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CORRUPTION OF RELIGION AND THE ESTABLISHMENT CLAUSE

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ABSTRACT

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. This Article explores one consideration, prominent at the time of the framing, that is often overlooked: the idea that religion can be corrupted by state involvement with it. This idea is friendly to religion but, precisely for that reason, is determined to keep the state away from religion.

If the religion-protective argument for disestablishment is to be useful today, it cannot be adopted in the form in which it was

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understood in the seventeenth and eighteenth 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. It offers the best explanation for many otherwise mysterious rules of Establishment Clause law.

TABLE OF CONTENTS

Laws, especially those with ambiguous language, are interpreted in light of their purposes.[1] The Establishment Clause of the First Amendment, which states that "Congress shall make no law respecting an establishment of religion," is an example.[2] One of its core purposes was to prevent the corruption and degradation of religion that the Framers associated with religious establishments. The Clause, the Supreme Court has said, "stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate."[3] This rationale has been neglected in modern Establishment Clause theory, but it can explain and justify the shape of our law better than the prevention of division along religious lines or of alienation, which are the themes that dominate contemporary thought about disestablishment.

The corruption rationale has a problem, however. It cannot be imported without modification into modern jurisprudence. Any notion of "corruption," "degradation," or "perversion" implies a norm or ideal state from which the degradation or perversion is a falling off. That paradoxically raises Establishment Clause problems of its own.

A claim that "we ought not to do A, because A is bad for B" implies that (1) B is a good thing, and (2) we can tell what is good and what is bad for B. Thus, any invocation of the corruption rationale presupposes both that religion is a good thing and that we can tell what is good and what is bad for religion. For example, the Framers' understanding of the corruption rationale relied on Protestant or Deist understandings of what uncorrupted religion consisted in. No court today could embrace those understandings without engaging in precisely the kind of intervention in live theological controversy that the Clause was intended to forestall. This difficulty has received almost no attention,[4] but it poses a

1. This is a commonplace of statutory interpretation. *See* 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 45:9 (7th ed. 2007).

2. U.S. CONST. amend. I.

3. Engel v. Vitale, 370 U.S. 421, 431-32 (1962) (quoting JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), *reprinted in* 2 THE WRITINGS OF JAMES MADISON 183, 187 (1901)). As will be detailed below, this historical claim is accurate.

4. The only extended treatment of the problem of which I am aware is John Courtney

fundamental challenge to the coherence of Establishment Clause jurisprudence.

This Article will elucidate the difficulty and show how it can be answered. The Framers' specific idea of the "religion" that must be protected from corruption has been supplanted by a different idea of religion, one that resists definition yet is quite clear in application. There is, in contemporary American culture, a proliferation of different understandings of the good of religion. Yet, despite this proliferation, we generally know religion when we see it. Many people who are divided by these understandings converge on the idea that the object of their contestation will be damaged and degraded by state interference with it. Thus clarified, the corruption rationale can explain many otherwise mysterious aspects of modern Establishment Clause law—notably, the peculiar rule, which has recently been formally stated for the first time, that older acknowledgements of ceremonial deism are probably constitutional, whereas newer ones will be invalidated. It also offers a new justification for that rule—one that is not *really* new, because it has been around for 350 years, but which has been obscured by the neo-Rawlsian approach that is now so prominent in contemporary writing on religious liberty.

Part I of this Article explores the gap in contemporary constitutional theory, and how the corruption argument can remedy it. Part II examines the way in which the corruption argument depends on a claim that religion is, in some way, a good thing. It also shows why this claim is hard to cognize from within the framework of neo-Rawlsian political theory. Part III describes the classic formulations of the claim, primarily by the founding generation. Part IV enumerates the central claims of the corruption thesis, showing how those claims are closely tied to its religious roots, and thus apparently presenting an insuperable Establishment Clause obstacle to a court's making those claims. It also shows the failure of Justice

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Murray, *Law or Prepossessions?*, 14 LAW & CONTEMP. PROBS. 23 (1949), discussed *infra* at text accompanying notes 313-19. It is noted in 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS 493 (2008), and may explain the caution with which he deploys the corruption argument. It is also briefly noted by Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 324-26 (1996), who eschews reliance on it because "these religious beliefs cannot be imputed to the Constitution without abandoning government neutrality on religious questions." *Id.* at 324.

Antonin Scalia's attempt to resolve this difficulty. Part V proposes a revision of the idea that separates it from its Protestant roots. Part VI responds to objections (including Rawlsian ones) to that proposal. Part VII shows how the reformulation offered here makes sense of the law.

I. THE GAP IN ESTABLISHMENT CLAUSE THEORY

Consider some familiar and well-settled rules of Establishment Clause law. The state may not engage in speech that endorses a particular religion, or religion generally.[5] It may not use a religious test for office.[6] A law is invalid if it lacks a secular legislative purpose,[7] or if it purposefully discriminates against certain religious practices.[8] Laws may not discriminate among religions.[9]

A theme that runs through this area of the law is the state's incompetence to decide matters that relate to the interpretation of religious practice or belief. The state may not attempt to determine the "truth or falsity" of religious claims,[10] courts may not try to resolve "controversies over religious doctrine and practice,"[11] may not undertake "interpretation of particular church doctrines and the importance of those doctrines to the religion,"[12] may make "'no inquiry into religious doctrine,'"[13] and may give "no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith."[14]

Yet, at the same time, there is a broad range of official religious practices that are tolerated. "In God We Trust" appears on the currency, legislative sessions begin with prayers, judicial proceed-

5. *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573 (1989).

6. *See, e.g.*, Torcaso v. Watkins, 367 U.S. 488 (1961).

7. *See* Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 95-98 (2002), and cases discussed therein.

8. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993).

9. *See, e.g.*, Larson v. Valente, 456 U.S. 228 (1982).

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

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

12. *Id.* at 450.

13. Jones v. Wolf, 443 U.S. 595, 603 (1979) (quoting Md. & Va. Eldership v. Church of God, Inc., 396 U.S. 367, 368 (1970)).

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

ings begin with "God save the United States and this Honorable Court," Thanksgiving and Christmas are official holidays, and, of course, the words "under God" appear in the Pledge of Allegiance. The boundaries of this permitted "ceremonial deism" are unclear. Prayers in school are unconstitutional, but not moments of silence.[15] The Supreme Court's most recent set of decisions is particularly confusing, holding that an official Ten Commandments display is unconstitutional if it was erected recently, but not if it has been around for decades.[16]

Any account of the Establishment Clause needs to explain these apparent inconsistencies. One can write them off as unprincipled compromises, and many have.[17] But it is possible to do better than that.

The Establishment Clause has multiple purposes,[18] so any argument about the basis of the Clause is going to be about what to emphasize. Two accounts of the purposes of the Establishment Clause dominate contemporary theory. One of these, whose leading proponent was Chief Justice Warren Burger, focuses on political division.[19] The other, principally articulated by Justice Sandra Day

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15. *See* Brown v. Gilmore, 258 F.3d 265 (4th Cir. 2001) (rejecting an Establishment Clause challenge to a Virginia statute authorizing school boards to establish a daily moment of silence), *cert. denied*, 534 U.S. 996 (2001).

16. *Compare* McCreary County v. ACLU, 545 U.S. 844 (2005) (invalidating a recently erected display), *with* Van Orden v. Perry, 545 U.S. 677 (2005) (upholding a forty-year-old display). Justice Breyer, the only Justice in the majority in both cases, relied on the divisiveness rationale in explaining his position. *See Van Orden*, 545 U.S. at 700-04 (Breyer, J., concurring). I will argue here that there are better grounds for his position than the ones he stated.

17. *See, e.g.*, GREENAWALT, *supra* note 4, at 86-87, 95-102; Douglas Laycock, Comment, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 223-31 (2004); Laura S. Underkuffler, *Through a Glass Darkly:* Van Orden, McCreary, *and the Dangers of Transparency in Establishment Clause Jurisprudence*, 5 FIRST AMENDMENT L. REV. 59, 60-61 (2006). Some writers have suggested that the entire body of Establishment Clause law reflects this kind of unprincipled compromise. *See* NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT 215-16 (2005); FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE: A CRITICAL ANALYSIS OF RELIGION CLAUSE JURISPRUDENCE 1-2, 5-6 (1995); Phillip Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CAL. L. REV. 817, 819 (1984).

18. *See* GREENAWALT, *supra* note 4, at 6-13; Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9, 37-54 (2004).

19. *See infra* Part I.A.

O'Connor, focuses on alienation.[20] Doubtless these concerns are among those that underlie the Establishment Clause. But a theory that makes them central cannot explain or justify the specific rules of law described above.

A. The Political Division Theory

Chief Justice Burger argued that a state program could be unconstitutional because of its "divisive political potential."[21] This mattered because "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."[22] Such division constituted "a threat to the normal political process,"[23] and "could divert attention from the myriad issues and problems that confront every level of government."[24] This argument has often been invoked in Supreme Court opinions, though it is unclear that it has done any analytical work in deciding cases.[25]

The most fundamental defect with this argument, as a basis for a constitutional rule, is that political division is an unavoidable part of life in a democracy. This division will frequently take the form of religious division.[26] It is not clear why division along religious lines is worse than divisions along lines of race, gender, age, ethnicity, or economic class.[27] As a standard for constitutionality, the division criterion is not administrable: it is impossible for a court to predict

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20. *See infra* Part I.B.

21. Lemon v. Kurtzman, 403 U.S. 602, 622 (1971).

22. *Id.*

23. *Id.*

24. *Id.* at 623.

25. For a thorough catalogue of examples, see Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667 (2006). The argument has a large scholarly following. *See, e.g.*, ROBERT AUDI, RELIGIOUS COMMITMENT AND SECULAR REASON 3-4, 27-30 (2000); Laycock, *supra* note 4, at 316-19; Ira C. Lupu, *To Control Faction and Protect Liberty: A General Theory of the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 357, 357 (1996); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 198-99 (1992).

26. Religious division has in fact been a basis for political division throughout American history. *See* A. JAMES REICHLEY, RELIGION IN AMERICAN PUBLIC LIFE 2-4 (1985). These divisions have remained manageable, not because of judicial intervention, but because the proliferation of religious factions has prevented any of them from gaining ascendancy. *See* Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself*, 37 CASE W. RES. L. REV. 674, 726-30 (1987).

27. *See generally* Garnett, *supra* note 25.

which measures will cause political division.[28] Moreover, the Supreme Court's Establishment Clause decisions themselves have been causes of political division; its decisions to invalidate prayer and Bible reading in the public schools have been very unpopular.[29] If the aim is to avoid division, then the law has been counterproductive.[30]

B. The Alienation Theory

A second theory, championed by Justice O'Connor, is concerned with preventing a certain kind of political alienation. "The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community."[31] Government may not take action that endorses a particular religious view, because this "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[32] This criterion, O'Connor argues, is better able than any rival conception to "adequately protect the religious liberty [and] respect the religious diversity of the members of our pluralistic political community."[33]

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28. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1278-84 (2d ed. 1988).

29. *See* Douglas Laycock, *Church and State in the United States: Competing Conceptions and Historic Changes*, 13 IND. J. GLOBAL LEGAL STUD. 503, 527 (2006).

30. STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 106-09 (1995).

31. Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

32. *Id.* at 688.

33. County of Allegheny v. ACLU, 492 U.S. 573, 627-28 (1989) (O'Connor, J., concurring in part and concurring in the judgment). This argument also has a large scholarly following. *See, e.g.*, CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 61-62, 122 (2007); Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2084-86 (1996); Steven G. Gey, *Life After the Establishment Clause*, 110 W. VA. L. REV. 1, 17-21 (2007). Many writers draw on both arguments. Thus, for example, Noah Feldman relies on the danger of political division to argue for an absolute rule against public funding for religious activities, whereas he relies on an alienation rationale for permitting government sponsored religious displays and prayers. *See* FELDMAN, *supra* note 17, at 14-16. He is aware that his proposals present their own dangers of division and alienation, but he does not explain how he knows how to quantify the magnitudes on each side—how, for example, he knows that secularists' "concerns over exclusion cannot effectively trump the sense of exclusion shared by the many Americans who

It is not clear, however, how endorsement either threatens religious liberty or fails to respect diversity. Endorsement, as such, is purely symbolic. It does not restrict religious liberty in any tangible way.[34] As for respect for diversity, several commentators have noted that it is not clear how endorsement is inconsistent with it:

> [I]t is not clear why symbolic exclusion should matter so long as "nonadherents" are in fact actually included in the political community. Under those circumstances, nonadherents who believe that they are excluded from the political community are merely expressing the disappointment felt by everyone who has lost a fair fight in the arena of politics.[35]

To ask that no one be alienated from the results of political decisionmaking is to ask too much. In a pluralistic culture, alienation is inevitable. "[S]ome beliefs must, but not all beliefs can, achieve recognition and ratification in the nation's laws and public policies; and those whose positions are not so favored will sometimes feel like 'outsiders.'"[36] Once more, judicial intervention may simply make things worse.[37] Finally, the focus on alienation distorts the Establishment Clause, transforming it from a prescription about institutional arrangements into a kind of individual right, the right not to feel like an "outsider."[38]

In short, both the division theory and the alienation theory suffer from the same defect. The pathology each seeks to prevent is in fact not preventable. Division and alienation will happen no matter what courts do. It is not clear why these effects, however regrettable they may be, are worse when they are connected with religion.

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want to express their religious values through politics." *Id.* at 16.

34. *See* Neil R. Feigenson, *Political Standing and Governmental Endorsement of Religion: An Alternative to Current Establishment Clause Doctrine*, 40 DEPAUL L. REV. 53, 65 (1990).

35. Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 712 (1986); *see also* Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 307 (1987); David M. Smolin, *Regulating Religious and Cultural Conflict in Postmodern America: A Response to Professor Perry*, 76 IOWA L. REV. 1067, 1097-99 (1991).

36. Smith, *supra* note 35, at 313.

37. SMITH, FOREORDAINED FAILURE, *supra* note 30, at 109-15.

38. Smith, *supra* note 35, at 300.

More particularly, the Establishment Clause rules discussed above cannot prevent division and alienation. On the contrary, they have sometimes exacerbated these problems. Because division and alienation are so ubiquitous in politics, they do not provide a reason to single out religion for special treatment; why is this kind of division and alienation especially bad? If these are the purposes that Establishment Clause law is supposed to serve, then the whole body of law is radically misconceived and should be abandoned.

C. The Comparative Strength of the Corruption Argument

The corruption argument can clear up these puzzles. It is not possible to prevent division and alienation, but it is possible to keep government away from religion. All the rules we considered at the beginning of this Article are well tailored to do that. They all prevent government from deciding religious questions. Even the sanctioning of ceremonial deism prevents government from deciding religious questions: old ceremonies, which were broadly ecumenical at the time that they were enacted, are allowed to remain, but they are frozen in place. No new theological decisions are allowed to be made.

The idea that religion can be damaged and degraded by state involvement has nearly disappeared from contemporary Establishment Clause theory. The neglect is apparent, for example, in Frederick Gedicks's (in many ways excellent and insightful) analysis of the Supreme Court's treatment of religion.[39] Gedicks thinks that the Court is nominally committed to principles of "secular individualism," which are suspicious of and hostile toward religion, whereas 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.[40] Contemporary doctrine, Gedicks thinks, is an incoherent congeries of these incompatible elements.[41] His work articulates widely shared assumptions about the character of contemporary controversies.[42]

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39. *See* GEDICKS, *supra* note 17.
40. *Id.* at 117-22.
41. *See id.* at 4-7.
42. Noah Feldman draws a similar contrast between the legal views of "legal secularists"

He omits, however, 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, including John Milton, Roger Williams, John Locke, Samuel Pufendorf, Elisha Williams, Isaac Backus, Thomas Jefferson, Thomas Paine, John Leland, and James Madison.[43]

The omission of this view makes the controversy over the meaning of the Establishment Clause 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.[44] There is no middle ground between the two views, and compromise is impossible.

The corruption 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.

If the corruption argument for disestablishment is to be useful today, however, it cannot be adopted in the form in which it was understood in the seventeenth and eighteenth 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.

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and "values evangelicals." FELDMAN, *supra* note 17, at 6-8. His omission of religiously based separatism from his diagnosis is noted in DARRYL HART, A SECULAR FAITH: WHY CHRISTIANITY FAVORS THE SEPARATION OF CHURCH AND STATE 14-15 (2006), and Perry Dane, *Separation Anxiety*, 22 J.L. & RELIGION 545, 546 (2007).

43. *See infra* Parts III.A-B.

44. *See* JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA 261-69 (1991); ROBERT WUTHNOW, THE RESTRUCTURING OF AMERICAN RELIGION 218-22 (1988).

II. "CORRUPTION" AND THE FREE EXERCISE/ESTABLISHMENT DILEMMA

Charles Taylor observes that there are three different strategies by which modern political philosophy has tried to cope with religious diversity. One, the "common ground strategy," seeks to establish political ethics on the basis of premises shared across different confessional allegiances: what all Christians, or even all theists, believe.[45] The difficulty with this approach is that as pluralism grows, the common ground shrinks. The universal sentiments of Christendom are not as universal as they once seemed. A second understanding, the "independent political ethic" strategy, seeks to abstract away from all our disagreements to something that is independent of them.[46] The aim is to infer, from certain fundamental preconditions of modern political life, conclusions about how political life should be organized.[47] Pluralism has also created a problem for this approach: we may want to ignore God only for political purposes, but if there are real live atheists in the society, then the state, by endorsing an ethic that is independent of religion, may appear to be taking their side on fundamental issues. The difficulties with both of these approaches, Taylor thinks, create the case for "overlapping consensus," which does not seek any agreement about foundations, but only acceptance of certain political principles.[48]

Taylor borrows the term "overlapping consensus" from John Rawls,[49] but by it he means something considerably shallower, and therefore less necessarily commited to neutrality toward contested ideas of the good. Taylor thinks that "Rawls still tries to hold on to too much of the older independent ethic."[50] Rawls expects citizens

45. Charles Taylor, *Modes of Secularism*, *in* SECULARISM AND ITS CRITICS 31, 33 (Rajeev Bhargava ed., 1998).

46. *Id.*

47. *Id.* Taylor observes that Grotius was an early explorer of this avenue: "We look for certain features of the human condition which allow us to deduce certain exceptionless norms, including those of peace and political obedience. Grotius would appear at times to be arguing almost more geometrico." *Id.*

48. *Id.* at 51.

49. *Id.*

50. *Id.*

not only to endorse a set of political principles, but also to accept a doctrine of political constructivism and just terms of cooperation.[51] This, Taylor thinks, is too much to ask.[52] As a schedule of rights, political liberalism for Taylor may suggest an independent political ethic, but this ethic will inevitably be interpreted in light of any interpreter's comprehensive view, and so will partake of the common ground strategy.

The regime of religious neutrality we actually have in the United States today resembles an overlapping consensus as Taylor (but not Rawls) understands it. The state is supposed to be neutral toward religion. But, at the same time, religion is treated as something so important that even political values are sometimes sacrificed for its sake. This treatment of religion as a good is not a result that could be reached within Rawlsian constructivism.[53] Neutrality in American law is based on a very abstract understanding of the common ground. Because a Rawlsian approach excludes a common ground strategy, contemporary neo-Rawlsians have understandably had difficulty acknowledging the common ground elements of the present regime.[54]

Federal and state law sometimes grant exemptions from laws that presumably serve some valid purpose when the laws place a burden on the free exercise of religion.[55] This cannot be justified by a purely political ethic, which would accommodate religion only when the power or stubbornness of the pertinent religious group made such accommodation prudent, would purge politics of religion altogether because religion is irrational and dangerous, or would make religious ideas a tool of politics whenever that seemed convenient.[56]

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51. *Id.*

52. *Id.*

53. *See infra* text accompanying notes 467-82.

54. Prominent among these are Martha Nussbaum, Christopher Eisgruber, and Lawrence Sager. *See generally* EISGRUBER & SAGER, *supra* note 33; MARTHA NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY (2008). They are critiqued in Andrew Koppelman, *Is it Fair To Give Religion Special Treatment?*, 2006 U. ILL. L. REV. 571. Rawls and Nussbaum are further engaged *infra* text accompanying notes 467-82.

55. For a survey of statutes and court decisions adopting the rule, see Laycock, *supra* note 17, at 211-12 & nn.368-73. For a survey of situations in which the rule is applied, see 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS (2006).

56. These were the positions taken by the purely political views that were held at the time of the founding. *See* JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL

The accommodation of religion gives rise to a puzzle in First Amendment theory: how to reconcile free exercise with establishment principles. The Supreme 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."[57] The Establishment Clause "mandates governmental neutrality between religion and religion, and between religion and nonreligion."[58] But the Court has also acknowledged that "the Free Exercise Clause, ... by its terms, gives special protection to the exercise of religion."[59] It is not logically possible for the government to be both neutral between religion and nonreligion and to give religion special protection. Some justices and many commentators have therefore regarded the First Amendment as in tension with itself.[60] Call this *the free exercise/establishment dilemma*.

The solution to the dilemma, I have argued in earlier writings,[61] 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

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EXPERIMENT 29-35 (2d ed. 2005).

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

58. Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968).

59. 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 was 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. Even after *Smith*, however, religions retain some special protection that nonreligious beliefs do not share. In *Church of the Lukumi Babalu Aye 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. 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.

60. As the Supreme Court put it recently, "the two Clauses ... often exert conflicting pressures." Cutter v. Wilkinson, 544 U.S. 709, 719 (2005).

61. *See generally* Shari Seidman Diamond & Andrew Koppelman, *Measured Endorsement*, 60 MD. L. REV. 713 (2001); Koppelman, *supra* note 54; Andrew Koppelman, *No Expressly Religious Orthodoxy: A Response to Steven D. Smith*, 78 CHI.-KENT L. REV. 729 (2003); Koppelman, *supra* note 7; Andrew Koppelman, *Akhil Amar and the Establishment Clause*, 33 U. RICH. L. REV. 393 (1999).

abstraction that the state is forbidden from endorsing any theological proposition, even the existence of God. 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 the conclusion. This Article argues that the explanatory power of the corruption argument is further evidence that my account is correct.

The corruption argument, I have already noted, rests on the core assumptions 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 sacred, too holy, to permit its "unhallowed perversion" by a civil magistrate.[62]

The Court makes two arguments here. The first is a contingent sociological claim that establishment tends to produce negative attitudes toward the "particular form"[63] 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.[64] It breaches the "sacred" and the "holy."[65] It is remarkable to find such prophetic language in the U.S. Reports,

62. Engel v. Vitale, 370 U.S. 421, 431-32 (1962) (quoting MADISON, *supra* note 3, at 187).
63. *Engel*, 370 U.S. at 431.
64. *Id.* at 431-32.
65. *Id.* at 432.

but it has appeared there repeatedly,[66] especially in opinions written by Justice Hugo Black, the principal architect of modern Establishment Clause theory.[67]

The most prominent contemporary proponent of this view is Justice David Souter. In four dissenting opinions, two of which were signed by one vote short of a majority of the Justices, and one concurrence, he has invoked the corruption 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

66. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 608 (1992) (Blackmun, J., concurring) ("The favored religion may be compromised as political figures reshape the religion's beliefs for their own purposes; it may be reformed as government largesse brings government regulation."); County of Allegheny v. ACLU, 492 U.S. 573, 645 (1989) (Brennan, J., concurring in part and dissenting in part) ("The government-sponsored display of the menorah alongside a Christmas tree also works a distortion of the Jewish religious calendar.... [T]he city's erection alongside the Christmas tree of the symbol of a relatively minor Jewish religious holiday ... has the effect of promoting a Christianized version of Judaism."); Bowen v. Kendrick, 487 U.S. 589, 640 n.10 (1988) (Blackmun, J., dissenting) ("The First Amendment protects not only the State from being captured by the Church, but also protects the Church from being corrupted by the State and adopted for its purposes."); Aguilar v. Felton, 473 U.S. 402, 409-10 (1985) ("When the state becomes enmeshed with a given denomination in matters of religious significance ... the freedom of even the adherents of the denomination is limited by the governmental intrusion into sacred matters."); Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 385 (1985) (favored religions may be "taint[ed] ... with a corrosive secularism"); Marsh v. Chambers, 463 U.S. 783, 804 (1983) (Brennan, J., dissenting) (stating that one "purpose of separation and neutrality is to prevent the trivialization and degradation of religion by too close an attachment to the organs of government"); Roemer v. Bd. of Pub. Works, 426 U.S. 736, 775 (1976) (Stevens, J., dissenting) (noting "the pernicious tendency of a state subsidy to tempt religious schools to compromise their religious mission without wholly abandoning it"); Sch. Dist. of Abingdon v. Schempp, 374 U.S. 203, 259 (1963) (Brennan, J., concurring) ("It is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil polity, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government."); Everson v. Bd. of Educ., 330 U.S. 1, 59 (1947) (Rutledge, J., dissenting) ("[W]e have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion.").

67. *See infra* text accompanying notes 287-319.

religion as such.[68] I will examine Justice Souter's arguments in Part V.

III. THE CLASSIC FORMULATIONS OF THE CLAIM

As noted earlier, any notion of "corruption" or "perversion" implies a norm or ideal state from which the corruption or perversion is a falling off.[69] A claim that "we ought not to do A, because that is bad for B," implies (1) that B is a good thing, and (2) that we can tell what is good and what is bad for B. Thus the 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 ideas made perfect sense at the time of the founding. They played a large role in the movement toward disestablishment. But

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68. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 711-12 (2002) (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting) (arguing that the Establishment Clause aims "to save religion from its own corruption," and "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., joined by Stevens and Ginsburg, JJ., dissenting) (stating that "government aid corrupts religion"); Agostini v. Felton, 521 U.S. 203, 243 (1997) (Souter, J., joined in this part of his opinion by Stevens and Ginsburg, JJ., dissenting) ("[R]eligions supported by governments are compromised just as surely as the religious freedom of dissenters is burdened when the government supports religion."); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 891 (1995) (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., 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."); Lee v. Weisman, 505 U.S. 577, 615 (1992) (Souter, J., joined by Stevens and O'Connor, JJ., concurring) (quoting with approval Madison's statement that "religion & Govt. will both exist in greater purity, the less they are mixed together." Letter from James Madison to Edward Livingston (July 10, 1822), *in* 5 THE FOUNDERS' CONSTITUTION 105, 106 (Philip B. Kurland & Ralph Lerner eds., 1987)); *Weisman*, 505 U.S. at 627 (quoting the same passage again, and citing the importance of "protecting religion from the demeaning effects of any governmental embrace").

Perhaps one should also count his dissent in *Hein v. Freedom from Religion Foundation*, 127 S. Ct. 2553 (2007), which quotes with approval Justice Black's statement that the Framers thought "'individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions.'" *Id.* at 2588 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting) (quoting *Everson*, 330 U.S. at 11).

69. 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).

they depend on contestable theological claims. 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.[70] It was pervasive during the period of the founding. Here I will focus on its leading expositors, but variations on the claim appear in much popular rhetoric of the time.[71]

A. Precursors

The generation that enacted the Establishment Clause did not invent the corruption argument. It had been around for over a century. Here we consider the most prominent early statements of the argument.

1. John Milton

The corruption argument against establishment emerged roughly simultaneously in England and America. We will begin with John Milton because he was writing against establishment in its classic form. The central elements of the English religious establishment were government control over the doctrines, structure, and liturgy of the state church; mandatory attendance at the religious worship services of the state church; public financial support of the state church; prohibition of religious worship in other denominations; the use of the state church for civil functions; and the limitation of political participation to members of the state church.[72] There was also a restriction of the dissemination of heretical doctrines by

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

71. *See, e.g.*, THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 130, 144, 156, 168 (1986); HAMBURGER, *supra* note 70, at 5 n.7, 55, 74-75, 121-22, 124, 170-71; LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 64-67, 124 (2d ed. 1994).

72. *See generally* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105 (2003).

means, inter alia, of licensing of the press: it was illegal to publish anything without prior permission of the Crown.[73]

Milton was opposed to all of these but attacked different strands of the Establishment in different writings. In *Areopagitica*,[74] Milton argued for the abandonment of licensing. This, he admitted, would allow the proliferation of heretical religious doctrines, and so undermine the established church's monopoly over religious opinion.[75]

Milton insisted that even correct religious doctrine would not bring about salvation if it was the consequence of blind conformity rather than active engagement with religious questions. "A man may be a heretic in the truth; and if he believe things only because his pastor says so, or the Assembly so determines, without knowing other reason, though his belief be true, yet the very truth he holds becomes his heresy."[76] Religious salvation was to be achieved only by struggle against temptation: "Assuredly we bring not innocence into the world, we bring impurity much rather: that which purifies us is trial, and trial is by what is contrary."[77] It follows that "all opinions, yea errors, known, read, and collated, are of main service and assistance toward the speedy attainment of what is truest."[78]

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73. *See* LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 6 (1985).

74. JOHN MILTON, AREOPAGITICA (1644), *reprinted in* JOHN MILTON: COMPLETE POEMS AND MAJOR PROSE 716 (Merritt Y. Hughes ed., 1957) [hereinafter AREOPAGITICA].

75. *See id.* at 748.

76. *Id.* at 739.

77. *Id.* at 728.

78. *Id.* at 727. The importance of a free choice between good and evil is likewise emphasized in JOHN MILTON, PARADISE LOST (1667), *reprinted in* JOHN MILTON: COMPLETE POEMS AND MAJOR PROSE, *supra* note 74, at 257 [hereinafter PARADISE LOST]. The speaker here is God the Father, explaining why it was right to allow the rebel angels and, later, Adam to transgress:

> Freely they stood who stood, and fell who fell.
> Not free, what proof could they have giv'n sincere
> Of true allegiance, constant Faith or Love,
> Where only what they needs must do, appear'd,
> Not what they would? what praise could they receive?
> What pleasure I from such obedience paid,
> When Will and Reason (Reason also is choice)
> Useless and vain, of freedom both despoil'd,
> Made passive both, had serv'd necessity,
> Not mee.

Id. at 260.

The truth did not need state assistance to prevail:

> And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter.[79]

The state, moreover, is likely to err in deciding what ideas to restrict: "if it come to prohibiting, there is not aught more likely to be prohibited than truth itself; whose first appearance to our eyes bleared and dimmed with prejudice and custom, is more unsightly and unplausible than many errors ...."[80] Even if errors can be prevented by coercion, "God sure esteems the growth and completing of one virtuous person more than the restraint of ten vicious."[81]

What matters is not outward conformity, but adherence to the inner light. All that coercion can produce is "the forced and outward union of cold and neutral and inwardly divided minds."[82] On the other hand, the pluralism that toleration would produce is not a bad thing; "those neighboring differences, or rather indifferences, ... whether in some point of doctrine or of discipline, ... though they be many, need not interrupt 'the unity of spirit,' if we could but find among us the 'bond of peace.'"[83]

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79. AREOPAGITICA, *supra* note 74, at 746.

80. *Id.* at 748.

81. *Id.* at 733.

82. *Id.* at 742.

83. *Id.* at 747-48; *see also* PARADISE LOST, *supra* note 78, at 262-63, where the sincere intent of prayer is much more important than its content:

> Some I have chosen of peculiar grace
> Elect above the rest; so is my will:
> The rest shall hear me call, and oft be warn'd
> Thir sinful state, and to appease betimes
> Th' incensed Deity while offer'd grace
> Invites; for I will clear thir senses dark,
> What may suffice, and soft'n stony hearts
> To pray, repent, and bring obedience due.
> To prayer, repentance, and obedience due,
> Though but endeavor'd with sincere intent,
> Mine ear shall not be slow, mine eye not shut.
> And I will place within them as a guide
> My Umpire *Conscience*, whom if they will hear,
> Light after light well us'd they shall attain,
> And to the end persisting, safe arrive.

Christopher Hill observes that Milton's theology rests on a radical Arminianism, in which salvation is available to all men who believe, and is in no way dependent on the formal ceremonies of Catholicism or the Anglican Church.[84] In sacraments as Milton understands them, "it is the attitude of the recipient that matters, not the ceremony."[85] This radical individualism was connected with a range of heretical religious views, many of them idiosyncratic to Milton.[86] Prominent among these was the priesthood of all believers: anyone with a gift for making the Word of God known should be free to disseminate it.[87] Milton's defense of free speech depended crucially on his religious views.[88] Given Milton's individualism, there was little of value left for a state-sponsored church to do.

Thus, Milton opposed any state funding for the support of ministers. The desire for state support, Milton argued, reflected "covetousness and unjust claim to other men's goods; a contention foul and odious in any man, but most of all in ministers of the gospel."[89] State-mandated tithes for the established clergy "give men just cause to suspect that they came neither called nor sent from above to preach the word, but from below, by the instinct of their own hunger, to feed upon the church."[90] The clergy's claim to a share of each person's earnings, Milton observed, had led to "their seizing of pots and pans from the poor, who have as good right to tithes as they; from some, the very beds," from which "it may be feared that many will as much abhor the gospel, if such violence as this be suffered in her ministers, and in that which they also pretend to be

84. CHRISTOPHER HILL, MILTON AND THE ENGLISH REVOLUTION 268-78 (1977).

85. *Id.* at 306.

86. *See id.* at 233-337. His religious views rested on a reading of biblical authority that was equally idiosyncratic. *See* Regina M. Schwartz, *Milton on the Bible*, *in* A COMPANION TO MILTON 37 (Thomas N. Corns ed., 2001).

87. *See* WILLIAM HALLER, LIBERTY AND REFORMATION IN THE PURITAN REVOLUTION 56-64 (1955).

88. *See* Vincent Blasi, Ralph Gregory Elliott First Amendment Lecture: Milton's Areopagitica and the Modern First Amendment (Mar. 1, 1995), *in* 1995 Yale L. Sch. Occasional Papers, Paper 6, *available at* http://lsr.nellco.org/cgi/viewcontent.cgi?article=1007&context=yale/ylsop.

89. JOHN MILTON, CONSIDERATIONS TOUCHING THE LIKELIEST MEANS TO REMOVE HIRELINGS OUT OF THE CHURCH (1659), *reprinted in* JOHN MILTON: COMPLETE POEMS AND MAJOR PROSE, *supra* note 74, at 856, 857.

90. *Id.* at 870.

the offering of the Lord."[91] Such support was fundamentally unchristian, because

> the Christian church is universal; not tied to nation, diocese, or parish, but consisting of many particular churches complete in themselves, gathered not by compulsion or the accident of dwelling nigh together, but by free consent, choosing both their particular church and their church officers. Whereas if tithes be set up, all these Christian privileges will be disturbed and soon lost, and with them Christian liberty.[92]

State support likewise elevates the civil power over God, subjecting the church to the "political drifts or conceived opinions"[93] 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."[94]

Some authorities have suggested that state support of religion should not be deemed to violate the Establishment Clause unless someone is coerced to support a religion with which they disagree.[95] Certain versions of the corruption argument, we shall see, condemn only coercive establishments, whereas others reach any state support for religion. Milton falls into the latter category. He never seems to have considered the possibility of a noncoercive establishment, but the argument just quoted reaches such an establishment as well. Any state influence over religion is an usurpation.

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91. *Id.* at 866.

92. *Id.* at 865.

93. *Id.* at 872; *cf. id.* at 878 ("For magistrates ... will pay none but such whom by their committees of examination they find conformable to their interests and opinions: and hirelings will soon frame themselves to that interest and those opinions which they see best pleasing to their paymasters; and to seem right themselves, will force others as to the truth.").

94. *Id.* at 872.

95. *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 693-94 (2005) (Thomas, J., concurring); Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 938-39 (1986). For a critique of claims that this was the original meaning of the Establishment Clause, see Douglas Laycock, *"Noncoercive" Support for Religion: Another False Claim About the Establishment Clause*, 26 VAL. U. L. REV. 37 (1991).

2. Roger Williams

In the Americas, the germinal formulation of the corruption argument is that of Milton's friend Roger Williams, who invented the modern, religiously tolerant state when he founded Rhode Island in 1635. Williams also was one of the first to use the metaphor of the "wall of separation" between church and state; his overriding concern was that, absent such a wall, the church would be corrupted by the world.

Williams's religious views are deeply alien to modern sensibilities. He was no secular individualist. Timothy Hall observes that Williams was "a religious fanatic" who "did not champion a proto-ecumenism and was not the sort of person likely to attend an interfaith community worship service."[96] Williams's weirdness shows the breadth of the range of views that can join in an overlapping consensus.[97] Common ground can be found even between modern liberals and the likes of Williams.

Williams's political views grew out of his religious ideas.[98] Williams was a part of the Separatist movement, which held that only those who had personally received God's grace could partake in the sacrament of communion.[99] The Puritans who believed this eventually concluded that they had to leave the Church of England, which ministered to saints and sinners alike, and form new, separate churches.[100] Williams accepted this argument, and eventually radicalized it by holding that the Separatist churches of New England were unregenerate as long as they did not publicly repent for ever having had anything to do with the Anglican church.[101]

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96. TIMOTHY L. HALL, SEPARATING CHURCH AND STATE: ROGER WILLIAMS AND RELIGIOUS LIBERTY 6, 18 (1998).

97. Hall notes this and uses the term on pp. 8-10, 147, and 165. The parallel between Williams and Rawls is developed in NUSSBAUM, *supra* note 54, at 57-63. *See also* EDMUND S. MORGAN, ROGER WILLIAMS: THE CHURCH AND THE STATE 115-26 (1967) (discussing Williams's political philosophy).

98. Nussbaum claims that Williams "nowhere alludes to these beliefs in arguing for liberty of conscience—nor should he, since it is his considered position that political principles should not be based on sectarian religious views of any sort." NUSSBAUM, *supra* note 54, at 43. This is true of some of Williams's arguments. It is not, however, true of his argument that establishment corrupts religion.

99. MORGAN, *supra* note 97, at 17, 22-23.

100. *Id.* at 15-17.

101. *Id.* at 20.

Even regenerate persons, such as Martin Luther or the martyrs burned by Queen Mary, were unqualified for church membership until they repented their past associations with corrupted churches, whether Catholic or Anglican.[102] Similar logic led him to hold that a man should not pray with his wife unless both were regenerate.[103]

The Puritans departed from English establishment by separating religious from political authority. No clergyman held any public office in early Massachusetts.[104] The state was responsible, however, for the spiritual welfare of its citizens, and heresy was a punishable offense;[105] Williams himself was exiled for his heretical views.[106] Ministers were supported by taxes, and voting and public office were restricted to church members.[107]

Williams condemned all this. Religious activity, Williams thought, was worthless unless it was sincere: "what ever Worship, Ministry, Ministration, the best and purest are practiced without *faith* and true perswasion that they are the true institutions of God, they are sin ...."[108] Authenticity of belief was, on the contrary, the central requirement for salvation. If one held that some points of doctrine were so fundamental that salvation was impossible without believing them, Williams wrote,

> I should everlastingly condemne thousands, and ten thousands, yea the whole *generation* of the *righteous*, who since the falling away (from the first primitive *Christian* state or *worship*) have and doe erre fundamentally concerning the true *matter*, *constitution*, *gathering* and *governing* of the *Church:* and yet farre be it from a pious *breast* to imagine that they are not saved, and that their soules are not bound up in the bundle of *eternall life*.[109]

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102. *Id.* at 37.
103. *Id.* at 27.
104. *Id.* at 70.
105. *Id.* at 71-72.
106. *Id.* at 71.
107. *Id.* at 74-76.
108. ROGER WILLIAMS, THE BLOUDY TENENT OF PERSECUTION (1644), *reprinted in* 3 THE COMPLETE WRITINGS OF ROGER WILLIAMS 1, 12 (Samuel L. Caldwell ed., 1963).
109. *Id.* at 64. On the other hand, Williams evidently presupposes in this passage that he is only talking about Christians. He does not suggest that people exposed to the Christian message who rejected it in favor of a competing nonchristian view could be saved. Thanks to Kent Greenawalt for pressing me on this point.

State coercion to participate in religious services was sinful for everyone present; it corrupted the service by introducing the presence of sinners, and it lulled the sinners into a false sense of security, hiding from them their awful condition.[110] Moreover, no human being had the power to start churches—that right was reserved to God—and so the people could not delegate to the state an authority (control over religion) that they did not themselves possess.[111] 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 ...."[112]

Williams's defense of freedom of conscience was crucially dependent on his ideas about the incompetence of government in religious matters. He did not value freedom for its own sake. For Williams, Perry Miller observes,

> freedom was something negative, which protects men from worldly compulsions in a world where any compulsion, most of all one to virtue, increases the quantity of sin. Liberty was a way of not adding to the stock of human depravity; were men not sinful, there would be no need of freedom.[113]

In nonreligious matters of morality that (he thought) affected the public safety, in which he included quarreling, disobedience, prostitution, uncleanliness, and lasciviousness, the state could legitimately coerce even those who were motivated by religion.[114] Williams did not favor religious exemptions as such, though he did worry that government's claim to be pursuing legitimate public interests might sometimes be a mask for religious persecution.[115] Conscience should be respected, not because it was less likely to err in religious matters, but rather because the conscientious search for

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110. MORGAN, *supra* note 97, at 32, 139.

111. *Id.* at 89.

112. WILLIAMS, *supra* note 108, at 250.

113. PERRY MILLER, ROGER WILLIAMS: HIS CONTRIBUTION TO THE AMERICAN TRADITION 29 (1962).

114. MORGAN, *supra* note 97, at 126-35. *But see* NUSSBAUM, *supra* note 54, at 49-50 (arguing that the logic of Williams's position entails religious accommodation).

115. HALL, *supra* note 96, at 103-11, 120-21.

religious truth was the only possible path to salvation.[116] Although only a few people could be saved, conscience alone could bring even this small number to God.[117]

A consequence of disestablishment that troubled most of Williams's contemporaries was that voluntary contributions might not be enough to support churches. This did not bother Williams because he thought that only false churches existed in the world, and, therefore, the world would be no worse if they all disappeared.[118] It followed from Williams's radical individualism that any religious institution at all was a corruption of Christianity. The worthlessness of any state-sponsored church was a corollary.

If you do not accept the theological premises of Separatism, then Williams's arguments about corruption will not move you at all. But it was by way of his Separatism that he arrived at a view of the proper role of government that bracketed religious controversy from public life.

Because Williams's theological views are so pessimistic and intolerant, he is a wonderful counterexample to Jean-Jacques Rousseau's dictum that "[i]t is impossible to live in peace with people whom one believes are damned."[119] It is hard to find another American thinker who was as convinced as Williams that his neighbors were headed for the inferno.[120]

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116. *See* MORGAN, *supra* note 97, at 130-42.

117. *See id.*

118. William G. McLoughlin, *Isaac Backus and the Separation of Church and State in America*, 73 AM. HIST. REV. 1392, 1408 (1968).

119. JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT 131 (Roger D. Masters ed., Judith R. Masters trans., 1978) (1762).

120. MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY (1965), appropriates Williams in a strange way. Howe, throughout the book, draws a contrast between the Jeffersonian, secularist view of separation, which he disfavors, and that of Williams, who feared "the worldly corruptions which might consume the churches if sturdy fences against the wilderness were not maintained." *Id.* at 6. He takes as evidence that the Williams view better represents our traditions, what he calls the "*de facto* establishment," which embraces "a host of favoring tributes to faith" such as Sunday closing laws, the use of God on the currency, legislative prayers, Thanksgiving proclamations, and so forth. *Id.* at 11. He uses the term because "this social reality, in its technical independence from law, bears legally some analogy to that ugly actuality known as *de facto* segregation." *Id.*

This gives rise to several puzzles. What Howe describes is not de facto at all, but de jure. De facto segregation is segregation in which the state does not officially give recognition to race at all, or even silently but intentionally take race into account. What Howe calls de facto establishment is a set of practices in which the state behaves in overtly religious ways and

3. John Locke

The idea that state authority over religion can corrupt religion is likewise emphasized in John Locke's *Letter Concerning Toleration*.[121] The central target of the Letter is the forcible repression of those who dissented from the doctrines of the Anglican church. The punishment of dissent in Restoration England was severe, with about 10 percent of the country's population subject to confiscation of goods, imprisonment, and deportation.[122] Locke dissented from all this. The position he advocated was shortly to be enacted in the Toleration Act of 1689,[123] which granted freedom of worship to Protestant Trinitarian dissenters who took an oath of

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proclaims religious truth. "Ceremonial deism" would be a better term for these practices. (In fact, the Court has never used "de facto establishment," but there have been a few references to "ceremonial deism" in the opinions.) When Justice Brennan introduced that term, he wrote:

> [S]uch practices as the designation of "In God We Trust" as our national motto, or the references to God contained in the Pledge of Allegiance ... can best be understood, in Dean Rostow's apt phrase, as a form of "ceremonial deism," protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content.

Lynch v. Donnelly, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting) (citation omitted).

Perhaps ceremonial deism can be justified. But Williams would be a strange authority to invoke on its behalf. Williams' suspicion of state control over religion would appear logically to extend to any degree of ceremonial support for religion. The draining of religious meaning through rote repetition is just the kind of degradation of religion of which Williams was afraid. That is why Rhode Island did not have an established church. If the state is incompetent to adjudicate religious matters, then why should it be authorized to declare that there is one God, and that the Hindus, Buddhists, and atheists are mistaken about this? This question never occurs to Howe. One can imagine what Williams would have thought of the modern Christmas display, paid for by tax dollars secured through the influence of the local merchants association, reminding us that Christ suffered and died on the cross so that we could enjoy great holiday shopping.

On the limits of Howe's reading of Williams, see also NUSSBAUM, *supra* note 54, at 41-42, 59, and GARRY WILLS, HEAD AND HEART: AMERICAN CHRISTIANITIES 97 (2007).

Steven B. Epstein's *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083 (1996), points out that ceremonial deism is inconsistent with the main thrust of contemporary Establishment Clause doctrine. But his argument is not conclusive because there are always two ways of resolving an inconsistency. When he tries to defend a rule of neutrality, the sole concern on which he relies is the alienation of nonbelievers. *Id.* at 2168-71. He does not rely on the corruption argument at all. This unnecessarily weakens his argument.

121. JOHN LOCKE, A LETTER CONCERNING TOLERATION (James H. Tully ed., 1983) (1689).

122. James H. Tully, *Introduction* to LOCKE, *supra* note 121, at 2.

123. *Id.* at 1.

allegiance.[124] (That Act also ended the repressive Massachusetts regime that Williams had opposed.[125])

Locke argued that "the Care of Souls is not committed to the Civil Magistrate, any more than to other Men."[126] One reason was the limited responsibilities of the state, which existed, according to his well-known social contract theory, solely in order to protect life, liberty, and property.[127] But another was that "no Man can, if he would, conform his Faith to the Dictates of another."[128] Coerced worship, Locke argued, would be "Hipocrisie, and Contempt of his Divine Majesty."[129] Coercion of worship is absurd, because what it produces has no religious value.

> Although the Magistrates Opinion in Religion be sound, and the way that he appoints be truly Evangelical, yet if I be not thoroughly perswaded thereof in my own mind, there will be no safety for me in following it. No way whatsoever that I shall walk in, against the Dictates of my Conscience, will ever bring me to the Mansions of the Blessed.[130]

Moreover, the religious divisions that existed "for the most part" concerned "frivolous things ... that (without any prejudice to Religion or the Salvation of Souls, if not accompanied with Superstition or Hypocrisie) might either be observed or omitted." Such matters ought not to divide "Christian Brethren, who are all agreed in the Substantial and truly Fundamental part of Religion."[131]

These arguments reach only coercion, and so do not speak directly to gentler forms of state authority over religion. Locke aspired to a social unity that crossed denominational lines, but one that only included Christians.[132] But Locke also thought that the state was generally incompetent to adjudicate religious questions:

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124. *Id.* at 1-3.
125. *See* CURRY, *supra* note 71, at 83.
126. LOCKE, *supra* note 121, at 26.
127. JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Ian Shapiro ed., Yale Univ. Press 2003) (1690).
128. LOCKE, *supra* note 121, at 26.
129. *Id.* at 27.
130. *Id.* at 38.
131. *Id.* at 36.
132. WILLS, *supra* note 120, at 177-83.

> The one only narrow way which leads to Heaven is not better known to the Magistrate than to private Persons, and therefore I cannot safely take him for my Guide, who may probably be as ignorant of the way as my self, and who certainly is less concerned for my Salvation than I my self am.[133]

Locke's argument is, of course, loaded with religious premises: that conscience is valuable because it is a way of discovering God's will; that it is sinful to act against conscience; that the rights of conscience are inalienable; and that no one can legitimately grant to another the right to make one's religious decisions.[134]

4. Samuel Pufendorf

The same premises animate the German philosopher Samuel Pufendorf's *Of the Nature and Qualification of Religion in Reference to Civil Society*,[135] written in 1687, two years before Locke's *Letter*, in reaction to the revocation of the Edict of Nantes by King Louis XIV. The revocation outlawed Protestantism in France. Pufendorf is not a direct source for American constitutional thought, but he was widely read and influential. When the first English translation of this work was published in 1698, Pufendorf "was already renowned in England and elsewhere in Europe" for his writings on natural law, which "were to play a major role in the shaping of German, Scottish, and French moral and political philosophy up to the American and French Revolutions."[136]

Pufendorf began with the premise that "every body is obliged to worship God in his own Person, Religious Duty being not to be performed by a Deputy, but by himself, in Person, who expects to

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133. LOCKE, *supra* note 121, at 37.

134. This is emphasized in SMITH, FOREORDAINED FAILURE, *supra* note 30, at 64-67; JEREMY WALDRON, GOD, LOCKE, AND EQUALITY: CHRISTIAN FOUNDATIONS OF JOHN LOCKE'S POLITICAL THOUGHT (2002), especially at 208-11; and Stanley Fish, *Mission Impossible: Settling the Just Bounds Between Church and State*, 97 COLUM. L. REV. 2255, 2259-60 (1997).

135. SAMUEL PUFENDORF, OF THE NATURE AND QUALIFICATION OF RELIGION IN REFERENCE TO CIVIL SOCIETY (Simone Zurbuchen ed., Jodocus Crull trans., 2002) (1689).

136. Simone Zurbuchen, *Introduction* to PUFENDORF, *supra* note 135, at x-xi. However, "[e]xcept for the treatises on natural law, little is known about the translation and reception of Pufendorf's works in Great Britain." *Id.* at xvii. The American colonists during the revolutionary period were quite familiar with his work. *See* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 23, 27, 29, 43, 150 (enlarged ed. 1992).

reap the Benefit of religious Worship, promised by God Almighty."[137] The state could have nothing to do with this: truth could only be imparted by convincing arguments, and revelation "must be acquired by the assistance of Divine Grace, which is contrary to all Violence."[138] God left people free to choose whether to be saved:

> It was not God Almighty's pleasure to pull People head-long into Heaven, or to make use of the new French way of Converting them by Dragoons; But, he has laid open to us the way of our Salvation, in such a manner, as not to have quite debarr'd us from our own choise; so, that if we will be refractory, we may prove the cause of our own Destruction.[139]

If orthodoxy is forcibly imposed, "by such Methods, perhaps the Commonwealth may be stock'd with Hypocrites, and dissembling Hereticks, but few will be brought over to the Orthodox Christian Faith."[140] The existence of open dissent may even "contribute to the encrease of the Zeal and Learning of the established Clergy," as evidenced by the fact that "in those places and times, where and when no Religious Differences were in agitation, the Clergy soon degenerated into Idleness and Barbarity."[141] Pufendorf's book is replete with biblical quotations and citations.

Note how the character and scope of the threatened corruption depends on the nature of the religion that needs to be protected from corruption. Unlike Williams, Pufendorf did not deny that churches are legitimate institutions. Unlike Milton or Locke, he did not deny the competence of the state to determine religious matters. For Pufendorf, corruption consisted in the forcing of individual consciences and the suppression of views regarded by the sovereign as heretical.

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137. PUFENDORF, *supra* note 135, at 13.
138. *Id.* at 15.
139. *Id.* at 33.
140. *Id.* at 78.
141. *Id.* at 109.

5. Elisha Williams

The religious character of the corruption argument is perhaps clearest in Congregationalist minister Elisha Williams's *The Essential Rights and Liberties of Protestants*.[142] Williams's pamphlet denounced a 1742 Connecticut law prohibiting ministers from preaching outside their own parishes:

> 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.[143]

The idea that beliefs founded on the authority of other people are worthless, so prominent in Milton, appears again in Williams:

> Now inasmuch as the scriptures are the only rule of faith and practice to a Christian; hence every one has an unalienable right to read, enquire into, and impartially judge of the sense and meaning of it for himself. For if he is to be governed and determined therein by the opinions and determinations of any others,

142. ELISHA WILLIAMS, THE ESSENTIAL RIGHTS AND LIBERTIES OF PROTESTANTS (1774), *reprinted in* POLITICAL SERMONS OF THE FOUNDING ERA, 1730-1805, at 51 (Ellis Sandoz ed., 2d ed. 1998).

143. *Id.* at 55, 61, 62. Williams also relies on a Lockean social contract theory about the limited jurisdiction of the state, *id.* at 56-61, 82-83, but he obviously does not stop there.

> the scriptures cease to be a rule for him, and those opinions and determinations of others are substituted in the room thereof.[144]

The principle of establishment, Williams argued, "has proved the grand engine of oppressing truth, Christianity, and murdering the best men the world has had in it; promoting and securing heresy, superstition and idolatry; and ought to be abhorred by all Christians."[145]

Williams did not, however, object to noncoercive endorsement of religion: "if by the word *establish* be meant only an approbation of certain articles of faith and modes of worship, of government, or recommendation of them to their subjects; I am not arguing against it."[146] Thomas Curry observes a deep tension within Williams's views on this point. He and other Congregationalist writers "assumed that there existed a fundamental Christianity that every reasonable Christian could advocate and, consequently, that the State could promote without violating anyone's conscience."[147] This "usually took the form believed in by themselves."[148] But they would become uncomfortable as soon as the state began to promote positions with which they disagreed.

Williams's entire argument is premised on a set of obligations that "all Protestants are agreed in."[149] From those obligations derive limitations on state power. If you do not accept his Protestant premises, however, the argument can have no weight at all.

B. The Founding Generation

Proponents of the corruption argument at the time of the founding came out of two very different religious factions. By far, the more numerous were the Baptists, led by Isaac Backus and John Leland. But the principal spokespersons for the argument were Enlightenment Deists such as Jefferson, Paine, and Madison.

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144. *Id.* at 63.
145. *Id.* at 77.
146. *Id.* at 73.
147. CURRY, *supra* note 71, at 118.
148. *Id.*
149. WILLIAMS, *supra* note 142, at 55.

1. Isaac Backus

The minister Isaac Backus wrote "the most complete and well-rounded exposition of the Baptist principles of church and state in the eighteenth century."[150] He and his much younger colleague John Leland, discussed below, were the leaders of the Baptist movement for separation. Like his admired predecessors Roger Williams and John Locke, Backus was centrally concerned about corruption: "bringing in an earthly power between Christ and his people has been the grand source of anti-Christian abominations ...."[151] Backus's specific target was the levying of religious taxes upon those who did not subscribe to the established religion and the jailing of unlicensed preachers.[152] Both were persistent grievances of the Baptists.

Like all the other writers we have examined, Backus relied on the voluntarist premise:

> As God is the only worthy object of all religious worship, and nothing can be true religion but a voluntary obedience unto his revealed will, of which each rational soul has an equal right to judge for itself, every person has an unalienable right to act in all religious affairs according to the full persuasion of his own mind, where others are not injured thereby.[153]

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150. William G. McLoughlin, *Introduction* to ISAAC BACKUS ON CHURCH, STATE, AND CALVINISM: PAMPHLETS, 1754-1789, at 1, 41-42 (William G. McLoughlin ed. 1968) [hereinafter *Introduction*].

151. ISAAC BACKUS, AN APPEAL TO THE PUBLIC FOR RELIGIOUS LIBERTY (1773), *reprinted in* ISAAC BACKUS ON CHURCH, STATE, AND CALVINISM, *supra* note 150, at 303, 334 [hereinafter AN APPEAL].

152. *Introduction*, *supra* note 150, at 31. "Though [Backus was] never imprisoned himself, he was several times in imminent danger of it." *Id.* at n.11.

153. ISAAC BACKUS, ISAAC BACKUS' DRAFT FOR A BILL OF RIGHTS FOR THE MASSACHUSETTS CONSTITUTION (1779), *reprinted in* ISAAC BACKUS ON CHURCH, STATE, AND CALVINISM, *supra* note 150, at 487. Put another way, "in religion each one has an equal right to judge for himself, for we must all appear before the judgment seat of Christ ...." AN APPEAL, *supra* note 151, at 332. William McLoughlin notes that the individualism here is very different from that of a Deist such as George Mason, who wrote in the Virginia Declaration of Rights that religion "can be directed only by reason and conviction, not by force or violence ...." *Introduction*, *supra* note 150, at 47. "The pietist wanted religious freedom so that men may follow the Truth of Revelation; the deist wanted it so men might seek the Truth wherever reason may lead ...." *Id.* at 48; *see also* McLoughlin, *supra* note 118, at 1403-04 (drawing a similar contrast with Jefferson).

After some agonizing on the issue, he rejected infant baptism.[154] He thought preachers should be those who feel God's call. External qualifications, such as a college education or ordination, hindered God's work.[155]

Christian establishment did not lead to pure religion. Rather, "tyranny, simony, and robbery came to be introduced and to be practiced so long, under the Christian name ...."[156] Ministers who sought state support were unchristian:

> [C]an any man in the light of truth maintain his character as a minister of Christ if he is not contented with all that Christ's name and influence will procure for him but will have recourse to the kings of the earth to force money from the people to support him under the name of an ambassador of the *God of Heaven*.[157]

Religious duties could not be delegated: "In all civil governments some are appointed to judge for others and have power to compel others to submit to their judgment, but our Lord has most plainly forbidden us either to assume or submit to any such thing in religion ...."[158] The state was also an unreliable source of religious guidance. "[A]s all earthly states are changeable, the same sword that Constantine drew against heretics, Julian turned against the orthodox."[159]

Backus was, however, a less strong separationist than his ally Jefferson. He did not oppose official proclamation of fast days and days of prayer.[160] He supported a law confining public officeholding to Christians.[161] He endorsed a petition requesting Congress to create a bureau to license the publication of Bibles, lest there be erroneous or heretical translations.[162] He did not object to laws

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154. *Introduction*, *supra* note 150, at 8-9.

155. *Id.* at 29.

156. ISAAC BACKUS, POLICY AS WELL AS HONESTY (1779), *reprinted in* ISAAC BACKUS ON CHURCH, STATE, AND CALVINISM, *supra* note 150, at 367, 373.

157. AN APPEAL, *supra* note 151, at 314.

158. *Id.*

159. *Id.* at 315.

160. *Introduction*, *supra* note 150, at 50-57.

161. *Id.* at 50.

162. *Id.* at 51; *see also* CURRY, *supra* note 71, at 217.

requiring attendance at church.[163] In one tract, he opposed paying Episcopalian chaplains for Congress, but, McLoughlin observes, "that was because they were Episcopalians."[164] Backus's views on church and state, McLoughlin concludes, were "far less logical and consistent" than those of his better-known contemporaries Madison, Jefferson, or even Leland.[165] Rather, his view resembled that of the proponents of noncoercive establishment, such as John Adams, who regarded the rights of conscience as "indisputable, unalienable, indefeasible, [and] divine," yet who nonetheless favored state-supported establishments.[166]

2. Thomas Jefferson

Thomas Jefferson, the quintessential rational Enlightenment proponent of separation, also relied on religious arguments about the corrupting effects of establishment. In his 1777 *Bill for Establishing Religious Freedom*,[167] he proposed to do away with all religious coercion and all taxation to support churches: "no man shall be compelled to frequent or support any religious worship place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief ...."[168]

Jefferson, too, relied on theological premises. He noted that "Almighty God hath created the mind free,"[169] and from this he inferred that

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163. CURRY, *supra* note 71, at 170.

164. 2 WILLIAM G. MCLOUGHLIN, NEW ENGLAND DISSENT, 1630-1883: THE BAPTISTS AND THE SEPARATION OF CHURCH AND STATE 931 (1971).

165. *Introduction*, *supra* note 150, at 50.

166. John Witte, Jr., *"A Most Mild and Equitable Establishment of Religion": John Adams and the Massachusetts Experiment*, 41 J. CHURCH & ST. 213, 217 (1999). This inconsistency weakened the Baptists' position politically. "Congregationalists found it difficult to believe that Baptist preoccupation with ministerial maintenance was anything more than a rationalization of self-interest on the part of people who wanted to avoid spending money." CURRY, *supra* note 71, at 176.

167. Thomas Jefferson, Bill for Establishing Religious Freedom (1777), *in* THOMAS JEFFERSON: WRITINGS 346 (Merrill D. Peterson ed., 1984).

168. *Id.* at 347. Jefferson reported drafting the bill in 1777; it was enacted, with some deletions, in 1786. *Id.* at 1554.

169. *Id.* at 346.

> all attempts to influence it by temporal punishments, or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and 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 ....[170]

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 ....[171]

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 ...."[172] And all this was unnecessary. Echoing Milton, Jefferson wrote that "truth is great and will prevail if left to herself ...."[173]

He repeated these arguments a few years later in his *Notes on the State of Virginia*.[174] He explained that religious dissent in Virginia had been fostered by establishment: "the 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."[175] 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

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170. *Id.*

171. *Id.*

172. *Id.* at 347. That the prevention of corruption is the dominant theme in Jefferson's bill is argued in WILLS, *supra* note 120, at 191-97.

173. Jefferson, *supra* note 167, at 347.

174. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA (1788), *reprinted in* THOMAS JEFFERSON: WRITINGS, *supra* note 167, at 123.

175. *Id.* at 283.

submit. We are answerable for them to our God."[176] The effect of religious coercion has been "[t]o make one half the world fools, and the other half hypocrites."[177] But Jefferson's argument, too, goes beyond coercion to imply a more general state neutrality toward religion. "Difference of opinion is advantageous in religion. The several sects perform the office of a Censor morum over each other."[178]

Thus, Jefferson famously advocated a "wall of separation between church and State."[179] He eliminated the chairs of Divinity at the College of William and Mary and prevented such chairs from being established at the University of Virginia, which did not even have a chaplain while he was its rector.[180]

Jefferson's idea of corruption was quite distinct from that of the earlier thinkers we have considered because he was a Deist who regarded any religious mystery as a foolish superstition. He was an admirer of Joseph Priestley's *A History of the Corruptions of Christianity*,[181] which denounced such core Christian doctrines as the resurrection and the Trinity.[182] 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.[183] 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

176. *Id.* at 285.

177. *Id.* at 286.

178. *Id.*

179. Letter from Thomas Jefferson to Messrs. Nehemiah Dodge and Others, a Committee of the Danbury Baptist Association (Jan. 1, 1802), *in* THOMAS JEFFERSON: WRITINGS, *supra* note 167, at 510.

180. THOMAS E. BUCKLEY, CHURCH AND STATE IN REVOLUTIONARY VIRGINIA, 1776-1787, at 62-65 (1977); LEVY, *supra* note 71, at 70-75.

181. JOSEPH PRIESTLEY, A HISTORY OF THE CORRUPTIONS OF CHRISTIANITY (1782).

182. He wrote to Adams that he had read the book "over and over again." DAVID L. HOLMES, THE FAITHS OF THE FOUNDING FATHERS 82 (2006). 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: THE SHAPING OF CHRISTIANITY IN AMERICA 48 (1963).

183. *See* JAROSLAV PELIKAN, JESUS THROUGH THE CENTURIES: HIS PLACE IN THE HISTORY OF CULTURE 189-93 (1985).

> deriving from it pence and power, revolt those who think for themselves, and who read in that system only what is really there.[184]

Jefferson's view had the potential to overlap with that of the religious proponents of disestablishment we have considered earlier. Because his theological views were so different, however, they implied a dramatically different understanding of what counted as corruption.

3. Thomas Paine

Similar to Jefferson, but even starker in his rejection of traditional religious dogmas, was Thomas Paine. Paine was the author of *Common Sense*,[185] "the most incendiary and popular pamphlet of the entire Revolutionary era ...."[186] His Deism places him well outside the mainstream of contemporary American religion, though the ideals he articulates were pervasive among the educated elite.[187] He trumpeted ideas that other Framers, such as George Washington and Benjamin Franklin, privately believed but thought it prudent to keep to themselves.[188]

Paine believed in God, but rejected all of the specific doctrines of Christianity, which he regarded as a collection of unbelievable superstitions. He thought that "religious duties consist in doing justice, loving mercy, and endeavouring to make our fellow-creatures happy."[189] This, he thought, was the true teaching of Jesus Christ, but institutionalized Christianity "has set up a religion of pomp and of revenue, in pretended imitation of a person whose life

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184. MEAD, *supra* note 182, at 46 (quoting Letter from Thomas Jefferson to Mrs. M. Harrison Smith (Aug. 6, 1816)). This letter was written late in Jefferson's life. As Noah Feldman notes, Jefferson became more radical about religious matters as he grew older, but even in his early career he sometimes expressed anticlerical views in private. FELDMAN, *supra* note 17, at 39.

185. THOMAS PAINE, COMMON SENSE (1776).

186. GORDON S. WOOD, THE AMERICAN REVOLUTION: A HISTORY 55 (2002).

187. On the place of Deism in eighteenth-century America, see HOLMES, *supra* note 182, at 1-51 (2006).

188. *See id.* at 56, 65-68.

189. THOMAS PAINE, THE AGE OF REASON (1795), *reprinted in* THE THOMAS PAINE READER 395, 400 (Michael Foot & Isaac Kramnick eds., 1987).

was humility and poverty."[190] Establishment corrupted religion precisely insofar as state support tended to perpetuate "wild and whimsical systems of faith and of religion."[191]

> The adulterous connection of church and state, wherever it has taken place, whether Jewish, Christian or Turkish, has so effectually prohibited by pains and penalties every discussion upon established creeds, and upon first principles of religion, that until the system of government should be changed, those subjects could not be brought fairly and openly before the world; but that whenever this should be done, a revolution in the system of religion would follow. Human inventions and priest-craft would be detected; and man would return to the pure, unmixed and unadulterated belief of one God, and no more.[192]

Paine confirmed the worst fears of proponents of establishment by holding that without state support, the central dogmas of Christianity would wither away. Paine, however, regarded this as cause for celebration.

4. John Leland

It was not necessary to be a Deist in order to support strong separation. One of Jefferson's most loyal allies was the Baptist minister John Leland.[193] Like Backus, Leland was primarily concerned with systems of taxation and licensing that burdened nonconforming religions.[194] Far more consistent than Backus, he strongly opposed any involvement of the state in religious matters.[195] He was an important source of the pressure to promise an amendment banning establishment in exchange for the ratifica-

190. *Id.* at 417.

191. *Id.* at 442.

192. *Id.* at 401. Benjamin Franklin held a similar view of "the essentials of every religion," which were unfortunately, in many religions, "more or less mix'd with other articles, which, without any tendency to inspire, promote, or confirm morality, serv'd principally to divide us, and make us unfriendly to one another." MEAD, *supra* note 182, at 64.

193. *See* HAMBURGER, *supra* note 70, at 156-57.

194. *See* L. H. Butterfield, *Elder John Leland, Jeffersonian Itinerant*, 62 PROC. AM. ANTIQUARIAN SOC. 154, 172-76 (1952).

195. *See* CURRY, *supra* note 71, at 176.

tion of the Constitution.[196] There are even unconfirmable 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.[197]

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 answer for individuals at the day of judgment, let men be controled by it in religious matters; otherwise let men be free.[198]

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.[199]

Establishments foster contempt for religion; they "metamorphose the church into a creature, and religion into a principle of state; which has a natural tendency to make men conclude that bible religion is nothing but a trick of state."[200] Even if nonconformity were 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

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196. *See* Butterfield, *supra* note 194, at 155, 183-84.

197. *Id.* at 183-96; Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301, 323-24. The evidence that the meeting did take place is marshaled in greater detail in Mark Scarberry, *John Leland and James Madison: Religious Influence on the Ratification of the Constitution and on the Proposal of the Bill of Rights*, 113 PENN. ST. L. REV. (forthcoming 2009).

198. JOHN LELAND, THE RIGHTS OF CONSCIENCE INALIENABLE (1791), *reprinted in* 2 POLITICAL SERMONS OF THE FOUNDING ERA, 1730-1805, at 1079, 1085 (Ellis Sandoz ed., 2d ed. 1998).

199. Butterfield, *supra* note 194, at 199.

200. LELAND, *supra* note 198, at 1087.

names."[201] The state should not have any power to provide for ministers, enact Sabbath laws, pay military chaplains, or have any religious qualifications for office.[202] He opposed a proposal to end delivery of the mail on Sundays.[203]

Leland was as suspicious of dead religious forms as Milton. He 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 pharisaical hypocrites."[204] 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."[205]

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 individualism 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."[206] 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

201. *Id.*

202. *See* CURRY, *supra* note 71, at 176.

203. MCLOUGHLIN, *supra* note 164, at 932; THE WRITINGS OF ELDER JOHN LELAND 561-70 (L.F. Greene ed., 1845).

204. Butterfield, *supra* note 194, at 235.

205. *Id.* at 205-06.

206. SANDERS, *supra* note 70, at 193.

> in order to know science, morality, economics, politics, and especially theology.[207]

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."[208]

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."[209] 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. He said, "I know myself to be a feeble, sinful worm."[210] Yet, he was indifferent to most theological controversies.[211] Feeling mattered to him more than doctrine.[212] He made Jeffersonian political philosophy 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."[213]

5. James Madison

The radical Protestantism of Backus and Leland and the Deism of Jefferson and Paine were brilliantly synthesized by James Madison in his *Memorial and Remonstrance Against Religious Assessments*,[214] the classic description of the pathologies that the

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207. MARK A. NOLL, AMERICA'S GOD: FROM JONATHAN EDWARDS TO ABRAHAM LINCOLN 11 (2002).

208. Butterfield, *supra* note 194, at 239.

209. MCLOUGHLIN, *supra* note 164, at 931.

210. *Id.*

211. *See* Butterfield, *supra* note 194, at 158.

212. 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.

Id. at 170.

213. *Id.* at 242.

214. MADISON, *supra* note 3.

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.

Madison's argument reaches well beyond coercion because it was offered against a bill that attempted to provide nonpreferential aid to religion. The bill in question would have allowed all Christian churches to receive tax money, and would have permitted each taxpayer to designate the church to receive his tax.[215] If the taxpayer refused to designate a church, the funds would go to schools.[216] Even this nonpreferential aid, Madison thought, tended to corrupt religion.

Madison was a rationalist Deist. He deplored the fact that "accidental differences in political, religious, and other opinions" were the cause of factional disputes.[217] "However erroneous or ridiculous these grounds of dissention and faction may appear to the enlightened Statesman, or the benevolent philosopher, the bulk of mankind who are neither Statesmen nor Philosophers, will continue to view them in a different light."[218] The coalition he led, however, consisted predominantly of Baptists and Presbyterians. All supported freedom of conscience, thought that religion was essentially voluntary, and regarded man's allegiance to God as prior to state authority.[219] But the rationalists "emphasized natural rights" and "the use of reason in the pursuit of [religious] truth," whereas the religious dissenters wanted to free man "to respond to God's call" and "the scriptural ... teachings of Christ."[220] Each side drew on the other's rhetoric, but they had fundamentally different goals.[221] Madison's task was to bring them together into a political coalition that could disestablish Anglicanism in Virginia.[222]

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215. A Bill Establishing a Provision for Teachers of the Christian Religion (1784), *reprinted in* Everson v. Bd. of Educ., 330 U.S. 1 app. at 72-74 (1947).

216. *Id.*

217. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON, 1776-1826, at 495, 501 (James Morton Smith ed., 1995).

218. *Id.*

219. BUCKLEY, *supra* note 180, at 179.

220. *Id.* at 179-80.

221. *See id.*

222. The heterogeneity of Madison's coalition is emphasized in Laycock, *supra* note 4, at 343-47.

The *Memorial and Remonstrance* begins with a theological claim, offering an understanding of religious duty that at this point will be familiar: "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."[223] 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 ...."[224] The idea that religion should be promoted because it is conducive 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."[225] Moreover,

> 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.[226]

Madison was reticent about his own religious beliefs, which were probably some variant of Deism,[227] 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

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223. MADISON, *supra* note 3, at 184-85.

224. *Id.* at 187.

225. *Id.*

226. *Id.* The importance of the corruption theme in the *Memorial and Remonstrance* is further elaborated in WILLS, *supra* note 120, at 207-22.

227. *See* HOLMES, *supra* note 182, at 91-98 (2006). For some evidence that Madison was, at least early in his life, sincere in holding the religious views stated in the *Memorial*, see JOHN T. NOONAN, JR., THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM 64-91 (1998). The specific claims about corruption in the *Memorial* are also made in his private correspondence, both early and late in his life. *See* THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 2-5, 341 (Marvin Meyers ed., rev. ed. 1981).

designed to appeal to Enlightenment Lockeans.[228] It is unlikely that these groups agreed on anything more than the propositions stated by Madison himself. But they did agree on *them*.[229]

What Madison achieved in Virginia is a fine early example of the kind of overlapping consensus contemplated by Charles Taylor.[230] A collection of very different comprehensive views of the purpose of human life converges on a set of political principles. The *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. They had fundamentally different ideas of what a noncorrupted religion would look like. Madison was carefully noncommittal about which of them was right. The coalition did not last long; it shortly fragmented over support for the French Revolution.[231] But by that time, the Establishment Clause had been adopted, and it remains in the Constitution.

Later, as President, Madison vetoed a congressional act incorporating an Episcopal congregation in the District of Columbia, and at first refused to issue proclamations of days of thanksgiving and

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228. On the variety of religious positions to which Madison was appealing, see BUCKLEY, *supra* note 180, at 179-80, and WITTE, *supra* note 56, at 21-35. 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).

229. Douglas Laycock has explained why someone interested in the original meaning of disestablishment might focus on the Virginia debate in which Madison's was the most important document:

> The state debates help show how the concept of establishment was understood in the Framers' generation. Learning how that generation understood the concept may be more informative than the brief and unfocused debate in the House [on the First Amendment. The Senate debate was not recorded.]. If the Framers generally understood the concept in a certain way, and if nothing indicates that they used the word in an unusual sense in the first amendment, then we can fairly assume that the Framers used the word in accordance with their general understanding of the concept....
>
> For several reasons, the debates in Virginia were most important. First, the arguments were developed most fully in Virginia. Second, Madison led the winning coalition, and he played a dominant role in the adoption of the establishment clause three years later. Third, the debates in Virginia may have been the best known.

Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 895 (1986).

230. *See supra* notes 45-52 and accompanying text.

231. SANDERS, *supra* note 70, at 211-12.

prayer.[232] He later did issue such proclamations,[233] but still later, said that this was a mistake. In an unpublished memorandum written late in his life and found after his death, he opposed the creation of congressional and military chaplains.[234]

C. Other Formulations

We have concluded our review of the use of the corruption argument up to the time of the framing of the First Amendment. There are, however, three other writers who have had such a powerful influence on modern thinking about the corrupting effect of establishments that they should be considered here. Two of them, Adam Smith and Alexis de Tocqueville, are major political theorists. The third, Justice Hugo Black, is the principal architect of modern Establishment Clause doctrine. The following discussion also briefly examines the view of disestablishment that prevailed at the time of the framing of the Fourteenth Amendment. That material is pertinent because it is the Fourteenth Amendment that makes the Establishment Clause applicable to the states.

1. Adam Smith

Adam Smith did not participate in the framing. He never traveled to the United States, spending most of his life in his native Scotland. But he was widely read in America. *The Wealth of Nations*[235] was found in 28 percent of American libraries in the period from 1777-1790, exceeding the holdings of Locke's *Treatises* and any book by Rousseau except *Emile*.[236] Smith had a substantial impact on the thinking of the Framers of the Constitution, and particularly on Madison's views about religious liberty.[237]

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232. James Madison, *Detached Memorandum* (ca. 1820), with accompanying notes, *in* MICHAEL W. MCCONNELL, JOHN H. GARVEY & THOMAS C. BERG, RELIGION AND THE CONSTITUTION 67-69 (2d ed. 2006).

233. *Id.*

234. *Id.*

235. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (R.H. Campbell & A.S. Skinner eds., 1981) (1776).

236. Samuel Fleischacker, *Adam Smith's Reception Among the American Founders, 1776-1790*, 59 WM. & MARY Q. 897, 901 (2002).

237. *Id.* at 907.

Smith focused not on coercion, but on state financial support for an established church. He thought that if clergy were given dependable incomes from the state, "[t]heir exertion, their zeal and industry,"[238] were likely to be much diminished:

> The clergy of an established and well-endowed religion frequently become men of learning and elegance, who possess all the virtues of gentlemen, but they are apt gradually to lose the qualities, both good and bad, which gave them authority and influence with the inferior ranks of people, and which had perhaps been the original causes of the success and establishment of their religion.[239]

Smith was responding to his friend David Hume's defense of established churches. In a passage that Smith quoted at length, Hume argued that the "interested diligence" of the clergy, spurred by the need for voluntary contributions of support, "is what every wise legislator will study to prevent; because, in every religion except the true, it is highly pernicious, and it has even a natural tendency to pervert the true, by infusing into it a strong mixture of superstition, folly, and delusion."[240] Such superstitious delusions, together with "the most violent abhorrence of all other sects," is what is most likely to draw customers.[241] The way to avoid this pernicious behavior by the clergy is "to bribe their indolence, by assigning stated salaries to their profession, and rendering it superfluous for them to be farther active, than merely to prevent their flock from straying in quest of new pastures."[242]

Smith agreed that, absent establishment, each pastor would be pressed to try to increase the number of his disciples. "But as every other teacher would have felt himself under the same necessity, the success of no one teacher, or sect of teachers, could have been very great."[243] The consequence would be "a great multitude of religious

238. 2 SMITH, *supra* note 235, at 788.
239. *Id.* at 789.
240. *Id.* at 791 (quoting DAVID HUME, THE HISTORY OF ENGLAND (1778)).
241. *Id.* (quoting HUME, *supra* note 240).
242. *Id.* (quoting HUME, *supra* note 240).
243. *Id.* at 792.

sects."[244] This pressure would in turn produce a better religion than an establishment could:

> The teachers of each little sect, finding themselves almost alone, would be obliged to respect those of almost every other sect, and the concessions which they would mutually find it both convenient and agreeable to make to one another, might in time probably reduce the doctrine of the greater part of them to that pure and rational religion, free from every mixture of absurdity, imposture, or fanaticism ....[245]

Smith also thought that small religious sects were much more likely than large churches to police the conduct of their members and keep them away from the dangers of profligacy and vice that were particularly ubiquitous in large cities.[246]

Samuel Fleischacker thinks it unlikely that Madison had read *The Wealth of Nations* at the time he wrote the *Memorial and Remonstrance*, but argues that the arguments against establishment just cited did have an influence on Madison's famous argument in *Federalist 10*[247] that political factions could more easily be controlled in a large republic.[248] Madison there responded to the widespread concern that in democracies majorities will be prone to oppress minorities. *Federalist 10* claimed that this danger would be averted by the size of the new American republic that the Constitution would create.

> Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.[249]

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244. *Id.*
245. *Id.* at 793.
246. *Id.* at 795-96.
247. James Madison, *Federalist No. 10*, *in* THE FEDERALIST PAPERS 45 (Clinton Rossiter ed., 1961).
248. *See* Fleischacker, *supra* note 236, at 907.
249. *Federalist No. 10*, *supra* note 247, at 51.

Madison made the point specifically with respect to religious factions: "A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source."[250]

Fleischacker observes the similarity between Madison's analysis of factions and Smith's analysis of sects: mutual conflict makes both weaker and less capable of achieving pernicious ends that they regard as their good. Both thought that deep features of human nature produce this result:

> [P]eople generally want to be addressed in truthful, decent terms, rather than with the accent of passion and prejudice, strong emotions driving fanaticism tend to dominate only for short periods of time and are discouraged in normal social intercourse, and people have economic and other interests connecting them with a great range of others in society.[251]

Because social forces tended to temper the problem, there was less need for enlightened statesmen to do the job. "Both Madison and Smith saw the liberty that gave rein to such interests as compatible with a republic that would be concerned, for the most part, with fostering virtue."[252] For both, uncorrupted religion could be known by its fruits: peaceable, virtuous behavior.

It is worth noting for a moment here a now-familiar argument that neither of them was making, but that is easily confused with theirs. That is the idea that religion is improved by market-like competition, in which the better religions succeed, and the worse ones go out of business. Friedrich Hayek, in familiar ways a disciple of Smith, makes this claim. Hayek thought that the persistence of customs conducive to social cooperation was closely tied to the support those customs received from religion. Of course, not all religions had this beneficent effect. "Among the founders of religions over the last two thousand years, many opposed property and the family. *But the only religions that have survived are those which*

250. *Id.* at 52.
251. Fleischacker, *supra* note 236, at 912.
252. *Id.* at 912-13.

support property and the family."[253] The process by which the pertinent selection occurred may have been invisible to those who benefited from it. "Customs whose beneficial effects were unperceivable by those practising them were likely to be preserved long enough to increase their selective advantage only when supported by some other strong beliefs; and some powerful supernatural or magic faiths were readily available to perform this role."[254] What matters is that the customs that survived were the ones that "influence[d] men to do what was required to maintain the structure enabling them to nourish their enlarging numbers."[255]

It is clear what Hayek's notion of uncorrupted religion is: any set of beliefs (whether they are true or false does not matter) that enables people to engage, "peacefully though competitively, in pursuing thousands of different ends of their own choosing in collaboration with thousands of persons whom they will never know."[256] Hayek himself was an atheist who regarded the notion of God as unintelligible;[257] effects were all he cared about.

The dynamic of competition contemplated by Hayek is quite unlike that of Madison or Smith, primarily because of Hayek's evident reliance on the theories of Max Weber and Charles Darwin.[258] Weber argued that the early growth of capitalism in Europe was facilitated by militant Calvinism, which promoted rationality, calculating frugality, and the highly systematized pursuit of profit.[259] This, he thought, was why the most prosperous parts of Europe in the sixteenth and seventeenth centuries were Protestant ones: Holland, England, Brandenburg-Prussia, and the Huguenot communities of France.[260] Darwin thought that some traits became more common in successive generations of organisms

253. 1 THE COLLECTED WORKS OF F.A. HAYEK: THE FATAL CONCEIT: THE ERRORS OF SOCIALISM 137 (W.W. Bartley III ed., 1988). Thanks to Max Schanzenbach for calling my attention to this work.

254. *Id.* at 138.

255. *Id.* The evolutionary argument is further developed in 2 FRIEDRICH A. HAYEK, LAW, LEGISLATION, AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE 17-23 (1976).

256. HAYEK, *supra* note 253, at 135.

257. *See id.* at 139-40.

258. Darwin's influence on Hayek is noted in JOHN GRAY, HAYEK ON LIBERTY 31-33 (3d ed. 1998).

259. *See* MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM (Talcott Parsons trans., 1958) (1904).

260. *See id.*

because those traits were more conducive to their carriers' survival in a given environment.[261] Hayek's model combined a Darwinian model of competition with a Weberian model of the effect of some religious ideas on economic behavior. Religions that promoted economic cooperation, as early Protestantism did, were most likely to survive and prosper.

Madison and Smith had a very different idea of the effects of competition. They both thought that the factions themselves would intentionally modify their behavior in the face of competition. Darwin did not think that species intentionally evolved. Weber did not think that the Calvinists were deliberately aiming at the creation of a capitalist economy. For Hayek, cooperation-inducing rules need not be adopted for that purpose: "Neither the groups who first practised these rules, nor those who imitated them, need ever have known why their conduct was more successful than that of others, or helped the group persist."[262]

Hayek did not care about religion as such at all. He liked it because he thought it was instrumentally good. He thus parted company with both Madison and Smith.

2. Alexis de Tocqueville

A variant of the corruption argument holds that establishment can only generate the kind of religion that people are likely to hold in low regard. This argument was pressed during the election of 1800 by followers of Jefferson, who wanted to discourage Federalist clergy from opposing Jefferson for his Deism.[263] (As we just saw, it was also anticipated by Hume, who, however, thought that the decline of religious enthusiasm was a good thing and so supported establishment.)

Here, the baseline against which corruption is measured is not the Protestant one of personal communion with God, but simply sincere religiosity, whatever its content. The argument thus is less pervasively Protestant. But it continues to presume that religion is a good thing, and that this good thing can be corrupted by state

261. *See generally* CHARLES DARWIN, ON THE ORIGIN OF SPECIES (1859).
262. HAYEK, *supra* note 255, at 21.
263. *See* HAMBURGER, *supra* note 70, at 130-32.

sponsorship. The classic proponent of this argument was Alexis de Tocqueville.

Tocqueville, writing at about the time that the last establishment in America was being abandoned, thought that in the new egalitarian regime of the United States, the old feudal morality had disappeared, and a pressing question was what kinds of morality would take its place. The answer was that people would be motivated by "self-interest properly understood."[264] They could be made to understand that it was in their self-interest to do good and serve their fellow creatures. The rational pursuit of self-interest would not produce heroes, but it would shape "a lot of orderly, temperate, moderate, careful, and self-controlled citizens."[265]

Religion played a crucial role in bringing about this understanding. "The main business of religions is to purify, control, and restrain that excessive and exclusive taste for well-being which men acquire in times of equality ...."[266] Tocqueville was silent on the theological issues, but he thought religious belief important to the well-being of democracy. "How could society escape destruction if, when political ties are relaxed, moral ties are not tightened? And what can be done with a people master of itself if it is not subject to God?"[267]

All religions, Tocqueville thought, had salutary social consequences:

> Every religion places the object of man's desires outside and beyond worldly goods and naturally lifts the soul into regions far above the realm of the senses. Every religion also imposes on each man some obligations toward mankind, to be performed in common with the rest of mankind, and so draws him away, from time to time, from thinking about himself. That is true even of the most false and dangerous religions.[268]

The American experience had taught that the best way to promote religion was to keep the state away from it. Man is

264. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 526 (George Lawrence trans., J.P. Mayer ed., 1969) (1835-40).

265. *Id.* at 527.

266. *Id.* at 448.

267. *Id.* at 294.

268. *Id.* at 444-45.

naturally religious. Because "the incomplete joys of this world will never satisfy his heart,"[269] he is naturally driven, by "an invincible inclination,"[270] toward contemplation of another world.

The "intellectual aberration"[271] of unbelief had arisen in Europe, Tocqueville thought, only because of establishment. Because religion had become identified with a conservative politics, it aroused the opposition of anyone who opposed the conservative party. It thereby forfeited its natural strength:

> As long as religion relies only upon the sentiments which are the consolation of every affliction, it can draw the heart of mankind to itself. When it is mingled with the bitter passions of this world, it is sometimes constrained to defend allies who are such from interest rather than from love; and it has to repulse as adversaries men who still love religion, although they are fighting against religion's allies. Hence religion cannot share the material strength of the rulers without being burdened with some of the animosity roused against them.[272]

This, Tocqueville thought, was why religious faith had withered in Europe:

> Unbelievers in Europe attack Christians more as political than as religious enemies; they hate the faith as the opinion of a party much more than as a mistaken belief, and they reject the clergy less because they are the representatives of God than because they are the friends of authority.[273]

In America, on the other hand, religion was powerful precisely because it was not associated with any party. All the clergy with

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269. *Id.* at 296.

270. *Id.* at 297.

271. *Id.*

272. *Id.*

273. *Id.* at 300-01. Contemporary scholarship agrees with Tocqueville's claims about the reason for the decline of religion in Europe. *See* JOSE CASANOVA, PUBLIC RELIGIONS IN THE MODERN WORLD 27-29 (1994); Shiffrin, *supra* note 18, at 48-54. On the other hand, establishment of an unusually oppressive kind has not diminished religiosity in Iran. In response to a survey that asked whether respondents believed in God, 99 percent in Iran, 94 percent in the United States, and 56 percent in France said yes. STEVEN GOLDBERG, BLEACHED FAITH: THE TRAGIC COST WHEN RELIGION IS FORCED INTO THE PUBLIC SQUARE 95 (2008).

whom Tocqueville spoke during his visit to America agreed that "the main reason for the quiet sway of religion over their country was the complete separation of church and state."[274]

Tocqueville agreed with Smith and Hume that sincere and enthusiastic religion was likely to be promoted by disestablishment, and he insisted, even more than Smith, that religious enthusiasm was likely to promote virtue. He was too sanguine, however, in his suggestion that "even ... the most false and dangerous religions"[275] could produce these valuable results. Marvin Zetterbaum observes that Tocqueville's solution to the problem of how to make self-centered people virtuous "lies in a simple extension of the principle of self-interest to include the rewards of a future life."[276] But it matters what those rewards are supposed to be rewards for. One must look beyond narrow self-interest in order to be willing to fly an airplane into a building.[277] Steven Smith has observed that "we cannot sensibly talk about the effects of 'religion' on character because different forms of religion attempt to inculcate very different character traits."[278] Whether religion is conducive to virtue "also depends on the kind of virtues that a particular society chooses to foster."[279] Tocqueville's vagueness on this point anticipated the famous remark by Dwight Eisenhower that "[o]ur form of government has no sense unless it is founded in a deeply felt religious faith, and I don't care what it is."[280]

3. The Fourteenth Amendment

Some mention must be made of the views of the framers of the Fourteenth Amendment, since it is by incorporation into that

274. TOCQUEVILLE, *supra* note 264, at 295.

275. *Id.* at 445.

276. Marvin Zetterbaum, *Alexis de Tocqueville*, *in* HISTORY OF POLITICAL PHILOSOPHY 761, 778 (Leo Strauss & Joseph Cropsey eds., 3d ed. 1987).

277. On the psychological and sociological forces inherent in religion that sometimes produce intolerance and persecution, see William P. Marshall, *The Other Side of Religion*, 44 HASTINGS L.J. 843, 853-59 (1993).

278. SMITH, FOREORDAINED FAILURE, *supra* note 30, at 102.

279. *Id.*

280. MARK SILK, SPIRITUAL POLITICS: RELIGION AND AMERICA SINCE WORLD WAR II 40 (1988). Less famously, Eisenhower made clear in the next sentence that he was not talking about just any religion at all: "With us of course it is the Judeo-Christian concept but it must be a religion that all men are created equal." *Id.*

amendment that the Establishment Clause is applicable to the states. The intent of the framers of the Fourteenth Amendment with respect to establishment is an important and not sufficiently studied question. There is little helpful evidence. At best, it can be shown that the corruption argument was still alive at this time, and influenced courts in this period.

Kurt Lash has shown that the framers of the Fourteenth Amendment intended to apply the establishment norm to the states. Freedom from established religion was understood to be an aspect of individual freedom of conscience. "By 1868, the (Non)Establishment Clause was understood to be a liberty as fully capable of incorporation as any other provision in the first eight amendments to the Constitution."[281]

Lash's article is the only sustained inquiry into the Fourteenth Amendment framers's views on establishment. Lash does not make much mention of the corruption argument. But he shows that it was still a familiar part of the discourse of nonestablishment in the last half of the nineteenth century. It was invoked by the Supreme Court of Ohio in one of the first cases to cite the federal Establishment Clause as a constraint on the states, the 1872 decision in *Board of Education v. Minor*,[282] which upheld a prohibition on religious instruction in public schools. The court, invoking an idea of competition more theologically loaded than Adam Smith's, declared that religion would flourish under a broad hands-off doctrine:

> Let the state not only keep its own hands off, but let it also see to it that religious sects keep their hands off each other. Let religious doctrines have a fair field, and a free, intellectual, moral, and spiritual conflict. The weakest-that is, the intellectu-

281. Kurt Lash, *The Second Adoption of the Establishment Clause: The Rise of the Non-Establishment Principle*, 27 ARIZ. ST. L.J. 1085, 1154 (1995). For a similar view on the incorporation question, see GREENAWALT, *supra* note 4, at 14-15, 26-39. Lash's evidence has been scandalously ignored by Justice Thomas as he has repeatedly claimed that the original intent of the framers of the Fourteenth Amendment was not to incorporate establishment at all. Van Orden v. Perry, 545 U.S. 677, 692-93 (2005) (Thomas, J., concurring); Newdow v. Elk Grove Unified Sch. Dist., 542 U.S. 1, 51 (2004) (Thomas, J., concurring in the judgment); Zelman v. Simmons-Harris, 536 U.S. 639, 677-80 (2002) (Thomas, J., concurring). For further discussion of Justice Thomas, see Andrew Koppelman, *Phony Originalism and the Establishment Clause*, 103 NW. U. L. REV. (forthcoming 2009).

282. 23 Ohio St. 211, 246 (1872), discussed in Lash, *supra* note 281, at 1125-31.

> ally, morally, and spirtually weakest-will go to the wall, and the best will triumph in the end.[283]

The Ohio court also was bold enough to distinguish true from false Christianity:

> True Christianity never shields itself behind majorities. Nero, and the other persecuting Roman emperors, were amply supported by majorities; and yet the pure and peaceable religion of Christ in the end triumphed over them all; and it was only when it attempted itself to enforce religion by the arm of authority, that it began to wane. A form of religion that can not live under equal and impartial laws ought to die, and sooner or later must die.[284]

The U.S. Supreme Court did not go this far when it addressed the establishment issue the year before in *Watson v. Jones*,[285] in which it rejected the "departure from doctrine" rule whereby courts could award property to the faction most faithful to a church's religious doctrines. But it did say that the state was an unreliable source of religious doctrine:

> It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to one which is less so.[286]

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283. Bd. of Educ. v. Minor, 23 Ohio St. 211, 250-51 (1872), quoted in Lash, *supra* note 281, at 1129.

284. *Id.* at 247. This passage is not quoted in Lash's article; thanks to Kurt Lash for bringing it to my attention. The court here echoes an argument from Madison, who argued that:

> [T]he Christian Religion ... disavows a dependence on the powers of this world .... [I]t is known that this Religion both existed and flourished, not only without the support of human laws, but in spite of every opposition from them.

Madison, *supra* note 3, at 9.

285. 80 U.S. 679 (1871).

286. *Id.* at 729. A similar view is expressed in German Reformed Church v. Seibert, 3 Barr. 282, 291 (Pa. 1846) ("Any other than [ecclesiastical courts] must be incompetent judges of matters of faith, discipline and doctrine; and civil courts, if they should be so unwise as to attempt to supervise their judgments on matters which come within their jurisdiction, would only involve themselves in a sea of uncertainty and doubt, which would do anything but

These passages are suggestive, but they do not cohere into any distinctive philosophy. Rather, they echo themes we have already examined. They are, at best, evidence that the corruption arguments remained part of the culture at the time the Fourteenth Amendment was framed, and so offer some support to the idea that the incorporated Establishment Clause is influenced by an idea of corruption at least somewhat like that which drove the original provision.

4. Hugo Black

The architect of modern Establishment Clause law is Justice Hugo Black, who wrote the most important early opinions interpreting the Clause.[287] Decisions authored by him declared that the Establishment Clause was applicable to the states,[288] that a "released time" program in which religious instruction was offered in the public schools was unconstitutional,[289] that state officeholders could not be required to profess a belief in God,[290] and that state-authored school prayers violated the Constitution.[291]

The last of these contained the most explicit invocation of the corruption rationale in any Supreme Court opinion, quoted more fully above,[292] which concluded with the declaration that "religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate."[293] 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' ... [a]nd he added extemporaneously, 'The prayer of each man from his soul must be his and his alone.'"[294] Three days after the decision was announced, in a letter explaining his decision to a niece, Black dismissed the idea that "prayer must be recited parrot-like in public

improve either religion or good morals."), quoted in Lash, *supra* note 281, at 1112 n.121.

287. The following discussion is heavily indebted to Dane, *supra* note 42, at 568-70.

288. Everson v. Bd. of Educ., 330 U.S. 1 (1947).

289. Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203 (1948).

290. Torcaso v. Watkins, 367 U.S. 488 (1961).

291. Engel v. Vitale, 370 U.S. 421 (1962).

292. *See supra* text accompanying note 62.

293. *Engel*, 370 U.S. at 431-32 (quoting MADISON, *supra* note 3, at 187).

294. ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 523 (2d ed. 1994).

places in order to be effective," citing the passage of the Sermon on the Mount that emphasizes the value of praying privately.[295]

Similarly strong language appears in his dissent in *Zorach v. Clauson*:[296]

> Under our system of religious freedom, people have gone to their religious sanctuaries not because they feared the law but because they loved their God. The choice of all has been as free as the choice of those who answered the call to worship moved only by the music of the old Sunday morning church bells. The spiritual mind of man has thus been free to believe, disbelieve, or doubt, without repression, great or small, by the heavy hand of government.[297]

The language of the holy and the sacred appears once again: "State help to religion injects political and party prejudices into a holy field.... Government should not be allowed, under cover of the soft euphemism of 'co-operation,' to steal into the sacred area of religious choice."[298]

Similar themes can be found in almost all of his Establishment Clause opinions.[299] He quoted with approval the religious antiestablishment arguments of Roger Williams, Jefferson, and Madison.[300]

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295. *Id.* at 523-24; Dane, *supra* note 42, at 569. He reportedly cited the same passage in other correspondence concerning *Engel*. *See* MR. JUSTICE AND MRS. BLACK: THE MEMOIRS OF HUGO L. BLACK AND ELIZABETH BLACK 95 (1986). His son recalls him saying in response to the protest against *Engel*: "Most of these people who are complaining, Son, are pure hypocrites who never pray anywhere but in public for the credit of it. Prayer ought to be a private thing, just like religion for a truly religious person." HUGO BLACK, JR., MY FATHER: A REMEMBRANCE 176 (1975).

Similar impatience with the rote recitation of words not felt is evident in a concurring opinion he coauthored with Justice Douglas in *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 644 (1943) (Black & Douglas, JJ., concurring) ("Words uttered under coercion are proof of loyalty to nothing but self-interest. Love of country must spring from willing hearts and free minds ....").

296. 343 U.S. 306 (1952).

297. *Id.* at 319-20.

298. *Id.* at 320.

299. The exception is his concurrence in *Epperson v. Arkansas*, 393 U.S. 97 (1968) (Black, J., concurring), in which he argued that a statute barring the teaching of evolution in the public schools should be invalidated on grounds of vagueness rather than as an Establishment Clause violation. He there suggested that, because both Darwin and the Bible were excluded from the curriculum, it was arguable that the exclusion "leave[s] the State in a neutral position toward these supposedly competing religious and anti-religious doctrines." *Id.* at 113.

300. Engel v. Vitale, 370 U.S. 421, 431-34 (1962); Everson v. Bd. of Educ. of Ewing, 330

On this basis he laid down the most fundamental Establishment Clause restrictions, most of which remain unquestioned to this day:

> The "establishment of religion" clause of the First Amendment means at least this: Neither 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. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."[301]

Repudiating the claim that his decisions manifested hostility to religion, he wrote that "the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."[302] He rejected a requirement that a Notary Public profess a belief in God, because "[t]he power and authority of the State of Maryland thus is put on the side of one particular sort of believers-those who are willing to say they believe in 'the existence of God.'"[303] He then quoted an earlier opinion: "'[W]e have staked the very existence of our country on the faith that complete separation

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U.S. 1, 12-13 (1947).

301. *Everson*, 330 U.S. at 15-16. He fought with Justice Felix Frankfurter over whether this opinion ought to be cited in subsequent Supreme Court opinions. *See* JAMES F. SIMON, THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA 180-83 (1989); Samuel A. Alito, Note, *The "Released Time" Cases Revisited: A Study of Group Decisionmaking by the Supreme Court*, 83 YALE L.J. 1202, 1210-22 (1974). Black repeated this entire passage in *Illinois* ex rel. *McCollum v. Board of Education*, 333 U.S. 203, 210-11 (1948), *Torcaso v. Watkins*, 367 U.S. 488, 492-93 (1961), and his dissent in *Board of Education v. Allen*, 392 U.S. 236, 250-51 (1968) (Black, J., dissenting).

302. *McCollum*, 333 U.S. at 212.

303. *Torcaso*, 367 U.S. at 490.

between the state and religion is best for the state and best for religion.'"[304] He cited the old theme that establishment breeds hypocrisy, arguing that the rule followed "the historically and constitutionally discredited policy of probing religious beliefs by test oaths or limiting public offices to persons who have, or perhaps more properly profess to have, a belief in some particular kind of religious concept."[305] The school prayer decision declared that

> the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.[306]

Disestablishment meant that "the people's religions must not be subjected to the pressures of government for change each time a new political administration is elected to office."[307] The Establishment Clause, Black claimed,

> was written to quiet well-justified fears which nearly all of them felt arising out of an awareness that governments of the past had shackled men's tongues to make them speak only the religious thoughts that government wanted them to speak and to pray only to the God that government wanted them to pray to.[308]

Recent scholarship has emphasized Black's suspicion of the Catholic church and his early involvement in the Ku Klux Klan as evidence that modern Establishment Clause doctrine is contaminated with bias.[309] Yet, the more important factor in explaining his

304. *Id.* at 494 (quoting *McCollum*, 333 U.S. at 232 (Frankfurter, J., concurring), which in turn was quoting *Everson*, 330 U.S. at 59 (Rutledge, J., dissenting)).

305. *Id.*

306. Engel v. Vitale, 370 U.S. 421, 425 (1962).

307. *Id.* at 430.

308. *Id.* at 435.

309. *See* HAMBURGER, *supra* note 70, at 422-34, 461-63; JOHN T. MCGREEVY, CATHOLICISM AND AMERICAN FREEDOM: A HISTORY 184-86 (2003); LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 182, 190, 368-69 (2000); Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 LOY. U. CHI. L.J. 121, 127-29 (2001). A different psychological explanation is offered by Noah Feldman, who speculates that Black was reacting to the atrocities of World War II. FELDMAN, *supra* note 17, at 173-75. Black was not

approach to the Establishment Clause is that he was raised a Baptist. By the time he wrote *Engel*, he was no longer formally affiliated with any church[310]—he told his son, "I cannot believe. But I can't not believe either."[311]—but he continued to hold a typically Baptist view of the corrupting effects of establishment.[312] The corruption claim, as he states it in the passages just quoted, could have been written by Backus or Leland.

A shrewder critique of Black was offered immediately after *Everson* and *McCollum* by the Catholic theologian John Courtney Murray.[313] Murray argued that the idea of separation that underlay these decisions depended on "a particular sectarian concept of 'religion.'"[314] The idea that religion is a fundamentally private and individual matter, one that can never be expressed in communal ritual, depends, Murray argued, on "a deistic version of fundamentalist Protestantism."[315] The idea of an absolute ban on assistance to religion "even in the demonstrable absence of any coercion of conscience, any inhibition of full religious liberty, any violation of civil equality, any disruption of social harmony"[316] cannot be sustained without this religious premise, he thought. Responding to Justice Rutledge's claim that separation "is best for the state and best for religion,"[317] he asked: "[B]y what constitutional authority is the Supreme Court empowered to legislate as to what is 'best for religion'? I thought church and state were separated here."[318]

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innocent of anti-Catholic bigotry. There is no excuse for his dissent in *Board of Education v. Allen*, 392 U.S. 236, 250-54 (1968), which hysterically claims that Catholic schools seeking to borrow textbooks from the state are "looking toward complete domination and supremacy of their particular brand of religion." *Id.* at 251.

310. He occasionally attended services at a Unitarian church. NEWMAN, *supra* note 294, at 521.

311. *See* BLACK, *supra* note 295, at 172.

312. He also had a typically Baptist view of the primacy of individual conscience, which is apparent in his plurality opinion in *Welsh v. United States*, 398 U.S. 333 (1970), in which he held that even those who did not believe in God could claim a religious exemption from the draft. He wrote that the law "exempts from military service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war." *Id.* at 344.

313. *See* Murray, *supra* note 4.

314. *Id.* at 29.

315. *Id.* at 31.

316. *Id.* at 30.

317. Everson v. Bd. of Educ., 330 U.S. 1, 59 (1947) (Rutledge, J., dissenting).

318. Murray, *supra* note 4, at 30 n.33.

Murray was on shakier ground when he claimed that "Madison's radically individualistic concept of religion" was "today quite passé."[319]

The problem about the religious roots of the corruption argument is nonetheless a pressing one, and for just the reason that Murray notes. A rule against establishment of religion ought not itself to establish a religion. The point is a powerful one, and it is remarkable that so little has been made of it since Murray wrote.

IV. THE TROUBLESOME RELIGIOUS ROOTS

Now that we have examined the argument for corruption as it was deployed by the founding generation, we can ask whether any of this matters for contemporary constitutional interpretation. It is clear that the corruption argument mattered to the Framers, and that they thought that preventing corruption of religion was one of the purposes of barring establishments of religion. Can that offer us any guidance in interpreting the Clause today?

The role of original meaning is contested in constitutional law. But it is generally agreed that, when a provision is aimed at a specific historical evil, the provision should be read as preventing a recurrence of that evil or others relevantly like it. Of course, there is room for disagreement as to what counts as other evils relevantly like it. For that, we have to look at what the problem is and offer an account of why it makes sense to remedy it. For such an account, the original meaning will not help us. The prohibition rarely arrives with a rule for its interpretation, and often the Framers had no specific interpretive rule in mind.[320] When the authors of the First Amendment condemned establishment, Thomas Curry notes, "they had in their minds an image of tyranny, not a definition of a system."[321]

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319. *Id.* at 29 n.29.

320. Thus, for example, Leonard Levy has shown that, at the time of the framing of the Free Speech Clause of the First Amendment, neither James Madison nor almost anyone else had figured out that the protection of free speech must prevent the state from punishing seditious libel, even though this core meaning of the Clause would shortly be argued by Madison in his critique of the Sedition Act a few years later. LEVY, *supra* note 73.

321. *See* CURRY, *supra* note 71, at 211. The Court has similarly observed that the purpose of the Framers of the First Amendment "was to state an objective[,] not to write a statute." Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970).

Jed Rubenfeld has observed that constitutional interpretation is frequently guided by paradigm cases, which are specific core commitments that are memorialized by the constitutional provisions. An example is the Fourteenth Amendment.[322] The Amendment's language is broad, but it was enacted specifically to outlaw the Black Codes—laws enacted by white-controlled legislatures after the Civil War, that imposed specific legal disabilities on blacks, such as requiring them to be gainfully employed under contracts of long duration, excluding them from occupations other than manual labor, and disabling them from testifying against whites in court.[323] Any plausible interpretation of the Fourteenth Amendment must invalidate the Black Codes. More generally, any interpretation that specifies the more general types of inequality that the Amendment forbids must be a chain of inferences from the core commitment represented by the paradigm case.[324]

Similarly with other constitutional provisions that are aimed at specific evils. The Fourth Amendment's[325] ban on unreasonable searches and seizures should be read in light of the controversies over general searches and writs of assistance before the American Revolution.[326] The contract clause should be read as a response to debtor relief legislation in the 1780s.[327] If original meaning is to count at all, then a constitutional provision must be understood to address the very problem that it was designed to address.

Unless a constitutional provision states a specific rule, it must be understood to stand for some principle. That principle must be a principle that addresses the very problem that the provision was designed to address. But it cannot simply be a rule that addresses that problem and nothing more. If the Framers had intended to do that, then they could have said so, and they did not.

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322. U.S. CONST. amend. XIV.

323. *See generally* THEODORE BRANTNER WILSON, THE BLACK CODES OF THE SOUTH (1965).

324. *See* JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 178-195 (2001). The idea that constitutional provisions should be interpreted in light of paradigm cases is, of course, hardly original with Rubenfeld. *See, e.g.*, Douglas Laycock, *Text, Intent, and the Religion Clauses*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 683, 690 (1990). Rubenfeld lays out the argument with unusual clarity and detail.

325. U.S. CONST. amend. IV.

326. *See* JED RUBENFELD, REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW 32-33 (2005).

327. Laycock, *supra* note 324, at 690.

The Establishment Clause is a particularly apt candidate for paradigm case interpretation because the core historical wrong that was intended to be barred—here, an establishment of religion of the kind that existed in England—is specifically named in the text.[328]

Paradigm case reasoning proceeds by "extrapolating general principles from the foundational paradigm cases and applying those principles to the controversy at hand."[329] With respect to provisions such as the First and Fourteenth Amendments, which prohibit certain government actions, the general principle should give a convincing account of the result in the paradigm case while at the same time properly specifying the kind of evil that the prohibition reaches. The principle should explain what kind of wrong the provision is prohibiting, so that in subsequent controversies, it is possible to tell whether the same kind of wrong is or is not occurring.

In Establishment Clause cases, then, to the extent that one wants to rely on original meaning—and I am by no means suggesting that this should be the sole source of constitutional law[330]—one should ask, (1) why did the Framers think establishment of religion is a bad thing, and (2) is the same bad thing brought about by the challenged action in this case? There will obviously be room for disagreement about both of these issues. The paradigm case method does not decide cases, but it makes clear which questions the judges should ask.

With respect to the first question, why the Framers thought establishment was a bad thing, the corruption argument is indisputably relevant. It was only one of the reasons why establishment was thought bad, but it was a consideration that played an important role, and so the Clause should be read in light of it.

The original argument about corruption cannot be used today without modification. In its original form, it is crucially dependent on Protestant or Deist premises. Today, Deism has disappeared, and

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328. Rubenfeld briefly discusses the interpretation of the Establishment Clause in RUBENFELD, REVOLUTION BY JUDICIARY, *supra* note 326, at 29-30.

329. *See* RUBENFELD, FREEDOM AND TIME, *supra* note 324, at 191.

330. Original meaning is more conventionally taken to be one of several sources of constitutional meaning, along with text, precedent, and much else. The classic catalogue of sources of constitutional law is PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982).

the largest religious denomination in the United States is Catholicism.[331] More generally, an interpretation of the Establishment Clause that relies on specific, contested theological premises is inconsistent with the purpose of the Clause. The trouble is that the corruption argument has a paradoxical and potentially self-nullifying quality: the corruption claim can always be applied to the understanding of religion that is the basis for any specific corruption claim. So, in order to be usable now, the argument will need some translation.

To begin this exercise in reconstruction, let us enumerate the recurring claims that fall under the rubric of "corruption."

A. The Claims Distilled

Religious behavior, without sincerity, is devoid of religious value. From this premise some, but hardly all, commentators have inferred that the religion that the state can promote is likely to be worthless. The idea that religious sincerity is crucial to salvation, and that one should follow one's own conscientious beliefs even in the teeth of contrary religious authority, was endorsed as early as Pope Innocent III (1198-1216): "'One ought to endure excommunication rather than sin ... no one ought to act against his own conscience and he should follow his conscience rather than the judgment of the church when he is certain ... one ought to suffer any evil rather than sin against conscience.'"[332] Noah Feldman observes that the idea of freedom of conscience is already being suggested by this kind of argument: "If it was sinful to act against conscience, then there might be reason to avoid requiring anyone to act against conscience."[333] But here it is only inchoate. Aquinas, who held basically the same view as Innocent, did not suggest that conscience entailed religious toleration. On the contrary, he supported the persecution of heretics.[334]

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331. This is why modern defenders of nonestablishment cannot simply invoke the original religious arguments to defend their position. *See, e.g.*, Marci A. Hamilton & Rachel Steamer, *The Religious Origins of Disestablishment Principles*, 81 NOTRE DAME L. REV. 1755 (2006).

332. Brian Tierney, *Religious Rights: An Historical Perspective*, *in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE 17, 25 (John Witte, Jr. & Johan D. van der Vyver eds., 1996) (quoting ORDINARY GLOSS TO THE DECRETALS (explaining two judgments by Innocent)).

333. Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 357 (2002).

334. THOMAS AQUINAS, ON PRINCELY GOVERNMENT, *in* AQUINAS: SELECTED POLITICAL

The present populations of South America and Africa are ample evidence that state coercion can eventually bring about many people's sincere adherence to the favored religious belief. Additional premises appear to be necessary in order for this argument to be a constraint on state power.

Establishment exaggerates the importance of doctrinal divisions. In fact, a variety of religious positions have religious value. State-induced religious uniformity, therefore, attacks the very value it seeks to promote. This goes beyond Aquinas because it holds that heresy is not a harm against which the state can legitimately protect the public. It may not be a harm at all. This may be because the theological differences at issue are not really that important. Or, it may be because the differences that are likely to bother the state are unlikely to be the ones that matter, or even that the state is likely to promote the wrong views, as Milton, Locke, and Madison argued. It may be that false religious views have positive value because engagement with them brings us closer to the truth, as Milton, Pufendorf, and Jefferson thought. This claim also supports the next argument.

The state is an unreliable source of religious authority. In part, this follows from the above argument. To those who have been on the losing side of state-imposed uniformity, it is also an inference from experience. Note, however, that because the corruption argument is itself religious, it has inherent limits: the state evidently is not so unreliable that it cannot discern religious value when that value is described at this level of abstraction. In order to make any use at all of the corruption argument, the state must be competent to say what is religious.

Religious teachings are likely to be altered, in a pernicious way, if the teachers are agents of the state. This can be derived from

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WRITINGS 3, 77-79 (J.G. Dawson trans., A.P. D'Entreves ed., 1981). There is some tension within this position, as the heretic may be exercising his own rational faculties to the best of his ability. Aquinas found it necessary to deny this, and to claim that the heretic is willfully denying the truth. *See* DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION 87-88 (1986). "Aquinas did not make clear whether he believed that a well informed conscience could ever be in conflict with ecclesiastical authority." MICHAEL G. BAYLOR, ACTION AND PERSON: CONSCIENCE IN LATE SCHOLASTICISM AND THE YOUNG LUTHER 57 n.138 (1977). Contemporary Catholicism takes a very different view. DIGNITATIS HUMANAE [DECLARATION ON RELIGIOUS FREEDOM] (1965) declares the right of individuals to seek the truth in religious matters, even if they follow false religions.

theological premises, as in the writings of Roger Williams.[335] It may also be an inference from experience, but if it is, then it presupposes some idea of what it means for a change in religion to be pernicious. That idea cannot be religiously neutral.

Establishment tends to produce undeserved contempt toward religion. This, too, is an inference from experience. It is, however, theologically controversial in that it rejects the view, which some people hold, that religion as such deserves contempt.

The legitimate authority of the state does not extend to religious questions. This can be derived from a kind of social contract argument, and Locke so derived it in an argument independent of his theological arguments. But it also follows from the above argument.

All of these arguments depend on some conception of the good of religion, which disestablishment protects from corruption. What could such a conception look like today? It is clear what it cannot be: an unmediated connection with God arrived at through personal study of the New Testament, as Milton and Elisha Williams wrote, and many of the other writers we have surveyed may have thought. What could take its place?

B. Scalia's Reformulation

As Jared Goldstein has observed, a rule that the state may not examine the merits of religious practices and beliefs depends on the premise that the state can tell what religion is. Otherwise, it is impossible to follow the rule.[336] But the discernment of what religion is itself appears to present a religious question. The problem becomes more acute once it is noted that the corruption argument depends on the premise that religion is a good thing. Then, we have to ask, what is this good thing? Is it possible to answer that question without committing oneself on controversial religious questions?

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335. *See supra* Part III.A.2.

336. *See* Jared A. Goldstein, *Is There a "Religious Question" Doctrine? Judicial Authority To Examine Religious Practices and Beliefs*, 54 CATHOLIC U. L. REV. 497 (2005). The same analytic point is made in another context by David Strauss, who shows that a colorblindness rule is necessarily intensely race-conscious. David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 199. For engagement with Goldstein's arguments, see Andrew Koppelman, *The Troublesome Religious Roots of Religious Neutrality*, 84 NOTRE DAME L. REV. 865 (2009).

Larry Alexander argues that, if religion is accommodated because it is a good thing, then one should only accommodate the true religion.[337] If duties to God have priority over duties to the state, then this priority only holds with respect to real, rather than imagined, duties to God.[338] In order to apply this rationale, the state would have to decide what the true religion is and to exempt only that religion's believers from generally applicable laws.[339] In the context of the corruption argument, a variation on Alexander's claim would be that the state should figure out which religious beliefs fall within the range of neighboring differences that have religious value, and then keep its hands off only those beliefs. That was the position of all the proponents of disestablishment who drew the line at certain religious beliefs that they thought were obviously false and destructive, such as atheism or Catholicism.[340]

Something like this formulation has been proposed by Justice Antonin Scalia. He offers his approach as a solution to the free exercise/establishment dilemma. "We have not yet come close to reconciling [the requirement that government not advance religion] and our Free Exercise cases, and typically we do not really try."[341] The solution he, Justice Thomas, and the late Chief Justice Rehnquist proposed would impose dramatic limits upon the Establishment Clause. They would read the Clause only to prohibit favoritism among sects, while permitting states to favor religion over irreligion. Of this group, Scalia has offered the clearest formulation of the alternative rule: "[O]ur constitutional tradition ... ruled out of order government-sponsored endorsement of religion ... where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ.)"[342]

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337. *See* Larry Alexander, *Good God, Garvey! The Inevitability and Impossibility of a Religious Justification of Free Exercise Exemptions*, 47 DRAKE L. REV. 35, 39-41 (1998).

338. *See id.*

339. *See id.*

340. *See* AREOPAGITICA, *supra* note 74, at 747; LOCKE, *supra* note 121, at 50; WILLIAMS, *supra* note 142, at 93.

341. Edwards v. Aguillard, 482 U.S. 578, 617 (1987) (Scalia, J., dissenting).

342. Lee v. Weisman, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting).

More recently, in *McCreary County v. ACLU*,[343] dissenting from a decision barring one ceremonial display of the Ten Commandments, he frankly acknowledged that ceremonial theism would entail "contradicting the beliefs of some people that there are many gods, or that God or the gods pay no attention to human affairs."[344] The Commandments "are assuredly a religious symbol, but they are not so closely associated with a single religious belief that their display can reasonably be understood as preferring one religious sect over another. The Ten Commandments are recognized by Judaism, Christianity, and Islam alike as divinely given."[345] Justice Stevens objected that "[t]here are many distinctive versions of the Decalogue, ascribed to by different religions and even different denominations within a particular faith; to a pious and learned observer, these differences may be of enormous religious significance."[346] Scalia, joined by Rehnquist, Thomas, and Kennedy, retorted that "[t]he sectarian dispute regarding text, if serious, is not widely known. I doubt that most religious adherents are even aware that there are competing versions with doctrinal consequences (I certainly was not)."[347] Justice Scalia thus envisions a role for the Court in which it decides which articles of faith are sufficiently widely shared to be eligible for state endorsement (and in which determinedly uneducable judicial ignorance is a source of law!). Evidently, according to Justice Scalia, the state may endorse any religious proposition so long as that proposition is (or is believed to be by a judge unacquainted with doctrinal niceties) a matter of agreement between Judaism, Christianity, and Islam. It would, for instance, be permissible for the state to declare that Gabriel is one of the most important archangels. The interpretation of the Establishment Clause would then depend on the further

343. 545 U.S. 844 (2005).

344. *Id.* at 893 (Scalia, J., joined by Rehnquist, C.J. and Thomas, J., dissenting).

345. *Id.* at 909. There is a delicious ambiguity, which I will not pursue further here, about what it means to be "associated with a single religious belief." *Id.* If the Ten Commandments are not so associated, then neither is the divinity of Christ, as Protestants and Catholics who violently disagree on many religious issues are nonetheless in agreement about that.

346. Van Orden v. Perry, 545 U.S. 677, 717-18 (2005) (Stevens, J., dissenting) (citing Steven Lubet, *The Ten Commandments in Alabama*, 15 CONST. COMMENT. 471, 474-476 (1998)).

347. *McCreary*, 545 U.S. at 909 n.12 (Scalia, J., joined by Rehnquist, C.J., Kennedy, J., and Thomas, J., dissenting).

development of the Muslim idea of the People of the Book—those who have received a revelation that is deemed (formerly by the Koran, now by the Supreme Court) to be reliably from God.

Like Backus or Adams, Scalia's vision of state incompetence is limited only to certain theological propositions. The state must not adjudicate the divinity of Christ. But it is only disagreement among monotheists that the state must keep its hands off. It can authoritatively and reliably pronounce its views on the question of theism.[348]

Scalia's solution will not work because it discriminates among religions. Chief Justice Rehnquist thought that the Establishment Clause forbids "asserting a preference for one religious denomination or sect over others."[349] Scalia once agreed: "I have always believed, and all my opinions are consistent with the view, that the Establishment Clause prohibits the favoring of one religion over others."[350] Not all religions involve a belief in "a benevolent, omnipotent Creator and Ruler of the world."[351] Scalia's formulation does discriminate among religions. Christians, Jews, and Muslims are in; Hindus, Buddhists, and atheists are out. The outs are a lot of people. Justice Scalia defended his approach by noting that the monotheistic religions "combined account for 97.7% of all

348. For a similar criticism of the nonpreferentialist position, see *Lee v. Weisman*, 505 U.S. 577, 616-18 (1992) (Souter, J., concurring). A defender of Scalia might say that there is a difference between saying that the state can discern the broadest religious truths (probably Locke's position about atheism) and saying, as Scalia does, that the state can discern a consensus or historical tradition and act to reflect the consensus view. As the development of Scalia's position makes clear, this distinction is unsustainable in practice. "Acknowledgement" easily slides into endorsement. Thanks to Kent Greenawalt for pressing me on this point.

349. Wallace v. Jaffree, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting).

350. Bd. of Educ. of Kiryas Joel v. Grumet, 512 U.S. 687, 748 (1994) (Scalia, J., dissenting).

351. The Court held long ago that the Establishment Clause forbids government to "aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." Torcaso v. Watkins, 367 U.S. 488, 495 (1961). The Court noted that "[a]mong religions in this country, which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others." *Id.* at 495 n.11. To say that Buddhism rejects theism is something of an overstatement. Although the historical Buddha had no interest in theological questions, some forms of Buddhism make theological claims, sometimes assigning divine status to Buddha himself. For a general overview of these issues, see Masao Abe, *Buddhism*, *in* OUR RELIGIONS 69-137 (Arvind Sharma ed., 1993). Hinduism is only the most prominent of many polytheistic religions. There are, concededly, monotheistic interpretations of Hinduism, but not all Hindus subscribe to these.

believers."[352] But he is fudging the numbers. In calculating the level of exclusion here, nonbelievers are doubly excluded, as they are not even entitled to be part of the denominator. If one adds the nonbelievers, as enumerated in the 2004 Statistical Abstract of the United States that Scalia cites, the excluded adult population is 33 million out of 207 million, or 16 percent.[353]

The numbers are in fact a bit more complicated than the Statistical Abstract suggests. The proportion of Americans who report having no religious preference doubled in the 1990s, from 7 percent in 1991 (which had been its level for almost twenty years) to 14 percent in 1998.[354] However, most of the members of this category are in fact religious. More than half believe in God, more than half believe in life after death, about a third believe in heaven and hell, and 93 percent sometimes pray.[355] The most careful study of this group concludes that the newer members of this group are mostly "unchurched believers" who declare no religious preference in an effort to express their distance from the Religious Right.[356]

It is pretty clear that these people are not interested in being part of the theistic triumphalism that Scalia wants to license. Similarly, Steven Gey observes that, in order to calculate the number of people excluded from Scalia's formula, one ought also to include the large number of theists who reject state sponsorship of religion, including "[t]raditional Roger Williams-style Baptists, Seventh-day Adventists, Jehovah's Witnesses, most Jews, many Presbyterians, and other modern nonfundamentalist Protestants."[357] Scalia does not explain his indifference to these people, although he conspicuously includes Jews and Muslims, who together comprise fewer than 4 million Americans.[358]

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352. *McCreary*, 545 U.S. at 894 (Scalia, J., dissenting).

353. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2004-2005, 55 tbl.67 (124th ed. 2004), cited in *McCreary*, 545 U.S. at 894 (Scalia, J., dissenting). Further data on the number of people Scalia is leaving out are compiled in Frederick Mark Gedicks & Roger Hendrix, *Uncivil Religion: Judeo-Christianity and the Ten Commandments*, 110 W. VA. L. REV. 275, 284-85 (2007). The data on which the Census Bureau relies is described in detail in BARRY A. KOSMIN & ARIELA KEYSAR, RELIGION IN A FREE MARKET (2006).

354. Michael Hout & Claude S. Fischer, *Why More Americans Have No Religious Preference: Politics and Generations*, 67 AM. SOC. REV. 165, 165 (2002).

355. *Id.* at 178-79.

356. *Id.* at 165, 179.

357. Gey, *supra* note 33, at 20.

358. U.S. CENSUS BUREAU, *supra* note 353, at 55 tbl.67. As Gey notes, most Jews are

Scalia's position is essentially that the state may take one side in the modern culture wars, in favor of traditionalists and against modernists. It may not be irrelevant that the traditionalists have become an important constituency of the Republican party.[359] This kind of religious division, with the coercive power of the state as the prize for which the religious factions struggle, is one of the central evils that the religion clauses are aimed at preventing. One may also wonder why Scalia thinks that the state's competence extends to this particular set of religious questions when he concedes its incompetence with respect to so many others.

Perhaps Scalia's central aim is to promote a certain kind of civic unity, which recognition of religion makes possible. This is clearest in his dissent from a decision invalidating a high school graduation prayer:

> The Founders of our Republic knew the fearsome potential of sectarian religious belief to generate civil dissension and civil strife. And they also knew that nothing, absolutely nothing, is so inclined to foster among religious believers of various faiths a toleration—no, an affection—for one another than voluntarily joining in prayer together, to the God whom they all worship and seek. Needless to say, no one should be compelled to do that, but it is a shame to deprive our public culture of the opportunity, and indeed the encouragement, for people to do it voluntarily. The Baptist or Catholic who heard and joined in the simple and inspiring prayers of Rabbi Gutterman on this official and patriotic occasion was inoculated from religious bigotry and prejudice in a manner that cannot be replicated. To deprive our

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separationists who are not interested in being included in Scalia's numerator. Gey, *supra* note 33, at 20.

359. *See* GEOFFREY LAYMAN, THE GREAT DIVIDE: RELIGIOUS AND CULTURAL CONFLICT IN AMERICAN PARTY POLITICS 12 (2001); WUTHNOW, *supra* note 44, at 218-22. The effect has become more pronounced over time. In the 2004 presidential election, those who attended church more than once a week voted for Bush by a margin of 65 percent to 35 percent, whereas those who never attended church were almost the inverse: 36 percent to 62 percent. *See* Jay Lefkowitz, *The Election, and the Jewish Vote*, COMMENTARY, Feb. 2005, at 61, 64. Among Orthodox Jews, 69 percent voted for Bush, whereas Conservative Jews gave him 23 percent and Reform Jews 15 percent. *Id.* Bush won 40 percent of the votes of Jews attending synagogue on a weekly basis, compared to 18 percent of those who rarely or never attend. *Id.*

It may also be relevant that the "originalist" credentials of Scalia's position are deeply flawed, suggesting that he is basing his position on something other than the intentions of the Framers. *See* Koppelman, *supra* note 281.

> society of that important unifying mechanism, in order to spare the nonbeliever what seems to me the minimal inconvenience of standing or even sitting in respectful nonparticipation, is as senseless in policy as it is unsupported in law.[360]

Social unity, he evidently thinks, depends on shared norms.

The problem with Scalia's prescription of official monotheism is that Baptists and Catholics and Jews can indeed be part of the overlapping consensus he contemplates, but we live in a society that also includes millions who are not monotheists.[361] Charles Taylor's point about the limitations of a common ground strategy is salient here.[362] If the aim is shared agreement, then it is counterproductive to propose unifying principles to which large numbers of citizens cannot possibly agree. The size of the remainder matters. Perhaps Scalia's solution made sense in the 1950s when the idea of a "Judeo-Christian" overlapping consensus was invented,[363] but it is no longer appropriate in contemporary American society.[364] Overlapping consensus is unstable and constantly under construction.

Scalia is right, however, about the importance of shared norms. A sense of solidarity is indispensable to democracy: if majorities are to rule legitimately, then the losers need to feel that they have some stake in the system. A sense of solidarity is also necessary to a functioning welfare state. The split between American liberals and the religious has greatly truncated the possibilities for a transformative left politics.[365]

As the common ground shrinks, however, its basis must become more abstract and vague. Christianity will no longer do the job. Neither will monotheism. But the idea that religion is something of value, and that that value is jeopardized when religious questions are adjudicated by the state, may continue to provide the common ground that is needed.

The pluralism we now face was not imagined by the Framers. It is therefore impossible to attribute to them any view about it.

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360. Lee v. Weisman, 505 U.S. 577, 646 (1992) (Scalia, J., dissenting).

361. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2008, at 59 tbl.74 (2008).

362. *See supra* note 45 and accompanying text.

363. *See* SILK, *supra* note 280, at 40-53.

364. *See generally* Gedicks & Hendrix, *supra* note 353.

365. *See* GARRY WILLS, UNDER GOD: RELIGION AND AMERICAN POLITICS 106-07 (1990).

Protestant Christianity was so pervasive in their culture that they did not even consider whether its establishment was inconsistent with religious liberty.[366] Modern religious pluralism has generated new knowledge about the range of religious issues that are potentially subject to corruption by state interference.

V. A PROPOSAL

A. Defining Religion

What, then, is the "religion" that the state must keep its hands off in order to avoid corrupting it? Religion is a category that is hard to delimit.[367] 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.[368] Religions just have a "family resemblanc[e]" to one another.[369] In doubtful cases, one can only ask how close the analogy is between a putative instance of religion and the indisputable instances.[370]

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366. Laycock, *supra* note 229, at 918-19; CURRY, *supra* note 71, at 218, 221.

367. Many writers have tried to evade this problem by saying that what is to be protected is not religion, but conscience. The reasons why this stratagem will not work are explored in Andrew Koppelman, Conscience, Volitional Necessity, and Religious Exemptions (unpublished manuscript, on file with author).

368. Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753, 762-63 (1984).

369. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 20 (G.E.M. Anscombe trans., 3d ed. 1958).

370. *See* GREENAWALT, *supra* note 55, at 124-25, 137-42; Greenawalt, *supra* note 368, at 761-63, 767-68; *see also* TRIBE, *supra* note 28, at 1181-83; George C. Freeman, III, *The Misguided Search for the Constitutional Definition of "Religion,"* 71 GEO. L.J. 1519, 1520, 1553, 1556 (1983); William P. Alston, *Religion*, *in* 7 THE ENCYCLOPEDIA OF PHILOSOPHY 140, 142 (Paul Edwards ed., 1967); Koppelman, *supra* note 7, at 125-39; Eduardo Peñalver, Note, *The Concept of Religion*, 107 YALE L.J. 791, 794, 814-16 (1997). Courts in Europe have done no better in devising a definition. REX AHDAR & IAN LEIGH, RELIGIOUS FREEDOM IN THE LIBERAL STATE 110-26 (2005). Indeed, it appears that no jurisdiction in the world has managed to solve this problem. *See* T. Jeremy Gunn, *The Complexity of Religion and the Definition of "Religion" in International Law*, 16 HARV. HUM. RTS. J. 189 (2003). Lest one think that the neo-Wittgensteinian approach advocated here is an artifact of academic preciousness, note that an analogical criterion is also used by that singularly hardheaded entity, the Internal Revenue Service. *See Defining "Religious Organization" and "Church,"* 868 EST., GIFTS & TR. PORTFOLIOS (BNA) ch. III (2007), *available at* http://taxandaccounting.

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."[371] 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."[372] 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 rules for how high one throws the ball in tennis, or how hard; yet tennis is a game for all of that and has rules too."[373]

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 time, what the practice has made it.[374]

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.[375]

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bna.com/btac/.

The vagueness of this approach avoids the difficulty, nicely delineated by Christopher L. Eisgruber and Lawrence G. Sager, that it would be paradoxical and self-defeating for a conception of religious liberty to depend on choosing among contested conceptions of what is religious. Christopher L. Eisgruber & Lawrence G. Sager, *Does It Matter What Religion Is?*, 84 NOTRE DAME L. REV. 807 (2009).

371. WITTGENSTEIN, *supra* note 369, at 20.

372. *Id.* at 31.

373. *Id.* at 33.

374. CHARLES TAYLOR, PHILOSOPHICAL ARGUMENTS 178 (1995).

375. *See* AL YANKOVIC, ANOTHER ONE RIDES THE BUS (Placebo Records 1981).

Jonathan Z. Smith has observed that the term "religion" denotes an anthropological category, arising out of a particular Western practice of encountering and accounting for foreign belief systems associated with geopolitical entities with which the West was forced to deal. Jonathan Z. Smith, *Religion, Religions, Religious*, *in* CRITICAL TERMS FOR RELIGIOUS STUDIES 269, 269, 275, 281 (Mark C. Taylor ed., 1998). Arising thus out of a specific historical situation, and evolving in unpredictable ways thereafter, "religion" would be surprising if it had any essential denotation.

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 something is a religion.[376]

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.[377] Neutrality is fluid; it is available in many specifications.[378] 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 religion 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),[379] responding to the fundamentally imperfect character of human life (if it is imperfect),[380] courage in the face of the heartbreaking aspects of human existence (if that kind of encouragement helps),[381] a transcendent underpinning for the resolution to act morally (if that kind of underpinning helps),[382] contact with that which is awesome

376. The list of reported cases that have had to determine a definition of "religion" is a remarkably short one. *See Religion*, 36C WORDS AND PHRASES 153-57 (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. J. C.L. & C.R. 117 (2001).

377. Koppelman, *supra* note 7, at 133-38.

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

379. JOHN M. FINNIS, NATURAL LAW AND NATURAL RIGHTS 89-90 (1980).

380. KEITH E. YANDELL, PHILOSOPHY OF RELIGION: A CONTEMPORARY INTRODUCTION 17, 32-34 (1999).

381. PAUL TILLICH, THE COURAGE TO BE 155-56, 163-78 (1952).

382. IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON (Mary Gregor ed. & trans., Cambridge University Press 1997) (1788); IMMANUEL KANT, RELIGION WITHIN THE LIMITS OF REASON ALONE (Theodore M. Greene & Hoyt H. Hudson trans., Harper & Row 1960) (1794).

and indescribable (if awe is something you feel),[383] and many others. No general description of the good that religion seeks to promote can be satisfactory, politically or intellectually.[384] 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. Recall the basic elements of the claim that establishment corrupts religion.

Religious behavior, without sincerity, is devoid of religious value.[385] Each of the understandings of the good of religion that I have described at least has a personal dimension, even if it also has communal aspects. So, hypocrisy is a ubiquitous worry, and state efforts to nudge citizens toward a particular religious view produces hypocrisy. Of course, the nudge may be gentle, and if it is gentle enough, it is unlikely to produce this particular pathology and may be quite effective.[386] So, this argument needs supplementation if it is to support as broad a hands-off rule as the Court has adopted.

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383. RUDOLF OTTO, THE IDEA OF THE HOLY 12-24 (2d ed. 1950).

384. 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).

385. *See supra* p.1896.

386. *See* Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607 (2000).

Establishment exaggerates the importance of doctrinal divisions. In fact, a variety of religious positions have religious value.[387] This follows from the premise that everything in the cluster should be treated as participating in the value of religion. The cluster conception of religion is essentially pluralistic. Some religions reject this premise, of course. But their adherents may nonetheless be persuaded that religious liberty will be more secure if the state is required to act as though this premise were true.

The state is an unreliable source of religious authority.[388] *Religious teachings are likely to be altered, in a pernicious way, if the teachers are agents of the state.*[389] *Establishment tends to produce undeserved contempt toward religion.*[390]

All of these may be treated as inferences from experience. The most notable datum that has presented itself since the framing is the frequently noted fact that in Europe, with its established churches, religion is withering away; in the United States, it is thriving.[391] One may also note the unattractive ways in which religion is transformed when the state tries to embrace it in a politically acceptable way. Steven Goldberg's book *Bleached Faith*[392] does this in some detail, noting that when the state displays the Ten Commandments, it typically does so in forms that deprive it of any meaning; that the movement to teach "intelligent design" in the schools demotes God to the status of a second-rate engineer of biological minutiae; that the promotion of Christmas produces a bland, commercialized Christianity while distorting the place of Hanukkah in the Jewish calendar. These examples have limited power because they will move some people more than others. All the argument needs to be effective, however, is for audiences to be able to think of *some* illustrations of these propositions.

The legitimate authority of the state does not extend to religious questions.[393] This follows from all of the above. It entails a hands-off rule with respect to theological questions. Implicit in the hands-off

387. *See supra* p.1897.
388. *See id.*
389. *See id.*
390. *See supra* p.1898.
391. *See supra* note 273.
392. GOLDBERG, *supra* note 273.
393. *See supra* p.1898.

rule is something analogous to the civil religion that Robert Bellah has observed in American practice. Bellah observes that there are "certain common elements of religious orientation that the great majority of Americans share" and that "provide a religious dimension for the whole fabric of American life, including the political sphere."[394] This orientation, which he labeled "the American civil religion,"[395] included as its tenets "the existence of God, the life to come, the reward of virtue and the punishment of vice, and the exclusion of religious intolerance."[396] This civil religion does not, however, include such controversial matters as the divinity of Jesus Christ. "The God of the civil religion is not only rather 'unitarian,' he is also on the austere side, much more related to order, law, and right than to salvation and love."[397]

Robert Wuthnow observes that the American civil religion described by Bellah has been fragmenting in recent years into two very different visions.[398] A conservative narrative holds that America's government is legitimate because it reflects biblical principles and has the potential to evangelize the world.[399] A liberal narrative holds that America has a responsibility to use its vast resources to alleviate the material problems that face the world.[400] In this liberal narrative, "[f]aith plays a role chiefly as a motivating element, supplying strength to keep going against what often appear as insuperable odds."[401] The two visions have become increasingly hostile to one another.[402] As a consequence, neither can effectively claim to speak for common American values.

The civil religion implied by the hands-off rule cannot by itself provide such common values. But neither does it preclude them. It is even more abstract than Bellah's Unitarian civic God.[403] It is a negative God, a God without predicates.[404] The hands-off rule re-

394. ROBERT N. BELLAH, *Civil Religion in America*, *in* BEYOND BELIEF: ESSAYS ON RELIGION IN A POST-TRADITIONAL WORLD 168, 171 (1970).

395. *Id.*

396. *Id.* at 172.

397. *Id.* at 175.

398. *See* WUTHNOW, *supra* note 44, at 241-67.

399. *Id.* at 244-47.

400. *Id.* at 250-51.

401. *Id.* at 251.

402. *Id.* at 254-55.

403. *See supra* text accompanying note 398.

404. *See* Anthony Kenny, *Worshipping an Unknown God*, 19 RATIO (n.s.) 441 (2006).

veals its reverence for the Absolute by omitting all reference to it in public decisionmaking. The aspiration should be for an eloquent silence, like a rest in music.

B. The Shaping of Modern Religion

The usefulness of an exceedingly abstract conception of the value of religion is reinforced by the recent work of Charles Taylor on the history and character of modern religion.[405] Taylor shows why convergence on any set of theological propositions is an impossibility in the modern world, and so cannot be a basis for social unity. A neo-Madisonian conception of religion will have to abstract away from such propositions. Madison's studied ambiguity has a lesson for us: the religion that needs protection from corruption will have to be conceptualized in a way that takes no sides in today's religious controversies.

Taylor argues that the emergence of a world in which theism is one option among others has roots in Christian theology.[406] From this he infers that the gap between theism and secularism is less profound than many think; "both emerge from the same long process of Reform in Latin Christendom."[407] But his story also implies that atheism is going to be with us as an existential option for the foreseeable future. His historical work reveals possibilities for social unity, the kind of reconciliation of diverse religious factions that Madison accomplished, but the reconciliation will not consist in shared theological beliefs.

In the primitive world of nature rituals and tribal deities, there was no clear distinction between the immanent and the transcendent. The sense of cosmic order pervaded everything.[408] The individual was deeply embedded in this world; there were no clear boundaries between self and nonself, personal agency and impersonal force.[409] Possession by demons was a real and terrifying

405. *See* TAYLOR, *supra* note 384, at 1-4.
406. *Id.* at 19-22.
407. *Id.* at 675.
408. *Id.* at 25-26, 32-33, 40-41.
409. *Id.* at 32, 39.

possibility.[410] In such circumstances, unbelief was literally unthinkable.[411]

Around the middle of the first millennium B.C., the great world faiths appeared. Following Karl Jaspers, Taylor calls this moment the "Axial Revolution."[412] Confucius, Siddhartha Gautama, the Hebrew prophets, Socrates, and Plato brought new visions of universal ethics and individual salvation.[413] A new line was drawn between the sacred and the profane. A world that had been unified was now divided between the disordered lower realm and the higher aspiration toward which individuals were to strive.[414] The new imperative toward moral improvement produced what Taylor calls "the Great Disembedding," in which the individual was separated from his social and cosmic environments, and Western individualism began.[415]

Taylor focuses on the evolution of the Christian world. From the beginning, he argues, there was a tension in Christianity between salvation for all, promised by a transcendent God, and the pagan practices and habits of mind that persisted among the laity.[416] This kind of tension, between the life of religious ascetics and the inevitably less perfect lives of ordinary people, is present in all civilizations organized around post-Axial religions, but Latin Christendom is distinguished by "the deep and growing dissatisfaction with it."[417] The movement that culminated in the Reformation began in the Middle Ages. After the Hildebrandine Reform of the eleventh century, there were repeated efforts by the Church, first to reform its own practices, and later to restrain as idolatrous the veneration of saints' relics, magic, miracle-mongering, and dancing around the maypole.[418] The Protestant Reformation radicalized this move by abolishing this tension and inaugurating the "priesthood of all believers." The idea gradually took hold that everyone, not only the clergy, could practice the virtues of the Gospel. Ordinary

410. *Id.* at 32, 36-37, 39.
411. *Id.* at 41.
412. *Id.* at 151.
413. *Id.* at 151-52.
414. *Id.* at 151-53.
415. *Id.* at 146-58.
416. *Id.* at 61-75.
417. *Id.* at 62.
418. *Id.* at 104, 242-43, 265-66.

life, including work, play, and sex, began to take on sacred meaning.[419]

The Christian virtues were no longer those of ascetic monks; an ethos of personal responsibility and self-discipline became available to everyone. This attempt to bring Christ into a world that had become desacralized inspired a new focus on that world.[420] Human beings now had to inhabit the world "as agents of instrumental reason, working the system effectively in order to bring about God's purposes; because it is through these purposes, and not through signs, that God reveals himself in his world."[421]

This disengaged stance toward a disenchanted world became the moral basis of the new scientific method. Technological control of the world became yet another way of doing God's work, benefiting the human race in accordance with His plan.[422] The highest goal was understood to be "a certain kind of human flourishing, in a context of mutuality, pursuing each his/her happiness on the basis of assured life and liberty, in a society of mutual benefit."[423]

The this-worldly ethos thus begotten eventually made it possible to cut loose from religiosity altogether. Once "God's goals for us shrink to the single end of our encompassing this order of mutual benefit he has designed for us,"[424] it is easy for God to drop out of the picture. The goal of order becomes simply a matter of human flourishing, and the power to pursue that goal is a "purely human capacity," not something we receive from God.[425]

Thus, a reforming movement in Christianity was in time transformed into militant secularism. In this new vision, Christianity is a danger to the goods of the modern moral order; it risks fanaticism and estrangement from our own nature.[426] Religion is suspect because it posits transcendent goals that are alien to human fulfillment; it is, in fact, the enemy of human fulfillment. Moreover,

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419. *Id.* at 179. The story of the growing affirmation of everyday life is more fully developed in CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY 211-302 (1989) [hereinafter SOURCES OF THE SELF].

420. TAYLOR, *supra* note 384, at 94.

421. *Id.* at 98.

422. See especially the discussion of Francis Bacon in SOURCES OF THE SELF, *supra* note 419, at 230-33.

423. TAYLOR, *supra* note 384, at 430.

424. *Id.* at 221.

425. *Id.* at 84.

426. *Id.* at 230, 239, 305, 308-09, 546-47.

the problem of theodicy becomes more acute in a world in which the purposes of the world are understood to center around human flourishing: "The idea of blaming God gets a clearer sense and becomes much more salient in the modern era where people begin to think they know just what God was purposing in creating the world, and can check the results against the intention."[427]

But the secular world view has discontents of its own, manifest in repeated waves of Romantic protest. It can beget a sense "that something central is missing, some great purpose, some élan, some fulfillment, without which life has lost its point."[428] It also has no good account of its own commitment to universal benevolence, which it cannot disentangle fully from its roots in Christian *agape*.[429]

> That I am left with human concerns doesn't tell me to take universal human welfare as my goal; nor does it tell me that freedom is important, or fulfillment, or equality. Just being confined to human goods could just as well find expression in my concerning myself exclusively with my own material welfare, or that of my family and immediate milieu. The in fact very exigent demands of universal justice and benevolence which characterize modern humanism can't be explained just by the subtraction of earlier goals and allegiances.[430]

The claim that universal benevolence is just part of human nature is not especially plausible. It also cannot account for "our sense that there is something higher, nobler, more fully human about universal sympathy."[431] It is unclear how this benevolence can be sustained in the face of the manifest shortcomings of actual human beings.[432]

Secularism and religious belief are each animated, for many of their adherents, by pictures of the world in which the other position is simply unimaginable.[433] "What pushes us one way or the other is what we might describe as our over-all take on human life, and its

427. *Id.* at 388.
428. *Id.* at 312; *see also id.* at 302.
429. *Id.* at 245-59.
430. *Id.* at 572.
431. *Id.* at 694.
432. *Id.* at 697.
433. *Id.* at 549. "The spin of closure which is hegemonic in the Academy is a case in point." *Id.*

cosmic and (if any) spiritual surroundings."[434] It is possible to feel some of the force of each opposing position, to stand "in that open space where you can feel the winds pulling you, now to belief, now to unbelief," but "this feat is relatively rare."[435]

What is far more common is to occupy some specific intermediate point between the polar positions.[436] For the past few centuries, there has been a growing proliferation of views that do this, first among the elite and then later generalized to the whole society.[437] Taylor observes:

> [T]he gamut of intermediate positions greatly widens: many people drop out of active practice while still declaring themselves as belonging to some confession, or believing in God. On another dimension, the gamut of beliefs in something beyond widens, fewer declaring belief in a personal God, while more hold to something like an impersonal force; in other words a wider range of people express religious beliefs which move outside Christian orthodoxy. Following in this line is the growth of non-Christian religions, particularly those originating in the Orient, and the proliferation of New Age modes of practice, of views which bridge the humanist/spiritual boundary, of practices which link spirituality and therapy. On top of this more and more people adopt what would earlier have been seen as untenable positions, e.g., they consider themselves Catholic while not accepting many crucial dogmas, or they combine Christianity with Buddhism, or they pray while not being certain they believe.[438]

This entire historical movement "has opened a space in which people can wander between and around all these options without having to land clearly and definitively in any one."[439] This, Taylor insists, does not mean simply the decline of religion, but at the same time "a new placement of the sacred or spiritual in relation to individual and social life. This new placement is now the occasion

434. *Id.* at 550.
435. *Id.* at 549.
436. *Id.* at 512.
437. *Id.* at 423.
438. *Id.* at 513.
439. *Id.* at 351.

for recompositions of spiritual life in new forms, and for new ways of existing both in and out of relation to God."[440]

Whatever position is held depends on its resonance for the individual. The reforming emphasis on free faith inevitably decentralizes; it is contradictory to seek "a Church tightly held together by a strong hierarchical authority, which will nevertheless be filled with practitioners of heartfelt devotion."[441] What matters is personal insight, without which external formulas are useless.[442] The upshot is an ethic of authenticity, in which people are encouraged to discover their own way in the world, to "do [their] own thing."[443]

This complicates any religiously-based sense of group identity. It is particularly a problem in those regimes, of which the United States is a notable example, in which "the senses of belonging to group and confession are fused, and the moral issues of the group's history tend to be coded in religious categories."[444] It is hard to think of America as "one nation under God" when we disagree so radically about the nature of God. At the time the Constitution was framed, a society that tried to realize immanent goods was understood to be identical with a society obedient to God's will. Because these have come apart, both sides of today's culture wars can plausibly claim to be effectuating the Founders' design.[445]

It is nonetheless possible to believe that the fragmentation of religions conceals a larger unity. This belief is encapsulated, Taylor observes, in the familiar American injunction to worship in the church of your choice:

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440. *Id.* at 437.

441. *Id.* at 466.

442. *Id.* at 489.

443. *Id.* at 475. The point is elaborated in SOURCES OF THE SELF, *supra* note 419, and in CHARLES TAYLOR, THE ETHICS OF AUTHENTICITY (1991). This individualist framework does not necessarily mean that the content will be individuating; people may find themselves joining radically communitarian religions. TAYLOR, *supra* note 384, at 516. This idea is developed in CHARLES TAYLOR, VARIETIES OF RELIGION TODAY: WILLIAM JAMES REVISITED (2002).

444. TAYLOR, *supra* note 384, at 458. For recent evidence of the individualistic basis of even communitarian traditions in the contemporary United States, see ALAN WOLFE, THE TRANSFORMATION OF AMERICAN RELIGION: HOW WE ACTUALLY LIVE OUR FAITH (2003). For example, Catholics now tend to describe their worship in terms of the personal significance of their faith. Fifty years ago, Catholics placed much more emphasis on doctrinal truth or correct liturgy. *Id.* at 10-17.

445. *See* TAYLOR, *supra* note 384, at 447-48.

> This supposes that each church doesn't just operate for its own ends, in competition, even hostility to others. There will inevitably be lots of that. But the idea is that there will also be a convergence, a synergy in their ethical effect. So that together, they constitute a wider body, a "church"—or at least those of them do which fit within certain tolerable limits.[446]

Those limits have shifted over time: Catholics were originally outside; by the mid-twentieth century, Jews and Catholics were included; the circle has widened again to include Muslims.[447] Taylor observes:

> Denominationalism implies that churches are all equally options, and thrives best in a régime of separation of church and state, de facto if not de jure. But on another level, the political entity can be identified with the broader, over-arching "church," and this can be a crucial element in its patriotism.[448]

The lesson I draw from Taylor's magisterial narrative is that religious fragmentation is an irresistible and ongoing trend, and that, therefore, any attempt to define communal identity in any but the vaguest terms is a prescription for inevitable division.[449] A persistent theme in all of the classic accounts of corruption that we reviewed in Part III was the idea that religion is individual, and that state interference distorts it. Modern developments have radicalized this individualistic tendency, although, as our discussion of Milton and Roger Williams shows, it was there from the beginning.

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446. *Id.* at 453-54.

447. *Id.* at 454, 524.

448. *Id.* at 454. This, Taylor thinks, has to include overtly religious participants in public life, so that

> God or religion is not precisely absent from public space, but is central to the personal identities of individuals or groups, and hence always a possible defining constituent of political identities. The wise decision may be to distinguish our political identity from any particular confessional allegiance, but this principle of separation has constantly to be interpreted afresh in its application, wherever religion is important in the lives of substantial bodies of citizens—which means virtually everywhere.

CHARLES TAYLOR, MODERN SOCIAL IMAGINARIES 193-94 (2004).

449. I draw a few other lessons in *Naked Strong Evaluation*, 56 DISSENT 105 (Winter 2009) (book review of CHARLES TAYLOR, A SECULAR AGE (2007)).

The broadening of the American civil religion is a sensible response to this trend. There are no longer any specific theological propositions that constitute the common ground. Rather, what unites the various religious views is a more generalized commitment to the humane treatment of every human being, the promotion of a culture of nonviolence and mutual respect.[450] The state should not discriminate among the citizens who share this common ground. Taylor's account also suggests that religious evolution is a delicate process in which the state is unlikely to have much to contribute. The hamhandedness of any contemporary intervention is the modern face of corrupting establishment.

At the center of the paradigm case that the Establishment Clause forbids is the official embrace of religious propositions. Modern disestablishment, and the contemporary rules of constitutional law that grow out of it, can be understood to reflect a dialectical movement within the Reformation.

An immediate consequence of Luther's objections to Church authority was a growing, and eventually obsessive, focus on doctrinal disputes. Elaborate theological edifices such as Calvin's *Institutes of the Christian Religion* and the pronouncements of the Council of Trent brought about an understanding of religion that was based less on piety and ritual than on intellectual assent.[451]

Religious persecution during the Reformation was based centrally on the victims' refusal to accept specified philosophical claims. Thus, Diarmaid MacCulloch observes that thousands of Protestants in sixteenth-century Europe were burned at the stake for denying the essence-accident distinction posited by Aristotle, who never heard of Jesus Christ.[452] Besides the frightful carnage this produced, this persecution also insulted the ideal of authenticity whose growth Taylor traces. That insult, and the hypocrisy it invited, was felt by many at the time to constitute a corruption of religion. All of the writers whom we are examining are reacting against this. Consider, for example, Locke's claim that "true and saving Religion consists

450. *See* A GLOBAL ETHIC: THE DECLARATION OF THE PARLIAMENT OF THE WORLD'S RELIGIONS (1993).

451. JAMES TURNER, WITHOUT GOD, WITHOUT CREED: THE ORIGINS OF UNBELIEF IN AMERICA 23-25 (1985). This conception of religion is shared by modern atheists, who understand religion to consist essentially of dubious factual claims. Indeed, as Turner shows, modern atheism was made possible by this conception of religion.

452. DIARMAID MACCULLOCH, THE REFORMATION: A HISTORY 25 (2003).

in the inward perswasion of the Mind, without which nothing can be acceptable to God. And such is the nature of the Understanding, that it cannot be compell'd to the belief of any thing by outward force."[453] Locke here presumes that religion is a matter of assent to propositions, and that corruption of religion consists in the absurd attempt to force such assent.

Locke's protest resounds in contemporary law, with its injunction that the state keep its hands off religious doctrine. The corruption that the Establishment Clause is aimed at preventing consists centrally in the imposition of religious doctrine by the state. The centrality of doctrine to the clause's prohibition arises out of a very specific history. But it continues to resonate with our situation today: doctrinal disagreement is even more profound than it was then.

VI. OBJECTIONS

The corruption claim is, as we have seen, necessarily parasitic on some conception of the good that is allegedly being corrupted. So, any claim of corruption of religion must be parasitic on a claim about the good of religion—or, as we have seen, about the cluster of claims that constitute that good.

The persuasiveness of the corruption claim that I have formulated here, therefore, depends on the contingency that you, my audience, agree that there is a genuine good in what I am trying to protect. If you think that there is some deep and enduring source of value in the cluster of ends I have described, and you think that the state is likely to choose badly if it is called upon to determine the relative merits of the ends within the cluster, or of the particular avenues by which any of these ends are pursued, then you have reason to want the state to treat religion as a good in precisely the way that I have described here. And, for the reasons I have given, that will entail, among other things, a hands-off rule.

The argument I have offered gives rise to obvious objections. I will consider three. First, one might object that the conception of "religion" I have offered is not specific enough, protecting some activities that are worthless. Second, one might object that it is *too* specific, unfairly privileging some activities over other equally

453. LOCKE, *supra* note 121, at 26.

valuable ones. Finally, one could claim that the entire approach is misguided because it is not appropriate to use such a contestable conception of the good as "religion," even defined as capaciously as I have proposed, in an argument for any particular deployment of political power.

The first objection has been developed by Timothy Macklem.[454] Recall that Greenawalt and others have argued that "religion" should be given its conventional meaning, as denoting a set of activities united only by a family resemblance, with no set of necessary or sufficient conditions demarcating the boundaries of the set.[455] My proposal follows from and elaborates on Greenawalt's claim. Macklem objects that the question of what "religion" conventionally means is a semantic one, but the question of what beliefs are entitled to special treatment is a moral one, and it requires a moral rather than a semantic answer.[456]

Macklem's analytical point is sound. But there are powerful reasons for denying the state the power to judge the objective value of particular religions. Macklem himself inadvertently displays those reasons when he proposes that courts undertake "a frank examination of the contribution that any doctrine held on the basis of faith, be it traditional or non-traditional, is capable of making to well-being."[457] In a pluralistic society, there are obvious dangers in giving judges the power to assign legal consequences to different religious beliefs based on the judges' own conceptions of well-being. Macklem's own confident withholding of protection from "cults" is not reassuring.[458] The decision to define religion vaguely, relying on the fuzzy semantic meaning, itself rests on moral grounds.

David Richards has developed the second objection, attacking Greenawalt from the opposite direction by arguing that commonsense conceptions of religion "hopelessly track often unprincipled and ad hoc majoritarian intuitions of 'proper' or 'real' religion."[459] This is a version of the corruption argument: the majoritarian intuitions he describes will distort the exercise of the individual conscience, which is the truly valuable thing that the disestablish-

454. *See* TIMOTHY MACKLEM, INDEPENDENCE OF MIND (2006).
455. *See supra* notes 368-70 and accompanying text.
456. MACKLEM, *supra* note 454, at 120-26.
457. *Id.* at 142.
458. *Id.*
459. *See* RICHARDS, *supra* note 334, at 142.

ment of religion ought to protect. His objection is the same as Macklem's: the question of what to protect is a moral, not a semantic one. While Macklem would narrow protection, however, Richards would broaden it. Richards has argued that the moral basis of the Free Exercise Clause is "a negative liberty immunizing from state coercion the exercise of the conceptions of a life well and ethically lived and expressive of a mature person's rational and reasonable powers."[460] His broadly libertarian account entails that "the right to conscience protects the sphere of action when state intervention therein is not justified by the protection of all-purpose goods."[461] For Richards, conscientious objections to law need not be based on morality or religion; it is enough that they arise out of the agent's exercise of his practical reason. This, he acknowledges, entails constitutional protection for "everything and anything."[462]

The concerns that motivate Richards's philosophy are rooted in his own experience as a young gay man in the 1960s and 1970s, when he took professional risks in order to be forthright and truthful about his sexuality. He was an early and courageous defender of gay rights at a time when most gay academics were deeply closeted and terrified of writing about these issues.[463] The right to conscience, he argues, protects "our moral autonomy in acknowledging the ethical principles that both define personal integrity and give shape indissolubly to the unity of belief and action that is one's life."[464] It is hard to see whose claims would be excluded by this principle: gay men who are less earnest and serious than Richards? The unserious gay man is also exercising his rational and reasonable powers. Richards himself is driven by concerns of a moral depth that his principle fails to capture.[465]

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460. *Id.* at 140.

461. *Id.* at 144.

462. *Id.* at 141.

463. He describes his personal history in DAVID A.J. RICHARDS, THE CASE FOR GAY RIGHTS: FROM *BOWERS* TO *LAWRENCE* AND BEYOND 6-9 (2005). Richards's position on the scope of the religion clauses is followed by Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 837 (1995), who cites him with approval at 963 n.535.

464. RICHARDS, *supra* note 334, at 144.

465. Moral seriousness is more salient in Joseph Raz's otherwise similar account of the reasons to protect conscientious objection. *See* JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY (1979). Raz thinks that the case for accommodating conscientious objectors depends on self-definition: "The areas of a person's life and plans which have to be respected by others are those which are central to his own image of the kind of person he is

The problem with any claim that purports to insulate all human conduct from state interference is that a rule that nominally protects everything in fact protects nothing. There are indeed plural values of great weight. Religion does not outweigh all other human concerns. But there is no way to operationalize a rule that one must protect all deeply valuable activities. All one can do is enumerate and protect them one at a time.[466]

The deepest objection to what I have proposed is Rawlsian. "[O]ur exercise of political power is fully proper," Rawls argues, "only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason."[467] The basic idea of political liberalism is that people with different comprehensive conceptions of the good can and should reach an "overlapping consensus" on the principles of political cooperation.[468] They may disagree about the ultimate foundations of the political principles that govern them, but they agree upon the principles, those principles are moral ones, and they are affirmed on moral grounds.[469]

A common ground strategy entails endless political struggle. The common ground is contingent and subject to continuing negotiation. The upshot is a messier liberal theory than the kind attempted by, for example, Rawls. A common ground strategy is, from Rawls's point of view, costly, because it gives up on the idea of universal civic friendship. That is the deepest problem with the corruption argument: it necessarily depends on a contestable conception of the good—in my formulation, the value of religion, understood very abstractly—and so can have no persuasive power to those who do not see any value in the good that the corruption argument seeks to protect. On this basis, Samuel Freeman, one of Rawls's most prominent followers and expositors, concludes that public reason excludes all comprehensive conceptions from public and even

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and which form the foundation of his self-respect." *Id.* at 280. This understanding goes beyond religion or conscience. "A law preventing dedicated novelists from pursuing their vocation with the freedom essential to it is as bad, and bad for the same reasons, as a law conscripting pacifists to the army." *Id.* at 281.

466. *See* Koppelman, *supra* note 54.

467. JOHN RAWLS, POLITICAL LIBERALISM 137 (1996).

468. *Id.* at 134.

469. *See id.* at 144-50.

private deliberations about coercive laws.[470] This is why "[a]ppeals to Christian doctrine simply do not count as good public reasons in our political culture."[471] The same can equally be said of all appeals to the idea that religion as such is a good to be promoted.

The Rawlsian objection to the claim about the good of religion that I have formulated here is that some people reasonably reject it, and that it, therefore, is not an appropriate basis for the exercise of political power. The idea that the search for meaning in life is good, Martha Nussbaum writes,

> is just a bit too dogmatic. We live in a country in which many people are skeptics, doubting that there is such a thing as the ultimate meaning of life, and where many others have dogmatic anti-meaning views. For the government to declare what Koppelman declares goes just a bit too far for true fairness to such skeptical and/or anti-metaphysical views.[472]

A regime that treats religion as a good is illegitimate for the same reason that a regime that treats Christianity as a good is illegitimate. It is not a regime "the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason."[473]

Because the corruption argument favors religion only by keeping the state away from it, it does not bias the basic structure in the ways that concern Rawls. No one's life chances are adversely affected by their holding any particular religious views. The favoring of religion by the corruption argument is in no way inconsistent with freedom of conscience. On the contrary, it is one path to such freedom.

A Rawlsian might still object to the favoring of religion by rules that disable government from deciding religious questions, in the way that the rules described at the beginning of this Article do, because these rules make a contestable idea of the good into part of the basic structure. The objection is related to Rawls's conception of

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470. *See* SAMUEL FREEMAN, JUSTICE AND THE SOCIAL CONTRACT: ESSAYS ON RAWLSIAN POLITICAL PHILOSOPHY (2007).

471. *Id.* at 201; *see also id.* at 200, 220, 224.

472. NUSSBAUM, *supra* note 54, at 168.

473. RAWLS, *supra* note 467, at 137.

distributive justice. If government is going to be concerned with distributive justice at all, then it needs to know what it is distributing. One of the distinguishing marks of a liberal political theory is that it will decline to specify those goods too precisely: there are good reasons for keeping "salvation by Christ" off the list.

Rawls sought to base his own theory of distributive justice on a thin theory of the good because he did not want government deciding any issue of deep value. In his final formulation, the primary goods that are the objects of distributive justice are citizens' needs understood from a political point of view. According to the political conception, every person has higher-order interests in developing and exercising his moral powers to develop a sense of justice and a conception of the good. Justice requires "conditions securing for those powers their adequate development and full exercise."[474] The primary goods are "essential all-purpose means to realize the higher-order interests connected with citizens' moral powers and their determinate conceptions of the good (so far as the restrictions on information permit the parties to know this)."[475] Obviously, religion cannot be a primary good in this sense; one can exercise one's moral powers without religion. The mere fact that most people value something highly does not make it a primary good.[476]

But the thin theory of the good that Rawls lays out is too parsimonious a basis for human rights. Aspects of the person that are not involved in the exercise of the moral powers may nonetheless be very important. For example, Rawls lacks the resources to condemn female genital mutilation, which does not deprive its victims of their moral powers or their normal capacities for cooperation. Female genital mutilation hurts its victims in other ways.[477] If a fuller conception of the person and the person's needs than Rawls offers are needed, then Rawls is poorly positioned to object to the inclusion of religious concerns in that catalog of needs.[478]

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474. *Id.* at 74.

475. *Id.* at 76.

476. *Id.* at 308.

477. The argument of the previous two paragraphs is developed in detail in Andrew Koppelman, *The Limits of Constructivism: Can Rawls Condemn Female Genital Mutilation?*, REV. POL. (forthcoming 2009).

478. So is Nussbaum. She argues that political respect should be given to "the faculty with which each person searches for the ultimate meaning of life," not its goal, and that we should

Rawls evidently thinks that pure constructivism is the only reliable path to social unity. In modern societies, there is so much normative pluralism that the only overlapping consensus that is consistent with respectful relations is that constructed without any reference to the actual normative views of members of society. That is why "partially comprehensive" views must be excluded. Political liberalism, he argues, should be freestanding, so that it "can be presented without saying, or knowing, or hazarding a conjecture about, what [comprehensive] doctrines it may belong to, or be supported by."[479] "[T]he political conception of justice is worked out first as a freestanding view that can be justified *pro tanto* without looking to, or trying to fit, or even knowing what are, the existing comprehensive doctrines."[480] This approach may possibly work under certain circumstances, but they are likely to be as unusual as the circumstances in which it is safe to drive a car while blindfolded.

T.M. Scanlon explains why the strategy of surveying and finding common ground among actual comprehensive views would not be satisfactory to Rawls.[481] "It would be impossible to survey all possible comprehensive views and inadequate, in an argument for stability, to consider just those that are represented in a given society at a given time since others may emerge at any time and gain adherents."[482] On the other hand, as the persistence of the corruption argument over the past 350 years shows, a consensus built around the convergence of a contingent set of actual views may last for quite some time.

"agree to respect the faculty without prejudging the question whether there is a meaning to be found, or what it might be like." NUSSBAUM, *supra* note 54, at 168-69. This effort to be just barely specific enough is a delicate one. As other critics of Nussbaum have observed, it is not clear how one can valorize a capability without valorizing what the capability is for. *See, e.g.*, KIMBERLY A. YURACKO, PERFECTIONISM AND CONTEMPORARY FEMINIST VALUES 41-46 (2003); Linda Barclay, *What Kind of Liberal is Martha Nussbaum?*, 4 SATS - NORDIC J. PHILOSOPHY 2, 15-16 (2003), *available at* http://www.sats.eu.com/issues42.htm.

479. RAWLS, *supra* note 467, at 12-13.

480. John Rawls, *Reply to Habermas*, 42 J. PHILOSOPHY 132, 145 (1995).

481. T.M. Scanlon, *Rawls on Justification*, *in* THE CAMBRIDGE COMPANION TO RAWLS 139 (Samuel Freeman ed., 2003).

482. *Id.* at 164.

VII. UNDERSTANDING THE RULES

Return to the Establishment Clause rules that we had trouble explaining at the outset: no endorsement of religion; no discrimination against particular religious practices; laws must have secular purposes; courts will not resolve controversies over religious doctrine. They are not well tailored to prevent division or alienation. How will these problems be appreciably worsened if, say, a court awards property to a claimant after a showing that the opposing party has departed from church doctrine?[483] If the purpose of the Establishment Clause is to prevent corruption of religion, on the other hand, all of these rules make sense. The central evil is actions of the government that are intended to manipulate the religious beliefs of the citizens. That is why the state cannot engage in speech endorsing religious propositions, employ religious tests, or enact laws that are tantamount to endorsement of religious propositions because they have no secular purpose. Discrimination among religions is likewise an effort to interfere in the development of religious doctrine. An obvious corollary is the state's incompetence to resolve controversies over religious doctrine. "[T]he government may not displace the free religious choices of its citizens by placing its weight behind a particular religious belief, tenet, or sect."[484]

An obvious implication of the corruption argument is that the state may not declare religious truth.[485] All of the religious practices that the authors considered here objected to had this as a common element. To review: Milton opposed the censorship of heresy and the payment of clergy by the Crown.[486] Roger Williams objected to

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483. *See* Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440 (1969).

484. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 733 (1976) (Rehnquist, J., dissenting). Laurence Tribe observes that all nine of the justices in this case agreed with this proposition. TRIBE, *supra* note 28, at 1240.

485. I set forth this premise as axiomatic in Koppelman, *supra* note 7. Some writers have observed that this premise was inadequately defended in that article. *See, e.g.*, Michael J. Perry, *What Do the Free Exercise and Nonestablishment Norms Forbid? Reflections on the Constitutional Law of Religious Freedom*, 1 U. ST. THOMAS L.J. 549, 570-72 (2003); Steven D. Smith, *Barnette's Big Blunder*, 78 CHI.-KENT L. REV. 625, 634-36 (2003). The present Article is, in part, a response.

486. *See supra* Part III.A.1.

similar practices in colonial Massachusetts.[487] Locke opposed the repression of religious dissenters.[488] Pufendorf wrote against Louis XIV's repression of Protestantism.[489] Elisha Williams opposed a law banning ministers from preaching outside their parishes.[490] Backus and Leland fought religious taxes and the jailing of unlicensed preachers.[491] Jefferson opposed religious coercion and taxation.[492] Madison opposed nonpreferential support for churches.[493]

Official declarations of religious truth raise recurring, core concerns of the corruption argument: that the state will manipulate religion to serve its own, decidedly nonreligious ends; that citizens will be induced to profess the state's religious line in order to curry official favor; and that the state will meddle in matters of great importance, with respect to which it is incompetent and untrustworthy.

The core Establishment Clause violation, from the perspective of the corruption argument, is action by the state that intentionally manipulates religion to serve official ends. Actions that have the incidental and unintended effect of advancing or inhibiting particular religious ideas present more ambiguous cases, and so it is harder to say what the corruption argument implies about them. It happens that the boundary that separates clear from contested issues in Establishment Clause doctrine runs along precisely these lines. We have already reviewed the areas of clarity. Now, consider the field of uncertainty.

Three questions dominate contemporary religion clause scholarship. First, should religiously based exemptions from generally applicable laws be determined by the courts or the legislatures?[494]

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487. *See supra* Part III.A.2.

488. *See supra* Part III.A.3.

489. *See supra* Part III.A.4.

490. *See supra* Part III.A.5.

491. *See supra* Parts III.B.1, III.B.4.

492. *See supra* Part III.B.2.

493. *See supra* Part III.B.5.

494. *See, e.g.*, GREENAWALT, *supra* note 55; MARCI HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW (2005); NUSSBAUM, *supra* note 54; Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1304-06 (1994); Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L.J. 555 (1998); Steven G. Gey, *Why Is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT.

Second, is it appropriate for citizens to seek to enact laws based on their religious beliefs?[495] And third, may government directly fund religious activity, so long as the principle that determines who gets the funding is not itself religious?[496]

L. REV. 75 (1990); Laycock, *supra* note 4, at 347-48; Ira C. Lupu, *The Case Against Legislative Codification of Religious Liberty*, 21 CARDOZO L. REV. 565 (1999); Ira C. Lupu, *Uncovering the Village of Kiryas Joel*, 96 COLUM. L. REV. 104 (1996); William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991); William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357 (1989-90); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992); Suzanna Sherry, *Enlightening the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 473 (1996); Suzanna Sherry, Lee v. Weisman: *Paradox Redux*, 1992 SUP. CT. REV. 123; Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195 (1992); Symposium, *Reflections on* City of Boerne v. Flores, 39 WM. & MARY L. REV. 597 (1998); Symposium, *Religion in Public Life: Access, Accommodation, and Accountability*, 60 GEO. WASH. L. REV. 599 (1992); Symposium, *State and Federal Religious Liberty Legislation: Is It Necessary? Is It Constitutional? Is It Good Policy?*, 21 CARDOZO L. REV. 415 (1999); Symposium, *The James R. Browning Symposium for 1994: The Religious Freedom Restoration Act*, 56 MONT. L. REV. 1 (1995); Mark Tushnet, *"Of Church and State and the Supreme Court": Kurland Revisited*, 1989 SUP. CT. REV. 373; Mark Tushnet, *The Rhetoric of Free Exercise Discourse,* 1993 BYU L. REV. 117.

495. *See, e.g.*, ROBERT AUDI AND NICHOLAS WOLTERSDORFF, RELIGION IN THE PUBLIC SQUARE: THE PLACE OF RELIGIOUS CONVICTIONS IN POLITICAL DEBATE (1996); ROBERT AUDI, RELIGIOUS COMMITMENT AND SECULAR REASON (2000); STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION (1993); CHRISTOPHER J. EBERLE, RELIGIOUS CONVICTION IN LIBERAL POLITICS (2002); KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS (1995); KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988); MICHAEL J. PERRY, UNDER GOD? RELIGIOUS FAITH AND LIBERAL DEMOCRACY (2003); MICHAEL J. PERRY, RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES (1997); MICHAEL J. PERRY, LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS (1991); RAWLS, *supra* note 467; RELIGION AND CONTEMPORARY LIBERALISM (Paul J. Weithman ed., 1997); PAUL J. WEITHMAN, RELIGION AND THE OBLIGATIONS OF CITIZENSHIP (2002); David M. Smolin, *Regulating Religious and Cultural Conflict in Postmodern America: A Response to Professor Perry*, 76 IOWA L. REV. 1067 (1991); Symposium, *Religiously Based Morality: Its Proper Place in American Law and Public Policy?*, 36 WAKE FOREST L. REV. 217 (2001); Symposium, *The Role of Religion in Public Debate in a Liberal Society*, 30 SAN DIEGO L. REV. 643 (1993); Sanford Levinson, *Religious Language and the Public Square*, 105 HARV. L. REV. 2061 (1992) (reviewing MICHAEL J. PERRY, LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS (1991)).

496. *See, e.g.*, Commentary, *On School Vouchers and the Establishment Clause*, 31 CONN. L. REV. 803 (1999); Steven K. Green, *Private School Vouchers and the Confusion Over "Direct" Aid*, 10 GEO. MASON U. CIV. RTS. L.J. 47 (1999/2000); Steffen N. Johnson, *A Civil Libertarian Case for the Constitutionality of School Choice*, 10 GEO. MASON U. CIV. RTS. L.J. 1 (1999/2000); Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989 (1991); Allan E. Parker, Jr. & R. Clayton Trotter, *Hostility or Neutrality? Faith-Based Schools and Tax-Funded Tuition: A GI Bill for Kids*, 10 GEO. MASON U. CIV. RTS. L.J. 83 (1999/2000); Kathleen M. Sullivan, *Parades, Public Squares and Voucher Payments:*

With respect to the first question, almost everyone agrees that some exemptions, such as excusing Quakers from military service, are permissible. The hard and hotly disputed question is whether those exemptions should be made by the legislature or the judiciary. That is a question of comparative institutional competence, and the corruption argument says nothing about it. The corruption argument, as we have noted, presupposes that religion is in some way a good thing. That presupposition offers the way out of the free exercise/establishment dilemma. The corruption argument is thus not inconsistent with religious accommodation, which rests on the same premise.

The concern about religious accommodation that the corruption argument highlights is that accommodation can sometimes be an occasion of hypocrisy. From its earliest formulations, the corruption argument has rested on the premise that only genuinely felt religious activity has value; a persistent objection to establishment has been that it produces feigned and therefore worthless religion. Exemptions can produce such hypocrisy. But this is a reason for being selective in making accommodations available, so that they are given more stingily when they involve some substantial secular benefit.[497] It is not a reason to reject exemptions as such.

As for the second question, the corruption argument is not, in any way, an argument that it is inappropriate for citizens to vote based on their religious beliefs. Its concern is that the coercive power of the state will be deployed to manipulate the religious beliefs of the citizens, not that the citizens' political behavior will be influenced by their own beliefs. It comes into play only when the state enacts a law that lacks a secular purpose and so is tantamount to an official declaration of religious truth.[498]

Finally, there is the question of funding for religious activity. Here, it matters crucially whether the state is making a religious determination when it provides the support. If it is making such a determination, then it is violating the core prohibition against the

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Problems of Government Neutrality, 28 CONN. L. REV. 243 (1996); Symposium, *Education Reform at the Crossroads*, 10 GEO. MASON U. CIV. RTS. L.J. 107 (1999/2000); Symposium, *Symposium on Law and Religion*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 239 (1999).

497. *See* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1016-18 (1990).

498. *See generally* Koppelman, *supra* note 7.

declaration of religious truth, and concerns about corruption come to the fore. If it is not, then the issue is, as with the exemption question, whether incentives for hypocrisy and pressure on religious minorities are being created.[499] That is a question of fact, and so the corruption argument has no clear implications about the question.

What about ceremonial Deism? Questions of religious doctrine are in fact directly addressed by the placement of "In God We Trust" on currency, or "under God" in the Pledge of Allegiance. The Supreme Court has sometimes claimed that these practices are not really religious, but that is a silly argument, as they are overtly and conspicuously religious.[500]

The general rule now seems to be that old forms of Deism are grandfathered, but newer ones are unconstitutional. As noted earlier, Justice Breyer, in the recent Ten Commandments cases, invalidated a recent display while upholding an older one.[501] Justice O'Connor, in her concurrence in the Pledge of Allegiance case,[502] explicitly made the age of a ceremonial acknowledgement relevant to its constitutionality. She thought that constitutionality was supported by the absence of worship or prayer, the absence of reference to a particular religion, and minimal religious content.[503] But the first of her factors was "history and ubiquity."[504] "The constitutional value of ceremonial Deism turns on a shared understanding of its legitimate nonreligious purposes," O'Connor wrote.[505] "That sort of understanding can exist only when a given practice has been in place for a significant portion of the Nation's history, and when it is observed by enough persons that it can fairly be called ubiquitous."[506] The consequence is to make old and familiar forms of ceremonial Deism constitutional, but to discourage innovation.

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499. Here, I am basically in agreement with the analysis offered in EISGRUBER & SAGER, *supra* note 33, at 198-239. The gap in their analysis, one on which they do not dwell, is that no constitutional issue is raised if pressure is placed on other ideological minorities, such as racists. Their argument implicitly singles out religion for special treatment without admitting that that is what it is doing. *See* Koppelman, *supra* note 61.

500. This is elegantly argued by GEDICKS, *supra* note 17, at 62-80.

501. *See supra* note 16.

502. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 33-45 (2004) (O'Connor, J., concurring).

503. *Id.*

504. *Id.* at 37.

505. *Id.*

506. *Id.*

There are two aspects of this area of the law that distinguish it.

The first is that it represented a common ground strategy—an effort, in its own time, to understand "religion" in an ecumenical and nonsectarian way. At the time that these elements of civil religion were put in place, the existence of God appeared to be the one aspect of religion that was common to the various religious factions then dominant in American life. This was true of the vague Deism embraced in the Declaration of Independence and the speeches of the Presidents, beginning with Washington; it was also true of the idea of a "Judeo-Christian" ethic that was invented in the 1950s.[507] This old settlement is part of the background in which contemporary American religion has developed. Its continuation is not an effort by an incumbent administration to manipulate religion. It simply recognizes that people are invested, in some cases very deeply, in the status quo.[508]

Of course, ceremonial Deism has an effect on religion. It produces a culture in which many people feel that their religious beliefs are somehow associated with patriotism. This has the salutary effect of fostering civic unity and common moral ideals and tempering religious fanaticism. It also has the less attractive effect of encouraging self-righteous nationalism and the idea that whatever the United States does, however repugnant, is somehow divinely sanctioned.[509] What matters for present purposes is that neither of these effects is specifically aimed at by government when it perpetuates these rituals. Political manipulation, in that sense, is not occurring. Some writers have argued that government should aim to minimize its effect on religion, but that goal is not a coherent one: any government actions at all will cause religion to be different from what it otherwise would have been.[510]

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507. *See* FELDMAN, *supra* note 17, at 164-70; SILK, *supra* note 280, at 40-53. Nonsectarian Bible reading was a less attractive and less successful variant, as it quickly became inflected with anti-Catholicism. *See* FELDMAN, *supra* note 17, at 61-92, 108-10.

508. *See* Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227 (2003).

509. *See* Jeffrey James Poelvoorde, *The American Civil Religion and the American Constitution*, *in* HOW DOES THE CONSTITUTION PROTECT RELIGIOUS FREEDOM? 141 (Robert A. Goldwin & Art Kaufman eds., 1987). For recent examples of the latter unattractive effect, see Andrew Koppelman, *Reading Lolita at Guantanamo*, 53 DISSENT 64 (2006).

510. *See* EISGRUBER & SAGER, *supra* note 33, at 27-28; GREENAWALT, *supra* note 4, at 451-56. This is why the corruption argument has so much more bite when government tries to affect religion as such than when it engages in facially neutral action that has a religious

Today, on the other hand, the invocation of theism, and specifically the erection of a Ten Commandments display, is an intervention in the bitterest religious controversies that now divide us.[511] Douglas Laycock thinks that a lesson of O'Connor's opinion is that "separationist groups should sue immediately when they encounter any religious practice newly sponsored by the government."[512] That is precisely the right lesson for them to take. New sponsorship of religious practices is far more likely to represent a contemporaneous effort to intervene in a live religious controversy than the perpetuation of old forms.[513]

There is one more aspect of the corruption argument that needs to be considered. This may be the most paradoxical aspect of all: the argument, even if it plays a powerful role in Establishment Clause theory, cannot be directly relied upon to decide cases. If a court tries to decide whether corruption has occurred in any particular case, it must first decide what a noncorrupted religion looks like. And that would itself violate the Establishment Clause.

Justice Souter, the principal modern proponent of the corruption rationale, has fallen squarely into this trap.[514] Dissenting in *Zelman v. Simmons-Harris*,[515] 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. Then he declared: "The risk is already being realized."[516] 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."[517]

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impact, such as providing education vouchers that can be used at religious schools.

511. *See* Gedicks & Hendrix, *supra* note 353, at 275.

512. Laycock, *supra* note 17, at 232.

513. For a similar conclusion, see EISGRUBER & SAGER, *supra* note 33, at 147.

514. Hugo Black, who made even more frequent use of the corruption argument, never did. *See supra* notes 287-308 and accompanying text. Black's influence on Souter is sometimes direct, as when Souter quoted with approval Black's declaration that the Framers thought "that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions." Hein v. Freedom From Religion Found., 127 S. Ct. 2553, 2588 (2007) (Souter, J., dissenting) (quoting Everson v. Bd. of Educ., 330 U.S. 1, 11 (1947)).

515. 536 U.S. 639, 711-12 (2002) (Souter, J., dissenting).

516. *Id.* at 712.

517. *Id.* at 713.

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."[518] Pybas is entirely correct to belabor Souter with the familiar concern about the limits of state competence:

> [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?[519]

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.[520] The corruption concern cannot support a rule that bans state action that corrupts religion. It should rather be understood as a rule-generating device, "a set of factors that courts [or other rulemakers] should consider in defining the more precise rules."[521]

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 ...."[522] Any such understanding would 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

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

519. *Id.* at 101-02.

520. 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. *See* Garnett, *supra* note 25. Garnett shows that divisiveness cannot provide a workable criterion for constitutionality. He does not, however, deny that religious division is one of the underlying concerns of the Establishment Clause. *See id.* at 1667.

521. I borrow this distinction from EUGENE VOLOKH, THE FIRST AMENDMENT AND RELATED STATUTES: PROBLEMS, CASES AND POLICY ARGUMENTS 698 (3d ed. 2008).

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

powers.[523] Claiming that the Christian religion is the only path to salvation and that all nonchristians 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 reflects loving concern rather than hatred. How could a state respond to that?

This objection is not fatal to the program, however, because 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.[524] Federal courts are also not to adjudicate the constitutionality of ambiguous state laws before the state courts have the opportunity to interpret them.[525] For the same reason that a court cannot decide whether the Ballards's religious claim is fraudulent, it cannot decide whether such a claim is hateful. If Ohio were to read its hatred proviso in the way Souter suggests, then that would raise constitutional difficulties. It has not happened yet, however, so it cannot be an argument against the law's constitutionality.

CONCLUSION

The corruption argument was once the basis for a political consensus among people with radically differing religious views. They agreed that religion was valuable, and that it was likely to be damaged by state efforts to manipulate it. The same understanding underlies much of modern Establishment Clause doctrine. When the Court invalidated a prayer that New York State had composed for public school classrooms, it declared that "[i]t is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance."[526] This vision of the Establishment Clause is worth reviving.

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523. *See* United States v. Ballard, 322 U.S. 78 (1944).
524. *See* SINGER & SINGER, *supra* note 1, § 45:11.
525. *See* R.R. Comm'n v. Pullman Co., 312 U.S. 496 (1941).
526. Engel v. Vitale, 370 U.S. 421, 435 (1962).

Citizens do need to share an understanding of what is valuable. But when the details of this particular Valuable Something are so hotly disputed, the most effective way for the government to pay it reverence is just to shut up about it.