

ESSAYS

A CRITIQUE OF *HOBBY LOBBY* AND THE SUPREME COURT'S HANDS-OFF APPROACH TO RELIGION

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INTRODUCTION

Over the past several decades, the United States Supreme Court has demonstrated an increasing refusal to engage in a close evaluation of the religious nature of Free Exercise and Establishment Clause¹ claims, instead deferring to adherents' characterizations of the substance and significance of a religious practice or belief.² The Supreme Court's hands-off approach, which it has justified on both constitutional and practical grounds, has

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1 U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

2 See, e.g., *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 458 (1988) (stating that interpreting the propriety of certain religious beliefs puts the Court "in a role that [it was] never intended to play"); *United States v. Lee*, 455 U.S. 252, 257 (1982) (refusing to assess the "proper interpretation of the Amish faith"); *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 721 (1976) (noting the "error" of "delv[ing] into . . . church constitutional provisions"); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 451 (1969) (refusing to "engage in the forbidden process of interpreting . . . church doctrine"); *United States v. Ballard*, 322 U.S. 78, 87 (1944) (avoiding the "forbidden domain" of evaluating religious doctrine). See generally Symposium, *The Supreme Court's Hands-Off Approach to Religious Doctrine*, 84 NOTRE DAME L. REV. 793 (2009).

attracted considerable scholarly attention, producing a substantial and growing body of literature assessing and, at times, critiquing the Court's approach.³

³ See, e.g., Kristen A. Carpenter, *Limiting Principles and Empowering Practices in American Indian Religious Freedoms*, 45 CONN. L. REV. 387 (2012); Christopher L. Eisgruber & Lawrence G. Sager, *Does It Matter What Religion Is?*, 84 NOTRE DAME L. REV. 807 (2009); Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What Are We Talking About?*, 84 NOTRE DAME L. REV. 837 (2009) [hereinafter Garnett, *A Hands-Off Approach to Religious Doctrine*]; Richard W. Garnett, *Assimilation, Toleration, and the State's Interest in the Development of Religious Doctrine*, 51 UCLA L. REV. 1645 (2004) [hereinafter Garnett, *Development of Religious Doctrine*]; Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) like the Boy Scouts?*, 22 ST. JOHN'S J. LEGAL COMMENT. 515 (2007); Frederick Mark Gedicks, *Towards a Defensible Free Exercise Doctrine*, 68 GEO. WASH. L. REV. 925 (2000); Jared A. Goldstein, *Is There a "Religious Question" Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U. L. REV. 497 (2005); Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843 (1998) [hereinafter Greenawalt, *Religious Property*]; Kent Greenawalt, *Hands Off: When and About What*, 84 NOTRE DAME L. REV. 913 (2009) [hereinafter Greenawalt, *Hands Off*]; Michael A. Helfand, *Between Law and Religion: Procedural Challenges to Religious Arbitration Awards*, 90 CHI.-KENT L. REV. 141 (2015); Michael A. Helfand, *Litigating Religion*, 93 B.U. L. REV. 493 (2013) [hereinafter Helfand, *Litigating Religion*]; Michael A. Helfand & Barak D. Richman, *The Challenge of Co-Religionist Commerce*, 64 DUKE L.J. 769 (2015); Paul Horwitz, *Act III of the Ministerial Exception*, 106 NW. U. L. REV. 973 (2012); Andrew Koppelman, *The Troublesome Religious Roots of Religious Neutrality*, 84 NOTRE DAME L. REV. 865 (2009); Randy Lee, *When a King Speaks of God: When God Speaks to a King: Faith, Politics, Tax Exempt Status, and the Constitution in the Clinton Administration*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 391; Howard Lesnick, *The Religious Lawyer in a Pluralist Society*, 66 FORDHAM L. REV. 1469 (1998); Samuel J. Levine, *Hosanna-Tabor and Supreme Court Precedent: An Analysis of the Ministerial Exception in the Context of the Supreme Court's Hands-Off Approach to Religious Doctrine*, 106 NW. U. L. REV. COLLOQUY 120 (2011) [hereinafter Levine, *Hosanna-Tabor*]; Samuel J. Levine, *Rethinking the Supreme Court's Hands-Off Approach to Questions of Religious Practice and Belief*, 25 FORDHAM URB. L.J. 85 (1997) [hereinafter Levine, *Rethinking the Supreme Court's Hands-Off Approach*]; Samuel J. Levine, *The Supreme Court's Hands-Off Approach to Religious Doctrine: An Introduction*, 84 NOTRE DAME L. REV. 793 (2009) [hereinafter Levine, *The Supreme Court's Hands-Off Approach: An Introduction*]; Christopher C. Lund, *Rethinking the "Religious-Question" Doctrine*, 41 PEPP. L. REV. 1013 (2014); Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER 35 (2015); Edward C. Lyons, *Causation and Complicity: The HHS Contraceptive Mandate and Asymmetrical Burdens on Free Exercise*, 55 S. TEX. L. REV. 229 (2013); William P. Marshall, *Bad Statutes Make Bad Law: Burwell v. Hobby Lobby*, 2014 SUP. CT. REV. 71 [hereinafter Marshall, *Bad Statutes*]; William P. Marshall, Smith, Ballard, and the Religious Inquiry Exception to the Criminal Law, 44 TEXAS TECH L. REV. 239 (2011) [hereinafter Marshall, *Religious Inquiry*]; Bernadette Meyler, *Commerce in Religion*, 84 NOTRE DAME L. REV. 887 (2009); Scott M. Noveck, *The Promise and Problems of Treating Religious Freedom as Freedom of Association*, 45 GONZ. L. REV. 745 (2010); Jeffrey Shulman, *The Outrageous God: Emotional Distress, Tort Liability, and the Limits of Religious Advocacy*, 113 PENN ST. L. REV. 381 (2008); Alex Talchief Skibine, *Culture Talk or Culture War in*

Although *Burwell v. Hobby Lobby Stores, Inc.*,⁴ is widely viewed as a landmark case on a number of grounds,⁵ an important but somewhat overlooked point of contention between the majority opinion and the primary dissenting opinion in *Hobby Lobby* revolves around the application of the hands-off approach.⁶ Specifically, writing for the majority, Justice Alito insisted that the Court must defer to the plaintiffs' characterization of both the nature and the degree of the burden that would be placed on their religious exercise if they were required, under the Affordable Care Act

Federal Indian Law?, 45 TULSA L. REV. 89 (2009); Priscilla J. Smith, *Who Decides Conscience? RFRA's Catch-22*, 22 J.L. & POL'Y 727 (2014); Nelson Tebbe, *Nonbelievers*, 97 VA. L. REV. 1111 (2011); Mayu Miyashita, Comment, *City of Boerne v. Flores and Its Impact on Prisoners' Religious Freedom*, 25 NEW ENG. J. CRIM. & CIV. CONFINEMENT 519 (1999); see also Nat'l Spiritual Assembly of the Bahá'ís of the U.S. Under the Hereditary Guardianship, Inc. v. Nat'l Spiritual Assembly of the Bahá'ís of the U.S., Inc., 628 F.3d 837, 846 n.2 (7th Cir. 2010) (referring to "the so-called 'hands-off' doctrine in disputes over religious property"); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1039 (7th Cir. 2006) (referring to "[t]he ministerial exception, and the hands-off approach more generally").

4 134 S. Ct. 2751 (2014).

5 See, e.g., Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673 (2015); Trevor Burrus, *From Status to Contract to Status: Burwell v. Hobby Lobby and the Primitivism of Politics*, 9 N.Y.U. J.L. & LIBERTY 60 (2015); Leslie C. Griffin, *Hobby Lobby: The Crafty Case that Threatens Women's Rights and Religious Freedom*, 42 HASTINGS CONST. L.Q. 641 (2015); Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154 (2014); Jason Iuliano, *Do Corporations Have Religious Beliefs?*, 90 IND. L.J. 47 (2015); Lyman Johnson & David Millon, *Corporate Law After Hobby Lobby*, 70 BUS. LAW. 1 (2014); Lupu, *supra* note 3; Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015); Eric Rassbach, *Is Hobby Lobby Really a Brave New World? Litigation Truths About Religious Exercise by For-Profit Organizations*, 42 HASTINGS CONST. L.Q. 625 (2015); David B. Schwartz, *The NLRA's Religious Exemption in a Post-Hobby Lobby World: Current Status, Future Difficulties, and a Proposed Solution*, 30 A.B.A. J. LAB. & EMP. L. 227 (2015); Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions After Hobby Lobby*, 82 U. CHI. L. REV. (forthcoming 2015), <http://ssrn.com/abstract=2496218>; Amy J. Sepinwall, *Corporate Piety and Impropriety: Hobby Lobby's Extension of RFRA Rights to the For-Profit Corporation*, 5 HARV. BUS. L. REV. 173 (2015); Neil S. Siegel & Reva B. Siegel, *Compelling Interests and Contraception*, 47 CONN. L. REV. 1025 (2015); Symposium, *Issues of Reproductive Rights: Life, Liberty & the Pursuit of Policy*, 28 J.L. & HEALTH 1 (2015); Symposium, *Religious Accommodation in the Age of Civil Rights*, 38 HARV. J.L. & GENDER VII (2015); Symposium, *Religious Accommodation in the Age of Civil Rights*, 9 HARV. L. & POL'Y REV. 1 (2015); Thad Eagles, Note, *Free Exercise, Inc.: A New Framework for Adjudicating Corporate Religious Liberty Claims*, 90 N.Y.U. L. REV. 589 (2015).

6 For examples of scholarship that have discussed the relevance of the Court's hands-off approach in the context of the *Hobby Lobby* case, see, for example, Lupu, *supra* note 3; Lyons, *supra* note 3; Marshall, *Bad Statutes*, *supra* note 3; Smith, *supra* note 3.

(ACA),⁷ to provide employees with health insurance that includes access to certain forms of contraception.⁸ According to Justice Alito, the hands-off approach precludes the Court from inquiring into the accuracy or plausibility of the plaintiffs' contention that complying with the ACA would impose a substantial burden on their religious practice.⁹ Writing for the dissenters, Justice Ginsburg offered a sharply contrasting view, concluding that Court need not accept the plaintiffs' assertion that providing such coverage would place a substantial burden on their exercise of religion.¹⁰ Instead, Justice Ginsburg concluded that Hobby Lobby's connection to the use of contraceptives by its employees is too attenuated to trigger an exemption from the requirement that it provide such coverage.¹¹

A close look at the majority and dissenting opinions seems to suggest that Justice Alito and Justice Ginsburg both relied on a hands-off approach to religion, but at the same time they reached very different conclusions. The sharp differences between Justices Alito and Ginsburg may thus be a further indication that, in addition to its other drawbacks,¹² the Court's hands-off approach is unwise and unworkable on its own terms, as its

7 Patient Protection and Affordable Care Act of 2010 § 1001(5), 42 U.S.C. § 300gg-13(a)(4) (2012).

8 See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2777–79 (2014).

9 See *id.* at 2778–79.

10 See *id.* at 2798–99 (Ginsburg, J., dissenting).

11 See *id.* at 2799.

12 See, e.g., Garnett, *A Hands-Off Approach to Religious Doctrine*, *supra* note 3 (examining the scope of the hands-off approach); Garnett, *Development of Religious Doctrine*, *supra* note 3 (arguing that governments are necessarily interested in and involved with religious claims and content); Goldstein, *supra* note 3, at 501 (“[I]t is incoherent to speak of a general prohibition on judicial examination of religious questions.”); Greenawalt, *Religious Property*, *supra* note 3 (examining problems resulting from the Court's hands-off approach to conflicts over religious property); Greenawalt, *Hands Off*, *supra* note 3, at 913 (noting the breadth of issues affected by the Court's hands-off approach); Helfand, *Litigating Religion*, *supra* note 3 (arguing that the Court's hands-off approach may unjustly deprive litigants of a forum for adjudicating religious claims); Levine, *Hosanna-Tabor*, *supra* note 3 (examining *Hosanna-Tabor* as an opportunity for the Court to revise the hands-off approach); Levine, *Rethinking the Supreme Court's Hands-Off Approach*, *supra* note 3, at 86 (arguing that the hands-off approach “may lead to a number of disturbing results, some of which have already evidenced themselves in Supreme Court decisions in both Free Exercise and Establishment Clause cases”); Levine, *The Supreme Court's Hands-Off Approach: An Introduction*, *supra* note 3 (describing critiques of the hands-off approach); Lund, *supra* note 3 (arguing that religious-question cases often involve the kinds of temporal and empirical issues that courts typically adjudicate); Marshall, *Religious Inquiry*, *supra* note 3 (describing difficulties with the hands-off approach when considered in the context of the Court's First Amendment jurisprudence); Smith, *supra* note 3 (arguing that the Court's hands-off approach will lead to inconsistent outcomes in religious exercise cases).

meaning and application remain far from clear. Moreover, the continued implementation of a hands-off approach will be particularly challenging with the increasing emergence of new health care technologies and the continuing diversity of religious practice in the United States. Thus, as *Hobby Lobby* demonstrates, rather than providing a mechanism for judges to resolve cases involving complex issues of law and religion, the hands-off approach serves to exacerbate the difficulties and differences that divide judges in adjudicating religious claims.

Part I of this Essay provides a brief overview for analyzing the Supreme Court's hands-off approach to religious doctrine. Specifically, this Part presents a summary of problems posed by the hands-off approach, followed by a brief taxonomy of different forms of judicial inquiry into religion. This Part aims to clarify which forms of inquiry are permissible—and typically necessary—for adjudication of a case involving a religious claim, and which forms of inquiry are precluded under the hands-off doctrine. Part II of this Essay applies the hands-off framework to the *Hobby Lobby* decision, considering the taxonomy of forms of judicial inquiry into religion in the context of both Justice Alito's majority opinion and Justice Ginsburg's dissenting opinion. This Part finds that while Justice Alito closely followed Supreme Court precedent regarding the hands-off doctrine, Justice Ginsburg seems to have departed significantly from central aspects of the Court's previous decisions.

Accordingly, Part III of this Essay takes a closer look at Justice Ginsburg's dissenting opinion, finding that her analysis may suggest a reformulated hands-off approach that, in some ways, extends the degree of deference afforded to the claims of religious adherents. Specifically, Justice Ginsburg seems to revive the view of Justice Robert Jackson, who argued, in a 1944 dissenting opinion, that judges should not question the sincerity of a religious claim.¹³ At the same time, however, Justice Ginsburg's approach likewise departs from Supreme Court precedent in allowing judges to question a claimant's characterization of a law or regulation as placing a substantial burden on the claimant's religious exercise. As a result, Justice Ginsburg's approach would appear to place additional limitations on the exercise of religious freedoms, beyond those presented by the Court's current hands-off approach. Thus, building on my previous work critiquing the Court's hands-off approach,¹⁴ this Essay calls upon the Court to reassess and rethink the scope and contours of the hands-off approach, both to remedy the problems inherent in the current approach and to prevent the additional concerns raised by the opinions in *Hobby Lobby*.

¹³ See *United States v. Ballard*, 322 U.S. 78, 93 (1944) (Jackson, J., dissenting).

¹⁴ See Levine, *Hosanna-Tabor*, *supra* note 3; Levine, *Rethinking the Supreme Court's Hands-Off Approach*, *supra* note 3; Levine, *The Supreme Court's Hands-Off Approach: An Introduction*, *supra* note 3.

I. THE SUPREME COURT'S HANDS-OFF APPROACH TO RELIGIOUS PRACTICE AND BELIEF: A BRIEF OVERVIEW

Over the course of developing its Religion Clause jurisprudence, the Supreme Court has adopted and expanded a hands-off approach to evaluating religious practice and belief. Relying on principles grounded in conceptions of both constitutional law and the role of judges, the Court has proscribed judicial determination of a wide range of questions related to religious doctrine.¹⁵ Notwithstanding some of the sound policy considerations underlying the Supreme Court's attempts to prevent judges from evaluating the substance of religious doctrine, the Court's hands-off approach produces additional problems of its own.

First, as an analytical matter, the precise contours and application of the Court's hands-off approach raise a variety of both descriptive and normative issues.¹⁶ Second, as a practical matter, requiring that judges defer to a religious claimant's characterizations of the nature of a religious claim may have the effect of broadening the range of religious rights in a way that proves unworkable for the government, courts, and society as a whole.¹⁷ Conversely, as a corollary to this problem, religious adherents who, under the hands-off approach, are granted broad religious freedoms, may face a backlash among the government, judges, and the public, resulting in the imposition of significant limitations on the range of claims recognized as worthy of constitutional or statutory protection.¹⁸

This dynamic seems to have led directly to the Supreme Court's landmark decision in the 1990 case, *Employment Division v. Smith*,¹⁹ which sharply curtailed the reach of Free Exercise protections.²⁰ The *Smith* case prompted Congress to enact the Religious Freedom Restoration Act

¹⁵ See *supra* note 2.

¹⁶ See sources cited *supra* note 12.

¹⁷ See Goldstein, *supra* note 3, at 502, 525–33 (arguing that “contrary to the Court’s language, an absolute prohibition on judicial examination of religious questions is neither possible nor advisable”); Levine, *Rethinking the Supreme Court’s Hands-Off Approach*, *supra* note 3, at 92–123 (collecting Free Exercise cases and examining the effects of the Court’s hands-off approach); Marshall, *Religious Inquiry*, *supra* note 3, at 251.

¹⁸ See Levine, *Rethinking the Supreme Court’s Hands-Off Approach*, *supra* note 3, at 134.

¹⁹ 494 U.S. 872 (1990).

²⁰ See Greenawalt, *Religious Property*, *supra* note 3, at 1906 (stating that the “major basis for the decision [in *Employment Division v. Smith*] is that courts should not have to assess religious understandings and the strength of religious feeling in order to decide if the religious claim is strong enough to warrant an exemption”); Levine, *Rethinking the Supreme Court’s Hands-Off Approach*, *supra* note 3, at 88 (“[T]he Court’s decision in *Employment Division v. Smith* was, in part, a result of the Court’s increasing reluctance to decide questions involving religious interpretation.”); Marshall, *Religious Inquiry*, *supra* note 3, at 255 n.124.

(RFRA),²¹ which the Court, in turn, declared unconstitutional as applied to state laws,²² further prompting Congress to enact the Religious Land Use and Institutionalized Persons Act (RLUIPA).²³ The proper interpretation and application of these statutes remain the subject of considerable debate and confusion.²⁴

21 See, e.g., *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429–30 (2006) (“Here the burden is placed squarely on the Government by RFRA rather than the First Amendment, but the consequences are the same. Congress’s express decision to legislate the compelling interest test indicates that RFRA challenges should be adjudicated in the same manner as constitutionally mandated applications of the test” (citing 42 U.S.C. §§ 2000bb-1(b), 2000bb-2(3))). The text of RFRA provides, in relevant part:

(a) In general

Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person—

- (1) is in furtherance of a compelling governmental interest; and
- (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. §§ 2000bb-1(a)–(b) (2012).

22 See *City of Boerne v. Flores*, 521 U.S. 507 (1997).

23 See *Holt v. Hobbs*, 135 S. Ct. 853, 859–60 (2015). The text of RLUIPA provides, in relevant part:

(a) General rule

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—

- (1) is in furtherance of a compelling governmental interest; and
- (2) is the least restrictive means of furthering that compelling governmental interest.

(b) Scope of application

This section applies in any case in which—

- (1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or
- (2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

42 U.S.C. §§ 2000cc-1(a)–(b).

24 See, e.g., Daniel P. Lenington, *Thou Shalt Not Zone: The Overbroad Applications and Troubling Implications of RLUIPA’s Land Use Provisions*, 29 SEATTLE U. L. REV. 805, 806, 834–36 (2006); Robin Fretwell Wilson, *When Governments Insulate Dissenters from Social Change: What Hobby Lobby and Abortion Conscience Clauses Teach About Specific*

The contentious nature of these statutes arguably stems, in part, from more general confusion over the Supreme Court's hands-off approach and may likewise account, in part, for the debate and confusion among the Justices in *Hobby Lobby*. After all, the necessity to adjudicate cases under the Religion Clauses, as well as under RFRA, RLUIPA, and state RFRA²⁵, requires consideration of religious claims, and thus, at times, may entail careful judicial examination of the substance and nature of religious doctrine. The challenge of reconciling the dual goals of adjudicating cases involving religion and maintaining appropriate deference to the beliefs of religious adherents stands at the center of the dispute among the Justices in *Hobby Lobby*. In an effort to clarify these issues, it may be helpful first to identify different categories of inquiry that arise in the course of adjudicating Religion Clause cases, and to explore Supreme Court precedent with respect to each category.²⁶

The following analysis will consider a brief taxonomy of four related but conceptually distinct forms of inquiry that may arise in the context of adjudicating a religious claim. The analysis will apply each of these questions to a hypothetical religious claim: An inmate in federal prison claims to belong to the Church of the One True Religion (COTR), requiring adherents to have a meal with steak and sherry every Friday afternoon. Another inmate, in the same prison, also claims to belong to the Church of

Exemptions, 48 U.C. DAVIS L. REV. 703, 714 (2014) (“[T]he public is unable to predict how courts will apply RFRA to particular disputes, causing confusion about when a legal duty applies to a religious believer and when it does not”); Eric D. Yordy, *Fixing Free Exercise: A Compelling Need to Relieve the Current Burdens*, 36 HASTINGS CONST. L.Q. 191 (2008); Jonathan Knapp, Note, *Making Snow in the Desert: Defining a Substantial Burden Under RFRA*, 36 ECOLOGY L.Q. 259, 278–92 (2009) (“RFRA and RLUIPA: Conflict and Confusion Abound”); Tokufumi Noda, Note, *The Role of Economics in the Discourse on RLUIPA and Nondiscrimination in Religious Land Use*, 53 B.C. L. REV. 1089, 1093 (2012) (noting the “confusion as to how to apply RLUIPA consistently”); Jaron A. Robinson, Comment, *Land, Libations, and Liberty: RLUIPA and the Specter of Liquor Control Laws*, 49 IDAHO L. REV. 157, 159 (2012) (“[S]ince its passage in 2000, RLUIPA has generated confusion among the federal courts of appeals.”); Emily Urch, Comment, *Shields and Kirpans: How RFRA Promotes “Irrational-Basis” Review as For-Profit Companies Challenge the Affordable Care Act’s Women’s Health Amendment*, 39 U. DAYTON L. REV. 173, 198 (2013) (“Since the Supreme Court has not defined what amounts to a ‘substantial burden’ when analyzing a RFRA claim, confusion is bound to continue.”).

²⁵ See Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRA*, 55 S.D. L. REV. 466 (2010); James W. Wright, Jr., Note, *Making State Religious Freedom Restoration Amendments Effective*, 61 ALA. L. REV. 425 (2010); *State Religious Freedom Restoration Acts*, NATIONAL CONFERENCE OF STATE LEGISLATURES (June 5, 2015), <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx>.

²⁶ It should be noted that, although the Court developed the hands-off approach in the context of interpreting the Free Exercise Clause, both the majority and dissent in *Hobby Lobby* applied the hands-off approach—albeit in different ways—in the context of the statutory interpretation of RFRA and RLUIPA as well.

the One True Religion, but asserts that adherents to the COTR are prohibited from having either steak or sherry, and are instead required to have a Friday afternoon meal consisting of brie and chardonnay.²⁷

1. Sincerity of a Religious Claim

By definition, the Free Exercise Clause, RFRA, and RLUIPA apply only to claims that are premised upon religious practice or belief. Although the Court has never mapped out the precise elements necessary for a system of belief to qualify as a religion,²⁸ as a threshold matter, a court must first conclude that a religious claim is sincere before affording Free Exercise, RFRA, or RLUIPA protections to the claimant. Thus, if a court determines, as a factual matter, that a claimant is not sincere in basing a

²⁷ This hypothetical is based on modified facts from actual cases involving the Church of the New Song. *See, e.g.*, *Church of the New Song v. Establishment of Religion on Taxpayers' Money in the Fed. Bureau of Prisons*, 620 F.2d 648, 652 (7th Cir. 1980); *Remmers v. Brewer*, 494 F.2d 1277 (8th Cir. 1974) (per curiam); *Theriault v. Carlson*, 339 F. Supp. 375 (N.D. Ga. 1972), *vacated*, 495 F.2d 390 (5th Cir. 1974).

²⁸ *See, e.g.*, Andrew W. Austin, *Faith and the Constitutional Definition of Religion*, 22 CUMB. L. REV. 1 (1991); Barbra Barnett, *Twentieth Century Approaches to Defining Religion: Clifford Geertz and the First Amendment*, 7 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 93, 131–38 (2007); A. Stephen Boyan, Jr., *Defining Religion in Operational and Institutional Terms*, 116 U. PA. L. REV. 479 (1968); Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 587–91; James M. Donovan, *God is as God Does: Law, Anthropology, and the Definition of "Religion,"* 6 SETON HALL CONST. L.J. 23, 29–70 (1995); Eisgruber & Sager, *supra* note 3, at 812–16, 834; George C. Freeman, III, *The Misguided Search for the Constitutional Definition of "Religion,"* 71 GEO. L.J. 1519, 1524–28 (1983); Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753, 759–61 (1984); John O. Hayward, *Religious Pretenders in the Courts: Unmasking the Imposters*, TRINITY L. REV. (forthcoming 2015), http://works.bepress.com/john_hayward/15/; Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233 (1989); John C. Knechtle, *If We Don't Know What It Is, How Do We Know If It's Established?*, 41 BRANDEIS L.J. 521 (2003); L. Scott Smith, *Constitutional Meanings of "Religion" Past and Present: Explorations in Definition and Theory*, 14 TEMP. POL. & CIV. RTS. L. REV. 89, 91–103 (2004); Jeffrey Omar Usman, *Defining Religion: The Struggle to Define Religion Under the First Amendment and the Contributions and Insights of Other Disciplines of Study Including Theology, Psychology, Sociology, the Arts, and Anthropology*, 83 N.D. L. REV. 123, 123–88 (2007); Ben Clements, Note, *Defining "Religion" in the First Amendment: A Functional Approach*, 74 CORNELL L. REV. 532, 536–39 (1989); Timothy L. Hall, Note, *The Sacred and the Profane: A First Amendment Definition of Religion*, 61 TEX. L. REV. 139, 141–52 (1982); Jeffrey L. Oldham, Note, *Constitutional "Religion": A Survey of First Amendment Definitions of Religion*, 6 TEX. F. ON C.L. & C.R. 117, 125–37 (2001); Eduardo Peñalver, Note, *The Concept of Religion*, 107 YALE L.J. 791, 795–99 (1997); Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1057–66 (1978).

claim in a religious practice or belief, the court will not apply these protections.²⁹

Applied to the case of inmates who claim to require particular religious diets based on the asserted beliefs of the COTR, a court would have to undertake a threshold determination of the factual sincerity of each inmate's assertion.³⁰ Similar to other forms of factual inquiry, the court would weigh the available evidence, including such factors as whether the inmate has adhered to this religion and this diet in the past, whether the religion has other adherents, and whether the inmate might have ulterior motives for the claim. Although none of these factors would, by itself, necessarily prove to be dispositive, together, these and other considerations will provide the grounds for the court's factual findings. If, on the basis of these findings, the court concludes that the inmate sincerely adheres to a religion with practices that include the specified diet, the inmate's claim will qualify for legal protections as an exercise of religion.³¹

2. Metaphysical Truth of a Religious Claim

Although courts may—presumably must—evaluate the sincerity of a religious claim before applying the Free Exercise Clause, RFRA, or RLUIPA, courts are precluded from evaluating the metaphysical truth of a religious claim. As the Supreme Court has repeatedly explained, as a basic tenet of the Court's hands-off approach to religious doctrine, the American legal system does not recognize or reject the metaphysical truth or validity of a particular religion or religious belief.³²

29 See, e.g., *United States v. Ballard*, 322 U.S. 78, 84 (1944); see also John T. Noonan, Jr., *How Sincere Do You Have to Be to Be Religious?*, 1988 U. ILL. L. REV. 713 (describing the Court's approach in *Ballard*); Kent Greenawalt, Book Review, 70 COLUM. L. REV. 1133 (1970) (reviewing MILTON R. KONVITZ, *RELIGIOUS LIBERTY AND CONSCIENCE: A CONSTITUTIONAL INQUIRY* (1968)); Ben Adams & Cynthia Barmore, Essay, *Questioning Sincerity: The Role of the Courts After Hobby Lobby*, 67 STAN. L. REV. ONLINE 59 (2014) (arguing that courts use objective criteria to inquire into the sincerity of religious beliefs); Kevin L. Brady, Comment, *Religious Sincerity and Imperfection: Can Lapsing Prisoners Recover Under RFRA and RLUIPA?*, 78 U. CHI. L. REV. 1431 (2011) (arguing that sincerity of religious beliefs is the determinative inquiry for claims by prisoners who fail to take advantage of religious accommodations).

30 See Brady, *supra* note 29, at 1442–63.

31 See, e.g., *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015) (“[O]f course, a prisoner’s request for an accommodation must be sincerely based on a religious belief and not some other motivation.” (citing *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2774 n.28 (2014))).

32 See, e.g., *Emp’t Div. v. Smith*, 494 U.S. 872, 887 (1990) (“Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.”); *United States v. Lee*, 455 U.S. 252, 257 (1982) (refusing to assess the “proper interpretation of the Amish faith”); *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981) (“[R]eligious beliefs need not be

Applied to the COTR, an inmate's claim to require a Friday afternoon meal of steak and sherry or brie and chardonnay may appear to most observers to be highly unusual, if not downright suspect. Indeed, a court might find, on the basis of evidence presented, that as a factual matter, the inmate is not sincere in this claim, but instead is fabricating a religious belief as a pretext to try to compel prison authorities to provide a meal well beyond the quality ordinarily available as part of a prison diet. Nevertheless, to the extent that a court finds the inmate to be sincere in the claimed adherence to a religion that requires or expects its adherents to partake of such a meal, the court has no authority to reject the claim on the grounds that it seems to represent an unlikely or even bizarre form of religious practice.

3. Accuracy or Consistency of a Religious Claim

A similar but somewhat more expansive form of the Court's hands-off approach involves a scenario in which individuals who claim to adhere to the same religion assert different views of that religion's beliefs or practices. In such scenarios, the Supreme Court has likewise repeatedly emphasized that judges have no role in adjudicating intrafaith differences of belief, whether they relate to property disputes, personnel issues, or other matters of doctrine.³³

acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728 (1872) ("The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."). In *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), the Court elaborated:

This Court cannot determine the truth of the underlying beliefs that led to the religious objections here or in *Roy*, and accordingly cannot weigh the adverse effects on the appellees in *Roy* and compare them with the adverse effects on the Indian respondents. Without the ability to make such comparisons, we cannot say that the one form of incidental interference with an individual's spiritual activities should be subjected to a different constitutional analysis than the other.

Id. at 449–50 (citing *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144 n.9 (1987)). In *Ballard*, 322 U.S. 78, the Court also stated:

Heresy trials are foreign to our Constitution. . . . The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain. The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position.

Id. at 86–87.

³³ See, e.g., *Holt*, 135 S. Ct. at 863 ("[T]he protection of RLUIPA, no less than the guarantee of the Free Exercise Clause, is 'not limited to beliefs which are shared by all of the members of a religious sect.'" (quoting *Thomas*, 450 U.S. at 715–16); *Lyng*, 485 U.S. at 457–58 ("[T]he dissent's approach would require us to rule that some religious adherents

It should be emphasized that the issue of accuracy or consistency, like the question of metaphysical truth, is conceptually distinct from the issue of sincerity. For example, a sincerely asserted claim would qualify as religious in nature even if the claim appears mistaken or irrational in the view of others, including other adherents to the same religion. Conversely, as a threshold matter, a claim would fail if the plaintiff were insincere, even if others consider the claim to be an accurate, plausible, or eminently rational religious belief.

To be sure, there remains a degree of complexity—and potentially, confusion—within the Court’s hands-off approach in the context of these questions. In practice, courts and others may find it difficult to disaggregate the issue of sincerity from issues of metaphysical truth or accuracy, and may tend to question a claimant’s sincerity if, in the eyes of the beholder, including the eyes of other adherents to the same religion, the claimant’s belief seems mistaken, insubstantial, or irrational.

misunderstand their own religious beliefs. We think such an approach cannot be squared with the Constitution or with our precedents, and that it would cast the Judiciary in a role that we were never intended to play.”); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 721 (1976) (noting the “error” of “delv[ing] into . . . church constitutional provisions”). In *Thomas*, 450 U.S. 707, the Court stated:

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. . . . [T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. 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.

450 U.S. at 715–16. Also, in *Presbyterian Church v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440 (1969), the Court further elaborated on the role of the courts:

First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern. . . . [T]he Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine. . . . The Georgia courts have violated the command of the First Amendment [T]he departure-from-doctrine element . . . requires the civil court to determine matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion. Plainly, the First Amendment forbids civil courts from playing such a role. . . . To reach those questions would require the civil courts to engage in the forbidden process of interpreting and weighing church doctrine.

Id. at 449–51.

Nevertheless, once a court has found that a religious adherent is sincere in asserting a claim as religious in nature, the court must afford Free Exercise, RFRA, or RLUIPA protections, regardless of how unpopular, unusual, or even bizarre the belief may appear in the view of outside observers, including the judge adjudicating the case, the public, or others. Accordingly, the Court has held that for the purposes of Free Exercise protection, the validity of an adherent's religious claim does not turn on whether other adherents share a similar belief. Instead, the claimant has the autonomy and authority to maintain an individualistic form of belief, entitled to protection as religious in nature, independent of whether the belief is shared—or repudiated—by others asserting adherence to the same religion.

In the context of the COTR, the two inmates have very different views of the diet their religion requires for a Friday afternoon meal. Indeed, their views are not only inconsistent with one another but incompatible, such that one inmate's asserted compliance with a requirement of the COTR would, according to the other inmate, constitute a violation of COTR doctrine. Once again, as a factual matter, in theory, a court might find one—or both—of the inmates to be insincere in asserting a particular form of belief. For example, in addition to general concerns that inmates might try to use insincere religious claims as a pretext to obtain special meals, perhaps the court will find that one or more of these inmates has the ulterior motive of sabotaging the other inmate's efforts to obtain a preferred meal or, more broadly, of undermining the other inmate's interests or credibility. Otherwise, under the Supreme Court's hands-off approach, to the extent that the court finds both inmates to be sincere in their beliefs, both are entitled to Free Exercise protections—even though the two forms of conduct are in conflict with each other and are asserted as being requested and required pursuant to the same religion.

4. Substantial Burden/Compelling Governmental Interest

RFRA provides that “Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person . . . is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that compelling governmental interest.”³⁴ RLUIPA consists of similar provisions, applied in the context of land use and prisons.³⁵

Under the terms of these statutes and pursuant to Supreme Court precedent, judges have the authority to evaluate whether the government's restriction on religion stands as the least restrictive means of furthering a

34 42 U.S.C. § 2000bb-1(b) (2012).

35 See 42 U.S.C. § 2000cc-1(b).

compelling governmental interest.³⁶ Is it less clear, however, whether the Court's hands-off approach to religion mandates not only that judges accept a religious adherent's sincere claim that a law burdens the exercise of religion, but also that judges defer to the adherent's characterization of the burden as substantial, thereby triggering the balancing tests in RFRA and RLUIPA. To be sure, the Court has declared that judges are precluded from determining the centrality of a practice or belief within a religious system,³⁷ but it has not ruled on whether this deference extends to the designation of a religious burden as substantial.³⁸

The distinction may prove significant in the context of the COTR if the inmates claim that the prison's failure to provide their respective diets, of sherry and steak or brie and chardonnay, would work a substantial

36 See, e.g., *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006); *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

37 See *Employment Division v. Smith*, 494 U.S. 872 (1990), in which the Court stated:

Nor is it possible to limit the impact of respondents' proposal by requiring a "compelling state interest" only when the conduct prohibited is "central" to the individual's religion. It is no more appropriate for judges to determine the "centrality" of religious beliefs before applying a "compelling interest" test in the free exercise field, than it would be for them to determine the "importance" of ideas before applying the "compelling interest" test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is "central" to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable "business of evaluating the relative merits of differing religious claims." As we reaffirmed only last Term, "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.

Id. at 886–87 (alteration in original) (first quoting *Lee*, 455 U.S. at 263 n.2 (Stevens, J., concurring); then quoting *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989)) (first citing *Lyng*, 485 U.S. at 474–76 (Brennan, J., dissenting); then citing *Thomas*, 450 U.S. at 716; then citing *Presbyterian Church*, 393 U.S. at 450; then citing *Jones v. Wolf*, 443 U.S. 595, 602–06 (1979); and then citing *Ballard*, 322 U.S. at 85–87). In *Lyng*, the Court stated:

We would accordingly be required to weigh the value of every religious belief and practice that is said to be threatened by any government program. . . . [This] offers us the prospect of this Court's holding that some sincerely held religious beliefs and practices are not "central" to certain religions, despite protestations to the contrary from the religious objectors who brought the lawsuit. In other words, the dissent's approach would require us to rule that some religious adherents misunderstand their own religious beliefs. We think such an approach cannot be squared with the Constitution or with our precedents, and that it would cast the Judiciary in a role that we were never intended to play.

485 U.S. at 457–58 (internal citations omitted).

38 See, e.g., *Lupu*, *supra* note 3, at 80–82.

burden on their religious exercise. If courts have the authority to evaluate whether a burden is substantial, a judge might engage in various forms of inquiry before requiring that the government satisfy the least restrictive/compelling interest standard. For example: a judge might look to whether the inmate engages in other forms of religious exercise, including a religious diet, throughout the rest of the week; a judge might find that the prison can substitute similar foods for those requested by the inmate; or a judge might order prison officials to provide the requested diet but only if the inmate pays for the additional costs involved.

If, however, the Supreme Court's hands-off approach precludes judges from inquiring into the nature of a law's effect on religion, a court would presumably have to accept the inmate's assertion that the prison's failure to provide the requested meal resulted in a substantial burden on the inmate's exercise of religion. In turn, the government would have to provide the meal, as requested, unless it can show that refusal to do so represents the least restrictive means of furthering a compelling governmental interest.

II. APPLYING THE HANDS-OFF APPROACH TO *HOBBY LOBBY*

In an effort to understand and clarify some of the precise points of contention between Justice Alito's majority opinion and Justice Ginsburg's dissenting opinion in *Hobby Lobby*, it might prove instructive to consider each opinion in light of the four forms of inquiry, outlined above, that compose Supreme Court precedent with respect to evaluating questions of religious practice and belief.

A. *Justice Alito's Majority Opinion*

The majority opinion in *Hobby Lobby*, authored by Justice Alito, relies heavily on the Supreme Court's hands-off approach to questions of religious doctrine. Indeed, the majority's formulation of the facts of the case fits squarely within the Court's deferential approach to religious adherents' characterizations of the nature of religious claims: "The Hahns and Greens believe that providing the coverage demanded by the HHS [Health and Human Services] regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage."³⁹ Accordingly, the majority applied Supreme Court precedent to conclude that the HHS regulations violated the plaintiffs' religious rights under RFRA.⁴⁰ In fact, Justice Alito's opinion provides a somewhat systematic application of the Court's hands-off approach in the context of different forms of judicial inquiry into religious claims.

39 *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778 (2014).

40 *Id.* at 2785.

1. Sincerity of a Religious Claim

Addressing the threshold question of the sincerity of the plaintiffs' religious claim, the majority noted that:

[T]he Hahns and Greens have a sincere religious belief that life begins at conception. They therefore object on religious grounds to providing health insurance that covers methods of birth control that, as HHS acknowledges, may result in the destruction of an embryo. By requiring the Hahns and Greens and their companies to arrange for such coverage, the HHS mandate demands that they engage in conduct that seriously violates their religious beliefs.⁴¹

As the opinion further observed, "the plaintiffs . . . assert that funding the specific contraceptive methods at issue violates their religious beliefs, and HHS does not question their sincerity."⁴² Thus, under Supreme Court precedent, the factual determination of the sincerity of the plaintiffs' religious beliefs would prove sufficient to satisfy the legal determination that the plaintiffs' claim is religious in nature.⁴³

2/3. Metaphysical Truth/Accuracy and Consistency of a Religious Claim

Having accepted the sincerity of the plaintiffs' claim, the majority applied well-settled elements of the hands-off approach to reject any argument that, in abiding by the HHS regulations, the plaintiffs would not, in fact, violate their religious beliefs. As the opinion put it:

[T]he Hahns and Greens and their companies sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial. Instead, our "narrow function . . . in this context is to determine" whether the line drawn reflects "an honest conviction," and there is no dispute that it does.⁴⁴

Indeed, the majority noted, the claimants' belief "implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another."⁴⁵ Thus, according to the majority, "[a]rrogating the authority to provide a binding national answer to this religious and philosophical question" would "in effect tell the plaintiffs

41 *Id.* at 2775 (citing Brief for the Petitioners at 9 n.4, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354), 2014 WL 173486, at *9 n.4).

42 *Id.* at 2779.

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

44 *Hobby Lobby*, 134 S. Ct. at 2779 (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981)).

45 *Id.* at 2778.

that their beliefs are flawed.”⁴⁶ Not surprisingly, therefore, affirming basic principles set forth as part of the Court’s hands-off approach, the majority declared that “[f]or good reason, we have repeatedly refused to take such a step.”⁴⁷

4. Substantial Burden/Compelling Governmental Interest

After thereby accepting both the sincerity and the substance of the plaintiffs’ religious claim, the majority turned to the provisions of RFRA, which prohibit the government from placing a substantial burden on the exercise of religion unless necessary as the least restrictive means of furthering a compelling governmental interest.⁴⁸ The majority found that, “[b]ecause the contraceptive mandate forces them to pay an enormous sum of money—as much as \$475 million per year in the case of Hobby Lobby—if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs.”⁴⁹ Finally, the majority concluded⁵⁰—as Justice Kennedy’s concurrence further elaborated⁵¹—that the restriction did not constitute the least restrictive means of furthering a compelling governmental interest.

B. Justice Ginsburg’s Dissenting Opinion

While Justice Alito’s majority opinion provided a fairly systematic—if not somewhat formalistic⁵²—application of the different categories of judicial inquiry into questions of religious practice and belief, in a manner largely consistent with Supreme Court precedent, Justice Ginsburg’s dissenting opinion focused, in part, on broader policy considerations. In so doing, the opinion may reflect the dissenters’ more general concerns about—and potential objections to—aspects of Supreme Court precedent in this area, including elements of the Court’s hands-off approach to questions of religious doctrine.

46 *Id.*

47 *Id.* (citing *Emp’t Div. v. Smith*, 494 U.S. 872, 887 (1990) (“Repeatedly and in many different contexts, we have warned that courts must not presume to determine . . . the plausibility of a religious claim.”); see *Hernandez v. Comm’r*, 490 U.S. 680, 699 (1989); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 450 (1969)).

48 See 42 U.S.C. § 2000bb (2012).

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

50 *Id.* at 2779–85.

51 *Id.* at 2785–87 (Kennedy, J., concurring).

52 See Kent Greenawalt, *The Hobby Lobby Case: Controversial Interpretive Techniques and Standards of Application* 4–5 (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 14-421, 2014), <http://ssrn.com/abstract=2512906>.

1. Sincerity of a Religious Claim

In responding to the majority's analysis, Justice Ginsburg first asserted that "I agree with the Court that the Green and Hahn families' religious convictions regarding contraception are sincerely held."⁵³ As such, consistent with the Court's hands-off approach to questions of religious doctrine, Justice Ginsburg might have been expected to likewise accept the plaintiffs' claims that following the mandate would entail a violation of their religious beliefs and, accordingly, that the law placed a substantial burden on their exercise of religion.

2/3. Metaphysical Truth/Accuracy and Consistency of a Religious Claim

Indeed, again like the majority, Justice Ginsburg cited Supreme Court precedent for the proposition that "courts are not to question where an individual 'dr[aws] the line' in defining which practices run afoul of her religious beliefs."⁵⁴ Having thus declared the need for judicial deference to the plaintiffs' characterizations of their religious obligations, the dissent appeared poised to likewise adopt and apply the Court's hands-off approach in the context of the plaintiffs' claim that adhering to the HHS regulation would work a substantial burden on their exercise of religion.

4. Substantial Burden/Compelling Governmental Interest

Somewhat surprisingly, however, Justice Ginsburg instead proceeded to question whether the law placed a substantial burden on the plaintiffs' religious exercise.⁵⁵ Justice Ginsburg declared that the plaintiffs' beliefs,

however deeply held, do not suffice to sustain a RFRA claim. RFRA, properly understood, distinguishes between "factual allegations that [plaintiffs'] beliefs are sincere and of a religious nature," which a court must accept as true, and the "legal conclusion . . . that [plaintiffs'] religious exercise is substantially burdened," an inquiry the court must undertake.⁵⁶

Whatever the merits of this distinction, Justice Ginsburg's ensuing evaluation of the plaintiffs' claim comes perilously close to—and, according to the majority, crosses the line into—the kind of judicial inquiry precluded by the Court's hands-off approach.⁵⁷

⁵³ *Id.* at 2798 (Ginsburg, J., dissenting) (citing *Thomas v. Review Bd.*, 450 U.S. 707, 715 (1981)).

⁵⁴ *Id.* at 2798 (alteration in original) (quoting *Thomas*, 450 U.S. at 715).

⁵⁵ *Id.* at 2798.

⁵⁶ *Id.* at 2798 (alterations in original) (quoting *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008)).

⁵⁷ See *id.* at 2778 n.35 (majority opinion) ("The principal dissent makes no effort to reconcile its view about the substantial-burden requirement with our decision in *Thomas*.");

Indeed, Justice Ginsburg expressly rejected the applicability of the hands-off approach to the question of whether the plaintiffs faced a substantial burden on their religion. Instead, “[u]ndertaking the inquiry that the Court forgoes,” Justice Ginsburg “conclude[d] that the connection between the families’ religious objections and the contraceptive coverage requirement is too attenuated to rank as substantial.”⁵⁸ Specifically, she wrote, “[a]ny decision to use contraceptives made by a woman covered under Hobby Lobby’s or Conestoga’s plan will not be propelled by the Government, it will be the woman’s autonomous choice, informed by the physician she consults.”⁵⁹

Finally, and again somewhat surprisingly, Justice Ginsburg critiqued not only the majority’s conclusion, but the methodology it employed in applying the least restrictive/compelling governmental interest test required under the provisions of RFRA.⁶⁰ In particular, Justice Ginsburg raised a number of largely hypothetical scenarios in which, she was concerned, the majority’s approach would require the government to demonstrate that a law was the least restrictive means for furthering a compelling governmental interest, and in turn, would require individualized judicial consideration of each of these cases.⁶¹ Rejecting the response that “each one of these cases . . . would have to be evaluated on its own . . . apply[ing] the compelling interest-least restrictive alternative test,”⁶² Justice Ginsburg

see also Lupu, *supra* note 3, at 82 (“The [*Hobby Lobby*] majority preferred the *Thomas* rule of judicial abstention; [Justice Ginsburg’s] dissent preferred active judicial involvement in the question of the religious substantiality of the burden.”); Lyons, *supra* note 3, at 262 (“[T]he legal guidance that does exist explicitly discourages courts from entering into the various types of considerations that might otherwise be thought relevant [to the substantial-burden issue].”); Marshall, *Bad Statutes*, *supra* note 3, at 113–16 (examining “Justice Alito’s decision to construe RFRA in a way that avoids the need for courts to inquire into burden”); Smith, *supra* note 3, at 748 (noting that Establishment Clause principles preclude judicial inquiries into “the ‘substantiality’ of a burden on religious exercise” and “the ‘centrality’ of a practice to religious belief”).

⁵⁸ *Hobby Lobby*, 134 S. Ct. at 2799 (Ginsburg, J., dissenting).

⁵⁹ *Id.*

⁶⁰ *See* 42 U.S.C. § 2000bb–1(b) (2012).

⁶¹ *Hobby Lobby*, 134 S. Ct. at 2805 (Ginsburg, J., dissenting) (“Would the exemption the Court holds RFRA demands for employers with religiously grounded objections to the use of certain contraceptives extend to employers with religiously grounded objections to blood transfusions (Jehovah’s Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists, among others)?”).

⁶² *Id.* (alteration in original) (quoting Transcript of Oral Argument at 6, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354), http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-354_3ebh.pdf).

argued that an application of RFRA that entailed such a judicial undertaking would constitute an “immoderate reading of RFRA.”⁶³

III. ANOTHER LOOK AT JUSTICE GINSBURG’S DISSENT: A REFORMULATED HANDS-OFF APPROACH?

A closer look at Justice Ginsburg’s opinion may suggest a reformulation of the Supreme Court’s hands-off approach to questions of religious practice and belief. As the majority noted in *Hobby Lobby*, in apparent contrast to Supreme Court precedent, Justice Ginsburg seems willing to allow—or require—a degree of judicial inquiry into the accuracy of a religious adherent’s claim, to the extent that such inquiry is relevant to the determination of whether the government has placed a substantial burden on the adherent’s exercise of religion.⁶⁴ At the same time, as she put it near the end of her dissent, Justice Ginsburg sees “an overriding interest . . . in keeping the courts ‘out of the business of evaluating’ . . . the sincerity with which an asserted religious belief is held.”⁶⁵ Thus, again in contrast to Supreme Court precedent, Justice Ginsburg seems to promote a hands-off approach that would disfavor judicial evaluation of the sincerity of an adherent’s asserted religious belief.⁶⁶

Justice Ginsburg’s apparent reformulation of Supreme Court precedent may account, in part, for the impression that the majority and dissenting opinions in *Hobby Lobby* are talking past each other. Perhaps, then, the divide in *Hobby Lobby* is rooted in a more basic division among the Justices regarding the wisdom, and the appropriate contours, of the Supreme Court’s hands-off approach to religion.

Indeed, one of the basic elements of the Supreme Court’s hands-off approach was established in the 1944 case *United States v. Ballard*,⁶⁷ in which the Court held that judges have the authority to evaluate the sincerity of an adherent’s belief in a religious principle, but not to question the inherent truth or validity of that principle.⁶⁸ On the grounds of this distinction, the majority affirmed a conviction of fraud, based on the factual conclusion that the defendants did not sincerely believe the truthfulness of the religious representations they made to others.⁶⁹ At the same time, the

63 *Id.*

64 *See supra* notes 55–59 and accompanying text.

65 *Hobby Lobby*, 134 S. Ct. at 2805 (Ginsburg, J., dissenting) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.2 (1982)).

66 *See Adams & Barmore, supra* note 29, at 59.

67 322 U.S. 78 (1944).

68 *Id.* at 86–88; *see discussion supra* note 29 and accompanying text.

69 *Ballard*, 322 U.S. at 83–84.

majority insisted that a court may not evaluate the inherent truth or falsity of a religious belief or doctrine.⁷⁰

Notably, Justice Jackson dissented in *Ballard*, rejecting the analytical distinction that would allow judicial inquiry into the sincerity of a religious belief while precluding the evaluation of the truth or accuracy of the belief.⁷¹ Instead, he argued that courts should likewise be prohibited from evaluating the sincerity of a religious belief, concluding that “I would dismiss the indictment and have done with this business of judicially examining other people’s faiths.”⁷²

Without citing *Ballard*—in fact, without resort to any citation—Justice Ginsburg’s concluding remarks in the *Hobby Lobby* dissent, decrying judicial inquiry into religious sincerity, seem to echo Justice Jackson’s concerns and may constitute an attempt to revive his approach, in the face of more than seventy years of precedent to the contrary. In this reading, Justice Ginsburg’s concerns about RFRA become more pronounced and, therefore, more understandable, and likewise, her rejection of other elements of the Court’s hands-off approach becomes more significant. Moreover, this reading of Justice Ginsburg’s jurisprudence may also account for the stark divide between the majority and the dissent in *Hobby Lobby*.

Ballard and its progeny established one of the safeguards against the unfettered reliance on religious claims as a defense to prosecution for otherwise illegal conduct, or as a basis for an exemption from an otherwise valid law. Under *Ballard*, a court has the authority to inquire whether an individual is expressing a sincerely held religious belief. If the court concludes that the individual is sincere, the claim will qualify as religious in nature for the purpose of the Free Exercise Clause or, more recently, RFRA and RLUIPA. Alternatively, if the court concludes that the individual is insincere, the claim will not qualify as based in religion.

Notwithstanding considerable merit to Justice Jackson’s argument, as a practical matter, his position would remove this safeguard and would permit any individual to conjure up and assert a religious justification for any form of otherwise illegal conduct.⁷³ Coupled with other elements of the Court’s hands-off approach, which additionally preclude judicial inquiry into the validity or consistency of a religious claim, Justice Jackson’s position would then allow any individual to assert a claim of any belief, however insincere or farfetched, and have that claim qualify as religious in nature under the Free Exercise Clause, RFRA, or RLUIPA.

70 *Id.* at 86–88.

71 *Id.* at 92–93 (Jackson, J., dissenting); see Marshall, *Religious Inquiry*, *supra* note 3, at 254–55.

72 *Ballard*, 322 U.S. at 95 (Jackson, J., dissenting).

73 See *supra* note 28; see also Marshall, *Religious Inquiry*, *supra* note 3, at 254–57.

To the extent that Justice Ginsburg seems to have echoed and adopted Justice Jackson's position, her concerns over an expansive application of RFRA are better understood and appreciated. Under the terms of RFRA, a law that places a substantial burden on religion must be shown to constitute the least restrictive means of furthering a compelling governmental interest.⁷⁴ If any asserted religious claim must be accepted as sincere—as Justice Ginsburg seems to advocate—and if a court must accept the adherent's characterization of a religious claim as a substantial burden on religion—as both the *Hobby Lobby* majority and Supreme Court precedent seem to require⁷⁵—then any individual can challenge any law through the assertion that it poses a substantial burden on the exercise of religion. Once the claimant simply asserts a religious belief that directly contradicts the law, courts would be precluded from inquiring into the validity of the claim on the basis of evaluating either the sincerity or the accuracy of the claim.

Of course, categorizing a claim as religious in nature, or subject to the RFRA balancing test, does not mean that the claim will necessarily succeed. No court has ever suggested that a murder conviction would be overturned because of an assertion that laws against murder substantially burden a religious belief that requires committing murder. Nevertheless, under the expansive protections of RFRA/RLUIPA, precluding judicial inquiry into both the sincerity of a religious claim and the characterization of the burden as substantial would place the government in a position of having to respond to any such assertions by demonstrating that the law was the least restrictive means of furthering a compelling governmental interest. Though laws against murder are an easy case, other laws and regulations, such as prison rules, zoning laws, and the ACA, would be closer calls. Indeed, Justice Ginsburg seems particularly wary of such a result, as illustrated by the parade of horrors she hypothesizes, representing scenarios that, she argues, would be difficult for courts to decide, and to decide appropriately, based on the majority's analysis.⁷⁶

As Justice Ginsburg acknowledged, both the plaintiffs in *Hobby Lobby* and the majority of the Court were not troubled by the hypotheticals she raises. In their views, each case would be considered under an individualized least restrictive/compelling interest test.⁷⁷ Tellingly, Justice Ginsburg responded that “approving some religious claims while deeming others unworthy of accommodation could be ‘perceived as favoring one religion over another,’ the very ‘risk the Establishment Clause was

74 42 U.S.C. § 2000bb-1(b) (2012).

75 See *supra* notes 48–49 and accompanying text.

76 See *supra* note 61.

77 See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2805 (2014) (Ginsburg, J., dissenting).

designed to preclude.”⁷⁸ Therefore, she concluded, “[t]he Court, I fear, has ventured into a minefield, by its immoderate reading of RFRA.”⁷⁹ Perhaps because Justice Ginsburg would eschew judicial consideration of religious sincerity, thereby removing one safeguard against overly broad religious protections, she would instead substitute a more limited application of RFRA through increased judicial inquiry into the asserted nature of the burden on religion.

Justice Ginsburg’s critique of the majority leaves open a number of questions of its own. Indeed, though Justice Ginsburg refers to the majority’s “immoderate reading of RFRA,”⁸⁰ she does not explain precisely how a different reading of RFRA would affect the outcome in the hypotheticals she raises, or—more to the point—how any reading of RFRA would avoid the application of balancing tests that, depending on the facts of particular scenarios, might result in outcomes that favor some religions and not others.

Ultimately, Justice Ginsburg seems to be advocating, in some ways, an even more robust and extensive form of the Court’s hands-off approach, one that would preclude these kinds of individualized and fact-specific considerations of religious claims. Regardless of the possible appeal of Justice Ginsburg’s arguments, the more restricted form of religious freedoms that her analysis could produce may illustrate yet another potential problem presented by the hands-off approach.

CONCLUSION

In the past three terms, the United States Supreme Court has decided three important religious freedom cases that implicated, to different degrees, the Court’s hands-off approach to questions of religious practice and belief. In the 2012 case, *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,⁸¹ in a unanimous opinion authored by Chief Justice Roberts, the Court formally recognized the ministerial exception, holding that, “[b]oth Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers.”⁸² In the 2015 case, *Holt v. Hobbs*,⁸³ in another unanimous decision, this time authored by Justice Alito, the Court accepted an inmate’s characterizations of both his practice of religion and the burden that prison regulations would place on

78 *Id.* (quoting *United States v. Lee*, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring in judgment)).

79 *Id.* (citing *Spencer v. World Vision, Inc.*, 633 F.3d 723, 730 (9th Cir. 2010) (O’Scannlain, J., concurring)).

80 *Id.*

81 132 S. Ct. 694 (2012).

82 *Id.* at 702.

83 135 S. Ct. 853 (2015).

his religious exercise.⁸⁴ Although the Justices reached unanimity in both of these cases, the opinions seemed to leave unanswered a number of difficult questions, likewise implicated by the hands-off approach, involving the precise contours of the ministerial exception⁸⁵ and the extent to which prison officials must defer to inmates' religious claims.⁸⁶

In notable contrast to the unanimity achieved in these cases, *Burwell v. Hobby Lobby, Inc.*,⁸⁷ decided in the interim, proved highly contentious, prompting a sharply divided Court to issue starkly contrasting majority and dissenting opinions. In further contrast to *Hosanna-Tabor* and *Holt*, in *Hobby Lobby*, the Justices took the opportunity to more fully explore the implications of the Supreme Court's hands-off approach to religion. Although the debates among the Justices in *Hobby Lobby* revolved around a number of controversial issues,⁸⁸ the differences between the opinions of Justice Alito and Justice Ginsburg turned, in part, on important differences with respect to the hands-off approach. Significantly, *Hobby Lobby* exposes some of the underlying fault lines and tensions among the Justices regarding the proper formulation and application of the hands-off approach to religion, raising additional concerns over the continued wisdom and viability of the Court's current approach and demonstrating the need for further exploration and, perhaps, substantial reconsideration in the future.

84 See *id.* at 862–63.

85 See, e.g., Richard W. Garnett & John M. Robinson, *Hosanna-Tabor, Religious Freedom, and the Constitutional Structure*, 2012 CATO SUP. CT. REV. 307; Levine, *Hosanna-Tabor*, *supra* note 3; Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of Hosanna-Tabor*, 108 NW. U. L. REV. 1183 (2014); Michael W. McConnell, *Reflections on Hosanna-Tabor*, 35 HARV. J.L. & PUB. POL'Y 821 (2012); Brian M. Murray, *The Elephant in Hosanna-Tabor*, 10 GEO. J.L. & PUB. POL'Y 493 (2012). For more critical views of *Hosanna-Tabor*, see, for example, Frederick Mark Gedicks, *Narrative Pluralism and Doctrinal Incoherence in Hosanna-Tabor*, 64 MERCER L. REV. 405 (2013); Leslie C. Griffin, *The Sins of Hosanna-Tabor*, 88 IND. L.J. 981 (2013); Ioanna Tourkochoriti, *Revisiting Hosanna-Tabor v. EEOC: The Road Not Taken*, 49 TULSA L. REV. 47 (2013).

86 See, e.g., *Incumaa v. Stirling*, 791 F.3d 517 (4th Cir. 2015); *Sessing v. Beard*, No. 1:13-cv-01684-LJO-MJS (PC), 2015 WL 3953501 (E.D. Cal. June 29, 2015); see also *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2014) (Sotomayor, J., concurring). For a more critical view, see, for example, Marci Hamilton, *The Supreme Court's New Ruling on the Religious Land Use and Institutionalized Persons Act's Prison Provisions: Deferring Key Constitutional Questions*, FINDLAW (June 2, 2005), <http://writ.news.findlaw.com/hamilton/20050602.html>.

87 *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

88 See *supra* note 5.