ESSAYS

OUR AGNOSTIC CONSTITUTION

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According to an argument heard a good deal lately, the fact that the Constitution says nothing about God means that we have a "godless Constitution," and that fact in turn entails that government and politics in the United States must be godless or, in the more usual locution, secular. The commitment to secular government in turn is thought to preclude governmental sponsorship of religious expressions (such as the national motto "In God We Trust") or of religious symbols (such as monuments to the Ten Commandments). This Essay argues that this interpretation of our "godless" Constitution is importantly correct—but even more importantly mistaken. It is true that the Founders purposefully made no reference to a deity—in contrast to many other state and national constitutions. Thus, the Constitution is godless or, more precisely, agnostic. But the agnosticism of the Constitution does not mean that governments operating under the Constitution must also be agnostic or that they must refrain from religious expression. On the contrary, paradoxical though this may initially seem, it is precisely the Constitution's agnosticism that permits governments to engage in such expression. Drawing a comparison with personal agnosticism, this Essay contends that, similar to a person who both believes and doubts at different cognitive levels, the political community too can affirm particular beliefs (on religious issues, for example) at one jurisdictional or juridical level while remaining noncommittal on other, more constitutive levels. Such "layered believing" can offer a valuable strategy for creating and maintaining political community in the midst of great diversity.

INTRODUCTION

The Constitution of the United States speaks both in what it says and in what it purposefully omits to say. Under the traditional enumerated powers doctrine, for example, the fact that the Constitution does not mention some particular governmental power is supposed to mean that the national government does not possess that power.[1] In a similar vein, the fact that the Constitution makes no mention of a deity is significant because it means . . . what?

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[1] JOHN E. NOWAK & RONALD D. ROTUNDA, PRINCIPLES OF CONSTITUTIONAL LAW 66 (2d ed. 2005). The doctrine is complicated, of course, by the fact of "implied powers."

According to one familiar interpretation, the fact that the Constitution says nothing about God means that we have a "godless Constitution,"[2] and that fact in turn entails that government and politics in the United States must also be godless—or, in the more usual locution, secular.[3] This commitment to secular government carries a variety of implications. In particular, and with reference to controversies that have taken center stage of late,[4] the commitment to secular government renders suspect governmental sponsorship of religious expressions or symbols.[5]

To be sure, it is customary to derive the commitment to secular government, and the ostensible prohibition of governmental religious expression, from (or at least to project them onto) what the Constitution explicitly says—namely, in the Establishment Clause of the First Amendment.[6] But that provision in itself is notoriously subject to competing interpretations: Though its malleable language surely can be read to impose a requirement of secular government, such a reading is hardly compelled by anything in the text or history of the clause. In itself, a provision forbidding a government to maintain an "establishment of religion"—presumably meaning something like an officially recognized and supported church[7]—no more compels the

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[2] *See, e.g.*, SUSAN JACOBY, FREETHINKERS: A HISTORY OF AMERICAN SECULARISM 269, 358 (2004) (describing "the flourishing religious pluralism envisioned by the framers of the godless Constitution" and referencing "the godless constitution" itself); ISAAC KRAMNICK & R. LAURENCE MOORE, THE GODLESS CONSTITUTION: A MORAL DEFENSE OF THE SECULAR STATE 27 (2d ed. 2005) ("The U.S. Constitution . . . is a godless document."); Daniel O. Conkle, *Religious Expression and Symbolism in the American Constitutional Tradition*, 13 IND. J. GLOBAL LEGAL STUD. 417, 418 (2006) ("We are committed to the idea of secular as opposed to religious government, and our national Constitution is itself a secular document."); James E. Pfander, *So Help Me God: Religion and Presidential Oath-Taking*, 16 CONST. COMMENT. 549, 551 (1999) (describing "[t]he agnostic (if not downright atheistic) character of the Constitution").

[3] *See* KRAMNICK & MOORE, *supra* note 2, at 189 ("The founders of the republic, whether they were pious or generally indifferent about church going, agreed on language creating a secular state.").

[4] *See, e.g.*, McCreary County v. ACLU of Ky., 545 U.S. 844, 858 (2005) (invalidating display of Ten Commandments monument at courthouse); Van Orden v. Perry, 545 U.S. 677, 681 (2005) (upholding display of Ten Commandments monuments at Texas State Capitol); Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 4–5 (2004) (dismissing challenge to "under God" in Pledge of Allegiance on standing grounds).

[5] *See infra* notes 36–40 and accompanying text.

[6] *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (holding that First Amendment requires government to act with secular purpose).

[7] In this vein, Douglas Smith argues that, for the founding generation, to "establish" religion meant to give a special corporate charter to a church. Douglas G. Smith, *The Establishment Clause: Corollary of Eighteenth-Century Corporate Law?*, 98 NW. U. L. REV. 239, 240 (2003). Michael McConnell argues that as a historical matter, an "establishment" of religion referred to an arrangement in which government controlled church doctrine and personnel, compelled subjects to attend and support the church, suppressed

conclusion that the government must refrain from acting on or expressing religious beliefs than an individual's decision not to belong to any church means that she cannot hold and express religious faith. Nor, it seems, did the enactors of the Establishment Clause understand it to confine government to the realm of secular belief and expression.[8] Thus, it is often noted that at the same time the First Congress drafted and approved the clause, it also appointed chaplains to begin legislative sessions with prayer and instructed the President to establish a national day of thanksgiving to God.[9]

It is not impossible, in short, to interpret the Establishment Clause to require secular government and hence to forbid religious expressions by government; but, given that nothing in the clause's text or history compels that interpretation,[10] why should we adopt it? At

alternative faiths, limited some privileges or offices to members of the official church, set aside official positions in government for church representatives, and provided financial support to churches or held government functions in churches. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2131 (2003). Obviously, the governmental measures challenged today under the Establishment Clause do not present all (or even many) of these features. To be sure, the "establishment of religion" prohibited by the First Amendment need not be construed to include all of the features of a classical establishment, but just how many of them should be required, and in what degree, presents a question to which the amendment itself does not supply a definite answer.

[8] *See* NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT 51 (2005) ("[T]he framers . . . were not secularists in the modern sense. They did not think that the state needed to be protected from the dangers of religious influence, nor were they particularly concerned with keeping religious symbolism out of the public sphere.").

[9] ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 23–25 (1982); THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 217–18 (1986). Laura Underkuffler-Freund explains that, at the time of the founding,

> routine governmental papers were replete with mention of "God," "Nature's God," "Providence," and other religious references. Religious references on the Great Seal of the United States were apparently deemed desirable by conservatives and reformers alike. When proposed designs were solicited, Franklin suggested an image of Moses lifting up his wand and dividing the Red Sea, with the motto "Rebellion to tyrants in obedience to God," and Jefferson proposed the children of Israel in the wilderness "led by a cloud by day and a pillar of fire by night." Reformers tolerated such references, apparently because they were not believed to implicate core concerns.

Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 837, 954–55 (1995) (footnotes omitted).

[10] I have argued elsewhere that the Establishment Clause was intended by its enactors simply to confirm that jurisdiction over religion, or over matters involving the establishment of religion, remained with the states and had not been reassigned to the national government. *See generally* STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM (1995); Steven D. Smith, *The Jurisdictional Establishment Clause: A Reappraisal*, 81 NOTRE DAME L. REV. 1843 (2006).

this point, the argument from the overall "godless" character of the document—from the fact that the Constitution itself does not make any reference to deity—has a potentially important role to play. Thus, Susan Jacoby observes that "[w]ithout downgrading the importance of either the establishment clause or the constitutional ban on religious tests for officeholders, one can make a strong case that the omission of one word—*God*—played an even more important role in the construction of a secularist foundation for the new government."[11]

For those who favor this interpretation, the vexing fact that throughout our history our national, state, and local governments have routinely and even flagrantly engaged in religious expression[12] stands as an embarrassment. Still, a deviant tradition does not alter the meaning of the Constitution itself. In this view, the tradition of public sponsorship of religious symbols and expressions, like other regrettable traditions, is simply an instance—hardly the only one—in which our practice has failed to live up to the constitutional ideal.[13]

In this Essay I will argue that this interpretation of our "godless" Constitution is importantly correct—but even more importantly mistaken. The interpretation makes a valid and valuable point but then proceeds, topsy-turvy, to draw the exact opposite of the correct conclusion. More specifically, the Constitution *is* godless—or, to use a slightly more precise and less fraught term, agnostic. And the Constitution's agnosticism is deeply significant: It manifests something crucially important about our Constitution and about our legal and political system. But the agnosticism of *the Constitution* does not entail that *governments operating under the Constitution* must be secular or must refrain from religious expressions. On the contrary, para-

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By this interpretation, the clause did not enact or adopt any substantive principle or right of religious freedom. This Essay's argument, though wholly compatible with this jurisdictional interpretation, in no way depends upon it.

11 JACOBY, *supra* note 2, at 28.

12 *See supra* note 9 and accompanying text. Stephen Gey laments that "the U.S. government frequently includes overt religious endorsements in many of its official pronouncements." Stephen G. Gey, *Atheism and the Freedom of Religion*, *in* THE CAMBRIDGE COMPANION TO ATHEISM 250, 256 (Michael Martin ed., 2007).

13 Thus, arguing in support of the Ninth Circuit's decision holding the words "under God" in the Pledge of Allegiance (at least as part of a public school recitation) unconstitutional, T. Jeremy Gunn observes that

> the dissenting judges are not advancing a *constitutional* argument when they identify the many cases where American traditions and laws incorporated religious language and symbols. One does not prove that an action is constitutional by citing the number of times it has occurred any more than one proves that murder should be legal by citing the number of times it is committed.

T. Jeremy Gunn, *Religious Freedom and* Laïcité*: A Comparison of the United States and France*, 2004 BYU L. REV. 419, 500.

doxical though this may initially seem, it is precisely the Constitution's agnosticism that permits governments to engage in such expressions.

In Part I, I will explain how proponents of "the godless Constitution" are correct, albeit sometimes a bit careless in their characterization. "Godless" is an inflammatory and ambiguous term. But the Constitution is fairly characterized as agnostic; moreover, its agnosticism is both deliberate and significant. This conclusion will lead us, in Part II, to consider a possible difficulty in the position of agnosticism—an objection that suggests that agnosticism is not actually possible and is nothing more than a polite or perhaps diffident cover for atheism. This objection, if cogent, would be troublesome both for individual would-be agnostics and for proponents of a constitutional agnosticism that is ostensibly "neutral"—not hostile—toward religion.

I will argue, however, that the objection is misconceived, and that in thinking about how agnosticism is possible, we can come to appreciate a valuable cognitive feature of human beings—what we might call our "layered" cognitive existence. More specifically, we often maintain not only first-order beliefs but also second-order beliefs about the first-order beliefs (or about the justifications or lack thereof for the first-order beliefs), third-order beliefs about the second-order beliefs, and so forth. This layered structure of our believing permits us to hold and act on particular beliefs at one level or in some contexts while doubting or suspending judgment about those beliefs at other levels or in other contexts. An agnostic can be understood to be a person who acts at one level on the belief that God does not exist (or, conceivably, that God does exist)[14] while at another level doubting or suspending judgment about that first-order belief.

Part III moves from considering the layered structure of believing as practiced by persons to exploring the implications of—and the valuable possibilities opened up by—the layered structure of believing and affirming within political communities. The discussion in this Part suggests that the Constitution, by virtue of its agnosticism and its legal supremacy, permits and encourages governments to employ a layering strategy in addressing the daunting challenges of creedal pluralism. The layering strategy makes it possible for governments to negotiate between conflicting beliefs and demands by affirming particular beliefs—including religious beliefs—in some ways or on some levels while declining to endorse such affirmations at other, more fundamental or constitutive levels.

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[14] *See infra* notes 65–67 and accompanying text.

I
THE AGNOSTICISM OF THE CONSTITUTION

The Constitution, it is said, is "godless." What does this assertion mean? And what are its practical implications?

A. Keeping Mum About Deity

The Constitution as it went forth from Philadelphia made no reference to God. In this respect, it conspicuously departed from what might be regarded as its two most important predecessor documents. The Constitution differed from the Declaration of Independence, which invoked "Nature and Nature's God"[15] and asserted that humans possess those inalienable rights with which they are "endowed by their Creator."[16] And the Constitution differed as well from the Articles of Confederation, which paid obeisance to "the Great Governor of the world."[17] No similar language appeared in the Constitution. To be sure, the Constitution did mention religion—but only to prohibit the imposition of any "religious Test" as a qualification for federal office.[18]

So the Constitution is overtly silent about God.[19] Citizens today might find this silence profoundly unremarkable. Why on earth *should* a mundane legal instrument refer to heavenly matters? Wouldn't any such reference be wholly gratuitous and out of place? There is no mention of a deity in the warranty to your new laptop, or in the grocery list you were handed when you left for work this morning, or in the local newspaper's weather report; but it would seem eccentric to describe these writings as a "godless warranty," a

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[15] THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

[16] *Id.* at para. 2. For a discussion of the significance of the Declaration's theistic language to the concept of equality, see GEORGE P. FLETCHER, OUR SECRET CONSTITUTION 91–105 (2001).

[17] ARTICLES OF CONFEDERATION, art. XIII (1781).

[18] U.S. CONST. art. VI, § 3. For a helpful recent discussion of the historical meaning of the "no test oath" clause, see Note, *An Originalist Analysis of the No Religious Test Clause*, 120 HARV. L. REV. 1649 (2007).

[19] Those who would prefer a more pious founding document sometimes point to its final paragraph, which declared that the Constitution was completed and signed on "the Seventeenth Day of September in *the Year of our Lord* one thousand seven hundred and Eighty seven . . . ." U.S. CONST. art. VII (emphasis added); *see, e.g.*, M.G. "Pat" Robertson, *Religion in the Classroom*, 4 WM. & MARY BILL RTS. J. 595, 601 (1995) (citing "Year of our Lord" reference in Constitution as "[v]estige[ ] of our religious history"). But this seems a desperate appeal: The reference to "the Year of our Lord" simply employed the conventional dating method of the era; it seems no more a purposive invocation of God than does attaching the letters "A.D." or "B.C." to a historical date. If the Framers meant to pay their devotions, they surely chose an oblique and even impious way to do so—as if, rather than welcoming deity in through the front door, they instead limited themselves to an almost imperceptible wave through the back window.

"godless grocery list," or a "godless meteorological report." So the U.S. Constitution doesn't talk about God: So what?

But this reaction to the Constitution's silence regarding God, though understandable, would also be historically and politically innocent. In fact, the makers of constitutions have often thought it suitable to pronounce on the subject of divinity.[20] The Canadian Constitution, for example, declares that "Canada is founded upon principles that recognize the supremacy of God . . . ."[21] The Irish Constitution purports to speak for the Irish people in invoking "the name of the Most Holy Trinity, from Whom all authority and to Whom, as our final end, all actions both of men and States must be referred," and it goes on to "acknowledg[e] all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial . . . ."[22]

In this country the expressions have been less theologically specific. But nearly every state constitution expresses deference to a being denominated "God," "Almighty God," "the Supreme Ruler of the Universe," or "the Sovereign Ruler of the Universe."[23] As they deliberated in Philadelphia, the delegates at the Constitutional Convention surely would have been aware of such expressions in, for example, the Massachusetts and Vermont Constitutions.[24] And they would have known that, as already noted, the Articles of

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[20] Eric Stein, *The Church and the Constitution for Europe: On the Margin of Joseph Weiler's "*Un' Europa Cristiana,*"* 11 COLUM. J. EUR. L. 451, 452 (2005) (book review) ("A comparative survey of the constitutional systems of [European] Union members discloses that a majority embodies Christianity in one way or another (e.g., the German, Irish, Maltese, Greek, Danish and English) although the French and Italian constitutions are strictly secular."). The essay discusses the controversy over the proposal to acknowledge Christianity in a constitution for the European Union. *Id. passim*.

[21] Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.), *as reprinted in* R.S.C., No. 5 (Appendix 1985). For a discussion of the lack of attention paid to the "Supremacy of God" clause in Canadian constitutional discourse, see Jonathon W. Penney & Robert Jacob J. Danay, *The Embarrassing Preamble? Understanding the "Supremacy of God" and the Charter*, 39 U.B.C. L. REV. 287 (2006).

[22] Ir. CONST., 1937, pmbl., *available at* http://www.taoiseach.gov.ie/index.asp?docID=243 (last visited Jan. 21, 2008). The provision is quoted and discussed in Michael J. Perry, *A Right to Religious Freedom? The Universality of Human Rights, The Relativity of Culture*, 10 ROGER WILLIAMS U. L. REV. 385, 403–04 n.36 (2005).

[23] *See* WILLIAM J. FEDERER, THE TEN COMMANDMENTS & THEIR INFLUENCE ON AMERICAN LAW 52–55 (2003) (compiling references to God in state constitutions).

[24] In the Preamble to the Massachusetts Constitution of 1780, for example, the people "acknowledg[ed], with grateful hearts, the goodness of the Great Legislator of the Universe" and "devoutly implor[ed] His direction." MASS. CONST. of 1780, pmbl., *reprinted in* 1 THE FOUNDERS CONSTITUTION 11, 11 (Philip B. Kurland & Ralph Lerner eds., 1987). The Vermont Constitution, adopted in 1777, declared that the purpose of government was to enable citizens "to enjoy their natural rights, and the other blessings which the Author of existence has bestowed upon man." VT. CONST. of 1777, pmbl., *reprinted in* 2 THE FOUNDERS CONSTITUTION, *supra*, at 2, 2.

Confederation that they were seeking to replace paid respects to "the Great Governor of the World."[25]

Just why the makers of constitutions have so often thought it important to include such language in constitutional texts is a crucial question to which we will give attention in Part III. For now, it is enough to say that the absence of any such reference in the Constitution drafted in Philadelphia was a salient feature—and was perceived as such. Thus, the omission hardly passed unnoticed: In ratifying conventions, critics objected strenuously to the absence of any acknowledgment of God.[26] And proponents did not respond with "Oops, we forgot"; rather, they vigorously defended the omission.[27]

So it is clear that the Constitution's silence regarding God was deliberate. That purposeful and portentous silence surely reveals something about the nature of the document and the political community it was adopted to support. But what?

B. "Godless"—Secular, Atheist, or Agnostic?

We will return to the question of what the Constitution's silence on God means. First, though, we should try to gain a bit more clarity about the religious, or rather nonreligious, character of the Constitution. The U.S. Constitution is "godless," it is said, but "godless" is an ambiguous (and also, probably deliberately, inflammatory)[28] term. Can we be more precise? In this context, does the term connote that the Constitution is atheistic? Or something less overtly dismissive of religion and God?

Just as a constitution could assert a belief in God, it could also in principle assert the nonexistence of God as one of the shared understandings on which a political community is based. Or a constitution could—and modern constitutions sometimes do—expressly declare that the government of the community is to be "secular."[29] The U.S.

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[25] ARTICLES OF CONFEDERATION, art. XIII (1781).

[26] *See* JACOBY, *supra* note 2, at 29–30 (describing "substantial controversy" and "inflamed rhetoric" generated in ratifying conventions by Constitution's omission of any reference to deity); KRAMNICK & MOORE, *supra* note 2, at 32 (noting that "a veritable firestorm broke out in the country at large during the ratification conventions in each of the states" over the "no religious test" clause).

[27] *See* KRAMNICK & MOORE, *supra* note 2, at 38–43 (discussing arguments supporting "no religious test" clause as antidiscriminatory and favoring religious freedom).

[28] The inflammatory character of the term is evident in the fact that it was chosen for the title of a book by one of the more aggressively incendiary journalist/provocateurs of our day. *See* ANN COULTER, GODLESS: THE CHURCH OF LIBERALISM (2006).

[29] For example, the preamble to India's constitution expressly declares that India is a "sovereign socialist secular democratic republic." INDIA CONST. pmbl., *available at* http://indiacode.nic.in/coiweb/welcome.html (last visited Jan. 31, 2008). *See generally* Seval Yildirim, *Expanding Secularism's Scope: An Indian Case Study*, 52 AM. J. COMP. L. 901,

Constitution does none of these things. It simply maintains a discreet silence on the subject of God.[30]

If we were to look for a more precise (and less provocative) label for this stance, the best term would be "agnostic." Though philosophers and others worry (both when speaking generally and when speaking about their own beliefs) about how to draw the lines of demarcation,[31] the term "agnostic" was invented[32] to denominate a middle ground between theism and atheism and, in popular usage, it maintains this meaning. The theist affirmatively asserts that God exists, and the atheist confidently contends that God does not exist, but the agnostic refrains from adopting either view. On epistemological grounds, or perhaps for more pragmatic reasons,[33] the agnostic

909 (2004) (discussing India's constitutional commitment to secularism). For a discussion lamenting the growing influence of efforts of the "Hindu Right" to undermine Indian secularism, see BRENDA COSSMAN & RATNA KAPUR, SECULARISM'S LAST SIGH?: HINDUTVA AND THE (MIS)RULE OF LAW (1999).

[30] *See* BRUCE LEDEWITZ, AMERICAN RELIGIOUS DEMOCRACY: COMING TO TERMS WITH THE END OF SECULAR POLITICS 52 (2007) ("The Constitution is not an atheistic document, though it makes no reference to God.").

[31] For a general consideration of the issue that explores the differences and the relationship between agnosticism and atheism, see J.J.C. Smart, *Atheism and Agnosticism*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY, http://plato.stanford.edu/entries/atheism-agnosticism/. For Bertrand Russell's personal reflection on the question, see BERTRAND RUSSELL, AM I AN ATHEIST OR AN AGNOSTIC? A PLEA FOR TOLERANCE IN THE FACE OF NEW DOGMAS (1947), *reprinted in* 11 THE COLLECTED PAPERS OF BERTRAND RUSSELL 89 (John G. Slater ed., 1997).

[32] The term's origin is sometimes attributed to Thomas Huxley. Gavin Hyman, *Atheism in Modern History*, *in* THE CAMBRIDGE COMPANION TO ATHEISM, *supra* note 12, at 27, 30–31. Huxley explained how and why he came up with the term:

> When I reached intellectual maturity and began to ask myself whether I was an atheist, a theist, or a pantheist; a materialist or an idealist; a Christian or a freethinker; I found that the more I learned and reflected, the less ready was the answer . . . . The one thing in which most of these good people were agreed was the one thing in which I differed from them. They were quite sure they . . . had, more or less successfully, solved the problem of existence; while I was quite sure I had not, and had a pretty strong conviction that the problem was insoluble.

THOMAS HENRY HUXLEY, *Agnosticism* (1889), *reprinted in* AGNOSTICISM AND CHRISTIANITY AND OTHER ESSAYS 142, 162 (1992). This stance proved to be embarrassing in the Metaphysical Society, however, where "most of [Huxley's] colleagues [were] *-ists* of one sort or another." *Id.* at 163. "So I took thought, and invented what I conceived to be the appropriate title of 'Agnostic.'" *Id.*

[33] J.J.C. Smart notes that a person might take an agnostic stance "out of mere politeness or in some circumstances from fear of giving even more offence." Smart, *supra* note 31, § 6, *available at* http://plato.stanford.edu/archives/sum2007/entries/atheism-agnosticism/ (archival URL). In addition, "[s]ome may call themselves 'agnostics' rather than 'atheists' merely because they are equally repelled by the fanaticism associated with some forms of theism and by the boring obsessiveness of what Hilary Putnam has called 'the village atheist.'" *Id.*

concludes that the preferred course is to suspend judgment—to take no position one way or the other on the existence of God.

This seems to be the course adopted by the Constitution. The document does not affirm theism, but neither does it say anything that could be construed as an affirmation of atheism. Nor does it say—not explicitly, anyway[34]—that governments in this country must be "secular"; such a requirement, if there is one, would have to be inferred from the Constitution's silence on the subject.[35]

So the Constitution adopts a position of agnosticism. And that position is significant for the constitution and conduct of government in America. But in what way?

To some interpreters, the answer seems straightforward: The Constitution's agnosticism means that government and politics in this country must likewise be agnostic, or perhaps "neutral,"[36] toward religion. They must, in other words, be "secular."[37] In their book *The Godless Constitution*,[38] Isaac Kramnick and R. Laurence Moore appear to conflate the premise (the Constitution is agnostic) with their conclusion (government and politics must be secular). Thus, they describe themselves in undifferentiating terms as belonging to the "party of the godless Constitution and of godless politics."[39] "The U.S. Constitution," reason Kramnick and Moore, "is a godless document. Its utter neglect of religion was no oversight; it was apparent to

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[34] *See supra* Part I.A (discussing significance of omission of word "God" in Constitution).

[35] I speak here of the unamended Constitution, but the addition of the First Amendment, though it provides those who favor "secular government" with a convenient text to which to attach such a constraint, surely does not by its terms or of its own force require any different conclusion. *See supra* notes 7–9 and accompanying text.

[36] *See, e.g.*, Randall P. Bezanson, *Means and Ends and* Food Lion*: The Tension Between Exemption and Independence in Newsgathering by the Press*, 47 EMORY L.J. 895, 915 n.86 (1998) ("[T]he constitutionally guaranteed relationship between government and religion . . . might be described as 'arms-length,' agnostic, or 'neutral.'"). The Supreme Court itself often uses the terms "neutral" and "secular" in close conjunction, seemingly on the assumption that they are nicely complementary or perhaps even mutually entailing. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 653 (2002) ("'[A]id is allocated on the basis of neutral, secular criteria . . . .'" (quoting Agostini v. Felton, 521 U.S. 203, 231 (1997))); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 301 (2000) (noting district judge's opinion that school's public forum had "secular purpose" and provided "neutral accommodation" of religious speech); *Agostini*, 521 U.S. at 205, 231 (1997) (finding no financial incentive for religious indoctrination where "aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion").

[37] *See* KRAMNICK & MOORE, *supra* note 2, at 189 (stating that founders intended to create secular state). For a discussion of the common but dubious equation of "secular" with religiously "neutral" government, see Steven D. Smith, *The Pluralist Predicament: Contemporary Theorizing in the Law of Religious Freedom*, 10 LEGAL THEORY 51, 58–66 (2004).

[38] KRAMNICK & MOORE, *supra* note 2.

[39] *Id.* at 12.

all. [It was s]elf-consciously designed to be an instrument with which to structure the *secular politics* of individual interest and happiness . . . ."[40]

Kramnick and Moore draw what evidently seems to them to be an irresistible, almost automatic, inference: The fact that the Constitution is "godless" or secular means that *government* and *politics* must likewise be secular, and this implication in turn means that Ten Commandments monuments, nativity scenes in publicly sponsored Christmas displays, and the words "under God" in the Pledge of Allegiance all violate the Constitution.[41] Other scholars and jurists draw a similar conclusion.[42] That conclusion—that governments in this country must be "secular"—is by now well entrenched in constitutional doctrine.[43]

So, does an agnostic Constitution entail an agnostic or secular politics and agnostic government? The inference seems natural and easy enough—too easy, maybe, or too lazy. We need to consider the inference more carefully. However, that consideration will benefit from a preliminary, closer look at the agnostic position itself.

II
THE POSSIBILITY OF AGNOSTICISM AND THE LAYERED CONDITION OF HUMAN EXISTENCE

Critics sometimes argue that agnosticism is a gentle term for atheism. On that understanding, an "agnostic" Constitution would in

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[40] *Id.* at 27 (emphasis added).

[41] *Id.* at 11–12, 194–97 (discussing why Ten Commandment monuments and words "under God" in Pledge of Allegiance are unconstitutional, and listing nativity scenes as another example of public religion that they are "worried" about). Though they make it clear that the words "under God" in the Pledge are unconstitutional in principle, Kramnick and Moore waffle about whether the words should actually be removed. They worry that "we should pick fights carefully" and that "purging God from the pledge would be a stupendous propaganda gift to the Pat Robertsons and Rush Limbaughs of the world." *Id.* at 197.

[42] For a particularly vigorous call for the elimination of virtually all publicly sponsored religious messages, symbols, or practices, arguing that the Supreme Court can and should hold most forms of ceremonial deism to be unconstitutional, see Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2091 (1996).

[43] Once again, in our clause-oriented jurisprudence, the requirement is typically projected onto what the Constitution, in the First Amendment, explicitly *says*. Thus, the requirement that governments must be secular is expressed in the first and second prongs of the so-called *Lemon* test, which interprets the Establishment Clause to require that government act for "secular" purposes and in ways that neither advance nor inhibit religion. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971). As previously noted, however, the First Amendment's Establishment Clause—on its face—does not necessarily yield such an outcome. *See supra* notes 7–9 and accompanying text.

reality be one that endorses or embraces atheism.[44] In addressing this criticism, it will be helpful to approach the issue by first considering what agnosticism entails in a more familiar setting—namely, the setting of personal belief. Are self-styled agnostics actually just polite or perhaps self-deceived atheists? Once we achieve some clarity about what agnosticism means on the level of personal belief, we can then return, in Part III, to the independent but analogous questions of agnosticism and belief as expressed in and by political communities.

On the level of personal belief, many thoughtful people have found agnosticism attractive. The existence or nonexistence of God may appear to elude proof, so it may seem that the most honest course is to suspend judgment. "In the absence of a convincing proof either of theism or of atheism," Anthony Kenny asks, "is not the rational position that of the agnostic, who refuses to place a bet either way?"[45] On a different view, however, agnosticism is impossible, and those who think they adhere to it are deceiving themselves. In this vein, David Novak asserts that "[d]espite the attempt to create a neutral position called 'agnosticism,' one can show that agnostics are actually timid atheists . . . ."[46]

Novak's view turns out to be mistaken, or at least oversimplified. But in considering how agnosticism is possible, we will need to notice an essential aspect of the human cognitive condition—its layered quality—that has vital relevance not only to individual believers but also, by analogy, potentially to government as well.

A. Are Agnostics Really Atheists?

The objection that agnosticism is impossible, and that agnostics are in reality indistinguishable from atheists, is suggested (though not quite categorically asserted) in William James's famous essay *The Will to Believe*.[47] James's essay in turn responded to another well-known and influential essay, *The Ethics of Belief*,[48] by the British mathematician William Clifford, that could be taken as a sort of brief, or an oration or homily, for agnosticism. Clifford's essay argued zealously[49]—almost evangelically—for the proposition that "it is wrong

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[44] *See infra* Part II.A.

[45] ANTHONY KENNY, WHAT I BELIEVE 46 (2006).

[46] David Novak, *Law: Religious or Secular?*, 86 VA. L. REV. 569, 574 (2000).

[47] WILLIAM JAMES, *The Will to Believe*, *in* THE WILL TO BELIEVE AND OTHER ESSAYS IN POPULAR PHILOSOPHY 1 (Longmans, Green & Co. 1927) (1897).

[48] 2 WILLIAM KINGDON CLIFFORD, *The Ethics of Belief*, *in* LECTURES AND ESSAYS 177 (London, MacMillan & Co. 1879), *reprinted in* PHILOSOPHY OF RELIGION: SELECTED READINGS 65 (Michael Peterson et al. eds., 1996).

[49] James complained that Clifford spoke "with somewhat too much of robustious pathos in the voice." JAMES, *supra* note 47, at 8.

always, everywhere, and for anyone, to believe anything upon insufficient evidence."[50] Apparently supposing that "wrong" was too insipid an adjective for such shameful credulity, Clifford emphasized that believing without adequate evidence was "sinful," "dishonest," "wicked," and "a great wrong towards Man."[51] He concluded that "[t]he credulous man is father to the liar and the cheat."[52]

Given the lack of probative evidence on many questions, the upshot of Clifford's counsel, it seems, is that we are under a moral duty to be agnostic on a great many matters. And indeed, even where evidence might be available in principle, most of us will not have the time and opportunity to carefully inspect and assess the evidence on most of the innumerable questions that life places in our path. Clifford was undeterred by such logistical limitations: If a person has not enough time to investigate a question, "[t]hen he should have no time to believe."[53]

For his part, James found these "agnostic rules for truth-seeking"[54] unsound for a variety of reasons. One of his objections is particularly pertinent here. There are momentous choices, James argued, that are forced upon us, so that we cannot avoid taking a position one way or the other.[55] To be sure, not all issues are of this character. Often we can suspend judgment on a question. However, there are times when we cannot:

> But if I say, "Either accept this truth or go without it," I put on you a forced option, for there is no standing place outside of the alternative. Every dilemma based on a complete logical disjunction, with no possibility of not choosing, is an option of this forced kind.[56]

Religion, James argued, is a subject that often presents such forced choices. It typically does not consist of abstract or detached propositions about which we can simply suspend judgment—like those of, say, string theory in physics—leaving the matter for specialists or waiting for further evidence to come in. Rather, religion offers normatively and existentially laden propositions that link belief to promised goods now and in the future. Such claims present us with forced choices.

James explains that "[w]e cannot escape the issue by remaining sceptical and waiting for more light, because, although we do avoid

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[50] CLIFFORD, *supra* note 48, at 70.
[51] *Id.* at 69–70.
[52] *Id.* at 70.
[53] *Id.* at 71.
[54] JAMES, *supra* note 47, at 28.
[55] *Id.* at 3–4.
[56] *Id.* at 3.

error in that way *if religion be untrue*, we lose the good, *if it be true*, just as certainly as if we positively chose to disbelieve."[57] We can see James's point by imagining the evangelist who proclaims to us: "Only those who believe in and accept Jesus will be saved! Everyone else will be damned!" With respect to this proposition, the Christopher Hitchens–type atheist[58] who says "You are an ignorant fool, and I utterly reject your message!" and the would-be agnostic who says "You might be right, but I'm uncertain, and so I suspend judgment" will be in the same boat. *Suspension of belief*, in short, is in this practical sense equivalent to *disbelief*. Agnosticism thus merges into atheism.

But if agnosticism is in fact equivalent to atheism, as James's argument seems to suggest, then it would follow that our agnostic Constitution is in reality an atheistic Constitution. And indeed, critics of the modern secular state sometimes assert as much.[59] But this is a disturbing proposition—one that even the most avid proponents of the "godless Constitution" have typically been at pains to deny. They have preferred to say that the Constitution, and the governments that operate subject to it, are "neutral" toward religion, neither endorsing it nor disapproving of it.[60]

So perhaps we should take a second look at the argument equating agnosticism with atheism. Is agnosticism as a position distinct from atheism actually possible? Or are self-styled agnostics simply deceiving us—and themselves?

B. Agnosticism and the Layered Character of Believing

James's argument shows that, in some respects and for some purposes, agnosticism and atheism may have identical consequences; in these respects the positions are practically equivalent. But that conclusion falls far short of establishing that the agnostic stance is identical, across the board, to atheism. Indeed, such a claim of complete correspondence seems simply mistaken. Surely there is a difference between saying "I believe that proposition *X* is false" and "I am unsure whether proposition *X* is true or false." The substance of these

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[57] *Id.* at 26.

[58] *See generally* CHRISTOPHER HITCHENS, GOD IS NOT GREAT: HOW RELIGION POISONS EVERYTHING (2007) (affirming, among other things, author's devout atheism).

[59] *See, e.g.*, JOHN COURTNEY MURRAY, THE PROBLEM OF GOD: YESTERDAY AND TODAY 99 (1964) ("Atheism is the public philosophy, established by law. The establishment was accomplished by the law of separation of church and state . . . .").

[60] *See* County of Allegheny v. ACLU, 492 U.S. 573, 610 (1989) ("A secular state, it must be remembered, is not the same as an atheistic or antireligious state. A secular state establishes neither atheism nor religion as its official creed."); *see also supra* note 36 (citing examples of people stating that Constitution requires "neutral" or "secular" government).

assertions is importantly different, and the fact that this difference may not matter for some practical purposes does nothing to dissolve or negate the difference itself. For other practical purposes, moreover, the difference might matter a great deal.

Suppose a state has a law (as many states once did)[61] requiring any person desiring to serve in public office to take an oath affirming the existence of God. With respect to that law, the honest agnostic and the honest atheist will be in the same position: Both will be disqualified. Conversely, if the state has heresy or blasphemy laws that impose punishments on people who affirmatively deny the existence of God, the agnostic and the atheist will *not* be in the same position. On the contrary, relative to those laws the agnostic will be in the same position as the theist.

As these examples suggest, in comparison to both the thoroughgoing atheist and the simple theist, the agnostic presents a complex case: In different senses and for different purposes, she is both like and unlike the atheist and the theist. These complexities push us to notice that the agnostic's mental life is complex, operating on more than one level.

Thus, on what for the sake of simplicity we might call the operational level—the level of belief-guided conduct—the agnostic might be, as James's argument suggests, very much like the atheist. Her uncertainty about the existence of God likely leads her to adopt, at least as a sort of provisional working hypothesis, the assumption that God does not exist.[62] As a result, she likely does not do many of the things—attending church, participating in sacraments, praying—that she might do if she believed in God. In short, she is like the atheist in the sense that she lives *as if* she believes there is no God.[63] But on another, more purely cognitive level, she is entirely unlike the atheist: Once again, the atheist confidently affirms that there is no God, while the agnostic makes no such affirmation. She may even deliberately

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[61] *See* Paul Horwitz, *Religious Tests in the Mirror: The Constitutional Law and Constitutional Etiquette of Religion in Judicial Nominations*, 15 WM. & MARY BILL RTS. J. 75, 108 (2006) ("In the period leading up to the framing and ratification of the Constitution—and, indeed, long after—virtually every new state, following longstanding tradition, imposed religious tests for office."). Today, such a law would be unconstitutional. *See* Torcaso v. Watkins, 367 U.S. 488, 495–96 (1961) (invalidating Maryland religious test for public office, and reaffirming unconstitutionality of religious tests).

[62] *See* HANS KÜNG, DOES GOD EXIST?: AN ANSWER FOR TODAY 573 (Edward Quinn trans., 1980) (observing that one "can, perhaps utterly honestly and truthfully, declare his inability to know (agnosticism with a tendency to atheism)").

[63] *See* Christine L. Niles, *Epistemological Nonsense?: The Secular/Religious Distinction*, 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 561, 574 (2003) ("The man who says 'I do not know' with his mouth declares with his life the opposite. Thus, the agnostic is not neutral, as he proclaims to be.").

reject the atheistic claim that the nonexistence of God is something that can be known or shown, and indeed she may scorn the atheist for being as credulous or dogmatic as the simpleminded theist, albeit in a nonreligious direction.[64]

Or the agnostic might live on these levels in a very different way. On the operational level of belief-informed conduct, the agnostic might decide to live as if God does exist. She might go to church, pray, and participate in sacraments.[65] Perhaps she likes the cultural, psychological, or aesthetic features of the religious life.[66] Perhaps she has been persuaded by the logic of Pascal's Wager.[67] Even so, on a more purely cognitive level, she might confess complete uncertainty about whether or not God exists.

Once we recognize the existence of levels of belief, no obvious reason appears to suppose that these levels are limited to two. On the contrary, there is no necessary constraint on the complexities of our belief structure: We can have beliefs, and second-order beliefs about those beliefs (or about the justifications, or lack thereof, for those beliefs), and third-order beliefs about those second-order beliefs. Nor is there any clean distinction between what we have been calling

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64 *See* KÜNG, *supra* note 62, at 569 ("Hence there is actually no conclusive argument for the *necessity* of atheism. And if someone says that there is a God, this, too, cannot be positively refuted.").

65 Anthony Kenny, a philosopher and professed agnostic, maintains that "[b]eing agnostic does not mean that one cannot pray. In itself, prayer to a God about whose existence one is doubtful is no more irrational than crying out for help in an emergency without knowing whether there is anyone within earshot." KENNY, *supra* note 45, at 64.

66 David Benatar argues:

> [T]here can be non-theistic reasons for observing religious practices. Engaging in religious practices might, for example, have sentimental value, provide a sense of tradition, or be thought either to add another valuable dimension to family life or be good for the children. Alternatively, or in addition, religious practice can be both an expression of and a means of fostering an (ethnic) identity.

David Benatar, *What's God Got to Do with It? Atheism and Religious Practice*, 19 RATIO 383, 390 (2006) (footnote omitted).

67 The basic idea of the wager, attributed to Pascal, is that if one believes in God and in reality there is no God, one loses nothing; but if one does not believe in God and God does exist, one might lose one's salvation. *See* BLAISE PASCAL, PENSÉES 123–25 (A.J. Krailsheimer trans., Penguin Classics rev. ed. 1995) (1669). (Though this is how Pascal's argument is usually described, his argument may have been directed toward someone inclined to believe in God but hesitating because of the concern that religious belief is contrary to reason. Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 191 n.178 (1991).) For a discussion of the possibility of agnosticism as an acceptable middle ground in Pascal's logic, see KENNY, *supra* note 45, at 45–47. For a careful exposition suggesting that standard criticisms fail to capture the context and purpose of the argument, and noting that Pascal's logic was centered on a gambling analogy and not metaphysics, see JAMES A. CONNOR, PASCAL'S WAGER: THE MAN WHO PLAYED DICE WITH GOD 184–87 (2006).

"operational" and "purely cognitive" beliefs: Beliefs on any level may inform our actions in different ways and contexts. For present purposes, though, and for the sake of simplicity, it is enough to recognize that beliefs can occupy more than one level. And we can still distinguish between some beliefs that are more obviously "operational" and others that are more "purely cognitive"—more purely cognitive, at least, relative to some other stratum of beliefs.

In a natural but misguided effort to consolidate, a critic might try to reduce this description of levels of belief into a more one-dimensional account featuring degrees of perceived probability. Thus, the atheist would be someone who believes the nonexistence of God to be certain or virtually certain; the committed theist would be someone who thinks the existence of God to be highly probable to the point of virtual certainty; and the agnostic would be someone who finds the evidence and arguments inconclusive in either direction. But this flattened depiction underestimates the richness and complexity of our cognitive and active lives; it fails to appreciate the possibility of maintaining first-order beliefs, second-order beliefs about the first-order beliefs, and so forth.

To be sure, we do make judgments of probability. And our second-order beliefs can act upon and alter or undermine our first-order beliefs. But they need not operate in this way.[68] A person can

[68] Some second-order beliefs naturally tend to undermine first-order beliefs; others do not. Suppose that Witness testifies, "I saw the defendant rob the 7-Eleven." Initially you (a juror, perhaps) believe Witness's testimony, but later you learn that Witness hates the defendant and has a history of perjury. Your second-order belief (Witness is untrustworthy) will naturally undermine your confidence in your first-order belief (Defendant robbed the 7-Eleven). Other second-order beliefs, however, seem to lack this tendency. Consider, for example, the sort of second-order belief that maintains that all our beliefs are shaped by cultural or sociological influences of which we are largely unaware, or that all of our beliefs are formed within "narratives" or "paradigms" that we take for granted but that may, once revealed, come to seem inapt or unduly limiting. *See, e.g.*, THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 24–25 (3d ed. 1996) (discussing, in terms of science, dominant role of overarching paradigm that guides research until such time that accepted paradigm ceases to function efficiently); CHRISTIAN SMITH, MORAL, BELIEVING ANIMALS: HUMAN PERSONHOOD AND CULTURE 63–76 (2003) (discussing how different narratives of existence, history, and purpose shape human lives). These sorts of second-order beliefs, though plausible to many, typically do not seem to undermine primary beliefs in any direct way. Stanley Fish likely overstates the point in claiming that seemingly subversive second-order reflections are always impotent in their capacity to affect primary beliefs. *See, e.g.*, STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 396 (1989) ("[Mark] Kelman's deconstructive theory . . . is entirely irrelevant to the practice it purports to critique and reform. It can neither guide that practice nor disturb it. Indeed, the insight that interpretive constructs underlie our perceptions and deductions cannot do anything at all." (discussing Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981))). Nonetheless, Fish seems to be correct in observing that pri-

say, sincerely, "I believe in proposition *X*. Although, at a different level or from a more detached perspective (or on some days, or in some moods), I sometimes wonder whether my reasons for believing *X* are actually reliable." It would misrepresent that person's state of mind to say simply that she believes that *X* is merely "probable." In one respect, she may think that *X* is more than merely probable; in another respect, she may doubt that *X* even rises to the level of being probable. The description of her beliefs as layered attempts to capture this complexity.

Recognizing these possibilities and complexities subverts the more straightforward descriptions of belief that we like and perhaps need to give in some contexts. Imagine the person who is asked to take a Gallup-type survey measuring religiosity. He would come to the first question ("Do you believe in God?") and dissolve into a schizophrenic, Hamlet-like paralysis ("Yes, I do . . . no, I don't . . . yes *and* no . . . yes, no, and not sure."). What would the pollster or sociologist do with such deeply conflicted data?

It is an unsettling prospect, perhaps.[69] The apparent dissonance posed by conflicting beliefs occupying different cognitive levels might seem to threaten our psychological equilibrium or our integrity—or even our sanity. Perhaps it would be most prudent just to ignore or suppress such layered complexities?

C. Layered Believing and Integrity

The sort of division in which a person believes at one level and doubts his beliefs—or the justifications for those beliefs—at a different level probably reflects a sort of internal dissonance. But far from precluding personal integrity, layered believing may offer the only way of maintaining integrity—at least for some persons in some situations. And layered (dis)believing permits us to acknowledge the valuable insights in both Clifford's and James's reflections on the problem of believing.

Here is one way to appreciate this possibility: Happily or not, on most serious questions (at least in important areas of life, such as politics, morality, philosophy, or religion), it is just a fact that there exist conflicting opinions, arguments, and evidence. Some of these

mary beliefs and the practices they animate often seem to survive such second-order reflections largely unscathed.

[69] Judith Jarvis Thomson suggests, "Presumably it is not literally inconsistent in a man to feel entirely confident that a certain number will win tomorrow's lottery while believing that he has no good reason to believe it will. At best, however, he has a divided consciousness." JUDITH JARVIS THOMSON, GOODNESS AND ADVICE 5 (2001). She concludes that "it would plainly be silly in him to stake much on that number." *Id.*

conflicting considerations might be thought of as first-order. On a given question—Is abortion morally wrong? Does God exist?—there are pro and con arguments. The conflict between such arguments may leave a person unable to form a confident belief on an issue. Conversely, the arguments may seem to point persuasively to a particular conclusion. But even in those situations, in which an assessment of first-order considerations initially leaves one with a firm conviction, there are still second-order reasons that may indirectly challenge this conviction.

Suppose, for example, that I weigh the arguments and evidence regarding the question of legalized abortion and conclude that the arguments and evidence in favor of a pro-life position are stronger than the arguments and evidence in favor of a pro-choice position. So I adopt a pro-life stance. Even so, I can also step back and reflect that a good many people at least as intelligent and educated and serious as I am—people with different backgrounds and life experiences and temperaments, probably—have reviewed the same considerations and have come down in favor of the pro-choice view. Where does this reflection leave me? Perhaps the pro-life position still seems demonstrably correct to me, so I remain staunchly pro-life. And yet . . . who knows? Maybe I am overlooking something (something that those who disagree with me are in a position to perceive); or maybe I am somehow thinking about the whole issue in the wrong way, or on misguided assumptions, or within an inappropriate paradigm. So it seems that my second-order reflections, though they do not directly refute or challenge my first-order belief, nonetheless give me reason to wonder about the reliability of the first-order intellectual operations that lead me to that belief.[70]

In this situation, it may seem that I have to choose between two unhappy alternatives. I might allow the conflicting first- and second-order considerations to reduce me to a paralyzing skepticism. On many contested questions, perhaps, I just cannot make up my mind; but even when I can, at least initially, further reflection leads me to distrust my own judgment. So I succumb to what Plato described as misology.[71] Or I become like the ancient (perhaps ludicrous) skeptic

[70] It was this sort of second-order doubt that Holmes noted in his famous dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Despite the things that we feel are certain to be true, Holmes suggested, when we step back and "realize[ ] that time has upset many fighting faiths," we will be more willing to leave beliefs to the "free trade in ideas." *Id.*

[71] PLATO, *Phaedo*, *in* 1 THE DIALOGUES OF PLATO 407, 445–47 (B. Jowett trans., 4th ed. 1953). In this dialogue, Socrates suggests that when people have seen arguments defeated over and over again, they sometimes become "misologists" who suspect that "there may be no health or soundness in any arguments at all." *Id.*

Cratylus who, as Aristotle reported, "in the end thought that one ought not to say anything, and used to merely move his finger . . . ."[72]

Or, more likely, perceiving that this sort of more thoroughgoing skepticism is not a viable way to live,[73] I might resolve just to make whatever judgments seem indicated, however slight their epistemic advantage, and then adopt a bunker mentality, or a sort of cognitive res judicata policy. So I reflect that the pro-life view seems somewhat more persuasive, perhaps, and I then proceed to embrace that conclusion wholeheartedly and to act upon it, declining any longer to worry about conflicting considerations. In order to seize this alternative, however, I will likely need to suppress some evidence—or at least to refrain from paying due attention to inconvenient considerations—even though at some level I remain aware that such considerations exist and that I am deliberately declining to engage with them.

In short, the alternatives may seem to be paralysis or bad faith. "Bad faith" here does not imply conscious dishonesty, but rather something more complex and paradoxical—a semiconscious concealment of conflicting considerations from oneself.[74] But the possibility of layered believing may offer an escape from this gloomy predicament. It allows a person to embrace—and, importantly, to act upon—whatever beliefs most strongly recommend themselves (thus respecting the important point in James's essay),[75] while at another level acknowledging epistemic limitations and doubts (thus respecting the crucial point in Clifford's essay).[76]

This sort of multileveled believing/doubting does not eliminate all dissonance, to be sure. It may not be an enviable cognitive state to which we should aspire; surely it does not reflect the sort of childlike faith that will move mountains.[77] Layered believing is possible only if the cognitive layers remain, at least to some extent, separate; and there is always a possibility of collapse or, short of that, a possibility that doubts on one level may contaminate and subvert beliefs at

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[72] ARISTOTLE, *Metaphysics* IV, *in* THE PHILOSOPHY OF ARISTOTLE 58, 67 (A.E. Wardman & J.L. Creed trans., 1963).

[73] M.F. Burnyeat, *Can the Skeptic Live His Skepticism?*, *in* THE SKEPTICAL TRADITION 117, 141 (Myles Burnyeat ed., 1983).

[74] *Cf.* DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE) 194–209 (1997) (discussing how judges may conceal their true motivations and ideologies when reaching decisions).

[75] JAMES, *supra* note 47, at 1–2.

[76] CLIFFORD, *supra* note 48, at 70.

[77] *Cf. Matthew* 17:20, 18:1–:3. On the contrary, layered belief may seem more typical of the story of Peter, who initially believed enough to walk on water but upon more careful reflection—i.e., upon noticing the wind and waves—doubted, and sank. *Matthew* 14:28–:32.

another level.[78] Still, layered believing need not be incompatible with personal integrity. On the contrary, in a complex world in which conflicting considerations often present themselves, layered believing may be the only way to maintain an honest integrity while retaining the ability to make decisions in life. The believer can honestly profess and act upon belief where, and to the extent that, he in fact experiences it and can also acknowledge the second-order doubts and uncertainties that persist despite his belief.

Of course, the creedal content assigned to these cognitive layers will vary from person to person. For some people, however, the most honest and workable arrangement will be to suspend judgment at one level on questions such as the existence of God while at another more practical or operational level to act on the hypothesis that there is no God—or, perhaps, that there is a God.[79] For those who (contrary to their own wishes, perhaps) find themselves in this situation, this sort of agnostic position may be the one most compatible with a healthy, functional integrity.

III
AGNOSTICISM IN THE POLITICAL COMMUNITY

For individuals, as we have seen, agnosticism can be an honest response to the challenge posed by complex and conflicting considerations that surround a crucial question, such as the questions of religion or the existence of God. Complexity and irresolvable conflict might seem to leave individuals with a gloomy choice between either skeptical paralysis or else bad faith in which belief is maintained by ignoring or suppressing relevant considerations. The possibility of layered believing offers a more promising (though still profoundly challenging) alternative. For some believers, layered believing will take the form of agnosticism: The person will suspend judgment on one level while acting on a provisional belief at another level. But complexity, conflict, and uncertainty are problems not only for individuals; they also arise to challenge communities, including political communities. And a layering response may be as valuable for communities as it is for individuals.

To be sure, the nature of believing is not identical for both individual persons and communities. Thus, to assert that an individual believes something is typically to assert something about that indi-

[78] *Cf.* KÜNG, *supra* note 62, at 573 ("[E]ven if I affirm God, denial of him remains a continual temptation.").

[79] *See supra* notes 66–67 (stating reasons that someone might act as though God exists at operational level despite maintaining doubts at another level).

vidual's mental state;[80] a community, by contrast, does not have a collective mind capable of exhibiting or possessing mental states in the same sense. And an individual's expression of belief typically arises out of and reflects some judgment about truth, while a community's affirmation may be taken more as a reflection of what *its citizens* believe and want affirmed. Despite these differences, there are also similarities or analogies between believing by persons and affirming by a community. Hence our reflections about believing on the personal level may shed light on the nature and problems of affirming on the community level.

More specifically, it turns out that believing is, or can be, layered in communities in a way analogous to the way it is layered in individuals. And as with individuals, that layered character of believing and affirming can provide a community with a promising strategy for dealing with conflicts in belief and for avoiding problems analogous to those of paralysis and bad faith on the personal level. Moreover, the Constitution seems almost ideally designed to facilitate such a strategy.

A. E Pluribus Unum? How?

A community, of course, is more than just a collection of individuals who happen to occupy the same geographical space. Rather, a community is composed of people who understand themselves—or imagine themselves[81]—to be bound together in some sense by common ties or commitments. But what is the substance or content of those common ties?

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[80] This is, to be sure, a radically simplistic statement about a highly complex matter. Elsewhere, I have engaged in somewhat more detailed and careful explorations of what "believing" entails. *See, e.g.*, Steven D. Smith, *Believing Persons, Personal Believings: The Neglected Center of the First Amendment*, 2002 U. ILL. L. REV. 1233, 1260–81 (discussing nature and content of belief and how believing is distinctive human feature); Steven D. Smith, *Science, Humanity, and Atrocity: A Lawyerly Examination*, 104 MICH. L. REV. 1305, 1311–13 (2006) (book review) ("Discovering what we believe . . . involves not a simple introspection and report but rather a more serious and searching investigation of . . . what we *think* we believe . . . but also of how we live, what we desire, what we would and would not be willing to do.").

[81] Benedict Anderson has emphasized that "all communities larger than primordial villages of face-to-face contact (and perhaps even these) are imagined." BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTION ON THE ORIGIN AND SPREAD OF NATIONALISM 6 (rev. ed. 1991). Such a community "is *imagined* because the members of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion." *Id.*

Plainly there is no simple or single answer to that question. Communities may coalesce around a common language,[82] a shared history, common symbols,[83] or loyalty to some ruling person or family. One frequent element in community, however, is the existence of shared beliefs or mutually supported affirmations on matters of importance to the members of the community.[84] And for many people, the beliefs of utmost importance will be those that pertain to ultimate matters such as the existence and character of a deity.

Thus, shared religious beliefs or affirmations are a possible and indeed common basis of community.[85] This is a modest claim. The claim, it should be stressed, is only that religion *may* serve as a valuable element in forming or maintaining community, not that it *must* provide the foundation for every community. Communities differ, both among themselves and over time, and there seems no way to say, in the abstract or across the board, that any particular ingredient either is or is not essential.[86]

So, how does the situation stand in the United States? Once again, there is no simple answer to that question. In this country,

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[82] *See id.* at 43 (noting "common element in nationalist ideologies which stresses the primordial fatality of *particular* languages and their association with *particular* territorial units").

[83] For a thoughtful reflection on the use of monuments, flags, stamps, and other such symbols in the maintenance of community in this country, see generally SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES (1998).

[84] *See* THOMAS BENDER, COMMUNITY AND SOCIAL CHANGE IN AMERICA 148 (1978) ("A commonwealth is based upon shared public ideals . . . .").

[85] Anderson observes that "[a]ll the great classical communities conceived of themselves as cosmically central, through the medium of a sacred language linked to a superterrestrial order of power." ANDERSON, *supra* note 81, at 13.

[86] To be sure, religion has sometimes been thought to be an indispensable basis of political community. In this vein, Rousseau argued that "no state has ever been founded without religion as its base." JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 180 (Maurice Cranston trans., Penguin Books 1968) (1762). According to a more contemporary scholar:

> For more than fourteen hundred years . . . it was a universal assumption that the stability of the social order and the safety of the state demanded the religious solidarity of all the people in one church. Every responsible thinker, every ecclesiastic, every ruler and statesman who gave the matter any attention, held to this as an axiom. There was no political or social philosophy which did not build upon this assumption . . . . [A]ll, with no exceptions other than certain disreputable and "subversive" heretics, believed firmly that religious solidarity in the one recognized church was essential to social and political stability.

Winfred E. Garrison, *Characteristics of American Organized Religion*, 256 ANNALS AM. ACAD. POL. & SOC. SCI. 14, 16–17 (1948) (emphasis omitted). For present purposes, however, we need not embrace that strong claim; it is enough to say that shared religious beliefs may be an important basis of community.

however, as de Tocqueville observed,[87] and as even contemporary "civil religion" theorists such as Robert Bellah recognize,[88] widely shared religious beliefs have arguably served as one element of community. In a similar vein, Justice Douglas famously asserted that "[w]e are a religious people whose institutions presuppose a Supreme Being."[89] And G.K. Chesterton, traveling in the United States, remarked that this seemed to be a "nation with the soul of a church."[90] These claims gain support from the fact that every single President, from George Washington, John Adams, and (notably, given his "separationist" legacy) Thomas Jefferson to Bill Clinton and George W. Bush, has included some invocation of or appeal to deity in an inaugural address[91]—a political genre in which a unifying theme is usually ascendant.

Nor is the centrality of religion in the American community merely a historical artifact. On the contrary, social science research consistently indicates that, unlike in most European nations, religion continues to be a matter of deep concern to many Americans.[92] Of course, it is conceivable that people might be devoutly religious and yet not associate religion with their political community. They might regard religion as a vitally important but purely private affair. Many Americans probably take this view.[93] But it seems clear that many other Americans do not.[94] The frequent passionate disputes over

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87 *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 287–94, 442–49 (J.P. Mayer ed., George Lawrence trans., Harper & Row 1969) (1840) (contending that religious belief directly and indirectly contributes to political society in United States).

88 *See, e.g.*, ROBERT N. BELLAH, *Civil Religion in America*, *in* BEYOND BELIEF: ESSAYS ON RELIGION IN A POST-TRADITIONALIST WORLD 168, 168 (1970) ("[T]here actually exists alongside of and rather clearly differentiated from the churches an elaborate and well-institutionalized civil religion in America.").

89 Zorach v. Clauson, 343 U.S. 306, 313 (1952).

90 G.K. CHESTERTON, WHAT I SAW IN AMERICA (1922), *reprinted in* 21 THE COLLECTED WORKS OF G.K. CHESTERTON 35, 45 (1990).

91 FEDERER, *supra* note 23, at 49–51.

92 *Compare* SPECIAL EUROBAROMETER 225: SOCIAL VALUES, SCIENCE & TECHNOLOGY 9 (2005), *available at* http://ec.europa.eu/public_opinion/archives/ebs/ebs_225_report_en.pdf (noting that just over half of Europeans say they believe in God), *with* BAYLOR INST. FOR STUDIES OF RELIGION, AMERICAN PIETY IN THE 21ST CENTURY: NEW INSIGHTS TO THE DEPTH AND COMPLEXITY OF RELIGION IN THE US 4, 8 (2006), *available at* http://www.baylor.edu/content/services/document.php/33304.pdf (noting that only ten percent of Americans say they are unaffiliated with any religion and that about three out of four pray regularly).

93 For a forceful recent articulation of this view from a devout perspective aiming "to show that efforts to use Christianity for public or political ends fundamentally distort the Christian religion because it is essentially an otherworldly faith," see DARRYL HART, A SECULAR FAITH: WHY CHRISTIANITY FAVORS THE SEPARATION OF CHURCH AND STATE 16 (2006).

94 *See* STEPHEN H. WEBB, AMERICAN PROVIDENCE: A NATION WITH A MISSION 6 (2004) (arguing that Christians should not abstain from political arena but should partici-

public religious expressions, such as the words "under God" in the Pledge of Allegiance or monuments depicting the Ten Commandments,[95] suggest that many citizens not only care about religion, but evidently also perceive an important linkage between religious beliefs and the community in which they are citizens.

Such controversies also make it obvious, however, that these expressions can be highly contentious, and that fact points to a dilemma that confronts any effort to appeal to belief as a source of unity in a pluralistic community. Even a belief that is widely shared (as the belief in deity appears to be in the United States)[96] will be rejected by some citizens, perhaps passionately.[97] Hence, associating the community with such beliefs may elicit support or loyalty from many citizens, but it will also likely offend and alienate others.[98]

So, what to do? The obvious remedy, it might seem, would be simply to forgo public reliance on or expression of the controversial beliefs[99] and instead to attempt to cultivate community on the basis of other sources or interests. Perhaps. But this remedy may be unavailable—or insufficient—for at least two reasons.

First, other possible common ties may either be lacking or too frail to support a secure and robust community. After all, virtually any possible unifying element will be less than fully inclusive. Should we base community on a common language? Some may think so, but this proposal will likely be as divisive as an attempt to assert a generic

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pate and "try to be on God's side"). On the basis both of history and contemporary evidence, Webb argues that "America is a nation whose very being is providential." *Id.* at 13.

95 *See* cases cited *supra* note 4.

96 *See* BAYLOR INST. FOR STUDIES OF RELIGION, *supra* note 92, at 8 (noting that nearly ninety percent of Americans affiliate with some religious group).

97 *See generally, e.g.*, HITCHENS, *supra* note 58. Naturally, some citizens might object to the public expression of religion generally while others might object to the particular beliefs being instilled. I attempt to explore some of the complexities associated with theistic belief in this country in Steven D. Smith, *How is America "Divided by God"?*, 27 MISS. C. L. REV. (forthcoming 2008).

98 *Cf*. KRAMNICK & MOORE, *supra* note 2, at 181 ("Religion has strong potential to divide people, for good as well as bad reasons."). Stephen Gey notes that "the government has gone so far as to insert the words 'under God' in the official Pledge of Allegiance and place 'in God we trust' on its currency," and he infers that "[i]n these respects, atheists are effectively precluded from participating fully in the public life of their country." Gey, *supra* note 12, at 264. *See generally* Frederick Mark Gedicks & Roger Hendrix, *Uncivil Religion: Judeo-Christianity and the Ten Commandments*, 110 W. VA. L. REV. 273 (2007) (arguing that expanded American religious diversity "prevent[s] Judeo-Christianity from performing the politically and socially unifying function of civil religion").

99 *Cf.* Douglas Laycock, *The Benefits of the Establishment Clause*, 42 DEPAUL L. REV. 373, 380 (1992) ("In the case of religion . . . [t]here is no need for the government to make decisions about Christian rituals versus Jewish rituals versus no religious rituals at all. For government to make that choice is simply a gratuitous statement about the kind of people we really are.").

or nonsectarian commitment to religion.[100] Could common interests—in economic prosperity, for example—serve to support community? Probably, to some extent—but then, of course, citizens will differ about how important economic prosperity is, how it should be achieved, and how whatever prosperity is achieved should be divvied up among classes of citizens. Like religion, economic interests may divide as much as they unite (Marx was surely right about that much).

What about a common commitment to one of the (many) other American ideals? How about a common commitment to, say, democracy, liberty, equality, or the rule of law? These ideals undoubtedly have been central to the American political enterprise, but such ideas are also notoriously generative of deep conflict in their concrete interpretations. Self-styled "liberals," "conservatives," and "libertarians" all believe in "liberty"—but in different and sometimes incompatible senses. And these ideals may stand in conflict with each other: "Liberty versus equality," for example, is a longstanding tension in American thought and politics.[101] So it seems that many of the most apparent alternatives to religion as a basis for community are themselves problematic.

In sum, religious belief is hardly the only possible basis of community; at the same time, it is not obvious that there are satisfactory and sufficient alternatives. There might be—and then again, there might not. In reality, it seems, community is an exquisitely complex phenomenon resting on a varying mix of ingredients, some of which directly involve government and some of which do not. Publicly sponsored religious beliefs or affirmations can be—and in this country have often been[102]—among those ingredients.

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[100] *See* Kenya Hart, *Defending Against a "Death by English": English Only, Spanish Only, and a* Gringa*'s Suggestions for Community Support of Language Rights*, 14 BERKELEY LA RAZA L.J. 177, 180 (2003) ("Although the . . . advocates of English-only laws claim that their activities are motivated primarily by a desire to forge national unity from the disparate cultures introduced by immigration, their tactics appear instead to be building only wider rifts between immigrants and natives." (footnotes omitted)).

[101] Reviewing a recent book by Ronald Dworkin, Danny Priel notes that:

> Dworkin characterizes the values [of liberty and equality] in such a way so that they do not conflict. But in doing that he can no longer claim to be relying on shared values because many believe that liberty and equality do in fact conflict. Even if Dworkin can show that there is some sense in which these values do not conflict, it still does not follow that these are the conceptions accepted by most people.

Danny Priel, *In Search of Argument*, 86 TEX. L. REV. 141, 150 (2007) (reviewing RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE?: PRINCIPLES FOR A NEW POLITICAL DEBATE (2006)).

[102] *See supra* note 9 and accompanying text (noting that religious references were commonplace elements of symbols of national unity and national rituals at time of nation's founding).

Consequently, a policy of categorically forgoing any appeal to religious belief as a basis of community would relinquish a potentially valuable resource. The resource is one a community might or might not need. And the need might vary from period to period; it is sometimes observed that the felt need for public appeals to religion seems stronger in times of war or crisis than in more peaceful and prosperous times.[103] But a community that endures for more than a moment in the sweep of history can count on experiencing crisis as well as prosperity, and it is in the difficult times that the need to maintain unity—and hence the need for the cultural resources that can help in that task of maintenance—will be especially imperative.

This observation, though, acknowledges only half of the problem that would be posed by forswearing all religious affirmations as a basis of community. The other half of the problem is noticed less often but is perhaps even more troublesome. It is not just that a community that forgoes any appeal to religious belief loses a possible claim on the allegiance of some citizens. Rather, some religious believers may hold the conviction that not only individuals but also *nations* are obligated to acknowledge their dependence on and gratitude to deity.[104] A nation that declines to give such acknowledgment would thus be undeserving of their respect. Hence, by forgoing all religious expression, a community may not only miss an opportunity to gain the allegiance of these citizens, but it may also affirmatively alienate them and forfeit their full loyalty.

In this vein, Thomas Berg observes that "many Americans . . . may view it as impossible to pledge allegiance without explicitly affirming that the state is limited by God."[105] He predicts that "if 'under God' were removed from the Pledge, . . . a substantial number of religious Americans will refuse to participate (or let their children

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103 *See* William P. Marshall, *The Limits of Secularism: Public Religious Expression in Moments of National Crisis and Tragedy*, 78 NOTRE DAME L. REV. 11, 11–13 (2002) (discussing how need for communal religious expression is heightened in times of national crisis, such as *Challenger* disaster or 9/11).

104 In this vein, George Washington maintained that "it is the duty of all nations"—notice that the duty applies to *nations*, not just to private individuals—"to acknowledge the providence of Almighty God, to obey His will, to be grateful for His benefits, and humbly to implore His protection and favor . . . ." George Washington, Proclamation: A National Thanksgiving (Oct. 3, 1789), *in* A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, at 64, 64 (James D. Richardson ed., 1896). Washington's successor, John Adams, issued a similar proclamation declaring that "the safety and prosperity of nations ultimately and essentially depend on the protection and the blessing of Almighty God, and the national acknowledgment of this truth is . . . an indispensable duty which the people owe to Him . . . ." John Adams, A Proclamation (Mar. 23, 1798), *in* A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, *supra*, at 268, 268.

105 Thomas C. Berg, *The Pledge of Allegiance and the Limited State*, 8 TEX. REV. L. & POL. 41, 70 (2003).

participate) in the ceremony because they will view the state as asserting that it is the highest authority."[106] Similarly, Richard Schragger explains that a position favoring public secularism and the privatization of religion

> reinforces a particular version of public life, sanitized of its members' deep religious convictions. Whether one agrees with them or not, these convictions are often the most prominently held normative beliefs of a majority of the citizenry. The implicit presumption is that the individual's private religious life can be easily separated from the community's public secular one, and that battles over religious expression in the public sphere are best understood in terms of majoritarian oppression of dissenting minorities.
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> However, this easy differentiation may not capture the way in which locals experience their communal life, which may involve public commitments to God, prayer, or religious experience.[107]

Consequently, "the very fact of enforced [religious] neutrality will oppress those who do not share that conception of the state's role."[108]

So a dilemma appears to loom—a dilemma that is comparable to the one that may seem to confront individuals in situations of creedal conflict. That is, it may seem that the political community faces two gloomy alternatives that are roughly analogous on the civic level to the more personal alternatives of skeptical paralysis and bad faith. The community might attempt to avoid alienating any of its members by simply declining, as a community, to affirm any beliefs that are controversial. Given that a large and pluralistic community is likely to exhibit diversity not only about religion but also about other weighty matters of belief that most engage human beings, this course would likely entail a refusal to meaningfully affirm any serious beliefs at all. The community would thus become an association that believes and stands for . . . nothing—or at least nothing of vital significance. "The civic community," Schragger explains, "emptied of what many members believe to be significant moral content, comes to be seen as an irrelevant entity."[109]

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[106] *Id.*

[107] Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1888–89 (2004).

[108] *Id.* at 1890.

[109] *Id.* at 1891. To be sure, the community might try to package its commitment to foregoing public expressions of belief into a type of inclusive belief in its own right—a sort of "no-orthodoxy orthodoxy." But the possibility is illusory; in addition to its apparent incoherence, a "no-orthodoxy orthodoxy" is no more likely to command a consensus than other sorts of orthodoxies are. I have discussed these and related difficulties at greater length in Steven D. Smith, Barnette*'s Big Blunder*, 78 CHI.-KENT L. REV. 625 (2003).

But that sort of community is not merely unattractive; it is arguably unsustainable. Standing for nothing, how could it command the loyalty of its citizens? Indeed, how could it even make decisions or act on matters that confront it? Decision and action, after all, require the actor to adopt, at least provisionally, some sort of stance or belief. A community without beliefs would thus be incapable of decision and action—it would be a community prone to paralysis.

In the alternative, the community might decide simply to embrace and endorse the beliefs favored by some of its citizens—an electoral majority, perhaps, or a dominant elite—and then pretend that these are the beliefs of the community as a whole. Contrary beliefs would thus be ignored, and the citizens who hold them would be, to that extent, marginalized. So the community would purport to be based on commitments to a set of beliefs. But insofar as these beliefs are held out as civilly unproblematic, or as beliefs fully shared by the community, the community arguably would be acting with the bad faith exhibited by the individual who suppresses conflicting evidence or considerations from consciousness.

Paralysis and bad faith are uninviting prospects as much for the community as they are for the individual. Is there any more attractive alternative? A whole host of liberal theorists—John Rawls,[110] Stephen Macedo,[111] and Bruce Ackerman[112] among them—advocate in one way or another what might be called a "least common denominator" strategy. The basic idea is this: Despite pluralism, there is likely to be some set of beliefs (in equality, for example, or democracy, or justice, or "human flourishing") that enjoys the support of an "overlapping consensus"[113]—at least if the beliefs are stated at a sufficiently lofty level of generality. So the community ought to affirm and ground itself in those beliefs and avoid committing itself to or acting on beliefs that are more contested. Religion and, in Rawls's version, other "comprehensive doctrines"[114] are almost surely not within that

110 *See* JOHN RAWLS, POLITICAL LIBERALISM 134 (expanded ed. 2005) (contending that overlapping consensus among "reasonable comprehensive doctrines" is basis of social unity).

111 *See* Stephen Macedo, *In Defense of Liberal Public Reason: Are Slavery and Abortion Hard Cases?*, *in* NATURAL LAW AND PUBLIC REASON 11, 13, 25–26 (Robert P. George & Christopher Wolfe eds., 2000) (positing that "public reasonableness" derives from overlap and convergence among the views, reasons, and arguments of citizens and forms basis for how public power should be exercised).

112 *See* BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 11–12 (1980) (arguing that "neutrality" constraint on political discourse is supported by almost all understandings of good life).

113 *See, e.g.*, RAWLS, *supra* note 110, at 144–54 (explaining these features of "overlapping consensus").

114 *Id.* at 12–13, 175.

sphere of "overlapping consensus." So for purposes of public reasoning and affirmation, government ought to steer clear of—and remain "neutral" toward—those sorts of beliefs. In other words, government should remain agnostic.

This is an alluring proposal, and in view of the bleak apparent alternatives it is hardly surprising that the proposal in its various versions pervades political and constitutional theorizing today. But the proposal has also provoked extensive criticism.[115] This is not the place to review the objections in detail. However, the core criticism asserts that the common denominator proposal is not in fact a third alternative at all, but rather it amounts to a thinly disguised version of one or the other of the unappealing alternatives already noted.[116]

The problem is this: Even if we assume that some minimal set of beliefs is generally shared—and even to do this we likely will have to disregard or disqualify substantial numbers of citizens[117]—tenets such as democracy, equality, and so forth are too few and too thin (or perhaps, in some cases, merely formal and thus substantively empty)[118] to actually allow the community to act on the myriad concrete issues that confront it. Taken seriously, therefore, the common denominator proposal would be a prescription of paralysis.

In reality, however, the more likely problem with the common denominator solution is not paralysis but rather bad faith. Decisions *will* be made and actions *will* be taken, and these necessarily will require the community to act on (and hence to affirm, at least implicitly) beliefs beyond those certified by the ostensible consensus. In

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115 I have considered a few objections in somewhat more detail in Steven D. Smith, *Recovering (from) Enlightenment?*, 41 SAN DIEGO L. REV. 1263, 1289–96 (2004). For more comprehensive critical assessments, see generally CHRISTOPHER J. EBERLE, RELIGIOUS CONVICTION IN LIBERAL POLITICS (2002); J. JUDD OWEN, RELIGION AND THE DEMISE OF LIBERAL RATIONALISM: THE FOUNDATIONAL CRISIS OF THE SEPARATION OF CHURCH AND STATE (2001).

116 *See* Smith, *supra* note 115, at 1302–03 (noting that because there will inevitably be situations where scarcity of consensus leaves insufficient discursive resources to resolve issues, community is forced either to do nothing or to allow consideration of factors unsupported by consensus).

117 Obviously, the ostensible consensus will leave out those who might be viewed as truly marginal characters—radical anarchists, monarchists, fascists, totalitarians, theocrats, and so forth. But it will also leave out the views of many more "mainstream" citizens—those who embrace most of the standard liberal democratic commitments and would happily render their allegiance to the political community on the condition that it acknowledge its dependence on a deity. Though largely invisible in the contemporary academy, this view may capture the convictions of millions of American citizens. *See generally* LEDEWITZ, *supra* note 30 (arguing that America has become religious democracy in that many citizens are voting based on religious convictions and religious beliefs are thereby shaping government policy).

118 *See* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 543–48 (1982) (suggesting that principle of equality is circular and therefore ultimately lacks substance).

order to maintain the appearance of conformity to the common denominator prescription, therefore, the community will have to engage in deceptive or bad-faith tactics. More specifically, it will have to smuggle in more specific content under the benign heading of general notions like "equality," while ignoring, marginalizing, or recasting beliefs that are dissident relative to the ostensible consensus that the theorist desires to maintain, and in the end gerrymandering the community that "counts" by simply banishing from consideration all citizens and views deemed "unreasonable."[119] Rawls's notorious abortion footnote presents a stark example of this tactic.[120]

But if it is alienating to have one's views rejected by government, it is surely even more galling to have those views rejected by an ostensibly inclusive and neutral regime with the explanation that one's views do not satisfy even the minimal requirement of reasonableness. Thus the common denominator strategy, so beloved of liberal theorists and reflected in constitutional doctrines such as the "no endorse-

[119] For a more detailed analysis arguing that one means by which theorists and courts move from meaningless generalities to substantive conclusions is by "gerrymander[ing] the constituency so as to eliminate dissenters who might disturb the necessary consensus," see Smith, *supra* note 115, at 1289–96. Stanley Fish captures the overall strategy: Common denominator liberal theorists effectively "elevat[e] the decorum of academic dinner parties to the status of discourse universals." STANLEY FISH, THE TROUBLE WITH PRINCIPLE 68 (1999). Fish argues that when liberal political theorists talk about "reason" and "reasonableness," in reality they are actually "negotiating a very small circle that begins and ends with their own prior conviction and a vocabulary made in its image. The key word in that vocabulary is 'reasonable.' But all that is meant by the word is what my friends and I take to be so." *Id.* at 195.

[120] *See* RAWLS, *supra* note 110, at 243 n.32 (stating that "any comprehensive doctrine that leads to a balance of political values excluding that duly qualified right [to have an abortion] in the first trimester is to that extent unreasonable"). Commenting on this footnote, Paul Campos asks:

> What can one say to the modern liberal intellectual who writes that abortion cannot be prohibited in the first trimester because "any reasonable balance" of political values requires recognizing such a right, and then "explains" this conclusion by pointing out that "at this early stage of pregnancy the political value of the equality of women is overriding, and this right is required to give it substance and force?" Such persons can no more be argued with than those who simply declare that a particular result is required because "God says so." Yet at least the religious fundamentalist is alluding to a rich cultural and intellectual tradition that might give some warrant for believing that statements about "rights" and "values" have some kind of metaphysical significance. Liberal ideologues, who celebrate tolerance and pluralism while at the same time condemning any meaningful dissent from their own thin idea of the good as not merely wrong, but contrary to the dictates of reason itself, cannot invoke even this meager excuse.

Paul F. Campos, *Secular Fundamentalism*, 94 COLUM. L. REV. 1814, 1826 (1994) (footnote omitted).

ment" test,[121] ends up aggravating the very problem that it was designed to resolve.[122]

B. The Layered Community

So, is there any other solution—any actual (rather than illusory) alternative to these unappealing options?

For individuals, as we have seen, what we have called "layered belief" offers a possible escape from the alternatives of skeptical paralysis and bad faith. An individual may believe on one level while remaining noncommittal or retaining reservations on another level. Might a comparable possibility be open to communities?

It seems so. In fact, a large political community such as the United States is more conspicuously and multiply layered than an individual is. In the United States, there are, of course, various layers of political *jurisdiction*—a national government, state governments, cities, counties, special districts, and subdivisions of various sorts. In addition, the political community is *juridically* layered, with state and national constitutions, statutes, common law rules, administrative regulations, and executive orders. This juridical layering is complex and not easily described in terms of any simple hierarchy. The Constitution, to be sure, is taken to be the supreme law—this is a crucial point, and we will return to it. But scholars and judges debate where judicial decisions fit into the hierarchy of law.[123] And various other measures—resolutions, mottos, pledges, official pronouncements of various kinds—may enjoy official status as expressions of

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121 The "no endorsement" doctrine holds that government violates the Constitution if it speaks or acts in ways that a "reasonable observer" would perceive as endorsing or disapproving of religion. *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 595–97, 620 (1989) (holding that Allegheny County courthouse's Christmas display violated Establishment Clause because it would be seen by reasonable observer as endorsing religious message). For recent critical discussions of the test, see Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & POL. 499, 499, 508–35 (2002), who concludes that Justice O'Connor's endorsement test for determining Establishment Clause violations is "neither a workable nor a wise judicial standard," and Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673, 694–730 (2002), who criticizes the endorsement test's emphasis on political equality as a rationale for finding Establishment Clause violations.

122 *See* Steven D. Smith, *Nonestablishment "Under God"? The Nonsectarian Principle*, 50 VILL. L. REV. 1, 13–17 (2005) (noting that "no endorsement" doctrine adds insult to injury by "tell[ing] those offended by what they sincerely perceive to be a religious or anti-religious message not only that the message is legitimate, but that their perception to the contrary does not count because they are not 'reasonable' observers").

123 This is evident in the recent intense debate about constitutional stare decisis. *See, e.g.*, *Can Originalism Be Reconciled with Precedent: A Symposium on* Stare Decisis, 22 CONST. COMMENT. 257 (2005) (discussing relationship between and merits of stare decisis and originalism in constitutional interpretation); Symposium, *Originalism and Precedent*, 5 AVE MARIA L. REV. 1 (2007) (same).

government, and hence in some sense as expressions of "the community," without quite attaining the dignity or at least the coercive force of "law" at all.

The doubly layered nature of our political community suggests the possibility of a complex institutional response to the challenge of accommodating diverse beliefs. Just as an individual may adopt a belief on one level while doubting or suspending judgment at other levels, the political community might affirm a belief in some ways and places while remaining resolutely noncommittal in other ways and places. Indeed, the complexity of the political system offers the possibility of an almost limitless variety of such layered stances. A belief might be affirmed at one level of government but not at other levels. Or it might be affirmed at one juridical level (in a state motto,[124] a nonbinding resolution, a local holiday display, or other official or quasi-official expressions, for example) but not at other levels (such as in statutes that impose legal duties or prohibitions).

The potentially valuable possibility that these complexities open up is that, in different ways or in different senses, a belief may be said both to be and not to be the belief "of the community." It may be a belief of the community at one level but not at another, more fundamental or constitutive level.

As an example, suppose that a lively controversy arises over some particular idea—for instance, the proposition that "marriage is a union between a man and a woman"—and citizens press the government (albeit from different directions) to take a stand on the proposition. For some citizens, the issue becomes one of essential principle: They could not give their wholehearted allegiance to any community that did not (or that did) affirm what we can call the traditional monogamy proposition. Plainly there is no panacea for this predicament: Whatever the government does or does not do or say, some citizens will be deeply unhappy.

Suppose now that the legislature or city council, elected by the voters of the community, passes by majority vote a resolution affirming the proposition. Is it correct now to say that the monogamy proposition officially expresses a belief "of the community"? Well, in one sense the statement seems plausible, and presumably those who think that a public profession of the monogamy proposition is desirable or imperative can take satisfaction in the resolution. Those who

[124] *See, e.g.*, ACLU of Ohio v. Capitol Square Review & Advisory Bd., 243 F.3d 289, 291 (6th Cir. 2001) (rejecting challenge to Ohio state motto "With God, All Things Are Possible").

opposed the proposition will obviously be less happy with the outcome.

But they can still observe that a commitment to traditional monogamy is not *constitutive* of the community. The commitment is reflected only in a noncoercive resolution that citizens are free to oppose and that conceivably may be repealed tomorrow. Moreover, everyone in the community understands this to be the case. The community existed before the resolution affirming the proposition was passed, and it still will exist as a community if and when the resolution is withdrawn or forgotten. So in an important sense, the monogamy proposition is incidental to, and not at all definitive of, the community.

At one level, in short, the community affirms the proposition, but at another, more fundamental level it does not. In this way, the layering strategy seeks to accommodate and give expression to the diverse beliefs of people in the community without descending into either paralysis or bad faith.

To be sure, any layered approach to the challenge of diverse belief is likely to be messy—and thus repugnant to theorists, who presumably are moved to become theorists, at least in part, precisely because they are typically animated by a stronger-than-average yearning for intellectual clarity and coherence.[125] The actual substantive content of public affirmations and reservations will shift from time to time and from place to place[126] as political movements arise or

[125] Some such consideration may help to explain why even philosophers who are personally religious (or at least sympathetic to religion) and who have explicitly criticized the liberal exclusion of religion from "public reason" may nonetheless eventually find themselves embracing the Rawlsian position, or something like it. *See, e.g.*, Philip L. Quinn, *Religious Citizens Within the Limits of Public Reason*, 78 MODERN SCHOOLMAN 105, 107, 117–18 (2001) (explaining concept of public reason and defending it from objection that it is premised on implausible levels of consensus among citizens); Charles Taylor, *Modes of Secularism*, *in* SECULARISM AND ITS CRITICS 31, 37–38, 51–53 (Rajeev Bhargava ed., 1998) (arguing that Rawlsian overlapping consensus approach to secularism, with certain modifications, must be followed).

[126] In this respect, the layering approach is nicely harmonious with the focuses on localism, "tailoring," "subsidiarity," or federalism recently emphasized by scholars such as Richard Schragger, Mark Rosen, Kyle Duncan, and Ira Lupu and Robert Tuttle. *See* Kyle Duncan, *Subsidiarity and Religious Establishments in the United States Constitution*, 52 VILL. L. REV. 67, 96–134 (2007) (analyzing Establishment Clause and religious establishments within theory of subsidiarity and arguing that "the Clause is properly understood as a structural strategy for partitioning off the federal government from a volatile area of social policy, one better left to individual states"); Ira C. Lupu & Robert W. Tuttle, *Federalism and Faith*, 56 EMORY L.J. 19, 60 (2006) (arguing for partial incorporation of Establishment Clause as applied to states); Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1516–17 (2005) (arguing that tailoring of application of constitutional principles to different levels of government has merit and should not be categorically rejected); Schragger, *supra* note 107, at 1811–18

recede and as citizens' beliefs wax and wane. In contemporary America, some localities will be inclined to sponsor particular religious symbols or expressions of certain kinds,[127] while others will adopt different expressions or attempt to distance themselves from *any* such expressions. A particular school district will endorse the teaching of intelligent design and then, following a public debate and an election, will repudiate that policy.[128] The results will be disparate and dissonant, and they will not fully satisfy everyone—or, probably, anyone. Even so, the layered approach provides space for governments to express beliefs calculated to secure the allegiance and support of citizens while at the same time assuring dissenting citizens that these beliefs are not the essence of the community. Thus, many citizens—most, perhaps—will be able to point to governmental expressions of beliefs with which they disagree, but they will also (if they will permit themselves) be able to look to other levels of law or government where these objectionable beliefs are *not* affirmed.

In the realm of religion, the layered approach thus permits a political community, depending on its constituency, to respond in complicated ways both to those citizens who may believe that government should acknowledge its subservience to deity (and, perhaps, that any government that does not so affirm is unworthy of their allegiance)[129] and also to those citizens who object to any such acknowledgment by government (and who might be unwilling to give their allegiance to any political community definitively identified with such a belief). Such a community might, at one political or juridical level, sponsor religious expression—as in a motto, or a holiday display—so that religious citizens can perceive a real harmony between their beliefs and their community. At the same time, the community might remain religiously detached at higher jurisdictional and juridical levels, so that citizens who object to such expressions can accurately conclude that the community itself is not founded on or identified with unacceptable theological commitments. In different senses, the

(arguing for decentralized jurisprudence of Religion Clauses that takes into account difference between local, state, and federal levels of government). The approach is also congenial with (though not dependent on) the interpretation of the Establishment Clause as jurisdictional or federalist in character. *See supra* note 10.

127 Thus, in the contemporary United States it seems likely that some local governmental institutions might sponsor expressions reflective of Christian citizens' faith and, in other localities, of Jewish, Muslim, or Hindu citizens' faith.

128 *See generally* Kevin Trowell, Note, *Divided by Design:* Kitzmiller v. Dover Area School District*, Intelligent Design, and Civic Education*, 95 GEO. L.J. 855 (2007) (discussing intelligent design controversies, including Kitzmiller v. Dover Area Sch. Dist., 400 F. Supp. 2d 707 (M.D. Pa. 2005), in which Middle District of Pennsylvania held that policy requiring teachers to read intelligent design statement to pupils violated Establishment Clause).

129 *See supra* note 104–105 and accompanying text.

political community both would and would not have associated itself with religious belief. But it plainly would not be *constituted by* such beliefs.

C. The Role of the Constitution

So how does the Constitution fit into this layering strategy? Taking community and stable government largely for granted, contemporary lawyers and scholars sometimes think of a constitution primarily as something that limits or reins in government by imposing restrictions, such as the requirement that government act through due process of law, or by establishing certain rights that government is not to infringe.[130] Often theorists will also view a constitution as a sort of statement of principles or aspirations that government should seek to honor or realize.[131] These approaches typically, if tacitly, take the existence of a relatively stable political community as a given.

But such complacency about community is risky. Community is not an either/or phenomenon: A polity in which large numbers of citizens become disaffected may remain intact but may nonetheless suffer a decline in the quality and depth of community—a "devaluation of the civic community."[132] Such a devaluation is especially damaging in a liberal democratic community because, as Charles Taylor explains, "democracies . . . require a relatively strong commitment on the part of their citizens. In terms of identity, being citizens has to rate as an important component of who they are."[133] Consequently,

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[130] *See, e.g.*, BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 11 (1991) (describing scholars like Ronald Dworkin, Richard Epstein, and Owen Fiss as "rights foundationalists" who emphasize "fundamental rights" in their understanding of Constitution).

[131] Lawrence Sager has long argued, for instance, that the Constitution should be understood as an attempted, although incomplete, embodiment of justice (even though not all of its requirements should be judicially enforced). *See, e.g.*, LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 5–10, 70–83 (2004) (arguing in favor of justice-seeking account of constitutional practice where judges act in partnership with Constitution to provide detail to Constitution's generalizations and to achieve political justice). In a similar vein, Robin West notes that some view the Constitution as a "repository of the 'glimpses,' 'memories,' and 'dreams' of the culture's moral ambitions." ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT 276 (1994).

[132] Schragger, *supra* note 107, at 1887; *see also* Peter L. Callero, *The Sociology of the Self*, 29 ANN. REV. SOC. 115, 115 (2003) (describing "an increasing individualization of social life"). *See generally* ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000) (discussing reasons for decline in community involvement over past several decades in United States).

[133] Taylor, *supra* note 125, at 43. Taylor elaborates:

> Traditional despotisms could ask of people only that they remain passive and obey the laws. A democracy, ancient or modern, has to ask more. It requires that its members be motivated to make the necessary contributions: of treasure (in taxes), sometimes blood (in war), and always of some degree of partic-

the imperative of maintaining citizens' active allegiance is a task the community neglects at its peril.

Particularly at the outset of a constitutional enterprise, this imperative will seem urgent. The daunting task at hand is to bring a government into existence and thereby to solidify or maintain a political community that may be fragile or perhaps merely inchoate; only if that primary objective is achieved can concerns about limiting government or improving society come into play. The primary role of a constitution, in this perspective, is not so much to limit or to improve as it is to *constitute* the community—to construct a government and thereby to constitute or at least to maintain a political community.[134] In this vein, Gordon Wood explains that "[b]ecause we today can take our nationhood for granted, we can indulge ourselves with the luxury of celebrating our multicultural diversity. But 200 years ago Americans were trying to create a nation from scratch and had no such luxury. They were desperately trying to make themselves one people . . . ."[135]

In that community-creating project, a constitution was (and is) more than just a legal instrument. It is also an important symbol, expressing and eliciting the allegiance of the community's citizens. So it seems natural for such a statement succinctly to set forth the

> ipation in the process of governance. A free society has to substitute for despotic enforcement with a certain degree of self-enforcement. Where this fails, the system is in danger. For instance, democratic societies where the level of participation falls below a certain threshold cease to be legitimate in the eyes of their members.

Id.

134 The point here is somewhat different from the one made by scholars, such as Ernest Young, who distinguish a constitution's constitutive function from its other functions, such as promoting entrenchment and conferring rights. *See* Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 411–12 (2007) ("A constitution generally does three primary things: It constitutes the government . . . . It identifies certain rights of individuals against that government. And (sometimes) it entrenches these structures against change . . . ."). In discussing the "constitutive" function, Young refers to a constitution's role in "creating governmental institutions, specifying their composition and methods for selecting their officers, conferring powers upon them, establishing operational procedures, and drawing the boundaries of their jurisdictions." *Id.* at 417. He argues persuasively that in the United States this sort of constituting is performed not just by the written Constitution ratified in 1789 and subsequently changed through formal amendment, but through statutes and other legal means as well. *Id.* at 417–22. The "constitutive" function that I am interested in here is both narrower and broader than the function that Young discusses. This Essay is about the document drafted in Philadelphia, and not all the other legal measures that do, to be sure, help to "constitute" governmental institutions and procedures. But the concern is with how that document served, and serves, to help constitute not just the *government*—its institutions, procedures, and so forth—but the *political community* itself.

135 Gordon S. Wood, *The American Enlightenment*, *in* AMERICA AND ENLIGHTENMENT CONSTITUTIONALISM 159, 161 (Gary L. McDowell & Johnathan O'Neill eds., 2006).

common bases, beliefs, or commitments that make the community a *community* rather than a disparate collection of individuals and political actors and units. As the historian J.R. Pole observes, "The great distinction and historic achievement of the American Constitution was to weld the disparate, shambling cluster of the self-interested original states into a national union. In other words, *to create* a nation of shared principles."[136]

A constitution, in short, might naturally be calculated to serve not merely as a practical, nuts-and-bolts blueprint for government but also as a sort of unifying statement or creed. But what would the content of such an expression be? The question is surely not susceptible of any general answer in the abstract; the answer depends, obviously, on what citizens *do* in fact believe and think is important to their union. Still, we might venture this much: A constitution calculated to serve as the foundation not for some short-term, limited-purpose organization—like a bowling league or a bird watchers' club—but rather for what aspires to be an enduring, encompassing, and "more perfect Union"[137] might naturally seek to affirm common beliefs on fundamental rather than trivial matters. And what could be more fundamental than beliefs about such cosmic concerns as the existence of a God who in some sense superintends the affairs of nations?

So it is at least readily understandable why, in a suitable political context, constitution-makers might think it appropriate, or perhaps even imperative, to include religious language in a constitution—and why virtually all state and many foreign constitutions do feature such language.[138] But in a large and pluralistic community, the matter is also delicate because, as discussed, religious language can divide and provoke as well as unify. Thus we come to the dilemma noted above—the dilemma of falling into either skeptical paralysis or bad faith—and to the possibility of a layering approach as a more promising alternative to those grim options.

In this context, it becomes possible to appreciate the value of the agnosticism adopted by the U.S. Constitution. As discussed, the Constitution does not affirm theistic beliefs—as some constitutions do, and as some citizens desired and indeed demanded[139]—but neither does it prescribe that governments must be atheistic or secular. By maintaining an agnostic posture in its own right, the

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136 J.R. Pole, *Nation-Making and the American Constitutional Process*, *in* AMERICA AND ENLIGHTENMENT CONSTITUTIONALISM, *supra* note 135, at 201, 201.

137 U.S. CONST. pmbl.

138 *See supra* notes 15–23 and accompanying text.

139 *See supra* notes 19–26 and accompanying text.

Constitution declines to mandate that governments operating under its auspices take any particular stance.

In this way, the Constitution permits a layered approach to problems of belief. But it does more than that: It affirmatively facilitates such an approach in three ways.

First, the Constitution maintains the jurisdictionally and juridically layered structure of government and law that makes a layered approach to public affirmations possible. Thus, the Constitution preserves a qualified independence of state and national governments, preventing the political system from collapsing into a unitary (one-level) form of government. And it undergirds the complex system of law in which different forms or juridical levels of law—constitutional, statutory, common law, and so forth—can flourish.

Of course, the Constitution also declares its own supremacy over other forms of law and over governments that operate under it,[140] and this supremacy points to the second crucial way in which the Constitution supports the layering strategy with respect to belief. Because the Constitution is both supreme and agnostic, expressions of belief by governments can never be regarded as ultimately constitutive of the political community. Governments at various political levels may make objectionable affirmations (objectionable to some, of course, but desired or demanded by others). But there is always something beyond those governments and their affirmations that is more fundamentally constitutive of the community and that remains steadfastly agnostic: the Constitution.

Suppose, for example, that something like the national motto ("In God We Trust") were adopted at every level of government—by Congress, by every state, and by every city and county in the land. Citizens who are atheists surely would find this situation galling: There would be no political entity in the country to which they might travel that would not affirm a belief to which they object. Even in this lamentable (to them) situation, however, these citizens would still be able to point to one level of law—the level of the Constitution—in which this objectionable (to them) belief is deliberately and conspicuously *not* affirmed. And since this level is that of supreme and constitutive law, they could take consolation in the observation that the national political community itself is not constituted by a commitment that they do not share.

This is not to say, of course, that atheistic citizens will find this situation ideal—far from it. Nor for that matter will the situation be ideal for more aggressively devout citizens who think that the commu-

[140] U.S. CONST. art. VI, § 2.

nity should not only express belief in God but also should constitute itself upon and around that commitment (or upon some even more sectarian affirmation or orthodoxy).[141] Just as atheists or agnostics might prefer a constitution that is not only itself agnostic but that prescribes agnosticism at every level of government, more devout citizens may embrace the view taken by some at the founding in favor of including theistic language in the Constitution.[142] And so they may support the sort of proposal that periodically has arisen in American history to make our Constitution more like those of Canada or the various states—to amend the text by adding religious affirmations.[143]

To alter the Constitution in either of these ways, however, effectively would subvert the layering strategy. Conversely, so long as the Constitution remains resolutely agnostic, that strategy remains available. This is no small contribution to the maintenance of political community in a complex, pluralistic society.

The Constitution facilitates a layering strategy in a third essential way as well—by protecting the freedom of speech and, hence, the freedom to dissent publicly from whatever beliefs the various levels of government may affirm.[144] The possibility and fact of dissent demonstrate that such affirmations cannot be taken to represent the beliefs of all citizens. As importantly, the fact that the right to dissent is guaranteed by the Constitution itself confirms that in expressing their disagreement, dissenting citizens are not in any way betraying or relinquishing their membership in the community and will not be deemed by the constitutive law of the community to have done so. The right to disagree, deliberately protected in the Constitution, is thus more fundamental to what constitutes the community as a community than are the various particular affirmations (religious or other-

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141 *See, e.g.*, ROUSAS JOHN RUSHDOONY, CHRISTIANITY AND THE STATE 184–90 (1986) ("[T]he Christian community must assert the priority of God's law-word as binding on all of life, including church, state, and school. Christians must once again take over government in education, welfare, health, and other spheres.").

142 *See supra* notes 26–27 and accompanying text.

143 For a description of the nineteenth-century movement to amend the Constitution to recognize Christianity in the Preamble, see PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 290–93 (2002).

144 Just as we today typically attribute any "secular government" requirement to the First Amendment, we typically do the same with the freedom of speech and hence the freedom to dissent. It is important in this context to note the view that to the Constitution's framers, the First Amendment protected—by putting in writing—rights that, they claimed, were already implicitly protected in the original Constitution. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 22 (1998) ("To the extent that principles of free political expression were implicit in the republican structure of the original Constitution, state legislatures were already bound to observe those principles . . . ." (footnote omitted)).

wise) that emanate from time to time from the various levels of government.

D. Constitutional Agnosticism in the Twenty-first Century

The layering strategy was openly employed in the early years of the Republic. Religious tests or qualifications for national office were forbidden.[145] And any official establishment of religion at the national level was prohibited.[146] At the same time, most early Presidents issued official proclamations that, as George Washington put it, discharged the nation's perceived duty "to acknowledge the providence of Almighty God, to obey His will, to be grateful for His benefits, and humbly to implore His protection and favor."[147] And states were permitted to maintain official religious establishments if they so chose; indeed, their power to do so was given explicit constitutional protection.[148] A state itself—Massachusetts being the leading example—might have in turn left the specific content of religious establishment to its various localities.[149]

Noting these and similar practices from the nation's early years that seem palpably at odds with the contemporary commitment to secular government, modern commentators often stress that such practices should not be permitted to influence contemporary constructions of the Constitution.[150] Conditions in the country have changed dra-

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145 U.S. CONST. art. VI, § 3; *see also supra* note 18.

146 U.S. CONST. amend. I.

147 President George Washington, Proclamation of a National Day of Thanksgiving (Oct. 3, 1789), *reprinted in* JOHN T. NOONAN, JR. & EDWARD MCGLYNN GAFFNEY, JR., RELIGIOUS FREEDOM: HISTORY, CASES, AND OTHER MATERIALS ON THE INTERACTION OF RELIGION AND GOVERNMENT 202, 202 (2001).

148 Scholars disagree about whether the purpose of the First Amendment was to protect state establishments from federal interference, but, as far as I can tell, even those who reject this interpretation acknowledge that the amendment had this consequence. For a more detailed discussion, see Smith, *supra* note 10, at 1870–74.

149 For a helpful description of the Massachusetts system, see generally John Witte Jr., *One Public Religion, Many Private Religions: John Adams and the 1780 Massachusetts Constitution*, *in* THE FOUNDERS ON GOD AND GOVERNMENT 23 (Daniel L. Dreisbach et al. eds., 2004).

150 For example, according to Douglas Laycock:

> The argument cannot be merely that anything the Framers did is constitutional. The unstated premise of *that* argument is that the Framers fully thought through everything they did and had every constitutional principle constantly in mind, so that all their acts fit together in a great mosaic that is absolutely consistent . . . . That is not a plausible premise. Of course the state and federal establishment clauses did not abruptly end all customs in tension with their implications. No innovation ever does.

Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 913 (1986).

matically, it is said, so that practices that might have seemed salutary (or at least innocuous) then would be wholly unacceptable now.

And indeed, the American community clearly has changed in crucial respects. For one thing, later amendments to the Constitution—the Fourteenth Amendment, in particular—have altered the overall character of the document.[151] In 1800, states were free to establish official churches if they so chose; today such an arrangement is unthinkable.[152] In addition, the nation has changed in countless other ways that may influence the sort of constitution we want to have.

Such developments typically provoke debates between originalists, who argue that social change in itself cannot alter the meaning of the Constitution,[153] and proponents of something like a "Living Constitution."[154] We need not engage those debates here. Hardly anyone today denies that, perhaps due to the Fourteenth Amendment, constitutional limits on state support for religion today are different in some respects than they were at the time the Constitution was initially written and adopted: The impermissibility of a state-established church is a conspicuous instance. But the immediate question is whether conditions have changed in any way such that even the partisans of a "Living Constitution" could make a persuasive argument

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[151] *See, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 636–40 (1943) (stating importance of Fourteenth Amendment in protecting citizens by limiting state powers and incorporating Establishment Clause); AMAR, *supra* note 144, at 227–30 (discussing structural complexities of incorporation of Establishment Clause given that Fourteenth Amendment gave citizens rights against states while Bill of Rights gave both citizens and states rights); Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1085–89 (1995) (discussing problems unique to incorporation of Establishment Clause but concluding that intent of incorporated Establishment Clause should prevail over original Establishment Clause).

[152] According to Ira Lupu and Robert Tuttle:

> States that maintained explicitly Christian identities in the first half-century of the Republic all eventually turned away from such public establishments; none have made any explicit move to reestablish a strong, denomination-specific religious identity, and a move of that sort would likely be met with widespread political condemnation. Put more simply, the American ethos of religion and state simply would not tolerate a state attempt to adopt a particular set of religious truths beyond general acknowledgment of a God.

Lupu & Tuttle, *supra* note 126, at 65 (footnotes omitted).

[153] *See, e.g.*, Saikrishna Prakash, *Radicals in Tweed Jackets: Why Extreme Left-Wing Professors Are Wrong for America*, 106 COLUM. L. REV. 2207, 2224–26 (2006) (reviewing CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA (2005)) (arguing that meaning of constitutional text is fixed by original understanding and does not change with changes in circumstances and consequences).

[154] *See, e.g.*, William J. Brennan, Jr., Address, *Construing the Constitution*, 19 U.C. DAVIS L. REV. 2, 7 (1985) ("[T]he genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.").

that a basic constitutional strategy—what I have called the layering strategy—that was embodied in the Constitution and employed in the early years of the Republic is now out of bounds.

What changes might be invoked in support of that argument? It seems that judges and scholars who argue that changes in society require new interpretations of the Constitution with respect to religion typically point to one central development: The country, they say, is more religiously pluralistic today than it was at the founding.[155] Back then, nearly all citizens were Protestants of some kind or another, except for the elite few who are usually, though somewhat unfortunately, described as "deists" today.[156] Now, by contrast, American society is characterized by a rich diversity spanning the whole spectrum of belief and nonbelief. In this vein, Stephen Stein observes that "the Founders would be dumbfounded if they could return today and see the religious world—the teeming marketplace of religious options—in America at the end of the twentieth century."[157] He concludes from this enhanced diversity that

> [t]he "intentions of the founders" with respect to religion, as expressed in the Constitution and the Bill of Rights, may not be a sufficient philosophical or theoretical basis for dealing with the new challenges that will face the principle and practice of religious liberty in our nation in the years ahead.[158]

Let us concede the accuracy of the following assessment: American society is more religiously pluralistic today than it was at the founding.[159] This fact surely does support the proposition that an

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155 In *Van Orden v. Perry*, Justice Stevens argued in dissent that, although interpretation of the Constitution today in matters of religion should adhere to "the broad principles contained in the Constitution," it should not follow the Framers' concrete "expectations"; adaptation is needed because "religious pluralism has expanded." 545 U.S. 677, 732–34 (2005) (Stevens, J., dissenting); *cf*. KRAMNICK & MOORE, *supra* note 2, at 201 ("At the beginning of the Republic most Americans, if they were religious, were some kind of Protestant. Now the religious landscape is much more complicated . . . .").

156 The label seems unfortunate insofar as it conflates a range of different beliefs and also because in its standard presentation—i.e., deism is the belief in a deity who created the universe and then left it to run on its own—it fails to convey the widespread acceptance even among so-called "deist" founders of a providential view of history, especially American history. *See* DANIEL J. BOORSTIN, THE LOST WORLD OF THOMAS JEFFERSON 225–34 (1993) (noting examples of Jefferson's providential view of history). For a helpful recent presentation of the various forms of religious belief that were influential at the founding, see generally DAVID L. HOLMES, THE FAITHS OF THE FOUNDING FATHERS (2006).

157 Stephen J. Stein, *Religion/Religions in the United States: Changing Perspectives and Prospects*, 75 IND. L.J. 37, 60 (2000).

158 *Id.*

159 It is arguable, however, that such claims often exaggerate both the degree of homogeneity in religion at the time of the founding, *see, e.g.*, JON BUTLER, AWASH IN A SEA OF FAITH: CHRISTIANIZING THE AMERICAN PEOPLE 1–2 (1992) ("If modern American

established state church—of the kind that existed in Massachusetts until well into the nineteenth century[160]—would be unacceptable today. But far from showing that the general layering strategy employed in the early years is obsolete, the fact of increased pluralism makes that strategy all the more apt. It is, after all, precisely the fact of pluralism that makes such a strategy valuable or necessary. Thus, if changes in American society justify changes in our interpretations of the Constitution, in this respect the layering interpretation of the Constitution should be more compelling, not less.[161]

To be sure, we can imagine "possible worlds," as the philosophers are fond of saying, in which American society might have evolved in ways that would render a layering interpretation unnecessary or unattractive. For example, if—as so many social thinkers predicted for so long[162]—society had become thoroughly secularized, in the sense that religious belief had largely faded away, there would no longer be any serious conflict about governmental expression of religious beliefs. Virtually no citizens would favor such expressions anyway, and the expression of religious belief would do nothing to gain or sustain the allegiance of citizens. Influenced by such prophecies of imminent sec-

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religion is complex and bumptious, so too were its earliest manifestations."), and the extent of diversity in the nation today. R. Laurence Moore observes that "although one can count hundreds of religious groups in the United States, the vast majority of religious Americans have gravitated toward a small number of 'mainline' denominations." R. LAURENCE MOORE, RELIGIOUS OUTSIDERS AND THE MAKING OF AMERICANS 205 (1986). At the end of the nineteenth century, the ten largest denominations accounted for seventy-five percent of the American population; a century later, they represented ninety percent. *Id.* at 206.

160 *See supra* note 149 and accompanying text.

161 It is conceivable that the utility of layering and religious pluralism do not ascend together forever in a linear fashion. Rather, there could be a bell curve, in which the utility of layering peaks and then descends at higher levels of religious diversity. While such a curve is conceivably possible, the advocates of a "Living Constitution" would at least bear the burden of proof to demonstrate that while layering was once useful to deal with religious pluralism, American diversity has now reached so high a level that it has completely reversed the original meaning of the agnostic Constitution. Barring more evidence, this argument, though conceivable, does not seem compelling.

162 José Casanova explains:

> In one form or another, with the possible exception of Alexis de Tocqueville, Vilfredo Pareto, and William James, the thesis of secularization was shared by all the founding fathers: from Karl Marx to John Stuart Mill, from Auguste Comte to Herbert Spencer, from E.B. Tylor to James Frazer, from Ferdinand Toennies to Georg Simmel, from Émile Durkheim to Max Weber, from Wilhelm Wundt to Sigmund Freud, from Lester Ward to William G. Sumner, from Robert Park to George H. Mead. Indeed, the consensus was such that not only did the theory remain uncontested but apparently it was not even necessary to test it, since everybody took it for granted.

JOSÉ CASANOVA, PUBLIC RELIGIONS IN THE MODERN WORLD 17 (1994) (footnote omitted).

ularization, proponents of secular government may have supposed or perhaps hoped that they were simply trying, by constitutional means, to help move the political community down the path along which history was inexorably carrying it anyway.

By now, though, it seems apparent that the predictions of the death of religion in advanced societies were greatly exaggerated.[163] American society, at least, appears to be as religious as it ever was, albeit in diverse ways. And once again, it is this vibrant but diverse religiosity that makes the layering strategy so valuable.[164]

CONCLUSION

It is important to acknowledge that we have an *agnostic* Constitution, but it is equally important to recognize that we have an agnostic *Constitution*. It is the Constitution that is agnostic, in other words, not politics or government. Indeed, it is precisely the Constitution's agnosticism that permits governments, at different levels and in different ways, to sponsor the sorts of religious expression that American governments have traditionally engaged in, and that may well be important in securing the loyalty of citizens, while not making such affirmation *constitutive* of the political community.

Modern scholars and Justices largely have overlooked the distinctive genius of the Constitution in this respect and have interpreted the

163 *See, e.g.*, Peter L. Berger, *The Desecularization of the World: A Global Overview*, *in* THE DESECULARIZATION OF THE WORLD: RESURGENT RELIGION AND WORLD POLITICS 1, 2 (Peter L. Berger ed., 1999) (rebutting assumption that today's world generally is secularized); BAYLOR INST. FOR STUD. OF RELIGION, *supra* note 92, at 8 (noting that ninety percent of Americans are affiliated with specific religions).

164 It is important to emphasize here that the value of the layering strategy can be understood and assessed independently from the particular substantive jurisprudence that might develop to regulate governmental statements or actions at various political and juridical levels. In this respect, layering is analogous to commitments such as free speech, or due process of law, or federalism: We can debate whether these are valuable commitments without knowing the precise substantive content of the speech that will in fact occur, or the exact nature of the cases that will be litigated, or the particular policies that may be adopted by state or national governments. In workshops discussing this Essay, participants often asked for a full statement of what constitutional restrictions I would place on the various levels of government. What should the Constitution prohibit the national government from doing or saying? The states? I have suggested that states would be forbidden to establish official state churches, but how close could they come to such an establishment? How much religiosity would be allowed into, say, noncoercive public statements? And so forth. Although these are obviously important questions, and although in previous work I have occasionally tried (in a halting way) to address such questions, *see, e.g.*, Smith, *supra* note 122, these questions are independent of and essentially extraneous to the thesis of this Essay. Whatever substantive content is given to constitutional doctrine will not be coming from me; hence, my own (probably idiosyncratic) views on such substantive questions, which in any case are usually highly tentative, have little relevance to an evaluation of the layering strategy itself.

document in ways that have worked to subvert its momentous contribution to the problem of maintaining community under conditions of creedal diversity. Adopting flattening, one-size-fits-all views of the matter,[165] they have interpreted the agnostic Constitution to mean that American *governments*—national, state, and local—must be uniformly secular in all of their operations and expressions. Given the deeply religious character of the American political tradition and citizenry, these procrustean interpretations inevitably have found themselves at war with the character of American politics and traditions.[166] The result, predictably, has been an unseemly series of unstable doctrines and unsatisfactory decisions. The so-called "no endorsement" doctrine and decisions represent a culmination of this unhappy development—manifested in judicial opinions that increasingly appear to have relinquished even the aspiration to believability;[167] Justice O'Connor's labored explanation in the Pledge of Allegiance case of how the words "under God" in the Pledge do not send any message today endorsing religion is perhaps the most egregious example.[168]

The alternative to this course of deception or bad faith might seem to be one of intellectual paralysis. A small but vivid manifestation of such paralysis appears in Justice Breyer's almost plaintive declaration in *Van Orden v. Perry*[169] that he could discover no satisfactory

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165 *See generally* Lupu & Tuttle, *supra* note 126 (discussing intersection of federal and state policy on religion, in particular how incorporation has ensured that state governments operate under identical restrictions as federal government).

166 For discussion of the tension between current Establishment Clause jurisprudence and American history, see generally Steven D. Smith, *Justice Douglas, Justice O'Connor, and George Orwell: Does the Constitution Compel Us to Disown Our Past?* (Univ. of S.D. Sch. of Law, Research Paper No. 06-17, 2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=728663.

167 *See supra* note 121 for a description of the "no endorsement" doctrine. Commentators have criticized it. *See generally* Choper, *supra* note 121 (discussing doctrine's shortcomings, especially its problematic reliance on individual sensibilities); Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266 (1987) (criticizing doctrine as (1) lacking clear concept of endorsement, (2) interjecting subjective, intent-based standard, (3) adopting overly expansive view of perceptions, and (4) failing to define religion).

168 Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 33–45 (2004) (O'Connor, J., concurring) (stating that use of "under God" constitutes instance of ceremonial deism, but not endorsement of religion, based on longstanding history and ubiquity of practice); *cf.* Douglas Laycock, Comment, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 235 (2004) ("This rationale is unconvincing both to serious nonbelievers and to serious believers."). Steven Shiffrin observes, "I am sure that a pledge identifying the United States as subject to divine authority is asserting the existence and authority of the divine." Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9, 70 (2004). Shiffrin adds that "pretending [that this and similar expressions] are not religious is simply insulting." *Id.* at 71.

169 545 U.S. 677 (2005).

doctrinal test at all to apply to difficult church and state questions, and hence he would seek to decide hard cases as they arise without resort to any doctrine or test but instead with the use of "legal judgment."[170] Breyer's position offers precious little help to lower court judges or other actors; insofar as "*legal* judgment" is understood to be judgment guided by legal rules or doctrines,[171] his opinion might also be viewed as internally contradictory.[172] Even so, the opinion surely stands as one of the more endearingly candid confessions of the current predicament of Establishment Clause jurisprudence.

There is, however, a more promising alternative. We might recover the idea that "it is a *constitution* we are expounding,"[173] and that it is *constitutional* agnosticism—not *governmental* or *political* agnosticism—that the Constitution gives us. By remembering and celebrating our agnostic Constitution, we might be able to allow for a more complex—but also more honest, responsible, and flexible—approach to the challenge of maintaining the *unum* in the *pluribus* of a diversely believing political community.

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170 *See id.* at 698–700 (2005) (Breyer, J., concurring) (asserting that in "difficult borderline cases" there is "no test-related substitute for the exercise of legal judgment").

171 *See generally* LARRY ALEXANDER & EMILY SHERWIN, THE RULE OF RULES: MORALITY, RULES AND THE DILEMMAS OF LAW (2001) (emphasizing essential importance of rules in legal decisionmaking).

172 *See* Erwin Chemerinsky, *Why Justice Breyer Was Wrong in* Van Orden v. Perry, 14 WM. & MARY BILL RTS. J. 1, 3–4 (2005) (criticizing Justice Breyer for, among other things, deciding that Establishment Clause was meant to prevent religious divisiveness but giving no guidance for how to apply divisiveness principle). Though I acknowledge the force of such criticisms about Justice Breyer's opinion, I feel estopped to press them myself, previously having argued that Establishment Clause cases ought to be decided on a prudential and largely ad hoc basis. *See* Steven D. Smith, *Unprincipled Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES 497 (1996) (arguing for prudential, rather than principled, decisionmaking and looking at some consequences thereof).

173 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).