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The Religion Clauses and Political Asylum: Religious Persecution Claims and the Religious Membership-Conversion Imposter Problem [notes]

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The Religion Clauses and Political Asylum: Religious Persecution Claims and the Religious Membership-Conversion Imposter Problem

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The Immigration and Naturalization Service (INS) has long been acquainted with the problem of marriage fraud where an applicant enters into a sham marriage in order to remain within the United States. A more recent phenomenon is the problem of religious conversion fraud. Recently, the INS has seen an increase in asylum claims for "persecution or a well-founded fear of persecution on account of . . . religion" 1 following an asylum applicant's claim of religious conversion. Typically, the conversion is from Islam to Christianity. Some Islamic regimes, including those of Sudan and Iran, have retained the premodern Shari' a rule that conversion to Christianity is apostasy, punishable by death or imprisonment. 2 Other Islamic countries, while declining to adopt de jure apostasy rules, prosecute and execute converts to other faiths, usually under the pretext that the converts are spies. 3

Although these Islamic regimes' use of apostasy laws is theoretically internally dubious, 4 the persecution of Christian converts is a real phenomenon that poses several difficult problems for the INS. Certainly some asylum applicants are opportunistic imposters. Many applicants, however, have been exposed to a variety of Christian denominations while in the United States. Enjoying the newfound freedom to convert, some asylum applicants sincerely embrace new faiths. Therefore, an adjudicator faces the dilemma of determining whether a

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2. See ANN E. MAYER, ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS 141 (2d ed. 1995) (female apostates are imprisoned until they return to Islam); JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 187 (1964) (noting that male apostates are given three days to renounce their apostasy and return to Islam or be put to death). An "apostate" is one who rejects or denies his or her faith.
3. See id. at 146 (noting "no verse in the Qur'an . . . stipulates any earthly penalty for apostasy" and that premodern jurists extrapolated apostate punishment from incidents during and after Mohammed's life that leave the subject open to alternative interpretation). The Qur'an itself explicitly exhorts religious tolerance and declines earthly punishment of those who deny Islam for another faith: "Say: 'O you who deny the truth! I do not worship that which you worship, and neither do you worship that which I worship. And I will not worship that which you have [ever] worshipped, and neither will you [ever] worship that which I worship. Unto you, your moral law, and unto me, mine!' " THE MESSAGE OF THE QUR'AN 109:1-6 (Muhammad Asad trans., 1984).
religious convert is an imposter or a legitimate member of a religious group that is persecuted in the applicant’s home country.

In assessing the applicant’s credibility, the constitutional dimensions of religious liberty can complicate the adjudicator’s task. The sincerity of religious membership and conversion, particularly in Christianity, is not easily judged by outward criteria. Moreover, sincere religious adherents—particularly new converts—may hold beliefs and practices, intentionally or not, that are heterodoxical. In addition, given the aspirational character of much religious belief, few, if any, religionists perfectly practice all of their faith’s creeds. Thus, given the distinctive character of Christian conversion and membership, Christian asylum applicants are likely to confront adverse INS credibility determinations.

This note argues that the Establishment and Free Exercise Clauses furnish asylum applicants a viable constitutional challenge to an administrative judge’s adverse credibility findings of religious membership. Because credibility findings of Christian conversion risk agency impairment of free exercise or imposition of a religious orthodoxy, asylum applicants can convincingly argue that a reviewing court must employ religion clause analysis in evaluating the agencies’ findings. Part I reviews the history of the U.S. provisions, noting the important gap that the religious persecution category fills in asylee protection, and discusses the phenomenon of conversion fraud. Part II analyzes the meaning of “religion” in U.S. asylum law, the importance of religious group membership to sur place asylees in obtaining protection, and the constitutional dimensions of sincerity determinations for religion-based claims. In this context, this note reviews potential free exercise and nonestablishment claims to adverse INS credibility determinations. Lastly, in Part III, this note assesses remedial proposals for addressing concerns raised by INS credibility determinations of religious conversion.

I. RELIGIOUS PERSECUTION CLAIMS

A. HISTORY

Following the Second World War, several western European countries signed and ratified the 1951 Convention Relating to the Status of Refugees (Convention). The Convention used the Jewish experience of Nazi Germany and the


7. See 1951 Convention Relating to the Status of Refugees, Apr. 22, 1954, 189 U.N.T.S. 137 [hereinafter Convention]. The United States was not a signatory. North American governments were particularly guilty for their inattention to the plight of European Jews. In 1939, Cuba and the United
Holocaust as the paradigm of persecution and provided five grounds on which applicants could obtain asylum: persecution on account of race, religion, nationality, social group, and political opinion. In 1967, the United States finally accepted the Convention's obligations through the Protocol Relating to the Status of Refugees (Protocol). The Protocol incorporated the Convention's definition of refugee as well as its five grounds for asylum.

In 1980, the United States enacted the Immigration and Nationality Act (INA) to bring existing U.S. asylum practices into conformity with Protocol obligations. The INA defines a "refugee" as "any person who is outside any country of such person's nationality who is unable or unwilling to return to... that country because of [past] persecution or a well-founded fear of [future] persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." The INA refugee definition thus conforms domestic law with the Convention and Protocol standard for asylum and refugee protection.

Notwithstanding the definition's potentially broad applicability, INS adjudicators have interpreted the INA narrowly in order to limit the number of asylees, thus avoiding a flood of applicants for the politically limited entitlement. The INS has accomplished this goal by strictly analyzing each term in the refugee definition. Assuming that the applicant is outside the country of his or her nationality and unwilling to return, the would-be asylee must establish: (1) treatment that amounts to past persecution or else a well-founded fear of future persecution; (2) a causal nexus that makes the persecution "on account of" one of the five grounds; and (3) that the claimed ground—religion, for this
note’s purposes—is legitimate, or alternatively, that the adjudicator recognizes that the applicant can credibly claim membership in the religious group.\textsuperscript{14}

Significantly, the refugee definition does not require that an asylum applicant have fled the home country because of a fear of persecution.\textsuperscript{15} A proposed 1981 amendment to the INA would have changed the definition of refugee to require that an alien establish persecution \textit{before leaving} the home country.\textsuperscript{16} The amendment failed.\textsuperscript{17} As a result, asylum adjudicators may recognize so-called \textit{sur place} or “bootstrap” asylum claims—where an alien creates the conditions that support an asylum application when he or she is not otherwise in danger.\textsuperscript{18}

For instance, a \textit{sur place} claim results when an asylum applicant claims religious conversion while in the United States, creating a condition that can place an alien in danger if returned to a home country where apostasy or religious belief are punished.\textsuperscript{19} Although on occasion the INS has rigidly approached \textit{sur place} claims in the past,\textsuperscript{20} the 1980 INA refugee definition and the failure of the 1981 amendment indicate that prior Board of Immigration Appeals’ (BIA) decisions denying \textit{sur place} claims are of limited precedential value.

B. SAVING “PERSECUTION ON ACCOUNT OF RELIGION” AS A DISTINCTIVE GROUND

Under the new asylum regime modelled after the Jewish experience of the Holocaust, many persecuted Jews would be able to seek protection under several, or perhaps even all, of the grounds for asylum—persecution on account

\textsuperscript{14} The controversy of what is a religion (versus a philosophy) in asylum determinations is beyond the scope of this note. See, e.g., Foroglou v. INS, 170 F.3d 68, 69 (1st Cir. 1999) (professed atheist claiming belief in Ayn Rand’s philosophy of Objectivism amounts to religious belief for purposes of the INA). Instead this note will focus on whether the claim of religious membership is credible. See discussion infra Part II.A.2.

\textsuperscript{15} See \textsc{Thomas Alexander Aleinikoff} \textit{et al.}, \textsc{Immigration and Citizenship: Process and Policy} 1109 (4th ed. 1998).

\textsuperscript{16} Under the amendment, asylum would only be available “if such alien establishes the acquisition of such refugee status which is based on facts existing before his departure from his [home] country.” \textit{Id.} at 1111 (quoting S. 776, 97th Cong. (1981)).

\textsuperscript{17} See \textit{id}.

\textsuperscript{18} See \textit{id.} at 1109.

\textsuperscript{19} See, e.g., \textit{Doe} v. INS, 867 F.2d 285, 286 (6th Cir. 1989) (An alien’s conversion to Christianity since his arrival in the United States and his outspoken protests against the antireligious atmosphere in China qualified him for asylum).

\textsuperscript{20} See, e.g., \textit{Matter of Nghiem}, 11 I. & N. Dec. 541, 544 (BIA 1966) (“For the most part [we have] not considered that joining protest groups or making public statements after entering the United States supports a withholding of deportation.”). Withholding of deportation—also known as withholding of removal—and asylum are similar remedies, except that withholding of deportation is a mandatory remedy while the grant of asylum is subject to the Attorney General’s discretion. In addition, withholding of deportation provides no temporary welfare benefit, allows the INS to deport the applicant to a safe third country, and curiously, demands a higher probability of persecution than asylum. See \textit{INS} v. \textit{Stevic}, 467 U.S. 407, 425-27 (1984).
of religion, race, social group, nationality, and political opinion. Over time, other religious groups that accrete distinct cultures would similarly be able to claim multiple grounds on which to obtain protection due to a common sociality, nationality, politics, or race, in addition to religion.

Religious converts, however, likely will only have recourse to the religion ground for protection. Because one's received childhood religion often coincides with social group, nationality, race, and political opinion, those individuals who leave a religion and convert to a new faith may find themselves with only one ground on which to seek protection from persecution. The convert likely shares his or her new faith with people of a different social group, nationality, race, and political opinion than that of his or her parents' religion. But unfortunately for religious converts in the United States, asylum for religious persecution is the most underdeveloped and ignored ground for protection.2

The phenomenon of conversion claims could be a reason for the INS to be more generous in the definition of what constitutes religious membership or conversely to narrow the criteria for credible religious membership because of concerns about imposters and fraudulent conversions.

C. THE IMPOSTER CONVERSION PHENOMENON

One threat to the continued viability of religious persecution claims is the growing perception that asylum applicants abuse religious asylum. Fraud discredits this ground for asylum as a hideout for frivolous and fraudulent claimants.22 This perception may have some truth to it. Several incentives make conversion fraud an attractive option for the opportunist. Asylees avoid deportation, receive welfare benefits, and obtain immediate work authorization.23 Unlike marriage fraud, conversion fraud does not require undertaking any legal obligation with another person. Last, because the claimed conversions are often to mainstream Christianity, examinations of sincerity prove problematic because of the modern religion's lack of verifiable, outward observances.24 Conversions to Christianity do not include distinct practices, such as Islamic daily prayer or Orthodox Judaism's strict sabbath observance.

To further complicate matters, fraudulent converts might appear more credible than their legitimate counterparts. A well-practiced imposter will impersonate the perfectly orthodox, straight-arrow religionist whereas actual converts

21. This concern partly motivated the passage of the International Religious Freedom Act of 1998 to correct for the perceived antireligious bias among asylum officers and adjudicators. See, e.g., Hearing on H.R. 2431, supra note 5, at 150 (statement of Mark Krikorian, Executive Director, Center for Immigration Studies) (conceding religious persecution claims, particularly Christian, may be treated less seriously than other claims and that there exists an antireligious and anti-Christian prejudice; also noting the possibility of imposter problems).

22. See id. One partial solution to conversion fraud is to eliminate some of the incentives that federal entitlements create. Withholding of removal, or withholding of deportation, a remedy similar to asylum, does not include welfare benefits.


24. See discussion infra Part II.C.
may still be learning the formalities of their newly chosen faith. Cases where
the INS catches actual imposters invariably involve ill-practiced opportunist.
Against this mixed background of fraudulent and legitimate conversion claims,
Part II examines INS efforts to separate the sincere claimant from the imposter,
the proverbial "wheat" from the "tares."

II. CONVERSION, CREDIBILITY, AND THE CONSTITUTION

A. ANALYSIS OF "RELIGION" UNDER THE INA

The INA asylum provision, like the First Amendment to the Constitution, employs the term "religion." Also like the First Amendment, the INA lacks any statutory or regulatory definition of religion. Therefore, it is debatable whether INS administrative law judges and reviewing courts should interpret the INA term "religion" coextensively with the Constitution's use of the same term. Does the INA asylum provision require a different definition of religion than the Constitution and would such a definition even be constitutionally permissible? If the terms are coextensive, Free Exercise and Establishment Clause jurisprudence apply to INS credibility determinations.

1. The Case for the Unified Approach to the Use of the Term "Religion"

Constitutional concerns about the religion clauses require that the term "religion" in the INA be read coextensively with the constitutional term. As previously discussed, administrative law judges and reviewing courts have approached eligibility for asylum by narrowly reading the INA to limit the number of eligible asylum applicants. Similarly, in the First Amendment context, when distinguishing religion from philosophy, courts have similarly interpreted religion narrowly so as to avoid paralyzing government. An overly broad definition of religion potentially leads to regulatory inaction where all regulations either offend the Free Exercise Clause for transgressing myriad philosophies or upset the Establishment Clause by creating an ideological orthodoxy. Combined, these two hermeneutic premises—limiting asylum grants and narrowing the meaning of religion under the religion clauses—collude to make the INA asylum ground for persecution on account of religion very narrow.

25. In such a situation, an imposter may perversely prove more convincing than the honest heterodoxical convert because of the imposter's study and emulation of what the "ideal" or perfectly orthodox convert would believe and do. See infra Part II.c.2.

26. See, e.g., Hajiani-Niroumand v. INS, 26 F.3d 832, 837 (8th Cir. 1994) (testifying he had become a Baptist, but having stated on his application he was Catholic).


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


30. See discussion supra Part I.A.

31. In fact, several commentators have noted the religious persecution ground's relative attrition.
Yet, Congress, in enacting the INA, should arguably not be understood to have narrowed the meaning of religion. First, neither the language of the INA nor any INS regulation has attempted to define the meaning of religion or what constitutes religious membership. Second, even if Congress or the INS altered the INA’s definition of the term religion to something narrower than the constitutional standard, an establishment of religion might result.

"Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another." Because the act of definition entails exclusion or inclusion, any project to define religion would likely fail judicial scrutiny as preferring one religion over another. In fact, congressional efforts to define religion narrowly have resulted in judicial intervention broadening the definition in order to save the statute from constitutional trespass. In the conscientious objector provisions of the Universal Military Training and Service Act (UMTSA), Congress attempted to define religion in terms of theism to the exclusion of all other religions. The Supreme Court generously interpreted the statutory term to include all religions, not just theistic ones, thus saving the provision from being struck down as unconstitutional. Just as the Constitution required a broad reading of the statutory enactment at issue in UMTSA concerning religion, the Constitution requires similar breadth when interpreting the term “religion” in the INA.

2. The Importance of Religious Group Membership

Credible religious group membership—whether or not one is truly a member of the Christian, Jewish, Islamic, or other religious community—becomes an important consideration in religious persecution claims, particularly for those who convert to a new faith while in the United States. An asylum applicant’s...
membership in a religious community figures into the INS's determination of whether the applicant would likely confront persecution in the home country, either at the hands of a government or a nongovernmental entity. 39 Although sur place asylum applicants themselves may have never suffered past persecution on account of their religion, the INS must determine whether similarly situated persons in the home country would face persecution upon return.

In the past, simple membership in a religious community was sometimes sufficient to receive asylum. 40 However, present asylum provisions require more than mere membership. 41 In order for a sur place convert to prevail on a claim for religious asylum, the new INS regulation requires not only demonstration of "inclusion in and identification" with a religious group, 42 but also evidence of a "pattern or practice . . . of persecution of a group of persons similarly situated to the applicant on account of . . . religion." 43 During the notice and comment period on the revised regulation, the INS explained the rationale for its new rule: "[D]efection of a bona fide refugee from a country that engages in widespread persecution may leave him in a difficult position to corroborate his claim. Accordingly . . . an applicant is permitted to show that a person in his position, as opposed to himself specifically, could be subject to persecution." 44 In addition, the proposed rule notice made clear that an applicant must "explain why he would be substantially identified with that particular group such that there is a reasonable possibility of his suffering persecution should he return to his country." 45 This "substantial identification" requirement provides the INS with a justification to undertake credibility determinations of religious group membership: if a persecutor would not substantially identify an applicant with a persecuted group, the applicant would not be at risk in the home country.

The new rule has met mixed application, the result being that some courts have applied the incorrect standard. For example, in Refahiyat v. INS, 46 an Iranian asylum applicant converted to the Latter-day Saint faith and claimed a well-founded fear of future persecution on account of his new Christian reli-

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42. Id.
45. Id.
46. 29 F.3d 553 (10th Cir. 1994).
The court explained that merely asserting membership in a minority religion is inadequate to establish a prima facie case of religious persecution. However, the court erroneously went on to hold that Refahiyat had to demonstrate that he had been “singled out” by the Iranian government. In using this standard, the Tenth Circuit erred because the authority on which the case relied for the “singled out” standard, Yousif v. INS, was no longer good law when Refahiyat was decided. Yousif was decided in 1986, prior to the 1990 INS final adoption of 8 C.F.R. § 208.13(b)(2) which changed the earlier standard for burden of proof in establishing refugee status. In Yousif, the Sixth Circuit had held that the applicant failed to demonstrate that he would be “singled out for persecution,” and therefore he could not prevail on his asylum claim. By citing a case that relied on a test no longer in force after 8 C.F.R. § 208.13(b)(2), Refahiyat perpetuated invalid law. Accordingly, other pre-1990 cases relying on the old Yousif standard for establishing a well-founded fear of persecution on account of religion are no longer good law in view of 8 C.F.R. § 208.13(b)(2).

Since the change in INS regulations, an applicant does not have to show that he or she would be singled out in the home country, but applicants who have not been singled out must demonstrate credible membership in a persecuted religious group. The necessity of group membership, however, creates potentially thorny constitutional questions because governmental determinations of religious group membership are at issue. Credibility determinations of who is “in” and who is “out” of a religious group for asylum purposes can run afoul of free exercise and establishment.

B. BALLARD AND THE SUPREME COURT’S SINCERITY TEST

Relevant to determinations of religious group membership is the sincerity of

47. See id. at 556-57.
48. See id. at 557.
49. See id.
50. 794 F.2d 236 (6th Cir. 1986).
52. 794 F.2d at 242.
53. Interestingly, the judge who decided Yousif, Senior Judge Brown, was sitting by designation on Refahiyat. See Refahiyat v. INS, 29 F.3d 553 (10th Cir. 1994).
54. See, e.g., In re Sarkis and Mourad, A24 583 821, A24 583 822 (BIA 1984) (claiming “[p]ersecution must be directed at the individual church-goers, not the institution”) (citing Lena v. INS, 379 F.2d 536 (7th Cir. 1967); Zupich v. Esperdy, 319 F.2d 773 (2d Cir. 1963), cert. denied, 376 U.S. 933 (1964)) (emphasis added). To be sure, under the new standard, applicants must demonstrate not only credible group membership, but also “a pattern or practice . . . of persecution of a group of persons similarly situated to the applicant on account of . . . religion.” 8 C.F.R. § 208.13(b)(2)(i) (1999).
claimants. In *United States v. Ballard*, the Supreme Court visited the issue of religious sincerity in a criminal mail fraud case brought against the founder of the “I Am” religion. The *Ballard* Court held that although a judge may instruct a jury to inquire into the sincerity of a belief, a judge may not instruct a jury to determine the veracity of the underlying belief. In a lone dissent, Justice Jackson expressed concern over a jury’s cognitive capacity to distinguish between the sincerity of the professor’s belief and the truthfulness of the belief itself: “[A]s a matter of either practice or philosophy I do not see how we can separate an issue as to what is believed from considerations as to what is believable.” Justice Jackson’s dissent observed the human tendency of juror and judge alike to accept as sincere that which is reasonably believable, and to reject as insincere those beliefs which the judge or juror finds untenable. The dissent expressed concern that assessments of religious sincerity could “[transform] into determination[s] of religious truth,” in turn risking “the indirect imposition of an orthodoxy.”

Read in the asylum context, Justice Jackson’s concern in *Ballard* would be that INS credibility determinations of an asylum applicant’s sincere religious membership could amount to an adjudicator estimating what is believable within the framework of membership in that particular religious group. Consider a Muslim who converts to Christianity and who explains to an INS adjudicator his or her religious belief that Jesus is the Son of God and that Mohammed was a prophet, notwithstanding the latter’s rejection of Jesus as the Son of God. An INS adjudicator confronted with such an applicant might issue a no-credibility finding because, following Justice Jackson’s insight, the belief seemed unbelievable to the trier of fact, given Christianity’s acceptance of Jesus’s divinity.

Despite the risks credibility determinations involve, some sort of sincerity test seems necessary. Otherwise the religion clauses and the religious persecution ground for asylum could become “a limitless excuse for avoiding all unwanted legal obligation.” For instance, imposters could claim that their religious conscience requires excusing them from military conscription and payment of taxes. Perhaps in recognition of the potential for abuse, the U.N. Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (U.N. Handbook), discussing conscientious-objector-based asylum claims, recommends a “genuineness” determination of the religious, political, or moral

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56. 322 U.S. 78 (1944).
57. See id. at 82-83.
58. Id. at 92 (Jackson, J., dissenting).
motivation of the objector through investigation of the applicant's "personality and background." To be sure, the U.N. Handbook notes that asylum applicants should be given the benefit of the doubt because of evidentiary hardships inherent in asylum claims. This benefit of the doubt, however, should only be granted when all evidence has been reviewed and when the adjudicator is "satisfied as to the applicant's general credibility."63

C. CREDIBILITY AND THE NATURE OF CHRISTIAN CONVERSIONS

Several aspects of Christian conversion complicate adjudicative determinations regarding credibility of membership or conversion, especially for those adjudicators unfamiliar with the Christian tradition. Just as commentators have noted that cultural differences may color credibility findings, religious differences may likewise contribute to adverse determinations. Below, this note examines some aspects of Christian conversion that might help inform judicial credibility determinations.

1. Past Conduct Is Nonprobative

In some asylum adjudications, INS administrative judges have relied on past bad behavior by professed Christian converts to cast doubt on the sincerity of their conversion. Evidence of poor past conduct, however, may not be probative as to the sincerity of Christian conversion. In fact, there is a long Christian tradition of conversion representing a point of radical departure from past performance. For example, Paul, one of the most famous early converts to Christianity, dramatically broke away from his past as a persecutor of Christians and became a fearless missionary for Christendom. Similarly, a modern-day

62. See id. ¶ 203.
63. Id. ¶ 204. The INS follows this recommendation by noting the probable sufficiency of a credible applicant's testimony without corroboration. See 8 C.F.R. § 208.13(a) (1999).
64. See, e.g., MUSALO ET AL., supra note 7, at 894 (noting that misunderstandings arising from cultural differences between the adjudicator and the asylum seeker result in adverse credibility findings).
65. See, e.g., Maloukh v. INS, 124 F.3d 217, No. 96-9524, 1997 WL 543369 at *1 (10th Cir. Sept. 3, 1997) (unpublished disposition) (noting past history of using a false social security number and perjury in conjunction with claimed conversion). The analysis of conversion credibility is separate from the Attorney General's discretionary considerations of whether or not to grant the discretionary remedy of asylum. The Attorney General may deny asylum if the alien's poor past conduct, such as circumventing orderly visa admissions procedures, rises to the standard for denial of discretion after an examination of the "totality of the circumstances." Matter of Pula, 19 I. & N. Dec. 467, 473 (BIA 1987). In addition, statutory bars to asylum exist for those who have committed particularly serious crimes, as well as for certain categories of individuals deemed unworthy of protection, such as those asylum seekers who have themselves persecuted others. See 8 U.S.C. § 1158(b)(2)(A)(i)-(ii) (1994).

And straightway he preached Christ in the synagogues, that he is the Son of God. But all that heard him were amazed, and said; Is not this he that destroyed them which called on this name in Jerusalem, and came hither for that intent, that he might bring them bound unto the chief priests?

Id. at 9:20-21.
convert's past may not be probative of present sincerity in conversion. For instance, a convert to Christianity might, notwithstanding past military service, claim conscientious objection to such service. Although examination of the credibility of conversion is still a legitimate inquiry during the course of a credibility determination, an administrative judge might wrongly consider past conduct of the Christian convert that, in fact, may be entirely nonprobative.

2. Conversion May Be a Process and Heterodoxical

Other administrative judges have found evidence of beliefs or practices that are incongruous with an orthodox believer of a Christian faith—such as a professedly converted Muslim requesting a pork-free diet—probative of insincerity. Such determinations, however, are problematic for at least two reasons. First, conversion may be a process whose completion is not contemporaneous with an initial conversion event. For example, a Muslim who converts to Christianity and requests an Islamic religious (hallal) diet simply may not have learned that his or her new faith does not require a pork-free diet. Equally possible is the fact that this person simply may prefer such a diet for nonreligious or traditional reasons. Second, many faiths recognize that even when a sincere conversion has occurred, there is a tendency to fall back into sin and error. Many faiths recognize human fallability and the possibility of spiritual recidivism. For a similar reason, some religion clause scholars have found academic efforts to define "religion" as an "ultimate concern" unsatisfactory because "only total unwavering commitment"—an unrealistic expectation for the fallible—would then be adequate to demonstrate sincere religious adherence.

67. See Bastanipour v. INS, 980 F.2d 1129, 1132 (7th Cir. 1992).
68. Several Christian denominations recognize conversion and growth in faith as a process:

When first even the least drop of faith is instilled in our minds, we begin to contemplate God's face, peaceful and calm and gracious toward us. We see him afar off, but so clearly as to know we are not at all deceived. Then, the more we advance as we ought continually to advance, with steady progress, as it were, the nearer and thus surer sight of him we obtain; and by the very continuance he is made even more familiar to us.

69. See Bastanipour, 980 F.2d at 1132.

Yet the grace of Baptism delivers no one from all the weakness of nature. On the contrary, we must still combat the movements of concupiscence that never cease leading us into evil. In this battle against our inclination towards evil, who could be brave and watchful enough to escape every wound of sin?

Id.
71. Stanley Ingber has noted:

[It is difficult to see how this ultimate concern definition could apply to religious beliefs with which a person is struggling. Even the most devout theist hoping to follow God's law often
Moreover, evidence that an asylum applicant's beliefs or practices are not perfectly in harmony with an orthodox believer of that faith may not be probative at all; the applicant may intentionally be a religious heterodox, one whose faith diverges from the established religious tradition. A convert's practices and belief might be assimilationist, or broadly inclusive of new religious belief; for example, a convert from Islam to Christianity may still accept Mohammed as a prophet, notwithstanding the tension with Islam's rejection of Jesus as the Son of God. In addition, although one speaks of being Catholic, Methodist, or Mormon, there are few, if any, individuals who adhere to their religion with perfect orthodoxy. For instance, the category "Catholic" may encompass a diversity of belief within a congregation, such as the phenomenon of some American Catholics rejecting Pope John Paul II's teachings concerning abortion and birth control. Converts in other religious denominations might find plausible alternative interpretations of religious texts that differ, correctly or incorrectly, from orthodox authority. Whereas religious leaders may excommunicate dissenters or unorthodox believers from community membership, it is inappropriate for INS officials to convene hearings about an applicant's religious orthodoxy in the context of credibility determinations.

3. Conversion Often Occurs During Adversity

Finally, some administrative judges have viewed auspicious conversions to Christianity during deportation hearings as suspect. For example, in Maloukh v. INS, the BIA considered a conversion during deportation proceedings, and the accompanying sur place claim for asylum, as suspicious. Although some asylum applicants may be opportunists, Christian conversion often occurs during adversity, such as death, divorce, hospitalization, imprisonment, poverty, or, arguably, the threat of deportation during asylum proceedings. Some conceptions of Christianity associate humbling circumstances with the soul's rapprochement to God, and conversely, prosperity with arrogance and separation from finding herself tempted to transgress and may even occasionally succumb to the temptation. Still, if the proposed standard cannot be met unless the person would choose 'martyrdom in preference to transgressing' her ultimate concern, she who deviates even slightly is lost. Only total, unwavering commitment is sufficient.

Ingber, supra note 59, at 269.


73. See discussion infra Part II.d.

74. See Refahiyat v. INS, 29 F.3d 553, 557 (10th Cir. 1994) (noting that while a deportation order was on appeal to the BIA, Refahiyat moved to remand the case owing to his recent conversion to the Church of Jesus Christ of Latter-day Saints and requested that he be granted religious asylum because of his bona fide status as a "practicing Christian").


76. See id. at *2.

77. See, e.g., Job 1-42 (recounting Job's afflictions and his spiritual refinement).
What may seem to be a timely and opportunistic conversion actually might be a legitimate exercise of religious liberty.

Thus, the sincerity of Christian conversion can be difficult to gauge. Past performance may not be probative of present sincerity; conversion can represent a break from the past, making references to the past inconsistency inapposite. Furthermore, intentionally or unintentionally, conversion may be heterodoxical, with new adherents retaining beliefs associated with their past religious experience. Efforts to impeach professed converts with doctrinal tests or quizzes could be misguided. In addition, Christian conversion often occurs during adversity, a fact not necessarily probative of bad faith on the part of the applicant.

Lastly, given the emphasis mainline Christianity places on the interior state of the convert's heart as opposed to institutional or ecclesiastical criteria, requirements of a "developed objective foundation of conversion" might ultimately prove impossible. As a result, administrative and judicial efforts to assess the sincerity of conversion risk unwarranted adverse credibility findings. The Free Exercise and Establishment clauses, however, may provide remedial relief from these erroneous adverse credibility findings.

D. THE RELIGION CLAUSES

There is no constitutionally protected right to asylum itself. In fact, Congress could entirely eliminate the asylum system and recede from its Protocol obligations. However, as long as asylum exists, the Executive is subject to the constraints of due process in implementing and enforcing congressional immigration policy. In addition, it is well established that aliens, just as U.S. citizens, enjoy substantive First Amendment constitutional protections; barring pres-

78. See, e.g., Matthew 19:24 ("And again I say unto you, It is easier for a camel to go through the eye of a needle, than for a rich man to enter into the kingdom of God.").


80. Najafi v. INS, 104 F.3d 943, 948 n.3 (7th Cir. 1997).

81. A theological criticism is appropriate at this point. Arguably, the conversion imposter problem results because modern American mainstream Christian religions require so little effort to be called a Christian that it is difficult to discern who is a sincere convert and who is an imposter. Cf. ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH 279-80 (1996) (stating many American religions and their memberships do not take their religious commitments seriously).

82. See Pierre v. United States, 547 F.2d 1281, 1288-89 (5th Cir. 1977) (noting that paroled refugees have no constitutional right to asylum).

83. See Protocol, supra note 9, art. 9.

84. See Animashaun v. INS, 990 F.2d 234, 238 (5th Cir. 1993) (holding the Fifth Amendment entitles aliens to due process of law in deportation proceedings); Haitian Refugee Ctr. v. Smith, 676 F.2d 1023, 1037 (11th Cir. 1982) (recognizing a guarantee of due process for a refugee's liberty interest threatened by deportation).

85. See, e.g., Kwong Hai Chew v. Colding, 344 U.S. 590, 596 n.5 (1953) ("[O]nce an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment."); Bridges v. Wixon, 326 U.S. 135, 148 (1945) ("[F]reedom of speech and of press is accorded aliens residing in this country."); American-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045, 1063-64 (9th Cir. 1995) (holding
ence outside the country, noncitizens may seek redress of constitutional rights just as nationals may.\textsuperscript{86}

Two particular claims which applicants could assert in the religious conversion-deportation setting are violations of the Free Exercise and Establishment Clauses of the First Amendment to the U.S. Constitution. This section examines these potential causes of action available to aliens confronted with adverse INS credibility determinations of religious membership.\textsuperscript{87}

1. Credibility Determinations Create Free Exercise Clause Claims

Where an applicant’s heterodox religious belief or practice results in an adverse credibility determination, the applicant may argue that such a determination has improperly denied him or her the statutory benefit of asylum\textsuperscript{88} and, upon deportation to a hostile country, free exercise of religion.\textsuperscript{89} In this last decade, the Supreme Court has limited constitutional protection of free exercise. However, notwithstanding the Court’s limitation of free exercise in \textit{Employment Division, Department of Human Resources v. Smith},\textsuperscript{90} aliens can still argue that the compelling state interest test applies to review of adverse agency credibility determinations.

In \textit{Sherbert v. Verner},\textsuperscript{91} the Supreme Court held that infringement of free exercise required a compelling state interest with narrowly tailored means to achieve the governmental interest.\textsuperscript{92} Although religious groups were not guaranteed victory under \textit{Sherbert} when they claimed a violation of their free exercise

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\textsuperscript{86} One obstacle to the exercise of constitutional rights is the alien’s lawful presence within the United States and development of a “sufficient connection” with “the people.” U.S. v. Verdugo-Urquidez, 494 U.S. 259, 265, 271 (1990) (once aliens lawfully enter and live in the U.S., and develop a “sufficient connection with this country,” substantive constitutional guarantees vest) (Rehnquist, C.J.). Thus, in order for free exercise and non-establishment guarantees to vest, the alien must not only have lawfully entered the United States, but also have developed a “sufficient connection” with “the people,” such as would arise through membership and participation in community religious, educational, or other voluntary associations.

\textsuperscript{87} The First Amendment reads in part, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .” U.S. Const. amend. I.

\textsuperscript{88} See Slye, supra note 33, at 233 (asserting that “[C]ourts are certainly as much an arm of government as draft boards or administrative agencies . . . .”).

\textsuperscript{89} Although the infringement of free exercise actually occurs in the foreign country, it is the U.S. government’s deportation that renders the applicant’s religious worship impossible. This infringement might be particularly acute for religious groups who believe that the United States is a new Jerusalem or a promised land for gathering. \textit{See, e.g., Doctrine & Covenants} 84:1-3 (declaring as revelation the gathering of Latter-day Saints to the State of Missouri for the establishment of a “New Jerusalem”).

\textsuperscript{90} 494 U.S. 872 (1990) (generally denying free exercise claims raised against neutral laws of general applicability).

\textsuperscript{91} 374 U.S. 398 (1963).

\textsuperscript{92} See id. at 406-07.
rights, the plaintiffs at least had recourse to judicial review of the offending law. In contrast, under Smith, the Supreme Court returned to the rule announced in Reynolds v. United States that neutral and generally applicable laws may incidentally infringe upon free exercise without offending the First Amendment, so long as the law is rationally related to a legitimate government interest. Under the Reynolds-Smith standard, no judicial balancing occurs to assess the relative value of government interest and the free exercise claim. For a litigant seeking to challenge neutral and generally applicable laws infringing free exercise, Smith requires little more than statutory rationality.

Arguably, however, Sherbert, not Smith, should apply to review of a free exercise challenge brought by an asylum applicant against an adverse credibility determination. In returning to the Reynolds standard, the Court did not overrule Sherbert. Instead, the majority distinguished the Court’s prior use of the compelling state interest test, limiting it to agency determination of unemployment benefits. Justice Scalia explained that Sherbert developed in a “context that lent itself to individualized governmental assessment.” This rationale, if applied to asylum, should allow Sherbert review of INS religious membership credibility determinations. INS asylum adjudication occurs during a highly individualized examination of religious membership and invites consideration of particular circumstances behind the applicant’s asylum proceeding. The Smith Court itself noted that “where the state has in place a system of individual exemptions, it may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.” Furthermore, the majority’s dicta—that even were Sherbert extended beyond unemployment compensation it would not apply to criminal law—is inapposite to asylum benefit adjudications, which are civil determinations.

In addition, Smith applies only to neutral laws of general applicability. A challenging asylum applicant, however, is not seeking exemption from such a law; in the asylum context, there is no generally applicable law barring an applicant’s religious conduct—such as the criminalized peyote use at issue in Smith. The only issue is an agency’s individual determination of credible religious membership. The applicant is challenging an agency’s applicant-specific, adverse credibility finding. The INS determination of credibility simply

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94. 98 U.S. 145, 167 (1878).
95. See Smith, 494 U.S. at 878-79.
96. See id. at 883.
97. Id. at 884.
98. Id. (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)). In Rader v. Johnston, the district court recognized a college student’s free exercise claim post-Smith for an individualized religious exemption to live outside freshman dormitory housing. The court held that where individualized exemptions from general laws are available, the government may not decline to extend such exemptions for religious hardship without compelling reasons. See 924 F. Supp. 1540, 1551-52 (D.Neb. 1996).
99. See Smith, 494 U.S. at 884.
involves a government agency "impos[ing] special disabilities on the basis of religious views or religious status"\textsuperscript{100} of the sort recognized as impermissible even under \textit{Smith}. Because a sincere, but heterodoxical, new convert may not squarely fit an administrative judge's conception of what it means to be a member of a certain faith, the government may violate the religionist's free exercise rights by imposing a special disability—an adverse credibility finding that denies asylum benefits—solely on the basis of the applicant's religious views.

Even if an asylum applicant were to demonstrate a violation of free exercise, the Court would still have to consider the government's admittedly compelling interests—maintaining control over borders, foreign affairs,\textsuperscript{101} and addressing the serious existing problem of conversion and religious membership fraud. If a federal court were to find the government's means the least restrictive to achieving this interest,\textsuperscript{102} the INS would still prevail. However, an applicant could argue that notwithstanding the government's compelling state interest, the agency's means for achieving its interest are insufficiently tailored to accomplishing its end. In fact, INS credibility determinations may be quite blunt tools. Present INS credibility determinations are both under- and over-inclusive; they exclude sincere, heterodox converts who will be persecuted abroad while admitting adept imposters who have studied the model of religious orthodoxy.\textsuperscript{103} In order to satisfy the strict scrutiny required by \textit{Sherbert}, the INS could adopt less restrictive measures that limit the infringement of free exercise rights, such as those discussed below,\textsuperscript{104} while still permitting the agency to fulfill its statutory obligations.

The \textit{Smith} majority did not overrule \textit{Sherbert} altogether. It is possible that the current Court would choose not to extend \textit{Sherbert} beyond the narrow realm of unemployment benefits; however, because \textit{Smith} left the compelling state interest test in place for cases of individualized assessments,\textsuperscript{105} it is likely that the

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\textsuperscript{100} Id. at 877 (citing McDaniel v. Paty, 435 U.S. 618, 618 (1978); Fowler v. Rhode Island, 345 U.S. 67, 69 (1953)).

\textsuperscript{101} See Kleindienst v. Mandel, 408 U.S. 753, 770 (1972). In \textit{Kleindienst}, the government argued that its denial of a visa and a waiver of statutory exclusion for aliens advocating world communism did not impact First Amendment concerns because Congress's plenary power to exclude foreign nationals outweighed First Amendment interests of American professors who had invited the foreign visitor to address them. The government's facially legitimate bona fide reasons justified the denial of INS and Department of State discretion. See id.


\textsuperscript{103} See discussion supra Part I.c. Representative Lamar Smith (R-Tex.) reported that one consular officer determined credible Christian religious membership by asking the alien to name a book of the Bible, presuming fraud if the alien was unable to name any book. See \textit{Hearing on H.R. 2431, supra} note 5, at 151. The consular officer's test could easily admit imposters as well as exclude bona fide Christians who were illiterate or of a religious tradition placing emphasis on scriptural texts other than the Bible.

\textsuperscript{104} See discussion infra Part III.

\textsuperscript{105} See Employment Div., Dept't of Human Resources v. Smith, 494 U.S. at 884. The Court also retained the compelling state interest for non-neutral laws and "hybrid" claims involving free exercise claims coupled with free speech, freedom of the press, association, and parental rights. See id. at 881.
Sherbert test still applies to individualized agency adjudications of asylum benefits.

But even if Sherbert is unavailable post-Smith, federal application of the Religious Freedom Restoration Act (RFRA) might yet provide asylum applicants redress for erroneous INS credibility determinations. In 1993, Congress passed RFRA to remedy the outcome of Smith by restoring the Sherbert test. Although the Supreme Court declared RFRA unconstitutional as exceeding Congress’s enforcement power under section 5 of the Fourteenth Amendment when applied to the states, several circuit courts have upheld RFRA as applied to the federal government and federal law. Because the immigration and nationality laws are uniquely federal, asylum applicants may similarly argue that RFRA’s compelling state interest standard applies to INS credibility determinations which implicate the free exercise of religion.

2. Credibility Determinations Create Establishment Claims

As previously discussed, Christian converts may adhere to beliefs and practices that deviate from the ideal of Christianity that adjudicators envision. Where an asylum applicant is confronted with an adverse credibility determination because of what the INS perceives to be doctrinal or practical inconsistencies, the alien may be able to allege a violation of the Establishment Clause. Because the Establishment Clause bans state imposition of religious orthodoxy both by means of endorsement and coercion, an adverse INS credibility determination may rise to a violation of the Establishment Clause, particularly when a convert’s pre-conversion conduct, heterodoxical belief or practice, or last minute conversion, causes the INS to deny the applicant a favorable credibility determination as a member of the religious group persecuted in the home country. Below, two modes of Establishment Clause analysis, coercion and endorsement, are analyzed and demonstrate the orthodoxy-establishing character of credibility determinations.

a. Coercion. At worst, adverse credibility determinations result in asylum applicants being coerced by the government to practice religion according to the INS’s accepted model of orthodoxy or else suffer deportation to a country where

108. See, e.g., Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 832-33 (9th Cir. 1999) (holding City of Boerne did not invalidate RFRA as applied to federal law); Bruce Young v. Crystal Evangelical Free Church, 141 F.3d 854, 858-59 (8th Cir. 1998) (holding Congress had authority to enact RFRA and make it applicable to United States bankruptcy laws); Alamo v. Clay, 137 F.3d 1366, 1368 (D.C. Cir. 1998) (assuming RFRA applies to the federal government notwithstanding City of Boerne).
109. See discussion supra Part II.c.
111. See discussion supra Part II.c.1.
112. See discussion supra Part II.c.2.
113. See discussion supra Part II.c.3.
one has a well-founded fear of persecution. The Supreme Court has found governmental coercion in situations with much lower stakes than the asylum setting. In *Lee v. Weisman*, the Supreme Court examined the constitutionality of a public school's use of prayer during graduation ceremonies. Weisman complained that the public prayer amounted to an establishment of religion because she felt obliged to either participate in the graduation prayer by standing with the rest of the audience, or else face peer stigma if she remained seated. The Court agreed: "[T]he Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.' "

Under the coercion test adopted by *Weisman*, an asylum applicant would have an even stronger claim of coercive establishment of religion than Weisman: when the INS fails to find a religious convert credible, owing to an administrative judge's assessment of what amounts to credible membership in a given faith, the convert is coerced into religious orthodoxy. If the convert does not submit to this orthodoxy, then the convert faces deportation to a country where the applicant may otherwise have a well-founded fear of persecution. In this instance, an implicit governmental dictate of what it means to be a member of a certain denomination is associated with governmental power to deport. For example, if an applicant is a convert to Christianity from Islam, but does not regularly donate at Sunday contribution, and if the administrative judge uses this as a factor in the denial of the applicant's credibility, then the INS is subjecting the applicant to its own indicia of what being a Christian means. Such a determination would be tantamount to the judge declaring that "Christians must contribute at Sunday collection in my scheme of things; if you don't, you must not be Christian, but still a Muslim, not credibly a member of the Christian community persecuted in the home country, and thus ineligible for asylum." Such adjudicator assessments, therefore, would result in "indirect coercive pressure . . . to conform to the prevailing officially approved religion." One might respond by arguing that the adjudicator is only assessing what would be evidence of credible membership in a given faith and therefore is not preferencing any one religion over another. But, for an establishment of religion to occur, it is not necessary that only one religion be established by coercion. Establishment Clause jurisprudence forbids equally the favoring of all reli-

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115. See id. at 583, 593.
116. Id. at 587.
117. See, e.g., Najafi v. INS, 104 F.3d 943, 945, 948 n.3 (7th Cir. 1997) (finding the INS established applicant had contributed $227 to his church during a nine month period).
118. Religious communities, of course, may make determinations of membership and status. When government, however, undertakes enforcement of religious obligations, establishment concerns arise.
gions.\textsuperscript{120} Even establishment of one version of all religions in competition with all other versions—heterodoxical though they may be—is still an establishment of religion. Thus, agency credibility determinations smuggling in conceptions of religious membership may offend the Establishment Clause by coercing applicants to accept the mandated orthodoxy.

\textbf{b. Endorsement.} While coercion is sufficient to prove a violation of the Establishment Clause, it is not necessary.\textsuperscript{121} Even if a court did not acknowledge INS credibility determinations as potentially coercive, an applicant could still prevail on an endorsement theory as stated in Justice O’Connor’s concurrence in \textit{Lynch v. Donnelly}\textsuperscript{122} and Justice Blackmun’s concurrence in \textit{Lee v. Weisman}.\textsuperscript{123} Whereas the \textit{Weisman} majority held that coercion indicates establishment,\textsuperscript{124} the \textit{Lynch} and \textit{Weisman} concurrences would hold that government cannot even so much as endorse religion.\textsuperscript{125} “Government may neither promote nor affiliate itself with any religious doctrine or organization, nor may it obtrude itself in the internal affairs of any religious institution.”\textsuperscript{126} The endorsement test for establishment, then, is whether a reasonable person would find that the government has endorsed a religion, some religions, or all religions.\textsuperscript{127}

Even endorsement of the orthodox conception of all religions still constitutes establishment with respect to the religiously heterodox within those congregations. For example, in \textit{Watson v. Jones},\textsuperscript{128} a Kentucky Presbyterian church found itself divided over the composition of the congregation’s authoritative religious leadership and who controlled the church’s property.\textsuperscript{129} As an antecedent to the question of who controlled the church property, the litigants asked the Court to determine which faction was the “true” Presbyterian church.\textsuperscript{130} The \textit{Watson} Court refrained from deciding the religious controversy because the dispute involved “theological controversy, church discipline, ecclesiastical government, [and] the conformity of the members of the church to the standard of morals required of them.”\textsuperscript{131} The Court recognized the difficulty of deciding the case on religious grounds and left the question of religious membership to the

\textsuperscript{120} See Everson v. Board of Educ., 330 U.S. 1, 15 (1947) (“Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.”).
\textsuperscript{123} 505 U.S. at 599 (Blackmun, Stevens, and O’Connor, JJ., concurring).
\textsuperscript{124} See id. at 587.
\textsuperscript{125} The endorsement theory of establishment has gained importance because of Justice O’Connor’s “swing vote” in establishment jurisprudence in the present Court.
\textsuperscript{126} See Lee, 505 U.S. at 599.
\textsuperscript{127} See id. at 600.
\textsuperscript{128} 80 U.S. (13 Wall.) 679 (1871).
\textsuperscript{129} See id. at 684. The root of this division was disagreement over religious perspectives on slavery. See id.
\textsuperscript{130} See id. at 703.
\textsuperscript{131} Id. at 733.
Presbyterian church’s ecclesiastical courts, concluding that “[t]he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.”

Agency definition of what is consistent or inconsistent with a particular faith impermissibly endorses what is excluded from governmental consideration by telling religious adherents what they must believe; invariably, definition “enshrines an orthodoxy within a Constitution designed in part to protect unorthodoxy.” To illustrate this principle, albeit outside the agency setting, consider *Late Corp. of the Church of Jesus Christ of Latter-day Saints v. United States*, which demonstrates what may result from an adjudicative foray into theology. In ruling on the constitutionality of a federal statute that annulled the Latter-day Saint church’s charter and confiscated its real property, Justice Bradley, writing for the Court, held that the Latter-day Saints could not claim violation of the Free Exercise Clause, because the Court did not consider the church religious. Instead, the majority described the church’s claim that plural marriage was religious as mere “pretense” and “sophistical” because the Court considered it “contrary to the spirit of Christianity.” The majority’s

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132. See id. at 729.
133. Id. at 728.
134. See Ingber, supra note 59, at 292.
136. 136 U.S. 1 (1890). Although the Supreme Court cannot “violate” the Constitution, see *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (“It is emphatically the province and duty of the judicial department to say what the law is.”), executive branch agencies will transgress the Establishment Clause by defining what counts as religious membership.
137. See Act of July 1, 1862, ch. 126, § 2, 12 Stat. 501 (1862) (annulling the ordinance incorporating the Church of Jesus Christ of Latter-day Saints).
138. See *Late Corporation*, 136 U.S. at 49 (“One pretense for this obstinate course is that their belief in the practice of polygamy, or in the right to indulge in it, is a religious belief, and therefore under the protection of the constitutional guaranty of religious freedom. This is altogether a sophistical plea.”). Had the Court acknowledged the religious character of plural marriage, the Court would have been forced to consider whether the statute violated the Latter-day Saints’ free exercise rights. In *Reynolds v. United States*, 98 U.S. 145 (1878), decided twelve years earlier, the Court held that neutral laws of general applicability may infringe on the practice of religion. See id. at 167. If the Court had recognized plural marriage as a religious commandment and practice, the statute at issue in *Late Corporation* would likely have failed even the *Reynolds* test because it specifically targeted the Latter-day Saint church as the aim of its legislative purpose. See Act of July 1, 1862, ch. 126, § 2, 12 Stat. 501 (1862). Instead, the *Late Corporation* Court held plural marriage not religious—notwithstanding its acknowledgment in *Reynolds* to the contrary—and therefore not worthy of free exercise protection under *Reynolds*. See *Late Corporation*, 136 U.S. at 49. Moreover, in *Davis v. Beason*, 133 U.S. 333 (1890)—decided the same year as *Late Corporation*—the Court upheld an oath requirement in the Idaho territory that all voters “swear (or affirm) that ... I am not a member of any order, organization, or association which teaches ... its members ... to commit the crime of ... polygamy ... as a duty arising ... from membership in such order, organization, or association, which practices ... plural or celestial marriage as a doctrinal rite of such organization.” Id. at 333 (emphasis added). The oath specifically identified by name the celestial marriage doctrine of Latter-day Saints and precluded Latter-Day Saints from voting on the basis of mere membership in organizations teaching plural marriage, without regard to whether the oath taker actually practiced, or encouraged, plural marriage. See id.
139. *Late Corporation*, 136 U.S. at 49; see also Ingber, supra note 59, at 292 (“Courts are never to
determination of what constituted Christian—or for that matter religious—
practice excluded the Latter-day Saints. 140 In short, because the Court found the 
Latter-day Saint’s belief in plural marriage unbelievable, it concluded that the 
claim was insincere. In so concluding, the Supreme Court did precisely what the 
Establishment Clause forbids the other branches of government: it established a 
religious orthodoxy by favoring a particular interpretation of what it means to 
be Christian. Contrary to the Court’s view regarding the unbelievability and 
“pretense” of plural marriage, fair-minded theologians could dispute the proper 
interpretation of Old Testament accounts of Jewish plural marriage 141 and their 
implications for Christians. 142 Ignoring such religious controversy and debate, 
the Court adopted de facto what it considered the proper scriptural interpretation 
regarding plural marriage, namely a reading which rejected plural marriage, 
and, by implication, Latter-day Saints from Christianity. Through its opinion in 
Late Corporation, the Court effected an orthodoxy by defining what it meant to 
(not) be Christian.

Similarly, administrative credibility determinations of an alien’s religious 
membership risk establishment of an agency-mandated orthodoxy. To be found 
credibly Christian, an alien might be forced to submit to an INS adjudicator’s 
conception of what constitutes a particular faith’s belief. If the religionist’s 
views about what it means to be a believer of that faith do not coincide with the 
immigration judge’s ideal, which may well be the case for new or heterodoxical 
converts, 143 the agency could find against the applicant’s credibility, arguably 
violating the Establishment Clause’s proscription on the endorsement of reli-
gion. An endorsement theory of establishment could thus support an alien’s 
First Amendment challenge to an adverse INS credibility determination. If the 
asylum applicant demonstrates that INS adjudicators impermissibly used particu-
lar religious practices or beliefs as a standard in evaluating his or her sincerity 
of conversion (and thus credibility of membership), then the asylum applicant 
will be able to state an establishment claim from which no compelling state 
interest could rescue the invalid determination.

Both coercion and endorsement theories of endorsement allow asylum appli-

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140. This holding differs from Reynolds where the Supreme Court concluded that even though 
polygamy might be religious, a neutral and generally applicable law could infringe on free exercise. See 
Reynolds, 98 U.S. at 167. As a threshold matter, Late Corporation simply did not acknowledge plural 
membership as religious. See Late Corporation, 136 U.S. at 49.

141. Moses, the Jewish prophet who gave the House of Israel the Ten Commandments, including the 
commandment “thou shalt not commit adultery,” Exodus 20:14, immediately thereafter gave Israel 
rules governing plural marriage in the following chapter, Exodus 21:10-11, thus strongly suggesting 
plural marriage was not considered adultery and, in fact, was religiously sanctioned at that time.

142. Considerable theological controversy surrounds the question of what relationship the Old and 
New Testament bear to one another and what Jesus’s statements concerning the law given by Moses 
mean. See, e.g., Matthew 5:17 (“Think not that I am come to destroy the law, or the prophets: I am not 
come to destroy, but to fulfil.”).

143. See discussion supra Part II.c.2.
cants the opportunity to challenge INS credibility determinations predicated on religious orthodoxy. If an adjudicator's conception of what constitutes religious membership in a particular faith results in rejection of asylum, the applicant can claim endorsement of a religious orthodoxy. More strongly, an applicant can claim that establishment results from agency coercion: an applicant confronted with the prospect of deportation to a hostile home country will feel compelled to capitulate to the orthodox practice rather than face death at the hands of religious courts in the home country. Together, free exercise and establishment claims can provide asylum applicants with tools to challenge credibility findings tainted by adjudicator disbelief or adjudicator orthodoxy.

III. REMEDIES: BALANCING COMPPELLING STATE INTERESTS AND PRIVATE RIGHTS

To respond to the free exercise and establishment concerns that INS credibility determinations raise, several different solutions are available which either narrowly tailor the government's means of achieving its compelling interest or ameliorate the risk of establishment involved in Ballard sincerity determinations. These approaches include an imputed religious opinion approach; a marriage fraud model for religious imposter claims; and a procedural remedy that provides reviewing courts with a record and guidelines for permissible agency determinations.

A. AVOIDING SINCERITY TESTS: POSNER'S APOSTASY ANALYSIS

One approach to religious conversion and membership claims is the Seventh Circuit's "apostasy analysis,"144 which is a variation of the imputed political opinion analysis. Imputed political opinion occurs when a persecuting regime or non-state actor attributes a disfavored opinion to the asylum applicant. The applicant may have a well-founded fear of persecution on account of political opinion, even if he or she is not political.145 Its analogue, the imputed religious opinion doctrine, holds that an asylum applicant may qualify as a refugee due to a well-founded fear of persecution on account of an erroneously imputed religious belief.146 For example, the apostasy analysis requires a judge to determine whether a religious judge from the home country, for example Iran, would have found that an applicant had apostatized from Islam.147 Thus, the religious conversion claims of an Iranian applicant for asylum would be mea-

144. See Bastanipour v. INS, 980 F.2d 1129, 1132 (7th Cir. 1992) (Posner, C.J.).
145. See Canas-Segovia v. INS, 970 F.2d 599, 602 (9th Cir. 1992) (Imputed political opinion is when "[a] persecutor falsely attributes an opinion to the victim, and then persecutes the victim because of that mistaken belief about the victim's views").
146. See, e.g., Bahadori v. INS, No. 90-70500, 1991 WL 224031, at *4 (9th Cir. Oct. 30, 1991) (unpublished disposition) (noting that the "BIA failed to consider whether Iranian authorities might impute [an apostate] Moslem identity to Bahadori, regardless of his mixed religious heritage"); Rees, supra note 13, at 501 (offering example of imputed religious opinion when Nazis sentence a non-Jew to death because they incorrectly believe he is a Jew).
147. See Bastanipour, 980 F.2d at 1132 (Posner, C.J.) (noting the BIA opinion erroneously did not consider "what would count as conversion in the eyes of an Iranian religious judge").
sured against what an Iranian religious judge would find as indicia of apostasy.\footnote{148}

The apostasy analysis simplifies the examination of the applicant’s credibility insofar as it avoids the sincerity analysis required by \textit{Ballard}. The imputed religious opinion and apostasy analysis entirely avoids the question of whether the applicant is sincere and actually converted. The question is whether an Iranian religious judge would find that the applicant has left Islam for Christianity.\footnote{149} Because Islam, like Judaism, places greater emphasis on outward observances than Christianity, one might suppose that bona fide indicators of apostasy might be more easily available.\footnote{150} For this reason, this analysis might prove more workable than the potentially subjective sincerity test.

While the approach has the virtue of avoiding constitutional questions of religious sincerity and conversion, the apostasy analysis may be too ironclad for imposters. Islamic regimes with Shari’a codes, such as Iran and Sudan, may have a very low tolerance for dissent from the regime’s imposed orthodoxy. The low tolerance for dissent even extends to religious disagreement within the framework of Islam.\footnote{151} In fact, an Iranian’s application for asylum in the “Great Satan”\footnote{152} might lead a conservative Iranian religious judge to conclude that the applicant is an apostate merely because he or she applied for asylum. To prevail under the apostasy analysis, asylum applicants need only enter evidence of what constitutes apostasy,\footnote{153} how apostates are treated,\footnote{154} and behave in such a way that an INS administrative judge attempting to stand in an Iranian religious judge’s shoes would find the applicant an apostate. The very ingredients of what counts as apostasy for a religious judge might provide imposters with a cookbook for findings of apostasy. To be sure, if it turned out that the numbers of actual imposters were low relative to all applicants, occasionally erring and admitting imposters under this approach would be tolerable given the great cost of inadvertent refoulement.

Apart from the policy considerations of the imputed religious opinion approach, an establishment difficulty might persist with this apostasy analysis. If American judges decide credibility based on what an Iranian religious judge’s determinations of credible religious conversion would be, the American judges are still ultimately deciding what constitutes religious membership—only this

\begin{itemize}
\item \textit{See Najafi v. INS}, 104 F.3d 943, 949 (7th Cir. 1997) (“In an asylum case involving a country which punishes the abandonment of religious belief, our task is theoretically easier. We must ask ourselves what would count as conversion in the eyes of the Iranian Religious Judge.”).
\item \textit{See id.}
\item \textit{See id. at 949.}
\item Alternatively, the religious judge might have a very high tolerance for apostasy if he believed that the asylum applicant was merely feigning apostasy under duress, an offense considered excusable under Shari’a law. \textit{See Schacht, supra} note 2, at 118.
\item \textit{U.S. Seeks Hegemony and Not Relations, Says Iran’s Supreme Leader, Deutsche Presse-Agentur}, Dec. 25, 1998 (noting Teheran’s regular habit of denouncing the United States as the “‘great Satan’ and enemy of Islam and Moslems around the world”).
\item \textit{See Najafi}, 104 F.3d at 949.
\item \textit{See id. at 948} (noting that how Iran treats apostates is “at the heart of the asylum inquiry”).
\end{itemize}
time employing an Iranian yardstick. Such determinations put American judges in the awkward position of “trying” asylum applicants for apostasy from Islam, with the reward of asylum if applicants have denied Islam. Thus, rather than avoid establishment concerns, the apostasy analysis defers them to a level once removed.

B. THE MARRIAGE FRAUD MODEL

The Immigration Marriage Fraud Act (IMFA) as well as the INS’s sham marriage investigation policy suggest a regulatory model for handling religious conversion and membership fraud. Under the 1986 IMFA, section 216 requires that an alien and a U.S. citizen remain married for two years of marriage following the conditional grant of a green card; otherwise, the alien faces deportation. At the conclusion of the two-year period, INS officials conduct the infamous marriage interview to assess the marriage’s validity. An additional IMFA provision originally provided that an alien’s “eleventh hour” deportation marriage—which occurs when a deportable alien auspiciously falls in love and marries a U.S. citizen to obtain a green card—was insufficient for relief from deportation. The provision’s unpopularity led to a subsequent amendment which now allows for eleventh hour marriages if an alien proves genuineness by clear and convincing evidence. In addition to these statutory requirements, the Ninth Circuit, in Bark v. INS, clarified the marriage requirement. In Bark, the petitioner and his wife had a shaky marriage, characterized by separation and arguing. The BIA relied on the separation to find that the marriage was fraudulent. The circuit court, however, corrected the BIA’s mistaken premise, explaining that “[a]liens cannot be required to have more conventional or more successful marriages than citizens.” Instead, the proper standard for determining marriage fraud is whether the alien and his or her spouse intend to establish a life together at the time of marriage.

A conversion imposter analysis could be based on the present marriage fraud approach. However, the analysis would have considerable constitutional difficulties. Unlike the marriage fraud context, where an alien may be required to remain married to the citizen, the conversion setting would be difficult to reconcile with the Establishment Clause: were the government to create a two-year prohibition on conversion to another faith on threat of deportation to a country where one would be persecuted, establishment concerns would be

156. See § 1186a(d) (1994) (authorizing the INS to conduct interviews and elicit detailed facts regarding the alien’s marriage).
157. See §§ 1154(g), 1255(e) (1994).
159. 511 F.2d 1200 (9th Cir. 1975).
160. See id. at 1201.
161. See id.
162. Id. at 1201-02.
163. See id. at 1202.
present. Persons who convert once may convert again in their quest for religious truth and divine guidance. Similarly, an intrusive conversion interview, akin to the INS marriage interview, risks the same dangers of imposed orthodoxy inherent in Ballard sincerity test determinations. The orthodox Christian convert may find an INS officer's religious values superimposed upon his or her own during a conversion sincerity interview. This danger persists despite a Bark-type rule recognizing imperfection in one's religious life. Lastly, a bar on recognizing eleventh hour conversions may ignore the reality of Christian conversion during adversity. Together, these concerns counsel against a marriage fraud model to religious conversion claims.

C. PROCEDURAL REMEDIES: AGENCY RECORD OF WHY CREDIBILITY WAS DENIED

Finally, a possible procedural remedy is to provide asylum applicants with a record as to why their claims for asylum based on religious membership were found not credible. Aliens would have an opportunity to challenge the adverse credibility findings in court. Recently, a House bill proposed that administrative law judges be required to give applicants reasons why the alien's claim was not credible. Specifically, the bill's provisions would have required the INS to provide applicants who are denied asylum on credibility grounds with the following:

(i) The statements by the applicant, or other evidence, that were found not to be credible.
(ii) A statement certifying that the applicant was provided an opportunity to respond to the Service's position on the credibility issue.
(iii) A brief summary of such response, if any was made.
(iv) An explanation of how the negative determination on the credibility issue relates to the applicant's religious persecution claim.

Aside from congressional action, such a remedy might result from either the creation of an INS regulation or else a judicial command to the agency to maintain a record of credibility determinations.

164. Cf. Note, The Constitutionality of the INS Sham Marriage Investigation Policy, 99 Harv. L. Rev. 1238, 1246 (1986) ("INS exerts pressure even on couples who have a bona fide marriage to conform their marital conduct to what the INS declares to be the 'norm' for marriages in terms of time spent together, sexual behavior, and level of intimacy.").
165. See supra Part II.c.3.
166. See Freedom from Religious Persecution Act, H.R. 2431, 105th Cong. § 9 (1998). The proposed section 9 would have operated in a slightly different context of an applicant's credible fear of persecution as opposed to credible religious membership. Section 9 of the bill would have amended section 208 to create subsection 208(e) on credibility issues. The House Judiciary Committee deleted this proposed language due to concern about administrative cost and delay. See Hearing on HR. 2431, supra note 5, at 10 (statement of Rep. Lamar Smith).
168. See Kenneth Culp Davis, A New Approach to Delegation, 36 U. Chi. L. Rev. 713, 728-29 (1969) (noting that judicially commanded rulemaking can effectively check abuses of administrative
A detailed record of credibility determinations would be useful for several reasons. First, when a reviewing court lacks a record, the judge is forced to defer to agency findings. Reviewing courts properly defer to an administrative judge’s findings of demeanor because the judge is actually present at the hearing. However, “credibility findings resting on analysis of [written] testimony rather than on demeanor may ‘deserve less than usual deference.’” 169

Second, a detailed record could facilitate administrative and judicial review of INS findings, especially when asylum applicants attempt to vindicate free exercise or nonestablishment rights against an agency denial of asylum. Although appellate court review still risks denial of a benefit or imposition of religious orthodoxy, the applicant at least has the opportunity for a court to review the most egregious agency decisions. 170 If a reviewing court finds that an immigration judge made an adverse credibility determination unsupported by substantial evidence on the record as a whole, 171 it could grant the applicant relief by finding the adverse creditibility determination unsupported. Conversely, by keeping detailed records of credibility determinations, the INS would have the opportunity to prevail where the BIA properly denied asylum for reasons of credibility. 172 In addition, the ready review available for asylum applicants discretion). A court might require the keeping of a detailed record as a procedural guarantee of due process. See, e.g., Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (in deciding whether to grant an additional procedural safeguard, the Court weighed “the private interest that will be affected by the official action”; “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards”; and “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail”). 169. Cordero-Trejo v. INS, 40 F.3d 482, 487 (1st Cir. 1994) (quoting Consolidation Coal v. NLRB, 669 F.2d 482, 488 (7th Cir. 1982)). 170. To further guard against imposition of religious orthodoxy, a judge could adopt a presumption analogous to the Internal Revenue Service’s (IRS) sincerity test presumption. When determining the tax status of groups claiming religious exemption from taxation, the IRS refuses to question the religious nature of belief on grounds of insincerity absent a clear showing that such beliefs or doctrines are not sincerely held. See Slye, supra note 33, at 258. 171. See Universal Camera Corp. v. NLRB, 340 U.S. 474, 491 (1951). By substantial evidence, Universal Camera intended that the evidence “must do more than create a suspicion of the existence of the fact to be established . . . . [I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.” Id. at 477; cf. Unification Church v. INS, 547 F. Supp. 623, 629 (D.D.C. 1982) (in the immigration context, INS suspicions about visa fraud cannot substitute for substantial evidence required to support findings of fact, even when applied to aliens). 172. Findings an immigration judge or asylum officer could present that would satisfy a reviewing court that INS had detected an imposter might include: applicant declarations that evidenced bad faith; unreasonable historical or chronological inconsistencies; or an applicant’s provision of evidence of religious membership that appears inconsistent with other claims but that the applicant in bad faith fails to clarify when given the opportunity to do so. See, e.g., Najafi v. INS, 104 F.3d 943, 947-48 (7th Cir. 1997) (applicant claimed he conscientiously objected to being drafted during the Iranian revolution of 1979 because of his religious belief; applicant, however, had only been exposed to his faith since 1984, and when asked, he identified no earlier religious belief that would have prohibited military service); Hajiani-Niroumand v. INS, 26 F.3d 832, 837 (8th Cir. 1994) (testifying he had become a Baptist, but stating on his application that he was Catholic); U.N. HANDBOOK, supra note 40, ¶ 204 (“The applicant’s statements must be coherent and plausible, and must not run counter to generally known facts.”).
might have a salutary effect without actually requiring litigation by forcing INS to exercise caution when deciding what constitutes religious membership. To be sure, the creation of detailed records for credibility determinations ultimately risks increased litigation and may be time consuming. But considering that INS action may affect aliens’ constitutional rights to free exercise and nonestablishment, the added procedural burden on the government is justified.¹⁷³

CONCLUSION

The constitutional dimensions of religious asylum can complicate the INS administrative judge’s task. Because of the nature of Christian conversion, religious membership is poorly measured by outward criteria for sincerity. Moreover, sincere religionists may hold beliefs and practices that are heterodoxical, ironically making such applicants less likely to be found credible than an imposter. After outlining free exercise and establishment challenges for Christian asylum applicants who may suffer unwarranted adverse credibility determinations, this note concludes that the creation of a detailed administrative record clearly stating reasons for denied credibility best serves the alien’s religious liberty and the state’s compelling interest in curtailing fraudulent asylum claims.

¹⁷³ Under Mathews v. Eldridge, 424 U.S. 319 (1976), reviewing courts balance additional procedural burdens for the government against the risk of violating those rights under present credibility determinations and the probative value of an additional procedural safeguard. Id. at 335.