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ACCOMMODATING "RELIGION"

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There is reason to be concerned that bias might operate in judicial efforts to define religion.[1]

INTRODUCTION

"[R]eligion is a highly complex concept."[2] It is both a member of the everyday English lexicon and a constitutional term of art.

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1. FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE 116 (1995).

2. KENT GREENAWALT, RELIGION AND THE CONSTITUTION: VOLUME 1: FREE EXERCISE AND FAIRNESS 139 (2006); *see also* Jonathan Z. Smith, *God Save This Honorable Court: Religion and Civic Discourse*, *in* JONATHAN Z. SMITH, RELATING

Recently, several commentators have suggested that "religion," as the term is understood and applied by courts, primarily refers to beliefs or systems of beliefs.[3] This conventional understanding privileges some religions at the expense of others.[4] Specifically, the notion that religion is chiefly a matter of adherence to a set of propositions reflects a Christian and largely Protestant worldview; this understanding measures whether something is a religion or not by the extent to which it resembles Protestant Christianity.[5] How should the law account for this imbalance, where the very constitutional foundation of religious liberty—the idea of religion itself—is not a level playing field? As Lori Beaman put it, "If the very notion of religion is imbued with a Christian definitional bias, how can law interpret religious claims outside that framework?"[6]

The subject of how (or whether) "religion" ought to be defined for legal purposes, or even how it should be understood as a general matter, is well trodden.[7] At this point, there is little to be gained by

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RELIGION: ESSAYS IN THE STUDY OF RELIGION 375-90, 375 (2004) ("[T]he study of religion is the only humanistic field in the American academy whose subject matter is explicitly governed by the United States Constitution.").

3. *See* Lourdes Peroni, *Deconstructing 'Legal' Religion in Strasbourg*, 3 OX. J.L. & REL. 235 (2014) (addressing European law); Aaron R. Petty, *The Concept of "Religion" in the Supreme Court of Israel*, 26 YALE J.L. & HUMAN. 211 (2014) (hereinafter Petty, *The Concept of "Religion"*); Aaron R. Petty, *"Faith, However Defined": Reassessing JFS and the Judicial Conception of "Religion,"* 6 ELON L. REV. 117 (2014) (hereinafter Petty, *"Faith, However Defined"*); *see also* BENSON SALER, CONCEPTUALIZING RELIGION: IMMANENT ANTHROPOLOGISTS, TRANSCENDENT NATIVES, AND UNBOUNDED CATEGORIES 22 (1993) ("Both private and public agencies in the United States have tended to make theistic 'belief' central to their conceptions of religion.").

4. Indeed, the danger of bias in Religion Clause jurisprudence is a very real one given that "[n]o Jewish, Muslim or Native American plaintiff has ever prevailed on a free exercise claim before the Supreme Court." GEDICKS, *supra* note 1.

5. Petty, *The Concept of "Religion," supra* note 3; Petty, *"Faith, However Defined," supra* note 3; Linda Woodhead, *Five Concepts of Religion*, 21 INT'L R. OF SOC. 121, 123 (2011) ("[T]he conception of religion as a matter of belief is a distinctly modern one with a bias towards modern Christian, especially Protestant, forms of religion.").

6. Lori G. Beaman, *Defining Religion: The Promise and the Peril of Legal Interpretation*, *in* LAW AND RELIGIOUS PLURALISM IN CANADA 192-216, 196 (Richard Moon ed., 2008).

7. *See, e.g.*, GREENAWALT, *supra* note 2; Barbra Barnett, *Twentieth Century Approaches to Defining Religion: Clifford Geertz and the First Amendment*, 7 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 93 (2007); Beaman, *supra* note 6; Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579 (1982); James M. Donovan, *God is as God Does: Law, Anthropology, and the Definition of "Religion,"* 6 SETON HALL CONST. L. J. 23 (1995); George C. Freeman, III, *The*

suggesting yet another definition or by proposing a novel comparative approach.[8] Several commentators have convincingly argued that true religious freedom in the United States is "impossible," that the religion clauses are hopelessly in tension with each other, that free exercise cannot be protected in the absence of cultural (and hence theological) understandings about religion, that legal pronouncements on religious freedom entail choosing between competing background assumptions about what religion is, and that definitions of religion inherently limit religious freedom by saying what is and what is not *really* religion.[9]

For better or worse, the religion clauses are a part of American jurisprudential legacy.[10] We must be able to address the religion clauses in some measure, if for no other reason than "[b]ecause the constitution says so."[11] To address the religion clauses, we must

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Misguided Search for the Constitutional Definition of "Religion," 71 GEO. L.J. 1519 (1983); Jeffrey Omar Usman, *Defining Religion: The Struggle to Define Religion Under the First Amendment and the Contributions and Insights of Other Disciplines of Study Including Theology, Psychology, Sociology, the Arts, and Anthropology*, 83 N.D. L. REV. 123 (2007); Lael Daniel Weinberger, *Religion Undefined: Competing Frameworks for Understanding "Religion" in the Establishment Clause*, 86 U. DET. MERCY L. REV. 735 (2009).

8. *See* WILFRED CANTWELL SMITH, THE MEANING AND END OF RELIGION 18 (1962); W. Richard Comstock, *Toward Open Definitions of Religion*, 52 J. AM. ACAD. OF RELIGION 499, 499 (1984) ("There is no want of proposals as to how religion might be defined."); Brian C. Wilson, *From the Lexical to the Polythetic: A Brief History of the Definition of Religion*, *in* WHAT IS RELIGION?: ORIGINS, DEFINITIONS, AND EXPLANATIONS 141-62, 141 (Thomas A. Idinopulos & Brian C. Wilson, eds., 1998) ("During the last hundred years or so, dozens, if not hundreds of proposals have been made, each claiming to solve the definitional problem in a new and unique way.").

9. *See* GREENAWALT, *supra* note 2, at 125 ("Any judicial test of what counts as 'religious' is worrisome; it is intrinsically difficult to apply and creates a danger that judges will favor the familiar over the unorthodox."); Ino Augsberg, *Taking Religion Seriously: On the Legal Relevance of Religious Self-Concepts*, 1 J. OF LAW, RELIGION & STATE 291, 292 (2012) ("[I]n order to prevent state authorities . . . from interfering in religious affairs, the law at the same time must and must not determine what religion or religiously motivated forms of behaviour are."); Arif A. Jamal & Farid Panjwani, *Having Faith in Our Schools: Struggling with Definitions of Religion*, *in* LAW, RELIGIOUS FREEDOMS AND EDUCATION IN EUROPE, 69-86, 69 (Myriam Hunter-Henin ed., 2011) ("[W]hen courts are asked to consider religious definitions . . . , there emerges a fundamental, and perhaps irreconcilable, tension between freedom of religion or religious expression, on the one hand, and the need for adjudication about religion or religious expression on the other.").

10. Benson Saler, *Cultural Anthropology and the Definition of Religion*, *in* THE NOTION OF "RELIGION" IN COMPARATIVE RESEARCH: SELECTED PROCEEDINGS OF THE XVI IAHR CONGRESS 831-36, 831 (Ugo Bianchi ed., 1994).

11. Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEM. LEGAL ISSUES

engage with the term "religion." In this Article, I hope to illuminate some of the problems in defining religion for legal purposes by taking a step back and examining problems with definitions of religion in general. I aim to begin a discussion of how the word "religion" in the First Amendment is best understood, given the fact that "religion" is not a neutral category.[12]

At the very least, a critical review of our constitutional terms of art seems overdue:

> The anxious obsessiveness of scholars of religion over the appropriate referent of the word 'religion' can be of service to a group—American lawyers and judges—which has spent a lot of words on the subject but which, in general, has not had the inclination or training to analyze carefully the discourse about religion that they employ.[13]

Drawing on definitions attempted in the field of religious studies and other disciplines, I ask whether religion should be defined for legal purposes. If so, how? And if not, what alternatives are available?[14]

In Part I, I briefly review the concept of religion with particular reference to the common understanding of religion as belief. I note

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313, 314 (1996); *see also* W. Cole Durham, Jr. & Elizabeth A. Sewell, *Definition of Religion*, *in* RELIGIOUS ORGANIZATIONS IN THE UNITED STATES: A STUDY OF IDENTITY, LIBERTY, AND THE LAW 3-83, 5 (James A. Serritella, et al., eds. 2006) ("[T]he power to define is the power to confer differential dignity and legitimacy."); GREENAWALT, *supra* note 2, at 125 ("A test of what counts as religious is nevertheless unavoidable in certain cases."); JAMES BOYD WHITE, FROM EXPECTATION TO EXPERIENCE 124 (1999) ("It is not possible for the law simply to avoid the use of the word, for it appears in the First Amendment, which is the ruling text in the field, and also, in one form or another, in important statutes . . . . ").

12. I am not the first to ask these antecedent questions, but there are few such studies in the legal field. *See, e.g.*, Freeman, *supra* note 7, at 1520 ("Surprisingly, no court or commentator has yet addressed the logically prior question: Can 'religion' be defined?").

13. Winnifred Fallers Sullivan, *Competing Theories of Religion and Law in the Supreme Court of the United States: An Hasidic Case*, 43 NUMEN 184, 185 (1996); *see also* ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY 43 (2013) ("[T]he vagueness of the legal understanding of 'religion' is troubling. It is surprisingly uncertain what is the object of all this protection.").

14. STEVEN D. SMITH, FOREORDAINED FAILURE, at vii (1995) ("Contemporary legal scholarship . . . is pervasively normative; its analysis is typically oriented toward, and culminates in, some sort of prescription for the proper resolution . . . ."); *see also id.* at 5 ("It may be that the source of our present frustrations in the area of religious freedom is not that judges and scholars have given careless answers, but rather that that they have asked wrong questions.").

that using belief as a criterion for identifying religion has several shortcomings, both internally and externally. Part II discusses various types of definitions and evaluates their utility in defining religion. Part II.A covers "essentialist" definitions, including several prominent examples, while Part II.B introduces "multifactor" strategies including polythetic classification/numerical phenetics, family-resemblance theory, prototype theory, and other open-ended approaches. Part III turns to application of definitions of religion in legal contexts. Part III.A traces the development of the Supreme Court's struggle with the definition of religion in modern cases. Part III.B addresses some of the leading academic thought on how to deal with the definitional quandary. In light of the many drawbacks and difficulties faced by all of the various approaches, Part IV suggests potential avenues for avoiding the issue, at least in part. Part IV.A discusses the largely abandoned theory of understanding "religion" differently in the Free Exercise Clause and the Establishment Clause. Part IV.B applies decisional sequencing to suggest that in Free Exercise cases, where the religious status of the claimant is in doubt, judges address whether the Free Speech Clause might resolve the issue without reaching the question of "religion." Finally, the last section offers a brief conclusion.

I. THE CONCEPT OF RELIGION: BEYOND BELIEF

"'Religion' is a heavily, perhaps even over, theorized term."[15] It is commonly assumed "to be a ubiquitous human phenomenon."[16] We are told that: "In every human community on earth today, there exists something that we, as sophisticated observers, may term religion, or a religion."[17] Further, some have suggested that scholars of religion have largely been derelict in directing critical attention to these assumptions.[18]

One important example is "[t]he widely shared assumption . . . that the larger category into which religion is, or is not, to be subsumed, is that of *belief*."[19] "On this account, being religious has to

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15. Michael L. Satlow, *Defining Judaism: Accounting for "Religions" in the Study of Religion*, 74 J. OF THE AM. ACAD. OF RELIGION 837, 837 (2006).

16. *See* BRENT NONGBRI, BEFORE RELIGION: A HISTORY OF A MODERN CONCEPT 1-2 (2013); Jonathan Z. Smith, *Religion, Religions, Religious, in* CRITICAL TERMS FOR RELIGIOUS STUDIES 269-84, 269 (Mark C. Taylor ed., 1998).

17. SMITH, *supra* note 8, at 18.

18. TOMOKO MASUZAWA, THE INVENTION OF WORLD RELIGIONS 6-7, n.9 (2005) (noting several exceptions that "highlight the overwhelming obtuseness of the subject matter all the more").

19. Nomi Maya Stolzenberg, *Theses on Secularism*, 47 SAN DIEGO L. REV. 1041,

do with believing certain things, where that amounts to subscribing to certain propositions and accepting certain doctrines."[20] And although "propositional beliefs typically play a significant role" in many religions,[21] this assumption has influenced how scholars have approached fundamental questions about what religion is and how it works. Even "many anthropologists tend to think of religion largely in terms of certain sorts of 'beliefs.'"[22] Individuals outside of the social sciences, "[t]o the extent that they may voice a definition at all, . . . are likely to emphasize belief—'belief in,' traditionally, a 'Supreme Being' or a 'God' or 'Gods . . . .'"[23] Many legal professionals are among them:

> Legal accounts of religion often take a similarly belief-based view of religion, as in the common tendency in the USA to define religion (broadly) in terms of "sincerely-held religious, moral, or ethical beliefs," and (narrowly) as beliefs asserted in an "authoritative sacred text" and "classic formulations of doctrine and practice."[24]

James Boyd White notes that "the view of religion as propositional is not eccentric."[25] He explains that:

> It is supported by at least two tendencies in our culture. One is the Christian tradition, which has focused so much attention on the Creed. . . . The other is the contemporary secular assumption . . . that real thought takes the form of

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1046 (2010).

20. Woodhead, *supra* note 5, at 123.

21. Victoria S. Harrison, *The Pragmatics of Defining Religion in a Multi-Cultural World*, 59 INT'L J. FOR PHIL. OF RELIGION 133, 134 (2006).

22. Benson Saler, *Religio and the Definition of Religion*, 2 CULTURAL ANTHROPOLOGY 395, 395 (1987); *see also* MANUEL A. VASQUEZ, MORE THAN BELIEF: A MATERIALIST THEORY OF RELIGION 1 (2011) ("Up until very recently, our discipline has taken for granted the view that religion is primarily 'private and interior, not shamelessly public; mystical, not ritualistic; intellectually consistent and reasonable; not ambivalent and contradictory.'").

23. SALER, *supra* note 3, at 21-22.

24. Woodhead, *supra* note 5, at 123; *see also* T. Jeremy Gunn, *The Complexity of Religion and The "Definition" of Religion in International Law*, 16 HARV. HUM. RTS. J. 189, 189, 203-04 (2003). *But see* Frederick Ferré, *The Definition of Religion*, 38 J. AM. ACAD. Religion 3, 9 (1970) ("[T]he public and the Congress (more so, fortunately, than the higher judicial benches of government) tend still to define religion in terms of some form of belief . . . .").

25. WHITE, *supra* note 11, at 132.

> propositions, the utterance of assertions about the way the world is.[26]

Defining religion in terms of beliefs is not an especially "ancient tradition."[27] Rather, "the conception of religion as a matter of belief is a distinctly modern one with a bias toward modern Christian, especially Protestant, forms of religion."[28] "The most obvious feature of the cognitive conception of religion is its inward nature, the fact that it resides within the recesses of the individual human mind."[29] This feature, when applied as a defining characteristic, is also immensely problematic.

To "focus on individual beliefs is not the only way to understand religion, faith or religious freedom."[30] Perhaps the most common objection is that "defining religion in terms of belief that has a particular kind of object, such as God, entails that certain belief systems which are routinely characterized as religious—Theravada Buddhism, for example—would have to be classed as non-religious."[31] In more general terms, "the cognitive model of religion as conscience" excludes or distorts non-creedal, non-cognitivist views.[32] For example, "[r]eligious communities with tightly formed

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26. *Id.*

27. Saler, *supra* note 22, at 395.

28. Woodhead, *supra* note 5, at 123. *See also* Christian Smith, et al., *Roundtable on the Sociology of Religion: Twenty-three Theses on the Status of Religion in American Sociology—A Mellon Working-Group Reflection*, 81 J. AM. ACAD. RELIGION 903, 922 (2013) ("In American sociology, we can easily recognize the legacy of certain kinds of Protestant theology, whose heavily creedal and voluntaristic natures, along with their relatively narrow, privatized accounts of divine involvement in history and life, have defined the way most Americans understand religion."); Nelson Tebbe, *Nonbelievers*, 97 VA. L. REV. 1111, 1133 (2011) (noting an "implicit orientation toward Protestant culture" marked by "individual belief or private inwardness"); Harrison, *supra* note 21, at 134 ("[S]uch definitions would seem to be particularly suited to Protestant forms of Christianity, which do tend to portray religion as essentially the affirmation of a set of beliefs.").

29. Stolzenberg, *supra* note 19, at 1046.

30. Winnifred Fallers Sullivan, *Judging Religion*, 81 MARQ. L. REV. 441, 449 (1998).

31. Harrison, *supra* note 21, at 134; *see also* WHITE, *supra* note 11, at 138 ("[T]he assumption that religion invokes belief in a Supreme Being who issues commands, enforced by sanctions, perhaps eternal ones, corresponds with only some kinds of religious experience. There are religious people who have no belief in a Supreme Being at all—Buddhists and some Quakers, for example, not to mention individual members of churches that have an official belief the person does not share.").

32. Stolzenberg, *supra* note 19, at 1045. *See also* Woodhead, *supra* note 5, at 124 ("Above all, it seems to be bound up with a scientism and empiricism which

authority and creeds may place a lower valence on individual conscience and belief."[33] But even with respect to creedal religions, belief is a difficult criterion to employ.

A. Belief as an Internally Problematic Criterion

Belief is a troublesome yardstick to measure religion against because belief itself is an amorphous concept. "[T]he nature and boundaries of belief are harder to trace,"[34] and arguments persist over whether it is "a mental state, act, or event, or a disposition to act or feel in certain ways under certain conditions, or perhaps something else."[35] Benson Saler states: "Many anthropologists employ the term belief with apparent abandon. A small number, however, wrestle explicitly with problems attendant on using that word."[36]

Moreover, belief alone is rarely the sum total of religious identity, and other aspects of one's religiousness may be antagonistic to professed beliefs. According to Mark Chaves, "[a]ttitudes and behavior correlate only weakly, and collections of apparently related ideas and practices rarely cohere into logically unified, mutually reinforcing, seamless webs."[37] Instead, "people's religious ideas and practices generally are fragmented, compartmentalized, loosely connected, unexamined, and context dependent."[38] So the assumption that belief can function as a proxy for all indicia of religious affiliation or adherence does not hold. What one believes and what one does are not necessarily aligned.

From the perspective of the faithful, treating religion as essentially propositional faith is incomplete, if not outright false, because it treats religion as though it was composed of a collection of facts, subject to verification.[39] This places "religion on the same

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assumes that all knowledge is primarily a matter of (testable) propositional belief, and with a shift of attention from the oral and practiced to the literate and encoded.").

33. Sullivan, supra note 30, at 449.

34. WHITE, *supra* note 11, at 135.

35. SALER, *supra* note 3, at 91.

36. *Id.*

37. Mark Chaves, *Rain Dances in the Dry Season: Overcoming the Religious Congruence Fallacy*, 49 J. FOR SCI. STUD. OF RELIGION 1, 2 (2010); *see also* WHITE, *supra* note 11, at 135-36 (suggesting that religion as practiced is far more nuanced and fluid than when limited to a belief/nonbelief dichotomy).

38. Chaves, *supra* note 37, at 2.

39. WHITE, *supra* note 11, at 132. *See also* Will Durant, *Freedom of Worship*, THE SATURDAY EVENING POST, Feb. 27, 1943, at 12 ("religion, like music, lives in a

plane of human knowledge."[40] It reifies religion, rather than treating it as lived experience.[41]

Finally, belief may not be as important to people's religious commitments as it appears from official statements of doctrine. People engage in religious activities for a variety of reasons, not all having to do with what they believe. "Many and perhaps most people engage in religious practice out of habit; adherence to custom; a need to cope with misfortune, injustice, temptation, and guilt; curiosity about religious truth; a desire to feel connected to God; or happy religious enthusiasm . . . ."[42] What religion means to particular individuals may be quite different from the creeds they profess.[43] In short, belief is neither coterminous with, nor necessarily representative of, "religion" generally.

B. Belief as an Externally Biased Category

Even assuming belief could be used as shorthand for religion, it would face insurmountable problems as applied to many "religions." As I have previously observed,[44] "we cannot study an ancient category called religion"[45] because "[i]t is only western modernity that knows this category of religion."[46] Indeed, it is no revelation

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world beyond words, or thoughts, or things").

40. Stolzenberg, *supra* note 19, at 1044.

41. WHITE, *supra* note 11, at 127; *see also* Petty, *"Faith, However, Defined," supra* note 3, at 139 ("John Calvin, for example, propounded doctrines, practices, and interpretations of biblical passages that he hoped *would induce* a personal relationship with God . . . .") (emphasis in original); Woodhead, *supra* note 5, at 121 ("Christian theologians have long objected that 'religion' is a modern concept which carries a baggage of secular presuppositions, and which narrows, distorts, and sucks the living truth out of that which it attempts to dissect."). This distortion may be particularly acute for those whom "religious beliefs are instilled by a higher authority and are not products of individual choice." William P. Marshall, *Religion as Ideas: Religion as Identity*, 7 J. CONTEMP. LEGAL ISSUES 385, 386 (1996).

42. Andrew Koppelman, *How Shall I Praise Thee? Brian Leiter on Respect for Religion*, 47 SAN DIEGO L. REV. 961, 964 (2010).

43. *See* Beaman, *supra* note 6, at 194 ("Like law, religion as it is written and religion as it is lived are two rather different pheonomena.").

44. Petty, *The Concept of "Religion," supra* note 3; Petty, *"Faith, However Defined," supra* note 3.

45. Steve Mason, *Jews, Judeans, Judaizing, Judaism: Problems of Categorization in Ancient History*, 38 J. FOR STUD. OF JUDAISM 457, 482 (2007).

46. *Id.* at 488; *see also* James Boyd White, *Introduction, in* HOW SHOULD WE TALK ABOUT RELIGION?: PERSPECTIVES, CONTEXTS, PARTICULARITIES (James Boyd White ed., 2006) 1-10, 3 ("Why should Westerners assume that the Japanese or Indonesians, say, have cultural formation that parallels what we call 'religion?'").

that religion is a more modern than ancient concept.[47] "[O]ur construct *religion* is of relatively recent provenience"[48] and "lacked a taxonomical counterpart in antiquity."[49] Thus, "Josephus cannot talk about Apion as a member of another *religion* because the category did not yet exist."[50]

The current understanding of religion "[is] stimulated in significant measure by the Reformation, with its sectarian doctrinal controversies over justification, the resistibility or irresistibility of grace, and the like. . . ."[51] "Protestants sought to cut out (or at least downsize) the middle man, so to speak, and to encourage a more direct relation between the individual and God."[52] "In the 'priesthood of all believers' anyone could read the Bible for himself or herself and could commune with God directly without the intercession of priests, saints, or sacraments."[53]

"[T]he development of that construct was carried further, and forged into a recognizably modern form, by the Enlightenment."[54] As Thomas Paine quipped: "My own mind is my own church."[55] Jefferson and Madison advocated for religious freedom on openly theological grounds, stressing the sanctity of conscience.[56] The term religion, as it is employed today, was not particularly useful until the eighteenth century when it acquired a sense of "objective reality, concrete facticity, and utter self-evidence."[57]

Thus, "religion" is "an intellectual construction, a device through which the rationalist passion for classifying and pigeonholing expresses itself."[58] And it is indisputably the product of the West.[59]

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47. NONGBRI, *supra* note 16, at 3.

48. Saler, *supra* note 22, at 395.

49. Mason, *supra* note 45, at 480.

50. *Id.*

51. Saler, *supra* note 22, at 395; *see also* Steven D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom?*, 122 HARV. L. REV. 1869, 1876-77 (2008) (reviewing KENT GREENAWALT, RELIGION AND THE CONSTITUTION – VOLUME 2: ESTABLISHMENT AND FAIRNESS (2008)) ("Although the sanctity of conscience was recognized in medieval Catholic teaching and canon law, the Protestant Reformation altered the significance of conscience in a way that profoundly affected, and to some extent redirected, historical commitments to the separation of church and state.").

52. Smith, *supra* note 51, at 1877.

53. *Id.*

54. Saler, *supra* note 22, at 395.

55. Smith, *supra* note 51, at 1878 (citing THOMAS PAINE, AGE OF REASON 6 (1794), *reprinted in* THE THEOLOGICAL WORKS OF THOMAS PAINE (1879)).

56. Smith, *supra* note 51, at 1880.

57. MASUZAWA, *supra* note 18, at 2.

58. Russell T. McCutcheon, *The Category "Religion" in Recent Publications: A Critical Survey*, 42 NUMEN 284, 286 (1995) (internal citation omitted); *see also*

"'In most societies, religion is not a separate category of experience and action; there is, rather, a *religious dimension* to every part of social life.'"[60]

Given the idea that religion as a universal category is a Western construct, both legal and non-legal scholars have observed the difficulty, perhaps impossibility, of satisfactorily defining it.[61] How

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SALER, *supra* note 3, at ix ("Religion is a Western folk category that contemporary Western scholars have appropriated."); *cf.* JONATHAN Z. SMITH, IMAGINING RELIGION: FROM BABYLON TO JONESTOWN, at xi (1982) ("Religion is solely the creation of the scholar's study. It is created for the scholar's analytic purposes by his imaginative acts of comparison and generalization. Religion has no existence apart from the academy."). *But see* Steve Bruce, *Defining Religion: A Practical Response*, 21 INTERNATIONAL REVIEW OF SOCIOLOGY 107, 107 (2011) (criticizing "various post-modern approaches which argue that there is actually no such thing as religion because 'religion' is a modern social construct").

59. *See* Petty, *The Concept of "Religion," supra* note 3, at 255; Petty, *"Faith, However Defined," supra* note 3, at 136; Woodhead, *supra* note 5, at 121-22 ("[T]he concept of religion has ethnocentric imperialist biases, and fails to do justice to non-Western cultures by forcing them into a Western straightjacket."); Bryan Rennie, *Daniel Dubuisson, The Western Construction of Religion: Myths, Knowledge, and Ideology*, 87 THE JOURNAL OF RELIGION 315, 315 (2007) (quoting DANIEL DUBUISSON, THE WESTERN CONSTRUCTION OF RELIGION: MYTH, KNOWLEDGE, AND IDEOLOGY 5 (2003)) ("'[O]nly an incredible ethnocentric illusion would authorize us to recognize it as still have true scientific vocation today. . . ,'" and "[r]eligion is in fact the West's most characteristic and most valued concept, without equivalent in other cultures. It is the legitimate daughter of Christianity, and questions relative to it are exclusively Western."); *see also* SMITH, *supra* note 8, at 43 ("Religion as a systematic entity, as it emerged in the seventeenth and eighteenth centuries, is a concept of polemics and apologetics."); McCutcheon, *supra* note 58, at 285-86 (citing Tim Murphy, "Wesen und Erscheiung" *in the History of the Study of Religion: A Post-Structuralist Perspective*, 6 METHOD AND THEORY IN THE STUDY OF RELIGIONS 119 (1994)) (suggesting "universalized categories as 'religion'—defined as essence or manifestation—are part of the baggage of Occidental Humanism"); Smith, *supra* note 16, at 269 (Religion "is a category imposed from the outside on some aspect of native culture.").

60. SALER, *supra* note 3, at 28 (quoting PHILIP K. BOCK, MODERN CULTURAL ANTHROPOLOGY: AN INTRODUCTION 380 (1969)). And this "accords with the views of numbers of anthropologists." *Id.*

61. Smith et al., *supra* note 28, at 922 ("[W]e need more clarity on what 'religion' even is."); *see* GAVIN LANGMUIR, HISTORY, RELIGION, AND ANTISEMITISM 69 (1990) ("Few words are so deeply freighted as 'religion'; and few raise so many questions."); Bruce, supra note 58, at 110 ("Much of the difficulty in defining religion comes from arguments about which of a largely agreed set of characteristics should be constitutive."); Smith, *supra* note 16, at 281 ("It was once a tactic of students of religion to cite the appendix of James H. Leuba's *Psychological Study of Religion* (1912), which lists more than fifty definitions of religion, to demonstrate that the effort to define religion in short compass is a hopeless task.") (internal quotation

religion is, or is not, defined can be critical because "many arguments or seeming disagreements about theoretical issues pivot on, or sometimes reduce to, variant definitional commitments."[62]

II. THE DEFINITIONS OF RELIGION

Many commentators have called for a judicial definition of religion, and many have lamented the purported inability of courts to satisfactorily apply the religion clauses in the absence of one.[63] These authors suggest that "[w]hile a 'definition cannot take the place of inquiry . . . in the absence of definitions there can be no inquiry . . . .'"[64] Others have retorted that "[a]ny definition of religion

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marks omitted); Stolzenberg, *supra* note 19, at 1041 (noting the "notorious difficulty of defining religion"); Sullivan, *supra* note 30, at 453 ("The difficulties of tightly defining the borders of religion and religious practice are familiar to religion scholars."); *see also* Comstock, *supra* note 8, at 499 ("Augustine's famous observation about time applies with equal force to religion; if not asked, we know what it is; if asked, we do not know."); John H. Garvey, *Free Exercise and the Values of Religious Liberty*, 18 CONN. L. REV. 779, 779 (1985) ("We have only recently abandoned the assumption, which may never have been true, that Americans share a common understanding of language about God and transcendent values. That understanding made it unnecessary to define for nonspeakers a meaning that even believers have trouble putting into words.").

62. Saler, *supra* note 22, at 395. As Winnifred Fallers Sullivan has noted, "[p]roblems of definition arise when decisions are made by prisoners as to the regulation of inmate religious observance; by zoning commissions when decisions are made as to the placement of places of worship, by taxing authorities when decisions are made as to exemptions from taxation, by schools when children claim a right to be excused from requirements on grounds of religious conscience, by cities when they celebrate ethno-religious holidays, by legislatures that are asked to regulate religious butchering, by military authorities administering a chaplaincy program, by judges who are asked to substitute religious ex-offender programs for other kinds of rehabilitation efforts.") WINNIFRED FALLERS SULLIVAN, THE IMPOSSIBILITY OF RELIGIOUS FREEDOM 148-49 (2005).

63. WHITE, *supra* note 11, at 124 ("[T]he most obvious problem here is that of understanding and defining the central term, *religion*."); Collier, *Beyond Seeger/Welch: Redefining Religion Under the Constitution*, 31 EMORY L.J. 973, 975 (1982) ("A clear definition of religion is essential to any case based solely on the religion clauses . . . ."); Garvey, *supra* note 61, at 781 ("It is impossible to apply the religion clauses without first defining the term 'religion.'"); Jeffrey L. Oldham, *Constitutional "Religion": A Survey of First Amendment Definitions of "Religion"*, 6 TEX. F. ON C.L. & C.R. 117, 123 (2001) ("The lack of a definition seems to make policing the First Amendment all but impossible in marginal cases.").

64. SALER, *supra* note 3, at 76 (quoting Melford E. Spiro, *Religion: Problems of Definition and Explanation*, *in* ANTHROPOLOGICAL APPROACHES TO THE STUDY OF RELIGION 90 (Michael Banton ed., 1966)).

reflects a particular theory about what religion is or . . . what religions are,"[65] or that "[d]efinitions of religion are not tools for inquiry, but the results of inquiry, prejudicing (not aiding) thinking, and begging (rather than clarifying) our questions."[66] Complicating matters are competing imperatives that legal definitions of religion should align with either contemporary understanding,[67] or consideration of what the Framers' understanding might have been.[68]

Attempts at definitions have been grouped into two broad categories. The first, termed "essentialist," aims to identify those characteristics that are shared by all "religions." Under an essentialist definition, a potential religion that lacks an essential element would not qualify as a religion. Essentialist definitions can be further subdivided into substantive definitions and functional definitions, which identify as essential characteristics what a religion is and what it does, respectively.

Other attempts at defining religion may not deem any one characteristic a necessary condition. These "multifactor" approaches to the definitional problem consider the issue from a more holistic perspective and apply a variety of methods to determine whether a given candidate should properly be considered a member of the group. "Contemporary multi-factorial approaches are inspired largely by Wittgenstein's discussion of 'family resemblances' or by so-called 'polythetic classification' in the biological sciences."[69] Both

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65. Ferré, *supra* note 24, at 4; *see also* Benjamin L. Berger, *Key Theoretical Issues in the Interaction of Law and Religion: A Guide for the Perplexed*, 19 CONST. F. 41, 47 (2011) ("[T]he adjudication of religious freedom inevitably involves the imposition of some juridical conception of what religion is, or what about religion really matters, and, in so doing, imposes a legal filter on what 'counts' as protected religion.").

66. Ferré, *supra* note 24, at 4.

67. SALER, *supra* note 3, at 77 ("It ought not to contradict major established meanings."); Kent Greenawalt, *Religion as Concept in Constitutional Law*, 72 CAL. L. REV. 753, 757 (1984) ("[W]e should be surprised to learn that what is religious for the law is widely at variance with what otherwise counts as religious.").

68. WHITE, *supra* note 11, at 124-25 ("[T]o decide what meaning it should be given is deeply problematic, particularly with respect to the First Amendment, where it must have a very different meaning for us now from any that was current in the population to which that text was originally addressed. Then it would have referred mainly to different branches of Christianity, indeed to different branches of Protestantism."). *But see* STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 17, 21 (1995) (suggesting the religion clauses were understood by the Founders to be entirely a grant of jurisdiction over religious matters to the states).

69. *Id.* at 832.

essentialist and multifactor approaches have significant limitations as applied to religion.

A. Essentialist Definitions

A "contrivance for bounding religion."[70]

"Ideally, [essentialist definitions] ought to specify what is distinctive of the phenomena defined, what separates them from all other phenomena."[71] "But what, if anything, makes religion distinctive among other ideologies, cultural formations, and social organizations that warrants particular attention?"[72] "Attempts to ascertain the essence of 'religion' are based on the assumption that 'religion' must indicate a distinctive set of data determined by some feature that all members of the set supposedly possess in common."[73]

"Essentialist definitions constitute the great majority of definitions explicitly proffered"[74] and they "typically take monothetic form:[75] they attempt, that is, to state a set of necessary and sufficient conditions for recognizing phenomenal instances of the category and maintaining category boundaries."[76] In other words, essentialist definitions "stipulate[] a single feature or set of conjunctive features that specifies what a category term basically means" and "specif[y] a set of necessary and sufficient features or conditions for identifying instances of the group of objects comprehended by the category."[77] "If any one stipulated feature or condition is missing with respect to some candidate for inclusion in the group, that candidate cannot be properly admitted."[78]

Essentialist definitions can be further divided into substantive definitions and functional definitions.[79] Substantive definitions

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70. SALER, *supra* note 3, at 226.

71. *Id.* at 87.

72. Smith, *supra* note 61, at 924.

73. Comstock, *supra* note 8, at 512.

74. SALER, *supra* note 3, at 24; *id.* at 81 ("[M]onothetic (essentialist) definitions are legion."); *see* Peter W. Edge, *Determining Religion in English Courts*, 1 OX. J.L. & RELIGION 402, 403 (2012) (exemplifying an attempt at defining religion in the legal context by relation to "metaphysical reality").

75. SALER, *supra* note 3, at 80.

76. Saler, *supra* note 10, at 831.

77. SALER, *supra* note 3, at 79.

78. *Id.*

79. *Id.* at 24 ("They typically gravitate toward one of two poles, the substantive ('religion *is* such and such') or the functional ('religion is that which *does* this and that').") (emphasis in original); *see also* Saler, *supra* note 10, at 831 ("Essentialist definitions span a spectrum from 'substantive' to 'functional.'").

"bring together analytically similar phenomena, aspects of which we believe we can explain in the same terms."[80] "A substantive definition of religion tells us what religion fundamentally *is*, what it is composed of (for example, beliefs of a certain sort or beliefs of a certain sort plus certain kinds of behaviors)."[81] For example, Frederick Ferré defines religion substantively as "one's way of valuing most intensively and comprehensively."[82] Steve Bruce takes a different substantive approach:

> I will define religion substantively, as beliefs, actions, and institutions based on the existence of supernatural entities with powers of agency (that is, Gods) or impersonal processes possessed of moral purpose (the Hindu and Buddhist notion of karma, for example) that set the conditions of, or intervene in, human affairs.[83]

Most anthropological definitions of religion "are essentialist: they purport to capture the presumptively abiding and universal characteristic(s) of religion."[84] Hideo Kishimoto's view is typical of a substantive anthropological definition: "Religion is an aspect of culture centered upon activities which are taken by those who participate in them to elucidate the ultimate meaning of life and to be related to the ultimate solution of its problems."[85]

Functional definitions, in contrast, define their object by reference to its consequence or function.[86] "A functional definition states what religion *does*, what consequences it has . . . (for example, it expresses and facilitates coping with existential concerns, or it promotes social solidarity)."[87] One of the most influential functional definitions of religion of the twentieth century was that of Emile Durkheim, who proposed that religion is a "division of the world into

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80. Bruce, *supra* note 58, at 111-12.

81. SALER, *supra* note 3, at 79-80; *see also* Steve Bruce, *The Pervasive World-view: Religion in Pre-Modern Britain*, 48 BRIT. J. OF SOCIOLOGY 667, 667-68 (1997) ("Substantive definitions identify religion in terms of what it is: for example, beliefs and actions which assume the existence of supernatural beings or powers.").

82. Ferré, *supra* note 24, at 11.

83. STEVE BRUCE, SECULARIZATION 1 (2011).

84. Saler, *supra* note 10, at 831.

85. Hideo Kishimoto, *An Operational Definition of Religion*, 8 NUMEN 236, 240 (1961).

86. Bruce, *supra* note 58, at 111-12.

87. SALER, *supra* note 3, at 80; *see also* Bruce, *supra* note 83, at 667 ("Functional definitions identify religion in terms of what it does: for example, providing solutions to 'ultimate problems,' or answering fundamental questions of the human condition.").

two domains, the one containing all that is sacred, the other all that is profane."[88] Durkheim was interested "in what religion did"—not just its substantive characteristics, but also "its characteristic social function."[89]

Initially, "monothetic definitions may seem attractive."[90] After all, "[p]henomena are often complex" and we must "select which of a range of characteristics we shall regard as definitive."[91] These "[m]onothetic definitions have a certain utility."[92] They may be pedagogically useful in marking a field of study; heuristically useful in "stimulating research," they have some "orientational value" as starting points for inquiry.[93]

But monothetic or essentialist definitions have a variety of difficulties as well. Perhaps most obviously, they are both over and under inclusive.[94] They do not take account of prominent features that are not part of the definition because crafting an exhaustive list is impossible; on the other side, they often do take account of characteristics that are not truly universal.[95] These limitations are present in both functional and substantive essentialist definitions.

"A church is a complex and dynamic organization, often including believers with a variety of views on important questions of faith, morals, and spirituality."[96] Functional definitions, therefore, "may count as religious things which do not on the face of it look terribly religious and which their adherents regard as secular."[97] "They tend to be so elastic—universalism is typically purchased by decreasing the specifics of content—that it is sometimes difficult to

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88. Wilson, *supra* note 8, at 150-51 (internal quotation marks omitted).

89. *Id.*

90. SALER, *supra* note 3, at 87.

91. Bruce, supra note 58, at 110.

92. *Id.* at 156.

93. *Id.*

94. GREENAWALT, *supra* note 2, at 763 ("No specification of essential conditions will capture all and only the beliefs, practices, and organizations regarded as religious in modern culture."); Durham & Sewell, *supra* note 11, at 11 (noting that Tillich's "ultimate concern" is likely over-inclusive because it could include sports, work, or whatever is subjectively the "ultimate concern" of an individual, while simultaneously being under-inclusive because it "might exclude some forms of Buddhism that do not attempt to address 'ultimate concerns'"). This common misreading of Tillich is addressed below.

95. Harrison, *supra* note 21, at 134.

96. Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1391 (1981).

97. Bruce, *supra* note 83, at 668.

be certain what they actually exclude."[98] And "to define religion in terms of social or psychological functions is to beg the question of just what functions this or that religion performs in this or that setting."[99] Functional definitions may also primarily account for observable side effects, rather than the origins, of phenomena.[100]

Substantive definitions are problematic for other reasons. They "tend to narrow religion to one or two explicit variables."[101] And those variables tend to be those that are seen in the dominant religious culture. Lori Beaman observes that "[o]ne of the most serious problems with substantive definitions of religion is their tendency to reify dominant conceptualizations of religion . . . ,"[102] and those concepts "may not be cognitively salient among some peoples."[103] For example, "when we seek to unpack the notion of 'superhuman' or 'supernatural,' we find difficulties with some non-western or traditional cultures."[104] "Applying the concept across cultures thus requires adjustments such as abandoning boundaries and, perhaps, replacing them with family resemblances."[105]

Overall, essentialist definitions focus attention away from complexities and subtleties.[106] "[O]verly rigid boundaries between religion and non-religion . . . facilitate . . . the dubious conflation of those categories and terms with presumptive 'things out there in the world.'"[107] And this reification "gives rise to interminable arguments about so-called 'borderline' cases."[108] In the legal context, this is enormously problematic. The marginal cases are the most important because they mark the reach of the law.

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98. Saler, supra note 10, at 832; *see also* Harrison, *supra* note 21, at 138-39 (noting Durkheim, Weber, and Geertz all fail to differentiate religious from non-religious phenomena).

99. Bruce, *supra* note 83, at 668

100. Wilson, *supra* note 8, at 155.

101. Saler, supra note 10, at 831-32.

102. Beaman, *supra* note 6, at 195.

103. Saler, *supra* note 10, at 831-32.

104. Bruce, *supra* note 83, at 668; *see also* SALER, *supra* note 3, at 156-57 (noting monothetic definitions may depend on non-native categories); Ferré, *supra* note 24, at 7 ("Especially in the theistic West there is a tendency to import, at least implicitly, theistic or supernaturalistic characteristics into the list of defining characteristics that determine the essence of religion.").

105. Stewart Elliott Guthrie, *Religion: What Is it?*, 35 J. SCI. STUDY OF RELIGION 412, 418 (1996).

106. SALER, *supra* note 3, at 156-57.

107. *Id.*

108. *Id.*

B. Multifactor Approaches

Seeking to pin a label on the nonexistent . . . is cosmic futility.[109]

"Some students of religion have come to suspect or suppose that no single distinguishing feature, or no specific conjunction of distinguishing features, can universally be found in what, on various grounds, we may wish to identify as 'religious.'"[110] Saler goes so far as to claim that "the task of identifying the essence or universal core of religion has largely been a failure."[111] He suggests that "[t]he phenomena commonly comprehended by applications of the word 'religion' are too complex and variable, and often too enmeshed with other phenomena in a larger universe, to be confined analytically within sharp, impermeable boundaries."[112]

"In the early 1960s, Wilfred Cantwell Smith argued that the attempt [to define religion] was misguided, and could not succeed, because the term 'religion' does not pick out phenomena that are naturally grouped together."[113] Talal Asad suggested that W.C. Smith's "attempt to address the old question of the nature of religion by denying that it has any essence was truly original."[114] It "was the first to argue against essentialist definitions of religion."[115] His recommendation against using "religion" as a reified concept has gained acceptance.[116] His work is "widely cited by historians of

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109. Ferré, *supra* note 24, at 4.

110. SALER, *supra* note 3; *see also* KOPPELMAN, *supra* note 13, at 12 ("Arising thus out of a specific historical situation, and evolving in unpredictable ways thereafter, 'religion' would be surprising if it had any essential denotation."); Koppelman, *supra* note 42, at 975 (same).

111. SALER, *supra* note 3, at x.

112. *Id.* at 197.

113. Harrison, *supra* note 21, at 140.

114. Talal Asad, *Reading a Modern Classic: W.C. Smith's The Meaning and End of Religion*, 40 HISTORY OF RELIGIONS 205, 206 (2001). It was not, in fact, the first. Benson Saler notes that as early as 1902, "William James, for example, remarks that 'As there . . . seems to be no elementary religious emotion, but only a common storehouse of emotions upon which religious objects may draw, so there might conceivably also prove to be no one specific and essential kind of religious act.'" SALER, *supra* note 3, at 158 (quoting WILLIAM JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE 27 (Modern Library 1929) (1902)). Saler continues, quoting James: "[W]e are very likely to find . . . 'no one essence, but many characters which may alternately be equally important to religion.'" *Id.*; *see also* Saler, *supra* note 10, at 832 (JAMES, *supra* note 114).

115. Asad, *supra* note 114, at 205.

116. McCutcheon, *supra* note 58, at 286.

comparative religion"[117] and "until recently . . . constituted one of the more notable critiques of the concept of 'religion' as it is used by scholars."[118] The problem with essentialist definitions, in a nutshell, is that "nobody's definition works very well."[119] "[T]here is just too much variety."[120] Less charitably, "religious traditions cannot be essentialized without being misrepresented."[121] As Paul Valéry put it, "everything simple is false."[122]

The alternative is not to make any one characteristic or set of characteristics determinative. The three most prominent examples of this "polythetic classification" are numerical phenetics (grouping by outward similarity); family resemblance (which looks to the number and strength of shared characteristics); and prototype theory (in which membership in a category is judged by relative similarity to a prototype of the category).[123] Other non-essentialist definitional strategies include having no definition, and permitting groups to define themselves. As with essentialist definitions, however, each of these approaches to determining what is a "religion" have difficulties of their own.

1. Polythetic Classification/Numerical Phenetics

"In biology the idea of polythesis is an organizing concept in an approach to classification by 'overall similarity.'"[124] "[N]o single feature is essential for membership in a polythetically defined taxon nor is any feature sufficient for such membership."[125] Frequently, not a single character is present in every member of the category.[126] "[W]ith every polythetic class there is associated a bundle of attributes," and some attributes are possessed by every member of the category.[127] Saler explains:

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117. Asad, *supra* note 114, at 205.

118. McCutcheon, *supra* note 58, at 285.

119. Koppelman, *supra* note 42, at 973.

120. Bruce, *supra* note 58, at 113.

121. Jamal & Panjwani, *supra* note 9, at 70.

122. PAUL VALERY, ŒUVRES II 864 (1942); *see also* Jeremy Webber, The Irreducibly Religious Content of Freedom of Religion, *in* DIVERSITY AND EQUALITY: THE CHANGING FRAMEWORK OF FREEDOM IN CANADA 192 (Avigail Eisenberg ed., 2006) ("The more detailed they are the less complete they seem.").

123. SALER, *supra* note 3.

124. Saler, *supra* note 10, at 834.

125. Rodney Needham, *Polythetic Classification: Convergence and Consequences*, 10 MAN, NEW SERIES 349, 357 (1975) (internal quotation marks omitted).

126. *Id.*

127. Martin Southwold, *Buddhism and the Definition of Religion*, 13 MAN, NEW SERIES 362, 370; *see also* SALER, *supra* note 3, at 158 (quoting Raymond Firth,

> For analytical purposes we may conceptualize [religion] in terms of a pool of elements that more or less tend to occur together in the best exemplars of the category. While all of the elements that we deem to pertain to the category religion are predictable of that category, not all of them are predictable of all the phenomena that various scholars regard as instantiations of religion.[128]

"This 'polythetic' model accounts for a wide diversity of actual religious manifestations while at the same time requiring the development of the basic map of characteristics that underlie a single 'religion.'"[129] But, like essentialist definitions, it also has significant limitations, both generally and as applied to social phenomena such as religion.

"Polythetic taxa in the biological sciences are especially (though not exclusively) associated with an approach to classification once known as numerical taxonomy and now more generally called numerical phenetics."[130] Numerical phonetics is essentially classification by overall outward similarity.[131] With respect to religion, this approach is fundamentally limited. The first problems appear when attempting to transfer the method from the hard sciences to the social sciences. "The student of religion . . . generally operates with a smaller number of characters and character states than does the numerical pheneticist in biology."[132] With fewer characters, grouping decisions become more difficult and more arbitrary. Additionally, students of religion "are less likely than biologists to agree empirically" on what the relevant character states even are.[133] This may be because the elements themselves are polythetic, rather than elemental as the case is more frequently in the hard sciences.[134]

Even assuming the applicability of numerical phenetics to religion, the theory itself remains problematic. To begin, it requires one to establish an artificial horizon for comparison. "The researcher . . . must first somehow establish a population of units that are to be

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Problem and Assumption in an Anthropological Study of Religion 89 J. ROYAL ANTHRO. INST. 129, 131 (1959)) ("This must allow for the possibility that in any one case not every element in the configuration will be present, and that every element present will not necessarily be there to the same degree.").

128. SALER, *supra* note 3, at 225.

129. Satlow, *supra* note 15, at 845.

130. SALER, *supra* note 3, at 167.

131. *Id.*

132. *Id.* at 219.

133. *Id.*

134. SALER, *supra* note 10, at 835.

subjected to empirical comparison for classificatory purposes. *After* that is done, the members of that population can be sorted into polythetically described groups."[135] Arbitrary selection of a limit on what is being classified may result in suboptimal classification. Better grouping might be possible if the selection is expanded, and particularly salient objects lying just outside the limit could seriously distort groupings. Finally, observed outward similarities may reflect common descent, but also may be nothing more than "similarities produced in other ways, (e.g., by 'convergent functional adaptations')."[136] For example, bees and birds both have wings, but few biologists would identify them as closely related because of it. For these reasons, within biology, numerical phenetics has been described as "dead."[137] With respect to polythetic taxa as a means of defining religion, Saler complains:

> I see little prospect of making a responsible and productive use of numerical phenetics, and we would do well to search for other options. Not only have weighty criticisms been entered against numerical phenetics in the biological sciences, and not only has that approach been supplanted by others, but strong reservations respecting its applicability to cultural phenomena are persuasive.[138]

2. Family Resemblance

One alternative to numerical phenetics is family resemblance theory. J.Z. Smith has suggested that family resemblance and polythetic classification "'are built around quite different philosophical presuppositions,'"[139] and Richard Paul Chaney claims that conflating the two "veils phenomenal differences."[140] "Family resemblances have to do with how we use our words and concepts whereas polythetic classifications . . . refer 'to our data charts.'"[141] Both approaches, however, hold "that no single feature is either necessary or sufficient for assigning candidates to the group comprehended by a category. Rather, candidates are assigned

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135. SALER, *supra* note 3, at 193.

136. *Id.* at 175.

137. *Id.* at 176.

138. *Id.* at 196.

139. *Id.* at 159 (quoting SMITH, IMAGINING RELIGION, *supra* note 58, at 136) (internal quotation marks omitted).

140. SALER, *supra* note 3, at 159 (quoting Richard Paul Chaney, *Polythematic Expansion: Remarks on Needham's Polythetic Classification*, 19 CURRENT ANTHROPOLOGY 139, 139 (1978)) (internal quotation marks omitted).

141. SALER, *supra* note 3, at 170 (quoting Chaney, *supra* note 140, at 139-40).

membership on the basis of differentially sharing some, but not necessarily all, of a set of phenomenal values or 'characteristics.'"[142]

"'Family resemblance,' as an established philosophical construct, is preeminently associated with Ludwig Wittgenstein's concept of philosophy as 'a battle against the bewitchment of our intelligence by means of language.'"[143] Wittgenstein uses the word "game" to illustrate his theory of language, asserting that no single feature is shared by every game.[144]

Generally speaking, family resemblance is attractive because it obviates the need to essentialize "religion" into one or a few determinative characteristics. But it also suffers from several serious drawbacks. First, to a certain extent, there is a problem of circularity. "What one is prepared to regard as religiously-relevant family resemblance will depend upon what one means by 'religion.'"[145] Similarly, broadening the definition to include marginal cases does not completely correct the assumptions that underlie essentialist definitions, running the risk of over inclusion. "Definitions of religion necessarily involve assumptions about its underlying nature. Each and every definition of religion implies at least some theoretical conclusions."[146] Finally, "[i]f we regard as a member of the 'religious family' everything that has some feature in common with standard examples of religion, the concept of 'religion' will have such a wide scope that it may well be analytically useless."[147] To borrow again from Valéry, "[c]e qui ne l'est pas est inutilisable."[148]

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142. SALER, *supra* note 10, at 833; *see* SALER, *supra* note 3, at 164-65 ("While all the members of [a family] need have no feature or quality in common, some pairs of members typically do have features or qualities in common, and their particular commonalities are predictable of them."); Wilson, *supra* note 8, at 158; *see also* Harrison, *supra* note 21, at 142 ("Perhaps, instead, 'religion' is a complex concept used to refer to things sharing a number of features—and thereby exhibiting a number of 'family resemblances'—not all of which need be present.").

143. SALER, *supra* note 3, at 159.

144. Harrison, *supra* note 21, at 141.

145. *Id.* at 143.

146. Gunn, *supra* note 24, at 193 (internal quotation marks omitted).

147. Harrison, *supra* note 21, at 143; *see* TIMOTHY FITZGERALD, THE IDEOLOGY OF RELIGIOUS STUDIES 72 (2000) ("[A] family resemblance theory of religion overextends the notion so badly that it becomes impossible to determine what can and what cannot be included.").

148. VALERY, *supra* note 122; Webber, *supra* note 122, at 192 ("[T]he more abstract they become, the more empty.").

3. Prototype Theory

Prototype theory presents a nuanced alternative to family resemblance. Prototypes are defined as "'the clearest cases of category membership defined operationally by people's judgments of goodness of membership in the category.'"[149] They "provid[e] an image of a commonplace example that then serves as an ideal or typical exemplar of a category with decisions as to whether another object is a member of the same category being based on matching it against features of the prototype (for example, employing a robin as the prototype for 'bird.')."[150] Prototypicality of a religion is determined by "cogent analytical arguments about elements that we deem analogous to those that we associate with our reference religions."[151] "The referents adjudged most prototypical are usually those deemed (1) to 'bear the greatest resemblance to other members of their own categories' and (2) to 'have the least overlap with other categories.'"[152]

Prototype theory has the advantage of minimizing the need for definitive category boundaries.[153] "We may explicitly conceive of categories *with reference* to clear cases that best fit them rather than conceptualizing categories monothetically, which implicates stipulated limits."[154] But this requires first identifying clear cases, and "what we regard as our clearest examples of religion are neither timeless nor monolithic."[155] As is usually the case, Western monotheisms are understood to be the most prototypical instantiations of religion.[156] Indeed, Martin Southwold "refers to Christianity as 'the religion prototypical for our conceptions' of religion,"[157] and J.Z. Smith notes "the features of other religions are routinely being matched against some Christian prototype."[158] The

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149. SALER, *supra* note 10, at 206-07 (quoting Eleanor Rosch, *Principles of Categorization*, *in* COGNITION AND CATEGORIZATION 27, 36 (Eleanor Rosch & Barbara B. Lloyd eds., 1978)).

150. SMITH, *supra* note 2, at 377.

151. SALER, *supra* note 3, at 225.

152. *Id.* at 211 (quoting Eleanor Rosch and Carolyn B. Mervis, *Family Resemblances: Studies in the Internal Structure of Categories*, 7 COGNITIVE PSYCHOL. 573, 599 (1975)).

153. Saler, *supra* note 10, at 835.

154. SALER, *supra* note 3, at 206.

155. Saler, *supra* note 10, at 836.

156. SALER, *supra* note 3, at 225.

157. *Id.* at 208 (quoting Southwold, *supra* note 127, at 367).

158. SALER, *supra* note 3, at 208 (quoting Southwold, *supra* note 127, at 367; SMITH, *supra* note 2, at 377).

analogical prototype approach, thus, may "harm minority religions and new religious movements."[159] It also leaves open the question of to what extent a candidate must share characteristics with the prototype in order to be classified as a religion.[160]

4. Other Definitional Strategies

a. Self-Definition

Thus far, the definitional strategies discussed have focused on objective criteria. But "[w]hat is the role of the claimant's own characterization?"[161] Self-definition may prevent a government from denying legal protections to religious groups or practices by denying their religious character, but can be "highly problematic because . . . [it] presents a clear danger of misuse."[162]

In 1968 an ordained minister sought to dismiss a criminal indictment against him on the ground that his facially unlawful use of LSD and marijuana were protected religious rites in a new church whose official songs were "Puff, the Magic Dragon" and "Row, Row, Row Your Boat."[163] A decade later, certain federal inmates demanded steak and wine as religious sacraments in their purportedly religious celebration of the coming destruction of prison authority.[164] Neither claim succeeded, but they highlight both the

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159. RUSSELL SANDBERG, LAW AND RELIGION 39 (2011) (internal quotation marks omitted).

160. Wilson, *supra* note 8, at 160.

161. Marc Galanter, *Religious Freedoms in the United States: A Turning Point?*, 1966 WIS. L. REV. 217, 255 (1966).

162. Augsberg, *supra* note 9, at 294; *see also* Ben Adams & Cynthia Barmore, *Questioning Sincerity: The Role of Courts After* Hobby Lobby, 67 STAN. L. REV. ONLINE 59, 59 (2014) ("If unable to evaluate sincerity, courts would indeed be powerless to identify fraudulent claims."); Durham & Sewell, *supra* note 11, at 30 (noting "a definition with infinitely malleable borders and no protection against strategic behavior would cease over time to have any meaningful substance"); Kareem Abdul-Jabbar, *Kim Davis is Not a Patriot*, TIME, Sep. 7, 2015, http://time.com/4024556/kareem-abdul-jabbar-kim-davis/ ("It's pointless to question Davis' sincerity, because there's no way to determine whether she's a pious zealot or savvy businesswoman looking to cash in on her notoriety. We can't always tell the difference between a true believer and an arrogant ideologue.").

163. Gail Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 805, 805 (1978) (citing United States v. Kuch, 288 F. Supp. 439, 444 (D.D.C. 1968)).

164. Merel, *supra* note 163, at 805 (citing Theriault v. Silber, 391 F. Supp. 578, 582 (W.D. Tex. 1975)). More recent purportedly religious prisoner claims include challenges to restrictions on diet, grooming, housing, conjugal visits, and distribution

potential for abuse and the important (if understated) role of sincerity in making claims based on religious grounds.[165]

The word "sincerity" is not found in the Constitution's religion clauses,[166] but it has been called "the threshold question" in cases implicating them.[167] One commentator has even suggested: "One can hardly imagine a serious argument *against* a sincerity requirement. That a belief is sincerely held obviously must be established before an inquiry into the beliefs [sic] nature may proceed."[168] But even here difficulties remain.

Sincerity is a measure of whether *beliefs* are honestly held, rather than fraudulently expressed for the purpose of obtaining a benefit. Because sincerity concerns beliefs, it has the same limitations and problems associated with using beliefs as a proxy for religion, discussed above. Yet, the most challenging issue is whether sincerity of beliefs can be evaluated without also evaluating the content of the underlying beliefs themselves. "In considering the sincerity of belief, courts cannot help but delve into the content of the beliefs in the process of determining the sincerity with which they are held."[169] The more familiar or reasonable the underlying belief, the easier it is psychologically for a judge to find the claimant's belief sincere.[170] This risks an indirect establishment of

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of literature. Ben Adams & Cynthia Barmore, *Questioning Sincerity: The Role of Courts After* Hobby Lobby, 67 STAN. L. REV. ONLINE 59, 61, nn.21-25 (2014); *see also* Ira C. Lupu, *To Control Faction and Protect Liberty: A General Theory of the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 357, 358 (1996) ("[W]e engage in this task with an appropriately skeptical eye when claimants stand to achieve earthly and material gain from the recognition.").

165. *See* Webber, *supra* note 122, at 194 ("One suspects that sincerity looms so large not merely for its own sake, but because it is self-limiting, posing the issues in a way that involves both judgment and abstention.")

166. Anita Bowser, *Delimiting Religion in the Constitution: A Classification Problem*, 11 VAL. U. L. REV. 163, 181 (1977); Note, *Defining Religion: Of God, the Constitution, and the D.A.R.*, 32 U. CHI. L. REV. 533 (1965) ("The word 'sincerity' is not mentioned . . . in the Constitution.").

167. *Id.* at 181-82 (quoting United States v. Seeger, 380 U.S. 163, 185 (1965) (internal quotation marks omitted)).

168. Dmitry N. Feofanov, *Defining Religion: An Immodest Proposal*, 23 HOFSTRA L. REV. 309, 390 (1994). *But see* ADAM B. SELIGMAN, ET AL., RITUAL AND ITS CONSEQUENCES: AN ESSAY ON THE LIMITS OF SINCERITY 103-04 (2008) ("Sincerity often grows out of a reaction against ritual . . . . Though the tension between the two usually remains under control, it can also lead to shifts in the balance between ritual and sincerity, as nearly any of the world's religious traditions shows: the Buddhist critique of Hinduism, Christian critique of Judaism . . . and so forth.").

169. Beaman, *supra* note 6, at 201.

170. Adams & Barmore, *supra* note 164, at 64 (quoting Int'l Soc'y for Krishna

orthodoxy or, at the very least, makes the sincerity of new, eccentric, or unfamiliar beliefs more difficult to establish. This is particularly problematic in the context of religious experience[171] because "[r]eligious experiences which are as real as life to some may be incomprehensible to others."[172]

But even where claimants are sincere in their beliefs, individual subjective accounts of whether that sincerity is religious presents problems of massive over-inclusiveness.[173] Allowing individuals to determine their own constitutional protection according to their own views of their actions' religiosity would "obliter[ate] . . . any meaningful distinction between religious and nonreligious."[174] "Self-definition is even more obviously ill-suited for establishment cases for which the perspectives of outsiders are very important."[175] Self-definition is therefore not a viable means to determine the extent of constitutional protections.

b. No Definition

Several authors have suggested that the Constitution itself, either because of establishment concerns or an overriding neutrality principle, precludes courts from defining religion at all.[176] But not defining religion leads to just as many problems. "[H]ow could anyone expect to go about developing a theory of religious freedom without invoking assumptions about, for example . . . the nature of

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Consciousness, Inc. v. Barber, 650 F.2d 430, 441 (2d Cir. 1982) (noting the "dangerous temptation to confuse sincerity with the underlying truth of a claim. Particularly for unorthodox beliefs, the challenge is that '[p]eople find it hard to conclude that a particularly fanciful or incredible belief can be sincerely held.'")); Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 248 (1989) ("Jurors are more willing to accept that a given belief is sincerely held if they also perceive it to be reasonably believable.").

171. Bowser, *supra* note 166, at 187.

172. United States v. Seeger, 380 U.S. 163, 184 (1965) (quoting United States v. Ballard, 322 U.S. 78, 86 (1944)).

173. Ingber, *supra* note 170, at 248.

174. Greenawalt, *supra* note 67, at 812; Ingber, *supra* note 172, at 248-49; *see also* Adams & Barmore, *supra* note 164, at 64 (quoting United States v. Bauer, 84 F.3d 1549, 1559 (9th Cir. 1996)) ("Neither the government nor the court has to accept the defendants' mere say-so.").

175. GREENAWALT, *supra* note 2, at 136.

176. Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 5 (1961); Jonathan Weiss, *Privilege, Posture and Protection: "Religion" in the Law*, 73 YALE L.J. 593, 604 (1964); Sharon L. Worthing, *"Religion" and "Religious Institutions" Under the First Amendment*, 7 PEPP. L. REV. 2, 314-15 (1980).

religion . . . ?"[177] The problem here is that "'when the term "religion" is given no explicit ostensive definition, the observer, perforce, employs an implicit one.'"[178] And the implicit definition may have many of the same problems associated with essentialist definitions described above. "All of us who use the word *religion* have a theory—explicit or implicit—about what religions basically are."[179] Explicitly declining to enter the fray, although ostensibly transparent, would likely conceal more reasoning than it would disclose.

In sum, neither essentialist nor polythetic definitions offer a panacea. Both types of definitions have substantial difficulties defining religion for legal purposes. Essentialist definitions, even where they account for the inadequacy of framing religion as largely a matter of belief, oversimplify the question. Religion "cannot be essentialized without being misrepresented."[180] Polythetic definitions, on the other hand, cannot adequately capture only and all "religions," and lack the determinacy that characterize effective legal rules. How, then, should courts handle religious claims when both defining and not defining religion raises such difficult problems

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177. SMITH, *supra* note 68, at 68.

178. SALER, *supra* note 3, at 76 (quoting Melford E. Spiro, *Religion: Problems of Definition and Explanation*, *in* ANTHROPOLOGICAL APPROACHES TO THE STUDY OF RELIGION 90 (Michael Banton ed., 1966)); *see also* Durham & Sewell, *supra* note 11, at 28 ("[A] non-definition still leaves the question to the courts of dividing a religious sphere, where courts should not intrude, from a nonreligious sphere.").

179. Ferré, *supra* note 24, at 6.

> Our experience, supported we think by that of others, is that it is in fact quite difficult to talk about religion in a satisfactory way, whether we are trying to do so within a discipline, such as law, psychology, or anthropology, or while speaking in more informal ways with our friends and colleagues. There are many reasons for this: it is in the nature of religious experience to be ineffable or mysterious, at least for some people and some religions. Different religions imagine the world, its human inhabitants, and their histories in ways that are enormously different and plainly unbridgeable. There is no super-language into which all religions can be easily translated, for purposes either of comparison or mutual intelligibility. What is more, it seems to be nearly always the case that one's religion's deepest truths and commitments and fundamental narratives appear simply irrational, even weird, to those who belong to another tradition, or are themselves simply without religion. This means that in any attempt to study and talk about a religion other than one's own there is a necessary element of patronization, at least whenever we are studying beliefs we could not imagine ourselves sharing.

180. Jamal & Panjwani, *supra* note 9, at 70.

III. FAIRLY APPLYING A BIASED CONCEPT

How can we talk about religion from a legal point of view?[181]

In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, the Supreme Court held that both the Free Exercise Clause and the Establishment Clause mandated that generally applicable employment laws could not govern the terms of employment of clergy.[182] Institutions relying on this ruling may soon confront arguments that *Hosanna-Tabor* does not apply because the employer is not religious.[183] The autonomy of religious institutions in the selection and terms of employment of their pastoral staff is but one instance of the First Amendment according "special solicitude" to religion where a definition may prove necessary.[184] Special legal status calls out for line-drawing. Given the lack of neutrality inherent in the concept of religion and the difficulties inherent in framing definitions generally, how should religion be defined for constitutional purposes?

Lawyers and judges in the United States have not taken advantage of non-legal academy's significant investment in attempting to define religion. Thus far, "[t]he legal approach to definition in the United States has been independent of the anthropological or even social scientific approaches."[185] Legal scholars, like all the rest, "have written volumes on the subject without reaching anything approaching agreement."[186]

The First Amendment to the U.S. Constitution provides that "Congress shall make no law respecting an establishment of religion,

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181. Augsberg, *supra* note 9, at 291.

182. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 710 (2012).

183. For a more thorough treatment of the problem of identifying religious institutions, *see* Zoë Robinson, *What is a "Religious Institution"?*, 55 B.C. L. REV. 181 (2014).

184. Andrew Koppelman has suggested that the Supreme Court's decisions concerning conscientious objector exemptions from the draft "placed pressure on the definition of religion that was becoming fairly unendurable by the time the Vietnam War ended." *See* KOPPELMAN, *supra* note 13, at 190, n.135.

185. Donovan, *supra* note 7, at 70. Although legal scholars and judges have made little use of insights from social sciences, the definitions they have proposed can be grouped the same way.

186. Choper, *supra* note 7, at 579; *see also* Greenawalt, *supra* note 67, at 753 ("Academic commentators have struggled to startlingly diverse proposals."). *But see* Gunn, *supra* note 24, at 190-91 ("It is fairly common for legal analyses of freedom of religion or belief to avoid a serious discussion of the definitional problem, even among the most important works.").

or prohibiting the free exercise thereof."[187] The Establishment Clause "mandates government neutrality between religion and religion, and between religion and nonreligion . . . [while] the Free Exercise Clause . . . by its terms, gives special protection to the exercise of religion."[188] "It is widely believed that the First Amendment puts courts and legislatures of the United States in a double bind when it comes to religion: requiring them to remain neutral with respect to religious concerns while simultaneously protecting these same concerns."[189] Obviously "[i]t is not logically possible for the government both to be neutral between religion and nonreligion and to give religion special protection."[190] Thus, "[t]he accommodation of religion gives rise to a puzzle in First Amendment theory: how to reconcile free exercise with establishment principles."[191]

Some have called "the profound tension, indeed paradox, between its religion clauses" the First Amendment's "great achievement."[192] The contradiction "reflects a struggle between two values, both of them crucial, neither of which can be accommodated perfectly."[193] The problem is that "[t]here is no neutral course out of a contradiction."[194]

Perhaps in partial recognition of the paradox, "[t]he Supreme Court has never seriously discussed how religion should be defined for constitutional purposes."[195] And as a result of the Court's demurrer, its jurisprudence has been deemed "incoherent."[196] Steven

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187. U.S. CONST. amend. I.

188. Andrew Koppelman, *Is It Fair to Give Religion Special Treatment*, 2006 U. ILL. L. REV. 571, 573 (2006) (quoting Epperson v. Arkansas, 89 S. Ct. 266, 270 (1968); Thomas v. Review Bd., 101 S. Ct. 1425, 1430 (1981)) (internal quotation marks omitted).

189. Koppelman, *supra* note 188, at 571.

190. Andrew Koppelman, *The Troublesome Religious Roots of Religious Neutrality*, 84 NOTRE DAME L. REV. 865, 880 (2009); *see also* Koppelman, *supra* note 188, at 590 ("Some Justices and many commentators have therefore regarded the First Amendment as in tension with itself.").

191. Koppelman, *supra* note 190, at 869.

192. WHITE, *supra* note 11, at 149. ("[T]he First Amendment has the great merit of insisting simultaneously upon the importance of religion and its danger."). *Id.*

193. *Id.* at 149.

194. Koppelman, *supra* note 188, at 573.

195. Choper, *supra* note 7, at 579; *see also* GREENAWALT, *supra* note 2, at 125 ("[T]he Supreme Court understandably has remained relatively silent."); Laycock, *supra* note 97, at 1373 (noting "the Supreme Court's failure to develop any coherent general theory of the religion clauses"); Weinberger, *supra* note 7, at 736.

196. Smith, supra note 51, at 1871 (quoting Steven G. Gey, *Vestiges of the Establishment Clause*, 5 FIRST AMEND. L. REV. 1, 4 (2006)); *see also* Rebecca

D. Smith laments, "[v]irtually no one is happy with the Supreme Court's doctrines and decisions in this area or with its explanations of those doctrines and decisions,"[197] and John Mansfield's view was probably representative: "[T]he Court's religion clause decisions reflected 'the incantation of verbal formulae devoid of explanatory value.'"[198] For his part, "Douglas Laycock has described the Court's establishment clause formula as 'so elastic in its application that it means everything and nothing.'"[199] Less charitably, the Supreme Court's religion clause jurisprudence "looks like a sort of schizophrenic, constitutional love-hate complex extending to religion both special immunities and special disabilities."[200] Much as it is in the social sciences, "[d]elimiting the term 'religion' in the first amendment . . . is not easily within reach of a practical solution."[201]

A. Legal Background

The Supreme Court's first modern discussion of the boundaries of legal religion came in 1879 in *Reynolds v. United States*.[202] There,

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Redwood French, *From Yoder to Yoda: Models of Traditional, Modern, and Postmodern Religion in U.S. Constitutional Law*, 41 ARIZ. L. REV. 49, 49 (1999) ("The Supreme Court and its commentators have been struggling for over a century to find an adequate definition or characterization of the term 'religion' in the First Amendment.").

197. SMITH, *supra* note 68, at v.

198. *Id.* at 3-4 (quoting John Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CALIF. L. REV. 846, 848 (1984)).

199. SMITH, *supra* note 68, at 3 (quoting Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 450 (1986)).

200. Smith, *supra* note 51, at 1886.

201. Bowser, *supra* note 166, at 163; *see also* SMITH, *supra* note 68, at 36 ("Extensive analysis has been dedicated to resolving, or at least reducing, this perceived conflict between the clauses.").

202. Reynolds v. United States, 98 U.S. 145 (1879). Prior to this (and even after, for a time), the Court's statements concerning religion expressly "used traditional Western Christianity as a benchmark of religion." Durham & Sewell, *supra* note 11, at 17. In 1844, the Court declared Christianity part of the common law in the "qualified sense" that "it is not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers or the injury of the public." Vidal v. Girard's Executors, 43 U.S. (2 How.) 127, 198 (1844). Even more than a decade after *Reynolds*, the Court suggested: "[W]e find everywhere a clear recognition of the same truth . . . that this is a Christian nation." Holy Trinity Church v. United States, 143 U.S. 457, 465 (1892). And as late as 1931, a majority of the Court was willing to declare that "[w]e are a Christian people . . . acknowledging with reverence the duty of obedience to the will of God." United States v. Macintosh, 283 U.S. 605, 625 (1931).

a Mormon sought an exemption from a law prohibiting bigamy because it was specifically permitted by his religion.[203] The Court turned to how the Framers of the First Amendment had defined the term and, relying on writings by Jefferson and Madison, concluded that although the Mormon practice of bigamy was religious, the claimant was not entitled to practice it.[204]

A decade later, the Court considered a similar case in *Davis v. Beason*.[205] The Territory of Idaho had enacted a law disenfranchising any person who belonged to an organization that supported polygamy.[206] Echoing James Madison,[207] the Court declared: "The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."[208] The Court, however, conflated the question of what constitutes religion with whether a religious practice can be legally prohibited.[209]

In 1931 at least four Justices remained committed to a belief-based, theistic view of religion, when Chief Justice Hughes, joined by Justices Holmes, Brandeis, and Stone stated: "[T]he essence of religion is belief in a relation to God involving duties superior to those arising from any human relation."[210]

It was not until 1944 that the Court began to retreat from an overtly theistic and specifically Christian formulation of what constitutes religion.[211] Throughout the second half of the nineteenth century, the Court based its decision "on the reality of God and the truth of individuals' religious claims."[212] In *United States v. Ballard*,

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203. *Reynolds*, 98 U.S. at 161.

204. *Id.* at 164, 165.

205. Choper, *supra* note 7, at 587 (citing Davis v. Beason, 133 U.S. 333 (1890)).

206. Choper, *supra* note 7, at 587.

207. *Id.* (citing J. Madison, *Memorial and Remonstrance Against Religious Establishments, reprinted in* THE COMPLETE MADISON 302 (S. Padover ed., 1953)).

208. Choper, *supra* note 7, at 587 (citing 133 U.S. at 341-42).

209. *Davis*, 133 U.S. at 341-42 ("Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. . . . To call their advocacy a tenet of religion is to offend the common sense of mankind.").

210. United States v. MacIntosh, 283 U.S. 605, 633-34 (1931) (Hughes, C.J., dissenting).

211. *See* Anand Agneshwar, *Rediscovering God in the Constitution*, 67 N.Y.U. L. REV. 295, 299, nn.18-22 (1992) (citing *MacIntosh*, 283 U.S. at 625; Church of the Holy Trinity v. United States, 143 U.S. 457, 465 (1891); Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 49 (1890); Vidal v. Girard's Executors, 43 U.S. (2 How.) 127, 198 (1844)); James McBride, *Paul Tillich and the Supreme Court: Tillich's "Ultimate Concern" as a Standard in Judicial Interpretation*, 30 J. OF CHURCH & STATE 245, 251 (1988)).

212. Agneshwar, *supra* note 211, at 299, n.21.

Justice Douglas was faced with "massive immigration, . . . a society increasingly influenced by the technological revolution" and "the changing faces of a pluralistic society,"[213] and thus discarded the Court's increasingly uncomfortable role of arbitrating religious claims, writing that "[m]en may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs."[214] Just a few years later, he abandoned specific references to Christianity in favor of recognition that "[w]e are a religious people whose institutions presuppose a Supreme Being."[215]

The content of beliefs, rather than belief itself, continued to be a major issue as the Court refined its understanding of religion through the twentieth century. *Torcaso v. Watkins*, decided in 1961, invalidated a Maryland law that required a declaration of a belief in God as a test for holding public office.[216] "In what has become a famous footnote, the Court noted that 'among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others.'"[217]

The Court followed *Torcaso* with its seminal decision in *United States v. Seeger*.[218] *Seeger* concerned interpretation of the conscientious objector provisions of the Universal Military Training and Service Act, rather than the constitutional definition of religion for the First Amendment, but it is generally understood that Congress intended the Act to provide all of the protection constitutionally available, and it has been interpreted as essentially a constitutional decision.[219] This is not necessarily the case with all congressional enactments concerning religion. Congress has much greater leeway to define religion more narrowly in the statutory than in the constitutional context.[220]

At the time, the Universal Military Training and Service Act provided an exemption from military service for those who:

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213. *Id.* at 299-300.

214. United States v. Ballard, 322 U.S. 78, 86 (1944).

215. Zorach v. Clausen, 343 U.S. 306, 313 (1952).

216. Torcaso v. Watkins, 367 U.S. 488 (1961).

217. Ingber, *supra* note 170, at 257 (quoting *Torcaso*, 367 U.S. at 495, n.11).

218. United States v. Seeger, 380 U.S. 163 (1965).

219. Malnak v. Yogi, 592 F.2d 197, 204 (3d Cir. 1979) (Adams, J., concurring) ("Although *Seeger* . . . turned on statutory interpretation . . . [it] remain[s] constitutionally significant."); Agneshwar, *supra* note 211, at 302, n.41; Ingber, *supra* note 170, at 260-61; McBride, *supra* note 211, at 250.

220. The distinction is sometimes lost, especially on non-lawyers. *E.g.*, Smith, *supra* note 2, at 376 (suggesting that the Internal Revenue Service is "America's primary definer" of religion).

> by reason of religious training or belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views on a merely personal moral code.[221]

Seeger claimed that his opposition to war was based upon his "belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed."[222] Relying on the writings of several modern theologians, "especially those of the theologian Paul Tillich,"[223] the Court concluded that sincere religious belief that "occupies a place in the life of its possessor a place parallel to that filled by the orthodox belief in God of those admittedly qualifying for the exemption" also qualifies.[224] The Court explained that a belief was parallel to the "orthodox belief in God" if it was "based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent."[225] Thus, the Supreme Court adopted an essentially functional definition of religion by looking to what role it plays in an individual's life.[226]

The Court's reliance on Tillich, a theologian, is noteworthy. Tillich argued: "'Religion' is the state of being grasped by an ultimate concern, a concern which qualifies as all other concerns preliminary and which itself contains the answer to the question of the meaning of our life."[227] "Ultimate concern," in turn, he described as "the

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221. 50 U.S.C. app. § 456(j) (1958). This provision was enacted in response to conflicting decisions by lower courts on how broadly religion was to be understood for conscientious objector status. *See* Greenawalt, *supra* note 67, at 759-60, n.27 (citing Kent Greenawalt, *All or Nothing at All: The Defeat of Selective Conscientious Objection*, 1971 SUP. CT. REV. 31, 37-38). It superseded an earlier provision, which granted conscientious objector status only to those who were "members of a well-recognized sect or organization." Act of 18 May 1917, ch. 15, para. 4, 40 Stat. 78 (1919). The 1917 law was intended to deny exemptions to those who had private reservations about the war. McBride, *supra* note 211, at 252.

222. *Seeger*, 380 U.S. at 166.

223. Greenawalt, *supra* note 67, at 760; *see also* Agneshwar, *supra* note 211, at 302; Ingber, *supra* note 170, at 259, n.148.

224. *Seeger*, 380 U.S. at 176.

225. *Id.* at 166, 176.

226. Choper, *supra* note 7, at 589; Ingber, *supra* note 170, at 259, n. 149.

227. SALER, *supra* note 3, at 106 (quoting PAUL TILLICH, CHRISTIANITY AND THE ENCOUNTER OF THE WORLD RELIGIONS 4 (1963)).

integrating center of the personal life"[228] to which "[a]ll other concerns are subordinated or sacrificed" and which is "experienced as promising 'total fulfillment.'"[229] Tillich also defined ultimate concern as "concern about what is experienced as ultimate,"[230] and he formulated his definition in earlier manuscripts as "concern for the ultimate."[231]

But as James McBride explains, "Tillich's 'ultimate concern' cannot be reduced to an affective attitude alone."[232] Instead, "there exist two poles in 'ultimate concern:' objective as well as subjective."[233] "Tillich believed that in true religious faith, 'the ultimate concern is a concern about the truly ultimate; while in idolatrous faith, preliminary, finite realities are elevated to the rank of ultimacy.'"[234] For Tillich, "[t]he best religion, in short, is one in which the central symbols nullify their own candidacies for ultimacy and take their significance only as manifesting and expressing Being Itself, which alone is properly deemed ultimate."[235] For Tillich, this is Christianity.[236] In applying Tillich's formulation of "ultimate concern," but avoiding the objective component of Tillich's theory, the Court distorted Tillich's theological views.[237]

Beyond this oversimplification and distortion, the use of Tillich's writings to establish a legal test is questionable. "Tillich's writings occupy volumes and are directed at theologians and lay believers, not lawyers. To extract from them the phrase, 'ultimate concerns,' and instruct judges to apply it as a legal formula seriously underestimates the subtlety of Tillich's thought and overestimates the theological sophistication of the participants in the legal process."[238] Nonetheless, *Seeger*'s holding, including reliance on the modified form of Tillich's theology remains the law.

A plurality of the Supreme Court took *Seeger* one step further in *Welsh v. United States*, by negating the need for an applicant to

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228. SALER, *supra* note 3, at 106 (quoting PAUL TILLICH, DYNAMICS OF FAITH 106 (1957)).

229. SALER, *supra* note 3, at 108.

230. *Id.* at 107-08 (quoting PAUL TILLICH, DYNAMICS OF FAITH 9 (1957)).

231. Smith, *supra* note 16, at 280.

232. McBride, *supra* note 211, at 269.

233. *Id.*; *see also* Agneshwar, *supra* note 211, at 308 ("Tillich's conception of religion has an objective as well as a subjective component.").

234. Agneshwar, *supra* note 211, at 308 (quoting PAUL TILLICH, DYNAMICS OF FAITH 12 (1957)).

235. SALER, *supra* note 3, at 111.

236. *Id.* at 110-11.

237. Agneshwar, *supra* note 211, at 309.

238. Choper, *supra* note 7, at 595.

subjectively believe his views were "religious" to receive conscientious-objector status.[239] Welsh expressly disclaimed that his basis for seeking conscientious-objector status was based on religion and struck the words "religious training and" from his application, leaving only his "belief."[240] Rather than religious training, Welsh's views were based on his study of history and sociology, his understanding of world politics, and his view that military enterprises were wasteful.[241] Four Justices concluded that although Welsh did not subjectively view his reasons for seeking an exemption as religious, they were tantamount to religious beliefs for purposes of the statute because they "play the role of a religion and function as a religion in his life."[242] In the thirty-five years since *Welsh*, the Supreme Court has addressed the definition of religion only twice, both times in dicta, and has not sought to modify its holding in *Seeger*.[243] In light of the Court's hands-off approach, several commentators have sought to fill the void. The two most notable approaches are those of Jesse Choper and Kent Greenawalt.

B. Academic Approaches

1. Jesse Choper's "Extratemporal Consequences"

Jesse Choper has suggested that the religion clauses protect actions that "have a unique significance for the believers . . . making it particularly cruel for the government" to insist on conformation to generally applicable laws.[244] Choper contends that focusing on "extratemporal consequences,"[245]—essentially the threat of damnation—is more in line with the "conventional, average-person concept of religion" than Tillich's "ultimate concern."[246] Choper recognizes the danger of "parochialism and intolerance" in how judges might apply his framework[247] but counters that it is superior to content-based approaches, it provides for the minimum content called for by the religion clauses in singling out religion, it has a

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239. Greenawalt, *supra* note 67, at 760 (citing Welsh v. United States, 398 U.S. 333 (1970)).

240. Agneshwar, *supra* note 211, at 303 (citing *Welsh*, 398 U.S. at 337).

241. Greenawalt, *supra* note 67, at 760.

242. *Id.* (quoting *Welsh*, 398 U.S. at 339).

243. Agneshwar, *supra* note 211, at 304-05.

244. JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES 74 (1995); Choper, *supra* note 7, at 597.

245. CHOPER, *supra* note 244, at 77; Choper, *supra* note 7, at 599.

246. Choper, *supra* note 7, at 599; *see also* CHOPER, *supra* note 238, at 77.

247. CHOPER, *supra* note 244, at 77; Choper, *supra* note 7, at 599.

substantial pedigree, and it fits with at least some doctrines of most major religions.[248]

Several commentators have been sharply critical of Choper's approach. Stanley Ingber has responded that "Choper's definition of religion, even by conservative standards, is grossly underinclusive."[249] Douglas Laycock notes that "many activities that obviously are exercises of religion are not required by conscience or doctrine."[250] Similarly, John Garvey explains that Choper's definition "might not apply to many matters of worship whose abandonment, though seen as undesirable, would not be visited with 'damnation or some like consequence.'"[251]

Ingber also observes that by limiting the inquiry to extra-temporal consequences, Choper *ipso facto* focuses on Western religions, excludes those (both Western and non-Western) that believe in the possibility of forgiveness in the afterlife (whether universal or specific),[252] and call on courts to immerse themselves in theological questions about whether and to what extent a particular action or inaction is compelled by fear of divine retribution.[253] Even taking the simplest example, "[m]any Christians are deeply unsure about the precise relation of sins in this life to the nature of existence in a possible afterlife."[254]

Choper's definition is not a functional one simply because it avoids the subjective inquiry into whether a particular belief is deeply and sincerely held. Rather, Choper presents us with a substantive definition in which he has defined-out the substance of many (perhaps most) religions and religious actions.

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248. CHOPER, *supra* note 244, at 78-80; Choper, *supra* note 7, at 599-601.

249. Ingber, *supra* note 170, at 276.

250. Laycock, *supra* note 97, at 1390; *see also* Garvey, *supra* note 61, at 793-94 ("The problem with Choper's suggestion . . . is that it threatens to remove coverage from a fairly broad range of cases that most of us think should get first amendment protection.").

251. Garvey, *supra* note 61, at 794.

252. The doctrine of universal reconciliation (also called universal salvation or *apokatastasis*) continues to be an influence with the Universalist Unitarian movement. *See* Richard J. Bauckham, *Universalism: A Historical Survey*, 4 THEMELIOS 48 (1978). The doctrine has influence among Trinitarian Christians and has supporters such as the noted Anglican bishop and scholar John A.T. Robinson. *See* JOHN A.T. ROBINSON, IN THE END, GOD (1968); John A.T. Robinson, *Universalism—Is It Heretical?*, 2 SCOT. J. THEOL. 139 (1949).

253. Ingber, *supra* note 170, at 276-77.

254. Garvey, *supra* note 61, at 794.

2. Kent Greenawalt's Prototype Approach

In contrast to Choper's essentialist proposal, Kent Greenawalt and George Freeman have separately suggested analogical approaches to defining religion.[255] Greenawalt proposes a prototype analysis, suggesting that "courts should decide whether something is religious by comparison with the indisputably religious in light of the particular legal problem involved."[256] As with any polythetic definition, "[n]o single characteristic should be regarded as essential to religiousness,"[257] because "[n]o specification of essential conditions will capture all and only the beliefs, practices, and organizations that are regarded as religious in modern culture and should be treated as such under the Constitution."[258] Andrew Koppelman has called these types of approaches "[t]he best modern treatments of the definition problem."[259]

Eduardo Peñalver, on the other hand, has criticized Greenawalt's approach, claiming that the degree of commonality between the entity to be classified and religion depends a great deal on what is chosen as the paradigm.[260] Greenawalt acknowledges the criticism and responds by suggesting that beginning the analysis with "major world religions" rather than those most familiar in the United States may "at least moderate the tendency" of bias "toward features of Western religions."[261] Both Peñalver and Ingber also worry that the open-endedness of Greenawalt's approach is insufficient to guide judges in making these determinations. Ingber claims that "without the ability to identify necessary and sufficient characteristics, courts would have no articulable basis for distinguishing between religious and nonreligious beliefs."[262] Ingber concludes that "[e]ach court thus is left to determine *sui generis* which beliefs qualify as 'religious' on

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255. GREENAWALT, *supra* note 2, at 139; Freeman, *supra* note 7; *see also* Greenawalt, *supra* note 67. Greenawalt explains that he became aware of Freeman's article only after a final draft of his had been completed, and that they differ at several points in their methods and conclusions. Greenawalt, *supra* note 67, at 753, n.2.

256. Greenawalt, *supra* note 67, at 753.

257. *Id.*

258. *Id.* at 763.

259. KOPPELMAN, *supra* note 13, at 44; *see also* Koppelman, *Troublesome*, *supra* note 190, at 880.

260. Eduardo Peñalver, *The Concept of Religion*, 107 YALE L.J. 791, 815 (1997).

261. GREENAWALT, *supra* note 2, at 140, n.57; *see also* Lupu, *supra* note 164, at 358 ("This methodology creates risks of discrimination against new faiths.").

262. Ingber, *supra* note 170, at 274.

the basis of whether or not they 'feel' religious."[263] He dismisses Greenawalt's approach as "not legal in nature."[264] Peñalver and Anand Agneshwar level a similar complaint, that Greenawalt's definition does "nothing to constrain the decisionmaking processes of individual judges. They would leave each judge completely free to determine whether or not a belief system is a religion according to the presence or absence of any single characteristic (or combination of characteristics) the judge chooses."[265]

Ingber, Peñalver, and Agneshwar go too far. A prototype analysis does not devolve automatically into completely unbridled discretion. As noted above, even where no single characteristic is essential, judges will still employ implicit understandings of what religion generally entails to arrive at a conclusion in a particular case.[266] Moreover, Greenawalt's prototype analysis may be more sensitive to religion as an element of culture or as lived experience, apart from its capacity to be linguistically compartmentalized. As Charles Taylor has noted, sometimes "the 'rule' lies essentially in the practice. The rule is what is animating the practice at any given time, and not some formulation behind it."[267]

That said, fair criticisms have been leveled at both Choper and Greenawalt's approaches. On the whole, each is subject to the same general limitations and problems to which the type of definition each proposes is generally subject. Choper's essentialist definition is too narrow, oversimplifies its object, and views religion from a Western, Christian, belief-based perspective. Greenawalt's approach is vague, permits judges a great deal of discretion, allows for the possibility of

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263. *Id.*

264. *Id.* This criticism is unfair. A test need not be essentialist to be "legal." First-year law students learn that "[p]roperty law has long recognized that property is a 'bundle of rights.'" Adam J. Levitin, *The Paper Chase: Securitization, Foreclosure, and the Uncertainty of Mortgage Title*, 63 DUKE L.J. 637, 660 n.79 (2013) (citing Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 746 (1917)); *see also* United States v. Craft, 535 U.S. 274, 278 (2002) (noting that "property" may be composed of a "collection of individual rights which" may be found in various combinations); Hohfeld, *supra* note 264, at 746 ("'[P]roperty' . . . consists of a complex aggregate of rights (or claims), privileges, powers, and immunities.").

265. Peñalver, *supra* note 260, at 816; *see also* Agneshwar, *supra* note 211, at 316-17 ("The judge, in essence, is free to impose his or her own view of what should count as religion. This standard will lead courts to take practices of familiar religions as the 'norm[.]'").

266. *See* SALER, *supra* note 3, at 76; Durham & Sewell, *supra* note 11, at 26-27; Ferré, *supra* note 24, at 6.

267. KOPPELMAN, *supra* note 13, at 44 (quoting CHARLES TAYLOR, PHILOSOPHICAL ARGUMENTS 165-80 (1995)).

inconsistent results, and merely moves the question of Western bias from the definition itself to the selection of the prototype and the determination of salient characteristics. In light of the difficulties in defining religion generally, and especially as a legal term of art, perhaps the better solution is to avoid relying on the religion clauses in the first place where it is possible to do so.[268]

IV. Avoidance Strategies

A. Dual Definitions

One attempt to avoid the difficulty, suggested initially by Lawrence Tribe and, later, a student writer in the Harvard Law Review, was to define religion differently in the Free Exercise Clause and the Establishment Clause. Tribe, writing in 1978, suggested that a more expansive understanding of religion in the free exercise context was necessary to accommodate the growing number of "recognizably legitimate" forms of religion, while a narrower understanding of religion under the establishment clause was necessary to preserve "'humane'" government programs from being constitutionally impermissible.[269] Tribe's proposal was to treat anything "'arguably religious'" as religious under the Free Exercise Clause, and anything "'arguably non-religious'" as not religious for purposes of the Establishment Clause.[270] The Harvard Law Review suggested that a bifurcated definition would "respond more sensitively to the values underlying the religion clauses[,]" would "perform[] the heuristic function of distinguishing and highlighting the purposes of each clause" and would "reduce[] the analytic tension between those clauses" thereby minimizing any judicial concern with spillover from one clause to another.[271]

Overtly defining religion differently for the two clauses, however, has always been controversial, most obviously because the word

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268. I do not mean to suggest that we should continue to rely on the religion clauses without defining religion, as discussed *supra* at Part II.B.4.b. I am suggesting that we avoid the need to rely on the clauses where they can be avoided by seeking resolution of claims under other provisions of law without reaching the need to address that claim under the religion clauses.

269. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-6, at 826-28 (1st ed. 1978).

270. *Id.* at 828.

271. Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1085-86 (1978).

"[r]eligion appears only once in the [First] Amendment."[272] As Justice Rutledge observed:

> [T]he word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid "an establishment" and another, much broader, for securing "the free exercise thereof." 'Thereof' brings down "religion" with its entire and exact content, no more and no less, from the first into the second guaranty.[273]

Additionally, defining religion differently in the two clauses "would create a three-tiered system of ideas:"[274]

> those that are unquestionably religious and thus both free from government interference and barred from receiving government support; those that are unquestionably non-religious and thus subject to government regulation and eligible receive government support; and those that are only religious [for purposes of the Free Exercise Clause] and thus free from governmental regulation but open to receipt of government support.[275]

Thus, borderline religious beliefs and new religious movements would be in a more advantageous position than old, well-established religions.[276] In other words, the dual definition approach "clearly discriminates against traditional religion" because what may be conventionally viewed as secular beliefs may win free exercise protection without corresponding establishment limitations.[277] This would be "free from governmental regulation but open to receipt of government support."[278]

Finally, several authors have suggested that two definitions may be unnecessary because the legal tests for each clause differ, and the Establishment Clause focuses more on the conduct of the

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272. Everson v. Bd. of Educ., 330 U.S. 1, 32 (1946) (Rutledge, J., dissenting); Durham & Sewell, *supra* note 11, at 14; *see also* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibit the free exercise thereof . . . .").

273. *Everson*, 330 U.S. at 32 (Rutledge, J., dissenting).

274. Malnak v. Yogi, 592 F.2d 197, 212 (3d Cir. 1979) (Adams, J., concurring).

275. *Malnak*, 592 F.2d at 212 (Adams, J., concurring).

276. Durham & Sewell, *supra* note 11, at 14; Feofanov, *supra* note 168, at 338-39; Ingber, *supra* note 172, at 288-91; Phillip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CALIF. L. REV. 817, 834-35 (1984).

277. Agneshwar, *supra* note 211, at 312.

278. *Malnak*, 592 F.2d at 212 (Adams, J., concurring).

government than the nature of a group claiming a privilege or exemption.[279] Indeed, the Supreme Court may already understand "religion" more narrowly in the establishment context.[280] In the face of this criticism, Tribe "withdrew his suggestion from the subsequent edition of his hornbook."[281]

B. Free Exercise as Free Speech

A more promising avenue, at least for free exercise cases,[282] is to avoid the need to define religion by instead evaluating the case under the Free Speech Clause. "Since at least 1890, the free exercise clause has been construed to protect forms of public expression, as well as the mere possession of religious belief."[283] "The freedom of expression and association guarantees of the first amendment impose some significant, albeit as yet sketchily defined, limitations on the government's ability to support, or require citizens to support, particular beliefs or groups[.]"[284]

Many, perhaps all, religious activities are a form of expression, and therefore protected by the Free Speech Clause.[285] Choper has observed that "almost all decisions of the Supreme Court that have vindicated individual rights by invoking the Free Exercise Clause

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279. Durham & Sewell, *supra* note 11, at 15.

280. Galanter, *supra* note 161, at 265.

281. Val D. Ricks, *To God God's, to Caesar Caesar's, and to Both the Defining of Religion*, 26 CREIGHTON L. REV. 1053, 1059, n.1 (1993) (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 11-6, 1186, n.53 (2d ed. 1988)).

282. Some Establishment Clause claims may also raise Free Speech issues, such as blasphemy legislation, but there is a more substantial overlap between Free Exercise and Free Speech protections. *See* GREENAWALT, *supra* note 2, at 152.

283. Merel, *supra* note 163 at 819.

284. Choper, *supra* note 7, at 610.

285. GREENAWALT, *supra* note 2, at 29 ("The right to engage in religious expression involves both free speech and free exercise."). *Id.* at 230 (citing Marshall, *supra* note 41, at 392-401)); *see also* SULLIVAN, *supra* note 62 (noting that many religious activities are protected by the Free Speech clause); Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119, 121 (2002) ("Many religious activities have an expressive dimension."); Choper, *supra* note 7, at 581 ("Under well developed constitutional principles, however, most free exercise cases either could have been, or were in fact, resolved under constitutional provisions other than either of the religion clauses."); Merel, *supra* note 7, at 820 ("The coextensiveness of the free speech and free exercise provisions is strongly suggested in the Supreme Court's recent decision in *Wooley v. Maynard*.") (citations omitted).

would just as easily have been resolved under other provisions of the Constitution and thus require no definition of religion at all."[286]

> Sometimes the Court . . . has bracketed the two freedoms [religion and speech] together to make them functionally equivalent . . . [this] is so common that it has led one commentator to conclude that free exercise has no independent content—that all religious liberty claims can be solved as free speech claims in disguise.[287]

William Marshall has gone so far as to suggest that "the only consistency" in the Court's free exercise jurisprudence is its "extraordinary reluctance to vindicate free exercise claims outside those protected under the speech clause."[288] Alan Brownstein similarly observes that "when we scrutinize case law during [the 1990s], most of the protection provided religious activity occurred under the auspices of the Free Speech Clause, not the Free Exercise Clause."[289]

Marshall has also suggested that freedom of religion issues might benefit from being subject to a Speech Clause analysis, and notes several cases in which the overlap was substantial.[290] Analyzing ostensibly religious claims under a Free Exercise rubric is not new. As early as 1943, the Supreme Court invalidated a "compulsory flag-salute requirement that" conflicted with the religious tenets of Jehovah's Witnesses.[291] The Court framed the issue as a matter of speech, regardless of the underlying religious

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286. CHOPER, *supra* note 244, at 64.

287. Garvey, *supra* note 61, at 782.

288. William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357, 366 (1989) (hereinafter, *Case Against*); *see also* William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545-46 (1983) (hereinafter Marshall, *Solving the Dilemma*) ("Indeed, the relationship between religious exercise and expression is so extensive that in nearly all cases in which the Court has sustained a litigant's religious objections to a religiously neutral law or regulation, it has done so with reference to freedom of expression.").

289. Brownstein, *supra* note 285, at 143.

290. William P. Marshall, *Religion as Ideas: Religion as Identity*, 7 J. CONTEMP. LEGAL ISSUES 385, 392-93 (1996) (citing Rosenberger v. Univ. of Va., 515 U.S. 814 (1995); Capital Square Review & Advisory Bd. v. Pinette, 515 U.S. 743 (1995); Wooley v. Maynard, 430 U.S. 705 (1977); Cantwell v. Connecticut, 310 U.S. 296 (1940)).

291. Marshall, *Case Against*, *supra* note 288, at 364 (citing W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 634-35 (1943)).

basis for the objection,[292] and concluded that the First Amendment as a whole was intended to "reserve from all official control" "the sphere of intellect and spirit."[293]

Unlike Brownstein, however, Marshall advocates for "construing free exercise as a subspecies of speech."[294] Public prayer and proselytization are literally speech; other religious practices including observing dietary norms, standards of grooming and dress, and participation in rituals contain a communicative element.[295] If nothing else, it communicates to co-religionists the commitment of the individual, and may identify the individual to outsiders.[296] Thus, Marshall contends, construing free exercise as a subset of speech would avoid the need to draw lines between religious belief and nonreligious ideologies or communities because such government compulsion is prohibited "whether or not their teachings or tenets are generally considered to be 'religious.'"[297]

"[T]he subsuming of religion under the rubric of speech has been accepted largely uncritically[,]"[298] and Brownstein contends that "[e]valuating burdens on religious practices as the regulation of speech has some virtues, but the problems with this approach may outweigh its benefits."[299] He contends that:

> Free speech doctrine undercuts Establishment Clause holdings in two key respects. First speech doctrine is grounded on a non-discrimination principle that precludes, or at least requires a compelling justification for, treating one message differently from another because of its communicative impact[300]. . . Second, free speech doctrine is conventionally understood and accepting a more limited

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292. Marshall, *Case Against*, *supra* note 288, at 364 (citing *Barnette*, 319 U.S. at 634-35).

293. *Barnette*, 319 U.S. at 642.

294. Marshall, *Solving the Dilemma*, *supra* note 288, at 546.

295. Choper, *supra* note 7, at 582 ("[T]here is no doubt that most rituals, rites, or ceremonies of religious worship—such as fasting, confessing, or performing a mass—that may be denominated as constituting 'action' rather than 'belief' or 'expression,' fall squarely within the protection the Court has afforded to nonverbal 'symbolic speech.'").

296. Brownstein, *supra* note 285, at 121.

297. Choper, *supra* note 7, at 610.

298. Brownstein, *supra* note 285, at 120.

299. *Id.*

300. *Id.* at 144.

> understanding of state action than Establishment Clause cases recognize."[301]

In *Employment Division v. Smith*, the Supreme Court held that (with two narrow exceptions) "the exercise of religion received no constitutional protection against neutral laws of general applicability."[302] Brownstein views *Smith* as insufficiently protective of religious freedom and suggests that post-*Smith*, the general application of rational-basis review has shifted the protection of religious liberty to Congress and state legislatures.[303] In this context, where protection of religious freedom by the political branches has become more important than it previously was, "conceptualizing religion as speech . . . creates a particularly difficult issue for legislative accommodations and exemptions of religious practice."[304] In other words, after *Smith*, if free exercise is speech, then statutory religious exemptions become difficult to justify and uphold. "[A]n expansive vision of the religion as speech that is subsumed under and protected by the Free Speech Clause precludes the adoption of many religion-only exemptions and accommodations and requires more even-handed treatment between religious and secular beliefs and viewpoints."[305]

Brownstein concedes, however, that "there is enough of a speech dimension to many religious activities, and religions play an important enough role in the marketplace of ideas" to suggest that "religion should be characterized as speech and protected under the Free Speech clause 'sometimes' and 'with caution.'"[306] In short, "most violations of the free exercise protection may be vindicated without reference to the free exercise clause and thus require no constitutional definition of 'religion' at all."[307]

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301. *Id.* at 145.

302. Brownstein, *supra* note 285, at 138 (citing Emp't Div., Dep't of Human Res. of Ore. v. Smith, 494 U.S. 872, 877 (1990) (footnote omitted)).

303. Brownstein, *supra* note 285, at 138-70.

304. *Id.* at 164.

305. *Id.* at 169. The passage of the Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb-2000bb-4) (1993), which intended to re-establish the pre-*Smith* standard of review, 42 U.S.C. § 2000bb(b)(1), only partially alleviates Brownstein's concerns. The Supreme Court held the RFRA unconstitutional as applied to the states, City of Boerne v. Flores, 521 U.S. 507, 511 (1997), but continues to enforce it against the federal government, Gonzales v. O Centro Espírita Beneficiente União do Vegetal, 546 U.S. 418, 423-24 (2006). *See generally*, Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 161-62 (2014).

306. Brownstein, *supra* note 285, at 182.

307. Choper, *supra* note 7, at 581.

"Any judge faces two sets of choices in a case. First she must decide *how* to resolve each of the issues before her. Second, she must also decide *the order* in which she will resolve these issues."[308] This "decisional sequence is critical in several respects."[309] A busy judge may discuss the simplest theory, issue a judgment, and decide not to reach the alternatives.[310] A more thorough judge may wish to discuss each alternative, investing more time initially, but hedging against the possibility that an appellate court might disagree with her view of a single basis for disposition.[311] "Presently, no doctrine constrains the judge's discretion to choose" when deciding whether to discuss one outcome-dispositive legal theory among several, or multiple independently dispositive legal theories.[312]

James Boyd White has suggested that "'the wisest position for the law is a frank recognition that it cannot understand or represent religious experience with anything like fullness or accuracy.'"[313] At least in some cases, the Free Speech Clause may provide a way for a court to adjudicate religiously based claims without having to attempt to understand or define religion or religious experience. And given that judges generally have discretion to tackle issues in the order that seems best, when there is a non-frivolous claim or defense in a Free Exercise case that places a party's status as a religion in question, judges should first analyze the claim under the Free Speech Clause to avoid the need for a definition if possible.

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308. Peter B. Rutledge, *Decisional Sequencing*, 62 ALA. L. REV. 1, 2 (2010).

309. *Id.* at 3.

310. *Id.*

311. *Id.*

312. *Id.* at 21.

313. Augsberg, *supra* note 9, at 293 (quoting WHITE, *supra* note 11, at 130); *see also* Jamal & Panjwani, *supra* note 9, at 76:

> When courts cannot avoid dealing with religious definitions, however, they must encounter the fact that they are very ill-equipped to make such determinations for two reasons: (1) legally, because rights to freedom of religion are subjectively defined and based, ultimately, on individual perception and conviction, without there being any sort of objective metric that the courts could use to assess religious definition; and (2) sociologically, because there is no way to interrogate a religious tradition as to its terms, meanings, or definitions since religious traditions can speak only through individual adherents . . . .

CONCLUSION

"'The First Amendment . . . is more than an exercise in social engineering.[314] It is an imported cultural symbol in the society[315]' that 'helps define who we are as a nation.'"[316] But its neutral application requires us to recall that "law is embedded in and indissociable from its cultural context . . . far from being neutral it is ideologically grounded in politically weighty presuppositions . . . ."[317] Therefore, "any account of religious freedom will necessarily depend on—and hence will stand or fall along with—more basic background beliefs concerning matters of religion and theology."[318] Critical and informed reflection on the idea of religion itself is necessary to fairly apply a legal category of "religion."[319] Any attempt to define religion fairly must account for the tendency of judges and courts to view "religion" through a Protestant lens focused on belief, as well as the origin of the idea of religion itself in Christian apologetics.

But attempts to define "religion" for legal purposes suffer from the same limitations as attempts to define religion for other purposes, along with many of the same disabilities faced by definitions generally. While some attempts may be better suited to particular contexts, or more sensitive to particular concerns, definitions of religion as a whole are uniformly inadequate.[320] Although it is far from a complete solution, shifting the inquiry, where possible, to the Free Speech Clause alleviates some of the pressure on the religion clauses to define religion. At the same time, "religious studies can help lawyers and judges to acknowledge the religiousness of Americans without establishing it—by recognizing the instability of religion as a category for American law."[321]

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314. Marshall, *supra* note 290, at 402 (citing STEVEN H. SHRIFFIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 5 (1990)).

315. Marshall, *supra* note 290, at 402 (citing JESSE H. CHOPER & STEVEN H. SHRIFFIN, THE FIRST AMENDMENT: CASES, COMMENTS, QUESTIONS, at xxi (1991)).

316. Marshall, *supra* note 290, at 402 (citation omitted).

317. MARGARET DAVIES, *Pluralism in Law and Religion*, *in* LAW AND RELIGION IN THEORETICAL AND HISTORICAL CONTEXT 72-99, 72 (Peter Cane et al., eds. 2008).

318. SMITH, *supra* note 68, at 63.

319. Berger, *supra* note 65, at 42 ("Meaningful study of the relationship between law and religion also resists disciplinary boundaries, inviting and perhaps demanding the insights of history, philosophy, sociology, and anthropology.").

320. Jamal & Panjwani, *supra* note 9, at 76.

321. Sullivan, *supra* note 30, at 442.