When Judges Are Theologians: Adjudicating Religious Questions

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ADJUDICATING RELIGIOUS QUESTIONS

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ABSTRACT

In this chapter, I explore how judges—and, more generally, U.S. courts—deal with legal disputes when they must consider not only laws and facts, but also religion, or maybe even more precisely, theology. Indeed, in a wide range of circumstances, judges are confronted with cases where the outcome in some way or another requires them to issue a decision that is predicated, to varying to degrees, on a theological question upon which there is some debate. While in American law the ostensibly simple answer to this question is simply that the Constitution prohibits courts from adjudicating religious questions, the reality is far more complicated. Indeed, the justifications for the religious question doctrine are quite different when considered in the context of private law cases—such as cases involving the interpretation of religious terminology in commercial instruments—and public law cases—where courts are asked to apply the state’s regulatory infrastructure in circumstances that invariably require some sort of interrogation of religious doctrine or practice.

In each sphere, the consequences of applying the religious question doctrine look different and may therefore encourage different strategies and outcomes. When judges dismiss private law cases that implicate theological questions, they often leave aggrieved parties without a remedy for legal wrongs that can have significant consequences, either financial or otherwise. When judges dismiss public law cases that implicate theological questions, they often limit the law’s reach and leave some spheres of the human condition beyond the scope of legitimate government regulation.

These consequences highlight the need for U.S. courts to reconsider the contours of the constitutional limitations on their authority to engage matters of theology. In the discussion below, I identify why a number of jurisprudential approaches may provide courts with more flexibility in the private law context. This disparity derives from fundamental disagreements over the origins of and animating principles behind the religious question doctrine, disparities which I argue courts should take seriously so as to

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avoid too-freely renouncing their central duty of resolving disputes submitted on the courthouse doorstep.

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I. Introduction

It is an oft-repeated maxim that “judges apply law to facts.” This maxim, to be sure, is somewhat simplistic; it glosses over certain important theoretical questions, such as debates between formalists and realists, and likely somewhat fails to account for the human element of judicial decision-making. And yet these and other complexities notwithstanding, the core proposition that judges, in order to fulfill their roles must weave fact and law together into a decision continues to stand at the very center of how we perceive the creation of legal decisions.

In this chapter, however, I hope to explore how judges—and, more generally, courts and the U.S. legal system—deal with legal disputes when they must consider not only laws and facts, but also religion, or maybe even more precisely, theology. Indeed, in a wide range of circumstances, judges are confronted with cases where the outcome in some way or another requires them to issue a decision that is predicated, to varying degrees, on a theological question upon which there is some debate.

In American law, there is often a simple answer given to this question: “civil courts cannot adjudicate disputes turning on church policy and administration or on religious doctrine and practice.” This is what is typically referred to as the “religious question doctrine,” and this doctrine, borne of the U.S. Constitution’s First Amendment, is construed to prohibit courts from resolving cases where there is an “underlying controversy over religious doctrine or practice.” Indeed, the Supreme Court has often expressed this general proposition, emphasizing that “[r]eligious experiences . . . may be incomprehensible to others” and therefore “beyond the ken of mortals.” Or, similarly, highlighting that, when it comes to resolving disputes that delve into dueling perceptions of religious obligation, “[c]ourts are not arbiters of scriptural interpretation.”

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5 See eg Burgess v Rock Creek Baptist Church, 734 F Supp 30, 31 (DDC 1990).
6 United States v Ballard, 322 US 78, 86-87 (1944).
Cases implicating religious questions generally run the gamut, although can broadly be subdivided into two categories: private law and public. Private law disputes implicating the religious question doctrine typically involve the interpretation of contracts, or other commercial instruments, that incorporate some sort of religious terminology into the agreement. Indeed, in a wide range of instances, parties enter what I, along with Barak Richman, have termed “co-religionist commerce”—that is, the sphere of commerce and commercial agreements where parties purchase religious goods or secure religious performance.\(^8\) Frequent examples include the contractual obligations of employees at religious institutions, purchase agreements for goods that have religious significance, and marriage agreements that outline religious standards for conduct.\(^9\) In drafting such agreements, parties aim to structure commercial or financial arrangements that will also comport with shared religious rules and values. In all these cases, when a dispute arises, courts may very well be faced with claims the require unpacking the meaning of theological questions, which inherently raise core religious questions.

Public law disputes implicating the religious question doctrine look somewhat different. In these cases, courts are asked to apply the regulatory infrastructure in circumstances that invariably require some sort of interrogation of religious doctrine or practice. Frequently those cases involve questions of religious liberty or religious entanglement where courts need—or at least are certainly asked—to identify the scope and meaning of religious assertions.\(^10\) Other times, courts are asked to apply regulatory schemes that interpret religious categories or terminology.\(^11\) In such circumstances, theological matters become insinuated into highly-charged debates over the extent of government authority and the degree of personal freedoms to avoid legal restrictions.

In each sphere, the consequences of applying the religious question doctrine look different. When judges dismiss private law cases that

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\(^9\) For a collection of examples, see ibid, 771-73 and 782.

\(^10\) See eg Thomas, [715]; Ballard. Other examples include the recent litigation over the contraception mandate. See infra notes 51-64 and accompanying text.

\(^11\) As discussed below, kosher consumer fraud laws are a prime example. See eg Ran-Dav’s County Kosher v State, 129 NJ 141 (NJ 1992) (considering constitutionality of the state’s “kosher law”); Commack Self-Service Kosher Meats, Inc. v Weiss, 294 F 3d 415, 419 (2d Cir 2002) (same); Barghout v Mayor of Baltimore, 833 F Supp 540, 542 (D Md 1993) (same).
implicate theological questions, they invariably leave aggrieved parties without a remedy for legal wrongs that can have significant consequences, either financial or otherwise. In turn, the religious questions doctrine has actual financial victims, so to speak. When judges dismiss public law cases that implicate theological questions, they limit law’s reach and leave some spheres of the human condition beyond the scope of legitimate government regulation. And in so doing, courts often leave some subset of citizens exposed to circumstances without the typical regulatory scaffolding otherwise intended to protect against various harms.

These consequences—which are undeniably significant—highlight the need for U.S. courts to consider—or maybe reconsider—the contours of the constitutional limitations on their authority to engage matters of theology. In the discussion below, I highlight some of the different approaches for adjudication of religious questions, considering some of the consequences of each approach. In turn, I assess three different approaches potentially available to courts when encountering circumstances that trigger the religious questions doctrine.

Examining these potential strategies also entails evaluating whether the different interests and consequences at stake in both private law and public law cases. Under the conventional approach to the religious question doctrine, cases implicating theology in the private law context are most likely to be dismissed as beyond the scope of judicial adjudicatory authority—with cases falling within the public law rubric serving as a close second. But other approaches to the religious question doctrine—approaches that poke their way into the case law periodically—take a somewhat different approach, identifying techniques for courts to resolve cases arising in the private law context even when they appear, at least at first glance, to require adjudication of religious questions. These disparities derive from fundamental disagreements over the origins of and animating principles behind the religious questions doctrine. And by outlining these origins and principles, I argue that courts may have some legal alternatives when encountering religious questions in the private law context, alternatives that courts should take seriously so as to avoid too-freely renouncing their central duty of resolving disputes submitted on the courthouse doorstep.

II. Judges as Theologians: From Kosher to Contraception

To appreciate the difference between private law cases and public law cases that implicate the religious question doctrine consider the term kosher or kashrut. As “defined” by the Encyclopedia Judaica, it is the “collective
term for the Jewish laws and customs pertaining to the types of food permitted for consumption and their preparation.” Of course, this definition, because it incorporates by reference an entire body of law, is really just the beginning of understanding what the term kosher connotes. And, not surprisingly, there have been numerous cases in the United States where courts have been thrust into resolving disputes that in one way or another implicate identifying the contours of the term kosher. Importantly, while maintaining some similarities, the different iterations of “kosher” cases vary significantly in context—sometimes arising in the private law context and sometimes in the public law context. In that way, the range of kosher litigation provides an excellent starting point for the various ways judges are pulled into cases that have a theological overlay.

Consider the following. In 2012, eleven plaintiffs filed suit—on behalf of themselves and, of course, all others similarly situated—against ConAgra, the parent corporation of the Hebrew National brand. Hebrew National has long been famous in the United States for its “kosher” hotdogs, which it advertises as being of exceedingly high quality because the company “answers to a higher authority.” The plaintiffs highlighted these advertising claims of ConAgra, emphasizing that the company advertises and sells meat products under the Hebrew National label, describing them as “100% kosher” “as defined by the most stringent Jews who follow Orthodox Jewish law.”

However, the plaintiffs contended that contrary to these representations, Hebrew National meat products did not satisfy these kosher standards. Indeed, according to the complaint, employees informed the kosher certification companies that procedures had “rendered the meat being processed not kosher” and instead of acting on this information, “little or nothing” was done to correct these kosher violations. As a result, the complaint alleged that purchasers of Hebrew National meat products overpaid for these products, mistakenly believing them to be “100%

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13 Class Action Complaint, Wallace v ConAgra Foods, Inc., 920 F Supp 2d 995 (D Minn 2013) (Civil No. 12-1354 (DFW/TNL)).
14 Ibid, [24]; see also ‘We answer to a higher authority’. Wikipedia <https://en.wikipedia.org/wiki/We_answer_to_a_higher_authority> (accessed 11 September 2017).
15 Complaint, Wallace, 920 F Supp 2d 995, [3].
16 Ibid, [17-21].
17 Ibid, [21].
kosher.” In turn, the complaint stated that ConAgra should be held liable for these misrepresentations regarding the kosher quality of these meat products under various consumer protection laws as well as for breach of contract and negligence.

ConAgra’s defense focused on cutting the suit off at the pass, emphasizing at the very outset of its brief supporting dismissal of the suit that adjudication of the plaintiffs’ claims violated the First Amendment: “Under the First Amendment to the United States Constitution, federal courts may not adjudicate disputes that turn on religious teachings, doctrine, and practice.” And, as argued by ConAgra, “Whether or not something is ‘kosher’ is exclusively a matter of Jewish religious doctrine.”

The district court adopted ConAgra’s view almost verbatim, dismissing the plaintiffs’ claims: “[t]he definition of the word ‘kosher’ is intrinsically religious in nature, and this Court may not entertain a lawsuit that will require it to evaluate the veracity of Defendant’s representations that its Hebrew National products meet any such religious standard.” And while the Eighth Circuit reversed the district court’s decision for lack of standing—and remanded the case to state court—a Minnesota state court reached an identical conclusion, holding that “It would be unholy, indeed, for this or any other court to substitute its judgment on this purely religious question.”

By dismissing the plaintiffs’ claims, however, the courts left a potential class of consumer fraud victims without legal recourse. Indeed, the federal district court judge himself emphasized this disconcerting consequence of dismissing the case; “[r]egrettably,” he concluded, “the Court recognizes that its decision likely leaves consumers without a remedy . . . .”

And yet, notwithstanding the fact the court’s decision left the victims of ConAgra’s alleged fraud without a remedy, the ultimate decision was far from surprising. Federal courts had for some time addressed the concept of kosher in a somewhat related context: kosher consumer protection laws.

18 Ibid, [39-40].
19 Ibid, [46-64].
20 Defendant’s Memorandum in Support of Motion to Dismiss First Amended Complaint, Wallace v ConAgra, 920 F Supp 2d 995, 1.
21 Ibid.
Indeed, nearly half the states have attempted to incorporate definitions for kosher into consumer protection legislation in the hopes of preventing food establishments from intentionally defrauding the public as to whether their food is, in fact, kosher. The existence of such significant legislative attempts to curb kosher fraud serves as, in large part, a response the U.S. historical experience. Kosher fraud has been a rampant problem in the United States; in fact, in the late 19th and early 20th century, the kosher food business was typified by extortion, intimidation, and physical violence.

As a general matter, the response to kosher fraud has largely come from the rise of a private kosher certification industry, which polices kosher food production through “social networks based upon trust and reputation.” But notwithstanding these private forms of regulation, states have persisted in attempts to use government regulation—that is, public law—in order to eliminate kosher fraud. Thus, for example, New Jersey enacted a regulation that made it “an unlawful consumer practice’ to sell or attempt to sell food ‘which is falsely represented to be Kosher,’” which it defined as food “prepared and maintained in strict compliance with the laws and customs of the Orthodox Jewish religion.” Similarly, Baltimore enacted an ordinance that made it a misdemeanor to, “with intent to defraud,’ offer for sale any food labeled kosher, or indicating compliance ‘with the orthodox Hebrew religious rules and requirements and/or dietary laws,’ when the food does not in fact comply with those laws.”

Courts uniformly struck down public law attempts to regulate kosher consumer fraud, holding that such laws violated the Establishment Clause of the First Amendment, although the reasons have varied depending on the specifics of each challenged regulation. The Fourth Circuit struck down Baltimore’s kosher fraud law that created a “Bureau of Kosher Meat and Food Control,” which included—by law—three duly ordained Orthodox Rabbis chosen from a list submitted by two Orthodox associations, on account that the law “foster[ed] excessive entanglement of religious and secular authority by vesting significant investigatory, interpretive, and

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25 See Barghout v Bureau of Kosher Meat & Food Control, 66 F 3d 1337, 1340 n.5 (4th Cir 1995) (listing 21 states that have adopted such laws).
27 Ibid, 10.
28 Ibid, 3.
29 Ran-Dav's, [145].
enforcement power in a group of individuals based on their membership in a specific religious sect.\textsuperscript{31} The Supreme Court of New Jersey struck down New Jersey’s kosher fraud law because it fostered excessive entanglement with religion; “disputes,” the court reasoned, “would call inescapably on the State to assume a religious role” and to “impose and enforce its own interpretation of Orthodox Jewish doctrine.”\textsuperscript{32} And the Second Circuit, also invoking the fostering of excessive entanglement with religion, struck down New York’s kosher regulatory scheme because it, among other constitutional infelicities, required the state to “sides in a religious matter, effectively discriminating in favor of the Orthodox Hebrew view of dietary requirements,” “to take an official position on religious doctrine” and to “create an impermissible fusion of governmental and religious functions by delegating civic authority to individuals apparently chosen according to religious criteria.”\textsuperscript{33}

The only instance of judicial approval of kosher laws came in 2012, when the Second Circuit held that New York’s Kosher Law Act of 2004 did not violate the Establishment Clause. That new incarnation of New York’s attempt to regulate the kosher industry had adopted a creative approach; instead of incorporating a standard for kosher, it required “sellers and manufacturers that market their food products as ‘kosher’ to label those foods as kosher and to identify the individuals certifying their kosher nature.”\textsuperscript{34} Plaintiffs argued that this version also violated the Establishment Clause, focusing on the requirement that kosher products still had to bear a kosher label, thereby entangling the state in religion.\textsuperscript{35} But the court rejected those contentions, noting that the statute did not “define kosher or authorize state inspectors to determine the kosher nature of the products,”\textsuperscript{36} thereby serving more as a disclosure requirement than as a robust state-run investigatory regime. Accordingly, the court concluded that the statute was constitutional, avoiding any denominationally specific definition of kosher and thereby side-stepping any sort of endorsement of one religious group over another.\textsuperscript{37}

On the surface, the fact that courts had generally found public law attempts to regulate the kosher industry unconstitutional provided an

\textsuperscript{31} Barghout v Bureau, [1342].
\textsuperscript{32} Ran-Dav’s, [162].
\textsuperscript{33} Commack v Weiss, [425].
\textsuperscript{34} Commack Self-Service Kosher Meats, Inc. v Hooker, 680 F3d 194, 201-202 (2d Cir 2012) (quoting NY Agriculture and Markets Law, s 201-a-201-d).
\textsuperscript{35} Ibid, [207].
\textsuperscript{36} Ibid, [201].
\textsuperscript{37} Ibid, [207-11].
ostensibly natural justification for the court’s conclusion in the Hebrew National litigation. Certainly ConAgra thought so as it repeatedly highlighted judicial decisions in the kosher fraud statute cases in its brief advocating for dismissal of the Hebrew National litigation. And yet, like the Hebrew National litigation, the fact that courts have struck down kosher fraud legislation as unconstitutional leaves consumers without regulation that could protect unsuspecting purchasers from falling victim to companies exploiting the constitutional limitations on judicial decision-making.

In this way, judicial unwillingness to resolve claims that implicate religious questions—like the definition of kosher—has real world consequences for your average consumer of kosher products. And it raises the question of whether courts have any alternatives in addressing legal disputes hinge, in some way or another, on ostensibly religious questions.

A. The Conventional View: No Religious Questions

When courts encounter questions of substantive religion or theology, their reaction is typically best described as “hand’s off”; thus, courts typically refuse to resolve the dispute on account of their view that “civil courts cannot adjudicate disputes turning on church policy and administration or on religious doctrine and practice.” When facing cases where the “underlying controversy over religious doctrine or practice,” courts invoke the “religious question” doctrine, which requires that they resist adjudicating the dispute and dismiss the case on First Amendment grounds.

On this conventional view, the judicial approach to religious questions dates back to America’s founding—and even preceding it as represented by the traditional reading of John Locke’s Letter Concerning Toleration. Moreover, some see this conventional approach in various Supreme Court decisions, which has strongly encouraged lower courts to avoid addressing religious questions.

38 Defendant’s Memorandum, Wallace, 920 F Supp 2d 995, [9-10].
40 Natal, [1576].
42 See eg Andrew Koppelman, ‘Corruption of Religion and the Establishment Clause’ (2009) 50 William & Mary L Rev 1831, 1859 (“But Locke also thought that the state was generally incompetent to adjudicate religious questions . . . .”).
43 Thomas; Ballard.
Contemporary advocates of this approach have expressed the rationale for this approach in a number of different ways. Maybe most famously, Ira Lupu and Robert Tuttle have argued that 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.”\(^{44}\) 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.”\(^{45}\) 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.\(^{46}\) As described by Jared Goldstein, this conventional view sees religious questions as different than standard questions of fact: “[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.”\(^{47}\)

Other advocates of this conventional approach have focused less on the inability of courts to penetrate the substance of religious law, but more directly on a different consequence of resolving religious questions: that judicial resolution of such questions will be interpreted as endorsement of one religious view over another—a form of, so to speak, prohibited denominational preference.\(^{48}\) For example, Laurence Tribe has argued that the prohibition against “doctrinal entanglement in religious issues” “more deeply [\(\) reflects the conviction that government—including judicial as well as the legislative and executive branches—must never take sides on religious matters.”\(^{49}\) And similarly, Christopher Eisgruber and Lawrence


\(^{45}\) Ibid, 122.

\(^{46}\) Ibid, 123.


\(^{48}\) As the paradigm of denominational preference, see Larson v Valente, 456 US 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.”).

\(^{49}\) Laurence H Tribe, American Constitutional Law s 14-11 (2d edn, Mineola, NY, Foundation Press, 1988) 1231. Tribe also notes 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
Sager have argued “[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.”^50

To concretize, consider how this approach would apply to our kosher cases. The two kosher cases emerge from different contexts—one considers how courts would resolve disputes between two litigants over the meaning of the word kosher and the other considers how legislatures, and in turn courts, might use a kosher standard to police certain religious forms of consumer fraud. Regardless of the context, though, the twin arguments in favor of the conventional “religious question doctrine” approach would have courts assume the standard hands-off disposition. To resolve the dispute would, to use the Lupu and Tuttle framework, require courts to intervene in a subject matter they are constitutionally incompetent from interrogating, and to use the logic of either Tribe or Eisgruber and Sager, to interpret the term kosher—regardless of context—might align the courts with one religious perspective as opposed to another, which itself would be constitutional impermissible under the Establishment Clause. Put differently, whether because of prohibited entanglement or some version of denominational preference, the conventional view would see courts as prohibited from resolving disputes that hinge on the definition of the term kosher.

While this conventional view is, in many ways, well settled, it has, of late, faced pressures at the doctrine’s boundaries. Much of this is the result of recent litigation over the Religious Freedom Restoration Act (RFRA), which prohibits government from “substantially burdening religious exercise,” unless those burdens satisfy strict scrutiny.51 The challenge has been that assessing what constitutes a substantial burden as opposed to an insubstantial burden is somewhat opaque. On the one hand, the need for a burden to be substantial provides some sort of threshold inquiry to make sure that not all religious claims can secure an exemption from the law. On the flipside, the ambiguity in the statutory terminology does raise the possibility that courts might distinguish between various forms of burdens based upon which is more theologically substantial.

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This question has become particularly pressing in recent years as various for-profit and non-profit companies challenged the Affordable Care Act’s so-called contraception mandate, which requires companies to include certain forms of contraception in their employee’s insurance coverage. In the first round of litigation, numerous religiously-motivated for-profit companies challenged the contraception mandate, arguing that providing their employees with insurance that covered contraception made them complicit in “sin”—and therefore complying with the contraception mandate constituted a substantial burden on their religious exercise.

This claim was ultimately vindicated by the U.S. Supreme Court in Burwell v. Hobby Lobby, and the government eventually provided a broader religious accommodation for religiously-motivated companies. However, numerous religiously-motivated non-profit employers claimed that the very process for securing the religious accommodation, which required some non-profits to self-certify as religious institutions, also constituted a substantial burden on their religious exercise. The rationale: filing the paperwork that confirms they are a religious institution, and thereby secures their religious exemption, will trigger contraceptive insurance coverage for their employees. And triggering such coverage—even if paid for and provided by a third party, not the objecting institution—still made them complicit in conduct they believed to be sinful. When finally addressing this claim on the merits in Zubik v. Burwell, the Supreme Court chose to remand the case to the federal courts of appeal, leaving the issue without final resolution.

Because of RFRA’s substantial burden standard, the claims in both these cases implicated the religious question doctrine. Critics of RFRA claims in both cases argued that the attenuated nature of the religious burden rendered it, by definition, insubstantial. For example, in Justice Ginsburg’s Hobby Lobby dissent, she argued that “the connection between the . . . religious objections and the contraceptive coverage requirement is

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52 Burwell v Hobby Lobby Stores, Inc., 134 S Ct 2751, 2775-83 (2014).
54 45 C.F.R. s 147.131(b) (2016).
55 ‘HHS Case Database’.
too attenuated to rank as substantial. The requirement carries no command that Hobby Lobby . . . purchase or provide the contraceptives they find objectionable. Instead, it calls on the companies covered by the requirement to direct money into undifferentiated funds that finance a wide variety of benefits under comprehensive health plans.57

And these claims that attenuated burdens could not qualify as substantial were amplified in the Zubik litigation. Maybe the most forceful example was the decision of the D.C. Circuit, which concluded that “the challenged regulations do not impose a substantial burden on Plaintiffs’ religious exercise under RFRA. All Plaintiffs must do to opt out is express what they believe and seek what they want via a letter or two-page form. That bit of paperwork is more straightforward and minimal than many that are staples of nonprofit organizations’ compliance with law in the modern administrative state.”58 Other federal courts of appeals reached similar decisions,59 which were echoed by scholars as well.60

In Hobby Lobby, the Supreme Court countered these claims by invoking a version of the religious question doctrine. Relying on prior decisions, the Supreme Court argued that the First Amendment prohibits judicial inquiry into the theological grounds for the professed substantial burden.61 And, according to the Court, determining whether the employers’ asserted burden was, indeed, substantial, implicated the types of religious questions that the First Amendment prohibited:

The [employers] believe that providing the coverage demanded by the [contraception mandate] 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. This belief implicates a difficult and important

57 Hobby Lobby, [2799] (Ginsburg, J. dissenting).
58 Priests for Life v United States Department of Health and Human Services, 772 F 3d 229, 237 (DC Cir 2014).
59 See eg Geneva College v Secretary United States Department Health and Human Services, 778 F3d 422, 442 (3d Cir 2015) (“[C]an the submission of the self-certification form, which relieves the appellees of any connection to the provision of the objected-to contraceptive services, really impose a ‘substantial’ burden on the appellees’ free exercise of religion? We think not. . . . [W]here the actual provision of contraceptive coverage is by a third party, the burden is not merely attenuated at the outset but totally disconnected from the appellees.”).
61 Burwell, [2778].
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. Arrogating the authority to provide a binding national answer to this religious and philosophical question, HHS and the principal dissent in effect tell the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step.62

But the Court’s decision in Zubik to remand the case, instead of invoking the religious question doctrine, has left open the door to the possibility that it might not extend the logic of the religious question doctrine to cases where claimants argue that filling out the relevant forms to secure an accommodation itself also constitutes a theologically substantial burden. And this reluctance to invoke the religious question doctrine in cases like Zubik does raise some questions as to whether conventional approaches to the religious question doctrine might have limits in the context of religious accommodations.

The reasons for this seem clear. Courts need tools to assess religious liberty claims—and determine which should be granted and which should be denied. In principle, the substantial burden inquiry provides the kind of threshold question that can serve as a judicial sorting mechanism. But if the religious question doctrine prohibits courts from distinguishing between the theological substantiality of different claims, courts might very well feel handcuffed, unable to use the degree of the theological burden to determine whether a given religious liberty claim is worthy of being granted. Thus, the conventional view of the religious question doctrine threatens to undermine the ability of courts to forestall an avalanche of claims for religious exemptions—a potential outcome that makes some courts and scholars nervous, especially as these sort of “complicity claims”63 continue to weave their way up to the Supreme Court.64

In this way, the conventional approach to cases implicating religious questions—that courts should remain hands off in all contexts—may be widely held, but its application still remains somewhat uncertain on the

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62 Ibid.
64 Mullins v Masterpiece Cakeshop, Inc., 2015 COA 115 (Colo Ct App, 13 August 2015), cert. granted Masterpiece Cakeshop v Colorado Civil Rights Commission, 85 USLW 3600 (26 June 2017) (No. 16-111).
edges. Indeed, one might even suggest that pressure on government to regulate conduct sometimes provides an impetus for courts to grant more wiggle room on the religious question doctrine under public law than it does under private law. Or, put in the language of the kosher cases, it may be one thing to say that courts cannot determine what food is kosher—a conclusion that has particular force in the context of a case between private parties like the Hebrew National litigation. But when it comes to surveilling consumer fraud, one wonders if courts, taking a cue from some of the Zubik litigation, are willing to identify a little more doctrinal wiggle room. Indeed, the existence of such public law wiggle room, so to speak, might even explain the judicial willingness to deem New York’s kosher fraud law constitutional even as some potential entanglement worries lingered. In the end, while the principles animating the conventional view of the religious question doctrine apply irrespective of whether it emerges in a public law or private law context, there is certainly significant pressure on courts to overlook the doctrine in order to remove constitutional obstacles standing in the way of laws that serve important regulatory functions.

B. A Private Law Fix: Embracing Contextualism

While the conventional approach to cases that implicate religious questions—that is, that courts should remain hands-off in all contexts—is undeniably well-accepted, there are theoretical alternatives that sometimes make their way into the case law. And ironically, those theoretical alternatives present themselves more forcefully when it comes to private law disputes than public law disputes.

One such alternative—one that I have explored along with Barak Richman—is a limited, but heightened, judicial embrace of contextualism. Contextualism asks courts to take the commercial context of religious agreements into account when encountering terminology that appears to be inherently theological. It thereby encourages courts to assess the subjective intent of contracting parties as well as the broader commercial context to unpack religious agreements that contain words that appear, at first glance, to only be susceptible to interpretation through engaging in theological forms of interpretation. Permitting courts to engage in contextualist inquiry would thereby enable courts to leverage the unique commercial and social environment of certain religious agreements when resolving disputes without rendering objective determinations regarding religious doctrine in

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65 Commack v Hooker.
66 This section draws heavily from the discussion in Helfand and Richman, ‘The Challenge of Co-Religionist Commerce’.
violation of the Establishment Clause. In this way, an increasingly contextualist approach can sidestep the challenges posed by the religious question doctrine—and its attendant impulse to adopt the hands off approach to such cases.

A commitment to contextualism encourages courts to consider the parties’ shared norms and expectations when interpreting and enforcing various religious agreements. Thus, in contrast to a purely formalistic approach to contract interpretation—one that prioritizes text and outward manifestations—contextualism asks courts to use context to assess the shared intentions of the parties. The very nature of co-religionist commerce suggests that careful evaluation of context will frequently lead courts to different conclusions. For example, contextual inquiry may in some cases reveal that documents that appear on their face to be commercial instruments were instead intended by the parties to serve as religious symbols, drafted as part of traditional religious ceremonies as opposed to commercial transactions. In other cases, contextual inquiry may provide a basis to interpret seemingly religious terminology, thus allowing enforcement without encroaching on Establishment Clause prohibitions. In this way, contextualism can further ensure the enforceability of co-religionist commerce by avoiding Establishment Clause pitfalls, using the norms and understandings shared by co-religionists to fill in gaps and interpret terms in co-religionist commercial agreements.

Consider how this approach might have been employed in the Hebrew National litigation. Instead of concluding that an inquiry into the objective definition of the term “kosher” was the only way to resolve the lawsuit, a court also could have used contextual evidence to evaluate whether the parties had a shared understanding of what the term “kosher” meant. Hebrew National had provided some of that context in its advertising by specifically referencing “Orthodox” standards of kosher. As an advertising campaign, Hebrew National may likely have thought those terms conveyed some sort of representation to potential consumer, which it intended to capitalize upon through its advertising. Thus, interrogating the subjective intent of the parties might have yielded a shared interpretation of the term that could have been employed to evaluate whether or not the advertising constituted either false advertising or a breach of contract.

Furthermore, the court might have considered Hebrew National’s

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67 Ibid, [810-21].
68 Ibid, [814-16].
69 See Complaint, Wallace, 920 F Supp 2d 995, [3].
“kosher” representations in light of various aids of interpretation. It could have considered the consistency of Hebrew National’s implementation of its kosher standards under the course of dealing rubric for contract interpretation—a point made by the plaintiffs in their brief on the motion to dismiss. And, maybe most material, the court might have considered the commercial standards for kosher certification, which have become relatively uniform as a result of various market pressures.

The court’s failure to do so—and to characterize this case as merely one which had to be dismissed on Establishment Clause grounds—is fairly typical of the conventional approach to religious questions. The court assumed the only method for adjudicating the plaintiffs’ claims was to provide an objective interpretation of “kosher” based solely on the formal text of its commercial representations. But a contextual approach could have provided methods for interpreting the term “kosher” that did not require becoming enmeshed in religious doctrine; a contextual approach could have provided an equally useful answer to a slightly different question: did the parties have an enforceable shared understanding of the term? To be sure, the use of such contextual evidence—such as subjective intent, course of dealing, course of performance and trade usage—might have been insufficient to determine whether Hebrew National could be held liable for consumer protection fraud or breach of contract. But a conventional approach to the religious question doctrine fails to even explore the opportunity. And as a result, it fails to consider how courts can provide meaningful adjudication of cases implicating religious questions instead of simply assuming that the Establishment Clause prohibits any method of affording the parties remedies for potential, and costly, legal harms.

While kosher litigation has not received the benefit of contextualism, courts do sometimes employ such a methodology to resolve disputes. One of the most notable examples has been a series of cases addressing *heter iska* (literally, permissible venture) agreements, which restructure loans as joint ventures in order to avoid Jewish law’s prohibition against usury.

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70 See Lytton, *Kosher*, 81-84 (describing why the kosher certification adopted by Hebrew National has become an industry outsider).

71 See Plaintiffs’ Memorandum of Law in Opposition to Defendant’s Motion to Dismiss, *Wallace*, 920 F Supp 2d 995, [16-19].

72 For the commercial reasons for uniformity of standards in the kosher certification market, see Lytton, *Kosher*, 132-34 (explaining how the interdependence of the kosher certification market has led to the creation of increasingly uniform certification standards).

73 See generally Jay M Zitter, ‘Application, Recognition, or Consideration of Jewish Law by Courts in United States’ in 81 *American Law Reports* 6th 1 (2013); Steven H
Accordingly, the intended borrower, instead of simply agreeing to pay interest, promises to pay a rate of return on an “investment,” typically capped at a rate of return equal to the intended interest rate.\(^\text{74}\) While sometimes such *heter iska* agreements will be executed as the sole agreement between the parties, they are often executed alongside some other document—anything from a standard loan agreement to mortgage documents.\(^\text{75}\) This device, introduced into the Jewish commercial markets sometime between the 12\(^{th}\) and 14\(^{th}\) centuries, enables market participants to grant interest bearing loans—but under a different name—thereby technically avoiding charging interest in violation of Jewish law.\(^\text{76}\)

Not surprisingly, courts have been asked on occasion to interpret such *heter iska* agreements in instances where the borrower’s venture has failed and the creditor would like his loan repaid.\(^\text{77}\) In such circumstances, the borrower will frequently cite the *heter iska* agreement and argue that the creditor bore the risk the venture would fail and therefore there is no remaining debt under the terms of the agreement.\(^\text{78}\)

By and large, courts have not been lured by formalism into enforcing *heter iska* agreements.\(^\text{79}\) To the contrary, courts have refused to enforce *heter iska* agreements literally, leveraging a variety of contextualist tactics to demonstrate that the parties only intended to satisfy a religious formalism and never intended for these agreements to be contractually binding.\(^\text{80}\) In so doing, courts have emphasized the contractual background of *heter iska* agreements, often emphasizing their factual context to infer the true intent


\(^{75}\) See eg *Heimbinder v Berkowitz*, 175 Misc 2d 808 (NY Sup Ct 1998) (executed alongside loan documents); *Edelkind v Fairmont Funding Ltd*, 539 F Supp 2d 449 (D Mass 2007) (executed alongside mortgage documents); *Barclay Commerce Corporation v Finkelstein*, 11 AD2d 327 (NY App Div 1st Dep’t 1960) (executed alongside a factoring agreement).

\(^{76}\) See *Leibovici v Rawicki*, 57 Misc 2d 141, 144 (NY Civ Ct 1968).

\(^{77}\) See eg *Barclay*.

\(^{78}\) Ibid.


\(^{80}\) See eg *Edelkind*; *Arnav Industries, Inc v Westside Realty Associates*, 180 AD 2d 463 (NY App Div 1st Dep’t 1992); *Barclay*.  

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of the parties.

For example, in *Heimbeinder v. Berkowitz*, the court refused to enforce a *heter iska* agreement, noting a variety of contextual considerations including that the agreement had been produced by the defendant from his pocket at the conclusion of the closing,\(^81\) and that the plaintiff admitted that the defendant had explained that he wanted to execute the *heter iska* agreement simply “because under Jewish law he was ‘not supposed to be charged interest.’”\(^82\) The court therefore concluded that the *heter iska* agreement was not intended by the parties to be enforceable, but “was ‘merely a compliance in form with Hebraic law.’”\(^83\)

Other courts addressing similar situations have followed suit, recognizing that just because the form of the *heter iska* could be interpreted as a true contract, the context of such agreements often indicates that the parties do not intend for civil courts to enforce the agreement.\(^84\) At bottom, these agreements are frequently best understood as religiously-sanctioned loopholes to avoid religious rules against charging interest and do not represent the mutual assent of the parties to adopt contractual obligations.\(^85\) And reaching this conclusion is possible without interrogating religious doctrine or theology; embracing some degree of contextualism would allow courts encountering such cases to provide a measure of justice that captured the intentions of the parties without violating the demands of the Establishment Clause.

Of course, the methodology of contextualism has far more traction in when it comes to private law. It is in the private law context where courts have access to considerations like the subjective intent of the parties and contractual context that can inform the meaning of an agreement—that is, without delving into religious and theological terminology. In this way, contextualist strategies—which avoid, as opposed to challenge, the religious question doctrine—highlight how the private law and public law incarnations of the religious question doctrine open different doors for judicial strategy to provide some degree of legal resolution to disputes that otherwise remain beyond the ken of courts.

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\(^81\) *Heimbeinder*, [817].
\(^82\) Ibid.
\(^83\) Ibid.
\(^84\) See *Edelkind*, [454]; *Arnav Industries*, [464]; *Barclay*, [328]; see also *Leibovici*.
\(^85\) See eg *Bollag v Dresdner*, 130 Misc 2d 221, 224 (NY Civ Ct 1985) (noting in the context of a *heter iska* that “[a] transaction must be considered in its totality and judged by its real character, rather than by the name, color, or form which the parties assign to it.”).
C. Challenging the Religious Question Doctrine: Distinguishing Between Public and Private Law

While contextualism offers one alternative to the conventional view of the religious question doctrine, it does not require overhauling the prevailing Establishment Clause jurisprudence. It simply sidesteps the problem by leveraging considerations like subjective intent and the contracting context to enforce—or refuse enforcing—commercial instruments that include religious terminology.

But this strategy is not the only alternative to the prevailing view that courts are constitutionally prohibited from resolving claims that turn on religious doctrine or practice. While the traditional story typically casts the religious question doctrine as finding its origins in the Supreme Court’s early church property cases, the reality is far more complex. Indeed, as I have argued elsewhere, the religious question doctrine—as currently conceived—is a relatively recent phenomenon. A close look at the early church property cases bears this point out, highlighting how the Court’s application of the Establishment Clause to intra-church disputes focused less on the inherent problems of judicial resolution of religious questions, and far more on the affirmative institutional rights of religious organizations.

For example, in its 1871 decision Watson v. Jones, the Court famously stated that “[t]he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.” But the Court explained this prohibition on judicial decision-making by emphasizing that the “establishment” of a “sect” derived not from the inability of courts to resolve religious questions, but from the affirmative institutional rights guaranteed religious organizations:

The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and 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, is unquestioned.

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86 This section draws heavily from Helfand, ‘Litigating Religion’.
87 See ibid, 519-42.
88 Watson v Jones, 80 US 679, 728 (1871).
89 Ibid, [728-29].
Thus, the reason courts were instructed to stay out of religious disputes had less to do with some sort of constitutional objection to resolving religious questions and far more to do with the right of religious institutions to resolve religious disputes internally. Thus, the Watson Court explained, “religious unions” retain a “right to establish tribunals for the decision of questions arising among themselves.”90 In subsequent decisions, the Supreme Court distilled this notion into a “freedom for religious organizations,” which entailed “an independence from secular control or manipulation” in adjudicating “matters of church government as well as those of faith and doctrine.”91

That the Supreme Court linked the constitutional prohibition against intervention in religious disputes to the institutional rights of religious organizations—as opposed to the inherent problems of judicial resolution of religious questions—is underscored by its decision in a number of early cases. For example, in Watson, the Supreme Court instructed lower courts that they could adjudicate disputes over compliance with the religious requirements of express trusts—cases that clearly entailed resolution of religious questions, which the Watson Court simply noted would require lower courts to navigate 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.”92 This facet of the Watson opinion has troubled scholars who have attempted to trace the religion question doctrine to the Court’s early church property cases,93 but it fits easily into an interpretation of these early church property cases as concerned primarily with the institutional autonomy of religious institutions. And the Court’s decision in Watson was far from alone; a number of subsequent Supreme Court decisions evidence a similar willingness to resolve religious questions,94 as did decisions by lower courts.95

90 Ibid, [729].
91 Kedroff v St. Nicholas Cathedral of Russian Orthodox Church, 344 US 94, 116 (1952).
92 Watson, [724].
94 See eg Bouldin v Alexander, 82 US (15 Wall) 131, 140 (1872) (holding that the majority of a congregational church is considered to represent the church only “if [it] adhere[s] to the organization and the doctrines”); Gonzalez v Roman Catholic Archbishop, 280 US 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.”).
95 See Helfand, ‘Litigating Religion’.
But in the latter half of the 20th century, the Supreme Court shifted its jurisprudential approach by reinterpreting its church property cases, casting them not as about protecting the internal decision-making of religious institutions, but as prohibiting judicial resolution of religious questions. Maybe the earliest attempt to do so was Justice Brennan’s concurrence in Abington School District v. Schempp, where he described the church property cases as “giv[ing] 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.”

Similarly, Justice Brennan’s subsequent majority opinions highlighted the same doctrinal move; the lesson of judicial abstention in church property cases was based upon an Establishment Clause prohibition to resolve religious questions, not based upon a Free Exercise principle granting some degree of religious autonomy to religious institutions. In United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, Brennan phrased this as follows: “the [First] Amendment [] commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine.”

And in Serbian Eastern Orthodox Diocese v. Milivojevich, Brennan again justified judicial abstention from an intra-church dispute, the particulars of which required assessing whether a particular church was hierarchical or congregational; and, as in his previous decisions, he grounded this decision in the newly minted religious question doctrine, explaining that rendering a decision in such disputes “frequently necessitates the interpretation of ambiguous religious law and usage,” and thereby “would violate the First Amendment in much the same manner as civil determination of religious doctrine.”

Thus, on Brennan’s account, the reason why courts do 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.” Put differently, courts must avoid intervening in intra-church disputes because they must avoid religious questions—a

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97 United States v Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449 (1969).
98 Serbian E Orthodox Diocese v Milivojevich, 426 U.S. 696 (1976).
100 Ibid, [708].
101 This approach also serves as the centerpiece of the Court’s decision in Jones v Wolf, 443 US 595, 603 (1979) (identifying the primary advantage of the “neutral principles” approach as its “promise[ ] . . . to free civil courts completely from entanglement in
conclusion that required the Court to actually discard some of its precedent that seemed far more willing to allow courts to resolve religious questions.102

Recognizing this doctrinal shift provides a window into a prior legal framework that left the constitutional door open to resolving religious questions. This far more permissive attitude toward religious questions stemmed from an apparent view that there was no inherent constitutional problem with interpreting religious doctrine or theological terminology. Thus, for example, determining what an express trust with religious terminology required did not, at least from the vantage point of the Supreme Court’s early decisions, pose a problem. In that way, adjudication of private law disputes—disputes over religious contracts or other commercial instruments—were well within the constitutional competence of courts.

To be sure, and as noted above, the conventional wisdom among scholars is that the religious questions doctrine serves as an important safeguard and should not be discarded or limited. To some, this is because courts lack the capacity to resolve religious questions.103 In the words of Paul Kauper, “[R]eligious truth by its nature [is] not subject to a test of validity determined by rational thought and empiric knowledge.”104

But there is good reason that, to the extent this justification focuses on judicial competence to probe the depths of theology, it may be overstated. When courts encounter private law disputes that implicate religious questions, they retain significant tools to determine the correct meaning of a religious term or theological concept. To the extent this concern views religious question as simply “too hard” for courts to resolve,105 courts already adjudicate claims that turn on deeply complex matters, including technology, science, economics, medicine, and finance.106 Courts overcome

102 Serbian E. Orthodox Diocese, [712-13] (holding that the “marginal civil court review” for fraud, collusion and arbitrariness announced in Gonzalez v Roman Catholic Archbishop, 280 US 1, 16 (1929), “undermine[s] the general rule that religious controversies are not the proper subject of civil court inquiry” and therefore must be rejected).

103 See infra notes 43-47 and accompanying text.


106 See eg Robin Fretwell Wilson, ‘Hospital Ethics Committees as the Forum of Last
such complexities by using standard fact-finding techniques, most notably by having the parties present expert testimony and evidence speaking to the contested issue.\textsuperscript{107}

Indeed, the challenges faced by courts in evaluating religious law and religious doctrine share many similarities with the frequent need for courts to determine questions of foreign law.\textsuperscript{108} And in those cases, the Federal Rules of Civil Procedure respond to the complexity by expanding the authority of courts to fact-find: “the 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.”\textsuperscript{109} Thus, instead of waiving the adjudicatory white flag, the Federal Rules of Civil Procedure take the opposite approach, trusting that courts, with more information, can overcome the relevant challenges. There is therefore good reason to believe that courts should similarly be capable of navigating competing claims regarding the substance of religious law and doctrine. Thus, to return to the Hebrew National litigation, a court might very well have been able to leverage expert testimony, combined with an intensive assessment of the relevant facts, to determine whether ConAgra had, in reality, engaged in pervasive kosher fraud, thereby defrauding thousands of consumers of a total of millions of dollars. The analysis might have been factually challenging, but there’s good reason that courts are up to that challenge.

However, advocates of the religious question doctrine do not simply make the competency claim. They also advance a far more fundamental challenge to judicial resolution of religious questions: that judicial resolution of religious questions, which typically requires picking one religious view over another, constitute either a constitutionally prohibited entanglement with or endorsement of religion. Examples of this abound. Laurence Tribe, for example, has argued that the religious question doctrine

\textsuperscript{108} See Goldstein, ‘Is There a Religious Question Doctrine?’ 539 (“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.”). I have explored this analogy further elsewhere. Michael A Helfand, ‘When Religious Practices Become Legal Obligations: Extending the Foreign Compulsion Defense’ (2008) 23 Journal of Law and Religion 535.
\textsuperscript{109} \textit{Federal Rules of Civil Procedure} 44.1. (noting that “[t]he court’s determination [regarding foreign law] must be treated as a ruling on a question of law”).
“more deeply [] reflects the conviction that government—including judicial as well as the legislative and executive branches—must never take sides on religious matters.”

Likewise, Christopher Eisgruber and Lawrence Sager have asserted 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.”

Kent Greenawalt has similarly argued that judicial intervention in inter-denominational disputes raises the very real prospect of “the possible endorsement of one minority group.”

By linking the religious question doctrine to an endorsement rationale, these arguments cast judicial resolution of disputes over religious doctrine and practice as “endorsing” one view of religion, thereby “send[ing] a message to nonadherents that they are outsiders, not full members of the political community.”

In the extreme, such message might even rise to the level of prohibited denominational preference.

But can endorsement really justify an across-the-board prohibition against judicial resolution of religious questions? Consider the following cases.

In Zummo v. Zummo, a Pennsylvania Superior Court addressed the claims of divorcing parents with respect to the custody of their three children; while the parents had raised the children as Jewish in accordance with the mother’s religious tradition, the father had himself grown up Catholic—and those conflicting religious traditions raised issues regarding the ongoing custody of their children. One of the primary holdings of the Superior Court was to reverse the lower court decision that prohibited a father from taking his children to “religious services contrary to the Jewish faith,” concluding that enforcing the provision was unconstitutional.

Now there are a variety of potential justification for such a holding, but the court included in its analysis that enforcing the provision would require the court to answer religious questions: “What constitutes a ‘religious service?’ Which are ‘contrary’ to the Jewish faith? What for the matter is the ‘Jewish’ faith? Orthodox, Conservative, Reform, Reconstructionist, Messianic, Humanistic, Secular and other Jewish sects might differ widely

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110 Tribe, American Constitutional Law, s 14-11, 1231.
114 See eg Larson, [246].
on this point. It is certainly true that various denominations of Judaism differ on how they answer these questions and where parents, each affiliating with different denominations, litigated such an issue, there might be reason to worry about picking one view over the other. But in Zummo, the father had asked the court to allow the children to attend Roman Catholic services—not the services of another Jewish denomination over which the parents disagreed. In such cases, the claim that deciding a religious question constitutes some form of prohibited endorsement or entanglement is far more specious. The court easily could have concluded that the services were “contrary to the Jewish faith” without endorsing one Jewish denomination over the other. It certainly appears that in such cases deciding the relevant religious question will not lead to those constitutionally prohibited ends.

Or consider the following case: Sieger v. Sieger. In the context of a divorce, the wife’s father 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. This arbitration provision was located within a larger engagement contract—which the wife, the husband and the wife’s father all signed—and it stated that any disputes between the parties would be settled “in accordance with the ‘regulations of Speyer, Worms, and Mainz.’” The father submitted the affidavit of an expert in Jewish Law, which stated “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.” 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. But 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, which “would establish one religious belief as

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116 Ibid, [61].
117 Ibid, [52].
119 Ibid, [35].
120 Ibid.
121 Ibid.
And the court did so even though it wasn’t clear there was an alternative understanding of the underlying religious doctrine.

What the foregoing cases highlight is that an unequivocal religious question doctrine, predicated on principles of endorsement or entanglement constitutes somewhat of a doctrinal overreach. Courts are prohibited, on the conventional account, from interpreting and applying religious rules or principles even if there is no genuine theological disagreement between the parties. This is particularly problematic in the context of private law disputes, where parties can incorporate religious rules and requirements that have a clear and undisputed meaning, but courts interpret the First Amendment as prohibiting judicial enforcement of those provisions simply because the provision is expressed in theological terms. Sometimes courts have even been explicit that the religious question doctrine applies even where there are no “competing theological propositions.”

But where there is no genuine disagreement over the meaning of a religious term, justifying the religious question doctrine on endorsement grounds seems unwarranted. And doing so leaves victims of genuine legal wrongs without a remedy.

This is not to say that endorsement does not serve as a valid justification of the religious doctrine in some contexts. But constitutionally prohibited endorsement is much less of a concern when it comes to private law and much more of a concern when it comes to public law. For example, the

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123 Sieger, [36] (internal quotation marks and citation omitted).
125 See ibid. It is worth noting that in these cases noted above where courts have been explicit that there is no need for “competing theological propositions,” those courts have framed the religious question doctrine on “entanglement” and not “endorsement” grounds. However, advancing a separate justification for the religious question doctrine under the umbrella of entanglement poses its own set of problems. See Helfand, ‘Litigating Religion’, 551-52.
126 As I have argued elsewhere, court might assess whether these is a genuine disagreement over a religious contractual term using the Restatement’s framework for interpreting contractual language. See Restatement (Second) of Contracts § 201. Doing so would demonstrate that in cases where genuine endorsement was a concern, the provision would fail anyway simply as a matter of private law. Thus, where parties held different subjective meaning of a religious term, and a court found that neither interpretation was clearly more reasonable than the other, the term would fail for lack of mutual assent. See Restatement (Second) of Contracts s 201(3). In this way, a religious question doctrine predicated on endorsement proves largely unnecessary in the private law context of contract interpretation. In cases where these is a true and genuine dispute over a term, thereby raising endorsement worries, the term will likely fail anyway under standard contract doctrine. For more on this point, see Helfand, ‘Litigating Religion’. 

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endorsement justification of the religious question doctrine provides ample jurisprudential resources for courts to avoid theological inquiries when courts consider using theology to determine the scope of exemptions granted religious claims.

To see how, consider again how the contraception mandate cases have pressed courts to assess what qualifies as a substantial burden under RFRA in order to determine which claims for religious accommodation ought to be granted. As noted above, because substantiality serves as a sorting mechanism for religious accommodation claims, numerous courts and scholars have argued that the complicity claims in both Hobby Lobby and Zubik should be deemed insubstantial because the claimants themselves are not being asked to engage in conduct they believe to be religiously objectionable. This kind of argument, however, ultimately rests on a theological claim—that the notion that various forms of participation in the causal chain of “sinful” conduct is not sufficiently theologically substantial in order to warrant the protection of RFRA. This kind of analysis implicates the religious question doctrine, because it requires courts to assess and compare various theological doctrines, and not simply for their meaning, but for their significance.\(^\text{127}\)

It is this latter instance of the religious question doctrine—the assessment of theological significance for public law purposes—that has been implicated in some of the more well-known instances before the Supreme Court. For example, it was in the context of a substantiality inquiry in Thomas v. Review Board that the Supreme Court held “it is not for us to say that the line [the petitioner] drew was an unreasonable one. Courts should not undertake to dissect religious beliefs . . . because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.”\(^\text{128}\)

In this kind of public law context, judicial assessment of theological doctrine and religious questions genuine implicates endorsement concerns. By labeling one burden on religious exercise theologically substantial and the other insubstantial, courts convey that government believes one faith commitment to be more important than the other. And that kind of

\(^\text{127}\) This is not to say that there aren’t other alternatives to assessing substantiality that can avoid the religious question doctrine—far from it. I have explored that issue elsewhere. See Helfand, ‘Identifying Substantial Burdens’.

\(^\text{128}\) Thomas, [715]. The same is, to a lesser degree, true of United States v Ballard, where the court employed the religious question doctrine in the context of determining whether or not Ballard could be convicted of criminal fraud given his sincere belief in the underlying statements at issue in the case. Ballard.
statement certainly has the ability to “send a message to nonadherents that they are outsiders, not full members of the political community.”

There is good reason to worry that theological investigation when it comes to public law will lead to the kinds of inequalities that convey governmental endorsement. Courts are predisposed to favoring religious majorities, whose religious practices are more well-known and respected, as opposed to religious minorities, whose religious practices are more obscure. Under a regime where courts evaluate the theological substantiality of religious burdens, the impact of laws on religious minorities are likely to be underestimated and underappreciated, unfairly circumscribing the protections afforded by RFRA. As I have noted elsewhere, such a result would be the height of irony as it would invert RFRA’s core commitment to protecting religious minorities. As the Supreme Court has emphasized, it is for this reason that “[r]epeatedly and in many different contexts, we have warned that courts must not presume to determine . . . the plausibility of a religious claim.” To do so would amount to government allocating legal burdens on the basis of which religious claims it found more appealing, more important—and potentially more in keeping with its own notions of morality and ethics.

On this view of the religious question doctrine, it is public law claims where the concerns animating the religious question doctrine are at its strongest. Evaluating which claims are theologically significant or substantial can raise serious questions of endorsement. Or, put in terms of the kosher cases, when states seek to outline and enforce a particular set of kosher standards, they might be pursuing the laudable goal of preventing kosher consumer fraud, but in doing so they run afoul of the religious question doctrine at its strongest. By contrast, when it comes to private law and the interpretation and enforcement of agreements, judicial refusal to adjudicate claims on account of the religious question doctrine often go too far, dismissing the case where there is little theoretical justification to do so.

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129 Lynch, [688] (O’Connor, J. concurring).
131 Ibid.
IV. CONCLUSION

On the conventional view, when the demands of U.S. law and the aspirations of religion merge, courts are often caught in the crosshairs, simultaneously asked both to resolve disputes, but to do so without answering “religious questions.” But while the application of this doctrine is often taken for granted, the principles motivating the constitutional prohibition do not apply quite as evenly as courts would have us believe. Thus, while the conventional view sees courts as either lacking the capacity to resolve religious questions, or alternatively as constitutional prohibited from doing so for fear of endorsing one religious belief over another, the strength of these justifications vary depending on the legal context. Whether it is an embrace of contextualism or an even heavier dose of skepticism of the religious question doctrine, there is good reason to believe that courts have both the capacity and authority to engage in theological inquiries to resolve private law disputes. And in so doing, they may not have to close the courthouse doors whenever a religious question comes there way, leaving some jurisprudential space for providing remedies for legal claims all-too often painted as “beyond the ken” of judges.

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