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Assimilation, Toleration, and the State's Interest in the Development of Religious Doctrine

Richard Garnett

Notre Dame Law School, rgarnett@nd.edu

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ASSIMILATION, TOLERATION, AND THE STATE'S INTEREST IN THE DEVELOPMENT OF RELIGIOUS DOCTRINE

Richard W. Garnett^{*}

Thirty-five years ago, in the context of a church-property dispute, Justice William Brennan observed that government interpretation of religious doctrine and judicial intervention in religious disputes are undesirable because, when "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." This statement, at first, seems wise and fittingly cautious, even unremarkable and obvious. On examination, though, it turns out to be intriguing, elusive, and misleading. Indeed, Justice Brennan's warning presents "hazards" of its own, and its premises—if uncritically embraced—can subtly distort our constitutional discourse.

This Article provides a careful and close examination of the statement's premises and implications, and concludes that, far from being a "purely ecclesiastical concern," the content of religious doctrine and the trajectory of its development are matters to which even a secular, liberal, and democratic government will almost certainly attend. Governments like ours are not and cannot be "neutral" with respect to religion's claims and content. As this Article shows, the content, meaning, and implications of religious doctrine are and have long been the subjects of government power and policy. Secular, liberal, democratic governments like ours not only take cognizance of religion; they also and in many ways seek to assimilate—that is, to transform—religious teaching. And it is precisely because such governments do have an interest in the content, and therefore in the "development," of religious doctrine—an interest that they will, if permitted, quite understandably pursue—that authentic religious freedom is so fragile.

^{*} Associate Professor, Notre Dame Law School. I am grateful to the editors and staff of the *UCLA Law Review* for inviting me to participate in their excellent Symposium, "Integration, Difference, and Citizenship: Celebrating 50 Years of the *UCLA Law Review*," and also for their assistance and patience in editing and publishing this Article. Three of my fellow participants in this Symposium, Professors Andrew Koppelman, Kenneth Karst, and Alan Brownstein, generously provided me with provocative criticism and helpful suggestions. I also appreciate the advice, comments, and assistance provided by many friends and colleagues, including A.J. Bellia, Tricia Bellia, Tom Berg, Patrick Brennan, Nicole Stelle Garnett, John Garvey, Steffen Johnson, John Nagle, John Robinson, Bob Rodes, Andrew Sabl, Mark Sargent, Michael Scaperlanda, Greg Sisk, Steve Smith, Howard Sklamberg, and Rob Vischer.

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INTRODUCTION

Thirty-five years ago, in the *Hull Church*¹ case, the U.S. Supreme Court held that the First Amendment does not permit civil courts to resolve church-property disputes involving "controversies over religious doctrine and practice."² Two Presbyterian churches in Savannah, Georgia had decided to withdraw from the Presbyterian Church in the United States,³ 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," the two local congregations turned not to "higher church tribunals," but instead to the Superior Court of Chatham County, Georgia.⁴ They filed separate suits "to enjoin the general church from trespassing on the disputed property."⁵ Eventually, the Supreme Court, in an opinion written by Justice Brennan, ruled that the Constitution did not allow the Georgia courts to decide whether the Church had violated its obligation under an implied state-law trust to "adhere to its tenets of faith and practice existing at the time of affiliation by the local

1. *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440 (1969) (*Hull Church*).

2. *Id.* at 449.

3. The Presbyterian Church in the United States merged in 1983 with the United Presbyterian Church in the United States of America to form the Presbyterian Church USA (PCUSA). More information about the PCUSA is available at the Church's web site, at <http://www.pcusa.org>.

There are a number of other Presbyterian churches in the United States, including the Presbyterian Church in America (PCA), which, along with several other Presbyterian churches, separated from the Presbyterian Church in the United States for reasons related to the latter Church's theological and political liberalism. For more on the PCA, see the Church's web site, at <http://www.pcanet.org>.

4. *Hull Church*, 393 U.S. at 443.

5. *Id.*

churches”⁶ or to “award church property on the basis of the interpretation and significance the civil court assigns to aspects of church doctrine.”⁷

I discuss in more detail below the ruling and reasoning in the *Hull Church* case. Enough has been said already, though, to warrant the preliminary observation that the decision was archetypically, and perhaps even trivially, correct. The Justices’ conclusion seems reasonably consonant not only with the relevant traditions and precedents,⁸ but also with appropriately robust notions of religious freedom and limited government.⁹ Of course civil courts should avoid venturing into disputes about the meaning and import of religious teachings and claims, if only to avoid embarrassment. The subject of this Article, however, is not the *Hull Church* Court’s relatively uncontroversial holding or its application of the well-settled “no religious decisions” principle.¹⁰ It is, instead, Justice Brennan’s passing observation that government interpretation of religious doctrine and judicial intervention in religious disputes are undesirable because when “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.”¹¹

At first, Brennan’s statement, like the *Hull Church* decision itself, seems wise and fittingly cautious, even unremarkable and obvious.¹² On

6. *Id.*

7. *Id.* at 441.

8. In my view, much of contemporary (that is, post-*Everson v. Board of Education*) Establishment Clause doctrine reflects poorly that provision’s history, purpose, and original meaning. I believe that the Framers and ratifiers intended the Establishment Clause to disable the new federal government from interfering with the religion-related decisions of the States’ legislatures. See STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* (1995). For other important studies, see, for example, GERARD V. BRADLEY, *CHURCH-STATE RELATIONSHIPS IN AMERICA* (1987); JOHN T. NOONAN, JR., *THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM* (1998); JOHN WITTE, JR., *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES* (2000); Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105 (2003).

9. See, e.g., Gerard V. Bradley, *Church Autonomy in the Constitutional Order: The End of Church and State?*, 49 LA. L. REV. 1057, 1061 (1989) (suggesting that “church autonomy” is the “flagship issue of church and state” and the “litmus test of a regime’s commitment to genuine spiritual freedom”).

10. See EUGENE VOLOKH, *THE FIRST AMENDMENT: PROBLEMS, CASES, AND POLICY ARGUMENTS* 826–40 (2001). Professor Tribe discusses this “principle” primarily under the heading of the prohibition on “[e]xcessive [e]ntanglement” between government and religion. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-11, at 1226, 1231 (2d ed. 1988).

11. *Hull Church*, 393 U.S. at 449.

12. Cf. JOHN LOCKE, *A LETTER CONCERNING TOLERATION* (1689), reprinted in 5 PHILIP B. KURLAND & R. LERNER, *THE FOUNDERS’ CONSTITUTION* 52 (1987). “[T]he 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.” *Id.* at 53.

examination, though, it is intriguing, elusive, and misleading. Although we might be tempted to dismiss the remark as merely a stylistic flourish or casual afterthought, it deserves and should inspire more in the way of analysis and reflection: What, exactly, is Justice Brennan's concern, and what, precisely, is his claim? What jurisprudential and theoretical work, if any, are the descriptive, predictive, and normative components¹³ of his statement intended to do? What considerations inform, and what implications are thought to follow from, judicial determinations that particular matters are "purely ecclesiastical"? What is the "development of religious doctrine," and what does it mean for such development to be "free"?¹⁴ And what should we make of the statement's internal tension? Although Justice Brennan references two distinct "hazards," his cautionary note is fairly read as suggesting that they are closely related, that is, that the content and "development of religious doctrine" are "matter[s] of purely ecclesiastical concern," with respect to which the government lacks any "secular interest[]."

This disclaimer of any such "interest" in matters of religious doctrine is unsurprising, of course; it is of a piece with the "privatization" of religion in liberal theory and in constitutional doctrine and rhetoric.¹⁵ Religion and politics alike are protected, it is said, by separating the public and private spheres—the "garden" and the "wilderness," as Roger Williams memorably put it¹⁶—and by rationalizing and secularizing the public while individu-

13. The descriptive claim is that doctrinal development is a "matter[] of purely ecclesiastical concern," the predictive claim is that the resolution by civil courts of "[doctrinal] controversies" threatens the "free development of religious doctrine," and the normative claim is that doctrinal "development" ought to be "free." See *Hull Church*, 393 U.S. at 449.

14. On the theological problem of doctrinal "development," see *infra* notes 119–121 and accompanying text.

15. See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971) ("The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice"); WILLIAM JAMES, *THE WILL TO BELIEVE AND OTHER ESSAYS IN POPULAR PHILOSOPHY* xi (Dover Publications 1956) (1897) ("In this age of toleration, no [one] will ever try actively to interfere with our religious faith, provided we enjoy it quietly with our friends and do not make a public nuisance of it"); Stephen L. Carter, *Evolutionism, Creationism, and Treating Religion as a Hobby*, 1987 DUKE L.J. 977, 978 (warning of the "great risk" that "religion, far from being cherished, will be diminished, and that religious belief will ultimately become a kind of hobby: something so private that it is as irrelevant to public life as the building of model airplanes"); cf. Richard S. Myers, *The Supreme Court and the Privatization of Religion*, 41 CATH. U. L. REV. 19 (1991). See generally Gerard V. Bradley, *Dogmatomachy: A "Privatization" Theory of the Religion Clause Cases*, 30 ST. LOUIS U. L.J. 275 (1986); Richard W. Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. REV. 771 (2001); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990).

16. See ROGER WILLIAMS, *MR. COTTON'S LETTER LATELY PRINTED, EXAMINED AND ANSWERED* (1644), reprinted in PERRY MILLER, *ROGER WILLIAMS: HIS CONTRIBUTION TO THE AMERICAN TRADITION* 89, 98 (1953); see also MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS* 5–6 (1965) (quoting Williams).

alizing, privatizing, and thereby safeguarding (and also, perhaps, domesticating¹⁷) the religious. At the same time, Justice Brennan's statement suggests that religious "doctrine" does and should "develop[]," that it should develop "free[ly]," and that such development is *itself* a constitutional desideratum.¹⁸ The statement reflects—in Dean Garvey's words—an "assum[ption] that 'the free development of religious doctrine' is something the First Amendment wishes to promote."¹⁹ It implies that government ought not only to avoid "inhibiting" doctrinal development, but should also aim to facilitate it, for the good of religion and the good of the polity, by removing "inhibit[ions]" imposed by others and perhaps also by creating incentives for revision.²⁰

Far from being "purely ecclesiastical concerns," then, 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. Indeed, we are at present embroiled in any number of academic and public discussions about what could fairly be characterized as efforts by governments to prompt, facilitate, and direct the "development of religious doctrine." These efforts include, for example, the proposed application of value-shaping antidiscrimination laws to religious schools and service programs;²¹ calls in the wake of the Catholic Church's clergy-abuse scandal for

17. See Richard John Neuhaus, *The Superficial in Pursuit of the Superficial*, FIRST THINGS, Dec. 2003, at 65, 66 ("Religion in America has been unmanned, tamed, domesticated; it has been made safe for liberal democracy."); cf. Thomas L. Shaffer, *Faith Tends to Subvert Legal Order*, 66 FORDHAM L. REV. 1089 (1998).

18. In the relevant paragraph, Justice Brennan twice in three sentences refers to "First Amendment values" before offering his observation about the "hazards" of "inhibiting the free development of religious doctrine." *Hull Church*, 393 U.S. 440, 449 (1969); see also *TRIBE*, *supra* note 10, § 14-11, at 1233 (noting the "growing perception" in the United States "that both doctrinal evolution and the autonomy of religious organizations were being stifled by judicial insistence that original doctrine be retained without fundamental departure" (quoting C. ZOLLMAN, *AMERICAN CHURCH LAW* § 251, at 238–39 (1933)); *id.* § 14-11, at 1235 ("The existence of dissidents is a pervasive fact of religious life; their role within religious organizations can be the healthy one of spurring continuing introspection and re-examination of doctrine.").

19. JOHN H. GARVEY, *WHAT ARE FREEDOMS FOR?* 146 (1996) ("[This] is not self-evident. Loosely translated, it means that heresy is a good thing. It may be, but not from the point of view of the orthodox faithful." (citations omitted)); cf. *TRIBE*, *supra* note 10, § 14-11, at 1235 ("The existence of dissidents is a pervasive fact of religious life; their role within religious organizations can be the healthy one of spurring continuing introspection and re-examination of doctrine.").

20. See, e.g., Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399, 1466, 1468, 1472 (2003) (arguing that law should "operationalize the New Enlightenment" by, among other things, "tak[ing] an affirmative role in promoting discourse" within religious communities, by promoting and protecting those engaged in "cultural dissent," and by "piercing the veil that protects religious authoritarianism from the processes of justice").

21. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 664 (2000) (Stevens, J., dissenting) ("[E]very state law prohibiting discrimination is designed to replace prejudice with principle . . .").

government supervision of how the Church trains its priests and whom it ordains;²² California's refusal—which was validated recently by that state's Supreme Court—to accommodate Catholic Charities' religiously grounded objections to funding prescription contraceptives;²³ and calls in both the popular press²⁴ and the academy²⁵ for the United States to encourage and assist the development and empowerment of “moderate” or “modern” voices in Islam.

I submit in this Article that Justice Brennan's warning presents “hazards” of its own, and that its premises—if uncritically embraced—subtly distort our constitutional discourse.²⁶ 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.²⁷ And it is precisely because secular, liberal, democratic governments have an “interest” in the content, and therefore in the “development,” of religious doctrine—an interest that such governments will, if permitted, quite understandably pursue—that religious freedom is so fragile. *Hull Church* and cases like it are rightly decided, and the “no religious decisions” rule is a good one, but both should rest on firmer foundations—or, at least, on more candidly stated premises—than distracting and disingenuous assurances that liberal governments do not care what religious institutions, communities, and traditions teach.

This Article should enhance our conversations about religion and liberalism generally, and about “assimilation” and “toleration” more specifically.

22. See Harvey Silverglate, *Pastors and Prosecutors*, WALL ST. J., July 29, 2003, at A14 (noting Massachusetts Attorney General Thomas Reilly's view that the State “must” play a central role in dictating internal governance reforms that the church “must” adopt”).

23. *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67 (Cal. 2004). As Justice Brown observed in dissent, several California legislators' statements suggest that the narrow “religious employer” exemption from California's Women's Contraception Equity Act was crafted in order to validate the view that “someone who practices artificial birth control can still be a good Catholic” and to help the Catholic Church to recognize that “it's time to do the right thing.” *Id.* at 103 (Brown, J., dissenting) (citation omitted). But see *id.* at 78 (court majority insisting that “the Legislature's motivation cannot reliably be inferred from a single senator's remarks”).

24. See, e.g., Andrew Sullivan, *Decent Exposure*, N.Y. TIMES BOOK REV., Jan. 25, 2004, at 10 (reviewing IRSHAD MANJI, *THE TROUBLE WITH ISLAM: A MUSLIM'S CALL FOR REFORM IN HER FAITH* (2003)) (noting “the difficult topic of American foreign policy as a critical aspect of the defanging of Islamism”); see also *infra* notes 171–172 and accompanying text.

25. See, e.g., Sunder, *supra* note 20; see also *infra* note 170 and accompanying text.

26. Cf. Steven D. Smith, *Barnette's Big Blunder*, 78 CHI.-KENT L. REV. 625, 625 (2003) (contending that Justice Jackson's famous “no orthodoxy” claim in *W. Va. State Bd. of Educ. v. Barnette* “committed the Court . . . and indeed the nation . . . to a course of massive collective delusion, and to a constitutional discourse reflecting and perpetuating that delusion”).

27. See generally STEVEN D. SMITH, *GETTING OVER EQUALITY: A CRITICAL DIAGNOSIS OF RELIGIOUS FREEDOM IN AMERICA* (2001); Stanley Fish, *Mission Impossible: Settling the Just Bounds Between Church and State*, 97 COLUM. L. REV. 2255 (1997).

Our understandings of, and attitudes toward, these notions are complicated, to say the least. A decade ago, in a provocative and prescient reflection on the *Mozert* litigation and the “paradox of a liberal education,” Professor Stolzenberg observed that “tolerance” is often “prescribed as a defense against enforced assimilation.”²⁸ She noted Justice Brennan’s frequently quoted claim that “[w]e are not an assimilative, homogenous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else’s unfamiliar or even repellant practice because the same tolerant impulse protects our own idiosyncrasies.”²⁹ Certainly, we tend to celebrate dissent, disagreement, and iconoclasm. With Justice Douglas, we “honor[] the right to be nonconformists and the right to defy submissiveness,” and we celebrate “lives of high spirits rather than hushed, suffocating silence.”³⁰ At the same time, we profess in our Great Seal and in our Melting Pot myths the assimilative hope—*e pluribus unum*³¹—that unity can emerge from and transcend our pluralism and protected idiosyncrasies. Nor are we of one mind with respect to the meaning and merits of “toleration”:³² As Professor Smith has observed, toleration need not be “neutral.” It is consistent with—indeed, it seems by definition to involve—judgment and disapproval.³³ To some, it is even oppressive.³⁴

The premises underlying the Court’s “no religious decisions” rule and our thinking about the appropriate stance of liberal governments toward the content and development of religious doctrine and other “ecclesiastical matters” are similarly complex. Obviously, that such governments tolerate objectionable doctrine does not mean they are neutral or indifferent toward

28. Nomi Maya Stolzenberg, “*He Drew a Circle That Shut Me Out*”: Assimilation, Indoctrination, and the Paradox of a Liberal Education, 106 HARV. L. REV. 581, 582 (1993). The *Mozert* case involved a challenge by “fundamentalist Christians” to their “local [public] schools’ requirement that children read from a textbook series that introduced the students to a variety of perspectives and attitudes.” *Id.* at 583, 584; see also *id.* at 584 n.5 (providing citations for the “five published opinions that form the core of the *Mozert* litigation”).

29. *Id.* at 582 n.1 (quoting *Michael H. v. Gerald D.*, 491 U.S. 110, 141 (1989) (Brennan, J., dissenting)).

30. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972).

31. “Out of many, one.” The Great Seal of the United States depicts, among other things, an American bald eagle, holding in its beak a scroll inscribed with the motto, “*E pluribus unum.*” More information on the Great Seal is available at the web site of U.S. Scouting, <http://www.uscouts.org/flag/sealmotto.html>.

32. Steven D. Smith, *The Restoration of Tolerance*, 78 CAL. L. REV. 305, 305–06 (1990) (“Although it has never wholly disappeared from liberal diction, ‘tolerance,’ like ‘patriotism,’ ‘higher law,’ ‘religion,’ and ‘obedience,’ may evoke ambivalent feelings in the proponents of liberal democracy.”).

33. *Id.* at 306 (“Properly speaking, one can ‘tolerate’ only beliefs or practices of which one disapproves.”).

34. See, e.g., Herbert Marcuse, *Repressive Tolerance*, in A CRITIQUE OF PURE TOLERANCE 81 (1969).

it. Through this Article's examination of Justice Brennan's richly ambiguous warning in *Hull Church*, we are reminded that—notwithstanding hornbook maxims to the contrary—governments like ours not only take “cognizance” of religion,³⁵ they also seek to assimilate religious traditions' doctrines and demands to their own.³⁶ Indeed, state actions touching on religious doctrine, and state efforts to shape and direct its development, are not unlike the evangelizing, proselytizing, and even indoctrinating activities of religious communities and believers. And yet, our constitutional law and church-state rhetoric purport to rule out such actions and efforts. What are needed, then, are revisions to our discourse about state action and religious doctrine, about orthodoxy and neutrality, and about assimilation and toleration. Such revisions are warranted, if only to return candor to the relevant legal, political, and moral arguments,³⁷ and thereby to provide more reliable protection for religious freedom, properly understood.

I. THE LAW KNOWS NO HERESY: AN OVERVIEW OF THE “NO RELIGIOUS DECISIONS” RULE

During the Summer and Fall of 2003, there was widespread talk of separation and schism in the Episcopal Church, and even in the worldwide Anglican Communion,³⁸ over that Church's decision to consecrate an openly gay priest as a bishop in New Hampshire.³⁹ In the course of these

35. See *Everson v. Bd. of Educ.*, 330 U.S. 1 app. at 64 (1947) (“We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance.”); see also Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 7–8 (1986) (“In my view, the establishment clause absolutely disables the government from taking a position for or against religion. . . . The government must have no opinion because it is not the government's role to have an opinion.”).

36. Cf. Stolzenberg, *supra* note 28, at 637 (noting the “‘imperial’ aspect of objective discourse, which although neutral in one sense nevertheless represents a form of socialization that rivals the Amish community's efforts to socialize adolescents into their traditional way of life”).

37. Smith, *supra* note 26, at 626 (“[W]e do not have that sort of ruggedly honest jurisprudence. Instead, we have a jurisprudence of subterfuges and elusive (or illusory) distinctions—one that requires us to pretend . . . that in the realm of belief, government cannot and therefore does not prescribe . . . any ‘right opinions.’”).

38. The Episcopal Church, or Episcopal Church in the USA (ECUSA), is the American branch of the Anglican Communion, which itself consists of thirty-eight self-governing Christian churches historically connected to the Church of England and now in communion with the See of Canterbury. More information is available at the ECUSA's web site, at <http://www.episcopalchurch.org>.

39. The Rev. Canon V. Gene Robinson was consecrated bishop of the Episcopal Church's Diocese of New Hampshire on November 2, 2003. The Archbishop of Canterbury, Rev. Rowan Williams, warned that the resulting divisions “would have very serious consequences for the cohesion of the Anglican Communion.” Statement from the Archbishop of Canterbury following the

conversations, and in the midst of heated moral and theological disagreements, it was often observed that any such division would have implications not only for the Church's doctrines and its members' beliefs and practices, but also, more prosaically, for the ownership of its not-insignificant properties.⁴⁰ In Pittsburgh, one local parish even filed a preemptive lawsuit "to preserve and protect the unity and integrity of the property" of the Church⁴¹ and to prevent "conservative" dioceses and parishes from taking Church property with them in the event of a denominational split. And when thousands of dissenting "conservative" Episcopalians gathered in Dallas to protest the New Hampshire consecration, their stated purpose was not only to "reaffirm [traditional] doctrines," but also to "scour canon law and mull what promise[s] to be the most bitter part of the dispute: Who gets the money if the Episcopal Church splits in two?"⁴²

The Court's *Hull Church* decision emerged from a similar controversy. The local Savannah congregations who elected to break communion with the Presbyterian Church in the United States no doubt felt called to "reaffirm [traditional] doctrines," while the Church was no less anxious to "preserve and protect the unity and integrity of [its] property." Thirty-five years ago, the departing churches' complaint was not about the consecration of a divorced and openly gay bishop, but that the Church had gone astray by

ordaining . . . women as ministers and ruling elders, making pronouncements and recommendations concerning civil, economic, social and political matters, giving support to the removal of Bible reading and prayers by children in the public schools . . . [and]

consecration of Canon Gene Robinson as Bishop-coadjutor of New Hampshire, available at <http://www.anglicancommunion.org/acns/articles/36/50/acns3658.html> (Nov. 3, 2003).

40. See, e.g., Mark Miller & Dirk Johnson, *Souls Divided*, NEWSWEEK, Nov. 17, 2003, at 52 ("This schism sets the stage for potentially vicious litigation over tens of millions of dollars of church property—and it raises a question at the heart of the culture wars: Whose church is it anyway?"); Richard N. Ostling, *Episcopal Property Could Be at Stake*, WASH. POST, Aug. 23, 2003, at B7 (quoting one canon law expert as saying: "This could be the biggest church real estate sale in history.").

41. Steve Levin, *Episcopal Property Lawsuit Filed Here*, PITT. POST-GAZETTE, Oct. 25, 2003, at A1.

42. Philip Chalk, *Houses of Worship: Who Gets What?*, WALL ST. J., Oct. 24, 2003, at W15; see also *Episcopalians Meet To Discuss A Possible Split*, N.Y. TIMES, Jan. 11, 2004, § 1, at 16. As this Article was being revised, it remained unclear whether or to what extent Bishop Robinson's election and consecration will divide the Anglican Communion or the Episcopal Church. Evidently, "a third of the Anglican provinces [have] declar[ed] themselves—to varying degrees—out of communion with the Americans." Stephen Bates, *US Anglicans Naïve About Gay Bishop*, THE GUARDIAN, Mar. 6, 2004, at 11. A commission set up by the Episcopal Church to investigate the fallout is slated to report in early 2005. See Stephen Bates, *US Church Must Repent for Gay Bishop Decision*, THE GUARDIAN, Apr. 16, 2004, at 2. One bishop has suggested, however, that "heresy" is to be preferred to "schism." See Editorial, *Heresy—and Schism*, RICHMOND TIMES-DISPATCH, Apr. 5, 2004, at A10 (quoting Bishop Peter Lee).

disseminat[ing] publications denying the Holy Trinity and violating the moral and ethical standards of the faith.⁴³

The local congregations' moves spurred Church officials "to take over the local churches' property . . . until new local leadership could be appointed," which in turn prompted civil lawsuits seeking "to enjoin the [Church] from trespassing on the disputed property."⁴⁴

Eventually, a Chatham County jury accepted the local churches' claims 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,'" and that the Church had therefore violated its obligation under a trust of local church property implied in Georgia law⁴⁵ 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 the local church property by embracing "new" religious 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," that "a civil court is a proper forum for that resolution," and that "there are neutral principles of law, developed for use in all [church] property disputes."⁵⁰ 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,"⁵¹ warning that it

43. *Hull Church*, 393 U.S. 440, 442 n.1 (1969) (citation omitted).

44. *Id.* at 443.

45. *Id.* 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 the case below. 159 S.E.2d 690 (Ga. 1968).

47. *Hull Church*, 393 U.S. at 444.

48. *Id.* at 441.

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

50. *Id.* at 445, 449.

51. *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 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

"would lead to the total subversion of . . . religious bodies" if church authorities' decisions about church doctrine could be appealed to the "secular courts."⁵² In other words, 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 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.⁵³ Rather, our Constitution guarantees to such organizations "an independence from secular control or manipulation" and the "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."⁵⁴

Hull Church is one of a cluster of consonant cases that illustrate and stand for what Professor Volokh calls the First Amendment's "no religious decisions" principle.⁵⁵ Nearly a century earlier, in *Watson v. Jones*,⁵⁶ the Court had similarly refused "to decree the termination of an implied trust because of departures from doctrine by [a] national [Presbyterian] organization."⁵⁷ Although *Watson* did not directly involve the interpretation and application of the First Amendment, it was "nonetheless informed by First Amendment considerations,"⁵⁸ and the Justices observed that "[t]he law knows no heresy, and is committed to the support of no dogma."⁵⁹

These and similar "considerations" were constitutionalized in *Kedroff v. St. Nicholas Cathedral*,⁶⁰ a fascinating and politically delicate case arising out of a dispute within the Russian Orthodox Church. 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." The Court concluded that "[s]uch a law violates the

jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice.").

52. *Id.* at 446 (quoting *Watson*, 80 U.S. at 728–29).

53. *Id.* at 448 (quoting *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952)).

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

55. See VOLOKH, *supra* note 10, at 826–40.

56. 80 U.S. 679. The *Watson* case is discussed in some detail in *Kedroff*, 344 U.S. at 110–17.

57. *Hull Church*, 393 U.S. at 445.

58. *Id.*; see also *id.* at 445 n.4. As the *Hull Church* Court noted, several post-*Watson* "nonconstitutional" decisions "recognize that there might be some circumstances in which marginal civil court review of ecclesiastical determinations would be appropriate," but also reiterate the notion that "[i]n the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical . . . are accepted in litigation before the secular courts as conclusive." *Id.* at 447 (quoting *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929)).

59. *Id.* at 446 (quoting *Watson*, 80 U.S. at 728).

60. 344 U.S. 94 (1952).

Fourteenth Amendment. It prohibits in this country the free exercise of religion.”⁶¹ The Justices were unimpressed by the fact that the legislature had required the New York churches to continue to adhere to traditional doctrine and practices; 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.”⁶² As Justice Frankfurter framed the matter in a concurring opinion, “[w]hat is at stake here is the power to exercise religious authority.” He insisted that “[t]he judiciary has heeded, naturally enough, the menace to a society like ours of attempting to settle such religious struggles by state action.”⁶³ In the end, Frankfurter concluded that “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.”⁶⁴

The Court reaffirmed this conclusion in the 1976 *Milivojeovich* case,⁶⁵ overturning a decision by the Illinois Supreme Court that purported to review the procedural and substantive merits of the proceedings through which that

61. *Id.* at 107. *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 this piece of property.”).

As the Court’s discussion of the relevant facts makes clear, the underlying dispute within the Church—like the one in the New York legislature—is difficult to separate from the “political disturbances which culminated . . . in the Bolshevik Revolution of 1917,” subsequent relations between the Church and the Soviet government, and mid-century relations between that government and the United States. *Id.* at 102. Interestingly, the Justices observed 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 . . . 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 117–18. The Supreme Court seems to have been similarly 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 130 (Jackson, J., dissenting) (“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 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.

62. *Id.* at 108.

63. *Id.* at 122 (Frankfurter, J., concurring). Justice Frankfurter emphasized also that “[l]egislatures have no . . . power . . . to settle conflicts of religious authority and none to define religious obedience.” *Id.*

64. *Id.* at 125 (Frankfurter, J., concurring).

65. *Serbian E. Orthodox Diocese v. Milivojeovich*, 426 U.S. 696 (1976).

church had “defrocked” one of its bishops. “The Holy Assembly of Bishops and the Holy Synod of the Serbian Orthodox Church [had] suspended and ultimately removed . . . Milivojević . . . as Bishop of the American-Canadian Diocese of that Church,” and he, in turn, had challenged that action in the civil courts of Illinois.⁶⁶ Justice Brennan, writing for the majority, stated that “[t]he basic dispute [was] over control of the . . . Diocese, . . . its property and assets.”⁶⁷ With respect to that dispute, the Supreme Court of Illinois concluded that the Bishop’s “removal and defrockment had to 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.”⁶⁸ However, relying heavily on *Hull Church, Watson*, and *Kedroff*,⁶⁹ 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 policy and resolutions based thereon of those disputes.”⁷⁰

There is, of course, much more that could be said about these particular cases, about church-property disputes, and about church-autonomy principles more generally.⁷¹ For present purposes, it is sufficient to emphasize that the point of these cases and principles is not that government officials and courts may not render decisions *about* “religion.” Indeed, such decisions could

66. *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, *id.* at 704–06, he filed suit in Lake County, Illinois, *id.* at 706–07.

67. *Id.* at 698. Justices Rehnquist and Stevens, both dissenting, took a strikingly different view of the case’s history and basic nature. *Id.* at 725–26 (Rehnquist, J., dissenting).

68. *Id.* at 708.

69. *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 (Rehnquist, J., dissenting) (“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.”).

70. *Id.* at 708. 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 opinion in *Maryland & Virginia Eldership of the Churches of God v. Church of God at Sharnburg*, 396 U.S. 367, 369 (1970) (Brennan, J., concurring), Justice Brennan warned that “permit[ting] 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.” *Milivojević*, 426 U.S. at 709.

71. See generally, Note, *Judicial Intervention in Disputes Over the Use of Church Property*, 75 HARV. L. REV. 1142 (1962); Bradley, *supra* note 9; Philip Hamburger, *Illiberal Liberalism: Liberal Theology, Anti-Catholicism, and Church Property*, 12 J. CONTEMP. LEGAL ISSUES 693 (2002); 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 (1981).

hardly be avoided by a court charged with interpreting our First Amendment.⁷² It is, instead, that state actors should not render *religious decisions*, that is, decisions involving the interpretation, application, or enforcement of religious beliefs, obligations, or doctrine.⁷³ As Professor Koppelman has succinctly put it, in a slightly different context, the animating idea is “that the government may not declare religious truth.”⁷⁴

Variations on this almost universally accepted rule appear over and again in a wide variety of the Court’s Religion Clause decisions: Government officials may inquire into the sincerity, but not the consistency, reasonableness, or orthodoxy of religious beliefs;⁷⁵ they must act and legislate with a “secular purpose”;⁷⁶ courts are cautious when inquiring into the “centrality” of a particular religious belief or practice;⁷⁷ the Constitution does not permit state action that creates or requires “excessive entanglement” between the government and religious institutions, practices, and teachings,⁷⁸ and also commands that “secular and religious authorities . . . not interfere with each other’s respective spheres of choice and influence”;⁷⁹ and so on.

These cases and doctrines reflect, among other things, an understandable skepticism about state actors’ competence and incentives in theological and religious matters,⁸⁰ and also an appropriate concern for the

72. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”).

73. Cf. *Milivojevic*, 426 U.S. at 735 (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.”).

74. Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 89 (2002). Koppelman also observes that it is an “axiom [of t]he Establishment Clause” that the “Clause forbids the state from declaring religious truth.” *Id.* at 108; see also Kent Greenawalt, *Teaching About Religion in Public Schools*, 18 J.L. & POL. 329, 331 (2002) (“That schools should not teach the truth of religious propositions has always seemed to me a sound principle.”).

75. See generally *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *United States v. Ballard*, 322 U.S. 78 (1944); *TRIBE*, *supra* note 10, § 14-6, at 1181–83.

76. See generally *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *TRIBE*, *supra* note 10, § 14-9, at 1204–14; Koppelman, *supra* note 74.

77. See generally *Employment Div. v. Smith*, 494 U.S. 872 (1990); *Hernandez v. Comm’r of Internal Revenue*, 490 U.S. 680 (1989); *TRIBE*, *supra* note 10, § 14-12, at 1248 (warning that “any more than minimal scrutiny might impinge upon free exercise values”).

78. See generally *Lemon*, 403 U.S. 602; *Aguilar v. Felton*, 473 U.S. 402 (1985).

79. *TRIBE*, *supra* note 10, § 14-11, at 1226; see also *VOLOKH*, *supra* note 10, at 916–21 (discussing “no delegations to religious institutions principle” under which “[t]he government may not delegate certain kinds of government power to religious institutions”).

80. See *Thomas*, 450 U.S. at 715 (“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 v. Milivojevic*, 426 U.S. 696, 714 n.8 (1976) (“Civil judges obviously do not have the competence of ecclesiastical tribunals in applying the ‘law’ that governs ecclesiastical

independence of religious institutions and the consciences of religious believers.⁸¹ Cases like *Hull Church* make sense both because there is little reason anymore to expect that lawyers and judges will have the training necessary to decide whether a local congregation has “abandon[ed] . . . its original tenets and doctrines,” and because allowing state actors to make and enforce decisions about church doctrine and discipline seems a bit like asking Mayor Daley to conduct the Chicago Symphony Orchestra, or like allowing the Green Party to parse and compose the Libertarian Party’s platform. Thus, although it has been argued that this reticence on the part of law and courts hamstrings both the liberalism and the religious freedom it is thought to serve,⁸² the “no religious decisions” principle is, and will almost certainly remain, at the heart of our Religion Clause doctrine.

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.”).

81. *Milivojevic*, 426 U.S. at 721–22 (“[R]eligious freedom encompasses the ‘power (of religious bodies) to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.’” (quoting *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952))).

Another reason that is sometimes suggested for embracing the rule applied in *Hull Church* is the idea that “religious truth by its nature [is] not subject to a test of validity determined by rational thought and empiric knowledge.” *TRIBE*, *supra* note 10, § 14-11, at 1232 n.46 (quoting *PAUL G. KAUPER, RELIGION AND THE CONSTITUTION* 26 (1964)); *cf. Milivojevic*, 426 U.S. at 714–75. The *Milivojevic* case states:

Indeed, 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. Constitutional concerns of due process, involving secular notions of ‘fundamental fairness’ or impermissible objectives, are therefore hardly relevant to such matters of ecclesiastical cognizance.

Id. As Professor Sunder has stated, “religion” is “constructed” in liberal theory as private, and entirely beyond reason and its methods. Sunder, *supra* note 20, at 1415–25.

However, it is not at all clear either that notions of “fundamental fairness” are “hardly relevant” to ecclesiastical or canonical matters, or that “departure from doctrine” questions and theological inquiries defy “reasoned” analysis or resolution. *Cf. Milivojevic*, 426 U.S. at 726–27 (Rehnquist, J., dissenting). Indeed, Professor Tribe’s claim, noted above, itself seems, ironically, to depend on contestable theological premises about the nature and objects of religious belief. A different view was offered by John Henry Newman, who insisted more than a century ago that:

Christianity has been long enough in the world to justify us in dealing with it as a fact in the world’s history. Its genius and character, its doctrines, precepts, and objects cannot be treated as matters of private opinion or deduction . . . It may indeed legitimately be made the subject-matter of theories . . . It has long since passed beyond the letter of documents and the reasonings of individual minds, and has become public property.

JOHN HENRY NEWMAN, *AN ESSAY ON THE DEVELOPMENT OF CHRISTIAN DOCTRINE* 3 (Notre Dame ed., 1989); *see also* Sunder, *supra* note 20, at 1423 (“[R]eligion is much more . . . subject to reasoned argument and change than earlier theorists acknowledged.”).

82. *See, e.g., Samuel J. Levine, Rethinking the Supreme Court’s Hands-Off Approach to Questions of Religious Practice and Belief*, 25 *FORDHAM URB. L.J.* 85, 134 (1997) (“[B]y grouping together different religious practices, courts may grant improper protections to professed adherents,

II. UNPACKING THE NOTION OF "DEVELOPMENT OF DOCTRINE"

Justice Brennan's opinion in *Hull Church* makes descriptive, predictive, and normative claims about a particular phenomenon, that is, the "development of doctrine."⁸³ My project is to unpack, examine, and learn from these claims. Accordingly, in this part, I focus more precisely on this phenomenon, before turning to the question whether the "development of doctrine" is, should, or ever could be "free" or a "matter of purely ecclesiastical concern."

First, what is "doctrine"? The Latin word *doctrina* means "teaching." Along the same line, Professor Wolfe's recent, widely noted study, *The Transformation of American Religion*, provides this colloquial, but workable, definition: "Doctrine can be defined as a body of teachings specific to a particular religion that spells out an understanding of who God is and what he demands of human beings."⁸⁴ Certainly, this formulation would require substantial revision before it could be useful in theological discourse. It is also worth noting that the definition fails to capture the contents of nontheistic or nonethical religious traditions. Nevertheless, it is sufficient for present purposes.⁸⁵ The "development of doctrine," then, is a change, set of changes, or trajectory of change in a religion's teachings.

resulting in unnecessary burdens on government and society, or, conversely, may permit unduly harsh governmental limitations on religious liberties.").

83. *Hull Church*, 393 U.S. 440, 449 (1969) ("[When] 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.").

84. ALAN WOLFE, *THE TRANSFORMATION OF AMERICAN RELIGION: HOW WE ACTUALLY LIVE OUR FAITH* 67 (2003); cf. David B. Hart, *A Most Partial Historian*, *FIRST THINGS*, Dec. 2003, at 35 (reviewing 3 MAURICE COWLING, *RELIGION AND PUBLIC DOCTRINE IN MODERN ENGLAND: ACCOMMODATIONS* (2001), and using "public doctrine" to mean "the entire spectrum of orthodoxies and heterodoxies propounded by the literature of popular, literary, and scholarly discourse in the public forum").

In the Roman Catholic context, Canon 750 of the *Code of Canon Law* states that Catholic doctrine—that is, "[t]hose things that are to be believed by divine and catholic faith"—consists of those things

which are contained in the word of God as it has been written or handed down by tradition, that is, in the single deposit of faith entrusted to the Church, and which are at the same time proposed as divinely revealed either by the solemn Magisterium of the Church, or by its ordinary and universal Magisterium, which in fact is manifested by the common adherence of Christ's faithful under the guidance of the sacred Magisterium.

John Paul II, Apostolic Letter *Motu proprio, Ad tuendam fidem* ¶ 4(A) (1998).

85. An appropriately detailed discussion of the complexities surrounding the meaning, nature, and function of "doctrine" would go well beyond the scope of this Article or the training of this author. For one influential and challenging work engaging these matters, see GEORGE A. LINDBECK, *THE NATURE OF DOCTRINE: RELIGION AND THEOLOGY IN A POSTLIBERAL AGE* (1984) (discussing, among other things, "doctrines and their problems").

It should also be noted that religious doctrine of a social, moral, or political character will be regarded by many theologians as raising different concerns and problems than "pure dogma." Avery

In addition to this working definition, at least the following three points are presumed: First, while it is reasonable to expect that a religion's "doctrine" will overlap substantially with what professed adherents actually believe, it makes sense to draw a distinction—one between aspiration and reality, perhaps—between religious doctrine and religious beliefs. After all, in any religious tradition or community, there will be disagreements, dissent, and ignorance.⁸⁶ What is more, not all religions lodge teaching authority in particular offices and structures or conceive of "authority" in the same way. Still, it seems safe enough to distinguish the "orthodox" doctrines of a faith tradition from the subjective beliefs and the creative, or simply mistaken, interpretations of some of its members. Second, and relatedly, although it is likely that a religion's rituals, liturgies, and art will reflect and express its doctrine, they should not be equated with it. That a religious tradition's church architecture and hymnody change (or degrade) does not necessarily indicate changes in doctrine, although the former certainly might presage or prompt the latter. Finally, it is worth distinguishing a religion's doctrines, or "teachings," from its "expression" more generally. Not everything that a religious leader, official, or believer says, whether about prayer or politics, about the Resurrection or recycling, is "doctrine."

In sum—and recognizing, again, that trained theologians would want to explore and refine these claims with more care than is possible or necessary here—a religion's "doctrines" are its core, orthodox teachings about, and understanding of, who God is and what human persons therefore are and should be. They are not only what a religion's professed adherents in fact believe, but are also—and more importantly—what they are or ought to believe, given their profession.

What does it mean, then, for doctrine to "develop"? The term would seem to involve more than mere change; it connotes more than the substitution of one religious proposition for another. "Development" suggests an unfolding; it implies changes in accord with some kind of narrative or principle. The development of doctrine, accordingly, should be separated, or

Cardinal Dulles, *Religious Freedom: Innovation and Development*, FIRST THINGS, Dec. 2001, at 35; John T. Noonan, Jr., *Development in Moral Doctrine*, 54 THEOLOGICAL STUD. 662, 669 (1993) (distinguishing "changes in theological propositions" from "mutations of morals"). Professor Alan Brownstein, in conversation and at the Symposium of which this Article is a part, noted a similar distinction.

86. See, e.g., PETER H. SCHUCK, DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE 269 (2003) (noting that "Americans profess strong religious convictions but appear to know little about basic religious ideas and facts" and that "Americans' theological ignorance is . . . remarkable").

perhaps distilled, from a broader, shapeless notion of change or transformation in religion.

Certainly, as Professor Wolfe has described, "religion" in America has been and is being radically "transformed."⁸⁷ Starting with what might be called the *demographics* of American religion, America's longstanding diversity of religious traditions, and not simply of Protestant Christian denominations, continues to expand.⁸⁸ This diversity is no longer confined simply to different forms of Puritanism, or to "higher" and "lower" forms of Protestant Christianity; it has long since outpaced Will Herberg's famous "Protestant, Catholic, Jew" taxonomy.⁸⁹ In Professor Brownstein's words, "[t]he range of religious beliefs throughout the United States is extraordinarily broad," and "[t]he variety of rituals, forms, of worship, and rules of conduct practiced by religious individuals and groups is equally substantial in scope."⁹⁰ What might once have been fairly characterized as a "righteous" (Protestant) "empire,"⁹¹ or a "Christian nation,"⁹² or a "religious people whose institutions presuppose a Supreme Being"⁹³ today is home to about as many Jews as live

87. See WOLFE, *supra* note 84. For a few recent reviews of Wolfe's book, see, for example, Edward Rothstein, *Reason and Faith: Eternally Bound*, N.Y. TIMES, Dec. 20, 2003, at B7; Jeff Sharlet, *A Trio of Books on the Meaning of Worship in the Post-Aquarian Age*, WASH. POST, Nov. 9, 2003, at T13; Stephen R. Warner, *They're OK, We're OK*, BOOKS & CULTURE, Mar./Apr. 2004, at 20.

88. See, e.g., Rebecca French, *Shopping for Religion: The Change in Everyday Religious Practice and its Importance to the Law*, 51 BUFF. L. REV. 127, 127 (2003) ("The last thirty-five years have seen an exponential increase in American pluralism, and in the number and diversity of religions."). See generally MARK NOLL, *AMERICA'S GOD: FROM JONATHAN EDWARDS TO ABRAHAM LINCOLN* 3-4 (2002) (studying the American "confluence" of "evangelicalism, republicanism, and common sense," noting that "[t]he changes taking place in American religious thought from the 1730s to the 1860s were part of a general shift within Western religious life," and observing that "[t]hroughout this period, the theological spectrum in America was broadening considerably").

89. WILL HERBERG, *PROTESTANT, CATHOLIC, JEW: AN ESSAY IN AMERICAN RELIGIOUS SOCIOLOGY* (1955). As Professor Schuck observes, "America is an anomaly among modern postindustrial societies" in that "its religiosity is more diverse." SCHUCK, *supra* note 86, at 261; see also *id.* at 266-67 ("An estimated 1,600 religions and denominations exist in the United States, a far cry from the 'three-religion country' proclaimed by Will Herberg in the 1950s.") On religious diversity in America generally, see, for example, DIANA L. ECK, *A NEW RELIGIOUS AMERICA: HOW A "CHRISTIAN COUNTRY" HAS NOW BECOME THE WORLD'S MOST RELIGIOUSLY DIVERSE NATION* (2001); SCHUCK, *supra* note 86, at 261-308.

90. Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119, 186 n.234 (2002) (citing, inter alia, JAMES W. FRASER, *BETWEEN CHURCH AND STATE: RELIGION AND PUBLIC EDUCATION IN MULTICULTURAL AMERICA* 4 (1999) ("[A]t the dawn of the new millennium the peoples of the United States are more secular, especially in their public culture, more religious, in many different private forms, and more diverse than ever before in the nation's history.")).

91. MARTIN E. MARTY, *RIGHTEOUS EMPIRE: THE PROTESTANT EXPERIENCE IN AMERICA* (1970).

92. *Church of Holy Trinity v. United States*, 143 U.S. 457, 471 (1892).

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

in Israel and to as many Muslims as Episcopalians. American “religion” now includes a wide variety of worshipping, teaching traditions and doctrine-promulgating institutions. And it offers to those leery of traditions and institutions an endless menu of loose and less confining spiritual affiliations. To speak of the “development of doctrine” is not simply to talk about changes to Christian teachings, or within particular Christian groups, but about the teachings of innumerable groups, communities, traditions, and sects, all moving (or not) and developing (or not) in response to a wide range of cultural and other pressures and constraints.

Religion has changed, or “transformed,” in other ways, too. Demographics and affiliations aside, American law, culture, and economics have radically altered not only the profiles of religious believers, but also the very nature of religious belief.⁹⁴ Indeed, Wolfe seems right to conclude that “in every aspect of the religious life, American faith has met American culture—and American culture has triumphed.”⁹⁵ In America today, “religion [simply] is like everything else.”⁹⁶ Religious believers, in Wolfe’s account, are neither

94. See WOLFE, *supra* note 84, at 2–3 (asserting that American religion, which is “always in a state of transition,” has “in the last half century or so . . . been further transformed with dazzling speed,” and is still “being transformed in radically new directions”). Wolfe advanced a similar argument a few years ago in a more general survey of American attitudes on allegedly divisive social and cultural issues. See ALAN WOLFE, *ONE NATION AFTER ALL: WHAT MIDDLE-CLASS AMERICANS REALLY THINK ABOUT: GOD, COUNTRY, FAMILY, RACISM, WELFARE, IMMIGRATION, HOMOSEXUALITY, WORK, THE RIGHT, THE LEFT AND EACH OTHER* (2000). Another helpful treatment of the “sea-change in the way religion is practiced and understood” in America is provided by Professor French. French, *supra* note 88, at 127.

95. WOLFE, *supra* note 84, at 2–3. It is no exaggeration, Wolfe thinks, to say that “in the United States, culture has transformed Christ, as well as all other religions found on these shores.” *Id.* “American culture is the world’s teenager, vibrantly exuberant if often crass,” and “has remade all in its path, homogenizing everything from the food we eat to the TV we watch. . . . God never had a chance against this juggernaut.” Rich Barlow, ‘Transformation’ a Thoughtful Analysis of U.S. Culture’s Impact on Religion, *BOSTON GLOBE*, Oct. 1, 2003, at 63 (book review). In a recent magazine article, Professor Wolfe restated and condensed, for a U.K. audience, his thesis that “[w]e should worry less about America’s conservatives. They are more American than they are Christian.” Alan Wolfe, *Dieting for Jesus*, *PROSPECT*, Dec. 18, 2003; cf. Hart, *supra* note 84, at 38 (reporting the connection between “the accommodationism of English Christian latitudinarians, attempting to adjust themselves to the supremacy of secularist public doctrine” and the “final victory of the public orthodoxy that now nourishes the imperturbable sanctimony, hectoring moralism, tender authoritarianism, and infinite dreariness of post-Christian Britain”).

96. WOLFE, *supra* note 84, at 245 (quoting PETER L. BERGER, *THE SACRED CANOPY: ELEMENTS OF A SOCIOLOGICAL THEORY OF RELIGION* 26 (1967)); see also *id.* at 2–3 (observing that while “strong religious believers” are often regarded by “liberal and secular” Americans as a “breed apart,” as “fanatics,” as “frustrated people rendered insecure by the dilemmas and opportunities of modernity,” or even as “petty tyrants, invoking divine authority to limit the freedom of those they fear,” the truth is that “[w]hether or not the faithful ever were a people apart, they are so no longer”).

Of course, to report Wolfe’s account of religion’s “transformation” is not necessarily to endorse the account, or to join him in celebrating the change. Compare WOLFE, *supra* note 84, at 4 (“[T]here

“resident aliens” nor “threat[s] to liberal democratic values”;⁹⁷ neither “saviors nor sectarians”;⁹⁸ neither “exotic nor an endangered species.”⁹⁹ On the contrary, they are so completely and typically American that, Wolfe predicts, “if Jonathan Edwards were alive and well, he would likely be appalled; far from living in a world elsewhere, the faithful in the United States are remarkably like everyone else.”¹⁰⁰ It appears that the vast middle swath of America is tolerant, latitudinarian, flexible, and content,¹⁰¹ American’s much remarked division and polarization notwithstanding.

Of course, it could well be that Wolfe overstates the matter, and that vibrantly countercultural religious belief and expression persist and remain more influential than the previous paragraph suggests. Still, it is hard to deny the striking changes in Americans’ religious sensibilities or consciousness—that is, in what we think “religion” is and is for. It is difficult here to avoid generalizations, and to capture and describe these changes precisely.¹⁰² Nonetheless, we can safely say that “religion” is understood differently, experienced differently, selected differently, and therefore speaks differently today than it once was and did. In other words, wholly apart from the sheer number of religious affiliations and descriptions that are now available, Americans think differently than they did before about what it means to affiliate with a religious community and to embrace, affirm, or profess a religious doctrine.¹⁰³ For example, it is often said that contemporary Americans’

is nothing in the transformation of American religion . . . that ought to cause [people of faith] bitter anguish and apocalyptic rejection.”), *and id.* at 262 (“Sometimes the more seemingly frivolous of the ways Americans practice their faith turn out to be blessings in disguise.”), *with Neuhaus, supra* note 17, at 66 (“[T]here are numerous Catholic, evangelical, Protestant, and Jewish thinkers who agree with much of Wolfe’s diagnosis. What they lament, however, [Wolfe] thinks we should celebrate.”).

97. WOLFE, *supra* note 84, at 253, 255.

98. *Id.* at 5.

99. *Id.* at 254.

100. *Id.* at 3. My colleague George Marsden has published recently a widely praised history and assessment of Edwards and his work. *See* GEORGE M. MARSDEN, *JONATHAN EDWARDS: A LIFE* (2003).

101. *See, e.g.,* DAVID BROOKS, *BOBOS IN PARADISE: THE NEW UPPER CLASS AND HOW THEY GOT THERE* (2000). John Courtney Murray once made a similar point about “unbelief” in America: “Unbelief in America has been rather easy-going, the product more of a naïve materialism than of any conscious conviction.” JOHN COURTNEY MURRAY, S.J., *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION* 58 (1960).

102. Garnett, *supra* note 15, at 798 (describing “state-sponsored change in religious believers’ own notions of what their faith means and what it requires” and gradual “re-making [of religion] . . . from a comprehensive account of the world to a therapeutic ‘cocoon wrapped around the solitary individual’”).

103. *See, e.g.,* SCHUCK, *supra* note 86, at 265 (suggesting that “further fragmentation” of religion in America is “likely as the forces of secularism, pluralism, and bureaucratization transform the nature, function, and relationships of religious groups”); *id.* at 268–69 (suggesting “that all religions in America, including those with strong hierarchical organizations, become de facto congregationalist in form and practice” and stating that “[t]he ultimate destinations of [Americans’]

religious beliefs, are, generally speaking, more emotional or “experiential” than intellectual.¹⁰⁴ Relatively few worry anymore about the alleged tension between faith and reason, in part because we are all hard-wired now to think that faith is non-reason, and that it operates in and speaks to realms where reason has no place or little purchase. Thus, as commentator David Brooks has observed, “Americans . . . don’t seem to care that their neighbors hold to false versions of the faith.”¹⁰⁵ It is not clear that many Americans think of religion as being about truth claims at all, or of religious claims and arguments as the kind of things that can be false. Instead, religion is regarded, even by many of the religious, as an expression of subjective longings, of autonomous self-expression and direction, and of consumer preferences, rather than as a response to a set of proposed truth-claims about the meaning of life and the destiny of the person.¹⁰⁶

These revisions—if that is what they are—to the sensibilities, premises, and expectations of American religious believers are not yet fully understood or appreciated by those who think and write about religion, law, and liberal democracy. In any event, observations and predictions about government involvement with the “development of doctrine” will need to account for the evolution in the ways religious believers and communities conceive of “doctrine” in the first place.

If the much-remarked changes in religions’ demographics and in religious consciousness should not be confused with the more discrete

implacable individualism . . . are the narcissistic, spiritual wanderings of the individuals and families who populate the growing questing culture”); French, *supra* note 88, at 127 (“Americans in the new century are in the midst of a sea-change in the way religion is practiced and understood.”).

104. See WOLFE, *supra* note 84, at 81 (noting that believers “seek authenticity through experience rather than through ideas”). A similar argument was advanced recently by *New York Times* writer Frank Bruni, commenting on the “withering of the Christian faith in Europe and the shift in its center of gravity.” In Bruni’s view, “for most, Christianity has evolved into an amorphous spiritual inclination rather than an exacting creed.” This is due, he thinks, to “cynicism about big institutions, grand ideologies and unfettered allegiances.” Frank Bruni, *Faith Fades Where it Once Burned Strong*, N.Y. TIMES, Oct. 13, 2003, at A1.

105. David Brooks, *The National Creed*, N.Y. TIMES, Dec. 30, 2003, at A21 (citing Tocqueville). Tocqueville also recorded in his diaries another’s observation that “for the majority [of Americans] religion is something respected and useful rather than a proved truth. . . . [I]n the depths of their souls they have a pretty decided indifference about dogma. One never talks about that in the churches; it is morality with which they are concerned.” This journal entry is available at the C-Span web site dedicated to Tocqueville’s American tour, at <http://www.tocqueville.org/md2.htm#1028a>.

106. See, e.g., WOLFE, *supra* note 84, at 17 (noting Charles Taylor’s claim that “modern religious life is characterized by a ‘new individualism’ in which personal expressiveness inevitably plays a role”); *id.* at 74 (noting that evangelicalism “play[s] down doctrine in favor of feelings” and that evangelical small-group meetings “provide powerful emotional experiences” but do not “encourage any kind of doctrinal reflection”). See generally CHRISTIAN SMITH, *CHRISTIAN AMERICA: WHAT EVANGELICALS REALLY WANT* (2000).

phenomenon of “development of doctrine,” neither should doctrinal development be equated with the “inculturation” of religion. This is a difficult, somewhat esoteric subject—more of a theological category than a sociological one—with which legal scholars are understandably unfamiliar. Strictly speaking, it has more to do with the transformation of culture by religion than the transformation of religion by culture. In the Roman Catholic context, for example, “inculturation” can refer to “clothing the core faith in a variety of cultural expressions for the purpose of cultural transformation.”¹⁰⁷ It has been emphasized that the “inculturation” of religion differs from “acculturation,” or assimilation, in that the former represents faith “liv[ing] in and through the cultures we inhabit,” while the latter involves “capitulat[ing] to the wisdom, myths, and reality of a culture.”¹⁰⁸ The idea, then, is that religious traditions—in America and elsewhere, today as always—often adjust and adapt in order to actualize and make meaningful in particular cultural contexts the core of their commitments. What appears from an external perspective to be a sweeping, culture-driven transformation of religion, or a more discrete change in doctrine, might instead be seen from inside the tradition as an *application* of that religion’s doctrine, and as an attempt to speak to and transform that culture.

Certainly, the theological intricacies of different traditions’ attempts to describe and respond to the challenge of inculturation go well beyond this Article’s scope. It is one thing to observe that religious practices and sensibilities have changed at the hands or in the context of a given culture; it is another to say that one of the challenges faced by many religious traditions

107. Angela C. Carmella, *A Theological Critique of Free Exercise Jurisprudence*, 60 GEO. WASH. L. REV. 782, 785 (1992) (collecting other sources discussing “inculturation” and related concepts); see also *id.* at 785 n.6. See generally H. Richard Niebuhr, *CHRIST AND CULTURE* (1951) (discussing various religious responses to the relationship, and conflicts, between religious faith and culture).

The Central Committee of the World Council of Churches, in its *Ecumenical Affirmation*, used the term “inculturation” similarly, to “describe the process by which the [Christian] Gospel is transmitted to people in a given situation in a specific culture” and “allow the universal message . . . to become present and understandable in a particular cultural milieu.” Joel A. Nichols, *Mission, Evangelism, and Proselytism in Christianity: Mainline Conceptions as Reflected in Church Documents*, 12 EMORY INT’L L. REV. 563, 617 (1998) (discussing the WCC Central Committee’s *Ecumenical Affirmation: Mission and Evangelism*).

108. JOHN F. CAVANAUGH, S.J., *THE WORD ENCOUNTERED* 68 (1996); see also John Paul II, *Redemptoris missio* ¶ 52 (proposing that inculturation is “not a matter of purely external adaptation,” but “means the intimate transformation of authentic cultural values through their integration in Christianity and the insertion of Christianity in various human cultures”); *id.* at ¶ 54 (noting that “culture is a human creation,” is “therefore marked by sin,” and so “needs to be ‘healed, ennobled and perfected’” (quoting Second Vatican Ecumenical Council, Dogmatic Constitution on the Church, *Lumen gentium* ¶ 17)).

is to find ways to voice their core claims in terms comprehensible at a particular time, and in a particular place, without thereby signing over the content of those claims to that time or place.¹⁰⁹ This inculturation of a religious tradition will be guided by, and will proceed in light of, that tradition's doctrine, and therefore should not be hastily conflated with changes or development in the doctrine itself.

Finally, there is the process or phenomenon of "development of doctrine" strictly so-called, by which I mean substantive change in the moral, theological, and other claims proposed by particular religious traditions to their adherents. It is not only that there are now many gods in America other than Christianity's, and also many religions other than Protestant Christianity, that are available to be transformed; and it is not only that Americans now evaluate the "products" in the religious marketplace according to different criteria. The products themselves have changed.¹¹⁰ They have, it appears, "developed."

To be sure, doctrinal development is related to the other changes in and to American religion. Like any other consumer product, doctrine is changing in accord with the popular articulation of those emotional and other needs to which religion is thought to respond.¹¹¹ As one reviewer of Wolfe observed, "American faiths . . . have tended to be optimistic and easygoing"; as a result, Americans "feel free to try on different denominations at different points in [our] lives," and have "trouble taking religious doctrines altogether seriously."¹¹² By and large, even "Protestant fundamentalists"—those Americans who, according to Wolfe, "generally take doctrine the most seriously"¹¹³—are not looking for "correct" doctrines, but rather for a "model that fits with pervasive cultural understandings about choice, individualism, autonomy, the importance of the self, therapeutic

109. Cf. Avery Dulles, S.J., *The Papacy for a Global Church*, AMERICA, July 15, 2000, at 68 ("The faith . . . must be successfully incarnated in the many cultures of the world.").

110. Cf. Noonan, *supra* note 85, at 662 ("That the moral teachings of the Catholic Church have changed over time will, I suppose, be denied by almost no one today.").

111. See WOLFE, *supra* note 84, at 246 ("It may seem sacrilegious even to suggest that the process of choosing a good make of car or finding decent child care have as much to do with emotional resonance as with a series of utilitarian calculations.").

112. Brooks, *supra* note 105; see also WOLFE, *supra* note 84, at 71 (noting that "evangelical believers," although they often express a desire to "take ideas seriously," are "sometimes hard pressed to explain exactly what, doctrinally speaking, their faith is"); *id.* at 88 (stating that many American Catholics have internalized "evangelical" ways of thinking and, as a result, "doctrine is simply not that important to them"); *id.* at 91 (concluding that Jews in America, notwithstanding their rich traditions of study and exegesis, have not resisted the "twelve-step religious confessionalism so widespread among evangelical religious believers").

113. WOLFE, *supra* note 84, at 67.

sensibilities, and an anti-institutional inclination common today.”¹¹⁴ Still, the theological, historical, and other considerations that one might expect to animate assessments of “developments” in doctrine—for example, a concern that such developments be authentic, and that they not distort the truth thought to have been contained in the original revelation or deposit of faith—increasingly seem irrelevant, except perhaps to working theologians, as doctrine itself has become “mobile, elusive and flexible.”¹¹⁵ This might be surprising; “belief, after all, should involve belief in something.”¹¹⁶ And yet, Wolfe concedes, perhaps is naïve to think that “people could continue to believe in the power of the religious doctrines that once inspired their ancestors when their society chews up ideas of any sort in order to digest them for widespread public consumption.”¹¹⁷

Turn back, for a moment, to the facts underlying the dispute in *Hull Church*, and to the kind of “development[s]” Justice Brennan probably had in mind. The Presbyterian Church in the United States had liberalized, the local churches complained. The Church had compromised, and not merely inculturated, its own traditional teachings: It had “departed from doctrine” by ordaining women, “denying the Holy Trinity,” and so forth.¹¹⁸ The objections of these two Savannah congregations were not to the Nation’s increasing religious diversity and not—at least not explicitly—to the consumerization of American believers and their sensibilities. Rather, their objections were to what they regarded as changes, revisions, or “development[s]” in *doctrina*, or teaching. It was these developments—their causes, direction, and substance—that, in Justice Brennan’s view, were not and could not be proper objects of “secular” concern.

Now, the foregoing effort to identify more precisely the phenomenon of “development of doctrine” has proceeded entirely apart from the rich theological debates about the standards that should govern and constrain the development of doctrine, about the markers of authentic development that distinguish it from inculturation or corruption, and so on. In the Roman Catholic context, for example, theologians from John Newman to John Noonan have struggled with these important problems.¹¹⁹ Lively

114. *Id.* at 74.

115. Brooks, *supra* note 105.

116. WOLFE, *supra* note 84, at 95.

117. *Id.*

118. *Hull Church*, 393 U.S. 440, 442 n.1 (1969) (citation and internal quotation marks omitted).

119. See, e.g., NEWMAN, *supra* note 81; Noonan, *supra* note 85, at 669–77 & n.22 (citing other work concerning “changes in propositions of faith”). As Newman put it,

conversations continue about whether Catholic teachings on religious freedom and capital punishment are restatements, developments, innovations, or indefensible revisions of doctrine.¹²⁰ Legal scholars would do well, for obvious and nonsectarian reasons internal to their own discipline, to engage, or at least become more familiar with, these controversies.¹²¹ The aim in this part, though, has not been to intrude upon the internal theological debates of one or any religious tradition, or to dissect the cultural and other movements described above. Rather, it has been to define precisely this notion of “the development of doctrine,” and to differentiate it from other social changes, religious expressions, and cultural phenomena, so as to better assess Justice Brennan’s statement that such development should be “free” and that its substance is a matter of “ecclesiastical” and not “secular” interest. For present purposes, the “development of doctrine” does not refer to amorphous sweeping changes in the style of American religion and the sensibilities of American believers. Instead, it refers to articulable changes to identifiable, orthodox claims and teachings of specific religious groups, regardless of whether these changes satisfy, from the point of view of one standing within the relevant tradition, whatever criteria exist in that tradition for distinguishing authentic development from heresy.

III. THE “UN-FREE” DEVELOPMENT OF DOCTRINE

Justice Brennan’s opinion in *Hull Church* is fairly read as claiming that “development” in religious doctrine should be—and, as a matter of First Amendment principle, must be—“free.”¹²² Thus, before turning to the question whether religious doctrine and its development are or should be matters

“true development . . . corroborates, not corrects, the body of the thought from which it proceeds.” NEWMAN, *supra* note 81, at 145. Newman also suggested:

The development . . . of an idea is not like an investigation worked out on paper, in which each successive advance is a pure evolution from a foregoing, but it is carried on through and by means of communities of men and their leaders and guides; and it employs their minds as its instruments and depends upon them while it uses them. . . . It is the warfare of ideas under their varying aspects striving for the mastery

Id. at 29.

120. See, e.g., Avery Cardinal Dulles, *Catholicism and Capital Punishment*, FIRST THINGS, Apr. 2001, at 30; Dulles, *supra* note 85, at 39 (“Over the past fifty years we have seen a strong and welcome development of the doctrine of religious freedom.”); see also Noonan, *supra* note 85, at 673 (“[T]he Church has the mission of determining what is only the projection of subjective feelings and what is an authentic response to Christ as revealed.”).

121. For examples of such engagement by prominent legal scholars, see, for example, SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988); MICHAEL J. PERRY, UNDER GOD? RELIGIOUS FAITH AND LIBERAL DEMOCRACY (2003).

122. See *supra* note 18.

only of "ecclesiastical concern," it makes sense to look a bit more closely at this claim.

Justice Brennan almost certainly used the term "free" to mean something like "free from direct, tangible influence or interference by government." The contention that the development of doctrine should be "free" in this sense is, under any attractive understanding of religious freedom, sensible and even compelling. And yet, there is no denying that governments like ours do prompt, shape, push, and constrain changes in religious doctrine all the time and in all kinds of ways. They could hardly do otherwise: Governments enact laws, laws are part of culture and operate on persons, and religions speak, act, and take shape in and through culture and persons.¹²³ In a sense, then, the "development of doctrine" is not and could never be "free" from outside and governmental influences. Nor could it ever effectively be constrained by such influences; after all, "[t]he human desire for mental repose is not to be satisfied in this life."¹²⁴ One of the challenges, then, for any polity that commits itself to religious freedom, is to recognize, manage, and restrain these influences.¹²⁵

Of course, for religious believers situated within particular communities and traditions, the causes of those doctrinal changes that are acknowledged—and, almost certainly, some will have to be acknowledged¹²⁶—are not

123. See, e.g., SCHUCK, *supra* note 86, at 273–74. Schuck notes:

This process of change [in immigrants' religious identities] . . . is a two-way street. Even as American religion alters the immigrants, the immigrants alter their religions, both in the United States and abroad. American social and ideological conditions helped liberalize the Catholic Church Similarly, Judaism was 'Americanized' during the twentieth century, and much the same is occurring today with Islam, Hinduism, Buddhism, and other world religions.

Id.; see also Thomas Bokenkotter, *Democracy Meets Doctrine*, AMERICA, Dec. 2, 2002, at 25, 27 (reviewing JAY P. DOLAN, *IN SEARCH OF AN AMERICAN CATHOLICISM: A HISTORY OF RELIGION AND CULTURE IN TENSION* (2002)) (stating that Dolan "shows how the democratic impulse at times exerted some pressures . . . on the American Catholic community," but noting also the "remarkable way the Catholic Church largely resisted these pressures and maintained its monarchical governance and distinctive traditions and identity in a country so enamored of individual freedom, so Protestant, so imbued with prejudice against the papacy and so contemptuous of tradition"); cf. *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 103 (1952) (noting that "[Russian Orthodox] church members already here [at the time of the Soviet revolution], immigrants and native-born . . . were accustomed to our theory of separation between church and state" and stating that "[n]aturally the growing number of American-born members of the Russian Church did not cling to a hierarchy identified with their country of remote origin with the same national feeling that moved their immigrant ancestors").

124. Noonan, *supra* note 85, at 676.

125. See generally Mark E. Chopko, *Shaping the Church: Overcoming the Twin Challenges of Secularization and Scandal*, 53 CATH. U. L. REV. 125 (2003).

126. Noonan, *supra* note 85, at 671 ("To deny that real change . . . occur[s] . . . would be an apologetic tactic incapable of execution and unworthy of belief.").

reducible simply to cultural, let alone political or legal, pressures. After all, to be a religious believer is, among other things, to believe that one's faith, its content, and its objects are more than artifacts, projections, or constructs. Accordingly, my aim here is not to deny that authentic doctrinal development is the result of clearer thinking, of new revelation, or of "deeper insight."¹²⁷ That governments will sometimes want to, and state action sometimes will, change religion's teachings does not mean that all such changes are caused by government. Even sincere, deep, and abiding religious commitments do not require one to dispute that law can inspire and shape the development of doctrine. Such development, in other words, is rarely "free," if by "free" one means "untouched by the aims and acts of governments, courts, and laws."

Most generally, governments shape through law and otherwise the social landscape and cultural environment—even the physical landscape and neighborhoods¹²⁸—in which religious communities and claims operate. Governments provide incentives and disincentives, and wave carrots and sticks, that influence our conduct, beliefs, and values. Governments collect taxes, confer licenses, disburse benefits, create entitlements, and structure expectations. They decide whether to allow usury, to recognize marriage, to regulate abortion, and to impose the death penalty. In these and countless other ways, law constructs the problems and poses the questions to which religious believers, traditions, and doctrines respond. In so doing, laws and governments shape the responses themselves.¹²⁹

Governments also persuade more subtly, through spending priorities, through the availability and definition of regulatory exemptions, and through conditions attached to public-welfare disbursements.¹³⁰ Governments affect the development of doctrine when they refuse a tax-exemption to an otherwise-eligible religiously affiliated college that discriminates on the basis

127. See John T. Noonan, Jr., *On the Development of Doctrine*, AMERICA, Apr. 3, 1999, at 6, 8. In a similar vein, as Andrew Koppelman reminded me, both at the Symposium of which this Article is a part and in private conversation, that religious doctrine takes shape in cultural and political contexts does not mean it is false. See, e.g., Koppelman, *supra* note 74, at 152 ("All religious choices are always already made in a political context. Even hermits in the wilderness got there by a process of socialization that led them to their religious convictions.").

128. See generally DOUGLAS RAE, CITY: URBANISM AND ITS END (2003).

129. See Mark Tushnet, *In Praise of Martyrdom?*, 87 CAL. L. REV. 1117, 1119 (1999) ("Religions necessarily negotiate their way through the non-religious world, and they are inevitably changed as they do so.").

130. On the persuasive power of conditional spending, see, for example, Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1 (2003). See also Tushnet, *supra* note 129, at 1119.

of race¹³¹ or to a church that crosses a state-defined line between the spheres of religion and electioneering.¹³² It would be implausible to maintain that governments are meddling in “matters of purely ecclesiastical concern”¹³³ when they refuse to contract out construction projects, social services, and education to firms, agencies, and schools whose practices are inconsistent with their moral and other commitments. In the end, whether one embraces a reductionist view of religion or believes instead as an article of faith that truth is discovered and expresses itself through religious doctrine in ways appropriate to the times, it seems unlikely that doctrine does, or even could, develop “free” from state action and from the effects of law.

Additionally, many prominent scholars today emphasize that law is both expressive¹³⁴ and didactic.¹³⁵ Law is more than a set of duly promul-

131. See generally *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); Garnett, *supra* note 15; Bradley, *supra* note ___, at 1068–71.

132. On this point, Professor Lee has quipped that the tax exemption is the government’s way of paying churches not to talk about certain things. Randy Lee, *When a King Speaks of God; When God Speaks to a King: Faith, Politics, Tax Exempt Status, and the Constitution in the Clinton Administration*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 391, 434 (“Section 501(c)(3) . . . pays churches through tax-exempt status to be silent on issues deemed by the state to be political.”); cf. *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 102 (Cal. 2004) (Brown, J., dissenting) (criticizing the Women’s Contraception Equity Act as an “intentional, purposeful, intrusion into a religious organization’s expression of its tenets” and insisting that “[t]he government is not accidentally or incidentally interfering with religious practice; it is doing so willfully by making a judgment about what is or is not religious”).

133. *Hull Church*, 393 U.S. 440, 449 (1969).

134. For more on “legal expressivism,” see, for example, Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000); Symposium, *The Expressive Dimension of Governmental Action*, 60 MD. L. REV. 465 (2001). The observation here that law is “expressive” is not intended to stake any particular claim in the ongoing debates over the content and merits of “expressivism,” but only to make the fairly pedestrian point that “law has an expressive dimension—it conveys meanings, sends messages.” Steven D. Smith, *Expressivist Jurisprudence and the Depletion of Meaning*, 60 MD. L. REV. 506, 510 (2001); cf. *id.* at 507. That said, as Smith observes:

The notion of an “expressivist jurisprudence” . . . is initially puzzling in the same way that calls for a “vocal theory of opera” or a “visual account of painting” would be puzzling. It seems plain enough that law “expresses,” or that it conveys “meanings”; that is just the way law quite obviously works. Law is not like a bully or a bulldozer that can just do things sullenly and through brute force; at its core, law is constituted by words, sentences, arguments, imperatives—by things that mean. If law did not convey meanings it would be impotent; or rather, it would not be law.

Id.

135. See, e.g., *United States v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting) (observing that “[o]ur expectations . . . are in large part reflections of laws that translate into rules the customs and values of the past and present,” and that “[s]ince it is the task of the law to form and project, as well as mirror and reflect, we should not, as judges, merely recite the expectations and risks without examining the desirability of saddling them upon society”); *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) (“In a government of laws, existence of the government will be imperilled [sic] if it fails to observe the law scrupulously. Our Government is the

gated rules, and it produces more than an array of rewards and punishments. It embodies, conveys, and is intended to inculcate claims about how we ought to live together and toward which ends we ought to move. It aims not only to control, but also to form, through instruction, persuasion, and example, those to whom it is addressed and to whom it applies.

Professor Koppelman has noted that the “most obvious way” the government “expresses an opinion” is “through the passage of legislation. In this arena, the government has available to it a particularly powerful type of symbolic conduct that is unavailable to other actors.”¹³⁶ But there are other ways that law speaks and teaches. For instance, Professor Levinson, in his thoughtful monograph on public monuments, explores the persuasive power of both symbolic and explicit government expression.¹³⁷ There, joining many other scholars and commentators,¹³⁸ he fixes his sights squarely on the “quixotic” notion that governments, in their expressive capacities, can be “neutral.” He refuses to “anathematize] . . . the state’s active tilting on behalf of a particular vision of how best to live one’s life.”¹³⁹ In fact, he insists, the state unavoidably and understandably *does* “honor” and “celebrate” some views and not others. Like religious believers, communities, and institutions, governments are “active participant[s] in the intellectual marketplace,” and their influence is unavoidable if not irresistible.¹⁴⁰

There is much more that is worth saying about the rich and complex problem of “government speech,”¹⁴¹ about related matters such as the “view-point neutrality” rules pronounced and enforced in the Court’s free-speech cases,¹⁴² and about the “endorsement” test often applied in cases involving

potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example.”). See generally M. Cathleen Kaveny, *Autonomy, Solidarity and Law’s Pedagogy*, 27 LOUVAIN STUD. 339, 349–53 (2002) (exploring the role of “law as moral teacher”).

136. Koppelman, *supra* note 74, at 111.

137. SANFORD LEVINSON, *WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES* (1998).

138. See, e.g., Smith, *supra* note 26, at 636, 639 (insisting that “government inevitably *will* endorse and in that sense prescribe some beliefs” and that “many of the most revered events and chapters in our constitutional tradition have resulted directly from [the] practice” of “endorsing and promoting particular beliefs over others”); cf. Andrew Koppelman, *No Expressly Religious Orthodoxy: A Response to Steven D. Smith*, 78 CHI.-KENT L. REV. 729 (2003) (insisting, inter alia, that Justice Jackson’s opinion in *Barnette* can reasonably be understood as advocating an entirely defensible principle against “expressly religious” public orthodoxy).

139. LEVINSON, *supra* note 137, at 77, 78.

140. *Id.* at 79.

141. See, e.g., Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1 (2000); Abner S. Greene, *Government Speech on Unsettled Issues*, 69 FORDHAM L. REV. 1667 (2001).

142. See, e.g., *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

public religious displays and expression.¹⁴³ For now, it is sufficient to underscore the point that government regulation, spending, and speech work in and through culture to shape the beliefs of persons and the commitments of religious and other communities. Such state actions prompt and participate both in the general “transformation” of religious sensibilities and, more specifically, in the development of particular religious doctrines.

It is not only positive legal prohibitions, conditional government spending, and symbolic state expression that complicate the “free development” account; judge-made legal doctrines do as well. These doctrines, particularly those generated by courts interpreting the First Amendment, construct the pathways along and through which governments may act. They guide religious communities’ decisions and lawyers’ advice. For example, the Court’s controversial decision in *Employment Division v. Smith*¹⁴⁴ allows governments to impose burdens on religiously motivated practices, and on compliance with duties expressed in religious doctrine, as long as these burdens are imposed via facially neutral, generally applicable laws. The Free Exercise Clause is understood, then, to allow legislators to increase the “costs” of complying with certain doctrines, thereby creating an incentive for religious communities to remove or relieve those costs by revising those doctrines.¹⁴⁵ To be sure, *Smith* and other recent cases do not permit legislators to “single out” religious believers or practices, because they are religious, for such burdens,¹⁴⁶ but we are not yet talking about state action aimed specifically at causing changes in religious teachings as such. Whatever the merits of *Smith*’s general-applicability and facial-neutrality requirements,¹⁴⁷ current free exercise doctrine not only permits legislative action to affect, but also can itself affect, the content of religious doctrine.¹⁴⁸

A corollary, or implication, of the *Smith* rule is that religiously grounded exemptions from laws or legislative accommodations for those who might otherwise be burdened by them are *not* constitutionally required.

143. See, e.g., *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 772–83 (1995) (O’Connor, J., concurring in part and concurring in the judgment).

144. 494 U.S. 872 (1990).

145. See, e.g., *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67 (Cal. 2004).

146. See generally *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1 (2000).

147. Compare Michael W. McConnell, *The Origins and Historical Understandings of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990), with Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245 (1991), Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L. REV. 555 (1998), and Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992).

148. See generally Carmella, *supra* note 107.

Governments are permitted to exempt religious believers from otherwise applicable, burdensome laws,¹⁴⁹ but such accommodations are a matter of grace: Whether these exemptions exist and what relief they provide are details to be worked out in the legislative arena, through the political process.¹⁵⁰ Even a willing legislature's ability to accommodate or exempt religiously motivated practice is constrained by doctrines that forbid the singling out of religion for special benefits.¹⁵¹ One upshot of all this, of course, is that some religious practices will be accommodated and others will not.¹⁵² Some state-imposed burdens on compliance with some religious obligations, and on living in accord with certain religious doctrines, will be lifted and others will not. Some burdens will strike majorities and legislators as calling for exemptions, and some doctrines giving rise to the burdened practices will seem worthy of accommodation, but others will not.¹⁵³ As the recent

149. See *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987) ("This Court has long recognized that the government may . . . accommodate religious practices and that it may do so without violating the Establishment Clause." (quoting *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144–45 (1987))). But see *City of Boerne v. Flores*, 521 U.S. 507, 536–37 (1997) (Stevens, J., concurring) (arguing that an "exemption" for religious practice provided by the Religious Freedom Restoration Act was unconstitutional because "the statute has provided the Church with a legal weapon that no atheist or agnostic can obtain," and insisting that "[t]his governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment"); Steven B. Gey, *Why Is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75 (1990). See generally Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685 (1992); McConnell, *supra* note 146.

150. *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990). As was stated in *Smith*: Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.

Id. See generally William K. Kelley, *The Primacy of Political Actors in Accommodation of Religion*, 22 U. HAW. L. REV. 403 (2000).

151. See *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989). See generally McConnell, *supra* note 146, at 41 (noting current Supreme Court doctrine that, "in the discretion of the legislature, religious exercise may be exempted from neutral and generally applicable laws if, but only if, the accommodation is 'designed to alleviate government intrusions that might significantly deter adherents of a particular faith from conduct protected by the Free Exercise Clause,' and would not 'have the effect of "inducing" religious belief'" (footnotes omitted)).

152. *Bd. of Educ. v. Grumet*, 512 U.S. 687, 715–18 (1994) (O'Connor, J., concurring) (expressing concern that one particular religious group was singled out for special accommodation by the legislature). But see *id.* at 722 (Kennedy, J., concurring) (objecting to a suggestion in majority opinion that "an accommodation for a particular religious group is invalid because of the risk that the legislature will not grant the same accommodation to another religious group suffering some similar burden" and noting that "[t]his rationale . . . [is] . . . without grounding in our precedents and a needless restriction upon the legislature's ability to respond to the unique problems of a particular religious group").

153. Cf. Tushnet, *supra* note 129, at 1119 (insisting that "[c]hanges induced by the availability of accommodations are no different, and no more troubling, than changes induced by the existence of television or automobiles").

Catholic Charities decision illustrates, those accommodations that emerge from the legislative process might not track—and, indeed, could very well undermine or insult—the religious commitments and obligations burdened by the law.¹⁵⁴

The “no religious decisions” principle itself is, oddly enough, another example of a religious-doctrine-shaping cluster of rules.¹⁵⁵ Along with several other similar doctrines—for example, the “entanglement” portion of the Court’s *Lemon* test and the prohibition on delegating public power to religious officials—the rule requiring courts to abstain from adjudicating disagreements over religious doctrine, even when those disagreements arise in the context of otherwise garden-variety legal disputes, can have the perhaps unexpected effect of influencing the development and shaping the content of that doctrine. On the one hand, some have argued that cases like *Hull Church* protect entrenched religious authorities and their decisions, not only from intrusive external second-guessing, but also from internal challenges.¹⁵⁶ The “no religious decisions” rule is seen by some as working to the disadvantage of dissenters advocating developments or changes in certain teachings.

Hull Church is a reminder, then, that a rule that defers to established religious authorities, to the possible detriment of dissenters, does not necessarily stifle doctrinal change or shore up traditional teachings. On the other hand, as Professor Levine has emphasized, the courts’ “hands off” approach to religious-doctrine questions can also make it more difficult for religious communities to fend off ersatz developments and inauthentic innovations.¹⁵⁷ Courts’ refusal to evaluate even the most outlandish claim about religious teaching, or to interpret even the most straightforward doctrinal statement, may have the ironic effect of hamstringing these communities’ efforts to persist.

Now, to recall that state actions—for example, government speech, public spending, legislative enactments, judicially crafted doctrine, and so on—influence not only the behavior and beliefs of religious people, but also the substance and development of religious doctrine, is not to say that such actions are designed to force such changes or are animated by any “invidious” intent. It is not to suggest that such actions are invalid, or even suspect. They are, again, inevitable. Nor is it to disagree with Justice Brennan’s basic point in *Hull Church* that disabling the government’s courts from

154. See generally *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67 (Cal. 2004).

155. On the “no religious decisions” principle, see *supra* Part I.

156. See, e.g., Sunder, *supra* note 20, at 1403, 1427, 1470; J. Brant, *Religion in the Workplace*, 4 EMPLOYEE RIGHT & EMP. POL’Y J. 87, 106–09 (2000).

157. See Levine, *supra* note 82, at 87, 113–15.

interpreting religious texts and claims is good law, sound policy, and protects religious freedom in important ways. It is merely to observe that doctrinal development is not ever really “free” in any strong sense.

We can say with confidence—and without wading too far into deep and difficult theological waters—that religious doctrine develops. This is not reductionism. It is merely an appropriate qualification of Justice Brennan’s statement, and a recognition that religion takes form in cultures and contexts shaped by law. To acknowledge as much is not—at least, not yet—to say anything about the ambitions of secular governments or the vulnerability of religious freedom.

Sometimes, however, doctrinal change is in the interest of secular, liberal, democratic governments, and accordingly, such governments will want to change—not necessarily to repress or punish, only to change—religious doctrine. Sometimes, such governments will quite understandably want not only to endorse and express messages that conflict with those of some or many religions, and not only to change the minds and shape the values of citizens, but also to bring about revisions in religions’ teachings. The purpose of these efforts is not merely to affect the behavior of religious believers, without regard to the origins of the views and habits in which that behavior might be rooted. Rather, it is to work a specific modification in the expression and teaching of religious institutions and traditions.

And so, turn now from what might be the unremarkable observation that the development and content of religious doctrines, like the beliefs and practices of religious persons, are shaped in many ways by state action to what is probably a more jarring claim, namely, that governments like ours sometimes act for the *purpose* of changing religious teachings. In other words, sometimes, promoting heterodoxy is policy.

It seems strange even to consider the notion of government policies aimed at causing modification to the tenets of a particular faith. Indeed, it would appear that, such policies and aims are textbook examples of what our governments may not do. Certainly, the overwhelming weight of the relevant case law and commentary is to this effect. After all, to identify a theological proposition—as a *theological proposition*—as in need of change, or to set the public sights on a doctrinal claim—as a *doctrinal claim*—is certainly to take “cognizance” of religion.¹⁵⁸ True, as Justice Goldberg once emphasized, “[g]overnment must inevitably take cognizance of the existence of religion and,

158. See Memorial and Remonstrance Against Religious Assessments, *reprinted* in *Everson v. Bd. of Educ.*, 330 U.S. 1 app. at 64 (1947) (“We maintain therefore that in matters of Religion, no man’s right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance.”).

indeed, under certain circumstances the First Amendment may require that it do so.”¹⁵⁹ Yet, this kind of “cognizance,” which goes well beyond the notice inevitably involved in efforts to exempt religiously motivated practices from particular regulatory burdens, seems dramatically out of place in our tradition of church-state separation.¹⁶⁰

However, many examples are available, and many more are certainly imaginable, of past and present government policies that can fairly be characterized as directed to produce changes in religious teaching.¹⁶¹ For example: In 1890, the Church of Jesus Christ of Latter-Day Saints abandoned polygamy, or “plural marriage,” a practice the Church had sanctioned since 1852, when Brigham Young “proclaimed that Mormons believed in and practiced . . . the ‘celestial’ law of plural marriage, or ‘Patriarchal Marriage.’”¹⁶² In 1896, Utah was admitted to the Union on the condition that its constitution provide that polygamy was “forever prohibited.”¹⁶³ A review of the conflict between the United States and Utah—or, more accurately, between the United States and the Mormon Church—over polygamy reveals that this was not simply a case where a generally applicable and religion-neutral marriage policy had the perhaps foreseeable but unintended consequence of burdening religiously motivated practice. Rather, it appears that the federal government designed and implemented policy with the aim of changing the Church’s doctrines and beliefs, not only to constrain conduct to which the government objected, but also to reduce what the United States saw as the dissonance between the values, worldview, and loyalties of Mormons and those of an ascendant American nationalism.¹⁶⁴

159. Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring); see also Vincent Blasi, Essay, *School Vouchers and Religious Liberty: Seven Questions from Madison’s Memorial and Remonstrance*, 87 CORNELL L. REV. 783, 789 (2002) (“[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.”).

160. On separationism as a “tradition,” see, for example, Steven D. Smith, *Separation as a Tradition*, 18 J.L. & POL. 215 (2002).

161. To characterize these policies in this way is not to presume or argue that any particular doctrinal movement would necessarily be regarded as the product of state (as opposed to divine or community) action by someone standing *within* a particular religious tradition, or even that it would be regarded as a “development” at all (as opposed to, say, a new articulation of traditional teaching, an instance of “inculturation,” etc.).

162. See SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA* 1 (2002). The Supreme Court had ruled in 1878 that Congress had the power to prohibit, and the First Amendment permitted Congress to outlaw, polygamy in the Territory of Utah. *Reynolds v. United States*, 98 U.S. 145 (1878).

163. Utah Enabling Act, ch. 138, 28 Stat. 107 (1894).

164. Again, that it was the goal of government policy to change the Church’s doctrine, and that the Church’s doctrine on plural marriage in fact changed, does not mean that the doctrine changed because of government policy, rather than because of a new and divine revelation, as the

One could also point to many episodes in American history where it was a policy goal of various governments to induce changes in the teachings of the Roman Catholic Church—or, at least, of the Roman Catholic Church in America—and thereby to “Americanize” practicing Catholics. For at least a century, and particularly during the 1870s, 1920s, and 1940s, it was unremarkable in respectable public-policy and political-theory debates for participants to express worries about the insufficiently democratic character of Catholicism and to endorse measures aimed at reforming that character.¹⁶⁵ Also, a number of tax- and incorporation-related measures were proposed during the latter parts of the nineteenth century, whose purpose was to undermine the power and voice of the Catholic Church’s allegedly foreign and undemocratic hierarchy by forcing changes in how the Church governed and organized itself.¹⁶⁶ These policies were animated not merely by the hope that Catholic citizens would become more American, but also by the more ambitious goal of influencing the messages that these citizens received from their Church.

In the present day, revelations about sexual abuse by Catholic priests have prompted calls for increased government supervision not only of the Church’s responses to allegations of abuse, but also of the Church’s training

Church today teaches. For another discussion of the Americanization of Mormonism, and of government efforts to prompt it, see, for example, R. LAURENCE MOORE, *RELIGIOUS OUTSIDERS AND THE MAKING OF AMERICANS* 25–47 (1986). See also Stephen L. Carter, *Religious Freedom as if Religion Matters: A Tribute to Justice Brennan*, 87 CAL. L. REV. 1059 (1999).

165. See generally PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* (2002); JOHN T. MCGREEVY, *CATHOLICISM AND AMERICAN FREEDOM: A HISTORY* (2003); Hamburger, *supra* note 71. McGreevy notes, inter alia, that Congress passed a law denying aid to schools in New Mexico when it was still a territory *precisely* to counter the territory’s predominant Catholicism, MCGREEVY, *supra*, at 117, that Michigan enacted a church-property bill in 1855 to “check[] the power of the Catholic bishops,” *id.* at 62, and so on.

The conclusion of an 1854 decision in Maine, affirming the dismissal of a lawsuit brought by a 15-year old girl who was expelled from her public school for refusing to read the King James version of the Bible, illustrates vividly these concerns. After stating that “[t]he education of the people is . . . a matter of public concern, and of . . . paramount importance,” the court went on to note that:

Large masses of foreign population are among us, weak in the midst of our strength. Mere citizenship is of no avail, unless they imbibe the liberal spirit of our laws and institutions, unless they become citizens in fact as well as in name. In no other way can the process of assimilation be so readily and thoroughly accomplished as through the medium of the public schools.

Donahoe v. Richards, 38 Me. 379, 391, 413 (1854).

For more detailed discussions of the connections between the Common School movement and the various no-aid Amendments, on the one hand, and nineteenth (and twentieth) century nativism and anti-Catholicism, on the other, see CHARLES LESLIE GLENN, JR., *THE MYTH OF THE COMMON SCHOOL* (1988); HAMBURGER, *supra*; LLOYD P. JORGENSEN, *THE STATE AND THE NON-PUBLIC SCHOOL, 1825–1925* (1987); MCGREEVY, *supra*.

166. See, e.g., HAMBURGER, *supra* note 165, at 287–334; Hamburger, *supra* note 71.

ordaining of priests, hearkening back to some of the Middle Ages' most dramatic secular-religious conflicts.¹⁶⁷ The Attorney General of Massachusetts, Thomas Reilly, raised eyebrows when he appeared to endorse the idea of government supervision of the Catholic Church's internal reforms and to suggest that the state could and should dictate the content of those reforms.¹⁶⁸ As one prominent lawyer—the General Counsel for the United States Council of Catholic's Bishops—put it, “the current scandal over the response to sexual abuse only serves to accelerate [an] existing trend toward shaping the Catholic Church to the prevailing culture, through litigation and legislation or regulatory action.”¹⁶⁹

We might also look to the many and proliferating statements in recent years by political leaders and commentators, and by Muslim believers and scholars,¹⁷⁰ concerning the need to encourage, as a matter of public policy (and also to defend, as a matter of theology) the development and ascendancy of a “moderate” version of Islam that is presumably more friendly to pluralism, markets, and secularism.¹⁷¹ Whether such statements and proposals

167. See generally HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983).

168. See Silverglate, *supra* note 22; see also Patrick J. Schiltz, *The Impact of Clergy Sexual Misconduct Litigation on Religious Liberty*, 44 B.C. L. REV. 949 (2003). Certainly, an appropriate treatment of clerical sexual abuse and the challenge of preventing and punishing it is well beyond the scope of this Article. Nevertheless, some reactions to the clergy-abuse crisis serve as examples of proposed policies whose ends include encouraging revisions to the Catholic Church's structure and doctrine.

169. Mark E. Chopko, *Shaping the Church: Overcoming the Twin Challenges of Secularization and Scandal*, 53 CATH. U. L. REV. 125, 132 (2003) (footnote omitted).

170. See, e.g., Sunder, *supra* note 20. See generally ABDULLAHI AHMED AN-NA'IM, *TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW* (1990); KHALED ABOU EL FADL, *THE PLACE OF TOLERANCE IN ISLAM* (Joshua Cohen & Ian Lague eds., 2002).

171. See NOAH FELDMAN, *AFTER JIHAD: AMERICA AND THE STRUGGLE FOR ISLAMIC DEMOCRACY* (2003); Thomas L. Friedman, Editorial, *War of Ideas, Part 1*, N.Y. TIMES, Jan. 8, 2004, at A33 (“We cannot change other societies and cultures on our own. But we also can't just do nothing . . . What we can do is partner with the forces of moderation within these societies to help them fight the war of ideas.”); LaShawn R. Jefferson, *The War on Women*, WALL ST. J., Aug. 22, 2002, at A12 (“The international community must pressure governments to reform criminal laws and strengthen secular justice systems so that the rule of law applies across society. Civil societies must be strengthened, and local women's groups that are pushing for reform should be supported.”); Ron Moreau et al., *Holy War 101*, NEWSWEEK, Dec. 1, 2003, at 28, 29 (describing concerns of American and Pakistani governments about teaching in radical Muslim schools (*madrasas*) and government efforts to reform them); Fareed Zakaria, *We Need To Get the Queen Bees*, NEWSWEEK, Dec. 1, 2003, at 33 (quoting Lee Kuan Yew's claim that “[m]oderate, modernizing Muslims, political, religious, civic leaders together have to make the case against the fundamentalists” and that “modernizers must feel that the U.S. and its allies will provide the resources, energy and support to make them winners”); cf. Ian Buruma, *Killing Iraq with Kindness*, N.Y. TIMES, Mar. 17, 2004, at A25 (warning that “history shows that the forceful imposition of even decent ideas in the claim of universalism tends to backfire” and asking “whether the cause of moderate Muslims is helped by the

are viewed as efforts to strengthen the “true” meaning and teachings of Islam in the face of fundamentalist and inauthentic doctrines, or as attempts to throw the weight of American policy behind reformers and dissenters whose goal is to revise and liberalize, without abandoning, their faith tradition, the point is the same: Our government perceives that it has, and so is acting to advance, a “secular” interest in the content and development of Muslim teaching, both as a means of shaping the behavior and dispositions of those who receive, accept, and profess Islam, and as a way of coaxing the content of a rival *nomos* in a more America-friendly direction. And it is not simply that America and many European nations are hoping that Muslims will assimilate themselves to their Western homes and neighbors, or even to the values ascribed to the “world community.” Rather, these nations arguably seek to assimilate, or to remake, Islam itself.¹⁷²

In sum, the “development of doctrine” will rarely be “free” from the indirect influence, if not the specific attention, of secular, liberal, constitutional governments. What is more, we can expect that such governments will sometimes legislate, speak, and spend for the purpose of changing a religion’s teachings and message. Governments like ours have tried and will try to act, regulate, spend, and speak in ways that move the substantive content of religious doctrine in a direction and toward conclusions that these governments endorse. To be sure, this claim runs counter to much of what we are accustomed to saying and thinking about limited government and church-state separationism. It seems in glaring contrast to, for example, Justice Brennan’s statement in *Hull Church* that the “development of

revolutionary war that has been set off by the American and British armies”); Christopher Dickey & Carla Power, *Rethinking Islam*, NEWSWEEK, Sept. 15, 2003, at 50, 51 (quoting exiled Muslim “reformer,” Rachid Ghannouchi: “[Washington] would like to change Islam, secularize it. . . . It wants to promote Islam without Sharia . . . and without jihad . . . the right to defend ourselves.”); Noah Feldman, Editorial, *A New Democracy, Enshrined in Faith*, N.Y. TIMES, Nov. 13, 2003, at A31 (stating that “[i]t would be . . . futile for the United States to unilaterally impose secularization in Afghanistan and Iraq”).

172. See, e.g., Barbara Amiel, *Muslims Have Just As Much to Fear From Militant Islam*, DAILY TELEGRAPH, Nov. 24, 2003, at 18 (“If the problem is militant Islam, the solution is moderate Islam.” (quoting Daniel Pipes)); Francis Fukuyama & Nadav Samin, *Can Any Good Come of Radical Islam?*, OPINION J., Sept. 12, 2002 (stating that “the great need now is for Western-oriented Muslims to take advantage of the turmoil created by September 11 to promote a more genuinely liberal form of their religion”); Jefferson, *supra* note 171 (warning that the United States should be as concerned about the consequences of certain “radical interpretations of Islamic law, or Shariah” that “subordinate and exclude women,” as about “combating terrorism emerging from militants in the Islamic world”; asserting that “[i]mmediate reform of the aspects of Shariah that deny women equality under law and in practice is needed”; and contending that “[t]here are varying interpretations among Islamic jurists about whether these applications are correct, but they are grossly unfair to women, antithetical to human-rights principles, and should be reformed”).

doctrine" is a religious, or "ecclesiastical," matter in which secular governments therefore have no interest. Thus, whatever this statement's prescriptive or normative merits, it certainly fails as a descriptive matter.

IV. DECLARING RELIGIOUS TRUTH? THE CONSTITUTION AND THE STATE'S INTEREST IN RELIGIOUS DOCTRINE

So far, I have identified a phenomenon—that is, the “development of doctrine”—and established that governments often do act in ways that do and are designed to influence such development. That this is so should come as no surprise. And yet, the image of state officials and government policymakers gathered together and designing a strategy to induce changes in those religious teachings to which they object is unsettling. Government action implementing such a strategy seems almost the paradigmatic example of what is and should be forbidden by the First Amendment. This is not the place for a detailed and perhaps quixotic discussion of the First Amendment's original meaning or animating principles, or for a reexamination of the disputes about what those who drafted and ratified the First Amendment meant or were understood to mean when they proscribed federal laws “respecting an establishment of religion.”¹⁷³ Instead, my aim here is to flesh out and test the intuition that doctrine-targeting state action is, or should be, constitutionally suspect.

The provisions of our Constitution dealing with religion and religious expression generate a variety of norms, principles, values, presumptions, tests, and prohibitions.¹⁷⁴ And we can be reasonably confident that any court would find a way, using one or another of the available tools, to invalidate state action that was framed explicitly as an effort to change a religion's teachings.¹⁷⁵ First, it is “beyond dispute” that governments in the United States may not compel worship, prayer, or participation in clearly religious activities, and also that the state could never require or punish affirmations (or recantations) of religious faith.¹⁷⁶ But such clumsy moves are not the kind

173. I am inclined to embrace Professor Smith's argument that the Establishment Clause is best understood as a “jurisdictional” provision. See SMITH, *supra* note 8; see also Douglas G. Smith, *The Establishment Clause: Corollary of Eighteenth-Century Corporate Law?*, 98 NW. U. L. REV. 239 (2003).

174. See generally VOLOKH, *supra* note 10, at 667–69; TRIBE, *supra* note 10, ch. 14.

175. But see *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983).

176. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (“It is beyond dispute that . . . the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise.”); *Torcaso v. Watkins*, 367 U.S. 488 (1961); see also Act for Religious Freedom Recited, VA. CODE ANN. § 57-1 (2003) (enacted 1786) (“[N]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever . . .”).

of state efforts under consideration here. It is also probable that any policy designed to prompt development in religious doctrine would conflict with one or another versions of the “neutrality” that the Religion Clause and the First Amendment more generally are thought to require.¹⁷⁷ However, an objection based on “neutrality” is nonresponsive, because the claim is precisely that government is not, cannot be, and probably should not be “neutral” with respect to the content of religious doctrine. The sorts of state action that might usefully be evaluated under a “neutrality” standard—for example, a school-voucher program, or a generally applicable criminal law—are different in kind from those being addressed in this Article.

In addition, official efforts of the kind hypothesized here could violate the “no religious decisions” rule set out in *Hull Church* and similar cases.¹⁷⁸ After all, it is bedrock law that “government is not a judge of religious truth” and “parliaments are not to play the theologian.”¹⁷⁹ However, *Hull Church* and cases like it speak to situations where, in the course of resolving an otherwise cognizable dispute, a secular court is asked to interpret, apply, or enforce religious tenets or obligations, as defined by the relevant religious authority. As I mentioned earlier, the courts’ “hands off” approach to these cases reflects a concern that, for lack of competence, civil judges will “get it wrong,” thereby interfering with the autonomy of religious institutions and with the right of religious authorities to decide what their religion means. This fear is enhanced by the prediction that mistaken interpretations—or even correct ones—will interfere with what Justice Brennan called the “free development of doctrine.”

177. For a detailed taxonomy of the ways the Court has employed the concept of “neutrality” in Religion Clause cases, particularly public-funding cases, see, for example, *Mitchell v. Helms*, 530 U.S. 793, 878–99 (2000) (Souter, J., dissenting). See generally Brownstein, *supra* note 90, at 186; Laycock, *supra* note 15, at 1002.

178. See also *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 699, 709 (1976) (“[T]his case essentially involves . . . a religious dispute the resolution of which under our cases is for ecclesiastical and not civil tribunals.”); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 108 (1952) (“Should 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.”); *Dixon v. Edwards*, 290 F.3d 699, 714 (4th Cir. 2002) (observing, *inter alia*, that “the civil courts of our country are obliged to play a limited role in resolving church disputes,” so long as they “can be decided without resolving an ecclesiastical controversy”).

179. MURRAY, *supra* note 101, at 75; see also *id.* at xi (noting that the freedom of religion includes “the freedom of the churches to maintain their own different identities, as defined by themselves. I take it that every church claims this freedom to define itself, and claims too the consequent right to reject definition at the hands of any secular authority.”); *id.* at 70 (“In contrast to the Jacobin system in all its forms, the American Constitution does not presume to define the Church or in any way to supervise her exercise of authority in pursuit of her own distinct ends. The Church is entirely free to define herself . . .”).

In the kind of scenario imagined here, though, the government's purpose is not to interpret or enforce religious doctrine, or to "get doctrine right." Accordingly, the salient danger is not so much that a judge will "get it wrong," thereby intruding on church autonomy and throwing a wrench in the works of "free" doctrinal development. Rather, the government's purpose is to engineer the adoption of a different religious message; the point is *precisely* to cause development and change. Given this aim, concerns about secular officials' competence in theological interpretation and exegesis seem largely beside the point. That the government might attempt to understand, but in fact misinterpret, a religion's doctrine is not the danger against which the Religion Clause's "no religious decisions" principle guards. Rather, the concern is that state officials and courts act *ultra vires* when they purport to resolve conflicts implicating or arising out of doctrinal disputes, or to use secular power to shore up one side of a doctrinal dispute. This concern is not implicated, however, in a hypothetical situation where the government attempts to bring about a change in religious doctrine that would bring that doctrine into conformity with its *own* interests and values. In such a situation, the important question is whether the government has correctly identified its own interests and values, which it desires religious teachings to reflect or support, and has prudently designed a doctrine-changing strategy that is likely to advance those interests and promote those values.

Another concern underlying the *Hull Church* line of cases is that government efforts to interpret and enforce religious doctrine—even if state actors "get it right" (as those courts in the United States and elsewhere that interpreted religious doctrine in the past clearly did, from time to time)—interfere with the autonomy of religious communities and the sanctity of believers' consciences. However, while a commitment to any plausible version of religious freedom should require opposition to such interferences, it is not clear that state-instigated developments of doctrine necessarily involve them. An official effort to bring about a revision in doctrine need not be coercive, and need not involve intrusive second-guessing or oversight of a religious community's internal workings. The goal, remember, is persuasion and transformation, not overt subjugation. The state's efforts are aimed at changing the doctrinal expression of religions, and do not directly target the beliefs and values of individuals. Of course, the reason for wanting a change in religious doctrine is to secure the change's "downstream effects," that is, citizens with state-endorsed commitments. Further, as Professor Koppelman reminds us, "[a]ll religious choices are always already made in a political context. Even hermits in the wilderness got there by a process of socialization that led them to their

religious convictions.”¹⁸⁰ Thus, that the government acts to shape that context, knowing and intending that its actions and that context might prompt or shape doctrinal development, does not seem to raise freedom-of-conscience or church-autonomy concerns.

Another component of contemporary Religion Clause jurisprudence is worth considering in more detail: All state action must have a “secular . . . purpose.”¹⁸¹ Perhaps because this idea is so foundational, government actions have only rarely been invalidated by the Supreme Court for lacking such a purpose.¹⁸² Nevertheless, the Court ruled that an Arkansas law banning the teaching of evolution in public schools and universities lacked such a purpose because the law was supported by no “considerations of state policy” other than the “religious views of some of its citizens.”¹⁸³ The Court also struck down a Kentucky statute requiring schools to post copies of the Ten Commandments, insisting that the law’s purpose was “plainly religious.”¹⁸⁴ In *Wallace v. Jaffree*,¹⁸⁵ the Court concluded that Alabama’s moment-of-silence law, which mandated such a moment “for meditation or voluntary prayer,” lacked any secular purpose.¹⁸⁶ And in *Edwards v. Aguillard*,¹⁸⁷ the Justices disapproved Louisiana’s decision to require equal treatment of evolution and creation science in schools.¹⁸⁸

Some applications of this rule have reasonably been criticized as scattershot and outcome driven. And its contours and bounds can reasonably be debated. In the end, though, it is descriptively accurate to say that “[a] world without the secular purpose requirement would be so strange as to be nearly unrecognizable.”¹⁸⁹ As Professor Koppelman has observed, the requirement that laws have a secular purpose, notwithstanding its several flaws, “follows directly from a principle at the core of the Establishment Clause: that government may not declare religious

180. Koppelman, *supra* note 74, at 152.

181. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

182. Professor Koppelman notes that “the cases in which the challenged statute survives the [secular purpose] prong vastly outnumber those in which the Court invalidates the statute.” Koppelman, *supra* note 74, at 97.

183. *Epperson v. Arkansas*, 393 U.S. 97, 107 (1968); see also *id.* at 103 (evolution is “proscribe[d] for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group”).

184. *Stone v. Graham*, 449 U.S. 39, 41 (1980) (per curiam).

185. 472 U.S. 38 (1985).

186. *Id.* at 58–59.

187. 482 U.S. 578 (1987).

188. *Id.* at 592 (concluding that the legislative history revealed a plan to “change the science curriculum of public schools in order to provide persuasive advantage to a particular religious doctrine that rejects the factual basis of evolution in its entirety”).

189. Koppelman, *supra* note 74, at 166.

truth.”¹⁹⁰ That is, “the First Amendment . . . is, among other things, a restriction on government speech. It means that the state may not declare articles of faith. The state may not express an opinion about religious matters. It may not encourage citizens to hold certain religious beliefs.”¹⁹¹ In addition, “[t]he state simply is not permitted to take an official position on matters of religion,”¹⁹² nor may it communicate such a position via legislation, symbolic conduct, or expression.¹⁹³

Professor Koppelman has provided a detailed and powerful rehabilitation and defense of the “secular purpose” requirement. Assuming, then, the existence and wisdom of such a constitutional rule, is it offended by state action and expression aimed at changing religious teaching—that is, by government conduct that has a purpose, and not merely an effect, of changing, revising, or pushing the evolution of doctrine? Would such efforts by government run afoul of the rule that public officials and actors not “declare religious truth”?

In a way, the secular-purpose requirement is a prescriptive restatement of Justice Brennan’s descriptive observation that doctrine and its development are matters of “purely ecclesiastical concern,” in which “secular interests” are not and should not be “implicat[ed].”¹⁹⁴ However, it is surely the case that plausible and powerful “secular” reasons exist for government to want particular religions to revise or abandon particular tenets, and that policies designed to satisfy this want would therefore have a “secular” purpose. For example, our government has a “secular” interest in bringing about a change in the racist doctrine of the World Church of the Creator (WCC), now known as the “Creativity Movement.” A “development” in that Church’s “doctrine” would not, in fact, be a matter of only “ecclesiastical” concern.¹⁹⁵ Remember, that the government’s interests and reasons are “secular” does not mean that they are pedestrian, procedural, or couched strictly in terms of policy mechanics. On the contrary, such “secular” reasons are highly normative, value-laden, and even “moral.”¹⁹⁶

190. *Id.* at 89; see also *id.* at 108 (observing that it is an “Establishment Clause [a]xiom” that the “Clause forbids the state from declaring religious truth”).

191. *Id.* at 109 (citing, *inter alia*, *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871) and *United States v. Ballard*, 322 U.S. 78 (1994)).

192. *Id.* at 111.

193. *Id.* at 110–11.

194. *Hull Church*, 393 U.S. 440, 449 (1969).

195. According to the Antidefamation League, the World Church of the Creator is one of the Nation’s “fastest-growing hate groups.” The Church “is a racial religion whose prime goal is the survival, expansion and advancement of the White Race.” See ADL Backgrounder: World Church of the Creator, at <http://www.adl.org/backgrounders/wcotc.asp> (July 6, 1999).

196. See generally Steven D. Smith, *The “Secular,” the “Religious,” and the “Moral”: What Are We Talking About?*, 36 WAKE FOREST L. REV. 487 (2001).

A “no religious decisions” purist might object at this point that the government’s interest—its “secular,” albeit moral, purpose—in the content and development of the WCC’s doctrine would be better served by prohibitions on racist threats by particular speakers, by punishing racism-motivated violence by particular actors, and by antiracist counterspeech than by policies inducing doctrinal development. Yes, the argument goes, the government clearly may and should act to deter, punish, and redress conduct that is inspired by the Church’s racist doctrine.¹⁹⁷ It may and should try to persuade Church members and others to reject such doctrine through symbolic endorsement of antiracism and other means. Such actions do not require public officials to “declare religious truth” or to “play the theologian.”¹⁹⁸ Instead, these actions target the behavior and beliefs of individuals for change, not the teachings of religious communities, associations, and traditions. But if there is a “secular purpose” that justifies state actions aimed both at shaping citizens’ beliefs and regulating these beliefs’ undesirable manifestations in conduct, it is hard to see why that same purpose could not justify similar actions aimed at the expression, or “doctrine,” of associations and traditions that instill, spread, and nurture such beliefs. That is, if there is a “secular” government interest in encouraging citizens to believe some things and not others, then there seems to be a similar interest in wanting religions to teach some things and not others.

What, then, about the attractive axiom that “government may not declare religious truth”?¹⁹⁹ Set aside for now the difficulty in crafting a sharp distinction—one that does not itself depend on assumptions that are, in the end, theological—between “religious truth” and “secular values” or “moral commitments.”²⁰⁰ A reasonable response to an objection grounded on this axiom might be that government action or expression aimed not just at countering the racist message of the WCC, but also and more particularly at bringing about a revision in that message, is not an effort to “declare religious truth.” It is, instead, an effort to undermine the government’s competition in the citizen-formation game by arranging for a rival source of meaning to abandon its own toxic message and to embrace, as religious truth, the message preferred by the state. It is an attempt to induce the *Church* to “declare” as

197. Cf. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 579 (1995) (“While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.”).

198. See Koppelman, *supra* note 74, at 89; MURRAY, *supra* note 101, at 75.

199. Koppelman, *supra* note 74, at 89.

200. See, e.g., Smith, *supra* note 196.

"religious truth" what the state happens also to embrace as "secular," civic truth. The government could say, if called to account, "We are not declaring religious truth. You are right—that is not our business. We are simply trying, through policy and lawmaking, to get this religious group to conform the content of its religious doctrine to public values, and to our (entirely secular) orthodoxy."

"Orthodoxy"? The game is up! Justice Jackson, remember, conceded in the flag-salute case that "[n]ational unity [is] an end which officials may foster by persuasion and example," but nonetheless warned that "[c]ompulsory unification of opinion achieves only the unanimity of the graveyard."²⁰¹ He went on to proclaim, in ringing terms and with characteristic flair:

[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.²⁰²

These words, widely thought to belong "among the great paeans to human liberty,"²⁰³ might seem to set our Constitution irrevocably against any ambitious doctrine-revision agenda. "There is," after all, "no mysticism in the American concept of the State"; "[a]uthority here," Justice Jackson insisted, "is to be controlled by public opinion, not public opinion by authority."²⁰⁴ In the end, however, *Barnette's* sweeping "no orthodoxy" proclamation can hardly be taken seriously as a description of how our government actually acts.²⁰⁵ Indeed, Professor Smith has written that Jackson's words "committed [us] to a course of massive collective delusion," "one that

201. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640–41 (1943).

202. *Id.* at 642; *see also* *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728 (1872) ("The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."); *cf.* MURRAY, *supra* note 101, at 85 ("We will tolerate all kinds of ideas, however pernicious; but we will not tolerate the idea of an orthodoxy. That is, we refuse to say, as a people: There are truths, and we hold them, and these are the truths.").

203. GLENDON SCHUBERT, *DISPASSIONATE JUSTICE: A SYNTHESIS OF THE JUDICIAL OPINIONS OF ROBERT H. JACKSON* 34 (1969).

204. *Barnette*, 319 U.S. at 641.

205. *Cf.* Koppelman, *supra* note 138. Professor Koppelman contends that *Barnette's* "no orthodoxy" claim can be salvaged by limiting its application to "expressly religious" orthodoxy. In Professor Smith's view, though, this rehabilitation project fails. *See* Smith, *supra* note 26. In any event, if the "no orthodoxy" rule is refashioned along the lines Koppelman suggests, then state policy directed to pushing religious doctrine toward the state's own not-expressly-religious orthodoxy does not violate or undermine the rule.

requires us to pretend . . . that . . . government cannot and therefore does not prescribe—does not officially stand for—any ‘right opinions.’”²⁰⁶ Of course governments—even liberal, constitutional governments—“prescribe” orthodoxy. Thomas Jefferson’s quip about polytheistic pick-pockets notwithstanding, even liberal, constitutional governments are not, and cannot be, indifferent to “matters of opinion.” Our government consciously and purposely articulates positions, stakes claims, and take stands; it approves, endorses, and subsidizes some controversial and contestable ideas, and rejects others. Indeed, our government in particular was founded upon, and dedicated to, certain ideas and propositions.²⁰⁷

Moving away from the Religion Clause for a moment, the Court has confronted alleged efforts by government to revise the expression and organizing principles of groups in a number of contexts.²⁰⁸ In *California Democratic Party v. Jones*,²⁰⁹ for example, the Court invalidated on First Amendment grounds a “blanket primary” system that California had adopted by initiative. Under that system—whose purpose was to encourage the nomination of more “moderate”, “centrist” candidates, and thereby to “improve” the tone of California’s elections and the substance of its politics—all registered voters, regardless of party, could vote for any candidate, regardless of party. In other words, anyone who wanted to was entitled by law to participate in selecting the spokesperson, and therefore the message, of the Republican, Green, or Peace and Freedom Party.²¹⁰ Seven Justices agreed that the blanket primary violated the Democratic Party’s fundamental “rights of association.”²¹¹ As Justice Scalia put it, the “blanket-primary” requirement “forces political

206. Smith, *supra* note 26, at 625–26; see also *id.* at 627. Smith states:

[T]he “no orthodoxy” position memorably articulated in *Barnette* has had a beguiling but baneful influence on our First Amendment discourses—and hence on our understanding of our community, and of ourselves.

Id.

207. See, e.g., MURRAY, *supra* note 101, at vii. Murray states:

In philosophy a proposition is the statement of a truth to be demonstrated. In mathematics a proposition is at times the statement of an operation to be performed. Our Fathers dedicated the nation to a proposition in both of these senses . . . The American Proposition presents itself as a coherent structure of thought that lays claim to intellectual assent; it also presents itself as an organized political project that aims at historical success.

Id.

208. See generally Richard W. Garnett, *The Story of Henry Adams’s Soul: Education and the Expression of Associations*, 95 MINN. L. REV. 1841 (2001).

209. 530 U.S. 567 (2000).

210. See *id.* at 575 (“[I]t is the nominee who becomes the party’s ambassador to the general electorate in winning it over to the party’s views.”).

211. *Id.* at 571; see also *id.* at 586 (“[T]he burden Proposition 198 [which created the blanket primary] places on petitioners’ rights of political association is both severe and unnecessary.”).

parties to associate with—to have their nominees, and hence their positions, determined by—those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival.”²¹² In his view, this “stark repudiation of freedom of political association”²¹³ was unjustified by any compelling state interests and was supported by few valid ones. The blanket-primary requirement, after all, “has the likely outcome—indeed . . . the *intended* outcome—of changing the parties’ message.”²¹⁴ However, the Court insisted, official unhappiness with or disapproval of an association’s message, or a preference for others, is an impermissible basis for restrictions on the freedom of expressive association.²¹⁵

The Court’s controversial decision in *Boy Scouts of America v. Dale*²¹⁶ is in a similar vein. There, the Justices narrowly decided that New Jersey’s nondiscrimination law could not be applied in such a way as to require the Boy Scouts to retain an openly gay scoutmaster. Both the precise holding and the working rationale of Chief Justice Rehnquist’s majority opinion are hard to pin down. Still, the case can fairly be read to endorse a theme set out a few years earlier, and a bit more clearly, in the *Hurley* case. There, Justice Souter insisted that the First Amendment does not permit government to pursue its interest in a “society free of the [relevant] biases” by applying antidiscrimination law, in a way that burdens associational freedoms, with the objective of “produc[ing] speakers free of [those] biases.”²¹⁷ In Justice Souter’s view:

[I]f [producing unbiased speakers] . . . is the point of applying the state law to expressive conduct, it is a decidedly fatal objective. . . . The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis.²¹⁸

212. *Id.* at 577.

213. *Id.* at 582.

214. *Id.* at 581–82; *see also id.* at 587 (Kennedy, J., concurring) (“The true purpose of this law . . . is to force a political party . . . to change the party’s doctrinal position on major issues.”).

215. *Id.* at 583 (disapproving laws whose only “object [is] simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law[s] choose to alter it with messages of their own” (quoting *Hurley v. Irish Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 578 (1995))); *see also id.* at 570 (noting that the blanket-primary initiative had been “[p]romoted largely as a measure that would ‘weaken’ party ‘hard-liners’ and ease the way for ‘moderate problem-solvers’”).

216. 530 U.S. 640 (2000).

217. *Hurley*, 515 U.S. at 578–79.

218. *Id.* at 579.

Finally, it would not push the doctrine-reforming analogy too far to mention the Court's relatively recent parental-rights case, *Troxel v. Granville*.²¹⁹ Although the Court was badly splintered, a clear majority disapproved the state of Washington's unusually expansive third-party-visitation law. The statute permitted "[a]ny person" to petition for court-ordered visitation of someone else's child "at any time," and authorized courts to grant such a petition, over custodial parents' objection, whenever visitation would serve the child's "best interest."²²⁰ Neither deference to parents' objections, nor any showing that the visitation requested is necessary to avoid harm to the child, was required. Insisting that "[p]arents have a right to limit visitation of their children with third persons"; that parents, not judges, "should be the ones to choose whether to expose their children to certain people or ideas"; and that it is not for the state "to make significant decisions concerning the custody of children merely because it could make a 'better' decision," the Washington high court had invalidated the statute,²²¹ and the Supreme Court affirmed.²²²

As I have noted elsewhere, *Troxel* "re-affirms the prerogatives of families to constitute themselves, and of parents to educate their children, in accord with *their* values and beliefs, and thereby to communicate those values and beliefs to the world, even when they are different from those preferred by the state."²²³ Parents express themselves, to their children and to the world, when they instruct, guide, discipline, and communicate with their children; families express themselves, to their members and to the world, when they constitute themselves and direct their activities in accord with certain aspirations.²²⁴ As Justice Souter noted in *Troxel*, decisions about things so prosaic as a child's playmates are, at bottom, decisions about the child's "social and moral character."²²⁵ These parental decisions, which the Washington law permitted courts to undo when they were not in accord with the courts' own "best interests" assessments, can fairly be analogized to doctrinal claims that the state might wish to help unsettle.

219. 530 U.S. 57 (2000).

220. *Id.* at 60 (citing WASH. REV. CODE § 26.10.160(3) (1994)).

221. *In re Custody of Smith*, 969 P.2d 21, 31 (Wash. 1998).

222. Justice O'Connor emphasized that the Constitution "does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made." *Troxel*, 530 U.S. at 72-73 (plurality opinion).

223. Garnett, *supra* note 208, at 1878.

224. See *Moore v. City of E. Cleveland*, 431 U.S. 494, 503-04 (1977) ("It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.").

225. *Troxel*, 530 U.S. at 78 (Souter, J., concurring).

Return now to the question whether government efforts to move and direct developments in religious doctrine would run afoul of the basic Religion Clause norm that the “government may not declare religious truth.”²²⁶ Each of the three cases mentioned above involves, at some level, a vindication by the Court of the claim that some state action has infringed on the right of the state’s norm-generating competitors—for example, a political party, a youth group, a family—to structure and transmit its own message, or “doctrine.” Do these decisions also vindicate what was almost certainly our initial reaction, that is, that governments like ours have no “secular interest,” and therefore may not meddle, in the “development of doctrine”?

I do not think so. *Dale* does not teach that governments lack a valid “interest” in what the Boy Scouts teach and say with respect to sexual morality; *Jones* does not hold that governments lack such an interest in the vibrancy, or lack thereof, of political debate; and *Troxel* does not stand for a rule that governments ought not to concern themselves with what parents teach to their children. What these cases do teach—correctly, in my view—is that the government’s interests in these matters are insufficiently weighty to justify the burdens that particular means of pursuing those interests impose on constitutionally protected freedoms. By the same token, *Hull Church* is rightly decided, and some government actions touching upon or affecting religious doctrine are unconstitutional, but not because the state lacks any interest in that doctrine, or is prohibited by the Constitution from trying to move and shape it.

In sum, the relevant case law seems consonant with Justice Brennan’s concern for the “free development of doctrine” and also with a commitment to the autonomy of religious and other mediating associations. This is as it should be.²²⁷ At the same time, as was outlined earlier, it is evident that government shapes religious doctrine and influences its development often and in many ways. This is true not only because it could hardly be otherwise, but also because—courts’ protestations to the contrary notwithstanding—liberal governments like ours have an “interest” in the content of associations’ messages, in the views of political parties’ nominees, in the views and attitudes parents impart to their children, and in the “development of doctrine” in religious communities.²²⁸

226. Koppelman, *supra* note 74, at 89; see also *id.* at 108 (observing that it is an “Establishment Clause [a]xiom” that the Clause “forbids the state from declaring religious truth”).

227. See generally Garnett, *supra* note 208.

228. The term “state interest” is a public-law term of art. In this sense, an “interest” is the “rational basis,” “substantial interest,” or “compelling interest” that is required under many of the balancing tests employed by courts in individual-rights cases. Here, I am making the more straightforward descriptive

V. COMPETING LOYALTIES: EXPLORING THE STATE'S INTEREST IN DOCTRINAL DEVELOPMENT

A closer examination of this "interest" might start with a basic proposition: We invariably care, and so our governments care too, what and in what our fellow citizens believe. We think that it matters what they value and that it matters to and for what they aspire. We care what our fellows are taught; it matters to us how and by whom they are formed.²²⁹ We care, therefore, what religions teach; we care about doctrine. Claims to the contrary, even when couched in the compelling language of pluralism and limited government, are at best disingenuous.

To be sure, we might very well decide, and for very good reasons, to refrain from trying—and to constrain our governments 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 inhere in a free, pluralistic, democratic society,²³⁰ keeping in mind Judge McConnell's claim 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."²³¹ We might doubt governments' ability to engage effectively in "direct inculcation of public virtue," particularly via means as seemingly treacherous to religious freedom as policies directed at the content of religious doctrine. Notwithstanding our 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. It would not mean that we did not care about the

point that any government, including a liberal one like ours, is committed to certain goals and values, and therefore has an "interest" in supporting and securing conditions that make its aims more attainable.

229. A century ago, the mathematician W.K. Clifford, responding to the claim that "there may be no harm done by the mere belief" in unsupported conclusions, insisted that doing so is a "great wrong towards Man," because one who does so "make[s] [himself] credulous." He also said, "[t]he danger to society is not merely that it should believe wrong things, though that is great enough; but that it should become credulous, and lose the habit of testing things and inquiring into them; for then it must sink back into savagery." W.K. CLIFFORD, *The Ethics of Belief*, in *THE ETHICS OF BELIEF AND OTHER ESSAYS* 70, 76 (1999).

230. 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"); see also STEPHEN MACEDO, *DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY* 278–79 (2000) ("We should not take for granted a shared civic life robust enough to master the many centrifugal forces to which modern life gives rise.").

231. McConnell, *supra* note 230, at 455. In my view, this is the better course.

development and substance of doctrine, only that we cared about religious freedom more.

That said, there is increasing disagreement, *contra* McConnell, about the "difficult[y]" of "the direct inculcation of public virtue," and also about just how fundamental to liberalism "neutrality" really is. In fact, the trend among liberal political theorists seems to be toward "thicker," more perfectionist notions of democracy. It seems to be to acknowledge, and also to insist, that the health of democratic societies depends crucially on the character, dispositions, habits, and premises of their citizens. We appear to be entering what Professor Smith might call a "fourth stage of liberalism," and emerging from the "[l]iberalism of [n]eutrality and [e]quality," which "eschews not only repression but also the very notion of an official orthodoxy."²³² This civic-virtues brand of liberalism, while generally not "repressi[ve]," is nonetheless aggressive, and perhaps more confident, in endorsing and attempting to inculcate its orthodoxy.

Most know the story about Benjamin Franklin being asked by a Philadelphia woman during the Constitutional Convention, "Well Doctor what have we got?," and Franklin responding, "A republic . . . if you can keep it."²³³ Similarly, many contemporary theorists believe that one of the things that must be done to "keep" a liberal democracy is to quite self-consciously create liberal democrats.²³⁴ In Amy Gutmann's words, "[c]onscious social reproduction," or citizen creation, is thought by many to be a requirement for deliberative democracy.²³⁵ After all, citizens capable of self-government, disposed toward tolerance, and comfortable with (not merely resigned to) pluralism do not just *happen*. "Liberal democratic citizens are made, not born,"²³⁶ insist the fourth-stage theorists, and we cannot take for granted the cultural conditions of democracy and self-government.²³⁷ Even liberal

232. Smith, *supra* note 32, at 308, 311. Professor Smith would probably contend that "third stage" liberalism actually does embrace "orthodoxy," and that the proposed "fourth stage" is simply the "third stage" unmasked. *Id.*

233. See 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 85 (Max Farrand ed., 1966).

234. Cf. William A. Galston, *Expressive Liberty, Moral Pluralism, Political Pluralism: Three Sources of Liberal Theory*, 40 WM. & MARY L. REV. 869, 872 (1999) ("Within the civic republican tradition, state intrusion to foster good citizens poses no threshold issues; not so for liberal democracy, whose core commitments place limits on the measures the state legitimately may employ.").

235. AMY GUTMANN, *DEMOCRATIC EDUCATION* 39 (1987) ("We are committed to collectively re-creating the society that we share The substance of this core commitment is conscious social reproduction.").

236. Galston, *supra* note 234, at 870.

237. See MACEDO, *supra* note 230, at 279 ("Our good fortune in having developed institutions that foster . . . shared civic values must neither lull us into complacency nor encourage reforms that rashly overlook the advantages of the system we have.").

societies, which aspire to tolerance and neutrality, must inculcate values and promote contested views of the good if they hope to thrive and survive.²³⁸ A society that aspires to meaningful democracy must take care that it produces citizens capable of valuing and achieving that end.²³⁹

Our ongoing conversations about “civic education,” religious freedom, and political liberalism proceed in accord with these general observations.²⁴⁰ It is argued, for example, that the education of young people is both the liberal state’s obligation and its particular prerogative, and that its purpose must include the inculcation of government-approved dispositions, attitudes, and beliefs.²⁴¹ Henry Adams would have reluctantly agreed: He once wrote—or, more precisely, he complained—that education is “a sort of dynamo machine for polarizing the popular mind; for turning and holding its lines of force in the direction supposed to be the most effective for State purposes.”²⁴² Similarly, our Supreme Court has noted approvingly that the objective of public education is the “inculcation” of “fundamental values necessary to the maintenance of a democratic political system.”²⁴³ The poet

238. See Smith, *supra* note 26, at 659 (noting that even “[p]roponents of a ‘no orthodoxy’ position occasionally acknowledge that in some situations, government cannot avoid endorsing some beliefs and rejecting others”).

239. See GUTMANN, *supra* note 235, at 39 (“[A] society that supports conscious social reproduction must educate all educable children to be capable of participating in collectively shaping their society.”).

240. There is a rich and growing scholarly literature on “civic education,” and on the challenges to certain conceptions of political liberalism posed by religious faith, teachings, and communities. See, e.g., BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); GUTMANN, *supra* note 235; STEPHEN L. CARTER, *THE DISSENT OF THE GOVERNED: A MEDITATION ON LAW, RELIGION, AND LOYALTY* 35 (1998); MEIRA LEVINSON, *THE DEMANDS OF LIBERAL EDUCATION* (1999); MACEDO, *supra* note 230; *MAKING GOOD CITIZENS: EDUCATION AND CIVIL SOCIETY* (D. Ravitch & J. Viteritti eds., 2001); *MORAL AND POLITICAL EDUCATION* (Nomos XLIII et al. eds., 2002); William A. Galston, *Civic Education in the Liberal State*, in *LIBERALISM AND THE MORAL LIFE* (N. Rosenblum ed., 1989); Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937 (1996); Michael W. McConnell, *Multiculturalism, Majoritarianism, and Educational Choice: What Does Our Constitutional Tradition Have to Say?*, 1991 U. CHI. LEGAL F. 123; see also Richard W. Garnett, *Regulatory Strings and Religious Freedom: Requiring Private Schools to Promote Public Values*, in *EDUCATING CITIZENS: INTERNATIONAL PERSPECTIVES ON CIVIC VALUES AND SCHOOL CHOICE* (S. Macedo et al. eds.) (forthcoming 2004).

241. For a different view, see, for example, Richard W. Garnett, *The Right Questions About School Choice: Education, Religious Freedom, and the Common Good*, 23 CARDOZO L. REV. 1281 (2002); Garnett, *supra* note 208.

242. *THE EDUCATION OF HENRY ADAMS: AN AUTOBIOGRAPHY* 78 (Modern Library ed., 1996).

243. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986); see also *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 241–42 (1963) (Brennan, J., concurring). Justice Brennan stated:

It is implicit in the history and character of American public education that the public schools serve a uniquely public function [sic]: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort—an

was right, then: The hand that rocks the cradle rules the world.²⁴⁴ Those who decide what children may and should learn thereby shape those children's character and commitments as well as, by extension, those of the community. Accordingly, Professor Macedo argues that a "more judgmental liberalism" is needed, one that is wary of and aggressive in opposing "religious enthusiasm" and that uses not only the public schools, but "all of the instruments of public policy," to "shape [the] social norms and meanings that mold individual choices and character."²⁴⁵

One need not be a Jacobin to agree that the health of civil society depends crucially on the formation, development, and training of capable, decent, other-regarding persons who are concerned with and motivated by the common good. After all, a democratic political community can no more perpetuate itself without attending carefully to the dispositions of its citizens than a religious community that does not evangelize each new generation can hope to thrive and survive. The question remains, of course, whether the perceived fragility of democratic values and the obvious role of education in producing and promoting those values require, or even justify, the regulatory particulars of the civic-education agenda.

In any event, today's "thicker" versions of liberal theory, the civic-education agenda, and the political needs to which that agenda is a proposed response support the claim that the liberal state is not and cannot be indifferent to the substantive content of the messages and teachings that shape those who would be liberal citizens.²⁴⁶ If religious doctrine plays a role in the formation of citizens, then it must be of interest to liberal governments.

Professor Smith's critical reflection on Justice Jackson's "fixed star" proclamation is instructive.²⁴⁷ Smith argues that one reason for skepticism toward Jackson's assertion that "no official, high or petty, can prescribe what shall be orthodox"²⁴⁸ is that the claim "has not been—and indeed *could not*

atmosphere in which children may assimilate a heritage common to all American groups and religions.

Id.

244. See WILLIAM ROSS WALLACE, *THE HAND THAT ROCKS THE CRADLE IS THE HAND THAT RULES THE WORLD*. Wallace, who wrote this poem around 1865, was a lawyer.

245. MACEDO, *supra* note 230, at 276–78; see also *id.* at ix (noting that public schools are "instruments for the most basic and controversial of civic ends[.] . . . [t]he project of creating citizens").

246. See Smith, *supra* note 26, at 637 (noting that "the most obvious and pervasive prescription of belief occurs in . . . public schools").

247. *Id.*

248. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

be—consistently implemented.”²⁴⁹ In fact, Smith observes, “the American Proposition” “rests” precisely “on the conviction that there are truths; that they can be known; that they must be held; for if they are not held, . . . there can be no hope of founding a true City, in which men may dwell in dignity, peace, unity, justice, well-being, freedom.”²⁵⁰ Smith also suggests that, even if it were possible for government to “carry on its business without ever expressing its official support for one set of controversial beliefs over others,”²⁵¹ it is not clear that such a government could hope to attract and sustain the allegiance of real people, who are more than mere interest-seekers and who need naturally to believe. “[A] community that neglects or ignores this dimension of our personhood”—by, for example, either pretending not to stand or in fact not standing for anything—will have at best a weak claim on our respect.”²⁵²

It does not necessarily follow from Smith’s observation that governments do or should strive to “stand[] for” things, or to support some beliefs or others, to the point of actively seeking to bring about revisions in those things for which *other* communities, including religious communities, stand. Still, Smith’s observations about what governments cannot help doing, and also about what they should do if they hope to inspire the engagement and enjoy the support of real people, shore up the claim that decent, liberal governments have an “interest” in what people believe and, therefore, in the content of religious teaching.

Professor Smith’s concern about the ability of a “truth-coy strain of modern liberalism” to serve as the basis for political community and to inspire the “allegiance necessary to a secure government”²⁵³ dovetails nicely with another interesting and helpful line of argument. Professor Carter’s 1995 Massey Lectures provide, among other things, a meditation on the often competing demands of “loyalty” made by the state and civil society’s various mediating associations, including religious communities, and on the state’s efforts to instill such loyalty via education and other means.²⁵⁴ It is important to recognize, Carter says, that

249. Smith, *supra* note 26, at 632; see also *id.* at 636 (“[T]he anti-orthodoxy principle asks the impossible, because government inevitably *will* endorse and in that sense prescribe some beliefs, and will explicitly or tacitly disapprove of other beliefs.”).

250. *Id.* at 639 (quoting MURRAY, *supra* note 101, at ix).

251. *Id.* at 640.

252. *Id.* at 641. Professor Smith has elaborated elsewhere his belief-centered moral anthropology. Steven D. Smith, *Believing Persons, Personal Believings: The Neglected Center of the First Amendment*, 25 U. ILL. L. REV. 1233 (2002).

253. Smith, *supra* note 26, at 640–41.

254. CARTER, *supra* note 240; see also *id.* at 27 (noting the “potentially subversive” nature of religious communities, “for the meanings that they discover and assign to the world may be radically distinct from those that are assigned by the political sovereign”); *id.* at 29–30 (“[R]eligion[s] . . . demand forms of allegiance and thus of loyalty.”); *id.* at 79 (referring to the state’s “competing instruction”).

religious communities seek to “project into the future”—via worship, activism, and doctrine—“an understanding of the world that may be quite different from that of the sovereign majority of . . . citizens.”²⁵⁵ “Religions matter,” he insists, precisely because their sometimes dissenting understandings affect how and what citizens think about difficult moral and political issues.²⁵⁶ And that they “demand forms of allegiance and thus of loyalty” is why the content of their claims can pose an obstacle to what Carter calls the “project of liberal constitutionalism,” which includes an effort to “create[] a single, nationwide community with shared values and shared, enforceable understandings of how local communities of all descriptions should be organized.”²⁵⁷

These questions of loyalty, formation, and competition arise not only in the dialogue between religion and government—though they are most pressing in that context—but also and more generally in the state’s relationship with the mediating associations of civil society. Not surprisingly, then, state action that targets the mission or message of “expressive” and other associations has received careful attention recently in the Court. These associations often “serve as vehicles for concerted activity by individuals, and for amplified expression to governments and to the world. They also, like governments, express and transmit messages of their own. We are shaped by mediating associations, even as we shape our world through them.”²⁵⁸ This is one reason why the liberal state and the intermediate associations of civil society will often compete for the opportunity to educate, and thereby to impart loyalties, inculcate values, and shape character.²⁵⁹ And the interest of liberal governments in the values, expression, and doctrine of associations seems particularly strong in the case of religious communities. While it is probably a mistake to reduce religions and faith traditions to voluntary

255. *Id.* at 141; see also *id.* at 30 (“[A] principal purpose of religious narrative and religious observance is to preserve the tradition of the past and project it into the future.”); *id.* at 27 (“[T]he meanings that they discover and assign to the world may be radically distinct from those that are assigned by the political sovereign.”).

256. *Id.* at 30.

257. *Id.* at 19, 29–30; see also MURRAY, *supra* note 101, at ix–x (“The question is sometimes raised, whether Catholicism is compatible with American democracy. The question is invalid as well as impertinent; for the manner of its position inverts the order of values. It must, of course, be turned round to read, whether American democracy is compatible with Catholicism.”).

258. Garnett, *supra* note 15, at 801.

259. See, e.g., Stephen Macedo, *Constituting Civil Society: School Vouchers, Religious Nonprofit Organizations, and Liberal Public Values*, 75 CHI.-KENT L. REV. 417, 428–30 (2000) (arguing that the liberal state’s “aim should be to promote a certain structure of groups and associations” and insisting that “the crucial thing is to foster memberships that are not tribalistic but pluralistic”).

associations, it seems clear—as Professor Carter has suggested—that what associations generally do, religious communities do particularly well.

Thus, liberal governments do have a “secular” interest in the substantive content of religious institutions’ expression, teachings, and doctrine, and the “development” of doctrine is, in fact, a matter of more than ecclesiastical concern. However—and this is the crucial point—this does not mean that constitutional law should not constrain governments’ efforts to pursue this interest, or that such efforts pose no threat to religious freedom, or even that the meaning of a “secular” interest is obvious.²⁶⁰ It is only to acknowledge what the Court in *Hull Church* now appears to have skipped past too quickly, namely, that the state’s interest is, from its own perspective, real and compelling, and also that governments do and invariably will try—through regulation, spending, expression, adjudication, and so on—to advance it.²⁶¹

I cannot emphasize enough that the conclusion toward which this line of argument points is not that *Hull Church* was wrongly decided, or that the state’s perceived social-reproduction and virtue-inculcation needs are normatively prior either to the integrity of religious traditions or to the expressive autonomy of mediating associations. Governments ought to steer clear of doctrinal disputes and ought to avoid excessive entanglement with the structure, governance, and teaching of religions. This is not, however, because religious doctrine does not matter to government, or to public life, but because religious freedom *does* matter. It matters in itself, because of what it is, and not merely because it is the logical implication of a policy of government “neutrality” or non-“cognizance.” As John Courtney Murray once put it, at the very heart of our notion of “freedom of religion” is the claim that “churches” have the “freedom . . . to maintain their own different identities, as defined by themselves.” Murray also stated: “[E]very church claims this freedom to define itself, and claims too the consequent right to reject definition at the hands of any secular authority.”²⁶² The concern that inspired this Article, however, is that breezy assertions denying any secular “interest” in shaping religion—like assurances that our government “must be neutral in matters of religious theory, doctrine, and practice”²⁶³ and that “religion must be a private matter for the individual, the family, and the institutions of private choice”²⁶⁴—will

260. See Smith, *supra* note 196.

261. See Macedo, *supra* note 259, at 418 (noting approvingly that the “flow of public monies” will mean that “some religious institutions and communities will have to compromise their spiritual mission” and “conform to public values”).

262. MURRAY, *supra* note 101, at xi.

263. *Epperson v. Arkansas*, 393 U.S. 97, 103–04 (1968).

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

in the end prove a poor defense against the inevitable efforts by the government to pursue its interest.²⁶⁵

CONCLUSION

Justice Brennan got it right, then, but he was also quite wrong: Secular, liberal, and democratic governments do, or at least could, find it in their interest to cause changes not only in what religious believers profess and how they behave, but also in what religious communities teach, praise, condemn, and require. These are not, in fact, "matters of purely ecclesiastical concern."

This Article's aim has been to provide a "point of entry" into our rich and ongoing conversations about commitment and toleration, about the claims of the state and the claims of faith, about integrity and integration, and about our aspirations to unity and the reality of division. The point of this examination of one sentence taken from a relatively uncontroversial Supreme Court opinion is not to level accusations of disingenuousness or dishonesty. Instead, it is to offer a reminder that liberal, democratic governments like ours necessarily care what their citizens believe, and therefore will invariably seek to shape the content of citizens' beliefs through government speech and other means, including regulation, subsidization, and criminalization. The state does this not simply for the sake of self-expression, but in order to form and change the minds of those to whom it speaks. A speaker hoping to change listeners' minds is not indifferent to the message of her competitors. A sober awareness of this fact is a better defense for the freedom of religion than marginalizing and misleading assurances of the government's lack of interest.

This Symposium was convened to examine, in a number of contexts, difficult questions concerning assimilation, toleration, and pluralism. "Assimilation," remember, is a complicated concept. Our dictionaries remind us that "assimilate" can serve as both a transitive and an intransitive verb; it

265. See Chopko, *supra* note 169, at 147 ("The question is whether, in pursuit of government-defined orthodoxy, the government has the right and the power to remake, or suppress, the religiously and philosophically diverse institutions created by our pluralistic citizenry."); see also Jacob T. Levy, *Liberal Jacobinism*, 114 *ETHICS* 318, 324 (2004) (reviewing BRIAN BARRY, *CULTURE AND EQUALITY* (2002)) ("Because states have an ongoing drive to create a shared national identity among their citizens, and because states have at their disposal the tools that they do, we need to worry on an ongoing basis that they will pursue violent, unjust projects of assimilation.").

is something that we do, and also something that is done to us.²⁶⁶ To “assimilate” is to “become like” or to “conform to”; it is also to “make like” or “cause to resemble.” An immigrant might well choose, as so many immigrants to the United States have done, to “assimilate” to the habits, tastes, and culture of her new home; it is also the case that, in any event and in many ways, the United States will “assimilate” her. As we have seen, religious believers and religion itself have both assimilated to, and been assimilated by, American culture. This Article is an effort to call attention to another, more specific, assimilation story, namely, liberal governments’ attempts and ambition to assimilate religious commitments, ideals, and doctrine to their own.

266. See, e.g., THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 111–12 (3d ed. 1992).
