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## LITIGATING RELIGION

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*This Article considers how parties should resolve disputes that turn on religious doctrine and practice – that is, how people should litigate religion. Under current constitutional doctrine, litigating religion is generally the task of two types of religious institutions: first, religious arbitration tribunals, whose decisions are protected by arbitration doctrine, and second, religious courts, whose decisions are protected by the religion clauses. Such institutions have been thrust into playing this role largely because the religion clauses are*

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*currently understood to prohibit courts from resolving religious questions. As it stands, the “religious question” doctrine is understood to prohibit courts from litigating religion.*

*Considering the options parties have when litigating religion highlights a gap in the current framework. In a growing number of cases, plaintiffs seek to resolve claims that turn on religious questions where no religious institution – neither religious arbitration tribunals, nor religious courts – is empowered to adjudicate the case. As a result, prohibiting courts from litigating religion creates an adjudicative vacuum where individuals are unable to secure justice. Indeed, the Article contends that this adjudicative vacuum is based upon a mistaken shift in the Supreme Court’s First Amendment jurisprudence, which erroneously interprets the religion clauses to prohibit courts from resolving religious questions. Instead, the religion clauses should be interpreted to require courts to defer to other religious institutions. Where no other religious institutions wait in the wings to resolve religious disputes, however, courts should, both as a matter of constitutional doctrine and sound policy, play a more active role in litigating religion.*

#### INTRODUCTION

It is a truism of First Amendment jurisprudence that “civil courts cannot adjudicate disputes turning on church policy and administration or on religious doctrine and practice.”<sup>1</sup> Where deciding a case requires resolving an “underlying controversy over religious doctrine and practice,” courts invoke the “religious question” doctrine, which requires that they resist adjudicating the dispute and dismiss the case on First Amendment grounds.<sup>2</sup>

While the religious question doctrine may be a constitutional truism, the Supreme Court has never quite made it clear why courts cannot adjudicate such claims – that is, why we cannot “litigate religion” in court. Courts generally have extracted the prohibition against litigating religion from the “church autonomy doctrine,” which requires judicial deference to religious institutions “whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by . . . church judicatories.”<sup>3</sup> But it is far from clear why a doctrine requiring deference to religious institutions should also entail judicial abstention from any and all claims implicating religious questions – even when there is no religious institution to defer to. Indeed, the move from judicial deference to religious institutions to judicial

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<sup>1</sup> *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575, 1576 (1st Cir. 1989).

<sup>2</sup> *See, e.g., Burgess v. Rock Creek Baptist Church*, 734 F. Supp. 30, 31 (D.D.C. 1990).

<sup>3</sup> *Ogle v. Hocker*, 279 F. App’x 391, 395 (6th Cir. 2008) (quoting *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727 (1871)); *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 655 (10th Cir. 2002) (“This church autonomy doctrine prohibits civil court review of internal church disputes involving matters of faith, doctrine, church governance, and polity.”); *see also Rweyemamu v. Cote*, 520 F.3d 198, 205 (2d Cir. 2008); *Minker v. Balt. Annual Conference of the United Methodist Church*, 894 F.2d 1354, 1357 (D.C. Cir. 1990).

abstention from religious adjudication is deeply fraught, leading scholars to justify the analytical jump.<sup>4</sup>

For some, the reason to prohibit courts from litigating religion is because courts lack the ability to address religious questions. Thus, for example, Ira Lupu and Robert Tuttle have argued that the Establishment Clause instructs courts not to interfere in cases implicating religious doctrine or practice because such “claims would require courts to answer questions that the state is not competent to address.”<sup>5</sup> Indeed, the reason why courts cannot decide such cases has nothing to do with grand notions of church autonomy or the Constitution’s desire to “systematically protect the interests of certain classes of parties, defined by religious mission.”<sup>6</sup> Instead, the Establishment Clause prohibits courts from interfering in such matters on a theory of “adjudicative disability” – the state simply has “limited jurisprudential competence” to decide such religious matters.<sup>7</sup>

For others, the reason to prohibit courts from this decisionmaking stems not from skepticism regarding judicial ability to resolve religious questions, but rather from concerns that judicial resolution of such questions will be interpreted as an endorsement of one religious view over another. Thus, for example, Laurence Tribe has argued that the prohibition against “[doctrinal entanglement in religious issues] reflects the conviction that government – including the judicial as well as the legislative and executive branches – must never take sides on religious matters.”<sup>8</sup> Along the same lines, Christopher Eisgruber and Lawrence Sager have argued that “[i]f government were to endorse some interpretations of religious doctrine at the expense of others, it would thereby favor some religious persons, sects, and groups over others.”<sup>9</sup> And Kent Greenawalt has raised a similar concern, worrying that judicial resolution of inter-denominational disputes may be perceived as “the possible endorsement of one minority group.”<sup>10</sup>

Determining the relationship between religious autonomy and judicial authority is now front and center in debates over conflicts between law and religion. In the recently decided *Hosanna-Tabor Evangelical Lutheran Church*

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<sup>4</sup> See *infra* Part III.

<sup>5</sup> Ira C. Lupu & Robert W. Tuttle, *Courts, Clergy, and Congregations: Disputes Between Religious Institutions and Their Leaders*, 7 GEO. J.L. & PUB POL’Y 119, 138 (2007).

<sup>6</sup> *Id.* at 122.

<sup>7</sup> *Id.* at 122-23.

<sup>8</sup> LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-11, at 1231 (2d ed. 1988). Tribe also observes that this endorsement concern represents the more fundamental rationale behind the religious question doctrine over and above the “desire to preserve the autonomy and self-government of religious organizations.” See *id.*

<sup>9</sup> Christopher L. Eisgruber & Lawrence G. Sager, *Does It Matter What Religion Is?*, 84 NOTRE DAME L. REV. 807, 812 (2009).

<sup>10</sup> Kent Greenawalt, *Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance*, 71 S. CAL. L. REV. 781, 804 (1998) (describing the endorsement concern implicated by various state kosher laws).

& *School v. EEOC*,<sup>11</sup> the Supreme Court took on its first church autonomy case in over thirty years, with some describing it as “the most important religious-freedom case in 20 years.”<sup>12</sup> But the issues raised in *Hosanna-Tabor* focused on what rights the Constitution provides religious institutions.<sup>13</sup> What *Hosanna-Tabor* failed to address was the extent to which courts can play a role in cases which turn on religious questions, but do not involve religious institutions. Put differently, while *Hosanna-Tabor* considered the need for courts to defer to religious institutions, it did not consider what role courts should play in litigating religion when there are no religious institutions to defer to.<sup>14</sup>

Indeed, the prohibition against litigating religion in judicial forums has come at a serious cost. As a number of courts have noted, dismissing a case as non-justiciable under the Establishment Clause “imposes a harsh consequence on a plaintiff”<sup>15</sup> and “is a drastic measure, because when a case is nonjusticiable it means the wrong committed, if there is one, cannot be remedied anywhere.”<sup>16</sup> Thus, unless some alternative religious forum exists for the resolution of claims implicating religious doctrine or practice, deploying the Establishment Clause as an ironclad structural restraint on judicial authority will frequently leave parties without any options to vindicate their rights.

In this way, both judicial and scholarly attempts to wrestle with the pragmatic need of parties to litigate religion all too often begin from the wrong starting point. Instead of asking why we cannot litigate religion in courts, this Article contends that our constitutional analysis must begin with the opposite question: where *should* parties litigate religion? Accordingly, this Article

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<sup>11</sup> 132 S. Ct. 694 (2012).

<sup>12</sup> Richard Garnett, *Here We Go! The Court Grants Cert. in the Ministerial-Exception Case*, MIRROR JUST. BLOG (Mar. 28, 2011), <http://mirrorofjustice.blogs.com/mirrorofjustice/2011/03/here-we-go-the-court-grants-cert-in-the-ministerial-exception-case.html>. *Hosanna-Tabor* naturally sparked significant and thoughtful debate on the contours of the church autonomy doctrine. See, e.g., Thomas C. Berg et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 NW. U. L. REV. COLLOQUY 175, 175-76 (2011), <http://www.law.northwestern.edu/lawreview/colloquy/2011/28/LRColl2011n28Garnett.pdf>; Caroline Mala Corbin, *The Irony of Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 106 NW. U. L. REV. COLLOQUY 96, 98 (2011), <http://www.law.northwestern.edu/lawreview/colloquy/2011/22/LRColl2011n22Corbin.pdf>; Paul Horwitz, *Act III of the Ministerial Exception*, 106 NW. U. L. REV. COLLOQUY 156, 158 (2011); see also Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 1 (2011).

<sup>13</sup> See *Hosanna-Tabor*, 132 S. Ct. at 706 (focusing on how the “Free Exercise Clause . . . protects a religious group’s right to shape its own faith and mission through its appointments”).

<sup>14</sup> For examples of such cases, see *infra* Part I.C.

<sup>15</sup> *Abdelhak v. Jewish Press Inc.*, 985 A.2d 197, 211 (N.J. Super. Ct. App. Div. 2009).

<sup>16</sup> *Congregation Yetev Lev D’Satmar, Inc. v. Kahana*, 879 N.E.2d 1282, 1286 (N.Y. 2007) (Smith, J., dissenting).

contends that where there is no alternative religious institution available to resolve a dispute turning on religious doctrine or practice, courts should resist dismissing the case.<sup>17</sup> In this way, courts should interpret the Establishment Clause as requiring only deference to religious institutions, but not requiring judicial abstention from litigating religion.<sup>18</sup> Both as a matter of constitutional law and sound policy, courts should wade into the waters of disputes turning on religious doctrine or practice so as to afford parties access to an adjudicative forum that can provide redress for legal wrongs.<sup>19</sup>

By focusing on the existence of adequate alternative forums for dispute resolution, this Article's interpretation of the Establishment Clause builds on the work of scholars such as Frederick Schauer, Richard Garnett, and Paul Horwitz, who have adopted institutional approaches to constitutional interpretation.<sup>20</sup> Such approaches "take[] First Amendment institutions seriously"<sup>21</sup> by recognizing that "in numerous areas of constitutional doctrine an institution-specific approach might be preferable to the categorical approach that now exists."<sup>22</sup>

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<sup>17</sup> See *infra* Part III.

<sup>18</sup> This Article uses the term "deference" to connote the relinquishing of state authority so as to "recognize[] the normative autonomy of" religious institutions "and protect[] them from state regulation and interference by granting them a private space." See Ralf Michaels, *The Re-State-Ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism*, 51 WAYNE L. REV. 1209, 1233-34 (2005) (discussing the concept of deference within a larger framework of legal pluralism). This Article does not render a view as to whether this concept of deference entails construing the church autonomy doctrine as waivable by the parties to a dispute, an issue I explore elsewhere in light of the Supreme Court's recent statements in *Hosanna-Tabor*, 132 S. Ct. at 709 n.4 (2012), that "the [ministerial] exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar." See Michael A. Helfand, *Religion's Footnote Four: Church Autonomy as Arbitration*, 97 MINN. L. REV. (forthcoming June 2013).

<sup>19</sup> See *infra* Part II.

<sup>20</sup> See Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 294-95 (2008) (arguing for the importance of religious institutions because they "contribute to . . . the reality of religious freedom under law" by serving as part of the infrastructure that makes religious freedom possible); Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79, 87 (2009) [hereinafter Horwitz, *Churches as First Amendment Institutions*]; Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1142-46 (2008) [hereinafter Horwitz, *Three Faces of Deference*]; Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1502 (2007); Frederick Schauer, *Institutions as Legal and Constitutional Categories*, 54 UCLA L. REV. 1747, 1749-50 (2007) [hereinafter Schauer, *Institutions as Legal and Constitutional Categories*]; Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 120 (1998).

<sup>21</sup> Horwitz, *Three Faces of Deference*, *supra* note 20, at 1142.

<sup>22</sup> Schauer, *Institutions as Legal and Constitutional Categories*, *supra* note 20, at 1758.

While such an approach represents a significant break from current application of the religion clauses, it covers fewer cases than one might initially anticipate. In practice, religious communities have largely filled the void left by the judicial refusal to decide cases implicating religion by developing institutions capable of doing so. First, some religious institutions maintain internal ecclesiastical bodies tasked with resolving religious litigation. For example, the Catholic, Episcopal, and Presbyterian churches all maintain ecclesiastical courts that resolve disputes arising within the church, including, most notably, employment disputes.<sup>23</sup> Second, other religious communities have created religious tribunals that function as arbitration panels, thereby allowing parties to submit disputes turning on religious doctrine or practice for binding resolution.<sup>24</sup> Using religious arbitration to address the need for litigating religion is most common in Jewish and Islamic communities.<sup>25</sup>

Indeed, the continued rise of such alternative forums for litigating religion highlights the dynamic relationship between religious courts and tribunals on the one hand and the Court's Establishment Clause jurisprudence on the other. It is precisely *because* there were other institutions able to resolve disputes implicating religious doctrine or practice that courts have been able to dismiss such cases without worry that these disputes would leave parties without recourse for significant, if not legally cognizable, harms. Given this dynamic relationship, it is far from surprising that U.S. law has promoted these alternative forums for dispute resolution – a judicial outsourcing of sorts – by insulating their decisions from judicial review on the merits.

Under public law, the church autonomy doctrine affords deference to internal religious adjudication by church courts, preventing U.S. courts from intervening in matters of religious “discipline, or of faith, or ecclesiastical rule, custom, or law.”<sup>26</sup> Similarly, when fashioned as arbitration awards, private law insulates the decisions rendered by religious arbitration panels from judicial review since “[a] court cannot examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one.”<sup>27</sup> In these two ways, both public law and private law provide alternative forums for parties to litigate religion, insulating religious adjudication from judicial review of the merits. Because courts cannot serve as the forum to decide such matters, religious institutions

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<sup>23</sup> See Brief of Religious Tribunal Experts Amici Curiae in Support of Petitioner at 7-18, *Hosanna-Tabor*, 132 S. Ct. 694 (No. 10-553) [hereinafter Amicus Brief of Religious Tribunal Experts].

<sup>24</sup> *Id.* at 18.

<sup>25</sup> *Id.* at 18-21; Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1249-52 (2011).

<sup>26</sup> *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727 (1871); see also *supra* note 3.

<sup>27</sup> *TC Contracting, Inc. v. 72-02 N. Blvd. Realty Corp.*, 833 N.Y.S.2d 622, 623 (App. Div. 2007).

fill the void, ensuring that parties have avenues to seek redress of legal wrongs wrapped in religion.<sup>28</sup>

To be sure, the relationship between religious tribunals and U.S. courts is more than an institutional curiosity; the existence of such alternative forums for litigating religion has long factored into Supreme Court decisions addressing the non-justiciability of religious questions under the Establishment Clause.<sup>29</sup> In fact, in its initial iterations of the church autonomy doctrine, the Supreme Court conditioned judicial abstention from cases turning on religious doctrine or practice on the existence of “church judicatories” already tasked with resolution of the dispute:

[W]henver the questions of discipline, or of faith, or ecclesiastical rule, custom, or law *have been decided by the highest of these church judicatories* to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.<sup>30</sup>

In this way, the Establishment Clause has served as a deference principle – and not simply as a principle of judicial abstention – where the Court’s willingness to dismiss such cases has been predicated on the importance of shuttling the litigation of religion to church courts created by the given religious community.<sup>31</sup>

Notwithstanding the origins of the doctrine, the Supreme Court has recast the Establishment Clause, and in turn the church autonomy doctrine, reinterpreting the doctrine not as one of institutional deference, but as a principle of judicial abstention. In so doing, the Supreme Court has instructed lower courts to get out of the business of litigating religion even when no other institution will fill the adjudicative void. The ramifications of this shift have been startling, leaving a wide range of cases unaddressed either by religious tribunals or by U.S. courts. For example, claims of defamation where the alleged defamatory statement speaks to the religious standing of the plaintiff are not currently resolved by courts for fear of passing on the truth or falsity of the religious statement.<sup>32</sup> Similarly, breach of contract claims in which the demanded performance requires executing religious conduct are typically dismissed by courts so as to avoid determining whether the performance complied with the requirements of the inherently religious conduct.<sup>33</sup>

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<sup>28</sup> See *infra* Part III. See generally Helfand, *supra* note 25.

<sup>29</sup> See *infra* Part I.

<sup>30</sup> *Watson*, 80 U.S. (13 Wall.) at 727 (emphasis added).

<sup>31</sup> See *infra* Part I.

<sup>32</sup> See, e.g., *Hutchison v. Thomas*, 789 F.2d 392, 393 (6th Cir. 1986); *Klagsbrun v. Va’ad Harabonim*, 53 F. Supp. 2d 732, 736 (D.N.J. 1999); *McManus v. Taylor*, 521 So. 2d 449, 451 (La. Ct. App. 1988); *Schoenhals v. Mains*, 504 N.W.2d 233, 235 (Minn. Ct. App. 1993); *Sieger v. Union of Orthodox Rabbis of the U.S. & Can., Inc.*, 767 N.Y.S.2d 78, 80 (App. Div. 2003).

<sup>33</sup> See, e.g., *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 466 (D.C. Cir. 1996)

Once a court dismisses such cases, plaintiffs are often left without a forum to resolve the dispute.<sup>34</sup> Such cases constitute neither religious institutional matters covered by church courts nor arbitral matters within the authority of religious arbitration tribunals. The problem arises because such cases fit squarely between public law and private law religious tribunals. Where both parties are individuals, no church court has authority to adjudicate the dispute, and without an arbitration agreement, no religious arbitration tribunal can address the claim. In cases that fit between public law and private law, plaintiffs' only avenue is judicial resolution – and it is precisely such resolution that is prohibited once the Establishment Clause is construed as preventing courts from litigating religion.

However, if we understand the Establishment Clause – and in turn the church autonomy doctrine – as a deference principle that asks courts to dismiss cases only where a more capable religious tribunal waits in the wings, then the existence of such unaddressed cases ought to change our application of constitutional doctrine. Indeed, to the extent a court is the forum of last resort, dismissing on the theory that courts lack the ability to address the complexities of litigating religion<sup>35</sup> fails to account for the broad fact-finding authority courts exercise in other deeply complex cases.<sup>36</sup> Furthermore, reformulating the Establishment Clause as a robust prohibition against courts adjudicating disputes turning on religious doctrine or practice has even led courts to apply the rule where there are no “competing theological propositions,” raising doubts as to whether endorsement principles can justify the rule.<sup>37</sup> In this way, the Supreme Court's shift from institutional deference to judicial abstention ignores the institutional underpinnings of the church autonomy doctrine and, as a result, the application of the religious question doctrine has become increasingly out of touch with constitutional principles. This disconnect, in

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(dismissing a case on Establishment Clause grounds because determining a professor's qualifications to teach canon law would require excessive entanglement); *Nevius v. Afr. Inland Mission Int'l*, 511 F. Supp. 2d 114, 120 (D.D.C. 2007) (dismissing a breach of contract claim on Establishment Clause grounds because interpreting the agreement would require the court to determine whether the defendant justifiably terminated the plaintiff “for lack of religious faith or misconduct undermining the ‘standing’ of the mission”); *El-Farra v. Sayyed*, 226 S.W.3d 792, 795 (Ark. 2006) (dismissing a case because the First Amendment prohibited the court from determining whether the defendant was terminated “on valid grounds according to Islamic Jurisdiction (Shair'a) [sic]”); *McEnroy v. St. Meinrad Sch. of Theology*, 713 N.E.2d 334, 337 (Ind. Ct. App. 1999) (dismissing a breach of contract claim because interpreting the contract would require excessive entanglement with religious doctrine and ecclesiastical law).

<sup>34</sup> See *supra* notes 15-16 and accompanying text.

<sup>35</sup> See *infra* notes 288-91 and accompanying text.

<sup>36</sup> See *infra* notes 310-20 and accompanying text.

<sup>37</sup> *Klagsbrun*, 53 F. Supp. 2d at 742; *Abdelhak v. Jewish Press Inc.*, 985 A.2d 197, 200 (N.J. Super. Ct. App. Div. 2009); see also *infra* notes 358-59 and accompanying text.



turn, has created a growing adjudicative vacuum, closing the courthouse doors to plaintiffs complaining of otherwise cognizable legal wrongs.

Returning to the institutional origins of the church autonomy doctrine requires that we begin our constitutional analysis by asking where parties *should* litigate religion. From such a vantage point, the adjudicative gap between religious courts and arbitration tribunals becomes deeply troublesome. And it is precisely this gap that the Court created in shifting the church autonomy doctrine from institutional deference to judicial abstention. By returning to the institutional deference framework, courts can abstain from litigating religion only where another institution is already tasked with resolving the dispute. Thus, instead of deploying the Establishment Clause because of “adjudicative disability,” courts should fill an important void by providing a forum for parties to litigate religion to secure redress of otherwise non-justiciable legal wrongs.

This Article proceeds in three parts. Part I explores how both arbitration doctrine and constitutional doctrine function to insulate the decisions of religious tribunals and courts from judicial review, thereby providing parties with both private law and public law alternatives for litigating religion. In turn, it examines cases that fall between these private law religious tribunals and public law religious courts; that is to say, cases in which no religious institution is in a position to resolve the case and civil courts are constitutionally required to dismiss the suit on First Amendment grounds. In such instances, plaintiffs are unable to pursue their claims in any forum and are thereby unable to litigate religion. Part II traces the constitutional origins of the religious question doctrine and criticizes the Supreme Court’s conceptual shift in its Establishment Clause jurisprudence from institutional deference to judicial abstention. Finally, Part III argues that courts should return to an approach of institutional deference and thereby rejects the notion that courts cannot, and should not, litigate religion.

## I. LITIGATING RELIGION

It is taken as constitutional gospel that courts should stay out of the business of “litigating religion” – that is, courts should not resolve cases that turn on questions of religious doctrine and practice.<sup>38</sup> This constitutional impulse is captured in the “religious question” doctrine, which instructs courts to “avoid . . . incursions into religious questions that would be impermissible under the first amendment.”<sup>39</sup> Thus, courts cannot “interpret[] ambiguous

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<sup>38</sup> Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 713 (1976) (“[T]he general rule [is] that religious controversies are not the proper subject of civil court inquiry . . .”); TRIBE, *supra* note 8, § 14-11, at 1231-34.

<sup>39</sup> Elmora Hebrew Ctr. v. Fishman, 593 A.2d 725, 730 (N.J. 1991); *see also, e.g., Milivojevich*, 426 U.S. at 709 (“[W]here 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

religious law and usage”<sup>40</sup> or resolve “controversies over religious doctrine and practice.”<sup>41</sup>

The constitutional prohibition against courts litigating religion has required courts to abstain from adjudicating a wide range of legal claims. For example, courts have generally avoided claims that require determining standards for clergy conduct, such as claims of breach of a minister’s contract<sup>42</sup> or claims of clergy malpractice.<sup>43</sup> Similarly, courts have refused to adjudicate contract claims that require interpretation of religious terminology.<sup>44</sup> Other claims that

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ecclesiastical tribunal within a church of hierarchical polity . . . .”); *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575, 1576 (1st Cir. 1989) (“[C]ivil courts cannot adjudicate disputes turning on church policy and administration or on religious doctrine and practice.”); *Burgess v. Rock Creek Baptist Church*, 734 F. Supp. 30, 31 (D.D.C. 1990) (holding that a court may not adjudicate a dispute that requires resolving an “underlying controversy over religious doctrine and practice”); *Lang v. Levi*, 16 A.3d 980, 989 (Md. Ct. Spec. App. 2011) (“The Supreme Court has held that both the Free Exercise and Establishment Clauses of the First Amendment prohibit judicial review of religious questions.”).

<sup>40</sup> *Milivojevic*, 426 U.S. at 708.

<sup>41</sup> *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449 (1969).

<sup>42</sup> See *supra* note 33.

<sup>43</sup> See, e.g., *Schmidt v. Bishop*, 779 F. Supp. 321, 327 (S.D.N.Y. 1991) (holding that a court cannot adjudicate clergy malpractice because it would be impossible to do so without entangling itself in determinations regarding the religious philosophy of a particular religion); *Nally v. Grace Cmty. Church of the Valley*, 763 P.2d 948, 960 (Cal. 1988) (refusing to impose a duty of care on pastoral counselors because “such a duty would necessarily be intertwined with the religious philosophy of the particular denomination or ecclesiastical teachings of the religious entity”); *Wisniewski v. Diocese of Belleville*, 943 N.E.2d 43, 76 (Ill. App. Ct. 2011) (“[I]n Illinois the courts have refused to entertain similar claims of ‘clergy malpractice’ because ‘the first amendment’s free exercise clause prohibits courts from considering claims requiring the interpretation of religious doctrine.’” (quoting *Amato v. Greenquist*, 679 N.E.2d 446, 450 (Ill. App. Ct. 1997))); *H.R.B. v. J.L.G.*, 913 S.W.2d 92, 98-99 (Mo. Ct. App. 1995) (holding that, as a matter of first impression, a student could not bring a claim against a church or a church official for breach of fiduciary duty because resolution of the claim would “inevitably require inquiry into the religious aspects of [the] relationship”); *F.G. v. MacDonell*, 696 A.2d 697, 703 (N.J. 1997) (finding that “some courts [] deny claims for [clergy malpractice]” because such claims “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”); *Jones v. Trane*, 591 N.Y.S.2d 927, 930 (Sup. Ct. 1992) (stating that it is unconstitutional for a court to consider clergy malpractice “when what is sought is an evaluation of a member of the clergy while acting as a spiritual counselor”); *White v. Blackburn*, 787 P.2d 1315, 1319 (Utah Ct. App. 1990) (refusing to establish a clerical malpractice cause of action because such an action would be “intertwined with religious philosophy” and thus potentially unconstitutional (quoting *Nally*, 763 P.2d at 960)).

<sup>44</sup> See, e.g., *Sieger v. Sieger*, 747 N.Y.S.2d 102 (App. Div. 2002) (denying a motion to intervene because to allow it would violate the Establishment Clause by requiring the court

courts refuse to adjudicate for fear that they would require litigating religion include claims of religious defamation, because those claims might entail evaluating the truth or falsity of the allegedly defamatory statement.<sup>45</sup> And, most famously, the prohibition against judicial resolution of claims turning on religious doctrine or practice has given rise to the “ministerial exception,” which exempts the employment relationship between religious institutions and their “ministers” from compliance with various employment statutes.<sup>46</sup>

In all such cases, courts dismiss the plaintiff’s claims because adjudicating the case would entail constitutionally impermissible judicial involvement in the resolution of religious questions.<sup>47</sup> And while the bases for such concerns remain of ambiguous constitutional origin – courts and scholars continue to dispute whether the bases for such concerns are grounded in the Free Exercise Clause,<sup>48</sup> the Establishment Clause,<sup>49</sup> or both<sup>50</sup> – there is near-unanimous agreement that courts are not a proper forum for litigating religion.

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to decide whether religious law had been violated); *Zummo v. Zummo*, 574 A.2d 1130, 1146 (Pa. Super. Ct. 1990) (vacating an order prohibiting a father from taking his children to certain religious services because of “excessive entanglement” problems implicating the Free Exercise Clause); *see generally* Tamar Snyder, *When Religion Restricts Lending*, WALL ST. J. (Feb. 17, 2012), <http://online.wsj.com/article/SB10001424052970204792404577227063335643188.html> (describing an increased use of religious contract forms in microfinance agreements).

<sup>45</sup> *See, e.g.*, *Abdelhak v. Jewish Press*, 985 A.2d 197, 207 (N.J. Super. Ct. App. Div. 2009); *see also* *Klagsbrun v. Va’ad Harabonim*, 53 F. Supp. 2d 732, 736 (D.N.J. 1999); *Farley v. Wis. Evangelical Lutheran Synod*, 821 F. Supp. 1286, 1289 (D. Minn. 1993); *Goodman v. Temple Shir Ami, Inc.*, 712 So. 2d 775, 777 (Fla. Dist. Ct. App. 1998); *Downs v. Roman Catholic Archbishop*, 683 A.2d 808, 813 (Md. Ct. Spec. App. 1996).

<sup>46</sup> *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 705 (2012) (observing uniform acceptance of the ministerial exception by federal courts of appeals); *Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 627 F.3d 1288, 1290 (9th Cir. 2010) (en banc); *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 655 (10th Cir. 2002).

<sup>47</sup> *See, e.g.*, *Redhead v. Conference of Seventh-Day Adventists*, 440 F. Supp. 2d 211, 220 (E.D.N.Y. 2006) (“[T]he ministerial exception guards against excessive entanglement and is a tool for analyzing the nature of the alleged burden on religious exercise.”); *Klagsbrun*, 53 F. Supp. 2d at 737 (“[T]he Establishment Clause requires, among other things, that a law or regulation not foster excessive governmental entanglement with religion. Excessive entanglement may occur when judicial review of a claim requires ‘a searching . . . inquiry into church doctrine.’” (quoting *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 723 (1976))); *Schmidt*, 779 F. Supp. at 328 (dismissing claim of clergy malpractice because it “would require the Court and the jury to consider the fundamental perspective and approach to counseling inherent in the beliefs and practices of [the Presbyterian] denomination. This is as unconstitutional as it is impossible. It fosters excessive entanglement with religion.”).

<sup>48</sup> *See, e.g.*, *Petruska v. Gannon Univ.*, 462 F.3d 294, 306 (3d Cir. 2006) (“The Free Exercise Clause protects . . . a religious institution’s right to decide matters of faith, doctrine, and church governance.”); *Combs v. Cent. Tex. Annual Conference of the United*

Methodist Church, 173 F.3d 343, 349 (5th Cir. 1999) (relying on the Free Exercise Clause to reject a claim of employment discrimination against a church); EEOC v. Catholic Univ. of Am., 83 F.3d 455, 461-62 (D.C. Cir. 1996) (“[T]he Free Exercise Clause exempts the selection of clergy from Title VII and similar statutes and, as a consequence, precludes civil courts from adjudicating employment discrimination suits by ministers against the church . . . .”); Natal v. Christian & Missionary Alliance, 878 F.2d 1575, 1578 (1st Cir. 1989) (“By its very nature, the inquiry which Natal would have us undertake into the circumstances of his discharge plunges an inquisitor into a maelstrom of Church policy, administration, and governance. It is an inquiry barred by the Free Exercise Clause.”); *Wisniewski*, 943 N.E.2d at 76; Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of Smith*, 2004 B.Y.U. L. REV. 1633, 1636; Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1378 (1981).

<sup>49</sup> See, e.g., *Schleicher v. Salvation Army*, 518 F.3d 472, 475 (7th Cir. 2008) (“[T]he ministers exception is a rule of interpretation, not a constitutional rule; and though it is derived from policies that animate the First Amendment, the relevant policies come from the establishment clause rather than from the free-exercise clause.”); *Klagsbrun*, 53 F. Supp. 2d at 737 (“The Establishment Clause merely prohibits courts from determining underlying questions of religious doctrine and practice.”); *Jeambey v. Synod of Lakes & Prairies, Presbyterian Church (U.S.A.)*, No. CX-95-902, 1995 WL 619814, at \*4-5 (Minn. Ct. App. Oct. 24, 1995) (“Excessive entanglement takes place when enforcement of claims requires judicial interpretation of the meaning of core questions of church discipline and internal governance. Excessive entanglement may also occur when judicial review of a claim requires an inquiry into church doctrine.” (citations omitted)); Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 4 (1998); Lupu & Tuttle, *supra* note 5, at 120-21.

<sup>50</sup> *Rweyemamu v. Cote*, 520 F.3d 198, 207 (2d Cir. 2008) (“In our view, the ministerial exception is constitutionally required by various doctrinal underpinnings of the First Amendment.”); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006) (“The exception is based on the establishment and free-exercise clauses of the First Amendment . . . .”); *Bryce*, 289 F.3d at 655 (“The [church autonomy] doctrine is rooted in the First Amendment’s Free Exercise and Establishment Clauses.”); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1304 (11th Cir. 2000) (“[T]he Free Exercise and Establishment Clauses of the First Amendment prohibit a church from being sued under Title VII by its clergy.”); *Bollard v. Cal. Province of the Soc’y of Jesus*, 196 F.3d 940, 945, 948 (9th Cir. 1999) (“[T]he Free Exercise and Establishment Clauses . . . require a narrowing construction of Title VII in order to insulate the relationship between a religious organization and its ministers from constitutionally impermissible interference by the government.”); *Scharon v. St. Luke’s Episcopal Presbyterian Hosps.*, 929 F.2d 360, 363 (8th Cir. 1991) (confirming dismissal of an employment discrimination case brought by a priest against a church-affiliated hospital based on the lower court’s “Establishment Clause-type analysis” and because “the Free Exercise Clause . . . also prohibits the courts from deciding [such] cases”); *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1165 (4th Cir. 1985) (affirming summary judgment “[b]ecause state scrutiny of the church’s choice would infringe substantially on the church’s free exercise of religion and would constitute impermissible government entanglement with church authority”). The Supreme Court recently has continued this practice in *Hosanna-Tabor*, 132 S. Ct. at 706 (holding that “[r]equiring a church to accept or retain an unwanted minister” “infringes the

But just because courts refuse to adjudicate such claims does not mean that these disputes disappear. Instead, dismissing such claims from civil courts propels them into alternative dispute resolution forums capable of addressing religious claims. Indeed, judicial abstention from litigating religion has long been tied to overarching principles of deference to religious institutions and their authority to resolve claims turning on religious doctrine and practice.<sup>51</sup> For example, in its 1871 decision in *Watson v. Jones*, the Supreme Court abstained from resolving a church property dispute on the grounds that civil courts must instead defer to the resolution adopted by the religious institution “whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories.”<sup>52</sup>

In this way, the religious question doctrine has long been premised on a background institutional framework of alternative forums for religious dispute resolution.<sup>53</sup> And it is because these institutions have emerged to litigate religion that courts have been able to abstain. Accordingly, understanding our expectations of how parties ought to litigate religion requires appreciating what institutions have taken up the task where courts have left off.<sup>54</sup> Indeed, considering how it is that religious institutions play this dispute resolution function also highlights some of the problems in the current system: instances where neither courts nor religious institutions are capable of adjudicating religious claims.<sup>55</sup>

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Free Exercise Clause,” in addition to “violat[ing] the Establishment Clause”).

Courts have frequently avoided the issue by simply, and ambiguously, grounding the church autonomy doctrine in the “First Amendment.” See, e.g., *Alcazar*, 627 F.3d at 1292 (citing “First Amendment considerations” as the basis for applying the ministerial exception to seminarians as well as ordained church officials); *Bryce*, 289 F.3d at 655 (affirming the lower court’s holding that petitioners’ claims were barred “by the church autonomy doctrine of the First Amendment”); *Laycock*, *supra* note 48, at 1395 n.176 (collecting Supreme Court cases).

<sup>51</sup> Kent Greenawalt characterized this deferential approach as the “hands off” doctrine. See Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843, 1844 (1998). The contours and application of the doctrine have sparked significant commentary and debate. See, e.g., Andrew Koppelman, *The Troublesome Religious Roots of Religious Neutrality*, 84 NOTRE DAME L. REV. 865, 868-69 (2009); Samuel J. Levine, *Rethinking the Supreme Court’s Hands-Off Approach to Questions of Religious Practice and Belief*, 25 FORDHAM URB. L.J. 85, 88 (1997). See generally Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What Are We Talking About?*, 84 NOTRE DAME L. REV. 837 (2009); Samuel J. Levine, *The Supreme Court’s Hands-Off Approach to Religious Doctrine: An Introduction*, 84 NOTRE DAME L. REV. 793 (2009) [hereinafter Levine, *Hands-Off Approach Introduction*].

<sup>52</sup> *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727 (1871).

<sup>53</sup> See *infra* Part I.A-B.

<sup>54</sup> See *infra* Part I.A-B.

<sup>55</sup> See *infra* Part I.C.

A. *Litigating Religion in Private Law*

Few trends better encapsulate the concept of litigating religion than the growing number of religious arbitration tribunals in the United States.<sup>56</sup> Indeed, the use of religious arbitration tribunals is ever-increasing in the United States and the network of such religious tribunals continues to grow.<sup>57</sup> For example, religious arbitration tribunals now service America's Christian, Islamic, and Jewish communities.<sup>58</sup> Such religious arbitration entails the adjudication of a dispute submitted by parties to religious authorities for adjudication in accordance with religious law.<sup>59</sup> Thus, for example, when two members of a Jewish community submit a dispute to a Beth Din – a rabbinical court – the Beth Din will convene a panel of authorized jurists to adjudicate the submitted dispute in accordance with Jewish law.<sup>60</sup> That religious arbitration is becoming a prominent feature of dispute resolution in the United States is far from surprising given the expanding deference and autonomy granted to arbitration tribunals generally.<sup>61</sup> Recent Supreme Court decisions continue to expand the scope of enforceable arbitration agreements.<sup>62</sup> Thus, by having the parties to a dispute consent to the authority of the religious tribunal by way of a

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<sup>56</sup> See generally Helfand, *supra* note 25, at 1231.

<sup>57</sup> *Id.* at 1243-44; R. Seth Shippee, "Blessed Are the Peacemakers": Faith-Based Approaches to Dispute Resolution, 9 ILSA J. INT'L & COMP. L. 237, 238 (2002) ("[T]raditional, faith-based alternatives to the mainstream legal system are alive and well, and, in many ways, busier and more influential than ever.").

<sup>58</sup> See, e.g., Glenn G. Waddell & Judith M. Keegan, *Christian Conciliation: An Alternative to "Ordinary" ADR*, 29 CUMB. L. REV. 583, 584 (1998) (discussing Christian arbitration); Michael C. Grossman, Note, *Is This Arbitration? Religious Tribunals, Judicial Review, and Due Process*, 107 COLUM. L. REV. 169, 177-82 (2007) (describing the current state of Christian, Muslim, and Jewish arbitration tribunals in the United States).

<sup>59</sup> See generally Helfand, *supra* note 25; Ginnine Fried, Comment, *The Collision of Church and State: A Primer to Beth Din Arbitration and the New York Secular Courts*, 31 FORDHAM URB. L.J. 633 (2004).

<sup>60</sup> For an example, see the Beth Din of America's form arbitration agreement, available online at [http://www.bethdin.org/docs/PDF3-Binding\\_Arbitration\\_Agreement.pdf](http://www.bethdin.org/docs/PDF3-Binding_Arbitration_Agreement.pdf).

<sup>61</sup> See, e.g., Lawrence A. Cunningham, *Rhetoric Versus Reality in Arbitration Jurisprudence: How the Supreme Court Flaunts and Flunks Contracts*, 75 L. & CONTEMP. PROBS. 129 (2012); Stephen L. Hayford, *Commercial Arbitration in the Supreme Court 1983-1995: A Sea Change*, 31 WAKE FOREST L. REV. 1 (1996); Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99 (2006); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996).

<sup>62</sup> For recent examples of Supreme Court cases enlarging the scope of the Federal Arbitration Act, see *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772 (2010); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010).

binding arbitration agreement,<sup>63</sup> religious communities have fashioned religious tribunals as arbitration panels. In doing so they have piggy-backed on the ascendancy of arbitration, thereby ensuring the decisions of religious tribunals are granted the force of law.<sup>64</sup>

Importantly, the decisions of religious arbitrators – like those of any other arbitrator – are granted wide deference. Courts are not empowered to second-guess an arbitrator’s decision on the merits, “even in circumstances where an arbitrator makes errors of law or fact.”<sup>65</sup> Thus, courts will disturb religious arbitration awards in only a limited set of statutorily mandated circumstances.<sup>66</sup> For the most part, these exceptions capture instances where there is a strong reason to believe that some sort of misconduct occurred in the issuance of the arbitration award. For example, an award is invalid where it “was procured by corruption, fraud, or undue means” or where “there was evident partiality or corruption in the arbitrators.”<sup>67</sup> So long as no such grounds exist, U.S. courts will enforce awards issued by religious arbitration tribunals.<sup>68</sup>

The growing popularity of religious arbitration in large part flows from the ability of such institutions to provide their respective religious communities with an opportunity to resolve disputes in accordance with shared religious values and obligations.<sup>69</sup> But communal autonomy is just one reason driving the increased popularity of religious arbitration; expertise also plays a role.

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<sup>63</sup> *Encore Prods., Inc. v. Promise Keepers*, 53 F. Supp. 2d 1101, 1112-13 (D. Colo. 1999) (“[T]hrough it may not be proper for a district court to refer civil issues to a religious tribunal in the first instance, if the parties agree to do so, it is proper for the district court to enforce their contract.”).

<sup>64</sup> *Id.* at 1109 (applying the strong federal policy favoring arbitration to the decision of a Christian Conciliation panel); *Meshel v. Ohev Sholom Talmud Torah*, 869 A.2d 343, 364 (D.C. 2005) (upholding a civil court’s order to compel arbitration before a Beth Din); *Abd Alla v. Mourssi*, 680 N.W.2d 569, 574 (Minn. Ct. App. 2004) (upholding the decision of an Islamic arbitration panel applying Islamic law).

<sup>65</sup> *N.Y. State Corr. Officers & Police Benevolent Ass’n v. State*, 726 N.E.2d 462, 465 (N.Y. 1999); *see also Gas Aggregation Servs., Inc. v. Howard Avista Energy, LLC*, 319 F.3d 1060, 1064 (8th Cir. 2003).

<sup>66</sup> *See* 9 U.S.C. § 10 (2006); Amina Dammann, Note, *Vacating Arbitration Awards for Mistakes of Fact*, 27 REV. LITIG. 441, 470-75 (2008) (collecting state grounds for vacatur).

<sup>67</sup> Dammann, *supra* note 66, at 456 n.43.

<sup>68</sup> *Dial 800 v. Fesbinder*, 12 Cal. Rptr. 3d 711, 724 (Ct. App. 2004) (“American courts routinely enforce money judgments and other orders by beth din panels.”); *Ghertner v. Solaimani*, 563 S.E.2d 878, 880 (Ga. Ct. App. 2002) (“[T]he results of a Bet Din, conducted pursuant to the Georgia Arbitration Act, are enforceable pursuant to that Act.”); *Abd Alla*, 680 N.W.2d at 574 (upholding the decision of an Islamic arbitration panel applying Islamic law).

<sup>69</sup> *See Helfand*, *supra* note 25, at 1268; E. Gary Spitko, *Gone but Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275, 296 (1999) (“Arbitration can empower cultural minorities by providing a forum for adjudication in which the decision-maker is selected because she understands and appreciates the minority culture at issue.”).

Religious arbitration tribunals typically resolve disputes between members of the same religious community, and such disputes frequently turn on the interpretation of religious doctrine, rules, or practices. For example, consider a case where a synagogue terminates its rabbi or a mosque terminates its imam for cause. Cause may entail failure to deliver adequate sermons or failure to maintain fidelity to the professed religious principles of the institution.<sup>70</sup> Such cases are frequently submitted for religious arbitration before a panel of experts in the relevant brand of religious law because those experts are well equipped to adjudicate claims that turn on these types of religious questions.<sup>71</sup>

Importantly, courts will routinely enforce awards issued in cases turning on religious doctrine or practice, just as they would any other arbitration award, and have consistently done so over and above Establishment Clause objections.<sup>72</sup> Enforcing such awards avoids any excessive entanglement with religious doctrine because the courts, when enforcing arbitration awards, are instructed not to investigate the merits of the dispute between the parties.<sup>73</sup> Instead, when reviewing arbitration awards, courts are tasked simply with ensuring that the arbitrators' decision was issued pursuant to an arbitration agreement between the parties and that the arbitrators complied with the statutorily mandated procedural requirements.<sup>74</sup>

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<sup>70</sup> *E.g.*, *El-Farra v. Sayyed*, 226 S.W.3d 792, 793 (Ark. 2006) (dismissing an imam's breach of employment contract claim for lack of subject matter jurisdiction where the cause for termination included claims that the imam's "misconduct 'contradicts the Islamic law'"); *Brisman v. Hebrew Acad. of Five Towns & Rockaway*, 895 N.Y.S.2d 482, 483 (App. Div. 2010) (upholding an arbitration award granted by a Jewish Beth Din in a wrongful termination claim where the parties "agreed to arbitrate the matter of [] termination in accordance with Jewish law and the rules of the Beth Din of America" and the Beth Din determined that the termination was without cause).

<sup>71</sup> *See Elmora Hebrew Ctr. v. Fishman*, 593 A.2d 725, 725, 732 (N.J. 1991); *Brisman*, 895 N.Y.S.2d at 483.

<sup>72</sup> *See, e.g.*, *Encore Prods., Inc. v. Promise Keepers*, 53 F. Supp. 2d 1101, 1113 (D. Colo. 1999); *Elmora*, 593 A.2d at 731. *See generally* Nicholas Walter, *The Status of Religious Arbitration in the United States and Canada*, 52 SANTA CLARA L. REV. 501, 521-27 (2012) (discussing general enforcement of religious arbitration awards over First Amendment objections).

<sup>73</sup> *See, e.g.*, *Meshel v. Ohev Sholom Talmud Torah*, 869 A.2d 343, 354 (D.C. Cir. 2005) (holding that granting an action to compel arbitration before a rabbinical court did not violate the First Amendment because "the resolution of appellants' action to compel arbitration will not require the civil court to determine, or even address, any aspect of the parties' underlying dispute").

<sup>74</sup> While the Supreme Court has recently stated that the statutory grounds for vacatur are exclusive, *see Hall Street Assocs. v. Mattel, Inc.*, 552 U.S. 576, 584 (2008), there is continued debate as to whether or not the manifest disregard standard and the public policy exception – often thought of as extra-statutory grounds for vacatur – can still be deployed as applications of 9 U.S.C. § 10(a)(4). *Compare, e.g.*, *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1283, 1290 (9th Cir. 2009) (holding that *Hall Street Associates* did not foreclose either the manifest disregard of the law or public policy grounds for vacating



By contrast, where the parties choose to pursue such claims in court rather than submitting them for religious arbitration, Establishment Clause concerns – at least under the current interpretation of the constitutional doctrine – loom large. This is because courts have interpreted the Establishment Clause to prohibit adjudication of claims turning on matters of religious doctrine or practice.<sup>75</sup> Thus, for example, a court would be constitutionally barred from deciding a case that required judicial inquiry into whether an imam’s sermons were so inadequate under Shari’a law so as to constitute cause justifying termination.<sup>76</sup> A court would be free, however, to enforce a religious arbitration award resolving those very same claims.

In this way, religious arbitration tribunals provide a forum to litigate religion that, if attempted in court, would be dismissed on Establishment Clause grounds. By treating the decisions of religious tribunals as arbitration awards, the law insulates the decisions from judicial review. As a result, courts can enforce the awards without becoming impermissibly entangled with religious doctrine. In turn, courts can then lean on arbitration doctrine to channel cases to religious tribunals that could not be adjudicated in civil courts, providing an alternative forum for resolving cases that implicate religious doctrine. Put differently, religious arbitration fills an adjudicative gap created by our current interpretation of the Establishment Clause, thereby ensuring that parties have a forum in which to litigate religion.

#### B. *Litigating Religion in Public Law*

Deploying arbitration doctrine to insulate the litigation of religion is only half of the story. While much litigation of religion takes place within the arbitration framework, another set of institutions – church courts<sup>77</sup> – has continued to provide religious communities with another forum for litigating religion.<sup>78</sup> These church courts service any number of Christian denominations by adjudicating disputes between individual co-religionists or competing factions in accordance with shared religious norms and values.<sup>79</sup>

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an arbitration award), *with* *Rogers v. KBR Tech. Servs.*, No. 08-20036, 2008 WL 2337184, at \*2 (5th Cir. June 9, 2008) (stating that *Hall Street Associates* “calls into doubt the non-statutory grounds [for vacatur]”). The Supreme Court itself has explicitly declined to clarify its position. *See Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1768 n.3 (2010).

<sup>75</sup> *See supra* notes 38-55 and accompanying text.

<sup>76</sup> *See El-Farra v. Sayyed*, 226 S.W.3d 792, 796 (Ark. 2006).

<sup>77</sup> This Article uses the terms “church courts” or “religious courts” to describe the adjudicative arms of religious institutions afforded autonomy and deference under the First Amendment. These “courts” are distinct from “religious tribunals,” a term which this Article uses to describe religious arbitration panels. While far from consistent, this distinction tracks the terminology frequently employed by constitutional and arbitration scholars respectively.

<sup>78</sup> *See* 2 WILLIAM W. BASSETT ET AL., *RELIGIOUS ORGANIZATIONS AND THE LAW* § 10:2 (1999).

<sup>79</sup> *See generally* Amicus Brief of Religious Tribunal Experts, *supra* note 23; Steven R.

For example, the United Methodist Church maintains a formal judicial system which, *inter alia*, adjudicates claims filed against pastors and members.<sup>80</sup> Similarly, the Presbyterian Church, U.S.A. provides its members with a “judicial process,” serving as “the means by which church discipline is implemented within the context of pastoral care and oversight.”<sup>81</sup> Along the same lines, the Roman Catholic Church’s canon law system covers a wide variety of substantive matters, including “virtually every aspect of ecclesiastical life for the Catholic Church’s congregations in almost every corner of the world.”<sup>82</sup> Other prominent examples of Christian denominations employing church courts in the United States abound.<sup>83</sup>

While religious arbitration tribunals and church courts share many characteristics, the mechanisms for insulating their respective decisions from

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Hadley, *Handbook of American Church Courts*, 22 WHITTIER L. REV. 251 (2000).

<sup>80</sup> THE UNITED METHODIST CHURCH, THE BOOK OF DISCIPLINE OF THE UNITED METHODIST CHURCH ¶ 361 (2008) (“Whenever [a local pastor, an associate member, a probationary member, or a full member], including those on leaves of all types, honorable or administrative location, or retirement, is accused of violating this trust, the membership of his or her ministerial office is subject to review.”); GEN. COUNCIL ON FIN. AND ADMIN. OF THE UNITED METHODIST CHURCH, ADMINISTRATIVE AND JUDICIAL PROCEDURES HANDBOOK 2 (2011) (explaining that the Methodist judicial system provides for a “Biblical understanding of justice and process”); *see also* Amicus Brief of Religious Tribunal Experts, *supra* note 23, at 7-10 (“The UMC views ordination as a ‘sacred trust,’ and therefore a minister accused of violating this trust is subject to review and, potentially, administrative or judicial action.”).

<sup>81</sup> THE CONSTITUTION OF THE PRESBYTERIAN CHURCH (U.S.A.), PART II, BOOK OF ORDER 2011-2013 § D-2.0100 (2011) [hereinafter BOOK OF ORDER]. For further background on the Presbyterian Church’s judicial process, *see* Amicus Brief of Religious Tribunal Experts, *supra* note 23, at 11-15 (stating that the Presbyterian Church’s “judicial process . . . represents ‘the exercise of authority by the governing bodies of the church for,’ among other things, ‘the prevention and corruption of offenses by persons.’” (quoting BOOK OF ORDER, *supra*, § D-2.0101)), and Hadley, *supra* note 79, at 309-14 (observing that “the ‘Rules of Discipline’ section of the *Book of Order* literally read[s] like the Federal Rules of Civil Procedure”). *See also* BOOK OF ORDER, *supra*, §§ D-3.0101 to 3.0106 (describing jurisdiction in the judicial process); *id.* §§ D-5.0100 to D5.0206 (describing obligations and authority of permanent judicial commissions). The decisions rendered by the permanent judicial commission of the General Assembly are available online at <http://oga.pcusa.org/section/committees/gapjc/permanent-judicial-commission-decisions/>.

<sup>82</sup> Amicus Brief of Religious Tribunal Experts, *supra* note 23, at 15-16; *see also* Hadley, *supra* note 79, at 318-23. For additional background on the sources of canon law, *see* LIBERA GEROSA, CANON LAW 49-60 (1996) (discussing the sources and formation of canon law). *See generally* R.H. HELMHOLZ, THE SPIRIT OF CLASSICAL CANON LAW (1996) (describing the “origins of a system of canon law”).

<sup>83</sup> Hadley, *supra* note 79, at 259-317 (describing the church courts of Seventh-Day Adventist, Baptist, Churches of Christ, Episcopal, Jehovah’s Witnesses, Church of Latter-Day Saints, Lutheran, Methodist, Nazarene, Orthodox, Pentecostal, and Reformed denominations).

judicial interference are markedly different. As explained, decisions issued by religious arbitration tribunals become legally enforceable through the standard process of confirming arbitration awards.<sup>84</sup> Where the award is issued pursuant to a binding arbitration agreement between the parties and is not tainted by misconduct,<sup>85</sup> courts cannot disturb the merits of the decision and are required to confirm the award, giving it the effect of a binding judgment.<sup>86</sup>

By contrast, decisions issued by church courts – whether adjudicating disputes between church members or between congregations and their clergy – are insulated from judicial review not by arbitration law but by constitutional doctrine. Under the First Amendment’s so-called “church autonomy doctrine,”<sup>87</sup> courts are instructed to defer to “church judicatories” whenever they have decided “questions of discipline, or of faith, or ecclesiastical rule, custom, or law.”<sup>88</sup> Accordingly, where a church’s organizational structure is deemed to be hierarchical,<sup>89</sup> courts will defer to their decisions on matters of church governance and polity.<sup>90</sup>

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<sup>84</sup> See *supra* Part I.A.

<sup>85</sup> See *supra* notes 65-68 and accompanying text.

<sup>86</sup> See *supra* notes 65-68 and accompanying text.

<sup>87</sup> The phrase “church autonomy doctrine” is typically associated with Douglas Laycock, who famously deployed the term in his seminal article, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*. See Laycock, *supra* note 48, at 1373. Laycock has stated, however, that he did not coin the phrase, but instead borrowed it from the title of Paul G. Kauper’s *Church Autonomy and the First Amendment: The Presbyterian Church Case*, 1969 SUP. CT. REV. 347. Douglas Laycock, *Church Autonomy Revisited*, 7 GEO. J.L. & PUB. POL’Y 253, 254 (2009).

<sup>88</sup> *Ogle v. Hocker*, 279 F. App’x 391, 395 (6th Cir. 2008) (quoting *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727 (1871)); *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 655 (10th Cir. 2002).

<sup>89</sup> “Hierarchical churches may be defined as those organized as a body with other churches having similar faith and doctrine with a common ruling convocation or ecclesiastical head.” *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 110 (1952). By contrast, a church’s structure may be deemed congregational where it “is strictly independent of other ecclesiastical associations.” *Watson*, 80 U.S. (13 Wall.) at 722. Applying this distinction between hierarchical and congregational churches, however, is notoriously complex. See, e.g., Ira Mark Ellman, *Driven from the Tribunal: Judicial Resolution of Internal Church Disputes*, 69 CALIF. L. REV. 1378, 1407 (1981) (“The entire process of labeling seems inherently arbitrary.”).

<sup>90</sup> See, e.g., David J. Young & Steven W. Tigges, *Into the Religious Thicket – Constitutional Limits on Civil Court Jurisdiction over Ecclesiastical Disputes*, 47 OHIO ST. L.J. 475, 482 (1986) (describing this deference principle).

This principle of deference is, however, limited by the “neutral principles of law” approach endorsed by the Supreme Court in *Jones v. Wolf*, whereby a court may render its own decision on internal religious disputes and focus “on objective, well-established concepts of trust and property law familiar to lawyers and judges,” thereby avoiding “entanglement in questions of religious doctrine, polity, and practice.” *Jones v. Wolf*, 443 U.S. 595, 603 (1979); see also *Md. & Va. Eldership of the Churches of God v. Church of*

Insulating the decisions of religious courts through constitutional doctrine rather than arbitration law has important practical implications for the standard of review employed by civil courts.<sup>91</sup> The awards of religious arbitration tribunals are subject to the statutory grounds for vacatur, such as corruption, fraud, evident partiality, or misconduct, just as any other arbitration award.<sup>92</sup> By contrast, the standard of review for church courts under the First Amendment is significantly more fraught. The Supreme Court initially envisioned accepting the decisions of “the proper church tribunals . . . as conclusive” only in the absence of “fraud, collusion, or arbitrariness.”<sup>93</sup> The Court, however, has subsequently retreated from allowing such “marginal civil court review,” arguing that “recognition of such an exception would undermine the general rule that religious controversies are not the proper subject of civil court inquiry, and that a civil court must accept the ecclesiastical decisions of church tribunals as it finds them.”<sup>94</sup> Accordingly, the Supreme Court held that courts may not inquire as to whether the decision of a religious court was “arbitrary,”<sup>95</sup> while also casting significant doubt on whether courts may review such decisions for fraud or collusion.<sup>96</sup>

In this way, courts interpret the First Amendment to prohibit review of religious court decisions, preventing any judicial inquiry into whether the religious adjudicative process conforms to standard conceptions of fairness.<sup>97</sup>

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God at Sharpsburg, Inc., 396 U.S. 367, 367-68 (1970). For additional commentary on the “neutral principles of law” approach, see Arlin M. Adams & William R. Hanlon, *Jones v. Wolf: Church Autonomy and the Religion Clauses of the First Amendment*, 128 U. PA. L. REV. 1291, 1297 (1980), and Greenawalt, *supra* note 51, at 1846.

<sup>91</sup> Sometimes courts confuse these two different mechanisms for insulating religious tribunals from judicial review of the merits. *See, e.g.*, *Mansour v. Islamic Educ. Ctr.*, No. 08-CA-3497 (Fla. Cir. Ct. Mar. 22, 2011) (recognizing the existence of an arbitration agreement, but considering deferring to the decision under the First Amendment).

<sup>92</sup> *See* 9 U.S.C. § 10 (2006).

<sup>93</sup> *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929).

<sup>94</sup> *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713 (1976).

<sup>95</sup> *Id.* at 712-13.

<sup>96</sup> *See, e.g.*, *Hutchison v. Thomas*, 789 F.2d 392, 395 (6th Cir. 1986) (“[T]he only exception to strict deference apparently left open by [*Milivojevich*] was “marginal review” for fraud or collusion and the possibility of such review was not endorsed, but merely left for later consideration.” (alterations in original) (quoting Ellman, *supra* note 89, at 1387)); Louis J. Sirico, Jr., *Church Property Disputes as Secular and Alien Institutions*, 55 FORDHAM L. REV. 335, 338 (1986) (“According to the Supreme Court, the free exercise clause even forbids a court from ruling on charges of a church’s arbitrariness and perhaps fraud or collusion.”); Roger W. Bennett, Note, *Church Property Disputes in the Age of “Common-Core Protestantism”: A Legislative Facts Rationale for Neutral Principles of Law*, 57 IND. L.J. 163, 175-76 (1982) (“Although the Court did not expressly invalidate judicial review for ecclesiastical fraud or collusion, it may have done so by implication.”).

<sup>97</sup> *See supra* notes 92-96 and accompanying text.

Instead, the First Amendment simply demands that courts stay out of the business of litigating religion.

C. *Litigating Religion in the Gap Between Public Law and Private Law*

Not all cases turning on religious doctrine or practice, however, are covered by either constitutionally protected church courts or religious arbitration tribunals. Cases that fall between these two alternatives and thus fall into an adjudicative gap are those that turn on religious doctrine or practice but cannot be submitted to either church courts or religious tribunals.<sup>98</sup> In such instances, the religious question doctrine requires courts to abstain from adjudicating religious claims,<sup>99</sup> thereby preventing civil courts from filling the adjudicative void and resolving such cases.<sup>100</sup>

Importantly, the religious question doctrine imposes this requirement even where there is no religious institution to which courts can defer. And it is in those cases where we begin to see how the religious question doctrine creates an adjudicative vacuum between constitutionally protected church courts and religious arbitration tribunals.<sup>101</sup> Consider the following examples.

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<sup>98</sup> For examples of such cases, see *infra* Part III.A-B.

<sup>99</sup> See *infra* Part III.A-B.

<sup>100</sup> See, e.g., *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575, 1576 (1st Cir. 1989); *Burgess v. Rock Creek Baptist Church*, 734 F. Supp. 30, 31 (D.D.C. 1990).

<sup>101</sup> For a recent example, see *Wallace v. ConAgra Foods, Inc.*, No. 0:2012cv01354 (D. Minn. Jan. 31, 2013). Here the plaintiffs alleged that the defendant engaged in widespread consumer fraud by representing that its products were 100% kosher in keeping with Orthodox standards. *Id.* at 2. In its order dismissing the case, the Court stated that while it found “the allegations in the Amended Complaint highly disconcerting,” it declined to exercise jurisdiction, because determining whether those products “are in fact kosher” was impossible “without delving into questions of religious doctrine.” *Id.* at 5, 9.

Other examples of cases that fall within the adjudicative gap include: (1) instances where parties dispute whether an arbitration conducted by a religious tribunal complied with the contractually required religious procedural rules, see, e.g., *Mansour v. Islamic Educ. Ctr.*, No. 08-CA-3497 (Fla. Cir. Ct. Mar. 22, 2011) (concluding that the enforceability of the arbitration award, to be decided in future proceedings, will rest upon a determination of whether the arbitrator complied with Islamic procedural law); (2) interpretation of contracts with religious terminology, see, e.g., *Soleimani v. Soleimani*, No. 11CV4668, 2012 WL 3729939, ¶ 27 (Kan. Dist. Ct. Aug. 28, 2012) (discussing Establishment Clause concerns preventing interpretation of a *mahr* agreement); and (3) choice of law or forum selection clauses that use religious criteria, see, e.g., *In re Ismailoff*, No. 342207, 2007 WL 431024, at \*2 (N.Y. Sur. Ct. Feb. 1, 2007) (refusing to enforce an arbitration provision which required selection of “three persons of the Orthodox Jewish faith”).

In addition, recent disputes over judicial enforcement of *get* settlement agreements – that is, settlement agreements between divorcing couples that include a contractual obligation for a husband to provide his wife with a Jewish divorce document – often implicate religious questions, threatening to undermine the enforceability of such agreements. See, e.g., *Victor v. Victor*, 866 P.2d 899, 902 (Ariz. Ct. App. 1993); *Aflalo v. Aflalo*, 295 N.J. Super. 527, 528 (Super. Ct. Ch. Div. 1996). To avoid these problems without running afoul of the

### 1. Contract Cases: Interpreting Religious Terminology

One way in which courts are asked to adjudicate disputes that turn on religious doctrine and practice is when contracts contain religious terminology.<sup>102</sup> In such instances, claims for breach of contract will often turn on the meaning of particular religious terms.<sup>103</sup> Typically, the way to resolve such disputes is by answering what amounts to a religious question. And while such issues frequently arise in an institutional context, there are cases where the two parties are both individuals. As a result, courts – typically state courts

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religious question doctrine, some courts have adopted the problematic holding that requiring a husband to provide a Jewish divorce document is not a religious act and therefore does not implicate the First Amendment. *See, e.g.*, *Minkin v. Minkin*, 434 A.2d 665, 668 (N.J. Super. Ct. Ch. Div. 1981) (holding, based on “credible expert testimony[,] that the acquisition of a *get* is not a religious act”); *In re Scholl*, 621 A.2d 808, 811 (Del. Fam. Ct. 1992) (following the precedent of *Minkin* and other cases holding that enforcing a *get* does not implicate religious conduct). Rejecting the religious question doctrine in the manner proposed in this Article would have the added benefit of both allowing the enforcement of these agreements without courts having to claim that such agreements do not implicate religious conduct. For articles collecting more examples, see *infra* note 137.

<sup>102</sup> The challenges facing courts that are interpreting and enforcing agreements infused with religious terminology have increasingly become the focus of significant scholarly discussion. *See, e.g.*, Jared A. Goldstein, *Is There a Religious Question Doctrine?: Judicial Authority to Examine Religious Practices and Belief*, 54 CATH. U. L. REV. 497, 520 (2005) (collecting cases on “The Application of an Absolute Prohibition on Judicial Inquiry into Religious Questions in Lower Courts”).

In particular, a number of recent articles have considered the applicability of the Establishment Clause when interpreting *mahr* agreements – agreements integral to the Islamic marriage process. *See, e.g.*, Nathan B. Oman, *Bargaining in the Shadow of God’s Law: Islamic Mahr Contracts and the Perils of Legal Specialization*, 45 WAKE FOREST L. REV. 579, 582 (2010) [hereinafter Oman, *Bargaining in the Shadow*]; Nathan B. Oman, *How to Judge Shari’a Contracts: A Guide to Islamic Marriage Agreements in American Courts*, 2011 UTAH L. REV. 287, 292 [hereinafter Oman, *Shari’a Contracts*]; 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); Charles P. Trumbull, Note, *Islamic Arbitration: A New Path for Interpreting Islamic Legal Contracts*, 59 VAND. L. REV. 609, 612-13 (2006).

The issues raised by *mahr* agreements track many of the persistent conundrums faced by courts in enforcing religious contracts. For other examples, see Greenawalt, *supra* note 10, at 785; Steven H. Resnicoff, *A Commercial Conundrum: Does Prudence Permit the Jewish “Permissible Venture”?*, 20 SETON HALL L. REV. 77, 78 (1989); and Hania Masud, Comment, *Takaful: An Innovative Approach to Insurance and Islamic Finance*, 32 U. PA. J. INT’L L. 1133, 1134 (2011).

<sup>103</sup> *See, e.g.*, Goldstein, *supra* note 102, at 520 (“In numerous cases, contracts have been deemed unenforceable because they contain religious terms that courts have held they are barred from construing.”); Lawrence M. Warmflash, *The New York Approach to Enforcing Religious Marriage Contracts: From Avitzur to the Get Statute*, 50 BROOK. L. REV. 229, 242-43 (1984).

– are asked to resolve a dispute over religious doctrine in circumstances where doing so will not entail usurping the authority of a religious institution.

Consider the case of *Sieger v. Sieger*.<sup>104</sup> In the context of a divorce, the wife’s father, Michael Tenenbaum, sought to have a court enforce what he claimed was an arbitration provision that covered disputes between himself and his son-in-law regarding the distribution of shared assets.<sup>105</sup> This arbitration provision was located within a larger engagement contract – which the wife, the husband, and Tenenbaum all signed – and it stated that any disputes between the parties would be settled “in accordance with the ‘regulations of Speyer, Worms, and Mainz.’”<sup>106</sup> Tenenbaum submitted the affidavit of an expert in Jewish Law, which stated that “the engagement contract does in fact contain an arbitration clause” because “the regulations of Speyer, Worms and Mainz provide that all disputes shall be submitted to a Beth Din for resolution.”<sup>107</sup> This tracked the well-known historical fact – at least, well known to those observing Jewish law – that Speyer, Worms, and Mainz were the centers for the study and promulgation of Jewish law around the turn of the first millennium.<sup>108</sup>

The court refused to enforce the supposed arbitration provision in the engagement contract, most notably because it would require the court to interpret the contract in light of religious principles.<sup>109</sup> Rendering such a determination, held the court, would violate the First Amendment. The court explained: “Consistent with First Amendment principles, ‘civil courts are forbidden from interfering in or determining religious disputes. Such rulings violate the First Amendment because they simultaneously establish one religious belief as correct . . . while interfering with the free exercise of the opposing faction’s beliefs.’”<sup>110</sup>

The problem in adopting such an approach is that in failing to resolve the dispute, the court left the petitioner unable to enforce the agreement in accordance with the shared expectations of the parties. Because the court left Tenenbaum with no way to enforce the arbitration provision, this case fits

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<sup>104</sup> 747 N.Y.S.2d 102 (App. Div. 2002).

<sup>105</sup> *Id.* at 103.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 104 (internal quotation marks and alterations omitted).

<sup>108</sup> See 2 MENACHEM ELON, JEWISH LAW: HISTORY, SOURCES, PRINCIPLES 788-89 (Bernard Auerbach & Melvin J. Sykes trans., 1994) (1988) (discussing the enactments of “shum” – the transliteration of the Hebrew acronym for Speyer, Worms, and Mainz).

<sup>109</sup> *Sieger*, 747 N.Y.S.2d at 104. The court’s refusal to enforce the arbitration provision has served to caution those drafting religious arbitration provisions, highlighting the premium on clarity in the religious arbitration context. See Fried, *supra* note 59, at 642-43; *id.* at 642 n.61 (citing *Sieger* in this context as “[o]ne instance where the agreement to submit to *beth din* arbitration was found to be too vague”).

<sup>110</sup> *Sieger*, 747 N.Y.S.2d at 104 (alteration in original) (quoting First Presbyterian Church v. United Presbyterian Church, 464 N.E.2d 454, 457-58 (N.Y. 1984)).

squarely in the gap between public and private law options to litigate religion.<sup>111</sup>

The consequences of litigating religious contract claims in the gap can be quite severe. For instance, in *Zummo v. Zummo*, the court refused to enforce an agreement whereby a father agreed not to take his children to “religious services contrary to the Jewish faith.”<sup>112</sup> One of the court’s primary concerns was that enforcing the agreement would entail excessive entanglement with religious matters: “What constitutes a ‘religious service?’ Which are ‘contrary’ to the Jewish faith? What for the matter is the ‘Jewish’ faith?”<sup>113</sup> While in typical contract cases courts would use standard methods of interpretation to answer such questions,<sup>114</sup> the court’s view was that the religious nature of the questions precluded the court from rendering a view.<sup>115</sup> As a result, this provision of the parental agreement was rendered unenforceable.<sup>116</sup>

These types of concerns can animate adjudication of a wide variety of breach of religious contract claims. Courts can, for example, refuse to enforce *mahr* agreements – agreements that are a necessary feature of the Islamic marriage process – on Establishment Clause grounds.<sup>117</sup> Indeed, any case in

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<sup>111</sup> Given the financial implications of dismissing such claims, it is not surprising that the overlap between commercial conduct and religious conduct continues to garner attention from scholars. *See, e.g.*, Michael A. Helfand, *Fighting for the Debtor’s Soul*, 19 GEO. MASON L. REV. 157 (2011) (describing the challenges courts face when trying to regulate conduct that is both religious and commercial); Jonathan C. Lipson, *Religious Liberty and Third-Party Harms*, 84 MINN. L. REV. 589, 616-21 (2000) (discussing how courts might disaggregate religious conduct and commercial conduct); Bernadette Meyler, *Commerce in Religion*, 84 NOTRE DAME L. REV. 887, 891 (2009).

<sup>112</sup> *Zummo v. Zummo*, 574 A.2d 1130, 1158 (Pa. Super. Ct. 1990). For critical assessments of *Zummo*, see Lauren D. Freeman, *The Child’s Best Interests vs. The Parent’s Free Exercise of Religion*, 32 COLUM. J.L. & SOC. PROBS. 73, 92-95 (1998), and Rebecca Korzec, *A Tale of Two Religions: A Contractual Approach to Religion as a Factor in Child Custody and Visitation Disputes*, 25 NEW ENG. L. REV. 1121, 1132-36 (1991) (“*Zummo* exemplifies the shortcoming of the current judicial approach, in that it fails to promote post-divorce family stability by ignoring the legitimate and reasonable religious contracts formed by the pre-divorce family.”). *See also* 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, 992 (1998).

<sup>113</sup> *Zummo*, 574 A.2d at 1146.

<sup>114</sup> *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 201 (1981) (providing guidelines for “whose meaning prevails” when “the parties have attached different meanings to a promise or agreement or a term thereof”).

<sup>115</sup> *Zummo*, 574 A.2d at 1146.

<sup>116</sup> *Id.* at 1147.

<sup>117</sup> *See Soleimani v. Soleimani*, No. 11CV4668, 2012 WL 3729939, ¶ 27 (Dist. Ct. Kan. Aug. 28, 2012) (discussing Establishment Clause concerns preventing interpretation of *mahr* agreement); *Zawahiri v. Alwattar*, No. 07-DR-02-756 (Ohio Ct. Com. Pl. Oct. 10, 2007), *aff’d*, No. 07AP-925, 2008 WL 2698679 (Ohio Ct. App. July 10, 2008) (refusing to enforce a *mahr* agreement on Establishment Clause grounds).



which parties incorporate religious terminology is susceptible to being rendered unenforceable for fear of excessive entanglement with religious doctrine.<sup>118</sup>

Importantly, the applicability of the entanglement doctrine persists even in cases where courts need not fear infringing on the authority of religious institutions to govern themselves. Arbitration provisions, custody agreements, and marriage contracts involve two individual parties. In such cases there is no religious institution waiting in the wings to adjudicate the case. Thus, when the court dismisses such claims on Establishment Clause grounds, the plaintiff cannot enlist a religious institution's adjudicative authority; in cases where both parties are individuals, there simply is no built-in religious institution that will resolve the dispute.

## 2. Tort Cases: Religious Defamation

Prohibiting courts from litigating religion also causes significant problems in the tort context.<sup>119</sup> One notable and recurring example of non-justiciable religious torts is cases of religious defamation. The challenge courts face in this context is that of addressing the defense of truth. Defendants frequently seek to avoid liability by claiming an allegedly defamatory statement was true – an inquiry courts cannot engage in where the statement has religious content, because they are barred from litigating religion.<sup>120</sup>

As an example, consider the facts of *Abdelhak v. Jewish Press*.<sup>121</sup> The plaintiff, an Orthodox Jewish doctor specializing in high-risk obstetrics, sued a Jewish newspaper for publishing his name on a list of individuals against whom a rabbinical court had issued an order of contempt.<sup>122</sup> According to the newspaper, this contempt order stemmed from the plaintiff's failure to comply with the rabbinical court's rulings and provide his wife with a *get* – that is, a Jewish divorce document.<sup>123</sup>

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<sup>118</sup> For a discussion of this issue in the context of *mahr* agreements, see Oman, *Bargaining in the Shadow*, *supra* note 102, at 582; Oman, *Shari'a Contracts*, *supra* note 102, at 292; Blenkhorn, *supra* note 102, at 192; Trumbull, *supra* note 102, at 641; Brian H. Bix, *Mahr Agreements: Contracting in the Shadow of Family Law (and Religious Law) – A Comment on Oman* 10 (Univ. of Minn. Law Sch., Research Paper No. 11-15, 2011), available at <http://ssrn.com/abstract=1752289>.

<sup>119</sup> For discussion of judicial treatment of religious tort claims, see generally Scott C. Idleman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 IND. L.J. 219 (2000), and Goldstein, *supra* note 102, at 522-25 (collecting cases).

<sup>120</sup> See, e.g., *Hartwig v. Albertus Magnus Coll.*, 93 F. Supp. 2d 200, 219 (D. Conn. 2000) (dismissing a defamation claim because addressing the defense of truth would require impermissible entanglement with canon law); *Klagsbrun v. Va'ad Harabonim*, 53 F. Supp. 2d 732, 742 (D.N.J. 1999) (dismissing a defamation claim because addressing the defense of truth would require impermissible entanglement with Jewish law).

<sup>121</sup> 985 A.2d 197 (N.J. Super. Ct. App. Div. 2009).

<sup>122</sup> *Id.* at 200.

<sup>123</sup> *Id.* at 200-01.

As it turned out, however, the plaintiff had not been issued a contempt order by a rabbinical court.<sup>124</sup> Both parties subsequently agreed that listing the plaintiff's name was a mistake and was based upon misinformation provided by an employee of the rabbinical court.<sup>125</sup> The plaintiff alleged that his reputation within the religious community and, in turn, his medical practice were both severely damaged by the newspaper's erroneous report of his religious transgressions.<sup>126</sup>

Yet the court, citing the Supreme Court's church autonomy cases as precedent, dismissed the plaintiff's defamation claim.<sup>127</sup> According to the court, adjudicating the plaintiff's defamation claim would impermissibly entangle the court in religious doctrine as it would "inevitably require[] the application of religious doctrine, practices and belief that the First Amendment forbids."<sup>128</sup> This outcome was somewhat surprising given that both parties agreed that listing the plaintiff's name in the newspaper constituted a false statement.<sup>129</sup> Thus, resolving the plaintiff's defamation claim would not require evaluating the truth or falsity of the newspaper's allegedly defamatory statement.<sup>130</sup>

Still, the court held that the First Amendment required dismissal of the plaintiff's claims because "determin[ing] how much of the decline in plaintiff's income resulted from the defamatory" listing would require the "jury . . . to develop a keen understanding of how an Orthodox Jew would view each such

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<sup>124</sup> *Id.* at 202.

<sup>125</sup> *Id.*

<sup>126</sup> For further discussion of the relationship between religious torts and communal norms, see ROBERT F. COCHRAN, JR. & ROBERT M. ACKERMAN, *LAW & COMMUNITY: THE CASE OF TORTS* 99-122 (2004).

<sup>127</sup> *Abdelhak*, 985 A.2d at 211. Similar First Amendment concerns arise in the context of "shunning" in religious communities. See Justin K. Miller, Comment, *Damned if You Do, Damned if You Don't: Religious Shunning and the Free Exercise Clause*, 137 U. PA. L. REV. 271, 272 (1988). As examples of this dynamic, see *Burgess v. Rock Creek Baptist Church*, 734 F. Supp. 30, 34 (D.D.C. 1990); *Grunwald v. Bornfreund*, 696 F. Supp. 838, 841 (E.D.N.Y. 1988); *Sands v. Living Word Fellowship*, 34 P.3d 955, 959 (Alaska 2001); *Anderson v. Watchtower Bible & Tract Soc'y of N.Y., Inc.*, No. M2004-01066-COA-R9-CV, 2007 WL 161035, at \*19 (Tenn. Ct. App. Jan. 19, 2007) ("Shunning is religiously based conduct, a religious practice based on interpretation of scripture, and is subject to the protection of the First Amendment. No tort liability can be imposed for shunning alone." (citations omitted)).

<sup>128</sup> *Abdelhak*, 985 A.2d at 210.

<sup>129</sup> *Id.* at 204.

<sup>130</sup> *Id.* at 207. The impermissibility of inquiring into religious doctrine and self-governance typically serves as the reason why similar defamation suits have been dismissed on First Amendment grounds. See, e.g., *Farley v. Wisc. Evangelical Lutheran Synod*, 821 F. Supp. 1286, 1289 (D. Minn. 1993); *Goodman v. Temple Shir Ami*, 712 So. 2d 775, 777 (Fla. Dist. Ct. App. 1998); *Downs v. Roman Catholic Archbishop*, 683 A.2d 808, 813 (Md. Ct. Spec. App. 1996); *Schoenhals v. Mains*, 504 N.W.2d 233, 236 (Minn. Ct. App. 1993).

event. Such an undertaking exemplifies the excessive involvement in matters of faith . . . or ecclesiastical . . . custom that the [New Jersey Supreme] Court prohibited.”<sup>131</sup>

While the court noted that “any order that prevents a plaintiff from pursuing what may well be a meritorious claim for the destruction of his good name imposes a harsh consequence on a plaintiff,” it nonetheless held that the Establishment Clause prevented adjudication of religious questions.<sup>132</sup> In this way, the court left the plaintiff without any forum in which he could seek redress of significant harm both to his business and to his dignity, a recurring outcome in religious defamation cases.<sup>133</sup> Given the tortious nature of the newspaper’s conduct, there was never an opportunity to secure the newspaper’s consent to resolve the plaintiff’s claim before a religious arbitration tribunal. Indeed, once the contours of the plaintiff’s defamation claim were clear, it became unlikely that the newspaper would ever agree to submit to arbitration; the likelihood that it could completely avoid liability in court was simply too enticing. And given the facts of the case, there was no religious institution that could claim constitutionally protected authority to resolve the dispute. In sum, both public law and private law failed the plaintiff; his defamation claim fell squarely in the gap between the two.

## II. CREATING THE GAP BETWEEN PUBLIC LAW AND PRIVATE LAW

The adjudicative vacuum between private law religious arbitration tribunals and public law church courts flows directly from the religious question doctrine. Under current constitutional doctrine, courts are not simply prohibited from adjudicating claims that require trespassing on the self-government authority of religious institutions;<sup>134</sup> courts are also prohibited from adjudicating claims that turn on religious doctrine or practice.<sup>135</sup> As a result, courts will dismiss claims that hinge on religious questions even if no other religious institution is waiting in the wings to resolve the religious dispute.<sup>136</sup> In this way, the religious question doctrine prohibits courts from addressing a wide set of claims even though dismissing such claims will leave plaintiffs without any forum that has the authority and ability to provide redress of serious cognizable harms.<sup>137</sup>

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<sup>131</sup> *Abdelhak*, 985 A.2d at 208.

<sup>132</sup> *Id.* at 211.

<sup>133</sup> *See supra* note 120.

<sup>134</sup> *See supra* note 3.

<sup>135</sup> *See, e.g.*, *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575, 1576 (1st Cir. 1989); *Burgess v. Rock Creek Baptist Church*, 734 F. Supp. 30, 31 (D.D.C. 1990) (citing *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-11 (1976)).

<sup>136</sup> *See supra* Part I.C.

<sup>137</sup> For articles collecting examples of claims that are barred by the church autonomy doctrine, see Perry Dane, “*Omalous*” *Autonomy*, 2004 B.Y.U. L. REV. 1715, 1733-34 (providing examples from labor, civil rights, malpractice, defamation, and contract law);

While scholars continue to puzzle over the justification for the religious question doctrine,<sup>138</sup> one of the primary claims of this Article is that the current iteration of the religious question doctrine stems from decades of doctrinal confusion regarding the church autonomy doctrine.<sup>139</sup> In its initial articulation, the church autonomy doctrine served as the constitutional analog to religious arbitration. At its core, the church autonomy doctrine served an adjudicatory function whereby religious institutions were empowered to resolve internal disputes that “involv[e] matters of faith, doctrine, church governance, and polity.”<sup>140</sup> In this way, the church autonomy doctrine was originally deployed by the Supreme Court to divide up dispute resolution responsibilities between religious and secular tribunals, with courts resolving secular disputes and religious institutions resolving internal religious controversies.<sup>141</sup>

With the increasing expansion of the Establishment Clause, however, the Supreme Court has obscured this primary function by injecting entanglement concerns into the church autonomy analysis.<sup>142</sup> As a result, courts now frequently cite the church autonomy doctrine as prohibiting courts from serving as a forum for litigating religion for fear of becoming “impermissibly entangled” with religious doctrine.<sup>143</sup> Thus, the church autonomy doctrine has been hijacked by entanglement and has ceased to play its primary dispute-resolution function. Indeed, church autonomy cases are now often cited to justify dismissing cases implicating religious doctrine even where no religious institution exists to fill the adjudicative void.<sup>144</sup> In this way, the church autonomy doctrine has been inverted; instead of serving as a doctrine to ensure the litigation of religion, it is now used to leave parties without a forum to do so.

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Carl H. Esbeck, *The Establishment Clause as a Structural Restraint: Validations and Ramifications*, 18 J.L. & POLITICS 445, 462 (2002) (providing examples of lawsuits involving torts, contracts, and criminal fraud); and Goldstein, *supra* note 102, at 520-25; Idleman, *supra* note 119, at 234-37. For examples of some additional cases, see *supra* note 101.

<sup>138</sup> See, e.g., Esbeck, *supra* note 49, at 43-58; Goldstein, *supra* note 102, at 501; Idleman, *supra* note 119, at 240-59; Levine, *Hands-Off Approach Introduction*, *supra* note 51, at 796-98.

<sup>139</sup> See *infra* Part III.A-B.

<sup>140</sup> See *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 655 (10th Cir. 2002); *infra* Part II.A.

<sup>141</sup> See *infra* Part II.A. Such a view tracks the arguments of many scholars that interpret the religion clauses through an institutional lens. See, e.g., Horwitz, *Churches as First Amendment Institutions*, *supra* note 20, at 88; Garnett, *supra* note 51, at 851; Garnett, *supra* note 20, at 288; Greenawalt, *supra* note 51, at 1844; Laycock, *supra* note 48, at 1374.

<sup>142</sup> See *infra* Part II.B.

<sup>143</sup> See *infra* Part II.B.

<sup>144</sup> See *supra* Part I.C.

A. *Church Autonomy's Dispute-Resolution Function*

Beginning in 1871 and over a period of eighty years, the Supreme Court developed the notion of church autonomy as predicated on the dispute-resolution function of religious institutions; that is, the Supreme Court granted religious institutions autonomy to resolve internal disputes over core religious matters.<sup>145</sup> In these early stages, the Court did not express concern over judicial entanglement in deciding cases implicating church doctrine.<sup>146</sup> Instead, the Court's inquiry approached the question from the opposite perspective, focusing on *where* parties should litigate religion.

The church autonomy doctrine was born in the Supreme Court's 1871 decision *Watson v. Jones*, addressing a church property dispute over the Walnut Street Presbyterian Church in Louisville, Kentucky.<sup>147</sup> The two factions within the church – divided over the issue of slavery – both sought title to the building, each claiming to be the “true” church.<sup>148</sup>

In reaching its decision, the Court emphasized the “unquestioned” common law right of churches “to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association.”<sup>149</sup> According to the Court, “It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.”<sup>150</sup>

Given these considerations, the Court proclaimed that courts should not intervene in religious disputes, but instead should accept the resolution reached by the internal dispute resolution system established within the religious community:

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<sup>145</sup> Horwitz, *Churches as First Amendment Institutions*, *supra* note 20, at 116-18 (describing *Watson's* legacy for the church autonomy doctrine).

<sup>146</sup> Of course, the Supreme Court's concern with entanglement only dates back to the early 1970s. *See, e.g.*, Mark E. Chopko, *Religious Access to Public Programs and Governmental Funding*, 60 GEO. WASH. L. REV. 645, 655 (1992) (observing that the entanglement prong finds its origin in *Walz v. Tax Comm'n*, 397 U.S. 664 (1970)). *But see* John T. Valauri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 U. PITT. L. REV. 83, 140 (1986) (“Beyond *Walz*, the entanglement prong has its origin in earlier cases and commentary. Like the other parts of the *Lemon* test, the entanglement prong is not an historical discovery or a doctrinal novelty. It is an attempt on the part of the Supreme Court to agree on workable standards of Establishment Clause doctrine.” (footnote omitted)).

<sup>147</sup> 80 U.S. (13 Wall.) 679, 692 (1871). For some helpful discussions of *Watson*, see Greenawalt, *supra* note 51, at 1847-52, and Lund, *supra* note 12, at 13-17.

<sup>148</sup> *Watson*, 80 U.S. (13 Wall.) at 694-700.

<sup>149</sup> *Id.* at 728-29.

<sup>150</sup> *Id.* at 729.

[W]henever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.<sup>151</sup>

In 1929 the Supreme Court had further occasion to reiterate the limited role courts could play in the resolution of religious disputes. In *Gonzalez v. Roman Catholic Archbishop*, the Court considered the claims of a minor heir, Raul Gonzalez, to the collative chaplaincy in the Roman Catholic Archdiocese of Manila.<sup>152</sup> The terms of the deed of foundation required that the nearest relative of the first chaplain and the foundress be named chaplain; all parties agreed that Gonzalez was indeed the nearest relative.<sup>153</sup> The Archbishop refused to appoint him, however, because, as a minor, he had failed to take the requisite courses in theology to become a chaplain and therefore did not satisfy the religiously mandated requirements for serving as the chaplain.<sup>154</sup>

In holding that no court could require the Archbishop to name Gonzalez as a chaplain, the Supreme Court stated: "Because the appointment is a canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them."<sup>155</sup> Citing *Watson*, the Court further explained: "In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise."<sup>156</sup> The Court further rejected the argument that canon law in force at the time of the execution of the deed of foundation permitted Gonzalez to serve as a chaplain, concluding instead that it was the canon law at the time Gonzalez was presented to serve as chaplain that

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<sup>151</sup> *Id.* at 727. It is worth noting that because *Watson* was decided before *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the Supreme Court applied these principles of church deference not as a matter of constitutional law, but as a matter of federal common law. See *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 115 (1952) ("It long antedated the 1938 decisions of *Erie R. Co. v. Tompkins* and *Ruhlin v. New York Life Ins. Co.*, and, therefore, even though federal jurisdiction in the case depended solely on diversity, the holding was based on general law rather than Kentucky law." (citations omitted)). For a discussion of this issue in the context of *Watson*, see Kurt T. Lash, *Beyond Incorporation*, 18 J. CONTEMP. LEGAL ISSUES 447, 456-59 (2009) ("[C]onsider what the Court in *Watson* did not discuss: The Free Exercise and Establishment Clauses of the First Amendment. The Court said nothing about the textual referents to religious freedom in the Bill of Rights. Instead, the Court discussed principles which had emerged over time at common law.").

<sup>152</sup> *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 10-15 (1929).

<sup>153</sup> *Id.* at 12.

<sup>154</sup> *Id.* at 13.

<sup>155</sup> *Id.* at 16.

<sup>156</sup> *Id.* (citing *Watson*, 80 U.S. (13 Wall.) at 727).

controlled.<sup>157</sup> And Gonzalez admitted he could not satisfy the requirements of canon law at the time he was presented.<sup>158</sup> In sum, the Archbishop retained the authority and autonomy to decide who could and could not fill religious positions within the church, and the Court held that those determinations must receive deference from civil courts.<sup>159</sup>

The Supreme Court further emphasized these same principles of autonomy and deference in its 1952 decision *Kedroff v. St. Nicholas Cathedral*.<sup>160</sup> In so doing, the Supreme Court elevated its holding in *Watson* to constitutional status,<sup>161</sup> concluding that it was a matter for church tribunals to determine who should occupy St. Nicholas Cathedral, and that the resolution of such matters must remain free from judicial intervention.<sup>162</sup>

Accordingly, in reliance on *Watson*, the Court struck down a New York corporations law that reallocated control over the St. Nicholas Cathedral to the Russian Orthodox Church of America.<sup>163</sup> As explained by the Court, “[*Watson*] radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation – in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”<sup>164</sup>

Together, *Watson*, *Gonzalez*, and *Kedroff* advanced a principle of church autonomy whereby churches had the authority to both establish methods for internal dispute resolution,<sup>165</sup> and for those resolutions to be granted judicial deference.<sup>166</sup> Importantly, in crafting this principle, the Court relied on both religion clauses of the First Amendment, each emphasizing the institutional relationship between religious institutions and civil courts.

On the free exercise front, the Court sketched a “freedom for religious organizations,” which entailed “an independence from secular control or manipulation” in adjudicating “matters of church government as well as those

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<sup>157</sup> *Id.* at 17.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 16-17.

<sup>160</sup> 344 U.S. 94 (1952).

<sup>161</sup> *See supra* note 151 (discussing *Watson*'s background as a case decided in federal common law).

<sup>162</sup> *Kedroff*, 344 U.S. at 113-16. For more background on *Kedroff*, see Richard W. Garnett, “*Things That Are Not Caesar’s*”: *The Story of Kedroff v. St. Nicholas Cathedral*, in *FIRST AMENDMENT STORIES* 171, 182 (Richard W. Garnett & Andrew F. Koppleman eds., 2012).

<sup>163</sup> *Kedroff*, 344 U.S. at 116.

<sup>164</sup> *Id.*

<sup>165</sup> *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 729 (1871).

<sup>166</sup> *Id.* at 729 (holding that resolutions established by churches “should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for”); *see also Kedroff*, 344 U.S. at 115-16 (reiterating and applying the Supreme Court’s holding in *Watson*).

of faith and doctrine.”<sup>167</sup> Thus the Court emphasized that religious institutions should be afforded “power to decide [such matters] for themselves, free from state interference.”<sup>168</sup> The Court recognized the primary dispute-resolution function of religious institutions, tasking them as the preferred forum for dispute resolution when the claims in question touched upon internal religious matters.<sup>169</sup> In turn, such institutions were granted autonomy and deference when playing this adjudicative role.<sup>170</sup> According to the Court, the First Amendment provided such autonomy “as a part of the free exercise of religion against state interference.”<sup>171</sup>

In articulating this vision of “freedom for religious organizations,” the Court recognized that religious institutions had the right and responsibility to develop religious faith and doctrine free from state manipulation and interference.<sup>172</sup> Were courts to wrest jurisdiction over cases properly before religious courts, civil courts would in essence undermine the primary dispute-resolution function of religious institutions and tribunals, insinuating themselves into the process of developing religious faith and doctrine.<sup>173</sup> The Court returned to this theme in later cases, noting that where courts co-opt authority over religious disputes “the hazards are ever present of inhibiting the free development of religious doctrine.”<sup>174</sup>

In further justifying the primary dispute-resolution role of religious institutions, the Court contended that religious institutions derive such

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<sup>167</sup> *Kedroff*, 344 U.S. at 116.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 115-16; *Watson*, 80 U.S. (13 Wall.) at 729 (“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.” (emphasis added)).

<sup>170</sup> *Kedroff*, 344 U.S. at 115-16; *Watson*, 80 U.S. (13 Wall.) at 729.

<sup>171</sup> *Kedroff*, 344 U.S. at 116 (finding that churches’ “[f]reedom to select clergy” is protected under the First Amendment). Given the heavy emphasis on the authority and autonomy of religious institutions in *Watson* and *Kedroff*, it is not surprising that those decisions serve as the foundation for many who argue for strong protection of religious group autonomy. See, e.g., Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99, 133 (citing *Kedroff* as an example where the Supreme Court’s “autonomy rhetoric . . . is not empty”); Mark DeWolfe Howe, *The Supreme Court, 1952 Term - Foreword: Political Theory and the Nature of Liberty*, 67 HARV. L. REV. 91, 94 (1953); Laycock, *supra* note 48, at 1395-98; Lund, *supra* note 12, at 12-17; see also Brady, *supra* note 48, at 1640 (“In *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America*, decided eighty years after *Watson*, the Court used some of its broadest language describing religious group rights.” (footnote omitted)).

<sup>172</sup> *Kedroff*, 344 U.S. at 116.

<sup>173</sup> *Id.* (“Freedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference.” (footnote omitted)).

<sup>174</sup> *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449 (1969).



authority from the “implied consent” of their membership to have disputes resolved internally by the established religious tribunals.<sup>175</sup> Following in the footsteps of philosophers like John Locke,<sup>176</sup> the Supreme Court conceptualized religious institutions as “voluntary religious associations,” created “to assist in the expression and dissemination of any religious doctrine.”<sup>177</sup> In turn, people who choose to join such associations have implicitly consented to have disputes related to church governance and doctrine resolved internally in the manner established by the religious organization.<sup>178</sup> Therefore, in requiring that members – whether they be individual members or member churches – submit disputes to religious tribunals and not U.S. courts, religious organizations do not impermissibly block access to the U.S. judicial system; to the contrary, they are simply enforcing a dispute-resolution process implicitly consented to as part of selecting membership in the organization.

In articulating this view, the Court explicitly compared religious organizations to other clubs and associations, noting that “[u]nder like circumstances, effect is given in the courts to the determinations of the judicatory bodies established by clubs and civil associations.”<sup>179</sup> Indeed, the Court’s emphasis on “implied consent” highlights the way in which the church autonomy doctrine created a constitutional analog to religious arbitration.<sup>180</sup> Just as contemporary religious arbitration tribunals exercise authority pursuant to the consent of the parties as expressed in an arbitration agreement, religious courts receive deference pursuant to the implied consent of the church members conveyed at the time of joining the organization.<sup>181</sup> Thus, the decisions of both religious arbitration tribunals and constitutionally protected religious courts are insulated from civil court review because the parties have explicitly or implicitly consented to the alternative dispute resolution process.<sup>182</sup>

There is an important flipside to this analogy, expressed by the Supreme Court in passing on a number of occasions. Like religious arbitration,

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<sup>175</sup> *Watson*, 80 U.S. (13 Wall.) at 729.

<sup>176</sup> See John Locke, *A Letter Concerning Toleration*, in *A LETTER CONCERNING TOLERATION* IN FOCUS 14, 20 (John Horton & Susan Mendus eds., 1991) (stating that a “church [is] . . . a voluntary society of men, joining themselves together of their own accord, in order to the public worshipping of God, in such a manner as they judge acceptable to him, and effectual to the salvation of their souls”).

<sup>177</sup> *Watson*, 80 U.S. (13 Wall.) at 728-29.

<sup>178</sup> *Id.*

<sup>179</sup> *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 16-17 (1929).

<sup>180</sup> See *supra* notes 61-62 and accompanying text (describing the primacy of consent in arbitration doctrine).

<sup>181</sup> *Gonzalez*, 280 U.S. at 16-17.

<sup>182</sup> *Watson*, 80 U.S. (13 Wall.) at 729 (“All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it.”); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 114 (1952).

constitutionally protected church courts are shielded from searching civil court review.<sup>183</sup> This deference is granted, however, only “[i]n the absence of fraud, collusion, or arbitrariness.”<sup>184</sup> Thus, the *Kedroff* Court caveated this deference by noting that the adjudicative freedoms provided religious tribunals are provided only “where no improper methods of choice are proven.”<sup>185</sup> In this way, the keystones of statutory grounds for vacating an arbitration award – corruption, fraud, undue means, partiality, and misconduct<sup>186</sup> – also serve as the constitutionally recognized exceptions to church autonomy. Indeed, by providing for such exceptions, the Court further demonstrated the adjudicative function of the church autonomy doctrine, which shields religious institutions from civil court review so long as there is no evidence that their method of dispute resolution is fundamentally flawed.<sup>187</sup>

Like its free exercise counterpart, the Supreme Court’s initial analysis of the Establishment Clause concerns implicated in the church autonomy doctrine focused on the doctrine’s dispute-resolution function.<sup>188</sup> Thus, the Court highlighted the dangers associated with having a civil court adjudicate a dispute between rival religious factions: “The law knows no heresy, and is committed to the support of no dogma, the *establishment of no sect.*”<sup>189</sup> In this way, the *Watson* Court’s establishment concerns centered on the core problem of civil courts resolving a factional dispute between parties raising competing claims as to which was the “true” church; in resolving such a dispute, a court’s decision would be tantamount to “establishing” a church.<sup>190</sup>

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<sup>183</sup> See *supra* notes 92-96 and accompanying text (discussing civil courts’ limited power to review decisions made by religious arbitration tribunals).

<sup>184</sup> *Gonzalez*, 280 U.S. at 16.

<sup>185</sup> *Kedroff*, 344 U.S. at 116 (citing *Gonzalez*, 280 U.S. at 16).

<sup>186</sup> See, e.g., 9 U.S.C. §10 (2006).

<sup>187</sup> See *supra* notes 165-74 and accompanying text (discussing how the church autonomy doctrine gives churches authority to use internal dispute-resolution methods and allows those resolutions to be binding). For further discussion of the parallels between church autonomy and arbitration, see Helfand, *supra* note 18.

<sup>188</sup> *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 729 (1871).

<sup>189</sup> *Id.* at 728 (emphasis added).

<sup>190</sup> *Id.* This emphasis on the institutional component of *Watson* and *Kedroff* tracks theories that emphasize the church as a primary object of the religious freedoms guaranteed in the First Amendment. See, e.g., Mark E. Chopko & Michael F. Moses, *Freedom to Be a Church: Confronting Challenges to the Right of Church Autonomy*, 3 GEO. J.L. PUB. POL’Y 387, 388 (2005) (“Churches have a right to be free of government control. . . . Religious freedom is not something government bestows or grants, but a right that inheres in a free people and in the church associations they form. A government must recognize this fundamental freedom if it is to govern legitimately. To refuse this freedom is a grave misuse of government power.”). See generally Steven D. Smith, *Freedom of Religion or Freedom of the Church* (Univ. of San Diego Sch. of Law Legal Studies Research Paper Series, Research Paper No. 11-061, 2011), available at <http://ssrn.com/abstract=1911412>.

It is important to observe that in these early years of the church autonomy doctrine, the Court did not express concerns with courts becoming impermissibly “entangled” with religious doctrine.<sup>191</sup> While obviously the Court had not yet developed that language,<sup>192</sup> the Court’s decisions in *Watson*, *Gonzalez*, and *Kedroff* – to the extent they raised the Establishment Clause – focused on the problem of having a court intervene in a case where its decision would amount to anointing one party as the true church.<sup>193</sup> The Court, however, expressed limited concern over having to decide disputes that turned on controversies regarding church doctrine. Rather, the Court in *Watson* instructed courts to adjudicate disputes over compliance with the religious requirements of an express trust by directly investigating religious questions.<sup>194</sup> Thus, in cases of an express trust, courts must engage in the “delicate” and “difficult” task of inquiring “whether the party accused of violating the trust is holding or teaching a different doctrine, or using a form of worship which is so far variant as to defeat the declared objects of the trust.”<sup>195</sup> While *Watson*’s approach to express trusts has troubled scholars attempting to trace the religious question doctrine to the Court’s early church property cases,<sup>196</sup> it fits easily into an interpretation of these cases as being primarily concerned with the institutional autonomy of religious institutions.

Indeed, judicial decisions issued in the wake of *Watson* evidenced significant comfort in resolving religious questions in a variety of contexts.<sup>197</sup>

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<sup>191</sup> See *supra* note 146.

<sup>192</sup> See *supra* note 146.

<sup>193</sup> See *infra* notes 253-56 and accompanying text (describing the introduction of entanglement into the church autonomy cases).

<sup>194</sup> See *Watson*, 80 U.S. (13 Wall.) at 724.

<sup>195</sup> *Id.*

<sup>196</sup> See Greenawalt, *supra* note 51, at 1852 (“The Court’s treatment of its first class of cases, express deeds and wills, is curiously dissonant with its treatment of the latter two. If courts may not competently resolve matters of doctrine and practice, even if these are part of a church constitution, how are those same courts competently to enforce express trusts? Standards will not be easier to apply because they appear in an express trust rather than church documents. Given what the Court says about implied trusts, perhaps a court should enforce an express religious trust against an otherwise legitimate authority only if the breach of the express trust is transparently clear . . . . If this limited degree of protection is appropriate for express trusts, why should courts not also protect against acts of higher church authorities that blatantly violate standards found in authoritative church documents other than trusts?”); John H. Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CALIF. L. REV. 847, 867 (1984) (observing that *Watson* – as opposed to the Court’s later church property cases – would have allowed for the enforcement of an express trust even if it required adjudication of a religious question).

<sup>197</sup> See, e.g., *Taylor v. Jackson*, 273 F. 345, 345-48 (D.C. Cir. 1921) (requiring a church to act in conformity with the requirements of its own regulations by giving the appellees notice before dropping them from church membership); *Sims v. Green*, 76 F. Supp. 669, 677 (E.D. Pa. 1947) (holding that civil courts have the duty to determine “the existence of

For example, only one year after *Watson*, the Supreme Court itself noted that the majority of a congregational church is considered to represent the church only “if [it] adhere[s] to the organization and the doctrines”<sup>198</sup> – an inquiry that requires resolution of underlying religious questions.<sup>199</sup> This approach was further endorsed by a federal circuit court in *Brundage v. Deardorf* in 1893, which famously held that even under *Watson*, courts were authorized to

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church law, whether it has been fairly interpreted and applied, and whether there are judicatories which have functioned in practical compliance with the law and within their jurisdiction,” and finding the defendant’s application of church law to not have been a “flagrant violation of the laws of the church”); *Barkley v. Hayes*, 208 F. 319, 328 (W.D. Mo. 1913) (“[Civil courts] will not interfere with the affairs of an ecclesiastical organization, where the rights of property are involved, unless there has been a palpable attempt by the governmental authorities of the church to abandon altogether the teachings of the original organization.” (emphasis added) (quoting *Mack v. Kime*, 58 S.E. 184, 194 (Ga. 1907))); *Brundage v. Deardorf*, 55 F. 839, 846 (C.C.N.D. Ohio 1893) (finding the majority of a church’s highest judicatory to have committed “[a]n open, flagrant, avowed violation of [church law]” and, therefore, to have ceased to be and represent the church); *Boyles v. Roberts*, 121 S.W. 805, 812 (Mo. 1909) (“[C]ivil courts will investigate and see that the church judicatory has acted, and, if so, whether it has acted within the terms of the constitutional grant of power. If beyond the constitutional provisions of the church, the acts will be declared void.”); *Jennings v. Scarborough*, 56 N.J.L. 401, 408 (1894) (finding a bishop’s order to terminate the rector of his church irregular and, thus, setting aside the order on grounds that notice to the vestry and the rector did not conform to the requirements of church law, and that the rector was deprived of “a hearing upon proofs presented before the committee”); *Cohen v. Eisenberg*, 19 N.Y.S.2d 678, 681-82 (Sup. Ct.) (finding that a majority of the orthodox rabbinate of New York declared poultry sold in New York was not kosher unless it had seals furnished by the Kashruth Association of Greater New York, but refusing to defer to the judgment of the rabbinate on the grounds that the plaintiff’s poultry “would otherwise meet every requirement to make it kosher . . . and . . . would be kosher if slaughtered and prepared in any place in the world except the city of New York”) *aff’d*, 24 N.Y.S.2d 1004 (App. Div. 1940); *Wallace v. Trs. of Gen. Assembly of United Presbyterian Church of N. Am.*, 50 A. 762, 762-64 (Pa. 1902) (voiding the ruling of the general assembly after finding (1) gross irregularity in the religious court’s failure to comply with the procedural requirements of church law; and (2) a lack of evidence which would justify the general assembly’s reversal of the synod); *Landrith v. Hudgins*, 120 S.W. 783, 816 (Tenn. 1907) (inquiring into both the language of a church constitution and its doctrinal commitments in order to resolve a church property dispute and noting that when deciding such disputes “it may become necessary to decide ecclesiastical or theological questions”).

<sup>198</sup> *Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131, 140 (1872).

<sup>199</sup> *Cf.* Note, *When Will Civil Courts Investigate Ecclesiastical Doctrines and Laws?*, 39 HARV. L. REV. 1079, 1080 (1926) (“[*Watson*] distinguished between cases where the property involved had been settled upon trust expressly for the promulgation of a particular set of doctrines, and cases where it had been given to the church without further qualification. There being a trust of the former type and a claim of diversion from the fixed purposes, it was recognized that investigation and comparison of religious doctrines would be unavoidable. This dictum has never been doubted.”).

investigate whether a religious institution's decisions complied with its own internally established rules.<sup>200</sup>

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<sup>200</sup> *Brundage*, 55 F. at 847-48 (“Certainly, the effect of *Watson v. Jones* cannot be extended beyond the principle that a *bona fide* decision of the fundamental law of the church must be recognized as conclusive by civil courts. Clearly, it was not the intention of the court to recognize as legitimate the revolutionary action of a majority of a supreme judicatory, in fraud of the rights of a minority seeking to maintain the integrity of the original compact.” (emphasis added)).

Some courts and scholars have read *Bouldin* and *Brundage* as inconsistent with *Watson* precisely because they limited the deference granted to religious institutions by the *Watson* decision to cases where a court had evaluated adherence to the institution's own religious doctrines. See Note, *Judicial Intervention in Church Property Disputes – Some Constitutional Considerations*, 74 YALE L.J. 1113, 1118 (1965) (arguing that “[t]he policy of complete deference to church tribunals [expressed in *Watson*] was quickly eroded” as “[t]he courts began to demand from the church tribunals adherence to some rudimentary notions of fairness,” with that “erosion beg[inning] in *Bouldin v. Alexander* with an implication that the court would only defer to a church tribunal which had followed its own procedural rules”); see also *Barkley*, 208 F. at 328 (citing *Brundage* as describing the rule that courts may review the decisions of religious institutions for compliance with internal religious rules as an “exception” to the conclusive deference approach expressed in *Watson*); *Boyles*, 121 S.W. at 810-11 (criticizing *Watson* for having endorsed unbridled deference in contradistinction to cases like *Brundage*); *Landrith*, 120 S.W. at 815 (“With great respect, we feel compelled to express the opinion that [*Watson*] is, on the general question, opposed to the weight of authority and of reason.”). Construing the scope of deference granted by *Watson* as excluding the possibility of judicial review holds the potential to recast *Watson* as rejecting the possibility of courts resolving religious questions; one could infer that the reason why courts do not review the decisions of religious institutions is because doing so would require impermissible resolution of religious questions. See *infra* Part II.B (emphasizing the Supreme Court's reliance on the religious question doctrine in rejecting judicial review of decisions reached by religious institutions).

That being said, such a reading may overstate the scope of deference granted by *Watson* to religious institutions. As noted above, the Court in *Watson* instructed lower courts to review the decisions of religious institutions to determine whether they were in compliance with an express trust. See *supra* notes 194-96 and accompanying text. In so doing, *Watson* itself embraces judicial resolution of some religious questions in service of judicial review of the decisions of religious institutions. Thus, it is unlikely that the *Watson* Court would have seen the judicial review of religious institutions endorsed in *Bouldin* and *Brundage* as impermissible on the grounds that it entails judicial resolution of religious questions. Given *Watson*'s treatment of express trusts, combined with the proximity of the Court's decisions in *Watson* and *Bouldin*, it seems more likely that the *Watson* Court did not see deference to religious institutions as standing in tension with judicial resolution of some subset of religious questions. Indeed, the rationale behind *Watson*, one of implied consent of the church's membership, would seem to limit the legitimate deference granted to religious institutions to instances where there has been no underlying fraud, collusion, or arbitrariness – that is, precisely in the ways expressed in cases like *Bouldin* and *Brundage*. For more on implied consent as a foundational principle in the Court's church autonomy cases, see generally Helfand, *supra* note 18.

The Court further entrenched this view in *Gonzalez* – thereby demonstrating its willingness to authorize judicial resolution of religious questions – by determining that the canon law in force when *Gonzalez* was presented was applicable (the Archbishop’s position) as opposed to the canon law in force when the deed of foundation was granted (*Gonzalez*’s position).<sup>201</sup> Rendering such a view constitutes a judicial resolution to a controversy over religious doctrine and practice.<sup>202</sup> The Court’s decision in *Gonzalez* had significant impact on lower courts, serving as the standard applied by courts in reviewing the decisions of religious institutions as late as 1965.<sup>203</sup> Indeed, in the years following *Watson* and *Gonzalez*, lower courts manifested significant willingness to resolve religious questions in any number of circumstances.<sup>204</sup> As such, it is difficult to read the Court’s early church autonomy cases as expressing some inherent worry over civil courts being involved in litigating religion.<sup>205</sup>

To be sure, the *Watson* decision contains scattered concerns over a court’s competence to resolve substantive religious questions. That such concerns appear in *Watson* should be far from surprising given that at the time of the founding, both James Madison<sup>206</sup> and Thomas Jefferson<sup>207</sup> echoed some of

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<sup>201</sup> *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 17 (1929) (“For we are of opinion that the Canon Law in force at the time of the presentation governs, and the lack of the qualification prescribed by it is admitted.”).

<sup>202</sup> It is important to note that at this stage of doctrinal development, the church autonomy doctrine was still a common law doctrine and was not constitutionalized until the Supreme Court’s decision in *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 115-16 (1952). *See supra* note 151. The Court’s holdings and analysis pre-*Kedroff* have been incorporated into constitutional doctrine, however, and continue to be treated as contributing to the contours of contemporary constitutional doctrine. *See, e.g.*, *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 447 (1969) (“In *Kedroff v. St. Nicholas Cathedral*, the Court converted the principle of *Watson* as qualified by *Gonzalez* into a constitutional rule.” (citation omitted)).

<sup>203</sup> *See Note, supra* note 200, at 1122 (collecting cases and observing that “[b]y 1950, the principles of *Watson v. Jones*, modified to minimize arbitrary action by church tribunals, though not of constitutional status, were widely followed by state and federal courts”).

<sup>204</sup> *See supra* note 197.

<sup>205</sup> To be sure, some courts chose to resolve religious questions notwithstanding their broad interpretations of *Watson*. For examples, see *supra* note 200.

<sup>206</sup> James Madison, *Memorial and Remonstrance Against Religious Assessments*, in *THE SEPARATION OF CHURCH AND STATE: WRITINGS ON A FUNDAMENTAL FREEDOM BY AMERICA’S FOUNDERS* 56, 64 (Forrest Church ed., 2004) (“[T]he Bill implies either that the civil magistrate is a competent judge of religious truths, or that he may employ religion as an engine of civil policy. The first is an arrogant pretension falsified by the contradictory opinions of rulers in all ages and throughout the world; the second an unhallowed perversion of the means of salvation.”); *see also* Michael W. McConnell, *The Problem of Singling Out Religion*, 50 *DEPAUL L. REV.* 1, 23-25 (2000) (discussing Madison’s incompetence argument).

<sup>207</sup> Act for Religious Freedom of 1786, VA. CODE ANN. § 57-1 (West 2012) (declaring

John Locke's famous arguments questioning the ability of civil government to speak authoritatively on matters of religious truth.<sup>208</sup>

But these concerns notwithstanding, most of the Court's sparse statements expressing worry about judicial incompetence were tightly cabined within an institutional framework. For example, in *Watson*, the Court worried about judicial inquiry into "doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination," because such questions would require courts to "inquire into all these matters . . . with minuteness and care, for they would become, in almost every case, the criteria by which the validity of the ecclesiastical decree would be determined in the

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religious freedom in part because of "the impious presumption of legislators and rulers civil, as well as ecclesiastical who, being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible"). Thomas Jefferson wrote the Act for Religious Freedom, which the Virginia General Assembly passed in January 1786. *Virginia Statute for Religious Freedom*, VA. HIST. SOC'Y, <http://www.vahistorical.org/sva2003/vsrf.htm> (last visited Mar. 22, 2013).

<sup>208</sup> Locke, *supra* note 176, at 19; *see also* Aziz Z. Huq, *The Signaling Function of Religious Speech in Domestic Counterterrorism*, 89 TEX. L. REV. 833, 870 (2011) (discussing the connection between Madison's incompetence argument and contemporary religious clause jurisprudence). On this count, some scholars have noted that the religious question doctrine can be seen as having longstanding roots dating back to the time of Locke and, in turn, America's founding. *See, e.g.*, Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831, 1859 (2009) ("But Locke also thought that the state was generally incompetent to adjudicate religious questions . . ."). That being said, it appears that application of the religious question doctrine has been uneven over time, with some courts demonstrating willingness to resolve religious questions. *See, e.g.*, *supra* notes 197-202 and accompanying text.

It is also worth noting that Locke's arguments questioning the ability of government to speak authoritatively regarding religious truth focused on the ability of the magistrate to dictate religious faith or conduct to unwilling adherents. Koppelman, *supra* at 1859. In this way, it was primarily an argument against government-imposed religious belief or practice as opposed to judicial resolution of religious questions. Thus, it seems worth wondering whether Locke would have embraced the contemporary articulation of the religious question doctrine; Locke's concerns centered on governmental capacity to choose the correct faith and not judicial capacity to evaluate the relative merits of competing interpretations of religious doctrine. Locke, *supra* note 176, at 30 ("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 myself, and who certainly is less concerned for my salvation than I myself am."). And even these more limited worries about governmental imposition of faith were couched within a larger context of an affirmative right to religious conscience. *Id.* at 29-30 ("Those things that every man ought sincerely to inquire into himself, and by meditation, study, search, and his own endeavours, attain the knowledge of, cannot be looked upon as the peculiar profession of any sort of men."). Accordingly, Locke's argument may speak more directly to cases like *United States v. Ballard*, 322 U.S. 78 (1944), as opposed to the religious question doctrine – a distinction discussed below. *See infra* notes 302-09 and accompanying text.

civil court.”<sup>209</sup> But the Court’s worry – which to some extent focuses on judicial capacity to resolve such matters – was quickly couched in terms of a concern over judicial trespass into religious matters properly within the authority and autonomy of religious institutions: “This principle would deprive these bodies of the right of construing their own church laws . . . and would, in effect, transfer to the civil courts where property rights were concerned the decision of all ecclesiastical questions.”<sup>210</sup>

Similarly, the *Watson* Court contended that “[i]t 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.”<sup>211</sup> Most scholars have interpreted this statement as evidence that in *Watson* the Supreme Court already endorsed some version of the religious question doctrine, interpreting the religion clauses to prohibit judicial resolution of religious questions.<sup>212</sup>

While such a statement does indicate some concern with courts resolving religious questions, the Court seems to speak more directly to why church courts were *better* at interpreting religious doctrine, so as to justify why church courts – as opposed to U.S. courts – should be granted adjudicative authority over core religious disputes. Thus, the Court’s emphasis seems to have been on the relative capacity of both religious institutions and civil courts to resolve religious questions; civil courts, on this view, are simply not “*as competent*” to resolve such matters.<sup>213</sup> But this is not to say that courts are incapable of

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<sup>209</sup> *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733 (1871).

<sup>210</sup> *Id.* at 733-34.

<sup>211</sup> *Id.* at 729 (emphasis added).

<sup>212</sup> For example, Carl Esbeck has recast this statement of the *Watson* Court as justifying the following proposition: “[C]ivil judges are incompetent to resolve questions concerning religious doctrine.” Carl H. Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347, 391 (1984); see also Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?*, 22 ST. JOHN’S J. LEGAL COMMENT. 515, 527 & n.73 (2007) (citing the Court’s statement in *Watson* for the proposition that “one of the justifications sometimes invoked in church-autonomy cases is the asserted incompetence of secular courts to resolve internal church disputes or to interpret and apply religious rules”); Goldstein, *supra* note 102, at 533 (citing the Supreme Court’s statement in *Watson* for the proposition that “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”); Greenawalt, *supra* note 51, at 1851 (“If civil courts were to deny church property to a body that would otherwise control it because the body has been guilty of a ‘departure from doctrine,’ civil courts would address matters for which they are woefully ill-suited, and the legal rule would frustrate changes in religious understandings.”); Idleman, *supra* note 119, at 264 n.134 (describing the Court’s statement in *Watson* as addressing “the matter of judicial competence”).

<sup>213</sup> This is also true of another statement by the *Watson* Court: “Any other than those courts must be incompetent judges of matters of faith, discipline, and doctrine.” *Watson*, 80 U.S. (13 Wall.) at 732 (quoting *German Reformed Church v. Commonwealth ex rel. Seibert*, 3 Pa. 282, 291 (1846)). While this sentence highlights the incompetence argument,



resolving such religious disputes – just that religious institutions should be given preference, and in turn deference, because they stand in a superior position with relation to adjudicating cases turning on religious doctrine and practice. In this way, the *Watson* Court’s statement may better be understood not as addressing judicial competence, but as justifying religious institutional autonomy.

In sum, the Court’s early church property cases were institutional in focus. The Court’s decisions deployed both the Free Exercise and Establishment Clauses to articulate a vision of church autonomy that centered on the institutional character of religious organizations. On the free exercise front, the Court protected church autonomy in order to empower religious institutions to develop religious faith and doctrine free from state interference and manipulation.<sup>214</sup> In order to promote this free development of faith and doctrine, the Supreme Court interpreted the Free Exercise Clause to include the right of churches to “establish tribunals for the decision of questions arising among themselves.”<sup>215</sup> In this way, the free exercise element of church autonomy aimed at protecting the dispute resolution function of religious organizations, with a focus on how religious institutions provide the space for the adjudication of religious questions and the development of religious doctrine.<sup>216</sup>

Similarly, the Court focused on how the institutional character of religious organizations triggered Establishment Clause concerns.<sup>217</sup> The Supreme Court prohibited civil courts from interfering with religious organizations’ internal adjudication of disputes between rival factions because doing so was tantamount to “establishing” a church; from the Court’s perspective, choosing

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it is preceded by the following: “‘The decisions of ecclesiastical courts, like every other judicial tribunal, are final, as they are the best judges of what constitutes an offence against the word of God and the discipline of the church.’” *Id.* (quoting *German Reformed Church*, 3 Pa. at 291). Again, the *Watson* Court appears to think of judicial incompetence to resolve religious questions as relative to the competence of religious institutions – and not in absolute terms. *See id.* (“[A]nd civil courts, if they should be so unwise as to attempt to supervise their judgments on matters which come within their jurisdiction, would only involve themselves in a sea of uncertainty and doubt which would do anything but improve either religion or good morals.”). Given this focus on relative incompetence, it is not surprising that *Watson* authorizes courts to resolve religious questions that arise in the context of express trusts. *See supra* notes 194-96 and accompanying text.

<sup>214</sup> *See* *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952) (“The [*Watson*] opinion radiates, however, a spirit of freedom for religious organizations, an independence from secular control or manipulation – in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”).

<sup>215</sup> *Watson*, 80 U.S. (13 Wall) at 729.

<sup>216</sup> *Id.* (“But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed.”).

<sup>217</sup> *See id.* at 728.

one faction over another to control a church would amount to the government establishing a church and thereby undermining core constitutional commitments.<sup>218</sup> Internal church fights over matters of faith, doctrine, and governance implicate institutional control and were therefore deemed to fall squarely within the responsibility of religious courts.<sup>219</sup> And when religious courts resolved internal disputes between rival factions – that is, decided matters that touched on the institutional character of the religious organization – their method of dispute resolution was afforded autonomy and their decisions were afforded deference under the First Amendment.<sup>220</sup>

B. *From Religious Institutions to Religious Questions*

In subsequent cases, the Supreme Court's church autonomy jurisprudence continued to emphasize the free exercise concerns associated with courts intervening in disputes between religious factions. Thus, in the 1969 church property case *Presbyterian Church in United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*,<sup>221</sup> the Supreme Court stated that where courts inject themselves into church property disputes, "the hazards are ever present of inhibiting the free development of religious doctrine."<sup>222</sup> This notion emphasized the line of precedent from *Watson* through *Kedroff*, highlighting how religious institutions must be granted autonomy and authority to develop, interpret, and apply their own religious rules and doctrine.<sup>223</sup>

But at the same time, the Court also began developing a fundamental overhaul of the church autonomy doctrine, recasting its relationship to the Establishment Clause. Starting in the 1960s, the Court – specifically Justice Brennan – began reinterpreting the church autonomy doctrine in a wholly new context: school prayer. The peculiarity of importing the church autonomy cases to the school prayer context cannot be overstated. The church autonomy doctrine originally dealt with the relationship between institutions.<sup>224</sup> Courts were instructed to avoid encroaching on the right of religious institutions to establish religious tribunals and adjudicate cases within the sphere of religious governance and polity.<sup>225</sup> On the flip side, courts were prohibited from

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<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 727 ("[W]henver the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.").

<sup>220</sup> *Id.*

<sup>221</sup> 393 U.S. 440 (1969).

<sup>222</sup> *Id.* at 449.

<sup>223</sup> *See supra* Part II.A.

<sup>224</sup> *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 16-17 (1929); *see also Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 115-16 (1952).

<sup>225</sup> *See Kedroff*, 344 U.S. at 116.

anointing a winner in a religious factional dispute.<sup>226</sup> Both of these concerns were *institutional*; they were premised upon recognizing a religious institution's dispute-resolution function and on avoiding the establishment of a church by resolving factional disputes within an institution.

In this way, it was far from clear what lesson the church autonomy cases could provide in the context of school prayer. School prayer cases required the Court to consider the role of religion in the absence of religious institutions. Thus, a doctrine like church autonomy – the focus of which had centered on the relationship between U.S. courts and religious institutions – seemed wholly out of place in school-prayer litigation.

To bridge this analytic gap, Justice Brennan filed a concurrence in *School District of Abington Township v. Schempp*<sup>227</sup> that recast the church autonomy cases to stand for a new proposition: “This line [of cases] has settled the proposition that in order to give effect to the First Amendment’s purpose of requiring on the part of all organs of government a strict neutrality toward *theological questions*, courts should not undertake to decide such questions.”<sup>228</sup>

The church autonomy cases, however, said no such thing. The cases, until Justice Brennan’s concurrence in *Schempp*, focused on *religious institutions* rather than on *religious questions*.<sup>229</sup> Thus, *Watson* and *Kedroff* emphasized how the dispute resolution function of religious institutions implicated both Free Exercise and Establishment Clause concerns. And the Court in *Gonzalez* actually waded into the waters of theological questions by deciding which version of canon law applied to the parties’ dispute.<sup>230</sup>

Notwithstanding these tensions, Justice Brennan’s concurrence in *Schempp* further characterized the church autonomy cases as follows:

These principles were first expounded in the case of *Watson v. Jones*, which declared that judicial intervention in such a controversy would open up “the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination . . . .” Courts above all must be neutral, for “[t]he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.”<sup>231</sup>

In this way, Justice Brennan moved the doctrine away from an institutional understanding of church autonomy focused on which institutions should adjudicate religious disputes and moved it toward a substantive understanding of church autonomy focused on what types of questions civil courts cannot

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<sup>226</sup> *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728-29 (1871).

<sup>227</sup> 374 U.S. 203 (1963).

<sup>228</sup> *Id.* at 243 (1963) (Brennan, J., concurring) (emphasis added).

<sup>229</sup> *See supra* Part II.A.

<sup>230</sup> *See supra* note 201 and accompanying text.

<sup>231</sup> *Schempp*, 374 U.S. at 243 (Brennan, J., concurring) (alterations in original) (citations omitted) (quoting *Watson*, 80 U.S. (13 Wall.) at 728, 733).

adjudicate.<sup>232</sup> Put differently, instead of considering where parties should litigate religion, Justice Brennan's analysis asked which questions could not be litigated in court.

After *Schempp*, the emphasis on religious questions became a permanent feature of the church autonomy doctrinal landscape. Thus, speaking on behalf of the majority in *Mary Elizabeth*, Justice Brennan emphasized two "hazards" that flowed from judicial intervention in church property disputes: first, "inhibiting the free development of religious doctrine," and second, "implicating secular interests in matters of purely ecclesiastical concern."<sup>233</sup> In expounding on this second concern, Justice Brennan's majority opinion cited *Schempp*, explaining that "the First Amendment enjoins the employment of organs of government for essentially religious purposes."<sup>234</sup> In turn, Justice Brennan's majority opinion emphasized the Establishment Clause concerns raised when civil courts adjudicate religious questions: "the [First] Amendment [] commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine."<sup>235</sup>

This shift was further entrenched – and made more explicit – with the Court's decision in *Serbian Eastern Orthodox Diocese v. Milivojevich*.<sup>236</sup> In *Milivojevich* the Court addressed whether a court could invalidate a church's decision to remove a bishop on the grounds that the removal decision was "arbitrary."<sup>237</sup> According to the Illinois Supreme Court, Bishop Dionisije Milivojevich had been arbitrarily removed and defrocked because the mother church had failed to follow church procedure in reaching its decision.<sup>238</sup> Writing on behalf of the majority, Justice Brennan reversed the decision of the Illinois Supreme Court, explaining that "it rest[ed] upon an impermissible rejection of the decisions of the highest ecclesiastical tribunals of this hierarchical church" and "impermissibly substitute[d] its own inquiry into church polity and resolutions."<sup>239</sup>

While the Court's holding in *Milivojevich* was consistent with *Watson* and *Kedroff*, its analysis radically changed the inquiry driving the church autonomy

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<sup>232</sup> Fredrick Mark Gedicks has highlighted this shift. In his view, it is the "judicial competence" justification that he sees as the dominant doctrinal rationale underpinning the Court's church property decisions. See Gedicks, *supra* note 171, at 133 ("[T]his line of cases has at least as much to do with judicial competence as church autonomy. After all, when religiously neutral legal doctrine suggests a resolution, church autonomy is irrelevant, and the Court may resolve the dispute in a way that ignores and even contradicts the result that would have been indicated by deference to church polity." (footnotes omitted)).

<sup>233</sup> *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969).

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> 426 U.S. 696 (1976).

<sup>237</sup> *Id.* at 698.

<sup>238</sup> *Serbian E. Orthodox Diocese v. Milivojevich*, 328 N.E.2d 268, 284 (Ill. 1975).

<sup>239</sup> *Milivojevich*, 426 U.S. at 708.

doctrine. Relying on his own concurrence in a previous case, Justice Brennan explained the rationale of the church autonomy doctrine as follows:

Consistently with the First and Fourteenth Amendments “civil courts do not inquire whether the relevant [hierarchical] church governing body has power under religious law [to decide such disputes] . . . . Such a determination . . . frequently necessitates the interpretation of ambiguous religious law and usage. To permit civil courts to probe deeply enough into the allocation of power within a [hierarchical] church so as to decide . . . religious law [governing church polity] . . . would violate the First Amendment in much the same manner as civil determination of religious doctrine.”<sup>240</sup>

Here Justice Brennan puts the cart before the horse. Following his analysis, the reason why courts should not intervene in internal church disputes regarding issues of church governance and polity is *because* doing so “frequently necessitates the interpretation of ambiguous religious law and usage.”<sup>241</sup> Put differently, courts must avoid disturbing church autonomy because they must avoid religious questions.

This line of argument inverted *Watson* and *Kedroff*, where the Court introduced church autonomy to insulate religious dispute resolution.<sup>242</sup> The purpose of church autonomy in both *Watson* and *Kedroff* was to provide for the free development of religious doctrine and to avoid establishing a church through choosing which religious faction represented the “true” church.<sup>243</sup> Thus, on the account provided in *Watson* and *Kedroff*, courts frequently avoided religious questions as a byproduct of the autonomy and deference afforded religious institutions.<sup>244</sup> *Milivojevich* stood *Watson* on its head, asking courts to afford religious institutions deference merely as a method of avoiding religious questions.<sup>245</sup>

Adopting this newly minted inversion of the doctrine predictably forced the Court to distance itself from some of its precedents. Most notably, the Court struggled to reinterpret *Gonzalez*, which appeared to explicitly provide for a “marginal civil court review” of decisions rendered by religious tribunals.<sup>246</sup> As the Court correctly noted, the marginal civil court review envisioned by the *Gonzalez* Court “inherently entail[ed] inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow, or else into the substantive criteria by which they are supposedly to decide the

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<sup>240</sup> *Id.* at 708-09 (alterations in original) (quoting *Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 369 (1970) (Brennan, J., concurring)).

<sup>241</sup> *Id.* at 708.

<sup>242</sup> See *supra* notes 165-220 and accompanying text.

<sup>243</sup> See *supra* notes 165-220 and accompanying text.

<sup>244</sup> See *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 729 (1871).

<sup>245</sup> *Milivojevich*, 426 U.S. at 708.

<sup>246</sup> *Id.* at 712-13.

ecclesiastical question.”<sup>247</sup> Such an inquiry stood at odds with the Court’s new contention that courts could not resolve claims that required resolution of religious questions: “But this is exactly the inquiry that the First Amendment prohibits; recognition of such an exception would undermine the general rule that religious controversies are not the proper subject of civil court inquiry . . . .”<sup>248</sup>

To resolve this newfound tension between *Gonzalez* and the Court’s evolving view of church autonomy, the Court simply implied that *Gonzalez* was no longer good law both by holding – contrary to explicit language in *Gonzalez*<sup>249</sup> – that courts could no longer review the decisions of religious tribunals for “arbitrariness”<sup>250</sup> and by refusing to affirm *Gonzalez*’s holding that courts may also review the decision of religious tribunals for fraud and collusion.<sup>251</sup> There was no room for *Gonzalez* once the Court concluded that church autonomy prohibited courts from addressing religious questions.

To further bolster its focus on religious questions, the Court also incorporated its newly introduced “entanglement” concerns into its church autonomy jurisprudence.<sup>252</sup> Accordingly, the Court stated that “[e]ven when rival church factions seek resolution of a church property dispute in the civil courts there is substantial danger that the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs.”<sup>253</sup>

Indeed, once the Court married its focus on religious questions with its newly announced entanglement doctrine, it was only natural that the Court would develop a “neutral principles” approach, further distancing its Establishment Clause jurisprudence from religious institutional autonomy. In fact, the “neutral principles” approach – which authorized courts to adjudicate church property disputes so long as they rely “exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges”<sup>254</sup> – is premised on this doctrinal shift from religious institutions to religious questions. As articulated by the Court, the approach focuses exclusively on a court’s ability to avoid entanglement in substantive religious

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<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929) (holding that courts can review the decisions of religious institutions only for “fraud, collusion, or arbitrariness”).

<sup>250</sup> *Milivojevich*, 426 U.S. at 713.

<sup>251</sup> *Id.* (discussing in passing “*whether or not* there is room for ‘marginal civil court review’ under the narrow rubrics of ‘fraud’ or ‘collusion’ when church tribunals act in bad faith for secular purposes” (emphasis added)).

<sup>252</sup> *Id.* at 709.

<sup>253</sup> *Id.*

<sup>254</sup> *Jones v. Wolf*, 443 U.S. 595, 603 (1979).

matters as opposed to considering the impact of adjudicating the dispute on religious institutional autonomy:

The primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity. 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.*<sup>255</sup>

Thus, the Court's re-interpretation of the church autonomy doctrine as resting on the entanglement concerns raised by religious questions made the "neutral principles" approach constitutionally preferable to other adjudicative alternatives. Accordingly, the religion clauses were not an obstacle to a court resolving a dispute between religious factions so long as the court could render a decision without addressing religious questions.<sup>256</sup>

By shifting the analysis to avoiding religious questions rather than deferring to religious institutions, the Court's endorsement of the "neutral principles" approach raised the ire of proponents of religious institutional freedom.<sup>257</sup>

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<sup>255</sup> *Id.* (emphasis added).

<sup>256</sup> Entanglement has now become a mainstay of church autonomy cases, especially those involving the ministerial exception. *See, e.g.,* Rweyemamu v. Cote, 520 F.3d 198, 205 (2d Cir. 2008) ("Others have emphasized that taking sides in a religious dispute would lead an Article III court into excessive entanglement in violation of the Establishment Clause."); Petruska v. Gannon Univ., 448 F.3d 615, 620 (3d Cir. 2006) ("Preventing a church from hiring ministers in accordance with its own beliefs . . . would therefore violate the Free Exercise Clause. Furthermore, such litigation would entangle courts in religious matters, in violation of the Establishment Clause."); *vacated*, 462 F.3d 294 (3d Cir. 2006); Askew v. Trs. of the Gen. Assembly of the Church of the Lord Jesus Christ of the Apostolic Faith, Inc., 776 F. Supp. 2d 25, 29 (E.D. Pa. 2011) ("[U]nder the First Amendment civil courts may not entangle themselves in the internal workings and doctrines of religious organizations. This rule was first established in *Watson v. Jones*." (citation omitted)); Van Osdol v. Vogt, 908 P.2d 1122, 1132-33 (Colo. 1996) ("In analyzing a church's choice of a minister, attempts to separate arguably impermissible discriminatory grounds for a decision from grounds stemming from the church beliefs excessively entangles a court with religion. Hence, the Establishment Clause insulates a religious institution's choice of a minister from judicial review." (footnote omitted)).

<sup>257</sup> *See, e.g.,* Adams & Hanlon, *supra* note 90, at 1294-97; Perry Dane, *The Maps of Sovereignty: A Meditation*, 12 CARDOZO L. REV. 959, 969 (1991) ("The problem with [neutral principles] . . . is that it too denies the collective, self-defining character of true legal orders. It treats religious autonomy as a negative freedom – the right not to have secular courts decide religious orthodoxy. But it ignores the positive side of autonomy, the right to define, and to enforce, legal rubrics and rights apart from those provided by the secular state."); Gedicks, *supra* note 171, at 136 ("Moreover, the Court's apparent commitment to church autonomy as a principle, evidenced by *Kedroff* and *Serbian Eastern Orthodox*, may have been called into question by its subsequent holding in *Jones v. Wolf* that a court need not defer to the decisions of church polity when the court believes itself

Indeed, the worry about the Court's reasoning was that it undermined church autonomy by allowing courts to resolve internal church disputes so long as the court could tip-toe around religious questions.<sup>258</sup> In this way the shift from religious institutions to religious questions paved the way for the endorsement of the "neutral principles" approach to church property disputes.<sup>259</sup>

But weaving together entanglement and church autonomy was a curious analytical move for a second, very different set of reasons. In its initial iteration, the Court had suggested that the "excessive entanglement" inquiry considered "whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement."<sup>260</sup> Such continued surveillance – the core entanglement worry considered by the Supreme Court in *Walz v. Tax Commission of the City of New York* – would presumably undermine the religious institution's autonomy and integrity.<sup>261</sup> The Court further elaborated on the hazards of excessive entanglement in *Lemon v. Kurtzman* by emphasizing another worry: the potential for political divisiveness where legislative initiatives propel government into the sphere of religion.<sup>262</sup> Thus, while "[o]rdinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, [ ] political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."<sup>263</sup>

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capable of resolving the dispute under religiously neutral principles."); Mansfield, *supra* note 196, at 863-68.

<sup>258</sup> Gedicks, *supra* note 171, at 136.

<sup>259</sup> That being said, it is far from clear whether a robust defense of an institutional approach to church autonomy entails a different outcome. It is quite possible that the optimal way to divide dispute-resolution responsibilities between religious tribunals and civil courts would be to empower civil courts to retain jurisdiction over cases that can be adjudicated on "neutral principles." Indeed, one might even conclude – using *Watson's* logic – that members of churches impliedly consent to the authority of religious tribunals so long as the dispute hinges on matters of religious governance and polity. For a similar point, see Horwitz, *Churches as First Amendment Institutions*, *supra* note 20, at 118. For further analysis on this point, see Helfand, *supra* note 18 (manuscript at 47-48).

<sup>260</sup> *Walz v. Tax Comm'n*, 397 U.S. 664, 675 (1970).

<sup>261</sup> William P. Marshall, *Remembering the Values of Separatism and State Funding of Religious Organizations (Charitable Choice): To Aid is Not Necessarily to Protect*, 18 J.L. & POL. 479, 485 (2002) ("Similar to the concern underlying limiting government sponsorship of religion, the non-entanglement principle works to limit government's influence over a religious institution in order to preserve the religion's autonomy and integrity. . . . Thus, in *Walz v. Tax Commission*, the Court upheld a church property tax exemption based in part on the policy of eliminating potential church-state confrontations in the form of tax evaluations, tax liens, and tax foreclosures.").

<sup>262</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971).

<sup>263</sup> *Id.*



On either count, entanglement served as a peculiar doctrinal vehicle to capture concerns over judicial resolution of religious questions. Such one-shot judicial decisions simply differ in kind from the “continuing surveillance” that worried the Court in *Walz*.<sup>264</sup> Furthermore, judicial resolution of submitted cases does not, in any obvious way, raise the specter of political divisiveness in the same way the *Lemon* Court worried legislative support of religion might. Indeed, the *Lemon* Court’s entanglement concerns focused on the contentiousness of political debate, predicting that legislative initiatives might lead to all-too divisive electoral politics.<sup>265</sup> Such concerns over divisive electoral politics seem foreign to instances of judicial resolution of religious questions.<sup>266</sup>

And herein lies the irony of the Court’s shift, focusing the church autonomy doctrine away from religious institutions and toward religious questions. Many critics of the Court’s current interpretation of the church autonomy doctrine criticize the adoption of the “neutral principles” approach as providing courts with too much latitude in adjudicating disputes between religious factions.<sup>267</sup>

While an important critique of the “neutral principles” approach, this critique has obscured how the focus on religious questions has handcuffed courts, prohibiting them from adjudicating cases that implicate religious doctrine or require resolution of a religious question.<sup>268</sup> This remains the case even where neither party before the court is a religious institution seeking to have its own internal religious court adjudicate the dispute in place of a civil court.<sup>269</sup> In fact, where a plaintiff seeks adjudication of a claim that turns on religious doctrine, courts now dismiss such cases on Establishment Clause grounds even where there is no religious institution that will fill the adjudicative vacuum. As a result, the problem raised by the Court’s interpretation of the church autonomy doctrine as prohibiting courts from adjudicating religious questions is not simply that in some instances courts may play too much of a role in the litigation of religion. The problem is the wide range of cases in which the role courts play is far too little.

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<sup>264</sup> *Walz*, 397 U.S. at 675 (“In analyzing either alternative the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement.”).

<sup>265</sup> *Lemon*, 403 U.S. at 622 (“Partisans . . . will inevitably champion this cause and promote political action to achieve their goals. Those who oppose state aid . . . will inevitably respond and employ all of the usual political campaign techniques to prevail. . . . It would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith.”).

<sup>266</sup> See *infra* notes 322-43 and accompanying text.

<sup>267</sup> See *supra* note 257.

<sup>268</sup> See *supra* Part I.C.

<sup>269</sup> See *supra* Part I.C.

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### III. FROM JUDICIAL ABSTENTION TO INSTITUTIONAL DEFERENCE: COURTS AS A FORUM FOR LITIGATING RELIGION

This Article has thus far made two primary claims. The first is that in the shadow of the Court's most recent iteration of the Establishment Clause's religious question doctrine, some litigants become trapped in an adjudicative vacuum between public and private law.<sup>270</sup> In such circumstances, the parties have no access to an adjudicative forum that allows them to litigate religion. The second primary claim of this Article is that the existence of this adjudicative gap is a mistake, caused by a shift in the Supreme Court's understanding of the religion clauses.<sup>271</sup> This shift led the Court to interpret the church autonomy doctrine as prohibiting judicial resolution of religious questions instead of requiring deference to religious institutions.

To remedy this adjudicative gap, this Article proposes a return to the origins of the church autonomy doctrine as embodied in *Watson*, *Gonzalez*, and *Kedroff*.<sup>272</sup> In those cases the Court understood the religion clauses as encapsulating a right to religious institutional autonomy.<sup>273</sup> At the core of that autonomy stood the dispute-resolution function of religious institutions. In order to develop religious doctrine and promote religious practice, religious institutions were charged with the resolution of disputes that centered on matters of church governance, discipline, and polity.<sup>274</sup> By contrast, the Court did not express concern over courts resolving claims that turn on religious doctrine or practice – it simply saw religious institutions as having primary authority over such matters.<sup>275</sup>

Understanding church autonomy in this way entails reining in the religious question doctrine. Where no other religious tribunal or court is able to resolve a religious claim, courts should not shrink from fulfilling their standard adjudicative responsibilities. If no other institution lays claim to resolving a religious dispute as a matter of religious institutional right, then courts should fill the adjudicative gap and provide the parties with a forum for litigating religion.

To be sure, such an approach asks courts to determine whether another institution has “laid claim” to resolving a particular dispute, a category that may seem at first glance difficult to apply. In its original formulation of the church autonomy doctrine, however, the Supreme Court provided guidelines for such a category, explaining that the justification for church autonomy flowed from an individual's decision to voluntarily join a religious organization: “All who unite themselves to such a body do so with an implied

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<sup>270</sup> See *supra* Part I.

<sup>271</sup> See *supra* Part II.

<sup>272</sup> See *supra* Part II.A.

<sup>273</sup> See *supra* notes 165-90 and accompanying text.

<sup>274</sup> See *supra* notes 165-90 and accompanying text.

<sup>275</sup> See *supra* notes 191-201 and accompanying text.

consent to this government, and are bound to submit to it.”<sup>276</sup> Scholars have generally been skeptical of employing the implied-consent rationale;<sup>277</sup> however, implied consent provides boundaries to church autonomy, indicating when it is that a religious institution has an interest in the resolution of a dispute. Thus, for example, when pastors sue their churches or when factions within a church contest who controls the organization, thinking in terms of “implied consent” provides an important justification for why courts should remain on the sidelines. Part and parcel with joining the particular religious organization was the underlying decision that such disputes – implicating the future and character of the religious institution – would remain beyond the authority of civil courts and would instead be resolved within the religious institution itself.

By contrast, where individual parties dispute the meaning of religious terminology in a contract or the truth of an allegedly defamatory statement, there is little about the dispute or the disputing parties that indicates any sort of implied consent to the jurisdiction of a religious institution. In this way, adopting *Watson*’s implied-consent model brings the rationale for the jurisdiction of church courts under the church autonomy doctrine significantly closer to the rationale for the jurisdiction of religious tribunals under arbitration doctrine.<sup>278</sup> In both instances, the question determining the authority of the religious institution is whether or not there is reason to deem the parties to have – either expressly or impliedly – consented to the jurisdiction of the religious tribunal or court.<sup>279</sup>

Thus, to determine whether or not to address a religious dispute, courts should begin by taking *Watson* seriously. Doing so will ensure that cases

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<sup>276</sup> *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 729 (1871).

<sup>277</sup> See, e.g., Nathan Clay Belzer, *Deference in the Judicial Resolution of Intrachurch Disputes: The Lesser of Two Constitutional Evils*, 11 ST. THOMAS L. REV. 109, 125 (1998) (“The implied consent theory, however, represents the second troublesome assumption employed by courts using a deference analysis. Implied consent relies upon the ‘unverified and frequently unwarranted’ assumption that local churches necessarily give up their power to control their property by merely affiliating with a hierarchical church.” (footnote omitted) (quoting William G. Ross, *The Need for an Exclusive and Uniform Application of “Neutral Principles” in the Adjudication of Church Property Disputes*, 32 ST. LOUIS U. L.J. 263, 309 (1987))); Patty Gerstenblith, *Civil Court Resolution of Property Disputes Among Religious Organizations*, 39 AM. U. L. REV. 513, 558 (1990) (criticizing courts for using the “implied consent” theory without investigating the actual subjective intent of the parties); Greenawalt, *supra* note 51, at 1874 (“People join hierarchical churches with the understanding that the highest bodies will settle matters. But the idea that members give implied consent to whatever the hierarchy does is not tenable for many members of many churches. They may have consented, instead, to acceptance of the hierarchy’s decisions so long as the hierarchy observes the rules of the church.”).

<sup>278</sup> See *supra* note 63 and accompanying text.

<sup>279</sup> See Helfand, *supra* note 18 (further discussing the analogy between church autonomy and arbitration).

falling into the adjudicative gap between religious arbitration tribunals and church courts will not be dismissed. Instead, courts would adjudicate such disputes precisely because no other institution has laid claim to the case – that is, *because* the case falls in the gap.

To some, however, the existence of such an adjudicative gap may not seem unique and therefore should not serve as a factor in interpreting constitutional provisions.<sup>280</sup> Indeed, merely having an adjudicative gap is not, in and of itself, exceptional. In fact, in analyzing the religious question doctrine numerous scholars have noted its similarity to the political question doctrine,<sup>281</sup> which finds its source in *Marbury v. Madison*: “Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.”<sup>282</sup> In this way, the political question doctrine represents another instance where the substance of a dispute leads courts to refuse resolving the matter submitted.

But the rationale for the political question doctrine largely derives from separation-of-power principles,<sup>283</sup> whereby courts avoid political questions because they are best left to other branches of government. Thus the Supreme Court has explained: “The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.”<sup>284</sup> In this way, the political question doctrine is particularly instructive for application of the religious question doctrine; courts are instructed to avoid political questions because there is some other government branch that is *better suited* to address the issue.<sup>285</sup> Current application of the religious question doctrine asks courts to do

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<sup>280</sup> Indeed, there are other areas of law where legal wrongs have no remedy. *See, e.g.*, Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After Wilkie v. Robbins*, 2007 CATO SUP. CT. REV. 23 (criticizing the fact that the Supreme Court’s recent *Bivens*’ jurisprudence gives rise to constitutional wrongs without legal remedy).

<sup>281</sup> *See* Gedicks, *supra* note 171, at 132 (“The Court has developed a religion clause analogue to the political question doctrine that disposes of many of these cases.”); Goldstein, *supra* note 102, at 499 (“As several commentators have noted, the prohibition on judicial inquiry into religious questions has much in common with the political question doctrine.”); Idleman, *supra* note 119, at 220 (“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.”).

<sup>282</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

<sup>283</sup> *See, e.g.*, *McMellon v. United States*, 387 F.3d 329, 373 (4th Cir. 2004) (describing “separation-of-powers principles” as being “expressed through the political question doctrine”).

<sup>284</sup> *Japan Whaling Ass’n v. American Cetacean Soc’y*, 478 U.S. 221, 230 (1986); *see also* *Khouzam v. Att’y Gen.*, 549 F.3d 235, 249 (3d Cir. 2008) (applying *Japan Whaling*).

<sup>285</sup> It is also worth noting that the political question doctrine itself has been under attack

much more: it asks courts to refuse litigating religion even though no other institution will fill the adjudicative void.<sup>286</sup>

Proponents of the rule that where no religious institution seeks to resolve the dispute courts should resolve religious claims must satisfactorily answer two key questions. First, are courts sufficiently competent to litigate religion? Second, does allowing courts to litigate religion undermine any of the constitutional commitments embodied in the religion clauses? The following Sections address these questions.

#### A. *Why Courts Can Litigate Religion*

Much of the hesitation on both constitutional and policy grounds to allow courts to resolve claims that turn on religious doctrine and practice stems from a concern that courts are ill equipped to render a satisfactory determination on religious issues. Put differently, courts and scholars worry that courts lack the *capacity* to litigate religion.<sup>287</sup>

For example, two of the most recent, and most prominent, exponents of this view, Ira Lupu and Robert Tuttle, have argued that the religious question doctrine is justified by courts' "adjudicative disability" in resolving questions of religion.<sup>288</sup> Thus, they argue, the Establishment Clause instructs courts not to interfere in cases implicating religious doctrine or practice because "claims would require courts to answer questions that the state is not competent to address."<sup>289</sup> Accordingly, the reason why courts cannot decide such cases has nothing to do with the Constitution's desire to "systematically protect the interests of certain classes of parties, defined by religious mission" and is not

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for some time. *See, e.g.*, Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976); Michael E. Tigar, *Judicial Power, the "Political Question Doctrine," and Foreign Relations*, 17 UCLA L. REV. 1135 (1970). There has also been a more recent wave of debate surrounding the political question doctrine. *See generally* Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 243 (2002) (arguing that the "demise of the political question doctrine" indicates the growing power of the Supreme Court and, more troubling, provides a mechanism for the Court to ignore how this growing power comes "at the expense of the other branches").

<sup>286</sup> For examples, see the discussion *supra* Part I.C.

<sup>287</sup> *See, e.g.*, PAUL G. KAUPER, RELIGION AND THE CONSTITUTION 26 (1964) ("[R]eligious truth by its nature [is] not subject to a test of validity determined by rational thought and empiric knowledge . . ."); TRIBE, *supra* note 8, § 14-11, at 1232 ("In short, law in a nontheocratic state cannot measure religious truth."); Lupu & Tuttle, *supra* note 5; *see also* Garnett, *supra* note 51, at 857 (describing and criticizing the view that religious questions are "too hard" and "too weird" to be decided by courts); Goldstein, *supra* note 102, at 533-40 (describing a "judicial fear of the nonrational" as underpinning the religious question doctrine).

<sup>288</sup> Lupu & Tuttle, *supra* note 5, at 137-38.

<sup>289</sup> *Id.* at 138.

an attempt to provide autonomy to religious institutions.<sup>290</sup> Instead, the Establishment Clause prohibits courts from interfering in such religious matters because they have “limited jurisprudential competence” to decide them.<sup>291</sup>

Moreover, the view that courts lack the capacity to litigate religion stems in large part from worry that religious claims lack objective and empirical bases.<sup>292</sup> Thus, “[i]n 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.”<sup>293</sup>

Indeed, proponents of such views marshal as support some of the Supreme Court’s free exercise jurisprudence. For example, in *Ballard v. United States*,<sup>294</sup> the Supreme Court reversed Guy Ballard’s conviction for mail fraud, which had been premised on the conclusion that Ballard had solicited funds for his “I am” movement by making false representations regarding his power to heal others.<sup>295</sup> Concluding that no court could convict Ballard on the grounds that his religious claims were false, the Supreme Court stated:

Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. . . . When the triers of fact undertake that task, they enter a forbidden domain.<sup>296</sup>

Similarly, in *Thomas v. Review Board*,<sup>297</sup> the Supreme Court concluded that the petitioner, a Jehovah’s Witness, could not be refused unemployment benefits where his professed religious beliefs required that he resign his

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<sup>290</sup> *Id.* at 122.

<sup>291</sup> *Id.* at 123. Lupu and Tuttle ground this view of the religious question doctrine within their larger interpretation of the principles underlying the religion clauses. *See id.* at 136-37 (“[T]he [Establishment C]lause represents a key element in the idea of limited government. . . . Marking out regulatory zones from which government is excluded constitutes a central element in a strategy of ensuring the anti-totalitarian quality of governance.”); *see also* Ira C. Lupu & Robert W. Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37 (2002) (further describing this view).

<sup>292</sup> *See* Garnett, *supra* note 51, at 854-58; Goldstein, *supra* note 102, at 502; *id.* at 533 (“[W]hile the resolution of normative questions about religion . . . may frequently lie beyond judicial competence, positive questions about religion . . . do not exceed judicial competence, and such questions can be resolved using ordinary tools of judicial factfinding.”).

<sup>293</sup> Goldstein, *supra* note 102, at 536.

<sup>294</sup> 322 U.S. 78 (1944).

<sup>295</sup> *Id.* at 83.

<sup>296</sup> *Id.* at 86-87.

<sup>297</sup> 450 U.S. 707 (1981).

employment. According to the Court, the Supreme Court of Indiana had erred in characterizing the petitioner as having made a “personal philosophical choice” as opposed to a religious choice.<sup>298</sup> The Court criticized the Supreme Court of Indiana’s skepticism of the petitioner’s religious beliefs, which had been based in part upon the willingness of another Jehovah’s Witness to continue in the same line of work refused by the petitioner:

Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses. . . . 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.<sup>299</sup>

The Court’s language in these cases – “[c]ourts are not arbiters of scriptural interpretation”<sup>300</sup> and religious beliefs are “beyond the ken of mortals”<sup>301</sup> – appear to express a view of adjudicative disability, where courts should avoid religious questions because they are incapable of addressing them.

But such a view confuses two separate claims regarding the appropriate role of law in resolving religious claims. Cases like *Ballard* and *Thomas* caution courts against imposing burdens on citizens based upon their religious beliefs and practices.<sup>302</sup> Thus, just as a party cannot be convicted for mail fraud on the ground that a court determined his sincerely held beliefs to be false, a party cannot be refused unemployment benefits on the grounds that a court doubts whether he has correctly understood the demands of his own faith.<sup>303</sup> In both instances, a court making such a claim would be trampling upon the free exercise rights of the party by subjecting him to burdens flowing from a claim regarding sincerely held religious beliefs. And it is here that the Supreme Court has expressed significant skepticism as to whether lower courts are capable of making such a claim.<sup>304</sup>

The religious question doctrine, by contrast, prohibits courts from resolving claims between two parties that turn on a dispute regarding religious doctrine or practice. For example, parties may dispute the meaning of a religious term

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<sup>298</sup> *Id.* at 713.

<sup>299</sup> *Id.* at 715-16.

<sup>300</sup> *Id.* at 716.

<sup>301</sup> *Ballard*, 322 U.S. at 87.

<sup>302</sup> *Cf.* Eisgruber & Sager, *supra* note 9, at 821 (“But church property cases are different, in that an intention-based approach by a court is likely not only to drift from the safe harbor of a counterfactual prediction that rests squarely on an individual claimant’s phenomenology, but also to enter the normatively unacceptable waters of choosing sides in theological debates.”).

<sup>303</sup> *See* TRIBE, *supra* note 8, § 14-12, at 1245.

<sup>304</sup> *Cf.* PAUL HORWITZ, *THE AGNOSTIC AGE* 192-98 (2011) (discussing *Ballard* in the context of an “agnostic” approach to religious fraud).

in a contract<sup>305</sup> or the meaning and truth of a religious slur.<sup>306</sup> To resolve such claims, courts do not express skepticism regarding the professed beliefs of the parties. They simply must employ standard fact-finding techniques in order to resolve the parties' dispute regarding religious meaning.<sup>307</sup> Put differently, cases like *Ballard* and *Thomas* encroach on the free exercise rights of individuals because the law imposes burdens based upon the subjectively held beliefs of the parties.<sup>308</sup> By contrast, the religious question doctrine is deployed on Establishment Clause grounds to prevent courts from becoming impermissibly entangled with the parties' dispute regarding religious meaning.<sup>309</sup> It is only this latter proposition this Article has thus far argued is constitutionally unsound.

Indeed, such robust claims of courts' adjudicative disability overestimate not only the scope of the Supreme Court's pronouncements on the issue, but also the depth of the challenge posed by allowing courts to litigate religion. First, while some think religious questions are simply "too hard" for courts to resolve,<sup>310</sup> courts already adjudicate claims that turn on deeply complex matters, including technology, science, economics, medicine, and finance.<sup>311</sup> Courts overcome such complexities by using standard fact-finding techniques,

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<sup>305</sup> See *supra* notes 102-18 and accompanying text.

<sup>306</sup> See *supra* notes 119-33 and accompanying text.

<sup>307</sup> For further discussion, see *infra* notes 317-20 and accompanying text (describing the use of standard evidentiary techniques for judicial determination of foreign law), and notes 337-358 and accompanying text (describing application of standard evidentiary burdens to religious tort and contract claims).

<sup>308</sup> Cf. Eisgruber & Sager, *supra* note 9, at 813-22 (stating that courts might be more inclined to resolve disputes turning on religious doctrine or practice where the court's task simply involves filling in gaps in a contract in accordance with the presumed intent of the parties).

<sup>309</sup> For examples, see *supra* Part I.C.

<sup>310</sup> See TRIBE, *supra* note 8, at 1232 ("In short, law in a nontheocratic state cannot measure religious truth."); Garnett, *supra* note 51, at 857 (collecting such views).

<sup>311</sup> See, e.g., *Ethyl Corp. v. EPA*, 541 F.2d 1, 69 (D.C. Cir. 1976) ("When called upon to make de novo decisions, individual judges have had to acquire the learning pertinent to complex technical questions in such fields as economics, science, technology and psychology."); Robin Fretwell Wilson, *Hospital Ethics Committees as the Forum of Last Resort: An Idea Whose Time Has Not Come*, 76 N.C. L. REV. 353, 372 (1998) ("[C]ourts have in fact confronted complex technical evidence in cases concerning computer technology, environmental science, epidemiology, psychology, and economics." (footnotes omitted)); Sarah Samuelson, Note, *True or False: The Expanding "False by Necessary Implication" Doctrine in Lanham Act False Advertising, and How a Revitalized Puffery Defense Can Solve This Problem*, 30 CARDOZO L. REV. 317, 325 (2008) ("Courts are often forced to analyze the validity of claims based on complex areas of science and technology in which they are not experts.").



most notably by having the parties present expert testimony and evidence on the contested issue.<sup>312</sup>

Second, and despite claims that religion lacks the empirical and rational basis needed to be a subject for judicial resolution,<sup>313</sup> courts are already tasked with addressing a variety of legal issues that entail deciding religious matters. For example, courts must determine whether a particular practice is religious to even know whether or not to apply First Amendment protections.<sup>314</sup> Other similar examples of judicial inquiries into religious practice include judicial evaluation of claims under the Religious Land Use and Institutionalized Persons Act (RLUIPA), such as to whether a zoning ordinance places a substantial burden on religious land use<sup>315</sup> or whether failure to provide kosher or halal food in prison places a substantial burden on inmates' religious practice.<sup>316</sup>

Indeed, the challenges courts face when evaluating religious law and doctrine are similar to those courts face in determining questions of foreign law.<sup>317</sup> Where courts are asked by a party to resolve an issue of foreign law, the Federal Rules of Civil Procedure embrace the court's capacity to address the

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<sup>312</sup> See Lewis A. Kaplan, *Experts in the Courthouse: Problems and Opportunities*, 2006 COLUM. BUS. L. REV. 247, 254 ("One option available to a judge faced with a case involving an unfamiliar science or technology is for the parties, or their experts, to tutor the judge on the complex issues present in the case. This is a good way for judges to learn the fundamentals of a particular discipline in a classroom-like setting, rather than in a courtroom."); Denise Ping Lee, Note, *The Business Judgment Rule: Should It Protect Nonprofit Directors?*, 103 COLUM. L. REV. 925, 954 n.173 (2003) ("Critics might counter that director decisions, as opposed to those of other professionals, are much more difficult for judges to evaluate. However, complex decisions are never evaluated on the basis of the judge's own personal knowledge on specific subject matters, but rather with the aid of numerous expert witnesses who help define 'reasonable' behavior.").

<sup>313</sup> See, e.g., KAUPER, *supra* note 287.

<sup>314</sup> See, e.g., Goldstein, *supra* note 102, at 526-28.

<sup>315</sup> See 42 U.S.C. § 2000cc (2006).

<sup>316</sup> See *id.* § 2000cc-1. The Supreme Court has held that RLUIPA's substantial burden test does not violate the Establishment Clause. See *Cutter v. Wilkinson*, 544 U.S. 709, 715 (2005); Kent Greenawalt, *Judicial Resolution of Issues About Religious Conviction*, 81 MARQ. L. REV. 461, 465-71 (1988) (describing the challenges of adopting a standard to resolve questions of "substantial burden").

By contrast, and consistent with their view of adjudicative disability, Ira Lupu and Robert Tuttle have argued that judicial inquiry into what constitutes a substantial burden violates the Establishment Clause. Ira C. Lupu & Robert W. Tuttle, *The Forms and Limits of Religious Accommodation: The Case of RLUIPA*, 32 CARDOZO L. REV. 1907, 1926 (2011).

<sup>317</sup> See Goldstein, *supra* note 102, at 538 ("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."). For further discussion on the analogies between foreign law and religious law and how they should impact judicial treatment of the latter, see Michael A. Helfand, *When Religious Practices Become Legal Obligations: Extending the Foreign Compulsion Defense*, 23 J.L. & RELIGION 535 (2008).

issue notwithstanding its inherent complexity: “[T]he court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence.”<sup>318</sup> Instead of claiming that federal courts lack the adjudicative capacity to interrogate the law of another country, the Federal Rules assume that courts can sift through arguments, briefs, and expert testimony in order to determine the substance of foreign law.<sup>319</sup> Courts similarly should be capable of navigating competing claims regarding the substance of religious law and doctrine.<sup>320</sup>

For these reasons, the claim that courts lack the ability to litigate religion stands on shaky ground. Accordingly, when a dispute falls into the adjudicative gap, because no religious institution stands ready to resolve it, there seems to be little reason to believe that courts are *incapable* of addressing the claims and providing the parties with a forum to redress legal wrongs. In the absence of a religious institutional interest in resolving the case, courts are undoubtedly the institution best able to provide the parties with justice.<sup>321</sup>

Claiming that courts are capable of litigating religion, however, is only the first step. Many concerns regarding judicial resolution of claims turning on religious doctrine and practice are not based on courts’ inability to resolve the matter. Instead, some of the strongest justifications for keeping courts out of the business of litigating religion are based on one of our core constitutional

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<sup>318</sup> FED. R. CIV. P. 44.1 (“The court’s determination [regarding foreign law] must be treated as a ruling on a question of law.”).

<sup>319</sup> Of course, there remains significant debate over the scope and application of this approach to foreign law. *See, e.g.*, Comm. on Int’l Commercial Disputes, *Proof of Foreign Law After Four Decades with Rule 44.1 FRCP and CPLR 4511*, 61 REC. ASS’N B. CITY N.Y. 49 (2006); Carolyn B. Lamm & K. Elizabeth Tang, *Rule 44.1 and Proof of Foreign Law in Federal Court*, 30 LITIG. 31 (2003); Roger M. Michalski, *Pleading and Proving Foreign Law in the Age of Plausibility Pleading*, 59 BUFF. L. REV. 1207 (2011) (examining methodological challenges and inconsistencies in the approach of courts to rendering determinations of foreign law).

<sup>320</sup> Indeed, notwithstanding current judicial interpretation of the Establishment Clause, courts periodically cite and interpret religious texts, doctrines, and rulings with relative comfort. *See, e.g.*, *Darab v. United States*, 623 A.2d 127, 132 (D.C. 1993) (reviewing classical Islamic texts and fatwa to evaluate a party’s claim of right to remain in a mosque); *Zimber v. Felber*, 445 N.Y.S.2d 366, 371 (Sup. Ct. 1981) (reviewing classical Jewish texts in elaborating on the doctrine of implied severance pay in Jewish Law); *Wener v. Wener*, 301 N.Y.S.2d 237, 240-41 (Sup. Ct. 1969) (reviewing classical Jewish texts in order to determine the scope of a husband’s obligations under his agreement to be married in accordance with “the Laws of Moses and Israel”).

<sup>321</sup> By conceiving of religious institutional interests as a side constraint on a court’s adjudication of religious questions, this Article’s approach differs from Jared Goldstein’s approach to the religious question doctrine, which focuses on whether or not the religious issue posed to the court is a “positive religious question.” *See* Goldstein, *supra* note 102, at 501 (“[O]n 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.”).

commitments captured in the First Amendment: the impermissibility of governmental endorsement of religion.

B. *Why Courts Should Litigate Religion*

Even if courts are capable of litigating religion, critics contend that courts nevertheless should not intervene in disputes turning on religious doctrine and practice. The concern typically arises out of the Establishment Clause's prohibitions on entanglement and endorsement.<sup>322</sup>

As observed above,<sup>323</sup> however, phrasing the concern in terms of impermissible governmental entanglement presents somewhat of a disconnect between the foundation of the entanglement doctrine and its application in the context of judicial resolution of religious questions. Indeed, the Supreme Court originally suggested that the "excessive entanglement" inquiry entails asking "whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement."<sup>324</sup> Thus, in *Walz*, the Court conceptualized entanglement as a concern that repeated governmental intrusion into the inner workings of a religious institution would undermine religious institutional freedom.<sup>325</sup> By contrast, judicial resolution of a claim, in and of itself, does not require repeat governmental intrusion.

Moreover, the *Walz* Court's entanglement concerns rested on a fear that governmental oversight would empower the courts to intrude on the inner workings of a religious institution. But such a quintessentially institutional worry seems out of place where a court undertakes resolution of a religious dispute in the adjudicative vacuum between church courts and religious tribunals; in these cases, there is no institution upon which the court might intrude.

To be sure, in *Lemon v. Kurtzman*<sup>326</sup> the Supreme Court expressed another entanglement concern: that excessive entanglement with religion might cause heightened political divisiveness.<sup>327</sup> The Court worried that if legislative initiatives were to propel the government into the sphere of religion, disputing factions might become so partisan as to undermine the normal functioning of democratic government.<sup>328</sup>

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<sup>322</sup> See *infra* notes 323-39 and accompanying text.

<sup>323</sup> See *supra* notes 260-64 and accompanying text.

<sup>324</sup> *Walz v. Tax Comm'n*, 397 U.S. 664, 675 (1970).

<sup>325</sup> See Marshall, *supra* note 261, at 485.

<sup>326</sup> 403 U.S. 602 (1971).

<sup>327</sup> See generally Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667 (2006).

<sup>328</sup> *Lemon*, 403 U.S. at 622 ("Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."); Garnett, *supra* note 327, at 1688.

But allowing courts to litigate religion seems unlikely to provoke the divisive electoral politics suggested by the Court in *Lemon*.<sup>329</sup> For the *Lemon* Court, the concern about political divisiveness was eminently legislative: “It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems that confront every level of government.”<sup>330</sup> The Court worried that excessive entanglement might impact the electoral and legislative politics:

Partisans of parochial schools . . . will inevitably champion [state aid to religiously affiliated elementary and secondary schools,] and promote political action to achieve their goals. Those who oppose state aid . . . will inevitably respond and employ all of the usual political campaign techniques to prevail. Candidates will be forced to declare and voters to choose.<sup>331</sup>

Consequently, entanglement threatened to undermine the normal processes of democratic elections and legislative politics.

But this dynamic does not easily map onto the question of whether courts should be allowed, in the absence of other religious institutions, to resolve disputes turning on religious doctrine or practice. Indeed, it is difficult to draw any straight causal line from the prospect of courts litigating religion to divisive legislative politics. This is not to say that the judiciary and the legislature are hermetically sealed off from one another.<sup>332</sup> Rather, the entanglement concern simply seems misplaced. And for this reason, courts’ frequent use of entanglement language when applying the religious question doctrine only muddies the analytical waters.<sup>333</sup>

The poor fit between classic entanglement concerns and concerns over the courts litigating religious disputes is precisely why scholars – tracking Justice O’Connor’s reformulation of entanglement<sup>334</sup> – have expressed their concerns

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<sup>329</sup> *Lemon*, 403 U.S. at 622 (observing that “[political division along religious lines] is a threat to the normal political process”). It is also worth noting that the “political divisiveness” rationale has been the subject of some significant criticism. See generally Garnett, *supra* note 327.

<sup>330</sup> *Lemon*, 403 U.S. at 623.

<sup>331</sup> *Id.* at 622.

<sup>332</sup> For an example of the significant literature examining the relationship between law, courts, and social change, see GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

<sup>333</sup> See TRIBE, *supra* note 8, at 1231-33 (describing the religious question doctrine as premised upon concerns of impermissible entanglement); see also, e.g., *Jones v. Wolf*, 443 U.S. 595, 603 (1979) (stating that the neutral-principles approach satisfies the requirements of the First Amendment because it “promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice”).

<sup>334</sup> See *Lynch v. Donnelly*, 465 U.S. 668, 689 (1984) (O’Connor, J., concurring) (“Focusing on institutional entanglement and on endorsement or disapproval of religion

over judicial resolution of religious questions primarily as an issue of endorsement.<sup>335</sup> For example, Laurence Tribe has argued that the prohibition against “doctrinal entanglement in religious issues . . . more deeply . . . reflects the conviction that government – including the judicial as well as the legislative and executive branches – must never take sides on religious matters.”<sup>336</sup> Similarly Christopher Eisgruber and Lawrence Sager have argued that “[i]f government were to endorse some interpretations of religious doctrine at the expense of others, it would thereby favor some religious persons, sects, and groups over others.”<sup>337</sup> And Kent Greenawalt has also expressed the concern over judicial resolution of inter-denominational disputes in terms of “the possible endorsement of one minority group.”<sup>338</sup> The concern is that judicial resolution of disputes over religious doctrine and practice would amount to “endorsing” one view of religion, thereby “send[ing] a message to nonadherents that they are outsiders, not full members of the political community.”<sup>339</sup> Thus, in linking the prohibition on courts litigating religion to

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clarifies the *Lemon* test as an analytical device.”); *id.* at 691-92 (“Focusing on the evil of government endorsement or disapproval of religion makes clear that the effect prong of the *Lemon* test is properly interpreted not to require invalidation of a government practice merely because it in fact causes, even as a primary effect, advancement or inhibition of religion. . . . What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community.”).

<sup>335</sup> See *infra* notes 336-39. In the context of the religious question doctrine, choosing between competing denominational views regarding interpretation of religious doctrine and practice touches upon questions of denominational preference in the same way it implicates questions of endorsement. This principle of denominational neutrality has been restated on many occasions. See, e.g., *Larson v. Valente*, 456 U.S. 228, 246 (1982) (“In short, when we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality.”).

<sup>336</sup> TRIBE, *supra* note 8, at 1231. Tribe also observes that this endorsement concern represents the more fundamental rationale behind the religious question doctrine over and above the “desire to preserve the autonomy and self-government of religious organizations.” *Id.*

<sup>337</sup> Eisgruber & Sager, *supra* note 9, at 812.

<sup>338</sup> Greenawalt, *supra* note 10, at 804.

<sup>339</sup> *Lynch*, 465 U.S. at 688 (O’Connor, J., concurring). While this argument does predominate among scholars, there are those who conceptualize the worry in the reverse. For example, Andrew Koppelman has argued that government intervention in religious questions is problematic not because it enhances the standing of one denominational view, but because governmental involvement degrades and corrupts religion. See Koppelman, *supra* note 208, at 1834; Koppelman, *supra* note 51, at 867.

Richard Garnett has argued that some might object to judicial resolution of religious disputes on the ground that government has no interest in the development of religious doctrine. See Garnett, *supra* note 51, at 859. Garnett, however, has also provided a robust

endorsement concerns, such theories emphasize that when courts resolve claims that turn on religious doctrine or practice there must be a loser, and that, by litigating religion, the court will invariably send a message to members of the losing party that they are “outsiders.”<sup>340</sup>

While such concerns are undoubtedly legitimate, they overstate the matter as it pertains to our primary inquiry: cases that fall into the adjudicative gap between religious arbitration and church autonomy. Consider some of the representative examples of these cases discussed above.<sup>341</sup>

Two parties dispute whether or not there has been a breach of contract. The parties’ dispute hinges on the meaning of a religious term in a contract – such as the choice of law provision in *Sieger v. Sieger*, which provided that any disputes be settled “in accordance with the regulations of Speyer, Worms and Mainz,”<sup>342</sup> or the custody agreement in *Zummo v. Zummo*, which prohibited a father from taking his children to “religious services contrary to the Jewish faith.”<sup>343</sup> In each case, a party files a claim in court for breach of contract, presenting a particular definition of the terms and claiming, based on that definition, that the other party has breached the contract. What would it look like for the court to resolve the claim?

To do so, the court would treat the word like any other word. To use the *Restatement (Second) of Contracts*’ approach, the court would begin by determining whether both parties had the same subjective understanding of the term when they signed the contract.<sup>344</sup> If not, the court would then allow the parties to present evidence of how a reasonable person would understand the word, with both sides marshaling evidence of a prior course of dealing or

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defense of the government’s interest in the development of religious doctrine, see Richard W. Garnett, *Assimilation, Toleration, and the State’s Interest in the Development of Religious Doctrine*, 51 UCLA L. REV. 1645, 1650 (2004), which is further bolstered by the recognition emphasized in this Article that judicial intervention in religious doctrine might also enable courts to resolve disputes that might otherwise fall within an adjudicative gap between church courts and religious tribunals. See *supra* Part I.C.

<sup>340</sup> For this reason, even Jared Goldstein, a critic of expansive application of the religious question doctrine, has expressed too strong a worry about judicial resolution of contract cases where the parties dispute religious terminology. See Goldstein, *supra* note 102, at 547-48 (“[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.”).

<sup>341</sup> See *supra* Part I.C.

<sup>342</sup> *Sieger v. Sieger*, 747 N.Y.S.2d 102, 103 (App. Div. 2002) (internal quotation marks omitted); see also *supra* notes 104-11 and accompanying text.

<sup>343</sup> *Zummo v. Zummo*, 574 A.2d 1130, 1146 (Pa. Super. Ct. 1990) (internal quotation marks omitted); see also *supra* notes 112-16 and accompanying text.

<sup>344</sup> RESTATEMENT (SECOND) OF CONTRACTS § 201(1) (1981) (“Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.”).

course of performance, or expert testimony on trade usage.<sup>345</sup> To find in favor of one party or the other would require the court to determine that one interpretation of the word was clearly reasonable and the other party should have known of that meaning.<sup>346</sup> If the court were unable to find one interpretation to satisfy this reasonableness standard, the contract would fail due to lack of mutual assent.<sup>347</sup>

As an example of this dynamic, consider *Frigaliment Importing Co. v. B.N.S. International Sales Corp.*<sup>348</sup> – the celebrated “chicken case” – where two parties disputed whether the term chicken in a contract referred to stewing chickens or broiler chickens.<sup>349</sup> After reviewing the parties’ evidence – which included everything from expert testimony to inferences from government regulations<sup>350</sup> – the court dismissed the complaint, concluding that the plaintiff had failed to carry his burden;<sup>351</sup> the evidence was simply too conflicted to permit the court to find one interpretation of the word “chicken” more reasonable than the other.<sup>352</sup>

The lesson of the chicken case, and cases like it, is that where there is deep controversy over the meaning of a word, dismissal is the likely outcome. For courts to apply this standard framework to contracts with contested religious terminology would presumably lead to the same result. In other words, where there exists significant controversy within a religious tradition over the meaning of a contractual term, courts will not be able to select one interpretation of the term over the other. Indeed, whether the term is “chicken” or “the Jewish faith,” courts faced with rival claims will dismiss the case. Thus, while scholars worry that the judicial resolution of a religious contract claim will be interpreted as the endorsement of one religious perspective over another, the reality is that such cases are prime candidates for dismissal. As a result, in contract cases where there truly is theological division, we need not worry about endorsement.

This is not only true of contract cases. Consider a religious defamation case where the parties’ contest the truth or falsity of the allegedly defamatory

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<sup>345</sup> *Id.* § 201(2)(b) (“Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made . . . that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.”).

<sup>346</sup> *See id.*

<sup>347</sup> *See id.* § 201(3) (“Except as stated in this Section, neither party is bound by the meaning attached by the other, even though the result may be a failure of mutual assent.”).

<sup>348</sup> 190 F. Supp. 116 (S.D.N.Y. 1960).

<sup>349</sup> *Id.* at 117.

<sup>350</sup> *Id.* at 119-29.

<sup>351</sup> *Id.* at 121.

<sup>352</sup> For further discussion of this point, see E. ALLAN FARNSWORTH, *CONTRACTS* § 7.9 (4th ed. 2004).

statement.<sup>353</sup> Under the common law rule, once a plaintiff proves that a statement is defamatory, there is a presumption that the statement is false unless the defendant can prove otherwise.<sup>354</sup> Thus, “truth is a complete defense” to a claim of defamation and the defendant must prove that truth by a preponderance of evidence.<sup>355</sup> Were a court to apply this standard framework to a case of religious defamation, it would begin with the common law presumption that the defamatory claim was false.<sup>356</sup> And if the truth of a defamatory statement was contested based upon a competing view from within the relevant religious community, the defendant would simply be unable to prove by a preponderance of the evidence that the statement was true. In such circumstances, the court would find for the plaintiff not by endorsing one view of religious truth over the other, but simply by enforcing the common law presumption in favor of falsity.<sup>357</sup> Thus, courts can avoid concerns of endorsement in religious tort claims even when such claims occur against the backdrop of intra-religious debate over the truth of the statement.

The importance of authorizing courts to litigate religion above concerns of potential endorsement is heightened in light of the various cases that fall into the adjudicative gap. Some courts have gone as far as to interpret the current prohibition on litigating religion as applying even to cases where there is *no dispute* over the religious doctrine. For example, in two recent New Jersey religious defamation cases, both a federal district court for the District of New Jersey and the Appellate Division of the New Jersey Superior Court concluded that courts become impermissibly entangled in the interpretation of religious doctrine or practice even if there are no “competing theological propositions” involved.<sup>358</sup> Not surprisingly, both courts expressed the religious question doctrine in terms of “entanglement,” avoiding any sort of reference to endorsement.<sup>359</sup> But as already noted, classic entanglement analysis serves as a poor fit to explain the religious question doctrine.

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<sup>353</sup> See, e.g., *Klagsbrun v. Va’ad Harabonim*, 53 F. Supp. 2d 732, 736 (D.N.J. 1999); *Abdelhak v. Jewish Press Inc.*, 985 A.2d 197, 200 (N.J. Super. Ct. App. Div. 2009).

<sup>354</sup> See *Ramirez v. Rogers*, 540 A.2d 475, 477 (Me. 1988) (holding that common law defamation principles apply to cases involving private plaintiffs and nonmedia defendants); *Parrish v. Allison*, 656 S.E.2d 382, 392 (S.C. Ct. App. 2007) (“[T]ruth is an affirmative defense as to which the defendant has the burden of pleading and proof, unless the statement involves a constitutional issue.”); ROBERT D. SACK, *SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS* § 3.3.2 (4th ed. 2012).

<sup>355</sup> See *Frank B. Hall & Co. v. Buck*, 678 S.W.2d 612, 623 (Tex. App. 1984) (“For many years the courts of Texas have held in libel and slander actions that truth of the defamatory statements is an affirmative defense, and the burden of proving truth by a preponderance of the evidence is on the defendant.”); SACK, *supra* note 354, § 3.3.2.

<sup>356</sup> See SACK, *supra* note 354, § 3.3.2 (explaining that this remains true in the majority of jurisdictions).

<sup>357</sup> *Id.*

<sup>358</sup> See *Klagsbrun*, 53 F. Supp. 2d at 742; *Abdelhak*, 985 A.2d at 200.

<sup>359</sup> See *Klagsbrun*, 53 F. Supp. 2d at 737 (citing *Serbian E. Orthodox Diocese v.*



Such decisions are particularly troubling because there is no possibility of expressing the underlying constitutional concern in terms of endorsement. How could there be endorsement in the absence of a dispute over the meaning of the religious term or the truth of the religious statement? Such decisions appear to be the natural outgrowth of a religious question doctrine that vacillates between entanglement and endorsement without truly implicating either concern. Indeed, because any hint of a religious question is currently understood by courts to trigger First Amendment concerns, defendants can avoid legitimate forms of liability by simply insinuating religious doctrinal disputes even where none exist and where doing so undeniably frustrates the original, mutually agreed-upon understanding of the parties. Disingenuous – or even worse, fraudulent – invocation of the religious question doctrine becomes an inviting option for defendants who otherwise would likely face significant financial liability.

Embracing the program of litigating religion protects against such litigation mishaps by asking courts to adjudicate claims that turn on religious doctrine or practice where no other religious institution is in a position to do so. Such an approach avoids dismissing a case too soon before a court can determine whether the religious issues underlying the parties' claims truly require dismissal. Indeed, when litigating religion, courts can largely avoid the concerns of endorsement while still adjudicating claims where endorsement is not a concern.

On the one hand, standard contract and tort doctrine put sufficient evidentiary burdens on the parties to ensure that claims implicating true competing theological propositions are rejected by the court.<sup>360</sup> Where there truly is a theological dispute, complaining parties will not be able to maintain their claims because they will not be able to satisfy the evidentiary burdens for “reasonableness” or “truth.” As a result, concerns that permitting courts to litigate religion will lead to impermissible endorsement of one side in a religious dispute are at best overblown and at worst invisible. Thus, the pressing need expressed by courts to dismiss the case on the front end – once they have determined that there is a religious question underlying the claims – overestimates the way in which standard contract and tort law enable the court to avoid impermissible endorsement on the back end.

On the other hand, having courts litigate religion – waiting to dismiss cases based on private law doctrine as opposed to constitutional doctrine – ensures that they do not short-circuit claims turning on religious doctrine or practice based upon phantom endorsement worries premised upon non-existent

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Milivojevich, 426 U.S. 696, 723 (1976)); *Abdelhak*, 985 A.2d at 200 (“Where, as here, a jury cannot evaluate plaintiff’s cause of action without developing a keen understanding of religious doctrine, and without applying such religious doctrine to the facts presented, the excessive entanglement that the First Amendment seeks to avoid is squarely presented.”).

<sup>360</sup> See *supra* notes 342-57 and accompanying text.

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theological disputes.<sup>361</sup> Indeed, recognizing that courts have both the capacity and authority to litigate religion will ensure that disputes turning on uncontested theological claims will be adjudicated in accordance with standard principles of law and equity. If the true worry underlying the prohibition on courts litigating religion is endorsement, then we may not need a religious question doctrine to effectuate such goals.

This is not to say that embracing the litigating-religion agenda does not raise any potential constitutional worries. Wholly supporting judicial resolution of religious claims in the adjudicative gap may give rise to cases where parties are able to satisfy the evidentiary burdens of contract law or tort law, but judicial resolution of the case might still be seen as endorsing the view of a dominant faction in a religious dispute over the view of a minority faction. Thus, there may be cases where a plaintiff can satisfy his burden of proving a particular interpretation of a religious term in a contract, but the court's finding in his favor might still be construed as an endorsement if there is some minority interpretation rejected by the court. Such cases would need to walk a fine line; the minority view would have to be sufficiently marginal so that it would not undermine the plaintiff's claim, but significant enough to raise the worry of endorsement. Such cases, even if limited in number, might give us pause before endorsing judicial resolution of claims turning on religious questions even where no other religious institution is in a position to do so.

Indeed, there remains reason to worry that judicial intervention in such cases might impact the internal development of religious doctrine within religious institutions.<sup>362</sup> Thus, in cases where courts resolve a claim turning on religious doctrine by incorporating a religious community's dominant interpretation, we might worry that such judicial decisions will further solidify the dominant view and, in turn, further marginalize the minority view. We might also worry that, although some instances of litigating religion do not directly interfere with a religious institution because no institution is positioned to adjudicate the case, judicial resolution of religious claims might be seen as interfering with the right of religious institutions "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."<sup>363</sup> Put differently, the distinction between endorsing an interpretation of religious doctrine and establishing a particular faction as the true church might collapse given the potential impact of judicial interference in doctrinal development on religious institutional autonomy.

While this is a serious worry about implementing the litigating-religion agenda, it does by its own terms reject the religious question paradigm advanced in cases such as *Milivojevich* and *Mary Elizabeth*.<sup>364</sup> It premises

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<sup>361</sup> See *supra* notes 358-59 and accompanying text.

<sup>362</sup> I am indebted to Fredrick Mark Gedicks for emphasizing this concern.

<sup>363</sup> *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952).

<sup>364</sup> See *supra* Part II.B (discussing the concern that judicial intervention might exacerbate partisan divisiveness).

concern over courts serving as a forum for litigating religion not on claims of adjudicative disability or doctrinal endorsement; instead, the concern arises once we extend the boundaries of what constitutes interference with religious institutional autonomy. Thus, on such an account, the church autonomy doctrine does not simply protect actual religious institutional governance and decisionmaking. It also precludes courts from adjudicating cases where the impact of the judicial decision might trickle down, further tipping the scales within a religious community on how to decide core institutional matters.<sup>365</sup>

Such a wide-ranging expansion of what it means to interfere with religious institutional decisionmaking, however, would seem to be too much for the religion clauses to bear. Indeed, one wonders whether under such a view governmental interactions with religious institutions currently deemed to pass constitutional muster could be recast as interference with internal religious institutional decisionmaking.<sup>366</sup> Instead, if we are taking institutions seriously, it seems fair to draw a line between cases actually implicating religious institutional autonomy and worries that judicial intervention might trickle down to impact religious institutional development of religious doctrine.

This need to draw a line between actual and potential church autonomy worries is particularly important given the need to balance such worries against the overarching value in providing parties with a forum to seek redress of legal wrongs. In its initial treatment of the church autonomy doctrine – as expressed in *Watson*, *Gonzalez*, and *Kedroff* – the Supreme Court appears to have struck this balance in favor of judicial resolution of religious questions.<sup>367</sup> In those cases, the Supreme Court adopted an institutional view of the Establishment Clause, asking courts to abstain from adjudicating religious disputes only in order to defer to religious tribunals or courts.<sup>368</sup> In this way, the Supreme Court

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<sup>365</sup> As noted above, the Supreme Court has long worried that judicial resolution of religious questions might intrude impermissibly on the authority of religious institutions to develop their own religious doctrine. *See, e.g., Kedroff*, 344 U.S. at 116; *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733-34 (1871) (“This principle would deprive these bodies of the right of construing their own church laws . . . and would, in effect, transfer to the civil courts where property rights were concerned the decision of all ecclesiastical questions.”).

<sup>366</sup> For example, one wonders on such an account whether the Court could maintain its view that there exists a subset of permissible but not required accommodations of religious practices. *See, e.g., Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005) (“[T]here is room for play in the joints between’ the Free Exercise and Establishment Clauses, allowing the government to accommodate religion beyond free exercise requirements, without offense to the Establishment Clause.” (quoting *Locke v. Davey*, 540 U.S. 712, 718 (2004))). There are, to be sure, scholars who see permissive accommodation as raising Establishment Clause worries. *See, e.g.,* Carl H. Esbeck, *When Accommodations for Religion Violate the Establishment Clause: Regularizing the Supreme Court’s Analysis*, 110 W. VA. L. REV. 359 (2007); Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 557 (1991).

<sup>367</sup> *See supra* Part II.A.

<sup>368</sup> *See supra* Part II.A.

assumed that lower courts would resolve religious claims unless there was another religious institution to which the court should defer. Using this approach, the *Gonzalez* Court itself rendered a view regarding religious doctrine without worry that it was somehow impermissibly litigating religion.<sup>369</sup> Put differently, the Court assumed that all cases would be adjudicated by a civil court in the first instance, unless a religious institution's interest took precedence. On this line of analysis, there would never be an adjudicative gap.

Closing the adjudicative gap undeniably comes with some costs. Not only does it mean that vestiges of endorsement may creep into judicial decisions, but further tasking courts to resolve religious questions in the absence of strong institutional interests may in some ways corrupt the very development of religious doctrine that church autonomy is meant to protect.<sup>370</sup> But, notwithstanding these potential negative consequences, the early church property cases still understood the Establishment Clause as dividing up dispute resolution responsibility between civil courts and religious courts.<sup>371</sup> Such an interpretation undoubtedly required balancing endorsement and corruption worries against the need to provide plaintiffs a forum in which to litigate religion. By focusing on deference to religious institutions as opposed to resolving religious questions, the Court implicitly sacrificed various potential establishment concerns in order to provide parties an opportunity to secure redress for legal wrongs. The considered judgment in these early church property cases was not perfect, but balancing competing values never is. But by taking this approach, the Court ensured that all claims would be adjudicated. In this way, the Court's focus on deferring to religious institutions was linked to embracing religious questions; by emphasizing the importance of dividing up responsibility over the resolution of religious disputes, the Court fully embraced its adjudicative role even when that entailed addressing religious questions. Accordingly, taking a strong institutional view of the Establishment Clause pushed the Court to embrace litigating religion.

While far from uniform, trends in legal scholarship appear to have revived this institutional vision of the Establishment Clause.<sup>372</sup> These trends were further entrenched by the Supreme Court's recent decision in *Hosanna-*

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<sup>369</sup> See *supra* notes 152-59, 201 and accompanying text.

<sup>370</sup> For the most forceful statement of the "corruption" worry, see Koppelman, *supra* note 208, at 1846, and Koppelman, *supra* note 51, at 870.

<sup>371</sup> See *supra* note 50 and accompanying text.

<sup>372</sup> Examples of this resurgence abound. See, e.g., Berg et al., *supra* note 12, at 175; Brady, *supra* note 48, at 1636; Chopko & Moses, *supra* note 190, at 388; Garnett, *supra* note 20, at 293; Garnett, *supra* note 51, at 863; Gedicks, *supra* note 171, at 105-06; Greenawalt, *supra* note 51, at 1844; Horwitz, *Churches as First Amendment Institutions*, *supra* note 20, at 112; Horwitz, *Three Faces of Deference*, *supra* note 20, at 1139; Howe, *supra* note 171, at 92; Laycock, *supra* note 48, at 1396; Lund, *supra* note 12; Smith, *supra* note 190, at 2.

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*Tabor*.<sup>373</sup> The focus of this revival, however, has primarily rested on emphasizing the importance of institutional deference and church autonomy. But while the trajectory of scholarship has explored the impact of the Establishment Clause on disputes that implicate religious institutions, it has failed to consider how to approach instances where no religious institutions fill the adjudicative void. Taking institutions seriously also requires considering how to address cases where institutions are absent; and it is here that the litigating religion agenda asks courts to play this role.

#### CONCLUSION

The aim of this Article has been to consider how we expect parties to litigate religion. Investigating how parties can resolve disputes that turn on religious doctrine and practice requires an examination of a wide array of institutions. On the one hand, religious arbitration tribunals are tasked with resolving religious disputes through arbitration agreements, and courts grant wide deference to such tribunals in keeping with principles of arbitration law. On the other hand, religious courts adjudicate disputes arising within religious institutions, and First Amendment principles protect their decisions from judicial interference.

Recognizing the wide range of institutions capable of litigating religion also highlights the cases falling between the cracks. Those cases that fall into the adjudicative gap face the further hurdle of the religious question doctrine, which prevents courts from resolving disputes turning on religious doctrine and practice. As a result, plaintiffs often are left without a forum in which to seek legal redress since neither religious institutions nor civil courts can resolve their claims. These cases – falling between public law and private law institutions – are particularly troubling given judicial expansion of the religious question doctrine to cases where there is no genuine theological disagreement underlying the dispute. In such instances, the Establishment Clause's entanglement and endorsement concerns do not provide adequate justification for judicial abstention from litigating religion. Moreover, these trends are particularly problematic because they enable individuals to cloak their tortious conduct and contractual breaches in religious terminology in order to avoid legal liability. Thus, by inverting the church autonomy doctrine as concerned with judicial avoidance of religious questions – as opposed to judicial deference to religious institutions – the Supreme Court has put religious adherents at significant risk of wrongful conduct that is shielded by a distorted interpretation of the Establishment Clause.

To rectify this state of affairs we must return to the origins of the church autonomy doctrine. Instead of viewing skeptically the judiciary's capacity to litigate religion, the Supreme Court originally conceptualized church autonomy as simply requiring deference to religious institutions. But where a religious institution does not wait in the wings to resolve a dispute, there is ample reason

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<sup>373</sup> *Hosana-Tabor Evangelical Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012).

to believe that courts have both the ability and authority to resolve claims turning on religious doctrine and practice. And by arming courts to once again litigate religion, we can better provide religious adherents with the full range of constitutional protections embodied in the religion clauses.