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INTRODUCTION

At the 2008 Annual Meeting of the American Association of Law Schools, the program organized by the Section on Law and Religion presented for consideration the claim that "the United States Supreme Court has shown an increasing unwillingness to engage in deciding matters that relate to the interpretation of religious practice and belief."[1] The Court, it was proposed, is—more and more—taking a "hands-off approach to religious doctrine."[2]

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* Professor of Law, University of Notre Dame. This paper was prepared for presentation at the program of the Section on Law and Religion at the Annual Meeting of the American Association of Law Schools in January, 2008. I am grateful to Rob Vischer and Sam Levine for conceiving and coordinating the program, to my fellow presenters—Chris Eisgruber, Andy Koppelman, and Bernadette Meyler—for their stimulating papers, to Kent Greenawalt for his typically thoughtful responses to the presentations and for setting such a wonderful example for all of us who aspire to be careful and thoughtful scholars, to my Notre Dame Law School colleagues who engaged and pushed me when I presented a version of this paper at a faculty workshop, to Tony Bellino for his assistance with research, and to the editors and staff of the *Notre Dame Law Review* for their hard work and patience.

1 Ass'n of Am. Law Sch., Annual Meeting: Reassessing Our Roles as Scholars and Educators in Light of Change, http://www.aals.org/am2008/friday/index.html (last visited Nov. 20, 2008) [hereinafter Program].

2 *See id.*; *see also* Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843, 1844 (1998) ("The Supreme Court's basic constitutional approach . . . is that secular courts must not determine questions of religious doctrine and practice."); Samuel J. Levine, *Rethinking the Supreme Court's Hands-Off Approach to Questions of Religious Practice and Belief*, 25 FORDHAM URB. L.J. 85, 85 (1997) ("In recent years, the United States Supreme Court has shown an increasing unwillingness to engage in deciding matters that relate to the interpretation of religious practice and belief.").

This proposal was, and remains, timely and important, as is illustrated by—to mention just a few, diverse examples—the ongoing property-ownership dispute between several "breakaway" Episcopal churches in Virginia, on the one hand, and the Episcopal Diocese of Virginia, on the other;[3] by the Supreme Court of Canada's recent ruling that an agreement regarding a religious divorce under Jewish law is enforceable in civil courts;[4] by a federal judge's ruling that the Georgia Institute of Technology had unconstitutionally taken on the task of instructing students about the merits of various traditions' positions on sexual morality;[5] and perhaps even by the Speaker of the House's controversial pronouncements, on "Meet the Press," about Roman Catholic teaching with respect to abortion.[6] In each of these controversies, a government actor is being asked to decide a question, or has presumed to resolve a dispute, involving the meaning or content of religious teaching.

But, such examples notwithstanding, is the proposed claim true? That is, is it really the case that American courts are showing such an "increasing unwillingness," and that they are doing so in accord with any identifiable principle or "approach"?[7] If there is, in the Court's

3 *See, e.g.*, Julia Duin, *Judge Rules in Favor of Breakaway Groups*, WASH. TIMES, Aug. 21, 2008, at A3.

4 *See, e.g.*, Zvi Halpern & Michelle Landy, *Court Upholds Civil Rights Against Religious Doctrine*, TORONTO STAR, Dec. 21, 2007, at AA08; *see also* Bruker v. Marcovitz, [2007] 3 S.C.R. 607, 2007 SCC 54 (Can.) (enforcing *get* obtained from rabbinical court on the basis that it constituted a civil contract).

5 *See* Sklar v. Clough, No. 1:06-CV-0627-JOF, slip op. at 83–84 (N.D. Ga. Apr. 29, 2008); *see also* Scott Jaschik, *Gay Rights vs. Religious Rights*, INSIDE HIGHER ED, May 2, 2008, http://www.insidehighered.com/news/2008/05/02/gatech (summarizing the *Sklar* decision and reactions on both sides of the holding). As Eugene Volokh commented:

> The Georgia Tech Safe Space training program materials (both printed handouts and Web materials) were apparently aimed at helping gays and lesbians feel comfortable and safe on campus, an eminently plausible goal. But they tried to accomplish this by taking stands on quintessentially theological questions—e.g., the true meaning of the Bible, and the "legitima[cy]" of various interpretations of "Biblical texts"—something the Establishment Clause has been read as prohibiting.

Posting of Eugene Volokh to The Volokh Conspiracy, http://volokh.com/posts/1217540045.shtml (July 31, 2008, 17:34 EST) (alteration in original). For another case presenting similar questions, see *Citizens for a Responsible Curriculum v. Montgomery County Public Schools*, No. Civ. A. AW-05-1194, 2005 WL 1075634 (D. Md. May 5, 2005) (holding that defendant's new curriculum endorsing a homosexual lifestyle likely violates plaintiff's First Amendment freedoms).

6 *See, e.g.*, Julia Duin, *Catholic Bishops Assail Pelosi over Her Remarks on Abortion*, WASH. TIMES, Aug. 27, 2008, at A1.

7 *See, e.g.*, Levine, *supra* note 2, at 85.

law-and-religion toolkit, something like a hands-off "rule," then what are that rule's scope, content, and justifications?[8] Which feared harms does it protect against, and which goods does it promote? When it comes to "matters that relate to the interpretation of religious practice and belief,"[9] *why* is the Court doing, and *should* it be doing, what it *is* doing?

I.

Step back for a moment, seventeen centuries or so. As fans of the *Da Vinci Code* are (in a way) aware,[10] in the year 325, the Arian Controversy was raging.[11] The Emperor Constantine, a convert to Christianity, was troubled by the strife among Christians and—perhaps more acutely—by the civil unrest that in many places accompanied their theological disagreements.[12] Accordingly, he asked Christian bishops from around the world to gather for an ecumenical council, in present-day Turkey, to restore both religious concord and civil peace.

Today, Constantine's move no doubt seems to most people a perfect example of that which the political authority cannot do and, indeed, should have no interest in doing. Most of us probably think that for the civil magistrate to inquire into—to even imagine the right or competence to inquire into—the "truth or falsity" of religious claims and doctrines is, as the Supreme Court put it in *United States v. Ballard*,[13] to enter a "forbidden domain."[14] We are confident that disputes over doctrine—disputes such as, for example, the fourth cen-

8 *See* Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. (forthcoming 2009) (manuscript at 16–17), *available at* http://ssrn.com/abstract=1268406 (proposing a "religion-protective" argument that is able to "provide[] a powerful reason for government, as a general matter, to keep its hands off religious doctrine").

9 Program, *supra* note 1.

10 *See generally* DAN BROWN, THE DA VINCI CODE (2003).

11 The "Arian Controversy" was a "controversy over Christ's divinity, which erupted with violent intensity during the reign of Constantine when the presbyter Arius of Alexandria challenged his bishop, Alexander, on the question of God the Son's relation to God the Father." THOMAS BOKENKOTTER, A CONCISE HISTORY OF THE CATHOLIC CHURCH 58 (1977); *cf.* PETER BROWN, THE RISE OF WESTERN CHRISTENDOM 40–41 (1977) (describing the hostility between Arius and Alexander giving rise to the Arian Controversy); 1 JAROSLAV PELIKAN, THE CHRISTIAN TRADITION 200–03 (1971) (same).

12 *See* BOKENKOTTER, *supra* note 11, at 61 ("With the unity of the Church at stake, Constantine convoked the first ecumenical council, which met at Nicaea in 325.").

13 322 U.S. 78 (1944).

14 *Id.* at 87. For a close study of the *Ballard* case, see JOHN T. NOONAN, THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIMENT OF RELIGIOUS FREEDOM 141–76 (1998).

tury argument over the divinity of Christ—are, as the Court insisted in *Watson v. Jones*,[15] "strictly and purely ecclesiastical in . . . character."[16] In every involvement or interference by government officials in "controversies over religious doctrine and practice,"[17] we think, the "hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern."[18] Religion is, after all, a "private matter."[19]

But, is it really? Or, is it entirely? And, even if it is, so what? Presumably, with respect to the particular "controvers[y] over religious doctrine and practice"[20] that occasioned the first Council at Nicaea, Constantine was not mistaken in perceiving that his Christian subjects' strong views on the matter—and their equally strong view that the question *did* matter—were not unrelated to, and could not be neatly separated from, eminently "secular" matters about which he was quite, and appropriately, concerned. Even with the benefit of hindsight, there is no reason to dispute what must have been the Emperor's view, namely, that the social and political order under his charge—to say nothing of his subjects' salvation—would be well served if the Arian Controversy were resolved. And so, why, exactly, do his concerns, and his actions, strike us as strange, even illegitimate?

They are not, after all, without contemporary parallels, or progeny. Yes, it is hard to imagine President Obama convening a council of Episcopalian bishops, and asking them—in the interest of preserving public peace (and tasteful music)—to resolve their various disputes.[21] And yet, we *can* imagine—we no longer have a choice—the People's Republic of China enacting a law purporting to regulate the reincarnation of the Dalai Lama.[22] This law certainly invades what we and our Supreme Court regard, again, as a "forbidden domain." And yet, is it so clear that the matter of the reincarnation of living lamas is "purely ecclesiastical," and does not touch directly on the Chinese state's "secular" interest in maintaining and strengthening its chokehold on Tibet? We might be amused, bewildered, or troubled

15 80 U.S. (13 Wall.) 679 (1872).

16 *Id.* at 733.

17 Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969).

18 *Id.*

19 *See* Lemon v. Kurtzman, 403 U.S. 602, 625 (1971).

20 *Presbyterian Church*, 393 U.S. at 449.

21 *See, e.g.*, Neela Banerjee, *Episcopal Church Remains Divided on Gay Issues*, N.Y. TIMES, Sept. 22, 2007, at A9.

22 *See, e.g.*, Jane Macartney, *China Tells Living Buddhas to Obtain Permission Before They Reincarnate*, TIMES (LONDON), Aug. 4, 2007, at 36.

by USAID's "mullahs on a bus" program in Central Asia, which "typically brings together about a dozen religious leaders who spend a day on a bus visiting various U.S.-funded projects and hearing directly from beneficiaries of the positive work the United States undertakes in a variety of fields."[23] And yet, it is not obvious that we should reject out of hand the program's premise, namely, that our government's interests—*our* interests—are well served by actions that soothe anti-American sentiments in Central Asia's Muslim communities.[24] When a majority of Canada's Supreme Court affirmed that agreements to remove religious barriers to remarriage are enforceable in civil courts, they did so—they insisted—in order to vindicate "Canada's approach to religious freedom, to equality rights, [and] to divorce and remarriage generally";[25] the Court's stated aim was not to decide a religious question or enforce a religious duty but rather to uphold the "democratic values, public order and the general well-being of" citizens.[26] The purpose of Georgia Tech's abovementioned "Safe Space" program—to "help[ ] gays and lesbians feel comfortable and safe on campus"[27]—was "eminently plausible"[28] and, it would seem, entirely secular,[29] even if it did involve functionaries talking theology. And so on.

It is easy to agree, at least at first, with Justice Brennan's warning, nearly forty years ago, in the *Presbyterian Church* case, that "[i]f civil courts undertake to resolve [doctrinal] controversies . . . the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern."[30] Indeed, as I have observed elsewhere, his statement

23 *See* Jessica Powley Hayden, Note, *Mullahs on a Bus: The Establishment Clause and U.S. Foreign Aid*, 95 GEO. L.J. 171, 177 (2006).

24 *Cf.* Cass R. Sunstein, *Misery and Company*, NEW REPUBLIC, Oct. 22, 2008, at 39, 41 (reviewing MARC SAGEMAN, LEADERLESS JIHAD: TERROR NETWORKS IN THE TWENTY-FIRST CENTURY (2008) and acknowledging the "importance of introducing moderation into both offline and online discussions among Muslims").

25 *See* Bruker v. Marcovitz, [2007] 3 S.C.R. 607, 636, 2007 SCC 54 (Can.); *see also id.* at 641 ("The significant intrusions into our constitutionally and statutorily articulated commitments to equality, religious freedom and autonomous choice in marriage and divorce that flow from the breach of his legal obligation are what weigh most heavily against him.").

26 *See id.* at 640.

27 *See, e.g.*, Volokh, *supra* note 5.

28 *See id.*

29 *See id.*

30 Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969)

"seems wise and fittingly cautious, even unremarkable and obvious."[31] It turns out, though, to be "intriguing, elusive, and misleading"[32]:

> Far from being "purely ecclesiastical concerns," . . . the content of religious doctrine and the trajectory of its development might instead be matters to which even a liberal, secular, and democratic state reasonably could, and perhaps should, attend. . . .
>
> [And so,] Justice Brennan's warning presents "hazards" of its own, and . . . its premises—if uncritically embraced—subtly distort our constitutional discourse. The meaning, movement, and implications of religious teachings are and have been both the subjects and objects of government power and policy. In the end, government like ours are not, and cannot be, "neutral" with respect to religion's claims. And it is precisely because secular, liberal, democratic governments have an "interest" in the content . . . of religious doctrine—an interest that such governments will, if permitted, quite understandably pursue—that religious freedom is so fragile.[33]

I try to flesh out this claim below. For now, the point is a simple one: even assuming there are some matters, problems, questions, or controversies that are so entirely "private" that the public authority could not conceivably have an appropriately secular interest in addressing them, we should not conclude too quickly that disputes involving or about religious doctrine are among them.

II.

All that duly said and noted, it would be both mulish and idle to deny that, in our political community, government arms and actors (including courts) steer well clear of theological disputes; they avoid (perhaps to a fault[34]) excessive entanglement with the governance and doctrines of religious communities, institutions, and traditions. And, this reluctance is well pedigreed. Professor Tribe cites the refusal, described in the *Acts of the Apostles*, of Gallio, a Roman proconsul in Greece, to judge a complaint that Paul was "inducing people to

31 Richard W. Garnett, *Assimilation, Toleration, and the State's Interest in the Development of Religious Doctrine*, 51 UCLA L. REV. 1645, 1647 (2004); *cf.* Levine, *supra* note 2, at 88 ("[I]t is sensible that courts should not serve as a theology board and should try to refrain from judicially imposed religious interpretation.").

32 Garnett, *supra* note 31, at 1648.

33 *Id.* at 1649–50 (footnotes omitted).

34 *See* Levine, *supra* note 2, at 86 (suggesting that the Court's "increasing refusal to consider carefully the religious questions central to many cases" could "lead to a number of disturbing results").

worship God contrary to the law."[35] "If it were a matter of some crime or malicious fraud," Gallio said to Paul's accusers, "I should with reason hear [your] complaint . . . ; but since it is a question of arguments over doctrine . . . and your own [that is, Jewish] law, see to it yourselves. I do not wish to be a judge of such matters."[36] For John Locke, "the power of civil government relates only to . . . civil interests, is confined to the care of the things of this world, and hath nothing to do with the world to come."[37] Somewhat closer to home, but in a similar vein, is James Madison's well-known, indignant insistence that it is "arrogant pretension[,] falsified by the contradictory opinions of Rulers in all ages, and throughout the world," to think that "the Civil Magistrate is a competent Judge of Religious truth."[38]

With respect to the Court's precedents and the relevant constitutional doctrines, a good place to start is with the *Presbyterian Church* case, one that, in many ways, now seems to presage the earlier mentioned contemporary controversy involving divisions in the Episcopal Church.[39] Two Presbyterian churches in Savannah, Georgia had decided to withdraw from the Presbyterian Church in the United States, believing that the Church had departed from settled doctrine, fallen into theological error, and generally been seduced by liberalism. After Church officials moved to "take over the local churches' property . . . until new local leadership could be appointed,"[40] the two

35 *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-11, at 1237 n.73 (2d ed. 1988) (citing *Acts* 18:12–16).

36 *Acts* 18:14–16 (New American Bible).

37 JOHN LOCKE, A LETTER CONCERNING TOLERATION (1689), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 52, 53 (Philip B. Kurland & Ralph Lerner eds., 1987). Of course, for Locke, the "care of things of this world" comprehended many things that we today, like Justice Brennan in the *Presbyterian Church* case, would likely regard as being of "purely ecclesiastical concern." Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969); *see* 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION 20–21 (2008) (noting that Locke did not argue for complete or total establishment).

38 James Madison, *A Memorial and Remonstrance Against Religious Assessments* (1785), *in* SELECTED WRITINGS OF JAMES MADISON 21, ¶ 5, at 24 (Ralph Ketcham ed., 2006).

39 The discussion that follows, of *Presbyterian Church* and other "no religious decisions" decisions, appeared earlier in Garnett, *supra* note 31, at 1646–59. For other detailed examinations of these decisions, see, for example, John E. Fennelly, *Property Disputes and Religious Schisms: Who Is the Church?*, 9 ST. THOMAS L. REV. 319, 319–30 (1997); Greenawalt, *supra* note 2, at 1846–63; Levine, *supra* note 2, at 88–92; Robert E. Rodes, Jr., *The Last Days of Erastianism—Forms in the American Church-State Nexus*, 62 HARV. THEOLOGICAL REV. 301, 307–17 (1969); Louis J. Sirico, Jr., *Church Property Disputes: Churches as Secular and Alien Institutions*, 55 FORDHAM L. REV. 335, 338 (1986).

40 *See Presbyterian Church*, 393 U.S. at 443.

local congregations turned not to "higher church tribunals,"[41] but instead to the Superior Court of Chatham County, Georgia.[42] There, they filed separate suits "to enjoin the general church from trespassing on the disputed property."[43]

Eventually, a jury accepted the local churches' claim that the Church's allegedly heterodox teachings and actions "amount[ed] to a fundamental or substantial abandonment of [the Church's] original tenets and doctrines,"[44] and that the Church had therefore violated its obligation, under a trust of local church property implied in Georgia law,[45] to "adhere to its tenets of faith and practice existing at the time of affiliation by the local churches."[46] Accordingly, the trial judge concluded that the implied trust had terminated, and with it the Church's right to occupy or otherwise interfere with the local church property in question.[47] In other words, the Church had lost its rights to and over the local church property by embracing and teaching "new" religious tenets and doctrines, and forsaking the originals.

The Supreme Court reversed, concluding that the First Amendment does not "permit a civil court to award church property on the basis of the interpretation and significance the civil court assigns to aspects of church doctrine."[48] Writing for a unanimous Court,[49] Justice Brennan acknowledged that "[i]t is of course true that the State has a legitimate interest in resolving property disputes,"[50] that "a civil court is a proper forum for that resolution,"[51] and that "there are neutral principles of law[] developed for use in all property disputes."[52] Nonetheless, he insisted that "it [is] wholly inconsistent with the American concept of the relationship between church and state to permit civil courts to determine ecclesiastical questions,"[53] warning

41 *Id.*

42 *See id.*

43 *Id.*

44 *Id.* (internal quotation marks omitted).

45 *Id.* at 444. The case's implied-trust and departure-from-doctrine theory "derives from principles fashioned by English courts." *Id.* at 443 n.2.

46 *Id.* at 443. The Supreme Court of Georgia affirmed. Presbyterian Church v. E. Heights Presbyterian Church, 159 S.E.2d 690, 701 (Ga. 1968).

47 *See Presbyterian Church*, 393 U.S. at 444.

48 *See id.* at 441, 444.

49 Justice Harlan wrote separately, to clarify a specific point, but nonetheless concurred in Justice Brennan's opinion. *See id.* at 452 (Harlan, J., concurring).

50 *Id.* at 445 (majority opinion).

51 *Id.*

52 *Id.* at 449.

53 *Id.* at 445–46 (discussing Watson v. Jones, 80 U.S. (13 Wall.) 679 (1872)); *see also id.* at 450 ("[T]he departure-from-doctrine element of the Georgia implied trust

that it "'would lead to the total subversion of . . . religious bodies'"[54] if decisions about church doctrine, made by church authorities, could be appealed to the "'secular courts.'"[55] That is, it cannot be up to a government official to decide whether a church has sold out its theological patrimony, exchanged it for faddish doctrinal novelties, and therefore forfeited its interest in local trust property. Such decisions and inquiries, Justice Brennan asserted, are wholly inimical to the "'spirit of freedom for religious organizations'" that animates our First Amendment.[56] Rather, our Constitution guarantees to such organizations "'an independence from secular control or manipulation'"[57] and the "'power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'"[58]

Presbyterian Church is one of a cluster of cases that seem to illustrate and confirm the hands-off rule, or what Eugene Volokh calls the "no religious decisions" principle.[59] Nearly a century earlier, in *Watson v. Jones*[60] the Court had similarly refused "to decree the termination of an implied trust because of departures from doctrine by [a] national [Presbyterian] organization."[61] In that case, which did not involve the interpretation and application of the First Amendment, but was "nonetheless informed by First Amendment considerations,"[62]

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theory requires the civil court to determine matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion. Plainly, the First Amendment forbids civil courts from playing such a role."); *id.* at 449 ("First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice.").

54 *Id.* at 446 (quoting *Watson*, 80 U.S. (13 Wall.) at 729).

55 *Id.* (quoting *Watson*, 80 U.S. (13 Wall.) at 729).

56 *See id.* at 448 (quoting Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94, 116 (1952)).

57 *Id.* (quoting *Kedroff*, 344 U.S. at 116).

58 *Id.* (quoting *Kedroff*, 344 U.S. at 116).

59 EUGENE VOLOKH, THE FIRST AMENDMENT 853–63 (2d ed. 2005). Professor Tribe, in his treatise, treats these cases, and this "principle," primarily under the heading of the prohibition on excessive entanglement, TRIBE, *supra* note 35, § 14-11, at 1226—specifically, "doctrinal entanglement in religious issues"—between government and religion. *Id.* § 14-11, at 1231.

60 The *Watson* case is discussed in some detail in *Kedroff*, 344 U.S. at 110–17.

61 *Presbyterian Church*, 393 U.S. at 445.

62 *Id.* at 445 & n.4. As the *Presbyterian Church* Court noted, several post-*Watson* "nonconstitutional" decisions—while "recogniz[ing] that there might be some circumstances in which marginal civil court review of ecclesiastical determinations would be appropriate," *id.* at 447—reiterated the notion that "'[i]n the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters

the Justices observed, among other things, that "[t]he law knows no heresy, and is committed to the support of no dogma."[63]

These and similar "considerations" were clearly constitutionalized in *Kedroff v. Saint Nicholas Cathedral*,[64] a fascinating and politically delicate case arising out of a dispute within the Russian Orthodox Church.[65] New York's legislature had purported to "transfer the control of the New York churches of the Russian Orthodox religion from the central governing hierarchy of the Russian Orthodox Church . . . to the governing authorities of the Russian Church in America."[66] The Court concluded that "[s]uch a law violates the Fourteenth Amendment. It prohibits in this country the free exercise of religion."[67] The Justices were unimpressed by the fact that, in so doing,

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purely ecclesiastical . . . are accepted in litigation before the secular courts as conclusive,'" *id.* (quoting Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1, 16 (1929)).

63 Watson v. Jones, 80 U.S. (13 Wall.) 679, 728–29 (1872).

64 344 U.S. 94 (1952).

65 *See id.* at 95.

66 *Id.* at 107.

67 *Id. But see id.* at 130 (Jackson, J., dissenting) ("[The law] has not interfered with . . . anyone's exercise of his religion. New York has not outlawed the Soviet-controlled sect nor forbidden it to exercise its authority or teach its dogma in any place whatsoever except on this piece of property . . . .").

As the Court's discussion of the relevant facts makes clear, the underlying dispute within the church—and the New York legislature's efforts to address and resolve it—is difficult to separate from the "political disturbances which culminated . . . in the Bolshevik Revolution of 1917," *id.* at 102 (majority opinion), later relations between the church and the Soviet government, and relations between that government and the United States. Interestingly, the Justices noted that the New York Court of Appeals had taken judicial notice that "the Russian Government exercised control over the central church authorities and that the American church [had] acted to protect its pulpits and faith from such influences," and had also stated that the "Legislature's reasonable belief in such conditions justified the State in enacting a law to free the American group from infiltration of such atheistic or subversive influences," *id.* at 108–09; *see also id.* at 117 ("The Court of Appeals of New York recognized, generally, the soundness of the philosophy of ecclesiastical control of church administration and polity but concluded that the exercise of that control was not free from legitimate interference."). And, the Supreme Court likewise seems to have been wary of the "dangers" of "subversive action" and "political use of church pulpits." *Id.* at 109; *see also id.* at 127 (Jackson, J., dissenting) ("[W]e have an ostensible religious schism with decided political overtones."); *id.* at 131 ("I do not think New York law must yield to the authority of a foreign and unfriendly state masquerading as a spiritual institution.").

In his concurring opinion, Justice Frankfurter elaborated on the fear of "political religion," noting that the "fear, perhaps not wholly groundless, that the loyalty of its citizens might be diluted by their adherence to a church entangled in antagonistic political interests, reappears in history as the ground for interference by civil government with religious attachments." *Id.* at 123–24 (Frankfurter, J., concurring). By way

the legislature had required the New York churches to continue to adhere to traditional doctrine and practices;[68] after all, "[s]hould the state assert power to change the statute requiring conformity to ancient faith and doctrine to one establishing a different doctrine, the invalidity would be unmistakable."[69] As Justice Frankfurter framed the matter in his concurrence, "[w]hat is at stake here is the power to exercise religious authority";[70] and, he insisted, "[t]he judiciary has heeded, naturally enough, the menace to a society like ours of attempting to settle such religious struggles by state action."[71] In the end, "it is not open to the governments of this Union to reinforce the loyalty of their citizens by deciding who is the true exponent of their religion."[72]

And, in the 1976 *Serbian Eastern Orthodox Diocese v. Milivojevich*,[73] the Court overturned a decision by the Illinois Supreme Court that purported to review the procedural and substantive merits of the proceedings through which that church "defrocked" one of its bishops.[74] The Holy Assembly of Bishops and the Holy Synod of the Serbian Orthodox Church had "suspended and ultimately removed"[75] Milivojevich as Bishop of the American-Canadian Diocese of that Church and he, in turn, had challenged that action in the civil courts of Illinois.[76] As Justice Brennan, writing for the majority, put the matter, "[t]he basic dispute [was] over control of the [Diocese], its property and assets."[77] With respect to that dispute, the Supreme Court of Illinois concluded that the Bishop's "removal and defrockment had to

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of illustration, Justice Frankfurter reminded his readers that "[i]t was on this basis, after all, that Bismarck sought to detach German Catholics from Rome by a series of laws not too different in purport from that before us today." *Id.* at 124.

68 *Id.* at 108 (majority opinion).

69 *Id.*

70 *Id.* at 121 (Frankfurter, J., concurring).

71 *Id.* at 122. Justice Frankfurter emphasized also that legislatures have no power "to settle conflicts of religious authority and none to define religious obedience." *Id.*

72 *Id.* at 125.

73 426 U.S. 696 (1976).

74 *Id.* at 698.

75 *Id.*

76 *Id.* at 697–98. His "immediate reaction," actually, was to "refuse to accept the [decisions of the Mother Church] on the ground that [they] contravened the administrative autonomy of the Diocese guaranteed by the Diocesan constitution." *Id.* at 704. After several rounds of Church proceedings, he filed suit in Lake County, Illinois. *Id.* at 704–07.

77 *Id.* at 698. Justices Rehnquist and Stevens, dissenting, took a strikingly different view of the case's history and basic nature. *See id.* at 726 (Rehnquist, J., dissenting) (describing the issue in the case as simply determining the "real Bishop of the . . .

be set aside as 'arbitrary' because the proceedings . . . were not conducted according to the [court's] interpretation of the Church's constitution and penal code."[78] However, and relying heavily on *Presbyterian Church, Watson,* and *Kedroff*,[79] Justice Brennan insisted that the Illinois Court's decision was unconstitutional in that it "rest[ed] upon an impermissible rejection of the decisions of the highest ecclesiastical tribunals of this hierarchical church upon the issues in dispute, and impermissibly substitute[d] its own inquiry into church polity and resolutions based thereon of those disputes."[80]

The animating themes of these church-property and intrachurch-dispute cases run through and appear over and again in the Court's decisions on the Religious Clauses. It is blackletter law that courts may not render "religious" decisions and should "rarely help[] to enforce religious standards or demand[] that people perform actions whose significance relates to religious obligations."[81] They may not decide whether a person's religious beliefs are true or orthodox: "Heresy trials are foreign to our Constitution," Justice Douglas proclaimed in *Ballard.* "Men may believe what they cannot prove."[82] Variations on this theme run through the case law: public officials may inquire into the sincerity, but not the consistency, reasonableness, or orthodoxy of religious beliefs.[83] Courts are cautious when inquiring into

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Diocese" through "application of . . . canon law," without the injection of preference into the matter).

78 *Id.* at 708 (majority opinion).

79 *Cf. id.* at 727 (Rehnquist, J., dissenting) ("The cases upon which the Court relies are not a uniform line of authorities leading inexorably to reversal of the Illinois judgment."); *id.* at 733 ("The rule of those cases . . . is that the government may not displace the free religious choices of its citizens by placing its weight behind a particular religious belief, tenet, or sect.").

80 *Id.* at 708 (majority opinion). In Justice Brennan's view, "this case essentially involves not a church property dispute, but a religious dispute the resolution of which under our cases is for ecclesiastical and not civil tribunals." *Id.* at 709. Quoting his own concurrence in *Maryland & Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367 (1970) (per curiam), Justice Brennan warned that "'[t]o permit civil courts to probe deeply enough into the allocation of power within a [hierarchical] church so as to decide . . . religious law [governing church polity] . . . would violate the First Amendment in much the same manner as civil determination of religious doctrine.'" *Serbian E. Orthodox Diocese*, 426 U.S. at 709 (latter alterations in original) (quoting *Md. & Va. Eldership*, 396 U.S. at 369 (Brennan, J., concurring)).

81 Kent Greenawalt, *Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance*, 71 S. CAL. L. REV. 781, 781 (1998).

82 *See* United States v. Ballard, 322 U.S. 78, 86 (1944); *see also* Watson v. Jones, 80 U.S. (13 Wall.) 679, 728 (1872) ("The law knows no heresy . . . .").

83 *See, e.g.*, Thomas v. Review Bd., 450 U.S. 707, 714 (1981) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."); *Ballard*, 322 U.S. at 86–88 (holding that the

the "centrality" of a particular religious belief or practice.[84] The Constitution does not permit state action that creates or requires "excessive entanglement" between the government and religious institutions, practices, and teachings.[85] It commands that "secular and religious authorities . . . not interfere with each other's respective spheres of choice and influence."[86] As Kent Greenawalt has put it, "[g]overnment must keep out of internal problems of religious bodies when those problems concern religious understandings."[87]

Perhaps, then, the task presented to the Section on Law and Religion's program was an easy one; perhaps our work here is done. Yes, courts are, and should be, "unwilling[] to engage in deciding matters that relate to the interpretation of religious practice and belief";[88] they do, and should, take a "hands-off approach to religious doctrine."[89] This sensible reticence is not only required by the Constitution's Religion Clauses; it also protects and promotes the religious-freedom commitments those Clauses embody. Is there really anything else to say? There must be. The just-concluded brief review notwithstanding, Kent Greenawalt has demonstrated that a "complexity of considerations . . . bear on how civil law should permissibly involve itself in matters of religious significance."[90] Indeed,

> [t]he aspiration for simple approaches is either deluded or badly misguided. It is deluded if a proponent believes simple approaches

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district court "properly withheld from the jury all questions concerning the truth or falsity" of religious beliefs, while allowing the sincerity of those beliefs to be determined).

84 *See, e.g.*, Employment Div. v. Smith, 494 U.S. 872, 886–87 (1990) ("It is no more appropriate for judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest' test in the free exercise field, than it would be for them to determine the 'importance' of ideas before applying the 'compelling interest' test in the free speech field."); Hernandez v. Comm'r, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith . . . .").

85 *See, e.g.*, Aguilar v. Felton, 473 U.S. 402, 409 (1985) (concluding that New York City's "system for monitoring the religious content of publicly funded Title I classes in . . . religious schools . . . inevitably results in the excessive entanglement of church and state"); Lemon v. Kurtzman, 403 U.S. 602, 607 (1971) (holding that a state law allowing superintendants to reimburse Catholic schools for supplies and salaries caused excessive entanglement and therefore was unconstitutional).

86 VOLOKH, *supra* note 59, at 916–21 (discussing "no delegation to religious institutions" principle under which "the government may not delegate certain kinds of government power to religious institutions").

87 Greenawalt, *supra* note 2, at 1844.

88 Program, *supra* note 1.

89 *See id.*

90 Greenawalt, *supra* note 81, at 843.

> will yield results sensitive to the nuances of our religious and social life. It is misguided if a proponent recognizes the Procrustean quality of simple approaches, but thinks their clarity and determinacy are worth the price of unhappy outcomes.[91]

III.

Perhaps we should start again. What does it mean, really, for a court—and, more generally, for the political authority—to take a "hands-off approach to religious doctrine"? And, why might we think such an approach is required by the commitment to religious freedom that is reflected in the Religion Clauses of our Constitution? In what way does such a rule serve—or, might it actually undermine, if misconstructed or misapplied—the complex of values that, we think, are both the foundation and end of those provisions?[92] Notwithstanding the impressive array of authorities we can cite for the rule, it seems worthwhile—even important—to get clear about what the rule is *not*, and about what does *not* require or justify it.

For starters, it is certainly *not* the case that government officials and courts may not render decisions that touch upon, affect, motivate, or even regulate religious believers and religiously motivated activities. James Madison famously insisted that "Religion is wholly exempt from [the] cognizance" of "the institution of Civil Society,"[93] but, of course, it is clearly *not* true that our courts and governments are not aware of, take no notice of, or refuse to acknowledge or recognize "religion."[94]

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91 *Id.*

92 *Cf.* 2 GREENAWALT, *supra* note 37, at 6–13 (listing and explaining a number of "interrelated values lying behind nonestablishment of religion").

93 Madison, *supra* note 38, ¶ 1, at 22. Madison's use of the term "Civil Society"—a term that, in contemporary usage, refers not so much to the institutions of government as to the intermediate space and associations between persons and the state—complicates the task of evaluating his claim.

94 Vincent Blasi has observed that:

> If "cognizance" in this context means "knowledge," "awareness," "notice," or "acknowledgment," surely a voucher system takes such cognizance of religion. Just as surely, under that interpretation a no-cognizance principle is a practical impossibility in the modern welfare state, or for that matter even in the minimal state of Madison's day.

Vincent Blasi, *School Vouchers and Religious Liberty: Seven Questions from Madison's* Memorial and Remonstrance, 87 CORNELL L. REV. 783, 789 (2002) (footnote omitted). Madison's point, instead, Blasi continues, is a jurisdictional one: "[T]he civil magistrate has no responsibility whatsoever for the way each citizen understands and discharges his duty to the Creator." *Id.* In any event, and as Philip Hamburger has observed, the provision that Madison actually proposed for inclusion in the Bill of Rights was a "far cry from [the position] that religion [is] 'wholly exempt' from the

"Religion" does not exist, never has existed, and could not exist in a sphere entirely separate from the public, civic, legal, or political. "Religion" and law are (almost) everywhere, and so there is no avoiding contact between them. As Chris Eisgruber and Larry Sager reminded us recently, it is not useful—it is not even possible—to speak of "church" and "state," or "religion" and "politics," as *entirely* separate.[95] Or, as Justice William Douglas wrote, in *Zorach v. Clauson*,[96] the idea that the "separation" of church and state "must be complete and unequivocal" does not and could not mean that "the state and religion [must] be aliens to each other."[97] In the context of the modern, activist, welfare state, a "see no religion" understanding of the relationship, or "nexus,"[98] between the civil and the sacred seems neither possible nor desirable. Such an understanding of "separation," and of the content of religious freedom, simply does not connect with the world we inhabit or with who and what we are. "The question," then, "is not *whether* the state should be permitted to affect religion or religion permitted to affect the state; the question is *how* they should be permitted to affect each other."[99] The hands-off rule should not be understood to suggest or require otherwise.

If this point seems too obvious to mention, even for deck-clearing purposes, we might recall, in a cautionary way, the back-and-forth between Justices Black and Rutledge, in the landmark case *Everson v. Board of Education*.[100] Responding to Justice Black's argument that the

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cognizance of civil society." PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 105 (2002).

95 CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 6–7 (2007).

96 343 U.S. 306 (1952).

97 *Id.* at 312.

98 My colleague, Robert Rodes, has used the term "nexus"—rather than, for example, "wall of separation"—in his church-state work. *See, e.g.*, Rodes, *supra* note 39. The word is, I think, a helpful one. As I have written elsewhere, the word "suggests a relation, even a symbiosis, between two distinct things—neither a collapse of one into the other nor a rigid segregation of the one from the other." Richard W. Garnett, Tribute, *Pluralism, Dialogue, and Freedom: Professor Robert Rodes and the Church-State Nexus*, 22 J.L. & RELIGION 503, 512 (2006–07); *see also* Thomas L. Shaffer, *The Christian Jurisprudence of Robert E. Rodes, Jr.*, 73 NOTRE DAME L. REV. 737, 757 (1998) ("[T]he foundation of [Rodes'] church-state theory is that the two are so intertwined—so much the remnant of Christendom—that they could not part even if they wanted to.").

99 EISGRUBER & SAGER, *supra* note 95, at 7; *see also, e.g.*, TRIBE, *supra* note 35, § 14-11, at 1232 ("[I]t is inevitable that at least some disputes affecting religion or touching the interests of religious institutions will be brought before the civil courts or other secular agencies.").

100 330 U.S. 1 (1947).

Establishment Clause requires "the state to be a neutral in its relations with groups of religious believers and non-believers,"[101] Justice Rutledge insisted that the "purpose" of the First Amendment's Religion Clauses was "not to strike merely at the official establishment of a single sect . . . . [T]he object was broader . . . . It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion."[102] To repeat: such a "comprehensive" separation is impossible and would be undesirable, and is also not comprehended within any plausible version or formulation of the hands-off approach.

Next, it is not the case that courts committed to a hands-off or "no religious decisions" approach may not ask questions or render decisions *about* "religion." Indeed, such decisions could hardly be avoided by a court charged with interpreting our First Amendment. What's more, as Kent Greenawalt has explained, such courts must, given their charge, "sometimes decide whether a claim, activity, organization, purpose, or classification is religious."[103] "Religion" must be identified, and defined, if its "free exercise" is to be protected and its "establishment" avoided. To be sure, defining "religion"—even in a rough-and-ready way—is a complicated and delicate task.[104] Still, there's no evading it. And, when carrying it out, we should not expect to be able to avoid entirely "the interpretation of religious practice and belief."[105]

Finally, if—as was suggested above—it is a mistake to think of the hands-off rule as merely an implication of or corollary to a constitu-

101 *Id.* at 18.

102 *Id.* at 31–32 (Rutledge, J., dissenting).

103 Kent Greenawalt, *Religion As a Concept in Constitutional Law*, 72 CAL. L. REV. 753, 753 (1984).

104 For more on the interesting problem of defining religion, and of the connection between this problem and the enterprise of providing judicially enforceable protection to religious freedom, see generally WINNIFRED FALLERS SULLIVAN, THE IMPOSSIBILITY OF RELIGIOUS FREEDOM 89–137 (2005) (describing law and society's various attempts at defining religion); Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 587–604 (discussing how to create an "ideal" constitutional definition of religion); Greenawalt, *supra* note 103, at 756–62, 776–807 (discussing how courts should undertake the "threshold" question of defining religion in religious liberty cases); Koppelman, *supra* note 8 (manuscript at 111–20) (delivering a proposal for defining "religion" for constitutional purposes); Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 125–40 (2002) (attempting to reconstruct the secular purpose doctrine through a more clear method for defining religion); Eduardo Peñalver, Note, *The Concept of Religion*, 107 YALE L.J. 791, 814–21 (1997) (arguing for an "evolving" constitutional definition of religion).

105 *See* Program, *supra* note 1.

tional commitment to "religion blindness," it also seems misguided to see the rule simply as the specification of a general "neutrality" requirement. Although there are, as Douglas Laycock and others have shown, different ways of understanding the idea, and the goal, of "neutrality" in the law-and-religion context,[106] our Constitution is not—and a secular political community does not have to be—strictly "neutral" with respect to religion. The "free exercise" of religion, it seems to me, is constitutionally protected not by accident, and not as a kind of lesser-included form of equality, liberty, or autonomy;[107] or as a grudging concession to the lingering idiosyncrasies of some. Instead, John Garvey probably got it right when he observed that our Constitution protects the freedom of religion because it thinks—that is, because *we* think—that religion (broadly understood) is a "good thing."[108] As Andy Koppelman has explained, in several places and with great care, our Constitution does, and so our governments may,

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106 *See* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990) [hereinafter Laycock, *Disaggregated Neutrality*]; Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. VA. L. REV. 51 (2007) [hereinafter Laycock, *Substantive Neutrality*].

107 *But see, e.g.*, EISGRUBER & SAGER, *supra* note 95, at 109 (describing Justice O'Connor's argument that religious freedom is of "a lesser status than . . . free speech"); James W. Nickel, *Who Needs Freedom of Religion?*, 76 U. COLO. L. REV. 941 (2005) (arguing that freedom of religion can derive from our other individual freedoms and is therefore disposable as a distinct category).

108 *See* JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 49 (1996). Garvey's view is consonant with the one presented in the Second Vatican Council's Declaration on Religious Freedom promulgated by Pope Pius VI in 1965. SECOND VATICAN ECUMENICAL COUNCIL, DIGNITATIS HUMANAE [DECLARATION ON RELIGIOUS FREEDOM] (1965) [hereinafter DIGNITATIS HUMANAE], *available at* http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html. There, the Council fathers affirmed the link between a "sense of the dignity of the human person" and the right to the "free exercise of religion," *id.* ¶ 1, while insisting that,

> [g]overnment . . . ought indeed to take account of the religious life of the citizenry and show it favor, since the function of government is to make provision for the common welfare. However, it would clearly transgress the limits set to its power, were it to presume to command or inhibit acts that are religious.

Id. ¶ 3; *cf.* Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 9, 11 (2000) (noting that "[t]he very text of the Constitution 'singles out' governmental acts respecting an establishment of religion or prohibiting the exercise of religion for special protections that are not accorded to any aspect of human life," but also insisting that "[n]ot only must religion be 'unimpaired,' . . . it must also be unsponsored, uncontrolled, and unpromoted").

treat religion—again, broadly understood—as a valuable thing, a human good, and a worthy pursuit.[109]

Now, to note, as I did above,[110] that "religion" must sometimes be defined by courts if its exercise is to be protected by courts is certainly not to say that it is easy for courts to define "religion."[111] Similarly, to say that our Constitution treats religion as a good thing—that is, to say that governments may and should accommodate religion and should attend to the conditions in which religious freedom thrives—is not to deny or slight the legal and moral limits that do and should constrain this treatment.[112] It *is* to suggest, though, that the hands-off rule is not about "blindness" or "neutrality," and also that the rule's content and rationale should be consistent with—and should, at least in part, take their shape from—the idea that religion and religious freedom are human goods that deserve protection and promotion. Yes, such a rule flows from the Constitution's Religion Clauses—not from these provisions' indifference, skepticism, or even fears about religion but rather from their respect and solicitude for it, and from the religious premises which they reflect.[113]

IV.

The hands-off rule, then, is not a rule that courts and civil authorities should not make decisions about, involving, or even affirming of religion and its exercise. It is, instead, a rule that state actors should not render *religious* decisions—decisions involving the resolution of religious questions or the enforcement of religious obligations;[114] we

109 *See* Andrew Koppelman, *Is It Fair to Give Religion Special Treatment?*, 2006 U. ILL. L. REV. 571 (arguing that it is fair for government to privilege religion, so long as it does so abstractly).

110 *See supra* notes 103–105 and accompanying text.

111 *See generally* SULLIVAN, *supra* note 104, at 138–59 (noting that the religion of ordinary people "fits uneasily into the spaces allowed for religion in the public square and in the courtroom").

112 *See, e.g.*, DIGNITATIS HUMANAE, *supra* note 108, ¶ 3 ("No . . . human power can either command or prohibit [religious] acts . . . .").

113 *See generally* Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 153–66 (1991) (describing the religious world view that historically underlies our constitutional commitment to religious freedom).

114 *Cf.* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 735 (1976) (Rehnquist, J., dissenting) ("[W]hile there may be a number of good arguments that civil courts of a State should, as a matter of the wisest use of their authority, avoid adjudicating religious disputes to the maximum extent possible, they obviously cannot avoid all such adjudications.").

should not, the rule would suggest, use secular law to assure observance of practices with religious significance.[115]

But, why not? In the relevant commentary and cases—including *Presbyterian Church* and the other intrachurch-dispute cases cited above—one encounters a number of different explanations and justifications for the requirement.[116] This is not necessarily a cause for concern. After all, the First Amendment serves a number of purposes and promotes a number of goods; it should not come as a big surprise that there have been offered, and are, a number of good reasons for such a provision and the judicial rules that help to implement it.[117] And again, Kent Greenawalt has shown the "complexity of considerations that bear on how civil law should permissibly involve itself in matters of religious significance. The aspiration for simple approaches is either deluded or badly misguided."[118]

That said, and admittedly wary of the risk of slipping into delusion, I want to suggest that some of the justifications often invoked for the rule are not entirely satisfactory and that, accordingly, allowing such justifications to shape the rule and its applications could also be "misguided." In perhaps an even riskier move, I will also suggest that, notwithstanding the "complexity of [the relevant] considerations,"[119] one particular justification for the hands-off rule should have primacy of place.[120]

First, the hands-off rule is sometimes presented as an implication of the purported fact that—in Professor Kauper's words—"'religious truth by its nature [is] not subject to a test of validity determined by

115 Greenawalt argues for the application of this rule in *Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance*, *supra* note 81, at 781.

116 *See, e.g.*, TRIBE, *supra* note 35, § 14-11, at 1232–42; Koppelman, *supra* note 8 (manuscript at 7) ("A theme that runs through this area of the law is the state's incompetence to decide matters that relate to the interpretation of religious practice or belief."); Levine, *supra* note 2, at 85–86 ("Justices have provided various rationales for the Court's approach. Some Justices have suggested practical justifications . . . . Other Justices have cited constitutional considerations . . . .").

117 *See generally* 2 GREENAWALT, *supra* note 37, at 6–13 (listing and explaining a number of "interrelated values lying behind nonestablishment of religion"); JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 41 (2d ed. 2005) ("Puritans, Evangelicals, Republicans, and Enlightenment exponents—these four groups of founders held up the four corners of the wide and swaying canopy of opinion on religious liberty in eighteenth-century America.").

118 Greenawalt, *supra* note 81, at 843.

119 *See id.*

120 Some of the discussion that follows is adapted from an earlier work of mine. *See* Richard W. Garnett, *The Freedom of the Church*, 4 J. CATH. SOC. THOUGHT 59 (2006).

rational thought and empiric knowledge.'"[121] In other words, the argument goes, courts may not answer religious questions, or declare religious truths, because they—and we—*cannot.* Religious claims and arguments are simply not the kind of things that *can be* false—or true.[122] At the end of the day, religion is all mystery and mysticism; there's no "there" there for the judicial mind or judicial methods to latch onto.[123] On this view, the possibility of "natural theology," and the conversation and relationship between "faith" and "reason," are of interest only to medievalists. Faith simply *is* non-reason, and it operates in and speaks to realms where reason has no place or little purchase. The Justices nodded to such a rationale in the *Serbian Eastern Orthodox Diocese* case, when they stated that "it is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith[,] whether or not rational or measurable by objective criteria."[124]

It is not clear, though, that "religious" questions defy "reasoned" analysis or resolution. Jared Goldstein has contended, for example, that a great many "positive questions about religion"[125]—to say nothing about questions of natural theology—are perfectly amenable to non-mystical methods of inquiry, and can be answered without recourse to revelation.[126] What's more, Professor Kauper's claim itself seems ironically to depend on contestable theological premises about the nature and objects of religious belief. A different view—with respect to Christianity—was offered by John Henry Cardinal Newman who insisted, more than a century ago:

> Christianity has been long enough in the world to justify us in dealing with it as a fact in the world's history. Its . . . doctrines, precepts, and objects cannot be treated as matters of private opinion or deduction . . . . It may indeed legitimately be made the sub-

121 TRIBE, *supra* note 35, § 14-11, at 1232 n.46 (quoting PAUL G. KAUPER, RELIGION AND THE CONSTITUTION 26 (1964)).

122 *Cf.* NOONAN, *supra* note 14, at 169 (noting, in the context of a discussion of the *Ballard* case, that for a "majority of judges" the "test of belief being religious was the sincerity with which the belief was held" and not the "content of the belief").

123 *See* Madhavi Sunder, *Piercing the Veil,* 112 YALE L.J. 1399, 1415–25 (2003) (noting that "religion" is "constructed" in liberal theory as private, entirely beyond reason and its methods).

124 Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 714–15 (1976) (footnote omitted).

125 Jared A. Goldstein, *Is There a "Religious Question" Doctrine? Judicial Authority to Examine Religious Practices and Beliefs,* 54 CATH. U. L. REV. 497, 533 (2005).

126 *See id.*

> ject-matter of theories. . . . It has long since passed beyond the letter of documents and the reasonings of individual minds . . . .[127]

Second, the concern animating the hands-off rule is sometimes framed as a concession to judicial incompetence in the face of unfamiliar, challenging, esoteric materials.[128] Religious doctrine questions are, it is thought, too tricky or specialized for them to tackle.[129] True, tax, patent, and F.E.R.C.[130] cases can be tricky and specialized, but they are harder for courts to avoid (even if they try). On this view, it is not that religion is too irrational—too *weird*—for judges; it is just that religious doctrine questions are too hard.[131] To be sure, there is little reason (anymore) to expect that lawyers and judges will have the training necessary to decide doctrinal, let alone theological, questions.[132] And, in any event, it might seem that allowing or asking even skilled state actors to make and enforce decisions about church doctrine and discipline seems a bit like asking Mayor Bloomberg to conduct the New York Philharmonic, or inviting the Green Party to compose and parse the Libertarian Party's platform.

But the fact that judges charged with deciding legal questions are usually unfamiliar with religious texts, doctrines, and traditions would not seem to require, as a principled matter, a strong hands-off rule. Judges answer hard questions, untangle complicated problems, and educate themselves about new fields, all the time. They hear testi-

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127 JOHN HENRY NEWMAN, AN ESSAY ON THE DEVELOPMENT OF CHRISTIAN DOCTRINE 3 (6th ed., Univ. of Notre Dame Press 1989) (1845); *see also* Sunder, *supra* note 123, at 1423 ("[R]eligion is much more . . . subject to reasoned argument and change than earlier theorists acknowledged.").

128 *See, e.g.*, Thomas v. Review Bd., 450 U.S. 707, 715 (1981) ("Intrafaith differences . . . are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences . . . ."); *Serbian E. Orthodox Diocese*, 426 U.S. at 714 n.8 ("Civil judges obviously do not have the competence of ecclesiastical tribunals in applying the 'law' that governs ecclesiastical disputes . . . ."); Watson v. Jones, 80 U.S. (13 Wall.) 679, 729 (1872) ("It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of [church] bodies as the ablest men in each are in reference to their own.").

129 *See* sources cited *supra* note 128.

130 The Federal Energy Regulatory Commission (F.E.R.C.) is an independent agency responsible for regulating interstate transmission of oil, gas, and electricity. For more information on what F.E.R.C. does and how it operates, see About FERC, http://www.ferc.gov/about/about.asp (last visited Nov. 23, 2008).

131 In his discussion of the *Ballard* case, Judge Noonan suggests a variation on the judicial-incompetence rationale, noting that "an empathetic pilgrimage of the imagination" would seem to be a "necessary condition for judging a religious claim" and asking, "can a judge be a pilgrim?" NOONAN, *supra* note 14, at 176.

132 *See* Levine, *supra* note 2, at 88 ("[I]t is sensible that courts should not serve as . . . theology board[s] . . . .").

mony; they listen to experts; they consider arguments. That we do not think government officials may or should "declare religious truth" does not mean—or, at least, it need not *always* mean—that they cannot take judicial notice of the fact that, say, ham-and-cheese sandwiches are not Kosher. A court that believes it can decide which rules and practices are, and are not, essential to the game of golf[133] probably does not lack the ability merely to confirm, or take judicial notice of the fact, that the Roman Catholic Church teaches that "Jesus of Nazareth . . . is the eternal Son of God made man."[134] Many "religious" questions are hard, but not *all* of them are hard.[135]

A third support for the hands-off rule is the "idea that religion can be damaged and degraded by state involvement with it."[136] This justification for the rule builds, of course, on premises about the nature and good of religion, and also about its vulnerability to corruption through government meddling. Andrew Koppelman shows, in his own contribution to this volume, that there is not—or, at least, that there need not be—any inconsistency between the Constitution's no-establishment command and a rule rooted in the view that religion is a good and valuable thing.[137] And he is right, I think, to highlight the historic and theoretical importance of this concern about "corruption."[138]

It is not obvious, though, that *all* decisions of the type that are sometimes said to be prohibited by the hands-off rule threaten to corrupt or undermine the vulnerable good of religion. Indeed, as Samuel Levine has argued, in some cases and contexts, courts' *failures* to take up questions involving religious questions—their excessive "aversion to 'comparative theology'"—present dangers of their own.[139] In other words, to join Professor Koppelman in affirming that governments should observe the hands-off rule precisely in order to avoid "corrupting," through their interference, the good of religion is not to specify the rule's content and reach. We can affirm that governments *may* elect to avoid "religious decisions" in order to avoid corrupting the good of religion without maintaining that, in fact, all

133 *See* PGA Tour, Inc. v. Martin, 532 U.S. 661, 682–83 (2001).

134 CATECHISM OF THE CATHOLIC CHURCH § 423, at 106 (2d ed. 2000).

135 *Cf.* Greenawalt, *supra* note 81, at 839 ("[S]traightforward determinations of religious requirements by civil courts may be appropriate if these determinations serve secular interests.").

136 *See* Koppelman, *supra* note 8 (manuscript at 14).

137 *See* Andrew Koppelman, *The Troublesome Religious Roots of Religious Neutrality*, 84 NOTRE DAME L. REV. 865, 869–70 (2009).

138 *See id.* at 870.

139 Levine, *supra* note 2, at 131.

"religious decisions" by courts and public officials actually *do* corrupt or degrade that good. It could well be, as Madison thought, that "ecclesiastical establishments" undermine the "purity and efficacy" of religion, and yield the unpleasant "fruits" of "pride and indolence in the Clergy; ignorance and servility in the laity."[140] This does not mean—or, at least, it does not establish—that governments may not take notice of, or come to conclusions about, religious doctrines and teachings.

Another, fourth, reason for the hands-off rule is the idea that matters of religious doctrine—its content, development, transmission, and so forth—are simply of no interest to civil, secular authorities. The reason for refusing to get involved in "religious" questions, then, is that there is no good reason *to* get involved. This disclaimer of any such "interest" in matters of religious doctrine is unsurprising, of course; it is of a piece with the much-remarked "privatization" of religion generally, both in liberal theory and in constitutional doctrine and rhetoric.[141]

At least two responses are possible here: First, it seems clear—and the cases, by their very existence, would seem to establish—that it often *is* necessary for courts and other officials to confront "religious" questions when doing what they ordinarily and appropriately do.[142] Next, the meaning, movement, and implications of religious teachings unavoidably are and have long been both the subjects and objects of government power and policy. It is simply not the case that governments like ours are, can, or even should be entirely indifferent to

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140 Madison, *supra* note 38, ¶ 7, at 24.

141 *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 625 (1971) (Douglas, J., concurring) ("[Our] Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice . . . ."); *see also* Gerard V. Bradley, *Dogmatomachy—A "Privatization" Theory of the Religion Clause Cases*, 30 ST. LOUIS U. L.J. 275, 280–317 (1986) (describing and evaluating the Supreme Court's normative jurisprudence of "private" religion); Richard W. Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. REV. 771, 795–98 (2001) (describing the Supreme Court's approach to "privatizing religion" and arguing that such an approach inappropriately requires religion to reform its conception of itself); *cf.* Richard S. Myers, *The Supreme Court and the Privatization of Religion*, 41 CATH. U. L. REV. 19, 58 (1991) (explaining that, despite the privatization thesis' "significant role" in shaping establishment clause doctrine, there has been a shift "toward the view that religion has a valuable role to play in the public realm").

142 *See* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 735 (1976) (Rehnquist, J., dissenting) ("[W]hile there may be a number of good arguments that civil courts of a State should, as a matter of the wisest use of their authority, avoid adjudicating religious disputes to the maximum extent possible, they obviously cannot avoid all such adjudications.").

religion's claims and content.[143] Indeed, I have suggested elsewhere that it is precisely because secular, liberal, democratic governments like ours *do* have an "interest" in the content, and therefore in the "development," of religious doctrine—an interest that such governments will quite understandably pursue—that religious freedom is so fragile.[144]

Now, Nelson Tebbe examines, in an important, recent article, the question "whether and how it is appropriate for a democracy to influence citizen choice concerning commitments of conscience."[145] Tebbe's precise claim is that it *is* permissible—indeed, as was mentioned earlier, it is to be expected—for liberal democracies to "skew private incentives toward nonreligious activities and messages, so long as [they] observe[] certain [constitutional] limitations."[146] Governments may, in other words, try to "influence citizens' choices among competing commitments of conscience,"[147] and may encourage citizens to pursue certain comprehensive commitments rather than others. This seems correct. Governments not only may, but inevitably will, try to convince citizens to endorse favored commitments. In so doing, it seems clear that they will unavoidably take account of, and evaluate, the religious doctrines and theological traditions that, for so many, supply the "commitments" that they are trying to move or transform.

There are, Tebbe insists, limits on such efforts: In so "convinc[ing]" and "encourag[ing]," Tebbe maintains, governments "may not . . . be driven by simple animus against religion."[148] And, he argues, they may not single out particular sects or groups for exclusion, even because of their illiberal activites and beliefs, or in order to "further[] a legitimate policy objective."[149] After all, "sectarian prefer-

143 *See generally* STEVEN D. SMITH, GETTING OVER EQUALITY: A CRITICAL DIAGNOSIS OF RELIGIOUS FREEDOM IN AMERICA 6 (2001) (arguing that courts should pursue the value of tolerance over a blind neutrality and that such tolerance is achievable precisely because of "our theistic heritage and commitments"); Stanley Fish, *Mission Impossible: Settling the Just Bounds Between Church and State*, 97 COLUM. L. REV. 2255 (1997) (critiquing classical liberal justifications for toleration on the basis that government will inevitably favor the beliefs and values it prefers).

144 *See* Garnett, *supra* note 31, at 1693–700.

145 Nelson Tebbe, *Excluding Religion*, 156 U. PA. L. REV. 1263, 1270 (2008). For additional discussion of Tebbe's article, see Richard W. Garnett, *"Excluding Religion": A Response*, 157 U. PA. L .REV. PENNUMBRA (forthcoming 2008), *available at* http://ssrn.com/abstract=1300604.

146 Tebbe, *supra* note 145, at 1267.

147 *Id.* at 1335.

148 *Id.* at 1327.

149 *Id.* at 1321.

entialism is . . . odious."[150] Is it really? Is it always? After all, we invariably care, and so our governments care too, what—and in what—our fellow citizens believe.[151] We think it matters what they value, and it matters to and for what they aspire. We care, therefore, what our fellows are taught; it matters to us how and by whom they are formed. Claims to the contrary, even when couched in the compelling language of pluralism and limited government, are at best disingenuous.

We might very well decide, and for very good reasons, to stay our and our governments' hands from trying to control too closely the commitments and values of others. Although we care about these values, and about who transmits them, we might nonetheless elect to assume the risks that seem to inhere in the idea of a free, pluralistic, democratic society,[152] keeping in mind Judge McConnell's fear that "it is difficult or impossible for a liberal state to engage in the direct inculcation of public virtue without compromising its liberal commitment to neutrality among the different and competing reasonable worldviews of the society."[153] We might doubt the government's ability to engage effectively in such "direct inculcation of public virtue," particularly via means as seemingly treacherous to religious freedom as policies directed at the content of religious doctrine. Notwithstanding the interest—again, the *secular* interest—in the substance and development of such doctrine, we could easily and wisely decide that the risks are too great. Such a decision, though, would not transform the government's interest into an "ecclesiastical" one.[154]

There is, *finally*, the most ancient rationale of all, namely, that secular authorities lack the *power* to answer some questions—*religious* questions—whose resolution is, under an appropriately pluralistic political theory, left to other institutions.[155] It is not that religious questions are hard, weird, or irrelevant;[156] it is that they are questions that the political authority lacks power, or *jurisdiction*, to answer.[157]

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150 *Id.* at 1320.

151 *See* Garnett, *supra* note 31, at 1693.

152 *See* Michael W. McConnell, *The New Establishmentarianism*, 75 CHI.-KENT L. REV. 453, 457–58 (2000) (observing that "a liberal society is always at risk" and is "vulnerable at its foundations").

153 *Id.* at 455.

154 *See supra* notes 16–19 and accompanying text.

155 *See, e.g.*, DIGNITATIS HUMANAE, *supra* note 108, ¶ 13 ("The freedom of the Church is the fundamental principle in what concerns the relations between the Church and governments and the whole civil order. . . . [T]he Church claims freedom . . . as a spiritual authority, established by Christ the Lord, upon which there rests, by divine mandate, the duty of . . . preaching the Gospel . . . .").

156 *See supra* notes 121–134, 141–154 and accompanying text.

157 *See supra* notes 59–87 and accompanying text.

This rationale, it seems to me, is not only the strongest; it also pulls the hands-off rule from the margins of First Amendment esoterica to the very heart of religious freedom and church-state separation, properly understood. I have suggested elsewhere that "the preservation of the churches' moral and legal right to govern themselves in accord with their own norms and in response to their own calling is our day's most pressing religious freedom challenge."[158] Getting the hands-off rule right is, it turns out, a crucial aspect of this challenge.

In addition, an examination of the hands-off rule provides an occasion, and an opportunity, to remind ourselves that the aim of what Steven Smith has called Americans' nineteenth-century "disestablishment decision" was not a religion-free culture, civil society, or political conversation.[159] It was not thought at the Founding, nor should it be thought today, that "religion" is something that an official charged with enforcing, interpreting, executing, or legislating pursuant to our Constitution could hope to avoid. The goal of our disestablishment experiment, instead, was to disaggregate (and protect) religious institutions and authorities from those of government.

Given this goal, Professor Smith was right, I believe, to suggest more than twenty years ago that the First Amendment's no-establishment provision has a "two-fold" "essential task," namely, "to prevent government from interfering in the internal affairs of religious institutions and, conversely, to prohibit religious institutions from directly exercising governmental authority."[160] The hands-off rule, then, should be constructed and applied consistent with this task and, correctly understood, it seems to me that the rule serves the task well.

A similar point can be made with respect to the Free Exercise Clause. Any plausible or attractive understanding of religious liberty, and of the "free exercise" of religion, will reflect an appreciation for the fact that religion is "exercise[d]" not only by individual persons, but also in and by communities, groups, institutions, and associations.[161] As Douglas Laycock argued, in an influential and still timely

158 Garnett, *supra* note 98, at 521. For a very different view, see generally, for example, Marci A. Hamilton, *The Waterloo for the So-Called Church Autonomy Theory: Widespread Clergy Abuse and Institutional Cover-up*, 29 CARDOZO L. REV. 225, 232–38 (2007) (criticizing the church-autonomy theory).

159 Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955 (1989).

160 *Id.* at 1018; *cf.* 2 GREENAWALT, *supra* note 37, at 234 (noting that it is "doubtful" whether religious communities "should be able to engage the power of government directly on their behalf").

161 *But see, e.g.*, Frederick Mark Gedicks, *Three Questions About Hybrid Rights and Religious Groups*, 117 YALE L.J. POCKET PART 192 (2007), http://thepocketpart.org/2008/03/24/gedicks.html ("Every once in a while the Court comes out with a deci-

article, the institutional dimension of religious freedom is not captured entirely by judicial tests forbidding "entanglement" between government authorities and religious institutions or activities.[162] There is also a "right to church autonomy," the "right of churches to make for themselves the decisions that arise in the course of running their institutions."[163] A hands-off rule can, and should, operate to vindicate, and not to undermine, this right.[164]

CONCLUSION

In 1952, Mark DeWolfe Howe examined the *Kedroff* case in his *Foreword* to the *Harvard Law Review*'s review of the Supreme Court's just-concluded Term.[165] Howe read the case as standing not merely for a judicial policy of avoiding strange or difficult questions, but instead as pointing to a longstanding and important "problem of political theory," namely, the

> pluralistic thesis . . . that government must recognize that it is not the sole possessor of sovereignty, and that private groups within the community are entitled to lead their own free lives and exercise within the area of their competence an authority so effective as to justify labeling it a sovereign authority.[166]

The reasoning in *Kedroff*, he insisted, "[n]ot only . . . impl[ies] that the Church as a spiritual body has liberties which will be given protection directly rather than derivatively, but it gives that protection to liberties which, in their essence, differ from those possessed by the members of the Church."[167] The hands-off rule, it seems to me,

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sion that hints at a doctrine of first-order group rights, which tempts law review commentators . . . to write futilely detailed accounts of the need for a first-order doctrine and what it should look like. . . . At this point, the smart money says that hints are all that a first-order group rights doctrine is ever going to be." (footnotes omitted)).

162 *See* Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1393–94 (1981).

163 *Id.* at 1394. *See generally* Garnett, *supra* note 120 (discussing the idea of *libertas ecclesiae*, or the freedom of the Church, in American constitutional law).

164 As was noted earlier, Professor Levine has warned that the hands-off rule can, if misapplied or misconstructed, "lead to a number of disturbing results." *See* Levine, *supra* note 2, at 86.

165 Mark DeWolfe Howe, *The Supreme Court, 1952 Term—Foreword: Political Theory and the Nature of Liberty*, 67 HARV. L. REV. 91 (1953).

166 *Id.* at 91.

167 *Id.* at 92. Howe suggested—going beyond the Court in *Kedroff*—that the decision's "pluralism" could justifiably be extended to other entities, including "schools and universities." *Id.* at 94.

should be oriented primarily—we need not say "exclusively"—toward these liberties. And what would it look like if it were? Good question.