whites. White people tend to equate racism with intentional, hostile discrimination.[74] Under this view, race discrimination always has a bad actor. Whites often simply do not see the other kinds of discrimination that operate. They are unaware of the unconscious racism that gives whites a boost in supposedly objective evaluations. They are unaware of the structural racism that results in "nude" stockings and Columbus Day. Remember, because the world is designed around their norms and needs, whites miss the way the status quo is highly racialized to their benefit.[75] "The white person's lived experience, the fabric of daily life, emphasizes—and minute to minute recreates—the whiteness of the world. This whiteness is just normal—'the way things are.'"[76] Accordingly, when someone tries to explain to a white person how they benefit from their race, they feel accused of racial malice. It is as though someone is equating them with the Ku Klux Klan.[77] "The good/bad binary is the fundamental misunderstanding driving white defensiveness about being connected to racism."[78] Because white people hear an accusation of ill will instead of a deconstruction of unconscious and structural processes, whites

---

[73] *Id.* at 57.

[74] Stephanie M. Wildman & Adrienne D. Davis, *Language and Silence: Making Systems of Privilege Visible*, 35 SANTA CLARA L. REV. 881 (1995) ("Generally whites think of racism as voluntary, intentional conduct, done by horrible others.").

[75] *See, e.g.*, Kerry A. Dolan, *Why White People Downplay Their Individual Racial Privileges*, STAN. GRADUATE SCH. BUS. (Aug. 27, 2016), https://www.gsb.stanford.edu/insights/why-whites-downplay-their-individual-racial-privileges ("Research shows that white Americans, when faced with evidence of racial privilege, deny that they have benefited personally.").

[76] Wildman, *supra* note 46, at 255.

[77] Indeed, I almost used the terms "unconscious discrimination" and "structural discrimination" instead of "unconscious racism" and "structural racism" in case some readers' reaction to the word "racism" would generate so much resistance that they would no longer be open to the idea that all race discrimination is not intentional and malicious.

[78] Robin DiAngelo, *White Fragility: Why It's So Hard to Talk to White People About Racism*, THE GOOD MEN PROJECT (Apr. 9, 2015), https://goodmenproject.com/featured-content/white-fragility-why-its-so-hard-to-talk-to-white-people-about-racism-twlm/.

fail to grapple with the fact that even if well-meaning, they nonetheless benefit from their whiteness.[79]

One defensive reaction is to position themselves as the real victims: When finally confronted with discussion of race, "whites position themselves as victimized, slammed, blamed, attacked."[80] At the same time whites exaggerate the harm to themselves, they minimize the actual harm to others. Consequently, moving the spotlight back onto whites once again erases and minimizing non-white experience.[81] "'Erasure' refers to the practice of collective indifference that renders certain people and groups invisible . . . [and] describe[s] how inconvenient people are dismissed, their history, pain and achievements blotted out."[82]

Moreover, the combination of elevating white pain and minimizing non-white pain, until conversations about race are equated with actual racism, results in a textbook example of a false equivalency.

> The language of violence that many whites use to describe anti-racist endeavors is not without significance, as it is another example of the way that White Fragility distorts and perverts reality . . . The history of brutal, extensive, institutionalized and ongoing violence perpetrated by whites against people of color—slavery, genocide, lynching, whipping, forced sterilization and medical experimentation to mention a few—becomes profoundly trivialized when whites claim they don't feel safe or are under attack when in the rare situation of merely talking about race with people of color.[83]

---

[79] George Yancy, *Dear White America*, N.Y. TIMES (Dec. 24, 2015), https://opinionator.blogs.nytimes.com/2015/12/24/dear-white-america/ ("You may have never used the N-word in your life, you may hate the K.K.K., but that does not mean that you don't harbor racism and benefit from racism.").

[80] DiAngelo, *supra* note 54, at 64.

[81] John Halstead, *The Real Reason White People Say "All Lives Matter"*, HUFF. POST (July 25, 2016), http://www.huffingtonpost.com/johnhalstead/dearfellowwhite-people_b_11109842.html ("'All Lives Matter' is really code for 'White Lives Matter,' because when white people think about 'all lives,' we automatically think about 'all *white* lives.'").

[82] Paul Sehgal, *Fighting 'Erasure': First Words*, N.Y. TIMES (Feb. 2, 2016), http://nyti.ms/1NOC0VQ.

[83] DiAngelo, *supra* note 54, at 65.

It explains how white people can get more upset by a black football player peacefully protesting police shootings than by the police shootings themselves.

This defensiveness reaches even higher levels when whites are faced not merely with discussions of how race shapes the status quo but actual attempts to remedy it. In fact, such efforts can be experienced as undeserved and hostile attacks. And, to be fair, these are attempts to take something from them, namely their unearned (and unfair) advantages. But because whites do not understand them as such, they feel unjustly targeted. Of course, reframing any move towards equality as an attack allows whites to resist it, thereby leaving intact the status quo, along with all their privileges.

III. CHRISTIAN PRIVILEGE

An exchange during the oral argument for *Salazar v. Buono*[84] reflects Justice Scalia's privileged Christian view of the Establishment Clause. The case involved an eight foot Latin cross on federal lands.[85] Its defenders argued it was meant to commemorate soldiers who had died during World War I.[86] The lower courts held that it violated the Establishment Clause for the federal government to display an obviously Christian symbol.[87] In response, Congress declared that the cross was "a national memorial commemorating United States participation in World War I and honoring the American veterans of that war;"[88] barred the use of federal funds to remove the cross; and transferred to private parties the plot of land on which the cross stood.[89] At one point during the oral argument, Justice Scalia

[84] 559 U.S. 700 (2010).
[85] *Id.* at 706–07 (describing size and location of the cross in the Mojave National Preserve).
[86] *Id.*
[87] *Id.* at 709 (describing how Ninth Circuit Court of Appeals concluded that "a reasonable observer would perceive a cross on federal land as governmental endorsement of religion.").
[88] *Id.* (quoting Department of Defense Appropriations Act, 2002, Pub.L. 107–117, § 8137(a), 115 Stat. 2278).
[89] The land deal was actually a land swap where the federal government received a private plot of land in return. *Id.* at 710 (stating in exchange, the Government was to receive land elsewhere in the preserve from Henry Sandoz and his wife). The swap was conditional: "The land-transfer statute provided that the property would revert

reacted to the ACLU attorney's characterization of the cross as a Christian symbol that honors Christian soldiers:

> JUSTICE SCALIA: The cross doesn't honor non-Christians who fought in the war? Is that -- is that --
>
> MR. ELIASBERG: I believe that's actually correct.
>
> JUSTICE SCALIA: Where does it say that?
>
> MR. ELIASBERG: It doesn't say that, but a cross is the predominant symbol of Christianity and it signifies that Jesus is the son of God and died to redeem mankind for our sins, and I believe that's why the Jewish war veterans --
>
> JUSTICE SCALIA: It's erected as a war memorial. I assume it is erected in honor of all of the war dead. It's the -- the cross is the -- is the most common symbol of -- of -- of the resting place of the dead, and it doesn't seem to me -- what would you have them erect? A cross -- some conglomerate of a cross, a Star of David, and you know, a Moslem half moon and star?
>
> MR. ELIASBERG: Well, Justice Scalia, if I may go to your first point. The cross is the most common symbol of the resting place of Christians. I have been in Jewish cemeteries. There is never a cross on a tombstone of a Jew.
>
> (Laughter.)
>
> MR. ELIASBERG: So it is the most common symbol to honor Christians.
>
> JUSTICE SCALIA: I don't think you can leap from that to the conclusion that the only war dead

---

to the Government if not maintained 'as a memorial commemorating United States participation in World War I and honoring the American veterans of that war.'" *Id.*

> that that cross honors are the Christian war dead. I think that's an outrageous conclusion.[90]

This exchange illustrates several of the privilege themes described in Part II, but in the context of religion rather than race. As discussed in more detail below, it highlights how Christianity is the unstated norm in the United States and that this Christian privilege is often invisible precisely because the Christian perspective is assumed to be the universal perspective. Furthermore, Christian fragility helps explain the emotional reaction that greets attempts to point out and remedy this state of affairs.

A. Privilege: Christianity as Unstated Norm

Just as whiteness confers unearned benefits, so too does Christianity. One of those benefits is that society is designed around Christian norms and needs.[91] Take the United States calendar. Many might assume that a Monday-Friday workweek with a Saturday-Sunday weekend—a weekend that facilitates Sabbath observance for Christians—is normal, natural, and universal. It is not. In Israel, the workweek is from Sunday to Thursday, or mid-Friday, to allow people to prepare Shabbat dinner on Friday and celebrate the Sabbath on Saturday. Countries with predominantly Muslim populations have Fridays off because Friday is the Muslim day of prayer.[92] Moreover, only

---

[90] *See* Transcript of Oral Argument at 38–39, Salazar v. Buono, 559 U.S. 700 (2010) (No. 08-472) [hereinafter *Salazar* Transcript].

[91] As I have noted elsewhere, "their Sabbath defines the workweek, their sacred days define state and national holidays, their morality defines the family and determines when life begins, belief in their God characterizes patriotism, and invocation of their God solemnizes, dignifies, and authenticates." Caroline Mala Corbin, *Ceremonial Deism and the Reasonable Religious Outsider*, 57 UCLA L. REV. 1545, 1578–79 (2010). If the cadence sounds familiar, I was riffing on a famous Catharine MacKinnon quotation about male privilege: "Men's physiology defines most sports, their health needs largely define insurance coverage, their socially designed biographies defined workplace expectations and successful career patterns, their perspectives and concerns define quality in scholarship, their experiences and obsessions define merit, their military service defines citizenship, their presence defines family, their inability to get along with each other —their wars and rulerships—defines history, their image defines god, and their genitals define sex." CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 224 (First Harv. Univ. Press paperback ed., 1991).

[92] *See, e.g.*, *Saudi Arabia Switches Start of Weekend from Thursday to Friday*, BBC NEWS (June 23, 2013), http://www.bbc.com/news/business-23031706 ("Friday remains a

Christians have their Christmas holiday built into the federal calendar.[93] The federal government does not close for the high holy days of other religions. There is no official day off for Yom Kippur or Passover (Judaism), or for Eid Al-Fitr and Eid Al-Adha (Islam), or for Diwali (Hinduism),[94] Vesak (Buddhism)[95] or any other religion's most sacred days.[96] Moreover, to paraphrase Peggy McIntosh, "[w]hen I am told about our national heritage or about 'civilization,' I am shown that people of my [religion] have made it what it is."[97] Indeed, our expressions of patriotism—our pledge of allegiance[98] and our national motto[99]— both incorporate the Christian (or maybe the Judeo-Christian) worship of God, and not the beliefs of other faiths.[100]

Christianity was certainly the unstated norm for Justice Scalia. This is evident in the exchange about the large Latin cross

---

holiday in Muslim countries because it is a holy day set aside for communal prayer.").

[93] In response to the claim that Christmas is a secular holiday that all Americans celebrate, I paraphrase Mr. Eliasberg: "I have been in Jewish schools. There is never a Christmas tree or Santa Clause or reindeer decorating the classroom of a Jewish school." *See Salazar* Transcript, *supra* note 90 ("I have been in Jewish cemeteries. There is never a cross on a tombstone of a Jew.").

[94] Emanuella Grinberg, *Six Things You Should Know About Diwali*, CNN (Oct. 26, 2014), http://www.cnn.com/2014/10/25/travel/diwali-2014/ ("The five-day celebration of good over evil is as important to Hindus as Christmas is to Christians").

[95] *Wesak*, BBC (Aug. 21, 2014), www.bbc.co.uk/religion/religions/buddhism/holydays/wesak.shtml ("This most important Buddhist festival is known as either Vesak, Wesak or Buddha Day.").

[96] I am focusing on Judaism and Islam in order to emphasize that the American tradition is really a Christian one, despite attempts to describe it as Judeo-Christian or Abrahamic to include Judaism and Islam.

[97] McIntosh, *supra* note 34, at 80. *See also* Joseph R. Duncan, Jr., *Privilege, Invisibility, and Religion: A Critique of the Privilege That Christianity Has Enjoyed in the United States*, 54 ALA. L. REV. 617, 626 (2003) ("People of Christian faiths are privileged in the United States in that they are guaranteed that the Supreme Court will open with a prayer that reflects their faith; that their child will be taught a pledge of allegiance that adopts their God; that when they look at United States currency they will see a reaffirmation of their beliefs; that public laws will be written to secure the display of religious documents in public buildings, including schools, that reflect their beliefs; that if a judge looks to religious texts to justify a decision that those texts will reflect their beliefs; that the legislature will open with a prayer reflecting their faith; and that the president will speak and take an oath of office in terms of their religion.").

[98] "One nation under God"

[99] "In God We Trust"

[100] Just as the calendar, with its Saturday-Sunday weekend, may at first seem "Judeo-Christian" but is really just Christian, so too are other practices designated Judeo-Christian. *See infra* notes 116-121 and accompanying text (analyzing Ten Commandments).

at issue in *Salazar v. Buono*. In explaining the Establishment Clause issue with the monument, counsel for the ACLU pointed out that the Latin cross is "the predominant symbol of Christianity."[101] Justice Scalia disagreed, arguing that in the context of a war memorial, it is instead a burial symbol: "the most common symbol of . . . the resting place of the dead."[102] As far as Justice Scalia was concerned, this was the normal way to mark the dead. But while Christians may equate the Latin cross with respectful honoring of the dead, that is a Christian practice, not a universal one. As the ACLU attorney rebutted, "[t]he cross is the most common symbol of the resting place of Christians. I have been in Jewish cemeteries. There is never a cross on a tombstone of a Jew."[103]

Moreover, Christianity not only served as Justice Scalia's unstated norm for burial practices, but Christianity (or monotheistic religions like Christianity) served as Justice Scalia's unstated norm for religion itself. For example, Justice Scalia defined "sectarian" through a Christian lens. Justice Scalia recognized that government endorsement of religion cannot be sectarian: "And I will further concede that our constitutional tradition, from the Declaration of Independence and the first inaugural address of Washington, quoted earlier, down to the present day, has, with a few aberrations, ruled out of order government-sponsored endorsement of religion . . . where the endorsement is sectarian."[104] But he then defined sectarian to mean preferring some God-centered faiths over others. Thus, the quotation ends: "[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)."[105] It is as if, for Justice Scalia, the universe of religions were limited to those that believe in God.[106] Consequently, state-sponsored prayers to God are

---

[101] *See Salazar* Transcript, *supra* note 90, at 38–39.
[102] *Id.*
[103] *Id.*
[104] Lee v. Weisman, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting).
[105] *Id.*
[106] Obviously, there are many religions that do not worship a God. *See* Caroline Mala Corbin, *Ceremonial Deism and the Reasonable Religious Outsider*, 57 UCLA L. REV. 1545, 1575 (2010) ("Many Hindus, for example, envision three main manifestations of the Divine—Brahma, Vishnu, and Shiva. Many Buddhists, on the other hand, do

nonsectarian and perfectly constitutional, even in public schools.[107]

Moreover, because he equated "religion" to monotheistic religions like Christianity, Justice Scalia could argue that prayers to God were unifying:

> I must add one final observation: The Founders of our Republic knew the fearsome potential of sectarian religious belief to generate civil dissension and civil strife. And they also 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.[108]

Of course, there is no God whom "all worship and seek."[109] Many religions have multiple gods, or no gods.[110] Or, even if they have a Supreme Being, it is not called God.[111] Not to mention that the United States is home to an ever-growing population of nonbelievers.[112] Despite this, Justice Scalia insists on describing worship of God as a unifying practice shared by everyone. In other words, he assumes that Judeo-Christianity is the norm. It should be obvious that a government-sponsored prayer that excludes millions of Americans is not unifying.

Justice Scalia takes this unstated norm further than most. Belief in God is not just the norm for religion. It is the norm for "American-ness." After rejecting any claim that school-sponsored prayers to God were sectarian, Justice Scalia added:

---

not worship any deities. Even Muslims, who do worship a Supreme Being, generally refer to their Supreme Being as Allah, and not God.").

[107] *Lee*, 505 U.S. at 641–42 ("But there is simply no support for the proposition that the officially sponsored nondenominational invocation and benediction read by Rabbi Gutterman—with no one legally coerced to recite them—violated the Constitution of the United States.") (Scalia, J., dissenting).

[108] *See id.* at 646. Justice Scalia makes this claim more than once. *See id.* (lamenting that decision as "depriv[ing] our society of that important unifying mechanism.").

[109] *Id.*

[110] *See* Corbin, *supra* note 106, at 1575.

[111] *See id.*

[112] In 2014, 22.8% of Americans reported that they were not affiliated with a particular religion, with 3.1% self-identifying as atheist and another 4.0% as agnostic. *See Ten Facts About Atheism*, PEW RESEARCH CTR. (June 1, 2016), http://www.pewresearch.org/fact-tank/2016/06/01/10-facts-about-atheists/.

"To the contrary, they are so characteristically American they could have come from the pen of George Washington or Abraham Lincoln himself."[113] In short, to be American is to believe in God.

B. Invisibility of Privilege

One of the hallmarks of white privilege is that white people do not even realize that whiteness serves as the default norm. Consequently, the (oblivious) privileged believe that their perspective is the only, and therefore the definitive one, rather than one of many. At the same time, the privileged never learn, because they never need to learn, other points of view. Justice Scalia seemed to share this trait. Consequently, Justice Scalia regularly assumed his perspective was universal and objective, unaware or disregarding views and information to the contrary.

Justice Scalia's exchange with the ALCU attorney in *Salazar v. Buono* reveals this blind spot.[114] Justice Scalia's claim that the Latin cross is a common symbol used to honor the dead reflects a Christian perspective, not a universal perspective. The ACLU attorney made this clear when he pointed out that Jews never use a Latin cross on their graves or memorials.[115] Despite the laughter that followed, Justice Scalia remained adamant, insisting on his vision of the cross as a universal symbol of reverence.

This same insistence that his perspective is the universal perspective appears in Justice Scalia's analysis of the Ten Commandments. During oral argument, Professor Chemerinsky explained to the Court, first, that the Ten Commandments were not sacred for all religions, not even for all the Abrahamic ones,[116] and, second, that different faith traditions have different versions of the Ten Commandments.[117] For example, unlike the

---

[113] *See Lee*, 505 U.S. at 642.
[114] *See Salazar* Transcript, *supra* note 90, at 38–39.
[115] *See Salazar* Transcript, *supra* note 90, at 38–39.
[116] *See* Transcript of Oral Argument at 15, Van Orden v. Perry, 545 U.S. 677 (2005) (No. 03-1500) ("JUSTICE SCALIA: I thought Muslims accept the Ten Commandments. MR. CHEMERINSKY: No, Your Honor, the Muslims do not accept the sacred nature of the Ten Commandments, nor do Hindus, or those who believe in many gods, nor of course, do atheists.").
[117] *See id.* at 15–16 ("MR. CHEMERINSKY: . . . And for that matter, Your Honor, if a Jewish individual would walk by this Ten Commandments, and see that the first

Ten Commandments at issue in two Supreme Court cases,[118] the Jewish Ten Commandments generally starts with full text of Exodus 20:2, acknowledging that God led the Jews out of slavery into freedom.[119] Indeed, the retelling of Exodus is at the heart of Passover, one of the most important Jewish holidays. In short, the challenged Ten Commandments were Christian, not Jewish.[120] As a result, a state-sponsored Ten Commandments display will inevitably play favorites even among religions whose texts refer to the Decalogue. Justice Scalia summarized the argument in a footnote:

> Because there are interpretational differences between faiths and within faiths concerning the meaning and perhaps even the text of the

---

commandment isn't the Jewish version, I am the Lord, thy God, took you out of Egypt, out of slavery, would realize it's not his or her government either."). *Cf.* Van Orden v. Perry, 545 U.S. 677, 717–18 (2005) (Stevens, J., dissenting) ("There are many distinctive versions of the Decalogue, ascribed to by different religions and even different denominations within a particular faith; to a pious and learned observer, these differences may be of enormous religious significance."); Paul Finkelman, *The Ten Commandments on the Courthouse Lawn and Elsewhere*, 73 FORDHAM L. REV. 1477, 1479 (2005) ("[A]ny display of the Commandments is inherently sectarian, because it must choose a translation, ordering, and numbering system that will favor, or endorse one or more religions, and therefore disfavor other religions.").

[118] The version upheld in Van Orden v. Perry, which mirrors the one struck down in McCreary Cty. v. ACLU of Ky., 545 U.S. 844, 851–52 (2005), was as follows:

> I AM the LORD thy God.
> Thou shalt have no other gods before me.
> Thou shalt not make to thyself any graven images.
> Thou shalt not take the Name of the Lord thy God in vain.
> Remember the Sabbath day, to keep it holy.
> Honor thy father and thy mother, that thy days may be long upon the land which the Lord thy God giveth thee.
> Thou shalt not kill.
> Thou shalt not commit adultery.
> Thou shalt not steal.
> Thou shalt not bear false witness against thy neighbor.
> Thou shalt not covet thy neighbor's house.
> Thou shalt not covet thy neighbor's wife, nor his manservant, nor his maidservant, nor his cattle, nor anything that is thy neighbor's.

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

[119] *See* THE TORAH: A MODERN COMMENTARY 539 (W. Gunther Plaut ed., 1981) ("I the lord am your God who brought you out of the land of Egypt, the house of bondage."). Moreover, Orthodox Jews do not spell out God, writing G-d instead. Finally, these first ten commandments are only a few of the 613 Jewish commandments, all of which are equally important. And this summary itself likely glosses over theological disputes within the Jewish community.

[120] In fact, the Ten Commandments at issue may represented a Protestant version, not just a Christian version. Catholic Ten Commandments do not include a separate prohibition against graven images. *See generally* Finkelman, *supra* note 117.

> Commandments, Justice STEVENS maintains that any display of the text of the Ten Commandments is impermissible because it "invariably places the [government] at the center of a serious sectarian dispute."[121]

Justice Scalia outright rejected this claim. His response to the point that any version of the Ten Commandments will inevitably favor some religious traditions was resounding: "I think not. The sectarian dispute regarding text, if serious, is not widely known. I doubt that most religious adherents are even aware that there are competing versions with doctrinal consequences (I certainly was not)."[122] In other words, if he did not know about or think it was important, then no one would. His perspective was the universal one. Even when confronted with people telling him that, in fact, there are other perspectives, he refused to give them weight.

Of course, even if the government-sponsored Ten Commandments did not favor Christianity over Judaism and Islam, they still favored the Abrahamic faith tradition over all others.[123] Nevertheless, Justice Scalia steadfastly maintained that the Ten Commandments were nonsectarian.

> Nor is it the case that a solo display of the Ten Commandments advances any one faith. They are assuredly a religious symbol, but they are not so closely associated with a single religious belief that their display can reasonably be understood as preferring one religious sect over another. The Ten Commandments are recognized by Judaism, Christianity, and Islam alike as divinely given.[124]

To Justice Scalia, all non-Abrahamic believers, as well as nonbelievers, either do not exist or do not matter. They are not

---

[121] *See McCreary Cty.*, 545 U.S. at 909 n.12 (Scalia, J., dissenting) (emphasis omitted).
[122] *Id.*
[123] Van Orden v. Perry, 545 U.S. 677, 719 (2005) (Stevens, J., dissenting) ("Even if, however, the message of the monument, despite the inscribed text, fairly could be said to represent the belief system of all Judeo-Christians, it would still run afoul of the Establishment Clause by prescribing a compelled code of conduct from one God, namely a Judeo-Christian God, that is rejected by prominent polytheistic sects, such as Hinduism, as well as nontheistic religions, such as Buddhism.").
[124] *McCreary Cty.*, 545 U.S. at 909 (Scalia, J., dissenting).

on his radar, and therefore, they need not be taken into consideration.

This disregard also explains Justice Scalia's claim that the government's preference for Christianity (dressed up Judeo-Christianity) is inevitable. Justice Scalia argued that:

> If religion in the public forum had to be entirely nondenominational, there could be no religion in the public forum at all. One cannot say the word "God," or "the Almighty," one cannot offer public supplication or thanksgiving, without contradicting the beliefs of some people that there are many gods, or that God or the gods pay no attention to human affairs.[125]

Of course, Justice Scalia was quite right that a truly nonsectarian prayer does not exist.[126] According to Justice Scalia, because nonsectarian prayers are impossible, then the next best thing is a prayer to God. He did not consider the more obvious solution—or at least obvious to those who do not share his blinkered privileged perspective—which is that if it is impossible for the government to pray in a way that does not exclude some citizens, it should simply refrain from praying.[127]

C. Christian Fragility

Just as white privilege breeds white fragility, Christian privilege breeds Christian fragility. Justice Scalia was not immune. Because Christians are used to thinking that their Christian perspective is universal and that their privileged status is normal, "even a minimum amount of [religious] stress becomes intolerable, triggering a range of defensive moves."[128] One of those defensive moves used by Justice Scalia is to position

---

[125] *Id.* at 893.

[126] Even among monotheistic religions a non-denominational prayer would be a challenge. Geoffrey R. Stone, *In Opposition to the School Prayer Amendment*, 50 U. CHI. L. REV. 823, 829 (1983) ("[T]he very concept of a 'nondenominational prayer' is self-contradictory. There are well over fifty different theistic sects in the United States, each of which has its own tenets regarding the appropriate nature and manner of prayer.").

[127] This, however, would mean Christians would lose the privilege of having the government sponsor prayer in their faith tradition.

[128] Diangelo, *supra* note 54, at 54.

Christians as victims. At the same time that Justice Scalia centers and inflates the harm to Christians, he marginalizes and downplays the harm to everyone else, allowing him to create false equivalencies.

As with white fragility, a defining characteristic of Christian fragility is getting easily and overly upset when one's privilege is highlighted. For example, in the exchange about the Latin cross, Justice Scalia decried as "outrageous" the unremarkable argument that a Latin cross is not really the way to honor non-Christians: "I don't think you can leap from that to the conclusion that the only war dead that that cross honors are the Christian war dead. I think that's an outrageous conclusion."[129] Justice Scalia also overreacted when defending a government-sponsored Ten Commandments monument, declaring, "[i]f religion in the public forum had to be entirely nondenominational, there could be no religion in the public forum at all."[130] The claim was pure hyperbole. There is no risk of religion disappearing from the public forum. The Establishment Clause only applies to government religious speech; private religious speech is constitutionally protected, as a string of Supreme Court cases makes clear.[131]

Justice Scalia's tendency to describe any attempt to eliminate Christian privilege as hostility to Christianity illustrates another hallmark of fragility. Thus, for example, when the Supreme Court held that two Kentucky counties could not post the Ten Commandments in their respective county courthouses, Justice Scalia complained, "[t]oday's opinion . . . ratchet[s] up the Court's hostility to religion."[132] Note that, in the tradition of insisting one's perspective is the universal

---

[129] *See Salazar* Transcript, *supra* note 90, at 39.
[130] McCreary Cty. v. ACLU of Ky., 545 U.S. 844, 893 (2005) (Scalia, J., dissenting).
[131] Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) (school could not exclude religious viewpoint from public forum); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995) (same); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (same); Bd. of Educ. v. Mergens, 496 U.S. 226 (1990) (same); Widmar v. Vincent, 454 U.S. 263 (1981) (same).
[132] *See McCreary Cty.*, 545 U.S. at 900 (Scalia, J., dissenting); *see also* Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 749 (1994) (Scalia, J., dissenting) ("Justice S[tevens]' statement is less a legal analysis than a manifesto of secularism. It surpasses mere rejection of accommodation, and announces a positive hostility to religion—which, unlike all other noncriminal values, the State must not assist parents in transmitting to their offspring.").

perspective, Justice Scalia equated religion with Christianity.[133] While Christians may interpret the removal of the government's Ten Commandments as an attack on their religion, Hindus, Buddhists, Sikhs, and countless others are unlikely to interpret it as an attack on theirs. On the contrary, one of the foundational principles behind the Establishment Clause's separation of church and state is that all religions flourish best when none is singled out for special government favor. Nevertheless, Justice Scalia viewed the Court's refusal to privilege Christianity as an attack, rather than a move towards equality for all religions.[134]

Another tactic of the privileged that Justice Scalia employed is to center the privileged group and their concerns, as displayed by his comments during the *Town of Greece v. Galloway*[135] oral argument. Each month, the town of Greece would invite a member of the clergy—the "chaplain for the month"—to give a prayer before the start of the town's monthly board meetings.[136] The vast majority of chaplains were Christians and most of the prayers were explicitly Christian.[137] As a consequence, non-Christians who were petitioning the government (for a zoning variance for example) faced the Hobson's choice of either joining in a prayer that was contrary to their beliefs or risk angering the demonstrably religious Town Board.[138] Justice Scalia argues:

> There is a serious religious interest on the other side of this thing that -- that -- that people who have religious beliefs ought to be able to invoke the

---

[133] This example, like many before and after it, could be used to illustrate more than one point, as they are intertwined and interrelated.

[134] This same impulse explains the so-called "War on Christmas." After years of ignoring all the non-Christians who do not celebrate Christmas, it became standard to wish people "Happy Holidays" instead of "Merry Christmas" during the "holiday season." In a sign of Christian fragility, this move towards inclusiveness was soon depicted as an attack on Christians and Christmas. *See, e.g.*, Jordan Lorence, *Three Reasons Why the New York Times' War on Christmas Denial is Wrong*, FOX NEWS (Dec. 22, 2016), http://www.foxnews.com/opinion/2016/12/22/three-reasons-why-new-york-times-war-on-christmas-denial-is-all-wrong.html ("[B]usinesses, feeling that social pressure, began ordering their workers to say 'Happy Holidays' rather than 'Merry Christmas.'"). As one commentator noted, the author "is confusing equality with persecution." *Id.*

[135] 134 S.Ct. 1811 (2014).

[136] *Id.* at 1816.

[137] *Id.*

[138] *See id.* at 1817–18.

> deity when they are acting as citizens, and not -- not as judges or as experts in -- in the executive branch.[139]

In other words, deploying a common defense mechanism of the fragile, he shifts the attention back onto the privileged group, in this case the Christians who compose the government.[140]

Similarly, in his *Lee v. Weisman*[141] dissent, rather than empathize with the young students who might feel coerced into participating in the state's sponsored prayers, Justice Scalia chastises them for failing to exhibit sufficient respect for other people's (Judeo-Christian) religious beliefs: "I may add, moreover, that maintaining respect for the religious observances of others is a fundamental civic virtue that government (including the public schools) can and should cultivate."[142] If respecting the state-sponsored (Judeo-Christian) religion leads observers to think that students are joining in a prayer that contradicts their own beliefs, well, so be it: "Even if it were the case that the displaying of such respect might be mistaken for taking part in the prayer, I would deny that the dissenter's interest in avoiding even the false appearance of participation constitutionally trumps the government's interest in fostering respect for religion generally."[143] For Justice Scalia, that was an acceptable cost.

This willingness to force the minority members of non-privileged religions to conform to or at least defer to the privileged majority reappears during the *Van Orden v. Perry* oral argument regarding Texas's granite Ten Commandments monument. At one point, Justice Scalia commented:

> I mean, we're a tolerant society religiously, but just as the majority has to be tolerant of minority views in matters of religion, it seems to me the minority

---

[139] Transcript of Oral Argument at 41, Town of Greece v. Galloway, 134 S.Ct. 1811 (2014) (No. 12-696).

[140] And employing another common tactic, see *infra* note 80-83 and accompanying text, Justice Scalia advances a false equivalency, in this case claiming that the right of government officials to pray while they govern is equivalent to the rights of citizens petitioning their government to be free from government-sponsored sectarian prayers.

[141] 505 U.S. 577 (1992).

[142] *See* Lee v. Weisman, 505 U.S. 577, 638 (1992) (Scalia, J., dissenting).

[143] *Id.* (emphasis omitted).

> has to be tolerant of the majority's ability to express its belief that government comes from God, which is what this is about. As Justice Kennedy said, turn your eyes away if it's such a big deal to you.[144]

Justice Scalia basically argued that in return for the majority tolerating the mere existence of minority religions—as though freedom of belief were not a fundamental principle of our country and required by the Constitution—the minority should stop complaining when the majority has the power to make the government endorse Christian (Judeo-Christian?) beliefs. In other words, Christian fragility recasts the constitutional requirement of religious liberty for all as "the majority tolerating minority views," and the privilege of government advocating Christian beliefs as "the minority tolerating majority views." And the privileged cherry-on-top is the dismissive coda—if the minority do not like seeing the majority's privilege in action, they should just close their eyes.

As is perhaps evident from these Justice Scalia excerpts, the flip side of the privileged's tendency to see everything from their own perspective is the inability to see from others' perspectives. Thus, while Justice Scalia well understood and sympathized with the Christian point of view, he was indifferent to others' point of view. As far as Justice Scalia was concerned, as long as the government does not legally require someone to participate in a religious exercise, the only harm government sponsored prayers or displays causes is "offense," and the Constitution is not meant to protect offended sensibilities. "[A]n Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views."[145] Thus, in response to the Seventh Circuit ruling that a public high school could not hold its graduation ceremony in a church, he groused:

> At most, respondents complain that they took offense at being in a religious place. See 687 F.3d,

---

[144] Transcript of Oral Argument, Van Orden v. Perry, *supra* note 116, at 17.
[145] Elmbrook Sch. Dist. v. Doe, 134 S. Ct. 2283, 2284–85 (2014) (Scalia, J., dissenting from the denial of certiorari) (quoting *Town of Greece* with approval).

> at 848 (plaintiffs asserted that they 'felt uncomfortable, upset, offended, unwelcome, and/or angry' because of the religious setting' of the graduations). Were there any question before, *Town of Greece* made obvious that this is insufficient to state an Establishment Clause violation.[146]

This privileged perspective meant that first, although Justice Scalia did not dispute that the government may not compel participation in government sponsored religious practices, he limited unconstitutional coercion to coercion by force of law. Justice Scalia could not imagine, nor even tried to imagine, what it might feel like to be the sole Muslim or sole Buddhist in a school of Christians, and have your government ask you, during your school graduation, to stand and pray to a God not your own when everyone around you is participating. He rejected out of hand the idea that students might be compelled to participate not from the pressure of a government fine, but from the pressure of social ostracism.

Second, this privileged perspective made Justice Scalia unsympathetic to any other harm besides coercion. He failed to consider that government endorsement of one or some faiths makes second-class citizens of those whose do not share those faiths. From the time of James Madison, proponents of a separation of church and state have explained that even apart from coercion, state-sponsored religion "degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority."[147] Justice O'Connor captured the idea in her endorsement test, arguing that state-sponsored religion "sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[148] Christian privilege is not just that Justice Scalia ignored all these potential

---

[146] *Id.* at 2285.

[147] James Madison, *Memorial and Remonstrance Against Religious Assessments, [C.A. 20 June] 1785*, NAT'L ARCHIVES (July 12, 2016), http://founders.archives.gov/documents/madison/01-08-02-0163.

[148] Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

harms, it is that Justice Scalia had the nerve to scold religious minorities for asking that their government not treat them like second-class citizens.[149]

The combination of overvaluing the harm to the privileged Christians and undervaluing the harm the non-privileged non-Christians leads to false equivalencies. Justice Scalia's quotation above about minority and majority religions tolerating each other in *Van Orden v. Perry* is one example. Another is his claim to equal competing interests in response to Justice Stevens's fear in the other Decalogue case that the government's religious favoritism will marginalizing religious minorities:[150]

> Justice STEVENS fails to recognize that in the context of public acknowledgments of God there are legitimate *competing* interests: On the one hand, the interest of that minority in not feeling 'excluded'; but on the other, the interest of the overwhelming majority of religious believers in being able to give God thanks and supplication *as a people*, and with respect to our national endeavors.[151]

Despite Justice Scalia's concern about thwarting the Christian majority's desire to give thanks as a people,[152] nothing prevents them from doing so. What they really want is for the *government*

---

[149] Of course, the irony of Justice Scalia dismissing the minority's complaints as mere oversensitivity is that oversensitivity is a defining characteristic of privileged fragility.

[150] McCreary Cty. v. ACLU of Ky., 545 U.S. 844, 899 (2005) (Scalia, J., dissenting) ("Finally, I must respond to Justice STEVENS' assertion that I would 'marginaliz[e] the belief systems of more than 7 million Americans' who adhere to religions that are not monotheistic."). Notably, Justice Scalia did not include the millions of Americans who do not adhere to any religion at all. (In 2007, when there were more than 227 million adults in the United States, *Total Population by Child and Adult Populations*, ANNIE E. CASEY FOUND. (Aug. 2016), http://datacenter.kidscount.org/data/tables/99-total-population-by-child-and-adult#detailed/1/any/false/18,17,16/39,40,41/416,417, roughly 4% of Americans identified as atheist or agnostic, Michael Lipka, *A Closer Look at America's Rapidly Growing Nones*, PEW RESEARCH CTR. (May 13, 2015), http://www.pewresearch.org/fact-tank/2015/05/13/a-closer-look-at-americas-rapidly-growing-religious-nones/. Those numbers would yield approximately nine million atheists & agnostics).

[151] *McCreary Cty.*, 545 U.S. at 900.

[152] Recall that the Ten Commandments at issue is the Christian version. *See supra* notes 116-121 and accompanying text.

to give thanks in accordance with their religious beliefs. However, giving thanks or otherwise practicing one's faith without government participation is not really a harm, never mind one of constitutional magnitude. Indeed, it is the status quo for most religious minorities. Meanwhile, the actual constitutional harm of a caste system based on religious belief is reduced by Justice Scalia to hurt feelings.

In sum, when Christianity's privileged position was challenged, Justice Scalia's Establishment Clause jurisprudence displayed many characteristics of white fragility. He professed outrage. He focused on how change will affect Christians, rather than how the status quo affects non-Christians. Finally, by exaggerating the harm to the already privileged while trivializing the harm to the non-privileged, he created false equivalencies that helped him justify maintaining the status quo, and Christians' privileged status within it.

D. Originalism as a Theory of the Privileged

In closing, I want to suggest that Justice Scalia's originalist approach to the Constitution was itself privilege in action. While originalism does not neatly map onto white privilege, it does share with it the false claim to objectivity and the tendency to reinforce a status quo that favors the privileged.

As an initial matter, a theory of constitutional interpretation where the scope of constitutional protection is pinned to a time rife with hierarchies based on race, religion, sex, etc., is likely more appealing to those who have historically been privileged along these dimensions.[153] For the privileged,

---

[153] Samuel Marcosson, *Colorizing the Constitution of Originalism: Clarence Thomas at the Rubicon*, 16 LAW & INEQ. 429, 483–84 (1998) ("[O]riginalism perpetuates racism by taking race into account in the wrong way: it actually reflects and places primary emphasis on the Framers' white supremacist racism."); James W. Fox Jr., *Counterpublic Originalism and the Exclusionary Critique*, 67 ALA. L. REV. 675, 686 (2016) ("[O]riginalism privilege[s] meanings from a racist (and sexist) age. . . ."). *Cf.* Daniel A. Farber, *A Fatal Loss of Balance:* Dred Scott *Revisited*, 39 PEPP. L. REV. 13 (2011) ("If *Dred Scott* was correct on originalist grounds, originalism looks morally questionable at least when the original understanding is tied up with earlier prejudices such as racism and sexism.").

adopting a constitutional theory that reinforces their privileged position may well be a feature and not a bug.[154]

Justice Scalia would have argued that he espoused originalism not because it benefits the privileged but because it curtails judicial discretion. Without it, judges could impose their own personal preferences onto constitutional law. Instead, originalism forces judges to interpret the constitutional by relying on something objective, namely the original understanding or original public meaning. It just so happens that in the case of the Establishment Clause, originalism yields a doctrine that countenances government sponsored Judeo-Christianity.

But this claim to objective constitutional interpretation is as spurious as whites' claim that their perspective is objective.[155] A full account, which would include the many different theories of originalism that originalists may choose from,[156] as well as the indeterminancy of history,[157] is beyond the scope of this Essay,

---

[154] Richard H. Fallon, Jr., *Are Originalist Constitutional Theories Principled, or Are They Rationalizations for Conservatism?*, 34 HARV. J.L. & PUB. POL'Y 5, 6 (2011) ("Suspicions of rationalization are also in order insofar as originalists maintain that the case for adopting an originalist theory is entirely independent of the theory's conservative valence.").

[155] Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court's Quest for Original Meaning*, 52 UCLA L. REV. 217, 279 (2004) ("The results of the study suggest that one of the principal justifications for originalism—that it will constrain the ability of judges to impose their own views in the course of decisionmaking—might not be accurate as a descriptive matter."); *see also id.* at 284 ("[T]he results of the study suggest not only that the originalist's object is illusory, but also that originalism's advantage over other approaches to constitutional interpretation with respect to its ability to constrain judicial discretion is marginal.").

[156] For a list of these theories, *see* Fallon, *supra* note 154, at 7 ("The various originalist theories differ from each other along at least four dimensions, involving: (1) the historical object or phenomenon that originalist judges or scholars should seek to identify—the Framers' intent, the original understanding of a specified group of lawmakers, or the original public meaning of constitutional language; (2) the conclusiveness of originally expected applications of constitutional language in fixing the Framers' intent, the original understanding, or the original public meaning; (3) the degree of determinacy with which historical sources can be expected to fix historical meaning and the role of judges in cases of relative indeterminacy; and (4) the circumstances, if any, under which non-historical considerations such as stare decisis, prudence, and apprehensions of normative desirability can justify constitutional decisions other than those that a purely historical criterion of constitutional meaning would mandate.").

[157] Often there is no fixed "general understanding" or "public meaning" waiting to be discovered. Thus, the claim to determinancy is illusory. *See* Suzanna Sherry, *The Indeterminacy of Historical Evidence*, 19 HARV. J.L. & PUB. POL'Y 437, 437 (1996) ("I view my task in this Article to be proving that history is indeterminate."); Or Bassok, *The Sociological-Legitimacy Difficulty*, 26 J.L. & POL. 239, 264–65 (2011) ("Critics of originalism argue that this pretense of objectivity, determinacy, and constraint is unrealistic, considering the highly indeterminate and relativistic nature of history as a

but I will mention two reasons. First, Justice Scalia did not always apply an originalist theory.[158] He was adamant about its necessity for the Establishment Clause, and would have overruled established precedent to do so.[159] In contrast, he did not mention originalism, or deferred to precedent, in other areas. For example, he never acknowledged in affirmative action cases "evidence suggesting that the Framers and ratifiers of the Equal Protection Clause did not expect it to be applied to bar race-based programs for the benefit of racial minorities."[160] In fact, Justice Scalia's use of originalism was so inconsistent some scholars have concluded that he was not really an originalist.[161]

Second, when Justice Scalia did rely on an originalist approach, the strictness with which he applied it varied.[162] For example, when interpreting the Second Amendment, he rejected

---

discipline, which exposes originalism to the same failing it set out to correct."); *see, e.g.*, District of Columbia v. Heller, 554 U.S. 570 (2008) (both majority and dissent apply an originalist approach to constitutional interpretation yet come to opposite conclusions); Marsh v. Chambers, 463 U.S. 783 (1983) (Justices in the majority and dissent come to different conclusions regarding founding era view of government prayers to or invocations of God).

[158] Andrew Koppelman, *Phony Originalism and the Establishment Clause*, 103 NW. U.L. REV. 727, 729 (2009) ("As others have noted, the 'originalist' Justices are only opportunistically originalist. When original meaning does not support the result they want to reach, they tend to ignore it . . . .").

[159] Justice Scalia has long argued that the touchstone for Establishment Clause should be history and tradition and not the existing *Lemon* test or endorsement test. *See supra* notes 26–28 and accompanying text (advocating for Establishment Clause jurisprudence based on history and tradition); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398–99 (Scalia, J., concurring) (insulting *Lemon* test by comparing it to a "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried"); Elmbrook Sch. Dist. v. Doe, 134 S. Ct. 2283, 2283–84 (2014) (Scalia, J., dissenting) (describing the endorsement test as an "errant line of precedent").

[160] Fallon, *supra* note 154, at 17 ("In *United States v. Virginia*, for example, Justice Scalia appeared to maintain that the Equal Protection Clause did not and could not bar gender-based exclusions from the Virginia Military Institute because the Equal Protection Clause was not originally understood as applicable to gender-based exclusions from public colleges and universities. By contrast, in cases involving race-based admissions preferences at public universities, Justices Scalia and Thomas have felt no need to grapple with evidence suggesting that the Framers and ratifiers of the Equal Protection Clause did not expect it to be applied to bar race-based programs for the benefit of racial minorities.").

[161] *See, e.g.*, Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 13 (2006) ("Justice Scalia is simply not an originalist. Whatever virtues he attributes to originalism, he leaves himself not one but three different routes by which to escape adhering to the original meaning of the text. These are more than enough to allow him, or any judge, to reach any result he wishes.").

[162] My description of strictness corresponds to Fallon's second dimension. *See* Fallon, *supra* note 154.

as "frivolous" the idea that the Second Amendment protects only the guns that existed at the time of the founding.[163] Because the types of guns have significantly changed, so should the scope of the Second Amendment.[164] When interpreting the scope of the Establishment Clause, however, Justice Scalia maintained that the government prayers to God that existed at the time of founding are still perfectly constitutional.[165] Yet prayers that might have been considered constitutional at the founding because they captured everyone's beliefs no longer do because of significant changes in the country's religious composition.[166] We are, after all, "a vastly more diverse people than were our forefathers."[167] But, although Justice Scalia insisted that the originalist interpretation must take into account changes in the country's gun composition, he rejected the argument that the originalist interpretation must take into account changes in the country's religious composition.[168]

Thus, even though Justice Scalia claimed that originalism curtailed his discretion, and that his conclusions were the result of objective decision-making, they were not.[169] I am not arguing that Justice Scalia intentionally exploited originalism's indeterminacy in order to achieve his desired outcome all while declaring his personal preferences played no role.[170] After all,

---

[163] District of Columbia v. Heller, 554 U.S. 570, 582 (2008) ("Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way.").

[164] *Id.* at 582 ("Just as the First Amendment protects modern forms of communications, *e.g.*, *Reno v. American Civil Liberties Union*, 521 U.S. 844, 849 . . . (1997), and the Fourth Amendment applies to modern forms of search, *e.g.*, *Kyllo v. United States*, 533 U.S. 27, 35–36 . . . (2001), the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.").

[165] *See supra* Part I.

[166] Marsh v. Chambers, 463 U.S. 783, 817 (1983) ("[O]ur religious composition makes us a vastly more diverse people than were our forefathers . . . . In the face of such profound changes, practices which may have been objectionable to no one in the time of Jefferson and Madison may today be highly offensive to many persons . . . .").

[167] *Id.*

[168] *See supra* Part I.

[169] McDonald v. Chicago, 561 U.S. 742, 908 (2010) (Stevens, J., dissenting) ("[A] limitless number of subjective judgments may be smuggled into his [Scalia's] historical analysis. Worse, they may be *buried* in the analysis.").

[170] Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 247 (2009) ("[O]riginalists can and often do move from one version of originalism to another as they decide different issues, thus allowing them to reach results that they

many whites truly believe that their conclusions about race—conclusions that confirm their privileged status—are the result of objective decision-making too. Nevertheless, Justice Scalia's originalism allowed him to claim objectivity while safeguarding Christianity's privileged status.

CONCLUSION

Several characteristics of privilege—unstated norms, invisibility, fragility—permeated Justice Scalia's Establishment Clause jurisprudence. Professor DiAngelo has noted that "if whites cannot engage with an exploration of alternative racial perspectives, they can only reinscribe white perspectives as universal."[171] In a similar way, Justice Scalia's insistence on originalism, with its questionable claim to objectivity, merely reinscribed Christian privilege.

personally prefer, all the while claiming (and likely mistakenly believing) that they are being guided by nothing more than the external constraint of history.").

[171] DiAngelo, *supra* note 54, at 66.