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Hands Off: When and about What

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HANDS OFF: WHEN AND ABOUT WHAT

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I. TWO GENERAL THOUGHTS

I was very pleased to have the chance to comment on these four thoughtful and challenging papers when they were delivered orally at the Association of American Law Schools (AALS) Convention in January, and I am glad to have the opportunity to share some of my unsystematic thoughts about their published versions. I begin with two general observations before addressing the individual essays in turn.

When I came up with the phrase "Hands Off" to liven the title of my article on judicial resolutions of property disputes generated by splits in religious groups,[1] I had not reflected on the wide range of issues that might be couched similarly. The themes of the AALS symposium and the substance of these papers, as well as Samuel Levine's Introduction, show just how broadly that concept may stretch. A great many problems regarding the law of the religious clauses[2] might be put in terms of whether the government should refrain from involving itself with religion.

With recognition of the hands-off implications of various issues, we need to keep in mind an important caution. That concept is far from capturing all the constitutional values that are relevant, and the dangers of hands on are much more worrisome in some instances than in others.

Here is one illustrative comparison. Were the courts to delve into religious doctrines to resolve intrachurch property disputes, they

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1 Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843 (1998). Most of the content of this Essay is also in 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 261–89 (2006).

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

would be choosing the understanding of one group of sincere worshippers over the understanding of another such group. These disputes arise just because practitioners understand the requisites of their faith in sharply opposed ways. To decide in favor of one side promotes the exercise of religion of that side at the expense of the exercise of religion of the other side. By contrast, if the courts make some inquiry into the content of the religious belief of an individual who seeks an exemption from some standard requirement (say, to be willing to work on Saturday in order to receive unemployment compensation),[3] it may fail to keep its hands off; but it does something that is necessary to facilitate certain forms of free exercise, it does not need to resolve any competing religious claims, and it does not frustrate the religious exercise of one of two competing groups.[4] One may conclude (as I do) that the reasons for the government to stay out of assessing religious claims is much stronger when resolving disputes by reference to church doctrine than when the content of an individual's claim is at stake, and that the value to free exercise of making the latter inquiry is well worth the cost. But whatever conclusion one draws about this particular comparison, one needs to keep in mind that the rubric of hands off is one possible beginning, not the end, of analysis.

My second general point concerns a difference between what one needs to resolve in theory in order to have a coherent, systematic approach to a range of issues, and what actual decisionmakers must settle in order to deal with most practical issues. Despite the aspirations and entirely appropriate efforts of legal scholars to critique murky confusions and compromises and offer proposals to clarify, judges and other legal actors manage to stumble along with fair success without resolving certain deeply troubling theoretical issues. One such issue is exactly what constitutes legislative intent. Another may be what precisely counts as religious for various constitutional and statutory purposes.[5] Of course, if the law requires classification in

3 If the special treatment concerns something like keeping isolated geographical areas free of distractions to open air worship or allowing the importation of a forbidden substance, it may be a group's tenets that need to be discerned. *See, e.g.*, Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 434–37 (2006).

4 This sentence puts aside, for the moment, the equality concerns that underlie much of what Christopher Eisgruber and Lawrence Sager say. *See* Christopher L. Eisgruber & Lawrence G. Sager, *Does It Matter What Religion Is?*, 84 NOTRE DAME L. REV. 807 (2009).

5 Andrew Koppelman makes just this point in his essay. *See* Andrew Koppelman, *The Troublesome Religious Roots of Religious Neutrality*, 84 NOTRE DAME L. REV. 865, 881–82 (2009).

terms of religion, decisionmakers need some notion of what religion is. A number of scholars, including myself, have offered suggestions for how to draw the necessary line(s).[6] But if in the vast majority of cases, a claim or attribute is definitely religious or definitely not religious without regard to which of the competing approaches one follows, judges may manage adequately almost all of the time without clearly adopting one approach in lieu of others. To generalize, uncertainty about the precise way to resolve one element in a chain of elements necessary to resolve a particular claim may or may not seriously undermine the entire effort. It is at least possible that religion clause law and related legal areas can function reasonably well in treating religion as special, without an authoritative settlement of just how to draw the line between religion and nonreligion.

II. NOT HAVING TO DEFINE RELIGION AS ONE REASON NOT TO TREAT RELIGION AS SPECIAL

My last point leads naturally to the essay by Provost Eisgruber and Dean Sager. They suggest that the very effort to define religion may involve undermining the egalitarian values of the religion clauses by "creating a sphere of orthodoxy."[7] The authors have elsewhere mounted a powerful argument that the crucial value of religious clauses is to build a protective fence against discrimination—that the application of the clauses should involve treating religious beliefs and practices like analogous nonreligious beliefs and practices, rather than treating religion better or worse than analogous nonreligion.[8] Their position is well illustrated by the two Ms. Campbells who are driven by conscience and compulsion to operate soup kitchens—one Ms. Campbell resting on the teaching of her faith, the other moved by a nonreligious response to suffering of the poor.[9] The authors strongly believe the two women should be treated in the same way; that approach will avoid any necessity to figure out which claims are religious.[10] I shall return shortly to this illustration, after making a few quick observations.

The strongest reasons that Eisgruber and Sager have for not treating religion as special do not concern problems of definition, and my

6 My own proposal is in *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753 (1984), with some elaboration in 1 GREENAWALT, *supra* note 1, at 124–56.

7 *See* Eisgruber & Sager, *supra* note 4, at 807.

8 *See* CHRISTOPHER L. EISGRUBER & LAWRENCE A. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 51–78 (2007).

9 Eisgruber and Sager, *supra* note 4, at 808.

10 *See id.* at 826–30.

responses to their main arguments are in an essay that considers their compelling book-length treatment.[11] In any case in which the matter is crucial and the answer is in doubt—a very small percentage of cases—the need to decide the borders of religion is troubling, but that is not a major basis to decide whether religion should ever be treated differently from analogous nonreligion.[12]

If one believes, as I do, that religion should sometimes be regarded distinctively by the law, it does not follow that the constitutional line under the religion clauses will always be to distinguish religious claims from analogous nonreligious ones. Thus, I have no doubt that one aspect of religious liberty under the Constitution is a freedom of atheists and agnostics not to embrace religion, and I also believe that nonreligious conscientious objectors to military service must, constitutionally, be treated like religious objectors.[13] Once a court determines that in a particular context religious and nonreligious claims must be treated equally, it does not need to determine if a particular claimant is religious. Such a judgment, however, may still be necessary in other cases for which the presence of religious elements may be crucial.

The Eisgruber-Sager position is most appealing when claimants seek exemptions from ordinary legal requirements. I find the position difficult to sustain for many Establishment Clause issues. The government cannot teach the truth or falsity of religious propositions; it can teach the truth or soundness of many assertions in the realm of political philosophy ("liberal democracy is a better form of government than autocracy") and morality ("we have a basic responsibility to help others"). Of course, a public school cannot compel students to believe any of these views, but it can offer them as true or sound in a way it cannot offer "Jesus Christ is our Savior."[14]

Another domain in which it is hard for the law to avoid saying what is religious is that of discrimination. Statutes bar discrimination

11 *See* Kent Greenawalt, *How Does "Equal Liberty" Fare in Relation to Other Approaches to the Religion Clauses?*, 85 TEX. L. REV. 1217 (2007) (book review); *see also* 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS 462–79 (2008) (addressing Provost Eisgruber and Dean Sager's "equal liberty" approach to the religion clauses).

12 I do not take Eisgruber's and Sager's essay here to suggest otherwise.

13 Since I think Daniel Seeger, whom my father Kenneth W. Greenawalt represented, was a religious person who did not believe in God (as the statute required), *see* United States v. Seeger, 380 U.S. 163, 166 (1965), the clearer example of a nonreligious claimant was raised in the later case of *Welsh v. United States*, 398 U.S. 333, 338 (1970).

14 *See* 2 GREENAWALT, *supra* note 11, at 465–70; Greenawalt, *supra* note 11, at 1233–38.

on grounds of religion,[15] and if the government itself discriminated on that basis in employment, or in many other transactions, it would act unconstitutionally. If a government official refuses to hire someone because she does not like his appearance, that is not unconstitutional; if she rejects him because he wears a yarmulke or a cross, that is unconstitutional. In such instances, a court must determine what amounts to discrimination on grounds of religion.

Now, to the exemption issue raised by the Ms. Campbells. The Eisgruber and Sager approach to the problem would not require a court to decide what counts as religion, but it might need to reconstruct the individual's beliefs to ascertain the strength of his or her claim. The authors approve assessment of a "phenomenological claim about what the claimant in fact believes"[16]—an approach the Supreme Court has taken in cases of unwillingness to participate in making armaments[17] and unwillingness to work on Sundays.[18] That examination can involve: (1) a judgment about the sincerity of a person who asserts beliefs whose content is undoubtedly religious; and (2) a judgment whether that content adequately supports reasons for special treatment. For example, if a claimant sincerely said that his religion teaches that people should try to be happy and that he would be happier if he didn't work on Saturday, a court might not view that as an adequate reason to be exempt from a requirement that, to receive unemployment compensation, one must be willing to accept jobs that include work on Saturday.

What is evident on reflection is that if the Eisgruber-Sager approach to exemptions were accepted, there would still be a difficult line to be drawn in some instances, though the line would be cast in terms other than religion. Objectors to military service must be conscientious; is it a conscientious objection to believe one could much better serve one's country by teaching children of poverty in an inner city? If the state offers some exemptions from childhood vaccinations, how must it treat a couple that sincerely says they are persuaded by scientific evidence that vaccination is, overall, more dangerous than beneficial? Or how must a couple be treated if, recognizing that a particular vaccination is highly beneficial in general, they honestly believe that their children will be best served by not being vaccinated given the lowered risk of disease that results from virtually all *other* children being vaccinated.

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15 *See, e.g.*, 42 U.S.C. § 2000e-2 (2000).

16 Eisgruber & Sager, *supra* note 4, at 813.

17 Thomas v. Review Bd., 450 U.S. 707, 713–16 (1981).

18 Frazee v. Ill. Dep't of Employment Sec., 489 U.S. 829, 834 (1989).

Similar difficulties arise in respect to avoiding work on Saturday or Sunday. In their book, Eisgruber and Sager, write of a (hypothetical) mother, who wants to stay home on Saturday to care for her children.[19] She could pay for childcare and would not experience the "inflexible obligation" of the Seventh-Day Adventist who succeeded in a free exercise entitlement to unemployment compensation in the case of *Sherbert v. Verner*.[20] But why should we assume that getting childcare would satisfy the parent's sense of obligation? A parent might well feel that an overarching responsibility in life was to nurture her children herself, including being with them on weekends. Would this be sufficient to receive an exemption?[21] Eisgruber and Sager do offer serious arguments for not ever making the success of claims for exemption depend on their being religious, but whatever alternative categorization might be made very likely would involve lines that themselves could be extremely troublesome to draw in occasional cases.

III. RELIGION AND COMMERCE

Bernadette Meyler addresses a number of aspects of financial transactions that concern religious groups and religious claims, giving us illuminating comparisons between the United States Supreme Court and the European Court of Human Rights.[22] She focuses partly on a significant theoretical issue: whether a line separates religion from commerce or whether the two overlap.[23] On this point, the overlap conception is clearly preferable. It is certainly possible that sincere religious beliefs and religious practices may include transactions that are undoubtedly commercial (unless one simply posits that anything genuinely religious cannot also be commercial). Consider a church that purchases a block of tickets to a play about the life of Jesus. The minister preaches that the movie is spiritually uplifting and urges members to purchase tickets at the basic sales price. The transaction between the church and a member buying a ticket is as commercial so far as the member is concerned as if the minister had urged members to see the movie and buy tickets at the box office. To

19 EISGRUBER & SAGER, *supra* note 8, at 115–16.

20 374 U.S. 398, 400 n.1 (1963); *see* EISGRUBER & SAGER, *supra* note 8, at 116.

21 If one demanded an "inflexible obligation," one would doubt whether the nonreligious Ms. Campbell would feel that about her soup kitchen. One would also wonder whether such an approach would unfairly favor the absolutists among us (religious and nonreligious) over those with a more nuanced view of human responsibilities.

22 Bernadette Meyler, *Commerce in Religion*, 84 NOTRE DAME L. REV. 887 (2009).

23 *Id.* at 906–11.

say that religion and commercial transactions can overlap, however, does not tell us, by itself, how the government should regard the transactions, nor does it tell us what is constitutionally permissible.

Some version of the "quid pro quo" approach seems the right way to distinguish purchases (which a taxpayer cannot treat as charitable donations[24]) from genuine donations. If a church collects from members for tickets to movies, plays, or operas, or for meals a church group has at a regular restaurant, the purchaser cannot treat the ordinary cost of the entertainment or meal as a donation, though he may treat extra cost ($50 if he pays $150 for a $100 ticket) in that way.[25] It would be obviously unfair if church members purchasing ordinary items through their church could claim deductions for the standard cost of the items; and a rule that allowed this would give religious groups an incentive to become retail outlets for a variety of products. Thus, some quid pro quo limit on donations is needed.

The problem is how to draw the line. We can quickly rule out two possibilities. The legal test cannot be whether the donor believes a donation will benefit her. Let us say she donates $50,000 to her church, with no strings attached and with no tangible benefit in return. She should not lose her tax deduction because she hopes and expects (1) that her spiritual welfare will be enhanced by her gift, (2) that she will feel better about herself, or (3) that she will gain respect from fellow members.

The second nonstarter would be to suppose that the "value" of ordinary goods that counts is the purchaser's estimate of their worth to her. One who purchases a $100 meal or opera ticket through a church can't claim all but $5 as a donation on the basis that she actually dislikes opera or fancy food but wished to participate with her church community. The problem here is administrability. The Internal Revenue Service can't try to figure out if people are being honest if they say they really didn't want items they paid for and that have a standard value in the market.

I believe quid pro quo analysis should rest on two crucial features: Is "the good" one that comes directly to the payer? And is "the good" one of ordinary social life, rather than mainly one in a transcendent or spiritual realm? If a couple pays a set fee for marital counseling by a minister, that would be a quid pro quo even if the couple thought

24 *See* Treas. Reg. § 1.170A-1(h)(1) (as amended in 2008).

25 *Id.* § 1.170A-1(h)(1) to (2) (allowing purchases for consideration to be treated as charitable donations to the extent that the taxpayer's payment exceeds fair market value).

the counseling would confer some spiritual benefit.[26] If a woman gives a large amount of money to repair stained glass windows in her church, that is a donation although she will benefit with others from her church being more beautiful.

If the benefit goes to the payer but is of a transcendent or spiritual kind, that should not count as quid pro quo.[27] Here are two examples: First, a church makes tithing a condition of membership; tithing should still count as a donation although in a sense it "purchases" the benefit of continuing membership. Second, a church member is assured that if she contributes a certain amount, her time in purgatory after death will be significantly reduced. The contribution should nevertheless count as a donation. The hard issues concern goods that resemble secular goods but that have distinctive elements (is the "clearing" of Scientologists with e-meters sufficiently like nonspiritual psychological counseling?[28]) or the goods mix some personal advantage to the payer with broader benefits (paying a pew rent assists the church but also assures a good seat). Trying to work out the best dimensions of a quid pro quo approach is far from simple—and one can easily perceive the opportunities for prejudice against unfamiliar and unpopular faiths—but I see no plausible alternative to such an effort.

What of advertising to encourage members or nonmembers to make quid pro quo purchases, or to donate money to join a religious group? If a religious group acts as a sales representative for an ordinary product and makes no religious appeal, that would count as ordinary advertising subject to standard regulations.[29] Years ago, "Monks' Bread" was sold in the New York area. Although advertised with a slogan along the lines of "baked in the quiet of the monastery," there was no genuine religious appeal. Even if "Monks' Bread" was sold by a religious organization, its advertising should be regulated like that of any other bread. Indeed, even if a religious or spiritual appeal were combined with ordinary product claims that are subject to simple factual assessments of accuracy, such as the product's physical ingredi-

26 To be clear, it is my sense that clergy rarely do set fees for counseling.

27 This proposition is at least arguable. One might say that when payment is made for any benefit that goes specifically to the payer, that should not count as a donation.

28 *See* Hernandez v. Comm'r, 490 U.S. 680, 684–85 (1989) (describing Scientology's process of "auditing").

29 *See* Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 303 (1985) ("It is virtually self-evident that the Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights.").

ents, the ordinary claims could be treated like similar claims made by nonreligious sellers of similar products.

When an effort to raise money does not fall into a typical quid pro quo category, religious organizations and their leaders are still subject to certain requirements of truthfulness. If a religious group seeks donations specifically to alleviate poverty or build a church, and instead uses the money raised to sustain a lavish lifestyle for the group's leaders, the leaders can be prosecuted for fraudulent misrepresentation. That is the theory on which Jim Bakker and some of his co-leaders were prosecuted,[30] and it is the undeniable core of prosecutions that should be allowed under the Free Exercise Clause—a core accepted even by those who agree with Justice Jackson's dissent in *United States v. Ballard*[31] that fraud prosecutions should not be founded on the theory that leaders who make assertions about religions or spiritual truth are being insincere.[32]

When it comes to possible state regulation of advertising, governments cannot regulate assertions of spiritual claims as inaccurate or misleading, as they can regulate assertions about the ordinary health benefits of medicines or foods. And the Supreme Court has cautiously maintained the position that certain sales of religious materials by proselytizers cannot be subject to license taxes that are applied to ordinary sales.[33] It is doubtful whether either in respect to the truth of spiritual claims or licensing, religion actually enjoys (or should enjoy) a special exemption; the treatment accorded to religious expression may also have to be extended to nonreligious ideological expression.[34] But whatever the answer to that question, the solicitation of money for religious purposes is definitely not subject to all of the forms of regulation allowed for ordinary commercial expression.

IV. Corruption and the Value of Religion

Andrew Koppelman argues persuasively that one strong reason for the government not to meddle in religious doctrines and practice is to avoid corruption, and he sees this reason as resting on a premise that religion is valuable.[35] I think the connection between the reason

30 United States v. Bakker, 925 F.2d 728, 731–32 (4th Cir. 1991).

31 322 U.S. 78 (1944).

32 *Id.* at 92–95 (Jackson, J., dissenting).

33 Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton, 536 U.S. 150 (2002); Murdock v. Pennsylvania, 319 U.S. 105 (1943).

34 For my discussion of this possibility, see 2 Greenawalt, *supra* note 1, at 286–88.

35 *See* Koppelman, *supra* note 5, at 867–69.

and the premise is somewhat more complicated than one might gather from his essay.

Koppelman stresses that whatever may have been true two centuries ago, one should not ground the protections of the religion clauses on a belief that a particular religion or theological view, such as mainstream Protestant Christianity, is sound and deserves various protections on that basis.[36] For constitutional purposes, he writes that we must now understand the value of religion much more broadly, in a much more encompassing way.[37] But once we take religion in this broader way, we should recognize that government does not show undue favoritism if it favors or promotes religion in general.

I find a degree of indeterminacy or ambiguity in just what counts as religion and as the government promoting religion. In his essay, Koppelman specifies various goods of religion, such as harmony with the transcendent origin of universal order (if it exists) and encouragement in dealing with the heartbreaks of our lives, before remarking that no general description of the good of religion is possible and that the government may not prefer some religious propositions over others.[38] Koppelman is clear that not every believer and practitioner of religion experiences every "good" of religion, and that the government cannot decide which goods of religion people need to find. There remains, however, a lurking question about the dogmatic atheist who concludes that religion is an unhelpful crutch that derives from delusion and that it, in every form, subtracts from the value of human life. Such a position does represent one answer to a series of questions about the meaning and value of human existence, including answers to some questions about theological propositions. Without a doubt, religious liberty includes the freedom to reject religion altogether, to adopt this adamant atheist viewpoint.[39] But can the government favor positive religious belief and practice in various ways? If so, it may be disfavoring this wholly negative set of answers to questions about religion. A closely related question is whether what may be seen as having value is people addressing and responding to religious questions (with positive or negative answers) or actually practicing religion in some form. Of course, one might value both addressing the questions and practicing, but exactly what the government could favor might depend on which of these valuations is most central.

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36 *See id.* at 880–82.

37 *See id.*

38 *Id.* at 881–82.

39 *See* Wallace v. Jaffree, 472 U.S. 38, 52–53 (1985) ("[T]he Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.").

I shall mention briefly a somewhat related difference. Koppelman comments on a tradition of religious individualism.[40] Various religious traditions are more or less individualistic, and many forms of religious upbringing do not greatly encourage individual thought and autonomy. If one believed that much of the religion's value resides in individuals themselves addressing and answering theological questions, one might conclude that discouraging certain forms of religious practice actually promotes that value. One thinks of *Wisconsin v. Yoder*[41] as an instance in which liberty of the Amish religion and its practice could be seen as pitted against an ideal of autonomous choice about what religious propositions to believe and what religion to practice (an ideal that might have been served by keeping Amish children in school).

However these minor questions about Koppelman's thesis might be resolved, there remains an issue about the status of valuing religion and a perplexity about what constitutes corruption. I agree with Koppelman that officials and citizens may regard the value of religion, in his general sense, as a foundation for much of the constitutional law about religion; but I believe one can also reach a similar conclusion without embracing that premise. The point is simplest with respect to accommodations. So long as many citizens do care deeply about religion—including attitudes that relations with God and certain religious practices take priority in their lives over their responsibilities as citizens to comply with the law—the government has reason when feasible to avoid conflicts between law and religious practice. Even someone who thinks religion is without value has a ground to suppose that government should avoid requiring pacifists to serve in the military under a general draft.[42]

Something similar may be said about the corruption of interference. Suppose one thinks religion is without value or that the positive and negative values are about equal, or one is unsure about religion's value. One might still believe that governable interference will make things worse, that it will lead to manipulation that renders religion and politics worse than they would otherwise be. In other words, one could worry about degradation or corruption, while doubting that a practice has positive value in the first place. Things can almost always get worse, and sometimes government involvement is a promising strategy for just that deterioration.

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40 *See* Koppelman, *supra* note 5, at 876–78.

41 406 U.S. 205, 215–17 (1972).

42 My remarks here leave open the question of how analogous nonreligious objectors should be treated.

In his discussion of conditions on receiving educational aid, Koppelman apparently embraces the view that actual corruption occurs only if a religion is drawn away from its genuine beliefs and practices.[43] It follows from this view that courts are not in a position to discern if corruption has occurred in any individual case. Since it is enough for him that the potential for corruption must be avoided, what one defines as actual corruption is not critical. But, for what it is worth, one might take a somewhat broader view of corruption than he does. If a judge accepts a payment to decide a case in a certain way, we think corruption is present even if the judge would decide the same way without the payment, and even if the judge is so conscientious that he never accepts a payment unless he has already determined to decide the case the way the briber wishes. If the government improperly offers payments to religious groups to accept doctrines or threatens coercion unless they renounce doctrines, we might think of that as corruption whether or not the groups deflect one iota from what they would otherwise do. At the very least, others may then wonder about the motivational springs of those leading the religion; and, once the government incentives or threats are in place, the leaders themselves may find it hard to avoid being influenced at all by what the government has done (even if the consequence is to lead them to dig in their heels to resist government pressure). According to this broader view of corruption, the question does not come down simply to whether the government action is likely to incline people to deflect from the dictates of a religion. Telling religious groups that they will benefit or suffer from government action depending on the doctrines they teach (the danger posed by setting conditions on religious teachings of private schools) is qualitatively different from undertaking government programs (such as requiring equal pay for women and men or supporting public education to the exclusion of private education) that may incline some people to act in ways contrary to what their religions recommend.

V. Overlapping Concerns and Jurisdictional Responsibilities

Richard Garnett's essay builds from the basic premise that governments have a variety of concerns that may be aided or threatened by religious doctrine.[44] Garnett argues that if the notions that religion is a private matter and that the government has no interest in religion are taken to mean that really nothing of importance to the

43 Koppelman, *supra* note 5, at 883–85.

44 Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What Are We Talking About?*, 84 Notre Dame L. Rev. 837 (2009).

government is at stake in what religious people practice, these notions are false.[45] This conclusion strikes me as undoubtedly correct. The government has an interest in reducing the commission of crimes, in reducing antisocial noncriminal behavior, and in promoting civic virtues. Not only may certain religions positively encourage various forms of criminal behavior, so also religious doctrines and practices may sometimes have the unintended effect of increasing such behavior. The same may be true of some antisocial but noncriminal behavior. Instances of racial and gender bias may be socially hurtful even if they are neither criminal nor form the basis of civil liability. Once one understands these basic realities, the overlap between government concerns and religious concerns is evident. Here are related illustrative examples where factual premises have at least a patina of plausibility. By insisting on a celibate priesthood, the Roman Catholic Church indirectly produces a higher incidence of sexual abuse of minors by priests than would occur if married persons were permitted to become priests.[46] By not allowing women to become priests, the Church has retarded to a degree the accomplishment of full equality for women in other areas of life (such as secular workplaces and families).[47] Were one to ask only about government interest, one might find a basis for the government to tell the Church what criteria it may use to choose priests, and perhaps to regulate how priests are trained and supervised.

When we turn from government interests to ways in which the government might affect doctrines and practices, some are more acceptable than others. The government may present as true or sound various conclusions about science, morality, and political philosophy that are at odds with the doctrines of certain religious groups. Without a doubt, it may prohibit and regulate various activities without reference to religious belief and practices, for example, barring racial and gender discrimination in employment.[48] These standard government practices may exert some indirect effort on what religious people are likely to accept and how existing religions are likely to develop. If the law forbids polygamy, a religion may become some-

45 *Id.* at 839–42.

46 A serious factual evaluation of this thesis would need to undertake a study of sexual abuse of minors in other institutions and a comparison of whether such abuse is actually less common among (mostly heterosexual) married men than men who remain unmarried and have no open sexual partner.

47 Here one would need to discern whether *this narrow limit* on women's opportunities does affect broader attitudes.

48 *See, e.g.*, 42 U.S.C. § 2000e-2 (2000).

what less likely to teach the virtues of polygamy;[49] if the government refuses tax benefits to universities engaged in racial discrimination, a religion may be inclined to alter practices of racial classification.[50] The legitimacy of such measures is not undermined if some in the government harbor a hope that religious beliefs and practices may be affected, so long as a sound justification and the main motivation lie elsewhere.[51]

Direct government efforts to alter or maintain religious doctrines and practices are another matter altogether. It may well be that within the United States, it will be better for the country as a whole if more moderate versions of Islam prevail over versions that are extreme, if "extreme versions" include sharply opposing American ideas of liberal democracy and promoting violence as an appropriate means of opposition. But it does not follow that the government should funnel money to moderate leaders to assist them in efforts to persuade others to their position. Additionally, if such action would be improper domestically, it is at least a serious issue whether our government should be making similar efforts in foreign countries in which achievement of political stability and a government's friendly relations with the United States matter to us.

Professor Garnett regards many of the reasons offered for the government to stay out of religion as less than compelling and thinks the strongest reason is a basic division of jurisdiction—that religion is simply not the government's business.[52] One might regard internal family life in much the manner Garnett treats religion. The government has substantial interests at stake in how members of families treat each other, but perhaps within certain boundaries, such as barring physical coercion, families, i.e. parents, should be left free to decide how to manage their internal relations.[53]

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49 For example, in 1890, Wilford Woodruff, President of The Church of Jesus Christ and Latter-day Saints, issued his Manifesto which officially ended the Church's support for plural marriages—eleven years after the Supreme Court rejected polygamy in *Reynolds v. United States*, 98 U.S. 145, 161–67 (1879). *See generally* RICHARD S. VAN WAGONER, MORMON POLYGAMY 133–40 (1989).

50 *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

51 Apart from what courts may examine, it is a troubling question how far officials should act in accord with reasons independent of religion if an actual dominant motive is to affect religion. My own sense is that it is usually, if not always, improper for officials to take action with the dominant motive to affect religion, even if they can find alternative reasons to support what they do.

52 *See* Garnett, *supra* note 44, at 854–63.

53 *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 66 (2000) ("[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fun-

My own view is that many factors point toward government's avoiding involvement with various choices made within religions, but I do think what Garnett has emphasized is a very strong reason. I shall comment briefly on competence, and then raise two questions about the jurisdictional divide. Garnett is right that courts are well able on the basis of expert testimony to discern the content of many religious beliefs and practices,[54] but we need to distinguish this competence from the possible ability of government officials to decide what religious views are true or sound. That is not an exercise for which officers of government are well suited, especially because they are under a constant temptation or inclination to find that soundness or truth comports with political advantage. Even in respect to discerning the core beliefs and practices of religious groups, one crucial problem when a dispute within a group arises is how susceptible or open to change a religion should be. Is a shift from seating that segregates by gender a central or core change in a group's practices? An answer to this question is not entirely descriptive; it involves a degree of normative judgment of a kind different from the usual judgments courts make. A further problem, of course, is the potential for judicial bias or discrimination (conscious or not), which may be much greater when judges are dealing with subjects (such as religion and political ideology) than when they discern the central premises of a group founded for cancer research.

A fundamental question about Garrett's thesis is whether he means it to apply to religion and government in general, or to liberal democracy, or to some other less than universal category of forms of political organization. Suppose members of a simple religious group create a political society in a remote location. Would it be wrong for them to mix religion and government, perhaps by assigning a significant political role to religious leaders? One can certainly imagine understandings of religion and government that would not recommend Garnett's sharp jurisdictional division. Perhaps it is sufficient to respond that in advanced, diverse, modern societies, liberal democracy is the best form of government, and that form should include recognition of religion as having a kind of domain of its own.

Although Garnett and Koppelman see their basic justifications for hands off as distinct, not only could the two approaches fit together in an understanding of a range of relevant factors, one might regard them as fairly closely related. According to the broad sense of

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damental right of parents to make decisions concerning the care, custody, and control of their children.").

54 *See* Garnett, *supra* note 44, at 857–58.

corruption I have suggested, a breach of the relevant jurisdictional boundaries might itself be seen as a kind of corruption, a bringing to bear of improper influences on a domain that should remain unaffected (or uncorrupted) by such influences.