Enlightening the Religion Clauses

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"The U.S. Constitution . . . is a godless document."[1]
"Constitutionalism . . . assumes that the passions of men will not conform to the dictates of reason and justice without constraint."[2]

INTRODUCTION

Any interpretation of the religion clauses confronts at the outset the problem that the two clauses are in apparent tension.[3] Whether as a result of underlying philosophy or as a result of changed circumstances and subsequent interpretation, the Establishment Clause seems to reflect a preference for the secular and the Free Exercise Clause a preference for the religious.[4] The tension mirrors a pervasive ambiguity in American thought: "On the one hand, Americans, although not dominated by any particular form of organized religion, have viewed their democratic traditions as intimately related to their general religious traditions. . . . At the same time, a second powerful conviction exists that, pursuant to constitutional command, government should be secular."[5]

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1. ISAAC KRAMNICK & R. LAURENCE MOORE, THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS 27 (1996).

2. STEPHEN HOLMES, PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 274 (1995).

3. The Religion Clauses do not present the only internal tension in the Constitution. Bob Nagel has suggested that there is an inevitable tension inherent in the constitutional grant of power to Congress: although the enumeration of specific powers implies limits, the breadth of the powers enumerated (to say nothing of the necessary and proper clause) seems to transcend those limits. Robert F. Nagel, *The Future of Federalism*, ___ CASE W. RES. L. REV. ___ (forthcoming 1996).

4. As many scholars have noted, "neutrality" is a problematic concept in this context, even if it was the original intent of the framers. *See, e.g.*, Suzanna Sherry, Lee v. Weisman: *Paradox Redux*, 1992 SUP. CT. REV. 123, 135-46; Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 315 (1987); William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 319 (1991) (*"Free Exercise Revisionism"*); William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357 (1989-1990) (*"The Case Against Exemption"*); Douglas Laycock, *Towards A General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1415-16 (1981); see also Michael W. McConnell, *The Religion Clauses of the First Amendment: Where is the Supreme Court Heading?* 32 CATH. LAW. 187, 197-98 (1989) (Court must either retreat from its Free Exercise jurisprudence or from its Establishment jurisprudence).

5. Diane L. Zimmerman, *To Walk a Crooked Path: Separating Law and Religion in the Secular State*, 27 WM. & MARY L. REV. 1095, 1095-96 (1986). For other statements recognizing the tension, *see, e.g.*, Sherry, supra note 4; John H. Garvey, *Freedom and Equality in the Religion Clauses*, 1981

The tension is most acutely felt in cases raising the question of whether to accord special treatment—either positive or negative—to religion and religious believers. Indeed, some scholars have suggested that this problem is *the* question under the religion clauses.[6] The older version of this problem is how to treat those with religious objections to general laws. The reasoning of the Court's Establishment Clause precedents, beginning with *Lemon v. Kurtzman*,[7] suggests that to accord special treatment to religious objections would be to privilege religious beliefs over secular beliefs, violating the Establishment Clause.[8] But a long line of Free Exercise cases simultaneously required just such an accommodation of religious beliefs.[9] Thus the Establishment Clause seems to demand that the government not favor religious beliefs over other beliefs, but the Free Exercise Clause demands that the government not disadvantage religious believers, even unintentionally; thus sometimes it *must* grant special privileges to religious believers to relieve the burdens it has unintentionally placed on them.

The core values of the two clauses seem well reflected in these two lines of cases, even if we would quibble with the Court's specific applications. We can probably all agree that the Establishment Clause is designed to prevent the government from putting its imprimatur behind any one religion or religion in general,[10] while the Free Exercise Clause is designed to protect religion from government interference. The problem, of course, lies in translating these broad principles into constitutional doctrine. There are four possible pairs of "pure"[11] interpretations of the two clauses: (1) we might interpret both clauses broadly; (2) we might

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SUP. CT. REV. 193, 213-14, 218; Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 709-10 (1986); Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149 (1991) (modern secularist interpretation of Establishment Clause deprives Free Exercise Clause of its original, and only sufficient, rationale).

6. Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 6 ("Virtually every controversy under the Religion Clauses can be understood as raising the question of the special status of religion"); Marshall, *supra* note 4, at 358 ("The jurisprudence of free exercise, in short, is the jurisprudence of constitutionally compelled exemption"); but see Laycock, *supra* note 4, at 1374, 1389-90 (not all religion clause questions exhibit tension). I have suggested elsewhere that this tension can only be resolved by elevating one clause above the other when they conflict. SHERRY, *supra* note 4.

7. 403 U.S. 602 (1971).

8. *See, e.g.*, Estate of Thornton v. Caldor, 472 U.S. 703 (1985); Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989).

9. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963); Thomas v. Review Board, 450 U.S. 707 (1981); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987).

10. "Imprimatur" is a more appropriate description than either "coercion" or "financial support,"—adopted by some scholars—because otherwise it would be perfectly acceptable for the Congress to establish a "Church of the United States" as long as it neither used any tax money nor insisted on attendance or affiliation. *See* Douglas Laycock, *"Noncoercive" Support for Religion: Another False Claim About the Establishment Clause*, 26 VAL. U. L. REV. 37, 39 (1991).

11. There are also what might be called "diluted" or intermediate approaches that blend two or more of the core interpretation pairs. These approaches raise the same problems as their parent pairs, and add unpredictability.

interpret both clauses narrowly; (3) we might prefer the Free Exercise Clause in cases of conflict; and (4) we might prefer the Establishment Clause in cases of conflict. I have argued elsewhere that (1) is impossible in a society as pervasively regulated as the modern United States, and that (2) is dangerous because it leaves the legislature too much discretion to favor or disfavor particular religions.[12] This article addresses the remaining choices: in cases of conflict, should we prefer the core principles of the Establishment Clause or of the Free Exercise Clause?

The constitutional dilemma of religion, moreover, goes much deeper than simply a conflict between the two religion clauses. Last term's decision in *Rosenberger v. Rector and Visitors of the University of Virginia*[13] was a new twist on an old problem. There the conflict was not between the Establishment Clause and the Free Exercise Clause, but between the Establishment Clause and the Free Speech Clause. The Court was forced to choose between allowing the University to disadvantage religious speakers relative to other speakers, or allowing the University to spend its students' money on religious proselytizing. The former alternative seems plainly inconsistent with the Free Speech Clause, the latter with the Establishment Clause. Similar disputes are arising at other state universities. The University of Minnesota, for example, recently settled a dispute over whether Christian student groups can receive University funding if they require their voting members to subscribe to a religious "Statement of Faith." The University requires all funded student organizations to eschew discrimination on various grounds, including religion, and thus refused to fund these groups. The Christian student groups claimed that the University's refusal to fund them violated their free speech and association rights under such cases as *Widmar v. Vincent*[14] and *Roberts v. United States Jaycees*.[15]

One way to look at the Court's decision in *Rosenberger* is to suggest that it and *Employment Division v. Smith*[16] together adopt an approach of formal neutrality: the government is prohibited only from *intentionally* advantaging or disadvantaging religious believers. Under this scheme, there is no free exercise violation if the government requires religious objectors to obey the same laws as everybody else; nor is there an establishment violation if the government funds religious speakers the same way it funds other speakers. Justice Scalia, perhaps the most prominent contemporary formalist, may perhaps have viewed the cases that

12. *See* SHERRY, *supra* note 4.
13. 115 S. Ct. 2510 (1995).
14. 454 U.S. 263 (1981).
15. 468 U.S. 609 (1984). For an account of the controversy and a defense of the students' position—to which the University ultimately acceded—*see* Michael Stokes Paulsen, A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups (unpublished manuscript).
16. 494 U.S. 872 (1990).

way, as he was in the majority in both cases. Formal neutrality of this sort, however, is especially unpopular among scholars of religion.[17] Additionally, the kind of formal neutrality implied by *Rosenberger* allows the government to fund religion directly since it funds similar charitable or educational enterprises,[18] which seems to deprive the Establishment Clause of its core prohibition on requiring taxpayers to support religion.

Other than a few unrepentant formalists, moreover, there is little overlap between those who agree with *Rosenberger* and those who applaud *Smith*. Justice Stevens, for example, joined the majority in *Smith* and the dissent in *Rosenberger*. Justice O'Connor, who joined the majority in *Rosenberger*, concurred only in the judgment in *Smith*, specifically declining to adopt the majority's position of formal neutrality. Most scholars (including myself) applaud one of the cases while lamenting the other. Michael McConnell, for example, bitterly condemned the decision in *Smith*[19] but argued the case for the winning plaintiffs in *Rosenberger*. Defining neutrality thus does not resolve the debate about the meaning of the religion clauses.

Instead, we must resolve the tension at a deeper level, that of conflict between religious and secular authorities generally. As the current debates in the literature about the extent to which religious reasons constitute legitimate justifications for public policy[20] indicate, this is, in fact, an epistemological conflict between faith and reason. The problem arises

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17. *See, e.g.*, Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685 (1992); Michael A. Paulsen, *Religion, Equality, and The Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311 (1986).

18. For an extended discussion of how neutrality might be defined to permit government funding of religion, see Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 588-89, 594-95 (1991). The Supreme Court went out of its way to avoid this implication of *Rosenberger*, struggling mightily to explain why a state university's use of student monies was not the same as governmental use of tax revenues. 115 S. Ct. at 2522.

19. Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990).

20. *See, e.g.*, BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980); KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988); MICHAEL J. PERRY, LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS (1991); Robert Audi, *The Separation of Church and State and the Obligations of Citizenship*, 18 PHIL. & PUB. AFF. 259 (1989) Franklin I. Gamwell, *Religion and Reason in American Politics*, 2 J. LAW & RELIG. 325 (1984); Edward B. Foley, *Tillich and Camus, Talking Politics*, 92 COLUM. L. REV. 954 (1992); Kent Greenawalt, *Religious Convictions and Lawmaking*, 84 MICH. L. REV. 352 (1985); Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611 (1993); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195 (1992); Ruti Teitel, *A Critique of Religion as Politics in the Public Sphere*, 78 CORNELL L. REV. 747 (1993); David M. Smolin, *Regulating Religious and Cultural Conflict in a Postmodern America: A Response to Professor Perry*, 76 IOWA L. REV. 1067 (1991); Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955 (1989); Smith, *supra* note 5; Anthony J. Bevilacqua, *Symposium: Politics, Religion, and the Relationship Between Church and State*, 39 DEPAUL L. REV. 989 (1990); *Foreword: The Role of Religion in Public Debate in a Liberal Society*, 30 SAN DIEGO L. REV. 643 (1993).

because the secular state—at least in our constitutional democracy—grounds its authority on notions of individual choice mediated by human reason, while religion often depends instead on "the irresistible conviction of the authority of God."[21] Thus, because "[r]eligious belief need not be founded in reason, guided by reason, or governed in any way by the reasonable,"[22] it can place demands on believers that are unjustifiable under the epistemology of the secular state. The claim that the Establishment Clause should be subordinated when it conflicts with the religious or speech rights of believers is really a claim that the import of the religion clauses is that the government must remain neutral not only on the potential truth of religious claims but also on their epistemology. It is a claim that the government should not be permitted to privilege reason over faith as a method of obtaining and verifying truth claims. Thus, any satisfactory interpretation of the religion clauses must come to terms with the inevitable conflict between faith and reason.

The gulf between those who would rely on faith and those who would rely on reason is illustrated by quotations from partisans on each side: "The bar against an establishment of religion entails the establishment of a civil order—the culture of liberal democracy—for resolving public moral disputes."[23] "[N]either you nor I, nor society, nor the state, nor this democracy, can bear to live without God. . . . How long will it take us to learn this truth? The time has come to restore the vital relationship between the church and state, between religion and law."[24]

I will argue in this article that our Constitution does—as a matter of history—and ought to—as a matter of policy—privilege reason over faith. This is not to say that religious freedom should be abandoned or that religious belief should be discouraged. Stephen Macedo has suggested that in resolving other constitutional dilemmas, we should envision the Constitution as islands of governmental powers "surrounded by a sea of rights," rather than as "islands [of rights] surrounded by a sea of governmental powers."[25] Similarly, I would approach interpretation of the religion clauses as preliminarily a question of orientation: should we presume that the constitutional protection of religion—found primarily in the Free Exercise Clause—is a limited aberration in a secular state, and thus best interpreted narrowly, or should we assume contrarily that the aberration is the confinement of religion to the private sphere, and thus instead interpret the Establishment Clause narrowly? To answer this

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21. Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 172 (1992).

22. Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1256 (1994).

23. Sullivan, *supra* note 20, at 198.

24. Anthony J. Bevilacqua, *Foreword: Church and State—Partners in Freedom*, 39 DEPAUL L. REV. 989, 991 (1990).

25. STEPHEN MACEDO, THE NEW RIGHT V. THE CONSTITUTION 32 (1986).

question, I will first try to define the major distinctions between faith and reason, and then to defend the primacy of reason using both historical and practical arguments. Finally, I will suggest what effect a preference for reason might have on constitutional doctrine.

I. OF FAITH AND REASON

Reason and religion are both notoriously difficult to define. I make no claim here to have solved the conundrum, but seek only to sketch broad epistemological differences and to note how contemporary legal scholars who have rejected the distinction have erred. I should note first that although religion and faith are not entirely interchangeable, they are closely related, especially in the United States. While it might be possible to envision a religion based wholly or partly on reason, most of the major religions in America are based on faith as the underlying epistemology. This is especially true of the types of claims that engender litigation.[26] The most basic tenets of each religion tend to be supported primarily by faith rather than reason, and indeed few religious claims could be justified by observation and rational argument. Moreover, to the extent that a religiously-motivated conclusion is also supportable by rational argument, it should not pose a problem in a secular state; it is only nonrational arguments that threaten the primacy of reason. There is thus a difference between religious motivations—which may cause us to believe or feel strongly about particular conclusions that are also rationally justifiable—and an epistemology of faith, in which nonrational beliefs are permitted to trump ordinary rationality. It is only the latter that presents a conflict with reason. Since the vast majority of American religious beliefs—and, in particular, the religious beliefs that engender constitutional litigation—fall into this latter category, I will sometimes equate religion with faith, opposing both to reason.

The crucial difference between faith and reason lies in both the source of truth and in what counts as valid evidence of it. These two aspects of truth, of course, are interrelated. For the faithful, the ultimate authority and source of truth is extrahuman, and evidence can—and in some religious traditions, must—be entirely personal to the individual; for the reasonable, both the source and the evidence for the truth lie in common human observation, experience, and reasoning. To have faith is to affirm a transcendent reality, different from that observed by nonbelievers.

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26. I have in mind such beliefs as creationism, *see, e.g.*, Edwards v. Aguillard, 482 U.S. 578 (1987), faith healing; Lundman v. McKown, 530 N.W.2d 807 (Minn. Ct. App. 1995), *cert. denied*, 116 S. Ct. 814, 828 (1996), and the variety of commands purportedly imposed by God, Sherbert v. Verner, 374 U.S. 398 (1963).

There are three interrelated differences between an epistemology of reason and one of faith. They all rest, in some sense, on the difference between a commonly shared perception of reality and a perception of reality accessible only to the faithful. First, the source of faith—at least in most religions in the United States—is extrahuman and thus accessible only to those who already believe or who convert. As Abner Greene puts it:

> Another way of putting this is that religion self-consciously revels in the unsensible, whereas science and other sources from which people make arguments at least purport to rely solely on the observable, on what we share as humans. So even if science (both natural and social) is based—as religion is—in an important way on faith (nondeducible premises), the critical difference is that by its own terms, science points to the human and natural world for the source of value, whereas religion, by its own terms, points not only to the human and natural world, but also outward to an extrahuman realm.[27]

To the extent that religion is based on an epistemology of faith (as are the major religions in the United States), any argument grounded solely on religious beliefs can ultimately be reduced to a claim about what God requires. Although some of these arguments can take rational form—such as disputes about the correct interpretation of sacred texts, about appropriate human goals or behavior, about whether particular obligations exist—they are nevertheless disputes about how we should determine what God commands.[28] The source of rational belief, by contrast, is shared human observation, experience, and capacity for reason.

Positing an extra-human source of ultimate authority has two consequences. It affects both one's attitude toward that authority and one's ability to validate one's beliefs. Secular science and liberal politics, both committed to the primacy of reason, necessarily deny that any truth is incontestable. While some beliefs may be given a presumption of correctness, all beliefs are ultimately subject to the critique of reason. Faith, on the other hand, demands fidelity. It is, as Michael McConnell points out, a belief in "the irresistible conviction of the authority of

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27. Abner S. Greene, *Is Religion Special? A Rejoinder to Scott Idleman*, 1994 U. ILL. L. REV. 535, 540. *See also* David R. Dow, *On Reading Stephen Carter's The Culture of Disbelief—A Dissenting Opinion*, 11 J. LAW & RELIG. 417, 435-36 (1994-1995).

28. Bill Marshall is thus mistaken when he states that some religious principles derive from reason rather than faith, William P. Marshall, *The Other Side of Religion*, 44 HASTINGS L.J. 843, 846-47 (1993), and that "[r]eligion can [be], and often is, susceptible to reasoned and dispassionate discussion," William P. Marshall, *The Inequality of Anti-establishment*, 1993 B.Y.U. L. REV. 63, 66. While reason may inform how the principles are apprehended, the principles themselves are presumably derived from God.

God."[29] As another scholar puts it: "Religious principles . . . are the words of God. Man lacks the power to modify them."[30] To question God's authority is to waver in one's faith.[31]

Finally, because the source of beliefs inspired by faith is extra-human, the validity of those beliefs is not testable by ordinary rational means. The methods of science and rational argument are of no avail in evaluating claims based on faith: "The process by which one develops belief in a transcendent reality—acquires faith—is not, cannot be, a rational process, for the validity of the objects of one's faith cannot be observed or tested, nor can it be logically proven."[32] Nor can faith be rationally *dis*proven, for while "incoherence, anomaly, and paradox *always* count as weaknesses in a scientific theory . . . this appears not to be the case for . . . traditional religious thought."[33] Thus, unlike replicable scientific truths and rational arguments based on human observation and experience, both the source and the validity of religious beliefs based on faith are uniquely personal, not shared except within the community of believers. As Kent Greenawalt puts it: "The truths that one person learns by making a leap of faith are not fully accessible to someone who has not made a similar leap, and generally accessible reasons are not powerful enough to induce a leap of faith."[34]

Larry Alexander and Bill Marshall, among others, reject this distinction, suggesting that there is no "epistemological divide" between reason and

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29. MCCONNELL, *supra* note 21, at 172; *see also* MCCONNELL, *supra* note 6, at 15 ("If there is a God, His authority necessarily transcends the authority of nations; that, in part, is what we mean by 'God'"); William P. Marshall, *Truth and the Religion Clauses*, 43 DEPAUL L. REV. 243, 252 (1994) (surveying literature).

30. DOW, *supra* note 27, at 434. Dow notes that unlike religious values, "legal and moral values are fluid; they are subject to discussion and hence ready alteration." *Id.* at 433.

31. For other descriptions of this difference between religion and reason, *see, e.g.*, Christopher Eisgruber, *Madison's Wager: Religious Liberty in the Constitutional Order*, 89 NW. L. REV. 347, 369 (1995) ("blasphemy is inconsistent with the [rationalist] American constitutional order, but the possibility of blasphemy is constitutive of many religious orders"); Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 530, Lonnie D. Kliever, *Academic Freedom and Church-Affiliated Universities*, 66 TEX. L. REV. 1477 (1988); FOLEY, *supra* note 20, at 959-60; see also MARSHALL, *supra* note 28, at 852 (although there is no epistemological difference between reason and religion, the human needs that religion serves make it inevitable that religion will be "dogmatic and authoritarian").

32. Frederick Mark Gedicks & Roger Hendrix, *Democracy, Autonomy, and Values: Some Thoughts on Religion and Law in Modern America*, 60 S. CAL. L. REV. 1579, 1604 (1987).

33. JEFFREY STOUT, THE FLIGHT FROM AUTHORITY: RELIGION, MORALITY, AND THE QUEST FOR AUTONOMY 105 (1981). *See also id.* at 106.

> What we might deem a 'paradox,' and therefore a *weakness*, traditional theology christens a 'mystery,' to be accepted on faith. So even *if* a given doctrine turns out to be a logical paradox, such that its intelligibility or comprehensibility must be taken on faith, a traditional theologian would not treat this as a potential obstacle to belief.

34. Kent Greenawalt, *Grounds for Political Judgment: The Status of Personal Experience and the Autonomy and Generality of Principles of Restraint*, 30 SAN DIEGO L. REV. 647, 649 (1993) (describing but not endorsing this view of religion).

faith.[35] They argue that secular truths are no more provable than religious truths by purely rational or empirical means.[36] Even if this is true—and I will argue in a moment that its truth is so constrained that it cannot bear the weight Alexander puts on it—it is of limited significance. The crucial epistemological difference between reason and faith is aspirational: religion's goal is to identify and follow the word of God while secularists attempt to appeal only to shared *human* knowledge. Even if it fails, then, the goal of reason is epistemologically different from the goal of religion.[37]

Moreover, in arguing that reason cannot support secular truths any more than it can support religious truths, these scholars adopt an overly cramped view of reason. Reason need not be either sterile or abstract. Owen Fiss has described what he calls substantive rationality, which is "an intellectual process in which we deliberate about ends, about what is just or fair or equal."[38] Others have described a similar process as pragmatism or practical reason.[39] Pragmatist moral reasoning need not be foundationalist or purely inductive: it can draw on common experience and observation and it can tolerate some amount of uncertainty. Nevertheless, moral reasoning, like legal reasoning, can be good or bad. It can contain inconsistencies and failures to notice logically necessary connections.[40]

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35. *See* Larry Alexander, *Liberalism, Religion, and the Unity of Epistemology*, 30 SAN DIEGO L. REV. 763, 774 (1993); MARSHALL, *supra* note 28, at 845-47; *see also* Robert Audi, *Rationality and Religious Commitment*, *in* FAITH, REASON AND SKEPTICISM 50 (Marcus Hester ed., 1992); GREENAWALT, *supra* note 20; Joseph Raz, *Facing Diversity: The Case of Epistemic Abstinence*, 16 PHIL. & PUB. AFF. 3, 39-43 (1990); Tom Stacy, *Reconciling Reason and Religion: On Dworkin and Religious Freedom*, 63 GEO. WASH. L. REV. 1, 55-56 (1994). For contrary views, *see, e.g.*, GEDICKS & HENDRIX, *supra* note 32; Mark Tushnet, *Religion and Theories of Constitutional Interpretation*, 33 LOYOLA L. REV. 221, 240 (1987); Greene, *supra* note 20; STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZES RELIGIOUS DEVOTION 43 (1993).

36. *See* ALEXANDER, *supra* note 35, at 774-75 ("the propositions of liberalism are not empirical, but metaphysical and normative," and "[m]oral reasoning rests either on nonempirical premises or on inferences that are not matters of logical entailment"); MARSHALL, *supra* note 28, at 846-47; Scott Idleman, *Ideology as Interpretation: A Reply to Professor Greene's Theory of the Religion Clauses*, 1994 U. ILL. L. REV. 337, 348 ("it is far from apparent that secular first principles . . . are in fact any more provable or accessible than religious first principles"); *see also* SMITH, *supra* note 20, at 1008 (while citizenry might agree on facts and reasoning methods, "political decisions are inevitably grounded in evaluative judgments, and in that realm, universal (or anything close to universal) agreement is much more elusive").

37. *See* EISGRUBER, *supra* note 31, at 369-70.

38. Owen M. Fiss, *Responses*, 5 YALE J. CRITICISM 213, 216 (1992); *see also* Owen M. Fiss, *Reason In All Its Splendor*, 56 BROOK. L. REV. 789 (1990); Steven G. Gey, *Why Is Religion Special? Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 175 (1990).

39. *See generally*, PRAGMATISM IN LAW AND SOCIETY (Michael Brint & William Weaver eds., 1991); JEFFREY STOUT, ETHICS AFTER BABEL: THE LANGUAGES OF MORALS AND THEIR DISCONTENTS (1988); Daniel A. Farber, *Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century*, 1995 U. ILL. L. REV. 163; Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989). Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988).

40. For an elaboration of how moral reasoning can fail, *see* JUDITH JARVIS THOMPSON, THE REALM OF RIGHTS 24-29 (1990). *See also* DAVID LYONS, ETHICS AND THE RULE OF LAW 32 (1984) ("Moral positions can be discredited if they are internally inconsistent").

It can fit poorly with experience or with one's other beliefs, or have unpalatable implications.[41] It can be based on faulty premises, unchallenged only because of cognitive negligence.[42] Reason is, moreover, publicly accessible: anyone can participate in a debate about whether particular reasoning is flawed.[43]

An epistemology of faith has no such limitations or qualifications. To have faith is to be able to ignore contradictions, contrary evidence, and logical implications. Indeed, one test of faith is its capacity to resist the blandishments of rationality: the stronger the rational arguments against a belief, the more faith is needed to adhere to it. Nor is it possible for those without faith to enter the discussion. Thus, although reason need not produce either certainty or unanimous agreement, it has features that differentiate it from faith, and make its truths more appropriate for public use. I now turn to the central question of the religion clauses: where faith and reason conflict, which should prevail?

II. THE CONSTITUTION OF THE ENLIGHTENMENT

The battle over the original intent of the religion clauses has been fought to a draw. There have been many interesting diversions along the way: Jefferson, whom historians consider the epitome of early American civic republicanism,[44] has been castigated as a liberal;[45] Madison, who practically invented the American idea of the liberal science of politics (*pace* Sunstein), has been lumped with evangelicals.[46] Nevertheless, we seem to have reached a point where, as Mark Tushnet has pointed out, "the better the history we have, the less helpful that history is in resolving problems of constitutional interpretation."[47] Now what?

I would suggest that in looking for the historical meaning of the religion clauses we have been looking in the wrong place. Trying to divine the

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41. Coherence with other beliefs is part of the pragmatist vision of reason. *See, e.g.*, LYONS, *supra* note 40, at 35; Charles Larmore, *Beyond Religion and Enlightenment*, 30 SAN DIEGO L. REV. 799, 812-13 (1993). Note that both coherence and adequate reasoning process are necessary for us to deem a belief rational. See Joseph Raz, *The Relevance of Coherence*, 72 B.U. L. REV. 273 (1992).

42. *See* RAZ, *supra* note 41, at 279-80 (1992) (in addition to coherence, "we also can expect that a person should not be rash, or gullible, or prejudiced, or superstitious").

43. *See generally* JOHN RAWLS, POLITICAL LIBERALISM (1993) (suggestion that only publicly accessible reasons should underlie public policy formation).

44. *See, e.g.*, LANCE BANNING, THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY (1978).

45. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1443, 1449-50 (1990).

46. MCCONNELL, *supra* note 45, at 1452-55.

47. Mark V. Tushnet, *The Origins of the Establishment Clause*, 75 GEO. L.J. 1509, 1511 (1987); *see also* Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 841 (1986) ("we cannot definitively read the minds of the Founders except, usually, to create a choice of several possible meaning for the necessarily recondite language that appears in much of our charter of government").

original intent of specific clauses is inevitably doomed to failure, as the controversy over the original meaning of the religion clauses illustrates. Indeed, the problems that beset originalism in general are especially troubling in the context of the religion clauses. Two of the strongest advocates of a broad Free Exercise Clause admit that the founding generation was concerned about a substantially different threat to religious freedom than the one that most concerns religious believers today. Michael McConnell puts it this way: for the founders, "the great threat to religious pluralism [was] a triumphalist majority religion," but "[t]he more serious threat to religious pluralism today is a combination of indifference to the plight of religious minorities and a preference for the secular in public affairs."[48] Or, as Douglas Laycock describes it, "[t]he nature of conflict over religious liberty has changed" from inter-sect violence and discrimination to conflicts between the secular and the religious.[49] It is difficult to see how the founders' resolution of the one problem—how to resolve inter-sect conflict—gives us any guidance on their resolution of the other—how to resolve the conflicts between the secular and the religious.

But if the dilemma of the religion clauses is viewed as primarily a conflict between faith and reason, history can offer more guidance. It is historically uncontroversial that the Enlightenment, with its emphasis on rationalism and empiricism and its rejection of religious faith and mysticism, was the primary epistemology of the founding generation. Most scholars consider the Constitution itself to be a product of the Enlightenment.[50] Unlike founding documents of the previous century,[51] the Constitution does not refer to God[52] or to any religious purpose. Indeed,

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48. MCCONNELL, *supra* note 21, at 169.

49. Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 FORDHAM L. REV. 883, 883-85 (1994).

50. *See, e.g.*, HENRY STEELE COMMAGER, THE EMPIRE OF REASON: HOW EUROPE IMAGINED AND AMERICA REALIZED THE ENLIGHTENMENT (1977); RALPH KETCHAM, FRAMED FOR POSTERITY: THE ENDURING PHILOSOPHY OF THE CONSTITUTION (1993); HENRY F. MAY, THE ENLIGHTENMENT IN AMERICA (1976); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969); Andrew J. Reck, *The Enlightenment in American Law II: The Constitution*, 44 REV. OF METAPHYSICS 729 (1991).

51. *See, e.g.*, *1632 Charter of Maryland*, *in* 3 FRANCIS N. THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1677 (1909) (granting charter "by the Grace of God" to Caecilius Calvert, Baron of Baltimore, who is "animated with a laudable, and pious Zeal for extending the Christian Religion" over lands "partly occupied by Savages, having no knowledge of the Divine Being"); *1620 Agreement Between the Settlers at New Plymouth*, *in* 3 THORPE at 1841 (begins "In the Name of God, Amen" and notes that the signatories covenant "in the Presence of God and one another"); *1635 Act of Surrender of the Great Charter of New England to His Majesty*, in 3 THORPE at 1860 (addressed to "all Christian People" and sending "Greeting, in our Lord God everlasting"); *1621 Ordinances for Virginia*, in 7 THORPE at 3810 (invoking "Divine Assistance").

52. For this lack, it was roundly criticized at the time of its adoption. *See* KRAMNICK & MOORE, *supra* note 1, at 26-45.

Actually, there is a single reference to "our Lord," but its context supports rather than refutes the Constitution's primarily secular nature. Between Article VII and the signatures of the delegates, is the following:

as one scholar has noted, the Constitution itself informs us that "it is Liberty's Blessings, not God's, that we are trying to secure 'to ourselves and our Posterity.'"[53] The underlying epistemology of the Constitution, then, is reason rather than faith. This is not to suggest that the founding generation was necessarily irreligious—although they were, according to one scholar, "a distinctly unchurched people"[54]—but simply that they created a secular *government*.[55]

This conclusion, moreover, is in accord with the way we ordinarily view legal and constitutional doctrine. A few examples should suffice. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[56] the Court recently examined at length what constitutes "knowledge" for purposes of expert testimony. The Court stated that "'knowledge' connotes more than subjective belief or unsupported speculation," although it need not mean certainty.[57] The Court also distinguished "scientific knowledge" from "absurd and irrational pseudo-scientific assertions."[58] Although the *Daubert* Court was concerned specifically with scientific knowledge, it seems uncontroversial that no court would permit, for example, a conviction based on the testimony of an astrologer who contended that the defendant's astrological chart demonstrated that he was guilty, or a medium who claimed that the dead victim named the murderer. Similarly, the test of rationality used by the Court in judging the constitutionality of any law that is not subject to heightened scrutiny would reject a law purportedly justified by astrology, or by the legislators' unsupported "faith" that, for example, blue cars were more dangerous than green cars and thus should be banned.

Our legal culture and constitutional history, then, seem to privilege rationality. Unless the religion clauses have a different source or

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> Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth In Witness whereof We have hereunto subscribed our Names.

The juxtaposition of the two ways of describing the date suggests that the delegates might have used the conventional phrase "the Year of our Lord" merely as a way of differentiating that date from the second, more significant description. Certainly the delegates did not seem to find the reference significant. Madison described Benjamin Franklin's original proposal for this language: "Done in Convention by the unanimous consent of *the States* present the 17th of Sepr &c—In Witness whereof we have hereunto subscribed our names." JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 654 (Monday, September 17) (Adrienne Koch ed., 1966) ("Madison's Notes"). There was no further discussion of this language.

53. LUPU, *supra* note 18, at 596.

54. KRAMNICK & MOORE, supra note 1, at 17.

55. And they did so "despite their enormous respect for religion, their faith in divinely endowed human rights, and their belief that democracy benefited from a moral citizenry who believed in God." KRAMNICK & MOORE, supra note 1, at 12.

56. 113 S. Ct. 2786 (1993).

57. *Id.* at 2795.

58. *Id.* at 2798. *Cf.* HOLMES, *supra* note 2, at 231 (1995) ("By the Enlightenment standards on which our constitutional settlement was based, a community's attempt to compel scientific outcomes congenial to its nonrational attachments should probably be described as a form of self-injury").

motivation, they too should be interpreted from an Enlightenment perspective. Certainly, a polity based on rationalist Enlightenment principles might have many reasons to protect religious freedom. Religious liberty might be seen as a natural right, or as a mere manifestation of a broader preference for liberty and against government interference with private choices. Religious beliefs and organizations may be conducive to producing responsible citizenry. Religious freedom may be necessary to avoid turmoil and keep the peace. Especially if religious belief is deeply-held, nonrational, and somewhat idiosyncratic,[59] the alternative to protecting religious liberty is a perpetually angry and resentful subpopulation of citizens. Thus protecting religious liberty—and, in particular, prohibiting government discrimination based on religion—may reduce religious strife and promote the welfare of both individuals and the community. There is some evidence that all these factors may have influenced the founding generation.[60] None of these motivations undermine the conclusion that the religion clauses, like the rest of the Constitution, rest on a primarily rationalist and secular philosophy as opposed to one of faith, and should thus be interpreted as a historical matter to privilege—or at least to permit the legislature to privilege—reason over faith.

Michael McConnell, however, has argued that rational secularists were not the only players on the constitutional stage in the eighteenth century. He suggests that religious evangelists, whose agenda did not include reliance on reason, were a major force behind the religion clauses.[61] Other scholars have vigorously disputed the implications of his historical analysis.[62] As Mark Tushnet comments, "[a]s a historian, McConnell is

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59. *See* John H. Garvey, *Free Exercise and the Values of Religious Liberty*, 18 CONN. L. REV. 779, 796 (1986); Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 GEO. WASH. L. REV. 841, 842 (1992).

60. *See, e.g.*, Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 837, 910-18 (1995) (surveying literature on founding generation's "belief . . . that religiously-based 'virtue' was necessary for the success of the republican experiment"); Mark Tushnet, *supra* note 47, at 1515 ("Miller, Levy, and Curry demonstrate that the framers' generation regarded religion as an essential precondition of social order and a crucial prop for the novel sort of government they were creating"); WALTER BERNS, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY 9-10, 27-30 (1976) (avoiding religious strife). SMITH, *supra* note 5, at 164 (libertarian arguments).

61. MCCONNELL, *supra* note 45.

62. *See, e.g.*, KRAMNICK & MOORE, *supra* note 1; Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992); Ellis M. West, *The Right to Religion-Based Exemptions in Early America: The Case of Conscientious Objectors to Conscription*, 10 J. LAW & RELIG. 367 (1993-94); GEY, *supra* note 38; MARSHALL, *supra* note 4. As Christopher Eisgruber and Lawrence Sager note: "McConnell believes that '[n]o other figure played so large a role in the enactment of the Religion Clauses as Jefferson and Madison.' We might reasonably conclude that the serious divergence between the views of these two pivotal thinkers renders history an unreliable guide to interpretation of the Religion Clauses." EISGRUBER & SAGER, *supra* note 22, at 1272-73 (1994).

a fine lawyer."[63] Even McConnell himself admits that the evidence is equivocal.[64] Certainly, McConnell's religiously sympathetic Madison[65] is a controversial portrait of the man who could write that "accidental differences in political, religious, or other opinions" appear "erroneous or ridiculous" to the "enlightened Statesman, or the benevolent philosopher."[66]

McConnell's conclusion that nonrational religious evangelists influenced Madison to include broad substantive protections for religious freedom in his bill of rights is also inconsistent with Madison's general political philosophy. The cornerstone of Madison's political scheme was constructing a way to avoid the devastating effect that factions could have on a democracy. The evangelists described by McConnell are, of course, just such a faction; indeed, in both the Philadelphia convention and *Federalist 10* Madison pointed to religious differences as one cause of factionalism.[67] Moreover, the tradition from which Madison drew his concern about factions recognized that factions were primarily the result of irrational impulses getting the better of human rationality.[68] To suggest that Madison's bill of rights was the product of a religious faction that

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63. Mark Tushnet, *The Rhetoric of Free Exercise Discourse*, 1993 B.Y.U. L. REV. 117, 127; *see also id.* at 124: "McConnell's article employs the best sort of 'law office history,' a rhetorical form designed to give historical evidence favorable to an advocate's position the most weight it can bear, while at the same time explaining away apparently unfavorable evidence. . . . [McConnell] regularly construes ambiguous evidence in favor of his interpretation, when it could just as easily be construed against it." *Cf.* Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881 (1995) (attack on McConnell's skills as a historian in context of a different article).

64. MCCONNELL, *supra* note 19, at 1117; Michael W. McConnell, *Should Congress Pass Legislation Restoring the Broader Interpretation of Free Exercise of Religion*, 15 HARV. J.L. & PUB. POL'Y 181, 185 (1992). Moreover, the Evangelical movement was more complex—and probably less wholeheartedly committed to the primacy of faith over reason—than McConnell suggests. *See* JAMES TURNER, WITHOUT GOD, WITHOUT CREED: THE ORIGINS OF UNBELIEF IN AMERICA 77-79 (1985):

> There was no escaping the fact, however much tactful words disguised it, that the God of Abraham and Isaac, of Augustine and Aquinas, of Luther and Calvin could hardly any more command credence from an alert twelve-year-old. Well before 1790, the idea had fully formed that God acted in two distinct modes. Although His spiritual governance remained immediate, personal, and except in broad principles unpredictable. He managed His visible world through impersonal natural laws. . . . Evangelicals, in common with virtually all educated Americans, accepted the divided God of the Enlightenment.

65. MCCONNELL, *supra* note 45, at 1452-55.

66. LETTER FROM JAMES MADISON TO THOMAS JEFFERSON (OCTOBER 24, 1787), *reprinted in* THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON, 1776-1826 (VOL. I), at 495, 501 (James Morton Smith, ed., 1995). Madison wrote later in the same letter: "Even in its coolest state, [religion] has been much oftener a motive to oppression than a restraint from it." Id. at 502. *See also* KRAMNICK & MOORE, *supra* note 1, at 103-06.

67. *See* MADISON, *supra* note 52, at 76 (Wednesday, June 6: "All civilized Societies would be divided into different Sects, Factions, & interests, as they happened to consists of . . . disciples of this religious Sect or that religious Sect"); THE FEDERALIST No. 10, at 79 (Clinton Rossiter, ed., 1961) ("A zeal for different opinions concerning religion . . . [has] divided mankind into parties [and] inflamed them with mutual animosity"). *See also* Marc M. Arkin, *The Intractable Principle: David Hume, James Madison, Religion, and the Tenth Federalist*, 39 AM. J. LEGAL HIST. 148 (1995).

68. *See* HOLMES, *supra* note 2, at 49, 51-52, 60.

rejected Enlightenment reason is to undermine everything that Madison believed about the science of politics.

The evidence McConnell presents merely recreates, then, in a more particular context, the general historical dispute over the meaning of the religion clauses. Was the primary purpose of the clauses to protect the church from the state or the state from the church?[69] In light of the strong evidence that the bulk of the Constitution—and indeed the framers themselves—were products of the secular Enlightenment, McConnell's history is an insufficient basis on which to conclude that the former was the primary motivation. The mere support of religious believers for the religion clauses is not dispositive: nonestablished religions—including the evangelicals—might well have supported the religion clauses in order to curtail the power of the established religions,[70] which is not inconsistent with the rationalist desire to create an entirely secular state.

McConnell also makes the somewhat different historical argument that the founding generation was overwhelmingly religious, and therefore would not have cast religion out of the public arena.[71] Steven Smith has similarly suggested that "the founding generation was deeply and pervasively influenced by Protestant thought and practice."[72] It is not necessary to dispute this conclusion in order to deny its significance.

First, the founding generation did not draw the same distinction between faith and reason that we do. As Gordon Wood notes, most eighteenth-century Americans believed that "[e]ven scriptural truth could be supported by experience and reason, and few American ministers saw any need to deny the Enlightenment for the sake of religion."[73] Similarly, another scholar suggests that Jefferson's "Bill for Establishing Religious Freedom," and the federal religion clauses that followed it, taught "that God seeks to extend religion not by force, or even by faith, but rather '*by its influence on reason alone.*'"[74] Another views as descriptive of the eighteenth century American philosophy Plutarch's saying—quoted with approval by an American thinker—that "to follow God and obey Reason is the same thing."[75] In 1784, Ethan Allen wrote that "[r]eason therefore

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69. *See* Stephen Pepper, *Conflicting Paradigms of Religious Freedom: Liberty versus Equality*, in 1993 B.Y.U. L. REV. 7, 15-19; SMITH, *supra* note 5, at 157 & n.26.

70. *See* Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 MINN. L. REV. 1047 (1996).

71. MCCONNELL, *supra* note 21, at 191.

72. SMITH, *supra* note 5, at 157.

73. WOOD, *supra* note 50, at 8. McConnell disputes this description of American religion, suggesting that the "Lockean-Jeffersonian preference for rational over traditional religion" did not reflect the beliefs of most Americans, who were in the throes of an evangelical religious revival. MCCONNELL, *supra* note 45, at 1435-73 (quotation at 1450).

74. Sanford Kessler, *Locke's Influence on Jefferson's 'Bill for Establishing Religious Freedom,'* 25 J. CH. & ST. 231 (1983).

75. KETCHAM, *supra* note 50, at 13; *see also* RUTH H. BLOCH, VISIONARY REPUBLIC: MILLENNIAL THEMES IN AMERICAN THOUGHT (1985); Ruth H. Bloch, *Religion and Ideological Change in the American Revolution*, *in* RELIGION AND AMERICAN POLITICS FROM THE COLONIAL PERIOD TO THE

must be the standard, by which we determine the respective claims of [religious] revelation."[76] In 1787, Thomas Jefferson advised his nephew to "[q]uestion with boldness even the existence of a God; because, if there be one, he must more approve of the homage of reason than that of blindfolded fear."[77]

In short, the framers (except for McConnell's evangelicals, whose influence is hotly disputed) believed in a reasonable God. One authority describes the framers as adhering to "a nondoctrinaire religious deism," which "rejected a supernatural faith built around an anthropomorphic God who intervened in human affairs," positing instead "a God understood as a supreme intelligence who after creating the world destined it to operate forever after according to natural, rational, and scientific laws."[78] But belief in a reasonable God will never create a conflict with the secular state, for whatever can be demonstrated or decided by reference to religion can as easily be justified based on human reason.[79] Where faith and reason conflict—as they do in many contexts today—appeals to a generation that saw them as complementary are of little use.

The historical appeal to our religious antecedents is troubling in another way as well. As Mark Tushnet has sharply reminded us, to the extent the framers were religious, they were exclusionary and inegalitarian:

> The connection that the framers drew was not between republican virtue and religion in general, or even between virtue and Christianity. It was between virtue and Protestant Christianity. In this light their social theory appears morally repugnant as well as wrong. . . . After all, most of the framers believed that Catholics, adherents to an authoritarian religion, could not be good republican citizens.[80]

1980s 44, 51 (Mark A. Noll ed., 1990); Harry S. Stout, *Rhetoric and Reality in the Early Republic: The Case of the Federalist Clergy*, *id.* at 62, 65; UNDERKUFFLER-FREUND, *supra* note 60, at 896-901.

76. ETHAN ALLEN, REASON THE ONLY ORACLE OF MAN 475 (1784).

77. Letter from Thomas Jefferson to Peter Carr (August 10, 1787), *in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 429, 431 (Adrienne Koch & William Peden, eds., 1944). Jefferson may have been extreme in his reliance on reason, but there are indications that the founders in general—like most Enlightenment thinkers—believed that any religious tenets that were contrary to reason should be rejected. *See* DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION 92-93 (1986); JOHN B. BURY, A HISTORY OF FREEDOM OF THOUGHT 105-06 (1913); Frederick Mark Gedicks, *The Religious, the Secular, and the Antithetical*, 20 CAP. U. L. REV. 113, 125 (1991); KRAMNICK & MOORE, *supra* note 1, at 101 ("It is worthwhile to note that Jefferson's views were by no means fundamental departures from those of his fellow founding fathers").

78. KRAMNICK & MOORE, *supra* note 1, at 34.

79. Indeed, belief in a reasonable God eventually eliminates the need for recourse to religion at all—at least in the public arena—as God's truths are all accessible to human reason. As Jeffrey Stout puts it, "[eighteenth century] Deism, in short, accepts only those tenets of traditional theology that can be established independently as probable hypotheses." STOUT, *supra* note 33, at 117 (1981); *see also* TURNER, *supra* note 64 (religious response to Enlightenment, by making God rational, eventually spawned unbelief).

80. TUSHNET, *supra* note 35, at 228.

The framers' general religiosity is not reflected in Justice Douglas' comment that "[w]e are a religious people whose institutions presuppose a Supreme Being."[81] Rather, it is epitomized by Justice Story's conclusion—in a case upholding a testator's establishment of a secular college—that "Christianity [is] a part of the common law of the state [in that] its divine origin and truth are admitted",[82] and that Judaism and Deism are "form[s] of infidelity."[83] I doubt that even the most ardent originalists want to rely on that kind of religious sentiment as the basis for their interpretation of the religion clauses. And once we free ourselves from this narrowest interpretation of the founders' views of religion, there is no logical stopping point short of reincorporating their general Enlightenment secularism with its preference for reason over faith.

III. THE REASONS FOR REASON

Abandoning the Enlightenment by denying the primacy of reason is as unwise as it is anti-originalist.[84] Without reason and empiricism, we have no way of mediating among the different claims of faith. Indeed, in this age of post-modernism, not only religious believers claim to "know" truths irreconcilable with rational scientific empiricism. Radical social constructivists also reject reason in favor of other epistemologies.

Radical social constructivists argue that Enlightenment reason does not exist apart from its social and political hegemony. Reason, they claim, is socially constructed; it is neither more nor less than the epistemology of those in power. Alternative epistemologies, while currently disfavored, are equally sound. Thus the radical project is to expose "scientific rationality" as just one among many ways of knowing, and to reject "linear, rationalistic thought" in favor of more personal, anecdotal, and intuitive epistemologies.[85] Epistemological pluralism is the order of the day, and policies and practices based on or justified by appeals to reason—from the

81. Zorach v. Clauson, 343 U.S. 306, 313 (1952).
82. Vidal v. Girard's Executors, 43 U.S. (2 How.) 127, 198 (1844).
83. *Id.*
84. A more detailed version of my arguments in favor of the primacy of reason may be found in Suzanna Sherry, *The Sleep of Reason*, 84 GEO. L.J. 453 (forthcoming February 1996).
85. *See, e.g.*, CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 54 (1987); GENEVIEVE LLOYD, THE MAN OF REASON: "MALE" AND "FEMALE" IN WESTERN PHILOSOPHY (1984); Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L REV. 971, 976, 1028-44 (1991); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 359 (1987); Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 893-94, 903 (1989); Linda R. Hirshman, *Foreword: The Waning of the Middle Ages*, 69 CHI.-KENT L. REV. 293, 297-98 (1993); Patricia A. Cain, *Feminist Legal Scholarship*, 77 IOWA L. REV. 19, 27 (1991); Gary Peller, *Race Consciousness*, 1990 Duke L.J. 758, 806; Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711, 1721 (1995).

Socratic method to the protection of freedom of speech—are discriminatory against those who are epistemologically different.

A few academic defenders of religion explicitly take a similar approach. Frederick Gedicks uses the language of social constructionism when he describes "the allocation of creationism to the marginalized world of subjectivity and evolution to the privileged world of objectivity" as "merely the exercise of social power."[86] But even those who do not explicitly endorse social constructivism are necessarily arguing in favor of epistemological pluralism and against the primacy of reason. Douglas Laycock, for example, would allow those with nonrational religious beliefs—such as that one will be eternally damned if one works on the Sabbath—to avoid obligations that are imposed on the rest of us.[87] Since he presumably would not grant the same privilege to flat-earthers (an exemption from overseas military assignments based on their fear of falling off the edge?), racists (an exemption from anti-discrimination laws?), or the insane (an exemption from any consequences for criminal conduct?), he is necessarily according the epistemology of faith as much respect as the epistemology of reason—and more respect than other similarly nonrational epistemologies. Certainly, those who argue that religious reasons and arguments are appropriate for public discourse and public policy-making are epistemological pluralists.[88]

What, then, is wrong with epistemological pluralism? Its primary failing is that it leaves no way to resolve disputes between epistemologies except by recourse to power.[89] If we cannot reason together, then all we can do is arbitrarily select winners and losers. The winners will necessarily be those with power. If reason is not a universal epistemology that can mediate between different belief systems, but only the particular belief system favored by the powerful, then whoever is in power will reify his own epistemology. That is the nature of the social constructivist critique. And using power to impose epistemological truths is just what even the pluralists themselves oppose: Justice Scalia's opinion in *Employment Division v. Smith*[90] was castigated for "leaving accommodation to the

86. Frederick Mark Gedicks, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671, 686 (1992); *see also* Michael J. Perry, *Comment*, 27 WM. & MARY L. REV. 1067, 1068 (1986) ("The liberal attempt to disqualify religious judgments or beliefs is an attempt to privilege a particular conception or range of conceptions of rationality, and thus liberalism is not at all as 'neutral' or 'impartial' as it aspires and advertises itself to be").

87. LAYCOCK, *supra* note 17; *see also* MCCONNELL, *supra* note 19; MCCONNELL, *supra* note 6.

88. See sources cited in note 20, *supra*.

89. Stephen Holmes makes an analogous argument: "Nonentanglement is an essential precondition for majoritarian politics in any multidenominational state." HOLMES, *supra* note 2, 58, at 225.

90. 494 U.S. 872 (1990). For criticism, *see* MCCONNELL, *supra* note 19; LAYCOCK, *supra* note 17.

political process,"[91] but leaving epistemological disputes to the political process is exactly what the abandonment of reason leads to.[92]

The problem with rejecting the Enlightenment in favor of epistemological pluralism is deeper than that it disappoints many of its adherents by legitimating Justice Scalia's position in *Smith*. If we cannot confidently assert that the earth is round or that evolution occurred, because those with a different epistemology present a counterargument that is valid in their world even if not in ours, the same is true of other scientific or historical statements. Historian Deborah Lipstadt has noted the connection between epistemological pluralism—specifically in its postmodernist form—and the flourishing of Holocaust denial theories.[93] There is indeed no principled way to distinguish those who maintain that the Holocaust never occurred from those who maintain that God frowns on homosexuality or that Jesus Christ was His Son. None of these claims is supported by reason, but only by faith; only the faithful concur. Ordinary standards of evidence and rationality are abandoned in the name of faith, and no amount of evidence will convince the faithful that they are wrong.[94]

The question then becomes whether the government is either permitted or required to grant alternative epistemologies the same respect that it accords Enlightenment rationality. In other contexts, we draw several careful distinctions that have been ignored in the context of religion: government may not prohibit beliefs, but it can circumscribe actions based on those beliefs and it can refuse to lend government support to those beliefs. The government can penalize a racist who acts on his certainty (despite the absence of any credible evidence) that blacks are inferior, and

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91. 494 U.S. at 890.

92. Of course, another possibility is to privilege the epistemology of faith. Most committed religious believers in fact do so, believing that they possess the one universal and objective truth. This position is not available to those advocating particular constitutional or legal doctrines, since if the Establishment Clause means anything, it means that the government cannot act as if it accepts the objective truth of particular religious beliefs.

93. DEBORAH E. LIPSTADT, DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY 18 (1993).

94. Two arguments against my analogy might be made, but both should be rejected. First, it might be argued that there is persuasive evidence that the Holocaust occurred (contrary to the claims of the faithful deniers) while there is no firm evidence against the divinity of Christ. But the difference between believing in something that is refuted by ordinary standards of evidence, and believing in something that is implausible and unsupported by ordinary standards of evidence, is only a matter of degree, and not of kind. Even if a claim cannot be "proven" false, if it would ordinarily be rejected in the absence of faith, it is not rational. Ordinary canons of rationality mitigate against the miraculous.

A second line of argument that proves fruitless is to suggest that supporters of some claims—especially Holocaust deniers and "creation scientists"—make pseudo-rational arguments and thus are *not* functioning under different epistemological standards. The point of privileging the Enlightenment, however, is to allow us to reject such arguments as unpersuasive *in our epistemological context*. Unless we are willing to agree with the radical social constructivists that all such judgments are mere social constructs, adopting an epistemology of reason allows us to dismiss some claims as unwarranted. *See* Daniel A. Farber & Suzanna Sherry, *Is the Radical Critique of Merit Anti-Semitic?* 83 CALIF. L. REV. 853 (1995).

a university can refuse to teach—or to subsidize a group preaching—that the earth is flat. There is no reason to think that the combination of the Free Exercise and Establishment Clauses mandate any different treatment for nonrational beliefs derived from religion. Indeed, the thrust of this Article is that the Constitution itself—including the religion clauses—privileges rational over irrational epistemologies.

IV. A REASONABLE CONSTITUTION

If the underlying epistemology of the Constitution is rationality, what does that mean for interpretation of the religion clauses? It means that the government must treat religious beliefs the same way it does other nonrational beliefs (absent a compelling interest to the contrary), and that it may adopt rationally justifiable policies that conflict with beliefs derived from alternative epistemologies. While the government presumably may not take a stance on the substantive truth or falsity of any particular beliefs, it can deem some beliefs more justifiable or more warranted because of their epistemological derivation. However, this epistemological privilege can be bestowed only on rationalism, and not on any nonrational epistemology.

In combination, these principles suggest that government may not make decisions that are themselves based on contested religious beliefs that cannot be rationally supported, that privilege religious over secular beliefs, or that single out religious beliefs from among other nonrational beliefs for preferential treatment. In each of these instances, the government is treating religious epistemology as superior to other epistemologies, including rationalism. This in turn implies that the government is more convinced of the substantive "truth" of some nonrational epistemologies than of others.

This does not mean, of course, that we should prohibit any nonrational beliefs. Moreover, as noted earlier, a rational polity might have secular reasons for protecting religious beliefs in particular. Nonetheless, in interpreting whatever religious protections a rational polity might be led to adopt, we must remember that rationality underlies both the polity itself and its decision to protect religious liberty. In other words, our Enlightenment Constitution protects religious liberty because doing so is rationally justifiable, not because religion itself is rational or in any sense "true." Any other interpretation ultimately treats matters of religious belief as sacred or at least equivalent to beliefs founded on human reason and experience. And for a government to treat religion in that way is to formulate policy on the basis of reasons accessible only to those who subscribe to the beliefs at issue, which is ultimately a matter of faith rather than reason.

Thus to the extent that protecting religion cannot be rationally justified, it should not be protected. Rational justifications, of course, include the argument that departing from general protection of religion—even in instances where it might not be rational in the abstract to protect a particular type of religious practice or belief—is unfair or otherwise detrimental. Thus very broad protection of religion can be justified even in a polity committed in general to the principle that government decisions must be made based on reasons accessible to all.

Another way of putting this is to suggest that the government itself may not engage in epistemological pluralism, although it must tolerate such pluralism and may ultimately conclude that subsidizing or otherwise encouraging such pluralism is good policy. Nor may it engage in epistemological preferentialism except to the extent that it prefers the Constitution's own rationalist epistemology.

Both the older line of accommodation cases and the newer questions raised in *Rosenberger* implicate questions of epistemological preferentialism. For the government to single out religious believers for special protection—as when it grants exemptions for religious but not secular conscientious objectors—is to privilege religious beliefs over both secular beliefs and the needs of the secular government. There is no objective difference between claims of eternal damnation and other objections to legally required conduct, and a law that grants exemptions only to religious objectors grants more credence to religious claims, necessarily privileging its underlying epistemology. Thus the Court in *Smith* was correct to reject the *Yoder* line of cases, and, indeed, should have gone so far as to prohibit the legislature from granting special privileges to religious objectors alone absent a compelling governmental interest.

Rosenberger raises somewhat more difficult questions. A factual inquiry might resolve the case easily: did (or would) the University of Virginia fund student publications dedicated to denying the Holocaust or justifying white supremacy? If not, then funding the religious publication singles out religiously derived nonrational epistemologies[95] for preferential treatment and is thus at least optional and perhaps prohibited.[96] In deciding not to fund any of these alternative epistemologies, the government is essentially determining that it will fund only those publications that conform to its

95. That the religious organization challenging the University's policy both derived its beliefs from a nonrational epistemology and intended to proselytize its faith is apparent from the publication itself. The publication is "A Christian Perspective," designed to "challenge" students to live according to "faith." 115 S.Ct. at 2515. Each issue urges readers to adopt beliefs on the basis of faith, not reason. *Id.* at 2534 (Justice Souter, dissenting).

96. Whether it is prohibited turns on two factors beyond the scope of this paper. First, we would have to decide under what circumstances the Establishment Clause should be interpreted to prohibit any government expenditure on behalf of religion. Assuming that the subsidy was not automatically prohibited, the University would still have to justify, in secular terms, preferring religious beliefs over other nonrational beliefs.

own rationalist epistemology. As I have suggested above, this course is perfectly consistent with both historical and practical interpretations of the Constitution. It is also consistent with the doctrines that the Court has developed for dealing with government subsidization of speech generally. The Court has essentially suggested that government subsidies may discriminate on the basis of the content of the speech if the unsubsidized speech interferes with or is antithetical to the purposes for which the subsidy is provided.[97] A university that chooses not to fund any nonrational epistemologies can argue that its educational mission—and its purpose in subsidizing student publications—is to foster rational thought rather than irrationality, and that funding publications that propound irrational beliefs is antithetical to this purpose.[98]

The more difficult situation arises if the University did (or would) fund other nonrational publications. Here the issue is whether the religion clauses either permit or require the government to single out religion, among other nonrational epistemologies, for *disadvantageous* treatment when it is spending public monies. The theory propounded in this paper would suggest that the government may not do so without a compelling reason, for the same reasons that it may not single out nonreligious alternative epistemologies for unfavorable treatment. To deprive religious publications, but not analogously irrational publications, of funding would be to make the funding decision not on the basis of epistemology but on the basis of underlying truth or falsity. Just as accommodating religious but not racist conscientious objectors would be according more respect to religious beliefs than to racist beliefs, subsidizing racist but not religious publications would be according more respect to racist beliefs. It is one thing for the government to distinguish between rational and irrational beliefs, but it is quite another for the government to deem some irrational beliefs truer or more worthy of respect. Thus, the government may choose not to subsidize or accommodate or otherwise benefit *any* nonrational

97. For illustration of this principle, see, e.g., Rust v. Sullivan, 500 U.S. 173 (1991) (speech about abortion not consistent with purposes of Title X program, and could therefore be prohibited to participants in program); Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 261 (1988) (school-funded publication may censor material as long as censorship is "reasonable related to legitimate pedagogical concerns"); Rankin v. McPherson, 483 U.S. 378 (1987) (public employee's speech did not interfere with functioning of her office, and therefore could not be penalized). *See generally* Luba L. Shur, *Content-Based Distinctions in a University Funding System and the Irrelevance of the Establishment Clause: Putting Wide Awake To Rest*, 81 VA. L. REV. 1665, 1712-20 (1995).

98. It is possible to question the whole doctrine, and to suggest that the University would have been required to fund all student publications if it funded any. For example, content-based discrimination is prohibited in the context of a public forum: just as the government may not prohibit speech it does not like in a public forum, it may not prohibit religious speech in a public forum. It might be possible to suggest that the University's subsidy program was the equivalent of a public forum. But if the University is required to fund other nonrational publications (for this or any other reason), then the issues are the same as if it voluntarily chose to fund some nonrational publications but not religious publications, discussed in text immediately following this footnote.

epistemologies, but it may not pick and choose among them without a compelling reason.[99]

CONCLUSION

I have argued that the government may not single out any irrational beliefs for preferential treatment, nor is it required to treat alternative epistemologies as favorably as Enlightenment rationality. Both history and practical considerations support the notion that the Constitution rejects epistemological pluralism in favor of the primacy of reason. There is no evidence that the religion clauses are an exception to this basic principle; indeed, for the founding generation, pre-Enlightenment religion was the primary—and perhaps the only—example of a nonrational epistemology. If we allow government decisions to be made on the basis of, or influenced by, premises and conclusions that fly in the face of the Enlightenment's rationalist and empiricist methodology, we must accord the same consideration to Holocaust deniers—and to racists, flat-earthers, and other peculiar or dangerous believers—as we do to religious believers. To do otherwise is for the government to accept as true the claims of particular religious believers—a course of action that is dangerous to government and religion alike, and is therefore wisely rejected by the Free Exercise and Establishment Clauses.

99. *See* SHUR, *supra* note 97, for a contrary argument, suggesting that as long as the university discriminates only on the basis of subject matter and not on the basis of viewpoint it may allocate its funds as it sees fit.