ASYLUM, RELIGION, AND THE TESTS FOR OUR COMPASSION

AADITYA P. TOLAPPA*

Under pressure to turn away noncitizens who fabricate religious affiliation to improve their chances of gaining asylum, immigration judges are known to ask asylum seekers doctrinal questions about their purported religions to assess their overall credibility. Immigration judges administer these "religious tests" with broad statutory authority to make credibility determinations and without meaningful review by the Board of Immigration Appeals or the federal Courts of Appeals. Although "religious tests" are currently allowed in immigration court, they are strictly forbidden in federal court because of an Establishment Clause principle called the "religious question doctrine," which forbids government tribunals from weighing in on intrafaith doctrinal disputes or holding claimants' beliefs and practices to judicial standards of orthodoxy. This Note highlights the difference in how religious tests are treated in these two adjudicative contexts and argues that for both constitutional and institutional reasons—that is, because of the Establishment Clause's mandates and the government's incompetence in adjudicating intimate issues of personal identity—appellate courts should forbid religious testing in asylum proceedings just as they do in federal courtrooms. To the extent that the government has a legitimate interest in preventing so-called "religious imposters" from gaining asylum, immigration judges can further that interest by gauging the sincerity and not the orthodoxy of applicants' beliefs, just as federal judges do.

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INTRODUCTION

On September 10, 2015, President Barack Obama announced that his administration would seek to resettle ten thousand Syrian refugees in the following fiscal year, a substantial increase from the fewer than two thousand that had been admitted to the United States in the year prior.[1] His announcement came during an international refugee crisis in which over one million migrants, the majority of whom were fleeing war and persecution in Africa and Asia, sought asylum in the West.[2] It also came as Islamophobic sentiments grew in both Europe and the United States.[3] Many Americans and Europeans expressed fear—whether in good or bad faith—that granting asylum to Syrian refugees would risk inviting extremism to home soil.[4]

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1 Gardiner Harris, David E. Sanger & David H. Herszenhorn, *Obama Increases Number of Syrian Refugees for U.S. Resettlement to 10,000*, N.Y. TIMES (Sept. 10, 2015), https://www.nytimes.com/2015/09/11/world/middleeast/obama-directs-administration-to-accept-10000-syrian-refugees.html [https://perma.cc/U6AT-SD2S].

2 *See* UNITED NATIONS HIGH COMM'R FOR REFUGEES, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2015, at 35 (2016), https://www.unhcr.org/576408cd7.pdf [https://perma.cc/A5YZ-JR6T] (noting that over one million migrants crossed the Mediterranean Sea to arrive in Europe over the course of two years).

3 Przemyslaw Osiewicz, *Europe's Islamophobia and the Refugee Crisis*, MIDDLE E. INST. (Sept. 19, 2017), https://www.mei.edu/publications/europes-islamophobia-and-refugee-crisis [https://perma.cc/S3NN-A64]; Goleen Samari, *Islamophobia and Public Health in the United States*, 106 AM. J. PUB. HEALTH 1920 (2016).

4 *See* Osiewicz, *supra* note 3 ("In this shifting political and security climate, . . . many non-Muslim Europeans . . . wrongly perceive Muslim refugees—and Muslims in general—as grave threats to their safety."). It is important to note that Muslim refugees from Syria have killed zero people in acts of terror on American soil between 1975 and 2015. Uri Friedman, *Where America's Terrorists Actually Come From*, ATLANTIC (Jan. 30, 2017), https://www.theatlantic.com/international/archive/2017/01/trump-immigration-ban-terrorism/514361 [https://perma.cc/F2YJ-TH5N]. Empirically, the increased flow of refugees and immigrants to host countries does not seem to increase crime rates or domestic terrorism rates,

Ominously, one congressperson warned that refugees were "coming from a country filled with Islamic terrorists" and that he feared "another Boston Marathon bombing situation."[5] Tragically, two months later, a group of terrorists executed a coordinated attack on the Stade de France, the Bataclan Theater, and several restaurants and cafes in Paris, killing hundreds and injuring hundreds more.[6]

The day after the Paris attacks, Senator Ted Cruz proclaimed on Fox News that "President Obama['s] . . . idea that we should bring tens of thousands of Syrian Muslim refugees to America . . . is nothing less than lunacy."[7] America, he urged, was obligated to provide a safe haven for "*Christians* who are being targeted for genocide, for persecution" and "*Christians* who are being beheaded or crucified . . . ."[8] When pressed by reporters, Senator Cruz doubled down, stating that the United States should grant asylum to Syrian Christians but not to Syrian Muslims.[9] Although Senator Cruz did not indicate how immigration officials should determine which applicants were Muslims and which were Christians, his implication was clear: He would have immigration officials administer some sort of "religious test" to those seeking refuge in the United States. In response, President Obama chastised Senator Cruz and asserted that in America, "[w]e don't have a religious test for our compassion."[10]

President Obama's arguments with Republicans about asylum policy continued for the rest of his presidency,[11] and after his term ended, newly

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although the risk of terrorism by refugees seems to rise as a function of host countries' attitudes toward refugees and economic competition. *See* Graig R. Klein, *Refugees, Perceived Threat & Domestic Terrorism*, STUD. CONFLICT & TERRORISM (Oct. 31, 2021), https://www.tandfonline.com/doi/full/10.1080/1057610X.2021.1995940 [https://perma.cc/MD3L-KXP2] ("Refugees' effect on domestic terrorism is conditioned by host-country social perception . . . and economic competition."); *Is There a Link Between Refugees and U.S. Crime Rates?*, NEW AM. ECON. RSCH. FUND (Feb. 7, 2017), https://research.newamericaneconomy.org/report/is-there-a-link-between-refugees-and-u-s-crime-rates [https://perma.cc/9EPJ-EJGV] (finding that of the ten U.S. cities that received the most refugees relative to size of population between 2006 and 2015, nine "actually became considerably safer, both in terms of their levels of violent and property crime").

5 Harris et al., *supra* note 1.

6 *Paris Attacks: What Happened on the Night*, BBC NEWS (Dec. 9, 2015), https://www.bbc.com/news/world-europe-34818994 [https://perma.cc/6DSV-SFAT].

7 Amy Davidson Sorkin, *Ted Cruz's Religious Test for Syrian Refugees*, NEW YORKER (Nov. 16, 2015), https://www.newyorker.com/news/amy-davidson/ted-cruzs-religious-test-for-syrian-refugees [https://perma.cc/8KMD-QSYH].

8 *Id.* (emphasis in original transcription of spoken quotations).

9 *Id.*

10 Nick Gass, *Obama Scolds Those Calling for 'Religious Test' of Syrian Refugees*, POLITICO (Nov. 16, 2015, 11:08 AM), https://www.politico.com/story/2015/11/obama-syria-refugees-215926 [https://perma.cc/Y9R5-HA3J].

11 *See, e.g.*, Nahal Toosi & Seung Min Kim, *Obama Raises Refugee Goal to 110,000, Infuriating GOP*, POLITICO (Sept. 14, 2016, 12:45 PM), https://www.politico.com/story/2016/09/obama-refugees-228134 [https://perma.cc/3EHV-92FX]

elected President Donald Trump announced a "Muslim ban,"[12] which resembled Senator Cruz's suggested policy. But President Obama's discourse with Senator Cruz elided a reality of the current asylum regime: Immigration officials *already* administer religious tests to asylum applicants, although not exactly how Senator Cruz envisioned.

Asylum law protects immigrants who face religious persecution in their countries of origin, but Congress and the courts fear allowing "religious imposters," or noncitizens lying about religious affiliation to bolster their asylum applications, into the United States.[13] As a result, immigration judges ("IJs") are allowed to screen for religious imposters by asking asylum seekers doctrinal questions about their purported religion and using applicants' religious knowledge (or lack thereof) as part of the IJs' overall assessment of applicants' credibility.[14] These kinds of religious tests would be strictly forbidden if judges were to administer them to religious claimants in federal court because of the so-called "religious question doctrine," an Establishment Clause principle that prohibits courts from resolving questions of religious doctrine or holding religious claimants' beliefs and practices to judicial standards of orthodoxy.[15] This Note highlights the discrepancy between how religious tests are treated in the asylum context versus how they are treated in federal court and argues that for both constitutional and institutional reasons—that is, because of the strictures of the Establishment Clause and the government arbiter's incompetence to

(noting the opposition from Republican representatives to President Obama's commitment to resettle 110,000 refugees in the U.S. in the fiscal year beginning October 1, 2016).

12 Jeremy Diamond, *Trump's Latest Executive Order: Banning People From 7 Countries and More*, CNN (Jan. 29, 2017, 4:38 PM), https://www.cnn.com/2017/01/27/politics/donald-trump-refugees-executive-order/index.html [https://perma.cc/3275-8TLC] (describing President Trump's executive order barring "citizens of seven Muslim-majority countries from entering the US for at least the next 90 days"); Michael D. Shear, *New Order Indefinitely Bars Almost All Travel from Seven Countries*, N.Y. TIMES (Sept. 24, 2017), https://www.nytimes.com/2017/09/24/us/politics/new-order-bars-almost-all-travel-from-seven-countries.html [https://perma.cc/7N9Y-UEPN] (indefinitely banning travel from Iran, Libya, Syria, Yemen, Somalia, Chad, and North Korea). President Trump's policy, as discussed in Section IV.A *infra*, did not screen applicants on the basis of religion but rather banned immigration from certain countries, most of which have substantial Muslim populations. *See* Trump v. Hawaii, 138 S. Ct. 2392 (2018) (holding that President Trump's policy indefinitely barring entry into the U.S. by nationals of six Muslim-majority countries was constitutional and not in violation of the Immigration and Nationality Act).

13 *See* Michael Kagan, *Refugee Credibility Assessment and the "Religious Imposter" Problem: A Case Study of Eritrean Pentecostal Claims in Egypt*, 43 VAND. J. TRANSNAT'L L. 1179, 1182–84 (2010) (describing the "religious imposter" problem and the state's interest in screening for fraudulent asylum applicants).

14 *See infra* Section II. This Note will use the phrase "religious test" to describe the IJ incorporating an asylum applicant's responses to questions of religious doctrine into the IJ's credibility determination, regardless of whether those questions came from the IJ herself or from other government actors, like an asylum officer or the government's counsel during the asylum or removal hearing.

15 *See infra* Section III.B.

adjudicate certain intimate issues of personal and social identity—appellate courts should resolve this inconsistency by forbidding religious testing in asylum proceedings. It asserts that the government can adequately further its legitimate interest in preventing religious imposters from gaining asylum by restricting IJs' questions to those probing sincerity of religious belief rather than mastery of religious doctrine.

This Note will proceed in four Sections. Section I will briefly trace the history of religious asylum[16] in America and will introduce the "religious imposter" problem that has animated restrictions on religious asylum grants. Section II will discuss IJs' use of religious tests to screen for religious imposters, including IJs' statutory authority to make credibility determinations at asylum proceedings and appellate courts' deferential standards for reviewing religious testing. Section III will analyze the Supreme Court's approach to testing the sincerity of religious claims in First Amendment and statutory contexts. It will show that although federal courts can and must gauge religious claimants' sincerity, they may not, according to the "religious question doctrine," hold claimants to judicial standards of orthodoxy without running afoul of the Establishment Clause. Section III will also compare the religious question doctrine to courts' treatment of racial identity in affirmative action cases to show that even aside from the Establishment Clause's constraints, courts may be ill-suited to adjudicate intimate questions of identity like those implicating religion or race. Section IV will argue that appellate courts should prohibit the use of religious tests in asylum proceedings because of the constitutional and institutional issues raised in Section III. It will conclude that the government can effectively screen religious imposters by probing applicants' sincerity rather than their knowledge of religious doctrine.

I

ASYLUM LAW AND THE "RELIGIOUS IMPOSTER" PROBLEM

American religious asylum policies are a product of Congress's competing desires to protect those fleeing religious persecution and to exclude "religious imposters" who feign fear of religious persecution to opportunistically gain refuge in the United States. Section I.A briefly recounts the history of American asylum law and its origins in international law. Section I.B discusses the religious imposter problem that has motivated the United States's restrictions on grants of religious asylum.

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16 This Note will refer to immigrants seeking asylum as "asylum seekers" or "asylum applicants" depending on context and will refer to asylum on the basis of fear of religious persecution as "religious asylum."

A. Sources of Asylum Law

Asylum law protects immigrants who face persecution in their countries of nationality. Modern American asylum law traces its roots back to the 1951 United Nations Convention Relating to the Status of Refugees (the "Refugee Convention").[17] The Refugee Convention, a treaty created to address the European refugee crisis in the wake of World War II,[18] defined a "refugee" as a person who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion" in her country of nationality, could not return.[19] Notably, the Refugee Convention prohibited signatory states from "refoul[ing]" refugees—expelling or returning them to their countries of nationality—if their "life or freedom would be threatened" on account of one of the five protected characteristics.[20] The United States agreed to the Refugee Convention's terms sixteen years later when it ratified the 1967 Protocol to the Refugee Convention (the "Protocol"), which incorporated the Refugee Convention's terms, including its definition of "refugee" and the five bases for refugee status, but eliminated the Refugee Convention's geographical and temporal limitations.[21]

When it enacted the Refugee Act of 1980, which amended the Immigration and Nationality Act of 1965 ("INA"), Congress brought the United States's system of handling refugees into accord with its obligations under the Protocol and the Refugee Convention.[22] In doing so, Congress expressly adopted the Refugee Convention's definition of a "refugee":

> The term "refugee" means . . . any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of,

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17 Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter Refugee Convention].

18 *See* Naomi S. Stern, *Evian's Legacy: The Holocaust, the United Nations Refugee Convention, and Post-War Refugee Legislation in the United States*, 19 GEO. IMMIGR. L.J. 313, 315 (2004) ("The U.N. Convention was a direct response to the Jewish refugee crisis created by the Holocaust and other refugee crises that emerged in the wake of World War II . . . ."); *see also* Refugee Convention, *supra* note 17, art. 1(B)(1)(b) (defining refugee in relation to "events occurring in Europe or elsewhere before 1 January 1951").

19 Refugee Convention, *supra* note 17, art. 1(A)(2).

20 *Id.* art. 33(1).

21 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

22 *See* S. REP. NO. 96-256 (1979), *reprinted in* 1980 U.S.C.C.A.N. 141 (adopting a similar definition of "refugee" as that of the Protocol). The Supreme Court has recognized that the express purpose of the Refugee Act of 1980 was to codify the United States's legal obligations under the Protocol and the Refugee Convention. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 436–37 (1987) ("If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees . . . .").

> that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .[23]

The Refugee Act also adopted the Refugee Convention's nonrefoulment provision, protecting refugees from deportation back to the country where they fear they may be persecuted.[24] Together, these provisions established two paths for legal protection that continue to govern asylum applicants today. First, the Attorney General and the Secretary of Homeland Security each have the discretion to grant asylum status to any applicant who can prove she is a "refugee" as defined in the statute, outside specific circumstances.[25] Asylum status conveys the ability to work in the United States and travel abroad without being deported.[26] Second, even an individual who is not granted asylum may not be removed from the United States if the Attorney General "decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion."[27] Gaining asylum status requires a lower standard of proof than withholding of removal.[28] Additionally, asylum grants are discretionary, but withholding of removal is mandatory: An asylum applicant *cannot* be sent back to a country if an applicant establishes that "more likely than not," her life or freedom would be threatened based on the aforementioned characteristics.[29]

B. Religious Asylum in the United States and the "Religious Imposter"

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23 Refugee Act of 1980, Pub. L. No. 96-212, § 201, 94 Stat. 102, 102 (codified at 8 U.S.C. § 1101(a)(42)).

24 *Id.* § 203(e), 94 Stat. at 107 (codified at 8 U.S.C. § 1231(b)(3)(A)).

25 *See* 8 U.S.C. § 1158(b)(1)–(2).

26 *Id.* § 1158(c).

27 *Id.* § 1231(b)(3)(A); INS v. Stevic, 467 U.S. 407, 430 (1984).

28 *See* Liz Bradley & Hillary Farber, *Virtually Incredible: Rethinking Deference to Demeanor When Assessing Credibility in Asylum Cases Conducted by Video Teleconference*, 36 GEO. IMMIGR. L.J. 515, 527 (2022) ("[A]sylum requires a well-founded possibility of persecution (equated to roughly 10 percent), while withholding of removal requires a 'clear probability' of persecution (greater than 50 percent)" (citing INS v. Cardoza-Fonseca, 480 U.S. 421, 440 (1987))); *see also* 8 C.F.R. § 208.16(b)(1)(iii) (declaring that an asylum applicant is eligible for withholding of removal if she demonstrates it is "more likely than not" that her life or freedom would be threatened in the country of removal).

29 8 U.S.C. § 1231(b)(3)(A); 8 C.F.R. § 208.16(b)(1)(iii). Even if an immigrant is granted withholding of removal, she may be sent to another country where the Attorney General determines her life or freedom would not be threatened on account of one of the protected characteristics. *Id.* § 1231(b)(1)–(2); *see, e.g.*, Daniel Wiessner, *Transgender Guatemalan Woman's Deportation Case to Get U.S. Supreme Court Review*, REUTERS (Oct. 3, 2022, 3:06 PM), https://www.reuters.com/legal/government/transgender-guatemalan-womans-deportation-case-get-us-supreme-court-review-2022-10-03 [https://perma.cc/WE4V-AKZ2] (describing the case of a Guatemalan transgender woman who was denied asylum because she had previously been deported, but who specifically challenged the lower court's determination that she was ineligible for withholding of removal) (citing Santos-Zacaria v. Garland, 22 F.4th 570 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 82 (2022)).

Problem

American asylum law has been driven by a desire to protect those facing religious persecution abroad. The United Nations passed the Refugee Convention in 1951 in the wake of the Holocaust, an event which led thousands of Jews to flee Nazi Germany, and as other religious and political minorities fled newly formed Communist regimes in Eastern Europe.[30] The United States signed onto the terms of the Refugee Convention by ratifying the Protocol in 1968, symbolically showing America's commitment to combating the harms of religious persecution that the Refugee Convention sought to address.[31] When Congress finally enacted the Refugee Act in 1980 and brought the United States asylum system into conformity with the Refugee Convention's guidelines, it did so amidst growing refugee crises in Southeast Asia and Eastern Europe, both of which stemmed at least in part from religious persecution.[32] Today, although the State Department does not consistently release data on how many asylum seekers apply based on fear of persecution specifically because of their religion,[33] as many as one-third of refugees admitted to the United States are religious minorities in their countries of origin.[34]

But the United States's history of protecting refugees has also been marked by a profound fear of opening doors to "religious imposters"—those who opportunistically lie about their religion to gain protection, or worse, do so to infiltrate and harm America. As the Holocaust unfolded, President Franklin Delano Roosevelt and his State Department denied thousands of visa applications from Jewish refugees, articulating fears that they may be

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30 Stern, *supra* note 18, at 315.

31 *See id.* at 326.

32 *Id.* (noting that reform to the immigration and refugee process had been "brewing for several years" in partial response to refugee crises in Vietnam, Laos, and Cambodia, which also coincided with an increase in Soviet Jews seeking refuge in the U.S. after being granted permission to leave the U.S.S.R.)); *see also Cambodian Genocide Program*, YALE UNIV. GENOCIDE STUD. PROGRAM (last visited Dec. 28, 2022), https://gsp.yale.edu/case-studies/cambodian-genocide-program [https://perma.cc/9K5P-RDZ7] (stating that Cambodian and international co-prosecutors found evidence of "genocide of the country's Cham Muslim minority").

33 *See, e.g.*, Emily McFarlan Miller & Jack Jenkins, *Refugee Data on Religion Disappears as Fewer Persecuted Christians Admitted to US*, RELIGION NEWS SERV. (Oct. 13, 2020), https://religionnews.com/2020/10/13/refugees-pesecuted-christians-trump-world-relief-state-department-resettlement-statistics-processing-system [https://perma.cc/3V4T-LHM8] ("The State Department no longer is making publicly available a number of statistics about refugees admitted into the United States, including their religious affiliation."); *see also* Karen Musalo, *Claims for Protection Based on Religion or Belief: Analysis and Proposed Conclusions*, 16 INT'L J. REFUGEE L. 165, 178 (2004) ("There are very few U.S. cases which provide a clear presentation of a claim based on discrimination on account of religion." (citations omitted)).

34 *See* Katayoun Kishi, *Most Refugees Who Enter the U.S. as Religious Minorities Are Christians*, PEW RSCH. CTR. (Feb. 7, 2017), https://www.pewresearch.org/fact-tank/2017/02/07/most-refugees-who-enter-the-u-s-as-religious-minorities-are-christians [https://perma.cc/M5WM-XLQH] (finding that over a third of the refugees who were admitted into the United States in fiscal year 2016 were religious minorities in their home countries).

voluntary or involuntary Nazi spies.[35] Within two decades of the Refugee Act's enactment, immigration officials expressed suspicion of widespread fraud by Chinese immigrants claiming persecution on the basis of their supposed Christian faith.[36] More recently, President Joe Biden suspended the "Direct Access" resettlement program for Iraqi refugees, which the United States created for those displaced by its invasion of Iraq, because his administration suspected that thousands of Iraqi refugees had applied fraudulently.[37] In these debates, it is difficult to separate good-faith concerns regarding immigration policy[38] and national security from sentiments rooted in xenophobia. Even though data suggest that asylum fraud is "extremely uncommon,"[39] fears of "religious imposters" continue to animate asylum

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35 *See, e.g.*, Daniel A. Gross, *The U.S. Government Turned Away Thousands of Jewish Refugees, Fearing that They Were Nazi Spies*, SMITHSONIAN MAG. (Nov. 18, 2015), https://www.smithsonianmag.com/history/us-government-turned-away-thousands-jewish-refugees-fearing-they-were-nazi-spies-180957324 [https://perma.cc/9KVF-B8VT] (detailing an account of a ship with hundreds of Jewish refugees being turned away from a port in Miami).

36 *See, e.g.*, Kirk Semple, Joseph Goldstein & Jeffrey E. Singer, *Asylum Fraud in Chinatown: An Industry of Lies*, N.Y. TIMES (Feb. 22, 2014), https://www.nytimes.com/2014/02/23/nyregion/asylum-fraud-in-chinatown-industry-of-lies.html [https://perma.cc/Z3HK-YFFD] (describing a federal investigation of immigration fraud in New York's Chinese population, which led to the prosecution of at least 30 people "accused of coaching asylum applicants in basic tenets of Christianity to prop up their claims of religious persecution").

37 Jonathan Landay & Ted Hesson, *EXCLUSIVE U.S. Suspects 4,000 Cases of Fraud in Iraqi Refugee Program – Documents*, REUTERS (June 18, 2021, 6:30 AM), https://www.reuters.com/world/exclusive-us-suspects-4000-cases-fraud-iraqi-refugee-program-documents-2021-06-18 [https://perma.cc/X6LT-82MY]; *see also Iraqi National Pleads Guilty to Conspiracy to Defraud U.S. Refugee Program*, DEP'T OF JUST., U.S. ATT'Y'S OFF., D.C. (Jan. 26, 2022), https://www.justice.gov/usao-dc/pr/iraqi-national-pleads-guilty-conspiracy-defraud-us-refugee-program [https://perma.cc/37Z7-72M5] (detailing an individual pleading guilty to one count of "conspiracy to defraud the United States" for scheming to steal information from the U.S. government and using that information to help applicants fraudulently gain refugee status through the Iraq P-2 program).

38 *See generally* Tuan N. Samahon, Note, *The Religion Clauses and Political Asylum: Religious Persecution Claims and the Religious Membership-Conversion Imposter Problem*, 88 GEO. L.J. 2211, 2215–21 (2000) (noting the practical problems with accepting "religious imposters"); Kagan, *supra* note 13, at 1182–90.

39 *Fact Sheet: Asylum Fraud and Immigration Court Absentia Rates*, NAT'L IMMIGR. F. (Oct. 8, 2021), https://immigrationforum.org/article/fact-sheet-asylum-fraud-and-immigration-court-absentia-rates [https://perma.cc/GZD5-ZXCN]. It is especially challenging to estimate rates of religious fraud in asylum cases because the United States Citizenship and Immigration Service (USCIS) does not routinely publish data on the number of asylum applications terminated due to fraud. When other governmental entities publish fraud statistics, they do not disaggregate by the grounds on which applicants sought asylum. *See, e.g.*, REBECCA GAMBLER, U.S. GOV'T ACCOUNTABILITY OFF., ASYLUM: ADDITIONAL ACTIONS NEEDED TO ASSESS AND ADDRESS FRAUD RISKS 68 (2015), https://www.gao.gov/assets/gao-16-50.pdf [https://perma.cc/DKD6-8PWJ] (noting that asylum terminations for fraud decreased from 103 in 2010 to 34 in 2014, but not addressing the grounds on which those applicants sought asylum); *but see* USCIS, I-589 Asylum Benefit Fraud and Compliance Assessment Report 2 (Nov. 16, 2009) (unpublished draft), https://www.fairus.org/sites/default/files/2017-08/Asylum_Fraud_DraftReport.pdf [https://perma.cc/YWW6-C33L] (detecting "proven fraud" in 12% and suspected fraud in 58% of

policy today, particularly as sitting presidents direct immigration officials to use increasingly stringent screening measures.[40]

II

RELIGIOUS ASYLUM APPLICANTS AND RELIGIOUS TESTS

Motivated to prevent religious imposters from gaining asylum, IJs sometimes ask questions about religious doctrine to applicants seeking religious asylum, and they are empowered to do so under the broad statutory authority to make credibility determinations at asylum hearings.[41] Those who do not answer in a way the IJ deems satisfactory are deemed "insincere" and thus non-credible.[42] IJs who use religious tests to gauge credibility are generally insulated from searching administrative or appellate review.[43] Section II.A explores IJs' authority to make credibility determinations at asylum hearings and the centrality of these findings in many asylum cases. It also introduces the avenues for administrative and appellate review for asylum applicants who seek to appeal adverse asylum determinations. Section II.B explains that IJs can and do test applicants' religious knowledge to gauge credibility at asylum hearings and shows that appellate courts' deferential standard of review enables IJs to continue doing so.

A. Credibility Determinations at Asylum Hearings

Most asylum cases end up in front of an IJ,[44] and in those hearings, IJs

a sample of 239 asylum cases, but not discussing the grounds on which each applicant sought asylum).

40 *See* Julia Jacobo, *How the Government Strives to Tell if a Refugee Applicant Is Lying About Being a Christian*, ABC NEWS (Jan. 30, 2017, 3:17 PM), https://abcnews.go.com/US/government-strives-refugee-applicant-lying-christian/story?id=45127055 [https://perma.cc/QLF5-AJFS] (noting that although President Trump's Press Secretary indicated the administration would not direct officials to administer religious tests, President Trump called for "extreme vetting" of all asylum applicants); Maria Sacchetti, *Lawyers Say the Biden Administration Is Still Rejecting Some Refugees Once Banned by Trump*, WASH. POST (Feb. 16, 2022, 6:00 AM), https://www.washingtonpost.com/national-security/2022/02/16/biden-trump-refugees [https://perma.cc/96WQ-6M4M] (describing advocates' concern that the Biden Administration continued to use the Trump Administration's "extreme vetting" procedures for asylum applications).

41 *See infra* note 45 and accompanying text.

42 *See* Kagan, *supra* note 13, at 1213.

43 *See infra* notes 49–54 and accompanying text.

44 Under the INA, all individuals who apply for asylum do so either either affirmatively or defensively. *See* 8 U.S.C. §§ 1158, 1225(b) (outlining procedures for applying for asylum). Although the differences between affirmative and defensive applications are immaterial to the substance of this Note, for a helpful summary of those procedures, see Shalini Bhargava Ray, *Applying the U.S. Constitution to Foreign Asylum Seekers: Exposing a Curious, Inconsistent Practice in the Federal Courts*, 100 MARQ. L. REV. 137, 146–47 n.64 (2016). Of note here, over half of affirmative applicants and all defensive applicants end up arguing their asylum cases before

are authorized to make credibility determinations regarding the applicant's testimony based on the "totality of the circumstances," including a wide range of factors like the applicant's "demeanor, candor, or responsiveness," as well as the "consistency of [the applicant's] statements with other evidence of record."[45] Understanding that asylum applicants "generally are unable to produce external corroborative evidence" because they have fled the places where any such evidence is likely to exist,[46] Congress allows applicants to meet their burden of proof solely through their own testimony, so long as the IJ finds their testimony credible.[47] As a result, "the applicant's credibility is the linchpin of the [immigration] judge's analysis [and] asylum is all but certain to be denied to an applicant who is deemed not credible."[48]

After the IJ issues a final decision at the removal proceeding regarding asylum status or withholding of removal, both the government and the applicant can appeal to the Board of Immigration Appeals (BIA), an appellate administrative body within the Department of Justice.[49] The BIA will defer to the IJ's findings of fact, including credibility determinations, unless they are "clearly erroneous," but will review all other issues in the case de novo.[50] The BIA may affirm the IJ's decision through summary order without issuing any opinion if it finds that the IJ reached the correct result, any errors in the IJ's decision were nonprejudicial, and the case does not

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an IJ. *See* Stephen Paskey, *Telling Refugee Stories: Trauma, Credibility, and the Adversarial Adjudication of Claims for Asylum*, 56 SANTA CLARA L. REV. 457, 470–71, 470 n.64 (2016) (reporting that in 2014, fifty-four percent of all asylum cases completed by asylum officers were referred to an immigration court for de novo review).

45 8 U.S.C. § 1158(b)(1)(B)(iii) (laying out other factors that IJs can consider in making the credibility determination, including the plausibility of the applicant's account, inconsistency between the applicant's written and oral statements, and internal consistencies, inaccuracies, or falsehoods in such statements, regardless of whether they go to the heart of the applicant's claim). Congress has instructed that when judging an applicant's credibility, the IJ should look to "[a]ll aspects" of the applicant's demeanor, including "his countenance, how he sits or stands, whether he is inordinately nervous, his coloration during critical examination, the modulation or pace of his speech and other non-verbal communication." H.R. REP. NO. 109-72, at 168 (2005) (quoting Mendoza Manimbao v. Ashcroft, 329 F.3d 655, 662 (9th Cir. 2003) (citations omitted)).

46 *See* DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 150 (Paul T. Lufkin ed., 3d ed. 1999).

47 8 U.S.C. § 1158(b)(1)(B)(ii) ("The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee.").

48 Paskey, *supra* note 44, at 474; *accord* Nicholas Narbutas, Note, *The Ring of Truth: Demeanor and Due Process in U.S. Asylum Law*, 50 COLUM. HUM. RTS. L. REV. 348, 352 (2018) ("[C]redibility determinations are critical to every asylum applicant's case, but an adverse credibility determination will likely result in the denial of an asylum seeker's claim when the applicant cannot present corroborating evidence—a difficulty asylum seekers frequently face.").

49 *See* 8 C.F.R. §§ 1003.1(b), 1240.15 (outlining appeal procedures). The IJ may issue a decision orally or in writing. BD. OF IMMIGR. APPEALS, PRACTICE MANUAL 49 (2021), https://www.justice.gov/eoir/page/file/1284741/download [https://perma.cc/3ZCU-UWA3] [hereinafter PRACTICE MANUAL].

50 8 C.F.R. § 1003.1(d)(3)(i).

raise substantial or novel factual or legal issues.[51] The applicant may appeal an adverse determination by the BIA to the federal Courts of Appeals,[52] which will defer to the IJ's factual determinations if they are "supported by reasonable, substantial, and probative evidence in the record when considered as a whole."[53] However, the Courts of Appeals generally review legal issues and the application of law to fact *de novo*.[54]

Thus, within the expansive language of 8 U.S.C.A. § 1158(b)(1)(B)(iii), IJs have broad latitude to choose how to gauge asylum applicants' credibility, and these credibility determinations are often decisive of applicants' claims. Furthermore, IJs' credibility determinations are scrutinized only minimally during administrative and appellate review.

B. "Solving" the Religious Imposter Problem: Testing Religion

Under their broad statutory authority to make credibility determinations, IJs wary of "religious imposters"[55] may test asylum applicants on their knowledge of their purported religion.[56] Because "[t]he vast majority of asylum cases are decided by Asylum Officers without issuance of a written decision and by [IJs] whose decisions are only put on paper if the decision is appealed," it is not clear how prevalent religious testing is in the asylum context.[57] However, in 2004, Professor Karen Musalo

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51 *See* 8 C.F.R. § 1003.1(e)(4); *see also* PRACTICE MANUAL, *supra* note 49, at 71 (reiterating that, "[u]nder certain circumstances, the Board may affirm, without opinion, the decision of an Immigration Judge or DHS officer").

52 8 U.S.C. § 1240(a)(1) (noting that final removal orders are reviewable under 28 U.S.C. § 1158). However, the Courts of Appeals lack the jurisdiction to review certain administrative determinations, such as the decision to safely remove an asylum applicant to a third country (i.e., not her country of nationality), or the decision to remove an applicant due to terrorism or criminal offense. *See* 8 U.S.C. §§ 1158(a)(3), 1252(a)(2)(B)(ii), 1252(a)(2)(C). Even in these situations, though, an asylum claimant may be able to seek judicial review of her constitutional claims or on questions of law, although the extent of this review is an unsettled area of law and is beyond the scope of this Note. *See* 8 U.S.C. § 1252(a)(2)(D); *see, e.g.*, Adame v. Holder, 762 F.3d 667, 672 (7th Cir. 2014) (holding that the language of § 1252(a)(2)(D) limits judicial review to constitutional claims and questions of statutory construction).

53 Rizal v. Gonzales, 442 F.3d 84, 89 (2d Cir. 2006); *see also* Vitug v. Holder, 723 F.3d 1056, 1062–63 (9th Cir. 2013) (discussing the limited review a Court of Appeal has over the BIA and the power of an IJ's decision).

54 *See, e.g.*, Acharya v. Holder, 761 F.3d 289, 295–96 (2d Cir. 2014). Even though the Courts of Appeals review legal issues "*de novo*," they will defer to the agency's interpretation of the statutes it administers. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844–45 (1984); *see also* INS v. Cardoza-Fonseca, 480 U.S. 421, 446–48 (1987) (applying *Chevron* deference in the immigration context).

55 *See* Musalo, *supra* note 33, at 218 ("Adjudicators are often suspicious that applicants may opportunistically claim to be adherents of a persecuted religious group in order to avoid removal.").

56 *See* 8 U.S.C.A. § 1158(b)(1)(B)(iii) (stating that an IJ may base credibility determinations on inherent plausibility, consistency, and inaccuracies, among other factors).

57 *Asylum Manual: Sources of Law*, IMMIGR. EQUAL., https://immigrationequality.org/asylum/asylum-manual/asylum-law-basics-2/asylum-law-basics-

surveyed nearly a hundred asylum practitioners from the United States, Canada, and Europe and stated that doctrinal tests were "a favored approach" among asylum adjudicators.[58] Although the USCIS's training manual for immigration officers instructs them to avoid judging an applicant's credibility based on her knowledge of religious tenets,[59] eight circuits—the

sources-of-law [https://perma.cc/K7JX-HNAE]. Although IJs' written decisions are not collected or published in any reporter, in 2019 and 2020, the BIA published fifty-six precedential written opinions. *See Agency Decisions*, U.S. DEP'T OF JUST., EXEC. OFF. FOR IMMIGR. REV., https://www.justice.gov/eoir/ag-bia-decisions [https://perma.cc/KAT5-Z4A8] (listing decisions 3949 through 4004 in Volumes 27 and 28 as having been published in 2019 or 2020). In fiscal year 2020—between the beginning of July 2019 and the end of June 2020—the government made 60,079 asylum decisions. TRAC Immigration, *Asylum Grant Rates Climb Under Biden*, SYRACUSE UNIV. (Nov. 10, 2021), https://trac.syr.edu/immigration/reports/667 [https://perma.cc/3ZRE-R8M6] (compiling data collected through Freedom of Information Act requests). Thus, a rough estimate would suggest that less than 0.1% of asylum cases produce written decisions detailing the factual and legal issues involved.

58 Musalo, *supra* note 33, at 218; LAWS. COMM. FOR HUM. RTS., TESTING THE FAITHFUL: RELIGION AND ASYLUM SUMMARY RESULTS OF SURVEY—A BRIEFING PAPER PREPARED FOR THE ROUNDTABLE ON RELIGION-BASED PERSECUTION CLAIMS 3 (2002) ("Asylum seekers who seek protection based on religious persecution repeatedly reported being questioned or quizzed about their religions."); Kagan, *supra* note 13, at 1210 ("Among the most common and controversial means of discerning religious sincerity is to ask a question or line of questions that tests whether a witness knows certain information about a religion."); Hedayat Selim, Julia Korkman, Peter Nynäs, Elina Pirjatanniemi & Jan Antfolk, *A Review of Psycho-Legal Issues in Credibility Assessments of Asylum Claims Based on Religion*, 2022 PSYCHIATRY, PSYCH. & L. 1, 11 (finding in a survey of twenty-one religious asylum crediblity assessments that "[a] common but highly contested strategy [wa]s to assess the credibility of asylum-seekers' religion through the extent of their religious knowledge").

59 REFUGEE, ASYLUM, & INT'L OPERATIONS DIRECTORATE (RAIO), U.S. CITIZENSHIP & IMMIGR. SERVS., RAIO DIRECTORATE—OFFICER TRAINING 19 (2019), https://www.uscis.gov/sites/default/files/document/foia/IRFA_LP_RAIO.pdf [https://perma.cc/RGN7-G9D2] (instructing officers to "not question the validity of a belief, even if the belief appears to be strange, illogical, or absurd . . . [including a]n individual's lack of knowledge of religious tenets").

Second,[60] Third,[61] Sixth,[62] Seventh,[63] Eighth,[64] Ninth,[65] Tenth,[66] and Eleventh[67]—have generally allowed the use of religious tests so long as the IJ does not deny asylum *solely* based on an applicant's lack of knowledge. As of this Note's publication, the First, Fourth, Fifth, and District of Columbia Circuits have not squarely addressed their standard of review when an IJ's adverse credibility determination regarding an asylum applicant was based solely or primarily on the applicant's lack of religious doctrinal knowledge.

The Second Circuit's approach to reviewing religious testing by IJs is instructive.[68] In *Rizal v. Gonzales*,[69] petitioner Yose Rizal had applied for asylum based on his fear that he would be persecuted in his country of nationality, Indonesia, because of his Christianity. Rizal had immigrated to America in 1998 and testified at his hearing that he had converted to Christianity in 1994. Rizal recounted that after his conversion, he had been threatened and severely beaten by coworkers and other members of his community because of his faith. He also talked about his church in Jakarta,

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60 *See, e.g.*, Rizal v. Gonzales, 442 F.3d 84 (2d Cir. 2006) (holding that lack of basic knowledge about Christianity could not be the sole basis for an IJ's adverse credibility determination).

61 Grigoryan v. Att'y Gen. of U.S., 355 F. App'x 605, 607–10 (3d Cir. 2009) (holding that the IJ's determination that the applicant had confused the Baptist religion with the Jehovah's Witness religion during his hearing was not enough to support an adverse credibility determination, although appellate courts may affirm an IJ's "adverse credibility determination even where, as here, a portion of the IJ's analysis is flawed").

62 Huang v. Holder, 360 F. App'x 632, 641 (6th Cir. 2010) (affirming the IJ's use of a religious test because the applicant "did not demonstrate the level of knowledge that one reasonably might expect of an allegedly long-term Zhong Gong practitioner and teacher").

63 Jiang v. Gonzales, 485 F.3d 992, 994–95 (7th Cir. 2007) (reversing the IJ's denial of asylum and remanding to the BIA because the IJ "erroneously discredited [the applicant's] testimony based on an exaggerated notion of how much people in China actually know about Christianity").

64 Ahmadshah v. Ashcroft, 396 F.3d 917, 920 n.2 (8th Cir. 2005) (noting in dicta that the court is "not convinced that a detailed knowledge of Christian doctrine is relevant to the sincerity of an applicant's belief," so the proper question is whether the applicant would be perceived as an apostate in his country of nationality).

65 Cosa v. Mukasey, 543 F.3d 1066, 1070 (9th Cir. 2008) ("[I]t is not unfair to test the scope of a petitioner's understanding of her religion or even to challenge a preposterous claim, but to do so . . . without a benchmark other than the IJ's views is unacceptable.").

66 Yan v. Gonzales, 438 F.3d 1249, 1251 (10th Cir. 2006) (reversing the IJ's adverse credibility determination because it was based "heavily" on the applicant's doctrinal knowledge of Christianity but did not consider the applicant's personal experiences with Christianity).

67 Mezvrishvili v. U.S. Att'y Gen., 467 F.3d 1292, 1296–97 (11th Cir. 2006) (holding that the IJ should have held the applicant to a level of doctrinal knowledge consistent with his purportedly practicing the Jehovah's Witness religion for four and a half years while never undertaking active religious study).

68 This Section uses the Second Circuit's caselaw as an example because more asylum cases are filed in New York than in any other state. *See* TRAC Immigration, *Asylum Decisions*, SYRACUSE UNIV., https://trac.syr.edu/phptools/immigration/asylum [https://perma.cc/8W2K-4TJM] (showing that from fiscal year 2001 until this Note's publication, New York's immigration courts had adjudicated 168,560 asylum cases while California's had adjudicated 142,095).

69 442 F.3d 84, 88–90 (2d Cir. 2006).

which had been burned down, and the church he had been attending in Queens, New York. On cross-examination, the government and the IJ herself asked Rizal several questions about Christian doctrine, including "[W]ho denied knowing Jesus after the crucifixion?,"[70] "Who was Moses?," and "[W]ho prepared the Ten Commandments?"[71] When Rizal was not able to answer these questions accurately—that is, Rizal could not recall who denied knowing Jesus, stated that Moses was born by Miriam, and thought the Ten Commandments were prepared by Jesus—the IJ cut the hearing short and issued an oral decision denying Rizal asylum because he had "provided no evidence to corroborate his purported identity as a Christian."[72]

On appeal, the Second Circuit held that the IJ's negative credibility finding had not been supported by substantial evidence. The Court stated that "[t]o the extent that the IJ's conclusion stemmed from the rationale that a certain level of doctrinal knowledge is necessary in order to be eligible for asylum on grounds of religious persecution, we expressly reject this approach."[73] The Court cautioned that people may identify with a religion without detailed knowledge of the religion's doctrinal tenets, and that even those without doctrinal knowledge could be persecuted for religious affiliation in their country of nationality.[74] However, the Court noted that questions about religious doctrine might be useful for determining an applicant's credibility if the applicant had claimed to be a teacher or an expert of the religion.[75] The Second Circuit concluded that a lack of "basic knowledge" about Christianity could not be the "*sole* basis for an adverse credibility finding" and remanded back to the BIA for further review.[76]

Nevertheless, in later cases, the Second Circuit applied *Rizal*'s test and distinguished its facts to endorse IJs' religious tests during asylum proceedings. For example, in *Zou v. United States Department of Justice*, petitioner Yun Yan Zou sought asylum claiming that she had fled China fearing persecution on account of her devotion to Falun Gong.[77] Upon her entry into the United States, Zou told an airport immigration inspector that she was a "follower" of Falun Gong, but when asked by the inspector about what "practicing" Falun Gong entailed, she was not able to answer.[78] Zou was also unable to articulate the "history or symbol" of Falun Gong but knew

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70 *Id.* at 87.
71 *Id.* at 88.
72 *Id.*
73 *Id*. at 90.
74 *Id.*
75 *Id.*
76 *Id.* at 91 (emphasis added).
77 Zou v. U.S. Dep't of Just., 198 Fed. App'x 84, 86 (2d Cir. 2006).
78 Brief for Respondent at 3–4, Zou v. U.S. Dep't of Just., 198 Fed. App'x 84 (2d Cir. 2006) (No. 05-3599).

the name of its leader.[79] At Zou's removal hearing, the government cross-examined her and asked her further questions about Falun Gong, to which she responded that she practiced daily and distributed Falun Gong literature publicly.[80] The IJ denied her asylum claim in part because he deemed her lack of knowledge about Falun Gong's history and its symbol to indicate that she had not actually practiced Falun Gong and distributed religious literature.[81] The Second Circuit affirmed the IJ's credibility determination, noting that *Rizal* allowed for religious tests "where an applicant claim[ed] to have been a teacher of, or expert in, the religion in question."[82] Here, the Court held, the IJ was reasonable to expect that if Zou really had practiced Falun Gong and distributed relevant literature for two years, she would have known more about it.[83]

Decisions from the Second Circuit and other Courts of Appeals bear out the same trend: Although courts purport to disfavor religious tests in asylum hearings, in reality, they endorse religious tests in a variety of circumstances, particularly when the applicant claims to have practiced for longer periods of time or in more substantial ways.[84] Furthermore, in the First, Fourth, Fifth,[85] and District of Columbia Circuits, which have not decisively spoken on this issue, IJs who use religious tests in credibility determinations do not face significant appellate scrutiny beyond the "substantial evidence" standard.[86]

III

CONSTITUTIONAL AND INSTITUTIONAL LIMITS ON TESTING SINCERITY

Federal courts considering religious claims must evaluate the sincerity of a litigant's purported religious beliefs before granting religious accommodations. However, the Supreme Court has articulated a so-called "religious question doctrine" rooted in the Establishment Clause that forbids courts from wading into questions of religious doctrine or gauging a

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79 *Id.* at 4.

80 *Id.* at 7–8.

81 *Id.* at 8.

82 *See Zou*, 198 Fed. App'x at 86 (quoting Rizal v. Gonzales, 442 F.3d 84, 90 (2d Cir. 2006)).

83 *Id.* (noting that a daily practitioner should have general knowledge, as opposed to the more specific questions asked in *Rizal*).

84 *See generally* Chen v. Holder, 326 Fed. App'x 615 (2d Cir. 2009); Lin v. Garland, No. 19-3630, 2021 WL 5264275 (2d Cir. Nov. 12, 2021); Toufighi v. Mukasey, 538 F.3d 988 (9th Cir. 2008).

85 The Fifth Circuit has referenced the Second Circuit's decision in *Rizal v. Gonzales* once, but distinguished *Rizal* without squarely addressing whether it would follow *Rizal*'s general approach to the use of religious tests in credibility determinations. *See* Chen v. Gonzales, 470 F.3d 1131, 1136 (5th Cir. 2006) (distinguishing *Rizal* on the grounds that the IJ here did not question the sincerity of Chen's beliefs, but rather whether Chen's beliefs would necessitate her attending an unregistered church in China).

86 *See supra* Section II.A.

claimant's sincerity based on her adherence to the court's conception of orthodoxy. The religious question doctrine may also be justified by a general principle that courts are incompetent to classify certain aspects of individuals' personal and social identity, as evidenced by the Court's hesitancy to define race or adjudicate racial-group membership in affirmative action cases. Section III.A briefly describes the sincerity requirement in federal cases involving religious liberties. Section III.B introduces the religious question doctrine and concludes that although the Establishment Clause allows courts to probe a claimant's sincerity, it prohibits finding a claimant insincere because the court thinks her beliefs or practices do not match the requirements of her purported religion. Section III.C will briefly compare the religious question doctrine to courts' treatment of racial identity—and scholarly commentary on that treatment—in affirmative action cases. It will suggest that courts' similarly apprehensive approach in religious and racial domains may reflect an acknowledgement that notwithstanding the Establishment Clause, courts lack the institutional competence to adjudicate certain intimate aspects of an individual's personal and social identity.

A. Sincerity in Religious Claims

People in the United States enjoy religious liberties that are protected by the Free Exercise Clause of the First Amendment to the United States Constitution, as well as by statutes like the Religious Freedom Restoration Act (RFRA)[87] and the Religious Land Use and Institutionalized Persons Act (RLUIPA).[88] The Free Exercise Clause states that the government "shall make no law . . . prohibiting the free exercise" of religion,[89] which courts have interpreted to prevent the government from denying benefits to, or imposing burdens on, individuals because of their sincerely held religious beliefs.[90] Additionally, RFRA and RLUIPA prohibit certain laws that substantially burden an individual's religious exercise unless the government can demonstrate its imposition furthers a compelling government interest and is the least restrictive means of furthering that interest.[91] Individuals

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87 Ch. 21B, 42 U.S.C. §§ 2000bb to 2000bb-4, invalidated in part by City of Boerne v. Flores, 521 U.S. 507 (1997).

88 Ch. 21C, 42 U.S.C. §§ 2000cc to 2000cc-5.

89 U.S. CONST. amend. I.

90 *See* Thomas v. Rev. Bd., 450 U.S. 707, 717–18 (1981) ("Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit . . . a burden upon religion exists.").

91 *See* 42 U.S.C. §§ 2000bb-1(a), 2000bb-1(b), 2000cc(a)(1). After the Supreme Court's decision in *City of Boerne v. Flores*, RFRA has applied to all laws enacted by Congress, but not to laws enacted by state legislatures. *See* 42 U.S.C. §§ 2000bb-2(1), 2000bb-2(2); *see also* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 695–96 (2014). Because it was enacted pursuant to

asserting claims under the Free Exercise Clause, RFRA, or RLUIPA may be entitled to religious accommodations.

However, for an individual to qualify for protection under the First Amendment,[92] RFRA,[93] or RLUIPA,[94] she must demonstrate that her claims are based on *sincerely held* religious beliefs—that is, that she really believes what she claims to. The "sincerity requirement" comes not from constitutional or statutory text, but from pragmatic concerns rooted in the history of conscious objections to military service.[95] Early selective service statutes allowed for individuals to opt out of conscription if, "by reason of religious training and belief," they were "conscientiously opposed to participation in war in any form."[96] Although these statutes did not explicitly mention sincerity, the Court, conscious of strong incentives for individuals to feign religious conviction, held in *Witmer v. United States* that "the ultimate question in conscientious objector cases is the sincerity of the registrant in objecting, on religious grounds, to participation in war in any form."[97] Both inside and outside the selective service context, the sincerity requirement has been understood by courts and scholars as a method by which courts can avoid opening the floodgates for "sham" claims that might render government programs ineffective.[98]

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authority under the Spending and Commerce powers, RLUIPA applies against the states, but to a more limited set of regulations: "program[s] or activit[ies] that receive[] Federal financial assistance," land use regulations, and religious restrictions on incarcerated people. 42 U.S.C. §§ 2000cc(a)(2), 2000cc-1(a).

92 *See* United States v. Seeger, 380 U.S. 163, 185 (1965) ("[W]hile the 'truth' of a belief is not open to question, there remains the significant question whether it is 'truly held.' This is the threshold question of sincerity which must be resolved in every case."); *cf.* Hernandez v. Comm'r of Internal Revenue, 490 U.S. 680, 693 (1989) ("[U]nder the First Amendment, the [government] can reject otherwise valid claims of religious benefit only on the ground that a [claimant's] religious beliefs are not sincerely held . . . .").

93 *See Hobby Lobby Stores*, 573 U.S. at 717 n.28 ("To qualify for RFRA's protection, an asserted belief must be 'sincere.'").

94 *See* Cutter v. Wilkinson, 544 U.S. 709, 725 n.13 (2005) ("[P]rison officials may appropriately question whether a prisoner's religiosity, asserted as the basis for a requested accommodation, is authentic. . . . [T]he Act does not preclude inquiry into the sincerity of a prisoner's professed religiosity." (citations omitted)).

95 *See* Adeel Mohammadi, Note, *Sincerity, Religious Questions, and Muslim Prisoners*, 129 YALE L.J. 1836, 1860 (2020) ("[An exemptor's] nonparticipation in the battlefield results in another servicemember's exposure. The sincerity doctrine thus emerged as a functional mechanism for claim management . . . ."); *see also* Ben Adams & Cynthia Barmore, *Questioning Sincerity: The Role of the Courts After* Hobby Lobby, 67 STAN. L. REV. ONLINE 59, 60 (2014) (noting incentives to "feign religious sincerity" forced draft boards to "conduct rigorous factual inquiries").

96 *See* 50 U.S.C. § 3806(j) (2012).

97 348 U.S. 375, 381 (1955); *accord Seeger*, 380 U.S. at 185 ("[T]he threshold question of sincerity . . . must be resolved in every case.").

98 *See* Nathan Chapman, *Adjudicating Religious Sincerity*, 92 WASH. L. REV. 1185, 1215 (2017) ("An accommodation in one case could be a floodgate for insincere claims. The government has a 'compelling interest' in preventing such a flood . . . ."); Korte v. Sebelius, 735 F.3d 654, 683 (7th Cir. 2013) ("Checking for sincerity . . . is important to weed out sham claims."); United States

B. The "Religious Question Doctrine" and the Establishment Clause's Limitations on Testing Sincerity

Courts must evaluate the sincerity of an individual's religious beliefs when she seeks religious accommodation,[99] but courts may not "presume to determine the place of a particular belief in a religion or the plausibility of a religious claim,"[100] and may make "no inquiry into religious doctrine."[101] These restrictions on a court's ability to adjudicate religious claims have been referred to as the "religious question doctrine." Although the religious question doctrine arises out of a series of cases about the Free Exercise Clause, it is quintessentially rooted in the Establishment Clause.[102] That is, when courts probe sincerity in a way that "delve[s] too deeply into questions of religious dogma,"[103] they risk impermissibly "establishing" religion.

Justice Robert Jackson's dissent in *United States v. Ballard* highlights the conceptual difficulties courts face when they evaluate a religious claimant's sincerity.[104] In *Ballard*, leaders of a new age religious movement called "I Am" were indicted on charges of fraud because they solicited donations with materials claiming, inter alia, that their leader, defendant Guy Ballard, possessed the supernatural ability to heal his followers.[105] The indictment alleged that the defendants knew their claims about Ballard's supernatural powers were false and communicated them anyway to trick people out of money.[106] At trial, the judge charged the jurors with determining whether "the defendants honestly and in good faith believed" the claims about Ballard and their religion, but did not ask the jury to pass judgment on the truth or falsity of the defendants' beliefs.[107] The Court of Appeals reversed, holding that the defendants could be found guilty only if the jury determined that their beliefs were false—that is, for example, that Ballard could not actually heal people.[108] Reversing the Court of Appeals,

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v. Lee, 455 U.S. 252, 258 (1982) ("[W]idespread individual voluntary coverage under social security . . . would undermine the soundness of the social security program." (alterations in original)).

99 *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 717 n.28 (2014).

100 Emp. Div. v. Smith, 494 U.S. 872, 887 (1990**)**.

101 Jones v. Wolf, 443 U.S. 595, 603 (1979) (quoting Md. & Va. Eldership v. Church of God, 396 U.S. 367, 368 (1970) (Brennan, J., concurring)).

102 *See generally* Ira C. Lupu & Robert W. Tuttle, *Courts, Clergy, and Congregations: Disputes Between Religious Institutions and Their Leaders*, 7 GEO. J.L. & PUB. POL'Y 119 (2009) (describing the "religious question doctrine" as an "adjudicative disability" imposed by the Establishment Clause); *see also* Mohammadi, *supra* note 95, at 1858 ("The Establishment Clause is probably the best constitutional basis for . . . the idea that passing judgment on religious questions is a form of establishing religion.").

103 Sherr v. Northport-E. Northport Union Free Sch. Dist., 672 F. Supp. 81, 90 (E.D.N.Y. 1987).

104 322 U.S. 78, 92 (1944) (Jackson, J., dissenting).

105 *Id.* at 79–80.

106 *Id.*

107 *Id.* at 82.

108 *Id.* at 84.

the Supreme Court held that juries cannot adjudicate the truth or falsity of an individual's religious beliefs, but can determine whether an individual is sincere in her purported religious beliefs.[109]

Dissenting, Justice Jackson agreed that juries should not be able to adjudicate the truth or falsity of an individual's beliefs, but raised three arguments for why juries are incompetent to evaluate sincerity,[110] which scholars have generally found "apply with equal force to any governmental adjudication of religious sincerity."[111] First, Justice Jackson argued that juries would have a difficult time separately considering accuracy and sincerity.[112] Second, he asserted that the nature of religious beliefs means that nonbelievers "are likely not to understand and are almost certain not to believe" the religious claimant.[113] Finally, Justice Jackson noted the complications in treating "sincerity" as a binary, when real religious practice may involve varying levels of belief in various aspects of doctrine.[114] Cognizant of the challenges Justice Jackson noted in his *Ballard* dissent, in *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*,[115] *Thomas v. Review Board of Indiana Employment Security Division*,[116] and *Employment Division, Department of Human Resources of Oregon v. Smith*,[117] the Court strictly limited the judiciary's ability to resolve questions of religious doctrine and orthodoxy.

In *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, a national church body and a local church organization both claimed title to a church building.[118] The local organization had broken off from the national church when the latter began ordaining women.[119] The Georgia Supreme Court applied a common law test and sided with the local church organization because the national body had "depart[ed] substantially

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109 *Id.* at 88.

110 *Id.* at 92–95 (Jackson, J., dissenting).

111 *See, e.g.*, Chapman, *supra* note 98, at 1205; *accord* Jared A. Goldstein, *Is There a "Religious Question" Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U. L. REV. 497, 534–35 (2005) (analogizing normative questions about religion to the political question doctrine); Mohammadi, *supra* note 95, at 1855 (reviewing Justice Jackson's dissent in *Ballard*).

112 *Ballard*, 322 U.S. at 92–93 (Jackson, J., dissenting) ("How can the Government prove these persons knew something to be false which it cannot prove to be false? If we try religious sincerity severed from religious verity, we isolate the dispute from the very considerations which in common experience provide its most reliable answer.").

113 *Id.* at 93.

114 *See id.* at 93–94 ("I do not know what degree of skepticism or disbelief in a religious representation amounts to actionable fraud. . . . It is hard in matters so mystical to say how literally one is bound to believe the doctrine he teaches . . . .").

115 393 U.S. 440, 452 (1969) ("[A] civil court may no more review a church decision applying a state departure-from-doctrine standard than it may apply that standard itself.").

116 450 U.S. 707 (1981).

117 494 U.S. 872 (1990).

118 *Presbyterian Church*, 393 U.S. at 442–43.

119 *Id.* at 442 n.1.

from prior doctrine" by ordaining women.[120] The Supreme Court reversed, stating that the common law test had impermissibly "require[d] the civil court to determine manners at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion."[121] Although the Court did not explicitly rest its conclusion on the Establishment Clause, it cited prior Establishment Clause cases and concluded that "[p]lainly, the First Amendment forbids civil courts from playing such a role."[122] At bottom, *Presbyterian Church* stands for the proposition that courts cannot adjudicate controversies that would "require [them] to engage in the forbidden process of interpreting and weighing church doctrine" without running afoul of the First Amendment's religious clauses.[123]

In *Thomas v. Review Board of Indiana Employment Security Division*,[124] the Court also determined that the Constitution forbids courts from resolving intrafaith doctrinal disputes and evaluating whether a religious claimant's beliefs are "correct" scriptural interpretations. The petitioner, Eddie Thomas, had quit his job at a factory that manufactured military equipment because, he claimed, helping to make war conflicted with his religious beliefs as a Jehovah's Witness.[125] The Indiana Supreme Court affirmed the agency's denial of unemployment benefits, holding that Thomas quit "voluntarily for personal reasons" rooted in his "personal philosophical choice[s]," rather than because his religion demanded it.[126] The Indiana Supreme Court seemed particularly concerned with two aspects of Thomas's case. First, Thomas stated that he was "struggling" with his beliefs, conceding that he would be willing to work at a factory producing steel for military weaponry, but not at a factory actually fabricating the military equipment.[127] Second, one of Thomas's coworkers, also a Jehovah's Witness, testified that his beliefs did not prevent him from working on military equipment, which the Indiana Supreme Court took to mean that this kind of job was "acceptable" according to the tenets of Jehovah's Witness faith.[128]

The Supreme Court reversed. In response to the Indiana Supreme Court's first concern, the Court held that "[c]ourts should not undertake to dissect religious beliefs because the believer admits that he is 'struggling'

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120 *Id.* at 450.

121 *Id.*

122 *Id.*; *see also id.* at 449–51 (citing Sch. Dist. of Abington v. Schempp, 374 U.S. 203 (1963) (resolving a dispute over school prayers on Establishment Clause grounds)).

123 *Id.* at 451.

124 450 U.S. 707 (1981).

125 *Id.* at 710.

126 *Id.* at 712–13 (quoting Thomas v. Rev. Bd., 391 N.E.2d 1127 (Ind. 1979)).

127 *Id.* at 715 (quoting *Thomas*, 391 N.E.2d at 1131).

128 *Id.*

with his position or because his beliefs are not articulated with . . . clarity and precision . . . ."[129] In response to the second concern, the Court stated that "the judicial process is singularly ill equipped to resolve [intrafaith] differences in relation to the Religion Clauses."[130] It concluded that "it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith."[131] Thus, *Thomas* advises that courts cannot compare a claimant's stated religious beliefs with the court's (or another religious person's) conception of orthodoxy to gauge that claimant's sincerity.[132]

Finally, the Court gave a full-throated endorsement of the religious question doctrine in *Employment Division, Department of Human Resources of Oregon v. Smith*.[133] *Smith* involved a First Amendment challenge by two members of the Native American Church who were fired because they used peyote for sacramental purposes and were thereafter denied unemployment benefits because they had been discharged for "misconduct."[134] *Smith* is a seminal case in the context of Free Exercise claims, and much of its impact is beyond the scope of this Note.[135] Of note here, the Court in *Smith* held broadly that "[i]t is not within the judicial ken to question . . . the validity of particular litigants' interpretations of [their] creeds,"[136] and that "courts must not presume to determine the place of a particular belief in a religion"—in this case, the place of sacramental use of peyote within the Native American Church's religion.[137] In sum, *Smith* and the cases before it established that although courts can and must decide whether a religious claimant is sincere in her beliefs, courts cannot evaluate that sincerity by comparing that individual's beliefs against the court's understanding of what her purported religion requires.

Although *Ballard*, *Thomas*, and *Smith* were technically Free Exercise cases and *Presbyterian Church* did not specify which religious clause

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129 *Id.*

130 *Id.*

131 Although the Court did not cite *Ballard* in this portion of its analysis, its concern with courts misunderstanding intrafaith diversity echoes Justice Jackson's dissent in *Ballard*. *See* United States v. Ballard, 322 U.S. 78, 93–94 (1944) (Jackson, J., dissenting) ("I do not know what degree of skepticism or disbelief in a religious representation amounts to actionable fraud. . . . Some who profess belief . . . read literally what others read as allegory. . . . It is hard in matters so mystical to say how literally one is bound to believe the doctrine he teaches . . . .").

132 *Cf.* Chapman, *supra* note 98, at 1248–49 (discussing *Thomas* as an example of a supposed "no-orthodoxy principle" within the Constitution).

133 494 U.S. 872 (1990).

134 *Id.* at 874.

135 For a helpful article detailing the impact of *Smith* on Free Exercise jurisprudence, see Elizabeth I. Trujillo, City of Boerne v. Flores*: Religious Free Exercise Pays a High Price for the Supreme Court's Retaliation on Congress*, 36 HOUS. L. REV. 645 (1999).

136 *Smith*, 494 U.S. at 887 (second alteration in original) (quoting Hernandez v. Comm'r of Internal Revenue, 490 U.S. 680, 699 (1989)).

137 *Id.*

justified its holding, the limitations these cases imposed on courts' ability to adjudicate religious claims are best understood as requirements of the Establishment Clause. Professor Frederick Mark Gedicks notes that one could conceptualize the religious question doctrine "as an individual or group right against government interference in theological disputes protected by the Free Exercise Clause, or as a structural bar on government resolution of theological disputes underwritten by the Establishment Clause."[138] Professor Gedicks's analysis rests on a distinction between so-called constitutional "rights," which are "personal liberty interests against otherwise legitimate government action," and "structures," which "allocate[] sovereign power . . . , granting or withholding such power from government . . . for the benefit of society as a whole rather than any particular individual or group."[139] Within Professor Gedicks's framework, at face value, *Ballard*, *Thomas*, and *Smith* all seem to be "rights" cases based on the Free Exercise Clause because they all concerned individuals asserting religious rights against otherwise legitimate governmental actions—a jury instruction in *Ballard* and employment decisions in *Thomas* and *Smith* that would have been lawful if not for claimants' religious objections. However, in each case, the Court appears to describe the types of inquiries into religion that courts may not engage in under any circumstances.[140] That the Court states these prohibitions in categorical terms suggests that the religious question doctrine is a structural constraint imposed by the Establishment Clause, "withholding . . . power from [the] government" to act in certain ways, regardless of context.[141]

Other First Amendment scholars and the Court itself have also asserted that the religious question doctrine derives from the Establishment Clause. Professors Ira Lupu and Robert Tuttle have argued that although the Court has not precisely articulated the constitutional basis for the "religious question doctrine," it is best understood as an "adjudicative disability"

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138 Frederick Mark Gedicks, *The Religious-Question Doctrine: Free-Exercise Right or Anti-Establishment Immunity?* 7 (Eur. Univ. Inst. Robert Schuman Ctr. for Advanced Stud., RSCAS Working Paper No. 2016/10, 2016) (footnotes omitted), https://cadmus.eui.eu/bitstream/handle/1814/40144/RSCAS_2016_10.pdf?sequence=1&isAllowed=y [https://perma.cc/GA55-5BRQ].

139 *Id.* at 5; *see also* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1 (1998) (describing the Establishment Clause as a structural provision).

140 United States v. Ballard, 322 U.S. 78, 88 (1944) (holding that juries categorically may not inquire into truth or falsity of an individual's religious beliefs); Thomas v. Rev. Bd., 450 U.S. 707, 716 (1981) (holding that a court may not apply its own conception of religious orthodoxy when adjudicating a case); Emp. Div. v. Smith, 494 U.S. 872, 887 (1990) (holding that a court may not resolve proper scriptural interpretation or the centrality of beliefs and practices within a given faith).

141 *See* Gedicks, *supra* note 138, at 5.

imposed by the Establishment Clause.[142] According to Lupu and Tuttle, the Court's Establishment Clause jurisprudence has evinced a principle that "[a] court may not adjudicate a cause of action if evaluation of the elements of, or defenses against, that cause of action necessarily requires the court to make findings that purport to interpret or apply church doctrine."[143] In dicta, the Court has stated that "[t]he prohibition on establishment covers a variety of issues," including "comment[ing] on religious questions."[144] Fundamentally, if a court gauges sincerity by investigating religious doctrine and comparing a religious claimant's articulated beliefs to what it believes are orthodox tenets, the court is essentially favoring individuals who practice religion in ways the court considers more orthodox to those who may espouse unorthodox views—that is, "establishing" orthodoxy. This violates a bedrock principle of the Establishment Clause, which is that the government cannot prefer one religious denomination or sect over another.[145]

C. Analogizing to Racial Classification[146]: The Court's Apprehension to Adjudicate Identity

The religious question doctrine may also reflect a broader constitutional principle that courts are ill-suited to interrogate intimate aspects of an individual's personal and social identity. As noted above, the Court has frequently discussed the religious question doctrine not just in terms of the strictures of the First Amendment's religious clauses, but also in terms of courts' incompetence to adjudicate certain features of individuals' religious beliefs, like their truth or falsity or their accordance with "official" religious

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142 *See* Lupu & Tuttle, *supra* note 102, at 122–23 (arguing that the Constitution does not protect specific religious rights for certain parties but rather prevents civil courts from resolving certain types of religious questions).

143 *Id.* at 135.

144 McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 875 (2005).

145 *See* Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947) ("The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can . . . prefer one religion over another."); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 183–84 (2012) (noting that Madison considered that the Establishment Clause would address fears that one sect would obtain pre-eminence); *accord* Larson v. Valente, 456 U.S. 228, 244 (1982) (stating that the Establishment Clause requires that one religious denomination not be preferred over another).

146 This Section discusses the courts' adjudication of racial identity vis-à-vis religious identity because race and religion are, ostensibly, classifications based on which the government may be asked to provide individuals benefits or accommodations differentially (e.g., affirmative action in the race context or religious exemptions in the context of religion). That said, scholars have highlighted similar issues to those described in this Section with courts adjudicating other aspects of individuals' identity, like sexual orientation. *See, e.g.*, Hedayat Selim, Julia Korkman, Elina Pirjatanniemi & Jan Antfolk, *Asylum Claims Based on Sexual Orientation: A Review of Psycho-Legal Issues in Credibility Assessments*, PSYCH., CRIME & L., Feb. 2022, at 1, 4 (noting difficulties with courts resolving claims involving sexual orientation because it is "not an overt and directly observable trait," and also because claimants may feel guilt, shame, or fear of exposing others to persecution by presenting documentary evidence).

dogma.[147] In *Thomas* and *Smith*, the Court essentially determined that it lacked the institutional competence to determine what set of beliefs and religious practices constitute *being* a Jehovah's Witness or *being* a member of the Native American Church, respectively. In both cases, the Court probed the sincerity of the litigants' beliefs without attempting to classify the litigants as *true* or *false* members of their purported religion.[148]

A similar principle also appears in judicial treatment of racial identity in the affirmative action context and scholarly commentaries on those cases, indicating that concerns about judicial competence to classify an individual's identity may transcend the Establishment Clause and provide a separate justification for the religious question doctrine. In cases involving race-based affirmative action, individuals may receive benefits based on membership in a particular racial or ethnic group. Just as Congress fears religious imposters may seek to unfairly gain asylum status, institutions administering affirmative action programs may fear that individuals will commit so-called "racial fraud," lying about their racial or ethnic identity to receive benefits they otherwise would not have been entitled to.[149]

The case of "racial fraud" most frequently discussed by scholars is *Malone v. Haley*, an unreported opinion from a Massachusetts state court.[150] *Malone* involved twin brothers appealing their discharge from the Boston Fire Department, which had accused them of lying about being Black to avail themselves of the department's race-conscious hiring policy.[151] As mandated by a prior consent decree, the city considered and hired minority candidates separately from white candidates, and imposed different cutoff application

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147 *See, e.g.*, Thomas v. Rev. Bd., 450 U.S. 707, 716 (1981) ("[I]t is not within the judicial function and *judicial competence* to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith." (emphasis added)); United States v. Ballard, 322 U.S. 78, 93 (1944) (Jackson, J., dissenting) ("When one comes to trial which turns on any aspect of religious belief or representation, unbelievers among his judges are likely not to understand and are almost certain not to believe him."); Emp. Div. v. Smith, 494 U.S. 872, 887 (1990) ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.").

148 Although not explicitly, the *Thomas* majority opinion apparently found the claimant sincere based on the facts on the record. *See Thomas*, 450 U.S. at 716 ("The narrow function of a reviewing court . . . is to determine whether there was an appropriate finding that petitioner terminated his work *because of an honest conviction* that such work was forbidden by his religion. . . . On this record, it is clear that Thomas [did]." (emphasis added)). The Court's inquiry focused on whether the claimant's beliefs were *religious* as opposed to merely philosophical. *See id.* at 715–16. *But see Smith*, 494 U.S. at 904 (O'Connor, J., concurring) ("As we noted in *Smith I*, the Oregon Supreme Court concluded that 'the Native American Church is a recognized religion, that peyote is a sacrament of that church, and that respondent's beliefs were sincerely held.'" (citations omitted)).

149 *See* Tseming Yang, *Choice and Fraud in Racial Identification: The Dilemma of Policing Race in Affirmative Action, the Census, and a Color-Blind Society*, 11 MICH. J. RACE & L. 367, 369 (2006) (examining the legal and social implications of self-conscious efforts by individuals to alter their racial identity).

150 No. 88-339 (Sup. Jud. Ct. Suffolk Cnty., Mass. July 25, 1989).

151 *Id.* slip op. at 1–2.

test scores for members of each group.[152] The Malone brothers, who presented as "fair-haired and light-skinned," had attained test scores below the cutoff for white applicants but sufficient to be hired as minority candidates. After the commissioner of the department realized the Malones had classified themselves as "White" in their unsuccessful 1975 job applications before listing themselves "Black" and gaining employment in 1977, he fired them for falsifying their materials in violation of the personnel code.[153] On appeal, the court allowed the Malone brothers to rebut accusations of racial "fraud" by demonstrating either that they had acted in good faith or that they were in fact Black.[154] To determine whether the brothers were Black, the court considered "visual observation of their features," "documentary evidence, such as birth certifications, establishing Black ancestry," and "evidence that they or their families [held] themselves out to be Black and [were] considered to be Black in the community."[155] Although the Malone brothers claimed they had discovered in 1976 that they had a Black ancestor, the court found they had failed to satisfy any of the factors listed above and thus had not demonstrated they were in fact Black. After finding they had also acted in bad faith, the court rejected the brothers' appeals.[156]

Scholars have noted that the *Malone* case of "racial fraud" highlights some of the conceptual challenges with adjudicating an individual's racial identity. Historically, American legal regimes tied race to bloodlines; for example, "because slavery depended on maintenance of the color line, racial mixing . . . required continual re-definition of who was considered legally Black and thus enslaveable."[157] However, the concept of race has evolved beyond ancestry into a social phenomenon characterized in part by an individual's self-conception and in part by the way others—both members and nonmembers of the same racial group—perceive her.[158] Courts, agencies, and individuals may define race using "different mixtures" of these two paradigms.[159] For example, in *Malone*, the court viewed "Blackness" as

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152 *Id.* at 2.

153 *Id.* at 14–15.

154 *Id.*

155 *Id.* at 16.

156 *Id.* at 23.

157 Yang, *supra* note 134, at 391.

158 *See, e.g.*, Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CAL. L. REV. 1231, 1239 (1994) (examining different approaches legal regimes have taken to identify race, in light of the modern recognition that race and ethnicity are socially constructed categories). For a history of colonial efforts to erase Native American racial identity, see Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787 (2019).

159 *See* Ford, *supra* note 143, at 1239 (describing the differences between a self-reported identity approach and "other-ascribed" identity approach to determining race). Notably, "[l]aws

some combination of physical presentation, lineage, and social perception, but the Malone brothers—if they were acting in good faith—viewed Blackness as strictly determined by ancestry. Thus, as noted by Professor Tseming Yang, *Malone* highlights that "[w]ithout a consensus about the specific content, both meaning and boundaries, of racial categories, assertions about racial identity are impossible to evaluate in a rational fashion."[160] Insofar as the law no longer subscribes to biological or clearly dichotomous definitions of race, it may be "nonsensical [for courts] to seek an objectively truthful determination of racial identity in . . . the same way that one ordinarily looks for truth or falsity in a fraud inquiry."[161]

Some scholars and members of the Court have suggested that because of the difficulties inherent in defining and identifying racial identity, courts should stay out of adjudicating individuals' race at all. Professor Richard Ford has highlighted the tension between the judicial desire for precise definitions and the complex, intimate nature of racial identity. Professor Ford posits that "[c]ourts . . . will most likely protect cultural styles that can be easily framed in terms of fixed categories, bright-line rules and quasi-scientific evidence," but notes that most Black people may not embrace any or all of the cultural styles typically associated with Blackness.[162] Thus, he suggests that courts may be incompetent to meaningfully identify an individual as "Black" or "non-Black," especially given the heterogeneity of Black identity in America.[163] In his concurring opinion in *Parents Involved in Community Schools v. Seattle School Dist. No. 1*,[164] a case brought under the Equal Protection Clause of the Fourteenth Amendment, Justice Anthony Kennedy expressed similar concerns about courts defining race and adjudicating whether an individual fits that definition:

> When the government classifies an individual by race, it must first define *what it means to be of a race*. Who exactly is white and who is nonwhite? To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society. . . . Under our Constitution the individual, child or adult, can find his own identity, *can define her own persona*, without state intervention that classifies on the basis of his race or the color of her skin.[165]

Cases like *Malone* and *Parents Involved* that implicate race-conscious

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that require courts to consider race rarely tell them how to *identify* race," and "[b]ecause of this missing guidance, judges and jurors . . . have relied on other factors to determine a person's racial identity," like observable characteristics, behavior, and self-identification. Deepa Das Acevedo, *(Im)mutable Race?*, 116 NW. L. REV. ONLINE 88, 107 (2021).

160 Yang, *supra* note 134, at 392.

161 *Id.*

162 RICHARD T. FORD, RACIAL CULTURE: A CRITIQUE 68–69 (2005).

163 *Id.*

164 551 U.S. 701 (2007).

165 *Id.* at 797 (Kennedy, J., concurring) (emphasis added).

policies often arise in the context of the Equal Protection Clause or civil rights statutes, and those legal regimes lack any equivalent of the Establishment Clause. However, the concerns raised by Justice Kennedy and the scholars cited above regarding the courts' institutional competence to adjudicate identity apply equally in the context of the religious question doctrine. Like race, religiosity cannot meaningfully be identified using "fixed categories, bright-line rules and quasi-scientific evidence."[166] Rather, an individual's religious identification may implicate her conceptions of her own identity and others' perceptions of her faith and religiosity, and courts may struggle to weigh these considerations in a principled manner, just as they do in the context of race.[167] Additionally, in *Thomas* and *Smith*, the Court acknowledged that an individual may identify as an adherent of a given religion but may not subscribe to every belief or engage in every practice typically associated with that religion.[168] The Court's concession that it lacks the competence to define the boundaries of religious doctrine seems to mirror Professor Ford's concerns with courts defining racial identity given the heterogeneity of racial culture.

Admittedly, judicial inquiries into race and religion may be distinct in meaningful ways. For example, American society and the courts generally embrace the concept of religious conversion[169] but seem to view race as immutable and racial "conversion" as illegitimate.[170] Thus, courts may feel empowered to resolve questions of racial identity by focusing on an individual's ancestry, observable characteristics, and behavior around others,[171] while feeling ill-equipped to classify an individual's religious identity using similar evidence. Additionally, as noted above, cases involving racial classifications often arise under different constitutional and statutory frameworks than those involving religious classifications, so the two regimes are governed by distinct doctrines. However, the existence of parallel concerns in the context of defining race and religion suggests that courts' aversion to asking religious questions may be rooted not just in the

166 FORD, *supra* note 162, at 68.

167 *Cf. id.* at 126–31 (describing general conflicts between the culture of institutions and individual culture, including accommodation conflicts between universities and students of religious groups).

168 *See* Thomas v. Rev. Bd., 450 U.S. 707, 716 (1981) (declining to adjudicate which interpretation of a common faith is more correct); Emp. Div. v. Smith, 494 U.S. 872, 887 (1990)(reiterating the contexts in which courts should not presume to determine the validity of particular beliefs in a religion).

169 *See, e.g.*, *Faith in Flux*, PEW RSCH. CTR. (Feb. 2011), https://www.pewresearch.org/religion/2009/04/27/faith-in-flux [https://perma.cc/DJB7-M6YK] (indicating as many as 44% of Americans identified with a different religion than the one they grew up with).

170 *See* Das Acevedo, *supra* note 159, at 106–10 (examining the concept of trait immutability within legal reasoning, and specifically race as an immutable characteristic).

171 *Id.* at 106–07.

Establishment Clause's prohibitions, but in a broader principle that courts lack institutional competence to adjudicate intimate and complex aspects of an individual's identity.

IV

THE ESTABLISHMENT CLAUSE'S PROHIBITIONS ON RELIGIOUS TESTING AT ASYLUM HEARINGS

Although appellate courts allow IJs to find asylum applicants insincere and thus incredible because they have failed "religious tests," appellate courts strictly forbid district court judges from doing the same when adjudicating federal litigants' claims for religious accommodation. Because of the constitutional and institutional issues outlined in Section III above, appellate courts should resolve this discrepancy in favor of banning religious tests in asylum proceedings. Section IV.A argues that the religious question doctrine ought to apply in the asylum context both because the Establishment Clause applies in administrative hearings and because, notwithstanding the Establishment Clause, IJs are just as incompetent to adjudicate religious identity as federal judges are. Section IV.B asserts that the use of religious tests at asylum hearings plainly violates the religious question doctrine. Finally, Section IV.C discusses the implications of prohibiting IJs from using religious tests, concluding that the government can adequately further its interest in preventing religious imposters from gaining asylum by limiting IJs' inquiry to *sincerity* of belief, rather than mastery of orthodox religious doctrine.

A. The Religious Question Doctrine Should Apply to Asylum Hearings

Appellate courts should apply the religious question doctrine to asylum hearings because IJs are subject to the same constitutional and institutional limitations that federal judges are. First, although the Court has never resolved whether non-citizens enjoy the same Free Exercise rights as citizens do,[172] the Establishment Clause applies not just to federal judges, but to

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172 *See, e.g.*, Gabriella M. D'Agostini, Note, *Treading on Sacred Land: First Amendment Implications of ICE's Targeting of Churches*, 118 MICH. L. REV. 315, 326 n.68 (2019) (first citing Steve Vladeck, *What's Missing from Constitutional Analyses of Donald Trump's Muslim Immigration Ban*, JUST SECURITY (Dec. 10, 2015), https://www.justsecurity.org/28221/missing-constitutional-analyses-donald-trumps-muslim-immigration-ban [https://perma.cc/Y73Y-C26A] (stating that the Establishment Clause has rarely, if ever, shown up in the Supreme Court's plenary power jurisprudence); then citing Alina Das, *Administrative Constitutionalism in Immigration Law*, 98 B.U. L. REV. 485 (2018)). Professor Alina Das has observed that the Court often invokes the canon of constitutional avoidance when asked to apply immigration provisions in situations that could raise serious constitutional concerns. *See* Das, *id.* at 498.

governmental tribunals more generally.[173] For example, *Thomas* and *Smith*, two of the religious question doctrine's foundational cases, both concerned adjudications by state unemployment agencies.[174] Although *Thomas* and *Smith* facially involved the Free Exercise Clause, in both cases, the Court indicated deep discomfort with state agencies rewarding certain manifestations of religious practice above others, a concern that the Court has principally associated with the Establishment Clause, as noted in Section III.B above.[175] Similarly, in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the Court heard a challenge from a Colorado baker who alleged that a state civil rights statute compelling him to provide wedding cakes to gay couples violated his First Amendment rights.[176] The Court reversed the Colorado Court of Appeals's rejection of the baker's Free Exercise claims because the commission failed to adjudicate the baker's case neutrally, apparently expressing hostility to the baker's religious beliefs while allowing other bakers to refuse service to customers on secular, conscience-based grounds.[177] Like *Thomas* and *Smith*, *Masterpiece Cakeshop* explicitly discussed only the Free Exercise Clause, not the Establishment Clause. However, the court's concern with a state agency favoring secularity over religion is quintessentially an Establishment Clause concern.[178] In *Thomas*, *Smith*, and *Masterpiece Cakeshop*, the Court appears to have endorsed applying the Establishment Clause's religious question doctrine not just to federal courts, but also to administrative agencies—at least those at the state level.

Second, notwithstanding that the Establishment Clause should apply to immigration courts, IJs lack competence to effectively determine what sets

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173 As suggested by scholars like Professor Carl H. Esbeck, the Establishment Clause is best understood as a "structural restraint on the government's power to act on certain matters pertaining to religion." Esbeck, *supra* note 139, at 4. Structural provisions apply to all government actors, "whether or not individual complainants suffer concrete 'injur[ies] in fact.'" *Id.* at 104. Furthermore, the Establishment Clause's incorporation against the states means that the restrictions it imposes apply to state governments and state agencies as well. *Id.* at 25–26 (citing Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947)) (discussing incorporation of the Establishment Clause against the states through the Fourteenth Amendment's Due Process Clause).

174 *See* Thomas v. Rev. Bd., 450 U.S. 707, 710–11 (1981) (involving the Indiana Employment Security Division); Emp. Div. v. Smith, 494 U.S. 872, 874–75 (1990) (involving the Employment Division of the Department of Human Resources of Oregon).

175 *See Everson*, 330 U.S. at 15–16 (stating that the Establishment Clause prohibits the state from preferring one religion over another); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 183–84 (2012) (connecting the Establishment Clause to concerns at the Founding regarding the preference for the religion of a politically dominant sect); *accord* Larson v. Valente, 456 U.S. 228, 244 (1982) (stating the Establishment Clause requires that one religious denomination cannot be preferred over another).

176 Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1725–27 (2018).

177 *Id.* at 1729–31.

178 *See, e.g.*, *Everson*, 330 U.S. at 15–16 ("The 'establishment of religion' clause of the First Amendment means at least . . . . [that] [n]o person can be punished for entertaining or professing religious beliefs . . . .").

of beliefs and practices constitute adherence to a given faith. In *Iao v. Gonzales*,[179] Judge Richard Posner wrote for the Seventh Circuit's panel and highlighted several issues with IJs' institutional competence to determine whether claimants in fact practiced the religions they claimed to. Among those concerns were IJs' lack of familiarity with foreign cultures and religious practices,[180] exaggerated notions of how much religious people know about their religion,[181] and susceptibility to misunderstandings caused by using translators of other languages.[182] An IJ's institutional competence may be at its nadir when she is asked to classify an applicant's adherence to a religion with which the IJ is not familiar, which may often be the case given the diversity of religions practiced both domestically and abroad.[183] Because IJs, like federal judges, lack the institutional competence to classify individuals from other countries based on their purported religious knowledge and beliefs, appellate courts should apply the religious question doctrine to asylum proceedings.

To the extent that the Court has deferred to the *federal* executive branch regarding issues involving immigration and national security, it has not indicated that individual executive adjudicators are permitted to violate the religious question doctrine. In *Trump v. Hawaii*, the Court evaluated the President's facially neutral immigration ban on individuals from certain countries with primarily Muslim populations and considered whether that policy unconstitutionally discriminated against Muslims.[184] The Court held

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179 400 F.3d 530 (7th Cir. 2005).

180 *Id.* at 533. Judge Posner's discussion of IJs unfamiliar with foreign religions brings to mind Justice Jackson's concern in his dissent in *Ballard* that non-believers in a given faith "are likely not to understand and are almost certain not to believe" the claims of believers. United States v. Ballard, 322 U.S. 78, 93 (1944) (Jackson, J., dissenting); *see also* Selim et al., *supra* note 58, at 4 ("Officials belonging to the same religion as the asylum-seeker, for example, may draw excessively on their own experiences, disregarding possible individual and cross-cultural variations in religious practice.").

181 *Iao*, 400 F.3d at 534. As noted in the previous footnote, Judge Posner's suggestion that IJs may overestimate immigrants' knowledge of their own religion brings to mind Justice Jackson's concern that followers of a given faith might believe or practice differently. *See Ballard*, 322 U.S. at 93–94 (Jackson, J., dissenting) ("I do not know what degree of skepticism or disbelief in a religious representation amounts to actionable fraud. . . . Some who profess belief . . . read literally what others read as allegory or metaphor . . . ."); *see also* Selim et al., *supra* note 58, at 3–4 ("[A]sylum-seekers whose conversion was sudden or resulted from an emotional crisis may be unable to give the expected reasoned explanations for their religious change. Recent converts may still be exploring their new religion, and expressing any uncertainty or doubt might damage their perceived credibility.").

182 *Iao*, 400 F.3d at 534–35; *see also* Selim et al., *supra* note 58, at 14–15 (identifying that asylum seekers' distrust of interpreters, interpreters' unfamiliarity with asylum seekers' religions, and interpreters' accidental distortions of the interviewer's questioning style could cause issues in asylum hearings).

183 *See, e.g.*, Cosa v. Mukasey, 543 F.3d 1066, 1069–70 (9th Cir. 2008) (chastising an IJ for asking the asylum applicant doctrinal questions and comparing the applicant's answers to information the IJ found through an internet search).

184 138 S. Ct. 2392, 2420–23 (2018).

that the President has broad authority to create facially neutral immigration policies pursuant to his authority over national security and foreign policy.[185] However, the Court's decision does not seem to apply to individual IJ's determinations about whether individual asylum claimants have misrepresented their religious affiliations. Unlike the President's policy in *Trump*, IJs' decisions about whether asylum seekers are "real" members of a given faith require the government probing doctrinal knowledge of specific religions, which could hardly be called "facially neutral."[186]

B. Religious Testing Violates the Religious Question Doctrine

If appellate courts apply the religious question doctrine to asylum courts, they should find that religious tests violate the religious question doctrine. First, the religious question doctrine prevents adjudicators from passing judgments on the centrality of a given belief or practice within religious doctrine[187] or attempting to resolve questions of what constitutes orthodoxy. The use of religious tests implicitly does both. Take, for example, the IJ's questions in *Rizal v. Gonzales*, discussed in Section II.B *supra*. In that case, the IJ based his credibility determination on whether Rizal was in fact a Christian, which the IJ adjudicated by asking Rizal questions like "[W]ho denied knowing Jesus after the crucifixion?," "Who was Moses?," and "[W]ho prepared the Ten Commandments?"[188] In doing so, the IJ implicitly decided that knowing the answers to these questions was central to being a Christian, and that therefore, any person who could not answer these questions could not be Christian. In essence, all religious tests follow the same logic as the one administered by the IJ in *Rizal*: an applicant is not

185 *Id.*

186 An analogy to cases involving race clarifies the distinction between the immigration policy upheld in *Trump v. Hawaii* and the individualized determinations of religious identity that IJs make using religious tests. Professor Kenji Yoshino has distinguished between so-called "formation" cases, in which the issue before the court is determining the racial identity of an individual, and "treatment" cases, in which the court analyzes how an individual was treated on the basis of an already known race. *See* Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 904–05 (2002). Within Professor Yoshino's framework, *Trump v. Hawaii* seems to be a "treatment" case about whether Muslims were treated improperly, whereas IJs' determinations of asylum seekers' religious identity are "formation" cases. Conceptually, *Trump v. Hawaii* need not apply to ad hoc "formation" cases in immigration court; if it did, it would likely raise serious constitutional issues due to Establishment Clause concerns. *See* Vladeck, *supra* note 172. As Professor Steve Vladeck notes about the "Muslim ban" at issue in *Trump v. Hawaii*, "*administering* such a ban would raise its own grave Establishment Clause questions, since it would require the relevant government officers to ask (and answer) ecclesiastical questions — exactly what the Establishment Clause prevents the government from doing." *Id.*

187 *See* Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 450 (1969) (prohibiting the court from determining "the interpretation of particular church doctrines and the importance of those doctrines to the religion"); Emp. Div. v. Smith, 494 U.S. 872, 887 (1990) ("[C]ourts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.").

188 Rizal v. Gonzales, 442 F.3d 84, 87–88 (2d Cir. 2006).

credible if she is not sincerely a member of her purported faith, and all members of the purported faith could answer certain doctrinal questions, so if the applicant answers those questions incorrectly, she is not a member of her purported faith and consequently, she is not credible. Thus, by definition, all religious tests violate the religious question doctrine's prohibition on inquiries into centrality of belief and defining orthodoxy.

Second, even if an IJ could say with certainty that a specific set of beliefs and pieces of knowledge was essential to a given religion, the religious question doctrine would prevent IJs from favoring those whose beliefs perfectly satisfied those tenets at asylum hearings. In *Thomas*, the Court indicated that courts are not competent to resolve intrafaith differences in beliefs or practices and also that courts should accommodate individuals who "struggl[e]" with their faith.[189] The religious question doctrine, then, prohibits adjudicators from treating the devout more favorably than the unorthodox. More concretely, if we imagine that the IJ in *Zou v. United States Department of Justice*, discussed in Section II.B *supra*, knew with certainty that the Falun Gong faith required knowing about its symbol and its history, as articulated in *Thomas*, the religious question doctrine would still have forbidden the IJ from conditioning Zou's asylum claim on her mastery of those facts, as she may have just been an unorthodox practitioner of the faith. Similarly, even if the IJ in *Rizal* knew for a fact that Christianity required knowing about the feats of Jesus, Moses, and Miriam, the religious question doctrine would prohibit the IJ from denying benefits to Rizal just because he did not possess that knowledge. Doing so would favor the devout over the unorthodox, a violation of the Establishment Clause.

C. Implications: Preventing Religious Imposters Permissibly

The idea that IJs should make *no* inquiry into an asylum applicant's religious knowledge may seem absurd on its face. After all, as the Court in *Thomas* noted, we can "imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection" under the First Amendment's religion clauses.[190] However, appellate courts reviewing asylum determinations have noted that "people can identify with a certain religion, notwithstanding their lack of detailed knowledge about that religion's doctrinal tenets, and . . . can [still] be persecuted for their religious affiliation."[191] Furthermore, it is possible that even an individual who did not

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189 *See* Thomas v. Rev. Bd., 450 U.S. 707, 715 (1981) (holding that the judicial process is not well-suited to resolving differences within a religion).

190 *Id.*

191 *Rizal*, 442 F.3d at 90; *accord* Ahmadshah v. Ashcroft, 396 F.3d 917, 920 n.2 (8th Cir. 2005) ("Even if [the applicant] did not have a clear understanding of Christian doctrine, this is not relevant to his fear of persecution. . . . If [he] has shown that Afghans would believe that he was an apostate, that is sufficient basis for fear of persecution under the law.").

practice a given religion in their country of origin might be perceived as doing so, and may be persecuted as a result.[192] Thus, although religious knowledge tests may well screen some religious imposters with sham claims, they do not seem properly tailored to the purpose of religious asylum: to protect those who reasonably fear persecution on the basis of their religion in their country of origin.

However, even if IJs cannot gauge credibility based on religious testing, they will be able to adequately screen for religious imposters by other means, such as by identifying significant inconsistencies in the applicant's own statements. For example, in *Huang v. Holder*, the petitioner and asylum applicant, Rongfu Huang, claimed that he had experienced past persecution in China based on his practice of the Zhong Gong religion.[193] Huang alleged that he had been beaten severely by Chinese police after his arrest on February 3, 2000.[194] On direct examination at his hearing, Huang stated that the police stopped beating him on February 5, 2000 but on cross-examination, he testified that he was beaten every day for twenty-eight days after his initial arrest.[195] Additionally, Huang asserted that the police only released him after a family member paid a bribe on his behalf, but Huang presented conflicting testimony about whether his wife or his father had paid the bribe and could not explain how he had obtained a receipt for the bribe, purportedly written by the police.[196]

In asylum cases like *Huang* involving claims based on past persecution, IJs may feel pressure to rely on religious tests because, as noted in Section II.A *supra*, asylum applicants may not be able to provide corroborative documentary evidence to support their claims, leaving IJs to make potentially high-stakes determinations without a robust evidentiary record. Indeed, the IJ ultimately found Huang not credible both due to the inconsistencies in his testimony about his past persecution and because he failed to articulate sophisticated knowledge of the Zhong Gong religion in response to a government attorney's questions.[197] However, *Huang* presents a clear example of how IJs can effectively screen for religious imposters without using religious tests or attempting to determine whether the asylum seeker belongs to her purported faith. Based on inconsistencies in Huang's testimony, the IJ reasonably found that Huang had not actually suffered past persecution due to his Zhong Gong faith. The IJ could have denied Huang's religious asylum claim on that basis alone and did not need to adjudicate whether Huang was in fact a practitioner of Zhong Gong.

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192 *See Rizal*, 442 F.3d at 90 n.7.
193 Huang v. Holder, 360 F. App'x 632, 633 (6th Cir. 2010).
194 *Id.* at 633–34.
195 *Id.* at 634–35.
196 *Id.* at 635.
197 *Id.* at 636.

Huang shows that even with a paucity of corroborative documentary evidence, effective cross-examination by the government's attorneys or by the IJ herself can build a sufficient evidentiary record to make credibility determinations without religious tests. Even in cases in which asylum seekers claim fear of future persecution rather than alleging past persecution, IJs may have other legitimate tools available to assess applicants' credibility. First, under their statutory authority, IJs could still assess applicants' overall credibility based on the totality of the circumstances, including applicants' demeanor and testimonial consistency.[198] Second, even if IJs cannot administer religious tests, they could ask open-ended questions about a claimant's religious beliefs (e.g., "What do you know about your religion?" or "What are your religious beliefs?") without running afoul of the religious question doctrine.[199] They could also probe the claimant's sincerity by inquiring into whether she appears to live in accordance with her self-identified religious beliefs, rather than whether her knowledge and beliefs comport with the IJ's conception of orthodoxy or with the practices IJ has previously seen from applicants of the same purported religion. Finally, when adjudicating claims of asylum seekers who have resided in the United States for some time, IJs may have access to more documentary evidence than they do in cases involving immigrants who have just left their countries of origin. As such, in those cases, IJs may be able to compare more pieces of evidence to determine consistency in an applicant's assertions. This may relieve the pressure IJs may feel to rely on religious tests so heavily.

Finally, to the extent that IJs are not able to screen "religious imposters" with the same efficacy that they can using religious tests, prohibiting religious testing will not necessarily undermine the President's overall asylum policies. As noted in Section I.A *supra*, the Attorney General and the Secretary of Homeland Security currently have the ultimate discretion to grant asylum to claimants who IJs and asylum officers have deemed credible.[200] With or without IJs conducting religious tests, the Attorney General and the Secretary of Homeland Security will be able to decide, under direction from the President, the number of candidates gaining asylum status

198 *See* 8 U.S.C. § 1158(b)(1)(B)(iii); *see also supra* note 43 and accompanying text.

199 Although the line between open-ended questions and religious tests may be faint depending on circumstances, meaningful appellate review and a presumption against the validity of obviously religious questions may still deter the use of religious tests at asylum proceedings. Admittedly, even through open-ended questions, an IJ may subconsciously determine an applicant's credibility based on the IJ's own knowledge of the applicant's purported religion, or issue a pretextual decision denying asylum status actually based on impermissible religious judgments. This Note's proposed intervention would not perfectly resolve these potentially serious issues. Nevertheless, the author believes prohibiting de jure religious testing in asylum proceedings would be a step in the right direction.

200 *See* 8 U.S.C. § 1158(b)(2) (describing exceptions to general conditions for granting asylum, including that the Attorney General and Secretary of Homeland Security may impose additional limitations and conditions or generally decline to grant asylum for other reasons).

and the attributes of the ideal asylum candidate. If anything, removing religious tests from the IJs' toolbox will reduce discretion among unelected administrators who are largely shrouded from public scrutiny and increase discretion among highly visible members of the President's cabinet, who are likely to be more accountable to the electorate than IJs are.

CONCLUSION

America's story is a story of religious asylum, but for many who reach its shores seeking refuge from religious persecution, asylum proceedings resemble the very religious inquisitions that the Founding Fathers fled from. Out of the public eye and insulated from meaningful review, immigration judges subject asylum claimants to "mini-catechism[s]"[201] that would be forbidden in any federal courtroom. By conditioning America's protection on immigrants' ability to articulate sophisticated knowledge of their religion, Congress and our immigration courts have lost sight of the diversity of religious experience that our federal courts have sought to protect, and that our society values so deeply. We have failed the "tests for our compassion." But it is not too late. The appellate courts have the power to enforce the mandates of the Establishment Clause, halt the use of religious tests in asylum proceedings, and bring our immigration courts into harmony with the federal courts.

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201 Yan v. Gonzales, 438 F.3d 1249, 1252 (10th Cir. 2006).