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Is There a "Religious Question" Doctrine?: Judicial Authority to Examine Religious Practices and Beliefs

Jared Goldstein
Roger Williams University School of Law, jgoldstein@rwu.edu

IS THERE A "RELIGIOUS QUESTION" DOCTRINE? JUDICIAL AUTHORITY TO EXAMINE RELIGIOUS PRACTICES AND BELIEFS

Jared A. Goldstein[†]

In the familiar 1947 movie *Miracle on 34th Street*, faith and law come into comical conflict. As anyone who has seen the movie remembers, the plot concerns the identity of a jolly, portly, white-bearded old man who calls himself Kris Kringle and claims to be the one and only Santa Claus. When the old man's apparent delusion lands him in a state mental institution, the film's romantic lead, a lawyer, sets out to free him. An involuntary commitment hearing is called to determine the purported Santa's sanity, and the old man's lawyer sets out to prove that his client is the true Santa. The district attorney argues that the existence of Santa Claus is not a proper subject for judicial inquiry. The judge considers this but rules that the existence of Santa Claus is a factual issue to be resolved through evidence. The question of proof is somewhat difficult: how can the existence of Santa Claus be established using the tools of law when, as our lawyer-hero explains, belief in Santa Claus is based on faith, and faith "means believing in things when common sense tells you not to"?[1]

Fortunately for movie watchers, the writers of *Miracle on 34th Street* were unfamiliar with the principle that courts are prohibited from resolving religious questions. Three years before the release of the movie, the Supreme Court issued its decision in *United States v. Ballard*,[2] which declares that the Religion Clauses of the First Amendment cordon off a "forbidden domain" that judges and juries may not enter: they may not attempt to determine the "truth or falsity" of religious claims.[3] Since *Ballard*, the Court has greatly expanded its articulation of this prohibition, stating that not only are courts prohibited from attempting to determine the truth of religious beliefs, but also they may not seek to

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[†] Associate, Shearman & Sterling, LLP; Associate Professor of Law, Roger Williams University School of Law (beginning Fall 2005). B.A. 1990, Vassar College; J.D. 1994, University of Michigan. I am grateful for comments on earlier drafts by Jonathan Cedarbaum, Gregory Magarian, Susan Schmeiser, and participants in the Washington-Area Legal Writing Group, most especially Amanda Frost and Justin Smith. I also benefited greatly from conversations with Terrence Sandalow and the continued guidance and wisdom of the Honorable Louis H. Pollak.

1. MIRACLE ON 34TH STREET (20th Century Fox 1947).
2. 322 U.S. 78 (1944).
3. *Id.* at 87.

resolve "controversies over religious doctrine and practice,"[4] may not undertake "interpretation of particular church doctrines and the importance of those doctrines to the religion,"[5] may make "no inquiry into religious doctrine,"[6] and may give "no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith."[7] Courts are thus said to be barred from resolving all questions about religious practices and doctrine. If the existence of Santa Claus is a religious question, courts may not answer it.

In *Employment Division v. Smith*,[8] the Supreme Court indicated that the prohibition against judicial resolution of religious questions should be understood to apply broadly and absolutely.[9] Since that decision in 1990, lower courts have relied on the prohibition to dismiss a wide range of otherwise ordinary disputes, whenever their resolution would require examination of religious matters. Courts deem contracts unenforceable when they contain religious terms that might require judicial construction.[10] In child custody and divorce cases, courts refuse to determine whether custodial parents abided by prenuptial or divorce agreements mandating that children be raised in a particular religion because it would require courts to examine religious questions.[11] Courts have refused to adjudicate negligence claims against churches, religious therapists, and faith healers because of the difficulties of determining the reasonableness of a religious actor's conduct without examining religious standards.[12] Courts have held unenforceable consumer fraud statutes prohibiting the false labeling of food to be kosher under Orthodox Jewish dietary standards because, among other reasons, such statutes call on courts to examine religious doctrines and practices to determine whether the food actually complies with Jewish law.[13] Employment discrimination claims against religious organizations are frequently dismissed because they might call upon courts to evaluate whether religious doctrines played any role in the employment decisions at issue.[14] A broad prohibition on judicial examination of religious questions thus

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

5. *Id.* at 450.

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

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

8. 494 U.S. 872 (1990).

9. *Id.* at 887-88.

10. *See infra* notes 133-39 and accompanying text.

11. *See infra* notes 140-44 and accompanying text.

12. *See infra* notes 145-47 and accompanying text.

13. *See infra* notes 148-51 and accompanying text.

14. *See infra* notes 153-56 and accompanying text.

has had the effect of immunizing from judicial review a wide range of conduct simply because examining the conduct could entail examining religious beliefs or practices.

As several commentators have noted, the prohibition on judicial inquiry into religious questions has much in common with the political question doctrine.[15] Just as the Constitution gives the political branches, and not the courts, the authority to resolve political questions, so the Constitution can be understood to leave questions about religion to religious bodies. It is appealing to believe that, just as *Marbury v. Madison*[16] declares that there are questions "in their nature political" and therefore unsuitable to judicial resolution, so there are questions that by their nature are religious and likewise off-limits to the courts.[17] Courts have no business deciding whether to declare war or impose taxes; nor should courts have any role in deciding what prayers should be said in church or who should be elected Pope.

Like the political question doctrine, the prohibition on judicial inquiry into religious questions is understood to be a justiciability doctrine—once it becomes apparent that the resolution of a case would require a court to undertake examination of religious matters, the court has no choice but to dismiss the case.[18] The prohibition on judicial examination of religious questions is also said to rest on two considerations analogous to prominent considerations in the political question doctrine. First, courts

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15. *See, e.g.*, Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99, 132 (1989) ("The Court has developed a religion clause analogue to the political question doctrine that [applies when the resolution of litigation] depends upon interpretation of religious doctrine . . . ."); Scott C. Idleman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 IND. L.J. 219, 220 (2000) ("Broadly conceptualized, this restriction amounts to a general prohibition on the adjudication of religious questions, not unlike the Article III prohibition on the adjudication of so-called political or nonjusticiable questions."); Jonathan Weiss, *Privilege, Posture, and Protection: "Religion" in the Law*, 73 YALE L.J. 593, 599 (1964) (stating that the Court has held that the "first amendment compels *religious reservation*—any examination of a religion's 'truth' for whatever purpose is forbidden by the Constitution"); Bernard Roberts, Note, *The Common Law Sovereignty of Religious Lawfinders and the Free Exercise Clause*, 101 YALE L.J. 211, 226 (1991) ("Perhaps the model of a 'religious question doctrine,' analogous to one version of the political question doctrine, will help to illuminate the civil courts' habit of refraining from inquiry into matters of religious law.").

16. 5 U.S. (1 Cranch) 137 (1803).

17. *Id.* at 170.

18. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-11, at 1236 (2d ed. 1988) (describing religious questions as "non-justiciable"); Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 42-49 (1998); Gedicks, *supra* note 15, at 132 (stating that when cases call upon courts to interpret religious doctrine they "generally must abstain from adjudicating the case rather than rendering the interpretation itself, because theological and ecclesiastical questions are not justiciable").

are said to be incompetent to resolve religious questions,[19] just as courts are said to be incompetent to resolve political questions.[20] Second, the prohibition on judicial resolution of religious questions reflects a concern about separation of powers—in this case, between church and state—just as the political question doctrine reflects concerns over the separation of powers between the judicial and the political branches.[21]

The post-*Smith* adoption of a broad prohibition on judicial inquiry into religious questions has received little attention in the courts and academic literature. To be sure, many articles have examined how the prohibition should be applied in various contexts. Some commentators have thus argued that kosher food laws are consistent with constitutional limitations on the courts' authority, while others have taken a contrary view.[22] Commentators have likewise taken differing positions on how the prohibition should be applied in adjudicating employment discrimination claims against religious entities, negligence claims against religious actors, contract claims involving religious terms, and child custody cases, among other subjects.[23] Considerable attention has been given to how

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19. James Madison declared the proposition that a "Civil Magistrate is a competent Judge of Religious truth" to be "an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world." JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, *in* 8 THE PAPERS OF JAMES MADISON 295, 301 (Robert A. Rultand et al. eds., 1973); *see also infra* notes 199-201 and accompanying text.

20. Baker v. Carr, 369 U.S. 186, 217 (1962).

21. *See* TRIBE, *supra* note 18, at 1226 ("The doctrines that prohibit excessive church-state entanglement reflect the Madisonian concern that secular and religious authorities must not interfere with each other's respective spheres of choice and influence."); *see also* Esbeck, *supra* note 18, at 42-45, 47. *See generally Baker*, 369 U.S. at 217 (stating that courts lack competence to resolve political questions because of a "lack of judicially discoverable and manageable standards").

22. *See infra* note 148.

23. *See* Joanne C. Brant, *"Our Shield Belongs to the Lord": Religious Employers and a Constitutional Right to Discriminate*, 21 HASTINGS CONST. L.Q. 275, 276-77, 280-83 (1994); Irving Breitowitz, *The Plight of the* Agunah*: A Study in* Halacha*, Contract, and the First Amendment*, 51 MD. L. REV. 312, 338-40 (1992); Laura L. Coon, *Employment Discrimination by Religious Institutions: Limiting the Sanctuary of the Constitutional Ministerial Exception to Religion-Based Employment Decisions*, 54 VAND. L. REV. 481, 484-86 (2001); Thomas J. Cunningham, *Considering Religion as a Factor in Foster Care in the Aftermath of* Employment Division, Department of Human Resources v. Smith *and the Religious Freedom Restoration Act*, 28 U. RICH. L. REV. 53, 79-85 (1994); Idleman, *supra* note 15, at 231-39; David J. Overstreet, Note, *Does the Bible Preempt Contract Law?: A Critical Examination of Judicial Reluctance to Adjudicate a Cleric's Breach of Employment Contract Claim Against a Religious Organization*, 81 MINN. L. REV. 263, 265-66 (1996); Jeremy Pomeroy, Note, *Reason, Religion, and Avoidable Consequences: When Faith and the Duty to Mitigate Collide*, 67 N.Y.U. L. REV. 1111, 1111, 1114 (1992). At least two articles have addressed the prohibition in greater depth. *See* Kent Greenawalt, *Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance*, 71 CAL. L. REV. 781 (1998); Samuel J. Levine, *Rethinking the*

statutes addressing religion can be construed consistently with the prohibition.[24] But with the adoption of an apparently absolute judicial prohibition on the resolution of all religious questions, the time has come to ask a much more basic question, much as Louis Henkin asked with regard to the political question doctrine in 1976: is there a religious question doctrine?[25]

As a purely descriptive matter, it is clear that the courts *believe* that such a doctrine exists and routinely dismiss cases for no other identifiable reason than that adjudication would require inquiry into religious matters. This Article argues, however, that it is incoherent to speak of a general prohibition on judicial examination of religious questions. There are numerous contexts in which courts routinely and legitimately undertake factual inquiries into religious doctrines and practices. The question is not *whether* courts may resolve religious questions but *which* religious questions lie beyond judicial ability and authority. This Article answers that question by arguing that, for both institutional and constitutional reasons, courts are barred from resolving normative questions about religion, such as the validity or truth of religious beliefs or the wisdom or efficacy of religious practices, but neither the institutional competence of the courts nor the separationist principle embodied in the Establishment Clause bars judicial resolution of positive religious questions, such as assessments of the content of religious doctrine, or determinations of the centrality or importance of a religious practice within the context of a religion. In other words, on religious matters, courts may not tell people what they should do or believe, but they may determine, in the sense of making factual findings, what beliefs people hold and what practices they engage in.

Supreme Court's Hands-Off Approach to Questions of Religious Practice and Belief, 25 FORDHAM URB. L.J. 85 (1997). Neither of those articles, however, advances a generally applicable principle for distinguishing when courts may and may not examine religious questions. A third article, Richard W. Garnett, *Assimilation, Toleration, and the State's Interest in the Development of Religious Doctrine*, 51 UCLA L. REV. 1645 (2004), LEXIS, Nexis Library, Uclalr File, was published too late in the editing process of the present Article to allow the author to respond to it fully. Professor Garnett does not take issue with the scope or validity of what he terms "the well-settled 'no religious decisions' principle." *Id.* at 1647. Professor Garnett instead argues that the content of religious doctrine is a subject about which the government has substantial interests. *See id.* at 1650.

24. *See, e.g.*, Marci A. Hamilton, *The Religious Freedom Restoration Act Is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1, 6-7 (1998); Gregory P. Magarian, *How to Apply the Religious Freedom Restoration Act to Federal Law Without Violating the Constitution*, 99 MICH. L. REV. 1903, 1904, 1945-62 (2001); Steven C. Seeger, Note, *Restoring Rights to Rites: The Religious Motivation Test and the Religious Freedom Restoration Act*, 95 MICH. L. REV. 1472, 1498-506 (1997).

25. *See* Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 597 (1976).

Part I of this Article traces the evolution of the prohibition on judicial examination of religious questions. As this Part shows, the scope of the prohibition has increased exponentially in recent years, with little discussion or dissent. Prior to *Ballard*, courts had long applied a limited common law principle of deference to ecclesiastical judgments, which barred courts from second-guessing the doctrinal decisions of church bodies.[26] Beginning in the 1960s, with the Court's decision in cases addressing disputes over the ownership of church property and culminating in the *Smith* decision in 1990, the principle has grown to an apparently absolute prohibition on judicial examination of all questions touching on religion. Courts are thus said to be equally barred from determining normative questions, such as whether Jesus really was the Messiah or whether Devil's Tower really is sacred, as they are barred from determining positive questions, such as whether throwing rice is considered a central part of a wedding ceremony or whether Jews consider pork to be kosher.

Part II shows that, contrary to the Court's language, an absolute prohibition on judicial examination of religious questions is neither possible nor advisable. There are substantial contexts in which courts legitimately inquire into religious questions and could not apply the Religion Clauses, or the hundreds of statutes that give special treatment to religion and religious practices, if they were prohibited from doing so. Most prominently, any determination of whether a belief or practice is "religious" and therefore subject to the Free Exercise Clause or the Establishment Clause necessarily entails inquiry into the content of religious doctrines and practices, and courts routinely make such inquiries, notwithstanding the apparent prohibition on judicial examination of religious questions.

Part III examines the argument that courts are institutionally incompetent to resolve religious questions. This rationale for prohibiting judicial assessment of religious questions depends crucially on a conception of law and religion as epistemologically distinct spheres—that is, that the validity of religious claims depends on faith, miracles, mystical experiences, and other nonrational sources, while law discovers truth exclusively through reason and empiricism. Under this conception, courts cannot resolve religious questions because they are not susceptible to the analytical tools available through law. To the extent this understanding of the difference between religious and legal thinking is correct, it counsels in favor of a prohibition on judicial resolution of normative questions about religion. In contrast, positive religious questions, such as those concerning the content of religious beliefs or the

26. *See infra* Part I.A.

importance of a religious practice within the context of a religion, do not call on courts to employ anything other than ordinary tools of judicial fact-finding and can be resolved through resort to traditional evidence, such as reliance on expert witnesses, treatises, and factual testimony.

Part IV examines the argument, based on the separationist principle embodied in the Establishment Clause, that courts are barred from resolving religious questions because such questions are constitutionally committed to religious bodies. While a judicial determination that a religious claim is true or valid would necessarily intrude into the sphere of religion protected by the Constitution, courts neither become excessively entangled in religious matters nor endorse religious doctrines merely by describing them in positive terms. The Religion Clauses are thus properly understood to prohibit judicial determinations of the truth or validity of religious claims but not to prohibit courts from making positive assessments of the content of religious doctrine and practices.

I. THE CREATION AND EXPANSION OF THE PROHIBITION ON JUDICIAL EXAMINATION OF RELIGIOUS QUESTIONS

Throughout the eighteenth and nineteenth centuries, American common law included a generally applicable principle that courts should avoid deciding certain kinds of religious questions out of respect for the separate authority of religious bodies.[27] In the last sixty years, that limited principle has grown into a seemingly absolute prohibition on all judicial inquiry into questions touching on religion, regardless of the type of question or how the question arises. The expansion began in 1944 with the Court's decision in *Ballard*, when the Supreme Court held that the Free Exercise Clause prohibits courts from determining the truth or validity of religious claims.[28] Twenty-five years later, the Court declared that the Establishment Clause prohibits courts from interpreting the meaning of religious terms or weighing the importance of doctrines or practices in the context of a religion.[29] Although that principle was articulated in broad terms, for the next twenty years the Court appeared ambivalent about the precise scope of the prohibition on judicial resolution of religious questions, and the Court continued to examine the meaning and context of religious doctrines and practices in determining numerous cases.[30]

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27. *See, e.g.*, Watson v. Jones, 80 U.S. (13 Wall.) 679, 733-34 (1871).

28. United States v. Ballard, 322 U.S. 78, 79, 88 (1944).

29. Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 441, 452 (1969).

30. *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 578-79 (1989); Hernandez v. Comm'r, 490 U.S. 680, 683-84 (1989); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 441-42 (1988); Corp. of the Presiding Bishop of the Church of Jesus

That changed in 1990, with the Court's decision in *Smith*, which holds that courts may not examine or weigh the importance of religious practices in determining whether an individual's rights to the free exercise of religion were violated.[31] *Smith*'s conclusion has been understood by the lower courts to evince an absolute prohibition on judicial examination of religious questions. Applying that prohibition, state and federal courts have dismissed scores of otherwise ordinary disputes—involving consumer fraud, child custody, employment discrimination, negligence, professional malpractice, and contracts—whenever their resolution would require any analysis of religious questions.[32]

A. The Common Law Origins of the Prohibition on Judicial Examination of Religious Questions

The principle that civil courts have no authority to adjudicate religious disputes dates back to medieval England, when church courts and crown courts existed side by side and had relatively distinct areas of jurisdiction. As Roscoe Pound described:

> In the politics and law of the Middle Ages the distinction between the spiritual and the temporal, between the jurisdiction of religiously organized Christendom and the jurisdiction of the temporal sovereign, that is, of a politically organized society, was fundamental. It seemed as natural and inevitable to have church courts and state courts, each with their own field of action and each, perhaps, tending to encroach on the other's domain, but each having their own province in which they were paramount, as it seems to Americans to have two sets of courts, federal courts and state courts, operating side by side in the same territory, each supreme in their own province.[33]

Under the dual legal system in place in medieval England, common law courts, under the domain of the King, had jurisdiction over temporal matters and lacked authority to decide religious questions because such

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Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 329-30 (1987); Edwards v. Aguillard, 482 U.S. 578, 580-82 (1987); School Dist. v. Ball, 473 U.S. 373, 375, 397-98 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997); Roemer v. Bd. of Pub. Works, 426 U.S. 736, 739, 766-67 (1976); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 697-98 (1976).

31. *See* Employment Div. v. Smith, 494 U.S. 872, 874, 890 (1990).

32. *See supra* note 23.

33. Roscoe Pound, *A Comparison of Ideals and Law*, 47 HARV. L. REV. 1, 6 (1933). *See generally* J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 146-52 (3d ed. 1990); Kenneth R. O'Brien & Daniel E. O'Brien, *Restatement of Inter-Church-and-State Common Law*, 5 JURIST 73 (tracing the history of the Catholic Church's supreme authority over internal church matters, free from secular supervision).

questions properly fell under the jurisdiction of the church and its own system of canon courts.

The longstanding division of authority between the crown's courts and the church courts formed the background for the rejection in the seventeenth and eighteenth century of civil authority over questions of faith. John Locke argued that civil courts had no authority to measure religious truth because such matters fell under the authority of religious bodies and the individual conscience: "And upon this ground, I affirm that the magistrate's power extends not to the establishing of any articles of faith, or forms of worship, by the force of his laws."[34] This principle was generally accepted throughout the American Colonies. Roger Williams thus wrote in 1644 that civil courts have no authority to judge the truth of religious convictions: "All civil states with their officers of justice, in their respective constitutions and administrations, are . . . essentially civil, and therefore not judges, governors, or defenders of the Spiritual, or Christian, State and worship."[35] James Madison likewise relied on what was by then a well-established principle in his *Memorial and Remonstrance Against Religious Assessments*, declaring the proposition that a "Civil Magistrate is a competent Judge of Religious truth" to be "an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world."[36]

Pursuant to the principle that civil courts have no authority over religious matters, nineteenth century courts refused to address the truth of religious doctrines,[37] to decide whether the Christian sacraments had been properly administered,[38] to enforce spiritual obligations,[39] or to compel church officials to perform religious duties.[40] When such questions about religion arose, the courts deferred to the final decisions of religious authorities, just as the common law courts of England would have deferred to church courts on matters within their jurisdiction.

In ways that plainly would be anathema under contemporary understandings of the place of religion in law, American courts in the

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34. JOHN LOCKE, A LETTER CONCERNING TOLERATION (1690), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 52 (Philip B. Kurland & Ralph Lerner eds., 1987).

35. ROGER WILLIAMS, THE BLOODY TENENT, OF PERSECUTION FOR CAUSE OF CONSCIENCE (1644), *reprinted in* THE FOUNDERS' CONSTITUTION, *supra* note 34, at 48.

36. MADISON, *supra* note 19.

37. *See, e.g.*, Trustees of E. Norway Lake Norwegian Evangelical Lutheran Church v. Halvorson, 44 N.W. 663, 665, 667 (Minn. 1890).

38. Reformed Protestant Dutch Church v. Bradford, 457 Cow. 525-26 (N.Y. 1826).

39. Congregation of the Roman Catholic Church v. Martin, 1843 La. LEXIS 25, at *13-14 (La. Feb. 1843).

40. Ferraria v. Vasconcellos, 1863 WL 3069, at *7 (Ill. Jan. 1863). *See generally* WILLIAM GEORGE TORPEY, JUDICIAL DOCTRINES OF RELIGIOUS RIGHTS IN AMERICA 138-41 (1948).

nineteenth century understood the bar on examining the truth of religious doctrines to be necessary to protect the dominant position of Christianity. Christianity was said to be part of the common law and, as a result, the truth of Christian doctrines could not be challenged in court.[41] Blasphemy against Christianity and the Christian Bible remained a common law crime until the early twentieth century,[42] and convictions were upheld for calling Jesus a bastard,[43] for characterizing the Bible to be a fable,[44] and for publishing a satire of the New Testament.[45] Alleged blasphemers could not defend themselves on the ground that they had spoken the truth.[46] As the Pennsylvania Supreme Court explained in 1824, if the truth of Christian beliefs were open to attack in court, no testimony could be credited because of the requirement that witnesses swear an oath of truthfulness on the Christian Bible:

> [A]ll false oaths, all tests by oath, in the common form, by the book, would cease to be indictable as perjury; the indictment must state the oath to be on the holy Evangelists of Almighty God; the accused, on his trial, might argue that the book by which he was sworn, so far from being holy writ, was a pack of lies, containing as little truth as Robinson Crusoe. And is every

41. *See* Church of the Holy Trinity v. United States, 143 U.S. 457, 471 (1892) ("[T]his is a Christian nation."); Updegraph v. Commonwealth, 1824 WL 2393, at *5 (Pa. Sept. 13, 1824) ("Christianity, general Christianity, is and always has been a part of the common law of Pennsylvania, . . . not Christianity with an established church and tithes and spiritual courts; but Christianity with liberty of conscience to all men."); 15A AM. JUR. 2D *Christianity* § 8 (2000) ("[I]t has been said that general Christianity is, and always has been, a part of the common law . . . ."). *See generally* Stuart Banner, *When Christianity Was Part of the Common Law*, 16 L. & HIST. REV. 27, 57 (1998).

42. *See* Banner, *supra* note 41, *passim* (discussing the historical idea that the Christian religion was part of the common law and thoroughly exploring blasphemy and its relationship to the old maxim); Robert A. Brazener, Annotation, *Validity of Blasphemy Statutes or Ordinances*, 41 A.L.R. 3D 519 (1972) (identifying a collection of cases regarding the validity of blasphemy statutes and ordinances). *See generally* CHARLES E. TORCIA, 4 WHARTON'S CRIMINAL LAW § 532 (14th ed. 1981) (defining blasphemy as "maliciously reviling God or religion [and] involves speaking evil of the Deity with an impious purpose to derogate from the divine Majesty" (citation omitted)). Blasphemy was understood to be a secular crime, not a religious offense, because public ridicule of Christianity was seen as a threat to the peace due to Christianity's dominant position. *See Updegraph*, 1824 WL 2393, at *4 (stating that Christianity "is the popular religion of the country, an insult on which would be indictable, as directly tending to disturb the public peace"); TORPEY, *supra* note 40, at 59 ("Blasphemy is a temporal offense. Violation of religious precepts will not be punished as such. Punishment follows because such attacks tend to destroy the peace of society.").

43. People v. Ruggles, 1811 N.Y. LEXIS 124, at *4-5, *13 (N.Y. Aug. 1811).

44. *Updegraph*, 1824 WL 2393, at *4.

45. State v. Mockus, 113 A. 39, 40, 45 (Me. 1921).

46. *See Updegraph*, 1824 WL 2393, at *8.

> jury in the box to decide as a fact whether the scriptures are of divine origin?[47]

Judicial examination of the validity of Christian teachings was thus prohibited because the truth of Christian doctrine was understood to be an unchallengeable foundation of the law.

The principle that courts could not delve into religious questions did not, however, preclude judicial pronouncements on the falsity of religious doctrines and practices outside mainstream Christianity. For instance, in 1922 an Oklahoma prosecution for fortune-telling was upheld against a practitioner of Spiritualism, notwithstanding the defendant's claim that her religion involved the practice of communicating with departed spirits.[48] The court doubted the contention that communicating with spirits was a protected form of religious freedom, describing the defendant's avowed religion as "a system of speculative philosophy, attended with superstitious credulity and . . . tinged with hypocrisy."[49] Other courts characterized claims of supernatural abilities to contact the dead, or to heal illnesses through psychic powers, to be fraudulent,[50] as something only lunatics could believe.[51]

In addition to protecting the dominant role of Christianity, the reluctance of nineteenth-century courts to resolve religious questions served the Madisonian goal of maintaining the distinct spheres of religion and law. In 1872, in *Watson v. Jones*,[52] the Supreme Court held, as a matter of federal common law, that courts should not resolve property disputes between rival church bodies by reference to religious doctrines.[53] The case arose as a result of a schism among a church's members over the issue of slavery, which resulted in two competing groups claiming

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47. *Id.*; *see also Mockus*, 113 A. at 43 (defending the position of Christianity as part of the common law on the ground that "[j]udicial tribunals, anxious to discover and apply the truth . . . require those who are to give testimony in courts of justice to be sworn by an oath which recognizes deity").

48. McMasters v. State, 207 P. 566, 568 (Okla. Crim. App. 1922).

49. *Id. Contra id.* at 570 (Matson, J., concurring) ("Can the state constitutionally prohibit communication with the spirit world, with which, so far as I am advised, we are at peace?").

50. Fay v. Lambourne, 108 N.Y.S. 874, 876 (N.Y. App. Div. 1908).

51. Post v. United States, 135 F. 1, 10-11 (5th Cir. 1905) (sustaining a prosecution against a practitioner of spiritual healing in which the government bore the burden of proving that the defendant did not actually possess the power to heal diseases through mental powers alone); People v. Elmer, 67 N.W. 550, 551 (Mich. 1896). *See generally* Gregory G. Sarno, Annotation, *Regulation of Astrology, Clairvoyancy, Fortunetelling, and the Like*, 91 A.L.R. 3D 766 (1979).

52. 80 U.S. (13 Wall.) 679 (1871).

53. *Id.* at 733-34.

ownership of the church property.[54] The Supreme Court overturned the lower court's ruling that the property belonged to the group that more closely followed the original teachings of the church.[55] *Watson* reaches this conclusion as a matter of the relative jurisdictions of civil courts and religious authorities, stating that "civil courts exercise no jurisdiction" over disputes that are "strictly and purely ecclesiastical in [their] character," because such matters must be left to church authorities to resolve.[56]

In ruling that the property dispute should not be decided based on a court's assessment of the litigants' adherence to church doctrines, *Watson* emphasizes that courts are not absolutely barred from examining religious doctrines in other contexts.[57] The Court contrasted judicial reliance on religious doctrine in deciding a dispute between competing church sects with the hypothetical case of a "pious man" who placed property in trust in a written instrument specifying that it be used by a congregation committed to Trinitarian Christianity.[58] In the latter case, the *Watson* Court stated, courts should be available to "prevent that property from being used as a means of support and dissemination of the Unitarian doctrine."[59] A court's duty in that hypothetical case would be "to inquire whether the party accused of violating the trust is holding or teaching a different doctrine."[60] *Watson* thus holds that fidelity to religious doctrines cannot serve as a rule of decision for adjudicating property disputes, but courts may nonetheless inquire into questions of religious doctrine and practice when such questions arise in the ordinary course of litigation and do not require judgments about the relative merits of religious claims.

In the eighteenth and nineteenth centuries, American law had thus developed a common law principle that the civil courts had no authority over religious matters and that courts therefore should avoid resolving religious questions in deference to proper church authorities. This principle had limited applications: it prevented courts from directly meddling in the internal affairs of mainstream Christian churches and prevented parties from challenging the truth of Christian doctrines. The principle did not prevent courts from declaring non-Christian religious claims to be false, nor was it understood to prevent courts from making factual inquiries into religious doctrines and practices, Christian and

54. *Id.* at 690-92.
55. *See id.* at 733-34.
56. *Id.*
57. *See id.* at 723.
58. *Id.*
59. *Id.*
60. *Id.* at 724.

otherwise, when such questions arose in the ordinary course of litigation and did not call on courts to make judgments about the merits of religious doctrines and practices.

B. The Expansion of the Prohibition Against Judicial Resolution of Religious Questions

Beginning with *Ballard*, decided in 1944, the Supreme Court issued a series of cases that constitutionalized and greatly expanded the principle that courts should not delve into questions of religious doctrine. In *Ballard*, the Court held that the Free Exercise Clause bars courts from determining the validity or truth of religious claims or doctrines.[61] In 1969, in *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*,[62] the Court announced a much more sweeping rule—that the Establishment Clause bars factual inquiry into the content of religious doctrines or practices, either to interpret religious doctrine or to determine the relative importance or centrality of a particular religious belief or practice to a believer.[63] In the twenty years following *Presbyterian Church*, however, the Court did not apply the rule literally and instead continued to inquire into the content and context of religious doctrines and practices in cases under the Free Exercise Clause and other areas.[64] That changed in 1990, with *Smith*, in which the Court relied on the broad prohibition against judicial inquiry into religious questions to substantially revise Free Exercise doctrine.

1. United States v. Ballard*: The Constitutional Prohibition on Judicial Assessment of Religious Truths*

Ballard arose out of charges of mail fraud against followers of Guy Ballard, founder of the I Am movement.[65] According to the indictment, members of the I Am movement mailed literature in which they claimed that Ballard had been chosen by Saint Germain to transmit divine messages to mankind, that the tracts of the I Am movement had been dictated directly by Jesus, and that, by virtue of his supernatural attainments, Ballard possessed the power to cure diseases and heal injuries.[66] The indictment alleged that Ballard's followers knew these

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61. *See* United States v. Ballard, 322 U.S. 78, 86 (1944).

62. 393 U.S. 440 (1969).

63. *See id.* at 449-50.

64. *See infra* Part I.B.3.

65. *See Ballard*, 322 U.S. at 79. A fascinating examination of the factual background to the *Ballard* case and the history of the I Am movement can be found in JOHN T. NOONAN, JR., THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM 141-56 (1998). *See also* Weiss, *supra* note 15, at 593-94.

66. *Ballard*, 322 U.S. at 79-80.

claims to be false and made them in order to swindle people of their money.[67] The court of appeals ruled that the defendants could be found guilty only if the jury determined that the defendants' claims were factually false.[68]

Reversing, the Supreme Court held that the Religion Clauses prohibit any inquiry into the truth or falsity of religious claims:

> The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom. . . . 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 that task, they enter a forbidden domain.[69]

The Supreme Court held that the defendants could be convicted of fraud if they did not sincerely believe the religious claims they made, without any inquiry by the jury into the truth of those claims.[70]

Ballard thus announces that the Constitution cordons off a "forbidden domain" that courts may not enter: courts may not determine the truth or falsity of religious claims.[71] Although *Ballard* is consistent with the earlier common law prohibition on judicial resolution of religious questions, it locates a constitutional source for the prohibition—the Free Exercise Clause and its protection against punishment for holding religious beliefs offensive to the majority.[72]

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67. *Id.* at 80.

68. *Id.* at 83.

69. *Id.* at 87.

70. *Id.* at 88. Justice Jackson dissented on the ground that allowing a conviction based on insincerity does not adequately protect religious freedom. *Id.* at 92, 95 (Jackson, J., dissenting). In Justice Jackson's view, the question of whether a defendant acted sincerely in making a religious claim cannot be sufficiently distinguished from the truth of the claim. *Id.* at 92 (Jackson, J., dissenting). For a discussion of the problems associated with ascertaining religious sincerity, see John T. Noonan, Jr., *How Sincere Do You Have To Be To Be Religious?*, 1988 U. ILL. L. REV. 713, 718-24 (1989). *See also* Weiss, *supra* note 15.

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

72. *Id.* at 86.

2. The Church Property Cases: The Constitutional Prohibition on Judicial Examination of Religious Doctrines

In a series of cases addressing church property disputes, the Court constitutionalized and expanded the rule, announced in *Watson*, that courts should not resolve property disputes between competing church factions by reference to religious doctrines.[73] The leading case, *Presbyterian Church*, arose as a result of a schism in the Presbyterian Church, in which title to a church was claimed both by the national church body and by the local church organization, which had broken with the national church over its decision to ordain women.[74] The property dispute made its way to the Georgia Supreme Court, which applied its longstanding rule that church property is held in trust for the central church organization as long as it adheres to the original church doctrines.[75] The Georgia court awarded the property to the local church on the ground that the national church body had substantially departed from its doctrines by allowing the ordination of women.[76] The Supreme Court reversed, concluding that "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."[77]

At the level of its holding, *Presbyterian Church* simply restates *Watson*, rejecting Georgia's departure-from-doctrine rule, which allowed a court faced with a property dispute between church factions to favor the church body that more closely adhered to the church's original theological doctrines. Such a substantive rule of decision amounted to a governmental endorsement of one set of religious factions—conservative factions—at the expense of progressive factions, violating the principle of neutrality that the law "is committed to the support of no dogma, the establishment of no sect."[78] Yet, in rejecting the departure-from-doctrine

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73. *See generally* Louis J. Sirico, Jr., *Church Property Disputes: Churches as Secular and Alien Institutions*, 55 FORDHAM L. REV. 335 (1986); Robert J. Bohner, Note, *Religious Property Disputes and Intrinsically Religious Evidence: Towards a Narrow Application of the Neutral Principles Approach*, 35 VILL. L. REV. 949 (1990).

74. Presbyterian Church v. Mary Elizabeth Blue Mem'l Presbyterian Church, 393 U.S. 440, 442 & n.1 (1969).

75. *See id.* at 443-44. Although the departure-from-doctrine rule had been rejected in *Watson*, that decision was based on federal common law and was binding on federal courts only. *See id.* at 445 n.4.

76. *See id.* at 443-44.

77. *Id.* at 444, 449.

78. Watson v. Jones, 80 U.S. (13 Wall.) 679, 728 (1871); *see also* School Dist. v. Schempp, 374 U.S. 203, 243 (1963) (Brennan, J., concurring) (stating that the Establishment Clause expresses a conviction "requiring on the part of all organs of government a strict neutrality toward theological questions").

rule, the Court's decision in *Presbyterian Church* appears to adopt a broad rule that the Religion Clauses bar *any* judicial inquiry into religious doctrines:

> [T]he departure-from-doctrine element of the Georgia implied trust theory requires the civil court to determine matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion. Plainly, the First Amendment forbids civil courts from playing such a role.[79]

The Court thus characterized judicial examination of religious questions as the "forbidden process of interpreting and weighing church doctrine."[80]

In *Presbyterian Church* and the subsequent church property cases, the Court embraced a prohibition on judicial interpretation of religious doctrine in order to foreclose the possibility that a court might rule that an authoritative doctrinal decision of a religious body is incorrect.[81] In *Serbian Eastern Orthodox Diocese v. Milivojevich*,[82] the Court overturned the judgment of the Illinois Supreme Court that local church property belonged to the American branch of the Serbian Orthodox Church rather than to the mother church in Yugoslavia.[83] As the Court stated, the fatal flaw of the Illinois court was that its decision "rests upon an impermissible rejection of the decisions of the highest ecclesiastical tribunals of this hierarchical church upon the issues in dispute, and impermissibly substitutes its own inquiry into church polity and resolutions based thereon of those disputes."[84] These cases can be understood simply to reject the power of courts to disagree with the religious judgment of church bodies.

The language of the decisions, however, goes much further in rejecting judicial examination of religious doctrines. In a one-paragraph concurrence in *Presbyterian Church*, Justice Harlan sought to make clear that the Court's opinion should not be read to preclude a court from interpreting and enforcing legal documents containing religious terms, at least where such terms are express and clear.[85] In holding out the

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

80. *Id.* at 451; *see also id.* at 450 (holding that the First Amendment prohibits civil courts from "assessing the relative significance to the religion" of a particular religious tenet).

81. *See id.* at 449-50.

82. 426 U.S. 696 (1976).

83. *Id.* at 698.

84. *Id.* at 708.

85. *Presbyterian Church*, 393 U.S. at 452 (Harlan, J., concurring) ("I do not, however, read the Court's opinion to go further to hold that the Fourteenth Amendment forbids

possibility that a court could construe religious terms appearing in deeds or wills, Justice Harlan relied on *Watson*'s hypothetical of the "pious man."[86] Cases following *Presbyterian Church*, however, eliminate any residual authority for courts to construe religious terms, however clearly expressed.[87] The Court approved two methods for resolving church property disputes, both of which entail "'no inquiry into religious doctrine,'"[88] and "'no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith.'"[89] Courts may either adopt a policy of deference to the church institution with authority to decide the property question and underlying religious doctrinal questions, or courts may decide the property dispute by applying "neutral principles" of law that do not entail any consideration of religious doctrinal matters.[90]

In the broad form articulated by the Court in these cases, the prohibition on judicial examination of religious questions goes far beyond both the common law prohibition and the rule announced in *Ballard*. Whereas *Ballard* prohibits courts from judging the truth of religious doctrines, the church property cases bar courts from making any "inquiry" into religious doctrines, from "interpreting" religious doctrines, and from determining the "importance" of religious doctrine to believers.[91] The church property cases further alter the constitutional source of the prohibition. Whereas *Ballard* is based principally on free exercise principles, the broad prohibition on judicial examination of religious questions articulated in the church property cases is grounded

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civilian courts from enforcing a deed or will which expressly and clearly lays down conditions limiting a religious organization's use of the property which is granted.").

86. *Id.* (Harlan, J., concurring).

87. *See* Md. & Va. Eldership v. Church of God, 396 U.S. 367, 369 n.2 (1970) (Brennan, J., concurring) ("Only express conditions that may be effected without consideration of doctrine are civilly enforceable.").

88. Jones v. Wolf, 443 U.S. 595, 603 (1979) (quoting *Md. & Va. Eldership*, 396 U.S. at 368).

89. *Id.* at 602 (quoting *Md. & Va. Eldership*, 396 U.S. at 368 (Brennan, J., concurring)).

90. *See* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 709 (1976).

> For where resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them.

Id.; *Wolf*, 443 U.S. at 603 ("The method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice.").

91. *See Wolf*, 443 U.S. at 602-04; United States v. Ballard, 322 U.S. 79, 83-86 (1944).

primarily on Establishment Clause principles.[92] Examination of religious questions is said to involve excessive entanglement with religion and to be constitutionally assigned to religious authorities.[93] The church property cases thus depart substantially from *Watson*, which had announced that religious bodies "come before us in the same attitude as other voluntary associations."[94] In announcing that courts may not purport to resolve religious questions, the church property cases announce a rule uniquely applicable to religious entities.[95]

3. Thomas, Hernandez, *and* County of Allegheny*: Confusion Over the Permissible Scope of Judicial Examination of Religious Questions*

Although the church property cases broadly declare that courts must not engage in the "forbidden process of interpreting and weighing church doctrine,"[96] in the first twenty years after issuing those opinions the Court continued to consider and weigh the importance of religious doctrines and practices in its analysis of cases under the Religion Clauses.[97] The rule against judicial review of religious matters appeared to be another instance of what the Court candidly recognized as its tendency to make overly broad pronouncements in cases under the Religion Clauses.[98]

The Court frequently examined the content of religious doctrines and practices in Free Exercise Clause cases. Until *Smith*, the Court applied a compelling interest test in evaluating free exercise challenges to the application of neutral governmental laws, requiring courts to assess the significance of the burden on the plaintiff's religious practice and weigh

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92. *See Wolf*, 443 U.S. at 602.

93. *See id.* at 603. There is some dispute among commentators regarding which of the two Religion Clauses form the basis for the church property cases. *Compare* Douglas Laycock, *Towards a General Theory of the Religion Clauses*, 81 COLUM. L. REV. 1373, 1396 (1981) (arguing that the church property cases rest on the Free Exercise Clause because "the primary constitutional violation [is] interfering with the right of the original church, which included both factions, to resolve the controversy itself"), *with* TRIBE, *supra* note 18, at 1232-34, 1237-42 (discussing the church property cases as Establishment Clause cases), *and* Esbeck, *supra* note 18, at 42-58 (arguing that the church property cases are based on the separationist principles of the Establishment Clause).

94. Watson v. Jones, 80 U.S. (13 Wall.) 679, 714 (1871).

95. *See Wolf*, 443 U.S. at 602.

96. Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 451 (1969); *see also id.* at 450 (holding that the First Amendment prohibits civil courts from "assessing the relative significance to the religion" of a particular religious tenet).

97. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 214 (1972); Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970).

98. *See Walz*, 397 U.S. at 668 ("The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles.").

that burden against the strength of the government's interest in applying the neutral law to the challenger. For example, in *Wisconsin v. Yoder*,[99] the Court held that Wisconsin's compulsory education requirement violated the free exercise rights of the Old Order Amish because the Amish religion prohibited sending teenagers to public schools.[100] In order to reach that conclusion, the Court gave careful examination to the doctrines and practices of Amish religion, noting the "strong evidence of a sustained faith pervading and regulating [the Amish's] entire mode of life," and describing the biblical command, "'[B]e not conformed to this world,'" to be "fundamental to the Amish faith."[101] The Court's free exercise cases required judicial examination of the content and significance of religious practices as an essential aspect of the constitutional test.[102]

In several cases following the church property cases, the Court grappled with the contradiction of both requiring and prohibiting judicial examination of religious doctrines and practices. For instance, *Thomas v. Review Board*[103] involved the free exercise rights of a Jehovah's Witness who was denied unemployment compensation after quitting his job, claiming that his religious beliefs forbade him from participating in military production.[104] To establish that the denial of benefits burdened his religion, Thomas was required to present some evidence about the content of his religion—in the words of the Court, to show that he "terminated his work because of an honest conviction that such work was forbidden by his religion."[105] The state attempted to rebut Thomas's characterization of his religious beliefs by demonstrating that the Jehovah's Witnesses do not actually forbid military work, offering testimony of one of Thomas's coworkers and fellow Jehovah's Witness.[106] The Court, however, held that assessing the content of Jehovah's Witness doctrine was beyond the constitutional competence of the judiciary: "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."[107]

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99. 406 U.S. 205 (1992).

100. *Id.* at 214.

101. *Id.* at 216, 219.

102. *See id.* at 214; Jones v. Wolf, 443 U.S. 595, 602 (1979); *Walz*, 397 U.S. at 669-70; Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 443-44 (1969).

103. 450 U.S. 707 (1981).

104. *Id.* at 709.

105. *Id.* at 716.

106. *Id.* at 715.

107. *Id.* at 716.

The contradiction in the Court's requirement that free exercise plaintiffs demonstrate a burden on their religious beliefs or practices while simultaneously prohibiting judicial examination of the content and importance of religious beliefs and practices can be seen most clearly in the course of a single paragraph in the Court's opinion in *Hernandez v. Commissioner*.[108] That case involved the disallowance of tax deductions for "auditing" and "training" sessions mandated by Church of Scientology teachings.[109] In addressing the claim that the disallowance violated the taxpayers' free exercise rights, the Court articulated the constitutional test as follows: "the free exercise inquiry asks whether government has placed a substantial burden on the observation of a *central* religious belief or practice and, if so, whether a compelling governmental interest justifies the burden."[110] The Court apparently recognized that requiring proof that a religious practice is "central" to the plaintiff's religion might be understood to call for judicial examination of the content and importance of religious beliefs and practices, as the next sentence in the opinion seeks to forbid such examination: "[I]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith."[111] The next two sentences of the opinion, however, demonstrate that the Court was nonetheless willing to makes its own assessment of the doctrines and teachings of the Church of Scientology:

> [W]e do, however, have doubts whether the alleged burden imposed by the deduction disallowance on the Scientologists' practices is a substantial one. Neither the payment nor the receipt of taxes is forbidden by the Scientology faith generally, and Scientology does not proscribe the payment of taxes in connection with auditing or training sessions specifically.[112]

Hernandez thus appears to hold that (1) free exercise plaintiffs must demonstrate that a burdened religious practice or belief is *central* to his or her religion, but (2) a court cannot determine whether the practice or belief *actually* is central to the plaintiff's religion, yet (3) courts may nonetheless assess whether the plaintiff's religion would consider the burden imposed by the challenged governmental action to be *substantial*. If nothing else, *Hernandez* demonstrates that the Court remained baffled over the extent to which judicial inquiry is allowed into religious doctrines and practices.

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108. 490 U.S. 680 (1989).
109. *Id.* at 683-84.
110. *Id.* at 699 (emphasis added).
111. *Id.*
112. *Id.*

In the same Term that *Hernandez* was decided, the Court expressed similar ambivalence about whether it should decide Establishment Clause cases without examining religious doctrines. In *County of Allegheny v. ACLU*,[113] the Court considered the constitutionality of a display of a crèche in a county courthouse and a menorah in a local government building.[114] In deciding whether these displays violated the Establishment Cause, the Court devoted considerable attention to the religious meaning and content of the displays. The majority opinion parsed the phrase appearing on the crèche, "Glory to God in the Highest," to express the sectarian sentiment, "Glory to God because of the birth of Jesus."[115] The majority concluded that "[t]his praise to God in Christian terms is indisputably religious."[116] Based on its conclusion that the crèche conveyed a "patently Christian message," the majority found that its display on public property violated the Establishment Clause.[117] Likewise, in considering the constitutionality of the display of the menorah, Justice Blackmun's concurring opinion examined voluminous evidence, including expert testimony, regarding the religious meaning of the menorah.[118] Dissenting on the unconstitutionality of the display of the crèche and concurring on the constitutionality of the display of the menorah, Justice Kennedy, joined by Chief Justice Rehnquist and Justices White and Scalia, criticized the Court for undertaking the "inappropriate task of saying what every religious symbol means. . . . This Court is ill equipped to sit as a national theology board, and I question both the wisdom and the constitutionality of its doing so."[119] Justice Blackmun defended his examination of the religious meaning of the menorah, stating that "[a]ny inquiry concerning the government's use of a religious object . . . requires a review of the factual record concerning the religious object."[120] The Court thus divided over whether it is constitutionally appropriate for a court to examine the content of religious doctrines and practices in deciding cases under the Establishment Clause.

113. 492 U.S. 573 (1989).
114. *Id.* at 578.
115. *Id.* at 598.
116. *Id.*
117. *Id.* at 601-02.
118. *Id.* at 613, 620-21 (Blackmun, J., concurring).
119. *Id.* at 678 (Kennedy, J., concurring in the judgment in part and dissenting in part).
120. *Id.* at 614 n.60 (Blackmun, J., concurring).

4. Employment Division v. Smith*: The Reshaping of the Free Exercise Clause to Avoid Examination of Religious Doctrines and Practices*

Although the opinions issued by the Court in the first two decades following the church property cases express considerable ambivalence over whether courts are constitutionally allowed to examine the content, meaning, and importance of religious doctrines and practices, none of the cases in those decades appear to take literally the church property cases' broad pronouncements of an absolute prohibition on judicial examination of religious doctrines and practices. That changed with the Court's decision in *Smith*, issued the Term following *Hernandez* and *Allegheny*. *Smith* broadly holds that courts are constitutionally barred from making any factual inquiries into the content or significance of religious doctrines and practices and that, as a result, the standard for deciding free exercise cases cannot depend on the significance of religious doctrines and practices in the context of a religion.[121]

In *Smith*, the Court overturned the compelling interest test applied in cases like *Yoder* in large part because it required courts to determine the significance of religious practices and doctrines.[122] As the Court stated, "[W]e have warned that courts must not presume to determine the place of a particular belief in a religion."[123] Because courts must not determine the religious significance of an allegedly burdened practice, the Court concluded that "[i]f the 'compelling interest' test is to be applied at all . . . it must be applied across the board, to all actions thought to be religiously commanded."[124] The Court thus announced that courts are constitutionally barred from distinguishing religious practices and doctrines that are central to a religion from those that are trivial—in the example of the Court, the Free Exercise Clause cannot be read to offer differing degrees of protection to the practice of throwing rice at weddings than to the wedding ceremony itself.[125] Because courts are constitutionally barred from determining the significance of religious practices, they cannot balance the significance of a governmental interest against the significance of a burdened religious practice.[126]

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121. Employment Div. v. Smith, 494 U.S. 872, 885 (1990).

122. *Id.* at 886-87; *cf.* Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 VA. L. REV. 1, 59 (1993) ("*Smith* . . . is a decision about institutional arrangements more than about substantive merits[,] . . . holding that judicially manageable standards for the resolution of Free Exercise exemption claims are lacking." (footnotes omitted)).

123. *Smith*, 494 U.S. at 887.

124. *Id.* at 888.

125. *Id.* at 887 n.4.

126. *Id.* at 889 n.5 ("[I]t is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice.").

Disagreeing with the majority's rejection of the compelling interest test, both the concurring and dissenting Justices nonetheless agreed with the majority that it is constitutionally impermissible for a court to determine the importance of a religious practice within the context of a religion.[127] The most prominent academic critics and defenders of the decision similarly agreed that the Free Exercise Clause does not require courts to determine the centrality of religious doctrines and practices.[128]

Smith thus confirms that the prohibition against judicial examination of religious questions articulated in the church property cases should be understood to be broad and absolute. Whereas the church property cases applied the prohibition to invalidate a rule of decision calling for examination of religious doctrines to decide property disputes, *Smith* applies the prohibition to cases arising under the Free Exercise Clause, holding that even in deciding cases about religious freedom, courts cannot examine the religious content of the practices and doctrines at issue.[129] As the lower courts were quick to grasp, if the content and significance of religious practices cannot be examined in addressing the scope of religious freedom, examination of the content and significance of religious practices and doctrine must be off-limits in all cases in which such questions could conceivably arise.

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127. *Id.* at 906-07 (O'Connor, J., concurring in the judgment); *id.* at 919 (Blackmun, J., dissenting).

128. For instance, Douglas Laycock, a vocal critic of *Smith*, agreed with the Court that "[a] threshold requirement of centrality would indeed be a mistake." Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 32 (1990); *see also* Kent Greenawalt, *Judicial Resolution of Issues About Religious Conviction*, 81 MARQ. L. REV. 461, 470 (1998) ("I am skeptical about the usefulness of requiring a 'central belief or practice.'"); Jesse H. Choper, *The Rise and Decline of the Constitutional Protection of Religious Liberty*, 70 NEB. L. REV. 651, 668 (1991) ("Judicial inquiry into such matters as how important a specific religious tenet is for a believer or how heavily the government imposed burden affects a particular individual's adherence to his religious precepts places the courts in an undesirably intrusive posture."); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1148 (1990) ("[A] court faced with a free exercise claim is not required to determine, in the abstract . . . how central a religious practice is."). Similarly, Ira Lupu, generally supportive of *Smith*, agreed with the Court that "any imaginable process for resolving disputes over centrality creates the spectre of religious experts giving conflicting testimony about the significance of a religious practice, with the state's decisionmaker authoritatively choosing among them." Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 959 (1989).

129. *Smith*, 494 U.S. at 885.

C. "This Court Is Constitutionally Barred from Inquiring into the Meaning of These Words":[130] The Application of an Absolute Prohibition on Judicial Inquiry into Religious Questions in the Lower Courts

In 1872, in deciding *Watson*, the Supreme Court stated that cases involving religious questions were "happily rare in our courts."[131] Since the Court's decision in *Smith*, however, there have been scores of cases that state and federal courts have characterized as raising religious questions prohibited to judicial inquiry. The lower courts assume that *Smith* and the church property cases establish an absolute prohibition and routinely dismiss any case that would require judicial inquiry into the content or significance of religious beliefs and practices. As Laurence Tribe uncritically stated, "American judicial decisions have tended to treat anything even *resembling* inquiry into [religious questions] as part of the forbidden religious realm."[132] The expanded prohibition on judicial examination of religious questions has led state and federal courts to dismiss disputes in seemingly every area of litigation—including consumer fraud, child custody and divorce, employment discrimination, torts, professional malpractice, and contracts—whenever their resolution would require analysis of religious questions. It has also led courts to construe statutes to avoid requiring any inquiry into religious questions and to invalidate statutes that require such inquiry. Below is a representative sampling of the cases.

1. Contract Cases

In numerous cases, contracts have been deemed unenforceable because they contain religious terms that courts have held they are barred from construing. For instance, in *Elmora Hebrew Center, Inc. v. Fishman*,[133] the New Jersey Supreme Court upheld the dismissal of a breach of contract action involving a contract requiring a rabbi to "perform all normal rabbinical duties incumbent upon a Rabbi of a traditional Jewish Congregation."[134] As the court held, judicial construction of the contract would require the court to make "incursions into religious questions that would be impermissible under the first amendment."[135] Similarly, in *Pearson v. Church of God*,[136] a retired minister argued that he was entitled to a pension under the terms of the

130. Pearson v. Church of God, 458 S.E.2d 68, 70 (S.C. Ct. App. 1995), *aff'd*, 478 S.E.2d 849 (S.C. 1996).

131. Watson v. Jones, 13 U.S. (1 Wall.) 679, 713 (1872).

132. TRIBE, *supra* note 18, n.67.

133. 593 A.2d 725 (N.J. 1991).

134. *Id.* at 727.

135. *Id.* at 730.

136. 458 S.E.2d 68 (S.C. Ct. App. 1995), *aff'd*, 478 S.E. 2d 849 (S.C. 1996).

pension agreement because he maintained a "ministry" even though his "pastoral license" had been revoked.[137] Concluding that the relevant terms in the pension agreement were religious, the court dismissed the case, stating that "this court is constitutionally barred from inquiring into the meaning of these words."[138] Courts thus profess a complete inability to construe the meaning of religious terms and dismiss any contract action calling for construction of religious terms.[139]

2. Family Law Cases

Questions about religion frequently arise in child custody cases, when one parent attempts to use the other parent's religion against him or her. In many cases, one parent has argued that the other practices a religion that is not in the best interests of the child, but the courts have generally refused to examine a parent's religion except when presented with clear evidence that particular religious practices pose a threat to the life of the child.[140] In other cases, courts have refused to determine whether a custodial parent violated prenuptial or divorce agreements mandating that children be raised according to the commands of a particular religion.[141] For instance, *Zummo v. Zummo*[142] involved the construction

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137. *Id.* at 70.

138. *Id.*

139. *See* Basich v. Bd. of Pensions, 540 N.W.2d 82, 86, 88 (Minn. Ct. App. 1995) (dismissing breach of contact action); Gabriel v. Immanuel Evangelical Lutheran Church, Inc., 640 N.E.2d 681, 684 (Ill. App. Ct. 1994) (same); Breitowitz, *supra* note 23, at 346, 348; Lawrence M. Warmflash, *The New York Approach to Enforcing Religious Marriage Contracts: From* Avitzur *to the* Get *Statute*, 50 BROOK. L. REV. 229, 234-35 (1984); Lindsey E. Blenkhorn, Note, *Islamic Marriage Contracts in American Courts: Interpreting* Mahr *Agreements as Prenuptials and Their Effect on Muslim Women*, 76 S. CAL. L. REV. 189, 192 (2002); Michelle Greenberg-Kobrin, Article, *Civil Enforceability of Religious Prenuptial Agreements*, 32 COLUM. J.L. & SOC. PROBS. 359, 373 (1999); Overstreet, *supra* note 23, at 263; Jodi M. Solovy, Comment, *Civil Enforcement of Jewish Marriage and Divorce: Constitutional Accommodation of a Religious Mandate*, 45 DEPAUL L. REV. 493, 511-12 (1996).

140. *See generally* Cunningham, *supra* note 23, at 53; Karel Rocha, *Should Religious Upbringing Antenuptial Agreements Be Legally Enforceable?*, 11 J. CONTEMP. LEGAL ISSUES 145 (2000); Martin Weiss & Robert Abramoff, *The Enforceability of Religious Upbringing Agreements*, 25 J. MARSHALL L. REV. 655, 656 (1992); Jordan C. Paul, Comment, *"You Get the House. I Get the Car. You Get the Kids. I Get Their Souls." The Impact of Spiritual Custody Awards on the Free Exercise Rights of Custodial Parents*, 138 U. PA. L. REV. 583 (1989); Jocelyn E. Strauber, Note, *A Deal Is a Deal: Antenuptial Agreements Regarding the Religious Upbringing of Children Should Be Enforceable*, 47 DUKE L.J. 971 (1998); George G. Blum, Annotation, *Religion as Factor in Visitation Cases*, 95 A.L.R. 5TH 533 (2002).

141. *See* Weiss v. Weiss, 49 Cal. Rptr. 2d 339, 342, 346-47 (Cal. Ct. App. 1996); Kendall v. Kendall, 687 N.E.2d 1228, 1236 (Mass. 1997); Zummo v. Zummo, 574 A.2d 1130, 1140, 1144 (Pa. Super. Ct. 1990). *See generally* Weiss & Abramoff, *supra* note 140, at 655-56.

142. 574 A.2d 1130 (Pa. Super. Ct. 1990).

of a divorce order prohibiting the husband from taking the children "to religious services contrary to the Jewish faith."[143] After the father took the children to Catholic services, the mother sought to enforce the order, but the Pennsylvania Superior Court held the dispute nonjusticiable:

> The father is prohibited from taking his children to "religious services contrary to the Jewish" faith. What constitutes a "religious service"? Which are "contrary" to the Jewish faith? What for the matter is the "Jewish" faith? Orthodox, Conservative, Reform, Reconstructionist, Messianic, Humanistic, Secular and other Jewish sects might differ widely on this point . . . . Both the subject matter and the ambiguities of the order make excessive entanglement in religious matters inevitable if the order is to be enforced.[144]

The court thus held that religious upbringing agreements are unenforceable because it is constitutionally impermissible for courts to determine what practices are consistent or inconsistent with religious faiths.

3. Tort Cases

Courts have refused to adjudicate negligence claims against churches, religious therapists, and faith healers whenever the reasonableness of an actor's conduct can be said to depend in any measure on religious standards.[145] For instance, courts have held negligence claims against

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143. *Id.* at 1142.

144. *Id.* at 1146.

145. *See, e.g.*, Schmidt v. Bishop, 779 F. Supp. 321, 328 (S.D.N.Y. 1991) (dismissing a malpractice claim against pastor for allegedly touching twelve-year-old girl during pastoral counsel and holding that adjudicating a clergy malpractice claim would unconstitutionally "require the Court or jury to define and express the standard of care to be followed by other reasonable Presbyterian clergy of the community"); Destefano v. Grabrian, 763 P.2d 275, 285 (Colo. 1988) (dismissing clergy malpractice claim); DeBose v. Bear Valley Church of Christ, 890 P.2d 214, 222 (Colo. Ct. App. 1994) (holding that a cleric could not be held liable for malpractice if his massage of the minor plaintiff "was engaged in solely in a sincere effort to facilitate the minor's communication with God"); Korean Presbyterian Church v. Lee, 880 P.2d 565, 570 (Wash. Ct. App. 1994) (dismissing tort of outrage claim brought against church for statements made during excommunication); *see also* Martin R. Bartel, *Clergy Malpractice After* Nally*: "Touch Not My Anointed, and to My Prophets Do No Harm,"* 35 VILL. L. REV. 535, 567 (1990); Constance Frisby Fain, *Clergy Malpractice: Liability for Negligent Counseling and Sexual Misconduct*, 12 MISS. C. L. REV. 97, 101, 103 (1991); Sue Ganske Graziano, *Clergy Malpractice,* 12 WHITTIER L. REV. 349, 355 (1991); Idleman, *supra* note 15, at 219, 228-29, 231-32, 234-38; C. Eric Funston, Note, *Made Out of Whole Cloth? A Constitutional Analysis of the Clergy Malpractice Concept*, 19 CAL. W. L. REV. 507, 517-18, 520, 526, 529, 533 (1983); James K. Lehman, Note, *Clergy Malpractice: A Constitutional Approach*, 41 S.C. L. REV. 459, 460, 472 (1990); Pomeroy, *supra* note 23, at 1141, 1143 (1992); Kelly Beers Rouse, Note, *Clergy Malpractice Claims: A New Problem for Religious Organizations*, 16 N. KY. L. REV. 383, 384 (1989).

religious counselors and spiritual healers to be nonjusticiable because they would require courts to undertake prohibited inquiry into the standard of care applicable to religious counselors.[146] Similarly, courts have held that they cannot adjudicate claims that a church negligently hired or supervised a priest accused of molesting children because the standard of care applicable to a church in its employment decisions might require examination of religious doctrines.[147]

4. Consumer Fraud Cases

Courts have held that consumer fraud statutes prohibiting the false labeling of food to be kosher (i.e., ritually fit for consumption under Jewish dietary standards) violate the Establishment Clause, among other reasons, because the enforcement of such statutes may require courts to determine whether food was prepared in compliance with Jewish law.[148] Although courts plainly have power to determine whether food is properly labeled organic or low-fat, and older cases had upheld state kosher laws,[149] all courts to address the issue since *Smith* have held those laws to be unconstitutional because they would require courts to interpret religious doctrine.[150] In the words of one court, to determine

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146. Baumgartner v. First Church of Christ, Scientist, 490 N.E.2d 1319, 1324 (Ill. App. Ct. 1986)

> [A]djudication of the present case would require the court to extensively investigate and evaluate religious tenets and doctrines: first, to establish the standard of care of an "ordinary" Christian Science practitioner; and second, to determine whether [the defendants] deviated from those standards. We believe that the first amendment precludes such an intrusive inquiry by the civil courts into religious matters.

Id.

147. Gibson v. Brewer, 952 S.W.2d 239, 246-47, 250 (Mo. 1997) (dismissing negligent hiring claim against Catholic church); L.L.N. v. Clauder, 563 N.W.2d 434, 437, 440-42, 447 (Wis. 1997) (dismissing negligent supervision claim against Catholic church). *See generally* Idleman, *supra* note 15, at 229-30, 234-35.

148. Commack Self-Service Kosher Meats, Inc. v. Weiss, 294 F.3d 415, 425-27 (2d Cir. 2002); Barghout v. Bureau of Kosher Meat & Food Control, 66 F.3d 1337, 1343-46 (4th Cir. 1995); Ran-Dav's County Kosher, Inc. v. New Jersey, 608 A.2d 1353, 1359-60, 1363 (N.J. 1992); *cf.* Catherine Beth Sullivan, Comment, *Are Kosher Food Laws Constitutionally Kosher?*, 21 B.C. ENVTL. AFF. L. REV. 201, 237-40, 245 (1993). *See generally* Stephen F. Rosenthal, *Food for Thought: Kosher Fraud Laws and the Religion Clauses of the First Amendment*, 65 GEO. WASH. L. REV. 951, 972 (1997); Mark A. Berman, Article, *Kosher Fraud Statutes and the Establishment Clause: Are They Kosher?*, 26 COLUM. J.L. & SOC. PROBS. 1 (1992); Karen Ruth Lavy Lindsay, Note, *Can Kosher Fraud Statutes Pass the* Lemon *Test?: The Constitutionality of Current and Proposed Statutes*, 23 U. DAYTON L. REV. 337, 362-64, 369 (1998); Gerald F. Masoudi, Comment, *Kosher Food Regulation and the Religion Clauses of the First Amendment*, 60 U. CHI. L. REV. 667, 683-85, 687-88 (1993).

149. *See, e.g.*, People v. Goldberger, 163 N.Y.S. 663, 665-67 (N.Y. Ct. Spec. Sess. 1916).

150. *See supra* note 148.

whether food is kosher "would require the civil courts to engage in the forbidden process of interpreting and weighing church doctrine."[151]

5. Employment Discrimination Cases

Employment discrimination claims against religious organizations are frequently dismissed because they might call upon courts to evaluate whether religious doctrines played any role in the challenged employment decision. Under Title VII of the Civil Rights Act of 1964,[152] religious organizations cannot be sued for discriminating on the basis of religion, but they remain subject to liability for discrimination on the basis of race, sex, or national origin.[153] When an employee brings a discrimination claim against a religious employer, however, the employer may assert that the challenged employment decision was not made on the prohibited basis of race, sex, or national origin, but instead was made because the plaintiff did not adhere to the organization's religious standards.[154] Courts have ruled discrimination claims nonjusticiable whenever religious employers raise such a defense.[155] As one court held, "Once the church states that the decision was, even in part, doctrinal, then the court would either have to invoke the First Amendment and cease inquiry or enter into the impermissible activity of analyzing church doctrine and perhaps weighing the importance of a particular area of the doctrine."[156]

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151. *Commack*, 294 F.3d at 425 (holding that the kosher regulations "require the State to take an official position on religious doctrine"); *Barghout*, 66 F.3d at 1337 ("'To reach those questions would require the civil courts to engage in the forbidden process of interpreting and weighing church doctrine.'" (citing and quoting Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 451 (1969))).

152. 42 U.S.C. §§ 2000e to 2000e-15 (2000).

153. 42 U.S.C. §§ 2000e-1 to -2 (2002); *see, e.g.*, Brant, *supra* note 23, at 283-85; G. Sidney Buchanan, *The Power of Government to Regulate Class Discrimination by Religious Entities: A Study in Conflicting Values*, 43 EMORY L.J. 1189, 1195, 1201, 1217-18 (1994); Coon, *supra* note 23, at 486-87; Gayle A. Grissum, *Church Employment and the First Amendment: The Protected Employer and the Vulnerable Employee*, 51 MO. L. REV. 911, 924 (1986); Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391, 392, 396 (1987); Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049, 1057-58, 1078, 1097, 1127 (1996).

154. 42 U.S.C. § 2000e-2.

155. Van Osdol v. Vogt, 908 P.2d 1122, 1133-34 (Colo. 1996); *see also, e.g.*, Himaka v. Buddhist Churches, 917 F. Supp. 698, 704-05, 708-09 (N.D. Cal. 1995) (dismissing Title VII claim against religious group because it would require examination of religious question); Geraci v. Eckankar, 526 N.W.2d 391, 396, 399-401 (Minn. Ct. App. 1995) (dismissing state employment discrimination action).

156. *Vogt*, 908 P.2d at 1129.

6. Cases Involving Statutory Construction

The prohibition on judicial resolution of religious questions has led courts to construe statutes not to require prohibited judicial inquiries into religion and to invalidate statutes that require such inquiry. For instance, the Massachusetts Supreme Judicial Court held unconstitutional a statute that prohibited employers from requiring an employee to take action that violated his or her religious creed.[157] In the case that reached the Massachusetts high court, Catholic employees objected to working on Christmas and brought suit under the statute.[158] The employer defended on the ground that Catholicism does not prohibit adherents from working on Christmas.[159] The Massachusetts court held that the dispute was not justiciable because it would have called on a court to determine what practices are required by Catholicism.[160]

II. AN ABSOLUTE PROHIBITION ON JUDICIAL EXAMINATION OF RELIGIOUS QUESTIONS IS NEITHER ADVISABLE NOR POSSIBLE

Before turning to an exploration of the two rationales that have been offered to support a prohibition on judicial examination of religious questions, this Part shows that a prohibition on judicial inquiry and resolution of religious questions cannot feasibly be applied in an absolute manner. In a variety of contexts, courts routinely resolve factual

157. Pielech v. Massasoit Greyhound, Inc., 668 N.E.2d 1298, 1304 (Mass. 1996).

158. *Id.* at 1299-300.

159. *Id.* at 1300.

160. *Id.* at 1304. Similarly, a conflict in the courts arose over the scope of permissible judicial inquiry into religious questions under the Religious Freedom Restoration Act (RFRA), enacted by Congress to overturn *Smith*, which prohibits the government from taking actions that "substantially burden" the exercise of religion unless the actions further a compelling state interest that cannot be achieved by less restrictive means. 42 U.S.C. § 2000bb-1(b) (2000). Some courts have held that government action can be said to impose a substantial burden on the plaintiff's exercise of religion only when the religious practice at issue is "mandated" by the claimant's religion and is "central" to that religion. *See, e.g.*, Henderson v. Kennedy, 253 F.3d 12, 16-17 (D.C. Cir. 2001). Other courts criticized that approach, holding that such judicial inquiry is barred by the Constitution, and instead adopted the conclusion that any religiously motivated action is protected by RFRA. *See, e.g.*, Mack v. O'Leary, 80 F.3d 1175, 1179 (7th Cir. 1996), *vacated and remanded by* 522 U.S. 801 (1997); Sasnett v. Sullivan, 908 F. Supp. 1429, 1444 (W.D. Wis. 1996), *aff'd*, 91 F.3d 1018 (7th Cir. 1996), *vacated and remanded by* 521 U.S. 1114 (1997). *See generally* Seeger, *supra* note 24. In 2000, Congress resolved the issue by amending RFRA to provide that it protects "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A) (2000). Some commentators have nonetheless argued that RFRA is unconstitutional even as applied to the Federal Government because it requires prohibited inquiry into religion. *See, e.g.*, Joanne C. Brant, *Taking the Supreme Court at Its Word: The Implications for RFRA and Separation of Powers*, 56 MONT. L. REV. 5 (1995). *But see* Magarian, *supra* note 24.

questions about the content and validity of religious doctrines and practices. Courts make extensive determinations about religious doctrines and practices in determining whether they qualify as "religious" under the Constitution and various statutes protecting and accommodating religion.[161] Courts also make determinations about the content of religion in assessing a wide range of religious programs provided by the government, such as those offered in prisons and in the military.[162] Furthermore, because there is no recognized test for distinguishing secular from religious questions, courts frequently address questions presented in secular terms in a manner that implicitly adopts a governmental position on the validity of religious doctrines and beliefs.[163]

As these examples demonstrate, it is not possible to understand the prohibition on judicial assessment of religious questions to be absolute. Courts cannot plausibly adopt the position characterized by Michael McConnell as "religion blindness," in which they would take no account of religious practices and beliefs.[164] Instead, the question properly to be addressed is which religious questions courts can competently resolve without violating the Religion Clauses.

A. Courts Examine Religious Practices and Doctrines in Determining Whether a Practice or Doctrine Is "Religious"

Notwithstanding the apparent prohibition on judicial examination of religious questions, courts routinely undertake factual inquiry into religious practices and doctrines in determining whether a set of beliefs and practices amounts to a "religion." Although no agreed meaning of the term "religion" has emerged under the First Amendment, a problem

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161. *See* Lee v. Weisman, 505 U.S. 577, 586 (1992); School Dist. v. Schempp, 374 U.S. 203, 210 (1963); Smith v. Pyro Mining Co., 827 F.2d 1081, 1084-85, 1096-97 (6th Cir. 1987).

162. *See* Quigg v. Armstrong, 106 Fed. Appx. 555 (9th Cir. 2004); Anderson v. Laird, 466 F.2d 283, 299-301 (D.C. Cir. 1972); Clanton v. Glover, 280 F. Supp. 2d 1360, 1365-66 (M.D. Fla. 2003).

163. Donald A. Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development, Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513, 532-33 (1968).

164. Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 689-91 (1992) (arguing that the Religion Clauses require accommodation of religion, not formal neutrality). Dissenting in *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976), Justice Rehnquist recognized that a prohibition on judicial resolution of religious disputes cannot be applied absolutely: "[W]hile there may be a number of good arguments that civil courts . . . should, as a matter of the wisest use of their authority, avoid adjudicating religious disputes to the maximum extent possible, they obviously cannot avoid all such adjudications," *id.* at 735 (Rehnquist, J., dissenting); *see also* Levine, *supra* note 23, at 133-34.

that has long vexed courts and commentators,[165] courts must nonetheless decide what constitutes a religion in construing the state and federal tax codes, the Religious Freedom Restoration Act (RFRA),[166] the Free Exercise Clause, state constitutions, and hundreds (if not thousands) of statutes that give special treatment to religious bodies and religious practices.[167] Although determining what constitutes a religion "may present a most delicate question," such determinations are necessary because, as the Court has declared, "A way of life, however virtuous and admirable" is not entitled to protection under the Religion Clauses "if it is based on purely secular considerations."[168]

Determining what constitutes a religion frequently requires extensive factual examination of the content and scope of religious doctrines and practices. Taking one example, in *United States v. Meyers*,[169] a defendant charged with marijuana possession claimed that the prosecution violated his rights under RFRA because he was a minister in the Church of Marijuana.[170] In deciding whether the Church of Marijuana was a bona fide religion and therefore entitled to protection under RFRA, the court canvassed case law on the meaning of the term "religion" and catalogued a set of factors that courts have employed: (1) whether the purported religion addresses "[u]ltimate [i]deas" such as humanity's purpose or

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165. The closest the Court has come to adopting a test for determining what constitutes a religion was in *United States v. Seeger*, 380 U.S. 165 (1965), in which the Court employed two tests for determining religiosity in determining conscientious objector status under the military draft law: a substantive test, asking whether a belief is "based upon a power or being, or upon a faith, to which all else is . . . ultimately dependent"; and a functional test, which asks whether a belief system "occupies in the life of its possessor a place parallel to that filled by the God of those [religions] admittedly qualifying for the exemption." *Id.* at 176. For a sampling of the large volume of academic commentary addressing, proposing, and rejecting various tests and definitions of religion, see Jesse Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579 (1982), and George C. Freeman III, *The Misguided Search for the Constitutional Definition of "Religion,"* 71 GEO. L.J. 1519 (1983).

166. 42 U.S.C. §§ 2000bb to 2000bb-4 (2000).

167. *See* 26 U.S.C. § 1402(g)(1) (2000) (providing that a person need not pay social security taxes if he can show that "he is a member of a recognized religious sect or division thereof and is an adherent of established tenets or teachings of such sect or division by reason of which he is conscientiously opposed to acceptance of the benefits of any private or public insurance"); 42 U.S.C. § 1996a(b)(1) (2000) (protecting Native Americans from prosecutions for peyote use if they can show that they used peyote for "bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion"); James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1445 (1992) (concluding that the terms "religion" or "religious" appear over 14,000 times in state and federal statutes, and religious exemptions appear in over 2,000 statutes).

168. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

169. 906 F. Supp. 1494 (D. Wyo. 1995), *aff'd*, 95 F.3d 1475 (10th Cir. 1996).

170. *Id.* at 1495.

place in the universe; (2) whether the purported religion includes "[m]etaphysical [b]eliefs," which "address a reality which transcends the physical and immediately apparent world"; (3) whether the purported religion prescribes a moral or ethical system; (4) whether the purported beliefs are "comprehensive," in that they seek "to provide the believer with answers to many, if not most, of the problems and concerns that confront humans"; and (5) whether the purported religion includes any of the "[a]ccoutrements of [r]eligion," such as a founding prophet, sacred writings, sacred sites, clergy, ceremonies, and holidays.[171] The court then proceeded to examine the beliefs and practices of the Church of Marijuana in considerable depth and concluded that it was not a religion.[172] Dozens of similar cases can readily be found, in which a statutory or constitutional right depends on judicial factfinding regarding the content of a claimant's religion.[173]

As several commentators have noted, the Constitution cannot plausibly be construed simultaneously to require protection for religion while forbidding courts from making assessments of whether a doctrine or practice is religious. Gregory Magarian has stated: "Forbidding such judgments out of concern about judicial encroachment on religion would amount to killing free exercise protection with kindness. By the same token, if courts could not discern which practices are 'religious,' then they could not credibly assess governmental actions under the Establishment Clause."[174] Factual inquiry into the meaning and content of religious doctrines and practices thus cannot plausibly be prohibited as long as courts are called upon to construe and apply the Religion Clauses and myriads of statutes giving special treatment to religion.[175]

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171. *Id.* at 1502-03.

172. *Id.* at 1504-07.

173. *See, e.g.*, Sutton v. Rasheed, 323 F.3d 236, 240, 242 (3d Cir. 2003) (holding that prisoners had a right to books published by the Nation of Islam, relying on expert testimony that the books were of "crucial religious significance" and contained the essential teachings of the Nation of Islam, without which adherents would not understand how to pray); Wilson v. Moore, 270 F. Supp. 2d 1328, 1350-54 (N.D. Fla. 2003) (examining role of prayer pipe, smudging, drums, and headbands in plaintiff's religion in determining free exercise claim); McBride v. Shawnee County, 71 F. Supp. 2d 1098, 1101 (D. Kan. 1999) (holding that Rastafarians were not entitled to smoke marijuana in prison because, unlike the use of peyote by certain Indian tribes, Rastafarian religion called for marijuana use "whenever the mood strikes" and not in scheduled ceremonies).

174. Magarian, *supra* note 24, at 1960; *see also* Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1, 32 (2000) (arguing that "[t]he Court cannot entirely escape the definitional problem—that is, as long as the Court finds any content in the religion clauses"); *cf.* Welsh v. United States, 398 U.S. 333, 372 (1970) (White, J., dissenting) ("It cannot be ignored that the First Amendment itself contains a religious classification.").

175. *See* Magarian, *supra* note 24, at 1960.

B. Courts Examine Religious Questions in Assessing the Government's Provision of Religious Programs

The government itself provides religious services in restrictive settings, such as prisons and the military. In these settings the Establishment Clause has been understood to allow (if not require) the government to hire chaplains,[176] serve religiously sanctioned food,[177] exempt religious practitioners from otherwise applicable rules, and generally make available religious programs to a wide variety of religious practitioners.[178] In providing for the religious needs of military personnel and prison inmates, the government determines what programs are needed by different religious communities and whether the programs it offers adhere to religious standards. For instance, when a prison has offered a Passover seder for Jewish inmates, prison officials have been called on to determine whether a prisoner actually is Jewish and therefore entitled to attend, a quintessentially religious determination.[179] In administering chaplaincy programs and in providing religiously sanctioned food, the government must determine whether the food it serves and the chaplains it hires adhere to religious law.[180] The government could not effectively provide religious services to inmates and military personnel without extensive inquiry into the content of religious doctrines.

C. The Difficulties in Distinguishing Religious from Secular Questions Make an Absolute Prohibition on Examining Religious Questions Impossible

If there is to be a religious question doctrine, there must be some sort of standard for determining which questions are religious and therefore out of judicial bounds. *Baker v. Carr*[181] identifies six criteria for identifying nonjusticiable political questions,[182] and cases and commentary have elaborated various formulations for each criterion.[183] Neither courts nor commentators, however, have elaborated criteria for

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176. Julie B. Kaplan, Note, *Military Mirrors on the Wall: Nonestablishment and the Military Chaplaincy*, 95 YALE L.J. 1210, 1210-11 (1986).

177. Jamie Aron Forman, Note, *Jewish Prisoners and Their First Amendment Right to a Kosher Meal: An Examination of the Relationship Between Prison Dietary Policy and Correctional Goals*, 65 BROOK. L. REV. 477, 477-80 (1999).

178. Abraham Abramovsky, *First Amendment Rights of Jewish Prisoners: Kosher Food, Skullcaps, and Beards*, 21 AM. J. CRIM. L. 241 (1994).

179. Greenawalt, *supra* note 128, at 462.

180. *See* Kaplan, *supra* note 176, at 1213-14; Forman, *supra* note 177, at 480-84.

181. 369 U.S. 186 (1962).

182. *Id.* at 217.

183. *See, e.g.*, Robert F. Nagel, *Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine*, 56 U. CHI. L. REV. 643 (1989) (describing various formulations of the political question doctrine).

identifying religious questions. Although courts routinely dismiss cases on the ground that they would require examination of religious questions, one searches in vain through the cases and the academic literature for any test to distinguish religious from secular questions or even any discussion of the need for such a test. Instead, courts and commentators distinguish the questions that may be judicially resolved from the prohibited category of religious questions without any identifiable analysis.

The absence of any test for determining what questions are religious derives only in part from the absence of an agreed meaning of the term "religion." Even where it is clear that a case involves religion, it is not always clear that the case raises any "religious questions." A case about the tax status of a church may involve various questions touching on religion, such as the criteria for church membership, the fundraising activities of the church, and whether the church is properly characterized as a religious entity, but not all questions involving religion are understood to be "religious questions" that courts are barred from addressing. If all questions touching on religion were off-limits to judicial inquiry, religious entities and religious actions would be absolutely immune from judicial consideration. Just as the political question doctrine does not bar a court from considering actions described as "political," so a religious question doctrine cannot bar all consideration of religious practices and beliefs.[184]

Given the undefined nature of the category of religious questions said to be off-limits to judicial scrutiny, it is not surprising that the same types of questions are perceived as religious in some contexts but secular in others. For instance, *Ballard* holds that it would be unconstitutional for courts to determine the truth or falsity of the claim that a person possesses supernatural powers or communicates with the spirit of a deceased saint,[185] yet criminal defendants may be found insane or incompetent to stand trial because they believe that they possess supernatural powers or that they, or their victims, were possessed by demons.[186] When offered as evidence of insanity, belief in spirit

184. *See Baker*, 369 U.S. at 217 ("The doctrine of which we treat is one of 'political questions,' not one of 'political cases.' The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority.").

185. United States v. Ballard, 322 U.S. 78, 79-80, 87-88 (1944).

186. *See, e.g.*, Archie v. State, 875 So. 2d 336, 338, 341 (Ala. Crim. App. 2003) (declaring that defendant was mentally ill and suffering under a "false belief system" because she believed that God told her to kill her daughter, whom she believed was possessed by Satan); Stevens v. State, 350 S.E.2d 21, 21-22 (Ga. 1986) (declaring defendant to be "delusional" and acting under a "delusional compulsion" because he beat his wife to death based on the belief that she was possessed by Satan and that, once beaten, she

possession has been unhesitatingly deemed to be "delusional" or part of a "false belief system."[187] Rather than declaring nonjusticiable the validity of claims of demon possession, courts rely on such claims to establish that the defendant is suffering from mental illness and should be committed to a mental institution.[188] In other contexts, courts have generally upheld government regulation of fortune telling, astrology, and communication with spirits, on the ground that such matters do not involve religion.[189] Courts offer no analytical basis for distinguishing supernatural claims that are religious (and therefore exempt from judicial examination) from supernatural claims that are secular (and therefore subject to government regulation). The distinction has meant, however, that fraud claims may be pursued against astrologers, palm readers, and mediums, but not against preachers and cult leaders.[190]

Moreover, when questions touching on religious doctrines present themselves in what are understood to be secular contexts, courts routinely resolve them in a manner that effectively, albeit indirectly, amounts to a governmental declaration on the validity of religious doctrines. This can be seen clearly in cases addressing the constitutionality of teaching about Darwinian evolution in the public schools. The Establishment Clause is understood to permit the government to declare the theory of evolution to be true even though such a declaration effectively amounts to a declaration that some

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would rise again, rid of the devil); State v. Brown, 449 N.E.2d 449, 452 (Ohio 1983) (declaring defendant to be insane because, at the time he killed his father, he believed himself to be in touch with guardian angels and the devil).

187. People v. Hernandez, 994 P.2d 354, 356 (Cal. 2000) (stating that defendant was "delusional" for believing that he was the "'white horseman' who would pass judgment on everyone"); Mental Hygiene Legal Servs. v. Wack, 551 N.E.2d 95, 95 n.1 (N.Y. 1989) (committing a defendant to mental institution for disorder that caused him to kill his wife and son based on the belief that they were possessed by the devil).

188. *See, e.g.*, *Wack*, 551 N.E.2d at 95-96.

189. *See* Sarno, *supra* note 51 (collecting cases). *But see* Argello v. City of Lincoln, 143 F.3d 1152, 1152-53 (8th Cir. 1998) (holding that city's interest in preventing fraud does not justify municipal ordinance against fortune telling); Rushman v. City of Milwaukee, 959 F. Supp. 1040, 1043 (E.D. Wis. 1997) (holding that city's attempt to ban public fortune telling violates First Amendment free speech clause); Spiritual Psychic Sci. Church of Truth, Inc. v. City of Azusa, 703 P.2d 1119, 1120-21 (Cal. 1985) (holding that prohibition on fortune telling violates state free speech protection), *overruled in part by* Kasky v. Nike, Inc., 45 P.3d 243 (Cal. 2002).

190. *Compare* N.Y. PENAL LAW § 165.35 (McKinney 1999) (prohibiting fortune telling for profit), *with* Molko v. Holy Spirit Ass'n, 224 Cal. Rptr. 817, 829 (Cal. Ct. App. 1986) (holding that claim could not proceed challenging the psychological techniques of the Unification Church because that would permit the jury to question the truth of the church's religious doctrine), *aff'd in part and rev'd in part*, 762 P.2d 46 (Cal. 1988).

religious doctrines of creation are false.[191] Questioning this result, Justice Black wondered whether governmental neutrality on religious matters might be better served by keeping the government from saying anything on subjects addressed by religion, such as the question of human origins:

> If the theory [of evolution] is considered anti-religious, as the Court indicates, how can the State be bound by the Federal Constitution to permit its teachers to advocate such an "anti-religious" doctrine to schoolchildren? . . . [Would] not the removal of the subject of evolution leave the State in a neutral position toward these supposedly competing religious and anti-religious doctrines?[192]

In Justice Black's view, constitutional difficulties arise not only when the government treats religious doctrines to be true but also whenever the government advances secular theories that conflict with religious beliefs.[193]

Justice Black's position has not prevailed, however, and for good reason: the government could hardly function if it were required to stay neutral on all subjects addressed by religious doctrines because such subjects know no limits.[194] Religions take varying positions on whether human life begins at conception or at birth, whether women should be free to work in traditionally male occupations, and whether homosexual behavior is normal or is deserving of punishment, but the fact that religious doctrines address these subjects has never been understood to bar the Court from holding that, under the Constitution, human life begins at birth,[195] that excluding women from military schools causes identifiable societal harms,[196] and that criminalizing homosexual sodomy is irrational.[197] Thus, notwithstanding *Ballard*'s rule against judging the truth or falsity of religious claims,[198] courts effectively may issue

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191. *See* Edwards v. Aguillard, 482 U.S. 578, 591 (1987) (declaring unconstitutional a Louisiana statute mandating the teaching of "creation science" in public schools whenever the theory of evolution is taught). Not only may the state teach evolution, it cannot prohibit its teaching. Epperson v. Arkansas, 393 U.S. 97, 109 (1968) (holding that the state cannot seek to prevent the teaching of evolution on the ground that it conflicts with the doctrine of the "'Divine Creation of man'"). The Establishment Clause does not allow a state to "blot out a particular theory because of its supposed conflict with the Biblical account, literally read." *Id.*

192. *Epperson*, 393 U.S. at 113 (Black, J., concurring).

193. *Id.* at 112-14 (Black, J., concurring).

194. *See* Conkle, *supra* note 174, at 29-31.

195. *See* Roe v. Wade, 410 U.S. 113, 159-62 (1973).

196. *See* United States v. Virginia, 518 U.S. 515, 554-58 (1996).

197. *See* Lawrence v. Texas, 539 U.S 558, 575-78 (2003).

198. United States v. Ballard, 322 U.S. 78, 86 (1944).

governmental declarations that certain religious beliefs are false. Indeed, the courts would be paralyzed if they could not do so.

As these examples show, it is not possible, or desirable, to prohibit courts from examining the content of religious doctrines. Courts do so routinely and could not, as a practical matter, avoid doing so.

III. JUDICIAL FEAR OF THE NONRATIONAL: THE INSTITUTIONAL COMPETENCE OF COURTS TO ADDRESS RELIGIOUS QUESTIONS

As with the political question doctrine, the prohibition on judicial resolution of religious questions is based in large part on the concern that courts lack the institutional competence to resolve certain questions. That was the view of James Madison;[199] it formed the central ground for the Court's 1872 decision in *Watson*;[200] and the Court has repeatedly articulated this rationale ever since.[201] As it has recently been characterized by the Court, however, the prohibition against deciding religious questions is much broader than the political question doctrine, which prohibits courts from making political decisions but does not prohibit courts from determining what decisions have been made by the political branches. This Part seeks to demonstrate that, while the resolution of normative questions about religion (e.g., Is a religious belief true or valid? Is a religious practice effective?) may frequently lie beyond judicial competence, positive questions about religion (e.g., What does a religious tradition say on a particular subject? Is a religious practice considered an important or central one by those who engage in it?) do not exceed judicial competence, and such questions can be resolved using ordinary tools of judicial factfinding.

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199. Madison, *supra* note 19.

200. Watson v. Jones, 8 U.S. (13 Wall.) 679, 729 (1871) ("It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own.").

201. *See* Employment Div. v. Smith, 494 U.S. 872, 887 (1990) ("What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is 'central' to his personal faith?"); Hernandez v. Comm'r, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 458 (1988) (stating that requiring courts to decide whether litigants correctly interpret religious doctrines "would cast the Judiciary in a role that we were never intended to play"); Thomas v. Review Bd., 450 U.S. 707, 716 (1981) ("[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceive[s] the commands of their common faith."); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 714 n.8 (1976) ("Civil judges obviously do not have the competence of ecclesiastical tribunals in applying the 'law' that governs ecclesiastical disputes.").

A. Judicial Incompetence to Resolve Normative Religious Questions

Courts are said to lack competence to answer political questions because there are no "judicially discoverable and manageable standards" for answering them.[202] Courts cannot determine whether to declare war, impose taxes, appoint officers, or sign treaties, because such questions call for "determination[s] of a kind clearly for nonjudicial discretion."[203] The same may be true for normative questions about religion, as there are no standards for courts to apply in deciding whether a religious belief is valid or true, what religious practices should be followed, or how a religious body should be organized. Such questions cannot ordinarily be resolved using the objective, rational, and empirical tools of law, and the Court has therefore been correct to conclude that courts lack competence to resolve such questions.

Outside the context of religion, one is hard pressed to find a subject matter about which courts have declared themselves categorically incompetent to find facts. Judges and juries make determinations on complex and arcane questions of science, economics, and psychology, subjects for which they lack any training. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[204] the Court expressed great confidence in the abilities of judges and juries to resolve such esoteric questions.[205] The difficulty of answering questions has provided no basis for declaring courts incompetent to do so.[206]

Given the courts' profound confidence in their factfinding abilities, the recognition that some questions cannot be solved using the tools of law represents a rare expression of judicial humility. In his dissenting opinion in *Ballard*, Justice Jackson articulated this point:

> If religious liberty includes, as it must, the right to communicate [religious] experiences to others, it seems to me an impossible task for juries to separate fancied ones from real ones, dreams

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202. Baker v. Carr, 369 U.S. 186, 217 (1962).

203. *Id.*

204. 509 U.S. 579 (1993).

205. *Id.* at 595-96. *Daubert* thus rejected the argument that abandonment of the "general acceptance" test for the admission of scientific evidence "will result in a 'free-for-all' in which befuddled juries are confounded by absurd and irrational pseudoscientific assertions," describing the argument as "overly pessimistic about the capabilities of the jury and of the adversary system generally." *Id.*

206. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 640 (1943) ("We cannot, because of modest estimates of our competence in [particular fields], withhold the judgment that history authenticates as the function of this Court when liberty is infringed."); *cf.* Jones v. Wolf, 443 U.S. 595, 613 n.2 (1979) (Powell, J., dissenting) ("The First Amendment's Religion Clauses, however, are meant to protect churches and their members from civil law interference, not to protect the courts from having to decide difficult evidentiary questions.").

> from happenings, and hallucinations from true clairvoyance. Such experiences, like some tones and colors, have existence for one, but none at all for another. They cannot be verified to the minds of those whose field of consciousness does not include religious insight.[207]

In this view, religious questions lie beyond the competence of courts because they cannot be verified through reason and empirical evidence.[208] Courts cannot answer religious questions on the terms used by religions because, as Bruce Ackerman has stated, the liberal state is "[d]eprived of divine revelation," and decisions cannot be made "on the basis of some conversation with the spirit world."[209]

The institutional competence rationale for prohibiting judicial resolution of religious questions is thus based on a conception of legal and religious questions as requiring distinct epistemologies.[210] Judicial tools available for answering factual and legal questions have long been understood to be limited exclusively to the rational, objective, and empirical.[211] Courts may attempt to answer scientific questions even

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207. United States v. Ballard, 322 U.S. 78, 93 (1944) (Jackson, J., dissenting); *see also* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 714-15 (1976) ("[I]t is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria."(footnote omitted)); PAUL G. KAUPER, RELIGION AND THE CONSTITUTION 26 (1964) ("Not only is [religion] by its nature not subject to a test of validity determined by rational thought and empiric knowledge, but a principal purpose underlying religious liberty is to remove the question of what is true religion from the domain of the secular authority.").

208. *Cf. Wolf*, 443 U.S. at 603 (holding that the neutral-principles approach to resolving property disputes among religious factions "relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges").

209. BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 103, 127 (1980); *see also* Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 24 (2000) ("'Faith' is distinguished from 'reason,' and 'reason' is said to be the hallmark of liberal governance."(footnote omitted)).

210. *See, e.g.*, McConnell, *supra* note 209, at 23-24 (characterizing Madison's statement that a civil magistrate is not a "competent Judge of Religious Truth" to imply "an epistemic, as opposed to an institutional, basis for the special place of religion under liberal democracy").

211. *See* EDWARDO COKE, 1 THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 179 (photo. reprint 1986) (1797) ("Common Law . . . is the absolute perfection of reason."); THE QUOTABLE LAWYER § 126.7, at 300 (Elizabeth Frost-Knappman & David S. Shrager eds., revised ed. 1986) ("[L]aw is reason free from passion." (quoting ARISTOTLE, POLITICS (c. 322 B.C.))); *id.* at 301 ("Law is a regulation in accord with reason." (quoting THOMAS ACQUINAS, SUMMA THEOLOGICA (c. 1258-1260))); Owen M. Fiss, *Reason in All Its Splendor*, 56 BROOK. L. REV. 789, 789 (1990) (arguing that the judicial method should be "entirely rationalistic"); Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 411 (1963) ("The domain of government . . . is that in which social problems are resolved by rational social processes, in which men can reason together, can examine problems and propose solutions

without scientific training because the tools of law are consonant with those of science.[212] Judicial decisions that cannot be explained in rational terms, in contrast, are not considered acceptable. For this reason, Justice Potter Stewart's famous dictum that defining pornography may be impossible yet "I know it when I see it," received considerable derision, as it suggested that legal conclusions could be based on gut feeling, unmediated by rational explanation.[213] In contrast to ordinary questions of fact, religious questions are understood to lie beyond judicial competence because they do not depend on the logic of law. Instead, religious questions may be answered on the basis of faith, mystical experiences, miracles, or other nonrational sources.[214]

The conception of law and religion as employing inherently distinct methodologies oversimplifies both law and religion.[215] As Larry Alexander points out, religious beliefs are frequently grounded on the same types of evidence and reasoning as secular beliefs. For instance, a Christian believer in God and the miracles of the Bible may base her beliefs on the "number of witnesses, their independently tested reliability, and the number of intelligent people who accept these accounts as true."[216] Similar reasoning and evidence is often used to support secular beliefs for which one lacks first-hand observation, such as, in Professor Alexander's examples, the "beliefs that Washington was the first president, that Kinshasha is the capital of Zaire, that Maris hit sixty-one home runs, and that the speed of light is constant."[217]

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capable of objective proof or persuasion, subject to objective [inquiry] by courts and electors.").

212. *See* John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 539 (1980) (stating that factual judgments must be based on "practices of common sense and science"); *cf.* Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 590 (1993) ("[T]he word 'knowledge' connotes more than subjective belief or unsupported speculation. The term 'applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds.'" (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1252 (1986))).

213. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

214. Such is the view, for instance, of Joanne Brant, who construes *Smith* to be based on the proposition that "[r]eligion encompasses the mystic, spiritual aspects of human nature, while law answers to the less esoteric demands of logic and tradition. By this reasoning, any attempt to measure the worth of a religious claim by the yardstick of rational argument and precedent is doomed to fail." Joanne C. Brant, *Taking the Supreme Court at Its Word: The Implications for RFRA and Separation of Powers*, 56 MONT. L. REV. 5, 20 (1995).

215. Larry Alexander, *Liberalism, Religion, and the Unity of Epistemology*, 30 SAN DIEGO L. REV. 763, 768-69 (1993). As Professor Alexander points out, "Some of religion's strongest supporters load the dice against religion by deeming it the realm of 'faith' *as opposed to* 'reason.'" *Id.* at 770 n.20.

216. *Id.* at 768.

217. *Id.* at 769.

Conversely, legal conclusions, like religious ones, may derive from nonrational sources. As Paul Gewirtz has argued, defending Justice Stewart's "I know it when I see it" dictum, law "includes knowledge that cannot always be explained, but that is no less valid for that."[218] Professor Gewirtz points to such nonrational elements as imagination, courage, compassion, intuition, and eloquence.[219] Other scholars, notably Kent Greenawalt, have argued that certain questions demanding governmental resolution, such as abortion rights and animal rights, cannot be resolved through reason alone, and require resort to nonrational (or what he terms "religious") modes of thinking.[220]

The conclusion that religion and law do not inherently resolve questions through distinct methodologies does not, however, mean that courts are institutionally competent to resolve normative religious questions, such as the validity of religious beliefs or the proper organization of religious bodies. Religious freedom means that religious beliefs may be based on any methodology that seems appropriate to the individual or religious group.[221] So, while an individual *may* base her religious beliefs and practices on the same types of logic and evidence available in the courtroom, such questions need not be resolved in that way. Religion is not unique in this respect. As Judge McConnell has explained, there are numerous categories of secular questions that, like religious questions, are not susceptible to judicial resolution due to their uniquely private or idiosyncratic nature. Just as Madison proclaimed that civil magistrates are not competent to determine religious truths, "there is no reason to suppose that the civil magistrate is a competent judge of artistic merit."[222] Similarly, "religion, like love, is a judgment most of us prefer to make for ourselves."[223] Thus, while there may be some normative religious questions that could be resolved through resort to ordinary judicial tools, the category is defined by its susceptibility to resolution by modes of thinking and types of evidence outside the

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218. Paul Gewirtz, *On "I Know It When I See It,"* 105 YALE L.J. 1023, 1023, 1044 (1996).

219. *Id.* at 1033.

220. Kent Greenawalt, *Religious Convictions and Law Making*, 84 MICH. L. REV. 352, 371 (1985); *see also* HILARY PUTNAM, REASON, TRUTH AND HISTORY 136 (1981) ("There is no *neutral* conception of rationality . . . .").

221. *See* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 714-715 (1976) ("[I]t is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria." (footnote omitted)).

222. McConnell, *supra* note 209, at 25; *see also* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.").

223. McConnell, *supra* note 209, at 27.

ordinary range of judicial decisionmaking. As a result, the courts have been correct to conclude that they lack institutional competence to resolve normative religious questions.

B. Judicial Competence to Determine Positive Religious Questions

In *Smith*, the Court reasoned that judicial resolution of positive questions about religion, such as whether a religious practice is considered central or important to practitioners of the religion, should be prohibited for the same reason that courts should not make normative judgments about religious beliefs: "Judging the centrality of different religious practices is akin to the unacceptable business of evaluating the relative merits of differing religious claims."[224] In a fundamental way, however, judicial examination of positive questions about religion is *not* akin to judicial examination of normative religious questions. To describe is not to judge, and the determination of what beliefs people hold does not require a determination of whether those beliefs are correct.[225] Judicial examination of the content of religious doctrine is more akin to judicial determinations of the content of foreign law: when a court determines what the law of England or Italy is, it does not judge the validity of those countries' laws or endorse the policies behind those laws. Courts are just as capable of determining what Judaism or Hinduism have to say as they are at determining what the laws of Israel or India are. This can readily be seen in cases in which courts have determined the content of the law of theocratic states, such as the Islamic Republic of Iran, where religious law governs.[226]

The clearest demonstration of judicial competence to undertake fact-finding about the content of religious doctrine and practices is, as discussed above, that courts routinely undertake extensive fact-finding into the content of religious doctrines and practices in determining whether a practice or doctrine is "religious" and therefore subject to the protections of the Religion Clauses and statutes addressing religion. In undertaking such inquiry, courts routinely examine the content of a purported religion's beliefs and practices, its ethical teachings, its

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224. Employment Div. v. Smith, 494 U.S. 872, 887 (1990) (quoting United States v. Lee, 455 U.S. 252, 263 n.2 (1982)) (internal quotation marks omitted).

225. *See* McConnell, *supra* note 128, at 1144 ("In such cases, the court is not judging the 'merits' of religious claims but solely trying to determine what they are.").

226. For instance, in *Bastanipour v. INS*, 980 F.2d 1129 (7th Cir. 1992), an Iranian citizen sought refugee status on the ground that as a convert to Christianity she faced a real threat of persecution in Iran. *Id.* at 1131, 1133. Experts on Islamic law testified to help the court determine how *sharia* law would treat converts like the plaintiff. *Id.* at 1133.

ceremonies and holidays, and various accoutrements of religion.[227] As Professor Magarian has concluded, it is only a difference of degree, not of kind, between the judicial fact-finding necessary to determine whether a practice or doctrine is "religious" and the fact-finding necessary to determine whether a practice or doctrine is considered important or central to the religion.[228]

To be sure, religious beliefs and practices are frequently based on faith or other nonrational sources, but determining what those beliefs and practices are, or whether they are considered important, does not require courts to employ anything other than ordinary fact-finding techniques. Courts competently can assess—that is, describe—the content of religious doctrines and practices without assessing their validity.[229] Taking what is perhaps a nonreligious example, suppose that a palm reader agreed to provide a traditional palm reading, but a customer refused to pay, claiming that the reading he received was unorthodox. There is no reason to believe that a court would be incompetent to resolve the palm reader's breach of contract claim. Each side could call experts to testify on the techniques of palm reading, describing what they consider to be traditional techniques. Treatises could be consulted. Certain basic points would become clear—that one line is known as the love line, another as the life line. Other aspects of palm reading might be considered more controversial within the palm reading community. Based on the evidence, and employing ordinary fact-finding standards, a court could determine that certain practices are considered traditional among palm readers, while others are considered unorthodox. It could undertake such fact-finding without any need to determine whether palm reading has any validity in describing personality traits, exposing the

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227. *See supra* notes 167-74 and accompanying text.

228. Magarian, *supra* note 24, at 1959 ("The determinations about religious substance necessary for strict scrutiny of accommodation claims differ only in degree from the most basic judgments about what constitutes 'religion' within the meaning of the First Amendment.").

229. Legal principles, no less than religious beliefs, may be based on unverifiable premises, but that does not prevent courts from determining what those principles are or how they should be applied. The recognition that law, like religion, may be based on unverifiable premises formed the basis for a joke in Justice Jackson's dissenting opinion in *Ballard*, in which he characterized belief in "dispassionate judges" as a mystical and unverifiable matter akin to belief in Santa Claus:

> All schools of religious thought make enormous assumptions, generally on the basis of revelations authenticated by some sign or miracle. . . . Religious symbolism is even used by some with the same mental reservations one has in teaching of Santa Claus or Uncle Sam or Easter bunnies *or dispassionate judges*. It is hard in matters so mystical to say how literally one is bound to believe the doctrine he teaches . . . .

United States v. Ballard, 322 U.S. 78, 94 (1944) (Jackson, J., dissenting) (emphasis added).

past, or predicting the future. That is, courts have the ability to discover the rules and doctrines understood to govern nonrational areas without making normative judgments about those rules and doctrines. Indeed, courts have long been charged with discerning the positive law without judging its wisdom.[230]

Institutional competence thus justifies the reluctance of courts to determine the validity or truth of religious claims and doctrines, but it cannot support a prohibition on judicial resolution of questions about the content of religious doctrines and practices. Courts have competence to apply processes of fact-finding to determine the contours of religious doctrines, yet refuse to do so when a clergy person gets fired for failing to provide traditional services, when a merchant sells food claimed to be kosher, or when a parent fails to raise a child in an agreed religion. There may be good reasons for courts to refuse to resolve such questions, but a lack of competence is not one.

IV. DOCTRINAL ENTANGLEMENT: THE CONSTITUTIONAL AUTHORITY OF COURTS TO ADDRESS RELIGIOUS QUESTIONS

The prohibition on judicial resolution of religious questions reflects not only a concern with the *institutional* competence of courts but also the *constitutional* competence of courts relative to religious authorities, that is, the conviction that the Religion Clauses leave the resolution of religious questions to religious authorities, free from governmental entanglement and interference.[231] As the Supreme Court has said, "[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."[232] This Part examines the

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230. *See, e.g.*, TVA v. Hill, 437 U.S. 153, 194 (1978) ("Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute.").

231. In this way, too, the prohibition is akin to the political question doctrine, which rests upon the conviction that the Constitution leaves certain decisions to be made by the political branches, free from interference by the courts. *See, e.g.*, United States v. Munoz-Flores, 495 U.S. 385, 394 (1990) (noting that the political question doctrine "is designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government"); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7-8 (1959). Just as the political question doctrine reflects a constitutional division of authority between the branches of government, the Religion Clauses express a division of authority between secular and religious bodies.

232. Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1948); *see also* TRIBE, *supra* note 18 (stating that the Establishment Clause reflects the "concern that secular and religious authorities must not interfere with each other's respective spheres of choice and influence"); McConnell, *supra* note 209, at 29 (asserting that the Religion Clauses divide power "between two jurisdictions: the earthly and the divine"). As with the separation of political and judicial authority, the division of authority between government and religion

extent to which judicial resolution of religious questions interferes with the protected sphere of religion and thereby exceeds judicial authority. First, it seeks to demonstrate that the Establishment Clause is best read to prohibit courts from judging the truth or validity of religious beliefs, but not to prohibit judicial resolution of positive questions about religion. Second, this Part argues that the conclusion that courts may answer positive questions about religion is unaffected by whether the question is a matter of dispute or controversy within a religious community.

A. Prohibiting Judicial Resolution of Positive Questions About Religion Cannot Be Squared with Establishment Clause Jurisprudence and Theory

It is easy to see why judicial resolution of normative religious questions intrudes into the sphere of religion protected from government meddling. The Religion Clauses give each church body, indeed each individual, authority to decide for itself, herself, and himself what religious doctrines to follow, which rituals to consider valid and meaningful, and which practices to deem mandatory or optional.[233] To declare a religious claim to be true or false, valid or invalid, would directly entangle the government in questions constitutionally assigned to the religious sphere.[234]

On the other hand, judicial resolution of positive questions about religion does not interfere with the authority of religious bodies or individuals to decide what beliefs to hold, what doctrines to follow, and what practices to observe. The government plainly cannot tell the Catholic Church who should be Pope; but, it would be hard to find that a court unconstitutionally meddles with the church by saying who the Pope is. The government would unconstitutionally entangle itself in religious matters if it allowed a jury to determine whether Guy Ballard actually possessed supernatural healing powers because it would interfere with the right of believers to decide that question freely, but there would be

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can be understood in jurisdictional terms, under which the government would exceed its jurisdiction if it decided religious questions. *See* Watson v. Jones, 80 U.S. (13 Wall.) 679, 733 (1871) (stating that questions of religious doctrine are "matters over which the civil courts exercise no jurisdiction"); Esbeck, *supra* note 18, at 10-11; O'Brien & O'Brien, *supra* note 33, at 85 (arguing that church and state are separate sovereigns, each of which can act independently and exclusively within its sphere).

233. *See* West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("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.").

234. In Justice O'Connor's formulation, the government would likewise be seen as violating the Establishment Clause if it "endorses or disapproves" a religious message, as the courts undoubtedly would do if they were to assess the validity of religious claims. *See* County of Allegheny v. ACLU, 492 U.S. 573, 625 (1989) (O'Connor, J., concurring in part and concurring in the judgment).

no interference with religion for the government to declare that Ballard's followers *believed* him to have had such powers. Likewise, it would not interfere with religion for a court to declare that Orthodox Jews believe that the Torah prohibits them from eating pork, that Christians believe in the divinity of Jesus, that the Cheyenne religion considers Devil's Tower to be a sacred site, and that Buddhists disclaim the existence of the self. Positive declarations about religion pose little or no threat of interference with religion because religious bodies and individuals remain entirely free to decide for themselves what to do and what to believe, and they remain free even if the government mischaracterizes their beliefs and practices.[235]

A constitutional distinction between the government's power to make normative and positive declarations on matters of religion has long been understood to apply in public schools. On the one hand, public schools violate the Establishment Clause when they require daily Bible readings or the recitation of prayers because such requirements are understood to be tantamount to a governmental embrace of the truth and validity of a religious message.[236] In contrast, the Establishment Clause allows public schools to offer comparative religion classes, in which students study the Bible, prayers, or other religious texts, as long as the religious material is "presented objectively as part of a secular program of education."[237] It has thus been recognized that, in schools, the government may make positive but not normative declarations about religious matters. There is no reason why the Establishment Clause should apply differently in courts than in public schools, prohibiting judges from making positive declarations about religion that would be acceptable if made by teachers.[238]

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235. *See* Laycock, *supra* note 128, at 16-17.

236. Stone v. Graham, 449 U.S. 39, 42 (1980) (per curiam) (discussing the Ten Commandments); Sch. Dist. v. Schempp, 374 U.S. 203, 225 (1963) (discussing Bible reading); Engel v. Vitale, 370 U.S. 421, 424 (1962) (discussing prayer).

237. *Schempp*, 374 U.S. at 225; *see also* Edwards v. Aguillard, 482 U.S. 578, 607 (1987) (Powell, J., concurring) ("Courses in comparative religion of course are customary and constitutionally appropriate."); *Stone*, 449 U.S. at 42 (per curiam) (stating that the Bible may constitutionally be studied "in an appropriate study of history, civilization, ethics, comparative religion, or the like"); Leslie Griffin, *"We Do Not Preach. We Teach." Religion Professors and the First Amendment*, 19 QUINN. L. REV. 1, 9 (2000); *cf.* Locke v. Davey, 124 S. Ct. 1307, 1313 (2004) (holding that the state does not violate the Free Exercise Clause by prohibiting state funds from being used to pursue degrees in divinity: "Training someone to lead a congregation is an essentially religious endeavor. Indeed, majoring in devotional theology is akin to a religious calling as well as an academic pursuit"). *See generally* Kent Greenawalt, *Teaching About Religion in the Public Schools*, 18 J.L. & POL. 329 (2002).

238. It may be tempting to say that declarations by judges about religion are constitutionally different from the same statements made by teachers because the

Not only the public schools, but Congress and the executive branch more generally are also authorized to make positive assessments about the content of religious beliefs and practices. The political branches are understood to have authority to establish exemptions from generally applicable laws for religious conduct, and they may do so based on examination and assessment of religious practices and beliefs.[239] For instance, when Congress decided to exempt Native Americans from state and federal laws criminalizing the use of peyote, it issued legislative findings regarding the content of Native American religion: "The Congress finds and declares that . . . for many Indian people, the traditional ceremonial use of the peyote cactus as a religious sacrament has for centuries been integral to a way of life, and significant in perpetuating Indian tribes and cultures."[240] If the political branches could not make such positive declarations regarding the content of religious practices and beliefs, the government could never act to accommodate religion. To prohibit the courts from making the same sorts of declarations would create the anomaly that the Religion Clauses apply more strenuously to the courts than the political branches.

In addition, while judicial resolution of positive questions about religion has been characterized as creating excessive "entanglement" between government and religion,[241] that conclusion cannot be squared with the development of "entanglement" as an Establishment Clause

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resolution of cases may depend on such declarations. Unlike a professor's resolution of religious questions, judicial resolution of religious questions, if allowed, would form the basis of government action. Litigants could win or lose their jobs, monetary damages, or custody of their children, based on a court's understanding or misunderstanding of their religions. *Cf.* ROBERT COVER, *Violence and the Word*, *in* NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 203-38 (Martha Minow et al. eds., 1995) (arguing that the fundamental difference between legal and literary interpretation is that the former provides justification for the state's use and threat of force). Yet the cases adopting and applying the broad prohibition on judicial resolution of religious questions make clear that the purely iterative act of resolving religious questions is itself understood to be prohibited by the Constitution. *See supra* notes 73-94, 122-28 and accompanying text.

239. *See, e.g.*, Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 335 (1987) ("[I]t is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions."); McDaniel v. Paty, 435 U.S. 618, 639 (1978) (Brennan, J., concurring in the judgment) ("[G]overnment [may] take religion into account . . . to exempt, when possible, from generally applicable governmental regulation individuals whose religious beliefs and practices would otherwise thereby be infringed."). *See generally* McConnell, *supra* note 164. *But see* Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 55, 580-81, 587 (1991).

240. 42 U.S.C. § 1996a(a) (2000).

241. *See* TRIBE, *supra* note 18, at 1231-32.

test.[242] The prohibition on governmental entanglement with religion has never been understood to embody an absolute prohibition of interaction between government and religion but instead reflects in some measure the *inevitability* of such interaction, as only "excessive" entanglement with religion is understood to violate the Establishment Clause.[243] The case law gives imprecise guidance on exactly what government interaction with religion is considered excessive,[244] but a rough standard of what the Court has considered to be excessive may be gleaned from the primary area in which the Court has employed excessive entanglement as a standard: the recurring problem of government monitoring of the religious content of programs receiving public funds.[245] When public funds are provided to religious entities, governmental bodies frequently seek assurance that the money is being used for secular purposes and not to advance religion.[246] The Court has held that no

242. The current status of "entanglement" as an Establishment Clause test is uncertain. Under the test articulated by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), government action was said to be consistent with the Establishment Clause when: (1) it has a secular purpose, (2) its principal effect does not advance or inhibit religion, and (3) it does not foster "'an excessive . . . entanglement with religion,'" *id.* at 612-13. Since then, however, the Court has called into question whether excessive entanglement should be regarded as a separate test or an aspect of the effects test. *See* Agostini v. Felton, 521 U.S. 203, 232 (1997). The status of the *Lemon* test itself is in doubt, with a majority of justices apparently adopting Justice O'Connor's "endorsement" test. *See* County of Allegheny v. ACLU, 492 U.S. 573, 625 (1984) (O'Connor, J., concurring in part and concurring in the judgment) (stating that the Establishment Clause is violated whenever the government "endorses or disapproves of religion"); *see also* Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses*, 8 SUP. CT. REV. 323, 326-28 (1995).

243. *Agostini*, 521 U.S. at 233 ("Not all entanglements, of course, have the effect of advancing or inhibiting religion. Interaction between church and state is inevitable, and we have always tolerated some level of involvement between the two. Entanglement must be 'excessive' before it runs afoul of the Establishment Clause." (citations omitted)); *Lemon*, 403 U.S. at 614 ("[T]otal separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable."); *see also* Roemer v. Bd. of Pub. Works, 426 U.S. 736, 745-46 (1976) ("A system of government that makes itself felt as pervasively as ours could hardly be expected never to cross paths with the church. . . . [A] hermetic separation of the two is an impossibility it has never required.").

244. *See* Laycock, *supra* note 93, at 1392 ("Sometimes [entanglement] seems to mean contact, or the opposite of separation; it has also been used interchangeably with 'involvement' and 'relationship.' Sometimes it seems to mean anything that might violate the religion clauses." (footnotes omitted)).

245. *Compare* Sch. Dist. v. Ball, 473 U.S. 373, 375 (1985) (discussing religious school programs receiving public funds), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997), *and Roemer*, 426 U.S. at 739-40 (discussing public funding of private religious colleges), *with* Everson v. Bd. of Educ., 330 U.S. 1, 3 (1947) (discussing public funds for bus transportation to religious schools).

246. Because the government must "maintain a course of neutrality . . . between religion and non-religion," the government cannot deny funding to an organization solely

excessive entanglement arises when the government monitors the content of a religious organization's services, as long as such monitoring is not "pervasive" and does not involve continuous government "surveillance" of religious entities.[247] Under these cases, no excessive entanglement with religion occurs from unannounced monthly visits by government officials to assess whether a religious entity is using public funds to promote religious or secular content,[248] or when religious entities are required to prove the absence of religious content in its publicly funded programming.[249] As these cases establish, the government does not interfere with religion merely by examining the content of services

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because it is religious when it provides public funding for other organizations doing similar work. *Ball*, 473 U.S. at 382. *Compare* Bowen v. Kendrick, 487 U.S. 589, 593 (1988) (upholding federal funding of agencies, including religious entities, to provide services addressing teenage sexual problems), *and Roemer*, 426 U.S. at 746 (upholding state statute providing subsidies to qualified colleges, including religiously affiliated institutions, stating that "religious institutions need not be quarantined from public benefits that are neutrally available to all"), *and Everson*, 330 U.S. at 3, 17-18 (approving busing services available to both public and private school children), *with* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 822-23, 845-46 (1995) (holding that, where the government generally allows private groups to use public school rooms after school hours it cannot deny the use of such rooms to religious organizations).

247. *See Lemon*, 403 U.S. at 619-20. For instance, in *Lemon*, the Court examined Rhode Island and Pennsylvania programs that reimbursed private schools for the costs of providing secular courses also offered in public schools. *Id.* at 606-07. The Court found that the programs involved excessive entanglement with religion because the programs required "[a] comprehensive, discriminating, and continuing state surveillance" of the content of the courses taught by the private school teachers in order to ensure that the courses were limited to strictly secular subjects and did not inculcate religion. *Id.* at 619. In contrast, in *Tilton v. Richardson*, 403 U.S. 672 (1971), the Court upheld a federal program that provided construction grants to colleges and universities, including religiously-affiliated institutions, but which specified that the funds could not be used to construct buildings used for religious instruction, training, or worship, *id.* at 675, 689. The Court found that the program did not foster excessive entanglement because it involved only minimal government monitoring to ensure that buildings constructed with public funds were used for secular purposes. *Id.* at 687 ("Such inspection as may be necessary to ascertain that the facilities are devoted to secular education is minimal."). In one of its most recent pronouncements, the Court held that no excessive entanglement resulted from a government program involving intermittent monitoring of whether public funding of remedial school teachers was being used for religious indoctrination. *Agostini*, 521 U.S at 234. In short, excessive entanglement will only be found where there is "'pervasive monitoring by public authorities'" of the religious content of programs provided by religious organizations. *Id.* at 233-34 (citation omitted).

248. *Agostini*, 521 U.S. at 234.

249. *See, e.g., Tilton*, 403 U.S. at 680 (finding no excessive entanglement where religious institutions receiving public funding "presented evidence that there had been no religious services or worship in the federally financed facilities, that there are no religious symbols or plaques in or on them, and that they had been used solely for nonreligious purposes").

provided by religious bodies.[250] No principle of entanglement that can be gleaned from the cases supports the conclusion that judicial examination of the content of religious doctrine should be considered any more intrusive, or so inherently intrusive as to bar courts from examining religious content in every case. In this context, "entanglement" represents simply a label for the anxiety created by government involvement in matters touching on religion.[251] It does not identify a principle for prohibiting judicial fact-finding regarding religious matters.

B. Courts May Resolve Disputed Religious Questions Unless Doing So Would Involve Normative Judgments on the Correctness of Religious Views

Passages in several of the Supreme Court's opinions suggest that the prohibition on judicial resolution of religious questions applies most forcefully when courts are called upon to resolve controversies or disputes over religious doctrines. For instance, in *Thomas v. Review Board*,[252] two witnesses disagreed over whether the doctrines of the Jehovah's Witnesses are consistent with performing work for the military,[253] but the Court ruled that it was beyond judicial authority "to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith."[254] For the reasons discussed above, it would violate the Establishment Clause principle of neutrality for a court to decide that one side in a religious dispute takes the normatively correct position. A court, therefore, could not constitutionally resolve the disputed question of whether performing military work is sinful. But the Constitution should not be read to prohibit a court from determining what beliefs are actually held by Jehovah's Witnesses, a question that can be addressed without determining whether those views are correct.

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250. *E.g.*, *Agostini*, 521 U.S. at 234.

251. *Cf.* Jonathan C. Lipson, *On Balance: Religious Liberty and Third-Party Harms*, 84 MINN. L. REV. 589, 593 (2000) (arguing that the Supreme Court's jurisprudence under the Religion Clauses is guided by two anxieties, an "anxiety of entanglement" and an "anxiety of anarchy").

252. 450 U.S. 707 (1981).

253. *Id.* at 711.

254. *Id.* at 716; *see also* Jones v. Wolf, 443 U.S. 595, 604 (1979) (stating that courts may not interpret religious doctrines if doing so "would require the civil court to resolve a religious controversy"); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 709 (1976) ("[T]his case essentially involves not a church property dispute, but a religious dispute."); Presbyterian Church v. Mary Elizabeth Mem'l Hull Presbyterian Church, 393 U.S. 440, 449 (1969) ("But 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.").

In order to address the free exercise question in *Thomas*, it was unnecessary to determine what doctrines are held by the Jehovah's Witnesses because the right to free exercise of religion guaranteed by the First Amendment is an individual right, which does not depend on whether an individual's religious beliefs accord with the other members of his religion.[255] But in other cases the parties' rights may well depend on an assessment of the religious beliefs of an organized religious body. Suppose that a contract requires a minister to abide by the standards of her church, but she is fired by the church board for presiding at a gay wedding, in violation of the official doctrines of the church. The minister or the board should be able to point to the official positions of the church in challenging or defending the employment decision. A court may determine whether the minister's action violated the church's standards without in any way deciding whether those standards are correct. That the church and the fired minister may disagree over whether those standards are correct does not change the nature of the court's positive inquiry, nor does it drag the court into undertaking a normative inquiry into which side correctly perceives the faith.

In some cases, the answer to disputed positive questions about the content of religious beliefs may be indeterminate and thus insufficient to resolve the religious issues presented by a case. For instance, in *Zummo v. Zummo*,[256] discussed above, divorcing parents had agreed not to take their children "to religious services contrary to the Jewish faith," and the noncustodial parent took her children to Catholic services.[257] The religious question presented by *Zummo*—does "the Jewish faith" allow Jews to attend non-Jewish religious services[258]—is a positive question, in that it can be answered by describing Jewish beliefs without taking a position on whether or not those beliefs are correct. The purely descriptive answer to that question, however, is indeterminate, in that some strains of Orthodox Judaism construe Jewish laws and traditions to prohibit Jews from attending services in a Christian church, while Reform, Reconstructionist, and Conservative Judaism take a contrary position.[259] A court could describe those differing beliefs but constitutionally could say nothing more. Other than saying that there are

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255. *See, e.g.*, Greenawalt, *supra* note 128, at 466 ("For most kinds of cases, there are powerful reasons to adopt an individual's perspective, not the group's. It is the individual who is seeking to engage in behavior; his or her convictions should matter the most.").

256. 574 A.2d 1130 (Pa. Super. Ct. 1990).

257. *Id.* at 1141-42.

258. *Id.* at 1146.

259. *Cf.* JOSEPH B. SOLOVEITCHIK, CONFRONTATION § II(3), *reprinted in* 6 TRADITION: A JOURNAL OF ORTHODOX THOUGHT (1964), http://www.bc.edu/research/cjl/meta-elements/texts/articles/soloveitchik.htm (last visited Nov. 14, 2004).

disagreements among the sects, a court could not determine that "the Jewish faith" allows or forbids Jews to attend Christian services without crossing the line into resolving the normative question of which Jewish sect is correct. To answer that question would be tantamount to a judicial endorsement of the doctrinal position of one sect at the expense of others. As a result, the court could determine whether the noncustodial parent violated the divorce agreement only if it could determine that the Zummos had in mind a particular Jewish denomination in setting out the terms of their agreement.

Disputes within a religious community highlight the difficulties that may arise in distinguishing positive from normative questions about religion. The application of the kosher food laws presents a good case in point.[260] It is possible to understand the question of whether food is properly labeled to be kosher in either normative or positive terms. One could view the question in normative terms as addressing the truth of the religious claim that the food complies with the laws established by God for the Jewish people. That appears to be the conclusion of courts that have held such statutes unconstitutional.[261] Defenders of kosher food laws have seen the question in positive terms, as addressing whether food is kosher in the common meaning of that term, without in any way addressing whether Jewish dietary laws have any legitimacy.[262] As this Article has argued, a court may not determine whether food actually is ritually fit for consumption according to God's laws any more than it may determine whether Devil's Tower actually is a sacred site, but a court may constitutionally determine whether Jews *believe* the food to be kosher just as it could determine whether the Cheyenne people *consider* Devil's Tower to be sacred.

The distinction between a court's authority to resolve positive and normative religious questions, while sometimes quite slippery, becomes especially significant when there are disputes within a religious community. For instance, Orthodox Judaism generally considers swordfish to be unkosher, while Conservative Judaism considers it to be kosher.[263] A court constitutionally may answer only the positive question—whether swordfish is understood within the Jewish community

260. *See supra* notes 148-51 and accompanying text.

261. *See, e.g.*, Ran-Dav's County Kosher, Inc. v. State, 608 A.2d 1353, 1363 (N.J. 1992) (concluding that kosher law is unconstitutional regardless of whether there is any religious dispute over what food is kosher: "The laws of kashrut are intrinsically religious, whether they are ambiguous or not and whether they are disputed or not. Religious doctrines cannot be recast as secular principles simply because they are clear . . . . Nor do religious doctrines become neutral simply because they are widely or even universally held.").

262. *See supra* note 148.

263. BLU GREENBERG, HOW TO RUN A TRADITIONAL JEWISH HOUSEHOLD 112 (1983); 6 ENCYCLOPEDIA JUDAICA 27 (1996).

to be kosher—the answer to which is indeterminate. For a court to determine whether swordfish *actually* is kosher would require the court to determine which set of rabbis are correct in their religious position, a determination that entails a normative judgment on which religious denomination correctly perceives God's commands.[264]

While the answer to disputed questions over the scope or content of religious beliefs may sometimes be indeterminate, the existence of such a dispute should present no bar to judicial examination. Litigants may readily gin up factual disputes over religious beliefs and practices, making the existence of religious controversies too easily manipulable to function as a threshold inquiry. Moreover, if the existence of disputes over religious beliefs and practices were a threshold question, it would only push the resolution of religious questions up a level of generality, as courts would still be required to assess whether there could be any plausible controversy over the religious issue, a question that itself would call for examination of religious matters. In any event, courts cannot feasibly avoid examining matters of religion over which disputes within a sect exist. In *County of Allegheny v. ACLU*,[265] for example, the Court had to assess the religious significance of a Hanukkah menorah in deciding whether a public display violated the Establishment Clause.[266] On this point there was conflicting evidence in the record, some testimony suggesting that the menorah had become primarily a secular object, other evidence suggesting its continued religiosity.[267]

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264. Although Kent Greenawalt does not employ the positive-normative distinction advanced in this Article, it would appear that this distinction underlies his position on the constitutionality of kosher food regulation. *See* Greenawalt, *supra* note 23, at 782. Professor Greenawalt argues that courts may not adopt an Orthodox definition of "kosher" where there are disputes between the Orthodox and Conservative communities over whether food is kosher: "Such unequal treatment should be regarded as denominational preference . . . [which] unjustifiably promotes Orthodox Judaism at the expense of Conservatism." *Id.* at 810. In contrast, Greenawalt asserts that a court *could* uphold a fine imposed against a merchant with an idiosyncratic definition of what food is kosher, *id.* at 793; in Greenawalt's example, someone who claims that any food prepared in the right spiritual environment should be considered kosher, even pork, which Jewish traditions have long emphatically considered unkosher. *Id.* In such a case, Greenawalt concludes that a court could undertake a positive inquiry into deciding whether the use of the term "kosher" comports with a common understanding of the term to mean "'acceptable according to traditional Jewish standards.'" *Id.* In Greenawalt's view, a court assessing that positive question would not be understood to endorse those standards: "It does not say people should follow *kosher* requirements; it merely assists those who have this belief in fulfilling it." *Id.* at 792. The latter hypothetical is troubling, however, in that it suggests an idiosyncratic or minority religious position would receive less protection than more established beliefs.

265. 492 U.S. 573 (1989).

266. *Id.* at 613-621 (plurality opinion).

267. *See id.* (plurality opinion).

Conceivably, a description of the religious significance of the menorah could be understood to endorse one religious view at the expense of another. But if courts could not resolve disputes over the religiosity of an object or practice, they could not plausibly know what practices and beliefs are protected by the Religion Clauses.[268]

CONCLUSION

The broad prohibition against judicial resolution of all religious questions, positive or normative, is a recent innovation. While that broad prohibition was first articulated in the church property cases of the 1960s and 1970s, its breadth only became clear in *Smith*. Since *Smith*, the prohibition has been applied in innumerable contexts, with the unexpected result that a broad swath of cases are now deemed nonjusticiable merely because they would require courts to examine the content of religious beliefs and practices. The rationales articulated for this prohibition—the competence of courts to resolve religious questions and the separationist principle embodied in the Establishment Clause—support only the modest rule adopted in *Ballard*, that courts must not purport to pass judgment on the merits of religious beliefs. These rationales do not support the much broader rule, applied since *Smith*, that courts must not attempt to resolve even positive questions about religious practice or doctrine. Such a broad rule is not supported by logic or history and, in any event, would be impossible to apply in the absolute manner articulated by the cases.

The conclusion that courts are not broadly prohibited from resolving positive questions about religious doctrines and practices does not mean, however, that courts must necessarily resolve all such questions whenever they arise. Certainly, there are circumstances when courts properly refuse to resolve even positive religious questions for reasons wholly apart from those used to support the broad prohibition discussed in this Article. For instance, a cause of action under which a party raises a religious question may not actually require the court to resolve the question. In this regard, courts issued conflicting decisions over whether RFRA protects only those religious practices that are both central to the plaintiff's religion and mandated by that religion, with some cases holding that the Constitution absolutely prohibits them from determining whether religious practices are mandated by religion or whether religious beliefs are central to a religion, a conclusion that should be rejected for the reasons discussed in this Article.[269] It may well be, however, that the text of RFRA does not require such inquiry, even if the Constitution and

268. *See* Magarian, *supra* note 24, at 1953; Conkle, *supra* note 174.

269. *See supra* note 160.

judicial competence would allow it. Indeed, given that religious freedom embodied in the Free Exercise Clause and RFRA is understood as an individual right, and not in terms of institutional religions, cases arising under the Free Exercise Clause and RFRA should rarely call on courts to decide between conflicting views about religious doctrines and practices, as the individual claimant's understanding of his or her religion should control.[270]

There may also be cases in which the Religion Clauses bar courts from taking certain actions based on a resolution of religious questions. Suppose that a congregant donates a large sum of money to a Jewish congregation on the stipulation that the congregation remain true to Orthodox practices, but the congregation adopts a policy eliminating sex-segregated seating and instituting mixed-sex seating. If the donor seeks an injunction against the policy on the ground that mixed seating conflicts with the traditional practices of Orthodox Judaism, the logic of this Article suggests that there is no bar to a court deciding whether Orthodox Judaism allows men and women to sit together during religious services. The conclusion that a court is institutionally and constitutionally competent to decide that factual question does not, however, mean that no constitutional problems would arise if a court were to issue an injunction against the practice of mixed-sex seating, as such an injunction would almost certainly violate the free exercise rights of the congregation and its members.

A court's authority to undertake fact-finding into positive questions about religion is thus a distinct question from its authority to impose remedies that may have the effect of inhibiting or promoting the exercise of religion. The means by which courts should resolve whether a proposed remedy may exceed the court's constitutional authority, however, demonstrates the impossibility of prohibiting judicial resolution of religious questions. In order to determine whether the Free Exercise Clause prohibits the government from imposing an injunction against a Jewish congregation from instituting same-sex seating, a court would have to determine, among other things, whether such seating constitutes the exercise of religion, a determination requiring courts to make positive assessments about the doctrines and practices of religion. Thus, the resolution of Free Exercise Clause cases, like many others, depends on a court's determination of the content of religious beliefs and practices. Such determinations do not exceed judicial competence and cannot plausibly be considered to be prohibited by the Constitution.

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270. *Cf.* Greenawalt, *supra* note 128, at 466.