Washington Law Review

Volume 92 | Number 3

10-1-2017

Adjudicating Religious Sincerity

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ADJUDICATING RELIGIOUS SINCERITY

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Abstract: Recent disputes about the "contraception mandate" under the Affordable Care Act and about the provision of goods and services for same-sex weddings have drawn attention to the law of religious accommodations. So far, however, one of the requirements of a religious accommodation claim has escaped sustained scholarly attention: a claimant must be sincere. Historically, scholars have contested this requirement on the ground that adjudicating religious sincerity requires government officials to delve too deeply into religious questions, something the Establishment Clause forbids. Until recently, however, the doctrine was fairly clear: though the government may not evaluate the objective accuracy or plausibility of a claimant's religious beliefs, it may adjudicate whether the claimant holds those beliefs sincerely.

Unfortunately, *Burwell v. Hobby Lobby* introduced confusion. The majority opinion appears to conflate the requirement that a claimant be sincere with the requirement that the claimant show that the government has "substantially burdened" the claimant's religious exercise. The dissenting opinion, by contrast, suggests that courts simply may not adjudicate religious sincerity. The first of these mistakes muddies the water about the relationship between sincerity and the other elements of a religious accommodation claim; the second illustrates the ongoing confusion for many jurists and scholars about the constitutional concerns surrounding an inquiry into a claimant's religious sincerity.

This Article attempts to defend and clarify the sincerity requirement. Against the scholarly consensus, it argues that courts can and should adjudicate an accommodation claimant's religious sincerity. Insincere claims impose costs on the government, third parties, and religious liberty itself. Courts can adjudicate sincerity, and reduce these costs, without violating the Establishment Clause. The Constitution's "no-orthodoxy principle" should be understood to prohibit a court from inferring that a claimant is insincere merely because the claimant's religious belief is implausible. Otherwise, a court should evaluate a claimant's sincerity by applying the ordinary rules of evidence. Moreover, when the claimant's sincerity is not in issue, a court should resist allowing its suspicion to affect the rest of its legal analysis. Finally, the Article clarifies the distinctions between whether a claimant is sincere, whether the claim is based on religious exercise, and whether the government has imposed a substantial burden on that exercise.

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INTRODUCTION

Comedian John Oliver recently started a church, "Our Lady of Perpetual Exemption."[1] He wanted to expose the tax exemptions available to televangelists who exchange promises of prosperity for donations.[2] Within weeks, Oliver had received tens of thousands of dollars.[3] Oliver claimed the stunt was entirely legal—the church had been incorporated in Texas, had complied with IRS registration requirements, and was therefore entitled to receive unlimited donations tax-free.[4] It wasn't. Even considering the IRS's fuzzy conception of "church,"[5] "Our Lady" was missing a crucial component of a religious accommodation claim: sincerity.[6] The scheme was, of course, a parody. By attempting to expose fraud, Oliver may have committed it.

Oliver is not alone in his confusion about the legal relevance of a religious accommodation claimant's sincerity. The black-letter law is pretty clear, but scholars question it and judges—including Supreme Court justices—misunderstand it. The rule is simple: to qualify for a religious accommodation, a claimant must demonstrate sincerity.[7]

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1. *Last Week Tonight with John Oliver: Televangelists* (HBO broadcast Aug. 16, 2015), http://www.hbo.com/last-week-tonight-with-john-oliver/episodes/02/49-august-16-2105/video/ep-49-clip-televangelists.html?autoplay=true [https://perma.cc/J3FX-LS8K] [hereinafter *Last Week*].

2. *See* Abby Ohlheiser, *Comedian John Oliver Takes On the Prosperity Gospel By Becoming a Televangelist*, WASH. POST (Aug. 17, 2015), https://www.washingtonpost.com/news/acts-of-faith/wp/2015/08/17/comedian-john-oliver-takes-on-the-prosperity-gospel-by-becoming-a-televangelist [http://perma.cc/Z4QP-JNAN].

3. Daniel Kreps, *John Oliver Shuts Down Fake Church Over Unsolicited Semen*, ROLLING STONE (Sept. 14, 2015), http://www.rollingstone.com/tv/news/john-oliver-shuts-down-fake-church-over-unsolicited-semen-20150914 [http://perma.cc/53DZ-JD77].

4. *See Last Week*, *supra* note 1.

5. *See* 26 U.S.C. § 170 (2012) (lacking any definition of "church"); *"Churches" Defined*, IRS, https://www.irs.gov/charities-non-profits/churches-religious-organizations/churches-defined [https://perma.cc/Q7Z8-4W5A] (explaining "[t]he term *church* is found, but not specifically defined, in the Internal Revenue Code").

6. Interestingly, Oliver noted the sincerity requirement. *See Last Week*, *supra* note 1. The fact that he (and perhaps his lawyer) ignored it shows how unimportant they thought it was. Sometimes, though, courts do adjudicate a church's sincerity. *See* Ideal Life Church of Lake Elmo v. Washington County, 304 N.W.2d 308, 318 (Minn. 1981) (Wahl, J., concurring specially) (finding that the Tax Court's sincerity analysis "is not clearly erroneous and should not be overturned here"); Ecclesiastical Order of the ISM of AM, Inc., v. Comm'r, 80 T.C. 833, 842 n.14 (1983) (deciding the case on another ground though the government suspected the claimant was insincere).

7. *See, e.g.*, Holt v. Hobbs, 574 U.S. __, 135 S. Ct. 853, 863 (2015) (discussing the requirements under the Religious Land Use and Institutionalized Persons Act); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. __, 134 S. Ct. 2751, 2774 n.28 (2014) (discussing the Religious Freedom Restoration Act); Witmer v. United States, 348 U.S. 375, 381–82 (1955) (conscientious objection provision of selective service statute); Ben Adams & Cynthia Barmore, *Questioning Sincerity: The Role of the Courts after* Hobby Lobby, 67 STAN. L. REV. ONLINE 59, 59–60 (2014) ("There is a long tradition

Courts and government officials adjudicate religious sincerity in a wide variety of contexts: fraud;[8] immigration;[9] employment discrimination;[10] prisoner religious accommodations;[11] conscientious objection from service in the armed forces;[12] and statutory accommodations from general laws.[13] The requirement makes sense. The point of a religious accommodation is to reduce the burden that a law may impose on someone's religious exercise. When a claimant is insincere, the law imposes no burden on religious exercise at all.[14]

Yet scholars have long questioned the wisdom and constitutionality of adjudicating religious sincerity. Most of them have endorsed Justice Jackson's dissenting opinion in the 1944 case *United States v. Ballard*.[15] The Supreme Court concluded that the First Amendment forbids the government from prosecuting persons on the ground that their religious beliefs are empirically inaccurate. Doing so requires the government to evaluate theological claims, something the Establishment Clause forbids. Justice Jackson would have gone further. He argued that courts should read the First Amendment to also prohibit the government from

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of courts competently scrutinizing asserted religious beliefs for sincerity without delving into their validity or verity.").

8. United States v. Ballard, 322 U.S. 78 (1944). *See generally* Stephen Senn, *The Prosecution of Religious Fraud*, 17 FLA. ST. L. REV. 325 (1990).

9. Jiang v. Holder, 341 F. App'x 126 (6th Cir. 2009) (holding that substantial evidence supported conclusion of the immigration judge that Jiang submitted insufficient evidence to support her claim that she was a practitioner of Falun Gong); *see* Kazemzadeh v. U.S. Att'y Gen., 577 F.3d 1341, 1361 (11th Cir. 2009) (Marcus, J., concurring) ("[W]hile the sovereign has a powerful interest in preventing aliens from filing fraudulent petitions for [religious] asylum, malingering is not at issue in this case.").

10. Davis v. Fort Bend County, 765 F.3d 480, 485–87 (5th Cir. 2014); Adeyeye v. Heartland Sweeteners, LLC, 721 F.3d 444, 448 (7th Cir. 2013).

11. *See* Andreola v. Doyle, 260 F. App'x 935, 935 (7th Cir. 2008) (affirming jury verdict that prisoner's beliefs were not sincere); Ford v. McGinnis, 352 F.3d 582, 591 (2d Cir. 2003) (Sotomayor, J.) (distinguishing between the truth of a religious belief and whether it is sincerely held). *See generally* Kevin L. Brady, Note, *Religious Sincerity and Imperfection: Can Lapsing Prisoners Recover Under RFRA and RLUIPA?*, 78 U. CHI. L. REV. 1431 (2011).

12. *Witmer*, 348 U.S. at 381; Hager v. Sec'y of Air Force, 938 F.2d 1449 (1st Cir. 1991); Conscientious Objection, Army Reg. 600-43 (Aug. 21, 2006).

13. *See, e.g.*, United States v. Quaintance, 608 F.3d 717, 723 (10th Cir. 2010) (denying accommodation from marijuana laws); Friedman v. Clarkstown Cent. Sch. Dist., 75 F. App'x 815, 819 n.1 (2d Cir. 2003) (denying accommodation from immunization requirement).

14. *See, e.g.*, Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 52–53; Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development*, 80 HARV. L. REV. 1381, 1417 (1967) ("[W]here the individual's conduct is repeatedly at variance with his avowed religious duties, restriction on his religious liberty is entirely academic—no serious injury is done to his conscience.").

15. 322 U.S. 78 (1944).

evaluating whether persons actually hold the religious beliefs they profess. His nuanced reasoning boiled down to the conviction that it is impossible to adjudicate religious sincerity without also passing judgment on whether the claimant's beliefs are plausible.[16]

Based largely on this argument, Professor Kent Greenawalt's assessment probably reflects the mainstream view among legal scholars. "[S]ome inquiry into sincerity is often essential," but "for just the reasons that Justice Jackson offered," "alternative approaches [to adjudicating religious sincerity] are preferable if they are feasible."[17] Some go further. Judge John Noonan argues that "Jackson seems to me right"[18]—"the first amendment requires" the government to abstain from inquiring into one's religious sincerity.[19] Even those scholars who accept that adjudicating religious sincerity may be a necessary evil suggest changing the ordinary rules of pleading and evidence to provide as much protection for claimants as possible.[20] No one has offered a sustained defense of the adjudication of religious sincerity under the ordinary pleading and evidentiary standards.[21]

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16. *See id.* at 92–93.

17. 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 122–23 (2006); *see also* Giannella, *supra* note 14, at 1418 (concluding that while "Mr. Justice Jackson's arguments are especially persuasive in cases where government would otherwise act to protect gullible citizens from spurious religious movements," "precluding inquiry into sincerity seems inappropriate when individuals make claim for special treatment vis-à-vis the state" to protect from "dilution of government programs"); Ronald J. Krotoszynski, Jr., The Apostle, *Mr. Justice Jackson, and the "Pathological Perspective" of the Free Exercise Clause*, 65 WASH. & LEE L. REV. 1071, 1984 (2008); Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 957 (1989) ("Because sincerity is tantamount to 'honesty' or 'good faith,' it may be necessary to, but it will rarely be sufficient as a screen for, free exercise claims."); Anna Su, *Judging Religious Sincerity*, 51 OXFORD J.L. & RELIGION 28 (2016) [hereinafter Su, *Judging Religious Sincerity*]; Mark Tushnet, Accommodation of Religion *30 Years On*, 38 HARV. J.L. & GENDER 1, 10 (2015) [hereinafter Tushnet, *Accommodation of Religion*] ("[O]ne can fairly wonder about the capacity of institutional decision makers, such as arbitrators or administrators of public benefits programs, to determine sincerity.").

18. John T. Noonan, Jr., *How Sincere Do You Have to Be to Be Religious?*, 1988 U. ILL. L. REV. 713, 720.

19. *Id.* at 724.

20. *See* KATHLEEN A. BRADY, THE DISTINCTIVENESS OF RELIGION IN AMERICAN LAW: RETHINKING RELIGION CLAUSE JURISPRUDENCE 280–83 (John Witte, Jr. ed., 2015); AVIGAIL EISENBERG, REASONS OF IDENTITY: A NORMATIVE GUIDE TO THE POLITICAL AND LEGAL ASSESSMENT OF IDENTITY CLAIMS 103–11 (2009) (critically analyzing the way the Canadian Supreme Court relies on a sincerity analysis to determine eligibility for an accommodation under the Canadian Constitution).

21. The most thorough defense of the practice to date appeared in a law review article thirty years ago. Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 BYU L. REV. 299, 325–31; *see also* Adams & Barmore, *supra* note 7; Peter J. Riga, *Religion, Sincerity, and Free Exercise*, 25 CATH. LAW. 246 (1980). As this paper goes to press, I have become aware of a

Uneasiness about adjudicating religious sincerity was limited to law reviews until the recent contraceptive mandate cases. During the oral argument in *Burwell v. Hobby Lobby*,[22] Justice Kagan suggested that it would be unconstitutional to "test the sincerity of religion."[23] Perhaps channeling the prevailing scholarly view, Justice Sotomayor called it "the most dangerous piece" of a religious accommodation analysis.[24] And Justice Ginsburg's dissenting opinion, joined by three other justices, asserted that "a court must accept as true" a plaintiff's "factual allegations that a plaintiff's beliefs are sincere and of a religious nature."[25]

Yet it is unclear whether these justices believe that the First Amendment really precludes adjudication of religious sincerity. The term after *Hobby Lobby* was decided, the Court stated in a unanimous opinion that a religious accommodation claimant "bore the burden" of "showing that the relevant exercise of religion is grounded in a sincerely held religious belief."[26]

Worse, none of the justices in *Hobby Lobby*, majority or dissenting, articulated a coherent distinction between adjudicating a claimant's religious *sincerity* and determining whether the government has placed a "substantial burden" on the claimant's religious exercise. Although Justice Alito, writing for the majority, emphasized that the penalties for failing to comply with the contraceptive mandate were a "substantial burden,"[27] the opinion failed to persuasively respond to Justice Ginsburg's charge that the Court's analysis collapsed the sincerity and substantial burden requirements, effectively allowing the claimants to

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forthcoming chapter that may complement this Article's argument. *See* Karen Lowentheil & Elizabeth Reiner Platt, *In Defense of the Sincerity Test*, *in* RELIGIOUS EXEMPTIONS (Kevin Vallier and Michael Weber eds., forthcoming 2018) (manuscript at 247) (on file with the author).

22. 573 U.S.__, 134 S. Ct. 2751 (2014).

23. Transcript of Oral Argument at 16, *Hobby Lobby*, 134 S. Ct. 2751 (No. 13-354, 356) (comments of Kagan, J.) [hereinafter Hobby Lobby Oral Argument].

24. *Id.* at 19–20 (Paul Clement: "I would think that the government in those kind of cases is really going to resist the sincerity piece of the analysis." Sotomayor, J.: "That's the most dangerous piece. That's the one we've resisted in all our exercise jurisprudence, to measure the depth of someone's religious beliefs"). *But see* Ford v. McGinnis, 352 F.3d 582, 591 (2d Cir. 2003) (Sotomayor, J.) ("The opinions of the DOCS religious authorities cannot trump the plaintiff's sincere and religious belief.").

25. *Hobby Lobby*, 134 S. Ct. at 2798 (Ginsburg, J., dissenting) (quoting Kaemmerling v. Lappin, 553 F.3d 669, 679 (D.C. Cir. 2008)).

26. Holt v. Hobbs, 574 U.S. __, 135 S. Ct. 853, 863 (2015); *see also* Cutter v. Wilkinson, 544 U.S. 709, 725 n.13 (2005) (Ginsburg, J., writing for a unanimous court).

27. *Hobby Lobby*, 134 S. Ct. at 2778.

decide the issue for themselves.[28] In the end, *Hobby Lobby* only exacerbated the confusion about whether and how to adjudicate religious sincerity.[29]

This Article argues that courts can, and should, adjudicate religious sincerity. The analysis should proceed as any other factual determination of a party's mental state, with one caveat: the Constitution prohibits courts from inferring *insincerity* from a religious belief's *inaccuracy* or *implausibility*. Furthermore, when the claimant's sincerity is not in issue—because the opponent has conceded the claimant's sincerity or because the issue is not relevant given the case's procedural posture—the court should not allow its suspicion about the claimant's insincerity to affect its analysis of the other elements of an accommodation claim. Courts can, and should, carefully distinguish between three concepts: whether a claimant is *sincere*, whether the claimant's acts or omissions are *religious*, and whether the government's regulation imposes a "substantial burden" on that "religious exercise."

Part I of the Article explains the constitutional principle that frames the disputes about adjudicating religious sincerity. Based on multiple constitutional provisions, the Supreme Court has articulated a number of doctrines that arise from what this Article calls the "no-orthodoxy principle": the government may not distribute benefits and burdens on its own evaluation of religious truth.

As Part II discusses, one of the doctrines based on this principle is that the government may not evaluate the *plausibility* or *accuracy* of one's religious beliefs. Many scholars believe that this prohibition effectively rules out the adjudication of religious sincerity too. As Justice Jackson argued long ago, it is hard to distinguish between the likelihood that a religious belief is *accurate* and the likelihood that the

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28. *See id.* at 2798–99; Wheaton Coll. v. Burwell, __ U.S. __, 134 S. Ct. 2806, 2812 (2014) (Sotomayor, J., dissenting); Frederick Mark Gedicks, "*Substantial" Burdens: How Courts May (And Why They Must) Judge Burdens on Religion Under RFRA*, 85 GEO. WASH. L. REV. 94, 98, 102 (2017); Su, *Judging Religious Sincerity*, *supra* note 17, at 44–45.

29. *See* Su, *Judging Religious Sincerity supra* note 17, at 45 ("At this jurisprudential moment then, it is clear that the twin legal threshold of sincerity and substantial burden are all but such in practice."). *Compare, e.g.*, Gedicks, *supra* note 28, at 98–99, 102 (arguing that courts should evaluate, on the basis of "secular law," whether the claimant will suffer "substantial religious costs" as well as "substantial secular costs"), *with* Chad Flanders, *Insubstantial Burdens*, *in* RELIGIOUS EXEMPTIONS (Kevin Vallier and Michael Weber eds., forthcoming 2018) (manuscript at 281) (on file with the author) (arguing that "courts should largely defer to plaintiffs as to what is a burden on their religious belief" so long as the claimant shows "that the government is actually *doing something* to the plaintiffs"), *and* Michael A. Helfand, *Identifying Substantial Burdens*, 2016 U. ILL. L. REV. 1771, 1775 (arguing that "in order to determine whether a burden is substantial, courts must examine the substantiality of the *civil penalties triggered by religious exercise*").

claimant actually believes it. After carefully engaging with Justice Jackson's argument, Part II concludes that, though his premise was sound, his conclusion does not follow. Courts can adjudicate religious sincerity without running afoul of the no-orthodoxy principle by declining to infer from evidence of a belief's inaccuracy or implausibility that the claimant is insincere.

But should they? Some argue that the constitutional risks of adjudicating religious sincerity should lead courts to err on the side of caution. As Part III of the Article argues, these scholars discount the costs of declining to enforce religious sincerity. Some of these costs are obvious. Fraud, whether based on religious claims or not, harms innocent people and soaks up public resources. A hands-off approach to religious sincerity invites false claims, which multiply litigation costs and, when granted, impose costs on taxpayers and perhaps third parties—all without relieving a burden from genuine religious exercise.

As Part III suggests, there are also subtler costs when courts believe they cannot adjudicate religious sincerity. Suspicion that a claimant is insincere won't just disappear; it is likely to creep into the court's analysis of other elements of the accommodation claim. Moreover, the widespread belief that "religious liberty" protects hucksters may erode public support for religious accommodations altogether. Perhaps counter-intuitively, adjudicating religious sincerity according to the no-orthodoxy principle may be the best way to promote religious liberty among those who are suspicious of phony claims.[30]

As this Article explains in Part IV, courts have all the tools they need to do just that. Officials routinely evaluate the sincerity of witnesses and the mental state of those accused of engaging in negligent misrepresentation or knowing fraud. When they adjudicate religious sincerity, courts must simply avoid inferring insincerity from inaccuracy, something that could be accomplished in a jury trial with an ordinary limiting instruction. This would permit a wide range of evidence that is highly probative of religious sincerity: evidence of ulterior motives; evidence of whether the claim "fits" with the claimant's religious biography; and evidence of whether the claim "fits" with the beliefs of the claimant's religious community (if any).

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30. "The main components of religious liberty are the autonomy of religious institutions, individual choice in matters of religion, and the freedom to put a chosen faith (if any) into practice." McConnell, *Accommodation*, *supra* note 14, at 1; *see* Tushnet, *Accommodation of Religion*, *supra* note 17, at 5 (noting that McConnell's definition of religious liberty "just about covered the waterfront").

Having addressed how to adjudicate religious sincerity, the Article concludes in Part V by sorting out the confusion about sincerity and "substantial burden" in *Hobby Lobby*. Disentangling "sincerity," "religious exercise," and "substantial burden" clarifies the disagreement between the majority and dissenting justices. It also allows for a robust response to the dissenting justices' charge that the majority collapsed the sincerity and "substantial burden" analyses, effectively deferring to the claimant's view on the issue. The claimants' sincerity was not in issue. Their "religious exercise" was abstaining from buying contraceptive insurance and the "substantial burden" was the threatened fine for that religious exercise. Contrary to the dissenting justices, the religiously inspired moral reasoning that supported the claimants' "religious exercise" was legally immaterial to their sincerity, to the nature of the "exercise" at issue, and to whether the regulation imposed a "substantial burden" on that exercise. Perhaps Congress should more carefully define the "substantial burden" component of the Religious Freedom Restoration Act (RFRA).[31] Until it does, however, this Article suggests that courts, guided by the statutory text and prior cases, can distinguish between a claimant's sincerity, whether the claim is based on religious exercise, and whether the regulation at issue imposes a substantial burden on that exercise.

I. THE CONSTITUTION'S NO-ORTHODOXY PRINCIPLE

Professor Ana Su has noted that "[t]he emergence of the sincerity requirement as a species of the religious question doctrine is a topic that is yet to be addressed by scholars in this field."[32] This Part explains that concerns about adjudicating sincerity, and the "religious question doctrine" from which those concerns arise, are based more fundamentally in a constitutional principle that the government may not take a position on the accuracy of private religious beliefs. The "no-orthodoxy principle," as this Article calls it, arises from several constitutional provisions, and the Supreme Court has applied it in a variety of contexts. Evaluating disputes about the government's role in adjudicating religious sincerity requires comprehending the principle's

31. Many debate the desirability of the current religious accommodation regime. Whether the terms of that regime are optimal is beyond this Article's scope. Changing them would not change the Article's core thesis: courts can and should directly address suspicion about the claimant's insincerity, and courts can and should avoid allowing such suspicion to influence the analysis of the other components of an accommodation claim.

32. Su, *Judging Religious Sincerity*, *supra* note 17, at 30 n.6.

origins, applications, and implications—and the limits of those implications.

A. Origins

The American framers broke with their English and colonial experience to place religious truth beyond the government's ken. The protestant Church of England had been the established religion since the sixteenth century.[33] The Church maintained positions on several Christian doctrines that were hotly contested both within the nation and across Europe, doctrines about the nature of God and about what happens to the bread and wine used during the Christian celebration of Eucharist or Communion.[34] To participate fully in England's politics, academics, and the legal profession, one had to subscribe to the established church's doctrines and participate in its ceremonies.[35]

As is well known, dissenters from the English religious establishment founded several of the American colonies.[36] Many of the colonies did not dissent from the notion of an established religion altogether, however—they simply preferred to establish a different Christian denomination. The New England colonies, in particular, adopted congregational puritanism instead of Anglicanism as their established religion.[37] Meanwhile, most of the Southern colonies officially favored the Church of England until after the War of Independence.[38]

The framers of the United States Constitution did away with religious tests for participation in government. Tucked into Article VI, better known for establishing federal law as "the supreme Law of the Land,"[39] the Religious Test Clause provides that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."[40] At the time, most states required officials to subscribe to Christianity or Protestantism.[41] Though some Americans protested the Religious Test Clause during the ratification debates, advocates of the

33. *See, e.g.*, DIARMAID MACCULLOCH, THE LATER REFORMATION IN ENGLAND 1547–1603 (1990).

34. *See id.*

35. *See* Test Act of 1672, 25 Car. 2, ch. 2; Corporation Act of 1661, 13 Car. 2, stat. 2., c. 1.

36. *See generally* MARK DEWOLFE HOWE, THE GARDEN IN THE WILDERNESS (1965).

37. SANFORD H. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA: A HISTORY 133 (1902).

38. *Id.* at 74.

39. U.S. CONST. art. VI, cl. 2.

40. U.S. CONST. art. VI, cl. 3.

41. *See* COBB, *supra* note 37, at 510–17.

Constitution defended it with two arguments. First, without the provision, one religious group, or a plurality of groups, would be able to exclude others from fully participating in the government, effectively rendering them second-class citizens.[42] Second, without the provision, the narrow-minded prejudice of some might discourage members of disfavored religious groups who nevertheless exhibited republican virtues from taking public office.[43]

As Gerard Bradley has argued, the Religious Test Clause has been self-executing. Because it operates even-handedly, no one has ever been subject to a religious test for federal office, and the clause has never given rise to a legal dispute.[44] The provision created a powerful baseline of religious equality by ensuring that no one would be excluded from federal office on account of religion. Such equality, even without the Establishment or Free Exercise Clause, likewise extended a measure of religious liberty to non-Christians by eliminating an incentive to ascribe to a form of Christianity in exchange for access to public office.[45]

To quell concerns that the federal government would engage in religious favoritism, the First Congress enacted the First Amendment,[46] which forbids Congress from making any "law respecting an establishment of religion, or prohibiting the free exercise thereof."[47] The Establishment Clause and Free Exercise Clause were the capstones on the Constitution's guarantee of religious freedom and equality. Broadly understood, they promised that the federal government would never grant political or civil rewards or impose legal burdens on the basis of religious belief and exercise. The First Amendment furthermore

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42. OLIVER ELLSWORTH, THE LANDHOLDER, VII, *reprinted in* ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 167, 169 (Paul Leicester Ford ed., 1892) (noting that if a religious oath "were in favour of either congregationalists, presbyterians, episcopalions, baptists, or quakers, it would incapacitate more than three-fourths of the American citizens for any publick office; and thus degrade them from the rank of freemen").

43. Tench Coxe, *An Examination of the Constitution of the United States of America*, PA. GAZETTE, Oct. 24, 1787, at 2 ("The people may employ any wise or good citizen in the execution of the various duties of the government.").

44. 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 (1987); *see also* MORTON BORDEN, JEWS, TURKS, AND INFIDELS (1984).

45. *See, e.g.*, Michael W. McConnell, *Establishment and Toleration in Edmund Burke's "Constitution of Freedom,"* 1995 SUP. CT. REV. 393.

46. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990); Vincent Philip Muñoz, *The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress*, 31 HARV. J.L. & PUB. POL'Y 1083 (2008).

47. U.S. CONST. amend I.

guaranteed the freedoms of speech, of the press, and of the people peaceably to assemble, each of which derived in part from English common law accommodations for religious and political dissenters.[48] Altogether, with the Test Clause, these provisions promoted religious liberty and equality.

Early Americans advanced an array of justifications for religious equality and liberty, some secular and others religious.[49] All of them, though, supported the principle that the government should not dispense benefits and burdens on the basis of one's religious beliefs. All except one, that is. Civic republicans believed that religion promoted virtue, and the development of public virtue was necessary for a republic to function properly.[50] Many civic republicans therefore believed that the government should advance religiosity through education and public ceremonies, and to some extent America continues to have vestiges of "civic religion."[51] Civic republicans were not concerned that religious minorities would be made to feel like political outsiders by the government's support for ceremonial religious practices. But some of them, at least, were keenly committed to eliminating political burdens imposed on religious minorities on account of their beliefs.[52] Together, the Religious Test Clause, Establishment Clause, and Free Exercise Clause were understood to eliminate such burdens and to promote political equality among citizens despite their disparate and constantly evolving religious beliefs.

B. Developing the No-Orthodoxy Principle

Although the outer bounds of these constitutional provisions are hotly contested today, the Supreme Court has long recognized that the government may generally take no position on religious doctrine. The Supreme Court has developed this no-orthodoxy principle on the basis of a variety of First Amendment provisions, and has applied it in a variety of contexts. In *United States v. Ballard*, the Court held that the Constitution forbids passing judgment on the accuracy of a religious

48. *See* JOHN INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY 20–62 (2012).

49. *See* John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 377–88 (1996).

50. *Id.*

51. *Id.* at 380–88.

52. *See, e.g.*, Letter from George Washington to the Hebrew Congregation in Newport, Rhode Island (Aug. 18, 1790), *in* 6 THE PAPERS OF GEORGE WASHINGTON, JULY-NOV. 1790, 284, 285 (Dorothy Twohig et al. eds., 1996).

accommodation claimant's beliefs, but not on the claimant's sincerity.[53] Scholars continue to maintain that the Constitution ought to extend to sincerity too. To better evaluate those arguments, this section provides a brief overview of the breadth—and limits—of the no-orthodoxy principle.

The principle found its first clear expression in a case involving a dispute over church property. In *Watson v. Jones*,[54] the Supreme Court concluded that, under general common law, state courts could not resolve property disputes that turn on the interpretation of religious doctrine:

> In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.[55]

As the Court stated nearly a century later in another church property dispute, "First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice."[56] These values, explained Justice Brennan, include "the free development of religious doctrine" and avoiding the imposition of "secular interests" on "matters of purely ecclesiastical concern."[57] The first sounds in free exercise, both individually and collectively, the latter in church autonomy. The Court has extended this principle to other cases involving disputes over church property,[58] and to other cases involving a church's selection of its own ministers (sometimes called the "ministerial exception").[59]

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53. 322 U.S. 78, 88–89 (1944).

54. 80 U.S. 679 (1871).

55. *Id.* at 728.

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

57. *Id.*

58. *See, e.g.*, Serbian E. Orthodox Diocese for U.S. and Can. v. Milivojevich, 426 U.S. 696, 720 (1976) ("the First Amendment commits" "the resolution of quintessentially religious controversies" "exclusively to the highest ecclesiastical tribunals"); Kreshik v. Saint Nicholas Cathedral, 363 U.S. 190 (1960); Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94 (1952).

59. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012) (holding that a "ministerial exception" to employment discrimination law is required by the Establishment Clause and the Free Exercise Clause).

Courts refer to the prohibition on deciding disputes about religious truth as the "religious question" doctrine.[60] Scholars variously call it the "no religious decision"[61] principle or the "hands-off approach"[62] to religious questions. They offer a variety of justifications: "religious truth by its nature [is] not subject to a test of validity determined by rational thought and empiric knowledge";[63] courts are incompetent to understand religious ideas;[64] the government will harm or corrupt religion by getting involved in it;[65] and "secular authorities lack the power to answer" "religious questions" "whose resolution is" "left to other [ecclesiastical] institutions."[66] Usually a combination of these rationales supports a court's abstention from deciding a dispute over religious doctrine.[67]

For purposes of the present inquiry, however, the religious question doctrine, and the church dispute cases usually associated with it, is best understood as a species of the no-orthodoxy principle applied to judicial power. The no-orthodoxy principle, drawn from a variety of constitutional provisions, more broadly prohibits the government from distributing benefits and burdens on the basis of religious doctrine. This promotes religious liberty, both individual and corporate, and political equality before the law. A court's resolution of a private contest about religious doctrine would throw the government's power behind the winning belief, thereby distributing secular benefits and burdens on the basis of the government's view of religious doctrine.[68]

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60. *See, e.g.*, Burgess v. Rock Creek Baptist Church, 734 F. Supp. 30, 31 (D.D.C. 1990). Some scholars have questioned whether the doctrine leaves some litigants without a way to enforce what they believe to be their rights under civil law. *See* Michael A. Helfand, *Litigating Religion*, 93 B.U. L. REV. 493, 501 (2013).

61. EUGENE VOLOKH, THE FIRST AMENDMENT AND RELATED STATUTES 901–10 (4th ed. 2011).

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

63. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-11, at 1232 n.46 (2d ed. 1988) (quoting PAUL G. KAUPER, RELIGION AND THE CONSTITUTION 26 (1964)). *See generally* Caleb E. Mason, *What Is Truth? Setting the Bounds of Justiciability in Religiously-Inflected Fast Disputes*, 26 J.L. & RELIGION 91 (2011).

64. *See, e.g.*, Serbian E. Orthodox Diocese for U.S. and Can. v. Milivojevich, 426 U.S. 696, 714, 714 n.8 (1976) ("Civil judges obviously do not have the competence of ecclesiastical tribunals in applying the 'law' that governs ecclesiastical disputes. . . .").

65. *See, e.g.*, Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831 (2009).

66. Garnett, *supra* note 62, at 861.

67. For a thoughtful critique of each justification, and an argument that the central animating justification for the "hands-off approach" ought to be that "the political authority lacks power, or *jurisdiction*, to answer," *id.*, and for religious questions, see *id.* at 855–62.

68. *See* Arthur Allen Leff, *Law and*, 87 YALE L.J. 989, 997 (1978) ("[B]ehind every [American] judge stands ultimately the naked power of the 101st Airborne. . . ."). On the relationship between

A corollary of the "religious question" doctrine is the First Amendment prohibition on the government determining the "centrality" of a religious belief to a religion.[69] Ascertaining what is central to a particular religious system or tradition, and what is periphery, is an aspect of defining religious orthodoxy.[70] Accordingly, the Religious Land Use and Institutionalized Persons Act (RLUIPA) and RFRA protect "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[71] Whether a religious belief is "sincerely held is different" from whether it is "central" to a religion,[72] but the two can be easily confused.[73] The difference is crucial, though. Determining the centrality of a belief requires evaluating the relationship between *one* belief of *one* person to an entire theology, belief system, and practice, in all its diversity. This requires determining the center of a theology, something about which coreligionists often disagree. A court may not do so without preferring one theological position to another, thus violating the no-orthodoxy principle. Adjudicating religious sincerity, however, focuses on whether the claimant actually believes the religious claim, not its relationship to other theological claims.[74] As explained below, adjudicating sincerity does not, and should not, entail a judgment about the centrality or veracity of the religious claim itself.

The Supreme Court has likewise enforced the no-orthodoxy principle in cases involving coerced religious speech. Holding that West Virginia could not require public school students to salute the flag against their religious beliefs, Justice Jackson unfurled some of the most stirring rhetoric to grace the U.S. Reports:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force to confess by word or act their faith therein.[75]

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state action, the distribution of private rights, and the Establishment Clause, see generally Nathan S. Chapman, *The Establishment Clause, State Action, and* Town of Greece, 24 WM. & MARY BILL RTS. J. 405 (2015) [hereinafter Chapman, *State Action*].

69. Emp't Div. v. Smith, 494 U.S. 872, 887 (1990) (noting a constitutional prohibition on determining "the place of a particular belief in a religion"); *see also* Hernandez v. Comm'r, 490 U.S. 680 (1989).

70. *See Smith*, 494 U.S. at 887.

71. 42 U.S.C. § 2000cc-5(7)(A) (2012); *id.* § 2000bb-2(4) (referring to section 2000cc-5).

72. Watts v. Fla. Int'l Univ., 459 F.3d 1289, 1295 (11th Cir. 2007).

73. *See* Hobby Lobby Oral Argument, *supra* note 23, at 19–20 (comments of Sotomayor, J.).

74. *See, e.g.*, *Watts*, 459 F.3d at 1295 ("The test is sincerity, not centrality."). Whether the belief is "religious" is another matter. *See infra* section V.A.

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

Under the Free Speech Clause, the Court thus extended the no-orthodoxy principle to protect private speech on *all* matters of "opinion."[76]

Although the Test Clause proved to be self-enforcing against the federal government, the Supreme Court has extended its prohibition to the states under the auspices of the Establishment Clause. In *Torcaso v. Watkins*,[77] the Court held that Maryland may not require notary publics to swear that they believe in God.[78] Although many of the constitutional framers likely would have condoned excluding non-theists from public office,[79] *Torcaso* extends protection equally to atheists and agnostics under the Establishment Clause.

Many of the contemporary cases that may seem to call the no-orthodoxy principle into question actually reinforce it. The Supreme Court has held that the government may sometimes display religious symbols, including the Ten Commandments, on its property.[80] Although the Court has rarely achieved a majority opinion in these cases, the justices who voted for the constitutionality of such displays have uniformly emphasized that the government, in displaying religious symbols, is not thereby promoting the veracity of the religious beliefs those symbols represent.[81] Rather, the government is acknowledging the role of religion among its citizens, recalling historical events, or promoting a spirit of civic unity (however ineffectively).[82] What the government is *not* doing, the justices maintain, is saying that one religion is true and others are false.[83] The reason the justices who have voted to uphold religious displays rely on this argument, I would submit,

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76. Including the opinion that one should "Live Free or Die." *See* Wooley v. Maynard, 430 U.S. 705 (1977) (holding that the First Amendment forbids New Hampshire from requiring Jehovah's Witnesses from displaying the state motto on their automobile license plates).

77. 367 U.S. 488 (1961).

78. *Id.* at 495.

79. Indeed some ratification advocates defended the Test Clause on the ground that the Oath Clause would exclude atheists. *See* Bradley, *supra* note 44.

80. *See* Van Orden v. Perry, 545 U.S. 677 (2005) (upholding the constitutionality of a Ten Commandments monument because of its history and secular presentation).

81. *Id.* at 691–92.

82. *See id*. *But see* McCreary Co. v. ACLU, 545 U.S. 844 (2005) (holding that framed copies of the Ten Commandments in Kentucky courthouses violated the Establishment Clause because their purpose was to promote religion).

83. *See Van Orden*, 545 U.S. at 702 (Breyer, J., concurring) (stating "few individuals, whatever their system of beliefs, are likely to have understood the [Ten Commandments] monument as amounting . . . to a government effort to favor a particular religious sect, primarily to promote religion over nonreligion, to 'engage in' any 'religious practice[e],' to 'compel' any 'religious practic[e],' or to 'work deterrence' of any 'religious belief'").

is that affirmatively promoting one religion over another would test the limits of the no-orthodoxy principle.

Another group of cases permit the government to endorse a form of civic religion that has little theological content beyond theism. The Supreme Court's decisions in legislative prayer and ceremonial religious speech cases may be best understood to permit the government to engage in generic religious speech meant primarily to unite the political community rather than to endorse religious orthodoxy.[84] Indeed, the more likely it is that an observer would attribute coherent and specific religious speech to the government, as opposed to a private party, the less likely it is that the speech is constitutional.[85] The cases undoubtedly, however, permit the government to promote theism over atheism.[86] It is questionable whether these decisions can be squared with the no-orthodoxy principle.

It must be noted that the no-orthodoxy principle does not preclude the government from deciding issues related to religion.[87] The First Amendment itself distributes benefits and burdens on the basis of *religion*—just not on the basis of particular theological beliefs (or the absence of them). On one hand, the Establishment Clause prohibits the government from making a "law respecting an [E]stablishment of religion."[88] On the other, the Free Exercise Clause prohibits the government from "prohibiting the free exercise" of religion.[89] In the course of making and enforcing law, therefore, the government cannot avoid deciding matters that touch on religion and religious beliefs.[90] But it may not take a position on their relative merit in a way that affects civil rights and liberties.

The no-orthodoxy principle poses a problem for adjudicating religious sincerity. The government may not distribute benefits and burdens on

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84. *See* Town of Greece v. Galloway, __ U.S. __, 134 S. Ct. 1811, 1814 (2014) (stating that prayers before town board meetings fall within the tradition of legislative prayers by promoting "universal themes, *e.g.*, by calling for a 'spirit of cooperation'"); Marsh v. Chambers, 463 U.S. 783, 792 (1983) (stating opening prayers, which have been present throughout the history of the United States, were not meant to proselytize or approve one religious view, but were seen as "conduct whose . . . effect harmonize[d] with the tenets of some or all religions" (quoting McGowan v. Maryland, 366 U.S. 420, 442 (1961))).

85. *See* Chapman, *State Action*, *supra* note 68.

86. *See Town of Greece*, 134 S. Ct. at 1819.

87. *See* Garnett, *supra* note 62, at 850–54.

88. U.S. Const. amend. I.

89. *Id.*

90. *See* Kent Greenawalt, *Religious Law and Civil Law: Using Secular Law to Assure Observance of Practice with Religious Significance*, 71 S. CAL. L. REV. 781, 843 (1998).

the basis of religious truth, but it can be difficult to distinguish between whether a religious claim is "true" and whether the claimant "truly" believes it. Whether the no-orthodoxy principle, as I have described it, prohibits courts from inquiring into a claimant's sincerity was effectively the issue in *United States v. Ballard*, and many scholars remain uneasy with the Court's conclusion.

II. THE *BALLARD* RULE AND JACKSON'S DISSENT

The no-orthodoxy principle discussed above is the impetus for scholarly disputes about the government's proper role in adjudicating religious sincerity. Most scholars endorse the view of Justice Jackson, dissenting in *United States v. Ballard*, that it is nearly impossible to adjudicate religious sincerity without also deciding the accuracy or plausibility of the claimant's religious beliefs.[91] This Part critiques Jackson's opinion, concluding courts may address most, but not all, of the concerns he and subsequent scholars have identified. The next Part discusses the costs to the government, third parties, and religious liberty when government officials declined to adjudicate religious sincerity.

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91. *See* GREENAWALT, *supra* note 17, at 122–23; Giannella, *supra* note 14, at 1418; Krotozynski, *supra* note 17, at 1984; Lupu, *supra* note 17, at 957; Noonan, *supra* note 18, at 720–21; Su, *Judging Religious Sincerity*, *supra* note 17, at 28; Tushnet, *Accommodation of Religion*, *supra* note 17, at 10. In *Reasons of Identity*, Avigail Eisenberg provides a critical analysis of the Canadian Supreme Court's reliance on a religious claimant's sincerity, alone, to determine eligibility for a religious accommodation under the Canadian Constitution. EISENBERG, *supra* note 20, at 103–11. She acknowledges that evaluating a claimant's sincerity, rather than the validity of the claimant's belief, "is at least designed to distinguish between genuine and fraudulent claims in a manner that avoids privileging the established tenets of religious faith according to religious elites; that takes seriously the relation between identity assessments and the subjective nature of religious belief; and that potentially broadens the scope of religious freedom so that it is more inclusive of religious minorities." *Id.* at 107. At the same time, from the standpoint of protecting minority identity, she argues that courts should consider more than just the plaintiff's sincerity. They should also consider the "collective dimension" of the claim, *id.* at 108, and "the general character of [the] religion, the practices it plausibly includes, and the role and importance of these practices to the religion," *id.* at 109. Relying on these considerations to determine the value of the claimant's religious exercise would raise serious concerns under the no-orthodoxy principle because they would potentially require courts to decide among competing understandings of the religion at issue. Under many U.S. religious accommodation statutes, such as RFRA, claimants are required to show not only sincerity, but also that the government has placed a substantial burden on the claimant's religious exercise. As I argue in section V.B, this requirement is not onerous, but it is sufficiently distinct from the requirement of religious sincerity to prevent the analysis from turning exclusively on the claimant's good faith.

A. The Ballard *Rule: Adjudicate Religious Sincerity, Not Accuracy*

In *United States v. Ballard*, the Supreme Court held that the government may not punish persons on the ground that their religious beliefs are inaccurate.[92] The Court tacitly suggested that courts may adjudicate a religious claimant's sincerity and perhaps even punish those who defraud others by making false statements about their own religious beliefs.[93]

The Court did not expressly distinguish between two forms of truthfulness upon which philosophers rely: sincerity and accuracy.[94] The distinction, explored at length by Bernard Williams, is crucial for identifying the limits of the no-orthodoxy principle.[95] At its most basic, accuracy is the disposition of "acquiring a correct belief in the first place, and . . . transporting that belief in a reliable form" to others.[96] Sincerity, by contrast, is the disposition "to say what one actually believes."[97]

The defendants in *Ballard* claimed to hold unusual religious beliefs, including that they had the power to cure illness.[98] In the process, they made a great deal of money from converts and those who sought healing.[99] The government indicted them on multiple charges of mail fraud.[100] Before trial the court rejected the defendants' argument that the prosecution violated their First Amendment rights.[101] At trial, the government and the defendants agreed that the jury would not decide whether the defendants' statements were actually false—only whether

92. 322 U.S. 78, 86–88 (1944).

93. *Id.* (explaining that the First Amendment placed the truth or falsity of the defendant's beliefs beyond the government's reach, but declining to decide whether the defendant's sincerity was likewise beyond the government's reach). For a wonderful account of the case and its progress through the federal courts, see JOHN NOONAN, THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM 139–76 (1998).

94. *See Ballard*, 322 U.S. at 86–88; BERNARD WILLIAMS, TRUTH AND TRUTHFULNESS: AN ESSAY IN GENEALOGY (2002).

95. *See generally* WILLIAMS, supra note 94.

96. *Id.* at 37.

97. *Id.* at 44. Williams describes accuracy and sincerity as "virtues of truth" because in order to exercise them one must overcome certain forms of resistance, including the "temptation" "to fantasy and the wish." *Id.* at 38, 44–45. He develops the dispositions and forms of resistance for each of these virtues at length. *See id.* at 84–122 (sincerity); *id.* at 123–48 (accuracy).

98. *Ballard*, 322 U.S. at 80.

99. *See id.*

100. *Id.* at 79.

101. *Id.* at 81.

they knew them to be false.[102] In other words, the jury could find the defendants guilty only if it concluded that they had been insincere about their religious beliefs. And it did so.[103]

On appeal, the defendants argued that the question before the jury was improper because it did not square with the indictment. The indictment, they argued, required the government to show that the content of the defendants' claims were untrue, not only that the defendants "well knew" them to be untrue.[104] The appellate court agreed with the defendants, holding that under the terms of the indictment, the government was obligated to prove that the defendants' claims were inaccurate, not merely insincere.[105]

Whether the government may try the veracity of one's religious beliefs was the issue before the Supreme Court. The Court concluded that the First Amendment foreclosed the government from passing judgment on the accuracy of the defendants' religious beliefs.[106] Writing for the Court, Justice Douglas offered a paean to the no-orthodoxy principle:

> Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. It embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others.[107]

After emphasizing the religious freedom at stake, Douglas clarified that any other rule would invite official distinctions on the basis of theological bias:

> The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake

102. *Id.* at 81–82.

103. *Id.* at 79.

104. *Id.* at 80.

105. *Id.* at 83.

106. Chief Justice Stone, dissenting, saw no reason why the government could not introduce evidence to the effect that the defendant had never healed anyone and had never been in San Francisco (despite claiming he met St. Germain there). *Id.* at 89.

107. *Id.* at 86.

> that task, they enter a forbidden domain. The First Amendment does not select any one group or any one type of religion for preferred treatment.[108]

The rule that the First Amendment forbids the government from evaluating the accuracy of an individual's religious beliefs has become an entrenched application of the no-orthodoxy principle.

The Court did not squarely hold that the government may adjudicate religious sincerity and punish insincere statements that amount to fraud, but its disposition of the case strongly implied that result. It declined to agree—twice—with Jackson's powerful arguments that the First Amendment prohibits prosecutions for religious insincerity.[109]

B. Justice Jackson's Dissenting Opinion: The No-Orthodoxy Principle and Religious Sincerity

Jackson agreed with the majority that the First Amendment places the accuracy of one's religious beliefs beyond the government's competence; he disagreed, however, about whether the First Amendment likewise places one's religious sincerity beyond the government's adjudicative authority. Though his objections arose in a case about criminal punishment, they apply with equal force to any governmental adjudication of religious sincerity, including a court's evaluation of a religious accommodation claim. Furthermore, most scholars seem to be persuaded by Jackson's account,[110] which remains the most thorough and nuanced critique of the government's authority to adjudicate religious sincerity. Therefore this section carefully considers his three arguments in turn. Each of them arises from a concern that judging religious sincerity would violate the no-orthodoxy principle, jeopardizing religious liberty and equality.

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108. *Id.* at 87.

109. *See* Ballard v. United States, 329 U.S. 187 (1946) (quashing the indictment on the ground that the district court had excluded women from the grand jury pool). In my view, the Court's best option in *Ballard* was to quash the indictment on the ground that its allegations, as framed, could not be established without determining the accuracy of the defendant's claims. The indictment charged that the claims were false and that the defendants "well knew" them to be false. *Ballard*, 322 U.S. at 80. It did not separately allege that the defendants falsely claimed *to hold particular beliefs*. Another indictment should have been framed to focus solely on whether the defendants believed what they said, without regard to whether those beliefs or statements accorded with objective reality. Whether the mail fraud statute can sustain an indictment and conviction on the basis of the speaker's insincerity alone is a separate matter of statutory interpretation.

110. *See supra* notes 17–20.

1. The Relationship Between Plausibility and Sincerity

Jackson's first argument was that it is difficult, both conceptually and as a matter of proof under the rules of evidence, to separate a statement's *plausibility*, if not its accuracy, from the speaker's likely sincerity.[111]

> The most convincing proof that one believes his statements is to show that they have been true in his experience. Likewise, that one knowingly falsified is best proved by showing that what he said happened never did happen. How can the Government prove these persons knew something to be false which it cannot prove to be false? If we try religious sincerity severed from religious verity, we isolate the dispute from the very considerations which in common experience provide its most reliable answer.[112]

Here, Jackson identifies a powerful reason for courts to tread carefully when reviewing a claimant's religious sincerity. His overriding concern is the no-orthodoxy principle. Evidence tending to show a statement's inaccuracy is also probative of whether the speaker believed it. Unless the speaker has admitted that she does not believe the statement, her sincerity must be proved (or disproved) by circumstantial evidence. The best circumstantial evidence that someone knew his statement to be false, maintains Jackson, is evidence that it was false—which is precisely what the Court places out-of-bounds.[113] It is therefore nearly impossible, he argues, to distinguish sincerity (permitted) from accuracy (forbidden).

Jackson is correct that evidence of a statement's inaccuracy is probative of the speaker's sincerity. One might go even further than Jackson did. What matters is not so much whether a statement is accurate; people often sincerely believe things that turn out to be inaccurate. For example, when a home seller says, "I thought the deck was structurally sound," the fact that it subsequently collapsed is some evidence, perhaps, that the seller was insincere. But in most people's experience, it is reasonable to believe a deck is structurally sound absent contrary evidence. It is the *reasonableness* or *plausibility* of the belief that bears on the speaker's sincerity, not the *accuracy* of it. And what is reasonable or plausible depends on one's experience. In an ordinary

111. *Ballard*, 329 U.S. at 92 (stating, "I do not see how we can separate an issue as to what is believed from considerations as to what is believable").

112. *Id.* at 92–93.

113. Chief Justice Stone and two others thought that examining the objective veracity of religious claims would be fine. *Id.* at 89–90.

case, a factfinder's experience can be, and often is, supplemented by expert witnesses and other evidence. But unlike the seller's belief that a deck is structurally sound, whether a religious belief is *plausible* must be placed, alongside its accuracy, beyond the government's authority by the no-orthodoxy principle.

So, to give Jackson's objection its due weight, it is not only evidence that a belief is inaccurate that the no-orthodoxy principle rules out, but also evidence that the belief is implausible or unreasonable. As Part V argues, the ordinary rules of evidence do not address this constitutional concern. Courts should take it into account when they adjudicate sincerity by prohibiting the factfinder from inferring religious insincerity from implausibility. Nevertheless, this does not mean that the government may not adjudicate religious sincerity. As the next Part explains, they have good reason to do so, and as Part V explains, they can do so without violating the no-orthodoxy principle.

2. The Nonbeliever's Bias

Jackson's second objection has to do with whether a nonbelieving adjudicator can relate to a believer. He argues, "any inquiry into intellectual honesty in religion raises profound psychological problems."[114] Citing William James, "who wrote on these matters as a scientist," he argues that religion is deeply experiential.[115] James "reminds us that it is not theology and ceremonies which keep religion going. Its vitality is in the religious experiences of many people."[116] Nonbelievers have never had the experiences that spurred the claimant's belief, and therefore they "are likely not to understand and are almost certain not to believe him."[117]

This argument is rich with irony. In the first place, Jackson, deciding a case as a justice on the Supreme Court, is appealing to the authority of religious studies (namely the religious psychology of William James) to argue that the government should not evaluate religious beliefs.[118] To be sure, James was not espousing a particular religious belief or doctrine, but he was certainly espousing a viewpoint about religious beliefs that, though perhaps consistent with the epistemological assumptions of some academic fields, is inconsistent with the views of many religious

114. *Id.* at 93.

115. *Id.*

116. *Id.*

117. *Id.*

118. *See id.*

believers.[119] Some people would maintain that their religious faith is in fact driven by theology and ceremony, not by experience. And others would reject a clear distinction between the three.

Caleb Mason has made an argument similar to Jackson's. He argues that courts should accept the view of some philosophers that religious statements are nonsense because they are not subject to revision on the basis of empirical evidence.[120] For this reason, Mason argues, courts cannot evaluate claims about religious truth, but may evaluate claims about non-religious truth (i.e., empirically evaluable claims) based on religious motivations.[121] Regardless of the merit of Mason's view of religious beliefs (many religious practitioners reject it),[122] courts could not base their fact finding on his view without violating the no-orthodoxy principle because they would be taking sides in a religious dispute. There is no vantage point on religion from which courts may avoid the no-orthodoxy principle.

In the second place, Jackson argues that a nonbeliever is unlikely to empathize with foreign religious beliefs, and, therefore, is unlikely to trust the religious claimant. As a result, those with different religious beliefs should not evaluate a claimant's sincerity. Yet Jackson had already confessed that he "can see in [the defendants'] teachings nothing but humbug, untainted by any trace of truth."[123] Somewhat ironically, then, he was able to perceive that his view of the plausibility of the defendants' claims may have biased him against the defendants' sincerity. Jackson thereby performed what he claimed to be so difficult.

Jackson was over-claiming. Most people are likely to accept that others sincerely believe some things that they find to be implausible. Many hold religious beliefs that are implausible to others, and those who don't hold such beliefs probably have friends or family members who do. Just as Jackson was able to do, most people will be able to distinguish between whether another's beliefs are accurate and whether they are sincere. Furthermore, courts routinely instruct jurors to not allow their biases or personal beliefs about this or that to interfere with

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119. *See id.*

120. Mason, *supra* note 63, at 114; *see also* BRIAN LEITER, WHY TOLERATE RELIGION?, ch. 2 (2013).

121. Mason, *supra* note 63, at 114.

122. Take, for instance, the claim that Jesus Christ has been raised from the dead, a quintessential example of a meaningless sentence under the standards of analytical philosophy. No less a practitioner than the Apostle Paul insisted that it was crucial to the Christian faith that Christ was actually—empirically—resurrected, 1 *Cor*. 15:12–20, and many Christians maintain that view, *see generally* N.T. WRIGHT, SURPRISED BY HOPE (2008).

123. *Ballard*, 322 U.S. at 92.

their evaluation of the evidence.[124] There is no reason to think that bias about the plausibility of a religious claim is especially hard to put aside when one evaluates the claimant's sincerity.

3. The Believer's Doubts

Jackson's final objection focuses on the claimant's epistemology. He argues that "I do not know what degree of skepticism or disbelief in a religious representation amounts to actionable fraud."[125] Judge John Noonan finds this to be the "decisive[]" argument against adjudicating religious sincerity.[126]

It is commonplace that doubt is often a component of religious belief. The standard for actionable fraud, the standard under which the Ballards were indicted, tried, and convicted, was knowing fraud.[127] Knowledge is neither faith nor doubt—it is certainty. The Ballards were not convicted because, when they promised to heal people of their illness, they were in fact having a crisis of faith. They were convicted because the jury concluded that they knew for certain their claims were not true.[128] The Ballards could have presented, and a court and jury would surely have considered, evidence to the effect that their beliefs, though sometimes tried and beset by doubt, disappointment, and struggle, had nevertheless been sincere. Most people can surely appreciate that such a faith may be genuine.

Building on Jackson's argument, Noonan develops a subtler one: what if the religious claimant believes that her claims are metaphorical, but allows her listeners to conclude that they are literal?[129] What if the Ballards, by telling their followers they would heal them, sincerely believed that they could heal them spiritually, though not physically? Such a statement may be sincere though it implies that the speaker believes something she does not. What may distinguish sincerity from insincerity in this case is whether the speaker *intended to deceive* the hearer about her beliefs.[130]

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124. *See, e.g.*, *infra* section IV.B.2; *see also Ballard*, 322 U.S. at 81–82 (recounting the trial court's commitment to restricting the jury from considering the plausibility or accuracy of the defendant's religious statements).

125. *Id.* at 93.

126. NOONAN, *supra* note 93, at 718.

127. *Ballard*, 322 U.S. at 80 ("Each of the representations enumerated in the indictment was followed by the charge that respondents 'well knew' it was false.").

128. *See id.*

129. NOONAN, *supra* note 93, at 722–23.

130. *See* WILLIAMS, *supra* note 94, at 100–10 (discussing implicatures and equivocations).

This well-founded concern can be addressed by ordinary rules of evidence. The religious claimant could introduce evidence to the effect that she sincerely holds her beliefs as metaphors, but not as objective fact. Unless the fraud regulation requires full disclosure, the defendant could not be punished.[131] Those who hold beliefs to be true metaphorically, rather than literally, know that they do. And even when they are unsure whether their beliefs are true literally, metaphorically, or neither, their state of mind—uncertainty—can be conveyed to others and is subject to evidentiary contestation. Adjudicating doubt or nuanced belief is in many ways no different from adjudicating *mens rea*: it is a question of degree.

On the basis of the foregoing objections, Jackson concluded that courts should be "done with this business of judicially examining other peoples' faiths."[132] Many scholars have either followed suit or determined that adjudicating religious sincerity is, at best, a necessary evil.[133] Though the no-orthodoxy principle gives rise to these concerns, it does not require courts to decline to adjudicate religious sincerity. Furthermore, as the next Part argues, *not* adjudicating religious sincerity likewise poses its own dangers to religious liberty and equality. Part IV therefore explains that courts adjudicating sincerity should tweak the rules of evidence to account for Jackson's objections under the no-orthodoxy principle, rather than to abandon the task altogether.

III. THE COSTS OF NOT ADJUDICATING RELIGIOUS SINCERITY

As scholars note, a court adjudicating religious sincerity risks unconsciously discounting the likelihood of sincerity based on its own appraisal of the belief's plausibility, something the no-orthodoxy principle forbids.[134] Perhaps, then, the government should abstain from adjudicating religious sincerity, whether in fraud or religious accommodation cases. Doing so, some suggest, is the only way to enforce the no-orthodoxy principle and to ensure the religious equality and liberty it was meant to protect.

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131. A law requiring full disclosure, even if it required a believer to admit, against his religion, that his beliefs are purely metaphorical, does not violate the no-orthodoxy principle, for it does not require the government to weigh in on religious truth. It may, however, impermissibly burden religious exercise, depending on the relevant legal standard. Under *Employment Division v. Smith*, it probably wouldn't. Under RFRA, it might.

132. *Ballard*, 322 U.S. at 95.

133. *See supra* notes 17–20.

134. *See supra* Part I.

This Part explores the dangers of *ignoring* religious sincerity. All of them stem from a presumption that religious insincerity happens—religious hucksters have long been a staple of the American experience, and accommodation claimants sometimes gin up religiosity to justify an exemption.[135] Ignoring insincere religious claims harms third parties, leads to doctrinal "suspicion creep," and erodes support for religious liberty. The next Part argues that courts can adjudicate sincerity, avoiding these costs, without violating the no-orthodoxy principle.

A. The Costs of Insincerity

Common sense and experience suggest that insincerity about religion is no less frequent than insincerity about anything else—perhaps more so. In a nation that is religiously pluralistic and in some places deeply religious, exaggerations, if not outright fibs, about one's religious beliefs are probably an important social lubricant.[136] But like other forms of false speech, religious insincerity can sometimes harm others. When it does, the calculus of religious freedom flips. Conduct that was protected may be punished. A claim for removing a burden on phony religious exercise is nothing other than rent-seeking.

Religious insincerity causes two kinds of harm to others: fraud, either on private parties or the government, and false accommodation claims, either against a private employer or the government. The persons harmed, and the gravity of that harm, depends on the context. Declining to adjudicate religious sincerity would ignore these harms, and could multiply them by inviting phony claims.

1. Fraud

This paper focuses on the adjudication of religious sincerity in the context of religious accommodation cases, but it is important to remember that a general principle against adjudicating religious sincerity would prohibit the government from prosecuting fraud—of any sort—premised on religious insincerity. This is what John Oliver apparently

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135. Of course, limiting religious accommodations by making the doctrine less generous would also alleviate some of these costs. For purposes of this Article, I take the current doctrine across the range of constitutional and statutory accommodations, federal and state, for granted. To the extent the law does extend religious accommodations, however, failing to enforce the sincerity requirement will come with the costs discussed in this Part.

136. *See* WILLIAMS, *supra* note 94, at 117 ("[I]t can be a tiresome feature of villages, as John Stuart Mill observed, that everything is everyone's business. Indeed, small traditional societies are typically full of lies, because it is so hard to keep anything secret.").

believes the Constitution requires and what some scholars believe to be desirable. Any attempt to capture the cost of avoiding inquiries into religious sincerity must therefore consider the costs of religious fraud.

The harm of a confidence game is obvious. A religious charlatan uses something that many people place beyond value to bilk them of money, time, and energy. Justice Jackson argued that the worst harm of religious fraud is the "mental and spiritual poison" it imparts to believers.[137] He further implied that the Constitution puts *all* the harms of religious fraud beyond punishment.[138] To the contrary: the First Amendment may require Americans to "put up with, and even pay for, a good deal of rubbish,"[139] but it does not protect knowing falsehoods that harm others, and it never has.[140]

2. Accommodation Claims

The harms caused by false accommodation claims vary with the circumstance. For instance, employers often contest a religious accommodation plaintiff's sincerity.[141] When the employer chooses not to grant an accommodation, the employee sues the employer for discrimination. The plaintiff must demonstrate sincerity.[142]

The costs of religious insincerity in the employment context depend on whether it is detected and litigated. If so, the costs are principally those associated with litigating the dispute.[143] If not, and the employer

137. *Ballard*, 322 U.S. at 95.

138. *Id*.

139. *Id.*

140. United States v. Alvarez, __ U.S. __, 132 S. Ct. 2537, 2544–46 (2012) (discussing cases where the court held that the First Amendment does not protect knowing falsehoods that harm others).

141. *See* 42 U.S.C. § 2000e-2(a)(1) (2012) (stating that it is unlawful for an employer to "discriminate against any individual with respect to his . . . religion . . ."); 29 C.F.R. § 1605.2 (2016) (outlining the "reasonable accommodation" and "undue hardship" elements of an employment religious discrimination claim); Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977); J. Gregory Grisham & Robbin W. Hutton, *Religious Accommodation in the Workplace: Current Trends Under Title VII*, 15 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 60, 60 (2014) ("[T]here has been an eighty-seven percent increase in the number of religious discrimination charges filed with the [EEOC] over the past ten years.").

142. Davis v. Fort Bend County, 765 F.3d 480, 485–86 (5th Cir. 2014); Adeyeye v. Heartland Sweeteners, LLC, 721 F.3d 444, 451–54 (7th Cir. 2013); Heller v. EBB Auto Co., 8 F.3d 1433, 1438–39 (9th Cir. 1993).

143. *See* Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 121 (2009); Laura Beth Nielsen, Robert L. Nelson, & Ryon Lancaster, *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 184–87 (2010).

provides an "accommodation," the costs amount to the sum of litigation (if any) and the economic and social costs to the employer, other employees, and perhaps even to customers, of giving the claimant something of value to which the claimant was not entitled.[144]

Prisoner accommodation cases also sometimes raise issues of religious sincerity.[145] RLUIPA subjects state and federal prisoner religious accommodation claims to the compelling-interest test.[146] The government has strong interests in prison uniformity, safety, and thrift, so it often has good reason to challenge religious accommodation requests on any ground available, including insincerity.[147] And unlike a claim for an accommodation from a generally applicable law, the potential political cost to the government of challenging a prisoner's religious sincerity approaches zero.

The costs of insincere religious accommodation claims in the prison context are similar to those in the employee context, with a couple of wrinkles. First, the taxpayer is paying the tab for the litigation and the "accommodation" of a phony claim. Second, the "accommodation" may impose some unique burdens on others, including heightened danger or inconvenience for other inmates and prison officials.[148]

The final category of claims that may call for an adjudication of religious sincerity arise when a claimant seeks an accommodation from a legal obligation that allegedly imposes a burden on the claimant's religious exercise. A host of constitutional, statutory, and regulatory provisions either expressly provide for such an accommodation or have been interpreted to do so. Some of them provide an accommodation from a specific law or regulation, such as mandatory military service. Others, like RFRA, potentially apply to virtually any legal obligation.

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144. Dallan F. Flake, *Bearing Burdens: Religious Accommodations that Adversely Affect Coworker Morale*, 76 OHIO ST. L.J. 169, 171, 175 (2015); Jennifer Fowler-Hermes & Luisette Gierbolini, *Religious Accommodation in the Workplace: The Devil Is in the Detail*, 88 FLA. B.J. 34, 35 (2014).

145. For a thoughtful analysis of insincere prisoner religious accommodation claims, see Brady, *supra* note 11.

146. 42 U.S.C. § 2000cc to § 2000cc-5 (2012).

147. *See* Holt v. Hobbs, 574 U.S. __, 135 S. Ct. 853, 863–65 (2015) (citing the government's compelling interest in prisons to reduce contraband or disguised identities); Cutter v. Wilkinson, 544 U.S. 709, 723 (2005) (describing congressional intent for RLUIPA to be applied with "the urgency of discipline, order, safety, and security in penal institutions" in mind).

148. *See Holt*, 135 S. Ct. at 863–65 (addressing the risks of RLUIPA as it must be applied with deference to prison officials who must still maintain order, security, and discipline). A significant risk to safety would probably defeat the claim under the "compelling governmental interest" and "least restrictive means" elements of a prison accommodation claim. 42 U.S.C. § 2000cc-1 (2012); *see also Cutter*, 544 U.S. at 723.

Although religious sincerity is a prerequisite for a successful religious accommodation claim outside of the prison context, the government rarely contests a claimant's sincerity. This may be for several reasons. One may be the no-orthodoxy principle. The government may be concerned that delving into the claimant's beliefs would violate the rule that the government may not adjudicate the accuracy of a claimant's religious belief. Another reason may be that insincerity (like any mental state) is hard to prove; many cases may be resolved in the government's favor on grounds that are easier to litigate. Yet another reason may be that the adjudication of sincerity is ordinarily a question of fact, and the vast majority of cases are resolved on questions of law before trial.[149] A final reason is that the government could be wary of political fallout for questioning the sincerity of a claimant whose beliefs may resonate with an important political constituency.

Given the costs associated with ignoring religious sincerity, the government should not hesitate to contest sincerity when it has reason to doubt the claimant's credibility. As with prisoner accommodation claims, an "accommodation" for other false accommodation claims may impose costs on third parties.[150] Religious accommodations, like all governmental distributions of rights, entail a trade-off of public goods. Religious freedom and equality is exchanged for administrative complication, financial costs, and, in some cases, increased burdens on others.[151] Accommodating a conscientious objector to war, for instance, shifts the burden of serving in the armed forces to another draftee. When the claim is insincere, an accommodation generates public costs and

149. *See generally infra* section IV.B.

150. At some point a religious accommodation may impose so many costs on third parties that it violates the Establishment Clause. *See generally* Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985). The degree to which a religious accommodation may burden third parties consistent with the Establishment Clause is a matter of academic dispute. *See, e.g.*, Richard W. Garnett, *Accommodation, Establishment, and Freedom of Religion*, 67 VAND. L. REV. EN BANC 39 (2014); Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343 (2014). The Court has consistently upheld statutes that accommodate religious exercise, even at another's expense, so long as the accommodation is not absolute and the government has an alternative way to alleviate the burdens imposed on third parties. *See* Brief of Constitutional Law Scholars as Amici Curiae in Support of Hobby Lobby and Conestoga, Et Al., Burwell v. Hobby Lobby Stores, Inc., 573 U.S. __, 134 S. Ct. 2751 (2014) (No. 13-354, 356).

151. For one account of how to determine whether an accommodation under a general accommodation law such as RFRA imposes a burden on third parties, see generally Nelson Tebbe, Micah Schwartzman, & Richard Schragger, *When Do Religious Accommodations Burden Others?*, *in* THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY (Susanna Mancini & Michel Rosenfield eds., forthcoming 2018) (on file with the author).

shifts private burdens without protecting religious liberty and equality. Furthermore, as the next two sections suggest, permitting insincere claims may indirectly harm religious liberty.

B. Doctrinal Implications

Abstaining from determining a claimant's sincerity also has negative effects on religious accommodation doctrine. First, a court's unaddressed suspicion about the claimant's sincerity may result in "suspicion creep." The court's suspicion may affect its analysis of whether the claimant's beliefs are "religious," and, if so, whether the government's regulation places a "substantial burden" on the claimant's religious exercise. Suspicion creep not only affects the analysis of the claim before the court; it also can contort the doctrinal analysis for future claimants whose claims are undoubtedly sincere.

Second, when courts are reticent to adjudicate religious sincerity, insincere claims appear to be a bigger problem than they really are. The government's "interest" in avoiding insincere claims is more "compelling" because there appears to be no way to stop them. An accommodation in one case could be a floodgate for insincere claims. The government has a "compelling interest" in preventing such a flood, and therefore a "compelling interest" in rejecting an accommodation for an admittedly sincere claimant.

1. "Suspicion Creep"

Ignoring religious sincerity can lead to suspicion creep. Suppose a court suspects a claimant is insincere. Suspicion creep occurs when a court's suspicion improperly influences its analysis of other doctrinal components of the claim.

Religious accommodation claimants must ordinarily establish that the government's regulation places a "substantial burden" on their "religious exercise."[152] To establish these elements, a claimant must show that the beliefs are (1) sincere, (2) religious, and (3) substantially burdened.[153]

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152. Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 427–30 (2006); *see also* Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–bb-4 (2012); Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc–cc-5 (2012); Angela C. Carmella, *State Constitutional Protections of Religious Exercise: An Emerging Post-*Smith *Jurisprudence*, 1993 BYU L. REV. 275 (discussing these elements in state constitutional law); Andy G. Olree, *The Continuing Threshold Test for Free Exercise Claims*, 17 WM. & MARY BILL RTS. J. 103 (2008) (arguing that the prima facie case for claims under the Free Exercise Clause, including the sincerity requirement, survived *Smith*).

153. *See, e.g.*, Holt v. Hobbs, 574 U.S. __, 135 S. Ct. 853, 862 (2015); Oklevueha Native Am.

The government must then show that the regulation is the "least restrictive means" of achieving a "compelling governmental interest."[154] Since claimants bear the burden of showing that their beliefs are religious and substantially burdened, these are the components of a religious accommodation claim most likely to suffer the effects of suspicion creep.

Consider a recent case. A prisoner alleged that he believes the Flying Spaghetti Monster is responsible for gravity (by pushing everything down with its invisible glutinous appendages), and he seeks an accommodation from prison regulations so that he can celebrate "FSMism" by eating large bowls of pasta and wearing pirate garb.[155] Suppose that the claim goes to a bench trial. Suppose further that the judge (wrongly) believes that the no-orthodoxy principle prohibits the adjudication of a claimant's religious sincerity. But the judge cannot shake the suspicion that the claimant does not really believe in the Flying Spaghetti Monster. Were the judge to allow that suspicion to influence, sub silentio, the analysis of another element of the accommodation analysis, such as whether FSMism is really a "religion," or whether the prison regulations imposed a "substantial burden" on the claimant's "religious exercise," the result would be suspicion creep.[156]

The ills of suspicion creep are at least twofold. At a minimum, a court is issuing a judgment without giving the full reasons for it. The point of written opinions is to demonstrate that the court is engaged in legal reasoning and attempting to follow the law. A judgment based on secret reasons undermines the rule of law. But judges probably routinely issue judgments based in part on unstated—and indeed subconscious—reasons. A more important concern, perhaps, is that suspicion creep can have the unintended effect of perverting a court's articulation of the requirements for a religious accommodation claim, making it harder for sincere claimants in future cases to state a claim.

Unsurprisingly, suspicion creep is hard to demonstrate. A judge is unlikely to say he is ruling against a claimant on grounds other than

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Church of Haw., Inc. v. Lynch, 828 F.3d 1012, 1015 (9th Cir. 2016).

154. *See* Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (2012); Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc (2012); Religious Freedom Protected, TEX. CIV. PRAC. & REM. CODE § 110.003 (West 2011).

155. *See* Cavanaugh v. Bartelt, 178 F. Supp. 3d 819, 823–26 (D. Neb. 2016).

156. For a possible example of this, see Kazemzadeh v. U.S. Att'y Gen., 577 F.3d 1341, 1364 (11th Cir. 2009) (Edenfield, J., dissenting) ("[i]n this case, although the Immigration Judge never directly addressed the issue of credibility, she commented throughout her order on the numerous questionable aspects of Kazemzadeh's conversion" and ultimately concluded that he did not have a well-founded fear of religious persecution in Iran).

sincerity because the judge suspects the claimant is insincere. And, of course, religious insincerity rarely operates in a vacuum. A judgment against an insincere religious accommodation claim, for instance, is over-determined. Without sincerity, there is no "religious exercise" and therefore no "substantial burden" on it.[157]

So how do we know that suspicion creep happens? Perhaps the best answer, though the least susceptible to proof, is common sense. A number of criminal defendants charged with illegal possession of marijuana have claimed a religious accommodation. For every case in which a court has expressly questioned the defendant's religious sincerity,[158] there is another in which the court squeezed reasonable suspicion about the claimant's sincerity into its analysis of another doctrinal question. One district judge, for instance, noted that "[t]he Court has given [defendant] the benefit of the doubt by not scrutinizing the sincerity of his beliefs . . . . even though it suspects [the defendant] is astute enough to know that by calling his beliefs 'religious,' the First Amendment or RFRA might immunize him from prosecution."[159]

In other cases, a court's rhetoric and analysis may suggest suspicion. In one of the recent contraception mandate cases, for instance, Judge Posner seemed to question whether the University of Notre Dame really held the beliefs that motivated its accommodation claim.[160] Notre Dame had argued that its religion forbade it from doing two things that the regulation required: executing the paperwork that would legally authorize and/or obligate its insurance providers to provide contraception coverage; and maintaining a contractual relationship with a provider that provided such coverage.[161] The government did not contest Notre Dame's sincerity, so the court was bound to accept it.

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157. *See, e.g.*, *Cavanaugh*, 178 F. Supp. 3d at 824 (suggesting that "the deliberate absurdity of [FSMism's] provisions would undermine" prisoner's argument for a religious accommodation).

158. *See* United States v. Quaintance, 608 F.3d 717 (10th Cir. 2010); United States v. Kuch, 288 F. Supp. 439, 444–45 (D.D.C. 1968) ("In short, the 'Catechism and Handbook' is full of goofy nonsense, contradictions, and irreverent expressions. There is a conscious effort to assert in passing the attributes of religion but obviously only for tactical purposes."); Lineker v. State, No. A-8957, 2010 WL 200014 (Alaska Ct. App., Jan. 20, 2010) (upholding trial court determination that claimant lacked a sincere religious belief for possessing marijuana).

159. United States v. Meyers, 906 F. Supp. 1494, 1509 (D. Wyo. 1995) ("The Court notes that Meyers' professed beliefs have an ad hoc quality that neatly justify his desire to smoke marijuana."); *see also* Oklevueha Native Am. Church of Haw., Inc., v. Lynch, 828 F.3d 1012 (9th Cir. 2016) (holding, under similar circumstances, that a prohibition on marijuana use does not "substantially burden" claimant's asserted beliefs because the claimant's religion does not require marijuana use).

160. Univ. of Notre Dame v. Burwell, 786 F.3d 606 (7th Cir. 2015).

161. *See* Appellant's Petition for Rehearing En Banc at 1, *Univ. of Notre Dame*, 786 F.3d 606

Nevertheless, Posner repeatedly framed Notre Dame's allegations about its religious beliefs in a way that suggested he was suspicious: "[b]ecause of its contractual relations with the two [insurance providers] . . . Notre Dame *claims* to be complicit in the sin of contraception[;]"[162] "Notre Dame *tells us* that it likewise objects to [another regulatory] alternative."[163] The more appropriate way to put it, given the procedural context, was that "Notre Dame [believes it is] complicit" and "Notre Dame likewise objects to that alternative." Posner's qualifiers suggest suspicion.

Furthermore, Posner emphasized a number of facts about the case that may have been relevant to determining Notre Dame's sincerity, but, assuming its sincerity, had no bearing on whether the regulations created a "substantial burden" on its religious exercise. He recalled that Notre Dame's prior conduct had been somewhat inconsistent with its religious beliefs,[164] emphasized repeatedly that he did not understand how Notre Dame's proposed regulatory solution would avoid complicity with sin,[165] and contrasted Notre Dame's religious objection with the objections of other nonprofits that accepted the government's accommodation.[166] All of these may be relevant to assessing Notre Dame's sincerity, but once it was established (or assumed as a matter of law) that Notre Dame sincerely believed that its religion forbade it from the conduct required by the government, these facts were irrelevant to whether the regulatory scheme substantially burdened that religious exercise.[167] Ultimately, it seems likely that Posner raised these points because he believed that

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(No. 13–3853).

162. *Univ. of Notre Dame*, 786 F.3d at 611 (emphasis added).

163. *Id.* at 618 (emphasis added).

164. *Id.* at 611 (Notre Dame signed Form 700 to avoid liability); *see also id.* at 610 ("When the accommodation was promulgated in July of 2013, Notre Dame did not at first bring a new suit . . . . Not until December 2013 did the university file the present suit, challenging the accommodation. The delay in suing was awkward, since the regulations were to take effect . . . on January 1, 2014."); *id.* ("The next day—the last day before it would be penalized for violating the regulations—the university signed EBSA Form 700 and thereby opted out of providing contraceptive coverage for its employees . . . . Later it signed the same form regarding Aetna.").

165. *Id.* at 612 ("It's difficult to see how that would make the health plan any less of a 'conduit' between Notre Dame and Aetna/Meritain."); *see also id.* at 617 ("Nor does Notre Dame explain how a government program that directly or indirectly provided contraception coverage to Notre Dame employees—as Notre Dame suggests—would avoid complicity in sin.").

166. *Id.* at 618 ("Notre Dame tells us that it likewise objects to that alternative. . . . the accommodation sought and received by Wheaton College.").

167. Posner was correct that "the courts cannot substitute even the most sincere religious beliefs for legal analysis" of whether the government was imposing a "substantial burden" under the statute. *See id.* at 622; *infra* section V.B.

Notre Dame was insincere, something he did not say directly, or because he believed that their religious beliefs—especially their beliefs about complicity—were implausible, something the no-orthodoxy principle puts outside the courts' authority.[168]

It is impossible to tell whether the court's suspicion (or perhaps its view that Notre Dame's religious beliefs were implausible) affected its doctrinal analysis. Because the court of appeals was only called upon to determine whether the district court had abused its discretion by declining to issue a preliminary injunction in the case, it did not have occasion to conclusively determine the legal issues. Judge Posner's rhetoric and analysis suggest, however, that he believed Notre Dame was not entirely forthcoming. Given that the government did not contest Notre Dame's sincerity, he should have consciously set aside his suspicion, rather than slipping it rhetorically into his analysis of the other elements of the claim.

Despite occasional examples of overt suspicion creep, and more frequent examples of tacit suspicion creep, there are probably more cases where the court's suspicion influences its legal analysis sub silentio. This form of suspicion creep is the most troubling, for it fails to signal to other courts the role that suspicion played in the analysis. This risks systemic doctrinal effects that disadvantage other religious accommodation claimants.

Suspicion creep is entirely understandable. Evidence of religious insincerity is relevant to a religious accommodation claim. Lawyers have long known that factfinders have a difficult time ignoring relevant evidence, even when rules of evidence place it out-of-bounds. This is why courts routinely decide evidentiary disputes without the jury present, to prevent evidence that is relevant, but prejudicial, from influencing the jury. In this respect, suspicion creep is no different from the effects of attempting to suppress any relevant evidence. A court that does not directly consider sincerity is nevertheless likely to be influenced by evidence of insincerity.

The procedural rules, too, contribute to suspicion creep. Because sincerity is a question of fact, not of law, courts are unlikely to resolve a case on sincerity before trial. On a motion to dismiss, the court will presume that the claimant's alleged religious sincerity is true.[169] On a motion for summary judgment against the plaintiff, the court will

168. *See Univ. of Notre Dame*, 786 F.3d at 628 (Flaum, J., dissenting) ("Yet the majority here sides with HHS, and 'in effect tell[s] the plaintiff[] that [its] beliefs are flawed.'" (quoting Burwell v. Hobby Lobby Stores, Inc., 573 U.S. __, 134 S. Ct. 2751 (2014))).

169. Fed. R. Civ. P. 12(b); *see* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

construe the evidence in favor of the plaintiff's sincerity.[170] The vast majority of cases are decided before trial, with a judgment on the pleadings or summary judgment.[171] Moreover, the government often (but not always) concedes a claimant's sincerity. The result is that trial courts rarely have an occasion to directly address the claimant's sincerity, even when the pleadings or evidence give rise to a suspicion of insincerity. Appellate courts, in turn, usually restrict themselves to reviewing the trial court's decisions; when the trial court made no decision about the claimant's sincerity, the appellate court has no occasion to review it.

Even when a court has determined that a religious accommodation claimant has carried the burden of showing religious sincerity by a preponderance of the evidence, the court may still have some doubt about it. A fifty-one percent chance of sincerity is sufficient to satisfy the legal standard, but it is unlikely to keep a court from allowing the forty-nine percent chance of insincerity to influence its legal analysis. All of these practicalities of adjudication help to explain why suspicion creep occurs, but they do not justify it. In fact, suspicion creep may be especially unfair when a litigant has not been obligated to establish sincerity because the opponent did not contest it or because the court decided the case on the pleadings (or both).

Avoiding concerns about insincerity does not make the issue go away; it transforms it, submerges it, and raises rule-of-law problems.[172] As the next two Parts of this Article explain, when courts confront suspicious religious claims, they should either address them head-on in a manner consistent with the no-orthodoxy principle, or self-consciously avoid allowing those suspicions to affect their legal analysis of whether the claimant's exercise is "religious" and whether the government regulation "substantially burdens" it. Both of these are legal questions for the court to determine, quite apart from the factual question about whether the claimant sincerely believes what he or she claims to believe.

2. A Flood of Insincere Claims

Systematically ignoring religious sincerity out of a concern that adjudicating it would run afoul of the no-orthodoxy principle can also

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170. Fed. R. Civ. P. 56. *See generally* Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

171. *See* VALERIE HANS & NEIL VIDMAR, AMERICAN JURIES: THE VERDICT ch. 1 (2007).

172. *See* Brady, *supra* note 11, at 1450 ("It is troubling that courts might be relying on unexpressed sincerity tests . . . . If sincerity is the determinative issue in RFRA and RLUIPA cases, courts should address the issue openly—not through implicit and imperfect proxies.").

limit religious liberty by giving the government a good reason to deny religious accommodations: the risk of insincere claims.

Once a claimant has established that a government regulation places a substantial burden on her sincere religious exercise, the government must show that the regulation is the least restrictive means of accomplishing a compelling government interest. One way for the government to meet this burden is to show that there would be so many legitimate demands for a religious accommodation that those accommodations would completely undermine the regulation.[173] This concern is entirely legitimate. Sometimes, however, a court will go further—it will consider the costs of *insincere* claims that might result from granting an accommodation for a sincere one.

Consider *United States v. Adeyemo*.[174] The government indicted the defendant for importing leopard skins without a permit and without declaring them.[175] The defendant asserted a defense to prosecution under RFRA.[176] According to the defendant, the non-importation law substantially burdened his use of leopard skins in the exercise of his Santeria religious beliefs.[177] The government issues permits for importing leopard skins, but not for religious reasons.[178] The court determined that the government had carried its burden of showing that religious accommodations from the non-importation law would undermine its compelling interest in protecting leopards.[179] The court listed several reasons. One of them was that there are enough Santerians in the United States who might want leopard skins that issuing permits on religious grounds would lead to the eradication of the species.[180] This may be an entirely legitimate concern. It goes to the heart of the government's compelling interest in not allowing a particular religious accommodation.[181]

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173. *See, e.g.*, United States v. Lee, 455 U.S. 252 (1982) (denying a Free Exercise accommodation from social security taxes partly on the ground that the government had a high interest in avoiding a flood of indistinguishable religious accommodation claims that would undermine the federal tax system).

174. 624 F. Supp. 2d 1081 (N.D. Cal. 2008).

175. *Id.* at 1091–92.

176. *Id.* at 1084.

177. *Id.*

178. *Id.* at 1085.

179. *Id.* at 1089–90.

180. *Id.*

181. *Id.* at 1091–92 (stating the government must have compelling interest in not allowing *this accommodation* of not allowing a religious exception to importing leopard skins, as opposed to a compelling interest in general).

The court went on, however, to agree with the government that allowing sincere religious accommodations would also encourage phony claims, which would be difficult to administer and may further decimate the species.[182] An accommodation may give rise to insincere claims, but the challenge of restricting insincere claims should not counsel against an accommodation for sincere ones.[183] As explained in Part IV, the government can sort out insincere claims. A speculative risk of false claimants and the administrative costs of outing them should not defeat a sincere claim unless, perhaps, "actual experience proved [false claims] to be a substantial obstacle" to the government's compelling interests.[184]

C. Distrusting Religious Liberty

Ignoring religious sincerity may have another important cost. When the government gives a pass to those who insincerely claim the benefits of religious liberty, it erodes the value of that liberty in the eyes of the public.

What could be a more powerful illustration of this phenomenon than the John Oliver sketch discussed at the beginning of this Article? Oliver sought to parody religious fraudsters precisely to illustrate that U.S. religious liberty law is too lax. In a sense, he ridiculed not only scam artists, but religious liberty itself. Perhaps Oliver's misperception of the sincerity requirement is widely shared. But the misperception that religious liberty entails the protection of phony religious claims undermines public support for the protection of sincere ones. Such a conclusion by the public is only sensible: if "religious liberty" inoculates fraudulent claims, perhaps we should rethink it. Eroding support for religious liberty altogether is a high price to pay simply because it is believed that courts cannot be trusted to weed out insincere claims.

As the next Part explains, all of the foregoing costs that arise from ignoring religious sincerity—to others, to doctrine, and to religious liberty itself—are avoidable. Courts may adjudicate religious sincerity without running afoul of the Constitution's no-orthodoxy principle.

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182. *Id.* at 1092.

183. *See, e.g.*, McConnell, *supra* note 14, at 53.

184. Giannella, *supra* note 14, at 1416; *see also* Sherbert v. Verner, 374 U.S. 398, 407 (1963) ("[I]t is highly doubtful whether such evidence [of the possibility of fraudulent claims] would be sufficient to warrant a substantial infringement of religious liberties."); Pepper, *supra* note 21, at 328.

IV. THREADING THE NEEDLE

Courts lack clear direction about the nuts and bolts of adjudicating religious sincerity.[185] This Part explains how courts may adjudicate religious sincerity without violating the no-orthodoxy principle. They should evaluate religious sincerity just as they would any other mental state, with one important caveat: they should avoid inferring insincerity from implausibility. Otherwise, courts should adjudicate religious sincerity subject to the ordinary rules of procedure and evidence, and should carefully weigh evidence of ulterior motive, personal inconsistency, and idiosyncrasy.

A. Burden of Proof

A religious accommodation claimant usually bears the burden of proving by a preponderance of the evidence that her religious exercise is based on a sincere religious belief. To avoid running afoul of the no-orthodoxy principle, some scholars suggest that courts should raise the burden of proof[186] and shift it to the opponent.[187] This would be a major exception to the rules of procedure and evidence, one the Constitution simply does not require.[188]

A religious accommodation claimant must usually show sincerity by a preponderance of the evidence.[189] Sincerity is a question of fact.[190] As a practical matter, the burden on the plaintiff depends on the motion

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185. *See* BRADY, *supra* note 20, at 204 ("The feasibility of a judicially enforceable right of exemption under the Free Exercise Clause will depend on formulating a workable, fair, and properly limited approach to sincerity questions."); Adams & Barmore, *supra* note 7, at 65 ("Even when weighing the sincerity of individual religious beliefs, '[c]ourts are often unclear about which party bears the burden of proof and what evidence is permissible.'"); Brady, *supra* note 11, at 1433 ("[C]ourts have not developed a formal sincerity test in RFRA and RLUIPA cases.").

186. *See* BRADY, *supra* note 20, at 282 (arguing that "courts should look for a clear and unmistakable discrepancy between the believer's claims and their [sic] behavior before concluding that their [sic] claims are insincere").

187. *See id.* at 283 ("A heightened evidentiary requirement also reduces the risk of discriminatory decision making more broadly."); Brady, *supra* note 11, at 1455–56.

188. *See, e.g.*, Pepper, *supra* note 21, at 328.

189. *See* Holt v. Hobbs, 574 U.S. __, 135 S. Ct. 853, 862 (2015) ("In addition to showing that the relevant exercise of religion is grounded in a sincerely held religious belief, petitioner also bore the burden of proving that the Department's grooming policy substantially burdened that exercise of religion."). One exception is the bankruptcy code, which essentially creates a presumption of sincerity for a pre-bankruptcy charitable transfer that is less than fifteen percent of income, or "consistent with the practices of the debtor in making charitable contributions." 11 U.S.C. § 548(a)(2) (2012).

190. *See* United States v. Seeger, 380 U.S. 163, 185 (1965).

before the court and whether the opponent has contested sincerity.[191] On a motion to dismiss, the court accepts the plaintiff's allegations as true and determines whether the plaintiff's claim can be dismissed solely on legal grounds.[192] The court does not adjudicate the plaintiff's sincerity. On a defendant's motion for summary judgment, the court construes the evidence in favor of the plaintiff's allegations to determine whether there is a genuine issue of material fact worthy of going to trial.[193] Unless the defendant has presented evidence of insincerity and the plaintiff has failed to present any credible evidence of sincerity, the court will likely not enter summary judgment on that ground.[194] If the opponent never contests sincerity, then the claimant, having put some evidence of sincerity into the record, has established it as a matter of law (regardless the stage of litigation). As a practical matter, therefore, before trial, the rules of procedure ordinarily favor a claimant's allegations of sincerity and presentation of some evidence of sincerity.[195]

Some scholars have argued that the burden should shift in accommodation cases, requiring the opponent to establish that the claimant is insincere.[196] Some have also suggested that the standard of proof ought to be higher than normal. Professor Kathleen Brady, for instance, argues that "courts should look for clear and unmistakable discrepancy between the believer's claims and their behavior before concluding that their claims are insincere."[197] According to Brady, "[a] heightened evidentiary requirement . . . reduces the risk of discriminatory decision making . . . . A narrowly tailored inquiry with a demanding standard of proof leaves less room for judges to equate

191. *See* Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 428–30 (2006) (discussing the pretrial burdens of proof under RFRA).

192. *See, e.g.*, Fed. R. Civ. P. 12(b)(6); Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

193. Fed. R. Civ. P. 56. *See generally* Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

194. EEOC v. Unión Independiente de la Autoridad de Acueductos y Alcantarillados de P. R., 279 F.3d 49, 56–57 (1st Cir. 2002); Snyder v. Murray City Corp., 124 F.3d 1349, 1352–53 (10th Cir. 1997).

195. The pretrial procedure does not change the claimant's burden when the claimant moves for judgment before trial or at trial. The plaintiff must still establish sincerity by a preponderance of the evidence.

196. *See* BRADY, *supra* note 20, at 282 (arguing that courts should require "clear and unmistakable evidence of insincerity," which means that the burden is on the opponent to present such evidence). *But see* Riga, *supra* note 21, at 260 ("[S]ince Free Exercise claims are proper to the individual alone, it is fair and equitable to place the burden of sincerity upon him and not upon the government.").

197. BRADY, *supra* note 20, at 282.

assertions that they view as kooky or implausible with claims that are insincere."[198]

Brady's constitutional concern is well placed, but her proposed remedy is unnecessary. The most precise way to prevent courts from violating the no-orthodoxy principle is to prohibit them from inferring insincerity from implausibility. Although constitutional and common law doctrines occasionally overprotect constitutional rights, courts should also take the costs of overprotection into account. In this case, requiring the opponent to prove insincerity would be inconsistent with an array of statutory regimes. It would also make it harder to weed out and thereby reduce the costs of insincere claims. An approach more tailored to the contours of the no-orthodoxy principle would neutralize Brady's concerns without violating the Constitution.

B. The Caveat: No Inferring Insincerity from Inaccuracy

Although the Supreme Court has stated that "*any* fact which casts doubt on the veracity of the [selective service] registrant is relevant,"[199] as discussed in Part II above, the no-orthodoxy principle demands an important caveat. Courts may not evaluate the "truth" of one's religious claims. In determining religious sincerity, what this means is that courts may neither determine as a factual matter that a religious claim is inaccurate, nor infer from a claim's apparent inaccuracy or implausibility that the claimant is insincere. This section provides a conceptual distinction between accuracy and sincerity, explains that courts and factfinders routinely distinguish between these concepts, and shows briefly how courts can protect against inferring insincerity from inaccuracy, steering clear of the no-orthodoxy principle.

1. Distinguishing Accuracy and Sincerity

Whether a religious belief is accurate is different from whether it is sincerely held. Accuracy and sincerity are both aspects of what philosopher Bernard Williams has called "truthfulness"—they overlap, but they are distinct.[200] Accuracy describes the correspondence between a statement (or a belief) and the object of that statement or belief. The accuracy of a statement is subject to empirical study. Whether a statement is in fact accurate is different from whether the speaker

198. *Id.* at 283.

199. Witmer v. United States, 348 U.S. 375, 381 (1955) (emphasis added).

200. *See* WILLIAMS, *supra* note 94.

actually believes what she asserts or claims to believe, i.e., whether the speaker is sincere. To oversimplify, perhaps, accuracy depends on the statement's correspondence to observable reality external to the speaker. Sincerity depends on the statement's correspondence to the speaker's subjective belief.

Both are crucial aspects of truthfulness, and the habits and abilities that help one become more adept at speaking accurately overlap with those that help one to become more adept at speaking sincerely. But the accuracy of a statement and the speaker's sincerity are nonetheless distinguishable. Suppose a speaker says, "that car is blue." The speaker is colorblind; the car is green. The speaker believes that the statement is accurate. The speaker is sincere, but the statement is inaccurate.

Suppose again that the colorblind speaker says, "the car is blue." And the car *is* blue. But this time the speaker believes it is green. He only said the car was blue to tease his young niece who is trying to learn her colors. (Admittedly a game to which the colorblind are not well suited.) Here we have the inverse of the prior hypothetical. The speaker is *insincere* (he believes the car is green) but the statement is nonetheless *accurate* (the car actually is blue).

This all seems fairly straightforward as applied to the color of a car. It gets somewhat more complicated as applied to religious beliefs, for an accommodation claim ordinarily entails beliefs not only about religion, but also about religious morality. A claimant could be inaccurate or insincere, or both, about either one. Under the no-orthodoxy principle, the government may not adjudicate the accuracy of the claimant's religious views, or the accuracy of the claimant's religious beliefs, whether they are about religious doctrine or religiously influenced morality. It may, though, adjudicate the claimant's sincerity as to either.

Consider the following example. A prisoner claims that his religion forbids him from cutting his beard, so he is entitled to an accommodation from the prison's no-beard policy. Here, there are two levels of potential inaccuracy. Most broadly, the claimant's religion may inaccurately describe God and God's commands. For instance, suppose the religion is theistic and, in fact, there is no God. Or the religion may be a variant of Christianity and in fact, perhaps, Jesus Christ was not in any way divine. And so on. It seems fairly settled and noncontroversial that the government may not determine that the claimant's religion, or any of its theological claims, is inaccurate. Nor, as I have suggested, may the government infer that the claimant is insincere simply because his claimed belief is either inaccurate or implausible.

Another possible inaccuracy arises, however. What if the claimant is simply inaccurate about whether his religion actually forbids him from

shaving his beard? Maybe he sincerely believes it does, but he is simply wrong. No one else who shares his religious beliefs agrees with him. And there appears to be no ordinary logic that would lead someone to conclude, based on whatever authorities dictate his religious morality, that the religion forbids an adherent from shaving. Suppose the *reason* this particular adherent believes his religion forbids beard-shaving is because its holy texts forbid touching another person's hair trimmings, and from this prohibition the adherent has determined that he cannot make it easier for someone else to violate this prohibition by shaving his beard and sending the trimmings on their merry way.

All of this—the clear prohibition, the adherent's reasoning, and the adherent's conscientious conclusion—are likewise questions of religious accuracy, beyond a court's ken. Whether the belief accurately reflects the best understanding of the religion would require the government to determine the best understanding of that religion, something the no-orthodoxy principle flatly prohibits. So too with whether the claimant's moral reasoning, or conscientious judgment on the basis of that reasoning, reflects either the community's beliefs or an accurate mode of moral reasoning. Some may find it unfortunate, from a theological, social, or cultural perspective, that the no-orthodoxy principle tolerates religious atomism. But it does. With respect to religious accuracy—including accuracy about what the claimant's religion requires—each person is an island.[201]

None of this, however, means that the government may not question whether the claimant sincerely believes that his religion forbids him from shaving his beard. And if the claimant cannot demonstrate that he sincerely believes this, the law does not require the government to permit an accommodation.

Much of the above is fairly well established in law, even though the Supreme Court justices sometimes appear to be confused about it. I have merely suggested a subtle change in language that should help to clarify the concepts. The government may adjudicate religious sincerity, but not religious accuracy or plausibility, understood as the likelihood that a belief or statement is accurate. My proposed contribution is simple: in the course of adjudicating religious sincerity, the government should avoid inferring insincerity from evidence of inaccuracy or implausibility. This notion is not entirely new,[202] but the forgoing distinction between sincerity and accuracy should make it clearer.

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201. *See, e.g.*, Thomas v. Review Bd., 450 U.S. 707, 715–16 (1981).

202. Adams & Barmore, *supra* note 7, at 64 ("Provided that courts take care that their test for sincerity is truly one for fraud, not verity or centrality, placing this limit on RFRA claims will best

2. Sincerity and Accuracy in Law

The distinction between sincerity and accuracy is not otherwise foreign to American law. Substantive law often distinguishes between sincerity and accuracy. Criminal law,[203] tort,[204] securities regulation,[205] and professional responsibility rules,[206] for instance, all distinguish between negligent misrepresentation (inaccuracy) and knowing fraud (inaccuracy *and* insincerity). In general, evidence that the speaker was aware that his statements were false increases the punishment or liability, so litigants and courts often have reason to carefully distinguish between inaccuracy and insincerity.[207]

Routine trial practice, too, requires judges and juries to distinguish between accuracy and sincerity. One thing that sets the common law system apart is the reliance on witness testimony rather than written answers to interrogatories.[208] One of the justifications for this difference is the belief that the probative value of testimony depends in part on the speaker's credibility, which is easier to judge in person through the real-time adversarial process.[209] Factfinders facing inconsistent testimony thus have to distinguish not only between the accuracy of the respective witnesses, but their sincerity.[210] To be sure, witnesses can sincerely disagree, leaving nothing for the factfinder to do but to determine, based

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effectuate Congress's intent."); McConnell, *supra* note 14, at 37 (noting that "the government can adopt screening devices designed to separate faith from fraud" "so long as the government confines its inquiry to the sincerity—as distinguished from the truth—of the individual's professed beliefs"); *see also* EISENBERG, *supra* note 20, at 106 ("The sincerity approach [under Canadian constitutional law] takes seriously the problems of authenticity by establishing the authenticity of a practice on the basis of evidence that can be reliably assessed but which steers clear of contentious considerations of doctrinal requirements of a religion.").

203. MODEL PENAL CODE § 2.02 (AM. LAW INST. 1962) (providing a gradient of measuring a defendant's culpability ranging from "purposely" to "negligently").

204. *Compare* RESTATEMENT (SECOND) OF TORTS § 552 (AM. LAW INST. 1977) (defining negligent misrepresentation), *with* RESTATEMENT (SECOND) OF TORTS § 526 (AM. LAW INST. 1977) (defining fraudulent misrepresentation requiring intent).

205. *See* 17 C.F.R. § 240.10b-5 (2016) (making it unlawful to commit fraud in connection with the purchase or sale of a security); Aaron v. SEC, 446 U.S. 680, 691 (1980) (stating "scienter is an element of a violation of § 10(b) and Rule 10b-5").

206. MODEL RULES OF PROF'L CONDUCT r. 1.0 (AM. BAR ASS'N 1983) (noting "fraud" requires a purpose or intent to deceive).

207. *See supra* notes 203–06.

208. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 373–74 (1768).

209. *See* JOHN H. LANGBEIN, THE ORIGINS OF THE ADVERSARY CRIMINAL TRIAL 246 (2003).

210. *See, e.g.*, Patrick v. LeFevre, 745 F.2d 153, 157 (2d Cir. 1984) ("[A]ssessing a claimant's sincerity of [religious] belief demands a full exposition of facts and the opportunity for the factfinder to observe the claimant's demeanor during direct and cross-examination.").

on other evidence, which account is more accurate. But often factfinders discount the testimony of witnesses they perceive to be insincere. So the conceptual compartmentalization of accuracy and sincerity, though perhaps unusual in ordinary life, is typical in law. The constitutional rule prohibiting courts from adjudicating the accuracy of religious claims but permitting the adjudication of religious sincerity is an outlier for prohibiting the one but not the other, but not for distinguishing between them.

3. Limiting the Factfinder's Use of Evidence of Inaccuracy

A number of scholars have urged that prohibiting the adjudication of religious accuracy is not enough—courts should also avoid adjudicating religious sincerity whenever possible. The reason is that evidence of plausibility is ordinarily probative of sincerity. The more implausible a factfinder believes the religious belief to be, the harder it will be for the factfinder to conclude that the claimant actually believes it.

The remedy is too much. Courts should admit all evidence probative of sincerity, other than evidence of religious inaccuracy or implausibility. If the factfinder is a jury, an instruction to the effect that the jury should not base its view of the claimant's sincerity on its own view of the plausibility of the beliefs should suffice. The rules of evidence allow courts to admit evidence to show one thing but not another, and judges give limiting instructions all the time.[211] In fact, the trial court's proposed jury instructions in *Ballard* were not all that bad.[212]

Professor William Marshall has noted "at least some tension" between this reading of *Ballard* and *Employment Division v. Smith*.[213] In

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211. *See* FED. R. EVID. 105 (stating the court must restrict evidence if it is admissible for one purpose but not another).

212. *See United States v. Ballard*, 322 U.S. 78, 81–82 (1944) ("As far as this Court sees the issue, it is immaterial what these defendants preached or wrote or taught in their classes. They are not going to be permitted to speculate on the actuality of the happening of those incidents. Now, I think I have made that as clear as I can. Therefore, the religious beliefs of these defendants cannot be an issue in this court. The issue is: Did these defendants honestly and in good faith believe those things? If they did, they should be acquitted. I cannot make it any clearer than that."). Judge Noonan suggests that *Ballard* effectively prohibits a claimant from testifying that his religious beliefs are accurate. *See* Noonan, *supra* note 18, at 718. I don't believe *Ballard* requires this result. *Ballard* prohibits prosecution for inaccurate or implausible religious claims. I see no reason why a party could not testify about the content of his belief—indeed, he may have to do so to establish sincerity. And of course a sincere claimant will believe that his claims are accurate. What neither the claimant nor the opponent may do is attempt to establish the accuracy of the claims (a factual judgment ruled out by the no-orthodoxy principle) to show the claims are sincere.

213. 494 U.S. 872 (1990); William P. Marshall, Smith, Ballard, *and the Religious Inquiry*

Smith, the Court held that the Free Exercise Clause does not require an accommodation from a neutral and generally applicable law.[214] Exempting claimants (and fraud defendants) from neutral and generally applicable rules of evidence—like the rule that one may infer insincerity from evidence of implausibility—seems to be inconsistent with *Smith*.[215] As Marshall notes, though, the *Ballard* rule is distinguishable from *Smith* because it seeks to promote additional concerns about "government prosecution of unpopular religious beliefs" and the government's incompetence "to decide religious issues."[216] I would go further. As in *Hosanna-Tabor*,[217] the *Ballard* rule does not conflict with *Smith* because it arises not only from the Free Exercise Clause, but also from the Establishment Clause. Both clauses (and others besides) lend their weight and rationale to the no-orthodoxy principle, of which the *Ballard* rule is one instantiation.

Finally, some object to putting a claimant's sincerity to a jury on the ground that a jury is more likely than a judge to be biased against unusual religions.[218] Therefore, the argument goes, adjudicating sincerity by jury trial would particularly disadvantage adherents of unusual minority religions.[219]

The objection about jury bias is unproven. The most recent empirical studies, though not directly on point, call it into question. Jury pools tend to be more diverse than the corps of professional judges, and therefore more likely to identify with a wider array of claimants than judges as a whole. Moreover, any given jury is certain to be more diverse, just by virtue of numbers, than any given judge.[220] Unsurprisingly, therefore, recent empirical studies suggest that juries are more likely than judges to side with victims of unconstitutional conduct than with the

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Exception to the Criminal Law, 44 TEX. TECH. L. REV. 239, 256 (2011).

214. *Smith*, 494 U.S. at 890.

215. *See also* Mason, *supra* note 63, at 117–18 (arguing that "the constitutional prohibition on finding 'religious beliefs' to be 'false' must refer to the non-literal functions served, in context, by religious propositions" for *Ballard* to comply with *Smith*).

216. Marshall, *supra* note 213, at 257.

217. Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC, 565 U.S. 171, 188 (2012).

218. *See, e.g.*, Krotozynski, *supra* note 17, at 1085 ("If pervasive social prejudice against new, oddball religions and religionists is a social fact, then protecting belief requires more than simply refraining from submitting the truth of a religion's tenets to a jury."); Lupu, *supra* note 17, at 955 ("The bias built into standards of sincerity is aggravated by the allocation of functions in the judicial process."); Noonan, *supra* note 18, at 719 ("Is a jury capable of discerning when the use of a symbol is insincere and hypocritical?").

219. *See* Krotozynski, *supra* note 17, at 1085.

220. *See* Nathan S. Chapman, *The Jury's Constitutional Judgment*, 67 ALA. L. REV. 189, 237–39 (2015).

government.[221] While I am aware of no empirical studies about the adjudication of religious sincerity, based on the evidence that is available to religious accommodation claimants and their lawyers, it is not obvious that they would opt for a bench trial.

Some might respond to the concern about jury bias by pointing to the constitutional fact doctrine, by which an appellate court reviews de novo the facts relevant to a constitutional judgment. Some courts have extended the doctrine to justify de novo review of facts relevant to a statutory religious accommodation case.[222] The constitutional fact doctrine should not justify de novo review of a claimant's sincerity. In the first place, the Supreme Court has been reluctant to allow appellate courts to review de novo the credibility of a witness,[223] a task that would likely be central to reviewing many adjudications of religious sincerity. More fundamentally, the doctrine is unprincipled and should be discarded. As I have argued elsewhere, a doctrine born of legitimate concern about southern bias against the speech rights of civil rights activists in one case[224] has unfortunately become a power-grab whenever it suits federal appellate courts.[225]

C. Evaluating Religious Sincerity

Putting aside evidence of a religious belief's accuracy, there are three categories of evidence that are relevant to a claimant's sincerity: nonreligious incentives for a claimant to make an insincere religious claim; evidence that the claimant's current religious claims do not "fit" with the claimant's religious biography; and evidence that the claimant's religious claims do not "fit" with the claimant's religious community.[226]

1. Insincerity Incentives

Evidence that the accommodation sought by a claimant would be attractive to anyone, not just to religious objectors, may be powerful

221. *See* Dan M. Kahan et al., *"They Saw a Protest": Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851 (2012); Dan M. Kahan et al., *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009).

222. *See* United States v. Friday, 525 F.3d 938, 948 (10th Cir. 2008) (McConnell, J.).

223. *See* Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657 (1989).

224. N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

225. Chapman, *supra* note 220, at 228–35.

226. *See* Int'l Soc. for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 441 (2d Cir. 1981) (summarizing a religious sincerity analysis that accords with the overview here); Senn, *supra* note 8, at 342 (cataloguing types of evidence relevant to adjudicating religious sincerity).

evidence of insincerity.[227] Classic examples include financial windfalls and avoiding the danger of serving in the armed forces.[228] Some conscientious objector cases involve both.[229] American law has frequently tried to reduce incentives for insincere religious accommodation claims by requiring accommodated parties to perform alternative service.[230] Such structural mechanisms can reduce the likelihood of insincere claims, and therefore the likelihood that a government official will have to inquire into a claimant's sincerity, but they cannot foreclose insincere claims altogether.

It is important to keep in mind that many religious accommodations do not give the accommodated party a benefit that would be attractive to everyone (or even to most people).[231] The theoretical justification for a religious accommodation is that it removes a unique burden on those with a conflicting religious commitment, not that it provides them with a special benefit for having a religious belief.[232] Hobby Lobby, for instance, did not stand to profit financially from declining to pay for employee insurance plans that covered certain forms of contraceptives; rather, the government argued that the plans virtually paid for themselves because the contraceptives would lower the overall cost of women's healthcare.[233] Likewise, few parents would prefer their adolescent children to work at home rather than to go to school, as the Amish parents sought in *Wisconsin v. Yoder*.[234] And this is to say nothing of the costs—financial, emotional, and otherwise—entailed in

227. *See* Adams & Barmore, *supra* note 7, at 65.

228. *See* United States v. Ballard, 322 U.S. 78 (1944) (mail fraud); Ideal Life Church of Lake Elmo v. Washington County, 304 N.W.2d 308, 318 (Minn. 1981) ("The court found that the primary, and perhaps the sole, purpose for incorporating the Ideal Life Church was to provide the Rossow family with the benefit of a tax-free home while maintaining the same use and control they had prior to incorporation."); David Bernstein, *Miami Is Worth a Mass?*, VOLOKH CONSPIRACY (Aug. 7, 2009) http://volokh.com/2009/08/07/miami-is-worth-a-mass/ [https://perma.cc/F5TR-ML32] (arguing that religious asylum may pose "a substantial risk of false conversions" and "a huge benefit being given to Iranians (and likely citizens of some other Muslim countries) who become Christian that is not given to Iranians who stay Muslim").

229. *See* Witmer v. United States, 348 U.S. 375, 383 (1955) (claimant first claimed an exemption from the draft as a farmer, then as a conscientious objector, probably because he (understandably) didn't want to exchange the financial benefits of tending the family farm for the costs of serving in the armed forces).

230. *See* GREENAWALT, *supra* note 17, at 122–23; McConnell, *supra* note 14, at 37.

231. BRADY, *supra* note 20, at 203, 280.

232. *See* Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 688 (1992).

233. *See* Adams & Barmore, *supra* note 7, at 65.

234. 406 U.S. 205 (1972).

going to the trouble to seek a religious accommodation. The specter of litigation alone could deter the fainthearted, much less the false.

In some cases, it is difficult to judge whether the accommodation would come packaged with a benefit that might be desirable to the insincere. Prisoners, for instance, may be less deterred by litigation, and may have a powerful incentive to request an accommodation to annoy or retaliate against prison officials.[235] On the other hand, prisoners often request, and receive, religious accommodations that are not obviously universally desirable, especially related to dietary restrictions and fasts.[236]

A word of caution about ulterior motives for religious claims is in order. Many litigants, in all kinds of cases, have multiple motives for bringing suit. To put it more precisely, they have multiple objectives and goals that they hope the suit will help them to realize—revenge, compensation, justice, the opportunity to tell their story, etc. Religious accommodation claimants may have multiple motives too. Evidence of multiple motives may or may not bear on whether the claimant is sincere about her religious exercise. Take Hobby Lobby, for instance. Suppose that the Green family that owns and controls Hobby Lobby had a range of motives for challenging the contraceptive mandate: they like free advertising; they are publicity hounds; they dislike President Obama; they dislike "socialized medicine"; they believe America should generally promote "pro-life" values; they don't think anyone should ever use abortifacients, and they want to reduce the risk that anyone will; and they believe that it would violate their religion for their company to pay for contraceptive insurance for its employees. The last of these motives is the only one that matters for purposes of satisfying the sincerity requirement. Evidence of another motive may suggest a reason the claimant might lie about his religious exercise. But so long as the claimant establishes that he is sincere about his religious exercise, any other motives he may have for seeking an accommodation are legally beside the point.

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235. *See* Reed v. Faulkner, 842 F.2d 960, 963 (7th Cir. 1988) ("Evidence of nonobservance is relevant on the question of sincerity, and is especially important in the prison setting, for an inmate may adopt a religion merely to harass the prison staff with demands to accommodate his new faith.").

236. *See*, *e.g.*, Lovelace v. Lee, 472 F.3d 174, 182 (4th Cir. 2006) (involving an accommodation from ordinary prison meal schedules so Muslim prisoners could fast from food during daylight in observance of Ramadan). Some prisoners would prefer a kosher diet, by contrast, simply because the food may be healthier or of a higher quality than the non-kosher prison food.

Moreover, many people don't differentiate between their religious, social, political, cultural, and personal ethical beliefs.[237] As John Locke noted long ago, all of these factors inform one's conscience.[238] Probably a number of religious accommodation claims arise from a conscientious objection shaped by multiple cultural influences, including religion. Most people are not trained philosophers or theologians, and they don't have the time, interest, or intellectual resources to distinguish between beliefs compelled by their religion and the moral norms of their social network. For practical purposes, the two are one and the same for most people—maybe for everyone. I doubt that the sources of one's conscientious judgments can be disentangled by anyone, let alone courts. Courts can determine whether a claimant holds her beliefs sincerely, and whether a source of those beliefs is religion.[239] But they should be reluctant to dive into a claimant's moral commitments to show that the claimant's objection arises not from a sincere religious belief, but from being planted in front of Sesame Street as a child.

2. Narrative Fit Evidence

The most powerful evidence of religious insincerity may be evidence that claimants have stated or acted inconsistently with their alleged religious beliefs.[240] A recorded statement by the claimant that he plans to manufacture a religious belief for purposes of litigation is, of course, pure gold. But short of that, evidence that the claimant has shifted religious views, apparently for purposes of litigation, is powerful.[241]

Courts should be thoughtful about how they evaluate evidence of inconsistent conduct or statements, though. People change over time. Their religious beliefs change. What good is religious liberty if one can't exercise it to change religious beliefs and conduct? Moreover, few live up to their ideals, whether they derive from religion or not. Many

237. Thanks to Hillel Levin for raising this point.

238. JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING bk. I, ch. 3, § 8, at 66 (Peter H. Nidditch ed., 1975) (1690); *see also* Nathan S. Chapman, *Disentangling Conscience and Religion*, 2013 U. ILL. L. REV. 1457, 1489–90.

239. *See infra* section V.A.

240. *See* BRADY, *supra* note 20, at 281 (arguing that courts should "carefully tailor the questions that judges can ask and focus the inquiry on whether the individual's free exercise claims are consistent with their overall conduct during the period of the dispute").

241. *See, e.g.*, Dobkin v. District of Columbia, 194 A.2d 657, 659 (D.C. 1963) (requiring appellant, member of the Reform Jewish faith, to proceed with trial after sundown on a Friday did not violate his religious liberty because "the trial court learned from appellant that he actually went to his office and worked on Saturdays" and he had declined to object to resetting the trial "for that day and hour").

religions account for failure or sin, as well as repentance and forgiveness. Common experience, then, suggests that what courts (and claimants) ought to be primarily concerned about is not whether the claimant's conduct and statements have always been a model of consistency, but whether the claimant's asserted religious beliefs make sense with, or fit into, the claimant's religious biography. If there are inconsistencies, a claimant may present evidence that accounts for them as expressions of religious exercise, such as conversion, "backsliding,"[242] or good old-fashioned failure. Evidence that the current religious claim does not "fit" with the claimant's religious narrative ought to weigh against the claimant's sincerity.[243]

A couple of cases are illustrative. In *Witmer v. United States*,[244] the Supreme Court reviewed a denial of conscientious objector status.[245] In his questionnaire, Witmer had requested an agricultural classification so he could continue working on his father's farm and "bring more of [it] under cultivation and closed."[246] "For this reason," he wrote, "I am appealing to you to grant me an agricultural classification as I assure you that I will increase production year after year, and contribute a satisfactory amount for the war effort and civilian use."[247] He "expressly disclaimed any ministerial exemption."[248] He did, however, claim to be a conscientious objector, stating that he was "required to maintain neutrality in the 'combats of this world.'"[249] He said he had never "given public expression to his conscientious objector views," but he "claimed that he had demonstrated his convictions by studying the Bible and by telling others about God's Kingdom and 'of how He will put a stop to all wars.'"[250]

When his local Selective Service Board denied his claim for classification as a farmer and conscientious objector, he offered a variation on this theme. He appealed the decision and requested classification as "a minister of the gospel."[251] The Appeal Board met

242. *See generally* Brady, *supra* note 11.

243. *See* Reed v. Faulkner, 842 F.2d 960, 963 (7th Cir. 1988).

244. 348 U.S. 375 (1955).

245. The Court reviewed the decision of the Selective Service System for whether it had any basis in fact. *Id.* at 381; *see also* Estep v. United States, 327 U.S. 114, 122 (1946).

246. *Witmer*, 348 U.S. at 378.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.* at 379.

with Witmer. He told them he had left his job of three years at a hat factory. He presented an affidavit of a local officer of the Jehovah's Witnesses that he had engaged in the "preaching of the good news or gospel to others" "on many occasions," stated that he carried Bibles and study aids from door to door, and said that "one could be ordained as a minister of the Jehovah's Witnesses without attending a seminary or performing funeral or marriage ceremonies."[252] In response to the prospect of serving as a noncombatant, he stated that he believed "the boy who makes the snow balls is just as responsible as the boy who throws them."[253] This claim was inconsistent with his initial "offer to contribute to the war effort" by running his father's farm.[254] Despite Witmer's seeming religious sincerity in general, the government concluded that his inconsistent statements about ministry and about helping the war effort suggested that his religious pacifism was not thoroughgoing enough to support conscientious objector status.[255] Applying a "some evidence" standard, the Supreme Court upheld the classification.[256]

Witmer's case was a close call. Given his prior inconsistent statements, there was nothing wrong with requiring him to explain whether his prior statements were in conflict, in his mind, with his current claim, and if so, how they both fit into a coherent religious biography. Without stronger evidence of narrative fit, the board was justified in concluding that he had failed to carry his burden of proving his religious sincerity (even if it would have been justified in concluding the opposite).

A more recent case arising under RFRA also illustrates the value of narrative fit evidence. In *United States v. Adeyamo*,[257] the defendant sought to quash an indictment against him for importing leopard skins without a permit and without declaring them.[258] He claimed that he used the skins for religious purposes as an adherent of a mixture of "the Yoruba religions and Catholicism."[259] He purported to believe "in the power of the Orisha known as Shango, and that he was intending to use

252. *Id.*

253. *Id.* at 380.

254. *Id.*

255. *Id.* at 382–83.

256. *Id.* at 383.

257. 624 F. Supp. 2d 1081 (N.D. Cal. 2008).

258. *Id.* at 1084.

259. *Id.* at 1086.

all of the seized leopard skins for a religious initiation ceremony."[260] He also submitted declarations from experts to show that possessing and using leopard skins are consistent with the Yoruba religion.[261]

To counter Adeyamo's story, the government produced evidence that Adeyamo "stated to investigators that he was Catholic, and that he believed in Jesus Christ."[262] While that, alone, might suggest only that Adeyamo was an adherent of Santeria or another syncretistic variant of Christianity and an animistic religion, the government's other evidence was more damning. According to Adeyamo's "purported friend," Adeyamo appeared to "despise[] the Santeria religion."[263] Adeyamo "did sell African items to individuals in the United States who practiced the Santeria religion but as soon as the sale was over, [he] physically moved away from these individuals to the other side of the room because he disliked the faith."[264] When Adeyamo's friend stayed with him in Nigeria, Adeyamo "did not practice the Santeria religion nor a mixture of the Catholic and Santeria religion, but instead performed only Catholic services in his house."[265] On the basis of the conflicting evidence about Adeyamo's religious consistency, the district court concluded that it could not determine Adeyamo's sincerity without personally assessing Adeyamo's credibility in an evidentiary hearing.[266] Since the court dismissed his motion on other grounds, there was no need for such a hearing.[267] The court and the government were right to question Adeyamo's religious sincerity given the evidence of his inconsistent past practice and statements.

3. Community Fit Evidence

More controversially, I suggest that courts should also consider evidence about whether the claimant's alleged religious beliefs fit with the beliefs of the claimant's religious community. Relying solely on such evidence to conclude that a claimant is insincere would effectively

260. *Id.*

261. *Id.*

262. *Id.* at 1087.

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. The court dismissed Adeyamo's motion on the ground that, assuming his sincerity, the government had satisfied its burden under RFRA to show that declining to accommodate religious objectors was the least restrictive way of achieving its compelling interest in protecting endangered leopards. *Id.*

favor mainstream religious beliefs, violating the no-orthodoxy principle.[268] But allowing evidence that the claimant's alleged beliefs are one-of-a-kind to supplement evidence that the claimant has ulterior motives for an accommodation, or that the claimant has acted or spoken inconsistently with the claim, reduces the no-orthodoxy concern without ignoring salient evidence.

The Supreme Court addressed a similar issue in a Free Exercise Clause case.[269] A Jehovah's Witness steel worker asserted that his religious beliefs against participating in war would not allow him to construct tank turrets. When the worker resigned rather than perform work that violated his conscience, the Indiana Supreme Court denied his unemployment compensation claim on the ground that his objection was personal and not "religious," partly because another Jehovah's Witness "had no scruples about working on tank turrets."[270] The Supreme Court disagreed. "Intrafaith differences of that kind are not uncommon among followers of a particular creed."[271] With a nod to the "religious question" doctrine, and therefore the no-orthodoxy principle, the Court also noted that, "the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses."[272] But the Court did not place evidence of "community fit" completely out-of-bounds, at least for determining whether an accommodation claimant's belief is "religious." "One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause; but . . . the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect."[273]

This analysis of evidence that some members (or the official organs) of the claimant's religious community hold a contrary view of the

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268. *See, e.g.*, Patrick v. LeFevre, 745 F.2d 153, 157 (2d Cir. 1984) ("[W]here unorthodox beliefs are implicated . . . the factfinder's temptation to merge sincerity and verity is as great as the need to guard against this conjugation."); Int'l Soc'y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 441 (2d Cir. 1981) ("A believer's sincerity is also evaluated in light of the religion's size and history . . . but this is not dispositive.").

269. Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707 (1981).

270. *Id.* at 715 ("[A]t least, such work was 'scripturally' acceptable.").

271. *Id.*; *see also* Love v. Reed, 216 F.3d 682, 688 (8th Cir. 2000) ("It is not the place of the courts to deny a man the right to his religion simply because he is still struggling to assimilate the full scope of its doctrine.").

272. *Thomas*, 450 U.S. at 715; *see also id.* at 716 ("Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.").

273. *Id.* at 715–16.

religion's requirements is spot-on. Such evidence may be relevant, both to show whether the claimant is motivated by religion, and whether the claimant is actually sincere.[274] But it ought rarely, if ever, to be dispositive of sincerity. Particularly in a nation with a profoundly "democratized" religious sociology,[275] few coreligionists are likely to believe all the same things; community beliefs and practices shape consciences, but they don't press them into molds.

Out of a concern that courts will favor well known religious beliefs over idiosyncratic claims, some scholars have suggested that courts should avoid considering the relationship of an accommodation claimant's beliefs and those of the claimant's co-religionists.[276] They are concerned, rightly, with steering clear of the no-orthodoxy principle. In my view, the danger of this is sufficiently mitigated by insisting that courts may not rely solely on evidence that a claimant's beliefs do not "fit" with the claimant's religious community. Allowing courts to consider such evidence, which can obviously be probative of sincerity, in addition to evidence of ulterior motives or personal inconsistency, reduces the dangers of letting religious insincerity off the hook, and avoids asking courts to tolerate too much cognitive dissonance.

4. Institutional Claimants

Some religious accommodations extend to institutions. Most recently, the Court has held that the First Amendment entitles religious institutions to an accommodation from employment discrimination laws that would interfere with their employment decisions about "ministers."[277] It has also held that RFRA entitles closely-held for-profit

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274. *See* Levitan v. Ashcroft, 281 F.3d 1313, 1321 (D.C. Cir. 2002) ("The litigant's assertion of a view so totally foreign to the creed with which he claimed to affiliate might well lead the court to question his sincerity.").

275. *See generally* NATHAN O. HATCH, THE DEMOCRATIZATION OF AMERICAN CHRISTIANITY (1989).

276. BRADY, *supra* note 20, at 202 ("[T]he examination of whether the believer's assertion of burden fits with their larger system of religious belief would impermissibly entangle courts in religious questions . . . Such determinations would involve courts in questions of religious doctrine that would exceed their expertise and role."); *see also id.* ("[W]henever the claimant's religious beliefs are unusual or seem implausible or unreasonable, there is a risk that the Court will find their claims to be insincere."); GREENAWALT, *supra* note 17, at 123 ("The undesirability of inquiries into sincerity, and especially the risk of discriminatory disbelief of the unorthodox, count against introducing a scheme of legal regulation in which officials must evaluate people's honesty."); Syndicat Northcrest v. Amselem [2004] 2 S.C.R. 551, 590 (Can.) ("Requiring proof of the established practices of a religion to gauge the sincerity of belief diminishes the very freedom we seek to protect.").

277. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 190 (2012).

corporations to an accommodation from a regulation requiring it to buy contraceptive insurance for employees.[278] Should the sincerity analysis differ for organizations?

In short, there seems to be no reason why institutions should be treated differently for purposes of a sincerity analysis. The law, ordinarily through institutional by-laws enforced by state law, determines who has authority to determine an institution's policy, including its "religious exercise," if any.[279] Under a statute like RFRA, the requirement is that the claimant's religious beliefs be sincere; responsibility for sincerity would seem to belong to whomever the law assigns authority to determine the institution's religious "beliefs."

The hard question would be what to do if the law assigns responsibility for determining an institution's religious beliefs to multiple people, some of whom cannot demonstrate their sincerity. Again, the question may ordinarily be resolved by by-laws. By-laws anticipate that officers may disagree and provide procedures for settling those disagreements and moving forward. If a sufficient number of officers necessary to the direct the corporation's policy under its by-laws hold the asserted religious beliefs sincerely, then a court should conclude that the institution does too. In all events, the adjudication of the institution's sincerity should be determined according to religiously-neutral principles of law that govern the analysis of a corporation's mental state in other contexts.

In summary, I have argued that courts can, and should, adjudicate religious sincerity. They should consider evidence of ulterior motive, personal inconsistency, and idiosyncrasy. Though evidence of inaccuracy (and implausibility) is probative of insincerity, as Justice Jackson argued, it should be ruled out by the no-orthodoxy principle. The final part of this paper explores the conceptual relationship between sincerity and other components of a religious accommodation claim, including the "substantial burden" element that divided the justices in *Hobby Lobby*.

278. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. __, 134 S. Ct. 2751, 2775–76 (2014).

279. *See id.* at 2775 ("State corporate law provides a ready means for resolving any conflicts by, for example, dictating how a corporation can establish its governing structure. Courts will turn to that structure and the underlying state law in resolving disputes." (citations omitted)).

V. DISENTANGLING "SINCERITY," "RELIGIOUS EXERCISE," AND "SUBSTANTIAL BURDEN"

So far, this Article has focused on how courts should adjudicate religious sincerity. It now explores one way courts should *not* adjudicate religious sincerity—by confusing it with other elements of an accommodation claim. Unfortunately, courts do confuse these elements,[280] and this confusion probably makes it harder for courts to resist suspicion creep. When insincerity is not an issue in the case, courts should avoid allowing their suspicion to affect their legal analysis. Hopefully, understanding the sincerity analysis will help to disentangle and clarify other components of a religious accommodation claim, especially "religious exercise" and "substantial burden."

A. Disentangling "Sincerity" and "Religious Exercise"

A religious accommodation claimant must show not only sincerity, but also that the government (or employer's) regulation creates a "substantial burden" on the claimant's "religious exercise."[281] These three concepts are distinguishable. This Article has already discussed the concept of sincerity at some length, distinguishing it from accuracy.[282] Whether a claimant's allegations are sincere should also be distinguished from whether the claimant's alleged "religious exercise" is "religious."[283]

Whether the religiosity of a claimant's beliefs is an issue depends upon the legal basis for the claimed accommodation. Some provisions offer an accommodation for any moral objection, whether based on religion or not.[284] The state and federal provisions that give rise to most accommodation claims, however, extend expressly to the exercise of

280. *See supra* notes 22–29.

281. *See* Oklevueha Native Am. Church of Haw., Inc. v. Lynch, 828 F.3d 1012 (9th Cir. 2016). A claim under the Free Exercise Clause must also show, as a precursor, that the regulation is not "neutral and of general applicability." *See* Church of the Lukumi Babalu Aye v. Hialeah, 508 U.S. 520, 531 (1993).

282. *See supra* Part VI.

283. *See* Watts v. Fla. Int'l Univ., 495 F.3d 1289, 1301, 1303 (11th Cir. 2007) (Tjoflat, J., dissenting) ("[f]ree exercise jurisprudence requires that a plaintiff plead *both* sincerity *and* the religious character of the plaintiff's belief" otherwise "any sincere act is sacrosanct—and potentially subject to constitutional protection").

284. *See, e.g.*, 29 C.F.R. § 1605.1 (2016) ("The [Equal Employment Opportunity Commission] will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.").

religion.[285] Requiring the claimant's objection to be based on religion, therefore, is simply a matter of fidelity to the legal provision that authorizes an accommodation.

The Supreme Court has never directly addressed the meaning of "religion" in constitutional or statutory law, but courts tend to read the word generously.[286] Ordinarily it covers not only traditional western and eastern religions but also a wide range of beliefs, practices, and communities that sociologists and anthropologists define as religions.[287] Faced with hard cases regarding the scope of "religion" or "religious exercise,[288] courts have broadly construed the concept to ensure a liberal equality among those who hold diverse beliefs, including beliefs that may be changing or novel.[289]

In the nature of language, however, "religion" cannot mean everything.[290] The most obvious beliefs that religion does not describe are those that the adherent insists are not religious. Foisting "religious" liberty on someone who disavows religion would certainly be ironic. This is not to say that nonreligious people are not entitled to religious liberty—they are entitled to be nonreligious, and to exercise their belief that religion is bunk.[291] It is only to say that an objection to complying with a law that does not arise from religious beliefs (including atheistic beliefs) does not entail an "exercise" of "religion."

In addition, claims based on religious parodies are not religious. They arise from parodies of religious exercise, not the exercise of religion.[292]

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285. *See supra* Part III.

286. For a fairly comprehensive account of how courts have defined religion under different constitutional and statutory provisions, see generally *Friedman v. S. Cal. Permanente Med. Grp.*, 102 Cal. App. 4th 39 (2002). Judge Adams provided an influential account in a concurring opinion in *Malnak v. Yogi*, 592 F.2d 197, 212–13 (3d Cir. 1979) (Adams, J., concurring in result).

287. *See* WINNIFRED FALLERS SULLIVAN, THE IMPOSSIBILITY OF RELIGIOUS FREEDOM 89–137 (2005); Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 587–604; Ben Clements, *Defining "Religion" in the First Amendment: A Functional Approach*, 74 CORNELL L. REV. 532 (1989); Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753, 756–62, 776–807 (1984); Koppelman, *supra* note 65; Jeffrey Omar Usman, *Defining Religion*, 83 NOTRE DAME L. REV. 123 (2007); Eduardo Peñalver, Note, *The Concept of Religion*, 107 YALE L.J. 791, 814–21 (1997) (arguing for an "evolving" constitutional definition of religion).

288. One, in my view, was *Moore-King v. County of Chesterfield*, 708 F.3d 560 (4th Cir. 2013) (holding that a fortune-teller's business was not an exercise of "religion").

289. *See* Africa v. Pennsylvania, 662 F.2d 1025 (3d Cir. 1981); *Malnak*, 592 F.2d at 212–13 (Adams, J., concurring in result).

290. What "religious" or "religion" means in a statute is a question of law; whether the claimant's alleged beliefs are "religious" is a question of fact.

291. *See* Kaufman v. McCaughtry, 419 F.3d 678 (7th Cir. 2005).

292. *See, e.g.*, Michelle Boorstein, *For Georgetown 'Apostles,' a Rowhouse Rebellion*, WASH.

The claimant may sincerely believe in the political or ethical objects of the parody, but that doesn't mean that the activity is a religion, or that the claimant sincerely holds religious beliefs. For instance, the Satanic Temple appears to be a parody of religion that has the purpose of eliminating the display of traditional religious faith in public spaces.[293] No doubt the founder and adherents sincerely believe these things should happen. This does not mean, however, that the Temple's proposed "After School Satan Club," for example, is an exercise of religion.[294] The Club may be protected, like the Good News Club or a Ku Klux Klan Club, under the public forum doctrine of the Free Speech Clause,[295] but it is unclear whether the Club is entitled to a *religious* accommodation because it is unclear whether the Club exercises religion.

Courts seem to do a fairly good job at sniffing out religious parodies, even those based on nonreligious beliefs to which the claimant is sincerely committed.[296] Consider again the Flying Spaghetti Monster case, *Cavanaugh v. Bartelt*.[297] Recall that a prisoner alleged an adherence to "FMSism" and claimed a right under RLUIPA to various accommodations from ordinary prison regulations (including the right to wear a pirate costume and to celebrate communion in the form of a large bowl of pasta). The court assumed for purposes of analysis that the

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POST (Nov. 11, 2006), http://www.washingtonpost.com/wpdyn/content/article/2006/11/10/AR2006111001978.html [http://perma.cc/2JZ5-EFSM]; NCC Staff, *When Festivus Was Recognized as a Religion for Several Months*, NAT'L CONST. CTR.: CONST. DAILY. (Dec. 23, 2016), https://constitutioncenter.org/blog/when-festivus-was-recognized-as-a-religion-for-several-months [http://perma.cc/E3QZ-LXN4].

293. *See* Katherine Stewart, *An After School Satan Club Could Be Coming to Your Kid's Elementary School*, WASH. POST (July 30, 2016), https://www.washingtonpost.com/local/education/an-after-school-satan-club-could-be-coming-to-your-kids-elementary-school/2016/07/30/63f485e6-5427-11e6-88eb-7dda4e2f2aec_story.html [http://perma.cc/NCD2-QV5C].

294. *See* Katherine Stewart & Moriah Balingit, *Several School Districts Say After School Satan Clubs Likely in Line With Policies*, WASH. POST (Aug. 1, 2016), https://www.washingtonpost.com/local/education/several-school-districts-say-after-school-satan-clubs-likely-in-line-with-policies/2016/08/01/c5ea1558-581a-11e6-9aee-075993d73a2_story.html?utm_term=.0af6b5815185 [https://perma.cc/MK3M-5Z34].

295. Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001); Capitol Square v. Pinette, 515 U.S. 753 (1995).

296. *See, e.g.*, Oklevueha Native Am. Church of Haw., Inc. v. Lynch, 828 F.3d 1012, 1015 (9th Cir. 2016) (reviewing district court judgment on grounds that "[n]o reasonable juror could infer . . . that Mooney's religion is anything more than a strongly held belief in the importance or benefits of marijuana"); Cavanaugh v. Bartelt, 178 F. Supp. 3d 819 (D. Neb. 2016) (prisoner's commitment to the ideology that inspired the Flying Spaghetti Monster and "FMSism" was not religious); United States v. Meyers, 906 F. Supp. 1494 (D. Wyo. 1995) (defendant's beliefs in the "Church of Marijuana" was not religious).

297. 178 F. Supp. 819 (2016).

claimant was sincere, but concluded that FSMism is not a religion.[298] It began as a satire of the intelligent design movement.[299] Its "religious" incidents seem to be designed to mock traditional religion. At its core, FSMism likely expresses a sincere belief about the nature of the universe and a sincere belief that public schools should teach science a particular way. But exercising speech rights to parody religion is not the exercise of religion.

On the other hand, courts sometimes construe religion too narrowly. In *Moore-King v. County of Chesterfield*,[300] the court considered whether a fortune-teller's services amounted to an exercise of religion. The claimant held eclectic beliefs on which she based her "psychic and spiritual counsel[ing]," including "'[s]pirituality, astrology, Reiki . . . Kabala'" and "a strong belief in the 'words and teachings of Jesus' . . . and a belief in 'the New Age Movement,' which [she] describes as 'a decentralized Western spiritual movement that seeks Universal Truth and the attainment of the highest individual potential.'"[301] The court concluded that, "Moore[-]King's beliefs more closely resemble personal and philosophical choices consistent with a way of life, not deep religious convictions shared by an organized group deserving of constitutional solicitude."[302] The court emphasized that Moore-King was largely responsible for curating her own beliefs, and that those beliefs were not dominated by beliefs promoted by an institution. While this may be a rational way to define religious exercise, it is not the most generous that courts have offered.[303] More importantly, it risks running afoul of the no-orthodoxy principle for favoring communal beliefs and practices over those that are privately curated. The notion of religion is surely robust enough to embrace a mosaic of beliefs and practices that are undoubtedly individually *religious*, no matter how distasteful such religious consumerism may be to some.

A harder legal question is whether the Constitution requires extending religious accommodations to beliefs and practices that are motivated

298. *Id.* at 824. It is quite possible that the claimant sincerely believed some doctrines of FMSism, since they are stated in equivocal terms and he presented evidence suggesting his sincerity, including the fact that he had "several tattoos proclaiming his faith." *See id.* at 827.

299. *Id.* at 824–26.

300. 708 F.3d 560 (4th Cir. 2013).

301. *Id.* at 564.

302. *Id.* at 571 (relying heavily on the Supreme Court's decision in *Wisconsin v. Yoder*, 406 U.S. 205 (1972)).

303. *See generally* Friedman v. S. Cal. Permanente Med. Grp., 102 Cal. App. 4th 39 (2002).

strictly by sincere *nonreligious* conscientious objections.[304] Though religious and nonreligious conscientious objections are conceptually distinct, there are often good reasons to extend accommodations to both.[305] When an accommodation provision expressly does so, of course, a court need not concern itself with whether the conscientious objection is based on religion. When a provision extends only to religious exercise, though, courts can, and should, distinguish between whether the exercise is "religious" and whether it is "sincere."

Just as with the claimant's sincerity, a court has an independent responsibility to determine whether the claimant's exercise is religious. Unfortunately, courts have not been consistent on this score.[306] Just as with any other legal provision, the meaning of "religion" or "religious" under an accommodation provision is a question of law.[307] Whether a claimant's belief or exercise is religious is thus a mixed question of law and fact. The claimant's assertion that the belief or exercise is religious is one—but only one—fact relevant to the legal inquiry. As in *Moore-King*, courts should independently evaluate whether the claimant's exercise is religious. Otherwise the claimant has the final word on whether her claim is based on religious exercise. As long as the court has adopted a sufficiently generous notion of religion, the no-orthodoxy principle does not require courts to defer to the claimant about whether her beliefs qualify. Doing so would essentially deputize sincere claimants to extend the scope of religious liberty ad infinitum.[308]

B. Disentangling "Sincerity" and "Substantial Burden"

A religious accommodation claimant must also show that the regulation imposes a "substantial burden" on his "religious exercise." Whether the government regulation substantially burdens the claimant's religious exercise is a question of law. Assuming that the act or omission at issue is religious and sincere, the court must determine whether the government's regulation burdens that act or omission, and if so, whether the burden is substantial.

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304. *See* Welsh v. United States, 398 U.S. 333 (1970). *See generally* Gregory P. Magrarian, *How to Apply the Religious Freedom Restoration Act to Federal Law Without Violating the Constitution*, 99 MICH. L. REV. 1903 (2001); Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351 (2012).

305. Nathan S. Chapman, *Disentangling Conscience and Religion*, 2013 U. ILL. L. REV. 1457.

306. *See, e.g.*, Watts v. Fla. Int'l Univ., 495 F.3d 1289 (11th Cir. 2007).

307. *See* Wisconsin v. Yoder, 406 U.S. 205, 215–16 (1972).

308. *See Watts*, 495 F.3d at 1303 (Tjoflat, J., dissenting) ("To interpret the First Amendment in such a fashion would stretch the scope of free exercise claims to an untenable degree.").

1. The Hobby Lobby *Mess*

Hobby Lobby muddied the meaning of substantial burden. The majority and the dissenting justices fundamentally disagreed about how to evaluate whether the contraceptive mandate imposed a substantial burden on the claimant's religious exercise. To make matters worse, Justice Alito, writing for the Court, failed to clearly address Justice Ginsburg's allegation that he had reduced the substantial burden analysis to one about sincerity. The resulting confusion is entirely unnecessary in light of RFRA's text and historical background.[309]

The confusion arises from the nature of Hobby Lobby's claims. Hobby Lobby had a sincere religious objection to doing a particular thing: buying insurance for employees that would cover certain contraceptives.[310] The *reason* Hobby Lobby objected to paying for such insurance is that the owners of Hobby Lobby believe that those contraceptives may in at least some cases result in the death of an innocent human being.[311] Their religion, as they understand it, forbids them from knowingly paying for contraceptives that entail such a risk.[312] The government did not question the owner's sincerity or whether their beliefs were religious.[313]

The majority and the dissenting justices disagreed about whether the contraceptive insurance mandate placed a "substantial burden" on Hobby Lobby's religious exercise. The majority concluded that the financial penalties that the government would be entitled to levy against Hobby Lobby for failing to comply with the mandate constituted a substantial burden.[314] The dissenting justices thought this was the wrong

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309. I share Paul Horwitz's view that "credit (or blame)" for the decision in *Hobby Lobby* "lies" "not with Justice Alito's opinion" "but with RFRA, which supplies the propulsion in both *Hobby Lobby* and Chief Justice Roberts's equally clear opinion in *Gonzales v. O Centro Epírita Beneficente União do Vegetal*." Paul Horwitz, *The* Hobby Lobby *Moment*, 128 HARV. L. REV. 154, 165 (2014). Accordingly, my analysis of what counts as a "substantial burden" relies on ordinary methods of statutory interpretation. To me, whether an accommodation in any given case is morally or politically desirable is another matter.

310. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. __, 134 S. Ct. 2751, 2775 (2014).

311. *Id.*

312. *Id.* at 2766.

313. As Professor Gedicks has argued, it is possible that the government did not contest Hobby Lobby's sincerity because it would entail an "expensive" "fishing expedition" into the contraceptive habits of the Green family by which "a jury would be repulsed." Gedicks, *supra* note 28, at 112. Given the sheer volume of contraceptive mandate accommodation claims, however, the most likely explanation is probably that the government wanted a clean sweep on the legal issues rather than to fight each case on the facts.

314. *Hobby Lobby*, 134 S. Ct. at 2779.

way to look at it. Instead, Justice Ginsburg argued that there was no substantial burden because the wrongs that Hobby Lobby did not want to be involved in—the killing of innocent human beings—were simply too attenuated from what the mandate required Hobby Lobby to do—pay for insurance for employees who have a legal right to use such contraceptives.[315] Ginsburg thought the majority merged the sincerity and substantial burden analyses.[316] She apparently perceived the Court as seeing itself legally obligated to accept not only that the claimant sincerely believed that its religion forbade complicity in its employees' use of certain contraceptives, but also that the claimant sincerely believed that the regulation was a substantial burden on its religious exercise. Justice Alito, writing for the Court, unfortunately failed to clarify the difference between those two concepts.

2. Sorting It Out

Hobby Lobby raised novel legal questions; the "substantial burden" inquiry was not one of them.[317] Once a claimant has established the fact of a sincere religious belief, the court decides, as a matter of law, whether the regulation at issue substantially burdens the claimant's religious exercise.[318] This entails identifying and evaluating three things: (1) what is the claimant's religious exercise?[319] (2) does the regulation burden that exercise? and (3) is the burden "substantial"?[320] The principal dissenting opinion in *Hobby Lobby* made an error at the first step that doomed its analysis of the others.[321]

Hobby Lobby's "religious exercise," for purposes of the statute, was *abstaining from paying for contraceptive insurance*. That exercise is the only relevant act or omission for determining Hobby Lobby's "religious exercise" because it is what the mandate required and what Hobby

315. *Id.* at 2799.

316. *See* Gedicks, *supra* note 28, at 119 n.118; Su, *Judging Religious Sincerity*, *supra* note 17, at 38–39 (reading the majority opinion likewise).

317. In my view, the most difficult legal questions were whether RFRA protects closely held for-profit corporations and whether the government had satisfied the "least restrictive means" requirement. I filed a brief supporting the claimants, arguing that the Establishment Clause did not prohibit their requested accommodation.

318. *Hobby Lobby*, 134 S. Ct. at 2779.

319. *See* Friedman v. Clarkstown Cent. Sch. Dist., 75 Fed. App'x 815, 818 (2003) ("[T]he requisite nexus between the objection to immunization and plaintiff's religious beliefs—if any—had not been shown.").

320. Holt v. Hobbs, 574 U.S. __, 135 S. Ct. 853, 862 (2015); Oklevueha Native Am. Church of Haw., Inc. v. Lynch, 828 F.3d 1012, 1015 (9th Cir. 2016).

321. *See infra* notes 355–57.

Lobby objected to doing.[322] The *reason* Hobby Lobby objected to that act or omission was the Greens' religiously-informed moral beliefs about facilitating sin.

Michael Dorf has argued that "[n]either the text nor the legislative history of RFRA provides any clear indication of how courts ought to determine whether an incidental burden on religion is in fact substantial."[323] Although the statute does not define "substantial," and the legislative history may be silent on that precise point, the statute was intended to implement the Supreme Court's prior decisions in *Sherbert v. Verner*[324] and *Wisconsin v. Yoder*.[325] The burdens in those cases were, respectively, the denial of employment benefits,[326] and criminal conviction and the imposition of a five-dollar fine.[327]

With respect to whether the government can be said to "burden" a claimant's conduct that the claimant believes to be wrong because it would facilitate *another's* sinful conduct, a case that followed *Sherbert*'s reasoning is directly on point. In *Thomas v. Review Board of the Indiana Employment Security Division*,[328] a steel worker objected to manufacturing tank turrets.[329] The *reason* was because he believed that doing so would facilitate others to do something he believed to be sinful—making war.[330] By contrast, Thomas was willing to work in the same plant in the roll foundry.[331] Because he declined to work on tank turrets, though, he lost his job.[332] Indiana declined to extend unemployment benefits to him.[333] The Supreme Court concluded that this impermissibly burdened his religious exercise.[334]

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322. *See* Jimmy Swaggart Ministries v. Bd. of Equalization of Cal., 493 U.S. 378, 392 (1990) (focusing on whether "the mere act of paying the tax, by itself, violates [the objector's] sincere religious beliefs").

323. Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1213 (1996).

324. 374 U.S. 398 (1963).

325. 42 U.S.C. § 2000bb(b)(1) (2012) ("The purposes of this chapter are (1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened.").

326. Sherbert v. Verner, 374 U.S. 398, 403–04 (1963).

327. Wisconsin v. Yoder, 406 U.S. 205, 207–08, 220–21 (1972).

328. 450 U.S. 707 (1981).

329. *Id.* at 710–11.

330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.* at 712.

334. *Id.* at 720.

With respect to Thomas's moral reasoning, which allowed him to work in the same plant, but not on tank turrets, the Court stated: "Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one."[335] Once the government had determined that Thomas's beliefs were sincere and religious, it could not reject his claim on the ground that it found his religiously-inspired moral reasoning to be unpersuasive. The rationale for this limit, of course, is the no-orthodoxy principle. If a court can reject a claim on the ground that the law simply cannot countenance the claimant's religiously-inspired moral reasoning, it effectively favors other forms of religiously-inspired moral reasoning, which threatens religious liberty and equality.

Just as in *Thomas*, the "religious exercise" to which Hobby Lobby objected was a particular act that Hobby Lobby believed would facilitate sin.[336] Determining that Hobby Lobby was sincere and engaged in religious exercise did not even begin the "substantial burden" analysis. Hobby Lobby was still required to show two things as a matter of law: the government imposed a "burden" on its religious exercise, and the burden was "substantial."[337]

To decide whether there is a "substantial burden," a court must determine whether the government's regulation, as a matter of law, forbids or requires the "religious exercise" at issue.[338] Professor Gedicks has argued that courts are so deferential to a claimant's view about a "substantial burden" that the standard is "effectively established by the claimant's mere say-so."[339] It is true that there has never been a great deal of Supreme Court precedent on what counts as a substantial burden. But the standard, as applied by the Supreme Court in prior cases, has sufficient content to guide a court's independent judgment and to place limits on what forms of government regulation may count as a "substantial burden."[340]

First, it should be emphasized that a court has an independent duty to determine the meaning of the challenged government regulation, and thereby to determine whether it will actually operate the way that the claimant alleges. Whether the claimant sincerely believes that the law forbids or requires her religious exercise is irrelevant. Courts should not

335. *Id.* at 715.

336. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. __, 134 S. Ct. 2751, 2765–66 (2014).

337. *Id.* at 2775.

338. *See, e.g.*, *id.* at 2779, 2798–99.

339. Gedicks, *supra* note 28, at 98.

340. For an outline of the Supreme Court cases touching on the issue, see VOLOKH, *supra* note 61, at 1068–69.

subject the meaning and application of a law to a claimant's religious belief. While courts must defer to a claimant's sincere and religious-based mistake of fact (about whether the exercise at issue is really immoral), they must *not* defer to the claimant's sincere and religious-based mistake of law (that the challenged regulation actually requires the conduct to which the claimant objects).

Second, the Supreme Court has decided some cases that set guidelines for the outer boundaries of a substantial burden. On the one hand, a criminal conviction (even one that carries a minor penalty)[341] and the denial of important government benefits (unemployment compensation) impose "substantial" burdens on religious exercise.[342] It is unclear whether a court would, or should, hold that a de minimis civil penalty, an administrative inconvenience, a minor licensing fee, or the denial of an "unimportant" benefit would amount to a "substantial burden" on religious exercise. Surely context matters.

On the other hand, the Court *has* made clear that some categories of government regulation do *not* impose a substantial burden on religious exercise. For instance, in *Bowen v. Roy*,[343] the claimant opposed the government's use of his daughter's social security number on the ground that it violated his religious belief for anyone to identify his daughter with a number.[344] The Supreme Court held that "[t]he Federal Government's use of a Social Security number for Little Bird of the Snow does not itself in any degree impair Roy's 'freedom to believe, express, and exercise' his religion."[345] The Court likewise applied this principle when a Native American tribe objected to the government's plan to build a road through federal land that was sacred to the tribe.[346]

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341. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972).

342. *See* Emp't Div. v. Smith, 494 U.S. 872 (1990).

343. 476 U.S. 693 (1986).

344. *Id.* at 700–01 (quotation omitted); *see also id.* at 700 n.6 ("Roy's religious views may not accept this distinction between individual and government conduct. It is clear, however, that the Free Exercise Clause, and the Constitution generally, recognize such a distinction; for the adjudication of a constitutional claim, the Constitution, rather than an individual's religion, must supply the frame of reference." (internal citation omitted)).

345. *Id.* at 700.

346. Lyng v. Nw. Indian Cemetery Protective Ass'n., 485 U.S. 439, 452–53 (1988). I am inclined to agree with Justice Brennan that the regulation at issue placed a substantial burden on the claimants because it made it impossible for the claimants to engage in religious conduct. *See id.* at 458–60 (Brennan, J., dissenting). It is important to note, however, that some Native American accommodation claims involving federal land use do not implicate the claimant's religious conduct. Under the notion of "substantial burden" articulated above, those claims, like the one in *Bowen v. Roy*, would fail to show a substantial burden on the claimants' religious exercise. *See, e.g.*, Snoqualmie Indian Tribe v. FERC, 545 F.3d 1207 (9th Cir. 2008); Navajo Nation v. U.S. Forest

These cases, though controversial,[347] illustrate the relationship between an "exercise of religion" and whether there is a substantial burden on that exercise. While the claimants' *beliefs* about what the government ought to do with its own property or program were in some sense a "religious exercise," the claimants did not believe that they were obligated to do or to abstain from an act that the government forbade or required. As a result, the court concluded that the regulation did not "substantially burden" their exercise. The cases may be read two different but complementary ways: to hold that a religious belief about what the government may or may not do does not amount to religious "exercise" for purposes of an accommodation claim; or to hold that government conduct that does not directly regulate or effect a claimant's religiously-motivated act or omission does not impose a "substantial burden" on the claimant's religious exercise. Either way, the cases illustrate an important limit on the accommodation of sincere religious exercise, a limit the court must independently evaluate *before* the government is obligated to show that the regulation is the least restrictive way to achieve a compelling interest.

The foregoing limits on what constitutes a "substantial burden" may not be a model of precision, and they are certainly capacious. But tallying these "secular costs" is not, contrary to detractors, "effectively" deferring to the "claimant's mere say-so,"[348] nor does it render the "substantial burden element functionally nonjusticiable."[349] Indeed, before *Hobby Lobby*, scholars tended to challenge the Supreme Court's application of the "substantial burden" element for protecting too little religious exercise, not too much.[350]

This account of "substantial burden" largely coincides with the Court's approach in *Hobby Lobby*. The Court accepted as true that Hobby Lobby had a sincere religious objection to paying for contraceptive insurance (its "religious exercise"); that the contraceptive mandate "burdened" that exercise by requiring Hobby Lobby to do the

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Serv., 535 F.3d 1058 (9th Cir. 2008).

347. *See, e.g.*, Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting A Place for Indians as Nonowners*, 52 UCLA L. REV. 1061, 1062–67 (2005); Allison M. Dussias, *Ghost Dance and the Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773, 774–75 (1997).

348. Gedicks, *supra* note 28, at 98.

349. *Id.* at 101.

350. *See* Lupu, *supra* note 17, at 936 ("[T]he law [about burdens on religious exercise] that has emerged thus far creates an intolerable risk of discrimination against unconventional religious practices and beliefs.").

opposite; and that the burden was "substantial" because of the financial penalties for noncompliance.[351] Contrary to Justice Ginsburg's claim, this did not "collapse" sincerity and substantial burden.[352] It gave both of them their due. Unfortunately, in attempting to respond to the dissent's critique, the Court stated that, "it is not for us to say that their religious beliefs are mistaken or *insubstantial*."[353] This choice of words was confusing. The Court probably meant that it could not determine the centrality or importance of the claimant's religious belief consistent with the no-orthodoxy principle. But using "insubstantial" may have reinforced the dissenting justices' concern that the Court was collapsing the sincerity and substantial burden inquiries. As the Court elsewhere emphasized, however, the object of a substantial burden analysis is *not* the sincerity or "centrality" of a claimant's religious exercise, but the governmental benefits and burdens that depend on the claimant abandoning it.[354]

The account above differs considerably from the dissenting justices' approach. Rather than evaluating whether the regulation placed a "substantial burden" on Hobby Lobby's "religious exercise," Justice Ginsburg evaluated whether Hobby Lobby's "religious exercise"—declining to pay for contraceptive insurance—was too causally attenuated from the employees' potential use of those contraceptives.[355] Ginsburg seems to have collapsed Hobby Lobby's "religious exercise" and the *reason* for that exercise. Perhaps Ginsburg simply did not think that RFRA *should* protect the religious exercise at issue in *Hobby Lobby*, and was determined to show that the claimants ought to lose on every element.[356] But determining as a matter of law that RFRA does not apply

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351. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. __, 134 S. Ct. 2751, 2778 (2014).

352. *Id.* at 2799.

353. *Id.* at 2779.

354. *Id.* at 2778, 2792.

355. A number of scholars have likewise argued that whether a law places a "substantial burden" on a claimant's religious exercise depends on the distance between the regulated conduct (of the claimant) and the ultimate conduct of another to which the claimant objects. Some think that forced payment of money *can* be a substantial burden on religious exercise and some don't. *Compare, e.g.*, Nomi M. Stolzenberg, *It's About Money: The Fundamental Contradiction of* Hobby Lobby, 88 S. CAL. L. REV. 727, 731–32 (2015) (concluding that forced payment is a substantial burden but, because taxes are a forced payment too, there is no "less restrictive" means for the government to achieve its interests), *with* Gedicks, *supra* note 28, at 123–24 (arguing that courts should evaluate whether forced complicity with sin substantially burdens a claimant's religious exercise). I don't think the causal connection matters for the "substantial burden" analysis because the burden is a question of what the *government* does to coerce the claimant's religious exercise, not the claimant's moral reasoning for that exercise.

356. Justices Breyer and Kagan, by contrast, did not join Justice Ginsburg's opinion on whether

to complicity claims would be inconsistent with the statute's text, which protects "religious exercise" without conditioning that protection on the sort of theological or moral reasoning behind that exercise. It would also be inconsistent with *Thomas*, in which the Court extended *Sherbert* to protect a complicity claim that was conceptually very similar to Hobby Lobby's.[357]

Worse, Justice Ginsburg's approach is in tension with the no-orthodoxy principle, for it suggests that religious accommodations should be available for some forms of religiously-inspired moral reasoning but not for others.[358] Carefully distinguishing between religious sincerity and whether a government regulation imposes a "substantial burden" on the claimant's religious exercise may reduce this risk.

CONCLUSION

This Article has attempted to clarify the sincerity requirement of a religious accommodation claim. Scholars, and occasionally judges, have suggested that the First Amendment forbids the government from adjudicating a religious claimant's sincerity. This Article has argued to the contrary. The Constitution forbids the government from determining the accuracy or plausibility of a claimant's religious beliefs, but not from adjudicating the sincerity with which the claimant holds them. Courts can and should evaluate a claimant's sincerity, when an opponent puts it in issue, to protect others from the costs of accommodating insincere religious claims. Furthermore, courts should distinguish between a

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RFRA protects closely held for-profit corporations. *See Hobby Lobby*, 134 S. Ct. at 2806 (Breyer and Kagan, JJ., dissenting).

357. *Cf.* Horwitz, *supra* note 309, at 156 ("The polarizing nature of the issue, and of the Court's decision, was both reflected in and encouraged by Justice Ginsburg's stinging dissent.").

358. *Cf.* Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in* Hobby Lobby*'s Wake*, 82 U. CHI. L. REV. 1897, 1908 (2015) ("[W]e are, in many cases, without the moral clarity or authority to challenge someone's belief that the conduct legally required of him would make him complicit in what he perceives as wrong."). Some scholars have suggested that courts can avoid violating the "religious question doctrine" by evaluating complicity by analogy to religiously-neutral legal norms of causation and responsibility. Gedicks, *supra* note 28, at 130–32; *see also* Elizabeth Sepper, *Substantiating the Burdens of Compliance*, 2016 U. ILL. L. REV. ONLINE 53, 59 (noting that courts "regularly apply principles of proximity, causation, and attenuation in a variety of First Amendment contexts"). Even if a judge could do so without selecting from among a variety of legal causation doctrines one that that merely corresponded with the judge's own moral views, a legal focus on complicity is misplaced. As explained above, the statutory question is whether the government's regulation substantially burdens the claimant's religious exercise, defined as the claimant's act or omission, not the *reason* for the claimant's religious exercise. *See supra* Part V.

claimant's sincerity, the claimant's religious exercise, and whether the government has placed a substantial burden on that exercise. Contrary to the received scholarly wisdom, carefully adjudicating religious sincerity may actually do more to promote than to undermine religious liberty.