

## THE TROUBLESOME RELIGIOUS ROOTS OF RELIGIOUS NEUTRALITY

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The Supreme Court has repeatedly said that neither it nor any other branch of the state can decide matters that relate to the interpretation of religious practice or belief. The state may not attempt to determine the “truth or falsity” of religious claims,<sup>1</sup> courts may not try to resolve “controversies over religious doctrine and practice,”<sup>2</sup> may not undertake “interpretation of particular church doctrines and the importance of those doctrines to the religion,”<sup>3</sup> may make “no inquiry into religious doctrine,”<sup>4</sup> and may give “no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith.”<sup>5</sup>

This has meant most concretely that, for cases involving disputes within religious organizations, the Court has had to craft special rules, distinct from those governing other controversies. At English common law, if issues of religious doctrine arose in disputes over contract obligations, tort claims, criminal fraud charges, or the administration

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1 United States v. Ballard, 322 U.S. 78, 87 (1944).

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

3 *Id.* at 450.

4 Jones v. Wolf, 443 U.S. 595, 603 (1979) (quoting *Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 368 (1970) (per curiam)).

5 *Md. & Va. Eldership*, 396 U.S. at 368 (Brennan, J., concurring).

of a trust, the courts would resolve those issues.<sup>6</sup> Most notably, property contributed to a religious body by a member would bear an implied trust in favor of the fundamental doctrines of that religious body, and in a dispute would be awarded to the group most faithful to those doctrines.<sup>7</sup> The Supreme Court has repudiated that approach. So the Court gives more deference to the decisions of church tribunals than it would give to similarly situated secular bodies.<sup>8</sup>

This doctrine has elicited objections:

(1) The rule is incoherent as applied to actual practice, since government in fact constantly makes religious judgments, notably when deciding who is entitled to a religious accommodation, or who the relevant religious tribunal is.<sup>9</sup> The rule is even self-contradictory, because it requires courts to decide which controversies are religious and thus beyond the state's cognizance. Because the rule can't be applied consistently, it in fact is applied inconsistently and arbitrarily.<sup>10</sup>

(2) "In reality, virtually every action taken by government at least tacitly teaches, if not the truth, then the falsity of some religious beliefs."<sup>11</sup> Thus, for example, teaching Darwin in the public schools implicitly contradicts the views of biblical literalists and creationists. Even the laws against murder contradict the religious beliefs of Aztecs.<sup>12</sup>

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6 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-11, at 1232-33 (2d ed. 1988).

7 *Id.* § 14-11, at 1233.

8 *See* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708-12 (1976); *Presbyterian Church*, 393 U.S. at 445-49.

9 *See* TRIBE, *supra* note 6, § 14-11, at 1241-42.

10 *See* Jared A. Goldstein, *Is There a "Religious Question" Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 *CATH. U. L. REV.* 497, 525-33 (2005). A similar concern underlies Samuel J. Levine, *Rethinking the Supreme Court's Hands-Off Approach to Questions of Religious Practice and Belief*, 25 *FORDHAM URB. L.J.* 85 (1997). The rule, Levine argues, distorts the interpretation of the Free Exercise Clause, leading some judges to withhold free exercise protection because granting it would require interpretation of religious beliefs. *See id.* at 92-123. It also distorts the interpretation of the Establishment Clause, either precluding government from engaging in valuable secular activities with a minor religious element or deferring excessively to a disingenuous claim of secularity, and thus allowing the government improperly to endorse and promote religion. *See id.* at 123-33.

11 Steven D. Smith, *Barnette's Big Blunder*, 78 *CHI.-KENT L. REV.* 625, 657 (2003). The same point is stressed in REX AHDAR & IAN LEIGH, *RELIGIOUS FREEDOM IN THE LIBERAL STATE* 151-53 (2005), and in Richard W. Garnett, *Assimilation, Toleration, and the State's Interest in the Development of Religious Doctrine*, 51 *UCLA L. REV.* 1645, 1670-82 (2004).

12 *See* Smith, *supra* note 11, at 657.

(3) Sometimes the state has a legitimate need to explicitly contradict, and attempt to change, the religious beliefs of some people.<sup>13</sup> Thus, for example, many American political leaders have noted the importance of encouraging the “ascendancy of a . . . version of Islam that is . . . friendly to pluralism, [free] markets, and secularism.”<sup>14</sup>

To evaluate these claims, we must consider why the challenged rule exists—why it is regarded as appropriate for government to keep its hands off religious doctrine. The government should be neutral with respect to religious doctrine just insofar as neutrality is entailed by these reasons.

Government neutrality toward religion is based on familiar considerations: the importance of avoiding religious conflict, alienation of religious minorities, and the danger that religious considerations will introduce a dangerous, irrational dogmatism into politics and make democratic compromise more difficult.<sup>15</sup>

Here I want to emphasize one consideration that is often overlooked: the idea that religion can be damaged and degraded by state involvement with it. The neglect is apparent, for example, in Frederick Gedicks’ (in many ways excellent and insightful) analysis of the Supreme Court’s treatment of religion. Gedicks thinks that the Court is nominally committed to principles of secular individualism, which are suspicious of and hostile toward religion,<sup>16</sup> while much of the country is devoted to a very different ethic, “religious communitarianism,” which permits the community to define itself and its goals in expressly religious terms, and which exerts a gravitational pressure of its own on constitutional interpretation.<sup>17</sup> Contemporary doctrine, Gedicks thinks, is an incoherent congeries of these incompatible elements.<sup>18</sup> His work articulates widely shared assumptions about the

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13 See Garnett, *supra* note 11, at 1677–82. Another objection is less substantial: (4) The rule disables courts from rejecting claims of questionable religious significance, because they are not permitted to decide whether the claims are reasonable inferences from religious premises. See Levine, *supra* note 10, at 92–122. Objection (4) makes sense only if heretical religious beliefs are not really religious, a dubious premise that might wipe out all religious claims, since most of the major religions began as heresies within already extant traditions. For example, if in order to be religious, a claim must “represent[ ] the view of an organized group,” *id.* at 110, then Martin Luther was not making a religious claim when he announced his ninety-five theses.

14 Garnett, *supra* note 11, at 1680.

15 See, e.g., AHDAR & LEIGH, *supra* note 11, at 138–51.

16 See Frederick Mark Gedicks, *The Rhetoric of Church and State* 25–43 (1995).

17 *Id.* at 10–13.

18 *Id.* at 1–6.

character of contemporary controversies.<sup>19</sup> However, he omits an important middle view, one that 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.<sup>20</sup>

The omission of this view makes the controversy over the meaning of the Establishment Clause<sup>21</sup> more polarizing than it needs to be. If any interpretive question simply turns on a choice between secular individualism and religious communitarianism, then in any Establishment Clause controversy, the state is taking sides between the forces of progressivism and religious traditionalism—in other words, it is adjudicating the bitterest issues of theological controversy that divide American religion<sup>22</sup> and thus doing precisely what the hands-off rule seeks to disable the state from doing. There is no middle ground between the two views, and compromise is impossible.

The degradation argument is important, because it offers a way to reframe the rhetoric of the Establishment Clause in a way that could moderate these tensions and make it possible to find common ground. The stakes are high.

If the religion-protective argument for disestablishment is to be useful today, however, it cannot be adopted in the form in which it was understood in the 17th and 18th centuries, because in that form it is loaded with assumptions rooted in a particular variety of Protestant Christianity. Nonetheless, suitably revised, it provides a powerful reason for government, as a general matter, to keep its hands off religious doctrine.

Part I of this Essay examines the way in which the Supreme Court has deployed the degradation argument and further explores the way in which the corruption argument depends on a claim that religion is, in some way, a good thing. Part II describes the classic formulations of the claim by the founding generation, with special attention to the way James Madison synthesized the very different religious views of the coalition against the Anglican establishment that he built in Virginia. Part III proposes a revision of the idea of corruption that separates it

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19 NOAH FELDMAN, *DIVIDED BY GOD* 6–9 (2005), draws a similar contrast, between the legal views of “legal secularists” and “values evangelicals.” His omission of religiously based separatism from his diagnosis is noted in DARRYL HART, *A SECULAR FAITH* 14–16 (2006), and Perry Dane, *Separation Anxiety*, 22 *J.L. & RELIGION* 545, 566–70 (2007) (book review).

20 See *infra* Part II.

21 U.S. CONST. amend. I.

22 See JAMES DAVISON HUNTER, *CULTURE WARS* 42–48 (1991); ROBERT WUTHNOW, *THE RESTRUCTURING OF AMERICAN RELIGION* 218–22 (1988).

from its Protestant roots. Part IV responds to objections to the hands-off rule.

### I. THE PARADOX OF "CORRUPTION"

Federal law and the law of every state sometimes grant exemptions from laws, laws that presumably serve some valid purpose, when the laws place a burden on the free exercise of religion.<sup>23</sup> The accommodation of religion gives rise to a puzzle in First Amendment theory: how to reconcile free exercise with establishment principles. The Court has declared that "[n]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."<sup>24</sup> The Establishment Clause "mandates governmental neutrality between religion and religion, and between religion and nonreligion."<sup>25</sup> But the Court has also acknowledged that "the Free Exercise Clause, . . . by its terms, gives special protection to the exercise of religion."<sup>26</sup> It is not logically possible for the government both to be neutral between religion and nonreligion and to give religion special protection. Some Justices and many commentators have therefore

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23 For a survey of statutes and court decisions adopting the rule, see Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 211–12 & nn.368–73 (2004). For a survey of situations in which the rule is applied, see 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION (2006).

24 *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947).

25 *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

26 *Thomas v. Review Bd.*, 450 U.S. 707, 713 (1981); see also *Marsh v. Chambers*, 463 U.S. 783, 812 (1983) (Brennan, J., dissenting) ("[I]n one important respect, the Constitution is *not* neutral on the subject of religion: Under the Free Exercise Clause, religiously motivated claims of conscience may give rise to constitutional rights that other strongly held beliefs do not.").

The privileged status of religion is somewhat diminished after *Employment Division v. Smith*, 494 U.S. 872 (1990), which held that there is no right to religious exemptions from laws of general applicability. *Id.* at 878–79. Even after *Smith*, however, religions retain some special protection that nonreligious beliefs do not share. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the Court struck down four ordinances that a city had enacted with the avowed purpose of preventing a Santeria church from practicing animal sacrifice. See *id.* at 526–28, 546–47. The laws, the Court held, violated the Free Exercise Clause of the First Amendment because their object was the suppression of a religious practice. *Id.* at 542, 547. The result would have been different if the law had targeted a club that did exactly what the Santeria did, not as part of a religious ritual, but because its members thought that killing animals was fun.

regarded the First Amendment as in tension with itself.<sup>27</sup> Call this *the free exercise/establishment dilemma*.

The solution to the dilemma, I have argued in earlier writings, is that the government is permitted to treat religion as a valuable thing, but only if “religion” is understood at such a high level of abstraction that the state is forbidden from endorsing any theological proposition, even the existence of God.<sup>28</sup> Accommodation is permissible so long as government does not discriminate, in its accommodations, between theistic and nontheistic religions. I will discuss this argument in more detail in Part III. This Essay will argue that the classic justification for the hands-off rule is further evidence that my account is correct.

The corruption argument, I have already noted, rests on a core assumption that religion is valuable and that neutrality exists in order to protect it. This is apparent in the Court’s most extensive statement of the corruption argument. In a decision invalidating a state’s imposition of a nonsectarian, state-composed prayer to be read in public schools, the Court explained:

[The] first and most immediate purpose [of the Establishment Clause] rested on the belief that a union of government and religion tends to destroy government and to degrade religion. The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs. That same history showed that many people had lost their respect for any religion that had relied upon the support of government to spread its faith. The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too

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27 As the Court put it recently, “the two Clauses . . . often exert conflicting pressures.” *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005).

28 See Shari Seidman Diamond & Andrew Koppelman, *Measured Endorsement*, 60 MD. L. REV. 713, 726–40 (2001); Andrew Koppelman, *Akhil Amar and the Establishment Clause*, 33 U. RICH. L. REV. 393, 398–404 (1999); Andrew Koppelman, *Is It Fair to Give Religion Special Treatment?*, 2006 U. ILL. L. REV. 571, 583–603; Andrew Koppelman, *No Expressly Religious Orthodoxy: A Response to Steven D. Smith*, 78 CHI.-KENT L. REV. 729, 734–36 (2003) [hereinafter Koppelman, *Religious Orthodoxy*]; Andrew Koppelman, *On the Moral Foundations of Legal Expressivism*, 60 MD. L. REV. 777, 779–84 (2001); Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 125–39 (2002) [hereinafter Koppelman, *Secular Purpose*].

sacred, too holy, to permit its “unhallowed perversion” by a civil magistrate.<sup>29</sup>

The Court makes two arguments here. The first is a contingent sociological claim, that establishment tends to produce negative attitudes toward the “particular form” of religion that is established. The second runs much deeper. In the final sentence, the Court claims that there is something fundamentally impious about establishment. It breaches the “sacred” and the “holy.” It is remarkable to find such prophetic language in the *U.S. Reports*.

The most prominent contemporary proponent of this view is Justice David Souter. In three dissenting opinions, two of which were signed by one vote short of a majority of the Justices, he has invoked the degradation argument as a reason for maintaining a strict rule that the state may not provide aid to religion in any form, even in a neutral program that does not aid religion as such.<sup>30</sup>

The Court’s use of the corruption argument is further evidence that our law treats religion as a good thing. Any notion of “degradation” or “perversion” implies a norm or ideal state from which the degradation or perversion is a falling off.<sup>31</sup> A claim that “we ought not to do *A*, because that is bad for *B*,” implies that (1) *B* is a good thing, and that (2) we can tell what is good and what is bad for *B*. Thus, the

29 *Engel v. Vitale*, 370 U.S. 421, 431–32 (1962) (footnotes omitted) (quoting JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments* (1785), in 2 THE WRITINGS OF JAMES MADISON 183, 187 (Gaillard Hunt ed., 1901)). The Court’s opinion evidently reflected the deeply felt religious beliefs of its author, Hugo Black. See *Dane*, *supra* note 19, at 568–70. According to one account, when Black delivered the judgment of the Court, his “voice trembled with emotion . . . as he paused over “too personal, too sacred, too holy.” . . . And he added extemporaneously, ‘The prayer of each man from his soul must be his and his alone.’” ROGER K. NEWMAN, HUGO BLACK 523 (2d ed. 1997) (quoting JAMES E. CLAYTON, *THE MAKING OF JUSTICE* 21 (1964); DAVID L. GREY, *THE SUPREME COURT AND THE NEWS MEDIA* 40–41 (1968)).

30 See *Zelman v. Simmons-Harris*, 536 U.S. 639, 711–12 (2002) (Souter, J., dissenting) (arguing that the Establishment Clause aims “to save religion from its own corruption,” and that “the specific threat is to the primacy of the schools’ mission to educate the children of the faithful according to the unaltered precepts of their faith”); *Mitchell v. Helms*, 530 U.S. 793, 871 (2000) (Souter, J., dissenting) (noting that “government aid corrupts religion”); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 891 (1995) (Souter, J., dissenting) (“[T]he Establishment Clause . . . was meant not only to protect individuals and their republics from the destructive consequences of mixing government and religion, but to protect religion from a corrupting dependence on support from the Government.”).

31 Vincent Blasi has noted that ideas of corruption or distortion of religion “are meaningless in the absence of a baseline.” Vincent Blasi, *School Vouchers and Religious Liberty: Seven Questions from Madison’s Memorial and Remonstrance*, 87 CORNELL L. REV. 783, 798 (2002).

Court's claim presents, in a different form than accommodation, the same problem: it presupposes that religion is a good thing, and that we can tell what is good and what is bad for religion.

These claims made perfect sense at the time of the Founding. They played a large role in the movement toward disestablishment. But they depend on contestable theological claims, of just the kind that the hands-off rule disqualifies government from making.

## II. THE CLASSICAL CORRUPTION ARGUMENTS

### A. *The Varieties of Corruption*

The claim's basis is at least as ancient as Jesus Christ's insistence on distinguishing the things that are Caesar's from the things that are God's.<sup>32</sup> It was pervasive during the period of the Founding. But the specifically Protestant argument for separation had been around for more than a century.<sup>33</sup>

John Milton thought that state support likewise elevates the civil power over God, subjecting the church to the "political drifts or conceived opinions"<sup>34</sup> of the civil ruler, and thus "upon her whose only head is in heaven, yea, upon him who is her only head, sets another in effect, and, which is most monstrous, a human on a heavenly, a carnal on a spiritual, a political head on an ecclesiastical body."<sup>35</sup> Roger Williams wrote that to subject religion to temporal power was thus "to pull *God* and *Christ*, and *Spirit* out of *Heaven*, and subject them unto *naturall*, sinfull, inconstant men, and so consequently to *Sathan* himselfe, by whom all *peoples* naturally are guided."<sup>36</sup> John Locke argued that because "no Man can, if he would, conform his Faith to the Dic-

32 See *Luke* 20:25; *Mark* 12:17; *Matthew* 22:21. Other early Christian formulations of the separation claim are briefly described in John Witte, Jr., *That Serpentine Wall of Separation*, 101 MICH. L. REV. 1869, 1876–86 (2003) (reviewing DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE (2002) and PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002)), and HAMBURGER, *supra*, at 21–38 (2002). For earlier English and American Protestant formulations, see THOMAS G. SANDERS, PROTESTANT CONCEPTS OF CHURCH AND STATE 184–202 (1964).

33 For examples, see THOMAS J. CURRY, THE FIRST FREEDOMS 130, 144, 156, 167–68 (1986); HAMBURGER, *supra* note 32, at 5 n.7, 55, 74–75, 121–22, 124, 170–71; LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE 64–67, 124 (1986).

34 JOHN MILTON, CONSIDERATIONS TOUCHING THE LIKELIEST MEANS TO REMOVE HIRELINGS OUT OF THE CHURCH (1659), *reprinted in* COMPLETE POEMS AND MAJOR PROSE 856, 872 (Merritt Y. Hughes ed., 1957).

35 *Id.*

36 ROGER WILLIAMS, THE BLOODY TENENT OF PERSECUTION (1644), *reprinted in* 3 THE COMPLETE WRITINGS OF ROGER WILLIAMS 29, 250 (Samuel L. Caldwell ed., 1963).



tates of another,"<sup>37</sup> all that state coercion could produce would be "Hypocrisie, and Contempt of his Divine Majesty."<sup>38</sup>

Elisha Williams was particularly clear about the religious basis for his argument that establishment was corrupting to religion:

That the sacred scriptures are the alone rule of faith and practice to a Christian, all Protestants are agreed in; and must therefore inviolably maintain, that every Christian has a right of judging for himself what he is to believe and practice in religion according to that rule . . . .

. . . .

. . . Every one is under an indispensable obligation to search the scripture for himself (which contains the whole of it) and to make the best use of it he can for his own information in the will of God, the nature and duties of Christianity. And as every Christian is so bound; so he has an unalienable right to judge of the sense and meaning of it, and to follow his judgment wherever it leads him; even an equal right with any rulers be they civil or ecclesiastical. . . . That faith and practice which depends on the judgment and choice of any other person, and not on the person's own understanding judgment and choice, may pass for religion in the synagogue of Satan, whose tenet is that ignorance is the mother of devotion; but with no understanding Protestant will it pass for any religion at all.<sup>39</sup>

The minister Isaac Backus, who wrote "the most complete and well-rounded exposition of the Baptist principles of church and state in the eighteenth century,"<sup>40</sup> was centrally concerned about corruption: "[B]ringing in an earthly power between Christ and his people has been the grand source of anti-christian abominations . . . ."<sup>41</sup>

Thomas Jefferson, the quintessential rational Enlightenment proponent of separation, declared in his 1777 *A Bill for Establishing Religious Freedom* that "Almighty God hath created the mind free," and from this he inferred that

all attempts to influence it by temporal punishments, or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and

37 JOHN LOCKE, A LETTER CONCERNING TOLERATION 26 (James H. Tully ed., Machett Publ'g Co. 1983) (1689).

38 *Id.* at 27.

39 ELISHA WILLIAMS, THE ESSENTIAL RIGHTS AND LIBERTIES OF PROTESTANTS (1744), reprinted in 1 POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA, 1730–1805, at 51, 55, 61, 62 (Ellis Sandoz ed., 2d ed. 1998).

40 William G. McLoughlin, *Introduction* to ISAAC BACKUS, ISAAC BACKUS ON CHURCH, STATE, AND CALVINISM 5, 41–42 (William G. McLoughlin ed., 1968).

41 ISAAC BACKUS, AN APPEAL TO THE PUBLIC FOR RELIGIOUS LIBERTY (1733), reprinted in ISAAC BACKUS ON CHURCH, STATE, AND CALVINISM, *supra* note 40, at 309, 334 (emphasis omitted).

meanness, and are a departure from the plan of the holy author of our religion, who being lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do . . . .<sup>42</sup>

He also noted the state's incompetence:

[T]he impious presumption of legislators and rulers, civil as well as ecclesiastical, who, being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavoring to impose them on others, hath established and maintained false religions over the greatest part of the world and through all time . . . .<sup>43</sup>

He specifically invoked corruption: establishment “tends also to corrupt the principles of that very religion it is meant to encourage, by bribing, with a monopoly of worldly honours and emoluments, those who will externally profess and conform to it.”<sup>44</sup>

He repeated these arguments a few years later in his *Notes on the State of Virginia*.<sup>45</sup> He explained that religious dissent in Virginia had been fostered by establishment: “[T]he great care of the government to support their own church, having begotten an equal degree of indolence in its clergy, two-thirds of the people had become dissenters at the commencement of the present revolution.”<sup>46</sup> Establishment was a violation of natural right. “[O]ur rulers can have authority over such natural rights only as we have submitted to them. The rights of conscience we never submitted, we could not submit. We are answerable for them to our God.”<sup>47</sup> The effect of religious coercion has been “[t]o make one half the world fools, and the other half hypocrites.”<sup>48</sup>

When Jefferson made these claims, he did not elaborate on his idea of corruption, but it was quite distinct from that of many of his fellow citizens. He was a deist who regarded any religious mystery as a foolish superstition.<sup>49</sup> He was an admirer of Joseph Priestley's *A His-*

42 THOMAS JEFFERSON, *A Bill for Establishing Religious Freedom*, in THOMAS JEFFERSON: WRITINGS 346, 346 (Merrill D. Peterson ed., 1984). Jefferson reported drafting the bill in 1777; it was enacted, with some deletions, in 1786. THOMAS JEFFERSON: WRITINGS, *supra*, at 1554 hist. n.346.2.

43 JEFFERSON, *supra* note 42, at 346.

44 *Id.* at 347.

45 THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA (1787), *reprinted in* THOMAS JEFFERSON: WRITINGS, *supra* note 42, at 123.

46 *Id.* at 283.

47 *Id.* at 285.

48 *Id.* at 286.

49 See DAVID L. HOLMES, THE FAITHS OF THE FOUNDING FATHERS 79–89 (2006).

*tory of the Corruptions of Christianity*,<sup>50</sup> which denounced such core Christian doctrines as the resurrection and the Trinity.<sup>51</sup> While he was President, he prepared a new, corrected version of the Bible, using scissors and a razor to excise from the New Testament any claim of the divinity of Jesus.<sup>52</sup> The corruption of Christianity consisted precisely in its capture by institutions that sought state largesse:

My opinion is that there would never have been an infidel, if there had never been a priest. The artificial structure they have built on the purest of all moral systems, for the purpose of deriving from it pence and power, revolt those who think for themselves, and who read in that system only what is really there.<sup>53</sup>

Jefferson's invocation of the corruption argument worked politically because it appealed not only to rationalists like himself, but also to intensely religious Christians, preeminently the Baptists.

One of Jefferson's most loyal allies was the Baptist minister John Leland.<sup>54</sup> Leland strongly opposed any involvement of the state in religious matters. He was an important source of the pressure to promise an amendment banning establishment in exchange for the ratification of the Constitution.<sup>55</sup> There are even unconfirmed stories indicating that, had Madison not promised Leland to work for such an amendment, Leland would have derailed the Constitution by blocking ratification in Virginia.<sup>56</sup>

Leland, like the other writers we have examined, took religious voluntarism as a basic premise:

Every man must give an account of himself to God, and therefore every man ought to be at liberty to serve God in that way that he can best reconcile it to his conscience. If government can

50 JOSEPH PRIESTLEY, *A HISTORY OF THE CORRUPTIONS OF CHRISTIANITY* (London, The British & Foreign Unitarian Ass'n 1871) (1782).

51 See *id.* at 1–51. Jefferson wrote to Adams that he had read the book “‘over and over again.’” HOLMES, *supra* note 49, at 82 (quoting Letter from Thomas Jefferson to John Adams (Aug. 22, 1813)). He “recommended it for students at the University of Virginia as the work most likely to wean them from sectarian narrowness.” SIDNEY E. MEAD, *THE LIVELY EXPERIMENT* 48 (1963).

52 See JAROSLAV PELIKAN, *JESUS THROUGH THE CENTURIES* 189–93 (1985).

53 Letter from Thomas Jefferson to Mrs. Samuel H. Smith (Aug. 6, 1816), in THOMAS JEFFERSON: WRITINGS, *supra* note 42, at 1404.

54 See HAMBURGER, *supra* note 32, at 156–57.

55 See L.H. Butterfield, *Elder John Leland, Jeffersonian Itinerant*, 62 *PROC. AM. ANTI-QUARIAN SOC'Y* 155, 183–96 (1952).

56 *Id.*

answer for individuals at the day of judgment, let men be controled by it in religious matters; otherwise let men be free.<sup>57</sup>

The state was an unreliable source of religious guidance:

It is error, and error alone, that needs human support; and whenever men fly to the law or sword to protect their system of religion, and force it upon others, it is evident that they have something in their system that will not bear the light, and stand upon the basis of truth.<sup>58</sup>

Even if nonconformity is tolerated, but certain beliefs favored, “the minds of men are biassed to embrace that religion which is favored and pampered by law (and thereby hypocrisy is nourished) while those who cannot stretch their consciences to believe any thing and every thing in the established creed are treated with contempt and opprobrious names.”<sup>59</sup> The state should not have any power to provide for ministers, enact Sabbath laws, pay military chaplains, or have any religious qualifications for office.<sup>60</sup> He opposed a proposal to end delivery of the mail on Sundays.<sup>61</sup>

Leland opposed Sunday schools, theological seminaries, and missionary societies, because their “natural tendency” was “to reduce the gospel to school divinity, and represent the work of the Holy Unction in the heart, to be no more than what men can perform for themselves and for others; and also to fill the ministerial ranks with pharasaical hypocrites.”<sup>62</sup> Even communion was of doubtful value, because after “more than thirty years experiment, I have had no evidence that the bread and wine ever assisted my faith to discern the Lord’s body. I have never felt guilty for not communing, but often for doing it.”<sup>63</sup>

A common strand in all of these arguments is religious individualism—the view that religious truth was a matter between the individual and God. Thomas Sanders observes that Leland brought the individu-

57 JOHN LELAND, *THE RIGHTS OF CONSCIENCE INALIENABLE* (New-London 1791), reprinted in 2 *POLITICAL SERMONS OF THE FOUNDING ERA, 1730–1805*, *supra* note 39, at 1079, 1085.

58 Butterfield, *supra* note 55, at 199 (quoting LELAND, *supra* note 57, at 1089).

59 LELAND, *supra* note 57, at 1087.

60 CURRY, *supra* note 33, at 176.

61 Letter from Elder John Leland to Col. R.M. Johnson (Jan. 8, 1830), in *THE WRITINGS OF JOHN LELAND* 561, 561–63 (photo. reprint 1969) (L.F. Greene ed., 1845); 2 WILLIAM G. McLOUGHLIN, *NEW ENGLAND DISSENT, 1630–1883*, at 932 (1971).

62 Butterfield, *supra* note 55, at 235 (emphasis omitted) (quoting Letter from Elder John Leland to S. Trott (Sept. 7, 1832)).

63 *Id.* at 206 (quoting Letter from Elder John Leland to the Shaftsbury Ass’n (Aug. 23, 1811), reprinted in *THE WRITINGS OF JOHN LELAND*, *supra* note 61, at 59–60).

alism of the Enlightenment into religion by abandoning the Puritan conception of a community governed, collectively, by God's law. "The form, nature, and significance of the church receded behind a preoccupation with the conversion of single souls, and the church represented no more than a voluntary compact of individuals."<sup>64</sup> This assumption was pervasive at the time of the Founding. In the late eighteenth century, Mark Noll observes, most Americans

shared both a mistrust of intellectual authorities inherited from previous generations and a belief that true knowledge arose from the use of one's own senses—whether the external senses for information about nature and society or the moral sense for ethical and aesthetic judgments. Most Americans were thus united in the conviction that people had to think for themselves in order to know science, morality, economics, politics, and especially theology.<sup>65</sup>

A state-sponsored orthodoxy was as counterproductive in theology as it would be in any of these other fields. Salvation was a matter for the individual. "My best judgment tells me that my neighbor does wrong," Leland wrote, "but guilt is not transferable. Every one must give an account of himself."<sup>66</sup>

Yet despite his alliance with Jefferson, Leland was no rationalist. He preached "the great doctrines of universal depravity, redemption by the blood of Christ, regeneration, faith, repentance and self-denial."<sup>67</sup> He once heard the voice of God speaking to him. One night, some devilish ghost approached his bed, groaning so horribly that Leland hid under the bedclothes and prayed to God for help.<sup>68</sup> He said, "I know myself to be a feeble, sinful worm."<sup>69</sup> Yet he was indifferent to most theological controversies.<sup>70</sup> Feeling mattered to him more than doctrine.<sup>71</sup> He made Jeffersonian political philosophy

64 SANDERS, *supra* note 32, at 215.

65 MARK A. NOLL, *AMERICA'S GOD* 11 (2002).

66 Butterfield, *supra* note 55, at 239 (quoting JOHN LELAND, *TRANSPORTATION OF THE MAIL* (1830), *reprinted in* THE WRITINGS OF JOHN LELAND, *supra* note 61, at 564, 565).

67 McLoughlin, *supra* note 61, at 931 (quoting JOHN LELAND, *THE VIRGINIA CHRONICLE* (1790), *reprinted in* THE WRITINGS OF JOHN LELAND, *supra* note 61, at 92, 108).

68 *Id.*

69 *Id.* (quoting LELAND, *supra* note 67, at 173).

70 See Butterfield, *supra* note 55, at 158.

71 At Baptist revivals, he wrote:

Such a heavenly confusion among the preachers, and such a celestial discord among the people, destroy all articulation, so that the understanding is not edified; but the awful echo, sounding in the ears, and the objects in great distress, and great raptures before the eyes, raise great emotion in the heart.

appealing to his poor, ignorant, and enthusiastic followers, and thus “succeeded in linking the political philosophy of the American enlightenment with the camp-meeting spirit.”<sup>72</sup>

### B. *Madison’s Synthesis*

The deism of Jefferson and the radical Protestantism of Leland were brilliantly synthesized by Madison in the *Memorial and Remonstrance Against Religious Assessments*,<sup>73</sup> the classic description of the pathologies that the founding generation associated with establishment. Madison, of course, is the one who actually led the movement for disestablishment, first leading the fight in Virginia, then as principal author of the First Amendment.<sup>74</sup>

Madison’s argument was offered against a bill that would have allowed all Christian churches to receive tax money, and would have permitted each taxpayer to designate the church to receive his tax.<sup>75</sup> If the taxpayer refused to designate a church, the funds would go to schools.<sup>76</sup> Even this nonpreferential aid, Madison thought, tended to corrupt religion.

The *Memorial and Remonstrance* begins with a theological claim: “It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society.”<sup>77</sup> Madison further argued that the idea “that the Civil Magistrate is a competent Judge of Religious truth” is “an arrogant pretension falsified by the contradictory opinions of Rulers in all ages.”<sup>78</sup> The idea that religion should be promoted because it conduces to good citizenship, an idea that we often hear even today, Madison denounced as an attempt to “employ Religion as an engine of Civil policy,” which he thought “an unhallowed perversion of the means of salvation.”<sup>79</sup> Moreover,

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*Id.* at 170 (quoting LELAND, *supra* note 67, at 115).

<sup>72</sup> *Id.* at 242.

<sup>73</sup> James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), in *THE MIND OF THE FOUNDER* 6 (Marvin Meyers ed., rev. ed. 1981).

<sup>74</sup> See DANIEL L. DREISBACH ET AL., *THE FOUNDERS ON GOD AND GOVERNMENT* 251 (2004).

<sup>75</sup> A Bill Establishing a Provision for Teachers of the Christian Religion (Dec. 24, 1784), reprinted in *Everson v. Bd. of Educ.*, 330 U.S. 1, 72–74 (1947) (Rutledge, J., dissenting) (contained in the supplemental appendix to Justice Rutledge’s dissent).

<sup>76</sup> *Id.* at 74.

<sup>77</sup> Madison, *supra* note 73, at 7.

<sup>78</sup> *Id.* at 9.

<sup>79</sup> *Id.*

experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation. During almost fifteen centuries has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstition, bigotry and persecution.<sup>80</sup>

Madison was reticent about his own religious beliefs, which were probably some variant of deism,<sup>81</sup> but the *Memorial and Remonstrance* is nonetheless the most useful source of antiestablishment thinking. It was a public document, not a private statement of Madison's views. It presented a synthesis of the antiestablishment views that prevailed in his time, combining religious arguments designed to appeal to Evangelical Christians and secular arguments designed to appeal to Enlightenment Lockeanes.<sup>82</sup> It is unlikely that these groups agreed on anything more than the propositions stated by Madison himself. But they did agree about *them*.

Madison's *Memorial and Remonstrance* states a set of pathologies that are to be avoided, which can be regarded as pathologies from a variety of different points of view. Different members of his coalition had different ideas about why these were pathologies. Madison was carefully noncommittal about which of them was right.

The Establishment Clause, then, is based on a convergence of views held by people with radically differing religious views, who nonetheless converged on the idea that religion could be damaged by state involvement.

80 *Id.* at 9–10.

81 See HOLMES, *supra* note 49, at 91–98. For some evidence that Madison was, at least early in his life, sincere in holding the religious views stated in the *Memorial and Remonstrance*, see JOHN T. NOONAN, JR., THE LUSTRE OF OUR COUNTRY 64–91 (1998). The specific claims about corruption in the *Memorial and Remonstrance* are also made in his private correspondence, both early and late in his life. See Letter from James Madison to William Bradford, Jr. (Jan. 24, 1774), in THE MIND OF THE FOUNDER, *supra* note 73, at 2, 2–5; Letter from James Madison to Thomas R. Dew (Feb. 23, 1833), in THE MIND OF THE FOUNDER, *supra* note 73, at 338, 341.

82 On the variety of religious positions to which Madison was appealing, see THOMAS E. BUCKLEY, CHURCH AND STATE IN REVOLUTIONARY VIRGINIA, 1776–1787, at 130–36 (1977), and JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 21–35 (2d ed. 2005). Vincent Phillip Muñoz observes that “Madison leaves it unclear whether the ‘Memorial’s’ argument is theological, strictly rational, or both.” Vincent Phillip Muñoz, *James Madison’s Principle of Religious Liberty*, 97 AM. POL. SCI. REV. 17, 22 n.13 (2003).

## III. CORRUPTION TODAY

Is there a way of understanding the corruption argument that does not itself paradoxically violate the Establishment Clause by depending on a particular vision of uncorrupted religion?

Madison solved the problem by offering an account of uncorrupted religion that was sufficiently vague to win the assent of people with widely varying religious views. That kind of solution remains promising.

Religion is a category that is hard to delimit.<sup>83</sup> The best treatments of the problem of defining “religion” for constitutional purposes, most prominently that of Kent Greenawalt, have concluded that no dictionary definition will do, because no single feature unites all the things that are indisputably religions. Religions just have a “family resemblance” to one another. In doubtful cases, one can only ask how close the analogy is between a putative instance of religion and the indisputable instances.<sup>84</sup>

This process need not yield indeterminacy. The concept of “family resemblance” is drawn from the philosophy of Ludwig Wittgenstein, who famously argued that “the meaning of a word is its use in the language.”<sup>85</sup> Thus, for example, there is no single thing common to “games” which makes them all games but “similarities, relationships, and a whole series of them at that.”<sup>86</sup> The use of the word “game” is thus not circumscribed by any clear rule. But that does not mean that it is not circumscribed at all. “[N]o more are there any

83 See 1 GREENAWALT, *supra* note 23, at 124–56; see also William P. Alston, *Religion*, in 8 ENCYCLOPEDIA OF PHILOSOPHY 366, 368 (Donald M. Borchert ed., 2d ed. 2006) (“If it is true that the religion-making characteristics neither singly nor in combination constitute tight necessary and sufficient conditions for something being a religion, and yet that each of them contributes to making something a religion, then it must be that they are related in some looser way to the application of the term.”); George C. Freeman, III, *The Misguided Search for the Constitutional Definition of “Religion,”* 71 GEO. L.J. 1519, 1565 (1983) (“There is simply no essence of religion, no single feature or set of features that all religions have in common and that distinguishes religion from everything else. There is only a focus, coupled with a set of paradigmatic features.”); Eduardo Peñalver, Note, *The Concept of Religion*, 107 YALE L.J. 791, 814–21 (1997) (developing a methodology for determining whether a belief system is a religion to help judges remain “sensitive to the deep flexibility and nuance involved in the meaning . . . of the word ‘religion’”). Courts in Europe have done no better in devising a definition. AHDAR & LEIGH, *supra* note 11, at 110–26.

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

85 LUDWIG WITTEGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 20 (G.E.M. Anscombe trans., 3d ed. 1968).

86 *Id.* at 31.



rules for how high one throws the ball in tennis, or how hard; yet tennis is a game for all that and has rules too.”<sup>87</sup>

Explaining Wittgenstein’s idea here, Charles Taylor observes that, with respect to a great many rule-guided social practices,

the “rule” lies essentially *in* the practice. The rule is what is animating the practice at any given time, and not some formulation behind it, inscribed in our thoughts or our brains or our genes, or whatever. That’s why the rule is, at any given time, what the practice has made it.<sup>88</sup>

The rules of appropriate comportment when riding on a bus, for instance, are not codified anywhere. But natives of the culture may understand quite well what they are, and there may be no doubt at all as to how they apply in particular cases, even if they have not been codified and could not be codified.<sup>89</sup>

The definition of religion in American law appears to work just this way. There is no set of necessary and sufficient conditions that will make something a “religion.” But it is remarkable how few cases have arisen in which courts have had real difficulty in determining whether or not something is a religion.<sup>90</sup>

In the context of the hands-off rule, religion should be understood by reference to a set of ultimate questions that the state must not try to answer. But the state can recognize and promote the good of religion, understood at a certain level of abstraction. Neutrality is fluid; it is available in many specifications.<sup>91</sup> The American approach is one defensible specification. The state is agnostic about religion, but it is an interested and sympathetic agnosticism. The state does not say, “I don’t know and you don’t either.” Rather it declares the value of religion in a carefully noncommittal way: “It would be good to find out. And we encourage your efforts to do that.”

The precise character of the good being promoted is itself deliberately left vague, because the broad consensus on freedom of relig-

87 *Id.* at 33.

88 CHARLES TAYLOR, *To Follow a Rule*, in *PHILOSOPHICAL ARGUMENTS* 165, 178 (1995).

89 See “WEIRD AL” YANKOVIC, *Another One Rides the Bus*, on *ANOTHER ONE RIDES THE BUS* (Placebo Records 1981).

90 The list of reported cases that have had to determine a definition of “religion” is a remarkably short one. See *Religion*, 36C WEST’S WORDS AND PHRASES 153–57 (West 2002 & Supp. 2008). A recent survey laments the absence of a clear definition, but offers no evidence that the courts have had any trouble deciding cases as a result. Jeffrey L. Oldham, Note, *Constitutional “Religion”: A Survey of First Amendment Definitions of Religion*, 6 TEX. F. ON C.L. & C.R. 117, 122–25 (2001).

91 See Andrew Koppelman, *The Fluidity of Neutrality*, 66 REV. POL. 633 (2004).

ion would surely collapse if we had to state with specificity the value promoted by religion. “Religion” denotes a cluster of goods, including salvation (if you think you need to be saved), harmony with the transcendent origin of universal order (if it exists),<sup>92</sup> responding to the fundamentally imperfect character of human life (if it is imperfect),<sup>93</sup> courage in the face of the heartbreaking aspects of human existence (if that kind of encouragement helps),<sup>94</sup> a transcendent underpinning for the resolution to act morally (if that kind of underpinning helps),<sup>95</sup> contact with that which is awesome and indescribable (if awe is something you feel),<sup>96</sup> and many others. No general description of the good that religion seeks to promote can be satisfactory, politically or intellectually.<sup>97</sup> The Establishment Clause permits the state to favor religion so long as “religion” is understood very broadly, forbidding any discrimination or preference among religions or religious propositions.

This understanding makes it possible to defend accommodations without running into the free exercise/establishment dilemma. The state is recognizing the value of religion, but it is making no claims about religious truth. It is the making of such claims that violates the Establishment Clause.

This understanding also provides a basis for the hands-off rule. Each of these understandings of the good of religion is manipulable for political purposes. Each is likely to be abused. There is no reason to trust the state to resolve religious questions. The incompetence and futility extend to the deepest religious divisions today.

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92 See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 89–90 (1980).

93 See KEITH E. YANDELL, *PHILOSOPHY OF RELIGION* 17–34 (1999).

94 See PAUL TILICH, *THE COURAGE TO BE* 139–54 (2d ed. 2000).

95 See IMMANUEL KANT, *THE CRITIQUE OF PRACTICAL REASON* 127–28 (Thomas Kingsmill Abbot trans., *Forgotten Books* 2008) (1788); IMMANUEL KANT, *RELIGION WITHIN THE LIMITS OF REASON ALONE* 48 (Theodore M. Greene & Hoyt H. Hudson trans., Harper & Row, 1960) (1794).

96 See RUDOLF OTTO, *THE IDEA OF THE HOLY* 31–40 (John W. Harvey trans., Oxford Univ. Press 2d ed. 1950).

97 Charles Taylor has stated the difficulties for any general theory of religion:

I doubt very much whether any such general theory can even be established. I mean a theory which can gather all the powerful *élans* and aspirations which humans have manifested in the spiritual realm, and relate them to some single set of underlying needs or aims or tendencies (whether it be the desire for meaning or something else). The phenomena are much too varied and baffling for that; and even if they were more tractable, we would have to stand at the end of history to be able to draw such conclusions.

CHARLES TAYLOR, *A SECULAR AGE* 679 (2007).

## IV. THE OBJECTIONS ANSWERED

So what can be said about the objections to the hands-off rule that we considered at the beginning?

The hands-off rule, I will now suggest, 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.

With respect to the first objection, Goldstein and Levine are right that the state has to scrutinize religion at least in order to decide what is religious.<sup>98</sup> The corruption objection presupposes this. Corruption is a danger if any specific conception of religion is sponsored by the state—for example, if the Court relied on Protestant premises to interpret the Establishment Clause, in the manner of Elisha Williams. But it does not arise out of the religious rationale for the hands-off rule as I have reformulated it here, because that rule understands religion so abstractly that it cannot be identified with the political program of any party.

The corruption rationale is abused, however, if a court tries to decide, in any particular case, whether there has been corruption.

Justice Souter, the principal modern proponent of the corruption rationale, has fallen squarely into this trap. Dissenting in *Zelman v. Simmons-Harris*,<sup>99</sup> in which the Court upheld a program that allowed parents to pay religious school tuition with state-funded vouchers, he cited the risk of corruption described by Madison.<sup>100</sup> Then he declared: “The risk is already being realized.”<sup>101</sup> He noted the decisions of many religious schools to comply with the Ohio program’s requirements that schools not discriminate on the basis of religion, nor “teach hatred of any person or group on the basis of . . . religion.”<sup>102</sup>

Kevin Pybas observes that Justice Souter’s argument amounts to “an accusation that the religious have been unfaithful to their God and to what their God requires of them.”<sup>103</sup> Pybas is entirely correct to belabor Justice Souter with the familiar concern about the limits of state competence:

98 See *supra* text accompanying notes 9–10.

99 536 U.S. 639 (2002).

100 *Id.* at 711–12 (Souter, J., dissenting).

101 *Id.* at 712.

102 *Id.* (quoting OHIO REV. CODE ANN. § 3313.976(A)(4) (West Supp. 2002)).

103 Kevin Pybas, *Does the Establishment Clause Require Religion to Be Confined to the Private Sphere?*, 40 VAL. U. L. REV. 71, 102 (2005).

[H]ow does Justice Souter know when a particular religious community has compromised its principles? Is he or the Court generally so well-versed in the theologies of the various religious traditions in this country that he or it is in a position to say to a religious community that it has violated its own principles?<sup>104</sup>

Justice Souter's error shows that, even if the corruption rationale is accepted, it cannot be operationalized as a requirement that courts look for corruption in particular cases. It is rather a reason for the state to avoid making any religious determinations at all.<sup>105</sup>

Justice Souter offers a more telling objection to the voucher program's restrictions when he observes that the ban on teaching "hatred" itself raises religious questions. This condition, he notes, "could be understood (or subsequently broadened) to prohibit religions from teaching traditionally legitimate articles of faith as to the error, sinfulness, or ignorance of others."<sup>106</sup> Any such understanding might violate the hands-off rule for the same reason that it was violated by the charge of fraud against Edna and Donald Ballard for claiming that St. Germain had given them extraordinary healing powers.<sup>107</sup> Claiming that the Christian religion is the only path to salvation and that all non-Christians are damned may or may not constitute "hatred." It is not clear how a state can decide that without getting into forbidden questions of theology. For example, a religious group might argue that its claims about the damnation of nonbelievers reflect loving concern rather than hatred. How could a state respond to that?

This objection is not fatal to the program, however, since the "hatred" proviso does not unambiguously require this result. A familiar canon of statutory construction holds that ambiguous laws are not to be read in a way that renders them unconstitutional.<sup>108</sup> Federal courts are also not to adjudicate the constitutionality of ambiguous state laws before the state courts have the opportunity to interpret them.<sup>109</sup> If Ohio were to read its "hatred" proviso in the way Souter

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104 *Id.* at 101–02.

105 The point here is analogous to one that Richard Garnett has made about the rule, sometimes entertained by the Court, that a law may be unconstitutional because it has the potential to divide the populace along religious lines. Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667, 1710–24 (2006). Garnett shows that divisiveness cannot provide a workable criterion for constitutionality. *See id.* He does not, however, deny that religious division is one of the underlying concerns of the Establishment Clause. *See id.*

106 *Zelman*, 536 U.S. at 713 (Souter, J., dissenting).

107 *United States v. Ballard*, 322 U.S. 78, 86–87 (1944).

108 *Branch v. Smith*, 538 U.S. 254, 272 (2003).

109 *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496, 501 (1941).

suggests, that would raise constitutional difficulties, but since it hasn't happened yet, it can't be an argument against the law's constitutionality.

The second and third objections are more radical. The second objection is that any time the state does anything, it is implicitly endorsing some religious claims and rejecting others.<sup>110</sup> This is certainly correct. But there is a big difference between explicitly endorsing religious claims and doing so only implicitly and nonspecifically. The homicide laws imply that Aztec cosmology is false, but they endorse no cosmology in particular. Smith thinks that the distinction does not matter much, but then he must believe either that the corruption of religion by official meddling is not a danger or that the corruption is inevitable.<sup>111</sup>

The latter possibility, that corruption is unavoidable, is also raised by Justice Souter's dissent in *Zelman*.<sup>112</sup> It is undoubtedly true that conditional funding places pressure on religious schools to comply with the conditions. This may have an effect on the content of the schools' religious teachings, even if that is not the state's purpose. But if the state funds public but not religious schools, then this also puts financial pressure on religious people *not* to send their children to religious schools. Pybas observes that this leads Souter's logic to absurd results: "If the Establishment Clause is intended to prevent states from placing individuals in a situation in which they will be tempted to compromise their religious beliefs, as Justice Souter maintains, then it would seem that public schooling itself violates the Establishment Clause."<sup>113</sup> Impact alone cannot be corruption, or else the corruption claim loses all its meaning. In the voucher case, the fact that the state is not expressly endorsing any religious proposition or trying to manipulate religion ought to be enough to answer that claim.

The third objection<sup>114</sup> challenges Justice Brennan's claim that 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

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110 See *supra* text accompanying notes 11–12.

111 My response to the second objection is developed in detail in Koppelman, *Religious Orthodoxy*, *supra* note 28, at 732–36.

112 *Zelman v. Simmons-Harris*, 536 U.S. 639, 711–15 (2002) (Souter, J., dissenting).

113 Pybas, *supra* note 103, at 96–97.

114 See *supra* text accompanying notes 13–14.

purely ecclesiastical concern.”<sup>115</sup> Garnett objects that there are not many matters of purely ecclesiastical concern.<sup>116</sup> The content of religious belief is extremely relevant to matters of governance, and the state can’t be indifferent to what citizens believe.<sup>117</sup>

Garnett insists on this point, yet he doesn’t seem to want to draw any practical conclusions from it.<sup>118</sup> He does not propose to change a single detail of existing Religion Clause jurisprudence. Indeed, he cites with approval my formulation: “[G]overnment may not declare religious truth.”<sup>119</sup> This suggests to me that his problem with Justice Brennan’s formulation is not practical but theoretical: he wants to know how one can endorse the rule that Justice Brennan announces without being confused or disingenuous. The interesting question that Garnett raises is not whether state agnosticism on religious matters is desirable, but rather whether and how it is possible. Can one give a coherent account of Justice Brennan’s rule? Or is the state not always, at least implicitly, taking sides in religious disputes?

In short, all of these objections are, in their strongest forms, directed not at the hands-off rule but at the coherence of its intellectual underpinnings. It is that coherence that I have defended here.

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115 *Presbyterian Church v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449 (1969).

116 *See* Garnett, *supra* note 11, at 1649–50.

117 *Id.*

118 Garnett’s one departure from a hands-off rule is his discussion of American attempts to encourage the less warlike variants of Islam in the Middle East. *See id.* at 1680–81. But in this case the nation is facing the kind of supreme emergency that can override any constitutional constraint. *See* MICHAEL WALZER, *JUST AND UNJUST WARS* 251–68 (4th ed. 2006). It is also pertinent that the manipulation is taking place overseas, where the Constitution has always had diminished force, but this is not dispositive; a federal program to fund Christian missionaries abroad would certainly be unconstitutional. The Constitution has something to say about Ann Coulter’s proposal, in response to Islamic terrorism, that “[w]e should invade their countries, kill their leaders and convert them to Christianity.” Ann Coulter, *This Is War*, NAT’L REV. ONLINE, Sept. 13, 2001, <http://www.nationalreview.com/coulter/coulter.shtml>.

119 Garnett, *supra* note 11, at 1658 (quoting Koppelman, *Secular Purpose*, *supra* note 28, at 89).