SYMPOSIUM

THE SUPREME COURT'S HANDS-OFF APPROACH TO RELIGIOUS DOCTRINE: AN INTRODUCTION

*Samuel J. Levine**

Although the current state of the United States Supreme Court's Religion Clause[1] jurisprudence is an area of considerable complexity,[2] the Court's approach is largely premised upon a number of basic underlying principles and doctrines. In 1971, the Court decided *Lemon v. Kurtzman*,[3] which delineated a three-part test for determining whether a law violates the Establishment Clause.[4] While the precise contours of the *Lemon* test have been subject to substantial

* Professor of Law, Pepperdine University. I thank Rick Garnett, Rob Vischer, and the Editors of the *Notre Dame Law Review* for working to organize this Symposium, and I thank Kent Greenawalt for his pioneering scholarship and thoughtful guidance. Finally, I thank Fraida Liba, Yehudah, Aryeh, and Rachel for continued encouragement.

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

2 For efforts of leading scholars to navigate the Court's Religion Clause jurisprudence, see, for example, CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2007); NOAH FELDMAN, DIVIDED BY GOD (2005); 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS (2006) [hereinafter GREENAWALT, FREE EXERCISE]; 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS (2007) [hereinafter GREENAWALT, ESTABLISHMENT AND FAIRNESS]; MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE (2008); STEVEN D. SMITH, FOREORDAINED FAILURE (1995).

3 403 U.S. 602 (1971).

4 *See id.* at 612–13.

refinement and modification,[5] the decision has not been overruled, and it remains the starting point for the Court's rulings in this area.[6] In 1990, in *Employment Division v. Smith*,[7] the Court seemed to upset settled free exercise law, in favor of a broad policy rejecting religious challenges to neutral statutes of general applicability.[8] The Court's decision in *Smith* prompted considerable criticism,[9] as well as subsequent legislation aimed at reversing and limiting its effect.[10] Nevertheless, the decision stands and, with some exceptions, represents the current state of free exercise law.

This Symposium issue of the *Notre Dame Law Review* explores another underlying principle of the Supreme Court's current Religion Clause jurisprudence, the Court's hands-off approach to questions of religious practice and belief. The Symposium is based on the program of the Law and Religion Section at the 2008 Annual Meeting of the Association of American Law Schools, in which a panel of leading scholars was asked to evaluate the Court's approach. The program description invited a variety of modes of analysis, ranging from descriptive considerations of the extent to which the Court's doctrine can, indeed, be characterized as hands-off, to normative justifications for—and critiques of—the Court's approach, to more practical and consequentialist arguments supporting or opposing the Court's position.[11]

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5 *See* Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 361–69; Kent Greenawalt, *Religion and the Rehnquist Court*, 99 NW. U. L. REV. 145, 146 (2004); Michael Stokes Paulsen, Lemon *Is Dead*, 43 CASE W. RES. L. REV. 795 (1993).

6 *See* GREENAWALT, FREE EXERCISE, *supra* note 2, at 33 ("[T]he use of [the *Lemon*] test as such, has been waning, but its elements still help determine whether a state law will be rejected.").

7 494 U.S. 872 (1990).

8 *See id.* at 878–82.

9 *See, e.g.*, Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 10–39 (arguing that deferral to facially neutral laws restricting religion creates a "legal framework for persecution"); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990) (arguing that "*Smith* is contrary to the deep logic of the First Amendment").

10 These include the Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. § 2000bb-1 (2000), *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997), and the Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000, 42 U.S.C. § 2000cc-1(a)(1) to (2) (2000).

11 The AALS program description stated:

> In recent years, a number of scholars have observed that the United States Supreme Court has shown an increasing unwillingness to engage in deciding matters that relate to the interpretation of religious practice and belief. Justices have provided various rationales for the Court's approach.

On a descriptive level, there is ample Supreme Court case law supporting the proposition that the Court generally eschews decision-making that requires adjudication of religious doctrine.[12] As a thresh-

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> Some Justices have suggested practical justifications for their reluctance to examine closely religious beliefs, declaring that courts are "ill equipped" to deal with such questions, which these Justices consider beyond judicial competence. Other Justices have cited constitutional considerations to support their view that courts should refrain from deciding questions of religious interpretation.
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> In response, some have argued that courts should be more willing to decide questions of religious interpretation, in particular when failure to do so would prevent a meaningful resolution of a case. In fact, according to some critics, as a result of the Court's increasing refusal to consider carefully the religious questions central to many cases, the Court often tends to group together religious claims and practices, regardless of the relative validity or importance of a particular practice within a religious system. This approach can have important and potentially negative ramifications for both Free Exercise and Establishment Clause jurisprudence.
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> Finally, the Court has not provided a definition of the term "religion," thereby refusing to interpret the very concept at the center of Free Exercise and Establishment Clause cases.
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> This session will address these issues from [a] number of perspectives. Descriptively, the session will consider the extent to which the Court has, in fact, applied a "hands-off" approach to questions of religious practice and belief. Normatively, the session will explore the arguments in favor of and opposed to such an approach. Finally, the session will look at prospects for rethinking some of the assumptions underlying the Court's attitudes, as well as the possibility of proposing alternative methods.

See Ass'n of Am. Law Sch., Program of 2008 AALS Annual Meeting, Section on Law and Religion, http://www.aals.org/am2008/friday/index.html (last visited Oct. 6, 2008).

The panel consisted of paper presentations by four of the authors contributing essays to this Symposium issue, Christopher Eisgruber, Richard Garnett, Andrew Koppelman, and Bernadette Meyler, in addition to thoughtful commentary provided by Kent Greenawalt, whose written response is included in this issue. The proceedings were skillfully moderated by Robert Vischer. *See id.*

12 *See, e.g.*, Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 458 (1988) (stating that interpreting the propriety of certain religious beliefs puts the Court "in a role that [it was] never intended to play"); United States v. Lee, 455 U.S. 252, 257 (1982) (refusing to assess the "proper interpretation of the Amish faith"); Thomas v. Review Bd., 450 U.S. 707, 714 (1981) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 721 (1976) (noting the "error" of "delv[ing] into . . . church constitutional provisions"); Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 451 (1969) (refusing to "engage in the forbidden process of interpreting . . . church doctrine"); United States v. Ballard, 322 U.S. 78, 87 (1944) (avoiding the "forbidden domain" of evaluating religious doctrine); *see also* Richard W. Garnett, *Assimilation, Toleration, and the State's Interest in the Development of Religious Doctrine*, 51

old matter, as far back as 1944, the Court emphasized that it may not determine the "truth or falsity" of a religious belief.[13] More recently, beginning in 1969, when faced with differing views of religious tenets, the Court has refused to engage in "interpretation of particular church doctrines and the importance of those doctrines to the religion,"[14] and has stated plainly that "[c]ourts are not arbiters of scriptural interpretation."[15]

Notably, though, in some cases, aspects of the majority's hands-off approach have faced objections leveled by a number of Justices in concurring and dissenting opinions.[16] Moreover, the current iteration of the Court's approach arguably represents the final product of a process in which, over the course of just a few decades, the hands-off

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UCLA L. REV. 1645, 1652–59 (2004) (providing an overview of the Court's "no religious decisions" jurisprudence); Jared A. Goldstein, *Is There a "Religious Question" Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U. L. REV. 497, 497 (2005) ("[T]he Court has greatly expanded its . . . prohibition [of assessing religious claims]."); Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843, 1844 (1998) ("The Supreme Court's basic constitutional approach . . . is that secular courts must not determine questions of religious doctrine and practice."); Samuel J. Levine, *Rethinking the Supreme Court's Hands-Off Approach to Questions of Religious Practice and Belief*, 25 FORDHAM URB. L.J. 85, 88 (1997) ("[I]n recent years, the Supreme Court has increasingly avoided addressing issues that require consideration of the nature of religious practice and belief.").

13 *Ballard*, 322 U.S. at 87.

14 *Presbyterian Church*, 393 U.S. at 450.

15 *Thomas*, 450 U.S. at 716.

16 For example, in *Serbian Eastern Orthodox Diocese v. Milivojevich*, one of the landmark church property cases, Justice Rehnquist dissented from the majority's hands-off approach that "'a civil court must accept the ecclesiastical decisions of church tribunals as it finds them.'" 426 U.S. at 726 (Rehnquist, J., dissenting) (quoting *id.* at 713 (majority opinion)). Joined by Justice Stevens, Justice Rehnquist responded that:

> [E]ven this rule requires that proof be made as to what these decisions are, and if proofs on that issue conflict the civil court will inevitably have to choose one over the other. In so choosing, if the choice is to be a rational one, reasons must be adduced as to why one proffered decision is to prevail over another. Such reasons will obviously be based on the canon law by which the disputants have agreed to bind themselves, but they must also represent a preference for one view of that law over another.

Id. at 726–27 (Rehnquist, J., dissenting). Therefore, Justice Rehnquist approved of the Illinois courts' approach, which the majority rejected, making such a rational decision, "on the basis of testimony from experts on the canon law at issue, that the decision of the religious tribunal involved was rendered in violation of its own stated rules of procedure." *Id.* at 727. For an analysis of Justice Rehnquist's dissent, see Greenawalt, *supra* note 12, at 1859–63.

Likewise, the language of dissenting opinions in free exercise cases suggests some dissatisfaction with an important aspect of the Court's hands-off approach: the refusal to consider the centrality of a religious practice or belief. Dissenting in *Lyng v. Northwest Indian Cemetery*, Justice Brennan, joined by Justices Marshall and Blackmun, wrote that:

> I believe it appropriate, therefore, to require some showing of "centrality" before the Government can be required either to come forward with a compelling justification for its proposed use of federal land or to forgo that use altogether. "Centrality," however, should not be equated with the survival or extinction of the religion itself . . . . [A]dherents challenging a proposed use of federal land should be required to show that the decision poses a substantial and realistic threat of frustrating their religious practices.

Lyng, 485 U.S. at 474–75 (Brennan, J., dissenting). To be sure, Justice Brennan rejected and responded to the majority's criticism that his view would "place courts in the untenable position of deciding which practices and beliefs are 'central' to a given faith and which are not, and invites the prospect of judges advising some religious adherents that they 'misunderstand their own religious beliefs.'" *Id.* at 475 (quoting *id.* at 457–58 (majority opinion)). Nevertheless, both the language and the logic of Justice Brennan's position differ significantly from the majority's hands-off approach.

Similarly, in an extended footnote to his groundbreaking and controversial majority opinion in *Employment Division v. Smith*, 494 U.S. 872 (1990), Justice Scalia characterized the concurring opinion of Justice O'Connor, joined by Justices Brennan, Marshall and Blackmun, and the dissenting opinion of Justice Blackmun, joined by Justices Brennan and Marshall, as requiring a consideration of the centrality of a religious practice or belief:

> While arguing that we should apply the compelling interest test in this case, JUSTICE O'CONNOR nonetheless agrees that "our determination of the constitutionality of Oregon's general criminal prohibition cannot, and should not, turn on the centrality of the particular religious practice at issue." This means, presumably, that compelling-interest scrutiny must be applied to generally applicable laws that regulate or prohibit *any* religiously motivated activity, no matter how unimportant to the claimant's religion. Earlier in her opinion, however, JUSTICE O'CONNOR appears to contradict this, saying that the proper approach is "to determine whether the burden on the specific plaintiffs before us is constitutionally significant and whether the particular criminal interest asserted by the State before us is compelling." "Constitutionally significant burden" would seem to be "centrality" under another name. In any case, dispensing with a "centrality" inquiry is utterly unworkable. It would require, for example, the same degree of "compelling state interest" to impede the practice of throwing rice at church weddings as to impede the practice of getting married in church. There is no way out of the difficulty that, if general laws are to be subjected to a "religious practice" exception, *both* the importance of the law at issue *and* the centrality of the practice at issue must reasonably be considered.
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> Nor is this difficulty avoided by JUSTICE BLACKMUN's assertion that "although . . . courts should refrain from delving into questions whether, as a matter of religious doctrine, a particular practice is 'central' to the religion, . . . I do not think this means that the courts must turn a blind eye to the severe impact of a State's restrictions on the adherents of a minority relig-

doctrine has undergone considerable modification and extension.[17]

> ion." As JUSTICE BLACKMUN'S opinion proceeds to make clear, inquiry into "severe impact" is no different from inquiry into centrality. He has merely substituted for the question "How important is X to the religious adherent?" the question "How great will be the harm to the religious adherent if X is taken away?" There is no material difference.

Id. at 887–88 n.4 (citations omitted).

Moreover, notwithstanding the hands-off approach, some Justices appear to have been more willing to examine the substance of religious doctrine in Establishment Clause cases. In *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), Justice Blackmun's opinion carefully considered the religious nature of a crèche and a menorah, in apparent violation of a hands-off approach. *See id.* at 578–622. Indeed, Justice Kennedy criticized Justice Blackmun for "assum[ing] the difficult and inappropriate task of saying what every religious symbol means." *Id.* at 678 (Kennedy, J., concurring in part and dissenting in part). Expressing one of the most common justifications for the Court's broad hands-off approach, Justice Kennedy sharply declared that "[t]his Court is ill equipped to sit as a national theology board, and I question both the wisdom and the constitutionality of its doing so." *Id.*

In a concurring opinion in *Lee v. Weisman*, 505 U.S. 577 (1992), Justice Souter seemed to find Chief Justice Rehnquist's Establishment Clause jurisprudence inconsistent with the Court's hands-off approach. Joined by Justices Stevens and O'Connor, Justice Souter rejected a "nonpreferentialist" interpretation of the Establishment Clause, which he ascribed to Chief Justice Rehnquist. *Id.* at 616 n.3 (Souter, J., concurring). Among the grounds he offered for rejecting the nonpreferentialist view, Justice Souter argued that:

> In many contexts, including this one, nonpreferentialism requires some distinction between "sectarian" religious practices and those that would be, by some measure, ecumenical enough to pass Establishment Clause muster. Simply by requiring the enquiry, nonpreferentialists invite the courts to engage in comparative theology. I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible.

Id. at 616–17.

Strikingly, in a more recent Establishment Clause case, Justice Souter appears to have strayed from the Court's hands-off approach as well, in a dissenting opinion joined by Justices Stevens, Ginsburg, and Breyer. *See* Kevin Pybas, *Does the Establishment Clause Require Religion to Be Confined to the Private Sphere?*, 40 VAL. U. L. REV. 71, 101–02 (2005) (analyzing Zelman v. Simmons-Harris, 536 U.S. 639, 711–12 (2002) (Souter, J., dissenting)).

17 *See generally* Goldstein, *supra* note 12, at 502–25 (discussing the "evolution of the prohibition on judicial examination of religious questions" and noting that "the scope of the prohibition has increased exponentially in recent years"); Levine, *supra* note 12 (describing the expansion of the Court's refusal to assess religious questions). For example, as I have noted elsewhere, the Court's holding in *Thomas v. Review Board*, 450 U.S. at 707, extended the hands-off approach in a manner arguably inconsistent with the Court's position in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). *See* Levine, *supra* note 12, at 92–101.

However, contrary to an inference apparently drawn by Professor Koppelman, I did not argue, as a normative matter, that "in order to be religious, a claim must

Additionally, there remain areas of church-state law in which courts may not always be able to avoid the types of judgments that the hands-off approach seems to preclude.[18] Nevertheless, just as *Smith* and

'represent[ ] the view of an organized group.'" *See* Andrew Koppelman, *The Troublesome Religious Roots of Religious Neutrality*, 84 NOTRE DAME L. REV. 865, 867 n.13 (2009) (quoting Levine, *supra* note 12, at 110). Rather, on a descriptive level, I observed the Court's analysis in *Thomas*, which granted free exercise protection to an individualistic interpretation of a religious belief system, may be inconsistent with the majority opinion in *Yoder*, in which Chief Justice Burger found the Amish lifestyle religious in nature, under the Religion Clauses, in part because it was "shared by an organized group." *See* Levine, *supra* note 12, at 110–11 (quoting *Yoder*, 406 U.S. at 215–16).

Likewise, as a descriptive matter rather than as a prescriptive claim, I observed that the Court's hands-off approach contributed to the Court's decision in *Employment Division v. Smith*, 494 U.S. at 872, which broadly curtailed the contours of free exercise protections. *See* Levine, *supra* note 12, at 87, 115–22 (outlining the Court's reticence in assessing religious doctrine); *see also* Greenawalt, *supra* note 12, at 1906 ("If one reads *Employment Division v. Smith* with any care, one notices that . . . *the* major basis for the decision is that courts should not have to assess religious understandings and the strength of religious feeling in order to decide if a religious claim is strong enough to warrant an exemption.").

18 For example, in a number of areas of free exercise claims, courts will have to determine whether the government has placed a "substantial burden" on a person's exercise of religion. This standard has been incorporated into both RFRA, 42 U.S.C. § 2000bb-1 (2000), and RLUIPA, 42 U.S.C. § 2000cc-1(a)(1) (2000). One plausible interpretation of the term "substantial burden" would likely require courts to examine carefully the substance of a claimant's religious beliefs, for the purpose of determining the degree of burden that the government has imposed on the claimant's exercise of religion.

Thus, in a recent en banc Ninth Circuit case, three dissenting judges disputed the majority's application of RFRA, in part because, according to the dissenters, the majority opinion was premised upon a "[m]isunderstand[ing of] the nature of religious belief and practice." Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1096 (9th Cir. 2008) (Fletcher, J., dissenting). Indeed, several pages of the dissenting opinion are dedicated to a detailed description of the precise nature of the plaintiffs' religious beliefs, including the extensively documented findings that "Hopi religious beliefs and practices center on the San Francisco Peaks"; "[t]he Peaks are also of fundamental importance to the religious beliefs and practices of the Navajo"; "[t]he Peaks figure centrally in the beliefs of the Hualapai. The Peaks are similarly central to the beliefs of the Havasupai . . . ." *Id.* at 1099–1102.

The dissent's insistence on careful consideration of the centrality of a religious claim to an adherent's religious practices and beliefs squarely contradicts a primary element of the Supreme Court's hands-off approach. Indeed, in *Lyng*, a case that in many ways serves as an analogue to *Navajo Nation*, the majority expressly rejected a similar argument propounded by dissenting Supreme Court Justices:

> We would accordingly be required to weigh the value of every religious belief and practice that is said to be threatened by any government program. . . . [This offers] us the prospect of this Court's holding that some sincerely held religious beliefs and practices are not "central" to certain religions, despite protestations to the contrary from the religious objectors who

Lemon continue to depict the general contours of the Court's approach to Free Exercise and Establishment Clause law, respectively, the hands-off approach accurately describes the Court's general attitude toward resolving questions of religious doctrine.[19]

Therefore, rather than addressing the substantive nature of the Court's hands-off doctrine, the contributors to this Symposium focus on the normative and practical justifications for the Court's approach. As Professor Richard Garnett observes in his Symposium essay,[20]

> brought the lawsuit. In other words, the dissent's approach would require us to rule that some religious adherents misunderstand their own religious beliefs. We think such an approach cannot be squared with the Constitution or with our precedents, and that it would cast the Judiciary in a role that we were never intended to play.

Lyng, 485 U.S. at 457–58.

Likewise, in *Smith*, the majority cited numerous Supreme Court precedents in support of the Court's rejection of a centrality analysis in free exercise cases, characterizing such an analysis as violating the Court's broader hands-off approach:

> Nor is it possible to limit the impact of respondents' proposal by requiring a "compelling state interest" only when the conduct prohibited is "central" to the individual's religion. It is no more appropriate for judges to determine the "centrality" of religious beliefs before applying a "compelling interest" test in the free exercise field, than it would be for them to determine the "importance" of ideas before applying the "compelling interest" test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is "central" to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable "business of evaluating the relative merits of differing religious claims." As we reaffirmed only last Term, "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.

Smith, 494 U.S. at 886-87 (citations omitted). In support of this approach, the majority cited such cases as: Hernandez v. Comm'r, 490 U.S. 680, 699 (1989); *Lyng*, 485 U.S. at 474–76 (Brennan, J., dissenting); United States v. Lee, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring); *Thomas*, 450 U.S. at 716; Jones v. Wolf, 443 U.S. 595, 602–06 (1979); *Presbyterian Church*, 393 U.S. at 450; *Ballard*, 322 U.S. at 85–87.

For examples of other areas in which courts may not be able to avoid adjudicating the substance of religious doctrine, see Goldstein, *supra* note 12, at 525–33.

19 *See* Garnett, *supra* note 12, at 1659 ("[T]he 'no religious decision' principle is, and almost certainly will remain, at the heart of our Religion Clause doctrine.").

20 *See* Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What Are We Talking About?*, 84 NOTRE DAME L. REV. 837 (2009).

descriptively, the hands-off rule is clear: "state actors should not render *religious* decisions—decisions involving the resolution of religious questions or the enforcement of religious obligations; we should not, the rule would suggest, use secular law to assure observance of practices with religious significance."[21]

The question that arises, Garnett explains, is then a deceptively simple one: "[b]ut, why not?"[22] In an effort to respond to this question, Garnett engages in a thoughtful and admittedly provocative analysis of various justifications that have been offered for the hands-off approach:

> I want to suggest that some of the justifications often invoked for the rule are not entirely satisfactory and that, accordingly, allowing such justifications to shape the rule and its applications could also be "misguided." In perhaps an even riskier move, I will also suggest that, notwithstanding the "complexity of [the relevant] considerations," one particular justification for the hands-off rule should have primacy of place.[23]

Specifically, Garnett insists that, "It is not that religious questions are hard, weird, or irrelevant."[24] Instead, building on his earlier work,[25] Garnett favors "the most ancient rationale of all" for the hands-off approach, "namely, that secular authorities lack the *power* to answer some questions—*religious* questions—whose resolution is, under an appropriately pluralistic political theory, left to other institutions."[26] According to Garnett, "[t]his rationale . . . is not only the strongest; it also pulls the hands-off rule from the margins of First Amendment esoterica to the very heart of religious freedom and church-state separation, properly understood."[27]

In his illuminating contribution to the Symposium, Professor Andrew Koppelman likewise aims to answer the basic question of "why it is regarded as appropriate for government to keep its hands off religious doctrine."[28] Koppelman responds through the ambitious framework of a broader defense of the hands-off doctrine against

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21 *Id.* at 854–55 (footnote omitted).

22 *Id.* at 855.

23 *Id.* (footnote omitted) (quoting Kent Greenawalt, *Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance*, 71 S. CAL. L. REV. 781, 843 (1998)).

24 *Id.* at 861.

25 Richard W. Garnett, *Pluralism, Dialogue, and Freedom: Professor Robert Rodes and the Church-State Nexus*, 22 J.L. & RELIGION 503, 512 (2007).

26 Garnett, *supra* note 20, at 861.

27 *Id.* at 861–62.

28 Koppelman, *supra* note 17 at 867.

objections it has faced from commentators on a variety of conceptual grounds.[29] After citing a number of "familiar considerations" supporting "[g]overnment neutrality toward religion," Koppelman cites "one consideration that is often overlooked: the idea that religion can be damaged and degraded by state involvement with it."[30]

Significantly, as Koppelman emphasizes, his position is "friendly to religion but, precisely for that reason, is determined to keep the state away from religion. It is associated with the most prominent early proponents of toleration and disestablishment."[31] In short, he explains, "the corruption argument depends on a claim that religion is, in some way, a good thing."[32] Therefore, he concludes, "[t]he hands-off rule . . . is an application of the corruption rationale. The state is to keep its hands off religion precisely for the sake of religion, because religion will be damaged by contact with the state."[33] In the process of elucidating this position, Koppelman defends the hands-off approach against objections directed at the "coherence of its intellectual underpinnings."[34]

Like Koppelman, Provost Christopher Eisgruber and Dean Lawrence Sager frame their Symposium essay as a response to objections to the Supreme Court's hands-off approach.[35] However, unlike Koppelman, they understand the purpose of the religion clauses as "not to protect religion per se, but to protect Americans from a certain kind of governmental malfeasance that proceeds against the backdrop of a religious and religiously diverse society."[36] In their view:

> [T]he point of the Religion Clauses is not to affirm (or deny) the value of religious practices, any more than the point of the Free Speech Clause is to affirm (or deny) the value of flag burning. The point of the Religion Clauses is instead to prohibit the government from showing the kinds of favoritism historically associated with religious persecution, and any doctrine that would involve courts in affirming (or denying) the value of religious practice would compromise rather than advance that purpose.[37]

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29 *See id.* at 866–67.

30 *Id.* at 867.

31 *Id.* at 868.

32 *Id.*; *see also* Andrew Koppelman, *Is It Fair to Give Religion Special Treatment?*, 2006 U. ILL. L. REV. 571, 571 ("Because religion is a distinctive human good, accommodation of religion as such is not unfair.").

33 Koppelman, *supra* note 17, at 883.

34 *Id.* at 886.

35 *See* Christopher L. Eisgruber & Lawrence G. Sager, *Does It Matter What Religion Is?*, 84 NOTRE DAME L. REV. 807 (2009).

36 *Id.* at 811.

37 *Id.* at 834–35.

Thus, relying on their groundbreaking book on religious liberty,[38] and employing what they characterize as a "shamelessly provocative title,"[39] Eisgruber and Sager ask plainly, "does it matter what religion is?"[40] To be sure, they limit the scope of their question, declaring, "[w]e have no doubt that it does matter . . . what religion is" for a variety of cultural, ethical, and sociological purposes, as well as to inform historical, philosophical, and legal conversations about religious freedom.[41] However, they reason that "it does not follow . . . that a robust and attractive regime of religious liberty has to make close and controversial judgments that qualify some activities as religious and disqualify others."[42] In fact, they conclude that "just where competing theories about the definition of religion become controversial and interesting, they also become irrelevant to constitutional law."[43]

Professor Bernadette Meyler's essay brings an international and comparative component to the Symposium, in addition to a more practical focus, reexamining the United States Supreme Court's hands-off approach through the contrast case of the European attitude toward commercial activities of religious organizations.[44] Returning to the origins of the Supreme Court's approach, Meyler observes that the Court's 1944 holding in *United States v. Ballard*[45] included the "surprising conclusion that, although a decision on truth or falsity might be impermissible, a jury *could* evaluate the sincerity of the religious adherent's belief in the propositions he or she had presented."[46] Meyler suggests that the Court "thus treated the religious beliefs in question as a kind of black box, attempting to circumnavigate them by resorting to an assessment of whether the defendants' beliefs were or were not sincerely held."[47] Consistent with this hands-off approach, "the Court will intervene in the assessment of whether fraud has occurred in the religious sphere only under a very specific and narrow range of circumstances."[48] Accordingly, she notes, "[w]ithin U.S. constitutional jurisprudence . . . religion has been granted substantial latitude to pursue

38 *See* EISGRUBER & SAGER, *supra* note 2.
39 Eisgruber & Sager, *supra* note 35, at 833.
40 *Id.* at 834.
41 *Id.* at 808.
42 *Id.* at 809.
43 *Id.*
44 Bernadette Meyler, *Commerce in Religion*, 84 NOTRE DAME L. REV. 887 (2009).
45 322 U.S. 78, 87 (1944).
46 Meyler, *supra* note 44, at 892.
47 *Id.* at 893.
48 *Id.* at 899.

paths that, if engaged in by nonreligious entities, would be considered commercial, without itself being given that label."[49]

Turning to the European Court of Human Rights, Meyler finds that the ECHR "has been much more willing than the U.S. Supreme Court to disaggregate speech from religion, to accept the characterization of proselytism involving financial incentives as a form of commercial speech and, as a consequence, to grant it lesser consideration than other kinds of religion or speech."[50] Indeed, "[w]hereas under the U.S. model religion and commerce can coexist, under the European paradigm, once an activity or entity is deemed commercial, it fails to be considered religious at all."[51] Finally, Meyler observes that in further contrast to the United States Supreme Court's hands-off approach in *Ballard*, the European Commission of Human Rights "viewed the state as acting within the legitimate bounds of its authority in policing the dissemination of religious assertions. . . . [The Commission thus indicated] a willingness to view religious consumers as even more in need of protection than secular ones, who might presumably operate according to more of a nationalist instrumentalist logic."[52]

Taken together, the essays in this Symposium demonstrate wide areas of disagreement among scholars as to both the conceptual underpinnings and the normative and policy justifications for the Supreme Court's hands-off approach to questions of religious practice and belief. In addition, there appears to be a correlation between scholars' views toward the hands-off approach and their broader attitudes toward the function of religion and the Religion Clauses in the context of American society. To the extent that the Court likewise premises its hands-off approach upon a more general Religion Clause jurisprudence, it remains to be seen whether, along with changes in other areas of Religion Clause doctrine, the Supreme Court might rethink both the conceptual and substantive components of the hands-off approach.[53]

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49 *Id.*

50 *Id.* at 896.

51 *Id.* at 908.

52 *Id.* at 910.

53 As Professor Kent Greenawalt observed in 1998, with respect to one area of the Supreme Court's hands-off approach, the church property cases that the Court decided in 1976 and 1979:

> Since [those decisions], some basic principles of free exercise and establishment jurisprudence have undergone radical transformation. If the Justices decide that the principles governing church property cases inadequately serve the values of free exercise and nonestablishment, we should not sup-

> pose that they will cling tenaciously to what was said twenty years ago. The truism that language of prior Court opinions is never set in stone seems especially apt for [church property cases].

Greenawalt, *supra* note 12, at 1863. Greenawalt's salient observation may apply more generally to other aspects of the Court's hands-off approach as well.