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Rethinking the "Religious Questions" Doctrine

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Rethinking the “Religious-Question” Doctrine

Christopher C. Lund*

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The “religious-question” doctrine is a well-known and commonly accepted notion about the First Amendment’s Religion Clauses. The general idea is that, in our system of separated church and state, courts do not decide religious questions. And from this premise, many things flow—including the idea that courts should dismiss otherwise justiciable controversies when they would require courts to decide religious questions.¹

Yet a vexing thought arises. The religious-question doctrine comes out of a notion that secular courts cannot resolve metaphysical or theological issues. But when one looks at the cases that courts dismiss because of the religious-question doctrine, none of them involve questions of a metaphysical or theological nature. Cases sometimes require decisions about what particular individuals or religious communities happened to believe, how they acted, or what motivated their actions. But those are temporal and empirical questions, which courts can investigate the same way

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1. See Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843, 1844 (1998) (concluding that “secular courts must not determine questions of religious doctrine and practice”); *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449 (1969) (concluding that judicial decisions cannot “turn on the resolution by civil courts of controversies over religious doctrine and practice”).

they investigate everything else. So when some claim that the doctrine is needed to keep the government out of theological issues or to maintain the government’s religious neutrality, they seem to go wrong. And when this thread gets pulled, the religious-question doctrine just seems to unravel.

While this short symposium piece leaves much unanswered, it suggests that a reconceptualization of the religious-question doctrine might be in order. If the religious-question doctrine is not primarily about the government’s inability to decide theological or metaphysical questions, what is it about? This piece tentatively suggests an answer: It is about religious liberty. Courts stay out of religious questions when they believe religious liberty is best advanced by courts staying out of religious questions. And courts get involved in religious questions when they believe religious liberty is best advanced by courts getting involved in religious questions. At bottom, the religious-question doctrine has more to do with religious liberty than religious questions.

I. AN INTRODUCTION TO THE RELIGIOUS-QUESTION DOCTRINE

The idea that the government, and courts in particular, should not take positions on religious issues has a long history. Two centuries ago, James Madison denied that “the Civil Magistrate is a competent Judge of Religious Truth.”² A century earlier, John Locke had said basically the same thing.³

American courts turned this idea into a legal principle through a series of disputes over church property going back to the nineteenth century.

2. See JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), reprinted in 8 THE PAPERS OF JAMES MADISON 295, 301 (Robert A. Rutland et al. eds., 1973) (“[T]hat the Civil Magistrate is a competent Judge of Religious Truth . . . is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world . . .”).

3. As Andrew Koppelman explains, Locke also thought that the state was generally incompetent to adjudicate religious questions:

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

Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831, 1859–60 (2009) (quoting JOHN LOCKE, A LETTER CONCERNING TOLERATION 37 (James H. Tully ed., 1983) (1689)).

Watson v. Jones involved a fight over slavery between two factions of a Presbyterian church.⁴ The national Presbyterian Church (the General Assembly) had ruled for the anti-slavery side, but the Kentucky courts declared its actions unlawful. Reversing this decision, the United States Supreme Court held that the Kentucky courts should not have countermanded the General Assembly. Judges cannot decide “the true standard of faith,”⁵ so courts must abstain from disputes that are “strictly and purely ecclesiastical in . . . character.”⁶

The religious-question doctrine came into full bloom almost a century later in *Mary Elizabeth Blue Hull*.⁷ *Mary Elizabeth* also involved warring factions fighting over church property. *Watson* had been about slavery; *Mary Elizabeth* was about women’s ordination. The national church had decided to ordain women, and in response, a dissenting congregation sued to secede and take its property with it.⁸ To resolve this dispute, the Georgia courts applied the old English rule, which required courts faced with a church split to decide which of the factions came closest to the original beliefs of the church.⁹ This, the Supreme Court unanimously concluded, was unconstitutional. “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.”¹⁰ As a result, “the [First] Amendment therefore commands civil courts to decide . . . disputes without resolving underlying controversies over religious doctrine.”¹¹

Mary Elizabeth forms the heart of the religious-question doctrine.¹² But

4. 80 U.S. 679 (1871).

5. *Id.* at 727.

6. *Id.* at 733.

7. Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969).

8. *Id.* at 442–43.

9. *Id.* at 443–44 & n.2.

10. *Id.* at 449.

11. *Id.*

12. See Koppelman, *supra* note 3, at 1836 (citing *Mary Elizabeth* as exemplifying the “state’s incompetence to decide matters that relate to the interpretation of religious practice or belief”); EUGENE VOLOKH, THE FIRST AMENDMENT AND RELATED STATUTES: PROBLEMS, CASES AND POLICY ARGUMENTS 901 (4th ed. 2011) (citing *Mary Elizabeth* as part of the “No Religious Decisions Principle,” whereby “[g]overnment officials may not . . . interpret religious doctrine”

if one reflects on it, there was no theological or metaphysical question in *Mary Elizabeth*. It can seem that way, when one contemplates a court having to decide which church faction is closer in theology to the original church. But the old English rule applied by the lower courts in *Mary Elizabeth* was simply an outgrowth of a generally applicable idea about implied trusts: When an organization splits into two, the property should go where the original donor of the party would have wanted it to go.¹³ The dispositive legal issue in *Mary Elizabeth* was really an empirical one about the beliefs of the original donor of the property: What did he or she believe, and where would he or she have wanted the property to go?

Neither *Watson* nor *Mary Elizabeth* involves any theological or metaphysical question, and the last case in this chain, *Milivojevic*,¹⁴ is precisely the same. The Supreme Court there held that a deposed bishop could not bring claims arguing that his removal had been improper under church law.¹⁵ The bishop there did not claim a right to reinstatement based on a reading of God’s will; he claimed a right to reinstatement based on the written policies and procedures of the Serbian Orthodox Church. But this too, the Court held, was constitutionally precluded.

It may help to draw a distinction between two kinds of religious questions. First-order questions are theological and metaphysical questions—whether a religious claim, such as the existence of God or the divinity of Christ, is true or false. Second-order questions are temporal and empirical questions—sociological questions about the beliefs or structure of a religious group, psychological questions about the religious beliefs and motivations of individual believers, and so on. While the distinction between first-order and second-order questions is not airtight, it does run deep.¹⁶ Among other things, it explains how the public schools can

(emphasis omitted)); Frederick Mark Gedicks, *The Recurring Paradox of Groups in the Liberal State*, 2010 UTAH L. REV. 47, 57 (citing *Mary Elizabeth* as one of the cases establishing the principle that “courts must avoid intervening in religious disputes when doing so would entail their deciding theological or ecclesiastical questions”).

13. *Mary Elizabeth*, 393 U.S. at 443–44 & n.2.

14. See *Serbian Eastern Orthodox Diocese for the United States of America & Canada v. Milivojevic*, 426 U.S. 696 (1976).

15. *Id.* at 724–25.

16. The two categories inevitably overlap. Religions sometimes make theological claims about history, for example. Such claims—historical claims about the resurrection of Christ or about the plates revealed to Joseph Smith—are both first- and second-order questions. As an example of an

successfully teach *about* religion (second-order propositions) without teaching religion (first-order propositions).

First-order religious questions are what Madison and Locke had in mind—and it is true enough that courts must abstain from such questions, if they are to maintain their religious neutrality. But second-order religious questions seem fully within the investigatory capability of secular courts. And *Watson*, *Mary Elizabeth*, and *Milivojevich* all involve second-order, not first-order, questions.

The same is true for the universe of lower-court cases as well. Courts universally dismiss claims of clergy malpractice.¹⁷ One can sue one’s lawyer or doctor for malpractice, but not one’s priest or rabbi. Courts say that adjudicating these cases would require them to decide religious questions,¹⁸ and commentators agree.¹⁹ But the questions presented in these cases are second-order ones. There need be no theological or metaphysical judgment in any of them. Such cases only require what every negligence case requires: A decision about the norms in some particular community—in this case, a religious community. Whether a priest or rabbi acted in conformance with the expectations of his or her congregation is a purely sociological inquiry. If we did not care about religious liberty, we would

overlapping claim, consider a Fifth Circuit opinion that took less than a page to conclude that a plaintiff could not bring a defamation suit claiming that the Scorsese film, *The Last Temptation of Christ*, made false historical claims about Jesus Christ. See *Nayak v. MCA, Inc.*, 911 F.2d 1082 (5th Cir. 1990).

17. See, e.g., *DeCorso v. Watchtower Bible & Tract Soc’y of N.Y., Inc.*, 829 A.2d 38, 46 (Conn. App. Ct. 2003) (“[C]ourts throughout the United States have uniformly rejected claims for clergy malpractice under the First Amendment. . . .” (internal citations and quotations omitted)).

18. See, e.g., *F.G. v. MacDonell*, 696 A.2d 697, 703 (N.J. 1997) (noting that “such a claim requires definition of the relevant standard of care,” which “could embroil courts in establishing the training, skill, and standards applicable for members of the clergy in a diversity of religions with widely varying beliefs”).

19. See, e.g., Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 BYU L. REV. 1789, 1823 (“Courts have good reason to reject claims of clergy malpractice when such claims invite the court to determine the standard of pastoral care for a ‘reasonable Catholic priest’ or a ‘reasonable Orthodox rabbi’ [because] [t]hese are judgments that only that particular religious tradition can render and are precisely the kinds of appraisals that the doctrine of ecclesiastical immunity bars.”); Scott C. Idleman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 IND. L.J. 219, 232–33 (2000) (noting that the tort would require “government assessment of the religious doctrine [that] is especially problematic where there is doctrinally-based intrachurch disagreement concerning the nature of the pastoral function,” because “the court might very well have to adjudge [which is] correct. . .”).

resolve these clergy-malpractice cases on their merits.

As an example, consider *Houston v. Mile High Adventist Academy*, where a Seventh-Day Adventist sued her Seventh-Day Adventist high school, claiming that she was "subjected to an inferior and substandard Biblical Christian education."²⁰ The court dismissed the case on First Amendment grounds.²¹ But the claim there posed no true theological question. The plaintiff did not argue that the theology taught by the school was wrong; the plaintiff argued that the school taught a theology rejected by most Seventh-Day Adventists. Of course, resolving this kind of dispute would require evidence about Seventh-Day Adventist theology. Both sides would probably seek to introduce documents from the church about its theology, reports from experts about the church's beliefs, and testimony from lay people about their expectations. A jury would need to resolve the conflict, but the jury's resolution would not be a pronouncement about who is correct *theologically*. It would be simply a pronouncement about whether the school has complied with the reasonable expectations of its religious community.

When one looks at the lower-court cases this way, it turns out that none of them involve first-order religious questions. Priests and rabbis have been universally unsuccessful at getting courts to adjudicate claims that they were fired without the good cause required by their written contracts.²² But such claims only require judgments about what the parties intended in their contractual language. Defamation suits get dismissed, although they only require decisions about whether a false statement of fact was knowingly made.²³ Excommunication and shunning cases get dismissed, even though they involve the same kinds of issues as ordinary intentional infliction of emotional distress cases.²⁴ None of these cases involve metaphysical or

20. 846 F. Supp. 1449, 1455 (D. Colo. 1994) (quoting the plaintiff's complaint).

21. *Id.* ("[M]y adjudication of whether Andrea was provided an adequate Biblical Christian education in accordance with the tenets of the Seventh Day Adventist church is barred by the first amendment.")

22. *See, e.g.*, *Friedlander v. Port Jewish Ctr.*, 347 F. App'x 654, 655 (2d Cir. 2009); *Leavy v. Congregation Beth Shalom*, 490 F. Supp. 2d 1011, 1013 (N.D. Iowa 2007); *Kraft v. Rector, Churchwardens & Vestry of Grace Church in N.Y.*, No. 01-7871, 2004 WL 540327, at *3 (S.D.N.Y. Mar. 17, 2004).

23. *See, e.g.*, *Purdum v. Purdum*, 301 P.3d 718 (Kan. Ct. App. 2013); *Ex parte Bole*, 103 So. 3d 40 (Ala. 2012).

24. *See, e.g.*, *Westbrook v. Penley*, 231 S.W.3d 389 (Tex. 2007); *Paul v. Watchtower Bible &*

theological questions. But courts dismiss them anyway.

Despite this, commentators still continue to describe the religious-question doctrine as being necessary to keep courts away from issues of religious truth. The “animating idea,” as one scholar described the religious-question doctrine, “is that the government may not declare religious truth.”²⁵ In his famous treatise, Laurence Tribe once described the religious-question doctrine as “reflect[ing] the conviction that government—including judicial as well as the legislative and executive branches—must never take sides on religious matters.”²⁶ But if these commentators are right, then the religious-question doctrine seems massively overbroad.

Some have sensed that there is a problem here—that the religious-question doctrine has grown far beyond what its rationales would justify. Usually they conclude that the religious-question doctrine should be narrowed, often dramatically narrowed. Sam Levine wrote such a piece fifteen years ago,²⁷ Jared Goldstein wrote one ten years ago,²⁸ and Michael Helfand wrote one quite recently.²⁹

II. THE HEART OF THE RELIGIOUS-QUESTION DOCTRINE

So what explains the overbreadth in the religious-question doctrine? Why do courts dismiss cases out of a desire to avoid deciding theological questions when the cases themselves do not involve theological questions? The answer seems simple enough. Courts are convinced that letting these cases go forward would create real religious liberty problems. In *Mary Elizabeth*, for example, one real problem the Supreme Court faced was that

Tract Soc’y of N.Y., Inc., 819 F.2d 875 (9th Cir. 1987).

25. Richard W. Garnett, *Assimilation, Toleration, and the State’s Interest in the Development of Religious Doctrine*, 51 UCLA L. REV. 1645, 1658 (2004) (internal citations and quotations omitted) *see also, e.g.*, Mary Jean Dolan, *Cautious Contextualism: A Response to Nelson Tebbe’s Nonbelievers*, 98 VA. L. REV. BRIEF 32, 36 (2012), <http://www.virginialawreview.org/sites/virginialawreview.org/files/Dolan%20Nonbelievers%20Response.pdf> (last visited Mar. 5, 2014) (“[T]he rationale for this ‘hands off’ doctrine [is] judicial incompetence to decide religious questions, which involve the supernatural and non-rational.”).

26. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-11, at 1231 (2d ed. 1988).

27. Samuel J. Levine, *Rethinking the Supreme Court’s Hands-Off Approach to Questions of Religious Practice and Belief*, 25 FORDHAM URB. L.J. 85 (1997).

28. Jared A. Goldstein, *Is There a “Religious Question” Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U. L. REV. 497 (2005).

29. Michael A. Helfand, *Litigating Religion*, 93 B.U. L. REV. 493 (2013).

the old English rule had grown into a system where churches could not change their religious doctrines without jeopardizing their property.³⁰ Even a single dissenter that wanted things the old way could claim a departure from doctrine and sue for control of the property.³¹ In the suit attacking the theology taught by the Seventh-Day Adventist high school, the real problem is not that the court would have trouble figuring out Seventh-Day Adventist theology, but that a plaintiff could have a legal right to control a school’s religious teaching.³² And the same seems true for the clergy malpractice cases, the defamation cases, and all the rest. They involve no true theological questions, but courts still see them as dangerous to their conceptions of religious liberty.

A good proof of this lies in how courts respond differently to the same religious question in different contexts. Take the Supreme Court’s recent decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,³³ which held that the First Amendment forbids ministers from bringing employment-based claims against their churches. Both sides there raised concerns about religious questions. Those in favor of the ministerial exception said that adjudicating these cases would envelop courts in religious questions about pretext and motivation.³⁴ Those opposed to the ministerial exception said that dismissing these cases would envelop courts in religious questions about who is and who is not a minister.³⁵ Both took the religious-question doctrine in plausible directions, although the Supreme

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

31. See Note, *Judicial Intervention in Disputes over the Use of Church Property*, 75 HARV. L. REV. 1142, 1148 (1962) (“Read literally, the Lord Chancellor’s opinion [in the English departure-from-doctrine case, *Pearson*] seems to brook no doctrinal evolution within a congregation except on pain of forfeiture of its property.”).

32. See *supra*, note 21 and accompanying text (discussing *Houston v. Mile High Adventist Acad.*, 846 F. Supp. 1449 (D. Colo. 1994)).

33. 132 S. Ct. 694 (2012).

34. See, e.g., MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION 332 (3d ed. 2011) (“Determining whether a church’s reasons for firing a minister were legitimate, as opposed to discriminatory, would require a court to evaluate religious questions.”).

35. See, e.g., *Elvig v. Calvin Presbyterian Church*, 397 F.3d 790, 797 (9th Cir. 2005) (Kozinski, J., concurring in the order denying rehearing en banc) (“The very invocation of the ministerial exception requires us to engage in entanglement with a vengeance.”). Professor Caroline Corbin calls this the irony of *Hosanna-Tabor*. See Caroline Mala Corbin, *The Irony of Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 106 NW. U. L. REV. 951 (2011).

Court sided with the former.

But now consider the Supreme Court’s *other* unanimous case about ministers. *McDaniel v. Paty*³⁶ invalidated a Tennessee statute barring ministers from serving as delegates to Tennessee’s 1977 constitutional convention. One problem with the statute, according to the Court, was that it required courts to answer religious questions—courts would have to draw some line between ministers and non-ministers, which would inevitably be imperfect and might end up discriminating against minority faiths.³⁷

Yet this, of course, was the very charge leveled against the ministerial exception that the Court completely rejected! *Hosanna-Tabor* establishes a special rule just for ministers, requiring an imperfect distinction between ministers and non-ministers. Yet the Court in *Hosanna-Tabor* felt confident that it was up to the task. While Justice Alito’s concurrence echoed *McDaniel*’s warning about possible discrimination against minority faiths, that became a reason not to abandon the ministerial exception but to strengthen it.³⁸

In a nice piece a few years ago, Rick Garnett looked at the idea of divisiveness in Establishment Clause cases.³⁹ The concept, it turned out, was totally malleable. The Supreme Court would say a program was divisive when it wanted to strike it down; the Court would say a program was not divisive when it wanted to uphold it; when the Court found an obviously divisive program that it wanted to uphold, the opinion would leave out any discussion of divisiveness as a consideration.⁴⁰ All the talk about political divisiveness, Garnett pointed out, was just a distraction—a red herring. The real work was being done elsewhere.⁴¹ This is my claim as regards the

36. 435 U.S. 618 (1978).

37. *See id.* at 632 n.4 (Brennan, J., concurring in the judgment) (“It is arguable that the provision not only discriminates between religion and nonreligion, but may, as well, discriminate among religions . . .”).

38. *Hosanna-Tabor*, 132 S. Ct at 711 (Alito, J., concurring) (worrying that a ministerial exception that applies only to those called “ministers” would be unfair to “Catholics, Jews, Muslims, Hindus, [and] Buddhists,” who “rarely if ever” use the term “minister” to “refer to members of their clergy”).

39. *See* Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667 (2006).

40. *See id.* at 1681–1708.

41. *See id.* at 1669–70 (concluding that the divisiveness argument has “rarely been outcome-determinative or done much real juridical work”).

religious-question doctrine. There is simply no there there. When courts think that religious liberty is best served by avoiding religious questions, they avoid religious questions. When courts think that religious liberty requires answering religious questions, they answer religious questions. The whole idea of religious questions drops out. What matters is religious liberty, not religious questions.

To give another example, consider what should be a simple question about religion: Are Roman Catholics Jewish? The answer, of course, is no. If a child were to put this question to his public school teacher—a state agent constitutionally bound to maintain strict religious neutrality—the public school teacher would respond quickly and correctly. Such a teacher cannot, of course, say that either Roman Catholicism or Judaism is true or false. But such a teacher could surely point out the obvious—that they are indeed different. Otherwise the teaching of history itself (let alone comparative religion) would be per se unconstitutional.⁴²

In all kinds of postures, judges feel the same way. They simply answer the religious question, without any remorse. Imagine a trust set up by a Jewish donor for the college expenses of Jewish children in a certain neighborhood. Say a child from the same neighborhood is excluded because he is Roman Catholic. If he sues, the court will enforce the trust. The court will have no compunction in declaring that the Roman Catholic child is not Jewish.⁴³

But change the context. Imagine now a trust set up by a Jewish father for his Jewish son, but a condition of the trust requires that the son not marry anyone who is not Jewish. Say the son marries a Roman Catholic woman. Now the law suddenly becomes uncertain, and judges suddenly become

42. The difference between teaching religion and teaching about religion is covered thoughtfully and in great detail in KENT GREENAWALT, *DOES GOD BELONG IN PUBLIC SCHOOLS?* (2007).

43. For precisely this kind of case, see *Lockwood v. Killian*, 375 A.2d 998, 1000-01 (Conn. 1977) (upholding the religious requirement in a scholarship program for “‘needy, deserving boys . . . who are members of the Caucasian race and who have . . . specifically professed themselves to be of the Protestant Congregational Faith,’” while simultaneously striking out the racial and gender requirements). See also RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. f (2003) (noting that “a criterion such as gender, religion, or national origin” can be used “when it is a reasonable element of a settlor’s charitable purpose and charitable motivation” and that, for example, nothing should stop “a Jewish man from leaving money to a university to establish a scholarship program, in the betterment of his religion as he sees it, to enable a rabbi or two each year to study in that university’s philosophy department”).

tentative. It turns out that courts are split on whether to enforce this kind of trust.⁴⁴ And those that refuse to enforce this trust will talk about the difficulties of deciding whether someone is really Jewish or not.

Change the context again. Imagine a couple enters into a prenuptial agreement where they agree to raise their children Jewish and take them only to Jewish services. When the couple divorces, the father becomes Catholic and claims that the prenuptial agreement is unenforceable. This hypothetical is an actual case, *Zummo v. Zummo*, and the court there refused to enforce the prenuptial agreement.⁴⁵ And in reaching this conclusion, the court relied heavily on the difficulties inherent in trying to figure out what is and is not Jewish.⁴⁶

In each of the three examples, the religious question facing the court is the same: Should Catholics be considered Jewish? But courts respond to it in different ways. In the first example, courts simply answer the question. In the second and third examples, courts are much more hesitant. If the religious-question doctrine is simply about courts being unable to answer religious questions, this does not make much sense.

But things make more sense if the religious-question doctrine is reconceived as being about religious liberty rather than about religious questions *simpliciter*. Religious liberty requires different things in different contexts. It therefore might require different approaches to the very same religious question, depending on the context. In the first example above—the college trust example—judges share a strong belief that private parties should be able to set up trusts to promote their personal religions. This is a part of religious liberty, and it could not exist unless courts were willing to enforce religious trusts.

In the second example—the trust prohibiting interfaith marriage—things get more complicated. Religious liberty cuts both ways. The instinct that

44. The authors of the relevant Restatement would apparently not enforce this trust. See RESTATEMENT (THIRD) OF TRUSTS § 29 illus. 3 (2003) (arguing that a “marriage condition [that] terminates all of N’s rights if, before termination of the trust, he ‘should marry a person who is not of R Religion,’ . . . is an invalid restraint on marriage,” and providing citations of relevant cases).

45. 574 A.2d 1130 (Pa. Super. Ct. 1990).

46. *Id.* at 1146 (“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.”).

people should be able to create religious trusts still has a great deal of force. But enforcing this kind of trust gives one person lasting influence over the religious choices of someone else. Balancing the competing interests is difficult, which explains why courts hesitate about the second trust. Similarly, the third example—the prenuptial agreement—also involves religious liberty cutting both ways. On one hand, one thinks of the mother. Before she had children, she had been given the promise that her kids would be raised in her faith. But there is also the father. Any conception of religious liberty includes the right to convert—the right to change one’s mind. To the extent that the father’s 1978 promise to raise his kids Jewish prevents him in 1991 from fulfilling his religious commitment to raise his kids Roman Catholic, that too is problematic.

None of these issues is easy. How any of them should be resolved is not clear. But what is clear is that they are *different* problems, posing *different* issues that involve *different* considerations. One would miss the boat entirely if one viewed these cases through the traditional religious-question doctrine, which would treat them as fundamentally the same because they involve the same religious question.

III. A WORD ABOUT THE FREE EXERCISE CLAUSE AND THE ESTABLISHMENT CLAUSE

The religious-question doctrine is a standalone doctrine, but concerns about religious questions also enter into subsidiary doctrines relating to the Free Exercise Clause and the Establishment Clause. Here too, it seems like the Court’s approach has been guided not by any abstract fear of religious questions, but by its practical judgment about what best suits its conception of religious liberty.

Take the Free Exercise Clause and the issue of regulatory exemptions. In the period before *Employment Division v. Smith*,⁴⁷ the government could not interfere with religious beliefs and practices without a compelling interest.⁴⁸ Thanks to the federal RFRA, state RFRAs, and state constitutional provisions, the compelling-interest test has been restored in

47. 494 U.S. 872 (1990).

48. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

many jurisdictions.⁴⁹ But there has always been a threshold showing that an individual plaintiff must make before the compelling-interest test is triggered. And that threshold has always been a function of three variables: sincerity, centrality, and burden.

This is where the concern about religious questions comes in. In a series of cases, the Supreme Court has taken firm control of judicial inquiries into these three variables. There is a strong presumption in favor of sincerity. Courts must presume that religious beliefs are sincerely held, unless there is extraordinary contrary evidence.⁵⁰ And legal doctrine often prevents courts from even taking into account that contrary evidence—courts are not supposed to ask whether a religious belief is internally consistent,⁵¹ or whether a larger religious group shares that belief.⁵² Some Justices experimented with centrality as a variable for a time,⁵³ but the Supreme Court ended up rejecting it as a consideration.⁵⁴ Yet the burden issue has become part of the fabric of the law. Cases now sometimes involve wide-ranging investigations as to whether a particular plaintiff has been “substantially burdened” by the law from which they seek exemption.⁵⁵ The Court thus treats sincerity, centrality, and burden quite differently. It refuses to consider centrality; it looks at sincerity quite deferentially; it examines burden without much deference.

There is nothing inconsistent about this. These divergent approaches

49. See Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAS*, 55 S.D. L. REV. 466, 469–73 (2010) (providing an overview of these developments).

50. See *Thomas v. Review Bd. of the Ind. Emp’t Sec. Div.*, 450 U.S. 707, 715 (1981) (“One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause; but that is not the case here . . .”).

51. See *id.* (“Courts should not undertake to dissect religious beliefs because the believer admits that he is ‘struggling’ with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.”).

52. See *Frazee v. Ill. Dep’t. of Emp’t Sec.*, 489 U.S. 829, 834 (1989) (“[W]e reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization.”).

53. See *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 354 (1987) (Brennan, J., dissenting).

54. See *Hernandez v. Comm’r of Internal Revenue*, 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 . . .”).

55. This is one of the most contested issues in the contraceptive-mandate cases now before the Supreme Court. See *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), *cert. granted*, 82 U.S.L.W. 3139 (U.S. Nov. 26, 2013) (No. 13-354); *Conestoga Wood Specialties Corp. v. Sec’y of U.S. Dep’t of Health & Human Servs.*, 724 F.3d 377 (3d Cir. 2013), *cert. granted*, 82 U.S.L.W. 3139 (U.S. Nov. 26, 2013) (No. 13-356).

reflect practical judgments that the Court has made over the course of decades about what serves religious liberty best. And many of them seem quite sound. The Court’s deferential approach to sincerity, for example, came out of a lived experience that people inevitably doubt the sincerity of religious beliefs they do not share.⁵⁶

And these judgments are neither sacrosanct nor impervious to reconsideration. The debate over the contraceptive mandate could well make us rethink the value of centrality as a consideration. Many have sympathy for the Catholic Church’s claim not to provide insurance covering contraception and abortion. But there is less sympathy for Tyndale House,⁵⁷ and even less for Hobby Lobby.⁵⁸ That is not a difference in sincerity or burden; it is a difference in centrality. And the fact that centrality is no longer a valid consideration could end up limiting free exercise—courts will be less likely to exempt the Catholic Church if it means having to exempt Hobby Lobby as well. All of this is to say that how courts should treat these kinds of religious questions depends on the exterior conceptions they have of religious liberty.

The history of the Establishment Clause illustrates the same point. Modern Establishment Clause cases revolve around whether the government has endorsed religion and inevitably when the government endorses religion, it takes a position on theological questions.⁵⁹ But Justices in these cases have taken the idea of religious questions in radically different ways. In *Lee v. Weisman*, the Court struck down government-sponsored prayer at a middle school graduation.⁶⁰ In a separate concurrence, Justice Souter dismissed the idea that prayers should still be permitted as long as they were nondenominational.⁶¹ Such an inquiry, he said, would require “the courts to engage in comparative theology [and] I can hardly imagine a subject less

56. See, e.g., *United States v. Ballard*, 322 U.S. 78, 92 (1944) (Jackson, J., dissenting) (“I do not see how we can separate an issue as to what is believed from considerations as to what is believable.”).

57. See *Tyndale House Publishers, Inc. v. Sebelius*, 904 F.Supp.2d 106 (D.D.C. 2012).

58. See *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013).

59. See *McCreary Cnty., Ky. v. ACLU of Ky.*, 545 U.S. 844, 875 (2005) (“The prohibition on establishment covers a variety of issues from prayer in widely varying government settings . . . to comment on religious questions.”).

60. 505 U.S. 577 (1992).

61. *Id.* at 616–17 (Souter, J., concurring).

amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible.”⁶²

But back in *County of Allegheny v. ACLU*, Justice Kennedy had taken the idea of religious questions almost the opposite way.⁶³ In that case, a city had put up holiday displays consisting of a crèche, a menorah, and a Christmas tree. Justice Kennedy argued that the judiciary should stay its hand and uphold the challenged displays, for striking them down would require the Court to say what religious symbols really mean. That, Justice Kennedy reasoned, would be improper: “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.”⁶⁴ This again reveals how manipulable concerns about religious questions can be. Justices can use them as a reason to invalidate government-sponsored religion; Justices can use them as a reason to uphold government-sponsored religion. As with *Hosanna-Tabor*, both sides can cite the religious-question doctrine for their own purposes. But something is wrong when a doctrine can be invoked by either side with equal effectiveness.

IV. CONCLUSION

This paper suggests that the Court’s religious-question doctrine is essentially parasitic on its conception of religious liberty. One can try to defend the results of the religious-question doctrine, of course.⁶⁵ But these results seem better defended by explicit recourse to concepts and principles of religious liberty, rather than vague and imprecise talk about religious questions.

And focusing on religious liberty directly might broaden the religious-question doctrine in some ways. But it might narrow it in others. Take, for example, the case of the Shari’a will—a testator who says that his estate should be partitioned among his heirs according to Shari’a law. If anything is solid about the religious-question doctrine, it is that such a will cannot be

62. *Id.*

63. *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 678 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

64. *Id.* at 578.

65. See, e.g., Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of Hosanna-Tabor*, 108 NW. U. L. REV. (forthcoming 2014) (defending some of these results).

legally enforced. But perhaps courts should enforce that will. For, after all, a court that enforces this will does not endorse Shari’a or even decide what Shari’a really is—such a court is only making a decision about what this particular testator probably intended when he referred to Shari’a law in his will. Of course the court might get those intentions wrong. But that is always a risk with wills. And whatever the risk, the court’s interpretation of Shari’a law is far more likely to accord with the testator’s intent than whatever default the intestacy laws provide. There are probably more examples, but this is enough to make the necessary point. We might be better off if we abandoned talk of religious questions.