JUDGMENTAL NEUTRALITY: WHEN THE SUPREME COURT INEVITABLY IMPLIES THAT YOUR RELIGION IS JUST PLAIN WRONG

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[W]e do not agree that the truth or verity of respondents' religious doctrines or beliefs should have been submitted to the jury. . . . [T]he First Amendment precludes such a course. . . . "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." [1]

I. INTRODUCTION

We consider it one of the great features of American democracy that our government may not make official pronouncements about particular religions. Because the Supreme Court of the United States takes seriously the First Amendment's prohibition of laws "respecting the Establishment of Religion, or prohibiting the Free Exercise thereof,"[2] church and state are kept separate enough that Congress may not enact a law, for instance, officially condemning the practice of Islam or endorsing the practice of Buddhism. Moreover, we are glad that our courts do not put individual faiths on trial—for example, if Catholic beliefs were at issue in a case, the government would not permit a priest to be put on the stand to defend before a secular judge the historical and rational merits of Catholicism.[3] A litigant may have to defend the substance of his legal theory before the court, but never the substance of his religious faith.

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[1] United States v. Ballard, 322 U.S. 78, 86 (1944) (quoting Watson v. Jones, 80 U.S. (13 Wall.) 679, 728 (1872)).

[2] U.S. CONST. amend. I.

[3] *See, e.g.*, *Watson*, 80 U.S. at 729 (holding that the courts may not adjudicate the validity of decisions made by religious tribunals).

For this reason the above quote from *United States v. Ballard*[4] rings true. There, the Court held that religious adherents accused of mail fraud could not be prosecuted on the basis of the verity of their religious claims, but only on the basis of whether those views were sincerely held.[5] Intuitively, this seems like a principle rightly inherent in the Religion Clauses. Consistent with the principle of Supreme Court jurisprudence that government ought to be neutral toward religion, government ought not state that a particular religious belief is true or false. The Court has kept the promise it made in *Ballard*; an examination of case law will not disclose a single circumstance in which the Court has explicitly declared a religious belief to be false.[6]

However, each of us communicates much more than what we state explicitly. Implicit communication can be logically derived from explicit statements. For instance, if a man says all squirrels are rodents and that all rodents are animals, we may infer that he would also say that all squirrels are animals. That he never considers this implication, that he says he does not care, even that he expressly denies it ("But I'm not saying all squirrels are animals . . . "), is no matter. If he has asserted the premises are true, he must affirm that the conclusion is true. In some circumstances, our Supreme Court is like this squirrel/animal-denier; it expressly declares that it passes no judgment on the truth of religious claims, but its premises, and more importantly, the decree of judgment it enters, compel the opposite conclusion, merely through the dry force of logic.

Suppose that an individual claimant seeks an exemption from a law of general applicability on the grounds of the Free Exercise Clause because the law inhibits the practice of his religion. Assume that the inhibited practice is premised on the individual's belief in a universal, objective religious truth. Suppose then that the Supreme Court (or any court for that matter)[7] denies this individual's Free Exercise claim. When this occurs, the Court has implicitly asserted that this individual's belief is not true.[8] This assertion is fundamentally at

[4] 322 U.S. 78 (1944).

[5] *Id.* at 83–88.

[6] *See, e.g.*, Bd. of Educ. v. Grumet, 512 U.S. 687 (1994) (Establishment Clause case declaring that a permissive separate school district for Hasidic Jews was improper); United States v. Lee, 455 U.S. 252 (1982) (Free Exercise case holding that the Amish are not exempt from Social Security); Sherbert v. Verner, 374 U.S. 398 (1963) (Free Exercise case granting exception from unemployment compensation laws to Seventh-Day Adventist who would not work on Saturday).

[7] The scope of this Comment is limited to the Free Exercise cases adjudicated by the Supreme Court of the United States, though the principles of the argument would apply equally to all subordinate courts that decide such issues.

[8] That the Court makes this implicit assertion is not important if considered a

odds with the principle of governmental neutrality toward religion that has been enunciated by the Court, thus resulting in an ironic instance of what this Comment terms "judgmental neutrality." The analysis that here follows suggests that the neutrality principle should therefore be clarified, modified, or abandoned.

A few qualifications are in order. First, this is a descriptive analysis, not a normative analysis. This Comment will not address whether the tests the Court uses in Free Exercise cases comport with the United States Constitution, nor will it discuss whether any given case was decided correctly under the applicable tests, nor will it weigh in on what the result should have been according to sound social policy. In addressing individual cases, for instance, this Comment will not argue that the religious exemption from compulsory education should have been denied in *Wisconsin v. Yoder*,[9] or that the laws-of-general-applicability principle from *Employment Division v. Smith*[10] violates the First Amendment.

Similarly, this is not the work of a zealot (of either the secular or religious variety) arguing for a principle of greater separation of church and state, or for broader accommodation of the Author's specific beliefs. This analysis does not imply that intelligent design should be taught in public schools, and neither does it compel the denial of state-funded vouchers for religious education. Which practices should be prohibited and which permitted is a policy question well beyond the scope of this Comment.

This Comment will only set forth the logically necessary consequences of the statements and rulings of the Court. If we accept these statements and rulings as premises, then in some circumstances we must inevitably conclude that the Court has passed judgment on the substance of individual beliefs. This plain reliance on logic is beneficial, for it removes from the ultimate conclusions any partisan flavor that could otherwise be insinuated. If the argument form is valid and all premises are agreed upon, then the conclusions here

private statement by a majority of nine federal judges. Rather, this implicit assertion is particularly significant because it necessarily follows from the Court's judgment; that is, the implicit assertion has as much force as the judgment itself.

[9] 406 U.S. 205 (1972). The Court granted the Amish plaintiffs an exemption to Wisconsin's compulsory education law where their religious beliefs required less formal education than the law demanded. *Id.* at 207, 234–35.

[10] 494 U.S. 872 (1990). In denying Native Americans the right to ingest peyote, a controlled substance, for religious purposes, the Court held that facially neutral laws of general applicability are presumptively valid against Free Exercise challenges. *Id.* at 879–80.

drawn ought to be equally amenable to the liberal and the conservative, the Hindu and the Mormon, the Scalia and the Souter.

Part II will begin with a brief survey of how the Supreme Court's policy of not evaluating the truth of religious beliefs is interwoven with its principle of neutrality toward religion. Part III will state the fundamental assumptions undergirding the Comment and set forth its formal argument, which is grounded in propositional logic. Examples and illustrations will be provided where appropriate. Part IV will apply the formal argument to key cases in the Supreme Court's Free Exercise jurisprudence, and clarify the scope of the thesis. Part V will rebut foreseeable objections to the argument. Part VI will address some of the practical and philosophical implications of the argument.

II. THE NEUTRALITY PRINCIPLE AND THE POLICY AGAINST JUDGING THE TRUTH OF RELIGIONS

The Supreme Court of the United States has continually relied on a policy of governmental neutrality toward religion in the First Amendment Religion Clause cases it has decided over the last sixty years,[11] even though it has never offered an explicit definition of the term "neutrality." In the absence of an express definition of neutrality, the term has taken on diverse, contextualized meanings, such that both those Justices who favor separation of church and state and those who favor accommodation of religion all declare, at least nominally, that their interpretation is neutral.[12] This ambiguity of definition and irregularity of application have caused great consternation for courts and commentators alike, many of whom have argued for the superiority of one form of neutrality to another.[13] Nev-

[11] *See* Everson v. Bd. of Educ., 330 U.S. 1 (1947) (first announcing the neutrality principle).

[12] *See, e.g.*, *Smith*, 494 U.S. at 879–80 (Scalia, J.) (holding that facially neutral laws of general applicability are presumptively valid); Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970) (Burger, C.J.) (adopting the idea of "benevolent neutrality" when holding that a New York tax exemption for religious organizations did not violate the Establishment Clause).

[13] *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 878–84 (2000) (Souter, J., dissenting) (distinguishing between three uses of neutrality in Establishment Clause jurisprudence and arguing against formal neutrality and in favor of secular neutrality); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 397–98 (1993) (Scalia, J., dissenting) (criticizing the inconsistent application of the Court's *Lemon* test for Establishment Clause violations); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 999–1018 (1990) (distinguishing between three uses of neutrality in religion jurisprudence, and favoring the idea of substantive neutrality).

ertheless, all agree that, however defined, neutrality is a value to be sought after in government interaction with religion.

The Supreme Court first announced the principle of neutrality in 1947 in the case of *Everson v. Board of Education*.[14] At issue was whether New Jersey's reimbursement to Catholic school students for school transportation costs was a violation of the First Amendment as a law respecting the establishment of religion.[15] In an opinion considered to be the first modern Establishment Clause decision,[16] the Court used strong, now-famous language setting forth the principles of what the government may and may not do:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion.[17]

Some of this language would seem almost antagonistic to religion, but the Court also made clear that the First Amendment "requires the state to be *a neutral* in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary."[18] Concluding that not allowing the program would amount to hostility toward religion, the Court found no Establishment Clause violation, but decided so by a five-to-four margin.[19] *Everson*'s dissenters would not necessarily have adopted a different rationale, but only a different result; the dissenting opinions of Justices Jackson and Rutledge actually placed more emphasis on neutrality than the majority opinion.[20]

Neutrality, in one sense or another, has continued to be a key component of the Court's analysis in subsequent Religion Clause cases. Five years after *Everson*, the Court ruled that a program where students were permitted to leave school for religious education was not a violation of the Establishment Clause, stating that "[t]he government *must be neutral* when it comes to competition between

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[14] 330 U.S. 1 (1947).

[15] *Id.* at 8.

[16] *See* Steven K. Green, *Charitable Choice and Neutrality Theory*, 57 N.Y.U. ANN. SURV. AM. L. 33, 46 (2000).

[17] *Everson*, 330 U.S. at 15.

[18] *Id.* at 18 (emphasis added).

[19] *Id.* at 18, 28 (Jackson, J., dissenting).

[20] *See id.* at 18–28 (stating that the American education system is premised on the idea that a school can "maintain a strict and lofty neutrality as to religion"); *id.* at 28–63 (Rutledge, J., dissenting) (using variations of the root word "neutral" three times). The majority used the word "neutral" only once. *See id.* at 1–18 (majority opinion).

sects."[21] In *Wisconsin v. Yoder*, the Court, permitting an exemption for the Amish to compulsory education laws, stated that "[a] regulation neutral on its face may, in its application, nonetheless offend the *constitutional requirement for governmental neutrality* if it unduly burdens the free exercise of religion."[22] In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[23] the Court held that:

> Although a law targeting religious beliefs as such is never permissible, if the object of a law is to infringe upon or restrict practices because of their religious motivation, *the law is not neutral, and it is invalid* unless it is justified by a compelling interest and is narrowly tailored to advance that interest.[24]

The Supreme Court's policy of not judging the truth of a religion is intimately bound up in the principle of governmental neutrality toward religion. *United States v. Ballard* was the first case to clearly state that the Court will not inquire into the truth of an individual's beliefs in evaluating a Free Exercise claim.[25] Though *Ballard* was decided in 1944, three years before the neutrality principle was first expressed in *Everson*, the Court retroactively imputed the neutrality principle to the *Ballard* decision when it decided *School District of Abington Township v. Schempp*[26] in 1963:

> The mandate of judicial neutrality in theological controversies met its severest test in *United States v. Ballard*. That decision put in sharp relief certain principles which bear directly upon the questions presented in these cases. . . . We said: "Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views." . . . "[I]t would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations." . . . [*Ballard*] shows how elusive is the line which enforces the Amendment's injunction of strict neutrality . . . .[27]

This use of backwards application is hardly a strained construction. Though the *Ballard* Court did not expressly set forth the principle of neutrality, many of the same members of the *Ballard* Court

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[21] Zorach v. Clauson, 343 U.S. 306, 314 (1952) (emphasis added).

[22] 406 U.S. 205, 220 (1972) (emphasis added).

[23] 508 U.S. 520 (1993) (facially neutral law shown to have been enacted to burden the practice of Santeria violated the Free Exercise Clause).

[24] *Id.* at 533 (citations omitted) (emphasis added).

[25] United States v. Ballard, 322 U.S. 78, 86 (1944).

[26] 374 U.S. 203 (1963).

[27] *Id.* at 244–45 (quoting *Ballard*, 322 U.S. at 86–87).

were present for the *Everson* decision,[28] which brought *Ballard*'s Free Exercise reasoning into an Establishment Clause context and first announced the neutrality principle. *Ballard*'s no-inquiry policy has been expressly preserved in later case law, together with the familiar neutrality principle.[29]

III. FORMAL ARGUMENT AND FUNDAMENTAL ASSUMPTIONS

This Comment argues, simply on the basis of deductive logic, that in certain circumstances the Court necessarily implies that an individual's religious beliefs are untrue. Because this argument is deductive, its persuasive value cannot be questioned by doubting the connection between the premises and the conclusion, but only by doubting the truth of the premises. The premises are few, and they are meant to be essentially self-evident. These premises include the Court's statements of legal principles in Free Exercise jurisprudence,

[28] Seven members of the *Ballard* Court were present for the *Everson* decision; Justice Roberts and Chief Justice Stone were replaced with Justice Burton and Chief Justice Vinson. *See* SUPREME COURT HISTORICAL SOCIETY, MEMBERS OF THE SUPREME COURT OF THE UNITED STATES (2007), http://www.supremecourtus.gov/about/members.pdf.

[29] *See* Employment 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."); Sherbert v. Verner, 374 U.S. 398, 408 (1963) (noting in dicta that judicial inquiry into the truth or falsity of religious beliefs is prohibited); *see also* United States v. Seeger, 380 U.S. 163, 184 (1965). In *Seeger*, a conscientious objector case, the Court held that "[t]he validity of what [respondent] believes cannot be questioned. Some theologians, and indeed some examiners, might be tempted to question . . . the truth of his concepts. But these are inquiries foreclosed to Government." *Id.*

Walz v. Tax Commission provides a further illustration of the unity of the no-inquiry policy and the neutrality principle. 397 U.S. 664 (1970). In that case, a property owner in New York contended that the Tax Commission's grant of exemptions for church property indirectly required him to make a donation to religious bodies and therefore violated the Establishment Clause. *Id.* at 667. The Court found it unnecessary to justify the religious tax exemption on grounds of the good works of social welfare programs that religious organizations provide for the community: "To give emphasis to so variable an aspect of the work of religious bodies would introduce an element of governmental evaluation and standards as to the worth of particular social welfare programs, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize." *Id.* at 674. The unity of the two policies is clear here. The neutrality principle declares that the government is not even to consider judging a religion by the social benefits it offers because this would come too near to evaluating the truth of the religion itself. It is also worth noting that rather than evaluating the merits of specific religious claims, the Court stated that religious organizations are presumptively considered socially valuable: "The State has an affirmative policy that considers these groups as beneficial and stabilizing influences in community life and finds this [tax exemption] useful, desirable, and in the public interest." *Id.* at 673.

the statements of the individuals' religious beliefs in those cases, and the rulings and results in those cases. Any meaningful analysis of the Court's interpretation of the Constitution must begin with this much. This Comment also makes two fundamental assumptions.[30] Because these assumptions are critical to the argument, a few words in their defense are in order.

First, if an individual thinks a proposition is objectively true, that individual sincerely believes the proposition. This assumption may seem axiomatic, or even merely semantic, but perhaps some readers are uncomfortable thinking about objective truth in the religious context.[31] However, most of us would readily acknowledge this axiom in areas where we frequently speak of objective truth—mathematics, for instance, which is objectively true. If we think "2 + 2 = 4" is true, we believe that 2 + 2 = 4. An individual may rationally doubt even his own existence, but he may not rationally doubt such truths, for they are themselves founded in reason.[32] In any case, whether as a redundant matter of linguistics or as a necessity of logic, the assumption holds—if an individual thinks a proposition objectively true, the only rational response is to believe that proposition.[33]

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[30] There is a third necessary assumption to the argument—that the Supreme Court operates in a rational and logical manner. Given that the American legal system is premised upon reasoning and argument, the validity of that assumption is not difficult to substantiate, and though the Court may sometimes fail in rationality, there would likely be few of us who would assert that rationality is not at least an aspirational ideal for our courts. *See infra* Part V.B.

[31] As for objective truth in religion, it is less important for purposes of the discussion here whether a given religion *is* objectively true, but rather that it *claims* to be. Indeed, most of the major world religions (and many of the minor ones) do claim to be objectively true. *See, e.g.*, AN INTERPRETATION OF THE QUR'AN 32:2–3 (Majid Fakhry trans., New York University Press 2004) (est. c. seventh century A.D.) (stating that the Qur'an is the truth from Allah); *John* 14:6 (Revised Standard Version) ("Jesus said to him, 'I am the way, and the truth, and the life; no one comes to the Father, but by me.'"); JOSEPH SMITH, THE DOCTRINE AND COVENANTS OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 1:30–33 (1886) (stating that the Mormon church is the only church with which God is pleased). We might even assume that it is because adherents believe a religion to be objectively true that they choose to follow it, perhaps even, as in the case of martyrs, kamikazes, and suicide bombers, against their immediate interest in self-preservation. Many adherents would perhaps choose ways of life other than the one commanded by their religion if they felt that the truth was something they could simply choose. Whether the reader believes it possible for any religion to be objectively true is not of particular significance here, for this discussion is limited to those religious adherents who claim their religion is objectively true.

[32] *See* GEORGE BOOLE, AN INVESTIGATION OF THE LAWS OF THOUGHT ON WHICH ARE FOUNDED THE MATHEMATICAL THEORIES OF LOGIC AND PROBABILITIES 1–23 (Dover Publications 1958) (1854).

[33] The converse of this assumption, that if an individual believes a proposition the individual thinks the proposition objectively true, is probably not correct. Many of us believe things by default, things that we would simply like to think are true, or

Second, if one sincerely believes a proposition, one acts upon that belief.[34] Also axiomatic, this assumption is expressed in such colloquialisms as "talk is cheap, put your money where your mouth is," or religious statements such as "[s]how me your faith apart from your works, and I by my works will show you my faith."[35] A skydiver shows that he really believes in the safety of the parachute when he jumps out of the plane, and a social reformer proves she cares for the homeless when she goes out on the streets to help them. We may doubt the mere words, dreams, or wishful thinking of either the skydiver or the social reformer, for apart from action, speech and thought are of dubious sincerity.[36]

The simple conditional *modus tollens* is the center of this Comment's formal argument. *Modus tollens* is an inherently valid logical form[37] that, in propositional form, proceeds as follows:

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things that we dimly suspect are true, none of which are supported by any claim to objective truth. The perception of objective truth is a sufficient condition to belief, but it is not a necessary condition.

[34] This is perhaps implicit in Religion Clause jurisprudence. For instance, the sincerity requirement shows that for an action to be protected, it must stem from genuine belief. *See, e.g.*, *Seeger*, 380 U.S. at 184 (interpreting a religious belief exemption to the Selective Service in an Act of Congress); DANIEL O. CONKLE, CONSTITUTIONAL LAW: THE RELIGION CLAUSES 82 (2003) ("For conduct to qualify as the exercise of religion under the Free Exercise Clause, the conduct must, at a minimum, be conduct that is sincerely motivated by religious beliefs."). Second, it should also be noted that the clause itself protects not just the belief, but the *exercise* of religion—the actions that of necessity flow from the belief. *See* U.S. CONST. amend. I.

[35] *James* 2:18.

[36] A strong critique could be leveled against this assumption based on the concept of sin, which could be defined as acting contrary to the behavior compelled by one's beliefs. The critique would state that because people sin, it is not true that if one sincerely believes a proposition, one acts upon the proposition. However, this assumption may yet be defended on three grounds. First, the assumption may be defended as a circular tautology—if an individual sins, it shows that the individual did not *really* believe what he said he believed; he at least did not believe it in the moment of the sin. This defense makes sense and offers philosophical consistency, but it is not supported by anything other than its mere statement and the insistence on the assumption as a tautology. Second, one may argue that all sin inherently amounts to a logical contradiction, because it involves acting contrary to the behavior commanded by a moral authority. Thus to the extent that the American government, the Supreme Court, and the reader presuppose reason as a fundamental authority, there should be no allowance for sin, that is, for actions contrary to the logic and reason in which our government is presumably grounded. Third, it may be conceded that sin is a counterexample to this assumed proposition but that, in any event, the government should not be sinning. *See infra* notes 141–47 and accompanying text.

[37] *See* JAMES B. NANCE & DOUGLAS J. WILSON, INTRODUCTORY LOGIC 191–92 (4th ed. 2006). In an inherently valid argument, if we assume the premises are true, the conclusion is necessarily true. *Id.* at 129.

If P then Q.
Not Q, therefore not P.[38]

The following is an example of *modus tollens* using sentences with concrete nouns:

If it is a squirrel, then it is a rodent.
It is not a rodent, therefore it is not a squirrel.[39]

Finally, here is a version of *modus tollens* most relevant to the discussion here:

If one sincerely believes a proposition, one acts upon it.
One doesn't act upon the proposition, therefore one does not sincerely believe it.

The *modus tollens* argument form may also be validly sequenced with another *modus tollens* to create two major premises as follows:

If P then Q.
If Q then R.
Not R, therefore not P.[40]

Or, as in the discussion here:

If one thinks a proposition is objectively true, then one sincerely believes it.
If one sincerely believes a proposition, one acts upon it.
One does not act upon the proposition, therefore one does not think it is objectively true.

This Comment posits that when the Supreme Court denies an individual's Free Exercise claim, and the individual's government-restricted action is a necessary consequence of the individual's belief in a universal objective truth, the Supreme Court implicitly asserts that the individual's belief is not true. A hypothetical will illustrate how this thesis fits into the *modus tollens* argument form.

Suppose that the religion of Wilsonism teaches that everyone who wishes to be saved must disobey traffic signals. Tim thinks Wilsonism is objectively true, so he believes this doctrine. Tim wants to be saved, so he knows he needs to disobey traffic signals. The government's laws, however, require that all citizens obey traffic signals. Tim therefore petitions a court for an exemption to the law on the ground of the Free Exercise Clause. Because the court finds that the compelling interest of traffic signal enforcement outweighs Tim's Free Exercise Claim, it refuses to grant Tim's exemption.[41] To wit,

[38] *Id.* at 191–92.

[39] *See id.*

[40] *See id.* at 189.

[41] This is a crucial point in the argument. The Court does not care about the individual's belief as long as that belief produces action consistent with government policy—in other words, where the individual's actions harmonize with the actions

the court will not permit anyone to take the specific action that Wilsonism commands for all of humanity. Therefore the court does not think Wilsonism is true.

Close scrutiny reveals one important difference between the propositional version of the *modus tollens* argument above and the subsequent "Wilsonism" hypothetical. In the former, an individual's failure to act on a belief shows that the individual does not think the belief true, where in the latter the court's denial of the individual's right to practice shows that the court does not think the individual's belief is true. Normally this would be fatal to the argument, because the use of terms is not consistent;[42] indeed, it would appear to be a subtle equivocation of sorts. However, there is no logical problem here because no switch in terms results when the individual's truth claim is *universal*. Where a truth claim is universal, its proponents and adherents assert that the truth applies to the court just as much as to the individual. Where the individual's belief is based on a claim to a *universal objective truth*, the court's denial of the individual's right to practice implies that the court has judged the belief false. In the hypothetical, Wilsonism claims that even the court itself, for its own salvation and that of its members, should not obey traffic signals. Because the underlying truth claim is universal, the court's refusal to permit the individual's religious practice is functionally and logically the same as when an individual refuses to perform the action required by the belief. Consequently, the court's denial carries the same implicit assertion of falsity as the individual refusal.

The Wilsonism hypothetical may seem absurd to the reader; it would seem to be the sort of strange example that the Court would rarely encounter in practice. However, religions have claimed far stranger things, and commanded actions far more loathsome to soci-

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commanded by the *government's* beliefs, we do not have a problem. It becomes difficult when the government action and the individual action are mutually exclusive—here, obeying traffic signals and disobeying traffic signals. Thus, the implicit assertion of falsity only occurs when the Free Exercise claim is denied.

[42] To understand why this could be a problem, consider the *modus tollens* form used above:

> *If P then Q. If Q then R. Not R, therefore not P.*
> *If one thinks a proposition is objectively true, then one sincerely believes it. If one sincerely believes a proposition, one acts upon it. One does not act upon the proposition, therefore one does not think it is true.*

NANCE & WILSON, *supra* note 37, at 189–93. When we replace the statement that the individual does not act upon the belief (not-R) with the court's refusal to allow the individual to act upon the belief, we would appear to have a swap in terms (not-R has been changed), which renders the argument logically invalid. However, the universality of the individual's belief makes this moot, as addressed in the text following this note above.

ety.[43] Were the Supreme Court to uphold traffic signal enforcement against the contrary claims of Wilsonism, few of us would contend that the Court made the wrong decision on policy; we do not think the universal religious claim of a minority should be allowed to subvert laws beneficial to society. At the same time, perhaps we are uncomfortable with the Court implicitly declaring a religion false. Nevertheless, because of logic, we simply cannot have it both ways.[44]

IV. APPLICATION OF ARGUMENT TO THE SUPREME COURT'S FREE EXERCISE JURISPRUDENCE

A. Reynolds v. United States[45]

The Supreme Court first decided a Free Exercise claim in *Reynolds v. United States*,[46] an 1878 case on a writ of error to the Supreme Court of the Utah Territory.[47] The petitioner, Reynolds, had been indicted for the crime of bigamy.[48] Reynolds was a member of the Mormon Church, which declared that the practice of polygamy was commanded by several sacred books and by the revelations of Almighty God to Joseph Smith.[49] According to the church, failure to

[43] Consider for instance the Heaven's Gate cult, where cult leader Herff Applewhite convinced thirty-nine followers to commit mass suicide with promises that they would be taken away by a UFO behind the Hale-Bopp comet in 1997. *See* Evan Thomas et al., *The Next Level*, NEWSWEEK, Apr. 7, 1997, at 28. Consider also that ritual human sacrifice in worship of the goddess Kali continues in India, though only as a fringe practice. *See* Alex Perry Atapur, *Killing for "Mother" Kali*, TIME—ASIA, July 9, 2002, at 17, *available at* http://www.time.com/time/magazine/article/0,9171,322673,00.html.

[44] An alternate way to structure this formal argument is to conceive of the church-state conflict as a conflict between the normative statements of two authorities. Suppose a given religion, laying claim to a universal, objective truth, teaches that everyone should do X, while the government forbids everyone from doing X (which carries the implicit normative command that one should not do X). If an individual brings a Free Exercise claim based upon his religion's command to do X and the government denies his claim, the government has implicitly stated that the religion's claim ("everyone should do X") is false. At the very least, the government, by enforcing its normative commands rather than the commands of the religion, has stated that the religion is not a real authority over the government, and thus denied the religion's inherent claims to sovereignty, supremacy, and transcendence. While this argument form is somewhat simpler and more clear than the form used in the body of this Comment, it does not result in as clear an assertion of the religion's falsity because it is not as founded in the nature of epistemology. It is thus only briefly noted here.

[45] 98 U.S. 145 (1878).

[46] *Id.*

[47] *See id.* at 153.

[48] *Id.* at 161.

[49] *Id.*

practice polygamy when given an opportunity to do so was damnable.[50] Reynolds therefore contended that the verdict in his case could only be "not guilty" because he had practiced polygamy out of a sincere belief in a religious duty.[51]

On appeal, the Supreme Court reasoned that a prohibition of bigamy must be outside the scope of the Religion Clauses, because bigamy had long been criminal—it was prohibited at the time the First Amendment was adopted, at the time Madison wrote his famous *Memorial and Remonstrance Against Religious Assessments*,[52] and even under the lesser religious liberty protections of England.[53] Additionally, the Court found that marriage, though sacred, was also a secular matter, and that the practice of bigamy led to unsavory social results: "[P]olygamy leads to the patriarchal principle, and . . . when applied to large communities, fetters the people in stationary despotism . . . ."[54] The Court also held that the non-enforcement of a law against an individual because of a private belief would essentially lead to anarchy:

> Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.[55]

Consequently, the Court held that Reynolds's sincere religious belief in the necessity of bigamy would not absolve him of violating the law.[56]

The Mormon Church lays claim to universal, objective truth.[57] By purported revelation from God, the Mormon Church claimed at

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[50] *Id.*

[51] *Reynolds*, 98 U.S. at 161–62.

[52] James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), *reprinted in* JAMES MADISON, THE COMPLETE MADISON 299 (Saul K. Padover ed., 1953).

[53] *Reynolds*, 98 U.S. at 164–65.

[54] *Id.* at 166.

[55] *Id.* at 166–67. This prompts an interesting question: Is the essence of government that it may compel the citizen to do something he or she does not believe in? This may be in accord with Max Weber's definition of the state as the monopoly of legitimate use of physical force. MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 154 (A.M. Henderson & Talcott Parsons trans., Free Press 1997) (1947).

[56] *Reynolds*, 98 U.S. at 168.

[57] *See* JOSEPH SMITH, THE DOCTRINE AND COVENANTS OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 1:30–33 (1886).

its founding to be the only church with which God was pleased.[58] In the Lord's Preface to *The Doctrine and Covenants*, God declares to all peoples that he who repents and follows the Church's teachings will be forgiven, but he who does not repent will have "the light which he has received" taken from him.[59] Events subsequent to the Supreme Court's decision in *Reynolds* show that the Court correctly understood the importance of the bigamy doctrine to the Mormon Church—when the church, after the *Reynolds* decision, issued an Official Declaration that it was no longer sanctioning or permitting bigamy,[60] Mormon President Wilford Woodruff gave an address lamenting the great spiritual cost at which the church had decided to discontinue the practice.[61]

All of these facts together, in conjunction with the logical form laid out above, demonstrate the Court's implicit assertion of the falsity of this Mormon belief. The Mormon Church, claiming to preach truth to all humankind, had commanded the practice of bigamy as a means of obtaining salvation. The Supreme Court, in upholding the laws of the Utah Territory, refused to allow the practice of bigamy. Because the universal teaching of the Mormon church was directed to the Court as much as to any individual, the Court's refusal to allow the practice of bigamy was a denial of the verity of the spiritual belief supporting the practice, and further, a denial that the purported spiritual authority was objectively true. The denial amounted to an implicit declaration that Mormonism, or at least its plural marriage doctrine, was false. *Modus tollens*, Q.E.D.[62]

This may be a cause for distress—we are uncomfortable that the Court, ostensibly grounded in neutrality, would do something so far

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[58] *Id.*

[59] *Id.* at 1:1–7, 30–33.

[60] THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, OFFICIAL DECLARATION 1 (1890).

[61] Woodruff's letter posed to the church this difficult question:

> Which is the wisest course for the Latter-day Saints to pursue—to continue to attempt to practice plural marriage, with the laws of the nation against it and the opposition of sixty millions of people . . . or, after doing and suffering what we have through our adherence to this principle to cease the practice and submit to the law, and through doing so leave the Prophets, Apostles and fathers at home, so that they can instruct the people and attend to the duties of the Church, and also leave the Temples in the hands of the Saints, so that they can attend to the ordinances of the Gospel, both for the living and the dead?

Wilford Woodruff, President, Church of Jesus Christ of Latter-Day Saints, Address at the Cache Stake Conference (Nov. 1, 1891), *in* DESERET WEEKLY, Nov. 14, 1891, *available at* http://scriptures.lds.org/od/1.

[62] *Quod erat demonstrandum* (that which was to be shown).

from neutral as to even *insinuate* that a religious doctrine is false. But whether the conclusion is comfortable or not, it is logically necessary from the premises.

B. Bob Jones University v. United States[63]

In 1983, the Supreme Court confronted the Free Exercise issue within the context of federal income tax exemptions.[64] The IRS had formerly permitted all religious or educational institutions to qualify for tax-exempt status, with contributions to such institutions being deductible.[65] However, in 1970, the IRS changed its policy such that it would no longer offer the tax benefit to institutions that practiced racial discrimination, since these institutions could not be deemed charitable.[66] Bob Jones University is a Christian university whose sponsors believed (at the time of the litigation) that the Bible specifically forbade interracial dating and marriage.[67] Because this policy was discriminatory, the IRS revoked the university's tax-exempt status.[68] The university brought an action for a refund in federal district court,[69] and the case ultimately came before the Supreme Court of the United States via the university's petition for certiorari.[70]

Among the university's various claims for the right to the tax exemption, the university asserted that the IRS regulation was a violation of the university's right to free exercise of religion under the First Amendment, because the university's policy of racial discrimination was based on sincerely held religious beliefs.[71] The Court disagreed, reiterating the principle from *United States v. Lee*[72] that the First Amendment's prohibition of restrictions on religious liberty was

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[63] 461 U.S. 574 (1983).

[64] *Id.* at 602–03.

[65] *Id.* at 577–78; I.R.C. § 501(a), (c)(3) (1954) (declaring specified institutions tax exempt); I.R.C. § 170 (1954) (making contributions to specified institutions deductible).

[66] *Bob Jones Univ.*, 461 U.S. at 577–78, 582. Though the language of § 501(c)(3) was disjunctive for religious, educational, *or* charitable organizations, *inter alia*, the Fourth Circuit held that the exemption had to be read against the background of charitable trust law, requiring an organization to be charitable. *Id.* at 582 (citing Bob Jones Univ. v. United States, 639 F.2d 147, 151 (4th Cir. 1980)). Because racial discrimination was not charitable, institutions that practiced it could not qualify for the exemption. *Id.*

[67] *Bob Jones Univ.*, 464 U.S. at 580.

[68] *Id.* at 581.

[69] Bob Jones Univ. v. United States, 468 F. Supp. 890, 907 (D.S.C. 1978).

[70] Bob Jones Univ. v. United States, 454 U.S. 892 (1981) (granting certiorari along with companion case, *Goldsboro Christian Sch., Inc. v. United States*).

[71] *Bob Jones Univ.*, 461 U.S. at 602.

[72] 455 U.S. 252 (1982).

not absolute.[73] Indeed, a restriction may be justified if it is necessary to effectuate a compelling governmental interest.[74] The Court declared that the "governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs."[75] Further compelling interest analysis revealed no less-restrictive alternative to the IRS regulation, nor any room for accommodation of the university's discriminatory practice.[76] Consequently, the Free Exercise claim failed against the valid regulation.[77]

Bob Jones University declares itself to be dedicated to Christian principles, grounding all of its courses in instruction from the Bible.[78] Bob Jones University does not maintain these beliefs privately, as though the truth only applies to the university, but rather believes that the Bible and its teachings are universally and objectively binding on all of humanity.[79] The university's belief in the Scriptural prohibition of interracial dating and marriage was strong enough that it instituted a ban of those practices on its campus and punished by expulsion both those who violated the ban and those who encouraged violation.[80] The Court even conceded that the discriminatory prac-

[73] *Id.* at 257–58 (denying an exception to the Social Security system for Amish persons and holding that free exercise protection is not absolute).

[74] *Bob Jones Univ.*, 461 U.S. at 603.

[75] *Id.* at 604.

[76] *Id.*

[77] *Id.* Neither did any of the university's other claims prevail. The Fourth Circuit's decision was affirmed, and tax-exempt status to Bob Jones University was denied. *Id.* at 605. It should be noted, however, that Bob Jones University has survived despite its lack of a tax exemption, and also that it dropped its discriminatory policies abruptly in 2000 per an announcement on Larry King Live. Susannah Meadows, *Passing the Torch at Bob Jones U.*, MSNBC.COM/NEWSWEEK, Jan. 29, 2005, http://www.msnbc.msn.com/id/6884040/site/newsweek/.

[78] *Bob Jones Univ.*, 461 U.S. at 579–81.

[79] Bob Jones University's philosophy statement emphasizes the institution's "adherence to the Bible as mankind's only source of faith and Christian practice." Bob Jones University, University Mission and Philosophy, http://www.bju.edu/about/mission.html (last visited Oct. 23, 2007). The statement also affirms the idea that belief is evidenced by action:

> Biblical values are integrated in every classroom and every other part of the educational process. . . . Christian professors and staff members encourage students by precept and *example* to a lifelong commitment to learning, teaching, and *exemplifying* spiritual truths. The founder's philosophy that BJU is not here just to teach men and women how to make a living, but more importantly, how to *live*, remains our focus.

Id. (emphasis added).

[80] *Bob Jones Univ.*, 461 U.S. at 579–81.

tices of the university stemmed from a "genuine belief that the Bible forbids interracial dating and marriage."[81]

If the Supreme Court, as agent of our government, actually believed that Almighty God universally prohibited interracial dating and marriage, it certainly would not have upheld the IRS regulation—rather, it would have acted in accordance with its belief, and found for Bob Jones. How could the Court uphold a tax regulation that punished those who followed the will of the omnipotent Creator? But because the Supreme Court upheld the IRS regulation, and did not act in accordance with University's claim to objective truth, the Court showed that it did not believe the dogma of Bob Jones University was correct. The Court implicitly declared that the university's claim to universal objective truth was false.[82] It may not have stated so expressly, but the logical implications cannot be avoided. In the end, we may think the Court ruled correctly on the Constitution, civil rights, and tax policy, but, however good the policy, can a ruling that passes even implicit judgment on a religion be called anything like neutral?

C. Native American Religion Cases

The Supreme Court also decided several significant Free Exercise cases involving Native American religion,[83] two of which will be discussed here. These cases are significant because in both cases the Court admitted it was substantially restricting the religious liberty of a minority religion, but purported to do so without either violating the principle of neutrality, or passing any kind of judgment on the underlying belief.[84] Nevertheless, by the stipulated facts and the ruling, the Court implied the opposite.

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[81] *Id.* at 603 n.28.

[82] When a religious belief conflicts with a secular law, the Court is obligated to decide on the basis of the secular law. *See Reynolds v. United States*, 98 U.S. 145, 166–67 (1878). It could be argued that a decision on this basis only shows that policy supporting the secular law is "more" true than the religious belief, not that the religious belief is affirmatively false. However, the concept of comparative truth will not serve us here where the secular law and the religious belief are in direct conflict, that is, where the law prohibits what the religion requires or vice versa. If we grant that the policy supporting the secular law is "more" true, then the contradictory religious belief is therefore false.

[83] Of these three significant cases, *Bowen v. Roy*, 476 U.S. 693 (1986), which pertains to a Free Exercise claim for avoidance of having a number imposed by the Social Security administration, will be addressed later. *See infra* notes 124–28 and accompanying text.

[84] *See* Employment Div. v. Smith, 494 U.S. 872, 876–90 (1990); Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 445–58 (1988).

In 1977, the United States Forest Service prepared to complete a stretch of road between the California towns of Gasquet and Orleans by laying down pavement on a six-mile segment that was previously unpaved.[85] As part of its preparation, the Forest Service commissioned an impact study of the consequences of developing the road.[86] The study found that the entire area "'is significant as an integral and indispensible [sic] part of Indian religious conceptualization and practice[,] . . . [and] successful use of the [area] is dependent upon and facilitated by certain qualities of the physical environment, the most important of which are privacy, silence, and an undisturbed natural setting.'"[87] Construction of the proposed road, the study found, "'would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples.'"[88]

However, the Forest Service chose not to follow the study's recommendation that the road not be completed and instead proceeded with construction plans.[89] Individuals and groups of Native Americans, as well as various environmental groups and the State of California, sued to enjoin the construction of the road.[90] The case came before the Supreme Court a decade later as *Lyng v. Northwest Indian Cemetery Protective Association.*[91]

Before discussing the merits of the case, the Court noted that "[i]t is undisputed that the Indian respondents' beliefs are sincere and that the Government's proposed actions will have severe adverse effects on the practice of their religion."[92] The Court also expressly denied that it was evaluating the truth of the Native Americans' claims: "This Court cannot determine the truth of the underlying beliefs that led to the religious objections here . . . ."[93] Additionally, the Court declined to adopt the dissent's proffered rule, which required an evaluation of how central a sincerely held belief was to a particular claimant's religion, because such a standard would require the Court "to rule that some religious adherents misunderstand their own religious beliefs."[94]

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[85] *Lyng*, 485 U.S. at 442.
[86] *Id.*
[87] *Id.* (quoting Forest Service study).
[88] *Id.*
[89] *Id.* at 442–43.
[90] *Id.* at 443.
[91] *Lyng*, 485 U.S. at 443–45.
[92] *Id.* at 447.
[93] *Id.* at 449.
[94] *Id.* at 458.

Despite its acknowledgment of the damage that the construction of the road would do to the Native American religion, the Court ruled for the Forest Service.[95] It stated that "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens."[96] The Court also noted that the central principle of the First Amendment was a restriction on what government may do to the individual, not what the individual may demand of the government.[97] The Court provided as a policy rationale that:

> However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires. A broad range of government activities—from social welfare programs to foreign aid to conservation projects—will always be considered essential to the spiritual well-being of some citizens, often on the basis of sincerely held religious beliefs . . . . The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion.[98]

Having articulated the weight of the religious issues at stake,[99] but realizing the negative policy precedent that a favorable ruling for the Native Americans would set,[100] the Court reversed the ruling of the Ninth Circuit, which had favored the Native Americans, and remanded for reconsideration of the injunction in light of the Court's holding and other relevant events.[101]

The religious claim asserted by the Native Americans was both universal and objective—the groups appealed not only to the interests of the tribe, but of all humanity:[102] "Individual practitioners use this area for personal spiritual development; some of their activities

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[95] *Id.* at 458.

[96] *Id.* at 448 (quoting Bowen v. Roy, 476 U.S. 693, 699 (1986) (denying American Indian father exception to Social Security policy on the basis of his religious belief where he sought to avoid having a number assigned to his two-year-old daughter)).

[97] *Lyng*, 485 U.S. at 451.

[98] *Id.* at 452.

[99] Even if the construction of the road would "virtually destroy the . . . Indians' ability to practice their religion," as the Ninth Circuit suggested, the Constitution provided no remedy for the claimants. *Id.* at 451–52 (quoting Nw. Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688, 693 (9th Cir. 1985)).

[100] "No disrespect for these practices is implied when one notes that such beliefs could easily require de facto beneficial ownership of some rather spacious tracts of public property." *Id.* at 453.

[101] *Id.* at 458.

[102] *Id.* at 451.

are believed to be critically important in advancing the welfare of the Tribe, and indeed, *of mankind itself*."[103]

Regardless of the policy behind this case—whether it was decided correctly under the First Amendment, whether it adequately protects the environment, or whether it offers sufficient protection from the impositions of religious minorities—there can be no dispute about what the ruling is logically *saying*. If, as the Native Americans claimed, it was in the best spiritual interests of mankind, based on divine mandate, to keep the proposed construction site clear, then the government would be utterly foolish to clearcut for the sake of a mere *road*. More to the point, if the Court really believed in the spiritual necessity of preserving the area, the Court would not have ruled as it did. But it did rule as it did, and therefore the Court did not believe the religious claim of the Native Americans. The Court implied by its ruling that at least this aspect of Native American religion was quite simply false.

What is perhaps most interesting about *Lyng* is that the Court expressly denied that it evaluates the truth of religions. Some would perhaps suggest that this express statement should cut against the implicit analysis set forth here. However, this Comment submits that the force of logic and the eventual result of the road's construction carry much more weight than the Court's dicta stating the contrary. The majority criticized the proffered test of the dissent, which would have evaluated the centrality of a particular doctrine to a religion, because the test required the Court to rule that it understood a religion better then its adherents did.[104] But setting aside whatever merits the dissent's position may have had, the pitfalls of its test are probably not as offensive as the Court's insinuation of the falsity of a group's beliefs; the majority's jurisprudence would not even give the individual a substantive hearing as to the grounds of his belief, but would nonetheless declare it false.

The Supreme Court's decision in *Employment Division v. Smith*,[105] another case pertaining to Native American religion, has perplexed commentators and redefined interpretation of the Free Exercise Clause.[106] The respondents, Smith and Black, were two Native Americans who were fired from their jobs at a drug rehab center because

[103] *Lyng*, 485 U.S. at 451 (emphasis added).

[104] *Id.* at 457–58.

[105] 494 U.S. 872 (1990).

[106] *See, e.g.*, Thomas F. Lamacchia, *Reverse Accommodation of Religion*, 81 GEO. L.J. 117, 120–39 (1992); Ira C. Lupu, *Employment Division v. Smith and the Decline of Supreme Court-Centrism*, 1993 BYU L. REV. 259.

they used peyote, a controlled substance.[107] They thereafter sought unemployment compensation, which was denied because their discharge was for work-related misconduct.[108] Before the Supreme Court was the question of whether the First Amendment permitted denial of unemployment compensation for religious drug use.[109] The Court ultimately held that because Oregon's unemployment provisions were facially neutral laws of general applicability, they were valid even without a sacramental exception for peyote use, and the denial of unemployment benefits to Smith and Black could stand.[110]

The Court's opinion in *Smith* does not reveal whether Smith and Black asserted that their religious use of peyote stemmed from belief in a universal truth.[111] However, one of the lower court opinions earlier on in *Smith*'s procedural history notes that "[Black] testified that he was not *required* by the [Native American] church to take peyote, but that it was a personal decision."[112] The absence of a religious requirement to ingest peyote cuts against a finding that the use of peyote was a universal mandate of the Native American religion. Since the universality of the religious claim is an essential element of the argument in this Comment,[113] the lack of a universal claim in *Smith* means there was no implicit assertion by the Court that Smith's and Black's beliefs were untrue. However, *Smith* is significant not merely for its holding regarding Smith's and Black's use of peyote, but for its broader implications, for *Smith* holds that laws of general applicability are presumed valid, despite that they may burden individual religious practice.[114]

If a law and an objective and universal religious belief command contradictory modes of conduct, one or the other must fall. The government restriction may be withdrawn or amended, or the religious adherent may be forced to cease practice, but there will be no peaceful coexistence. Because the religious action stems from belief in a universal, objective truth, and the law presumably stems from the government's policy beliefs, resolving the dispute between religious observance and governmental action will either implicitly assert that

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[107] *Smith*, 494 U.S. at 874.

[108] *Id.*

[109] *Id.* at 876.

[110] *Id.* at 890.

[111] *Id.* at 872–74.

[112] Black v. Employment Div., 707 P.2d 1274, 1276 (Or. Ct. App. 1985).

[113] *See supra* notes 42–44 and accompanying text.

[114] *Smith*, 494 U.S. at 879.

the religious belief is false, or that the contrary governmental policy is not as important as it was first claimed.

Smith declares that facially neutral laws of general applicability are presumptively valid, and need provide no exception for contrary religious practices.[115] Before *Smith*, the Court was more ready to find that the religious interest could be reconciled with governmental policy through an exception,[116] but post-*Smith*, where the governmental action is presumptively valid, the contradictory religious claim generally will not stand. Logic then leads us to the implicit holding of *Smith*: if an action contradictory to generally applicable law is premised on belief in a universal, objective truth, the substance of that belief is presumptively false. Thus presumptively valid state action often amounts to presumptively false religion.

The *Smith* doctrine is very difficult, if not impossible, to reconcile with the policy of governmental neutrality toward religion in which it is ostensibly grounded.[117] The Court adopted as a rule of decision a footnote from *United States v. Lee*, that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[118] Douglas Laycock, discussing the different uses of the term "neutrality" in Supreme Court Religion Clause jurisprudence, criticizes the *Smith* doctrine, which he calls "formal neutrality," noting that it can often be discriminatory and lead to absurd results.[119] However, even more significant than Laycock's policy objection to the

[115] *Id.*

[116] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (granting an exception for the Amish to compulsory education law); Sherbert v. Verner, 374 U.S. 398 (1963) (mandating payment of unemployment benefits to Sabbatarian in face of contrary state law).

[117] In the public outcry after *Smith*, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA), which required government action that substantially burdened a religious practice to be narrowly tailored to serve a compelling state interest. Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. § 2000bb (2000)). In *City of Boerne v. Flores*, 521 U.S. 507, 529–36 (1997), the Court held that the original version of RFRA violated principles of federalism and was unconstitutional as applied to the States, which prompted Congress to revise RFRA appropriately. *See* 42 U.S.C. § 2000bb-1 to -4 (2000). For the purposes of the discussion here, it is not so much important what the specific law or standard of review for religious issues is, but rather that the judicial decrees in the cases discussed here imply a statement that the religious belief in question is false. Regardless of whether *Reynolds* or *Lyng* would be binding precedent today, we know that in the context of their time, the cases delivered this implicit message; that in itself should be cause for concern.

[118] *Smith*, 494 U.S. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982)).

[119] Laycock, *supra* note 13, at 999–1001.

Smith doctrine is that because of the doctrine, a "neutral" law of general applicability may be anything but—it may ultimately pass judgment on the truth of religion, which is hardly reconcilable with *any* definition of neutral. In *Smith*, the Court cited *Ballard* and carefully noted that the government may not "punish the expression of religious doctrines it believes to be false"[120]—but merely by punishing the individual's doctrinal expression *in action*, the Court declares the doctrines false, violating *Ballard* inadvertently.

D. Exceptions

Though the Court has made implicit judgments of the truth of particular religions in the cases and circumstances set forth above, it is not this Comment's contention that the Court judges the truth of a religion *whenever* it decides a Free Exercise case. When certain elements of the thesis are absent or otherwise changed, no implicit truth judgment results.

First, the Court makes no implicit judgment of a religion's truth when it permits the religious practice to continue, either through an exception or by declaring the government restriction void as unconstitutional. In *Wisconsin v. Yoder*,[121] where the Amish sought an exception to a Wisconsin law that made education compulsory until age sixteen, the Court held that a religious exception was proper because the government's asserted policy interest in the law was already adequately served by Amish practice.[122] Did the Court's allowance of the Amish religious practice constitute an implicit declaration that Amish beliefs are true? Hardly—to suggest so would be the logical fallacy of affirming the consequent.[123] Therefore the implicit declaration only exists when the Free Exercise claim is denied, and it can only implicitly assert falsity, not truth. Indeed, the religious practices that the government allows—whether Amish education, the Catholic mass, or Muslim prayer—are permitted because they are *consistent with govern-*

[120] *Smith*, 494 U.S. at 877 (citing United States v. Ballard, 322 U.S. 78, 86–88 (1944)).

[121] 406 U.S. 205 (1972).

[122] *Id.* at 221–26. The Court held that the Amish did not foster ignorance and were adequately equipped to participate in contemporary society and in the democratic process. *Id.* at 223–26.

[123] "Affirming the consequent" is an invalid logical form, i.e., if the premises are true, the conclusion is not necessarily true. The form goes as follows: *If P then Q. Q, therefore P. If it is a squirrel, then it is a rodent. It is a rodent, therefore it is a squirrel.* *See* NANCE & WILSON, *supra* note 37, at 191–92. Here, affirming the consequent looks like this: If one believes the Amish religion, one permits its practices. The Court permits Amish practices, therefore it believes the Amish religion.

ment policy,[124] not because the government believes all of these religions are true. A wide variety of beliefs may be consistent with observing the law, but these beliefs are not thereby endorsed by the law because of this consistency. Tolerance is not approval.

Second, no implicit assertion of falsity results from the Court's denial of a belief that the adherent does not claim to be universal. In *Bowen v. Roy*,[125] Stephen J. Roy, a Native American, protested the use of a Social Security number for his daughter, Little Bird of the Snow Roy, because he believed the use of the number would rob her of her spirit.[126] The Supreme Court ruled that the Social Security Administration's effort to impose and use a number for Little Bird of the Snow did not violate the Free Exercise clause.[127] Roy made no assertion (on record) that the imposition of a Social Security number robbed *everyone* of their spirits, i.e., Roy did not state that this purported truth applied to anyone other than Little Bird of the Snow.[128] Had he made such an assertion, the Court's denial of his religious exception would, in his view, amount to the robbery of the souls of every American citizen. In such a hypothetical case, the Court's denial of the claim would have implied that the Court did not believe the Social Security system was mass soul robbery. But because Roy's religious belief *only* applied to Little Bird of the Snow, the Court's decision did not necessarily pass judgment on that belief. Namely, the Court could still have actually agreed with Roy's belief, and yet held, albeit uncomfortably, that the public interest of uniform administration of Social Security outweighed the individual interest of the protection of Little Bird of the Snow's soul.[129]

Third, the Court makes no implicit assertion of falsity if the individual does not claim that the restricted practice is based on objective truth. Where an individual maintains a religious belief and practice, but also allows that other directly contradictory religious practices may be equally valid or "true," the argument fails, because propositional logic cannot be applied. Essentially, if the claimant admits that "A and not-A" might be "true" in the realm of religion, there will be no logical consequence to a restriction of the claimant's religious practice, because logic simply has no business with "A and not-A."

[124] Or perhaps not inconsistent with government policy.

[125] 476 U.S. 693 (1986).

[126] *Id.* at 695–98.

[127] *Id.* at 712.

[128] *Id.* at 695.

[129] Perhaps this was a regulatory taking of the property interest of the soul, but not such as would require compensation under the Takings Clause. *See* U.S. CONST. amend. V; *see also, e.g.*, Pa. Coal Co. v. Mahon, 260 U.S. 393, 411–16 (1922).

The individual may be offended by the Court's restriction of his religious liberty, but he does not suffer an implicit assertion that his belief is false. While some readers may find sympathy with such subjective ideas of "truth," the Court has yet to encounter a Free Exercise claim premised on such an idea,[130] and many major world religions are founded on an idea of objective spiritual truth.[131]

V. REBUTTAL

A. No Express Judgment of Religious Beliefs

One might argue that the thesis of this Comment is without support because the Supreme Court has expressly declared that it does not judge the truth of an individual's religious belief when evaluating a Free Exercise claim.[132] But which is more significant here, the ultimate result of a Free Exercise case, or the statements the Justices make about what principles controlled the result? A man may make earnest declarations of his love for his wife, but if he sleeps with other women every night, we are inclined to suspect that his practice is more controlling than his professions otherwise.

However, this is not to suggest that the Court privately articulates definite decisions about religious truth, as though its deliberations in *Reynolds* led the Justices to conclude Mormonism was false. This Comment alleges no bad faith or ill will toward religion on the Court's part, but rather contends that the Court's assertion of religious falsity is implicit, just below the surface. Indeed, because the statement is implicit, many of the Justices may never have been cognizant of it. Few of us realize all the things our actions reveal about our beliefs, but we cannot quarrel with logic. In fact, the Court's direct statements on the constitutional policy[133] of not inquiring into the truth of a religion actually lend greater importance to this Comment's argument, for they disclose a hidden conflict between our lofty legal policy and some rather inconvenient facts—this is a conflict that ought to be resolved.

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[130] That no party argues before the Court that his or her religion is merely subjectively true may indicate the diminished persuasive value of subjectivity and personal opinion.

[131] *See supra* note 31.

[132] *See, e.g.*, Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 449 (1988); United States v. Ballard, 322 U.S. 78, 86 (1944).

[133] *See* Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) (discussing "the constitutional requirement for governmental neutrality"); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 244–45 (1963) (discussing the unity of the no-inquiry and neutrality policies in *Ballard*).

It might then be argued that the Court has at least followed its policy of not making an inquiry per se into the truth of a religion. In other words, assuming the thesis of this Comment is correct, and the Court does make these implicit assertions of falsity, at least it never puts a religion on trial to defend the empirical, rational, or legal merits of its faith.[134] It is true that a court would not put an Islamic cleric on the stand to testify to the Qur'an's divine inspiration, nor would it make factual findings about the Catholic doctrine of *ex cathedra*.[135] But is this entirely a good thing? Which is worse, judging a religion based on its merits as presented to the court, or judging it implicitly without giving it an opportunity to be heard, and then denying that any judgment was ever made? Granted, neither of these alternatives is particularly appealing, but the first is at least self-consistent.

B. Government Regulates Action, but this Says Nothing About Truth of Belief

It could also be argued that though the government may restrict action, it may never restrict individual belief, and thus its denial of an individual's freedom of religious *practice* would not imply that the individual's *beliefs* are false. Indeed, the Supreme Court has enunciated this principle in some capacity: "Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."[136] However, such a distinction will be fatal to the argument here only if its second assumption (if you sincerely believe, then you act)[137] is disproved. We may intellectualize and posit the existence of a world where belief could be meaningful without action, but rare would be the religion that would concur. Even Protestant Christianity, which uniquely emphasizes the doctrine of *sola fide* (faith alone),[138] affirms wholeheartedly the Scripture that "faith, if it has no works, is dead."[139] Not even the Supreme Court itself will permit such a wall of separation—consider its words in *Wisconsin v. Yoder*: "This case, therefore, does not become easier because respondents were convicted for their 'actions' in refusing to send their children to the public high school; in this

[134] It could be argued, however, in such cases as *Dover*, where the court denied the teaching of intelligent design in public schools based on the merits of the theory, that the court has in effect put religion on the stand. Kitzmiller v. Dover Area Sch. Dist., 400 F. Supp. 2d 707 (M.D. Pa. 2005).

[135] *See, e.g.*, *Ballard*, 322 U.S. at 86.

[136] Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940).

[137] *See supra* notes 34–36 and accompanying text.

[138] *See, e.g.*, Westminster Confession of Faith, Chapter XI (1646).

[139] *James* 2:17.

context belief and action cannot be neatly confined in logic-tight compartments."[140] Finally, the government clearly agrees as well, for it expects a belief that is more than mental. It would be unlikely to allow a citizen not to observe federal law simply because the citizen believed that following federal law was a good idea. The state expects obedience and not mere lip service; should not obedience be expected of the state?

But perhaps the action-belief connection may be criticized on the basis of sin—if sin is when we know the law and believe the truth, but we do not act accordingly,[141] the second assumption of this Comment[142] is disproved by the fact of sin, for it is possible to believe something sincerely without acting upon it. Sin, at least as a concept, is something of which we are all aware, and perhaps the government is, like all of us, simply human—that the government does not act on a belief does not necessarily indicate that it does not hold the belief.

The assumption may nevertheless be defended on three principal grounds. The first two are relatively esoteric and philosophical, and thus relegated to the footnotes.[143] The third is of practical im-

[140] Wisconsin v. Yoder, 406 U.S. 205, 220 (1972).

[141] "Whoever knows what is right to do and fails to do it, for him it is sin." *James* 4:17.

[142] If you believe, then you act. *See supra* notes 34–36 and accompanying text.

[143] First, the assumption could be defended as a tautology, and therefore defended circularly. Sin may be an action not in accordance with a stated belief, or with a previously held belief, but in the moment of the sin, the individual shows that he does not really believe what he says he believes—otherwise he would not have done it. If a Catholic genuinely believes that God will damn the adulterer, but commits adultery later, he shows that his belief did not hold firm in the moment of temptation, because no possible reward of adultery is greater than eternal punishment. *See, e.g.*, *Proverbs* 7:27 (saying of the adulteress that "[h]er house is the way to Sheol, going down to the chambers of death"); DANTE ALIGHIERI, THE DIVINE COMEDY 9–10 (Lawrence Grant White trans., Pantheon Books 1948) (1321) (condemning in Canto V of the *Inferno* the lustful to the second circle of hell, though a reader could, in ruminating upon Dante's glorification of Paolo and Francesca, conceivably desire such a punishment more than paradise). Applying this understanding of sin to this argument, perhaps the Court does not *generally* disbelieve in the truth of the religions the practice of which it prohibits, but only disbelieves them in the moment of its decisions. However, it would be strange that such behavior, neither noble nor predictable, should be bound up in the Court's bedrock principle of neutrality.

Second, the assumption may be defended on the ground that sin ought to be counted as inherently irrational. When an individual consciously sins by breaking some moral law, that is, when he does what he knows he ought not do, he engages in a kind of self-contradiction. He simultaneously affirms the authority of the lawgiver, by granting it ought-ness, and denies that lawgiver's authority, showing with his law-breaking action that he believes the authority without power to punish him to the point of deterrence. *See* C.S. LEWIS, MIRACLES 56–58 (HarperCollins 2001) (1947) (offering a discussion of this ought-ness). Consider also the apostle Paul's words in the epistle to the Romans as an example of the irrationality of sin:

portance here: what business does our government have with sinning? This is not asked to suggest that the government should conform itself to a particular notion of right and wrong, that is, to avoid sin in the religious sense (it would thus become a theocracy), but rather that the government should conform itself to what it believes. If the government believes something, it should act accordingly; it should not sin against its own acknowledged truths. If our government is premised on the idea that all men are created equal,[144] then our governmental structure should reflect the premise,[145] and our courts should enforce the principle.[146] In fact, much of legal scholarship (in which grand tradition this Comment hopes to continue) is fundamentally concerned with getting the government to, in effect, *stop sinning*—when an author writes a piece criticizing a decision of the Court or a piece of legislation as unconstitutional or otherwise legally erroneous, the author is in effect saying that the government is acting contrary to its beliefs.[147] Perhaps this Comment may be attacked on the basis that the government is human and does not execute what it says it believes, but so can many other valid works of legal scholarship. It may even be unrealistic to expect that the government will ever stop "sinning," but there is certainly value in working toward that goal.

> I do not understand my own actions. For I do not do what I want, but I do the very thing I hate . . . . For I know that nothing good dwells within me, that is, in my flesh. I can will what is right, but I cannot do it. For I do not do the good I want, but the evil I do not want is what I do. Now if I do what I do not want, it is no longer I that do it, but sin which dwells within me.

Romans 7:15–20.

Here, Paul is consumed by the sub-rational, instinctual force of sin, which compels him to do what he knows he ought not. Thus, to the extent that sin is inherently irrational, it has no place in this argument and need not be accounted for, since this Comment has presumed reason as a fundamental authority and ground of the discussion. This Comment will not quarrel with mere instinct. Further, as applied to the issues here, if we assume the government's "sin" is irrational, we would all readily acknowledge this irrationality ought to be avoided.

[144] *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[145] *See* U.S. CONST. amend XIV.

[146] *See* 42 U.S.C. § 1983 (2000).

[147] *See, e.g.*, Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1425–27 (1987) (arguing the Court's Eleventh Amendment jurisprudence and other decisions are inconsistent with the principle of popular sovereignty inherent in the Constitution); Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1713–30 (2000) (criticizing some aspects of the Court's discretionary jurisdiction); Wayne R. LaFave, *The "Routine Traffic Stop" from Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843 (2004).

Finally, it is simply not meaningful to speak of the protection of the freedom to believe apart from the freedom to act. The freedom to believe is inviolable—while a government may compel an action, it can only *influence* a belief. A government could endorse one religion and condemn another,[148] and a government could even force an individual to recant a belief under penalty of death[149]—but to recant is one thing, and to change one's mind is quite another.[150] Recall the words that Galileo supposedly muttered after he was forced to recant his heliocentric view of the universe: "And yet it moves."[151] We call those who believe but do not act hypocrites, and thus the gracious governmental "freedom" to believe and not to act is little more than the freedom to be a hypocrite.

C. The Court Simply does not Consider Religion when Deciding a Case

One might finally argue that the Court does not imply a religion is false when it denies a Free Exercise claim because the Court simply does not make decisions on the basis of religion at all. Because of Jefferson's famous "wall of separation,"[152] it could be argued, the sacred

[148] England, for example, swung between official Catholicism under Mary I and official Protestantism under Elizabeth I, with both queens punishing dissidents with death. JOHN GUY, TUDOR ENGLAND 226–308 (1988).

[149] For instance, under the reign of Mary I, Thomas Cranmer, Archbishop of Canterbury and author of the Book of Common Prayer, recanted the heresy of which he had been convicted when threatened with being burned at the stake. DIARMAID MACCULLOCH, THOMAS CRANMER: A LIFE 555–605 (1996).

[150] However, Cranmer took back his recantation and was sentenced to death. *Id.* at 603–05. At the stake, he was asked again to recant to save his life, but instead he thrust into the fire the hand that had signed the first recantation. *Id.*

[151] This well-known legend, though it is apocryphal, illustrates the inability of the state (or there, the church) to coerce belief. *See* A. Rupert Hall, *Galileo nel XVIII secolo*, 71 RIVISTA DI FILOSOFIA 83, 375–78 (1979).

[152] *See* Reynolds v. United States, 98 U.S. 145, 164 (1878) (quoting Jefferson's language regarding the "wall of separation" between church and state, and suggesting that this principle inheres in the First Amendment). For an argument supporting a strict application of Jefferson's "wall of separation," see Richard Rorty, *Religion As Conversation-Stopper*, *in* RICHARD RORTY, PHILOSOPHY AND SOCIAL HOPE 168–74 (1999). Rorty contends that religious views ought to be barred from civil discourse as premises for establishing law, for that enterprise ought to be guided by purely secular considerations. *Id.* at 169, 173. Rorty graciously applies this standard to his own atheism, allowing that under his model, neither he nor the religious devotee would be permitted to contend for the philosophical premises supporting their political conclusions on any ground "save the assent we hope they will gain from our audience." *Id.* at 173. While this pragmatic approach may sometimes produce political consensus, it has no tendency to produce truth or good, because, as David Luban has noted, the goodness of all pragmatic aims depends upon the correctness of the premises supporting them. *See* David Luban, *What's Pragmatic about Legal Pragmatism?*, 18

and the secular are kept apart such that the purely secular political decisions of the Court do not impinge upon the religious convictions of the individual. The Court knows no dogma—it believes no religion; it disbelieves no religion.[153]

However, an appeal to the separation of church and state here assumes that because the two concepts can be kept separate theoretically, they can be separated in practice. How do we determine the province of the state and the province of religion? What makes something a religious issue? But for cases such as *Smith*, most of us would have assumed that the degree to which a government chooses to restrict drug use is a secular matter. However, because Smith and Black asserted that their use of peyote was a religious practice, what had first seemed to be exclusively secular became a disputed religious issue.[154] The same could be said of *Lyng*, for if anything seems completely secular, it is the building of roads. Yet because Native Americans asserted that the proposed site for the road was essential to their religious practice, the construction of a highway became a religious issue.[155] The Court has spoken of the "purely secular considerations" of a restrictive law in analyzing a Free Exercise claim,[156] but how can something about which a claimant has ultimate religious views be called "purely secular?" Does the Court then define what is secular and what is sacred?[157] That, of all things, would hardly be neutral.

It might be argued then that the Court simply does not care whether a religion is true when it decides a case. This is probably correct, because the Court goes out of its way not to consider the truth of a religion when adjudicating a Free Exercise case,[158] but that does nothing to obviate the implicit statement resulting from the

CARDOZO L. REV. 43, 51 (1996); *see also* MICHAEL J. PERRY, UNDER GOD? RELIGIOUS FAITH AND LIBERAL DEMOCRACY 44 (2003) (criticizing Rorty and arguing that the problem is not that fundamental premises are discussed in public debate, but the manner in which these premises, sacred or secular, are introduced).

[153] United States v. Ballard, 322 U.S. 78, 86 (1944) (quoting Watson v. Jones, 80 U.S. (13 Wall.) 679, 728 (1872)).

[154] *See* Employment Div. v. Smith, 494 U.S. 872, 874 (1990); *supra* Part IV.C.

[155] *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); *supra* Part IV.C.

[156] Wisconsin v. Yoder, 406 U.S. 205, 215 (1972). "A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations . . . ." *Id.*

[157] The Court does, at least, define what religion is for some statutory purposes. *See* United States v. Seeger, 380 U.S. 163, 176 (1965) (defining the "religious training and belief" exemption in the Universal Military Training and Service Act as "[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption . . . .").

[158] *See Ballard*, 322 U.S. at 86.

Court's judgment and decree. A man may say he does not care whether Islam is true, but we can tell he does not think the religion is true if he does not pray five times daily toward Mecca. The principle goes the same for the Court; indeed, it may not remotely care whether any of the religious doctrines that appear before it are true, but its apathy can communicate just as much as its concern.

There is an inherent overlap of church and state;[159] it is the overlap of reality. Religions have stated authoritative positions on almost every aspect of our lives,[160] and the government regulates almost every area of our lives.[161] Religions make commands of all mankind on the basis of purported divine authority, and the government makes laws that apply to all citizens on the basis of its capability of enforcement. Because of the concurrent jurisdiction of the sacred and the secular,[162] there will always be an abundance of conflict between church and state. Such conflict, as when the government prohibits polygamy and Mormonism promotes it,[163] must be resolved. A fundamental contradiction between the commands of the state and the commands of religion may be resolved either by the government altering its laws

[159] Consider the Court's words in *Lynch v. Donnelly*: "In every Establishment Clause case, we must reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that, as the Court has so often noted, *total separation of the two is not possible*." 465 U.S. 668, 672 (1984) (emphasis added) (holding that display of a crèche during the holiday season did not violate the Establishment Clause because in context it was not an endorsement of religion).

[160] Such as tithes, the afterlife, and gay marriage.

[161] Such as income tax, estate tax, and marriage licenses.

[162] Consider these remarks of Rousseau:

> While things were in this situation, Jesus came to establish a spiritual kingdom on earth, which, by separating the theological from the political system, made the State no longer one, and caused those intestine dissensions which have never ceased to agitate the Christian peoples. This novel idea of a kingdom of the other world could never have entered the heads of pagans, and they always considered the Christians as really rebels, who, with a hypocritical air of entire submission, were only seeking the opportunity of rendering themselves independent and masters by artfully usurping the authority which in their weakness they pretended to respect. This was the cause of the Christians being persecuted. . . . However, as there had always been a prince and civil laws, the consequence resulting from this double power has been a perpetual conflict for jurisdiction which has made any system of good polity impossible in Christian States; and men could never certainly inform themselves whether it was the master or the priest they were bound to obey.

JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT 117 (Charles Frankel ed. & trans., Hafner Publishing 1957) (1762).

[163] *See* Reynolds v. United States, 98 U.S. 145 (1878).

to grant permission (where the government admits it was wrong), or by the continued restriction of a religious practice, in which case the government says that the religion is wrong. Thus, pointing to the church and state distinction cannot answer the question. Should the principles of logic be suspended by this "wall of separation?"

Moreover, because church and state strive to control the same facets and arenas of life, government can hardly be neutral toward religion. When a court adjudicates a Free Exercise case, it is issuing a decision concerning the extent of the authority of another claimed sovereign, namely, the individual's religion. Where two sovereigns claim rights to the same territory, we would not trust the tribunal of one sovereign to be a neutral arbiter of the dispute; it is for this reason that the Constitution commits disputes between states to the original jurisdiction of the Supreme Court—a superior sovereign.[164] Similarly, because the State seeks to govern much of the same territory as Religion, it cannot pretend to be neutral when adjudicating a conflict between a religious adherent and the government, since it has a vested interest in the matter[165] (and unfortunately, there is no superior sovereign to whom this dispute may be taken). This is not to suggest that the government should recuse itself from deciding such issues, for if the courts would not adjudicate any matters that presented religious questions, the courts could not adjudicate much of anything. A less-than-impartial decision may be better than no decision at all. But if the courts must adjudicate, they ought to do so without pretending to such a "lofty neutrality."[166]

VI. IMPLICATIONS AND PRESCRIPTIONS

The implicit judgment of individual religious beliefs described here is essentially inevitable.[167] The only way to avoid this judgment

[164] U.S. CONST. art. III, § 2; *see, e.g.*, New Jersey v. New York, 526 U.S. 589 (1999) (adjudicating the question of whether certain portions of Ellis Island belonged to New York or to New Jersey, and finding for New Jersey).

[165] One might ask how this situation is any different than an everyday criminal trial, where the government is both a party (the prosecution) and at the same time an adjudicator (the judge), yet is expected to be neutral. The matters addressed here are distinct because the very heart of the issue being addressed in a religion case is the state's sovereignty—not necessarily whether the state has the actual power to do as it wishes, but whether, as the religious adherent claims, there exists a higher Sovereign to which the state must answer. In a criminal prosecution, this fundamental philosophical conflict is not implicated; it is merely a question of the relationship of the accused to the laws above him.

[166] *See* Everson v. Bd. of Educ., 330 U.S. 1, 23–24 (1947) (Jackson, J., dissenting).

[167] This phenomenon is probably not unique to the United States government, but may be inherent in any non-theocracy, that is, in any state where the gods and

would be to grant every Free Exercise claim, since no truth implications result from permitting the religious practice to continue.[168] However, the Court cannot decide every conflict in favor of religion—if it did, the results would be anarchically disastrous. Consider the Court's words in *Reynolds*: "Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?"[169] The Court must decide certain cases in favor of government restriction, relying on governmental policy against the specific religious practice. As we have seen, it has decided against polygamy, against racial discrimination, in favor of roads, and against the use of controlled substances. But when the Court decides these cases, it cannot do so and pretend that it has implied nothing about the truth of the religious belief. We are comfortable that the Court would deny a Free Exercise claim for the right to human sacrifice, but our comfort cannot come without an understanding of the implicit judgment resulting from this denial. None of this is to suggest that the Court should not apply the principles of the Constitution in the face of a contrary religious belief, or that the principles of the Constitution are unwise in such circumstances—nevertheless, the Constitution is not without its consequences, and those consequences should be acknowledged.

Because the Court makes these implicit assertions, it cannot be said to be neutral toward religion. The Court's stated policy of not judging the truth of religions is bound up in the principle of neutrality.[170] Government can hardly be said to act neutrally between itself and a religion, or between religions generally, when it has implicitly judged some of them false.

"Judgmental neutrality" is an accurate, if unfortunately ironic, way of describing the policy the Court practices now. The Court should therefore modify, clarify, or abandon the neutrality principle. Such action is imperative in light of the fact that the Court has declared that neutrality is a controlling principle in Religion Clause

the government have concurrent jurisdiction. *See supra* note 162. Where the laws of the church and the laws of the state conflict, one or the other must bend. If it is the church that bends, then the state, by asserting its own sovereignty, has denied the authority of the church. Since one of the church's fundamental claims *is* its authority (that God, however defined, is the omnipotent Creator), the state has denied the truth of the religion along with its authority.

[168] *See supra* notes 120–23 and accompanying text.

[169] Reynolds v. United States, 98 U.S. 145, 166 (1878).

[170] *See supra* Part II.

cases,[171] and given the Court's declarations of how strict and serious is the principle of neutrality.[172] It does not make sense that an unworkable, even nonsensical principle should govern such important matters.

Because the Court frequently decides close cases by turning to the neutrality principle,[173] much is at stake on the idea of neutrality. But if the principle is not workable, and if judgments against religion must inevitably be made, the Court should not retain the illusion that neutrality can guide the resolution of important cases. Perhaps what is called the principle of neutrality can be clarified, such that the Court will express what it is *actually* doing when it decides a Free Exercise case, rather than what it would like to think it is doing. If not clarified, the neutrality principle should be abandoned and replaced with a standard more meaningful and workable.

Further, because the Court implicitly judges some beliefs false, there must be that which the Court thinks is *true*.[174] The Court believes something; it believes in the validity of governmental policy—perhaps this is its Established religion?[175] For instance, when the

[171] *See, e.g.*, Walz v. Tax Comm'r of New York, 397 U.S. 664, 676 (1970) (noting the policy of neutrality); Sherbert v. Verner, 374 U.S. 398, 409 (1963) (stating that government must be neutral in the face of religious differences); Zorach v. Clauson, 343 U.S. 306, 313–14 (1952) (holding that government must be denominationally neutral).

[172] In *School District of Abington Township v. Schempp*, the Court held that "'[t]he government is neutral, and, while protecting all, it prefers none, and it *disparages* none.'" 374 U.S. 203, 215 (1963). The Court further held that "[i]n the relationship between man and religion, the State is firmly committed to a position of neutrality." *Id.* at 226. The Court has also held that "[a] central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion." Rosenberger v. Univ. of Va., 515 U.S. 819, 839 (1995).

[173] *See supra* Part II.

[174] The nature of government belief, including its epistemology, faith claims, and the extent to which a government agency reflects or creates government belief, would be an interesting topic for another paper.

[175] There is evidence of this even in one of the earliest state-court Free Exercise cases, where a Jewish man was required to testify on the Sabbath. Philips v. Gratz, 2 Pen. & W. 412, 416 (Pa. 1831). The court stated that "[r]ightly considered, there are no duties half so sacred as those which the citizen owes to the laws." *Id.* On a related note, Michael J. Perry persuasively argues that for governmental policy to be based on religious beliefs is neither a violation of the Establishment Clause, nor is it illegitimate in a liberal democracy. PERRY, *supra* note 152, at 20–52.

> [I]n a liberal democracy, it is altogether fitting—it is altogether "liberal"—for religious believers to make political choices, including *coercive* choices—choices to ban or require conduct—on the ground of what is, for them, a religious claim: that each and every person is sacred, that all persons are subjects of justice.

Id. at 51.

Court implicitly asserted in *Bob Jones University v. United States*[176] that Almighty God did not command discriminatory practices, it was because the university's practices contradicted federal law and the policy on which that law stood. Thus the Court knew that governmental policy against discrimination was the truth upon which it made its decisions, and the Court was therefore forced to restrict the religious practice that contradicted this truth. The Court did not merely restrict the practice; it implicitly declared that the practice was not divine.

For the most part, we do not know what the Court affirmatively believes, because it rarely offers direct statements of its beliefs.[177] However, we can at least identify several specific doctrines that the Court does *not* believe. The Court does not believe that God commands polygamy,[178] that God commands racial discrimination,[179] that Native American worship is necessary for the salvation of mankind,[180] nor, in dicta, does the Court believe that any worthy god commands human sacrifice.[181] In fact, that the Court does maintain these beliefs is one of the reasons it cannot be said to be neutral. While it may not hold a specific opinion on the Noble Eightfold Path or the doctrine of transubstantiation, it does believe in some fundamental truth—however amorphous that greatest-common-denominator truth may be[182]—that ultimately supports governmental policy.

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[176] 461 U.S. 574 (1983).

[177] For a rare exception to this generality, see the words of Justice Douglas in *Zorach v. Clauson*: "We are a religious people whose institutions presuppose a Supreme Being." 343 U.S. at 313. Justice Douglas has inferred the governmental belief in a Deity from the nature of governmental policy. *See id.*

[178] *See generally* Reynolds v. United States, 98 U.S. 145 (1878).

[179] *See generally* Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

[180] *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 442 (1988).

[181] *See Reynolds*, 98 U.S. at 166 (noting that it would not be seriously contended that the state was powerless to intervene if a religion commanded human sacrifice). *But see Genesis* 22:2 ("[God] said, 'Take your son, your only son Isaac, whom you love, and go to the land of Mori'ah, and offer him there as a burnt offering upon one of the mountains of which I shall tell you.'"). Perhaps if the Judeo-Christian God commanded human sacrifice in the present (even if He were to intervene at the last instant and stop the act), the Court would have a greater problem with this particular Deity than it has expressed to date.

[182] While legal pragmatism—a results-oriented, anti-formalist legal philosophy—has been advocated by such jurists as Richard Posner as a means of reaching societally amenable legal results without standing on any particular philosophical assumption, *see* Richard Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 5, 10 (1996), David Luban wisely observes that none of these results are meaningful, or in any sense correct, absent knowledge that the philosophical assumptions undergirding them are true:

> [I]n principle philosophical questions have right and wrong answers,

Above all, this Comment does not suggest that the implicit judgments of the Court are inherently good or inherently bad. The only normative claim made here is that the Court should be consistent. If these implicit judgments are inevitable in our legal system, then we should not consider the fact of judgment to be what is good or bad, but rather the result of the judgment. We may ask whether the case was rightly decided on the law, and whether the decision was supported by sound policy, but we should not praise or condemn a case merely because it happened to judge another belief system false. As with many matters, this comes down to a deep question of policy, grounded in our fundamental moral and social values. What do we as a society think of polygamy? What do we think of racial discrimination? What do we think of sacrificing our roads to preserve Native American religion? None of these are posed as rhetorical questions—each requires an answer founded on some kind of substantive belief in value, and none can be answered by appealing to neutrality.

Perhaps many readers are disturbed by the idea of the Supreme Court judging religions false. In our age of tolerance and acceptance, where we fear the perceived ills of all religious fundamentalism, we are not fond of our government making absolute pronouncements, even under its breath, about any religious belief. This is the sort of thing that starts wars, we think, and it just does not seem very nice. However, this Comment submits that each of us is far more comfortable with the idea of a court judging beliefs than we would readily either expect or admit. Consider, in the context of criminal law, the deific decree defense.[183] This defense is used when a defendant does something horrifically atrocious, such as bludgeoning his wife and son, shooting a police officer, or repeatedly stabbing his stepmother, and then says that God commanded the action.[184]

> and legal decisions that presuppose philosophical positions can be criticized for getting them wrong. On this line of thinking, we find a straightforward and relatively uncontroversial way in which legal pragmatism cannot be freestanding. Legal decisions will turn on right answers to philosophical questions in the same way that they turn on right answers to factual questions. And a judge who tries to "do" law while ignoring the relevant questions of first philosophy can be accused of intellectual and professional irresponsibility.

Luban, *supra* note 152, at 51. For objections to Luban's argument, see Richard Rorty, *Pragmatism and Law: A Response to David Luban*, *in* RORTY, *supra* note 152, at 104.

[183] For a brief synopsis of the deific decree defense, see *People v. Serravo*, 823 P.2d 128, 129–30 (Colo. 1992).

[184] For cases where the deific decree defense was presented, see *Serravo*, 823 P.2d at 130–31 (defendant not guilty by reason of insanity for stabbing his wife "to sever the marriage bond" according to God's command); *Laney v. State*, 486 So. 2d 1242

Where the belief is sincerely held, it may operate as a valid defense to the crime.[185] But we do not call it the Free Exercise defense—we call it the insanity defense.[186] Essentially, the defendant's religious belief is so grossly divergent from the society's morals that it is entitled to no respect. At best it entitles its holder to medical or psychological treatment rather than normal incarceration. Thank God we are willing so to judge.

(Miss. 1986) (defendant shot police officers because God commanded the act); *State v. Blair*, 732 A.2d 448 (N.H. 1999) (husband bludgeoned his wife and son with a hammer after God revealed he would be cast into the lake of fire if he refused to do so); *State v. Lafferty*, 20 P.3d 342, 351–53 (Utah 2001) (Mormon fundamentalist killed his sister-in-law and her infant child pursuant to divine revelation); *State v. Cameron*, 674 P.2d 650 (Wash. 1983) (en banc) (defendant stabbed his stepmother repeatedly upon God's command to stop the "evil spirit" within her).

[185] *See Serravo*, 823 P.2d at 129–30.

[186] *Id.*