The legal conception of "religion"

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ACCOMODATING "RELIGION"

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[T]here is reason to be concerned that bias might operate in judicial efforts to define religion.†

I. INTRODUCTION

"Religion is a highly complex concept."[1] It is both a member of the everyday English lexicon and a constitutional term of art. Recently, several commentators have suggested that "religion," as the term is understood and applied by courts, primarily refers to beliefs or systems of beliefs.[2] This conventional understanding privileges some religions at the expense of others.[3] 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.[4] How

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[1] 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 RELIGION 375-90, 375 (2004) ("the study of religion is the only humanistic field in the American academy whose subject matter is explicitly governed by the United States Constitution.").

[2] *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) (addressing Israeli law) (hereinafter *The Concept of "Religion"*); Aaron R. Petty, *"Faith, However Defined": Reassessing* JFS *and the Judicial Conception of Religion*, 6 ELON L. REV. 117 (2014) (symposium article) (addressing British law) (hereinafter *"Faith, However Defined"*). *See also* BENSON SALER, CONCEPTUALIZING RELIGION: IMMANENT ANTHROPOLOGISTS, TRANSCENDENT NATIVES, AND UNBOUNDED CATEGORIES 22 (1993) ("Public agencies in the United States have tended to make theistic 'belief' central to their conceptions of religion. Doing so is in keeping with hoary Western traditions that dispose them to convert religious imaginings and sensitivities into systems of propositions.").

[3] 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 † at 116.

[4] Petty, *The Concept of "Religion," supra* note 2; Petty, *"Faith, However Defined," supra* note 2, Linda Woodhead, *Five Concepts of Religion*, 21 INTERNATIONAL REVIEW OF SOCIOLOGY-REVUE INTERNATIONALE DE SOCIOLOGIE, 121, 123-24 (2011) ("[T]he conception of religion as a matter of

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, "[i]f the very notion of religion is imbued with a Christian definitional bias, how can law interpret religious claims outside that framework?"[5]

The subject of how (or whether) "religion" ought to be defined for legal purposes, or even how it should simply be understood as a general matter, is well-trodden.[6] At this point, there is little to be

belief is a distinctly modern one with a bias toward modern Christian, especially Protestant, forms of religion.").

[5] 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).

[6] *See, e.g.*, Lael Daniel Weinberger, *Religion Undefined: Competing Frameworks for Understanding "Religion" in the Establishment Clause*, 86 U. DET. MERCY L. REV. 735 (2009); Beaman, *supra* note 5; 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); 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); GREENAWALT, *supra* note 1; 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, 10 (James A. Serritella, et al., eds. 2006) ("In addressing the question of the definition of religion, scholars in the field appear to agree only on their disagreement."); L. Scott Smith, *Constitutional Meanings of "Religion" Past and Present: Explorations in Definition and Theory*, 14 TEMP. POL. & CIV. RTS. L. REV. 89 (2004); Lee J. Strang, *The Meaning of "Religion" in the First Amendment*, 40 DUQ. L. REV. 181 (2002); Jeffrey L. Oldham, *Constitutional "Religion": A Survey of First Amendment Definitions of "Religion"*, 6 TEX. F. ON C.L. & C.R. 117 (2001); Eduardo Peñalver, *The Concept of Religion*, 107 YALE L.J. 791 (1997); James M. Donovan, *God is as God Does: Law, Anthropology, and the Definition of "Religion,"* 6 SETON HALL CONST. L.J. 23 (1995); Dmitry N. Feofanov, *Defining Religion: An Immodest Proposal*, 23 HOFSTRA L. REV. 309 (1994); Andrew W. Austin, *Faith and the Constitutional Definition of Religion*, 22 CUMBERLAND L. REV. 1 (1991/1992); Ben Clements, *Defining "Religion" in the First Amendment: A Functional Approach*, 74 CORNELL L. REV. 532 (1989); Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233 (1989); George C. Freeman, III, *The Misguided Search for the Constitutional Definition of Religion*, 71 GEO. L.J. 1519 (1983); Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579 (1982); Steven D. Collier, *Beyond Seeger/Welch: Redefining Religion Under the Constitution*, 31 EMORY L.J. 973 (1982); Timothy L. Hall, *The Sacred and the Profane: A First Amendment Definition of Religion*, 61 TEX. L. REV. 139 (1982); Sharon L. Worthing, *"Religion" and "Religious Institutions" Under the First Amendment*, 7 PEPPERDINE L. REV. 2 (1980); Gail Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 805 (1978); Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978); Anita Bowser, *Delimiting Religion in the Constitution: A Classification Problem*, 11 VAL. U. L. REV. 163 (1977); Note, *Defining Religion: Of God, the Constitution, and the D.A.R.*, 32 U. CHI. L. REV. 533 (1965).

gained by suggesting yet another definition or by proposing a novel comparative approach.[7] 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 the nature of religion; that legal pronouncements on religious freedom necessarily 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.[8]

[7] *See* 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."); 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."); WILFRED CANTWELL SMITH, THE MEANING AND END OF RELIGION 21 (1962) ("there has been in recent decades a bewildering variety of definitions; and no one of them has commanded wide acceptance."). *See also* Val D. Ricks, *To God God's, to Caesar Caesar's, and to Both the Defining of Religion*, 26 CREIGHTON L. REV. 1053, 1053 n.1 (1993) (noting that "[s]o much has been written on the subject that authors apparently have begun to standardize certain parts of the discussion.").

[8] *See* Ino Augsburg, *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 must determine and at the same time must not determine what religion or religiously motivated forms of behavior 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) ("when courts are asked to consider religious definitions . . . there emerges a fundamental, and perhaps irreconcilable, tension between freedom of religion or religious expression, on one hand, and the need for adjudication about religion or religious expression on the other."); Winnifred Fallers Sullivan, et al., *Introduction*, in AFTER SECULAR LAW 1-19, 6 (Winnifred Fallers Sullivan, et al., eds. 2011) ("Indeed, the bare question of 'what constitutes religion' in the secular state necessarily involves the law in a process of theologizing, demonstrating the 'impossibility of religious freedom' and of a complete separation between law and religion."); Christopher L. Eisgruber & Lawrence G. Sager, *Does It Matter What Religion Is?*, 84 NOTRE DAME L. REV. 807, 807 (2009) ("[I]n order to protect religious liberty we have to define what religion is, and once we are in the business of saying that some beliefs, commitments, and projects are entitled to special treatment as 'religious' while others are not, we are creating a sphere of orthodoxy of exactly the sort that any plausible understanding of religious liberty should deplore."); GREENAWALT, *supra* note 1 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."); WINNIFRED FALLERS SULLIVAN, THE IMPOSSIBILITY OF RELIGIOUS FREEDOM (2005); STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 68 (1995) ("In adopting a theory of religious freedom that is consistent with some background principles, but not with others, therefore,

But for better or worse, the religion clauses are a part of the American jurisprudential legacy.[9] We must be able to address the religion clauses in some measure if for no other reason than "[b]ecause the constitution says so."[10] And to address the religion clauses, we must at least 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 the problems with definitions of religion more generally and, indeed, definitions generally. I aim to begin a discussion of how the word "religion" in the First Amendment is best understood, given the understanding, still relatively new to the legal world, that "religion" is not a neutral category.[11]

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."[12] Drawing on definitions attempted in

government (or the judge or the legal scholar) must adopt, or privilege, one of the competing secular or religious positions."); Worthing, *supra* note 7 at 345-46 ("If a government can define what is a 'church,' it can also define what is not a church, and can do so in a manner that excludes religions that are not favored by government officials."); Jonathan Weiss, *Privilege, Posture and Protection: "Religion" in the Law*, 73 YALE L.J. 593, 604 (1964); Francis J. Conklin, S.J., *Conscientious Objector Provisions: A View in the Light of Torcaso v. Watkins*, 51 GEO. L.J. 252, 277 (1963) ("Since any attempt by a court to define or interpret the word 'religion' in the first amendment must, of necessity, imply the exclusion of some opinions which a small minority may choose to call religion, the plain implication in this opinion is that any such attempt is automatically unconstitutional.").

[9] 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) ("For the time-being, however, religion remains with us as a term and as a category.").

[10] Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 314 (1996). *See also* Durham & Sewell, *supra* note 6 at 5 ("the power to define is the power to confer differential dignity and legitimacy."); GREENAWALT, *supra* note 1 at 125 ("sometimes defining religion or religious is unavoidable"); SULLIVAN, *supra* note 8 at 148 ("When law claims authority over religion, even for the purpose of ensuring its freedom, lines must be drawn."); 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.").

[11] 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 6 at 1520 ("Surprisingly, no court or commentator has yet addressed the logically prior question: Can 'religion' be defined?").

[12] 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).

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?[13]

In Part II, I briefly review the concept of religion with particular reference to the common understanding of religion as belief. I note that using belief as a criterion for identifying religion has several shortcomings, both internally and externally. Part III discusses various types of definitions and evaluates their utility in defining religion. Part III.A covers "essentialist" definitions, including several prominent examples while Part III.B introduces "multifactor" strategies including polythetic classification/ numerical phenetics, family-resemblance theory, prototype theory, and other open-ended approaches. Part IV turns to application of definitions of religion in legal contexts. Part IV.A traces the development of the Supreme Court's struggle with the definition of religion in modern cases. Part IV.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 V suggests potential avenues for avoiding the issue, at least in part, when possible. Part V.A discusses the largely abandoned theory of understanding "religion" differently in the Free Exercise Clause and the Establishment Clause. Part V.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" when it is possible to do so. Part VI offers a brief conclusion.

II. THE CONCEPT OF RELIGION: BEYOND BELIEF

"'Religion' is a heavily, perhaps even over, theorized term."[14] But it is commonly assumed "to be a ubiquitous human

See also id. at 185-86 ("By and large, legal debates about the First Amendment fail to deal serious with how to talk critically about the church that is being kept separate or the religion that is being accommodated. There is a tendency in legal discourse to have 'religion' be a place holder in the sentence. No content is ascribed to the word. It is simply filled . . . without examination."); ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY 43 (2013) ("the vagueness of the legal understanding of 'religion' is troubling. It is surprisingly uncertain what is the object of all this protection.").

[13] STEVEN D. SMITH, FOREORDAINED FAILURE 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 the wrong questions.").

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

phenomenon."[15] We are told that "[i]t is customary nowadays to hold that there is in human life and society something distinctive called 'religion': and that this phenomenon is found on earth at present in a variety of minor forms, chiefly among outlying or eccentric peoples, and in a half-dozen or so major forms."[16] Further, some have suggested that scholars of religion have largely been derelict in directing critical attention to these assumptions.[17]

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."[18] "On this account, being religious has to do with believing certain things, where that amounts to subscribing to certain propositions and accepting certain doctrines."[19] And although it is "undeniable . . . that propositional beliefs typically play a significant role" in many religions,[20] 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.'"[21] And 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.'"[22] Many legal professionals are among them:

[15] 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).

[16] SMITH, *supra* note 7 at 19. *See also id.* at 1 (noting familiarity with "world religions" belies a "rather monumental assumption that is pervasive as it is unexamined, namely, that religion is a universal, or at least ubiquitous phenomenon to be found anywhere in the world at any time in history, albeit in a wide variety of forms and with different degrees of prevalence and importance.").

[17] 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").

[18] Nomi Maya Stolzenberg, *Theses on Secularism*, 47 SAN DIEGO L. REV. 1041, 1046 (2010).

[19] Woodhead, *supra* note 4 at 123. *See also* Stolzenberg, *supra* note 18 1041 n.2 & 1045 (on the ubiquity of the assumption that religion is primarily belief); Weiss, *supra* note 8 at 604 (as an example, noting "religion is traditionally an area of faith and assent").

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

[21] 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.'").

[22] SALER, *supra* note 2 at 21-22.

> 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."[23]

James Boyd White notes "the view of religion as propositional is not eccentric."[24] 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 propositions, the utterance of assertions about the way the world is.[25]

But "[a]n emphasis on isolating various beliefs and making them central to an analytically distinct department of culture termed *religion* is not a markedly ancient tradition."[26] 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."[27] "The most obvious feature of the cognitive

[23] Woodhead, *supra* note 4 at 123. *See also* Peroni, *supra* note 2 at 236 ("[B]ackground assumptions about religion as primarily a matter of conscience or belief appear throughout the [European Court of Human Rights'] freedom of religion case law."); 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) (noting "'belief in a supreme being remains a necessary characteristic of religion for the purposes of English charity law'" and "religious belief is perhaps the most readily understandable facet of religion" for Western asylum adjudicators); SALER, *supra* note 2 at 22 ("Public agencies in the United States have tended to make theistic 'belief' central to their conceptions of religion"); *But see* Frederick Farré, *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 branches of government) tend still to define religion in terms of some form of belief.").

[24] WHITE, *supra* note 10 at 132.

[25] *Id.*

[26] Saler, *supra* note 21 at 395 (italics in original).

[27] Woodhead, *supra* note 4 at 123 ("The 'confessionalization' of religion in the post-Reformation period tended to define and distinguish different forms of religion (particularly Christianity) in terms of distinctive 'confessions' of faith."). *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,

conception of religion is its inward nature, the fact that it resides within the recesses of the individual human mind."[28] 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."[29] 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."[30] In more general terms, "the cognitive model of religion as conscience" excludes or distorts non-creedal, non-cognitivist views.[31] For example, "in many religious traditions, the needs and identity of the community would take precedence and religious practice would play a bigger role. Religious communities with tightly formed authority and creeds may place a lower valence on individual conscience and belief."[32] 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 what is a religion because belief itself is an amorphous concept. "The nature and

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 20 at 134 ("such 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.").

[28] Stolzenberg, *supra* note 18 at 1046.

[29] Winnifred Fallers Sullivan, *Judging Religion*, 81 MARQ. L. REV. 441, 449 (1998). *See also* Saler, *supra* note 9 at 142 (citing PETER WINCH, THE IDEA OF A SOCIAL SCIENCE AND ITS RELATION TO PHILOSOPHY 102 (1958)) ("Ritual statements . . . must be understood within their contexts of expression. There is no general norm for intelligibility and rationality of religious statements against some universal standard of judgment but only against the standards contained in the 'form of life' in which they are expressed.").

[30] Harrison, *supra* note 20 134. *See also* Durham & Sewell, *supra* note 6 at 6-7 (collecting authority); WHITE, *supra* note 10 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.").

[31] Stolzenberg, *supra* note 18 at 1045. *See also* Woodhead, *supra* note 4 at 124 ("Above all, it seems to be bound up with a scientism and empiricism which 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.").

[32] Sullivan, *supra* note 29 at 449.

boundaries of belief are hard to trace,"[33] and "philosophers continue to argue about how to conceptualize belief," whether it is "a mental state, act, or event, or a disposition to act of feel in certain ways under certain conditions, or perhaps something else."[34] Benson Saler suggests that the "debate over the status of belief ought to prove troubling for the easy acceptance of . . . any . . . definition of religion that makes belief essential to religion and does not provide a cogent account of the significance of 'belief.'"[35]

Moreover, belief alone is rarely the sum total of religious identity and other aspects of one's religiousness may be antagonistic to professed beliefs. Mark Chaves notes that "attitudes and behavior correlate only weakly, and collections of apparently related ideas and practices rarely cohere into logically unified, mutually reinforcing, seamless webs."[36] Instead, "people's religious ideas and practices generally are fragmented, compartmentalized, loosely connected, unexamined, and context dependent."[37] 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 do not necessarily align.

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.[38] This places "religion on the same plane of human knowledge"[39] as any other facts. It reifies religion, rather than treating it as lived experience.[40]

[33] WHITE, *supra* note 10 at 135.

[34] SALER, *supra* note 2 at 91.

[35] *Id.* at 92.

[36] Mark Chaves, *Rain Dances in the Dry Season: Overcoming the Religious Congruence Fallacy*, 49 J. FOR THE SCIENTIFIC STUDY OF RELIGION 1, 2 (2010). *See also* WHITE, *supra* note 10 at 135-36 (suggesting that religion as practiced is far more nuanced and fluid than when limited to a belief/nonbelief dichotomy).

[37] *Id*.

[38] WHITE, *supra* note 10 at 132. *See also* Will Durant, *Freedom of Worship*, THE SATURDAY EVENING POST, Feb. 27, 1943, at 12 ("religion, like music, lives in a world beyond words, or thoughts, or things").

[39] Stolzenberg, *supra* note 18 at 1044.

[40] WHITE, *supra* note 10 at 127. *See also* Petty, *"Faith, However, Defined," supra*, note 2 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 4 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).

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."[41] What religion means to particular individuals may be quite different from the creeds they profess.[42] In short, belief is neither coterminous with nor necessarily representative of "religion" more generally.

B. Belief as an Externally Biased Category

Even assuming belief could be used as shorthand for religion, it would face insuperable problems as applied to many "religions." As I have previously observed,[43] "we cannot study an ancient category called religion"[44] because "[i]t is only western modernity that knows this category of religion."[45] Indeed, "[i]n the academic field of religious studies, the claim that religion is a modern invention is not really news."[46] "[O]ur construct *religion* is of relatively recent provenance,"[47] and "lacked a taxonomical counterpart in antiquity."[48] Thus, "Josephus cannot talk about Apion as a member of another *religion* because the category did not yet exist."[49]

The current understanding of religion "was stimulated in significant measure by the Reformation, with its sectarian doctrinal controversies over justification, the resistibility or irresistibility of grace, and the like."[50] "Protestants sought to cut out (or at least

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

[42] *See* Beaman, *supra* note 5 at 194 ("Like law, religion as it is written and religion as it is lived are two rather different pheonomena.").

[43] Petty, *The Concept of "Religion," supra* note 2; Petty, *"Faith, However Defined," supra* note 2.

[44] Steve Mason, *Jews, Judeans, Judaizing, Judaism: Problems of Categorization in Ancient History*, 38 J. FOR THE STUDY OF JUDAISM 457, 482 (2007).

[45] *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?'").

[46] BRENT NONGBRI, BEFORE RELIGION: A HISTORY OF A MODERN CONCEPT 3 (2013).

[47] Saler, *supra* note 21 at 395.

[48] Mason, *supra* note 44 at 480.

[49] *Id.*

[50] Saler, *supra* note 21 at 395. *See also* Steven D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom?*, 122 HARV. L. REV. 1869, 1876-77

downsize) the middle man, so to speak, and to encourage a more direct relation between the individual and God."[51] "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."[52]

"[T]he development of that construct was carried further, and forged into a recognizably modern form, by the Enlightenment."[53] As Thomas Paine said, "my own mind is my own church."[54] Jefferson and Madison advocated for religious freedom on openly theological grounds stressing the sanctity of conscience.[55] 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."[56]

Thus, "religion" is "an intellectual construction, a device through which the rationalist passion for classifying and pigeonholing expresses itself."[57] And it is indisputably the product of the West.[58] "'In most societies, religion is not a separate category

(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.").

[51] *Id.* at 1877.

[52] *Id.*

[53] Saler, *supra* note 21 at 395.

[54] Smith, *supra* note 50 at 1878.

[55] *Id.* at 1880.

[56] MASUZAWA, *supra* note 17 at 2.

[57] Russell T. McCutcheon, *The Category "Religion" in Recent Publications: A Critical Survey*, 42 NUMEN 284, 286 (1995) (internal citation omitted). *See also* SALER, *supra* note 2 at ix ("Religion is a Western folk category that contemporary Western scholars have appropriated."). *Cf.* JONATHAN Z. SMITH, IMAGINING RELIGION: FROM BABYLON TO JONESTOWN 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-REVUE INTERNATIONALE DE SOCIOLOGIE 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.").

[58] *See* Petty, *The Concept of "Religion," supra* note 2; Petty, *"Faith, However Defined," supra* note 2; Woodhead, *supra* note 4 at 121-22 ("the concept of religion has ethnocentric imperialist biases, and fails to do justice to non-Western cultures by forcing them into a Western straightjacket."); Koppelman, *supra* note 41 at 975 ("the term religion denotes an anthropological category, arising out of a particular Western practice of encountering and accounting for foreign belief systems associated with geopolitical entities with which the West was forced to deal."); Bryan Rennie, *Daniel Dubuisson, The Western Construction of Religion: Myths, Knowledge, and Ideology*, 87 THE JOURNAL OF RELIGION 315, 315 (2007) (noting "'only an incredible ethnocentric illusion would authorize us to recognize it as still have true scientific vocation today'" and "Religion is in fact the West's most characteristic and most valued concept, without equivalent in other cultures.

of experience and action. There is, rather, a *religious dimension* to every part of social life.'"[59]

Given that the idea of 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.[60]

It is the legitimate daughter of Christianity, and questions relative to it are exclusively Western.") (quoting DANIEL DUBUISSON, THE WESTERN CONSTRUCTION OF RELIGION: MYTH, KNOWLEDGE, AND IDEOLOGY 5 (2003)); Smith, *supra* note 15 at 269 (Religion "is a category imposed from the outside on some aspect of native culture."); Sullivan, *supra* note 29 at 443 ("Indiscriminate use of the word 'religion' as well as other reifying categories describing religious cultural phenomena—including Christianity, Hinduism, and Buddhism—have been widely and thoroughly criticized in religious studies because their use makes indefensible claims about the existence of referents for those labels."); Stewart Elliott Guthrie, *Religion: What Is it?*, 35 J. SCI. STUDY OF RELIGION 412, 418 (1996) (Religion "is a concept stemming from a particular culture at a particular time."); McCutcheon, *supra* note 57 at 285-86 ("How useful is this category, given its clearly European and largely Christian-influenced heritage?") (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.")); Saler, *supra* note 21 at 395 ("Common contemporary acceptations of the word *religion*, it is generally recognized, derive from Western cultural traditions and experiences.") (italics in original); SMITH, *supra* note 7 at 43 ("Religion as a systematic entity, as it emerged in the seventeenth and eighteenth centuries, is a concept of polemics and apologetics.").

[59] SALER, *supra* note 2 at 28 (quoting PHILIP K. BOCK, MODERN CULTURAL ANTHROPOLOGY: AN INTRODUCTION 380 (1969)). And this "accords with the views of numbers of anthropologists." *Id.*

[60] Smith, *supra* note 27 at 923 ("we need more clarity on what 'religion' even is."); Bruce, *supra* note 57 at 110 ("Much of our difficulty in defining religion comes from arguments about which of a largely agreed set of characteristics should be constitutive."); Woodhead, *supra* note 4 at 121 ("Controversy over the definition of religion is a constant . . . . The concept of religion has never been uncontentious and its critics have never been quiet . . . . It has proved impossible to fox on a definition which all—or even a majority—can agree."); Stolzenberg, *supra* note 18 at 1041 (noting the "notorious difficulty" of defining religion); Andrew Koppelman, *The Troublesome Religious Roots of Religious Neutrality*, 84 NOTRE DAME L. REV. 865, 880 (2009) ("Religion is a category that is hard to delimit."); Smith, *supra* note 50 at 1883 n.72 ("The challenges of saying what 'religion' even is has vexed judges and scholars."); Harrison, *supra* note 20 at 133 ("Given that most of us have no trouble recognizing such traditions as religious, it is perhaps surprising that there is little agreement about what religion is or, indeed, if 'it' is anything distinctive at all . . . . Elementary though this may seem, it has proven difficult to formulate a definition of religion that can command wide assent."); Satlow, *supra* note 14 at 838 ("defining a 'religion' is no easy matter."); WHITE, *supra* note 10 at 125 ("By what criteria, then can 'religion' possibly be defined, and the line between it and 'nonreligion' be drawn?"); Smith, *supra* note 15 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 omitted); Sullivan, *supra* note 29 at 453 ("The difficulties of tightly defining the borders of religion and

How 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."[61]

III. 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.[62]

religious practice are familiar to religion scholars."); Guthrie, *supra* note 58 at 412 ("Scholars agree broadly that no convincing general theory of religion exists" and that "writers in every discipline concerned with religion admit that even the definition of the term still eludes consensus"); GAVIN LANGMUIR, HISTORY RELIGION, AND ANTISEMITISM 69 (1990) ("Few words are so deeply freighted as 'religion'; and few raise so many questions"); 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."); Comstock, *supra* note 7 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."); Choper, *supra* note 6 at 579 ("Giving the concept of 'religion' a precise meaning is a formidably complicated task."); Martin Southwold, *Buddhism and the Definition of Religion*, 13 MAN, NEW SERIES 362, 362 (1978) ("Religion is not . . . an institution with sharp boundaries."); SMITH, *supra* note 7 at 21 (noting religion "is notoriously difficult to define.").

[61] Saler, *supra* note 21 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.") SULLIVAN, *supra* note 8 at 148-49.

[62] Oldham, *supra* note 6 at 123 ("The lack of a definition seems to make policing the First Amendment all but impossible in marginal cases."); WHITE, *supra* note 10 at 124 ("The most obvious problem here is that of understanding and defining the central term, *religion*."); Feofanov, *supra* note 6 at 313 ("Simply put, we need a definition of religion because it determines what is protected and what is not."); Clements, *supra* note 6 at 553 ("[T]he plain language of the religion clauses suggests the need for a definition. . ."); Garvey, *supra* note 60 at 781 ("It is impossible to apply the religion clauses without first defining the term 'religion.'"); Collier, *supra* note 6 at 975 ("A clear definition of religion is essential to any case based solely on the religion clauses."); Hall, *supra* note 6 at 160 ("[G]iving effect to the protections of the free exercise clause requires at least some definition of religion."). *But see* Bruce, *supra* note 57 at 107 (maintaining, with respect to non-legal definitions, that "if we are looking for an academic pursuit that merits the insult ['academic'] then the obsession of some students of religion with the definition of their subject matter would be a strong candidate.").

These authors suggest that "[w]hile a 'definition of cannot take the place of inquiry . . . in the absence of definitions there can be no inquiry.'"[63] Others have retorted that "[a]ny definition of religion reflects a particular theory about what religion is or . . . what religions are,"[64] 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."[65] Complicating matters are competing imperatives that legal definitions of religion should align with either contemporary understanding,[66] or consideration of what the Framers' understanding might have been.[67]

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, 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

[63] SALER, *supra* note 2 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)).

[64] Farré, *supra* note 23 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.").

[65] Farré, *supra* note 23 at 4.

[66] SALER, *supra* note 2 at 77 ("It ought not to contradict major established meanings."); Kent Greenawalt, *Religion as as Concept in Constitutional Law*, 72 CAL. L. REV. 753, 757 (1984) ("we should be surprised to learn that what is religious for the law is widely at variance with what otherwise counts as religious").

[67] WHITE, *supra* note 10 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* SMITH, *supra* note 8 at 17, 21 (suggesting the religion clauses were understood by the Founders to be entirely a grant of jurisdiction over religious matters to the states).

resemblances' or by so-called 'polythetic classification' in the biological sciences."[68] Both essentialist and multifactor approaches have significant limitations as applied to religion.

A. Essentialist Definitions

A "contrivance for bounding religion"[69]

"Ideally [essentialist definitions] ought to specify what is distinctive of the phenomena defined, what separates them from all other phenomena."[70] "But what, if anything, makes religion distinctive among other ideologies, cultural formations, and social organizations that warrants particular attention?"[71] "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."[72]

"Essentialist definitions constitute the great majority of definitions explicitly proffered"[73] and they "typically take monothetic form:[74] they attempt, that is, to state a set of necessary and sufficient conditions for recognizing phenomenal instances of the category and maintaining category boundaries."[75] 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."[76] "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."[77]

Essentialist definitions can be further divided into substantive definitions and functional definitions.[78] Substantive definitions

[68] Saler, *supra* note 9 at 832.

[69] SALER, *supra* note 2 at 226.

[70] *Id.* at 87.

[71] Smith, *supra* note 27 at 924.

[72] Comstock, *supra* note 7 512.

[73] SALER, *supra* note 2 at 24. *See also id.* at 81 ("monothetic (essentialist) definitions are legion."). For a recent example of an attempt at an essentialist definition of religion in the legal context, *see* Peter W. Edge, *Determining Religion in English Courts*, 1 OX. J.L. & RELIGION 402, 403 (2012) (defining religion by relation to "metaphysical reality").

[74] With respect to definitions of religion, "all monothetic definitions are essentialist definitions." SALER, *supra* note 2 at 80.

[75] Saler, *supra* note 9 at 831.

[76] SALER, *supra* note 2 at 79.

[77] *Id.*

[78] *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

"bring together analytically similar phenomena, aspects of which we believe we can explain the same terms."[79] 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)."[80] For example, Frederick Farré defines religion substantively as "one's way of valuing most intensively and comprehensively."[81] Steve Bruce takes a different substantive approach:

> I will define religion substantively, as beliefs, actions, and institutions based on the existence of supernatural entitites 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.[82]

Most anthropological definitions of religion "are essentialist: they purport to capture the presumptively abiding and universal characteristic(s) of religion."[83] Hideo Kishimoto 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 all its problems."[84]

Functional definitions, in contrast, define their object by reference to its consequence or function.[85] "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)."[86] One of the most influential

that')."') (italics in original). *See also* Saler, *supra* note 9 at 831 ("Essentialist definitions span a spectrum from 'substantive' to 'functional.'"); Beaman, *supra* note 5 at 193 ("For the most part, definitions can be divided into substantive and functional accounts of religion, succinctly described as what religion is and what religion does.").

[79] Bruce, *supra* note 57 at 111-12.

[80] SALER, *supra* note 2 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.").

[81] Farré, *supra* note 23 at 11 (original in italics).

[82] STEVE BRUCE, SECULARIZATION 1 (2011).

[83] Saler, *supra* note 9 at 831.

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

[85] Bruce, *supra* note 57 at 111-12.

[86] SALER, *supra* note 2 at 80. *See also* Bruce, *supra* note 80 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.").

functional definitions of religion of the twentieth century was that of Emile Durkheim, who proposed that religion is a "division of the world into two domains, the one containing all that is sacred, the other all that is profane."[87] Durkheim was interested "in what religion did"—not just its substantive characteristics, but also "its characteristic social function.[88]

Initially, "monothetic definitions may seem attractive."[89] After all, "[p]henomena are often complex" and we must "select which of a range of characteristics we shall regard as definitive." Additionally, "[m]onothetic definitions have a certain utility."[90] They may be pedagogically useful in marking a field of study; heuristically useful in "stimulating research"; and they have some "orientational value" as starting points for inquiry.[91]

But monothetic or essentialist definitions have a variety of difficulties as well. Perhaps most obviously, they are both over and under inclusive.[92] They take no 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.[93] 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 view on important questions of faith, morals, and spirituality."[94] 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."[95] "They tend to be so elastic—universalism is typically purchased by decreasing the specifics of content—that it is sometimes difficult to be certain what they actually exclude."[96] And "to define religion in

[87] Wilson, *supra* note 7 at 150-51 (internal quotation omitted).

[88] *Id.*

[89] SALER, *supra* note 2 at 87.

[90] *Id.* at 156.

[91] *Id.*

[92] GREENAWALT, *supra* note 1 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 6 at 11 (noting that Tillich's 'ultimate concerns' 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.'). I address this common misreading of Tillich below.

[93] Harrison, *supra* note 20 at 134.

[94] 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).

[95] Bruce, *supra* note 80 at 668.

[96] Saler, *supra* note 9 at 832. *See also* Harrison, *supra* note 20 at 138-39 (noting Durkheim, Weber, and Geertz all fail to differentiate religious from non-religious phenomena).

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."[97] Functional definitions may also primarily account for observable side effects, rather than the origins, of phenomena.[98]

Substantive definitions are problematic for other reasons. They "tend to narrow religion to one or two explicit variables."[99] And those variables tend 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"[100] and those concepts "may not be cognitively salient among some peoples."[101] For example, "when we seek to unpack the notion of 'superhuman' or 'supernatural,' we find difficulties with some non-western or traditional cultures."[102] "Applying the concept across cultures thus requires adjustments such as abandoning boundaries and, perhaps, replacing them with family resemblances."[103]

Overall, essentialist definitions focus attention away from complexities and subtleties.[104] "[O]verly rigid boundaries between religion and non-religion"[105] "facilitate . . . the dubious conflation of those categories and terms with presumptive 'things out there in the world.'"[106] And this reification "gives rise to interminable arguments about so-called 'borderline' cases."[107] In the legal context, this is enormously problematic. The marginal cases are the most important because they mark the reach of the law.

B. Multifactor Approaches

Seeking to pin a label on the nonexistent . . . is cosmic futility[108]

"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

[97] Bruce, *supra* note 80 at 668
[98] Wilson, *supra* note 7 at 155.
[99] Saler, *supra* note 9 at 831-32.
[100] Beaman, *supra* note 5 at 195.
[101] Saler, *supra* note 9 at 831-32.
[102] Bruce, *supra* note 80 at 668. *See also* SALER, *supra* note 2 at 156-57 (noting monothetic definitions may depend on non-native categories); Farré, *supra* note 23 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.").
[103] Guthrie, *supra* note 58 at 418.
[104] SALER, *supra* note 2 at 156-57.
[105] *Id.*
[106] *Id.* at 157.
[107] *Id.* at 156-57.
[108] Farré, *supra* note 23 at 4.

grounds, we may wish to identify as 'religious.'"[109] Saler goes so far as to claim that "the task of identifying the essence or universal core of religion has largely been a failure."[110] 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."[111]

"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."[112] 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."[113] It "was the first to argue against essentialist definitions of religion."[114] His recommendation against using "religion" as a reified concept has gained acceptance.[115] His work is "widely cited by historians of comparative religion"[116] and "until recently . . . constituted one of the more notable critiques of the concept of 'religion' as it is used by scholars."[117] The problem with essentialist definitions, in a nutshell, is that "nobody's definition works very well."[118] "[T]here is just too much variety."[119] Less charitably, "religious traditions cannot be essentialized without being misrepresented."[120] As Paul Valéry put it, "everything simple is false."[121]

[109] *Id.* at 158. *See also* KOPPELMAN, *supra* note 12 at 45 ("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 41 at 975 (same).

[110] SALER, *supra* note 2 at x.

[111] *Id.* at 197.

[112] Harrison, *supra* note 20 at 140.

[113] 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. 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 store-house 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 2 at 158 (quoting WILLIAM JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE 27 (1929) [1902]). Saler continues, quoting James: "we 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 9 at 832 (quoting James).

[114] Asad, *supra* note 112 at 205.

[115] McCutcheon, *supra* note 57 at 286.

[116] Asad, *supra* note 112 at 205.

[117] McCutcheon, *supra* note 57 at 285.

[118] Koppelman, *supra* note 41 at 973.

[119] Bruce, *supra* note 57 at 113.

[120] Jamal & Panjwani, *supra* note 8 at 70.

[121] PAUL VALERY, NOTRE DESTIN ET LES LETTRES (1937). A similar sentiment is found in PAUL VALERY, ŒUVRES II 864 (1942) (« Ce qui est simple est toujours

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). 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.'"[122] "[N]o single feature is essential for membership in a polythetically defined taxon nor is any feature sufficient for such membership."[123] Frequently, not a single character is present in every member of the category.[124] "[W]ith every polythetic class there is associated a bundle of attributes," and some attributes are possessed by every member of the category.[125] Saler explains:

> 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.[126]

faux. Ce qui ne l'est pas est inutilisable. »). *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.").

[122] Saler, *supra* note 9 at 834.

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

[124] *Id.*

[125] Southwold, *supra* note 60 at 370. *See also* SALER, *supra* note 2 at 158 ("'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.'") (quoting Raymond Firth, *Problem and Assumption in an Anthropological Study of Religion* 89 J. ROYAL ANTHRO. INST. 129, 131 (1959)).

[126] SALER, *supra* note 2 at 225.

"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.'"[127] 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."[128] Numerical phenetics is essentially classification by overall outward similarity. This approach is fundamentally limited, both as applied to religion and more generally. With respect to religion, the first problems appears 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."[129] With fewer characters, the decision how to group them becomes 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.[130] This may be because the elements themselves are polythetic, rather than elemental as the case is more frequently in the hard sciences.[131]

Even assuming the applicability of numerical phenetics to religion, the theory itself remaains 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 subjected to empirical comparison for classificatory purposes. *After* that is done, the members of that population can be sorted into polythetically described groups."[132] Arbitrary selection of a limit on what is being classified may result in less than optimal 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, like 'convergent functional adaptations.'"[133] 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

[127] Satlow, *supra* note 14 at 845.
[128] SALER, *supra* note 2 at 167.
[129] *Id.* at 219.
[130] *Id.*
[131] Saler, *supra* note 9 at 835.
[132] SALER, *supra* note 2 at 193.
[133] *Id.* at 175.

phenetics is "dead."[134] 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.[135]

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'" and Richard Paul Chaney claims that one author's "'converging of them veils phenomenal differences.'"[136] "Family resemblances have to do with how we use our words and concepts whereas polythetic classifications . . . refer 'to our data charts.'"[137] 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 membership on the basis of differentially sharing some, but not necessarily all, of a set of phenomenal values or 'characteristics.'"[138]

"'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.'"[139] Wittgenstein illustrates his theory of language by means of the word 'game,' claiming it is

[134] *Id.* at 176.

[135] *Id.* at 196.

[136] *Id.* at 159 (quoting JONATHAN Z. SMITH, IMAGINING RELIGION: FROM BABYLON TO JONESTOWN 136 (1982) and Richard Paul Chaney, *Polythematic Expansion: Remarks on Needham's Polythetic Classification*, 19 CURRENT ANTHROPOLOGY 139, 139 (1978)).

[137] SALER, *supra* note 2 at 170 (quoting Chaney, *supra* note 136 at 139-40)).

[138] Saler, *supra* note 9 at 833. *See also* Harrison, *supra* note 20 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."); SALER, *supra* note 2 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."). *See generally* JOHN HICK, AN INTERPRETATION OF RELIGION: HUMAN RESPONSES TO THE TRANSCENDENT (1989); NINIAN SMART, THE PHENOMENON OF RELIGION (1975).

[139] SALER, *supra* note 2 at 159.

fruitless to search for a single feature that all games have in common."[140]

Generally speaking, family resemblance is attractive because it seeks to avoid the need to essentialize "religion" into one or a few determinative characteristics. But it too 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.'"[141] Similarly, broadening the definition to include marginal cases does not completely correct the assumptions that underlie essentialist definitions, and runs the risk of overinclusion. "Definitions of religion necessarily involve assumptions about its underlying nature. Each and every definition of religion implies at least some theoretical conclusions."[142] 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."[143] To borrow again from Valéry, "Everything complex is unusable."[144]

3. Prototype Theory

Prototype theory presents a nuanced alternative to family resemblance. Prototypes are understood to be "'the clearest cases of category membership defined operationally by people's judgments of goodness of membership in the category.'"[145] In other words, 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.')."[146] 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."[147] "The referents adjudged most prototypical are usually those that are deemed (1) to 'bear the greatest

[140] Harrison, *supra* note 20 at 141.

[141] Harrison, *supra* note 20 at 143.

[142] Gunn, *supra* note 23 at 193 (internal quotation omitted).

[143] Harrison, *supra* note 20 at 143. *See also* FITZGERALD, *supra* note 141 at 72 ("[A] family resemblance theory of religion overextends the notion so badly that it becomes impossible to determine what can and what cannot be included.").

[144] VALERY, *supra* note 120; Webber, *supra* note 120 at 192 ("the more abstract they become, the more empty.").

[145] Saler, *supra* note 9 at 835 and SALER, *supra* note 2 at 206-07 (both quoting Eleanor Rosch, *Principles of Categorization*, *in* COGNITION AND CATEGORIZATION 27, 36 (Eleanor Rosch & Barbara B. Lloyd, eds. 1978)).

[146] Smith, *supra* note 1 at 377.

[147] SALER, *supra* note 2 at 225.

resemblance to other members of their own categories' and (2) to 'have the least overlap with other categories.'"[148]

Prototype theory has the advantage of minimizing the need for definitive category boundaries.[149] "We may explicitly conceive of categories *with reference* to clear cases that best fit them rather than conceptualizing categories monothetically, which implicates stipulated limits."[150] But this requires first identifying clear cases, and "what we regard as our clearest examples of religion are neither timeless nor monolithic."[151] As is usually the case, Western monotheisms are understood to be the most prototypical instantiations of religion.[152] Indeed, Martin Southwold "refers to Christianity as 'the religion prototypical for our conceptions of religion,'" and J.Z. Smith notes "the features of other religions are routinely being matched against some Christian prototype."[153] The analogical prototype approach, thus, may "harm minority religions and new religious movements."[154] 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.[155]

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?"[156] Self-definition may prevent a government from denying legal protections to religious groups or practices by denying their religious character, but at the same time "is highly problematic because . . . [it] presents a clear danger of misuse."[157]

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

[149] Saler, *supra* note 9 at 835.

[150] SALER, *supra* note 2 at 206.

[151] Saler, *supra* note 9 at 836.

[152] SALER, *supra* note 2 at 225.

[153] *Id.* at 208 (quoting Southwold, *supra* note 60 at 367); Smith, *supra* note 1 at 377.

[154] RUSSELL SANDBERG, LAW AND RELIGION 39 (2011) (internal quotation omitted).

[155] Wilson, *supra* note 7 at 160.

[156] Marc Galanter, *Religious Freedoms in the United States: A Turning Point?*, 1966 WISC. L. REV. 217, 255.

[157] Augsburg, *supra* note 8 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 6 at 30 (noting "a definition with infinitely malleable borders and no protection against strategic behavior would cease over time to have any meaningful substance.").

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."[158] 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.[159] Neither claim succeeded, but they do highlight both the potential for abuse and the important (if understated) role of sincerity in making claims based on religious grounds.[160]

The word "sincerity" is not found in the religion clauses,[161] but it has been called "'the threshold question'" in cases implicating them.[162] One commentator has even suggested that "[o]ne 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 nature may proceed."[163] But even here difficulties remain.

First, sincerity is a measure of whether *beliefs* are honestly held, rather than fraudulently expressed for the purpose of obtaining a benefit. And since sincerity concerns beliefs, it brings with it and is limited by the problems associated with using beliefs as a proxy for religion, discussed above. Sincerity also raises several new issues. 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

[158] Merel, *supra* note 6 at 805 (citing United States v. Kuch, 288 F. Supp. 439, 444 (D.D.C. 1968)).

[159] *Id.* (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 of literature. Adams & Barmore, *supra* note 157 at 61-62 nn.21-25 and accompanying text. *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.").

[160] *See* Webber, *supra* note 120 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.")

[161] Bowser, *supra* note 6 at 181 ("The word 'sincerity' is not mentioned . . . in the Constitution.").

[162] *Id.* at 181-82 (quoting United States v. Seeger, 380 U.S. 163, 185 (1965)).

[163] Feofanov, *supra* note 6 at 390. *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.").

determining the sincerity with which they are held."[164] The more familiar or reasonable the underlying belief, the easier it is psychologically for a judge to find the claimant's belief sincere.[165] This risks an indirect establishment of 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[166] because "'[r]eligious experiences which are as real as life to some may be incomprehensible to others.'"[167]

But even where claimants are sincere in their beliefs, individual subjective accounts of whether that sincerity is religious presents problems of massive over-inclusiveness.[168] Allowing individuals to determine their own constitutional protection according to their own views of the religiousity of their actions would "obliter[ate] . . . any meaningful distinction between religious and nonreligious."[169] "Self-definition is even more obviously ill-suited for establishment cases for which the perspectives of outsiders are very important."[170] 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.[171] But not defining religion leads to just as many problems as defining it does. "[H]ow could anyone expect to go about developing a theory of religious freedom without invoking assumptions about, for example . . . the nature of religion . . . ?"[172] The problem here is that "'when

[164] Beaman, *supra* note 5 at 201.

[165] Adams & Barmore, *supra* note 157 at 64 (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.") (quoting Int'l Soc'y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 441 (2d Cir. 1982)); Ingber, *supra* note 6 at 248 ("Jurors are more willing to accept that a given belief is sincerely held if they also perceive it to be reasonably believable.").

[166] Bowser, *supra* note 6 at 187.

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

[168] Ingber, *supra* note 6 at 248.

[169] Ingber, *supra* note 6 at 248-49; Greenawalt, *supra* note 66 at 812. *See also* Adams & Barmore, *supra* note 157 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.").

[170] GREENAWALT, *supra* note 1 at 136.

[171] Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 5 (1961); Weiss, *supra* note 8 at 604; Worthing, *supra* note 6 at 314-15.

[172] SMITH, *supra* note 8 at 68.

the term "religion" is given no explicit ostensive definition, the observer, perforce, employs an implicit one.'"[173] 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."[174] 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. 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?

[173] SALER, *supra* note 2 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 6 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.").

[174] Farré, *supra* note 23 at 6. *See also* White, *supra* note 45 at 2.

> 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 or 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 and its human inhabitants, and their histories, in ways that are enormously different and plainly unbridgeable; and 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, its 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.

IV. FAIRLY APPLYING A BIASED CONCEPT

How can we talk about religion from a legal point of view?[175]

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.[176] Institutions relying on this ruling may soon confront arguments that *Hossana-Tabor* does not apply because the employer is not religious.[177] 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.[178] 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?

Despite the significant investment of the non-legal academy in attempting to define religion, lawyers and judges in the United States have not taken advantage of these efforts. Thus far, "[t]he legal approach to definition in the United States has been independent of the anthropological or even social scientific approaches."[179] And legal scholars, like all the rest, "have written volumes on the subject without reaching anything approaching agreement."[180]

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

[175] Augsburg, *supra* note 8 at 291.

[176] 132 S. Ct. 694 (2012).

[177] 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).

[178] 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 12 at 190 n.135.

[179] Donovan, *supra* note 6 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. *See* Durham & Sewell, *supra* note 6 at 13 ("Definitions of religion in the legal scholarly literature and United States court cases largely follow the types of definitions advanced by social scientists.") & 17 ("Legal definitions of religion have largely followed social science trends.").

[180] Choper, *supra* note 6 at 579. *See also* Greenawalt, *supra* note 66 at 753 ("Academic commentators have come to startlingly diverse proposals."). *But see* Gunn, *supra* note 23 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.").

religion, or prohibiting the free exercise thereof."[181] 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."[182] "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."[183] Obviously "[i]t is not logically possible for the government both to be neutral between religion and nonreligion and to give religion special protection."[184] Thus, "[t]he accommodation of religion gives rise to a puzzle in First Amendment theory: how to reconcile free exercise with establishment principles."[185]

Some have called "the profound tension, indeed paradox, between its religion clauses" the First Amendment's "great achievement."[186] The contradiction "reflects a struggle between two values, both of them crucial, neither of which can be accommodated perfectly."[187] The problem is that "[t]here is no neutral course out of a contradiction."[188]

Perhaps in partial recognition of the paradox, "[t]he Supreme Court has never seriously discussed how religion should be defined for constitutional purposes."[189] And as a result of the Court's demurrer, its jurisprudence has been deemed "incoherent."[190]

[181] U.S. Const. amend. I.

[182] Andrew Koppelman, *Is It Fair to Give Religion Special Treatment*, 2006 U. ILL. L. REV. 571, 573 (internal quotations omitted).

[183] *Id.* at 571.

[184] Koppelman, *supra* note 60 at 869-70. *See also id.* ("Some Justices and many commentators have therefore regarded the First Amendment as in tension with itself.").

[185] *Id.* at 869.

[186] WHITE, *supra* note 10 at 149. *See also id.* ("[T]he First Amendment has the great merit of insisting simultaneously upon the importance of religion and its danger.").

[187] *Id.* at 149. *See also* Hall, *supra* note 6 at 387 ("The challenge of the religion clauses then is to create a doctrine that can work simultaneously as a protection for religion and as a protection against religion.").

[188] Koppelman, *supra* note 183 at 573.

[189] Choper, *supra* note 6 at 579. *See also* GREENAWALT, *supra* note 1 at 125 ("[T]he Supreme Court understandably has remained relatively silent."); Laycock, *supra* note 94 at 1373 (noting "the Supreme Court's failure to develop any coherent general theory of the religion clauses."); Freeman, *supra* note 6 at 1524 ("Throughout its history, the Supreme Court has had surprisingly little to say about the meaning of religion."); Weinberger, *supra* note 6 at 736.

[190] Smith, *supra* note 50 at 1871; Rebecca 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 commentators have been struggling for over a century to find an adequate definition or characterization of the term 'religion' in the First Amendment.").

Steven 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."[191] And "John Mansfield's view was probably representative: the Court's religion clause decisions reflected 'the incantation of verbal formulae devoid of explanatory value.'"[192] 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.'"[193] 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."[194] 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."[195]

A. Legal Background

The Supreme Court's first modern discussion of the boundaries of legal religion came in 1879 in *United States v. Reynolds*.[196] There, a Mormon sought an exemption from a law prohibiting bigamy because it was specifically permitted by his religion.[197] The Court turned to how the Framers of the First Amendment had defined the term and, relying on writings by Jefferson and Madison,

[191] SMITH, *supra* note 8 at v.

[192] *Id.* at 3-4 (quoting John Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CAL. L. REV. 846, 848 (1984)). *See also* SULLIVAN, *supra* note 8 at 155 ("[T]he legal limits to religious freedom are often expressed by rhetorically set boundaries that are strangely unhelpful when it comes to actual cases.").

[193] SMITH, *supra* note 8 at 3 (quoting Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 450 (1986)).

[194] Smith, *supra* note 50 at 1886.

[195] Bowser, *supra* note 6 at 163. *See also* SMITH, *supra* note 8 at 36 ("Extensive analysis has been dedicated to resolving, or at least reducing, this perceived conflict between the clauses.").

[196] 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 6 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 that "we find everywhere a clear recognition of the same truth . . . that this is a Christian nation." Church of the Holy Trinity v. United States, 143 U.S. 457, 465 (1891). 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).

[197] *Id.* at 161.

concluded that although the Mormon practice of bigamy was religious, the claimant was not entitled to practice it.

A decade later, the Court considered a similar case in *Davis v. Beason*.[198] The Territory of Idaho had enacted law disenfranchising any person who belonged to an organization that supported polygamy.[199] Echoing James Madison's *Memorial and Remonstrance Against Religious Establishments*,[200] the Court declared that "[t]he 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."[201] The Court, however, conflated the question of what constitutes religion with whether a religious practice can be legally prohibited.[202]

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 wrote "the essence of religion is belief in a relation to God involving duties superior to those arising from any human relation."[203]

It was not until 1944 that the Court began to retreat from an overtly theistic and specifically Christian formulation of what constitutes religion.[204] Throughout the second half of the nineteenth century, the Court had based its decision "on the reality of God and the truth of individuals' religious claims."[205] In *United States v. Ballard*, Justice Douglas, faced with "massive immigration," "a society increasingly influenced by the technological revolution" and "the changing faces of a pluralistic society,"[206] discarded the Court's increasingly uncomfortable role of arbitrating religious claims, when he wrote that "[m]en may believe what they cannot prove. They

[198] Choper, *supra* note 6 at 587 (citing 133 U.S. 333 (1890)).

[199] *Id.*

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

[201] *Id.* (citing 133 U.S. at 341-42).

[202] 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.").

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

[204] *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).

[205] Agneshwar, *supra* note 205 at 299 n.21.

[206] *Id.* at 299-300.

may not be put to proof of their religious doctrines or beliefs."[207] And 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."[208]

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.[209] "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.'"[210]

The Court followed *Torcaso* with its seminal decision in *United States v. Seeger*.[211] *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.[212] 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 the constitutional context.[213]

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

> 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

[207] 322 U.S. 78, 86 (1944).

[208] Zorach v. Clausen, 343 U.S. 306, 313 (1952).

[209] 367 U.S. 488 (1961).

[210] Ingber, *supra* note 6 at 257 (quoting *Torcaso*, 367 U.S. at 495 n.11).

[211] 380 U.S. 163 (1965).

[212] 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 205 at 302 n.41; Ingber, *supra* note 6 at 260-61; McBride, *supra* note 205 at 250; Note, *Toward a Constitutional Definition of Religion*, *supra* note 6 at 589.

[213] The distinction is sometimes lost, especially on non-lawyers. *E.g.*, Smith, *supra* note 1 at 376 (suggesting that the Internal Revenue Service is "America's primary definer" of religion).

> not include essentially political, sociological, or philosophical views on a merely personal moral code.[214]

Seeger claimed that his opposition to war was based upon his "belief in devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed."[215] Relying on the writings of several modern theologians, "especially those of theologian Paul Tillich,"[216] the Court concluded that sincere religious belief that "occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption" also qualifies.[217] 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."[218] Thus, the Supreme Court adopted an essentialist functional definition of religion by looking to what role it plays in an individual's life.[219]

The Court's reliance on Tillich, a theologian, is noteworthy. Tillich argued that "'Religion' is the state of being grasped by an ultimate concern, a concern which qualifies as all other concerns as preliminary, and which itself contains the answer to the question of the meaning of our life."[220] "Ultimate concern," in turn, he described as "the integrating center of the personal life"[221] to which "all other concerns are subordinated or sacrificed" and which is "experienced as promising 'total fulfillment.'"[222] Tillich also defined ultimate concern as "concern about what is experienced as ultimate,"[223] and he also formulated his definition, in earlier manuscripts, as "concern for the ultimate."[224]

[214] 50 U.S.C. App. § 456(j) (1958). This provision, 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 66 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), superseded an earlier provision which granted conscientious objector status only to those who were "members of a well-organized 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 205 at 252.

[215] 380 U.S. at 166.

[216] Greenawalt, *supra* note 66 at 760. *See also* Agneshwar, *supra* note 205 at 302; Ingber, *supra* note 6 at 259 n.148.

[217] 380 U.S. at 176.

[218] *Id.* at 166 & 176.

[219] Ingber, *supra* note 6 at 259 n. 149; Choper, *supra* note 6 at 589.

[220] SALER, *supra* note 2 at 106.

[221] *Id.* at 106.

[222] *Id.* at 108.

[223] *Id.* at 107-08.

[224] Smith, *supra* note 15 at 280.

But as James McBride explains, "Tillich's 'ultimate concern' cannot be reduced to an affective attitude alone."[225] Instead, "there exist two poles in 'ultimate concern': objective as well as subjective."[226] "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.'"[227] 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."[228] For Tillich, this is Christianity.[229] In applying Tillich's formulation of "ultimate concern," but avoiding the objective component of Tillich's theory, the Court distorted Tillich's theologicial views.[230]

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."[231] 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 subjectively believe his views were "religious" to receive conscientious-objector status.[232] 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."[233] 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.[234] 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

[225] McBride, *supra* note 205 at 269

[226] *Id.*; *see also* Agneshwar, *supra* note 205 at 308 ("Tillich's conception of religion as an objective as well as a subjective component.").

[227] Agneshwar, *supra* note 205 at 308 (quoting PAUL TILLICH, DYNAMICS OF FAITH 12 (1957)).

[228] SALER, *supra* note 2 at 111.

[229] *Id.* at 109.

[230] Agneshwar, *supra* note 205 at 309.

[231] Choper, *supra* note 6 at 595.

[232] Greenawalt, *supra* note 66 at 760 (citing 398 U.S. 333 (1970)).

[233] Agneshwar, *supra* note 205 at 303 (citing 398 U.S. at 337)).

[234] Greenawalt, *supra* note 66 at 760.

function as a religion in his life.'"[235] 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*.[236] In view 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 "unique significance for believers" that makes it "particularly cruel" for the government to insist on conformation to generally applicable laws.[237] Choper contends that focusing on "extratemporal consequences,"[238]—essentially the threat of damnation—is more in line with the "conventional, average-person concept of religion" than Tillich's "ultimate concern."[239] Choper recognizes the danger of "parochialism and intolerance" in how judges might apply his framework,[240] 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 substantial pedigree; and it fits with at least some doctrines of most major religions.[241]

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."[242] Douglas Laycock notes that "many activities that obviously are exercises of religion are not required by conscience or doctrine."[243] Similarly, John Garvey explains that Choper's definition "might not apply to many matters of worship

[235] *Id.* (quoting 398 U.S. at 339)).

[236] Agneshwar, *supra* note 205 at 304-05. *See also* Peñalver, *supra* note 6 at 799 ("Subsequent Supreme Court decisions have not dealt directly with the issue of defining religion.").

[237] JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES 74 (1995); Choper, *supra* note 6 at 597.

[238] CHOPER, *supra* note 237 at 77; Choper, *supra* note 6 at 599.

[239] Choper, *supra* note 6 at 599; *see also* CHOPER, *supra* note 237 at 77.

[240] CHOPER, *supra* note 237 at 77; Choper, *supra* note 6 at 599.

[241] CHOPER, *supra* note 237 at 78-80; Choper, *supra* note 6 at 599-601.

[242] Ingber, *supra* note 6 at 276.

[243] Laycock, *supra* note 94 at 1390. *See also* Garvey, *supra* note 60 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.").

whose abandonment, although undesirable, would not be visited with 'damnation or some like consequence.'"[244]

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),[245] 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.[246] 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."[247]

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.

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.[248] 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."[249] As with any polythetic definition, "[n]o single characteristic should be regarded as essential to religiousness,"[250] 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."[251] Andrew

[244] Garvey, *supra* note 60 at 794.

[245] The doctrine of universal reconciliation (also called universal salvation or *apokatastasis*) continues to be an influence with the Universalist Unitarian movement, *see* Richard Bauckham, *Universalism: A Historical Survey*, 4 THEMELIOS 47 (1978), and among Trinitarian Christians has supporters including the noted Anglican bishop and scholar John A.T. Robinson, *see* JOHN A.T. ROBINSON, IN THE END GOD (1969); John A.T. Robinson, *Universalism—Is It Heretical?*, 2 SCOT. J. THEOL. 139 (1949).

[246] Ingber, *supra* note 6 at 276-77.

[247] Garvey, *supra* note 60 at 794.

[248] GREENAWALT, *supra* note 1 at 139; Greenawalt, *supra* note 66; Freeman, *supra* note 6. 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 66 at 753 n.2.

[249] Greenawalt, *supra* note 66 at 753.

[250] *Id.*

[251] *Id.* at 763.

Koppelman has called these types approaches "[t]he best modern treatments of the definition problem."[252]

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.[253] 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."[254] Both Peñalver and Ingber also worry that the open-endedness of Greenawalt's approach is not sufficient 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."[255] Ingber concludes that "[e]ach court thus is left to determine *sui generis* which beliefs qualify as 'religious' on the basis of whether or not they 'feel' religious."[256] He dismisses Greenawalt's approach as "not legal in nature."[257] 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."[258]

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

[252] KOPPELMAN, *supra* note 12 at 44; *see also* Koppelman, *supra* note 60 at 880.

[253] Peñalver, *supra* note 6 at 815.

[254] GREENAWALT, *supra* note 1 at 140 & n.57. *See also* Lupu, *supra* note 159 at 358 ("This methodology creates risks of discrimination against new faiths.").

[255] Ingber, *supra* note 6 at 274.

[256] *Id.*

[257] *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). *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); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 746 (1917) ("'Property' . . . consists of a complex aggregate of rights (or claims), privileges, powers, and immunities.").

[258] Peñalver, *supra* note 6 at 816. *See also* Agneshwar, *supra* note 205 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.'").

essential, judges will still employ implicit understandings of what religion generally entails to arrive at a conclusion in a particular case.[259] 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."[260]

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 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.[261]

V. 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

[259] *See* Farré, *supra* note 23 at 6; SALER, *supra* note 2 at 76; Durham & Sewell, *supra* note 6 at 26-27.

[260] KOPPELMAN, *supra* note 12 at 44 (quoting Charles Taylor, *To Follow a Rule*, *in* PHILOSOPHICAL ARGUMENTS (1995)).

[261] I do not mean to suggest that we should continue to rely on the religion clauses without defining religion, as discussed *supra* at Part III.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.

being constitutionally impermissible.[262] 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.[263] The Harvard Note 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.[264]

Overtly defining religion differently for the two clauses, however, has always been controversial, most obviously because the word "religion" appears in the First Amendment only once.[265] As Justice Rutledge observed, "The 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."[266]

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

> 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.[267]

Thus, borderline religious beliefs and new religious movements would be in a more advantageous position than old, well-established religions.[268] In other words, the dual definition approach "clearly discriminates against traditional religion" because what may be

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

[263] *Id.* at 828.

[264] Note, *supra* note 6 at 1085-86.

[265] Durham & Sewell, *supra* note 6 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.").

[266] Everson v. Bd. of Educ., 330 U.S. 1, 32 (1946) (Rutledge, J., dissenting).

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

[268] Durham & Sewell, *supra* note 6 at 14; Feofanov, *supra* note 6 at 338-39; Ingber, *supra* note 6 at 288-91; Philip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CAL. L. REV. 817, 834-35 (1984).

conventionally viewed as secular beliefs may win free exercise protection without corresponding establishment limitations.[269] This would be "free from governmental regulation but open to receipt of government support."[270]

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 government than the nature of a group claiming a privilege or exemption.[271] Indeed, the Supreme Court may already understand "religion" more narrowly in the establishment context.[272] In the face of this criticism, Tribe "withdrew his suggestion from the subsequent edition of his hornbook."[273]

B. Free Exercise as Free Speech

A more promising avenue, at least for free exercise cases,[274] 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."[275] "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."[276]

Many, perhaps all, religious activities are a form of expression, and therefore protected by the Free Speech Clause.[277] Choper has observed that "almost all decisions of the Supreme Court that have

[269] Agneshwar, *supra* note 205 at 312.

[270] Malnak v. Yogi, 592 F.2d 197, 212 (Adams, J., concurring).

[271] Durham & Sewell, *supra* note 6 at 15 (collecting authority).

[272] Galanter, *supra* note 156 at 265.

[273] Ricks, *supra* note 7 at 1059 n.22.

[274] 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 1 at 152.

[275] Merel, *supra* note 6 at 819.

[276] Choper, *supra* note 6 at 610.

[277] GREENAWALT, *supra* note 1 at 29 ("The right to engage in religious expression involves both free speech and free exercise") & 230 (citing Marshall, *supra* note 40 at 392-401). *See also* SULLIVAN, *supra* note 8 at 149 (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) ("[m]any religious activities have an expressive dimension."); Choper, *supra* note 6 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 clause."); Merel, *supra* note 6 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*.").

vindicated individual rights by invoking the Free Exercise Clause would just as easily have been resolved under other provisions of the Constitution and thus require no definition of religion at all."[278] And in fact, "[s]ometimes 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."[279] 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."[280] 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."[281]

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.[282] 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. The Court framed the issue as a matter of speech, regardless of the underlying religious basis for the objection,[283] and concluded that the First Amendment as a whole was intended to "reserve from all official control" "the sphere of intellect and spirit."[284]

Unlike Brownstein, however, Marshall advocates for construing free exercise as a subset of speech.[285] Public prayer and proselytization are literally speech; other religious practices

[278] CHOPER, *supra* note 237 at 64.

[279] Garvey, *supra* note 60 at 782 (citing William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545 (1983)).

[280] William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE WESTERN U.L. REV. 357, 366 (1989). *See also* Marshall, *supra* note 279 at 545-56 ("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.").

[281] Brownstein, *supra* note 277 at 143.

[282] Marshall, *supra* note 40 at 392-93 (citing Rosenberger v. Univ. of Va., 115 S. Ct. 2510 (1995); Capital Square Review & Advisory Bd v. Pinette, 115 U.S. 2440 (1995); Wooley v. Maynard, 430 U.S. 705 (1977); Cantwell v. Connecticut, 310 U.S. 296 (1940)).

[283] Marshall, *supra* note 280 at 364 (citing W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 634-35 (1943)).

[284] *Barnette*, 319 U.S. at 642.

[285] Marshall, *supra* note 279 at 546.

including observing dietary norms, standards of grooming and dress, and participation in rituals contain a communicative element.[286] If nothing else, it communicates to co-religionists the commitment of the individual, and may identify the individual to outsiders.[287] 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.'"[288]

"[T]he subsuming of religion under the rubric of speech[] has been accepted largely uncritically,"[289] 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."[290] He contends that "[f]ree 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. . . . Second, free speech doctrine is conventionally understood and accepting a more limited understanding of state action than Establishment Clause cases recognize."[291]

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."[292] 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. 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."[293] 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

[286] Choper, *supra* note 6 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.'").

[287] Brownstein, *supra* note 277 at 121.

[288] Choper, *supra* note 6 at 610.

[289] Brownstein, *supra* note 277 at 120.

[290] *Id.* at 120.

[291] *Id.* at 145.

[292] Brownstein, *supra* note 277 at 138 (citing Employment Div., Dep't of Human Resources of Ore. v. Smith, 494 U.S. 872, 877 (1990)).

[293] Brownstein, *supra* note 277 at 164.

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."[294]

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."[295] 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."[296]

"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."[297] This "decisional sequence is critical in several respects."[298] A busy judge may discuss the simplest theory, issue a judgment, and decide not to reach the alternatives. 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. "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.[299]

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.'"[300] At

[294] *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 to 2000bb-4), 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, 548 U.S. 418, 423-24 (2006). *See generally*, Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 161-62 (2014).

[295] *Id.* at 182.

[296] Choper, *supra* note 6 at 581.

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

[298] *Id.* at 3.

[299] *Id.* at 21.

[300] Augsburg, *supra* note 8 at 293 (quoting WHITE, *supra* note 10 at 130). *See also* Jamal & Panjwani, *supra* note 8 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

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 nonfrivolous 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.

VI. Conclusion

"The First Amendment . . . is more than an exercise in social engineering. It is an imported cultural symbol in the society that helps define who we are as a nation."[301] 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."[302] 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."[303] Critical and informed reflection on the idea of religion itself is necessary to fairly apply a legal category of "religion."[304] 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.[305]

> 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.

[301] Marshall, *supra* note 40 at 402.

[302] 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).

[303] SMITH, *supra* note 8 at 63.

[304] Berger, *supra* note 64 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.").

[305] Jamal & Panjwani, *supra* note 8 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

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."[306]

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.

[306] Sullivan, *supra* note 29 at 442.