# Determining What Counts as Religion in American Public Life: Theory, History and Law

**Samuel Free Williams**
**Richmond, Virginia**

**BA, Swarthmore College, 2003**
**MA, Vanderbilt University, 2007**

**A Dissertation Presented to the Graduate Faculty**
**of the University of Virginia in Candidacy for the Degree of**
**Doctor of Philosophy**

**Department of Religious Studies**

**University of Virginia**
**May 2017**

**©Copyright by**
**S. Free Williams**
**All Rights Reserved**
**May, 2017**

## Abstract

This dissertation applies methods for conceptualizing religion within the field of religious studies to debates over the significance of religion in American law. In particular, I focus on two related questions in American jurisprudence: What should count as religion in American courts, and is a satisfactory justification of the special constitutional status of religion possible? Judges require some mechanism to determine which claims to religious status merit constitutional protection, but courts and legal scholars have not developed a consensus approach to identifying religion. In order to evaluate the existing proposals for determining religious status, I first review several prominent critiques of the field of religious studies. Through these critiques I arrive at a three key criteria for evaluating approaches to determining what counts as religion. I then develop a comprehensive taxonomy of methods for conceptualizing religion within religious studies and related fields, and I use the three criteria to evaluate these methods. I argue that no existing proposal for determining what counts as religion is adequate to the demands of courts, so I develop an alternative that relies on a historically grounded, analogical approach to classification. Some scholars also argue that the special constitutional status of religion requires a justification, and while this claim is not uncontested, I argue that fairness and the conceptual coherence of the concept of religion both demand such a justification. I evaluate a range of proposed justifications for this special status, and I argue that none can satisfactorily explain why religious claimants merit special protections – and burdens – that are not available to non-religious claimants.

**Acknowledgements**

I must first express my deepest gratitude to my advisor, Charles Mathewes. Without Chuck's able guidance and admirable equanimity in the face of my occasional dissertation anxiety, I would not have been able to get this project off the ground, let alone complete it. Chuck replied gamely to even my most eccentric expressions of academic anxiety, which notably included my submission of a "Smiths Dissertation Doldrums" playlist, and for this he earned my admiration as well as my gratitude. I also owe a significant debt to James Childress, whom I have viewed as a model scholar throughout my career as a doctoral student. Jim's feedback set a high standard for the quality of this work, and the opportunities for professional development and teaching that he has made available have substantially shaped me as a scholar. Micah Schwartzman's impressively broad knowledge of religion clause jurisprudence helpfully demonstrated the paucity of my own knowledge at the outset of this project, and he has since patiently and carefully developed my understanding of this complex and subtle field. Heather Warren guided me through my first semester of teaching as a doctoral student, and has been a regular source of recommendations for readings in the history of religion in America, anecdotes about academia, and solace in the midst of the more thankless phases of graduate work ever since. Nichole Flores bravely joined this project at its latest stage, and her perspective both strengthened the project and encouraged me to further pursue the lines of research I develop herein.

The religious studies department at the University of Virginia has served as my intellectual home for many years, and my colleagues and teachers at UVA have informed much more than my academic life. Of special note are Paul Jones and Margaret Mohrmann, whose models of pedagogical excellence benefitted me both as a student and as a teacher. The grace and brilliance of my many colleagues and friends at UVA merit a monograph of their own; the following list is, accordingly, far from comprehensive. Adam Newman, Alison Melnick, Joe Laycock, Natasha Mikles, Chris Hiebert and Brenton Sullivan all at various points discussed the ideas in this project with me, and I am grateful for their feedback.

I am also grateful to the faculty of the religious studies department of the College and William and Mary for providing me the opportunity to teach during one phase of my dissertation writing. Moreover, I am indebted to my students at William and Mary, whose intelligence, diligence and kindheartedness both challenged and inspired me.

The faculty and students of the Religion Department of Swarthmore College first introduced me to the scholarly study of religion, and the questions their classes and conversations raised are very much present in this work. The faculty of the Graduate Department of Religion at Vanderbilt University helped me to understand the academic study of religion as a profession. In particular, Patout Burns and Paul DeHart guided me through the development and submission of my Master's thesis, and their advice also proved helpful to me while I worked on this larger project.

I presented early versions of some of the material in this dissertation at meetings of the International Consortium for Law and Religion Studies and the American Academy of Religion. I am thankful to both ICLARS and the AAR for including my presentations in their conferences, and to my co-panelists for their comments on my work.

Above all, I wish to thank my family, to whom I owe more than I can express. My brother Aaron daily exhibits a level of dedication to and love for his vocation that I can only hope to emulate. My bookshelves are dotted with books that my parents, Sammy and Lynda, first bought while they were in seminary and then generously passed on to me when I began my career as a doctoral student. My highest hope is that I am as worthy a steward of their work and ideals as I have been of their books. This dissertation, and all the works that follow it, are my effort to fulfill that stewardship.

# Table of Contents

# INTRODUCTION

## I. The Relevance of Religious Studies to Legal Scholarship

In a 2008 essay published in the *Journal of Religion and Culture*, Sarah Barringer Gordon highlighted a lack of reciprocity between the field of religious studies and religion clause jurisprudence.[1] American courts, for their part, have long wrestled with the significance of religion through their free exercise clause and establishment clause cases, and this religion clause jurisprudence has in turn provided much material for historians of American religion. Gordon further notes that the opinion in one religion clause case, *Abingdon v. Schempp*, arguably provides the basis for the modern orientation of the field of religious studies.[2] Courts and legal scholars would, Gordon contends, benefit from scholarly work in the field of religious studies on religion and law, but Gordon claims that this work is largely unavailable. According to Gordon, academic

---

[1] Sarah Barringer Gordon, "Review Essay: Where the Action Is—Law, Religion, and the Scholarly Divide" in *Religion and Culture: A Journal of Interpretation*, v. 18 no. 2 (2008) p 249-271.

[2] To support this claim, Gordon cites both the majority opinion of Thomas Clarke and the concurring opinion of William Brennan. The Court's decision in *Schempp* (374 U.S. 203 1963) found that daily Bible readings in a Pennsylvania school district violated the establishment clause, but Clarke qualified this finding by emphasizing the educational value of the study of religion: "In addition, it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment." (225) Brennan likewise emphasized the value of "non-devotional" study of religious texts: "The holding of the Court today plainly does not foreclose teaching *about* the Holy Scriptures or about the differences between religious sects in classes in literature or history. Indeed, whether or not the Bible is involved, it would be impossible to teach meaningfully many subjects in the social sciences or the humanities without some mention of religion." (300). Gordon notes that the year after *Schempp*, the National Association of Bible Scholars transformed into the American Academy of Religion, providing some substance to her claim the court's ruling in *Schempp* shaped the modern field of religious studies.

theorists of religion either do not attend sufficiently to legal judgments of religion, or otherwise fail to provide the sort of input that lawyers actually require. Gordon concludes her essay with a wishlist of sorts for contributions to legal thinking from religious studies scholars:

> "Yet scholarship in the field has not yielded, say, a workable definition of religion for constitutional purposes. Nor has the broader public turned to scholars of religion for careful evaluations of the role of student prayer at high school football games or the relationship of the Ten Commandments to the American legal order, just to name two recent controversies. Instead we call the lawyers." [3]

Gordon notes elsewhere in her essay that some religious studies scholars do, in fact, focus on religion and law, but she finds these contributions wanting.[4] There are several reasons that legal scholars find existing contributions from religious studies scholars unhelpful. First, Gordon's criticism suggests that the scholarship in the field of religious studies rarely addresses a specific need of American courts. She further argues that those scholars who do attend to the needs of American courts often fail to grasp the complexity of the courts' rulings in religion clause cases.[5] Some legal scholars also argue that the concepts that religion scholars rely on – especially the concept of religion itself – are either obscure, or premised on a significantly different understanding of the concept of religion.[6] Finally, the field of religious studies itself offers little methodological coherence, so any legal scholar who ventures into religious studies scholarship in search of a useful definition of religion or a clear description of the

---

[3] Ibid, 269.
[4] Gordon specifically cites Winnifred Sullivan, whose books *The Impossibility of Religious Freedom* and *Prison Religion* Gordon reviews in the essay.
[5] This is Gordon's primary critique of Sullivan. See Gordon, supra n. 1, at 259-260.
[6] See Nelson Tebbe, "Nonbelievers" 97 Virginia L.R. 1111, 2011, 1132-1135. I consider Tebbe's critique of academic theories of religion in Chapter 4.

connection between the ten commandments and the US constitution is likely to leave disappointed.

In this work I take up Gordon's challenge to direct the resources of the field of religious studies to the needs of American courts by focusing on judicial determinations of religious status. Every case involving a religion clause claim requires judges to at least implicitly determine if the claim is, in fact, religious. For courts, then, the most important contribution that religious studies scholars could offer is a definition of religion, or at least a reliable mechanism for determining if a claim to religious status has merit. This potential contribution is not without significant obstacles: concepts of religion in the field of religious studies often prove obscure, and scholars disagree frequently over the significance of the term "religion". However, given the centrality of the concept of religion to the field, if religious studies cannot offer a substantive contribution to legal determinations of religious status, then field is unlikely to offer useful contributions to *any* practical questions.

## II. On Theories and Methods

The subfield of theories and methods for the study of religion encompasses a range of conflicting approaches to conceptualizing religion, and this lack of consensus leaves my project without an obvious starting point. At various points, both the field of religious studies and its various progenitors offered strong candidates for a consensus approach to conceptualizing religion. For example, substantive-cognitive approaches to

conceptualizing religion, which identify religion with a unique type of knowledge[7], and functionalist approaches, which rely on a unique output to characterize religion, both achieved widespread allegiance among religious studies scholars at different points, and both also maintain some defenders today. Mircea Eliade's theory of religion, which utilized an experiential approach to conceptualizing religion, provided what amounted to a tentative methodological consensus within the field in the postwar era.[8] However, widespread criticisms of Eliade's approach have left the field without a dominant methodology for conceptualizing religion.

Moreover, contemporary scholars working in and around theories and methods are frequently more interested in critiquing these earlier approaches to conceptualizing religion than they are in developing alternative frameworks. In Chapter 1, I consider the critiques of the field of religious studies from Talal Asad, Timothy Fitzgerald, Russell McCutcheon and others, and though their works vary in some significant ways, I identify four key critiques of the earlier conceptions of religion that many of these critics articulate. First, theorists such as Eliade argued that religion is *sui generis*, that is, they

---

[7] E.B. Tylor's "minimum definition" of religion as belief in spiritual beings is a prominent example of this approach. Edward Burnett Tylor, *Primitive Culture*, Ch. 11 p. 420 (1889). See infra, Chapter 1 Part II.A.1.a.

[8] Consider the impact of Eliade's perspective on religious studies textbooks in the second half of the twentieth century. Many did not incorporate a theoretical perspective, but those that did usually began with either a review of Eliade's claim that the experience of a sacred/profane divide is fundamental to religion or an allusion to Rudolf Otto's claim that the experience of the holy is the essence of religion. See, for example, Theodore Ludwig, *The Sacred Paths: Understanding the Religions of the World*, (Prentice-Hall, 1996), which begins with Eliade's theory of the sacred; Roger Schmidt, *Exploring Religion*, (Belmont: Wadsworth, 1988), which concludes that the experience of the holy is the foundation for the concept of religion; and Warren Matthews, *World Religions*, (Minneapolis: West, 1991), which also begins with a discussion of the sacred and the profane.

claim that religion is a unique phenomenon not reducible to the data of another field such as anthropology or sociology. The contemporary critics, however, argue not only that this claim to *sui generis* status is unwarranted, but also that it functions to promote the non-academic agendas of its proponents. Second, comparative work in the field relies on the assumption that religion is a transcultural phenomenon: in other words, the field of religious studies relies on the claim that the Buddhist Studies scholar and the Islamic Studies scholar are examining different instantiations of the same underlying phenomenon. The contemporary critics essentially claim that this assumption begs the question. Similarly, older approaches often portray religion as transhistorical; that is, they presume that at least some aspect of the concept does not change with time. The contemporary critics argue that there is little basis for this claim, given that the significance of the concept has demonstrably shifted. Finally, older concepts of the field understood religion to be a human universal, but contemporary critics question this claim in light of strong evidence to the contrary.

At first glance, these contemporary criticisms of religious studies appear to cast further doubt on the utility of the field to jurisprudence. Given that these critics undermine older approaches to conceptualizing religion without offering alternatives, they do not present courts with a clear mechanism for determining religious status. Moreover, the content of the critiques calls the viability of the religion clauses into question. Critiques that demonstrate that religion is not a transhistorical phenomenon undermine the conceptual continuity of religion clause jurisprudence: if the significance of the concept of religion shifts over time, then religion clause jurisprudence cannot be anchored to a concrete concept of religion. On the other hand, critiques that cast doubt on

the transcultural status, universality, or *sui generis* status of religion raise questions about the justifiability of the religion clauses. The *sui generis* concept of religion facilitates justifications of the special status of religion, since it offers a concept of religion that does not overlap with other fields of knowledge. If religion is not a universal, and if it is not a transcultural phenomenon, then the Constitution protects the interests of some groups more thoroughly than it protects those of others. In summary, then, the contemporary critiques of the field of religious studies raise several significant problems for religion clause jurisprudence without providing an obvious means for simplifying judicial determinations of religious status.

I contend, however, that these critical perspectives offer several important contributions to legal thinking about religion. First, courts and legal scholars often articulate concepts of religion that parallel those of religious studies scholars, so critiques of academic concepts of religion are useful for demonstrating the flaws in some legal approaches to determining religious status. In the second part of Chapter 1, I develop a comprehensive taxonomy of approaches to determining what counts as religion within the field of religious studies. In this part of the chapter, I rely on insights drawn from my analysis of the critical theories of religion in the first part of Chapter 1 to demonstrate the shortcomings of these various theories of religion. In Chapter 2, I reuse this taxonomy in order to catalogue legal approaches to conceptualizing religion. While courts and legal scholars rarely rely directly on academic theories of religion to develop their own definitions, the major theories exhibit a strong formal similarity to their counterparts in the field of religious studies. Now, legal scholars are admirably thorough in critiquing one another's work, so no proposed approach to conceptualizing religion in the field of

law is without its critics, but the critical theories within the field of religious studies are more radical for one key reason: critics such as Asad and Fitzgerald openly question whether religion is a viable category, while legal scholars tend to treat religion as a stable concept.[9] I argue below, however, that recognition of the historically variable character of religion could have important consequences for religion clause jurisprudence.

In addition, these critiques of the field of religious studies raise productive questions about the standards for useful contributions to legal debates. Critiques that undermine claims that religion is either a *sui generis* phenomenon or a transhistorical concept do in fact cast doubt on any effort to present religion as a simple concept, but courts should not rely exclusively on simple concepts. Simple concepts have an obvious appeal for courts: a theistic definition of religion, for instance, would prove relatively easy to apply, and the clarity of the concept would help ensure a relatively neutral application of the religion clauses in a variety of cases. A judicial preference for a simple concept of religion that ultimately proves to be conceptually indefensible, however, would indicate that courts prefer simplicity to accuracy. In short, if courts cannot grapple with a complex concept of religion, and if religion is a complex concept, then there is reason to believe that religion clause jurisprudence is not dealing with *religion*.

Finally, a critical approach raises questions about the justifiability of the special constitutional status of religion. In the first part of Chapter 3, I review the substance of the special constitutional status of religion; here I note that the most prominent example of this special status is the exemption from general laws that is available to some

---

[9] This is not to say that no legal scholar recognizes religion as a historically variable concept, but rather that they view the *constitutional* category of religion as stable.

religious claimants but not to similarly situated non-religious claimants. Moreover, I argue in part II of Chapter 3 that both fairness and the need for a mechanism to determine religious status render a justification of this special status necessary. Any such justification must be based exclusively on a clear concept of religion, since a justification that is applicable to non-religion could not explain why religion merits its special constitutional status. For example, a justification for religion's special status that relies on the claim that religions promote civic virtue fails because there are non-religious means of fostering civic virtue.[10] The new critical perspective on the field of religious studies undermines efforts to justify religion's special status in part because the critics offer compelling arguments against the *sui generis* concept of religion. If religion is not a unique phenomenon, then proponents of religion's special constitutional status cannot base their justifications on any qualities unique to religion.

In theory, a proponent of religion's special constitutional status could reframe their justificatory argument around a historically contingent concept of religion, but the critiques of the concept of religion as a transcultural, universal phenomenon limit the impact of any revised justification. If critics such as Asad and Fitzgerald are correct in claiming that religion is not a phenomenon common to all cultures, then the special status of religion protects the interests of some cultural groups while ignoring those of others. Religion clause jurisprudence offers some strong support for this hypothesis: Protestant Amish claimants, whom Justice Burger celebrated in *Wisconsin v. Yoder* as exemplars of

---

[10] I do not contend that the promotion of civic virtue is a valid state activity; I only note that some defenders of the special constitutional status of religion see the promotion of civic virtue as a possible justification. See infra, Ch. 3 Part IV.A.2.a.

"Jefferson's ideal of the 'sturdy yeoman'"[11] earned broad exemptions from compulsory education requirements, while a member of the black liberationist MOVE organization was denied a dietary accommodation in prison on the grounds that MOVE is not a religion.[12] The critical theories of religion suggest that this discrimination is not simply the product of a few courts' biases in favor of Protestant Christian litigants, but is the result of a flaw in the religion clauses themselves.

The new critical perspectives on religion may at first offer only negative input on religion clause jurisprudence, but this negative input is nevertheless important. Courts rely on flawed approaches to determining religious status, and a demonstration of these flaws is an important contribution to religion clause jurisprudence. More importantly, a critique of the special constitutional status of religion reframes the role of the religion clauses in the liberal constitutional order: rather than a humanistic defense of individual rights, the free exercise clause confers legal privileges only on groups that closely resemble the churches that have historically been demographically dominant in the United States. In short, these critical perspectives suggest that religion clause jurisprudence in fact promotes a covert religious establishment of groups that loosely resemble Protestant Christianity.

## III. Reframing the Concept of Religion Through a Critical Lens

My ultimate goal in this work is to provide more than negative contributions to legal scholarship on the concept of religion. I aim to use insights gained from the new critical perspectives on theories and methods for religious studies to arrive at an approach

---

[11] *Wisconsin v. Yoder*, 406 U.S. 205 (1972) at 226.
[12] *Africa v. Commonwealth*, 662 F.2d 1025 (1981).

to conceptualizing religion that can fill courts' need for a mechanism to determine religious status. In other words, I claim that these critical perspectives can facilitate a reconceptualization of the study of religion that can also prove useful to courts and legal scholars.

There are, however, significant reasons to think that these new critical perspectives have little constructive input to offer any effort to reconceptualize the field of religious studies. First and most obviously, the critiques overlap primarily in their critical perspective on the field, and few of the critiques offer input on how to re-orient the study of religion within the field of religious studies. Moreover, many of the critics aim to substantially de-legitimate the field of religious studies: Russell McCutcheon argues that religious studies scholars cling to a phenomenological concept of religion in order to maintain funding for tenure lines, while many critics, including Donald Wiebe and Timothy Fitzgerald, argue that the field provides cover for scholars who covertly promote a theological agenda.[13] Finally, some critics argue that the work of religious studies scholars should be relocated to other fields.[14] In short, these new criticisms highlight the flaws of the field in order to argue for its limitation rather than contribute to its revitalization.

---

[13] See Russell McCutcheon, *Manufacturing Religion: The Discourse of Sui Generis Religion and the Politics of Nostalgia* (New York, Oxford University Press, 1997); Donald Wiebe, *The Politics of Religious Studies: The Continuing Conflict with Theology in the Academy*, New York, St. Martin's Press, 1999; and Timothy Fitzgerald, *The Ideology of Religious Studies*, (New York, Oxford University Press, 2000). See infra, Chapter 1 Part I, and Part IV.B

[14] Fitzgerald, for instance, argues for the primacy of anthropology over religious studies; McCutcheon argues for eliminating all work in the field that is not related to the social sciences.

I argue, however, that some trends in these new criticisms can contribute to a reconceptualization of the field. In section II.D of Chapter 1, I catalogue the common historical orientation of many of these new criticisms of the field. Older approaches in the field of religious studies frequently recognized that expressions of religion shifted with historical circumstances, but the new critics share a common theme in arguing that the concept of religion itself is the product of historical processes. Given that the concept of religion itself is subject to historical change, scholars must offer some explanation to link the various versions of that concept. I contend that most of the new critical perspectives coalesce around the claim that shifting usage of the term by various groups of agents accounts for the historical development of the concept. While the new critics highlight the ever-shifting usage of the term religion to support their efforts to de-legitimize the field, I claim that a study of this shifting usage is in itself a worthwhile project.

Indeed, work by a number of scholars in religious studies and related fields already tracks the development of the usage of the term "religion" through various periods in history, so my proposal is not entirely novel.[15] However, most existing studies focus on the usage of the term by scholars, and consequently these studies assign the responsibility for shifting the significance of the concept of religion to academic theorists. I argue, however, that the field should look more broadly to usage of the term by other agents, and I claim that first amendment litigation is a particularly rich source of shifting usage of the term. At the conclusion of Part II.D of Chapter 1, I consider Tisa Wenger's *We Have a Religion* as a model of a usage-centered approach to studying the

---

[15] I review these studies in Ch. 1, Part II.D

concept of religion that looks to litigants and bureaucrats rather than scholars as the agents driving a shift in the meaning of religion.

Now, any approach to studying a concept that takes usage as its primary data must address one particularly significant theoretical challenge. If a concept is defined *exclusively* by its usage, then the only defensible approach to that concept is nominalism. A nominalist approach to a concept provides a significant challenge because the nominalist argues that the only link between various uses of a term is the term itself. A nominalist approach to conceptualizing religion would undermine any effort to identify religion as a field of study, since previous uses of the term do not, for the nominalist, condition future usage. A nominalist approach could also prove problematic for courts, since courts a nominalist framework for religion would force courts to accept all claims to religious status without any further analysis.

I look to Remford Bambrough's defense of family resemblance concepts against the charge of nominalism as a model of a usage-centered approach that does not collapse into nominalism. Bambrough refuses to accept the nominalist's binary: for the nominalist, terms either admit to monothetic definitions or constitute nominalist concepts. Bambrough instead charts a middle course through which agents can understand categories tied to complex terms even though those categories cannot be identified by a monothetic definition. I argue that Bambrough's family resemblance approach is compatible with the claim that some concepts are subject to historical shifts, and I use his perspective to claim that although religion is a historically contingent concept, and although the term is subject to change, it nevertheless identifies a coherent category.

## IV. Family Resemblances and A Revised Analogical Approach

Bambrough's defense of family resemblance approaches also provides a helpful starting point for my own proposed mechanism for determining what counts as religion in American courts. Legal scholars and some judges have experimented with analogical, family resemblance approaches to determining religious status for some time. I argue in Chapters 2 and 3 that these analogical accounts of religion are subject to some significant limitations. First, because an analogical approach is non-definitional, it does not provide a simple, clear mechanism for determining religious status. This lack of a clear mechanism for determining what counts as religion is especially concerning since, as Eduardo Peñalver argues, analogical approaches cannot effectively constrain judicial decision-making.[16] Moreover, because analogical approaches do not offer a clear concept of religion, they also do not provide an adequate basis for a justification of the special constitutional status of religion. Finally, some analogical approaches openly court a version of ethnocentrism by adopting western monotheisms – especially Christianity – as their prototypes for the category of religion.

In Chapter 4, I address these concerns by developing a revision of the analogical approach. I argue there that Bambrough's family resemblance concept of religion and the historical framework for the critical theories of religion can amend some of the flaws of existing versions of the analogical approach. A historical framework, for instance, can demonstrate that although the origins of the category of religion lay with ethnocentric concepts, its development can exceed those limitations. Moreover, Bambrough's defense of family resemblance concepts illustrates the possibility of a stable category that does

---

[16] Eduardo Peñalver, "The Concept of Religion," *Yale Law Journal* v. 107 n. 3 (1997). I discuss Peñalver's critique in Chapter 2, Part III.C.3.a.

not rely on a monothetic foundation. I ultimately argue that judges should accept all non-contradictory claims to religious status, and I claim that this acceptance does not devolve into nominalism so long as the legal category of religion excludes claims from those who simultaneously deny that they are religious.

What my revised analogical approach cannot do, however, is facilitate a justification of the special status of religion. This limitation is not particular to my own proposed approach: I argue in Chapter three that no proposed justification for religion's special status is satisfactory. Any such justification must, I contend, explain why a religious claimants merit an exemption from a generally applicable law while the claims of similarly-situated non-religious claimants do not. I offer a comprehensive review of the range of possible justifications for religion's special status in Chapter 3, but here I note that the absence of any such justification raises questions about the religion clauses themselves. If the Constitution grants rights to some citizens that are unavailable to others, and if no satisfactory justification of that grant of rights is available, then religion may no longer be a suitable category for constitutional privilege. In Chapter 4, I propose that protection of conscience, would prove more inclusive and, accordingly, more palatable, than is the protection of religion.

## V. Outline of the Project

In the first chapter, I assess the status of theories and methods for conceptualizing religion within the field of religious studies. I first review several prominent critiques of the field of religious studies, and through these critiques I arrive at a few key criteria for evaluating approaches to determining what counts as religion. The most important criterion, I argue, is a capacity to coherently and consistently distinguish religion from

non-religion. In the second part of the chapter, I develop a comprehensive taxonomy of approaches to conceptualizing religion in the field. I first review the variety of substantive monothetic and functionalist monothetic definitions of religion, and I conclude that none can adequately distinguish religion from non-religion. I then consider polythetic classification and analogical classification as alternative approaches to determining religious status. Next, I consider the impact of historical approaches to conceptualizing religion on the effort to determine what counts as religion. I conclude in Chapter 1 that the historically fluctuating usage of the term by a variety of agents should serve as the initial data for the study of religion, and I argue that a usage-centered approach can avoid the pitfalls of nominalism if scholars aim to work out the conceptual unity of the various uses of the term.

In the second chapter, I turn to efforts to determine what counts as religion in both courts and legal scholarship. I first review several accounts of the importance of threshold determinations of religious status for American courts, and I then consider a series of strategies for obviating these determinations. I conclude that none of these "avoidance strategies" is adequate, so I devote most of the chapter to reviewing efforts by judges and legal scholars to develop a mechanism for determining what counts as religion. I conclude that none of these proposals is satisfactory, and I argue in the final section of the chapter that the absence of such a mechanism calls the viability of religious freedom into question.

In the third chapter, I examine the special constitutional status of religion. In the first two parts of this chapter, I briefly describe the benefits and burdens that make up the special constitutional status of religion, and then review three arguments in favor of

developing a justification for that special status. In the third part of the chapter, I review a series of proposals for avoiding a justification of religion's special status, and in the fourth part I directly evaluate the range of possible justifications. I find that no proposed justification of religion's special status is adequate. While in Chapter 2 I question whether the project of religious freedom remains viable, in Chapter 3 I question whether it *should* be viable, given that it grants legal privileges to some citizens while withholding them from others.

In the fourth and final chapter, I begin by considering several arguments against the application of academic theories of religion to court determinations of religious status. I find these arguments unconvincing, so in the second part of the chapter I develop my own approach to determining religious status. My approach relies on both a historical approach to conceptualizing religion and analogical classification. I argue that courts should defer to individual claimants' determinations of religious status on the grounds that individual usage of the term is the best contemporary source for its meaning. I conclude the fourth chapter with brief discussions of a few potential applications of my research. I note that my revised analogical approach could have impact on two contemporary debates in legal scholarship. The first concerns the special legal status of religious institutions, and I contend that my approach supports critics of this new "religious institutionalism". The second debate involves judicial deference to religious claimant's own concepts of some key legal concepts, including contraception, abortion, and the threshold for a substantial burden.

# Chapter 1: Theories, Methods and Critics: The Concept of Religion in the Field of Religious Studies

What role do determinations of what counts as religion play in the field of religious studies? Are such determinations essential to the conceptual viability of the field? I will address these questions in the first part of this chapter by reviewing the work of some critics who claim that the field is incoherent because it lacks a reliable mechanism for identifying religion. I organize my review around an examination of four standards for viability that these critics propose: *sui generis* status, universality, transcultural applicability, and transhistorical status. I argue that each of these criteria is flawed in some significant way: some of these criteria set the standard for coherence too high, while others are fundamentally misguided. Nevertheless I conclude at the end of this first part of the chapter that these criteria indicate one important standard for the methodological coherence of the field: the capacity to distinguish religion from non-religion in at least a provisional fashion.

In the second part of this chapter, I will review the various candidates for a mechanism to distinguish religion from non-religion by developing a taxonomy of approaches to determining what counts as religion. Here I rely on Benson Saler's work from *Conceptualizing Religion*[17] in order to account for the variety of approaches within

---

[17] Benson Saler, *Conceptualizing Religion*, (New York, Berghahn Books, 2000).

the field. I first review several varieties of monothetic approaches, and then consider polythetic and analogical classification as possible alternatives to a monothetic strategy.

At the conclusion of the second part of the chapter, I consider the impact of a historical approach to conceptualizing religion on efforts to determine what counts as religion. Many scholars use the claim that religion is a historically contingent phenomenon to critique any effort to establish religious studies as a coherent field of study, but I argue that a historical concept of religion can provide the groundwork for useful research in the field. I propose establishing the continuity of the historical concept of religion by tracking its usage, especially among certain groups of similar agents. Most scholars who take an agent-centered approach to studying the historical development of the concept of religion focus on the work of academics as key architects of the modern understanding of the term, but I will argue that judges and litigants also play an important role in determining the significance of the term.

Finally, in the third part of the chapter I address accounts of the purpose of the study of religion. Many scholars of religion, as well as many critics of field of religious studies, argue that there is a connection between methods for determining what counts as religion and proposed purposes for the study of religion. In this section, I will consider nominalist, normative, and descriptive accounts of the purpose of religious studies. I conclude this section by reconciling a descriptive account of the purpose of religious studies with a historical approach to understanding the concept of religion.

## I. The importance of determinations of what counts as religion within the field of religious studies

Some critics of the field argue that religious studies cannot claim any logically consistent identity without a general concept of religion to link the various area studies and methodologies that comprise the field. Some of these critics further claim that the field offers no defensible candidates for that linking concept, and that the field's integrity is therefore open to question. Timothy Fitzgerald, for example, argues that:

> " … there is no coherent non-theological theoretical basis for the study of religion as a separate academic discipline. The major assumption lying behind much comparative religion, also called phenomenology of religion, is that 'religion' is a universal phenomenon to be found in principle in all cultures and all human experience." [18]

Here Fitzgerald uses a claim that religion is not a universal category to support a further claim that religious studies is not a coherent academic discipline. The importance of a viable definition of religion for Fitzgerald, then, is clear: without a viable definition, the field of religious studies itself is invalid. I will examine this claim at the conclusion of this first part of chapter 1, but first I will review in section A. the various standards for coherence that critics and advocates of the field propose. In section B, I then examine the methodological problems that arise from efforts to develop a concept of religion that meets these criteria, and I thereby call the utility of the criteria into question. Given the limits of the four criteria for establishing the coherence of religion, I turn in section C. to a consideration of non-foundationalist approaches to the study of religion. In section D., I propose a revised set of criteria for the coherence of the field of religious studies.

---

[18] *The Ideology of Religious Studies*, (New York, Oxford University Press, 2000), 3. I do not intend to accept the substance of Fitzgerald's critique without further investigation, but I do contend that the field must answer critiques along the lines of Fitzgerald's.

## A. Four Criteria for the Evaluating the Conceptual Coherence of Religion

In the passage I cite above, Timothy Fitzgerald identifies universality as an important component of any defense of the coherence of the category of religion. In this section, I also review three additional criteria for the coherence of the category of religion that critics and supporters of religious studies alike invoke: *sui generis* status, transcultural applicability and transhistorical applicability.

### 1. Sui Generis status

First, critics of the field – as well as some of its defenders – argue that scholars must establish the *sui generis* status of religion in order to ensure the coherence of the field. Mircea Eliade, who in many ways shaped the modern field of religious studies, explains both the nature of the *sui generis* claim and its importance at the outset of *Patterns in Comparative Religion*:

> "In the same way, a religious phenomenon will only be recognized as such if it is grasped at its own level, that is to say, if it is studied *as* something religious. To try to grasp the essence of such a phenomenon by means of physiology, psychology, sociology, economics, linguistics, art or any other study is false; it misses the one unique and irreducible element in it … Obviously there are no *purely* religious phenomena; no phenomenon can be solely and exclusively religious. Because religion is human it must for that reason be something social, something linguistic, something economic – you cannot think of [humans] apart from language and society. But it would be hopeless to try and explain religion in terms of any one of those basic functions which are really no more than another way of saying what man is. It would be as futile as thinking you could explain *Madame Bovary* by a list of social, economic and political facts; however true, they do not affect it as a work of literature."[19]

To claim that religion is *sui generis* is to claim that it is unique object of knowledge not reducible to any other field's object of study. Eliade's work here also indicates a number of benefits for scholars of religious studies that result from the establishment of religion's

---

[19] Mircea Eliade, *Patterns in Comparative Religion*, p. xi. London, Sheed & Ward, 1958.

*sui generis* status. First, scholars might use *sui genris* claim to insulate the field of religious studies from the reductivist efforts of other scholars in other fields religion: if the object of religious studies is distinct those of other fields, such as history, anthropology, and psychology, then the field's status rests on relatively stable foundations. Second, scholars might use the claim that the field's object of study is unique in order to demonstrate that religious studies scholars employ unique methodologies designed specifically to study religion.[20] Moreover, while the establishment of *sui generis* status could protect the field from reductivist efforts of those in other fields, it might also prevent reductivist moves by those *within* the field. If there is no clear argument to explain why the religion is not a discrete field of study, then there may also be no clear argument to explain why the field of religion cannot incorporate other disciplines into its ambit. The study of religion could then become the "study of everything".[21] In summary, the *sui generis* status of the category of religion ensures that the study of religion targets a discrete field of study; that it is the study of *something*, rather than the study of *everything* (as might be the case with an expansive study of

---

[20] Any successful effort by scholars to establish unique methodologies for the field may further reinforce its independence. In part II of this chapter, I review efforts to establish the independence of religious studies that rely both on the *sui generis* status of its object and the uniqueness of its methodology.

[21] Religious studies scholars have in recent years produced volumes examining the following topics as religions/religious: Baseball (*The Faith of Fifty Million: Baseball, Religion and American Culture* ed. Christopher Evans and William R. Herzog, Louisville: Westminster John Knox Press, 2002), Star Trek (*Star Trek and Sacred Ground: Explorations of Star Trek, Religion, and American Culture*, ed. Jennifer Porter and Darcee McLaren, Albany: State University of New York Press, 1999), and iPhones (Heidi Campbell and Antonio LaPastina,"How the iPhone Became Divine: New Media, Religion and the Intertextual Circulation of Meaning" in *New Media*, published online, May 18, 2010 at http://journals.sagepub.com/doi/abs/10.1177/1461444810362204 ).

religion) or the study of *something else* (as might be the case if reductivists such as Fitzgerald are correct).

Critics of the field of religious studies also identify several problems likely to result from a failure to establish the *sui generis* status of religion. First, as I note above, the field may devolve into a "study of everything" if there is no concept of religion to delimit the field of study. While the absence of any limits may at first glance appear to bolster the field, in fact the adoption of a universal scope for religious studies may prove to be a substantial disadvantage: if the field neither offers a unique approach nor a unique type of data, then its usefulness is subject to question.[22] On the other hand, any failure to establish the *sui generis* status of religion may bolster the claims of scholars in other fields who would seek to collapse the study of religion into anthropology, sociology, or some other field.[23] Finally, in the absence of a strong defense of religion as a separate field of study, the term may have no single clear referent, and, accordingly, precise use of

---

[22] Fitzgerald labels taxonomical arguments that may result from an overly broad concept of religion the "intractable problems of marginality": if religion is a broad, under-defined concept, then which phenomena at the margins count as religious? Fitzgerald wonders: "For example, are ghosts, witches, emperors, and ancestors gods? How about film stars? What is the difference between a superhuman being and a superior person? Why should Benares, Mount Fuji, or the Vatican be considered sacred places and not the White House, the Koshien Baseball Stadium in Osaka, or the Bastille?" (Fitzgerald, *Ideology*, 5) The implicit addendum to these taxonomical questions is: why does it matter? Can a study of the White House steeped in concepts of "ritual" and "holiness" reveal anything new or interesting? Scholars who defend the conception of religious studies as the "study of everything" could potentially claim that religious studies offers a unique methodology, and that this methodology justifies the existence of religious studies as a distinct field even if its object of study overlaps with those of other fields. The merits of this argument rely on the uniqueness of the field's methodologies.

[23] I review below Timothy Fitzgerald's argument in *The Ideology of Religious Studies*; he claims that much of the work in the field of religious studies could be more effectively pursued in the field of anthropology. This claim follows from his further claim that religion is merely an aspect of culture; thus, the study of religion should properly be a subset of the study of culture.

the term may therefore be impossible.[24] Scholars who wish to defend the field of religious studies may be able to address these three problems by defending religious studies as a field premised on a unique methodology rather than a unique object of study. The field may productively overlap with other fields if its approach is unique,[25] and this unique approach may also insulate the field from the reductivist efforts of scholars in other fields.[26] Moreover, a focus on the unique methodology offered by religious studies might obviate the problem of imprecise signification if scholars focus on adverbial and adjectival constructions of the term rather than the noun religion.[27]

### 2. Transcultural Applicability

The second criterion for a defensible concept of religion is its transcultural applicability. If theorists of religion are to demonstrate that scholars who study, for instance, Tibetan Buddhism and those who study American Christianity are engaged in relevantly similar types of study, they must show that underlying phenomenon of religion

---

[24] Ibid, 6: "Some scholars who have no theological intention still wish to define religion in relation to superhuman agents. Yet my analysis shows that scholars do not in fact use the word 'religion' consistently to refer to beliefs about a supernatural other world. Scholars in religious studies and other humanities subjects are either not critically conscious of their own usage, or alternatively they sometimes consciously reject the possibility of consistent analytical usage of religion along so-called common-sense lines as belief in gods or the supernatural. 'Religion' and 'religions' are used in a vast variety of contexts and include so many different things that they have no clear meaning." One function of definitions is to explain why a varied collection of phenomena constitutes a category; here Fitzgerald claims that the category of religion lacks any such explanation, and thus the referent of a scholar's (or any person's) use of the term is not clear.

[25] For instance, a "religious" approach to the study of American history may differ in its methods from a "non-religious" approach.

[26] Even if critics such as Fitzgerald could establish that religion is one aspect of culture, religious studies scholars may be able to defend the value of their field by claiming that their methodology produces unique insights.

[27] A methodological approach is subject to an important critique that I review in section I.B below. In addition, the utility of a methodological approach for establishing the *sui generis* status of religious studies depends on the plausibility and strength of the proposed methodology; I review several prominent candidates in section II of this chapter below.

is present in both cultural contexts.[28] Scholars of religious studies may not need to demonstrate that the expressions of religion in the two contexts are identical in order to establish the coherence of the field, but scholars must establish that the separate manifestations of religion do, in fact, indicate the unity of the underlying concept.

Critics such as Fitzgerald argue that if scholars of religion cannot establish grounds for its transcultural applicability, then these scholars are, in essence, guilty of begging the question: If scholars in the field of religious studies do *not* prove that the underlying phenomenon of religion is present in both American Christianity and Tibetan Buddhism, then they assume the comparability of the two phenomena at the outset. Any assumption of transcultural comparability may therefore interfere with a close study of the individual cultural contexts that scholars groundlessly group as "religions".[29]

---

[28]Such a determination is severable from the determination that religion is *sui generis*. The objects of study for the scholar of American Christianity and the scholar of Tibetan Buddhism can be linked without a determination that those objects belong in their own, unique category of phenomena. Moreover, one might determine that religion *is* a unique field of study while claiming that the object of study is unique to a particular cultural context. For example, some scholars claim that the concept of religion as a distinct aspect of human life is the result of efforts by some western intellectuals to develop a religion-secularism binary. See John Millbank, *Religion and Social Theory* and Timothy Fitzgerald, *A Discourse of Civility and Barbarity*.

[29] Fitzgerald, *The Ideology of Religious Studies*, 6: "It cannot be assumed at the outset that what is loosely referred to as belief in the supernatural in one context (for example, propitiation of angry ghosts in Japan) shares any significant a priori semantic properties with what is loosely described as belief in the supernatural in another context (for example, possession by the goddess Mariai in central India) … What one actually has is extremely complex problems of contextual hermeneutics. Working with the blurred and yet ideologically loaded concept of 'religion' and 'religions' as a starting point can confuse and impoverish analysis, conceal fruitful connections that might otherwise be made, encourage the uncritical imposition of Judaeo-Christian assumptions on non-western data, and generally maximize our chances of misunderstanding." I address complications arising from the effort to establish religion as a transcultural category,

### 3. Universality

Third, critics of religion and theorists of religion alike often claim that religion either is, or needs to be, universal. This claim to the universality of religion is distinct from the claim that religion is transcultural. One could demonstrate that the phenomenon of religion present in both Tibetan Buddhism and American Christianity is identical (or even merely similar) without demonstrating that religion is present in all human cultures. Put differently, religion may be a phenomenon present in a number of different cultures without being a universal feature of human experience. If scholars can only show that religion is a phenomenon that appears in a few contexts, then the field of religious studies may only be a study of those contexts (i.e. American Christianity, Tibetan Buddhism, and so on).[30] The establishment of the universality of religion therefore involves a claim about human nature; scholars in religion often make this claim by referring to humans as *homo religiosus*. Any successful proof that humans are in fact *homo religiosus* benefits scholars of religion in several ways. First, as Eliade notes, such proof justifies the application of the methodologies of the field to virtually any cultural context.[31] Second,

---

including the concern with an "uncritical imposition of Judea-Christian assumptions on non-western data" below in section I.B.2.

[30] If a concept of religion fails the universality test, and the field is restricted to the study of particular contexts, then the effort to distinguish religious studies from anthropology may be fruitless. This is Fitzgerald's claim in *The Ideology of Religious Studies*.

[31] Mircea Eliade, "Crisis and Renewal" in *The Quest: History and Meaning in Religion*, p. 67: "Consequently, whatever may be the reason for which human activities in the most distant past were charged with a religious value, the important thing for the historian of religions remains the fact that these activities *have had* religious values. That is to say that the historian of religions recognizes a spiritual unity subjacent to the history of humanity; in other terms, in studying the Australians, Vedic Indians, or whatever other ethnic group or cultural system, the historian of religions does not have a sense of moving in a world radically "foreign" to him." Here Eliade touches on the importance to the field of the transcultural applicability of religion, but he also relies on the universality of religion to claim that the religionist can study any culture without fear of straying into the unfamiliar. The potential exception to the universal reach of religion is, for Eliade,

Eliade also claims that the universality of religion ensures that scholars of religion study the essence of humanity rather than contingent historical developments of human cultures. Eliade thus claims that the history of religions, "more than any other humanistic discipline," can make claims about the nature of humankind.[32]

If scholars in the field of religious studies are unable to establish religion as a human universal, then some methodological problems may ensue. Timothy Fitzgerald, as I note above, claims that scholars cannot establish grounds for comparative work without first establishing that religion is a human universal. Moreover, Fitzgerald claims that scholars who assume that religion is a human universal without establishing it as such in fact disguise the theological nature of their work. The real work of the field is not, according to this critique, the claims that follow from the ungrounded assumption of religion as a human universal; rather, religious studies scholars covertly promote the importance of religion – and often specific religions – through studies based on the ungrounded assumption that humans are *homo religiosus*.[33]

---

contemporary secular cultures, and I will address this potential problem for his approach in section I.B.2 below.

[32] Eliade, "A New Humanism" in *The Quest: History and Meaning in Religion*, p. 9. Eliade specifically claims that: "More than any other humanistic discipline (i.e. psychology, anthropology, sociology etc.), history of religions can open the way to a philosophical anthropology. For the sacred is a universal dimension.... Thus, the historian of religions is in a position to grasp the permanence of what has been called [humanity's] specific existential situation of "being in the world," for the experience of the sacred is its correlate." For Eliade, the establishment of religion as a universal feature of human experience places the study of religion at the center of the humanities, as the study of humanity *par excellence*.

[33] Critics ascribe a number of motives to the scholars whom they accuse of this covert theologizing. Fitzgerald claims that these scholars are interested in promoting a "liberal ecumenism": the idea of religion as a human universal therefore undermines any particular religion's claims to exclusive revelation and instead promotes an agenda of

### 4. Transhistorical Status

Finally, some scholars claim that religious studies requires a transhitorical concept of religion; that is, they claim that some aspect of religion must be consistent throughout all historical contexts in order for the field to be coherent. The claim that religion is transhistorical is distinct from the claim that it is universal: one could demonstrate that religion is a universal phenomenon in the present without demonstrating that it was always so. A critic might, for instance, claim that religion is universal in the present, but was limited or nonexistent in the past.[34] Scholars who defend the field of religious studies often claim that either religion or some aspect of religion is insulated from historical change. Eliade, for example, acknowledges that human beings are historically conditioned while simultaneously claiming that religion itself is not a mere product of history:

> "We know that we can grasp the sacred only through manifestations which are always historically conditioned. But the study of these historically conditioned expressions does not give us the answer to these questions: What is the sacred? What does a religious experience actually mean?"[35]

Eliade thus reserves for the field of religious studies an object of study that is not fully determined by its historicality.

Critics of Eliade's claim that religion is a transhistorical phenomenon employ a variety of arguments to demonstrate that religion is, in fact, a historically conditioned

---

tolerance. See *The Ideology of Religious Studies*, 6-10. Russell McCutcheon identifies another category of motives in his discussions of Eliade's work. According to McCutcheon, Eliade promotes the idea of religion as a human universal in order to counter the rise of secularism in the 20th century. See Russell McCutcheon, *Manufacturing Religion: The Discourse of Sui Generis Religion and the Politics of Nostalgia* (New York, Oxford University Press, 1997), Ch. 1-2.

[34] Conversely, one might follow Mircea Eliade in claiming that religion was universal in the past, but is not universal in the modern "secular" west.

[35] Eliade, "The Origins of Religion" in *The Quest: History and Meaning in Religion*, 53.

phenomenon. These critics also offer a number of proposals for reconfiguring religious studies as a primarily historical discipline based on their critique of the concept of transhistorical religion. Fitzgerald, for instance, claims that the modern idea of religion is the product of the process of secularization, and thus he seeks to substantially relocate religious studies within the history of ideas.[36] Russell McCutcheon and Talal Asad, on the other hand, claim that the concept of religion is the product of the economic and political interests of scholars of religion themselves, and they study religion as a phenomenon embedded in particular institutions rather than a transhistorical phenomenon.[37] In all cases, critics who deny Eliade's claim of the transhistorical nature of religion[38] note that the failure of this claim supports reductivist claims of historians. A study of the development of either the phenomenon or the concept of religion through time does not appear methodologically or thematically distinct from other studies in the field of history.

## B. Problems Resulting from the Effort to Establish a Category of Religion that meets the Four Criteria

Some defenders of the field of religious studies contend that the field can offer concepts of religion that meet some or all of these four criteria; I will review and taxonomize the efforts of some these defenders in section II of this chapter. Before

---

[36] See Timothy Fitzgerald, *Discourse of Civility and Barbarity*. I detail this proposal in section II.D below.

[37] McCutcheon goes so far as to claim that he does field work in department meetings and academic conferences. See *Manufacturing Religion*, esp. 6-7. Asad focuses more on anthropologists of religion than on religious studies scholars, and he is more willing to ascribe benign motives to scholars than is McCutcheon. See *Genealogies of Religion*, especially the introduction.

[38] I review both the critiques Eliade's claim that religion is transhistorical and various critics' proposals for refiguring much of religious studies as a historical discipline in section II.D below.

reviewing these attempts, I will pause to question whether these criteria for the logical consistency of the category of religion are necessary. I will also consider arguments that efforts to establish these criteria are counterproductive.

### 1. The Limits of Sui Generis Religion

Despite the advantages that the *sui generis* concept of religion offers, some scholars note a series of conceptual problems stemming from efforts to establish religion as a separate and irreducible object of study. For instance, the effort to establish the *sui generis* status of religion may limit scholars' understanding: if a focus on the unique methods of the field of religious studies leads scholars to ignore the approaches of other fields, then they will likely miss the nuances of their object of study. At the outset of section I.A of this chapter, I cite Eliade's *Patterns of Comparative Religion*; Eliade here emphasizes the importance of studying religion *as* religion, and *not* as economics or linguistics. For Eliade, scholars of religion must study religious phenomena exclusively through the use of methodologies particular to the field precisely because religious phenomena are *sui generis*; no other methodology could adequately explain a religious phenomenon. Russell McCutcheon, in *Manufacturing Religion*, points out the weaknesses of this approach by noting that any effort to exclude political and economic causes of religious phenomena necessarily obscures the roles of these political and economics factors.[39] Finally, some accounts of *sui generis* religion limit access to the

---

[39] *Manufacturing Religion,* 167-177. McCutcheon makes use of an illustrative example involving the self-immolation of Thich Quang Duc. According to McCutcheon's work, both religious studies scholars and writers in the media focused on religious and spiritual motivations for the act, and therefore failed to account for the political roots and political meanings of the act. McCutcheon catalogues a variety of interpretations of Thich Quang Duc's act in the field of religious studies, and notes that none describe or interpret the political context. Eliade himself advocated *for* the inclusion of other methodologies in the

field for both scholars employing methodologies borrowed from other disciplines and those who have not themselves had religious experiences.[40]

### 2. Universality and its Critics

Scholars also identify a number of problems likely to result from the effort to establish religion as a human universal. In his critique of Eliade's claim that religion is a human universal, Russell McCutcheon argues that the effort to establish this universality is driven by a particular political agenda. For McCutcheon, Eliade's two related claims that 1) religion is a human universal and 2) modern humans are estranged from this aspect of human life amount to a defense of a conservative political ideology under the guise of a neutral academic discipline. For McCutcheon, Eliade in effect claims that religion is a necessary component of human experience, and that non-religious people lack this essential human experience. The concept of the *homo religiosus* is, in McCutcheon's view, theological anthropology disguised as scientific observation; he's also concerned that ideological agenda of thinkers such as Eliade may distort their presentation of the data.[41] Furthermore, efforts to defend the claim that religion is a human universal despite the fact that some people reject religion may strain the

---

work of religious studies; see, for example, "The New Humanism" in *The Quest: History and Meaning in Religion.*

[40] I discuss the limitations of substantive definitions of religion based on affect and experience in section II.A.1.c below.

[41] McCutcheon, *Manufacturing Religion*, 29: "In other words, in spite of some interpreters' claims to the contrary, when read in term of their sociopolitical implications, the idealist methods and presuppositions of research constitute a powerful means for authorizing and normativizing what turn out to be conservative political claims about the state of the world that support dominant power structures in as much as they marginalize the contextual specificity of the data." I consider some of the claims regarding the purpose of religious studies raised here in part III below.

underlying concept past the point of credibility.[42] If scholars in the field are to defend the claim that religion is universal, then they must develop an explanation for the existence of people who are not religious.[43] Finally, W.C. Smith claims that even if scholars can establish some universal element common to all instantiations of religion, they may "do violence" to any account of the particular religions by focusing primarily – or even exclusively – on that common element.[44] An account that, by contrast, focuses on the particularity of other religions would likely make use of the methods of study from other fields, including history and anthropology, so a focus on the common element of religion furthers the insulation of religious studies from these other disciplines.

### 3. Transcultural Status and Historical Particularity

Scholars also raise a number of concerns with efforts to establish the transcultural applicability of religion. In *The Meaning and End of Religion*, W.C. Smith worries that the study of transcultural religions may lead scholars to miss the importance of the cultural context of the emergence of a religious tradition. For example, Smith notes the similarities among the historical emergences of various religious traditions, but he also questions whether the term "religion" can adequately capture these differences:

---

[42] I note above in n. 4 that efforts to treat Star Trek, baseball, and iphone as religious phenomena may undermine the credibility of the field, but I think that the claim that religion is a human universal is hardest to maintain with regard to those who specifically disavow religiosity. Consider as a representative example Stephen Prothero's *God is Not One: The Eight Rival Religions that Run the World* (New York, Harper Collins, 2011), in which Prothero includes a coda on atheism, which he deems "a religion of sorts". Any effort to count those who specifically reject religion as religious strains the category.

[43] Scholars employ a few strategies to defend this point. Eliade, for example, claims that secular people are estranged from their religious nature, while others argue, much like Prothero's claim about atheism, that secularism is a religion.

[44] Ibid, 149: "… even if there were a least common denominator, it does violence to such religious faith as men have historically had to discount as unessential and irrelevant whatever is particular or special or unique in any case. Are we to regard as insignificant anything in the history of Chinese Buddhism that was not duplicated in Ceylon?"

> That something special was happening with the development of these great movements is undeniable; and to this their distinctive nomenclature bears some sort of testimonial. My contention is not that these emergences may be ignored; but on the contrary, that what was happening in these cases needs to be understood more carefully and more adequately than the single noun formation makes possible.[45]

Smith is concerned that any effort to establish a uniform structure of religion – or a uniform pattern for the historical emergence of religion – will ignore the unique histories and structures of the individual traditions. Smith therefore goes on to conclude that the field of religious studies could be re-established on firmer ground by focusing on a study of particular religious traditions rather than attempting to discover and reify the universal quality of "religion" in each of its historical instantiations. Other scholars note that an assumption of transcultural applicability may invite scholars and students alike to employ ethnocentric models when studying unfamiliar religions. Benson Saler, for example, fears that western students who study non-western religions might too readily reduce the aspects of those religions to a familiar western model.[46] Other critics identify a wide range of effects resulting from the scholars' application of western models of religion to non-western contexts. Fitzgerald, McCutcheon and others link scholars' efforts to map contemporary western sociological structures onto non-western societies to the efforts of

---

[45] Ibid.

[46] Saler, *Conceptualizing Religion*, 70: "At the same time, however, we ought to recognize that a definition might mislead students. It could do so by being so narrow and idactive that it is egregiously ethnocentric and, in companionship with other definitions and word uses, miscasts other cultures into a Western mold, thereby misrepresenting them." Part of Saler's concern here focuses on the viability of a transculturally applicable definition of religion, but I think he is also highlighting the problems that might arise even if transcultural applicability is established. Even if scholars can establish that the same religious phenomena, experiences or ideas are present in two distinct cultural contexts, they do not thereby render the contexts identical. The risk, then, is that students and scholars might readily move from demonstrating the similarity (or, indeed, the identity) of two religious phenomena to assuming the similarity of the cultural contexts themselves.

imperialist governors to structure those same non-western societies as facsimiles of the liberal, capitalist west.[47]

### *4. Transhistorical Status and the History of the Category of Religion*

Finally, some critics of the field of religious studies claim that efforts to establish religion as a transhistorical phenomenon may obscure the historical development of both particular religions and the academic concept of religion itself. Russell McCutcheon, for instance, claims that any study of religion as an ahistorical phenomenon may ignore – or conceal – the political and economic implications of developments in particular religions.[48] Timothy Fitzgerald, on the other hand, argues that any focus on the ahistorical nature of religion may obscure the role changes in the concept of religion have played in the sociological process of differentiation.[49]

## C. The Viability of Non-foundationalist Approaches to the Study of Religion

---

[47] Fitzgerald's argument here is representative: "Surely, the reader may be thinking, the study of other people's religions brings the student face to face with non-western forms of faith and worship? But my argument is that actually it imposes on non-western institutions and values the nuance and form of western ones, especially in such popular distinctions as those between religion and society, or between religion and the secular, or religion and politics, or religion and economics." For Fitzgerald, scholars who claim that religions operate in the same way in all cultures facilitate the work of homogenizing imperialists who want to impose a uniform order in all cultural contexts.

[48] To support this point, McCutcheon cites a passage from Eliade's *Patterns in Comparative Religion* in which Eliade reviews solar hierophanies. According to McCutcheon: "… Eliade suggests that only this one type of hierophany – images of the sun specifically – is liable to being used by distinct subgroups within society for their own material ends. Yet while acknowledging the link, the text simultaneously and quite effectively minimalizes it insomuch as this intimate association between elites and such narratives is described as a virtual anomaly… The presumption is that normally hierophanies, as symbolic expressions or manifestations of an ultimately distinct and autonomous essence, are naturally neutral when it comes to issues of sociopolitical contestation."

[49] *Discourse on Civility and Barbarity,* Ch. 1.

The criteria I outline in section A. above sketch the contours of a foundationalist conception of the field of religious studies. If religion is *sui generis*, and if scholars can identify some consistent concept of religion that transcends its various historical and cultural manifestations, then the field of religious studies can be based on knowledge of this distinct and articulable concept of religion. Some defenders of the field – I have employed Eliade as a representative example - embrace this foundationalist approach, claiming that they can demonstrate that religion meets all of these criteria and, consequently, that the field of religious studies merits its status as a separate and autonomous academic discipline. Many critics of the field – I have cited McCutcheon and Fitzgerald as primary examples – also embrace this foundationalist approach. These critics claim that no concept of religion can meet the criteria listed, and, consequently they claim that the field of religious studies is groundless. In section II below, I seek to arbitrate between these two perspectives by reviewing and evaluating various methods for determining what counts as religion.

However, there are several reasons to suspect that scholars in the field of religious studies do not need to offer a foundationalist defense of the concept of religion. First, it is doubtful that every other academic discipline can meet the four criteria listed above: literature[50] and business[51], to name two, may be as vulnerable to these attacks on their

---

[50] Can literature be defended as *sui generis*? If so, scholars of literature need to explain what distinguishes one sort of text from others. Moreover, could scholars of literature defend its trancultural, transhistorical status? Do oral cultures produce anything that counts as literature?

[51] Can business be defended as *sui generis*? Any attempt to do so may rely on a definition of business, but such definitions are frequently contested within the very institutions devoted to the study of business. See Porter and Kramer "Creating Shared Value" *Harvard Business Review*, January 2011; Milton Friedman, "The Social Responsibility of

coherence as religion is. Academic disciplines are not organized according to the careful plan of a single rational author, but rather reflect the accrued and often *ad hoc* choices of many actors, so we should not expect each field to target a discrete and articulable concept that transcends its manifestations in various cultural and historical settings.

Moreover, some scholars offer non-foundationalist models for the field of religious studies. Some claim that scholars may need only a provisional concept of religion to ground their study, while others claim that scholars can rely on ordinary usage of the term religion to delimit the field. W.C. Smith argues that religion is discrete but not articulable, and accordingly proposes a redirection of study in the field to particular traditions. Jonathan Z. Smith, on the other hand, argues that academics are free to reshape the concept of religion to fit their own needs and interests.

### 1. Rely on Provisional Concepts of Religion

One possible non-foundationalist approach is to claim that scholars only require provisional parameters for the concept of religion to productively narrow their field of study. Scholars might therefore begin with a rough and ready concept of religion and build up a more concrete concept through the process of their work. Such an approach is non-foundationalist since it does not rely on a clear and discrete concept of religion as the basis for knowledge in the field of religious studies. Benson Saler suggests that the strategy of "holding a definition in abeyance", which is roughly equivalent to this provisional approach, offers a number of methodological benefits to the scholar studying religion. If the scholar assumes a full definition of religion at the outset of the study, then

---

Business to Increase its profits", *The New York Times Magazine*, September 13, 1970 and R. Edward Freeman, "The Stakeholder Theory of the Modern Corporation". Moreover, can scholars of business defend its transcultural, transhistorical status?

he/she is likely both to miss a variety of phenomena that could be included within the concept, and to employ bias in favor of the scholar's own cultural understanding of religion.[52] Moreover, one can question whether any scholar needs an explicit definition before embarking on a general study of religion. Saler notes that even scholars widely known in the field for their definitions of religion did not begin their research with more than a provisional concept: "Weber, Evans-Pritchard, and Durkheim explicitly talk about "religion", yet they maintain that it should be defined later in the course of the research that concerns them rather than at the beginning. Yet the research in each case has to do with 'religion' ".[53] Saler here notes that a scholar's developed, explicit concept of religion must begin as a provisional, even ad-hoc, concept. Any valuable research will

---

[52] Saler, *Conceptualizing Religion*, 70: "An explicit definition might also prove unfortunate for some persons embarking on research. Acceptance of an explicit definition without much reflection would constitute *de facto* conformance to an established conceptual mode. Such conformance might blind researchers to valuable information, information beyond the purview of the established conceptualization, and inhibit the development of fresh perspectives." Saler then goes on to note that scholars who forego an explicit definition of religion in favor of a provisional concept may *also* operate with an implicit bias towards a particular model of religion, usually that of Christianity. His position here is premised on the assumption that no adequate foundationalist approach to studying religion is available.

[53] Ibid, 71-72. Importantly, Saler is critical of the assumption that Weber, Evans-Pritchard and Durkheim implicitly employ: "The three authors cited are able to maintain their stand in sanity and good conscience. They can do so because they correctly assume that their readers will have some general understanding of "religion", an understanding that they and their readers more or less tacitly share." Saler thinks that given the similar contexts in which each thinker wrote, that concept is likely Judeo-Christian: "Where does that shared tacit understanding come from? From, I think, the similar experiences that Weber, Evans-Pritchard, Durkheim and many of their readers have had in Euro-American societies, from their common culturally-induced inclinations to regard "Judaism" and "Christianity" as religions, and from their common culturally-supported dispositions to deem those religions clear exemplars of what they mean by "religion"." Saler may be too quick to assume the commonality of each thinker's experience: the processes of secularization in Durkheim's France, Weber's Germany, and Evans-Pritchard's England were not uniform, and, consequently each thinker may operate with different concepts of religion, Christianity, and Judaism.

require a revision of that concept, and this process of revision (and *only* this process of revision), for the scholars listed above, enables an explicit definition of religion.[54]

### 2. Rely on Ordinary Usage of the Term Religion

Some theorists claim that the field does not require a definition of religion to guide study; rather, these theorists claim that they can determine what counts as religion by looking to ordinary usage of the term. Peter Byrne claims that scholars could develop a provisional account of religion by beginning with a review of the uses of the term in ordinary language. Byrne acknowledges that ordinary usage of the term is quite broad, but he claims that scholars who can precisely state the goal of their study should be able to distill from the ordinary usage of the term a useful operational definition.[55] Byrne develops his own, intentionally broad definition of religion, but he claims that this broad definition is nevertheless sufficient to distinguish religious phenomena from non-

---

[54] W.C. Smith considers two alternative methods involving the use of a provisional concept of religion based on Hegelian idealism. First, one might "[postulate] a transcendent ideal of which the historical actualities are a succession of mundane and therefore imperfect, compromised manifestations." Such an approach does rely on a provisional concept of religion, as a full and accurate definition would only be possible after the full historical development of all instantiations of religion. Such an approach would, however, presuppose the integrity and coherence of the concept while acknowledging that humans cannot presently offer a fully adequate definition. Such an approach raises difficult questions regarding which historical era scholars should privilege in developing their concept of religion: Hegelians might look to the end of history, disciples of Adolf Harnack might look to the origin of the religion, while disciples of Troeltsch might try to develop a concept of the religion adequate to all of its historical instantiations. Moreover, such an approach, while theoretically useful for defining a particular religion, is likely to prove less useful for developing a concept of religion in general.

Second, one might look not to historical development as the ideal for the concept of religion, but rather to the minds of believers. Such an approach raises concerns about the insider-outsider problem, which I discuss below.

[55] For Byrne, a non-theological purpose appears to be sufficient for definitional precision. See Peter Byrne, "Religion and the Religions" in *The World's Religions*, ed. Peter Clarke, (Milton Park, Routledge, 1988), 3-28.

religious phenomena.[56] He defends the vagueness of his definition by drawing on Wittgenstein's use of the concept of family resemblance to delimit the category of game.[57] Some scholars defend the merits of a "vague" definition by pointing out the limits of a precise definition; Benson Saler, for instance, claims that no precise definition is likely to match the "multivocal" uses of the term in ordinary language, and thus a vague term may be preferable.[58] For Byrne, it would be disadvantageous to precisely define religion according with a set of necessary and sufficient conditions; rather, Byrne claims that the open-ended family resemblance approach allows for religions to change while remaining recognizably religious.[59]

### 3. W. C. Smith

Alternatively, a scholar might defend the existence of a coherent concept of religion while denying that scholars have adequate access to that category. In *The Meaning and End of Religion*, W.C. Smith acknowledges challenges to scholars' ability to establish the *sui generis* status of religion[60], its universality and transcultural status[61]

---

[56] Ibid, "To Sum up: a religion is an institution with a complex of theoretical, practical, sociological and experiential dimensions, which is distinguished by characteristic objects (gods or sacred things) goals, (salvation or ultimate good) and functions (giving an overall meaning to life or providing the identity or cohesion of a social group.)

[57] I address Wittgenstein's family resemblance approach in section II.C below.

[58] *Conceptualizing Religion*, 73-74: "Some anthropologists, however, hope to develop a "scientific language" – a presumptively "neutral" (non-ethnocentric) language the terms of which would retain scientific constancy when applied analytically across cultural and sub-cultural boundaries and whose meanings would depend only minimally (if at all) on unexpressed understandings. That, I suspect, is an aspiration that may be impossible to achieve. It strikes me as especially chimerical when the procedure is to take a multivocal folk term such as religion and define it anew – and monothetically – in the hope of transforming it into a universal analytical term that can be successfully applied transculturally."

[59] Byrne, "Religion and the Religions" 10-11.

[60] W.C. Smith, *The Meaning and End of Religion*, (New York, Harper & Row, 1978), 2, noting the reductive trends in the fields of "psychology, sociology, economic history, and

and its historical endurance[62] and concludes that religious people, rather than religion itself, are the only viable object of study for the scholar of religion. Smith cites one further reason to doubt the capacity of scholars to adequately define the concept of religion: the insider-outsider problem. Any scholar (an ethnographer, for instance) who studies the practices of a culture that is not their own must explain how they can adequately access and understand those practices as an outsider. Smith identifies a unique problem for outsiders who wish to study a religion that is not their own: The religious person might, in theory, serve as the proper object of study for a scholar of religion, but Smith argues that: "the concept [of religion] is necessarily inadequate for the man who believes and therefore cannot but be misleading for the outsider who does not."[63] Smith here acknowledges that many of the traditions frequently studied as religions rely on concepts to which humans do not have complete access.[64] For example, if insiders do not believe it is possible to give an adequate account of the concept of God, and if, further, the concept of God is central to the religion, then outsiders cannot define religion without

---

also the *ad hoc* sciences of *Religionwissenschaft* [which] have seemed to illuminate the ostensibly religious behavior of man"

[61] Ibid, 148-149: "In the first place, there is no *a priori* reason for believing that all instances of 'Hinduism', for example, or 'Taoism' or 'Buddhism' must have something in common."

[62] *The Meaning and End of Religion*, 119-121. Smith here notes both the historical shifts in ways of being religious *and* the historical evolution of an understanding and study of religion.

[63] Ibid, 134.

[64] Consider, as a representative example, Guanilo's claims from Anselm's *Proslogion*. In section 4 of his reply on behalf of the fool to Anselm's argument, Gaunilo discusses the inability of humans to form an adequate understanding of God. Humans cannot put God into a category of similar beings or compare God to other beings, since God is utterly unlike all other beings. Gaunilo later notes (in a nominalist fashion) that humans might hear the term God and understand what word it signifies without understanding the concept behind the term.

fabricating an understanding that the insiders themselves lack.[65] Smith thus allows that the concept of religion may be coherent, but humans cannot fully explain that coherence.[66] Nevertheless, Smith defends a re-grounded study of religion that focuses not on some elements common to all instantiations of religion, but rather on the study of those instantiations in their uniqueness. [67] [68]

### 4. Jonathan Z. Smith and Deference to Scholarly Interest

Moreover, one might question whether scholars *ever* need to develop more than a provisional concept of religion to facilitate their studies. In *Drudgery Divine*, Jonathan Z. Smith notes the central role of comparison in the work of religious studies. Smith focuses on scholars who study the origins of Christianity, arguing that they focus on claims of Christianity's similarity and dissimilarity to both Judaism and the variety of Greco-Roman religions of late Antiquity. The viability of this comparative enterprise may at

---

[65] I discuss the difficulty of employing terms such as God that defy human understanding to define religion in section II.A.2 below.

[66] This approach therefore differs from the two approaches outlined above in n. 21. In those cases, the concept of a particular religion develops historically, and thus is *not yet* fully adequate, while Smith here defends a claim that the concept of religion may be adequate now, but it is nevertheless inaccessible to humans presently.

[67] Smith again acknowledges that adherents to particular religions may be motivated by ideas and practices that are inaccessible to the outside observer, but he nevertheless contends that "The man of religious faith lives in this world. He is subject to its pressures… particularized within one or another of its always varying contexts of time and place, and he is observable." Thus, Smith claims that scholars of religion can defensibly study the cumulative responses of individual adherents to the historical tradition.

[68] Benson Saler offers a trenchant critique of Smith's claims regarding the transcendent. Saler bluntly states that the origins of Smith's concept of a transcendent in religion that is not readily accessible to human analysis are undeniably Western: "W.C. Smith's transcendent is in the Western religious tradition. He appears to suppose, moreover, that a longing for the authority of a transcendent is natural to humanity and that some realization of that longing is experienced by many – perhaps most – human beings." Given Smith's claims about the inaccessibility of the transcendent to outsiders, it is difficult to see how he could establish its presence in non-Western religions.

first appear to rely on an assumption of the transcultrual, transhistorical and universal nature of religion: in other words, critics of the field might charge these scholars of Christian origins with assuming the comparability of early Christianity, Pharisaic Judaism and Greco-Roman mystery religions on the grounds of common membership in the category of "religion". Smith, however, concludes that the warrant for the comparative enterprise resides elsewhere:

> "What this terminology reminds us of is that, like the efforts of taxonomy which forms its presupposition, there is nothing 'natural' about the enterprise of comparison. Similarity and difference are not 'given'. They are the result of mental operations … In the case of the study of religion, as in any disciplined inquiry, comparison, in its strongest form, brings differences together within the space of the scholar's mind for the scholar's own intellectual reasons. It is the scholar who makes their cohabitation – their sameness – possible, not 'natural' affinities or processes of history."[69]

For Smith, the question is not: Is the scholar's comparative enterprise warranted? Indeed, the scholar's work itself provides the warrant for comparison as an academic enterprise.[70] Rather, Smith asks: Is the scholar's comparative enterprise useful? If useful research can be developed through comparisons grounded on the scholar's own theories and models, then the work of religious studies requires neither an explicit definition of religion nor an aspiration to an explicit definition. Still, Smith's criterion leaves a further question: what,

---

[69] Jonathan Z. Smith, *Drudgery Divine: On the Comparison of Early Christianities and the Religions of Late Antiquity,* (Chicago, The University of Chicago Press), 1990, 51.
[70] For Smith, this warrant stems from the scholar's development of a third term of a comparison. Smith claims that: "statements of comparison are never dyadic, but always triadic; there is an implicit 'more than' and there is always a 'with respect to'. In the case of an academic comparison, the 'with respect to' is most frequently the scholar's interest, be this expressed in a question, a theory, or a model…" For Smith, the warrant for comparison ultimately resides with scholarly interest; if academics use a particular third term to generate *interesting* comparisons, then the comparison is worthwhile. Such an approach can, however, expansively incorporate any phenomena within the field of the study of religion.

exactly, counts as useful? I will address this question in part III of this chapter when I review conceptions of the purpose of religious studies.

### 5. Criticisms of Non-foundationalist Approaches

Advocates of foundationalist approaches, however, contend that a clear, defensible definition of religion is a prerequisite for religious studies for a number of reasons. Melford Spiro claims that scholars cannot determine a field of inquiry without a definition: "It is obvious, then, that while a definition cannot take the place of inquiry, in the absence of definitions, there can be no inquiry – for it is the definition, whether ostensive or nominal, which designates the phenomena to be investigated." Spiro claims that the scholar's choice is not, therefore, between definitional and non-definitional strategies; rather, the scholar can choose either an explicit definition or an implicit one. Scholars who, like Durkheim, Evans-Pritchard and Weber delay a definition until the end of the inquiry merely deceive both themselves and their readers: "Indeed, when the term 'religion' is given no explicit ostensive definition, the observer, perforce, employs an implicit one."[71] Spiro here claims that *only* a definitional approach can adequately determine what counts as religion; any scholar who claims to adopt a non-definitional approach nevertheless determines their field of study with a definition without acknowledging that they are doing so.

Critics of the field raise further concerns about non-definitional approaches. Timothy Fitzgerald claims that in the absence of a clear definition of religion, scholars cannot account for the wide variety of phenomena included within the rubric of religious

---

[71] Melford Spiro, "Religion: Problems of Definition and Explanation" in *Anthropological Approaches to the Study of Religion*, ed. Michael Banton, (London, Tavistock, 1966), p. 90.

studies. As a result, scholars slip from one concept of religion to another without indicating that they have done so, and thus elide distinctions between the concepts evoked by one use of the term and those evoked by another. Moreover, the use of the term "religion" without adequate definition may allow scholars to smuggle in conceptions of religion tied to a particular cultural context (usually that of Christianity) while disguising this orientation through the use of vague language regarding religion.[72] Fitzgerald shares Spiro's concern that only a definitional approach can adequately delimit the field of study, but he highlights an additional danger that Spiro does not focus on. Spiro finds it a "strange spectacle" that scholars of religion could fail to distinguish "teachings of a philosophical school [from] the beliefs of a religious community," but Fitzgerald, who doubts that any adequate definition of religion is possible, concludes that scholars may consequently be unable to distinguish the field of study proper to religious studies from those of other fields.[73] In other words, Fitzgerald suspects that a non-definitional approach conceals the conceptual incoherence of "religion", and suspects that if scholars were to make their implicit concepts of religion explicit, the overlaps between the field of religious studies on the one hand and anthropology and history on the other would be clear. Unless scholars can employ a precise definition of religion, they will be unable both to determine what the field of study is and to explain how it is distinct from the work of other fields.

---

[72] Fitzgerald, *The Ideology of Religious Studies*, 10-12.
[73] Fitzgerald, *The Ideology of Religious Studies*, 87. Fitzgerald critiques a family resemblance approach, which relies on a non-definitional understanding of what counts as religion, noting that "The problem is, how do you distinguish the family of religions from other close relatives, such as the family of ideologies, the family of worldviews, or the family of symbolic and ritual systems?"

## D. Assessment

It is not clear, however, why demonstration of disciplinary overlap should serve as the death knell of an independent field of religious studies. Various disciplines within the academy frequently employ methodologies borrowed (partially or fully) from the work of other disciplines, and disciplines also regularly examine one another's objects of study. Arguably, such overlap is a tremendous advantage to "borrower" and "loaner" alike; a degree of specialization that renders, say, an anthropologist's work incomprehensible to an historian is not desirable, and disciplinary overlap can serve as an antidote to such hyper-specialization. Moreover, while it may be pleasing to think that the divisions of academic study follow a carefully constructed design, new disciplines often emerge through complicated historical processes rather than a sober administrative recognition of a new field for investigation. Attempting to map a precise set of non-overlapping methodologies and fields of study onto the academy is likely to prove fruitless, and any such effort may also be detrimental to academic study.

In short, both the critics of religious studies and some of the field's defenders overemphasize the importance of *sui generis* status. As McCutcheon notes, scholars who seek to study exclusively religious phenomena necessarily ignore the political, cultural and economic components of their objects of study. If, however, the study of religion is an inherently interdisciplinary endeavor, then the critics are unwise to dismiss the field for failing to meet the *sui generis* criterion, as its interdisciplinarity necessarily requires setting aside a defense of the field as *sui generis*. Defenders and critics of the field similarly overvalue the transhistorical status of religion. If, as critics such as Fitzgerald contend, the concept of religion is in flux, then that historical development itself is an important subject of study, and scholars in the field of religious studies may prove to be

well equipped for its study. Finally, critics and defenders of the field alike overvalue the universality criterion. Scholars in the field can address Fitzgerald's concern about covert theologizing by refraining from promoting claims proper to theological anthropology.[74]

Some criticisms of the field remain, however. First, scholars who pursue comparative work must provide some warrant for transcultural application of the term religion; should they assume the comparability of two phenomena before establishing the grounds for the comparison, they are guilty of begging the question. In addition, scholars must be able to state in at least a provisional fashion what counts as religion. Without a mechanism to determine what counts (and what does not count), the field may devolve into the study of everything, and, in the process, say little of interest. A definition of religion would provide a mechanism for determining what counts as religion, but it is not necessarily the only mechanism for doing so. Spiro and Fitzgerald doubt that non-definitional approaches can ever reliably determine what counts as religion, so any such approach must answer their concern. If a non-definitional approach can, in fact, reliably determine what counts as religion, then Spiro and Fitzgerald's concerns may be unwarranted.

Finally, any approach to determining what counts as religion must be able to account for ordinary usage of the term. Melford Spiro terms this requirement "intuitivity", and he explains that because religion "is a term with historically rooted meanings, a definition must satisfy not only the criterion of cross-cultural applicability but also the criterion of intra-cultural intuitivity; at the least, it should not be

---

[74] Alternatively, scholars could evade this critique by foregrounding the theological nature of their work.

counterintuitive."[75] If a scholar develops an approach that excludes a phenomenon generally considered religious, then he/she must at least offer a justification for the exclusion.[76]

In summary, then, I argue that any viable concept of religion must meet the following three criteria: 1) a capacity to distinguish religion from non-religion in at least a provisional fashion, 2) a warrant for transcultural applications of the term, and 3) resonance with existing uses of the term religion. I dismiss the utility of the other three criteria I discuss in this section - *sui generis* status, transhistoricality, and universality - for several reasons. The demand for *sui generis* status unproductively restricts the interdisciplinarity of the field of religious studies, so I suggest the capacity to distinguish religion from non-religion as a useful alternative to the criterion of *sui generis* status. The criterion of universality places an unattainable standard on the field, and runs counter to clear empirical evidence that some people are not religious. The criterion of transhistoricality, I argue, is inherently flawed, since concepts subject to historical change

---

[75] Spiro, 91. Spiro here applies this rule regarding "intuitivity" to definitional approaches to determining what counts as religion, but this requirement is also crucial for non-definitional approaches. The vagueness of a non-definitional approach may lead to the inclusion of a variety of phenomena that do not meet the intuitivity requirement.

[76] In *Conceptualizing Religion*, Benson Saler considers whether scholars should abandon the term religion on account of the various critiques of the concept. He cites its widespread usage as an important reason *not* to dismiss the term, thereby offering an implicit reason to accept Spiro's intuitivity test: "However polysemous the word religion may be, it nevertheless is employed by millions of people today… The fact that not all peoples have an expression or concept approximating to what contemporary westerners mean by "religion", and the multivocatlity of terms for it among those who do utilize such terms, might be regarded as subverting the suitability of a transcultural analytic category labeled religion. But, even so, scholars must nevertheless confront its considerable powers among the millions who do employ it."

are worthy of study; more to the point, that historical change itself is an important object of study.

## II. Approaches to Determining What Counts as Religion in The Field of Religious Studies

In part I., I conclude that scholars in religious studies need, at a minimum, some mechanism for determining what counts as religion. In this section, I review the variety of mechanisms scholars in the field have proposed for determining what counts as religion. It is beyond the scope of this work to develop a comprehensive account of all scholarly accounts of religion, so I instead aim build a taxonomy of the key *strategies* for determining what counts as religion. In so doing, I rely on Benson Saler's taxonomical work in *Conceptualizing Religion* as a guide: I borrow, and, in some cases modify, his taxonomy of strategies for determining what counts as religion. I also rely on typological analysis to develop each category of strategies for determining what counts as religion: I select one or a few key scholars to represent each strategy. To evaluate the proposed mechanisms for determining what counts as religion, I draw on the criteria outlined in I.E. above. First, any approach must provide a mechanism to distinguish religious from non-religious phenomena. Second, an approach must provide a warrant for transcultural applications of the term if scholars who endorse that approach do, in fact, wish to apply the term across cultures. Finally, an approach must accord with ordinary uses of the term religion. In other words, should a scholar develop a monothetic criterion for religion that does not include Christianity or Buddhism but does include devotion to the St. Louis Cardinals, we will have reason to suspect that what they are describing is not *religion*.

The approaches I catalogue below fall into a number of categories. First, some of the approaches are definitional: they identify one key feature or some set of features that

characterize religion, and then include any member in the category of religion that possesses that feature or features. The taxonomical description for definitional approaches is monothetic; definitions that focus on a single feature are simple monothetic definitions: I term definitions composed of multiple features complex monothetic definitions. Because definitional strategies identify religion with one key element or set of elements, they are also foundationalist. I also consider several non-foundationalist approaches to determining what counts as religion. In section B., I take up polythetic approaches. I consider complex monothetic approaches in this section in order to clearly distinguish them from polythetic approaches. In section C., I consider analogical classification as an alternative approach to understanding what counts as religion. Finally, in section D., I consider the effect that conceptualizing religion as historically variable has on determining what counts as religion.

## A. Monothetic Approaches

The simplest strategy for determining what counts as religion is a monothetic approach; such an approach identifies religion with a single essential feature. The simplicity of this type of monothetic approach is its primary advantage: by restricting the definition to one feature that serves as both the necessary and sufficient condition for religiosity, a monothetic approach makes the distinction between religious phenomena and non-religious phenomena quite clear. The clarity of a monothetic approach renders it especially useful to any scholar who wishes to establish the *sui generis* status of religion. If religion can be identified by one essential feature, and if that essential feature is not reducible to the object of study of other fields, then scholars can readily demonstrate that religion is a discrete category. However, the clarity of a monothetic approach can prove disadvantageous if the essential feature is present in phenomena not counted as religious

in ordinary usage of the term. Defenders of a monothetic approach must, therefore, identify a candidate for the single essential feature of religion that is both present in most phenomena included in ordinary usage of the term religion and absent in most phenomena *not* included in ordinary usage. Second, as Benson Saler has noted, the clarity that at first glance appears to be the greatest strength of a monothetic definition can prove a weakness in "borderline" cases. Saler notes that equivocal usage of many terms, including religion, is common; thus we should expect some ambiguity in the application of these terms. A monothetic approach that removes ambiguity from the classification of such "borderline" cases may not satisfactorily match ordinary usage of the term.[77] These challenges indicate a set of tests for the success of an effort to provide a monothetic definition of religion.

Monothetic definitions fall into two primary categories: substantive and functionalist. A substantive definition, as Saler puts it, "tells us what religion fundamentally is, what it is composed of" while a functionalist definition: "states what religion *does,* what consequences it has for individuals and/or culturally organized human social groups."[78] Substantive definitions, in other words, identify the necessary and sufficient conditions for religion in certain elements of thought, activity and affect, while

---

[77] Saler, *Conceptualizing Religion*, 87-88. Saler in fact concludes that monothetic approaches *cannot* remove ambiguity, since the placement of borderline classes in a clear category itself undermines the categories: "Borderline categories, by appearing to transgress or threaten the very boundaries that create them are themselves veritable specters of vagueness for those who would tidy-up language and the world with monothetic devices."

[78] Ibid, 79-80. Saler in fact identifies a third type of monothetic definition: mixed definitions, which combine elements of substantive definitions and functionalist definitions. For the sake of simplicity, I will limit my consideration of monothetic definitions to the two primary categories of substantive and functionalist, though I will consider borderline, "mixed" cases under these two headings.

functionalist definitions identify those necessary and sufficient conditions with certain outcomes. I review these different approaches separately in the following subsections.

## 1. Substantive Definitions of Religion

### a. Substantive-cognitive Definitions

Substantive approaches aim to provide a definition in the Aristotelian sense: they can offer both a genus and a differentiating criterion. In the previous section, I note the three main types of genus that scholars look to as a foundation for religiosity: cognition, affect and activity.[79] Of these three types of substantive definitions, the cognitive is the most common. A cognitive approach to defining religion can ground religion in a unique way of knowing, a unique object (or objects) of knowledge, or both. A definition that identifies religion with theism is an example of a cognitive approach that relies on a unique *object* of knowledge, while a definition that focuses on faith is an example of an approach identifies religion with a unique *mode* of knowledge.

A theistic approach to defining religion takes knowledge of God/Gods to be the essence of religion, but a scholar might identify religion with another object of knowledge. Theologians, for example, frequently move beyond mere theism in their focus on cognitive content essential to religion; instead of claiming that belief *in*

---

[79] I here exclude a substantive definition that relies on the claim that religion is not of human origin, and thus cannot be adequately expressed in terms of human activity, knowledge or affect. I discuss such an approach in I.C.3 above in my discussion of W.C. Smith's proposed division of religious studies into studies of traditions and studies of faith. I also exclude other possible grounds for a substantive definition of religion. Conceivably, one could argue that religions are characterized by a unique type of institution, and some scholars do focus on the role of exercises of power within institutions fostering the religion of their adherents. I review Talal Asad's claims to this effect in *Genealogies of Religion* in section II.D below. However, even Asad does not claim that an institution originates particular religions, even if he claims that current adherents may induce new adherents to become religious through an institution.

god/gods is the essence of religion, the theologian may focus on particular beliefs *about* god as the essence of religion.[80] Scholars have suggested other candidates for the unique cognitive content of religion. Hegel argued that religion is a kind of knowledge of absolute- not contextual - truth[81] [82], while several post-Hegelians proposed other unique objects of knowledge for religion. Feuerbach, for instance, claimed that religion is consciousness[83] of the infinite, and he identified this infinite with human nature itself.[84]

---

[80] Luther, for instance, argued that the essence of faith is to believe that God will keep God's promise of salvation. Subsequent Protestant theologians focused on developing creeds and confessions of faith to more precisely identify the cognitive content of their concept of religion.

[81] Admittedly, Hegel identifies this absolute with God.

[82] Hegel, *Letures on the Philosophy of Religion* vI.II.1.b: "Religion is not consciousness of this or that truth in individual objects, but of the absolute truth of truth as the Universal, the All-comprehending outside of which there lies nothing at all." Several notes are important here. First, Hegel does not distinguish religion from *philosophy* on the object of their knowledge, as he contends philosophy also aspires to absolute truth; religion and philosophy can, however, be distinguished from all other types of knowledge by their common object. Second, as I note below, Schleiermacher does distinguish religion from philosophy on the grounds of the type of knowledge involved; in fact, he concludes that religion does not involve *knowledge*, but rather mere consciousness. For the purposes of my taxonomy, however, I consider this distinction moot, as Hegel is still identifying religion as a kind of cognitive operation, even though he does not think it rises to the level of determinate thought.

[83] For Feuerbach, consciousness is undoubtedly cognitive content: "Consciousness, in the strictest sense, is present only in a being to whom his species, his essential nature, is an object of thought." *The Essence of Christianity* (1989), 1.

[84] Ibid, 2: "Religion being identical with the distinctive characteristic of man, is then identical with self-consciousness – with the consciousness which man has of his nature." Ultimately, Feuerbach does not think that this identifying characteristic of religion can serve to distinguish religion from other forms of knowledge, as his stated aim is to unveil the hidden anthropological nature of all religion. However, Feuerbach does think he can distinguish his sort of anthropology from other sorts: "But so far from giving a trivial or even a subordinate significance to anthropology - a significance which is assigned to it only just so long as theology stands above it and in opposition to it – I, on the contrary, while reducing theology to anthropology, exalt anthropology into theology." Ibid, xviii. Arguably, Feuerbach ultimately identifies the distinguishing feature of religion as normative, and even practical; he refers to religion as "the dream of the human mind", indicating that his "exalted" anthropology is characterized by its aspirations.

Other proposed cognitive definitions include a belief in the supernatural[85], or a belief in causes or events that conflict with the rational order.

Despite their popularity, substantive-cognitive definitions of religion suffer from a number of limitations. Theism potentially offers the advantage of clarity that is characteristic of monothetic approaches, but scholars have long noted that theism excludes many phenomena from the category of religion that ordinary usage would include. E.B. Tylor in *Primitive Culture* sought a more inclusive "minimum definition" of religion on the grounds that theism excludes some groups that are, in Tylor's view, demonstrably religious.[86] Tylor therefore concludes that the unique object of religious knowledge should be "spiritual beings" rather than God.[87] Similarly, Emile Durkheim in *The Elementary forms of Religious Life* rejected several cognitive definitions of religion on the grounds that they exclude much that is generally considered religious. Durkheim considers the possibility of a definition based on supernaturalism, or, as he puts it, "a sort

---

[85] Saler cites Anthony Wallace's textbook *Religion: An Anthropological View* as an example of an approach that relies on supernaturalism. See *Conceptualizing Religion*, 122. Because supernaturalism focuses on knowledge not derived from rational means, in many cases it is best categorized as a unique mode of belief rather than a unique object of knowledge. However, belief in a non-rational order itself can fit the model of a unique object of knowledge.

[86] Edward Burnett Tylor, *Primitive Culture*, Ch. 11 p. 420 (1889) "Animism"; Tylor begins his account of religion by rejecting the approach of those who dismiss non-theists as irreligious: "They attribute irreligion to tribe whose doctrines are unlike theirs, in much the same manner as theologians have so often attributed atheism to those whose deities differed from their own." Tylor thus concludes that restricting a definition of religion to theism is a workable strategy only for scholars with an apologetic agenda.

[87] Ibid, 426-427. Tylor further explains the two elements of spiritualism: "It is habitually found that the theory of Animism divides into two great dogmas, forming parts of one consistent doctrine; first, concerning souls of individual creatures, capable of continued existence after the death or destruction of the body; second, concerning other spirits, upward to the rank of powerful deities." Belief in spiritual beings, Tylor further notes, frequently includes a belief in their impact on the material world, and in the capacity of living humans to influence their behavior.

of speculation upon all that which evades science or distinct thought in general," but he dismisses this possibility by arguing that at many periods in the history of Christian theology, "faith reconciled itself easily with science and philosophy."[88] Durkheim next considers the possibility of grounding religion on a belief in divinity, before dismissing theism on the grounds that such an approach would exclude Buddhism.[89] In other words, there are strong reasons to suspect that theism does not meet Spiro's intuitivity criterion unless scholars first restrict the community of intuition.[90] Durkheim also employs an insightful critique of the use of supernaturalism to define religion. He claims that the concept of supernatrualism relies on the belief: "that a natural order of things exist," as a precondition to the belief in events or causes that transcend or violate that natural order. Durkheim further claims that this belief in a rationally explicable order is relatively recent, and thus supernaturalism could only ground a concept of modern religion.[91]

One additional potential weakness of a substantive approach that identifies religion with particular cognitive content is the indeterminacy of the cognitive content. The utility of a substantive-cognitive approach is dependent on the clarity of the criterion for religiosity that the definition provides, and many elements of the proposed cognitive

---

[88] Emile Durkheim, *Elementary forms of Religious Life*, 39.
[89] Ibid, 45: "But howsoever evident this definition may appear, thanks to the mental habits which we owe to our religious education, there are many facts to which it is not applicable, but which appertain to the field of religion nevertheless. In the first place, there are great religions from which the idea of gods and spirits is absent, or, at least, where it plays only a secondary and minor role. This is the case with Buddhism." I discuss Durkheim's functionalist definition of religion in section II.A.2 below.
[90] Here I indicate that an ethnocentric limitation to the intuitivity criterion is necessary to ground substantive – or other – approaches to defining religion. I consider Saler's limited adoption of ethnocentrism below in section II.C
[91] *Elementary Forms of Religious Life*, 41.

definitions of religion are themselves notoriously difficult to define.[92] A theistic definition, for instance, is only a useful marker of religion if it promotes a clear, identifiable concept of God,[93] while Tylor's definition of religion as "belief in spiritual beings" can only provide the basis for comparison of different religions if it also offers a clear concept of spiritual beings.[94] Moreover, a theologian might offer a concept of God

---

[92] Saler, citing Karl Popper, notes that excessive demand for specificity can lead to infinite regress: one first demands the definition of term A, then one demands the definition of the terms used to define A, and so on. However, the possibility of infinite regress is not a reason to dismiss all investigation of the elements of a definition, and I think that the terms used to support cognitive definitions of religion require further explication.

[93] Given the significant debates among theologians about what the concept of God entails, there is no reason to suspect that theism provides significant clarity about God. Theologians who follow in the wake of Aristotle's analysis might identify God as the prime mover. Neo-Orthodox Protestant theologians reject philosophical concepts of God in favor of the character of "God" that is revealed in the narratives of the Hebrew Bible and the New Testament. Anselm's interlocutor in the *Proslogion*, Gaunilo, provides the most direct critique of the clarity of the concept of God: he suspects that humans cannot understand the concept indicated by the term "God"; thus anyone subscribing to his brand of nominalism would conclude that theism *cannot* provide clarity for the concept of religion.

[94] Benson Saler claims that Tylor's definition cannot meet this challenge. For Saler, Tylor's definition loses its monothetic quality once Tylor begins to explain the category of "spiritual beings". According to Saler: "In Tylor's account, in short, 'spiritual beings' do not constitute a homogenous class based on substance. They pertain to the same category more because of function than because of substance. Even so, *the category spiritual beings is analogically constituted.* Spiritual beings have the function of animating, yet there are notable difference among them with respect to function. Souls animate human bodies (and, by conceptual extension, other bodies) But spiritual beings such as Gods, viewed by Tylor as "personified causes", animate nature. The latter, on Tylor's account of human intellectual developments, are conceptualized analogically to the former." To this list of similar yet distinct spiritual functions I would add the ordinary usage of spirit to indicate a collective identity. The "spirit" of an institution may, to some degree motivate – and perhaps animate – its members, but, following Saler's logic, it does so in a manner distinct from the soul or Gods. Saler goes on to conclude: "Tylor's "minimum definition" appears at first glance to be a straight-forward, substantive monothetic definition. But when we unpack his conception of the crucial component of "spiritual beings", those of us who may have supposed that such beings are immaterial discover unexpected complexity. All spiritual beings are not iso-substantive or iso-functional. Rather, they are analogically related." *Conceptualizing Religion*, 88-92.

that either departs significantly from ordinary understanding of God or overlaps significantly with another field of study, thus undermining any concomitant claim to the *sui generis* status of religion.[95] Hegel's identification of religion with consciousness of the absolute can only provide clarity if his project of developing a philosophical and determinate understanding of the absolute is possible.[96]

Other substantive definitions identify religion with a unique type of knowledge rather than a unique object of knowledge. Most commonly, scholars identify faith as the unique mode of knowledge that characterizes religion, and this then leads to a variety of explanations of what constitutes faith. Thomas Aquinas claims that faith is a type of knowledge that is distinguished from other types in its source; faith proceeds not from observation and reason, but from divine revelation. Moreover, Aquinas claims that faith is a form of knowing that gives access to knowledge that is inaccessible to human reason.[97] Other theologians have characterized faith differently, claiming that it not only reveals truths that are inaccessible to reason, but that it reveals truths that are hostile to

---

[95] Paul Tillich's identification of God with ultimate concern arguably commits this error. While Tillich sought to employ existential philosophy in his study of theology, his identification of God with existential concern places theology within the field of existential philosophy. I consider Tillich's definition of religion below in II.A.2.

[96] It is *well* beyond the scope of this work to evaluate the success of Hegel's project of developing a true philosophy of religion, but suffice it to say that Hegel himself only sketches the contours of this project in *Lectures of the Philosophy of Religion*.

[97] Aquinas, *Summa Theologica*, Iq1a1-2. Aquinas uses the first question of the *Summa* to establish that sacred doctrine (commonly translated as theology) is a discipline that proceeds from different sources than does philosophy. Theology is based on revelations from God that humans apprehend through faith; Aquinas is clear, however, in asserting that the knowledge gained from faith *is* knowledge. Aquinas argues that humans can reason from the knowledge gained through faith, but *some* of the relevant data can only be gained through faith. In addition, it is worth noting that Aquinas believes that theology is distinct from philosophy in both its methods (reliance on faith and revelation) and its object (God). See especially *Summa Theologica* I.q1a6.

reason.[98] W.C. Smith dispenses with any effort to offer an account of faith,[99] and merely notes that religious groups employ a mode of knowledge that is unique. For Smith, faith is a mode of knowing that is only accessible to those within a particular religious community, and he doubts that these "insiders" can ever offer a sufficient explanation of faith to outsiders.[100] Other scholars attempt to distinguish religious knowledge without directly appealing to the concept of faith. Hegel, as I note above, argues that religion and philosophy share a common object – absolute truth – so he distinguishes the two by claiming that philosophy aims for complete, determinate knowledge of that which religion and faith only understand indeterminately.[101] Clifford Geertz describes

---

[98] Luther, in *The Pagan Servitude of the Church*, objects to efforts on the part of scholastics such as Aquinas to define the manner in which Christ is present in the sacraments. Luther instead suggests that Christians believe in Christ's presence in the sacrament in a different manner: "When I fail to understand how bread can be the body of Christ, I, for one, will take my understanding prisoner and bring it to obedience with Christ; and, holding fast with a simple mind to His words, I will firmly believe, not only that the body of Christ is in the bread, but that the bread is the body of Christ." This language of imprisonment at the very least suggests a hostile relationship between faith and other modes of knowledge. In *Martin Luther: Selections from His Writings*, ed. John Dillenberger, 1962. Karl Barth, in his commentary on Romans, also frequently emphasizes the rupturing quality of faith. He decries humans' efforts to build a concept of God using reason: "We suppose we know what we are saying when we say "God"…. We allow ourselves an ordinary communication with [God]…. This is the ungodliness of our relationship to God. And our relation to God is *unrighteous*." Ultimately, Barth concludes that the work of faith is to break down these false conceptions of God, thus faith is actively hostile to ordinary human reasoning.

[99] He does, however, suggest that such an account could serve as one of the twin pillars of a reformulated discipline of religious studies. See *The Meaning and End of Religion*, Ch. 7.

[100] Ibid, 130: "… there are some for whom the tradition has a transcendent reference – and for whom this is indeed its point; and these are by that very fact in a different position from those (whom we therefore call 'outsiders') for whom it does not. It therefore follows that the latter's conception of that particular religious complex must be inadequate and unserviceable for the former.

[101] Hegel clarifies this distinction between determinate and indeterminate knowledge in stating that religious knowledge assumes a teleological connection between all causes and events, but philosophy can produce determinate knowledge that *demonstrates* this

distinguishes religion as a unique mode of understanding derived from cultural symbols.[102] Geertz compares religion to other modes of understanding, including aesthetics, science, and common sense, and he concludes that religion is distinct because it serves to integrate new data into the agent's meaning-laden interpretation of the world.[103]

W.C. Smith's analysis offers one reason to doubt that faith can serve as a reliable criterion for a definition of religion. If faith defies itself defies definition, then it cannot be useful to scholars who wish to define religion.[104] Some critics of religion[105] employ a

---

connection. Hegel thus claims that religion produces mere awareness of absolute truth, while philosophy promises actual knowledge. *Lectures on the Philosophy of Religion* vI.II.1.b

[102] Geertz's full definition of religion is as follows: "(1) a system of symbols which acts to (2) establish powerful, pervasive, and long-lasting moods and motivations in men by (3) formulating conceptions of a general order of existence and (4) clothing these conceptions with such an aura of factuality that (5) the moods and motivations seem uniquely realistic." Clifford Geertz, "Religion as a Cultural System,". Given that point (1) focuses on the symbols themselves, one could construe his approach as relying on a unique cognitive content. However, because he focuses on the differences between religious perceptions on the one hand and aesthetic, scientific, and common sense perceptions on the other, I elect to focus on his portrayal of religion as a unique mode of knowledge.

[103] Ibid. A common sense mode of understanding, for Geertz, is marked by "a simple acceptance of the world" and a practical drive to "bend [the world] to one's practical purposes." A scientific perspective, for Geertz, is connected with any practical interests, but instead tries to integrate observations into a system of "formal concepts". An aesthetic perspective is similarly disengaged from practical purposes, and instead focuses on "an eager dwelling upon appearances." A religious perspective parallels a scientific perspective in attempting to integrate everyday appearances into a wider system of significance, but religion does so "…not out of an institutionalized skepticism which dissolves the world's givenness into a swirl of probabilistic hypotheses, but in terms of what it takes to be wider, nonhypothetical truths."[103]

[104] The claim that faith cannot be a *useful* criterion for a definition of religion is not equivalent to the claim that faith *is not* a (or even *the*) criterion for defining religion. If Smith's claims about religion are correct, then faith both is essential to religion and defies external analysis. If this is the case, then religion cannot be usefully defined even if we recognize faith as the essential criterion of a definition of religion. Such a definition

similar line of argument to raise concerns about religious adherence itself. Richard Rorty, in his seminal article "Religion as Conversation Stopper" argues that it is precisely the peculiar and inaccessible source of religious knowledge that renders its inclusion in public debate unacceptable.[106] Geertz's definition, on the other hand, likely cannot provide sufficient grounds to distinguish religious modes of knowledge from others. If the category of religion were to include all interpretations of data that were both meaningful and practical, then there's very little such a category could exclude.

Both types of cognitive approaches to defining religion are subject to one further criticism. Many scholars note that a cognitive approach necessarily precludes the potential priority of practice or activity in constituting religion. Talal Asad, for instance, takes issue with Clifford Geertz's emphasis on the role of symbols in religion. Asad, citing Vytgotski's theory of childhood development, claims that social practices likely precede any cognitive understanding of religion in at least some contexts.[107] Asad further

---

would be both true and unusable if faith itself cannot be defined. Put differently: circular arguments may be true, but that does not make them useful.

[105] Here I intend to indicate critics of either religious adherence itself or the inclusion of religion in political debate, rather than critics of religious studies.

[106] Richard Rorty, "Religion as Conversation Stopper," in *Common Knowledge*, (1994). Here Rorty claims that "… we should be suspicious of the very idea of a 'source of moral knowledge'" He goes on to explain, in his characteristically pragmatistic fashion, that "the only test of a political proposal is its ability to gain assent from people who retain radically diverse ideas about the point and meaning of human life". If W.C. Smith is right to claim that religious knowledge is not accessible to outsiders, then Rorty might be right to conclude that religiously sourced arguments will not meet with much success in the public square. However, Rorty later altered his claims in "Religion as a Conversation Stopper". See "Religion in the Public Square: A Reconsideration," in *The Journal of Religious Ethics* (2003). V.31n.1.

[107] Talal Asad, "Religion as an Anthropological Category" in *Genealogies of Religion*, 31: "Half a century ago, Vytgotsky was able to show how the development of children's intellect is dependent on the internalization of social speech. This means that the formation of what we have here called "symbols" is conditioned by the social relations in

employs the example of Augustine's support for the state suppression of the Donatist movement to conclude that the exercise of power through officially mandated religious rituals may actually constitute the cognitive content of religion.[108] Any scholar who defines religion according to cognitive content therefore misses the practices and social forces that have already determined how people understand religion. Asad is further concerned that a focus on cognitive content betrays the bias of some scholars: a cognitive approach renders contemporary Christianity, with its focus on orthodoxy, the paradigmatic religion, while relegating religions that focus on orthopraxy, such as medieval Christianity or Islam, to lesser forms of the category of religion.[109]

### b. Substantive-practical Definitions

Asad's critique of cognitive definitions of religion draws on the importance of particular religious practices, but his endorsement of a historical approach to understanding religion prevents him from attempting a substantive definition of religion that focuses on practices unique to religion. In fact, substantive-practical definitions of religion are uncommon, and other scholars have agreed with Asad's claim that this uncommonness demonstrates the Protestant, cognitive bias of the field.[110] Nevertheless, a

---

which the growing child is involved – by the social activities that he or she is permitted or encouraged or obliged to undertake – in which other symbols are crucial. The conditions that explain how symbosl come to be constructed, and how some of them are established as authoritative rather than others, then become an important object of anthropological inquiry." For Asad, in other words, practices and the distribution of power in institutions are the proper site for the study of religion.

[108] Ibid, 34-35.

[109] I discuss Asad's argument regarding the historical development of the category of religion in section II.D below.

[110] Catherine Bell, for instance, argues that the "Protestant distrust of rites" explains much of the field's lethargy in taking up ritual as a subject of scholarly interest: "Even today, a self-consciously "modern" attitude tends to equate a full ritual system with a

monothetic, practical definition of religion is possible; scholars need only to identify the relevant form of practice that is the essence of religion and explain 1) How that form of practice differs from other, non-religious practices and 2) Whether this form of practice accounts for Spiro's "intuitivity" test. There are two primary candidates for this type of practice: ethics and ritual.

As a scholarly discipline, ethics is primarily cognitive[111], but within a community, ethics becomes an exercise that blends cognitive and practical elements.[112] Scholars do not generally rely exclusively on ethics to define religion in general, but there are examples of movements *within* particular religions that use ethics to determine the essence of their religion. Leaders of the early Christian church argued that those who sinned severely were no longer part of the community[113], and some Anabaptist applications of the ban operate on similar principles.[114] Similarly, the Kharijite movement in early Islam marked all who failed to live up to the standards of *sharia* as *kufr*; this determination amounted to an exclusion of these *kufr* from the community, and, in some cases, justified the use of violence against them.[115] Some contemporary Islamic resistance

---

"primitive" form of religiosity." "Ritual" in *The Blackwell Companion to the Study of Religion*, ed. Robert Segal, 2006. Quote on p. 399.

[111] If ethics involves normative claims, then the study of ethics generally involves a comparative study of normative claims (descriptive ethics) or a study of whether and how normative claims are possible (metaethics).

[112] Communities – religious or otherwise – still discuss how they should live, and such discussions clearly involve cognitive content. They presume, however, that such cognitive discussions have a conative element, and if that presumption is accurate, then ethics necessarily fuses cognitive claims with activity.

[113] Tertullian, for instance, argues that the lapsed have only one chance to return to the fellowship through the practice of exomologesis. See Tertullian, *On Repentance*.

[114] See *The Schleitheim Confession*.

[115] Some translations render *kufr* as unbeliever, and this translation might undermine my claim that the Kharijites relied on practice to determine one's identity as a Muslim.

movements rely on determinations that political leaders are *kufr* to justify armed resistance to their governments.[116] If a sufficient number of religious groups in fact use ethics to demarcate the boundaries of the religious community, then an account of the relevant practices might suffice as a definition of those religions. If, moreover, scholars could determine significant overlap among the relevant practices in various religions, they may be able to develop a substantive, practical definition of religion.

However, there are several reasons to conclude that such an effort is not likely to be successful. First, any effort to use an ethnographic account of the practices of various religious groups to construct a definition of religion relies on a particular outcome of the study: the studies would have to demonstrate that the practices of the various religious groups do, in fact, overlap in some relevant way. Moreover, any effort to develop a definition of religion from ethnographic accounts of religious practices would also have to account for apparent similarities between religious practice and non-religious practice. Any failure to demonstrate either overlap among the practices of various religious groups or to distinguish religious practice from non-religious practice would also fail Spiro's intuitivity criterion: if an account of the ethics of a religious group is not sufficiently different from the ethics of, say, a humanist reading group, then we would have strong reasons to doubt that the account can provide a definition of religion.

Scholars have long looked to ritual as a candidate for the essence of religion. Robertson Smith, in his *Lectures on the Religion of the Semites* offered a qualified

---

However, any determination that a person is *kufr* nearly always involves charges that the person has committed some practical sin.

[116] See John Kelsay, *Arguing the Just War in Islam*, Ch. 4: "Armed Resistance and Islamic Tradition"

defense of prioritizing religious practice over religious belief for any study of ancient religions. He accepts that religious practice may well be motivated by religious belief, but he claims that, in ancient religions, the practices "were rigorously fixed" while any "meaning attached to [them] was extremely vague, and the same rite was explained by different people in different ways."[117] For Smith, then, any adequate study of ancient religions must focus on a study of institutionalized performance of religious rituals.[118]

One key difficulty in developing substantive definitions of religion based on ritual is in identifying the distinctive element of ritual practice. For Robertson Smith, the crucial element is relation to God or gods, and though Smith still asserts the priority of practice in ancient religion, this definition reintroduces the problems discussed above of basing a definition on the concept God.[119] Some scholars account for this difficulty by melding performance with some other type of knowledge in their descriptions of religious activity. J.Z. Smith, for instance, analyzes hunting rituals among Siberian tribes and concludes that ritual focuses on the tension between the reality of a hunt and the ideal of the hunt. This concept of ritual therefore depends on the cognitive work of the participant; Smith presumes that "at some point, he reflects on the difference between his actual killing and the perfection represented by the ceremonial killing."[120] Ritual, in

---

[117] Robertson Smith, *Lectures on the Religion of the Semites: The Fundamental Institutions*, 16. Accessed online at https://archive.org/details/lecturesontherel028530mbp Smith goes on to further assert the primacy of ritual in ancient religions by noting that beliefs were rarely obligatory, while participation in rituals was.

[118] Ibid, 25: "We shall find that the history of religious institutions is the history of ancient religion itself"

[119] Smith, 32. Here Smith defines the fundamental principle of ancient religion as "the solidarity of the gods and their worshippers in one organic society."

[120] J.Z. Smith, "The Bare Facts of Ritual," *Journal of the History of Religions*, v. 20 1/2, 1980, 126.

Smith's eyes, represents a performance rendered ideal by controlling its circumstances: contingency and luck have been factored out, leaving ritual a performance that *cannot* be represented in the world.[121] Other scholars directly embrace the ambiguity implied by a definition that does not firmly distinguish ritual activity from other forms of activitiy. Ronald Grimes, for instance, distinguishes between "hard definitions" of ritual, which offer clear boundaries between ritual and other forms of activity, and "soft definitions", which do not. The advantage of soft definitions, for Grimes, is precisely their openness: "Soft [definitions] aim at surveying and connecting adjacent fields."[122]

Whatever the advantages of open conceptions of ritual may be, they do not offer a clear mechanism for determining what counts as religion. In fact, an open conception of ritual necessarily leads to over-inclusiveness: were scholars to include in the category religion every activity that either exists in tension with an unrealized ideal or involves "animated persons", "formative gestures" and "crucial times", then they would develop a concept of religion that greatly exceeds the bounds of Spiro's "intuitivity" criterion. More precise definitions, such as Robertson Smith's, nevertheless rely on some cognitive

---

[121] Ibid, 124-125: "I would suggest that, among other things, *ritual represents the creation of a controlled environment* where the variable (i.e., the accidents) of ordinary life have been displaced *precisely* because they are felt to be so overwhelmingly present and powerful. *Ritual is a means of performing the way things ought to be in conscious tension to the way things are in such a way that this ritualized perfection is recollected in the ordinary, uncontrolled course of things*. Ritual relies for its power on the fact that it is concerned with quite ordinary activities, that what it describes and displays is, in principle, possible for every occurrence of these acts. But it relies, as well, for its power on the fact that, in actuality, such possibilities cannot be realized."

[122] Ronald Grimes, "Defining Nascent Ritual" in *Journal of the American Academy of Religion*, Vol. 50 n. 4 (December 1982), 541. Grimes goes on to propose the following definition of ritual, which, true to form, does not establish hard boundaries: "Ritualizing transpires as animated persons enact formative gestures in the face of receptivity during crucial times in founded places."

element such as divinity of spiritual beings. Such an approach may still qualify as *practical*, but it involves the weaknesses of cognitive approaches that rely on the necessarily vague concepts of "God" and "spiritual beings".

### c. Substantive-Affective Definitions

Other scholars address the shortcomings of substantive-practical and substantive-cognitive approaches by proposing a third type of definition based on affect or experience. Scholars who defend such an approach typically offer an understanding of affect or experience as distinct from both cognition and practice.[123] Friedrich Schleiermacher, for example, distinguishes affect from cognition by noting that the former is immediate and unreflective. Cognition, for Schleiermacher, can involve reflection on representations derived from immediate experience, but it is, therefore, mediated; affect or feeling is always, in his view, experience unmediated by mental representations.[124] Rudolf Otto similarly distinguishes affect from cognition by highlighting the insufficiency of the latter to comprehend the former.[125] While Mircea

---

[123] Though neither Schleiermacher nor Otto accepts Kant's divisions of cognition, ethics and affect without revision, both draw on the divisions of his three critiques in identifying the three rival grounds for the concept of religion.

[124] Friedrich Schleiermacher, *The Christian Faith*, edited by H. R. Mackintosh and J. S. Stewart, (Philadelphia, Fortress Press) 1928, 6-7. Schleiermacher grants that feelings may be accompanied by either action or knowledge, but he maintains that it is nevertheless possible to distinguish pure feeling from any mixture of feeling and cognition. He cites that examples of "joy and sorrow" as "genuine states of feeling", while noting that "self approval and self reproach" as the results of "analytic contemplation." Cognition, in other words, may produce feeling, but feeling can also produce cognition, and therefore feeling cannot be reduced to cognition.

[125] Rudolf Otto, *The Idea of the Holy: An Enquiry into the Non-Rational Factor in the Idea of the Divine and its relation to the Rational*, Ch. 2. Otto claims that the Holy does not properly belong to either ethics or cognition: "While [the holy] is complex, it contains a quite specific element or 'moment' which sets it apart from 'the Rational' in the meaning we gave to that word above, and which remains inexpressible … in the sense that it completely eludes apprehension in terms of concepts."

Eliade is less interested than is Otto in asserting the difference between cognitive and affective understandings of religion,[126] he nevertheless grounds his essential element of religion, the distinction between the sacred and the profane, in experience rather than cognition.[127] Schleiermacher and Otto both find their distinction between affect on the one hand and rationality and practice on the other useful in supporting their claims that religion should be understood as affective. Schleiermacher draws on something akin to Spiro's "intuitivity" test, claiming that no one equates perfect knowledge of doctrine with perfect religiosity or piety.[128] Schleiermacher also dismisses the possibility that any sort

---

[126] Eliade, *The Sacred and the Profane*, 1961. Eliade praises Otto for his focus on the experiential aspect of religion: "The extraordinary interest aroused all over the world by Rudolf Otto's *The Sacred*, pubished in 1917, still persists. Its success was certainly due to the author's new and original point of view. Instead of studying the *ideas* of God and religion, Otto undertook to analyze *the religious experience*." However, Eliade proposes to deemphasize this distinction in his own work: "We propose to present the phenomenon of the sacred in all its complexity, and not only in so far as it is *irrational*. What will concern us here is not the relation between the rational and the nonrational elements of religion but the *sacred in its entirety*." 8-10.

[127] Ibid, 11. Eliade's understanding of religion as primarily – at the very least, originally – an experiential phenomenon is evident for several reasons. First, he claims that the distinction between sacred and profane is only possible through an experience of the sacred: "Man becomes aware of the sacred because it manifests itself, shows itself, as something wholly different from the profane." (11) Moreover, Eliade contends that the sacred and the profane are, for the religious person, different "modes of being in the world" (14).

[128] Friedrich Schleiermacher, *The Christian Faith*, (1928), 9: "Accordingly, on the hypothesis in question [that religion/piety is a form of knowledge], the most perfect master of Christian Dogmatics would always be likewise the most pious Christian. And no one will admit this to be the case… but all will agree rather that the same degree of perfection in that knowledge may be accompanied by very different degrees of piety, and the same degree of piety by different degrees of religion." Schleiermacher's approach focuses on piety, but since he uses the concept of piety to compare religions, I consider his definition of piety functionally equivalent to a definition of religion. Schleiermacher himself hesitates to use the term "religion" to serve this comparative purpose because he fears that some will associate it with "natural religion" and will, in turn, claim that it is possible to subscribe to only this "natural religion" and not any particular religion. Schleiermacher therefore emphasizes the impossibility of developing a religious

of action or practice is the essence of religion by noting that an analysis of actions alone is insufficient to determine their degree of religiosity. He instead concludes that an evaluation of the religiosity of an act depends upon its intentions, which Schleiermacher counts as a species of feeling.[129] Otto, on the other hand, calls the reader's attention to their own experience, and bases his clear distinction between affect and cognition on his certainty that the reader's experience will confirm Otto's claims.[130] Eliade employs his distinction between "modalities of experience" and action itself to undermine claims that any sort of practice could be the substance of religion. The distinction between a religious act and a non-religious act is not, for Eliade, the content of the act itself, but rather the experience – or, in his terms, the modality of being - of the participants.[131]

While Schleiermacher and Otto's emphasis on the non-rational character of religion serves to distinguish their affective approaches from cognitive definitions of religion, their use of the non-rational also complicates their efforts to distinguish *religious* affects and experiences from non-religious affects and experiences. If rational analysis is of limited utility for explaining and understanding the sorts of experiences characteristic of religion, then scholars may have difficulty explaining what is

---

consciousness outside of a particular religion by using the term only to refer to particular religions. See *The Christian Faith* 29-31.

[129] Ibid, 9-10. Schleiermacher goes on to state that religion deals with feelings of dependence because religion accounts for the human experience of recognizing that some elements of our lives are not under our control. He claims that religion is the feeling of *absolute* dependence because only God could be the agent of unrequited dependence, since human beings have the capacity to affect both one another and the world.

[130] *The Idea of the Holy*, Ch.3.

[131] Eliade cites an example of eating to support this claim: "For modern consciousness a physiological act – eating, sex, and so on – is in sum only an organic phenomenon, however much it may still be encumbered by tabus … But for the primitive, such an act is never simply physiological; it is, or can become, a sacrament, that is a communion with the sacred."

characteristic of those experiences. Schleiermacher ultimately does not claim that religious experiences are qualitatively different from non-religious experiences. Rather, he claims that all experience contains both a "self-caused element and a "non-self-caused" element; the latter element is expressed affectively as a "feeling of dependence" while the former is expressed as a "feeling of freedom". Schleiermacher argues that human experience always includes a mixture of these two, but he concludes that the impossibility of a pure feeling of freedom leads humans, over a period of time, to experience a feeling of pure, or "absolute dependence". It is this latter feeling that he identifies with religion, and, given that he ties this characteristic "feeling of absolute dependence" to human experience generally, Schleiermacher does not offer a clear mechanism for separating religious from non-religious phenomena. Otto, however, faults Schleiermacher for integrating his account of religious affections into his account of affections in general. Otto instead contends that the experience of the holy is "so primary and elementary a datum in our psychical life" that it is "only definable through itself."[132] For Otto, therefore, the only mode of analysis adequate to the uniqueness of religion is analogy,[133] and he employs his analogical method to note the elements of "awe",

---

[132] Otto, *The Idea of the Holy*, 9: " What [Schleiermacher] overlooks is that, in giving the name 'feeling of dependence' at all, we are really employing what is no more than a very close analogy. Any one who compares and contrasts the two states of mind introspectively will find out, I think, what I mean. It cannot be expressed by means of anything else, just because it is so primary and elementary in our psychical life, and therefore only definable through itself."

[133] Ibid. While Otto does claim that the analogy between a feeling of dependence as described by Schleiermacher and genuine religious feelings is qualitative, he nevertheless acknowledges that analogical analysis is useful so long as the scholar acknowledges the limits of the analogy: "The feeling of which Schleiermacher wrote has an undeniable analogy with these [religious] states of mind: they serve as an indication to it, and its nature may be elucidated by them, so that, by following the direction in which they point, the feeling itself may be spontaneously felt. But the feeling is at the same time also

"overpoweringness", and the "wholly other" that characterize specifically *religious* experiences.[134] Eliade denies that reason is unsuited to analyzing religious experiences, and instead relies on results of his work to establish the distinction between religious and non-religious experiences.[135] However, in relying on the totality of his work to establish the distinction between religious and non-religious experiences, Eliade fails to provide a straightforward mechanism for determining what counts as religion. [136]

---

qualitative different from such analogous states of mind." Otto goes on to critique Schleiermacher for failing to recognize the qualitative difference between religious feelings and other sorts of feeling: "Schleiermacher himself, in a way, recognizes this by distinguishing the feeling of pious or religious dependence from all other feelings of dependence. His mistake is in making the distinction merely that between 'absolute' and 'relative' dependence, and therefore a difference of degree and *not of intrinsic quality* [emphasis mine]."

[134] Ibid, 12-30. Here Otto uses analogy to describe religious experiences in terms of other feelings and experiences; he does not use an analogical method to determine what counts as religion.

[135] Eliade acknowledges that religious modes of experience are, to some extent, conditioned by historical context, but he maintains that the essential distinction between religious experience and non-religious experience is relevant regardless of historical variation: "Hence there are differences in religious experiences explained by differences in economy, culture, and social organization – in short, by history. Nevertheless, between the nomadic hunters and the sedentary cultivators there is a similarity in behavior that seems to us infinitely more important than their differences: *both live in a sacralized cosmos*, both share in a cosmic sacrality manifested equally in the animal world and in the vegetable world. We need only compare their existential situations with that of a man of the modern societies, *living in a desacralized cosmos*, and we shall immediately be aware of all that separates him from them."

[136] In *The Sacred and the Profane*, Eliade elaborates distinctions between religious and non-religious experiences of time, space, nature, and human life over the course of a series of chapters. His approach is not an example of Saler's "holding a definition in abeyance", as he does not provide a simple definition of religious experience at the conclusion of the work, either. Moreover, his method is plagued by his assumption that the various religious experiences he catalogues are, in fact, religious. In other words, he assumes a transcultural applicability of the concept of religion before establishing the parameters of the concept and thereby providing a warrant for that comparison. A charitable reading of Eliade would suggest that he, like JZ Smith, *constructs* similarities for scholarly purposes (see section I.D above), but Eliade denies that he is doing this, since he claims he is elaborating on the essence of religion. One might also classify

While Otto provides a clear distinction between religious experiences and all other experiences, his emphasis on the unique, *sui generis* character of religious experience ultimately undermines the capacity of his account to determine what counts as religion. As I note above in section I.A, critics of the field of religious studies frequently claim that scholars in the field use the concept of *sui generis* religion to bar scholars from other fields from studying religion; Otto, goes several steps beyond this in specifically uninviting readers who have no personal affective experience of religion: "The reader is invited to direct his mind to a moment of deeply-felt religious experience… Whoever cannot do this, whoever knows no such moments in his experience, is requested to read no further."[137] Otto's affective approach provides the strongest foundation for the claim that religion is *sui generis*, and in so doing, it exposes the limitations of *sui generis* concepts of religion. Because, for Otto, the distinction between religious feelings and other types of feeling cannot be adequately expressed to an outsider, an affective concept of religion cannot determine what counts as religion and what does not. Moreover, because Otto claims one can only describe the experience that forms the essence of religion through indirect, analogical analysis, his approach is subject to Fitzgerald's concern about scholars' equivocal uses of the term "religion". Finally, Otto's approach is clearly subject to Asad and Saler's concerns about transcultural and transhistorical applications of the concept of religion: Otto *cannot* directly provide a warrant for comparing religions, because he can only point an ineffable experience of the holy as the shared essence of the concept of religion. Schleiermacher, on the other hand, *does*

---

Eliade's approach as polythetic definition of religion; I consider this possibility below in II.B.

[137] Otto, *The Idea of the Holy*, 8.

provide a direct account of the specific types of feelings and experiences that characterize religion, but his characteristic "feeling of absolute dependence" is too integrated into other aspects of human experience to serve as a mechanism to determine what counts as religion.[138]

### d. Assessment of substantive approaches

Benson Saler identifies a number of additional limitations to all three types substantive definitions of religion. While they can potentially offer the benefits of clarity, this ostensible clarity in turn gives rise to "interminable arguments about so-called borderline cases".[139] Because a substantive approach uses a binary approach to categorization[140], borderline cases cannot be treated as marginally religious or quasi-religious.[141] Moreover, as I note above, substantive approaches sometimes exclude phenomena that many intuitively consider religious. Saler also argues that a substantive approach may import western concepts into contexts where those concepts have only limited applicability.[142] In other words, a substantive definition that relies on western

---

[138] Schleiermacher does not intend to generate a concept of religious feeling that can be readily distinguished from non-religious feelings; rather, he is convinced that the religious feelings are always present as a mixture with other sorts of affect and experience: "What we have thus described constitutes the highest grade of human self-consciousness; but in its actual occurrence it is never separated from the lower," *The Christian Faith*, 18.

[139] Saler, *Conceptualizing Religion*, 157.

[140] Either a phenomenon possesses the crucial criterion for religiosity and counts as a religion, or it does not possess this feature and is not a religion.

[141] Saler's own analogical approach allows for a scalar, rather than binary, determination of religious status; thus a phenomenon could be fully religious, quasi religious, or not religious at all. I discuss his approach in section II.C below.

[142] Ibid, 156: "Thoughtful ethnographers are likely to judge monothetic definitions of religion to constitute potential sources of distortion in some ethnographic applications. Such definitions sometimes explicitly depend on concepts that may not be cognitively salient among various peoples (as, for instance, in definitions that are tied to the Western category "supernatural")."

concepts does not provide a warrant for transcultural application of the concept of religion.

Finally, the presence of three plausible categories of substantive definitions of religion itself inveighs against the viability of substantive definitions. Any strong argument in favor of, for instance, a cognitive approach to defining religion is also a strong argument against the viability of both an affective approach and a practical approach. Scholars who employ a particular substantive approach do not necessarily exclude the importance of the other two categories of substantive definitions of religion; they might instead assert the primacy of their chosen monothetic approach. Schleiermacher, for instance, acknowledges that both practices and cognitive content can be distinctly religious, though he contends that only a particular type of experience or feeling can be the essence of religion.[143] Similarly, Clifford Geertz's definition of religion prioritizes cognitive content, but he allows that practices and experiences can count as religious so long as they are derived from the symbols he identifies as the essence of religion. An assertion of the primacy of one sort of substantive definition can still fall short of the intuitivity criterion, since some religions (some forms of Protestant Christianity, for instance) may express the primacy of cognitive content while others express the primacy of practical content.

---

[143] Schleiermacher, *The Christian Faith* 10-11: "… there are both a knowing and a doing which pertain to piety, but neither of these constitutes the essence of piety: the only pertain to it inasmuch as the stirred-up Feeling sometimes comes to rest in a thinking which fixes it, sometimes discharges itself in an action which expresses it."

### 2. Monothetic Functionalist Definitions

Although the presence of strong arguments for various types of substantive definitions of religion seems at first glance to support multifactorial approaches to defining religion, a theorist could nevertheless support a monothetic approach by turning to functionalist definitions. Functionalist definitions are monothetic insofar as they focus on a single essential criterion for religiosity, but they do not, like substantive definitions, focus on a single critical aspect of practice, thought or affect. Rather, functionalist definitions look to a common outcome or purpose in order to generate a definition of religion. A functionalist approach therefore has the benefit of potentially accounting for the overlap of the three substantive approaches to defining religion: cognitive, practical and affective content might all be components of a definition that identifies religion with a particular outcome or purpose. Additionally, because functionalist definitions allow for more flexibility than do substantive definitions, they may obviate Saler's concern about "interminable debates about so-called borderline cases."

Scholars have proposed a number of different functionalist definitions of religion. Clifford Geertz, as noted above, relies to some extent on the cognitive content of symbols to ground his concept of religion, but his concept of religion also incorporates an affective element, as he identifies the role symbols play to "establish powerful, pervasive, and long-lasting moods and motivations in men"[144]. Geertz ultimately links these cognitive and affective elements of religion through their common function, which is, as Geertz sees it, the transmission of a particular type of cultural data that serves to address the limitations of human mortality and to "synthesize a people's ethos – the tone,

---

[144] Geertz, "Religion as a Cultural System"

character and quality of their life, its moral and aesthetic style and mood." In citing a social function for religion, Geertz echoes Durkheim's perspective. As noted above, Durkheim rejected several substantive definitions of religion on the grounds of their under-inclusiveness; he instead attempts to construct a definition of religion that accounts for both cognitive and practical elements of religion. [145] Durkheim proposes that the link among all religious phenomena is their social orientation[146]; he therefore concludes that:

> "A religion is a unified system of beliefs and practices relative to sacred things, that is to say, things set apart and forbidden – beliefs and practices which unite into one single moral community called a Church, all those who adhere to them."[147]

Paul Tillich famously proposed an account of religion that, at first glance, appears to blend elements of cognitive and affective substantive definitions of religion. His account is cognitive insofar as he offers an explanation of the concept of God; that explanation, however, draws on experience:

---

[145] *Elementary Forms of Religious Life,* 51. Durkheim begins his own effort to define religion by noting that "Religious phenomena are naturally arranged in two fundamental categories: beliefs and rites. The first are states of opinion, and consist in representations; the second are determined modes of action."

[146] Ibid, 59. Durkheim goes so far as to claim that observations of religion and observations of social life overlap substantially: "In all history, we do not find a single religion without a church… wherever we observe the religious life, we find that it has a definite group as its foundation." One could conclude from this that Durkheim in fact proposes a substantive definition that identifies religion with a particular type of institution. Such a proposal would, in short, identify as religious any person or activity associated with an institution that proposes a division of sacred and profane; acceptance of institutional authority could, for this theory, be the marker of *religious* beliefs and practices. However, Durkehim does not claim that "Churches" precede the religious beliefs and practices of individual members. Durkheim dispels any such claim through his contrast of religion with magic and his correlative contrast of churches with communities of magic. While a community of magic can be formed when new members accept the previously existing beliefs of a religious elite, "a college of priests is not a church." (60). Rather, a church is constituted by the shared beliefs of the community.

[147] Ibid, 62.

> "A phenomenological description of the meaning of "God" in every religion, including the Christian, offers the following definition of the meaning of the term "god." Gods are beings who transcend the realm of ordinary experience in power and meaning, with whom men have relations which surpass ordinary relations in intensity and significance."[148]

Tilllich grounds his concept of God in a phenomenological reading of human experience; the experiential ground for religion is, for Tillich, the "realm of ultimate concern"; whatever a human being directs himself to as his primary goal effectively *is* his God.[149] Thus, the purpose that is common to all varieties of religion is to provide meaning to a person's life by constituting some "ultimate concern" as that person's God.

Functionalist definitions of religion may serve a number of scholarly purposes well, but they are not effective mechanisms for determining what does (and what does not) count as religion.[150] Functionalist definitions are overly inclusive; Saler notes that approaches such as those of Tillich and Geertz in fact exclude very little:

> "When, for instance, [functionalist definitions] identify religion as a way of coping with presumptively universal existential or emotional concerns, it is hard to limit what can then be assigned to the rubric religion, and virtually everyone is rendered religious by definition."[151]

Such over-inclusiveness effectively assumes the premises of the case for *homo religiosus* by counting even those who reject religion as religious. Saler also notes that an over-inclusive definition attenuates the analytical utility of the term religion:

---

[148] Paul Tillich, *Systematic Theology*, 1967, v.1 p. 212.1
[149] Ibid.
[150] Arguably, Tillich's goal is not to define religion, but rather to develop a phenomenological contrast of idolatry and piety. Nevertheless, some interpreters have understood Tillich's concept of "ultimate concern" as a functionalist approach to defining religion. I consider the 1978 Harvard Note's appropriation of Tillich's concept of "ultimate concern" for constitutional purposes in Chapter 2, section II.A.2.b
[151] Saler, *Conceptualizing Religion*, 157.

> "Religion is a word that has traditional meaning for us and for the audience for which we write, and by so widening or otherwise altering what it includes, it may well cease to have much utility as a research and literary tool."[152]

If *anything* can be counted as religious, then the term no longer picks out anything with precision. Moreover, the over-inclusiveness of functionalist approaches undermines any effort to establish religion as *sui generis*; by blending religion with other fields of knowledge, defenders of functionalist render any account of it as a discrete field impossible. Finally, functionalist approaches both rely on and exacerbate the vagueness that plagues some key terms in religious studies. Saler notes that functionalist definitions do little to limit the correct usage of the term religion; Tillich's approach in turn does little to limit the correct usage of the term God. Indeed, nearly anything could constitute a person's God in Tillich's model, and this raises further concerns about the precision of one of the key terms in religious studies.

## B. Polythetic Approaches to Determining What Counts as Religion

Benson Saler groups both analogical and polythetic approaches into the broader category of "multifactorial approaches"[153]; I consider them separately because the two approaches are conceptually different despite their similarities. I also include complex monothetic definitions in this section, and I do so to clearly distinguish a complex monothetic definition from a truly polythetic approach to classification. I begin this section with an explanation of the origin of the concept polythetic classification in the philosophy of biology.

---

[152] Ibid.
[153] *Conceptualizing Religion*, Ch. 6.

### 1. Background on Polythetic Classification

The monothetic approaches I describe in section II.A above focus on a single feature that is both a necessary and sufficient condition for religiosity, but a monothetic approach might instead rely on multiple features. Such an approach would then define religion, or any other class of objects, with reference to a set of features that are individually necessary for the class, but are only sufficient collectively. No single feature, in other words, is sufficient to establish a class for this complex monothetic approach.

Polythetic approaches, on the other hand, dispense with necessary features altogether. The term "polythetic approach" was first coined by philosophers who pursued its application to biological taxonomies.[154] Morton Beckner, who pioneered the concept, explains it this way:

> A class is ordinarily defined by reference to a set of properties which are both necessary and sufficient (by stipulation) for membership in the class. It is possible, however, to define a group *K* in terms of a set *G* of properties *f, f2, .... Fn* in a different manner. Suppose we have an aggregation of individuals (we shall not yet call them a class) such that:
>
> 1) Each one possesses a large (but unspecified) number of the properties in *G.*
>
> 2) Each *f* in *G* is possessed by large numbers of these individuals and
>
> 3) No *f* in *G* is possessed by every individual in the aggregate.
>
> By the terms of (3), no *f* is necessary for membership in this aggregate; and nothing has been said to warrant or rule out the possibility that some *f* in *G* is sufficient for membership in the aggregate.[155]

---

[154] See R.R. Sokal and P.H.A. Sneath, *Principles of Numerical Taxonomy*, 1963. Sneath elsewhere credits Morton Beckner with developing the concept of polythetic classification, though Beckner himself preferred the term polytyptic. See Sneath, "Recent Developments in Theoretical and Quantitative Taxonomy," in *Systematic Zoology*, 1961. See also, Rodney Needham, "Polythetic Classification: Convergence and Consequences" in *Man*, V. 10 n. 3 (Sep. 1975), 349-369.

[155] Morton Beckner*, Biological Way of Thought*, 22. Cited in Needham (1975) at 353.

Polythetic classification therefore differs markedly from monothetic classification in that no single feature can serve as both a necessary and a sufficient condition for membership in the class. Moreover, polythetic classification differs from complex monothetic definitions in that no defined *set* of features can define a class, either. A member of the class *K* might lack any one of the features of set G and nevertheless be included in the class, so no single feature or list of features can adequately define the class. Benson Saler notes that proponents of polythetic approaches to biological taxonomies advocate developing large numbers of characteristics. Because the polythetic approach relies on an overlap of features to define a class, the potential for overlap must be statistically significant in order to establish that class, so polythetic classification functions best when biologists can identify dozens, or even hundreds of features relevant to a particular class.[156]

Beckner notes that one significant result of polythetic approaches to taxonomy is a proliferation of borderline disputes; in fact, he deems these disputes essential to a polythetic approach.[157] A potential member of the class that possesses a high percentage of the features is likely to be included; a potential member that possesses a low percentage of the features is likely to spark debate. To the extent that the rigidity of monothetic definitions of religion is a flaw, the borderline disputes characteristic of polythetic definitions are a feature, not a bug. For Beckner, these sorts of disputes in biological taxonomy are "the whole point" of polythetic defitions; a scholar may thereby:

---

[156] Saler, p. 169.
[157] Beckner, 25. Cited in Needham, (1975) at 354.

> "avoid committing oneself to a necessarily arbitrary delimitation of a class before a theoretically adequate definition can be found… [polythetic classification] leaves the borderline between K and non-K indeterminate where there is no theroretical reason for drawing the borderline at a particular point."

Debate about the inclusion of a borderline case is productive because it may lead to a more refined understanding of the class in question. This potential for revision is, in turn, another element of a polythetic approach to defining religion. Whereas a monothetic definition identifies a single, unchanging essence of religion, some polythetic approaches allow for modifications to the concept. If debate about borderline cases leads to the inclusion of several members that share features not included in the original set of overlapping features, may add the new features to the old.[158]

### 2. Polythetic Classification in the field of Religious Studies

Several scholars of religion have praised the potential of polythetic approaches; these scholars frequently identify polythesis as a remedy for the limitations of monothetic approaches. Well before the development of Beckner's theory of polythetic classification, William James presaged the appeal of its application to the concept of religion through a critique of monothetic definitions. James, noting the variety of proposed definitions of religion, concluded that these definitions "prove that the word 'religion' cannot stand for any single principle or essence, but is instead a collective term."[159] A polythetic approach

---

[158] For instance, suppose a class of phenomena is defined polyethetically as those members that possess some of the features (A, B, C, D, E, F, G, H, J). Suppose further that debate about borderline cases leads to the inclusion of several new members, many of which possess the further features (H, I). A polythetic approach may allow for a revision of the original set of features to include (H,I).

[159] William James, *The Varieties of Religious Experience*, Ch. 2. James' work predates the efforts of the philosophers of science reviewed above; technically speaking, therefore, he does not offer a defense of a polythetic approach to defining religion. Nevertheless, his

captures this concept of a "collective term" in that it does not rely on a "single principle" to establish the category of religion. More recently, many scholars of religion have highlighted flaws of monothetic approaches that polythetic classification can address. For example, I described in section I.B.2 above W.C. Smith's claim that any effort to define religion by looking to a single common element risks drawing scholars' attention away from other important components of religion.[160] A polythetic approach can remedy this flaw by refusing to identify religion with a single element. Martin Southwold highlights this point in his defense of polythetic approaches to understanding religion, claiming that a polythetic approach can account for the complexity of religion:

> "Religion is not a homogenous system responding to any single need or inclination. Rather, a religion is compounded of a variety of forms of behavior which tend to be produced in response to diverse individual and social requirements; but these forms of behavior, though they have in this sense diverse origins, have marked affinities one with another that lead to their coalescence into a moderately coherent system."[161]

In addition, a polythetic approach can address Talal Asad's concern that monothetic approaches reflect the scholar's own biases with regard to religion in two significant ways. First, a polythetic approach would prevent scholars from excluding beliefs or practices from the category of religion on the basis of an element that is characteristic of only a single religious tradition. Second, a polythetic approach negates efforts to conceptualize religion as a scalar phenomenon. In "Fences and Neighbors," J. Z. Smith contends that monothetic approaches to defining religion often render Judaism merely

---

rejection of a monothetic approach, and his support of the term as "collective" indicates an implicit acceptance of the concept of a polythetic approach.

[160] W.C. Smith, *The Meaning and End of Religion*, 149.

[161] Martin Southwold, "Buddhism and the Definition of Religion" in *Man*, V. 13 n. 3 (September 1978) pp. 362-379.

quasi-religious because these approaches frame Judaism as possessing the single feature of religion in a diminished form. Smith approves of polythetic approaches that present Judaism a full member of the category religion.[162]

Some scholars have even directly proposed polythetic understandings of religion. Unsurprisingly, these scholars often highlight features for the class of religion that overlap with the criteria highlighted in the monothetic definitions reviewed above. Martin Southwold, for instance, derives a list of twelve key attributes from descriptions of members of the category.[163] His criteria are:

> "1) A central concern with godlike beings and men's relations with them.
> 2) A dichotimisation of elements of the world into sacred and profane, and concern with the sacred.
> 3) An orientation towards salvation from the ordinary conditions of worldly existence.
> 4) Ritual practices.
> 5) Beliefs which are neither logically nor empirically demonstrable or highly probably, but must be held on the basis of faith …
> 6) An ethical code, supported by such beliefs.
> 7) Supernatural sanction on infringements of that code.
> 8) A mythology
> 9) A body of scriptures, or similarly exalted oral traditions.
> 10) A priesthood, or similar specialist religious elite.

---

[162] J. Z. Smith, "Fences and Neighbors: Some Contours of Early Judaism" in *Imagining Religion: From Babylon to Jonestown*, 1982. See especially pp 3-5, where Smith provides a brief account of Beckner, Sneath, and Sokol's approaches to taxonomy. See also on this point, Bruce Lincoln, *Holy Terrors* , 2003 p. 5: "… let us recall Asad's narrower objection to Geertz. Any definition that privileges one aspect, dimension or component of the religious necessarily fails, for in so doing it normalizes some specific traditions (or tendencies therein), while simultaneously dismissing or stigmatizing others." Lincoln goes on to conclude that an inclusive definition must be "polythetic and flexible".

[163] For Southwold, membership in the category is determined by natural language usage of the term: "But the classes with which we classify phenomena are mostly polythetic. This is because they are by-products of usage in natural languages: such a class is merely the totality of things to which people have applied a particular word." Southwold, 370. I discuss the limitations of Southwold's mechanism for determination of membership in a class below.

> 11) Association with a moral community, a church…
> 12) Association with an ethnic or similar group."[164]

Southwold concludes that "anything which we would call a religion must have at least some" of these attributes.[165] Bruce Lincoln proposes a defintion that he describes as "polythetic and flexible", and, in so doing, he highlights four key "domains" for determining religiosity:

> "1. A Discourse whose concerns transcend the human, temporal and contingent, and that claims for itself a similarly transcendent status…
> 2. A set of practices whose goal is to produce a proper world and/or human subjects, as defined by a religious discourse to which these practices are connected…
> 3. A community whose members construct their identity with reference to a religious discourse and its attendant practices…
> 4. An institution that regulates religious discourse, practices, and community, producing them over time and modifying them as necessary, while asserting their eternal validity and transcendent value."[166]

Lincoln then concludes that: "All four domains- discourse, practice, community, and institution – are necessary parts of anything that can properly be called a "religion"."[167] Thus, though Southwold and Lincoln propose some similar characteristics for their understandings of religion, their mechanisms for determining membership in the class are markedly different. Lincoln contends that any member of the class "religion" must possess all four properties he lists, while Southwold concludes that a member need only posses "some" of his twelve attributes.

---

[164] Ibid, 370-371.
[165] Ibid.
[166] Bruce Lincoln, *Holy Terrors*, 5-7.
[167] Ibid.

### 3. Misunderstandings of Polythetic Classification

Southwold and Lincoln's contrasting methods for establishing membership in the category of religion highlight a few key misunderstandings about polythetic classification. Lincoln, for his part, characterizes his approach as both polythetic and definitional, but a truly polythetic approach to classification cannot be definitional. Polythetic classification does not identify a set of necessary and sufficient conditions for determining membership in a class, so a polythetic approach is not definitional. Lincoln's approach, by contrast, does seem to be definitional: he argues that any potential member of the category of religion must possess all four of his "domains", so he effectively renders each domain a necessary condition for religiosity. One could therefore characterize his approach as a complex monothetic definition: he highlights several necessary conditions for religiosity, and seems to conclude that only the presence of all four is sufficient to establish membership in the category.[168]

Southwold, on the other hand, specifically disavows monothetic approaches, but he argues that his polythetic approach to determining what counts as religion is derived from ordinary usage of the term. Southwold argues that all definitions are either "Real" or "Nominal", and explains that real definitions *must* be monothetic, while nominal

---

[168] It is worth noting that Lincoln's definition arguably does not satisfy Asad's critique of Geertz, despite the fact that he constructs his definition to do precisely this. Asad faults Geertz not for excluding affective or practical elements of religion from his definition of religion, but rather for prioritizing cognitive elements over practical elements. Lincoln repeats this mistake. He makes the primary criterion of religiosity the "discourse whose concerns transcend the human, temporal and contingent", and he frames the other criteria around this concept of "religious discourse". A religious practice is one "whose goal is to produce a proper world … as defined by a religious discourse"; a religious community is one "whose members construct their identity with reference to a religious discourse,". Asad, however, argues that practice generates discourse; concepts of the transcendent are generated, for Asad, by the certain types of practice. See Asad, " The Construction of Religion as an Anthropological Category", especially 30-35.

definitions merely reflect actual usage of the term. Because he derives his twelve properties of religion from usage of the term, he characterizes his approach as a nominal definition. Southwold is content to conclude that such an approach is not "really" a definition,[169] but a polythetic approach does not have to be merely nominalist if it evokes an actual class of comparable objects. Southwold's concept of nominalist polythetic definitions could consider a class with Buddhism and Christianity as conceptually indistinct from a class with Buddhism and Baseball, assuming people regularly speak of Buddhism and Baseball as members of a class. A truly polythetic approach, however, would support the claim that people group Buddhism with Christianity and not with baseball for a reason – specifically, that Buddhism and Christianity share a sufficient number of overlapping features to justifies the formation of a common class.[170] Such an approach could establish a class that is more than merely nominal in at least two ways. First, some classes may be truly polythetic, such that identification of a significant number of overlapping features among the members of the class is the only way to substantiate membership in the class. Second, the polythetic constitution of a class may be a stand-in until scholars develop a monothetic definition of that class.[171]

---

[169] Southwold counts this as an advantage, since he concludes that: "The Real Definition is almost always futile because it amounts to the search for the significant common attributes of a class that has none. Hence Real Definition ought not to be attempted." [170]

[171] This second strategy is significantly informed by the biological use of polythetic definitions in numerical typing. In contemporary biology, a significant overlap in features among various biological creatures usually provides the grounds for presuming a monothetic explanation for their membership in a common class, specifically descent from a common ancestor. Thus, describing the various features shared among lions, tigers and cats indicates a monothetic explanation for those similarities, specifically a prehistoric common ancestor. Polythetic classification is derived, in many ways, from the work of Michel Adanson, whose work predated that of Darwin. Thus, his polythetic

### 4. Assessment

Complex monothetic defintions, such as Lincoln's, offer one key advantage over simple monothetic definitions. To the extent that a monothetic definition is over-inclusive, the addition of further criteria to that definition can productively narrow its scope. However, there are several aspects of complex definitions that raise significant doubts about their utility in the context of religious studies. First, complex monothetic definitions cannot correct for the under-inclusiveness of a simple monothetic approach. Additional criteria will only narrow the scope of a monothetic definition, and accordingly a complex monothetic approach exacerbates the problem of under-inclusiveness. Lincoln includes several criteria that substantiate this concern that complex monothetic definitions can prove under-inclusive: his emphasis on "religious community" and "religious institutions", for example, might exclude new religious movements, individual religious practitioners, and movements that specifically reject institutional organization. Moreover, complex monothetic approaches cannot compensate for the vagueness of some of their criteria. In section II.A.1 above, I argue that terms such as God, ritual, and spiritual beings are too under-defined to usefully ground a definition of religion. Lincoln's concepts of "transcendent discourse" and "religious discourse" are at least as vague as these terms, and could be manipulated to either include or exclude virtually any phenomena from the category of religion.

The key difficulty for truly polythetic approaches to classification, on the other hand, is determining what counts as significant overlap. Biological uses of polythetic

---

approach was a temporary substitute awaiting a more concise, monothetic explanation of biological similarity. It is also worth noting that this form of literal family resemblance should not be confused with Wittgenstein's metaphorical concept of family resemblance discussed below in II.D.

definitions rely on statistical modeling to determine when overlap is significant, but without a longer list of features, statistical significance is not possible. Southwold's polythetic approaches proposes a list of a dozen features of religion, but biological classification typically relies on lists of hundreds of features. Moreover, the features themselves may be difficult to establish. Both Southwold and Lincoln rely in their polythetic definitions on some concept of God, the transcendent, or the divine it is difficult to establish what these concepts mean. Finally, a polythetic approach may not be able to account for historical changes in the concept of religion. I note above that Robertson Smith deemed ritual a central element of ancient religion, while acknowledging its diminished role in contemporary religion. Should ritual then be included among the features of religion? Or, put differently, do polythetic approaches provide a warrant for transhistorical applications of the concept religion?

## C. Family Resemblance and Analogical Approaches

Wittgenstein's concept of family resemblance categories forms the basis of an alternative to both polythetic classification and monothetic definitions. At several points in his work, Wittgenstein takes issue with the claim that humans can only understand a category by comprehending a single feature common to all members of the category.[172] Most notably, Wittgenstein uses the example of games in *Philosophical Investigations* to substantiate his critique of the monothetic approach to classification. The concept of a game is not, Wittgenstein argues, defined by a single common feature;[173] as games only

---

[172] Renford Bambrough offers a comprehensive summary of Wittgenstein's critiques of the essentialist approach to definition in "Universals and Family Resemblances" in *Proceedings of the Aristotelian Society*, V. 61 pp. 207-222.

[173] Ludwig Wittgenstein*, Philosophical Investigations*, 66: "Consider for example the proceedings that we call "games". I mean board-games, card-games, ball-games,

share a series of features: "we see a complicated network of similarities overlapping and criss-crossing: sometimes overall similarities, sometimes similarities of detail."[174] Wittgenstein terms this sort category, formed by a series of overlapping features rather than a single defining characteristic, a family resemblance:

> "I can think of no better expression to characterize these similarities than 'family resemblances'; for the various resemblances between the members of a family: build, features, color of eyes, gait, temperament, etc. etc. overlap and criss-cross in the same way. – And I shall say: "Games form a family." [175]

Wittgenstein's insistence that games do form a family marks his approach as distinct from Southwold's nominalist definition. Family resemblance is based on similarities rather than mere usage of a term, so the family resemblance approach aims to establish a stronger association than a nominalist definition.

---

Olympic games, and so on. What is common to them all? – Don't say: 'there *must* be something common, or they would not be called 'games'' – but *look and see* whether there is anything common to all. – For if you look at them you will not see something that is common to *all*, but similarities, relationships, and a whole series of them at that. To repeat: don't think, but look! – Look for example at board-games, with their multifarious relationships. Now pass to card-games; here you find many correspondences with the first group, but many common features drop out, and others appear. When we pass next to ball-games, much that is common is retained, but much is lost. Are they all "amusing"? Compare chess with noughts and crosses. Or is there always winning and losing, or competition between players? Think of patience. In ball games there is winning and losing; but when a child throws his ball at the wall and catches it again, this feature has disappeared. Look at the part played by skill and luck; and at the difference between skill in chess and skill in tennis. Think now of games like ring-a-ring-a-roses; here is the element of amusement, but how many other characteristic features have disappeared! And we can go through the many, many other groups of games in the same way; can see how similarities crop up and disappear."

[174] Ibid.

[175] Ibid, 67.

### 1. Analogy, Family Resemblance, and Polythetic Classification

The family resemblance approach to classification therefore mirrors a polythetic classification in a few significant ways. Both approaches utilize an overlapping set of characteristics to establish a category, and this reliance on multiple features distinguishes these two multi-factorial approaches to category formation from the definitional approach of monothetic classification. The key distinction between the two approaches is their contrasting mechanisms for determining when an overlap of characteristics indicates the existence of a category. The polythetic approach to category formation, which I describe in more detail in section II.B.1 above, relies on a determination that two phenomena share a statistically significant number of features to establish their membership in a common category.[176] Family resemblance approaches to classification, however, rely on other mechanisms for determining when an overlap of features constitutes a category. Benson Saler, for example, proposes a prototype approach to family resemblance classification. Such an approach requires selecting a paradigm case for a category, and then admitting new members to the category based on their similarity to the selected prototype.[177] Wittgenstein's own description of the category of games looks to usage of the term as the primary indication of membership in a common category, and some scholars propose alternatives to a prototype approach that rely on ordinary usage as the

---

[176] Benson Saler argues that the statistical approach of polythetic classification is related to one other distinction between polythesis and analogical classification. For some biologists, polythetic classification aims to establish homologies: members of a classification share features because they share a common ancestor. Analogical classification, however, merely highlights

[177] Saler describes his prototype approach throughout Chapter 6 of *Conceptualizing Religion*. I review the prototype approach in more detail in section II.C.3 below.

mechanism to determine when an overlap of features indicates common membership in a category.[178]

Benson Saler highlights an additional difference between family resemblance approaches to classification and polythetic classification. In the context of evoluationary biology, taxonomists use polythetic classification to substantiate a claim that two taxa are not merely similar, but homologous. The concept of shared ancestry is not relevant to classification outside the field of biological classification, and so comparisons can only establish that two taxa, or even two members of the same taxon, are merely analogous.[179] [180] In one sense, then, even polythetic approaches to classifying religion are analogical, in that they cannot establish that two phenomena with a statistically significant overlap of features share a common ancestor.[181] However, I will continue to distinguish polythetic

---

[178] In section I.C.2 above, I consider Peter Byrne's proposal to rely on ordinary usage of the term religion as a strategy for determining what counts. See Byrne, "Religion and the Religions" in *The World's Religions*, ed. Peter Clarke, (Milton Park, Routledge, 1988), 3-28. Byrne's strategy aims only to establish a provisional category of religion, so I characterize his proposal as an avoidance strategy rather than a family resemblance approach to classification. Rem B. Edwards also proposes an alternative to a prototype approach that relies on ordinary usage, and I consider his proposal below in section II.C.3. See Rem B. Edwards "The Search for Family Resemblances of Religion" in *Ways of Being Religious*, 2000, pp 21-24.

[179] Unless one could propose that, for instance, all religions share a single origin in some prehistoric culture. I consider this potential approach in section II.D.2.b below.

[180] For Saler, this distinction between homology and analogy indicates a wider contrast between biological taxonomies and taxonomies in the social sciences: "The family resemblance approach not only deals with how we use our words and concepts, but it implies the question of why we use them – for what purposes and in what contexts? It focuses our attention on human activity and convention. The polythetic approach of the biological pheneticists, in comparison, represents a significantly different perspective and commitment. An operant empiricism in the service of a statistical realism, it is founded on the conviction that life forms can be apprehended characterized and grouped in their multiplicity." *Conceptualizing Religion*, 170.

[181] At first glance, the impossibility of establishing homology appears to serve as a reason to limit its usage outside of evolutionary biology. However, I see no *conceptual* reason

classification from family resemblance approaches by referring to the latter as analogical, and I do so for a few reasons. First, as I note in section II.B above, some scholars specifically tout a polythetic approach to classification as an alternative to monothetic approaches. Second, the reliance on statistical significance that is characteristic of polythetic approaches is distinct from the approaches of family resemblance classification, so I separate polythesis from analogy for the sake of clarity.

### 2. Family Resemblance, Ordinary Usage, and Nominalism

Saler's description of the difference between polythetic approaches and family resemblance approaches also highlights the importance of ordinary usage of a term to analogical approaches. Wittgenstein's framework for a family resemblance category presumes that humans understand and use categories even if they cannot establish firm parameters for those categories. Saler's prototype approach relies on usage less directly, but he nonetheless insists that an analogical approach addresses both "how we use our terms and concepts" and "why we use them – for what purposes and in what contexts?"[182] Both types of family resemblance approaches, then, rely to some extent on the ordinary use of a term in order to develop an understanding of its boundaries.

---

that statistical significance could not provide a means for establishing a category. I argue above in section II.B.3 that polythetic approaches may be of limited utility for classifying religion only because I doubt that scholars could produce enough characteristics of religion to ground a determination of statistical significance.

[182] Saler, *Conceptualizing Religion*, 170.

Timothy Fitzgerald offers a sharp critique of this deference to ordinary usage and to non-definitional accounts of religion in general in *The Ideology of Religious Studies*.[183] A family resemblance approach, Fitzgerald contends, aims to avoid the exclusiveness of monothetic approaches while retaining some clear – if flexible – concept of religion; in Fitzgerald's metaphor, advocates of a family resemblance approach aim to throw out the "bathwater" of exclusive monothetic definitions while keeping the "baby" of a coherent concept of religion.[184] For Fitzgerald, however, the baby and the bathwater are inseparable: he claims that no coherent concept of religion – and no mechanism for distinguishing religion from non-religion – is possible without a definition of religion. Fitzgerald builds his case through by looking at usage of the term religion in scholarly texts, and he arrives at three principle critiques of family resemblance approaches. First, he claims that scholars use the term in such varied ways that there is no reason to believe that these uses overlap in some coherent way. In this, his claims reflect an argument I made in section II.A above: each argument for one sort of substantive definition of religion counts as an argument against another candidate for a substantive definition. According to Fitzgerald, the mutual exclusivity of these substantive definitions

---

[183] I cite both Fitzgerald and Melford Spiro's critiques of non-definitional approaches above in I.C; since a family resemblance approach is the primary non-definitional aconut of religion, I review Fitzgerald critique in depth here.

[184] Fitzgerald, *The Ideology of Religious Studies*, 73: "Generally speaking this idea is attractive because it seems to avoid the need for essentialist definitions like belief in God or gods, which would be felt to exclude too much 'religionlike' data, and to create a more flexible category without at the same time throwing the baby out with the bathwater."

undermines claims that ordinary usage of the term religion points to a coherent concept of religion.[185]

Second, Fitzgerald claims that without an essentialist definition of religion, scholars cannot distinguish between religion and non-religion. Advocates of family resemblance accounts[186] of religion argue that language users can distinguish between legitimate and illegitimate uses of a term even without a definition, but Fitzgerald argues that any limits to legitimate use of the term religion are few and unexplained.[187] Now, both scholars and lay users of the term religion may claim that some phenomena are clearly not religious, but Fitzgerald counters such claims by noting that: "certain kinds of institutions that many religionists regard as non-religious or secular (such as the nation state) have proved amenable to analysis in terms of the same dimensions."[188] The viability of religious investigations of the nation-state (or, as I suggest above, of Star Trek and baseball) indicates, for Fitzgerald, that users of the term cannot adequately distinguish between legitimate and illegitimate uses of the term religion. Fitzgerald notes

---

[185] Fitzgerald here notes problems similar to those I discuss above in section II.A: each monothetic argument for a substantive definition of religion counts as an argument against another candidate for a substantive definition. Fitzgerald notes that scholars rely on a variety of concepts to ground their definitions of religion: ritual, experience of the sacred, and God, before concluding that actual use of the term does not coalesce around a central meaning.

[186] Fitzgerald specifically targets Peter Byrne's account, which I review above in I.C.

[187] Ibid, 88: "The only point that 'family resemblances' seems to establish in practical terms is that the world religion can be, or rather is, used in many different contexts and does not require an essence to give it meaning – except the sacred. And though in the context of discussion about 'meaning' this may be an important point, it may turn our in our context to be something of a pyrrhic victory. For on Byrne's own account, the number of contexts in which the R-word can be legitimately employed is vast and open-ended. But then what would constitute illegitimate use?" Fitzgerald's argument is that scholarly use is so broad that there are *not* illegitimate uses of religion.

[188] Ibid, 61.

that defenders of a family resemblance account may remedy this gap by terming phenomena intuitively considered non-religious but nevertheless subject to religious analysis as "quasi-religions" or "religion-like" phenomena.[189] However, it is precisely the goal of inclusiveness that makes such distinctions impossible: Fitzgerald notes that scholars such as Byrne and Ninian Smart who wish to study religion transculturally render distinctions between religion and non-religion impossible.[190] In short, the bathwater of exclusive essentialism simply *is* the baby of a coherent concept of religion.

For Fitzgerald, not only are family resemblance theories inadequate for distinguishing religion from non-religion; they are also unable to establish any sort of category. The theory of family resemblance relies on the claim that some resemblances indicate membership in a common group. The question, then, is which resemblances belong in a group, and how does a language-user know which resemblances constitute group membership?[191] Fitzgerald doubts whether family resemblance theories can provide workable boundaries for categories, and he directly targets Wittgenstein's example of games to make his point:

---

[189] On this point, Fitzgerald cites Ninian Smart, *The World's Religions*, 25.

[190] Fitzgearld, 2000. 71: "It seems to me that there is a contradiction at the heart of Smart's concept of religion between essentialism on the one hand, which has it that religions have a nature that distinguishes them from secular or non-religious ideologies such as humanism; or which distinguishes religious institutions from political or economic ones; and on the other hand his much wider and looser claim to be studying significant ideas and practices in human communities."

[191] Fitzgerald(2000), 89: "The idea of family resemblances also implies a metaphor or an analogy, the key word being 'family'. How important is the word 'family', and does it merely mean that things we traditionally or habitually group together under the same general category can be loosely referred to as a family? What is the difference between a resemblance and a family resemblance? Are things that resemble each other *therefore* members of the same family?"

> "Here is an example. A man tells his friend about his friend's girlfriend, "She's playing games with you." This means something like "She is fooling you around" or "She is manipulating you and enjoying it" or "She's flirting but has no serious intention." Where is the resemblance between this situation and a game of chess? Perhaps in this loose use of language one can see if one uses one's imagination, the hinted-at connections of meaning that might be explained by saying that they are part of the same language game. But I suggest that, outside the context of the philosophy seminar, where the legitimate topic of conversation is how words get their meaning, these connections seem extremely tenuous and are not as important or interesting as the differences, the unique contexts of these situations." [192]

For Fitzgerald, any category that one might derive from the varied usage of the term "game" would be so loose as to be incoherent. Only a conceptual framework that can correct or clarify general usage of term can lend it coherence, and Fitzgerald insists that such a framework must be founded on a monothetic definition.

Before I consider Fitzgerald's third critique of family resemblance approaches to conceptualizing religion, I want to consider one key implication of the first two critiques. Fitzgerald's assessment of family resemblance categories entails a claim that they devolve into nominalism. A nominalist definition of a term relies exclusively on usage of the term, as the nominalist denies that any external standard can guide usage. Fitzgerald argues that religious studies scholars do not appear to be bound by some concept of religion that governs all uses of the term, and he doubts whether a family resemblance approach to categorization can ever provide a coherent framework guiding usage of the term. Now, not all uses of a term need be subject to some clear standard for the term's correct usage. Poetic license and scholarly license, for example, permit some uses of a term in novel ways. However, if the concept of religion is determined exclusively by its

---

[192] Ibid, 93.

usage, then the study of religion can only be the study of uses of the term religion.[193] Moreover, no justification for the special social and legal status of religion is available if there is no concept of religion underlying the various uses of the term.

Renford Bambrough's defense of family resemblance theory[194] provides a helpful rejoinder to the claim that family resemblance categories are necessarily nominalist. According to Bambrough, the nominalist's position on classifying games is that "…games have nothing in common except that they are called games", while Wittgenstein's own claim is that: "...games have nothing in common except that they *are* games." Bambrough demonstrates the difference between these two approaches to category formation by considering a hypothetical category of "alpha", which is made up of: "the star Sirius, my fountain-open, the Parthenon, the color red, the number five, and the letter Z." Bambrough then compares a collection of objects in the group alpha to a collection of objects in the group chair, and derives three important conclusions from the results. First, he observes that while members for "alpha" are selected arbitrarily, selection for the group chair is *not* arbitrary. Second, he notes that: "the class of alphas is a *closed* class. Once I have given my list I have referred to every single alpha in the universe, actual or possible." Any new additions to the category of "alpha" constitute modifications of the category itself. Finally, Bambrough identifies a corollary of the first two points:

---

[193] Such a study is of limited utility, given that anything could be religion for a nominalist.

[194] J. Renford Bambrough, "Universals and Family Resemblance" in "Proceedings of the Aristotelian Society", New Series, Vol. 61 (1960-1961) pp 207-222. Cited in Saler, *Conceptualizing Religion*, 160-164.

> "I cannot teach the use of the word "alpha" except by specifically attaching it to each of the objects in my arbitrarily chosen list. No observer can conclude anything from watching me attach the label to this, that, or the other object, or to any number of objects however large, about the nature of the object or objects, if any, to which I shall later attach it."

In this sense, the class of alphas exemplifies the nominalist's idea of a class of objects: it *only* reflects usage, and the class of objects holds no feature in common other than the speaker's decision to include them in the class. The use of the term chair, on the other hand *can* be taught. The criteria governing correct usage of the term are complex, and they are derived from human conventions for the term, but they nonetheless provide some guidance to those who use the term. Bambrough's distinction between nominalist categories and family resemblance categories provides a partial answer to Fitzgerald's concern. Religion may in fact be a nominalist category if inclusion in the class is entirely arbitrary, but a family resemblance approach to conceptualizing religion is possible. Such an approach must provide some guidance to correct usage of the term, and accordingly must provide a rationale for including some phenomena in the category while excluding others.

Fitzgerald also overlooks, I think, the possibility of merely metaphorical descriptions of similarity. There is a distinction between a comparison that refers to membership in some general category and one that merely highlights common features, and the latter sort of comparison often does not require an explicit warrant. The poet, in other words, does not need to generate a common class in order to compare the object of his affection to a summer's day. Clarity regarding metaphorical usage of the term religion would prove useful for some scholars in the field of religious studies: those scholars who construe religious studies as the study of everything might base their work on firmer

methodological foundations with a clear grounding in metaphor. Arguing that devotion to Star Trek or baseball shares some common features with devotion to religion does not require arguing that either *is* a religion.[195]

Fitzgerald's concern regarding the varied usage of the term religion still obtains, however, as does his third critique of approaches that rely on ordinary usage of the term religion. The origins of the term religion are western, and Fitzgerald questions whether a family resemblance approach that relies on usage of the term can provide a warrant for its transcultural application. Now, scholars who study religion in non-western cultures do make use of both the term religion and a number of related terms.[196] If usage of the term "religion" is the sole factor establishing its significance, then the scholarly use of the term itself provides the warrant for its transcultural application. Such a warrant amounts to scholarly nominalism: religion is whatever a religious studies scholar declares it to be.[197] I argued above in section I.C.5 that such an approach cannot provide a mechanism for distinguishing religion from non-religion, and is likely to be of little use. On the other hand, if scholarly usage of the term religion does not provide the warrant for its transcultural application, then scholars who describe the religion of societies that possess no correlative for the western term may have no theoretical basis for their claims.

---

[195] This claim is consistent with ordinary usage of the term. When someone says of his friend that "Baseball is his religion", he does not mean that baseball *is* a religion, but rather means to highlight some similarities between religious devotion and his friend's devotion to baseball. *Scholarly* description of baseball as a religion, on the other hand, should include a warrant for the claim in order to explain how the methodologies of religious studies illuminate some features of baseball in a new or interesting way.

[196] Saler specifically cites the use of the terms "sacred" and "monotheism". See *Ideology of Religious Studies*, Chapters 3-4.

[197] This scholarly nominalism approaches Jonathan Z. Smith's proposal, which I review above in section I.C.4

Fitzgerald argues that scholars who study non-western countries add little when they apply terms such as "religion" or "the sacred", and instead suggests that they rely on the methodological tools of anthropology.[198] Fitzgerald may not be correct to claim that the concepts of religious studies are of little use in non-western contexts, but his critique nevertheless highlights the need for advocates of a family resemblance approach to justify transcultural applications of the term.

### *3. Analogical Classification and the Concept of Religion*

#### a. Prototype Approach

In section II.C.1 above, I describe two different analogical approaches to determining membership in a category. A prototype approach requires scholars to select a paradigm case of religion, and then classify other phenomena as religions based on their similarity to this prototypical religion. Benson Saler defends a prototype approach in *Conceptualizing Religion*, and he argues that his approach can provide an answer to the critiques of family resemblances approaches I describe above. For Saler, western religions serve as prototype of religion, so scholars should evaluate new candidates for membership in the category by developing analogies between those candidates and examples of western religion:

> "Many anthropologists who study religion implicitly and sometimes explicitly compare what strikes them as "religious" in non-Western societies with what they suppose to be the religious traditions of the west. Indeed, they *first recognize* "religion" among non-Western peoples by finding professed convictions and other behaviors they interpret as analogues of those that they assign to the domain of "religion" in Western societies past and present."

---

[198] Fitzgerald, *The Ideology of Religious Studies*, Ch. 3-4.

While such use of prototypical analysis may generate a relatively stable category of religion, Saler is clear that we should not expect such a category to be marked by a predicate universal to the category, but rather a "network of predicates, criss-crossing and overlapping." Nevertheless, Saler argues that agreement regarding clear prototypes provides a coherent foundation for the family resemblance category of religion without any appeal to necessary and sufficient conditions. Moreover, Saler's prototype theory provides a response to Fitzgerald's remaining concerns. Although Saler does not share Fitzgerald's concern that scholars use the term religion in incoherently varied ways[199], Saler concedes that scholars implicitly employ what he terms a "western folk category" of religion. Moreover, Saler here admits that his prototype approach relies not on the ordinary usage of non-westerners who may have no clear correlative to the "western folk category" of religion; rather, the warrant for the application of the term religion is the *scholar's* determination of similarity with reference to the prototype. Thus, if scholars find the term religion facilitates useful comparisons between western and non-western experiences, then that scholarly utility itself justifies the comparison. Importantly, the prototype itself serves to evade the charge of "scholarly nominalism", since usage of the term is guided by the prototype itself.

---

[199] Saler, 199. Where Fitzgerald sees incoherent variance in scholars' usage of the term religion, Saler sees substantial overlap in meanings associated with the term: "Disagreement over specific theoretical points notwithstanding, many contemporary academic students of religion overlap in basic understandings. To an important extent, moreover, they participate in a universe of discourse with distinguished 19th century Western students of religion, although their experiences and sensitivities differ to some extent from those of their predecessors."

One consequence of Saler's adoption of a prototype approach is that he conceives of religion as a scalar phenomenon. A prototype approach does not focus on binary categorizations of phenomena as either religious or non-religious; rather, a prototype approach determines degrees of religiosity based on a given phenomenon's resemblance to the prototype. A prototype approach can therefore account for "quasi religions", including Fitzgerald's example of nationalism, by determining that such phenomena share some characteristics with religions, but are considerably less religious than Christianity or Judaism. Saler is also careful to note that although his concept of religion itself is scalar, membership in the category need not be:

> "…prototype effects, or judgments that some things in a category better exemplify that category than other things that pertain to it, do not prove that membership in the category is graded and that the structure of the category is given by the prototype effects."[200]

Thus, Saler might claim that some religions (specifically Judaism, Christianity and Islam) better exemplify the category than others (such as Buddhism), while still claiming that the others are fully members in the category of religion. Scholars enable comparison by both using a few key elements of the prototypes as markers of religion[201] and developing an overall understanding of religion from the prototypes. Still, Saler admits that his prototype mechanism leaves lingering questions regarding the boundaries of the category:

---

[200] Saler, *Conceptualizing Religion*, 205. Ch. 6 of conceptualizing offers a comprehensive account of Saler's understanding of the prototype approach to family resemblance accounts of religion.

[201] Saler suggests that theism may serve as the primary marker, though he by no means proposes a *de facto* monothetic approach.

> "But where, then, essentialist diehards [such as Fitzgerald] may nevertheless ask, does the category give out? Where is the line that separates religion from non-religion? *There is no hard and fast line.*"[202]

Saler here admits that he can offer no easy answers to scholars who, like Fitzgerald, demand an account that clearly separates religion from non-religion. Saler claims that the only viable solution is a case-by-case analysis that may "trace diminishing degrees of typicality."[203] Saler does, however, provide some loose guidance for this "case-by-case analysis", claiming that scholars may determine to exclude some of the less religious phenomena from the category of religion on the basis of two criteria:

> "We are reluctant to call these cases religions largely for one or two reasons. First, they strike us as containing too few of the elements that we associate with religion. Second, the contexts in which the elements occur, and the ways the elements are elaborated within those contexts, do not remind us strongly enough of other phenomena that we have no hesitation in calling religions."

Saler's criteria for exclusion from the category religion are noteworthy for several reasons. First, his first criterion overlaps significantly with polythetic determinations of religious status: phenomena are excluded from the category of religion because they possess: "too few of the elements that we associate with religion." Here, the question of what counts as "too few" is paramount, and Saler defers this question to the scholar's own judgment. Second, both criteria for exclusion rely substantially on scholars to make judgment calls, and, perhaps because of this, Saler sees these determinations as tentative.

---

[202] Ibid, 218.

[203] Ibid, 220: "The best that I can do – some will find it unsettling! – is to trace diminishing degrees of typicality, and to offer arguments as cogent as I can make them for my decisions in assigning or failing to assign specific candidates to the group comprehended by the category. In stipulating a research category explicated with reference to the clearest examples, I commit myself to the rendering and defending of analytical judgments respecting less clear cases."

A scholar may revise a determination of membership (or non-membership) in the category based on further study.

A second consequence of Saler's adoption of a prototype approach is his rapprochement with ethnocentrism. A prototype approach requires scholars to designate a prototype, and Saler is clear in claiming that the prototype for religion must be the collection of western monotheisms.[204] Saler's explicit designation of western religions as prototypes appears to fly in the face of the inclusiveness that most scholars seek in developing their concepts of religion. Saler defends his move in several ways. First, he claims that most scholars – even those with the most inclusive intentions – already implicitly employ western religions as prototypes, so an explicit recognition of the role that western religion does not deepen the ethnocentrism of the field. The prototype approach thus acknowledges the unavoidable fact that scholars who study religion are predominantly western, and thus bring western conceptions of religion to their studies.[205] Saler also acknowledges that western analytical categories, such as religion, cannot perfectly conceptualize the culture and lives of non-westerners, but neither are they completely inadequate. Any claim that western categories are fully inadequate to the lives of non-westerners relies, in Saler's view, on an assumption of the complete alterity of

---

[204] Ibid, 212: "I propose that we formally acknowledge what many of us do informally: that we explicitly recognize our individual idealizations of 'mainstream' Judaisms and Christianities as "prototypical" in the highest degrees of the category religion. I suggest, moreover, that we enlarge this set of eminently category-fitting phenomena to include that family of religions called "Islam"." Saler here is careful to note that none of the three western monotheisms is monolithic; he prefers to see each as a "family" of religions. Nevertheless, he deems each family sufficiently coherent to serve as the prototype.

[205] Saler specifically addresses the role of the scholar's preconception of religion in the field of ethnography, stating: "The ethnographer, in short, does not arrive in the field a mythical "blank slate."" *Conceptualizing Religion*, 228.

non-westerners. Saler concludes that we can warrant some uses of western categories with non-westerners on the grounds of the "family resemblance among human beings"[206]. He therefore claims that an "unbounded" concept of religion might serve as a useful starting point for scholars seeking to understand the cultures and lives of non-westerners; so long as scholars do not take the prototype as either an ideal or a rigid form, a prototype approach need not exclude or distort non-western religions.[207]

### b. Derive Characteristics from Usage

Other family resemblance approaches do not explicitly rely on prototypical analysis. Rem B. Edwards, for instance, begins with ordinary usage to mark which phenomena are typically included in the category of religion, and then identifies a number of overlapping characteristics present in many of the phenonmena.[208] This approach contrasts with Saler's prototypical approach in that Edwards derives the key criteria for religion from a variety of instances of the category rather than using a few set prototypes. Edwards further suggests that determinations of whether a given phenomenon counts as religion may rely on both the number of resemblances between the phenomenon and the existing members of the category and the "importance of these traits." Despite the apparent distinction between Edwards' approach and that of Saler, their conclusions largely overlap: Edwards argues more of the features of religion are present in the western monotheisms than in other religions, and from this concludes that: "these Western religions have had a definitive influence on our very conception of

---

[206] Ibid, 241. Saler he offers an extended defense of the ethnographers' work, claiming that study of other cultures is, in fact, possible even if the ethnographer can never achieve an objective perspective and must, therefore, begin with his/her own categories.
[207] See especially *Conceptualizing Religion*, 254-263
[208] Rem B. Edwards "The Search for Family Resemblances of Religion" in *Ways of Being Religious*, 2000, pp 21-24.

religion. We do in fact take them as paradigms for the application of the concept, since they exhibit *all* the important traits that we ascribe to a 'religion.'" Edwards here provides indirect support to one facet of Saler's prototype approach. Saler argues that intellectual integrity requires foregrounding the western origins of the concept of religion, and he claims that most scholars already operate with an implicitly western understanding of religion. Edwards's conclusion provides support to Saler's claim, in that he arrives at the claim that the western monotheisms are "paradigms" only after analyzing usage of the term.

### 4. Assessment

The primary drawback of family resemblance accounts of religion is their vagueness. Saler admits that determinations of what counts as religion that rely on scholarly judgments that are, at best, tentative, but he sees this vagueness as an advantage in the academic context: scholars might use a vague concept of religion in order to facilitate comparisons between western and non-western cultures, thus the vagueness itself is important for justifying the transcultural application of the concept of religion. However, as Fitzgerald notes, this vagueness becomes a weakness in contexts that require a more concrete determination of religious status. Fitzgerald specifically cites the role that religion plays in some constitutional schemes as one such example:

> "Here is a legal and cultural context that gives significance to the definitional issue. But the context has had to be specified. On the other hand, if there is very little at stake in the definition of a word, then the fact that it is loose and vague seems not to matter."[209]

---

[209] Fitzgerald (2000), 90.

While Saler would likely note that he sees vagueness as an advantage in an academic context, and while he would further dispute the claim that there is "very little at stake" in academic determinations of religious status, he might concede that family resemblance approaches to understanding religion might prove unwieldy in courts. On the other hand, Saler's description of the implicit western bias of anthropologists and scholars of religion is arguably applicable to judges and bureaucrats as well, and a family resemblance approach may prove useful in an account of the gradual expansion of the category of religion in those contexts as well.

## D. Historical Approaches

Strictly speaking, the category of "historical approaches to determining what counts as religion" is artificial, since most of the scholars whose work I review in this section are primarily interested in critiquing the concept of religion, and none proposes to use a historical account to determine what counts as religion. Nevertheless, much of the work I review in this section says a great deal about what religion is and what religion is not, and I therefore claim that, collectively, this work offers an inchoate approach to determining what counts as religion. However, given that the thinkers I describe below subscribe to no common methodology, any effort to generate a category based on their approaches requires some warrant. I frame that warrant as a common response to Mircea Eliade's understanding of the field of religious studies. At the end of *The Sacred and the Profane*, Eliade offers his account of the structure of the field:

> "At present, historians of religion of religion are divided between two divergent but complementary methodological orientations. One group concentrates primarily on the characteristic *structures* of religious

> phenomena, the other choose to investigate their *historical context*. The former seek to understand the *essence of religion*, the latter to discover and communicate its *history*."

Scholars who loosely subscribe to what I call an historical approach deny that there is any warrant for Eliade's first orientation because there is no defensible essence of religion apart from its history. As Talal Asad puts it:

> "My argument is that there cannot be a universal definition of religion, not only because its constituent elements and relationships are historically specific, but because that definition is itself the historical product of discursive processes."[210]

Religion is a historical phenomenon through and through, and, as such, it is both subject to change and constituted by that change.

This recognition of religion as a historical phenomenon leads to two related questions. First, in what ways has religion changed, and what do these changes reveal about the nature of religion in modernity? In section D.1 below, I review three key types of changes to the substance of the category of religion in modernity. First, I review the secularization thesis as well as some of its revisions and critiques. Second, I consider the global application of the concept of religion. Finally, I note an increasing use of adverbial and adjectival forms of the term religion as a final, if less crucial, shift in the concept of religion.

The second key question is this: what, if anything, provides continuity to the concept of religion if it has no essence apart from its history? In section D.2 below, I first consider a historical reframing of the nominalist's critique of religion, and I then consider the following possible links between the concept of religion in various historical eras:

---

[210] Asad, 1993, 29.

institutional succession, etymology, ritual and practice, and agents. I argue that only an account focused on agents can adequately account for shifts in the concept of religion, and I also conclude that the current scholarly focus on the role of academics in shaping the concept of religion overlooks the role of other agents. Finally, I consider Tisa Wenger's work in *We Have a Religion* as a model of an alternative agent-centered approach.

Now, an understanding of religion as a historical phenomenon does not necessarily provide an alternative to the other approaches to determining what counts as religion that I describe above. An acknowledgement that religion has shifted over time is not equivalent to a mechanism for determining what does count as religion, or what *should* count as religion. I argue in section D.2 that a focus on the role of agents, in particular judges and litigants, can help scholars track these historical changes in the concept of religion, so my proposed approach relies to a large extent on usage of the term. I conclude this section by noting that my historical approach is compatible with both polythetic classification and analogical classification.

### *1. Substance of Historical Changes to the Category of Religion*

#### a. The Secularization Thesis and its Critics

If the category of religion has no essence apart from its history, then the elements that make up the category are subject to change. What changes in religion do scholars identify? In this section I look to three basic markers of change in the nature of religion: secularization, global application, and use of the adjectival and adverbial forms of the term without specific reference to traditional candidates for the noun form. Sociologists and scholars in related fields have long used the secularization thesis as a summary

answer to the question of how religion has changed in modernity. Following José Casanova, I identify three separate elements of the secularization thesis. The primary claim is that of differentiation: modern religion exists in a social domain that is separate from those of the state, the economy, and science, whereas premodern religion was not. The second claim, for Casanova, is a purported corollary of the first: because religion is separated from other social domains, its importance in the lives of modern people will decline. In a similar fashion, Casanova claims that advocates of the secularization thesis see the third claim as a corollary of the first two: because religion is differentiated from other domains in modern society, and because it is less important to modern society, it must also be privatized; that is, religion is centered on individuals rather than institutions and communal gatherings.[211] The secularization thesis, in other words, summarizes the substance of changes to modern religion by looking to differentiation, decline, and privatization.

However, contemporary sociologists challenge much of this framework for the secularization thesis, and Casanova's work provides a concise summary of these challenges. Casanova first denies that thesis of differentiation necessarily entails the other two claims, and in this he departs markedly from classical formulations of the secularization thesis. Advocates of the secularization thesis see the process of secularization as uniform and irreversible: differentiation should inevitably lead to privatization and a decline in religion. Advocates also see modern religion itself as

---

[211] José Casanova, *Public Religions in the Modern World*, Chicago, University of Chicago Press, 1994. Casanova summarizes the secularization thesis in the introduction of the work, especially pp 7-8.

uniform: it is separated from other social forms, privatized and in decline. Casanova challenges this claim that the march of secularization is uniform and inevitable in two important ways. First, he cites a number of examples of societies in which differentiation does not lead to privatized religion or a decline in religion. Differentiation may therefore be an essential feature of modern religion, but privatization and decline are not. Second, Casanova argues that the effects of differentiation on modern societies are not uniform, and the corresponding degrees and forms of privatization and decline also vary from one context to another. In brief, French *laicite* and American freedom of religion are different regimes of secularity; each permits different roles for religion, and operates with different conceptions of religion. Casanova claims that scholars can only develop an understanding of secularism by looking at the distinct processes of secularization – and their distinct results – in various cultural and political contexts.

Casanova's work therefore suggests that differentiation, privatization, and decline might be helpful heuristics for a study charting the changes to religion in modernity, but they should not be taken as uniform, universal processes. The heuristics suggest that 1) modern religion is bounded in a way that premodern religion was not 2) modern religion's relationship to public life has accordingly changed and 3) modern religion cannot claim the universal scope that it once did.

### b. Global Religion

The secularization thesis – even Casanova's qualified version of it – charts new limitations on the category of religion in the modern era, but the second substantial change – global application – charts an expansion of the category. Several scholars whose work I have already reviewed call attention to applications of the term, with its western

roots, to non-western contexts. For example, Benson Saler notes the expansion of the term religion from a "western folk category" to a term with global reach. W.C. Smith notes that this application of the term religion to non-western contexts results in a "double involvement": the concept of religion (and the original, western members of the category) affect the collection of data about non-western phenomena deemed religions, and the data about these religions in turn affects the category itself.[212] Jonathan Z. Smith's seminal article "Religion, Religions, Religious" tracks the beginnings of the global application of the term religion and the various taxonomical schemes used to categorize those global religions.[213]

### c. Adverbial and Adjectival formulations of religion

Finally, some scholars note that contemporary usage of the adjectival and adverbial forms – religious and religiously – is not always tied to traditional candidates for the noun form. J. Z. Smith, for instance, notes that modern usage of the adverbial form "religiously" includes contexts that do not refer to specifically religious practices: he cites the example of a description of a woman who reads the newspaper religiously, meaning that she does so with "conscientious repetition".[214] Smith suggests that this usage of the term is derived from Latin usage: "the adjectival *religiosus* and the adverbial *religiose* were cultic terms referring primarily to the careful performance of ritual obligations." There is some warrant, I think, for explaining such adverbial and adjectival uses of the term as metaphorical: surely the speaker does not intend to say that his friend's newspaper reading counts as a religion, but instead wants to call attention to the

---

[212] W.C. Smith, *The Meaning and End of Religion,* 51-52.
[213] Jonathan Z. Smith, "Religion, Religions, Religious" in *Critical Terms for Religious Studies,* edited by Mark C. Taylor, Chicago, University of Chicago Press, 1998.
[214] Ibid, 270.

similarity between the friend's devotion to a newspaper and a religious adherent's devotion to some ritual. Regardless, any account of shifts in modern uses of the term religion must acknowledge that some adverbial and adjectival uses of the term do not refer to traditional religions per se.[215]

## *2. Continuity of the Category of Religion within a Historical Approach*

### a. Continuity and Nominalism

If, as I argue in the previous section, the elements that compose the category of religion are subject to change, then the nominalist's critique of the category of religion gains new purchase. In section II.C.2 above I review Timothy Fitzgerald's claim that family resemblance theory, with its intentional rejection of an essentialist approach to defining religion, cannot ground a coherent concept of religion. Fitzgerald's essentialist critique is equally germane to a historical approach. If there is no transhistorical essence of religion, and, if, further, many features of religion shift over history, then how can scholars connect the public, undifferentiated, western "religion" of the pre-modern era to the private, differentiated, global "religion" of the modern era? If the connection lies entirely in the mere use of the term, and not in some overlapping set of referents, then the nominalist's critique may be especially relevant to historical accounts of religion. Now, some scholars who offer historical accounts of the concept of religion at some points appear to agree with the nominalist's critique. Talal Asad, for instance, directly denies the

---

[215] In fact, this metaphorical use of the term religion likely plays some role in the efforts of some religious studies scholars to include iPhones, Star Trek and baseball in the category religion. See n. 4 above. A metaphorical description of a person's devotion to his iPhone as "religious" requires no warrant, but the metaphorical use of the term religion does not itself warrant the conclusion that the iPhone *is* a religious object.

possibility of a definition of religion, and one could read this denial as an endorsement of a nominalist approach.[216] Timothy Fitzgerald offers a historical account of the concept of religion in *Discourse on Civility and Barbarity*[217], and thus he too links a historical account of religion with the claim that there is no sustained or sustainable referent or set of referents for the term. However, in offering an *account* of the historical variation of the term religion, Asad, Fitzgerald and others undermine at least the most extreme versions of the nominalist's critique. According to Renford Bambrough's critique of nominalism,[218] a thoroughgoing nominalist must claim that the application of a term is purely arbitrary if he/she is to link the members of the category by the name *only*. To the extent that scholars who develop historical accounts of religion provide convincing, non-random conceptual links between various historical usages of the term, their accounts cannot be purely nominalist. A historical account can only qualify as truly nominalist if it charts a change in the use of religion that defies explanation; any account of the various historical referents for the term religion that does not describe a random agglomeration is not, therefore, nominalist in this sense. In short, a demonstration that the meaning of the term religion has shifted is not sufficient to prove that the term is meaning*less*.

In this section, I survey a variety of scholars' efforts to describe the continuity between generally contemporary uses of the term and generally pre-modern uses.

---

[216] Asad, 1993, 29: "My argument is that there cannot be a universal definition of religion, not only because its constituent elements and relationships are historically specific, but because that definition is itself the historical product of discursive processes."

[217] Timothy Fitzgerald, *Discourse of Civility and Barbarity: A Critical History of Religion and Related Categories*, Oxford University Press, 2007. I describe Fitzgerald's historical account of religion in this section below.

[218] See section II.C above.

Scholars who adopt a historical approach to understanding religion link modern uses of the term to pre-modern uses of the term (including ancient) phenomena through a variety of mechanisms. Some early historians of religion theorized a direct institutional link between modern forms of religion and ancient forms of religion. Other scholars suggest (though few do so seriously) that etymology itself might provide a tie between modern and pre-modern uses of the term. Still others suggest that religious practices may provide continuity between different conceptions of the concept of religion. Most contemporary critics of religion, however, look to the agents of the shift in the term's meaning to establish connections between contemporary and pre-modern or early-modern versions of the concept of religion. I consider each of these theories in turn.

### b. Institutional Succession

First, scholars might answer the nominalist's challenge by pointing to institutional or organizational succession as the tie between modern and pre-modern understandings of religion. Scholars have long used such an approach, implicitly or explicitly, to account for changes in *particular* religions. For instance, while modern Christianity in the United States is, according to the secularization thesis, differentiated and privatized in some manner, medieval Christianity in Western Europe was not. The link between the two therefore lies with a theory of Christianity as a historical phenomenon.[219] A specifically *institutional* historical account could connect medieval European Christianity to contemporary American Christianity by a demonstrable chain of institutional and

---

[219] See, for instance, Adolf Harnack, *What is Christianity?* And, especially, Ernst Troeltsch, "What does 'Essence of Christianity' Mean?" and *The Social Teaching of the Christian Churches*.

organizational connections linking the two.[220] A theory of institutional or organizational succession could only suffice to explain the historical evolution of the concept of religion *in general*, however, if it can propose a common origin for all historical instantiations of religion. In the early modern period, some theologians and theorists believed that such an account of a common origin was possible: some scholars speculated about the possibility of a common origin of all religions[221] while some early modern Christian theologians relied on biblical evidence to develop a theory of the common origins of all religions. Modern theorists of religion have not, however, developed evidence to support a theory of a common *institutional* origin of all religions. In the unlikely event that modern scholarship does so, any account of the historical continuity of religion based on organizational/institutional succession would still further rely on an understanding of institutional succession itself. When new religious movements break away from existing religious institutions, they often claim to instantiate a return to the original form of the religion.[222] Would a scholar describe such a change as institutional succession, or a breakaway from the religious institution? Without a clear concept of succession, a theory of common origins cannot account for the historical variation of the concept of religion.

---

[220] Histories of particular denominations tend to take this approach by linking the various denominations in the new world, for instance, to those in the old, or by offering one account of the history of some particular denomination.

[221] In "Religion, Religions, Relgious", Jonathan Z. Smith cites an example of one such scholar, J. Newton Brown, whose entry on Buddhism in the *Encyclopedia of Religious Knowledge* proposes a bifurcated history of religion. For Brown, the Abrahamic religions share a common organizational origin, and he claims it is "probable" that "the idolatrous systems of religion, have had a common origin and have been modified by the different fancies and corruptions of different nations." He bases this speculation on his claim that: "The essence of idolatry is every where the same." Brown's claims are, to say the least, difficult to substantiate outside of an apologetic standpoint.

[222] Most reform movements in both Christianity and Islam fit this description.

### c. Etymology

Some scholars use an etymology of the term religion to complement an account of the historical variation in the concept of religion. W. C. Smith, for instance, begins his historical investigation of the concept of religion with "simply a verbal inquiry".[223] His etymology traces the term's origins in the latin *religio* through early Christian modifications[224] to early modern efforts to encompass a variety of practices – both Christian and non-Christian – within the term's ambit. Smith concludes his etymology with a discussion of the "four quite distinct senses" in which modern people use the term religion. First, the term may indicate "personal piety"; second, it may describe a particular community or set of practices, third, it may be used within the community to describe its own ideal form, and finally, it may indicate the qualities shared by all particular communities counted as religious.[225] Now, Smith's taxonomy of modern usages of religion clearly shares some features with the pre-modern uses of the term that he tracks in his etymology, and thus the etymology appears to provide historical continuity. However, Smith admits through his account that he relies not on the word itself, but on its usage.[226] The word "religion" itself cannot provide historical continuity, because its meaning has varied historically. Moreover, an etymological approach cannot answer the charge of nominalism: if an etymological account of the historical changes in the concept of religion can only compare a set of pre-modern referents of the term

---

[223] W. C. Smith, 1978, p. 16.
[224] Smith is particularly interested in the various binaries that early Christians used with the term religio: true religion and false religion, our religion and their religion, religions of the gods and religion of god. See p. 23-30.
[225] Ibid, 48-50.
[226] Indeed, Smith states at the outset that the etymology is only useful for indicating *how* the users of the word think: "Our method will begin with simply a verbal inquiry. For the way we use words is a significant index of how we think."

religion with a set of modern referents of the term, then it cannot offer an explanation of any shifts that such a comparison reveals. An etymology is useful, therefore, only insofar as it illuminates the ways in which agents have altered both their use of the term and that of others.

### d. Ritual and Practice

Some other scholars suggest that religious rituals and practices can provide continuity between different historical uses of the term. In sections II.A.1.a and II.A.1.b above, I review Talal Asad's claim that religious practice – especially ritual – precedes and actually constitutes any special cognitive content of religion. Asad critiques what he takes to be Clifford Geertz's understanding of religion as primarily cognitive by looking to Vytgotsky's theory of learning. Children do not, on Asad's reading of Vygotsky, learn ideas through a merely intellectual exchange, but through the "internalization of social speech". Therefore, the social practices – and the economic conditions that enable them – in which children participate determine what and how they learn.[227] In theory, then, one could construct an account of the link between modern and pre-modern understandings of the concept of religion by comparing the sorts of practices that shape concepts of religion in each period. However, such an account could not explain why or how practices change over time, nor could it answer charges of nominalism: if pre-modern religion is defined only by one set of practices, and modern religion is defined only by another, then scholars could not explain the link between the two by means of practices only. Asad himself is more interested in understanding the process of how some practices become

[227] Asad, 1993, 31.

authorized while others are proscribed, and thus his account also falls back onto an analysis of agents rather than practices.

### e. Agents

Finally, many scholars look to agents themselves as the link between modern meanings of the term religion and pre-modern meanings of the term. According to this type of approach, the meaning of the term religion has shifted because particular agents – and, especially, groups of like-minded agents – have employed the term in new ways. An account of shifts in the term religion that merely catalogued various historical uses of the term religion by particular agents might prove sufficient to account for historical change, but it would not guard against charges of nominalism.[228] Most accounts that focus on agents accordingly go beyond merely tracking new uses of the term by particular agents; many studies highlight trends within certain groups of like-minded innovative users of the term religion, and most also speculate about the motivations of these innovative users. The theory underlying Bambrough's rejection of the nominalist's claim that each use of a category term is conceptually unconnected to every other use of the term is that users of a term can recognize both correct and incorrect uses of the term; thus Bambrough concludes that one cannot accurately include just any item in the category of chair. Agent-centered accounts of religion as a historical concept contend that particular groups of agents alter the bounds of correct and incorrect uses of the term. They might propose applications of the term religion to new referents, police applications of the term to particular established but undesirable (to the agents) referents, or promote some

---

[228] Such an account could not distinguish between innovative and incorrect uses of the term. Here I rely on Bambrough's claim that the thoroughgoing nominalist cannot comprehend the concept of an incorrect use of a term.

applications of the term as ideal. In the succeeding paragraphs, I offer a brief taxonomy of agent-centered accounts of the historical evolution of the concept of religion, and I look to three differentiating criteria to organize this taxonomy: 1) The particular shift in usage of the term that a scholar focuses on, 2) The group identity of like-minded innovative users of the term that a scholar highlights and 3) the motivations of the agent and/or group that explain their innovative use of the term.

### *(1) Academics – Religious Studies Scholars*

Many scholars have proposed, for instance, that academics themselves are the primary agents driving historical change in the usage and meaning of the term religion, though their accounts differ with regard to both the disciplinary loyalties and the motivations of these academics. Tomoko Masuzawa, for instance, highlights the 19th century appearance of the term "world religions", which Masuzawa sees as a replacement for older, four-part taxonomies of religions.[229] [230] Masuzawa attributes this shift to the work of both early anthropologists and the forerunners of the modern field of religious studies[231], and she ascribes a number of motivations to these scholars. First, they sought to understand non-European societies through European social models, so they sought out religions in non-European societies that played a role comparable to that of Christianity

---

[229] Per Masuzawa, that division usually consisted of some variety of the following: Jews, Christians, Mohammedans and idolaters. See *The Invention of World Religions,* Preface.
[230] Tomoku Masuzawa, *The Invention of World Religions: Or, How European Universalism Was Preserved in the Language of Pluralism*, Chicago, University of Chicago Press, 2005.
[231] Masuzawa specifically references those who studied "Oriental" religions under the guise of *religion-Wissenschaft* as the forerunners of the contemporary field of religious studies.

in western societies.[232] Second, she claims that scholars used their examination of the role of religion in non-European societies to examine the new, differentiated role of religion in the west, and even to promote the process of differentiation. These scholars might therefore use the undifferentiated religion of non-European societies as a foil for their western counterparts, and thereby to propose what role religion should have in modern western societies.[233] Masuzawa succinctly states the twin motivations of these scholars thusly: "The modern discourse on religion and religions was from the very beginning – that is to say, inherently, if also ironically – a discourse of secularization; at the same time, it was clearly a discourse of othering."

Russell McCutcheon also looks to scholars of religion as primary agents in the historical evolution of the term, but he focuses on uses of the term that correspond with phenomenological accounts of religion, especially that of Mircea Eliade. McCutcheon argues that twentieth century scholars found such uses of the term advantageous in their efforts to first secure and then defend autonomous departments of religious studies. He concludes, therefore, scholars' motivations have often been focused on prestige and wealth: for McCutcheon, professors describe religion as *sui generis* in order to protect

---

[232] Ibid, 18: "As such, these religions offered European scholars a powerful, far-reaching and comprehensive categorical framework by virtue of which they could hope to explain the characteristic features of a given non-European society. In effect, according to the essential logic of this scholarship, a non-European nation of any stature was presumed to have one (or sometimes more than one) of these religions in lieu of Christianity."

[233] Ibid, "… throughout the nineteenth century, endless speculation on the differences and similarities between religions continually provided opportunities for modern Europeans to work out the problem of their own identity and to develop various conceptions of the relation between the legacy of Christianity on the one hand and modernity and rationality on the other.

increasingly scarce tenure tracks positions.[234] McCutcheon also ascribes a second motivation to scholars of religion who promote shifts in the usage of the term, and I briefly described this account in section I.B above: For McCutcheon, scholars who defend both the *sui generis* concept of religion and the companion concept of *homo religiosus* face a significant challenge in explaining the processes of differentiation and secularization in modern societies: if these scholars propose that religion is a human universal, then secularized societies present data that significantly undermines that proposal. For McCutcheon, Eliade's strategy for addressing this problem is to describe the historical process as one of estrangement. To the extent that Eliade does describe a historical shift from *homo religiosus* to modern man, the story he writes is a tragedy. The "politics of nostalgia" that McCutcheon accordingly ascribes to Eliade runs directly counter to Masuzawa's description of religious studies scholars who seek to promote the process of secularization: while Masuzawa claims that scholars shift their usage of the term to limit the power of religion in society, McCutcheon claims that scholars shift their usage in order to *promote* the power of religion in modern society.

Jonathan Z. Smith concludes his review of the historical evolution of definitions of religion by claiming that scholars constantly vary their uses in a variety of ways, and no single variation predominates over the others. For Smith, this complex of overlapping histories of the term "religion" is a predictable result of the scholars' varied needs for the

---

[234] McCutcheon, 1997. McCutcheon develops this claim throughout the introduction of the work. It is worth noting, I think, that anxiety about tenure lines is neither limited to religious studies nor unwarranted in an era of administrative focus on cost-cutting in higher education.

term. Smith's conclusion is that we cannot assign a single definition to the term, because scholars use it for a variety of purposes.[235]

### *(2) Academics: Other Fields*

Other studies focus on the role of scholars in fields related to religious studies, such as anthropology. Talal Asad claims that anthropologists who defend *sui generis* religion bear some of the responsibility for shifting the meaning of the concept[236] through their defense of the concept of differentiation. Asad ascribes a pair of seemingly opposed motivations to these anthropologists, claiming that both liberal defenders of religion and some secularist opponents of religion might employ an account of the historical process of differentiation to promote their preferred social models.[237]

---

[235] J. Z. Smith, 1998, 281-282: After reviewing James Leuba's *Pschological Study of Religion* which includes dozens of definitions of religion, Smith concludes: " The moral of Leuba is not that religion cannot be defined, but that it can be defined, with greater or lesser success, more than fifty ways… "Religion" is not a native term; it is a term created by scholars for their intellectual purposes and is theirs to define." Smith might also conclude that we cannot generate a single account of the historical evolution of the term, since various scholars have seen a variety of changes to their research need, though he nevertheless highlights a number of trends in the historical shift of the concept of religion.

[236] A *sui generis* account of religion can allow for historical change if it, as Asad notes, retains an understanding of a transhistorical essence of religion.

[237] Asad, 1993, 27-28. Asad reviews Louis Duomnt's account of differentiation, and replies by noting that its retention of a transhistorical essence of religion facilitates strategies for both opponents and defenders of religion: "Yet the insistence that religion has an autonomous essence – not to be confused with the essence of science, or of politics, or of common sense, invites us to define religion (like any essence) as a transhistorical and transcultural phenomenon. It may be a happy accident that this effort of defining religion converges with the liberal demand in our time that it be kept quite separate from politics, law and science – spaces in which varities of power and reason articulate our distinctively modern life. This definition is at once part of a strategy (for secular liberals) of confinement, and (for liberal Christians) of the defense of religion." Asad's secular liberals presumably adopt such a strategy because they fear that without it, religion might gain more prominence in society; Asad's liberal Christians adopt the same strategy for the opposite reason.

In his work *Discourse on Civility and Barbarity*, Timothy Fitzgerald shifts his attention from the role of religious studies scholars in constructing the category of religion to the role of scholars in other fields, especially political theory and economics. For Fitzgerald, scholars in these fields described religion as differentiated in order to underscore the methodological and conceptual independence of their fields of study from religion. [238] [239]

Christian Smith offers a particularly robust agent-centered theory of the shift in the meaning of the term religion in his collection, *The Secular Revolution: Power, Interests and Conflict in the secularization of American Public Life.* Smith targets secular academics in several disciplines, especially sociology, though he acknowledges that these academics only achieved their goals through alliances with both members of marginalized religions and liberal Protestants.[240] According to Smith, these intellectual elites were motivated by a desire to supplant the "19th century mainline protestant establishment" that still played the dominant role in American public life in the early twentieth century. Smith, perhaps more than most scholars who study secularization, sees the process as a direct result of plan to achieve a specific outcome, arguing that the agents

---

[238] Timothy Fitzgerald, *Discourse on Civility and Barbarity: A Critical History of Religion and Related Categories,* Oxford, Oxford University Press, 2007. Little of Fitzgerald's work focuses on contemporary political theorists and economists; he instead devotes his attention to early modern figures who bridged the modern divide between the academy and the practice of politics, including Locke, Jefferson, and Penn.

[239] John Milbank offers a similar account of the process of differentiation in his work *Theology and Social Theory*, though, as his title suggests, his focus lies with the efforts of political scientists, sociologists, and economists to circumscribe the reach of theological methods.

[240] Christian Smith, *The Secular Revolution: Power, Interests and Conflict in the secularization of American Public Life*, Berkeley, University of California Press, 2003, 32-37.

at the center of his study: "mobilized movements to depose the established regime from its positions of control."[241]

### *(3) Assessment of Focus on Academics*

The preceding list of agent-centered accounts of the historical continuity of religion share a common focus on the pivotal role of academics in determining the evolving meanings of religion. Given that the studies differ in both their accounts of *which* academics played this pivotal role and the motivations they ascribe to the pivotal academics, a single meta-narrative is unlikely to prevail.[242] Indeed, several of the scholars whose work I detail above acknowledge that different scholars with varying and even opposed goals might ally to promote similar modifications to the concept of religion: Asad claims that both liberal Christians and secularists sought to promote a differentiated, privatized concept of religion, and Christian Smith sees a similar alliance among liberal Protestants and secularist sociologists. This variety of shifting scholarly accounts of religion follows from Jonathan Z. Smith's claim that scholars define religion for their own purposes: assuming that scholars have very different goals in studying religion, we should expect religion to be in flux, rather than a stable and unchanging concept. Moreover, the failure of a meta-narrative of secularization does not negate the importance of these various "micro-narratives" of shifts in the understanding of religion. I note above Jose Casanova's efforts to draw scholars' attention to both the very different processes of secularization and the equally different results of these processes in the

---

[241] Ibid, 3.

[242] In effect, any success that McCutcheon, for instance, meets in charging religious studies scholars with promoting a particular concept of religion inveighs against Christian Smith's claim that secular sociologists bear the primary responsibility. On the other hand, the accounts might prove complementary if neither aspires to be the meta-narrative of the process of secularization.

modern world. These scholarly accounts that focus on different, and sometimes opposed efforts by various academics to shift the concept of religion in order to promote both their scholarly and their political agendas arguably contributes to the more robust account of secularization that Casanova desires.

These studies do, however, share a weakness in their nearly exclusive focus on the role of academics in promoting shifts in the concept of religion. I note above that an agent-centered account of the historical shift in religion relies on the ability of the agents in question to either propose new uses of the term or to restrict old ones. The studies of scholarly efforts to change the concept of religion do demonstrate that scholars *sought* to both promote new uses of the term and restrict some established uses, but the studies do not demonstrate that the scholars' reach is unlimited. Some scholars have nevertheless claimed that *only* scholars shape the category of religion. Jonathan Z. Smith, in the opening to *Imagining Religion*, notably claims:

> "If we have understood the archeological and textual record correctly, man has had his entire history in which to imagine deities and modes of interaction with them. But man, more precisely western man, has had only the last few centuries in which to imagine religion. It is this second order, reflective imagination which must be the central preoccupation of any student of religion. That is to say, while there is a staggering amount of data, of phenomena, of human experiences and expressions that might be characterized in one culture or another, by one criterion or another, as religious – *there is no data for religion*. Religion is solely the creation of the scholar's study. It is created for the scholar's analytic purposes by the imaginative acts of comparison and generalization. Religion has no independent existence apart from the academy."[243]

Here Smith presumes that only scholars have an interest in the general, comparative work that requires the second order work of "imagining" religion in general, rather than

---

[243] Smith, *Imagining Religion*, xi.

thinking within or about a particular religion. Scholars undoubtedly do "imagine" religion in this way, and their understandings of the term religion undoubtedly shape the way others use the term – especially their students. It is not clear, however, why others should not be similarly engaged in this work of imagining – and reshaping – the concept of religion. Others, including lawyers, bureaucrats, journalists, and leaders of particular religions to name a few, have occupational interests in developing, and, in some cases, altering their understandings of religion. Academics undoubtedly have had some influence in shaping modern usage of the term religion, but that influence is not, I contend, proportional to the scholarly interest in this academic influence.

I therefore conclude that further studies of the historical shifts in the concept of religion should supplement existing studies by looking to the role of agents outside the traditional academy. According to the theory underlying the historical approach's rejection of nominalism, any agent who has shaped others' usage of the term religion is an appropriate subject for such a study. Indeed, some scholars have already looked to agents outside the academy. I note above that a number of the agent-centered studies that focus on the role of academics also acknowledge the role of non-academics.[244] Other studies have focused primarily on these non-academics, looking to the importance of journalists[245] and public school teachers[246], among others.

---

[244] In particular, Asad and Christian Smith note that academics who promote the differentiation and privatization of religion ally with liberal Christians and, for Smith, members of marginalized religions.

[245] See, for instance, Richard Flory, "American Journalism and Religion, 1870-1930" in *The Oxford Handbook of Religion and the American News Media*, ed. Diane Winston, Oxford, Oxford University Press, 2012.

### *(4) We Have a Religion*

In her work *We Have a Religion: The 1920s Pueblo Indian Dance Controversy and American Religious Freedom*, Tisa Wenger directs her attention to two additional groups of agents responsible for shaping the meaning of religion in American public life: government officials, particularly officers of the Bureau of Indian Affairs (BIA), who were charged with regulating Native American reservations, and the Pueblo Indians themselves, who used a claim of religious status to protect the practice of their ritual dance from regulatory restrictions.[247] According to Wenger, tribal leaders among the Pueblo developed a strategy around labeling some of their dances as religious activity in response to efforts to suppress the dances by assimilationists within the BIA and the Indian Rights Association, an advocacy group dedicated to Christianizing Native Americans.[248] These opponents of the dances responded to this strategy by claiming that no practices as immoral, "vicious" and "unbridled" as the Pueblo dances could merit the protections of the first amendment, and they cited the example of *US v. Reynolds* to support this claim.[249] Nevertheless, the BIA superintendent for the Pueblos ultimately

---

[246] Kraig Beyerlein, "Educational Elites and the Movement to Secularize Public Education: The Case of the National Education Association" in *The Secular Revolution: Power, Interests and Conflict in the secularization of American Public Life*, Berkeley, University of California Press, 2003

[247] Tisa Wenger, *We Have a Religion: The 1920s Pueblo Indian Dance Controversy and American Religious Freedom*, Chapel Hill, University of North Carolina Press, 2009. Wenger also catalogues the role of artists and academics – especially anthropologists - in promoting an understanding of the dances as religious activity. See especially Ch. 3, "The Modernist Deployment of Religion".

[248] These assimilationists sought to bring Native American practices in line with the assimilationists' goal of a Christian America. The assimilationists objected to the dances on the grounds that the dances were too sexual, and therefore incompatible with Protestant American mores. Wenger discusses the origins of the IRA in Ch. 1.

[249] Ibid, 153.

accepted their claim to religious status, in part because reframing the dances as religious practice required the tribe to allow its members to opt out.[250]

Wenger's approach indicates the direction of study I intend to pursue in this work. If, as she suggests, the contemporary category of religion is the result of negotiation between a variety of religious groups and governmental authorities, then scholars who seek to understand the category of religion in the American context[251] should look to these negotiations. For the purposes of my research, I propose to look to jurisprudence rather than the decisions of bureaucracies, as I think that this topic provides a number of advantages. First, bureaucratic determinations of religious status are relatively rare[252], but legal determinations of religious status abound. Second, judicial determinations have an appreciable impact on claimants that extends beyond the cases at hand[253], so reading judicial determinations of religious status as partially constitutive of a public understanding of religion can be warranted. Finally, there is a substantial literature

---

[250] Wenger addresses this compromise in her chapter, "The Implications of Religious Freedom,", pp. 183-236

[251] Here I follow Casanova in claiming the there is not a single, uniform process of secularization, and that the various regimes of secularity are themselves quite different from one another. Casanova suggests that scholars pay attention to the differences in these regimes of secularity, and I propose that looking to American legal determinations of religious status is one key source of data for the peculiarly American version of secularity.

[252] IRS determinations of tax-exempt status are the one notable exception to this rule.

[253] I develop this point further in Chapter II. Legal determinations of religious status may influence bureaucratic determinations of religious status. Furthermore, a legal determination of religious status may lend a degree of social prestige to a group. Finally, a legal determination of religious status not only addresses the case at hand, but may also obviate some future legal action. Thus, for instance, an organization that secures religious status in one trial may deter future trials based on claims of a ministerial exception, for example.

regarding determinations of religious status among legal scholars[254], and judges and scholars alike occasionally consider the merits of other academic theories of religion when developing their own guidelines for determining religious status. By addressing my study of religion as a historical concept to legal scholarship, I intend to test the utility, and, indeed, relevance of the study of religion to other fields.

Wenger's work also suggests that a historical analysis can, at least, shed light on on some of the shifting elements that make up the category of religion. A historical analysis cannot offer the straightforward formulae of monothetic definitions of religion, but historical analysis can utilize scholarly concepts to highlight how contested features of the category gained both institutional and cultural support. For instance, Wenger notes that some members of the Indian Rights Association opposed any reading of the Pueblo dance as religious on the grounds that it was too performative, and too sexual. A historical analysis here detects that these critics subscribed to an Old Light Protestant understanding of religion as primarily contemplative. The Bureau's decision to classify the Pueblo dance as religious indicates that the category became sufficiently flexible to encompass primarily performative elements of religion. The Bureau's decision also suggests that although the syncretism of the Pubelo Indians' practice was a subject of controversy, syncretism can be included within the category of religion.

---

[254] Earlier in this section, I fault academics who study religion as a historical concept for their excessive – indeed, nearly exclusive – focus on the role of academics in shaping the category of religion. In addressing legal scholarship on religion, I may appear to expose myself to my own critique. However, because legal scholarship is practical in the sense that legal scholars often explicitly seek to shape judicial opinions through their scholarship, I think it is relevantly different from the work of academics who address only other academics.

I conclude this section with a brief acknowledgement that a historical understanding of the concept of religion is not incompatible with analogical and/or polythetic understandings of religion. I note above in section II.C that truly polythetic approaches to defining religion – that is, those approaches that identify a set of overlapping features of religion, but no formula for necessary and sufficient conditions of religion – can accommodate the possibility of change that is essential to a historical approach. Specifically, modern religions might share a greater number of traits with one another than they do with ancient religions will still belonging to one polythetic class. Put differently, a polythetic class can accommodate trends and historical shifts.

An analogical approach to understanding religion is a strong complement to a historical approach. A historical approach to determining what counts as religion focuses on identifying shifts in the meaning of the concept, especially shifts generated by particular agents. A historical approach does not, however, necessarily determine *how* those agents generate these shifts in their understanding of the concept. A theory of analogy can explain how those who use the term "religion" apply it to new referents without resorting to nominalism.

## III. The Purpose of Religious Studies

Many of the accounts of the concept of religion that I review in part II of this chapter link an understanding of the concept of religion to claims about the purpose of the study of religion.[255] Jonathan Z. Smith's claim on this point is both representative and

---

[255] In Chapter II, I review Timothy Macklem's parallel claim merely descriptive, semantic accounts of the concept of religion are insufficient to guide a judge's application of guarantees of the freedom of religion, since such an application is an

seminal: " 'Religion' is not a native term; it is a term created by scholars for their intellectual purposes and therefore is theirs to define."[256] Now, I above take issue with Smith's limitation of the range of definers to scholars, and many of the critics of the study of religion I review question whether scholars have only intellectual purposes in mind when they shape the concept of religion. Nevertheless, Smith here helpfully underscores the interdependence of scholarly interests and the definition of religion by suggesting that the former determines the latter. Other scholars reverse this causation, claiming that a proper understanding of religion shapes scholarly interests and, consequently, the study of religion.[257] Still other scholars suggest an intermediate position: Benson Saler, for instance, acknowledges the roots of the term "religion" as a western folk category, but argues that the category can be modified to meet scholarly interests. I intend this survey of the various models for the purpose of religious studies as a complement to the survey of mechanisms for determining what counts as religion in part II above. Moreover, an understanding of the purpose of religious studies provides a metric for evaluating the utility of a definition of religion. I above cited several scholars, including Benson Saler, who weigh the merits of proposed definitions of religion based on their capacity to productively focus study, and I contended in part II of this chapter that several proposed approaches to defining religion do not sufficiently direct scholars' attention because they cannot reliably determine what counts as religion. While under-inclusiveness, over-inclusiveness and vagueness are all strong reasons to conclude that a

---

explicitly normative use of the term. This section of Chapter I thus parallels that section of Chapter II.

[256] Smith, 1998, 281.

[257] Mircea Eliade's focus on letting a phenomenological understanding of religion guide the discipline of religious studies serves as a representative example of this point.

proposed definition of religion does not productively direct a scholar's focus, their collective absence is not sufficient to demonstrate that a definition *does* provide productive scholarly focus. In order to determine whether a definition is useful to scholars, we must examine what the scholar's purpose is.

At the outset of this chapter, I quote Timothy Fitzgerald's claim that:

> " … there is no coherent non-theological theoretical basis for the study of religion as a separate academic discipline. The major assumption lying behind much comparative religion, also called phenomenology of religion, is that 'religion' is a universal phenomenon to be found in principle in all cultures and all human experience." [258]

As I noted above, Fitzgerald here links the claim that scholars cannot adequately define religion to the claim that the study of religion has no defensible purpose. His claim highlights an additional aspect of the relationship between a definition of religion and the purpose of religious studies: critics claim that if scholars cannot define religion, then the field of religious studies may have no defensible purpose. Other critics reverse the order of this critique, using the claim that scholars in the field pursue covert theological or political agendas to question the coherence of the concept of religion. I argued in part I of this chapter that scholars of religion do not need a complete definition of religion to ground the field of study; I claimed that a reliable mechanism for determining what counts as religion is sufficient to orient the field. Nevertheless, scholars cannot evade the justificatory questions raised by the interdependence of the definition of religion and the purpose of religious studies. If scholars can at best offer provisional outlines of the

---

[258] *The Ideology of Religious Studies*, (New York, Oxford University Press, 2000), 3. I do not intend to accept the substance of Fitzgerald's critique without further investigation, but I do contend that the field must answer critiques along the lines of Fitzgerald's.

concept of religion – provisional concepts that are subject to historical variation – can they offer a defensible purpose for the study of religion?

In this final part of Chapter 1, I compare several accounts of the link between the definition of religion and the purpose of religious studies, and I ground this comparison on three separate questions: 1) What relationship between the study of religion and the definition of religion does this account entail? 2) Does this account of the relationship between the study of religion and the definition of religion help focus the field of religious studies? 3) Does this account provide a plausible and defensible justification for the study of religion?

## A. Nominalist accounts of the relationship between the definition of religion and the purpose of religious studies

One possible interpretation of Jonathan Z. Smith's claim that religion "is a term created by scholars for their intellectual purposes" is nominalist.[259] If a scholar's interest – and *only* a scholar's interest – constituted the concept of religion, then a scholar could deem any object of interest a "religion" without inconsistency. A scholar in a religious studies department who wished to study, for instance, Star Trek conventions, could warrant such an investigation by merely claiming that attendance of these conventions is ritualistic, and therefore religious. The various instances of the category of religion would then, like Bambrough's category of "alphas", share no common feature other than the

---

[259] This is not, as I will contend below, the most plausible interpretation of Smith's position.

scholar's usage of the term religion.[260] [261] A nominalist reading of this claim facilitates an understanding of the field of religious studies as the study of everything: a scholar could position any object of study within the field of religious studies without inconsistency. A nominalist interpretation therefore fails to productively limit the scope of the field of religious studies, because it does not limit that scope at all. Accordingly, a nominalist interpretation also cannot offer a clear account of the purpose of religious studies, because the nominalist interpretation will admit *any* scholarly purpose as valid. If the concept of religion is constituted by scholarly interest alone, then any justification of the study of religion also rests on scholarly interest alone. Any topic of study is therefore valid within the ambit of religious studies because it captures the interest of a religious studies scholar, and any topic loses its validity as a subject of investigation the moment scholars no longer wish to study it.

There are, however, several reasons to reject the nominalist reading of the claim that scholars shape the concept of religion to their own purposes. In section II.D.2.e above, I reviewed the work of several scholars who highlight the role of academics – especially in the field of religious studies – in shaping the concept of religion. These agent-centered historical accounts of the concept of religion cohere with the claim that scholarly interest determines the concept of religion; I cite Jonathan Z. Smith's work in "Religion, Religions, Religious" as one example of such an agent-centered account of

---

[260] Some studies that offer little to no methodological warrant for considering a phenomenon as a "religion" do use a variety of other terms associated with religious studies, such as "ritual" or "pilgrimage". However, the usage of a collection of terms does nothing to dispel the charge of nominalism if the scholar offers definitions for none of the terms.

[261] This is the substance of Fitzgerald's nominalist critique of religion, which I review extensively in section II.D.2.a above.

religion. Though all of these agent-centered historical accounts focus on the claim that religious studies scholars have shaped the concept of religion, none of the accounts claims that the scholars defined religion *ex nihilo*. That is, the scholarly agents who shape the concept of religion rely on existing understandings of the term to do so. Tomoko Masuzawa highlights nineteenth century scholars' efforts to shift from a four-part taxonomy of religions to the concept of world religions, while Christian Smith, Talal Asad and others highlight scholars' efforts to shift from an undifferentiated account of religion to a strictly differentiated account. These accounts are incompatible with a nominalist interpretation of the concept of religion because they deny that the scholar is free to apply the term religion to anything; these accounts, in other words, admit the possibility of incorrect usage of the term religion even as they track changes in the rules regarding the use of the term.

In addition, the agent-centered historical accounts of religion that I reviewed in section II.D above highlight a few motivations common to most of the academics who have shaped the concept of religion. Some of the scholars highlight apparently divergent motivations: Talal Asad, for instance, claims that liberal Protestants promoted the concept of differentiated religion in order to protect religion, while secularists did so in order to curtail it. Nevertheless, the scholarly accounts of the historical shift in the concept of religion indicate that motivations for this shift coalesce around a few key nodes.[262] This coalescence of scholarly purposes undermines a nominalist account of the relationship between the concept of religion and the purpose of religious studies, because

---

[262] Specifically, Smith, Asad and others identify differentiation and secularization more generally as a crucial goal for anthropologists and scholars of religion, while Masuzawa, Saler and others identify global application as the central goal for these same scholars.

it suggests that scholars share a few common goals in pursuing the study of religion. Given these shared goals, and given the persistence of these goals even as the concept of religion shifts, it is not plausible to claim that the field is constituted by mere scholarly whim.

## B. Normative accounts of the relationship between the definition of religion and the purpose of religious studies

Other scholars claim that the field of religious studies serves a normative purpose. Frequently, critics of the field claim that religious studies scholars are covertly pursuing a normative goal through their work in the field, but the claim that religious studies is a substantially normative field is not limited to critics, as some scholars within the field embrace this mantle. A normative account of the purpose of religious studies identifies some practical, social goal for the study of religion, and claim that both scholarship and courses in the field advance this social goal.

For instance, many critics of the field claim that its true purpose is to defend, and even to advance the role of religion in society. Now, this claim is necessarily imprecise: because the concept of religion itself is vague, an agenda of promoting the role of religion in society may take many forms. Accordingly, critics and defenders of the field alike describe many distinct goals within this wider category of "promoting religion". Russell McCutcheon, as I note above, claims that Mircea Eliade pursued a dual normative goal in his work in religious studies. For McCutcheon, Eliade was not solely motivated by a desire to describe religious phenomena; he also sought to 1) reacquaint and reunite secularizing westerners with Christianity and 2) legitimize older and discarded forms of political order in the west that granted greater power to the church. Thus, two possible forms of "promoting religion" are to lead secular moderns to reengage with specific

religious institutions and traditions, and to advocate particular political arrangements that grant significant power to religious institutions.[263] Donald Wiebe describes another possible form of promoting religion in his essay "The Failure of Nerve in the Academic Study of Religion"[264]. For Wiebe, the development of religious studies as a social scientific discipline in the late nineteenth and early twentieth centuries provides a patina of intellectual credibility to the theological work that is currently "rampant" in the field, and Wiebe worries that this prevalence of theology will ultimately undermine the field's credibility. For Wiebe, then, the covert purpose of the field of religious studies – at least for the theologians in the field – is to generate respectability within the academy for a theological agenda. Finally, scholars might promote religion through the field of religious studies by using their work to deepen both their own personal faith and that of their students.[265]

Other critics claim that the field serves a nearly opposite normative goal: that of curtailing the influence of religion. This claim too is necessarily imprecise: because the concept of religion itself is vague, an agenda of limiting or diminishing its role in society may take many forms. Some scholars contrast the role of religious studies as a limited, focused field with that of medieval and early modern theology, which served as what John Milbank terms a "meta-discourse". For Milbank, the current disciplinary scheme of

---

[263] McCutcheon discusses his critique of Eliade's covert political goals in Chapter 1, "Ideological Strategies and the Politics of Nostalgia" and Chapter 3, "The Debate on the Autonomy of Eliade" of *Manufacturing Religion*.
[264] Donald Wiebe, *The Politics of Religious Studies: The Continuing Conflict with Theology in the Academy*, New York, St. Martin's Press, 1999, 141-162.
[265] Theoretically, a scholar in virtually any field might use their work to deepen their faith, so it is unclear that the presence of scholars' personal normative commitments are unique to religious studies.

the academy, which relegates religion to a limited and specific discourse, serves to disempower theology and, accordingly, to ensure the ascendancy of secular social sciences: "If theology no longer seeks to position, qualify or criticize other disciplines, then it is inevitable that these discourses will position theology."[266] This first form of curtailing the influence of religion, then, is by quarantining theological discourse within the limited field of religious studies. Christian Smith highlights a second and related mode of diminishing the influence of religion. Although Smith is primarily interested in the role of secular sociologists, he also parallels Milbank's claim that the establishment of a limited departmental identity for religious studies plays a role in dislodging theology as the meta-discourse within the academy. For Smith, however, this move has more than merely academic consequences: establishing social science as the prominent humanistic discourse within the academy served as a means to counter the political power of what he terms a protestant elite in America in the early twentieth century.[267] Thus, a second mode of diminishing religion is using the limited role of religious studies to underscore the supremacy of social science, which in turn provides the impetus for attacking policies endorsed by religious institutions and religious people. Finally, the field of religious studies might diminish the influence of religion by undermining religious belief itself. Some reductionist accounts of religion, such as Marx's claim that religion is a byproduct of economic oppression[268] or Freud's claim that religion is a byproduct of psychological

---

[266] Milbank, 1990, 1.
[267] Christian Smith, 2003; 3, 43-53. Smith claims that these newly prominent social scientists sought a number of specific policy goals, including an end to religiously-motivated censorship, limits on the imposition of Victorian morality through legislation, and, ultimately, limits on the influence of Protestantism in American public schools.
[268] See especially Karl Marx,

guilt and anxiety[269], undermine the validity of religious belief, and to the extent that scholars in the field of religious studies promote these theories (or similar theories), they may also undermine the validity of religious belief.

Other scholars claim that the normative purpose of the field of religious studies is to promote tolerance. Russell McCutcheon, for example, opens his chapter on the purpose of teaching religious studies by claiming: "many comparative religion textbooks continue to presume that the fundamental issue to be addressed in the classroom is the problem of religious plurality."[270] For McCutcheon, these classes are characterized by a "poverty" of theory because they readily reach for the assumption of *sui generis* religion as a basis for tolerance. A *sui generis* account of religion entails that all particular religions participate in a fundamentally similar enterprise, and for McCutcheon the call to tolerance is founded on this claim of fundamental sameness. Other scholars in the field directly accept the normative goal of promoting tolerance. Jonathan Z. Smith, for instance, argues that promoting tolerance is an inevitable byproduct of developing intellectual understanding about previously unfamiliar phenomena. In his essay "The Devil and Mr. Jones," Smith uses the events of surrounding the deaths at Jonestown to demonstrate his account of the purpose of religious studies. For Smith, religious studies is a human science, and, consequently, an Enlightenment project; Smith describes the nature of Enlightenment human sciences thusly: "the Enlightenment impulse was one of tolerance and as a necessary concomitant, one which refused to leave any human datum,

---

[269] See especially Sigmund Freud, *Totem and Taboo*, IV.
[270] McCutcheon, "The Poverty of Theory in the Classroom" in *Manufacturing Religion,* 101-126.

including religion, beyond the pale of understanding, beyond the pale of reason."[271] This refusal to leave religion "beyond the pale of understanding" contrasts, for Smith, with the analysis that followed immediately upon the tragedy of Jonestown, which rendered the act as mad and incomprehensible. For Smith, scholars in the field of religious studies cannot simply leave the data of Jonestown unanalyzed:

> "How, then, shall we begin to think about Jonestown as students of religion, as members of the academy? … A basic strategy, one that is a prerequisite for intelligibility, is to remove from Jonestown the aspect of the unique, of its being utterly exotic. We must be able to declare that Jonestown on 18 November 1978 was an instance of something known, of something we have seen before. We must perform an act of reduction. We must reduce Jonestown to the category of the known and the knowable."

Here Smith claims that it is precisely because religion is not *sui generis* that it can be rendered intelligible, and, because it can be understood, it may prove socially tolerable.[272]

While each of these three types of normative justifications suggests *a* relationship between the concept of religion and a justification of the field of religious studies, none actually requires either a particular or a stable concept of religion to provide the justification it seeks. In each case, the normative goal, rather than a particular concept of religion, provides the justification for the field of study, and the definition of religion is therefore important only insofar as it serves this normative goal. If, for instance, McCutcheon is accurate in claiming that Eliade's true goal in pursuing religious studies is

---

[271] Jonathan Z. Smith, *Imagining Religion*, 104.

[272] Ibid, 111-112. Smith is careful to add that tolerance is not equivalent to approval: "To interpret, to venture to understand, is not necessarily to approve or to advocate. There is a vast difference between what I have described as "tolerance" and what is now known as "relativism". The former does not necessarily lead to the latter." Thus, Smith's brand of tolerance is not equivalent to abdicating moral judgment in the face of pluralism. Tolerance here *is*, however, distinct from the immediate moral aversion and intellectual avoidance that followed Jonestown.

to persuade secularizing westerners to re-engage with Christianity and Christian institutions, then the concept of religion itself is no longer essential to Eliade's conception of the field. Rather, the concept of religion is a tool for promoting this normative goal, and a particular definition of religion is useful insofar as it does so. The coherence and stability of the definition of religion actually plays little role in justifying the study of religion for these normative approaches, since the validity of the normative goal itself determines the viability of the field. If the goals of promoting tolerance, or limiting the influence of particular religious institutions in society, or of promoting the influences of those same religious institutions are valid academic pursuits, then a field that advances these goals is necessarily valid. For a scholar endorsing a normative approach, the field of religious studies is not essentially *about* religion, and precise concepts of religion might prove detrimental to such a scholar's normative goals. If, for example, a scholar wishes to focus on promoting tolerance, then a precise definition of religion might prove to be a hindrance because it could exclude some ideologies and allegiances that lead to intolerance. Such a scholar would likely prefer a pliable definition that could incorporate, for example, political beliefs as "religions".

Because a normative justification of the field does not rely essentially on a definition of religion, such approaches are unlikely to provide useful guidance on the concept of religion. Moreover, few scholars openly claim that the field has or should have a normative orientation. While critics such as McCutcheon are not wrong to highlight potential methodological flaws that can follow from a covert normative orientation, ascribing a normative purpose to a field whose scholars largely reject it is unwarranted. There is no reason to conclude that scholars who covertly (or overtly) see their work as

linked to a normative goal cannot generate work that also fits within a descriptive framework of the field. Moreover, there is no reason to conclude that a field with a primarily descriptive role cannot also have a secondary normative role. Jonathan Z. Smith's analysis of the case of Jonestown suggests that careful and consistent description of new religious movements itself coheres with the claim that the goal of religious studies is to promote a sort of tolerance.

## C. Descriptive accounts

Finally, some accounts of the purpose of religious studies rely on the claim that religion is a relatively discrete and discernible object of study. If religion is an identifiable object of study, then the purpose of the field is merely to advance knowledge about that object. For these descriptive accounts of the purpose of religious studies, the field needs no *special* warrant; rather, it can defer to general warrants about advancing knowledge of any and all discernible objects of study.

The prototypical examples of descriptive justifications for the study of religion all stem from monothetic definitions of religion, as monothetic definitions offer the most straightforward mechanism for rendering religion a discrete and discernible object of study. Mircea Eliade, whose account of religion as a unique form of experience I review in section II.A.1.c, claims that the purpose of religious studies is to gather and interpret religious data, i.e. data drawn from the unique form of experience that constitutes religion.[273] E. B. Tylor, whose "minimum definition" of religion as "Belief in spiritual beings" I review in section II.A.1.a above, claims that the purpose of his study of animism is to collect, compare, and taxonomize data about various kinds of belief in

---

[273] See especially "A New Humanism" in *The Quest: History and Meaning in Religion*.

spiritual beings.[274] Tylor's account successfully narrows the field of religious studies, as he limits his focus to a specific kind of cognitive content. Eliade certainly aspires to do the same, but, absent a more specific explanation of how religious experiences differ from other sorts of experience, his focus remains overly broad. Moreover, both accounts provide defensible justifications for the study of religion to the extent that their monothetic definitions of religion hold: followers and Eliade and Tylor can claim that the field's purpose is to advance a particular type of knowledge so long as that sort of knowledge can be distinguished form others. However, as I discuss in section II above, there are many strong reasons to question every proposed monothetic definition of religion. Can a descriptive account of the purpose of religious studies hold without a monothetic definition of religion?

Some theorists who propose polythetic and family resemblance definitions of religion also claim that religious studies can have a purely descriptive function. Among those who endorse a multi-factorial approach, some, like Bruce Lincoln, reproduce Eliade's understanding of the role of religious studies while rejecting the monothetic approach to defining religion.[275] While Lincoln admits that the concept of religion is composed of a variety of features, he holds to Eliade's claim that religious studies contributes a unique and valuable set of data. In his study of revolutionary social movements, Lincoln claims that any such study cannot be complete without including

---

[274] Tylor begins his chapter on Animism by exploring another possible purpose for his study: determining whether religion is natural to human beings or is the product of historical development. Tylor's key interest, however, is in collecting and organizing data regarding beliefs in spiritual beings.

[275] I reviewed Lincoln's attempt to generate a polythetic definition of religion above in section II.B.

perspectives from religious studies.[276] In other words, Lincoln retains Eliade's conviction that religious studies has a unique contribution to make without offering a defense of that uniqueness.

Benson Saler, who acknowledges the historical origins of the concept of religion as a "western folk category", nevertheless thinks it can play a significant role in anthropological study. Religion need not be a natural category or an absolute, unchanging category to be useful to the anthropologist; it can merely serve as a starting point for analysis of less familiar cultures.

> "Categories are not only devices for recognizing, for sorting out and thus taking notice of in some definite way, 'objects' (whatever we cognize) and organizing information and retrieving information about them, but they facilitate and routinize the extension of our understandings. If we suppose that two objects pertain to the same category and one is better known to us than the other, we tend to make inferences about the lesser known on the basis of our acquaintance with the better known. Doing so is doubtless advantageous to us in coping with the existential press of life, our confrontations with a multitude of problems that tax our capacities and competencies." [277]

---

[276] At the conclusion of his religious analysis of "religions of revolution" and "religions of the status quo" in *Holy Terrors*, Lincoln underscores the importance of religion's unique contribution: "At present it is easy to overvalue the role of religion within sociopolitical revolutionary upheavals, given recent events in Iran, Latin America, Ireland, Lebanon and Poland, just as in the past it was easy to dismiss its role as relatively unimportant, or to ignore it altogether. Both tendencies strike me as unfortunate, and I prefer the view espoused by Georges Balandier, among others, of revolution as a total social phenomenon that embraces not only political, economic and military issues but artistic, cultural and religious ones as well. To ignore any of these areas… is to impoverish our analysis accordingly." 91. Ultimately, it is unsurprising that Lincoln reprises Eliade's claim that religious studies must be included because it offers a unique perspective and set of data: as I contend in section II.B above, his polythetic approach ultimately collapses into a monothetic approach because he assigns the pivotal role in defining religion to cognitive content.

[277] Saler, *Conceptualizing Religion*, 254.

For Saler, religion is precisely this sort of heuristic category, and he directly advocates making inferences about lesser-known (i.e. non-western) cultures based on the examples of western religions.[278] While Saler's analysis renders the purpose of the *category* of religion descriptive, it does little to illuminate the purpose of the field of religious studies. Saler here presumes that religion is a subset of culture, and that anthropologists will therefore use this category to generate useful cross-cultural comparisons. Indeed, a family resemblance approach alone cannot ground a descriptive justification for the field of religious studies: because a family resemblance approach operates without reference to a specific feature or set of features that define the category of religion, it cannot explain why specialists in religious studies are needed to study religion.

Many of the historical approaches to understanding religion that I describe above in section II.D are specifically designed to undermine the legitimacy of the field, so, at first glance, they offer little in the way of justifications of the field as a descriptive endeavor. For critics such as Timothy Fitzgerald, who tracks scholars' efforts to modify the term religion to meet their immediate needs, a historical approach amounts to a defense of the nominalist perspective I describe in section III.A above. Fitzgerald tracks the wide variety of contemporary and historical usages of the term religion and claims that the term has no consistent meaning that would substantiate its use as a separate "analytical category". Fitzgerald does, however, identify a second possible purpose resulting from a historical understanding of religion:

---

[278] Saler also emphasizes that this category of religion is unbounded, and is, therefore, subject to revision.

> "Instead of studying religion as though it were some objective feature of societies, it should instead be studied as an ideological category, an aspect of modern western ideology, with a specific location in history."[279]

Here, Fitzgerald departs from a nominalist line of argument, and acknowledges that the term religion has some shared meaning for those who use it. The field of religious studies could potentially have a purpose in describing these shared meanings at different points in history.[280]

I contend that this second sort of historical approach, in combination with a family resemblance approach to understanding religion, can offer a justification for a modified field of religious studies with a descriptive focus. As I note above in the introduction to section II.D, contemporary historical approaches to understanding religion are premised on the rejection of monothetic approaches. Scholars such as Fitzgerald argue that this rejection of monothetic definitions necessarily entails an embrace of nominalism, but the sophisticated defense of a family resemblance approach that I review in section II.C.2 above, suggests that religion can be a stable, identifiable category without relying on a monothetic definition. Monothetic definitions are useful for supporting a *sui generis* concept of religion, and to the extent that *sui generis* religion justifies the field of religious studies on descriptive grounds, monothetic definitions can play this justificatory role. With this link between *sui generis* religion and the purpose of the field of religious studies in mind, Fitzgerald concludes that if scholars reject the

---

[279] Fitzgerald, 2000, 4.

[280] For Fitzgerald, acknowledging the historically specific meanings of the concept of religion supports his claim that the work of scholars in the field is properly located within other disciplines. I address this argument below.

concept of *sui generis* religion, then they must justify the field by reconceptualizing it as "cultural studies":

> "My proposal then is that those of us who work within the so-called field of religion but who reject the domination of ecumenical theology and phenomenology reconceptualize our field of study in such a way that we become critically aligned with theoretical and methodological fields such as anthropology, history, and cultural studies. As a contribution to this reconceptualization, I propose that religious studies be rethought and rerepresented as cultural studies, understood as the study of the institutions and the institutionalized values of specific societies, and the relation between those institutionalized values and the legitimation of power."[281]

While I endorse Fitzgerald's call to "critically align" with scholars from other fields[282], I do not think that a reconceptualization of the field as cultural studies is necessary for this goal; in fact, such a reconceptualization is likely counterproductive. "Culture" is arguably a *less* determinate analytical category than is religion, and, accordingly, cultural studies is *more* likely to devolve into the ungrounded "study of everything" than is religious studies. Moreover, Fitzgerald himself argues that the category of religion identifies a recognizable set of phenomena even though the category is not set apart by a single monothetic criterion: religion is a complex concept with western roots that organizes how many – including non-westerners – understand the world.

A family resemblance approach recognizes religion as complex and multi-factorial, and thus a family resemblance approach facilitates an understanding of religious studies as an interdisciplinary, descriptive academic endeavor. Because religion cannot be explained with reference to a simple, monothetic definition, the study of religion must not only align with, but also incorporate the perspectives of a wide variety of academic

---

[281] Ibid, 12.
[282] Indeed, many scholars in the field already take up this alignment,

disciplines. For this type of family resemblance approach, the field of religious studies is necessary not because, as Bruce Lincoln and Mircea Eliade claim, it offers a unique interpretive framework to complement those of political science, philosophy, and sociology, but because, as an inherently interdisciplinary field, it *already incorporates those approaches.* The utility of religious studies, for the descriptive approach I here imagine, lies in an explicit rejection of claims to methodologies or data that are unique to the field. The purpose of religious studies, then, is to utilize theories and methods from a variety of fields of study to describe historical phenomena that transcend disciplinary divisions.

# Chapter 2: Religion in American Courts: Why Courts Must Determine What Counts as Religion, and Why No Proposed Method for Doing So Is Viable

In the previous chapter I reviewed the importance of determinations of what counts as religion for the field of religious studies. In this chapter, I will review the importance of these same determinations of religious status for American courts. I begin in Parts I and II by considering whether such determinations are necessary at all. In part I, note that there are important justificatory and political considerations in favor of developing a clear mechanism for determining what counts as religion. One argument in favor of explicit determinations of religious status is the importance of justifying the special constitutional treatment of religion. After a brief consideration below, I take up this question separately in Chapter 3. In part II, I consider a range of alternatives to determinations of religious status. Scholars and judges have proposed several strategies for avoiding determinations of religious status, including deference to individual choice, sincerity tests, a pure "neutrality" approach, and adjudicating religion cases with reference to some other value, such as speech or multicultural rights. After I review each of these strategies, I conclude that none satisfactorily obviates the need for threshold determinations of religious status.

Parts I and II, in short, aim to establish that courts cannot avoid determining what counts as religion. In Part II, I examine whether there are any clear standards for those judgments. In the absence of clear standards for determining what counts, court

judgments of religious status in one jurisdiction are likely to vary from judgments in others jurisdictions. More importantly, as Eduardo Peñalver notes[283], only a clear and consistent standard for religiosity can limit judicial bias; the lack of any such clear standards permits each judge to rely on their own concept of religion in court judgments. Consequently, the most important criterion for evaluating the various proposals for determining what counts as religion in American courts is a capacity to clearly and consistently distinguish religion from non-religion.

Drawing on the work of Kent Greenawalt, Jesse Choper, and Timothy Macklem, I develop six criteria for evaluating the adequacy of these proposals, and I then use the taxonomy I developed in Chapter 1 to categorize the various proposals for determining what counts as religion. I conclude that none of the existing proposals is adequate to these criteria, largely because no mechanism meets the critical first criterion of consistently and clearly distinguishing religion from non-religion. My taxonomy aims to comprehend the range of possible mechanisms for conceptualizing religion, so I further conclude that no future proposal for determining what counts as religion is likely to prove adequate to these criteria. Finally, I argue that one worrisome consequence of the failure to develop a consistent mechanism for determining what counts is that court judgments of religion are inconsistent. New religious movements and non-western religions bear the brunt of this inconsistency, as they are sometimes recognized as religions, but often are not.

---

[283] Eduardo Peñalver, "The Concept of Religion," *Yale Law Journal* v. 107 n. 3 (1997), 815.

## Part I: The Importance of Determinations of What Counts as Religion in American Courts

Why do courts need to determine what counts as religion? First and foremost, judges must rule on cases in which the religiosity of a person, organization, or practice is both contested and critical to the ruling in the case. These threshold considerations constitute the primary reason that courts need some mechanism for determining what counts as religion. Some scholars claim that courts may also need a definition of religion in order to explain *why* religion merits special constitutional consideration. I will briefly review these justificatory reasons for defining religion in section B below; I offer a more complete consideration of this topic in chapter 3. Finally, determinations of religious status may play a political role by lending the imprimatur of the court to an organization's contested claim to religious status.

### A. Threshold Determinations

In contrast to religious studies scholars, whose primary interest in the concept of religion is theoretical, judges and legal scholars have a practical interest in determining what counts as religion.[284] As Kent Greenawalt puts it, courts must make these threshold determinations regarding religion in order to decide certain types of cases: "Because federal and state constitutions forbid government from infringing on religious liberty or supporting religion, courts must sometimes decide whether a claim, activity, organization, purpose, or classification is religious."[285] While Greenawalt argues that

---

[284] In fact, Kent Greenawalt suggests that a theoretical interest in defining religion might obstruct courts' efforts to develop practical means for determining what counts as religion: "Most courts have prudently eschewed theoretical generalizations in approaching that question. Academic commentators have struggled to startlingly diverse proposals." Kent Greenawalt, "Religion as a Concept in Constitutional Law" 72 *California Law Review* 72 no. 5 (1984): 753.

[285] Ibid.

legal scholars must have some mechanism for determining what counts as religion, he acknowledges that some scholars and judges have developed "strategies of avoidance" with regard to the religion clauses.[286] I discuss five prominent avoidance strategies in Part II of this chapter.

There are several varieties of threshold determinations, so a suitable mechanism for determining what counts as religion must be adequate to each type. For Kent Greenawalt, the "simplest cases" in which threshold considerations of religion are at stake are those "when someone seeks a privilege granted only to those with religious grounds".[287] Most disputed threshold determinations cohere with this model, and these disputes accordingly focus on whether the grounds for the claims in question are, in fact, religious. For example, in *Founding Church of Scientology v. US,* the Church of Scientology sought to recover federal income taxes on the grounds that it was entitled to tax exemption as a religious organization under 501(c)3 of the Internal Revenue Code, so one key determination in the focused on the litigants claim that Scientology is a religion.[288] Other cases involving litigants who grounds their claims for a legal privilege in their religions have included threshold determinations of the religious status of the

---

[286] Kent Greenawalt, *Religion and the Constitution, Volume I: Free Exercise and Fairness* (Princeton: Princeton University Press, 2008), 135.
[287] Greenawalt, *Religion and the Constitution v. 1*, 124.
[288] *Founding Church of Scientology v. U.S.,* 409 F. 2d 1146 (1969). The court determined that scientology is, in fact, a religion. "Finally, we come to the vexing question: is Scientology a religion? On the record as a whole, we find that appellants have made out a *prima facie* case that the Founding Church of Scientology is a religion." Moreover, the Court noted that even though the government had not contested the religious status of scientology, a determination of religious status was not automatic: "Not every enterprise cloaking itself in the name of religion can claim the constitutional protection conferred by that status. It might be possible to show that a self-proclaimed religion was merely a commercial enterprise, without the underlying theories of man's nature or his place in the Universe which characterize recognized religions."

Fellowship of Humanity[289], Ethical Culture,[290] the MOVE organization[291], Wicca[292] and atheism.[293] Courts have made similar determinations in a limited number of establishment clause cases. In *Malnak v. Yogi*, for instance, the 2nd Circuit Court heard an establishment clause challenge to an elective course on Transcendental Meditation in the New Jersey public schools. Because both the members of the school board and representatives of the Science of Creative Intelligence/Transcendental Meditation objected to the characterization of TM as a religion, the Court had to determine whether TM is a religion in order to adjudicate the establishment clause challenge.[294]

In some cases, courts accept that the underlying grounds for a claim to a religious exemption are religious while questioning the religiosity of the belief, practice, organization or claim at issue in a particular case, so threshold determinations in these cases are not limited to the religiosity of the grounds for these claims. Often such threshold determinations focus on activities associated with a particular religion. In *Davis v. Beason*, for instance, the court accepted the religious basis for Davis' claim to an exemption from statutes outlawing polygamy while stating in dicta that the practice of polygamy itself could not be considered religious.[295] In other cases, courts may accept

---

289 *Fellowship of Humanity v. Co. Alameda*, 153 Cal. App. 2d 673 (1957).
290 *Washington Ethical Society v. District of Columbia*, 249 F. 2d 127 (1957)
291 *Africa v. Commonwealth*, 662 F.2d 1025 (1981)
292 *Dettmer v. Landon*, 799 F. 2d 929 (1986)
293 *Kaufman v. McCaughtry*, 419 F.3d 678 (7th Cir. 2005).
294 *Malnak v. Yogi,* 592 F.2d 197 (1979). A similar question regarding the religious status of yoga is at issue in *Sedlock v. Baird*, 235 Cal. App. 4th 874 (2015).
295 *Davis v. Beason*, 133 U.S. 333 (1890) at 341-342: "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." The court did not rely on this claim that promoting polygamy is not a religious activity to uphold Davis' conviction; Justice

that claimants subscribe to a religion while questioning whether a particular organization is, in fact, religious. In her dissent in *Burwell v. Hobby Lobby*, Justice Ginsburg accepted the religious basis of the plaintiffs' objection to the contraception mandate, but she argued that their for-profit corporations could not exercise religion, and were not, in fact, religious organizations.[296] In still other cases, courts accept that the underlying grounds for a claim are religious while concluding that a claimant has misconstrued those grounds. In *Thomas v. Review Board*, for instance, the Indiana Supreme Court accepted that Eddie Thomas' beliefs as a Jehovah's Witness were religious while also concluding that his belief that his religion required him to abstain from working directly in weapons production was a "personal philosophical choice, rather than a religious choice."[297] [298] Finally, courts in some cases accept the religiosity of an organization while examining

---

Field instead relied on a determination that the free exercise clause does not limit the government's ability to regulate religiously motivated conduct.

[296] *Burwell v. Hobby Lobby*, 134 US 2751 (2014) at 2796: "Again, the Court forgets that religious organizations exist to serve a community of believers. For-profit corporations do not fit that bill."

297 *Thomas v. Review Board*, 271 Ind. ___, 391 N. E. 2d 1127. The court based this conclusion on the fact that Thomas apparently "stuggl[ed]" to articulate a clear and consistent position on his religious duties with regard to weapons production. The US Supreme Court overturned, contending that: "W*e see, therefore, that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs because the believer admits that he is "struggling" with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ." Thomas v. Review Board, 450 US 707 (1981) at 715. The court considered a similar line of argument regarding the potential incompatibility of profits and religiosity in Founding Church of Scientology v. US* 409 F.2d 1146 (1969). This case is distinct from *Hobby Lobby* in that the Church of Scientology sought a 501(c)3 designation.

[298] In some cases, courts also make determinations about the centrality of a particular practice to a claimant's religion (See, for instance, *Wisconsin v. Yoder*, 406 U.S. 205 (1972); and whether a particular practice is required by the claimant's religion. Since these determinations do not directly question whether the practice in question is religious, I do not consider them here.

which of its activities and claims are made for religious purposes and which are made for "wholly secular" purposes.[299]

This potential for a layering of multiple threshold determinations of religious status in a single case illustrates an important requirement for an adequate method for determining what counts as religion in a legal context. Any mechanism for determining what counts as religion must be separately applicable to organizations, activities, purposes, and beliefs. Alternatively, courts could collapse these layers of determinations of religious status into a single threshold determination by accepting that any claim that arises from religious grounds is religious whether it pertains to beliefs, organizations, activities or purposes. Indeed, the Supreme Court's decision in *Thomas v. Review Board* indicates a reluctance to layer threshold determinations.[300]

## B. Justificatory Considerations

In Chapter 3, I discuss at length the special constitutional status of religion and the efforts of scholars to develop a normative justification of that special status.[301] For the purposes of this section, I note that first amendment jurisprudence confers numerous

---

[299] See *Christofferson v. Church of Scientology, etc*., 644 P. 2d 577 - Or: Court of Appeals 1982 at 604-605. Here the court ruled that the church of scientology could be subject to liability claims arising from claims it makes and activities it pursues for "wholly secular" purposes.

[300] Supra n. 15 at 715: "We see, therefore, that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs because the believer admits that he is "struggling" with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ." The Court's deference to Thomas' own understanding of his religious responsibilities suggests a model in which a single threshold determination of religious status is sufficient: once a court determines that the grounds for a litigant's claim is religious, the Court then defers to the claimant's determinations of what beliefs and duties are part of his/her religion.

[301] See infra, Ch. 3.

benefits and burdens on religious claimants.[302] Many scholars argue that this unequal treatment of religion demands a justification; some scholars doubt that a satisfactory justification is forthcoming, and accordingly argue that the special constitutional treatment of religion should be curtailed, or even eliminated.[303] Other scholars, such as Timothy Macklem, agree that a justification of the special status of religion is required, but claim that such a justification is available. [304]

The need for a justification of the special status of religion provides an additional reason, beyond threshold considerations, for judges to determine what counts as religion. A consistent, coherent mechanism for determining what counts as religion would not only facilitate a normative justification of its special status; it would be integral to any normative justification of the special constitutional treatment of religion. A monothetic approach – whether simple or complex – would provide a clear basis for such a

---

[302] I discuss these benefits and burdens in more detail in Ch. 3, Part I.

[303] Christopher Eisgruber and Lawrence Sager, for instance, deem questions about the uniqueness of religion "imponderable", and their scheme of equal liberty accordingly would eliminate constitutional exemptions from neutral laws for religious claimants that are not also available to non-religious claimants. Christopher Eisgruber and Lawrence Sager, *Religious Freedom and the Constitution*, (Cambridge, Harvard University Press, 2007), 20. Marci Hamilton has long defended the neutrality framework articulated in *Employment Division v. Smith* on the grounds that constitutional exemptions for religious claimants facilitate significant third party harms, and she directly advocates for the repeal of legislation that promotes special exemptions for religious claimants, including both the Religious Freedom Restoration Act, Religious Land Use and Institutionalized Persons Act. See: See especially: Marci Hamilton, *God vs. the Gavel: Religion and the Rule of Law*, (Cambridge, Cambridge University Press), 2005; "The Case for Evidence-based Free Exercise Accommodation:Why the Religious Freedom Restoration Act Is Bad Public Policy", *Harvard Law and Policy Review* v. 9, 2015; "The Constitutional Limitations on Congress's Power Over Local Land Use: Why the Religious Land Use and Institutionalized Persons Act Is Unconstitutional", *Albany Government Law Review*, v 2. n. 2, 2009.

[304] Timothy Macklem, "Faith as a Secular Value," (2000) 45 *McGill Law Journal* .v. 45 no. 1. I consider Macklem's argument in depth in Chapter III, sec. II.A

justification: any explanation of the special status of religion could focus on either the single element (in the case of a simple monothetic approach) or the set of elements (in the case a complex monothetic approach) identified in the definition. In fact, if there were a convincing monothetic account of religion, any justification that did not center on those defining elements would not serve to justify the special constitutional treatment of *religion*, but rather some other phenomenon. If, for instance, some scholar were to demonstrate a convincing account that theism is essence of religion, then any justificatory account of the special status of religion would have to explain why belief in God merits special constitutional treatment.

The importance of justifying the special status of religion can also provide one basis for evaluating the merits of mechanisms for determining what counts as religion. In Chapter 1, I argue that non-monothetic approaches offer less clarity for determining what counts as religion, and they are less useful, therefore, for justifications of special constitutional status of religion. A polythetic approach, for instance, that uses statistical analysis of overlapping characteristics to establish a category could not focus a justificatory account of the special status of religion on a few relevant features. Analogical approaches, which frequently lack even a mechanism for explaining when overlap indicates common membership in a category, could not focus a justificatory account on *any* list of features, large or small. For some scholars, this lack of utility for justificatory considerations is a significant drawback. Timothy Macklem, for example, offers a sharp critique of what he terms "semantic approaches"[305], which only describe various accounts of religion, without considering the normative account of the purpose of

---

[305] Macklem's primary interlocutor on this point is Kent Greenawalt.

religious freedom within a given constitutional scheme. Such semantic accounts may generate a wide variety of possible meanings of the term religion, and Macklem claims that without a definition of religion, this variety of possible meanings can neither indicate an underlying order of the concept nor provide a clear link to a justificatory account of the special status of religion.[306] For Macklem, then, the importance of a normative account of the role of religion in a particular constitutional scheme not only provides a reason to say what counts as religion, but it also provides a reason to prefer some mechanisms for saying what counts – to others. Monothetic approaches are preferable precisely because they can support a normative account of the special constitutional status of religion.

Both Macklem on the one hand and Eisgruber and Sager on the other see efforts to define religon as closely related to efforts to justify its special constitutional treatment. Macklem believes that justices cannot develop a non-arbitrary method for determining what counts as religion without developing a definition that explains its special constitutional treatment, and he believes he can provide this sort of definition of religion., Eisgruber and Sager, on the other hand, believe that there is no possible account of religion that can justify its special treatment under the constitution, and thus they oppose its special constitutional treatment. Chapter 3 of this work addresses efforts to justify the special constitutional treatment of religion; for the purposes of this chapter, it is only

---

[306] Macklem here parallels Timothy Fitzgerald's critique of family resemblance approaches to understanding religion: both scholars suggest that a family resemblance approach projects a coherent meaning onto a set of irreducibly diverse usages of the term religion. See Chapter I, section II.C above.

necessary to note that the justificatory considerations provide a significant additional motivation for judges and legal scholars to determine what counts as religion.

## C. Political Considerations

Some scholars[307] and some iterations of the Supreme Court[308] claim that the Court can[309] and should play a unique political role of establishing constitutional protections for some types of "discrete and insular minorities".[310] Proponents of this goal usually include non-majority religions among those groups most in need of Court protections, and most of these proponents see a rigorous application of both the free exercise clause and the establishment clause as a means to promote this goal. In some cases, however, a determination of religious status in itself may offer substantial protection to some groups. New religious movements in America and elsewhere often meet with strong resistance from both existing religious groups and non-religious people, and this resistance sometimes takes violent form.[311] One illustrative example of this sort of resistance is the Anti-Cult Movement (ACM) of the 1970s and 1980s, which sociologists and religious

---

[307] See, for instance, Robert A. Dahl, "Decision-Making in a Democracy: The Role of the Supreme Court as a National Policy Maker, 6 *Journal of Public Law*, v. 6 n. 279 (1957).

[308] See *United States v. Carolene Products Co*., 304 US 144 (1938), footnote 4. The Court here indicates that it may employ "more searching judicial inquiry" in reviewing legislation that targets "discrete and insular minorities." Justice Stone arguably framed this role for the Court in political terms, arguing that the court's strict scrutiny is activated because "prejudice against discrete and insular minorities may be a social condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."

[309] Other scholars dispute the Court's capacity to effect political change. See Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change*, 2nd Edition, (Chicago: University of Chicago Press, 2008).

[310] I do not take up a direct discussion of this proposed political purpose for the judiciary here; I only intend to note that in some cases, a determination of religious status may promote the political goal of protecting disfavored minorities.

[311] Consider, for instance, the death of Joseph Smith in 1843 at the hands of an anti-Mormon mob.

studies scholars study as one example of a loosely affiliated network of opponents to new religious movements who occasionally employed violence to dissuade new members from either joining or remaining in these movements.[312] One technique employed by some members of the Anti-Cult movement was "deprogramming", which involved kidnapping and detaining new members of movements that the ACM targeted, for periods of a few days up to several weeks.[313] In the words of one of its foremost practitioners, Ted Patrick, deprogramming: "may be said to involve kidnapping at the very least, quite often assault and battery, almost invariably conspiracy to commit a crime, and illegal restraint."[314] Members of the anti-cult movement often justified these techniques by claiming that new religious movements are not religions, but are in fact cults; the ACM also used this claim to de-legitimize new religious movements more generally. A court determination of religious status, therefore, offers at least two sorts of protection to members of new religious movements. First, a determination of religious status activates the protections of the first amendment; a convert to a new religious movement whom deprogrammers target may raise a free exercise challenge to resist deprogramming once the movement is determined by a court to be a religion.[315] Second, a determination of religious status lends the imprimatur of legal authority to new

---

[312] See David Bromley and Anson Shupe, *The New Vigilantes: Anti-Cultists, Deprogrammers and the New Religions.* Beverly Hills: SAGE 1980*;* Anson Shupe and Susan E. Darnell, *Agents of Discord: Deprogramming, Pseudoscience, and the American Anticult Movement*, (Transaction, New Brunswick, 2006).

[313] John LeMoult, "Deprogramming Members of Religious Sects" 46 Fordham L. Rev. 599 (1978). LeMoult notes that deprogramming was rarely challenged in court because it was nearly always pursued at the behest of a relative, usually a parent, of the member of a new religious movement.

[314] Ted Patrick, with Tom Dulack, *Let Our Children Go!* (1976).

[315] See LeMoult, supra n. 74. Targets of deprogramming have also charged their captors with kidnapping, assault, and illegal imprisonment.

religious movements. Arguably, then, if Courts have a political function of protecting disfavored minorities, then the protection of new religious movements stands as an additional reason for courts to determine what counts as religion.

## II. Avoidance Strategies

In Part I of this Chapter, I presented several arguments in support of the claim that courts must make determinations of religious status. This claim is not uncontested, however, as several scholars have proposed strategies for avoiding these determinations. In part II, I review five strategies for obviating, or at least minimizing the need for, threshold determinations: 1) Deference to a claimant's own determination of religious status, 2) Sincerity tests 3) Collapsing the protections of the free exercise clause into the freedom of speech and the freedom of association, 4) Collapsing the protections of the free exercise clause into robust judicial defense of multicultural rights and 5) Adopting a stance of strict neutrality with regard to religion.

There are several reasons that courts might wish to avoid determinations for religious status, despite the importance of threshold determinations, a need to justify the special constitutional status of religion, and the political importance of protecting non-majoritarian religions. First, some scholars dispute the claim that the special constitutional status of religion requires justification.[316] Similarly, many scholars dispute the claim that courts should play a political role in protecting "discrete and insular minorities."[317] The primary reason that scholars endorse avoidance strategies, however, is that determinations of religious status are frequently laborious, and they are rarely

---

[316] I review these arguments in Part III of Chapter 3.
[317] See Gerald N. Rosenberg, *The Hollow Hope*, supra n. 27.

indisputable. Any effort courts expend on determining whether a claim is, in fact, religious is directed away from any weighing of the merits of the case. Moreover, religion clause jurisprudence, as I shall show in Part *III* of this chapter, does not provide a consistent mechanism for determining religious status, so an avoidance strategy aims to disentangle judges from a particularly contentious and unproductive line of argument.

I conclude, however, that judges cannot avoid determinations of religious status. The proposed alternatives involve judges in equally laborious determinations, offer imperfect substitutes for religion, and/or simply fail to obviate threshold determinations.

## A. Deference to personal choice

First, some scholars have proposed deferring to a claimant's own determination of religious status as an effective strategy for obviating threshold determinations of religious status. Such a strategy could be premised on a nominalist theory of religion: if the term "religion" has no consistent meaning, then all uses of the term are correct, and all claims to religious status must be admissible. A strategy of deference to a claimant's self-determination of religious status might alternatively be premised on a theory that judicial determinations of religious status are not justifiable. Gail Merel, for instance, argues that the underlying principle of both religion clauses is a protection of individual choice in matters of religion, and she therefore concludes that the religion clauses "require an expansive and highly subjective definitional approach to religion."[318] Merel

---

[318] Gail Merel, "The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment," *University of Chicago Law Review*, 45 no. 4 (1978): 829. Merel's claim that the protection of individual choice is the underlying principle of the religion clauses is far from uncontested. In addition, I dispute her characterization of her own approach as definitional: deference to an individual

acknowledges that self-definition approach might seem both "judicially illimitable" and "practically unmanageable", but she concludes that such an "expansive reading" of the term religion is preferable to "a formula that would permit the Court to prescribe the parameters of religious faith."[319] Merel's justification for judicial deference to individual determinations of religious status is distinct from that of the nominalist: she does not preclude the possibility of a definition of religion, but instead notes that any judicial effort to set "parameters" for the definition of religion amounts to an establishment of religion.

Merel notes that the primary drawback to her proposed deference to self-determination of religious status is that it would likely result in an increase in free exercise claims. Kent Greenawalt highlights an additional problem with a self-definition approach, suggesting that it implies nominalism, and that nominalism cannot provide a justification for the special constitutional protection of religion:

> "Another way courts could minimize their involvement would be to accept as dispositive, or give great weight to, an individual's own honest determination whether her practice is religious or not. But protection of religious exercise should not depend on idiosyncratic views of what constitutes religion. If two members of a group that takes a forbidden drug share opinions about ultimate reality and the place of drugs in human life, but, having taken different courses about religion, disagree over whether their use is religious, the amount of legal protection they receive should not vary."[320]

---

claimant's own determination of religious status does not amount to a collection of necessary and sufficient criteria for religiosity.

[319] Ibid, 831-832. Merel qualifies this proposed deference to individual claimant's determinations of religious status by adding a sincerity test to her approach. I discuss sincerity tests below in section 1.b.

[320] Greenawalt, *Religion and the Constitution, Volume I*, 136. Greenawalt's use of the modifier "honest" here suggests that he's coupling self-determination with a sincerity test.

Greenawalt's critique here certainly applies to the nominalist's justification of judicial deference to individual self-determination of religious status. A nominalist could accept the conclusion that Greenawalt's two drug-takers should receive different levels of legal protection, because the nominalist would claim that neither membership in a group nor "opinions about ultimate reality and the place of drugs in human life" are determinative of religious status. Rather, the nominalist claims that the *only* factor that determines religion status is use of the term religion, and Greenawalt's two drug-takers are in fact distinct in this critical respect. Greenawalt's implication is that the nominalist cannot provide a *satisfactory* justification for this distinct treatment, and in this he is correct: a nominalist can only say that all uses of the term religion are correct, and therefore cannot explain why religious claims merit special treatment.[321] Merel's approach, however, is not premised on the nominalist's claim that there can be no definition of religion; rather, she claims that a judicial imposition of "parameters" for a definition of religion constitutes an establishment of religion. Greenawalt's concern about justification does not apply to her position with the same force that it indicts the nominalist's: Merel's approach does not preclude a satisfactory justification for special treatment of religion; it merely precludes the invocation of such a justification in court.[322]

## B. Sincerity Tests

---

[321] I consider the justificatory dimensions of definition of religion more fully in section I.B below and, especially, in Chapter 3.

[322] Such a solution may not, however, be satisfactory. Arguably, Merel's proposal could work if there were a common understanding of the meaning of religion. A general consensus on the meaning of religion that also explains its special status might sufficiently justify its special treatment without requiring a judicial determination. I contend below and in Chapter 1, however, that no such general consensus exists.

Many scholars and judges alike propose a sincerity test as an important qualification to a pure self-determination model. In many cases, a sincerity test effectively replaces a determination of religious status, because courts may simply deny all insincere claims of religious status. One plausible extension of this theory is for courts to conversely accept all *sincere* claims of religious status as religious; such a strategy would effectively replace determinations of religious status for all free exercise cases. The Supreme Court in *U.S. v. Ballard* premised its validation of a lower court's use of a sincerity test on the severability of determinations about the content of religious beliefs and determinations about the sincerity of believers, especially the leaders of a purportedly religious movement.[323] Subsequently, courts have used sincerity tests to reject claims to religious status in many cases, and courts have looked to all of the following as evidence of insincerity: "goofy nonsense" and mockery of other religious songs and catechisms[324],

---

[323] *US v Ballard*, 322 U.S. 78 (1944). The majority in *Ballard* concluded that determinations regarding the truth of religious claims are beyond the purview of courts: "Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs." at 86. However, the Court remanded the case and did not preclude determinations regarding the sincerity of the Ballards' beliefs.

[324] *US v. Kuch*, 288 F. Supp. 439 (1968) at 444. Judge Gesell questioned the sincerity of adherents to the Neo-American Church on these grounds: "Reading the so-called 'Catechism and Handbook' of the Church containing the pronouncements of the Chief Boo Hoo, one gains the inescapable impression that the membership is mocking established institutions, playing with words and totally irreverent in any sense of the term. Each member carries a 'martyrdom record' to reflect his arrests. The Church symbol is a three-eyed toad. Its bulletin is the 'Divine Toad Sweat.' The Church key is, of course, the bottle opener. The official songs are 'Puff, the Magic Dragon' and 'Row, Row, Row Your Boat.' In short, the 'Catechism and Handbook' is full of goofy nonsense, contradictions, and irreverent expressions. There is a conscious effort to assert in passing the attributes of religion but obviously only for tactical purposes.' Here the court takes the apparent lack of substance of the Neo-American church's beliefs as evidence of mockery, and takes mockery as evidence of insincerity. In *Theriault v. Silber,* 453 F.Supp. 254 (1978), Judge Wood notes that the Church of the New Song's "one attempt at a paschal type feast produced a tongue-in-cheek request for prison authorities to supply

the presence of a clear ulterior motive for members of a purportedly religious movement[325] - especially if claimants previously pursued the ulterior motive without reference to religious beliefs[326], the absence of any institutional efforts to establish conformity of belief[327], an individual's failure to abide by standards of conduct that he/she professes[328] a focus on politics rather than theology[329], and the "megalomania" of

---

steak and wine." He concludes that the "tongue-in-cheek" request is proof of the believers' insincerity.

[325] In *Kuch*, supra n. 41, Judge Gesell argued that recreational drug use, not religion, was the goal of most members of the Neo-American church: "It is clear that the desire to use drugs and to enjoy drugs for their own sake, regardless of religious experience, is the coagulant of this organization and the reason for its existence." In *Theriault*, Supra n. 42, Judge Wood claimed that the goal of the Church of the New Song was not religious, but rather the resistance to prison discipline: "Rather than urging upon its followers any particular theology or philosophy of life, the Church of the New Song appears to encourage a relatively non-structured and free-form, do-as-you-please philosophy, the sole purpose of which is to cause or encourage disruption of established prison discipline for the sake of disruption. Disruption of and/or problems for prison authorities is not the *result* of this so-called religion; it is rather the underlying *purpose* of it."

[326] In *Sherr v. Northport-East Northport U. Free Sch. D.*, 672 F. Supp. 81 (E.D.N.Y. 1987), Judge Wexler used a family's previous, non-religious application for exemption from school vaccinations for an older son as evidence that the claim for exemptions for a younger son on religious grounds was not sincere.

[327] In *Kuch*, supra n. 42, Judge Gesell argued that institutional failure to enforce conformity of belief attenuates the link between institutional membership and personal belief: "The name of the Church is at the top of the seal and across the bottom is the Church motto: 'Victory over Horseshit!'. The Court finds this helpful in declining to rule that the Church is a religion within the meaning of the First Amendment. Obviously the structure of this so-called Church is such that mere membership in it or participation in its affairs does not constitute proof of the beliefs of any member, including Kuch. In short, she has totally failed in her burden to establish her alleged religious beliefs, an essential premise to any serious consideration of her motions to dismiss."

[328] In *Dobkin v. District of Columbia*, 194 A. 2d 657 - DC: Court of Appeals (1963), the court dismissed a Jewish claimant's argument that a previous trial violated his free exercise rights because it continued after sundown on a Friday. Judge Clayton cited Dobkin's own apparent hypocrisy in dismissing this claim: "But here, inquiring into the situation, the trial court learned from appellant that he actually went to his office and worked on Saturdays, and was justified in concluding that there was no valid religious basis for putting the trial over to another day." The court here does not explicitly invoke a sincerity test, though its implicit operation is evident.

a movement's founder.[330] At first glance, then, a sincerity test does appear to obviate at least some threshold determinations of religious status, and courts could in theory adopt a posture of accepting all sincere claims to religious status in order to avoid threshold determinations of religious status altogether.

However, both the concept and execution of sincerity tests leave much wanting. At best, a sincerity test can replace a threshold determination of religion with a sincerity determination, but, as evidenced by the complex list of considerations above, it is far from clear that this exchange simplifies the judge's work. Sincerity determinations require examining a claimant's state of mind, and such examinations are rarely straightforward. Moreover the sincerity considerations listed above are subject to a number of flaws. Justice Douglas noted in *Ballard* that a religious leader's insincerity does not invalidate the beliefs of their followers, but several of the judicial determinations cited above, including those in *Ballard*, take a leader's insincerity as evidence of the

---

[329] In Theriault, supra n. 42, Judge Wood claimed that the Church of the New Song's primarily political focus served as evidence of its founder's insincerity: "The exclusively political and non-religious nature of the doctrine of the 'Church of the New Song' as that doctrine has developed in the writings of the petitioner over the past three years, together with the violent and raucous tone of its services at the Atlanta Penitentiary, indicate that the 'Church' has totally failed the 'trial run' test which it received in the Northern District of Georgia three years ago. The professed belief of Mr. Theriault that he is the second Messiah (Paratestament, Theriault, Chap. 7, V.1-114) appears to this Court to be insincere and, like the rest of the actions of the petitioner, are 'essentially political, sociological and philosophical'."

[330] In *Theriault*, supra n. 41, Judge Wood notes Theriault's proclamation of his own Messiah-hood before noting that this megalomania renders his statement non-religious: "The professed views of Mr. Theriault that he 'would have established a new World order' with Harry W. Theriault as the head of the Order (see generally Paratestament, Theriault) are, in the opinion of the Court, more closely akin to the megalomania of Adolph Hitler and the Nazis or Charles Manson and his 'family' than any 'belief . . . that `occupies a place' parallel to that filled by the orthodox belief in God'." One wonders what Judge Wood would make of Jesus' claims to be the Son of Man and his promise of a heavenly kingdom.

insincerity of all adherents.[331] Kent Greenawalt counsels that a "sensitive evaluator" of sincerity claims should also take into account both the possibility that a claimant's own beliefs may diverge from those other adherents and the possibility that a claimant's sincerity is focused on practices rather than propositions.[332] This wise counsel nevertheless conflicts with judicial determinations that either a lack of institutional discipline or the inconsistency between a claimant's purported beliefs and his/her actions constitute insincerity.

At worst, judges blur the distinction between sincerity tests and determinations of religious status and thus use sincerity as a cover for what is, in fact, a determination of religious status. In some cases, judges have used the absence of a "belief in a Supreme Being", or religious activities or rituals as evidence that a claim to religious belief is insincere.[333] In others, judges use a group's lengthy and recognizable history as a

---

[331] In his dissent in *Ballard*, Justice Jackson acknowledges this point, noting that even a fraudulent religious leader may provide some spiritual comfort to his followers. Supra n. 40 at 94: "If the members of the sect get comfort from the celestial guidance of their 'Saint Germain,' however doubtful it seems to me, it is hard to say that they do not get what they pay for." Jonathan Weiss, in his commentary on the *Ballard* case, goes farther in noting that sincere belief is not always taken as a requirement for honesty, noting that doubt does not always disqualify priests from service. Moreover, he thinks courts err if they believe that proof of a religious leader's insincerity invalidates their follower's experiences, noting that "In Poland, a "Messiah" recanted under Catholic pressure, and some of his followers still kept faith." Jonathan Weiss, "Privilege, Posture and Protection: Religion" in the Law", Yale Law Journal V. 73, No. 5, (March 1964), p 600.

[332] Greenawalt, supra n. 4, 121.

[333] US v. Kuch, supra n. 41, at 443: "What is lacking in the proofs received as to the Neo-American Church is any solid evidence of a belief in a supreme being, a religious discipline, a ritual, or tenets to guide one's daily existence. It is clear that the desire to use drugs and to enjoy drugs for their own sake, regardless of religious experience, is the coagulant of this organization and the reason for its existence." Here, the court presumes that recreational drug use is the primary motivation for adherents of the Neo-American church precisely because that church lacks some elements of a definition of religion.

religious organization to aid their determinations of a claimant's sincerity.[334] Moreover, it is difficult to see how Judge Gesell in *Kuch* could determine that the Neo-American Church's liturgy is "goofy nonsense" without a prior determination of what counts as religion. Judges may defend the use of tests based on belief in a supreme being, historical prominence, or goofiness to determine religious status, but they should not elide the distinction between a sincerity test and a determination of religious status. Finally, the core principle of a sincerity test is the incompatibility of insincerity, and perhaps even partial sincerity, with religious belief. Some religious studies scholars claim that insincerity may in fact play a crucial role in religious culture.[335] It is conceivable that insincerity or incomplete sincerity might play a role as an early stage in a religious believer's life, so a presumption of the incompatibility of religious belief and insincerity therefore goes too far.

### C. Collapse the free exercise clause into free speech and freedom of association

Because courts sometimes note the substantial overlap between the free exercise of religion on the one hand and the freedom of speech and the freedom of association on the other, some legal scholars propose treating all free exercise claims as either free speech claims or freedom of association claims. Such an approach would obviate threshold determinations of religious status since no such determination would be required to activate the protections of the free speech clause or the freedom of

---

[334] In *Wisconsin v. Yoder*, 406 US 205 (1972) at 235, the Court saw the long and prominent history of the Amish church as strong evidence of the sincerity of its believers: "Aided by a history of three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society, the Amish in this case have convincingly demonstrated the sincerity of their religious beliefs."

[335] See David Chidester, *Authentic Fakes: Religion in American Popular Culture*, (Berkeley, University of California Press, 2005).

association. Such an approach would also obviate difficult questions regarding the justifications for special treatment of religion because non-religious speech and non-religious associations also receive constitutional protections under the jurisprudence of free speech and freedom of association.[336] Courts frequently resolve claims to religious exemptions by instead relying on free speech clause jurisprudence[337], and in some cases the Supreme Court has explicitly acknowledged the substantial overlap among the first amendment clauses.[338] In a seminal article[339], William Marshall developed a proposal to adjudicate free exercise claims through these other venues of first amendment jurisprudence. Marshall relies on *Widmar v. Vincent*, a case in which the Court used the free speech clause to overturn a public university's decision to deny a religious student

---

[336] Some judges and legal scholars contend that extant legal concepts of religion cannot answer these justificatory questions, and that free exercise exemptions may be unjustifiable and/or unconstitutional. In *Welsh v. US*, 398 US 333 (1970) at 356, Justice Harlan argued that any judicial effort to create exemptions only for religious claimants would run afoul of the establishment clause: "However, having chosen to exempt, [Congress] cannot draw the line between theistic or nontheistic religious beliefs on the one hand and secular beliefs on the other. Any such distinctions are not, in my view, compatible with the Establishment Clause of the First Amendment." In other words, Harlan argues that a reading of the free exercise clause that grants protections beyond those of the free speech and freedom of association raises establishment clause concerns. William Marshall's proposal for adjudicating free exercise claims as free speech claims rests in part on Harlan's logic: "whether an activity is protected by the first amendment should not turn on its being construed as religious or secular. Claims based on religion are not entitled to judicially created exemptions from laws of general applicability unless such exemptions are available to those advancing manifestations of secular ideas as well. This approach would require that no more stringent protection be allowed free exercise claims than would be granted to comparable secular activity." William Marshall, "Solving the Free Exercise Dilemma: Free Exercise as Expression." 67 *Minnesota Law Review*, v. 67, 545 (1982-1983) at 547.

[337] Perhaps most notably in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943).

[338] In *Widmar v. Vincent*, 454 US 263 (1981), the Court described both religious worship and discussion as "forms of speech and association protected by the First Amendment."

[339] Marshall, "Solving the Free Exercise Dilemma", supra n. 54.

group access to university facilities to conduct prayer meetings, and Marshall therefore concludes that the free speech clause can encompass most free exercise claims:

> "The implications of *Widmar* are potentially significant. Because few activities are more profoundly religious than prayer, *Widmar* suggests that there is no core religious activity exclusively protected by the free exercise clause…. After *Widmar*, religious speech is speech."[340]

Marshall concedes that his proposal would exclude one set of free exercise claims from constitutional protections: "the only aspect of religious conscience not covered under the free expression mantle is conscience infringed by statutes of general applicability that are not directed at affecting any communicative beliefs."[341] However, Marshall argues that these claims for exemptions from laws of general applicability raise establishment clause concerns precisely because they are not available to non-religious citizens, and he therefore concludes that Courts should not enforce them.

At first glance, then, Marshall's proposal provides an attractive mechanism for obviating determinations of what counts as religion. If the only free exercise claims that are not cognizable under the free speech clause are unconstitutional, then federal courts may simply protect all claims of conscience without making a threshold determination regarding religious status. However, as Justice White notes in his dissent in *Welsh v. U.S.,* the text of the first amendment itself suggests that the free exercise clause and the free speech clause do not fully overlap:

> "It cannot be ignored that the First Amendment itself contains a religious classification. The Amendment protects belief and speech, but as a general

---

[340] Ibid, 559-560.
[341] Ibid, 588. In the wake of *Hosanna Tabor Evangelical v EEOC* 132 US 694 (2012), Marshall would have to add the ministerial exception to the list of free exercise rights not also protected by the free speech clause.

> proposition, the free speech provisions stop short of immunizing conduct from official regulation. The Free Exercise Clause, however, has a deeper cut: it protects conduct as well as religious belief and speech."[342]

For White, then, the additional protections of the free exercise clause for behavior cannot be dismissed as unconstitutional because they are, in fact, in the constitution. Also, Marshall's proposal for collapsing the free exercise clause into the free speech clause does not apply to analysis of state constitutions, the establishment clause of the federal constitution, or federal or state statutes that address religion, so Marshall's strategy does not completely obviate the need for judicial determinations of religious status.[343] In addition, Marshall's solution relies on his claim that the only type of free exercise claim not protected by the free speech clause is a claim to an exemption from a generally applicable statute, but Courts have recently validated new types of free exercise claims, including the ministerial exception. These new dimensions of free exercise jurisprudence undermine Marshall's claim that the free speech clause can encompass nearly all free exercise claims.

### D. Collapse the free exercise clause into multi-cultural rights

Although the concept of multicultural rights is not established in the US Constitution, some scholars increasingly argue that a robust liberal political theory requires protections for non-majority cultures.[344] Thus, were such a theory to find expression in American law, it might serve as a useful alternative to the religion clauses. Multicultural rights provides an attractive proxy for protecting religious freedom for two

---

[342] Supra n. 54 at 372.
[343] Admittedly, Marshall's goal is not to eliminate threshold determinations regarding religion, but is instead to eliminate the discrepancy between constitutional treatment of religious claimants and constitutional treatment of non-religious claimants.
[344] See Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford, Oxford University Press, 1996).

primary reasons. First, theories of multicultural rights provide a robust justification for exemptions from general laws, and these exemptions are arguably the most contentious aspect of free exercise jurisprudence. A theory of multiculturalism that insists on the importance of preserving distinct cultural communities could justify exemptions as an indispensible mechanism for protecting these sorts of cultural identities. Second, multiculturalism overlaps substantially with religion: theorists of multiculturalism rely on religious minorities as the primary examples of cultures threatened by legal regimes insensitive to cultural differences. If multiculturalism can both provide the same level of legal protections to religion and protect the same range of claimants that the free exercise clause does, then it may be a viable proxy for the free exercise clause. Judges could then avoid determinations of what counts as religion by simply enforcing multicultural rights.

The primary drawback of a proposal to collapse the free exercise clause into a constitutional protection of multi-cultural rights is that there is no jurisprudential tradition of directly protecting multi-cultural rights in the United States.[345] [346] In fact, theorists of multiculturalism who look for examples of protections of multicultural rights in the United States invariably look to free exercise accommodations.[347] While it is unsurprising that multicultural rights overlaps substantially with religious freedom, the absence of any

---

[345] Michael Helfland has argued that while multiculturalism has played little role in American constitutional theory, it has proven influential in private arbitrations. See Michael Helfland, "Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders" *New York University Law Review*, v.86, n. 5 (Nov. 2011), 1231-1305.

[346] To some extent, the theory of multiculturalism has played a role in Canadian Law, as section 27 of the Canadian Charter of Rights and Freedoms specifically protects the "multicultural heritage of Canadians".

[347] See, for example, Sarah Song, "Multiculturalism" in *Stanford Encyclopedia of Philosophy*, (Edward N. Zalta ed., 2011), http://plato.stanford.edu/entries/multiculturalism/

independent constitutional foundation for multicultural rights in the American context renders multiculturalism a poor proxy for freedom of religion. Judges cannot use multiculturalism to obviate determinations of what counts as religion if the only constitutional foundation for multicultural rights is precisely the free exercise clause.

Even if proponents of multicultural rights were able to develop an independent constitutional basis for upholding those rights in American courts, it is not clear that multi-cultural rights could encompass all cases currently comprehended within free exercise clause jurisprudence. Some free exercise cases do clearly involve multi-cultural rights; in fact, theorists of multi-cultural rights have looked to cases such as *Goldman v. Weinberger*[348] as evidence that religion has served as a partial proxy for multicultural rights in American courts.[349] Other cases, such as *Employment Division v. Smith*[350] and *Wisconsin v. Yoder*[351] also arguably fit this model of using the free exercise clause as a partial proxy for the multicultural rights of Native Americans and the Amish, respectively. In other free exercise cases, however, it is more difficult to establish a link to multicultural rights. For instance, Adell Sherbert's[352] claims to exemptions from Saturday work were based on her membership in a Seventh-Day Adventist Church, but it is not immediately clear that her church membership also constitutes membership in a

---

[348] *Goldman v. Weinberger*, 475 U.S. 503 (1986).
[349] Song, "Multiculturalism", supra n. 65.
Theorists such as Song and Kymlika see religion as partially constitutive of culture, so a religion is only a partial proxy for multicultural rights since multicultural rights incorporate rights of religious freedom.
[350] 494 U.S. 872 (1990)
[351] 406 U.S. 205 (1972)
[352] *Sherbert v. Verner,* 374 U.S. 398 (1963).

distinct cultural group. Similarly, James Kaufman's[353] appeal to the free exercise clause to support his petition to create an atheist study group in prison was based on his identification as an atheist, but this identity is not immediately identifiable as cultural. While scholars may – and often do - develop theories of religion and culture that could explain how Sherbert and Kaufman's religious identities are also cultural, a scholar could not do so without developing an understanding of what religion is. Such work might make multicultural rights a viable jurisprudential substitute for freedom of religion, but it would make for a poor "avoidance strategy", as the concept of multicultural rights would *require* a mechanism for determining what counts as religion in order to encompass the wide variety of cases currently comprehended by the free exercise clause.

## E. Neutrality

Kent Greenawalt notes that a judicial policy of "strict neutrality" with regard to religion could, in theory, limit the frequency of threshold determinations.[354] According to Philip Kurland's classic formulation, a policy of neutrality can encompass both of the religion clauses:

> "The freedom and separation clauses should be read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion to either to confer a benefit or to impose a burden." [355]

For Greenawalt, such a policy would, if applied strictly, greatly reduce the Court's religion clause workload, and thus the need for threshold determinations, by prohibiting

---

[353] *Kaufman v. McCaughtry*, 419 F.3d 678 (2005).
[354] Greenawalt, *Religion and the Constitution v. 1*, 136.
[355] Philip Kurland, "Of Church and State and the Supreme Court," *University of Chicago Law Review*, Vol. 29, No. 1 (Autumn 1961), 97.

all accommodations of religious practices.[356] However, Greenawalt also notes that courts would still need to make threshold determinations for claims that religious classifications are the basis of discrimination.[357] Moreover, many of the tests the Court has devised for applying the establishment clause would rely on an implicit determination of religion even under a "strict neutrality" regime. It is far from clear, for instance, that the concept of a "secular purpose" can be articulated without reference to religion. In fact, strict neutrality requires an implicit concept of religion even as it bars classification on the basis of religion: courts can only reject religious classifications if they can identify them as such.[358] Finally, scholars have noted several reasons that a "strict neutrality" regime is both unworkable and undesirable for reasons other than its limited need for threshold determinations.[359]

## F. Assessment

Each of the five strategies of avoidance therefore suffers from significant flaws. Strict neutrality relies on implicit determinations of religious status, and does not

---

[356] Greenawalt, *Religion and the Constitution v. 1*, 136.
[357] See *Church of Lukumi Babalu Aye v. City of Hialeah,* 508 US 520 (1993).
[358] This does not contradict Greenawalt's claim that a policy of strict neutrality would minimize threshold determinations given that the court will see very few petitions for religious accommodations under a regime that specifically rejects those accommodations. (i.e. *Smith* without RFRA) Nevertheless, the Court's ruling in Smith requires an implicit, if noncontroversial, determination that Alfred Smith and Galen Black's use of peyote was, in fact, religious.
[359] See, for instance, Douglas Laycock, "Formal, Substantive, and Disaggregated Neutrality Towards Religion," *Depaul Law Review,* V. 39, 1990. Here Laycock argues that strict neutrality can produce outcomes intolerable to both separationists and religionists alike. Strict neutrality could endorse indirect state funding of religious schools, and it could also support laws that ban the practice of the mass. The Court has since partially adopted a neutrality regime and reached conclusions similar to Professor Laycock's two scenarios in *Employment Division v. Smith* and *Zelman v. Simmons-Harris* 536 US 639 (2002). It is worth noting that Layock's proposal of a "substantive neutrality" approach does not obviate threshold determinations of religious status, since he must first propose his own method for determining what counts as religion.

completely obviate the need for explicit threshold determinations. William Marshall's proposal to rely on the free speech clause is only realistically applicable to free exercise cases, and his proposal for even these cases may be obsolete in light of new dimensions of free exercise jurisprudence. An approach that relies on sincerity tests to qualify pure deference to individual determinations likely does not simplify a court's work, and relies on the under-examined and often confused concept of sincerity. Deference to a claimant's self-determination of religious status is unworkable if it is premised on nominalism, as such a model defies all efforts to develop a consistent meaning of the religion clauses. Deference to individual self-determination based on judicial non-competence, on the other hand, significantly elevates worries that a robust reading of free exercise clause may give rise to anarchy, thus realizing the *Reynolds* court's fear that "every citizen [would] become a law unto himself"[360]. This final strategy of deference to an individual self-determination is suspect not because of its merits but rather because of the parade of horribles that might follow from its adoption, so I will consider it again later. However, these significant flaws of the strategies of avoidance lend significant support to Greenawalt's claim that threshold determinations of religious status are necessary for Court's to adjudicate cases regarding claims to religious status. In summary, then, courts cannot avoid determining what counts as religion; the important remaining question, then, is: What standards, if any, guide and constrain those determinations?

---

[360] *US v. Reynolds*, 98 US 145 (1879)

## III. Approaches to Determining What Counts as Religion in Courts and Legal Scholarship

In Part II of Chapter I, I develop a taxonomy of approaches to determining what counts as religion in the field of religious studies. In this section, I borrow that taxonomy and apply it to the field of law. Before proceeding, I first consider a few criteria for evaluating mechanisms for determining what counts as religion in the field of law. In chapter 1, I employed three primary criteria: (1) a capacity to clearly distinguish between religious and non-religious phenomena, (2) a warrant for transcultural application of the term religion and (3) coherence with ordinary usage of the term religion. All three of these criteria are also relevant for an evaluation of legal mechanisms for determining what counts as religion. The first criterion, a capacity to clearly distinguish between religion and non-religion, is highly important in the legal context as well, since the absence of any clear criteria for religion may leave religion clause jurisprudence dependent on judicial preferences. Learned Hand once characterized his concerns about judicial power in saying: "For myself, it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not."[361] Hand used this line to support an argument that most of the bill of rights – including the religion clauses – are nonjusticiable, on the grounds that judges inevitably employ their own moral preferences to invalidate democratic decisions. Now, I do not intend to support this elevated level of judicial restraint, but if the concepts underlying the guarantees of the Constitution are not well defined, then Hand's allusion to Plato's Guardians is apt. If there are no clear constraints on judicial determinations of religion, then judges may simply rely on their own ideas of religion, and dismiss claims to

---

[361] Learned Hand, *The Bill of Rights: The Oliver Wendell Holmes Lectures*, (1958), 73-74.

religious status that they find unfamiliar. A clear and consistent mechanism for determining what counts as religion, then, is necessary for the religion clauses to have any consistent meaning at all.

Courts and scholars are also concerned about transcultural applicability of the term religion, as they insist that the protections of the first amendment are not available only to those who subscribe to traditional western religions.[362] Finally, courts and scholars frequently begin their efforts to determine what counts as religion by referring to dictionaries, indicating a concern with ordinary usage of the term.

Kent Greenawalt suggests a few additional criteria for evaluating the adequacy of a legal mechanism for determining what counts as religion.[363] First, he claims that an adequate approach must "encompass all the cases in which courts must decide whether or not something is religious". I note above in section I.A.2 of this chapter that threshold determinations of religion do not all take the same form, and Greenawalt here claims that an adequate approach must, therefore, comprehend the variety of threshold determinations that courts are likely to face. Second he claims that an adequate approach must be "unitary", that is, the same concept of religion must be used for both free exercise jurisprudence and establishment clause jurisprudence. I incorporate this criterion as a modification of the first criterion I list in the paragraph above: an adequate

---

[362] Eduardo Peñalver focuses on a similar concern about the potential for western bias in the use of the term religion. Peñalver claims that the origins of the modern discourse of religion in primarily Protestant academic circles may help to explain why non-Christian free exercise claims so rarely prevail in Court. See Peñalver, "Note: The Concept of Religion", *Yale Law Journal*, v. 107 no. 3 (Dec. 1997).

[363] Kent Greenawalt, "Religion as a Concept in Constitutional Law", supra n. 2. One of Greenawalt's criteria, linkage to modern nonlegal concepts of religion, overlaps substantially with my criterion of coherence with ordinary usage of the term.

mechanism for determining what counts as religion must distinguish religion from non-religion clearly *and* consistently. Finally, he notes the importance of consistency with Supreme Court jurisprudence; any concept of religion for constitutional purposes must, he insists, "fit reasonably well with what the Supreme Court has said about "defining" religion." Jesse Choper suggests an additional criterion: he claims that any mechanism for determining what counts as religion should not foreclose the possibility of future modifications to the concept of religion.[364]

Finally, the justificatory considerations I consider above in section I.B provide an additional metric for evaluating mechanisms for determining what counts as religion. As I note in that section, Timothy Macklem argues that any approach to determining what counts must provide a justification for the special protections and burdens for religion in a particular constitutional scheme. I will apply this justificatory evaluation of the various mechanisms for determining what counts as religion I develop in chapter 2 separately in chapter 3.

In summary, then, the criteria for adequacy I employ for the remainder of this section are: 1) A capacity to consistently and clearly distinguish religion from non-religion, 2) a warrant for transcultural application of religion, 3) correspondence with ordinary usage of the term religion 4) applicability to all types of cases courts are likely

---

[364] Jesse Choper, "Defining Religion in the First Amendment", *University of Illinois Law Review*, 1982, 579 (1982). For Choper, the importance of protecting new religious movements is paramount: "At the same time, the definition should be sufficiently capable of growth to include new, unusual, and nonconformist sects and beliefs as well as traditional ones."

to face 5) coherence with existing supreme court jurisprudence and 6) openness to modification. I argue that none of the proposed approaches adequately meets the criteria,

## A. Monothetic Approaches

In chapter I, I described monothetic approaches to defining religion as "the simplest definitional strategy for determining what counts as religion."[365] A monothetic approach is definitional because it identifies religion with some singular feature or set of necessary and sufficient features. I note above in chapter 1 that monothetic approaches fall into the categories of substantive definitions, which identify religion with some unique component, and functionalist definitions, which identify religion with some unique role or output. I further subdivide monothetic-substantive definitions into those that identify religion with a cognitive element (substantive-cognitive definitions), a practical element (substantive-practical definitions), or an affective element (substantive-affective definitions).

### *1. Substantive Monothetic Definitions of Religion in the Field of Law*

Judges and legal scholars tend to prefer monothetic approaches to determining what counts as religion, most often because monothetic definitions minimize the ambiguity in the concept of religion. As I noted above in Chapter 1, however, the clarity of a monothetic approach is both an advantage and a weakness: monothetic approaches frequently exclude phenomena commonly recognized as religious, and this weakness plagues legal efforts to determine what counts as religion. Of the legal scholars and judges who prefer monothetic definitions, most opt for substantive approaches; this group

---

[365] See infra, Ch. 1, part II sec. A.

in turn greatly prefers cognitive monothetic definitions to both affective and practical monothetic definitions.

### a. Substantive-Cognitive definitions of religion

In Chapter 1, I note that substantive cognitive definitions of religion can either identify religion with a unique *object* of knowledge, a unique *mode* of knowledge, or both. A theistic definition of religion, for instance, identifies religion with a unique object of knowledge, namely God or gods. A definition that focuses on faith, on the other hand, identifies religion with a unique mode of knowledge.

#### *i. Theism*

In its earliest free exercise cases, the Supreme Court employed a theistic definition of religion. The Court's use of a theistic definition is most prominent in *Davis v. Beason*[366], an 1890 case addressing a Mormon's claim for a free exercise exemption to federal laws proscribing polygamy: "The term "religion" has reference to one's view 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."[367] The Courts only occasionally ruled on free exercise cases before the incorporation debate, but did reassert the theistic formula in *US*

---

[366] Earlier in *Reynolds*, supra n. 78, the Court tasked itself with "ascertaining [the] meaning" of the term religion, but then refined this task by noting that "The precise point of the inquiry is, what is the religious freedom which has been guaranteed." The court therefore did not develop its own definition of religion in *Reynolds*, but cited with approval those of Madison and Jefferson, who both focus on the centrality of a creator to the concept of religion. The *Beason* Court, by contrast, directly defines religion.

[367] Supra n. 12. This definition appears at first glance to incorporate both cognitive and practical elements, but any claim that this defintion is therefore polythetic is specious. As I note in Chapter 1 in my analysis of Bruce Lincoln's attempt to define religion polythetically, a definition cannot be polythetic if one of its elements defines the others. In the Court's definition, the knowledge of the creator defines the duties imposed, thus the cognitive element of the definition is primary.

*v MacIntosh* in 1931.[368] [369] After the incorporation debate, however, courts abandoned a theistic definition of religion on the grounds that such an approach excludes phenomena commonly recognized as religious. In *Washington Ethical Society v District of Columbia*, an appellate court rejected an effort by the District of Columbia to deny a religious tax exemption to the non-theist Washington Ethical Society. The court's reasoning in part relied on the flexibility, even ambiguity of the concept of religion: "Reference to standard sources of definitions discloses that the terms "religion" and "religious" in ordinary usage are not rigid concepts. Indeed, the definitions in these standard works taken together are by no means free from ambiguity."[370] In *Torcaso v. Watkins*, the Supreme Court in a footnote explicitly recognized this rejection of a theistic definition: "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

---

368 *United States v. Macintosh*, 283 US 605 (1931). Justice Sutherland, before citing the Davis court's definition of religion, reprised its theistic form: "The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation."

369 For a review of state courts efforts to define religion, see Jeffrey 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 *Nortre Dame Law Review*, v. 83 n. 123 (2007).

370 Supra n. 8. The court did not, however, explicitly determine that the Washington Ethical Society was a religious organization, because it did not find this determination to be within the scope of the case: "The question before us now is not broadly whether petitioner is in an ecclesiastical sense a religious society or a church, but narrowly whether under this particular statute it is qualified for tax exemption."

others."[371] Legal scholars also widely recognize the exclusivism of a theistic definition as a significant limitation.[372]

In Chapter 1, I cite the ambiguity of the concept of God as an additional drawback to a theistic definition of religion. The clarity of a monothetic, definitional approach is, in theory, its greatest advantage, but a definition can only provide this clarity if the elements that comprise it are relatively unambiguous. I argued in Chapter 1 that the concept of God is notorious for eluding definitions, and that a theistic definition does not, therefore, provide a clear mechanism for distinguishing religion from non-religion. Courts have also implicitly recognized the ambiguity of the concept of God as a reason to set aside theistic definitions. The Court in *US v. Seeger*, for instance, premised its adoption of a functionalist definition of religion on its inability to define either 'God' or 'Supreme Being' substantively, reasoning that the vagueness of the concept of God renders a theistic definition a poor mechanism for determining what counts as religion.[373] The 1978

---

[371] *Torcaso v. Watkins*, 367 US 488 (1961).

[372] Peñalver, for instance, attributes the rejection of theism to an understanding of the increasing diversity of religions in the United States: "Our growing understanding of other cultures, however, demonstrated that many belief systems to which we would apply the word "religion" do not involve belief in God. Hence, theism was dropped as a necessary element of "religion". Supra n. 1 at 810.

[373] *United States v. Seeger*, 380 US 163 (1965) at 174-175. The Court related the ambiguity of the concept of God to the diversity of religions in the country: "Few would quarrel, we think, with the proposition that in no field of human endeavor has the tool of language proved so inadequate in the communication of ideas as it has in dealing with the fundamental questions of man's predicament in life, in death or in final judgment and retribution. This fact makes the task of discerning the intent of Congress in using the phrase "Supreme Being" a complex one. Nor is it made the easier by the richness and variety of spiritual life in our country. Over 250 sects inhabit our land. Some believe in a purely personal God, some in a supernatural deity; others think of religion as a way of life envisioning as its ultimate goal the day when all men can live together in perfect understanding and peace. There are those who think of God as the depth of our being; others, such as the Buddhists, strive for a state of lasting rest through self-denial and

Harvard Note similarly relied on the ambiguity of the concept of God in mid twentieth century theological work as one basis for its adoption of a functionalist approach to defining religion.[374] In brief, then, courts and legal scholars alike have long recognized both exclusivism and ambiguity as significant flaws of theistic definitions of religion, and theism has consequently played little role in contemporary debates over what should count as religion for constitutional purposes.

### *ii. Other substantive-cognitive definitions that focus on a unique object of knowledge*

Since courts largely abandoned theistic definitions of religion after World War II, scholars and judges have proposed several other substantive-cognitive definitions of religion. In most cases, the resulting definitions are more inclusive than theism, but I will show that they nevertheless frequently exclude some phenomena that scholars and laity alike recognize as religious. Moreover, some of these substantive-cognitive definitions rely on elements that are even more ambiguous than the concept of "God" that underlies theism, and thus they do not provide a clear mechanism for distinguishing religion from non-religion.

---

inner purification; in Hindu philosophy, the Supreme Being is the transcendental reality which is truth, knowledge and bliss."

[374] "Harvard Note", 91 *Harvard Law Review*, v. 91 1056 (1977-1978) at 1068: "Yet, even within Christianity –historically at the center of American religious experience- there is a respected and vocal group of theologians with radically new views of God, of church, and, therefore, of religion. These less traditional Christian theologies offer a redefinition of the content of Christianity. They thus dramatize the disutility of a content- based test for religion: as the available content-based criteria are undermined by the adduction of doctrinal counterexamples from within traditions popularly recognized as religious, the unique capacity of a subjective approach to defining religion becomes increasingly clear." I consider the Note's own functionalist approach below in section A.2.b of this chapter.

For instance, some courts have looked to belief in spiritual beings as alternative substantive-cognitive definitions of religion.[375] Belief in spiritual beings cannot serve as a clarifying definition if the content of the term "spiritual beings" is itself indeterminate, so this substantive-cognitive definition reproduces theism's ambiguity flaw.[376] Other courts have looked to the existential nature of religious questions as grounds for a substantive-cognitive definition of religion. The court in *Founding Church of Scientology v. US*, for example, contrasted an authentic religion with "a commercial enterprise, without the underlying theories of man's nature or his place in the Universe which characterize recognized religions."[377] Similarly, the court in *Malnak v. Yogi* argued that religions should in part be distinguished by a content-based test, noting that religious content addresses: "… the deeper and more imponderable questions — the meaning of life and death, man's role in the Universe, the proper moral code of right and wrong."[378] Judge Adams, writing for the majority in *Malnak*, contends that this existential approach to defining religion is consonant with the Supreme Court's rulings in *Seeger* and *Welsh*, so he claims that such a definition is consistent with existing jurisprudence. These existential definitions, however, suffer from a number of flaws. First, courts' efforts to identify existential content usually result in polythetic, rather than monothetic, definitions. Accordingly, these definitions can be separated into distinct elements: religions address questions about human nature, proper human conduct, humanity's

---

[375] As I shall contend below in section II.A.1.3, the courts in question treat belief in spiritual beings as a unique mode of belief rather than a unique object of knowledge. Nevertheless, a court could, in theory, build a substantive-cognitive definition of religion around either belief in spiritual beings as a unique object of knowledge.
[376] See Chapter I, II.A.1.a
[377] Supra n. 6 at 1160.
[378] Supra n. 12 at 208.

relationship to the universe, and the significance of death, to name just a few. I discuss polythetic definitions in detail below in II.B, but for the moment I note that polythetic definitions do not offer the clarity of a monothetic approach. Must, for instance, a purported "religion" address all of these existential topics, or merely three of the four, in order to count as religion? In addition, existential concepts are vague, so judges whose definitions rely on existential concepts apply them inconsistently.[379] Finally, the existential approach is widely over-inclusive, as many disciplines not commonly recognized as religions – notably including philosophy and anthropology - address these existential questions.[380]

One final substantive-cognitive definition of religion is Jesse Choper's proposal to treat belief in "extra-temporal consequences" as a constitutional definition of religion. This definition appears to avoid the ambiguity flaw, primarily because Choper can offer clear description of "belief in extra-temporal consequences" as "the belief .. [that] the effects of actions taken pursuant or contrary to the dictates of a person's beliefs extend in some meaningful way beyond his lifetime."[381] Choper finds this definition particularly

---

[379] Judge Adams, for instance, found that Transcendental Meditation's claim that Creative intelligence is the "basis of everything" constituted an "ultimate idea" while the MOVE organization's claim that "our religion is simply *the* way of life, as our religion in fact *is* life." did not. See *Africa v. Commonwealth*, 662 F. 2d 1025 (1981) at 1027. It is unclear what content of the concept "ultimate idea" allows Judge Adams to include a claim about the "basis of everything" while excluding a claim that "our religion in fact *is* life."

[380] Judges Adams recognizes this potential for over-inclusiveness, and accordingly adopts two additional "indicia" for determining what counts as religion. I address these additional indicia below in section II.C with analogical approaches. A simple monothetic approach relying on existential content to define religion could plausibly classify study of Sartre or career counseling as religious activities.

[381] Supra n. 81 at 599.

useful in justifying the special treatment of religion within a constitutional framework.[382] Choper also believes that this definition is sufficiently flexible to admit new phenomena into the category of religion while satisfactorily encompassing all phenomena commonly named religious.[383] Nevertheless, some commentators have claimed that Choper's definition is not sufficiently inclusive. Andrew Austin claims that his approach would exclude pantheistic religions and other religions that do not focus on a transcendent realm.[384] Kent Greenawalt claims that Choper's definition may exclude mundane practices within a religion that is otherwise marked by belief in extratemporal consequences.[385] Several scholars also critique Choper's definition on justificatory grounds; I will address their arguments in Chapter 3. Nevertheless, Choper's definition is, at the very least, less exclusive and more precise than a theistic definition, and he makes a plausible case for the definition's openness to including new phenomena within the ambit of religion.

#### *iii. Substantive-cognitive definitions that focus on a unique mode of belief*

Scholars and judges alike have developed definitions that focus on a mode of belief unique to religion, and the majority of these approaches in turn focus on religion as a non-rational mode of apprehending truths. For instance, the 2nd Circuit Court in *US v. Kauten* argued that: "Religious belief arises from a sense of the inadequacy of reason as a

---

[382] Ibid, 597-598. I disucss the justificatory implications of Choper's approach in Chapter 3, Part III sec. A.3.1.iii.
[383] Ibid, 599-601.
[384] Andrew Austin, "Faith and the Constitutional Definition of Religion" 22 *Cumberland Law Review*, v. 22 n, 1 (1991-1992), 32. I disucss Austin's own faith-based definition of religion below in section II.A.1.a.iii below.
[385] Greenawalt, supra n. 4 at 131. Greenawalt cites the example of the use of wine for communion, which he contends is a valued practice for many Christians even if they do not believe that non-use of wine will not result in extra-temporal penalties.

means of relating the individual to his fellow-men and to his universe."[386] Similarly, the Supreme Court in *US v. Ballard* relied on a characterization of religion as beyond the scrutiny of rational investigation: "Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others."[387] Andrew Austin offers a direct definition based in part on these judicial statements: "The earmark of a religious belief is that it is based upon faith. A belief based on faith is one that its adherent cannot base upon logical reasoning from a provable assumption."[388] Brian Leiter, in turn, claims that religious beliefs are characterized by their "insulation from evidence."[389] Both Leiter and Austin can cite *Ballard* and *Kauten* as evidence that their proposals cohere with existing jurisprudence, and both aim to offer specific concepts of the mode of knowledge unique to religion. In this effort, Leiter fails without a further description of what counts as either evidence or "ordinary standards of evidence", but Austin's concept of belief not "base[d] upon logical reasoning from a provable assumption" offers a more concrete defense against the ambiguity flaw. However, Austin's definition is arguably both under-inclusive and over-inclusive. On the one hand, theologians often claim to operate by logically arriving at their conclusions from provable assumptions, so Austin's definition

---

386 *United States v. Kauten*, 133 F. 2d 703 (1943). The Court did not, however, use this formula as a definition of religion, preferring to highlight it as one element of such a definition.

387 Supra n. 40 at 86.

388 Austin, supra n 101 at 36.

389 Leiter *Why Tolerate Religion*, (Princeton, Princeton University Press, 2013), at 19: "Religious beliefs, in virtue of being based on "faith," are insulated from ordinary standards of evidence and rational justification, the ones we employ in both common-sense and in science."

may exclude some patently religious arguments.[390] On the other hand, much human knowledge arguably proceeds without beginning from a "provable assumption," so Austin's definition cannot firmly exclude history, ethics, and art – to name only a few – from the category of religion.

Other approaches closely parallel Austin and Leiter in identifying religion with a particular mode of knowledge, but instead highlight a unique *source* for knowledge rather than a unique *methodology*. Abner Greene, for instance, grants that both religious and secular beliefs "might not be provable", he claims that religion is nevertheless unique because it alone derives its conclusions from an "extrahuman source of value". For Greene, the significance of the "extrahuman" criterion is that it renders religious claims absolutely inaccessible to outsiders. While some sorts of claims associated with religion – Greene cites the principle of loving one's neighbor as oneself – might be difficult for an outsider to learn and appreciate, the claims that directly rely on "extrahuman" authority are fundamentally inaccessible.[391] Now, Greene's distinction here appears to offer a precise meaning of "extrahuman" that limits ambiguity critiques, but the category is still vague. Greene's own examples of "extrahuman" authority suggest that only direct divine commands without further elaboration qualify as "extrahuman", and if this is the case, then his definition may simply be an elaboration on theism. If he intends to include more than merely divine command ethics, however, it is not clear why, for instance, the idealized will of the vanguard party might not constitute an extrahuman authority.

---

[390] Thomas Aquinas five proofs of the existence of God are the most notable example of this rational approach. *Summa Theologica*, I.1q2a3.
[391] Abner Greene, "The Political Balance of the Religion Clauses," 102 *Yale Law Journal*, v. 102, 1611 (1993), 1616-1620.

Finally, the standard of "extrahuman" authority excludes much that ordinary usage of the term religion includes, since many religious claims do not rely directly on divine commands or other nonhuman sources of reasoning.

Finally, the court in *Malnak v Yogi* considered comprehensiveness as a mode of knowledge unique to religion. In *Malnak v. Yogi*, for instance, the court cited comprehensiveness as its second "indicia" of religion, claiming that a comprehensive mode of knowledge is distinct because its advocates see it as a "ruling science". Judge Adams himself acknowledged, however, that non-religious forms of knowledge may share this feature, so he claims that comprehensiveness alone cannot define religion. [392]

### b. Other Substantive Definitions

In Chapter 1, I discuss two additional types of substantive monothetic approaches to defining religion: substantive-practical and substantive-affective. Substantive-practical definitions identify some type of activity as the essence of religion, while substantive-affective approaches identify some type of feeling or experience as the essence of religion.

#### *i. Substantive-Practical Definitions*

Courts and legal scholars frequently identify practical components of religion, but only rarely do they identify these practical components as part of the essence of religion. To my knowledge, no court or legal scholar has developed a definition of religion that relies entirely on practical components, though some have developed multi-factorial

---

[392] Supra n. 12 at 209. Nevertheless, Adams in his reasoning comes close to rendering comprehensiveness the essence of religion. Adams notes that non-religious institutions may aspire to present "complete" approaches to truth, and he further notes that they may then become religions in so doing: "Likewise, moral or patriotic views are not by themselves 'religious,' but if they are pressed as divine law or a part of a comprehensive belief-system that presents them as 'truth,' they might well rise to the religious level."

approaches that include practical elements among others. The court in *Malnak v. Yogi*, for instance, highlighted a number of potential "formal, external, or surface" indicators of religious status, including: "formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, [and] observation of holidays."[393] Judge Adams in *Malnak* relies on analogical reasoning to establish a link between established incidences of these "formal, external or surface" signs and the activities of groups whose religious status is contested[394], but I want to note here the difficulty with establishing a formal definition from any of these practical elements. As I note in Chapter 1, scholars face tremendous difficulty in trying to distinguish religious rituals and holidays from non-religious rituals and holidays. At first glance, belief in God or spiritual beings might seem to ground this distinction, but such an approach simply collapses the substantive-practical approach into a substantive-cognitive approach: if a *religious* holiday is simply a holiday celebrated with reference to God, then the unique cognitive content, not the unique practical content, serves to define religion. Without such a substantive-cognitive distinction, however, the work of distinguishing non-religious activities from religious activities becomes much more complex. Non-religious organizations develop hierarchies, celebrate holidays, and propagate their beliefs: members of political clubs, for instance, elects officer, observe inaugurations, and go door-to-door trying to persuade others to join their causes. Without a relevant distinction between the activities of a political club and those of a religious organization, the

---

[393] *Malnak v. Yogi*, supra n. 12 at 209.
[394] I consider analogical approaches to determining what counts as religion in legal literature below in section III.C.

practical components Judge Adams lists in *Malnak* cannot form the basis of a definition of religion.

Other proposals for practical-substantive definitions of religion highlight a unique connative structure for religious action rather than looking to the content of the action itself; in other words, these approaches highlight the manner in which religions move their adherents to action. Such an approach blends a substantive-practical approach with a substantive-affective approach since it looks in part to the motivations of an action to define religion. Brian Leiter, for example, argues that religions make demands upon their adherents that are uniquely "categorical: "that is, demands that must be satisfied, no matter what an individual's antecedent desires and no matter what incentives or disincentives the world offers up."[395] The Court in *US v. Kauten* similarly highlighted the categorical nature of religious demands, and further noted that adherence to categorical demands can result in self-sacrifice.[396] These connative definitions of religion, however, are limited by both under-inclusiveness and over-inclusiveness. Leiter qualifies his position by noting that "not … all beliefs commonly denominated 'religious' issue in such commands", conceding that many religious actions are not characterized by categorical demands and self-sacrificial action.[397] On the other hand, some non-religious moral systems are also characterized by categorical demands, most notably Kantian

---

[395] Supra n. 106 at 18.
[396] Supra n. 103 at 708: "[Religion] is a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets." Notably, this definition relies on the priority of the motivation over the action itself, and thereby comes close to an affective definition of religion.
[397] Leiter's definition incoroporates three distinct elements, thus he does not see this qualification as a flaw in his definition of religion. I address complex monothetic approaches below in section B.

ethics.[398] Unless categoricity and acceptance of self-sacrifice are refined so that they only apply to religious actors, they cannot not serve as adequate components of a monothetic-substantive definition of religion.

### *ii. Substantive-Affective Definitions*

Substantive-affective definitions offer a concept of religion that is not fully available to rational analysis, so they are uniquely unwieldy for legal analysis. Consequently, no legal scholar or court has included a purely affective component in a their definitions of religion. As I note in Chapter 1, scholars such as Otto and Eliade who identify religion with a unique feeling experienced only by insiders seek to shield religion from reductive analysis, so it is hardly surprising that judges, who require a rational means for determining what counts as religion, are reluctant to adopt substantive-affective definitions of religion. If Eliade and Otto's account of religion is accurate, then only a court that relied directly on its own religious experience could accurately determine what counts as religion, and such reliance on its own experience would raise significant establishment clause concerns.[399] Nevertheless, some scholars have used

---

[398] Leiter dismisses the impact of secular Kantian ethics, claiming that religions are much more likely to "give effect" to categorical demands: "Pure Kantian moral agents are few and far between, but those who conduct their lives in accord with the categoricity of the moral demands they recognize are overwhelmingly religious." This claim, it seems to me, requires a great deal more empirical evidence that Leiter's anecdotal claim that he only knows of a "few" true Kantians. To what extent do religious moral agents treat the demands of their religious system as categorical? What study design could measure such a claim? Should Leiter be able to demonstrate through a comprehensive study that religious actors are qualitatively distinct with regard to their adherence to categorical demands, he may well be able to offer a substantive-practical definition of religion. In the absence of such a study, however, the categorical nature of secular Kantian ethics inveighs against Leiter's claim that categorical moral demands are unique to religion.

[399] If judges were to rely on their own religious experience to either confirm or disconfirm a claimant's religiosity, they would thereby erect a national standard for religion that centered on judges' own personal experiences of religion.

substantive-affective characteristics as one component of their definitions. Brian Leiter, for instance, argues that one defining feature of religion is its capacity to offer existential consolation. Leiter initially explains this feature of religion in terms of the content of its beliefs; he notes that the beliefs of religion address questions of death and the significance of human life. In fact, however, it is the impact those beliefs have on the religious person that distinguishes them; for Leiter, religions render these facts explicable to the individual believer, and, accordingly, provide existential consolation.[400]

### 2. Functionalist Definitions

Since the Supreme Court's midcentury rejection of theism as a definition of religion, courts and scholars alike have experimented with functionalist approaches to defining religion. A functionalist approach, as I note in chapter 1, does not rely on a single essential feature of thought, practice or affect to define religion, but rather "a common outcome or purpose of practices, thoughts and affects in order to generate a definition of religion."[401] A functionalist definition of religion can therefore account for the blend of cognitive, affective and practical features characteristic of phenomena commonly recognized as religious without resorting to a multi-factorial approach. The chief defect of functionalist approaches, however, is their over-inclusiveness: functionalist approaches often cannot reasonably exclude any belief or practice from the category of religion, and thus they fail to distinguish religion from non-religion.

---

[400] Leiter, *Why Tolerate Religion?*, supra n. 106, Ch. 2
[401] See infra, Ch. 1 Part II Sec A.2

### a. Parallel Position

In *US v. Seeger*, the Supreme Court developed a functionalist approach to determining what counts as religion that it later confirmed in *Welsh v. US.*[402] The *Seeger* court, after rejecting monothetic-substantive definitions of religion, argued that: "A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition."[403] This "parallel position" test appears to prioritize cognitive content by focusing on beliefs, but otherwise does not limit the concept of religion at all. Functionalist definitions can exclude at least some phenomena by specifying the function common to all members of the category, but the *Seeger* and *Welsh* courts rely on the "place… filled by God" without clarifying what that role is. Because the Court leaves this aspect of God unspecified, a claimant could theoretically frame nearly any belief as holding a "parallel position" to that of God in the life of a believer. The court in *Welsh* nevertheless claimed that its approach excludes two groups from the category of religion: those "whose beliefs are not deeply held" and "those whose objection to war does not rest at all upon moral, ethical, or religious principle but instead rests solely upon considerations of policy, pragmatism, or expediency." The first exclusion suggests that

---

[402] Both cases dealt with statutory rather than constitutional understandings of the concept of religion, but the court gave no reasons to conclude that the statutory definition should diverge from the constitutional definition. In fact, Justice Harlan's concurrence in *Welsh* included his concern that the statute in question violated the establishment clause by protecting religious conscientious objectors without offering comparable protections for non-religious conscientious objectors, indicating that the Court's understanding of religion for the purposes of the statute has significant bearing on its understanding of religion in the constitution.

[403] *US v. Seeger*, supra n. 90 at 176.

the court is employing an unstated comprehensiveness criterion[404], while the second indicates that policy and pragmatism cannot occupy a position parallel to that of God in the life of a believer. However, without further explanation of what that role is, it is not clear why a commitment to, say, pragmatism or a policy goal cannot be functionally equivalent to the theist's commitment to God.

### b. Ultimate Concern

Other functionalist definitions offer more concrete understandings of the function of religion. A Note in the 1978 Harvard Law Review, for instance, developed an application of Paul Tillich's understanding of God as "ultimate concern" to the constitutional definition of religion.[405] The Note explains that concern, for Tillich, indicates an agent's motivations, and these motivations can be ranked in terms of importance. Sufficient examination of this ranking will reveal: "the underlying concern which gives meaning and orientation to a person's whole life," and this paramount, or ultimate, concern is, for Tillich, the essence of religion.[406] This functionalist definition therefore offers more specificity than the "parallel position" definition of *Seeger*; the role of God is to provide the controlling motivation to human lives. The Note's own logic confirms this specificity, since the ultimate concern approach: "rejects any belief which for the individual is subordinate or capable of compromise." However, the definition is generally open-ended, and many motivations not commonly counted as religious could qualify as an ultimate concern. Tillich himself acknowledges that any number of aesthetic, practical, or political interests might serve as an individual's ultimate concern,

---

[404] Perhaps that Court would contend its "parallel position" test implies this "deeply held" criterion, but it is not clear that all theists maintain "deeply held" beliefs.
[405] Supra n. 91.
[406] Ibid at 1067.

and an approach that relies on Tillich's formulation therefore cannot reasonably exclude *a priori* any motivation from the category of religion.[407] The "ultimate concern" standard is also under-inclusive, as much that is commonly counted as religious may not rise to the level of ultimate concern for at least some religious adherents. For example, while some religious adherents care deeply about liturgy, others do not, but few would claim that the Eucharist is not religious for those who are relatively indifferent to its form.

### c. Provides answers to religious questions

Finally, some functionalist definitions center on the types of questions that religions alone can answer. Douglas Laycock, for instance, once proposed defining religion for constitutional purposes as "any set of answers to religious questions, including the negative and skeptical answers of atheists, agnostics and secularists."[408] Laycock goes on to explain that the "fundamental religious question is: "What is the nature of God, and what does he/she want from us?" At first glance, then, Laycock's definition appears to be substantive-cognitive, as it centers on a particular concept, namely theism. However, Laycock's definition is distinct from theism, as is evidenced by his inclusion of non-theists within the category of religion. Laycock achieves this inclusiveness by blending a substantive-cognitive definition with a functionalist approach: he does not identify religion with a particular conceptual claim (the existence of God), but instead sees religion as a mechanism for generating a variety of claims about a particular topic. Layock's definition, then, is widely inclusive by design: he not only

---

[407] George Freeman notes that even egoism cannot be excluded from the category of religion if courts adopt an "ultimate concern" test. George Freeman, "The Misguided Search for the Constitutional Definition of Religion," *Georgetown Law Journal*, v. 71, 1519 (1982-1983), 1535-1536.

[408] Douglas Laycock, "Religious Liberty as Liberty," *Journal of Contemporary Legal Issues*, v. 7, 313 (1996), 326-327.

includes phenomena not commonly considered religious within the category; he also includes those, including atheists and secularists, who specifically reject the label of religion for their own positions. Moreover, his fusion of a functionalist definition with a substantive-cognitive definition raises Talal Asad's concern about the cognitive (and anti-practical) bias of western approaches to defining religion.[409]

### d. Assessment of functionalist approaches

Some scholars, including Laycock, argue that the broad-inclusiveness of functionalist definitions is necessary in order to ensure the equal treatment of traditional theists and nontheists, including atheists and secularists. For Laycock, inclusiveness is necessary to prevent the government's entry into a cultural conflict between theists and nontheists; he maintains that the government must remain neutral in all such conflicts.[410] Others have expressed similar concerns about the unequal treatment likely to result from a restrictive definition of religion. In his concurrence in *Seeger*, Justice Douglas argued that a more restrictive definition of religion would render the statute at issue in violation of both the Establishment clause and the Due Process Clause of the Fifth Amendment. Douglas saw a more inclusive reading of religion as the solution to these questions of constitutionality:

> "But it is, in my opinion, not a *tour de force* if we construe the words "Supreme Being" to include the cosmos, as well as an anthropomorphic entity. If it is a *tour de force* so to hold, it is no more so than other instances where we have gone to extremes to construe an Act of Congress to save it from demise on constitutional grounds."[411]

---

[409] Admittedly, the inclusiveness of Laycock's definition significantly mitigates this concern.
[410] Laycock, supra n. 125 at 326-327.
[411] Supra n. 90 at 188.

A functionalist approach, then, can seemingly obviate justificatory questions regarding the special constitutional treatment of religion by including a maximum range of phenomena within the category of religion. Religion is effectively rendered non-special without addressing those justificatory questions because nearly any perspective, activity or belief can be construed as religion within a functionalist scheme.

There are, however, several important criticisms of the inclusiveness of a functionalist scheme. First, several legal scholars have noted a strong correlation between the Court's limited adoption of a functionalist definition of religion in *Seeger* and *Welsh* and its more recent experiments with neutrality, especially after *Employment Division v. Smith*. Donald Beschle, for instance, claims that the inclusiveness of the functionalist defintions in *Seeger* and *Welsh* necessitated a retreat from the strict scrutiny standard for free exercise cases first used in *Sherbert v. Verner*.[412] For Beschle, the combination of a broad definition of religion and the strict scrutiny standard for free exercise cases raised the old fears of anarchy first articulated by the *Reynolds* Court: "To permit this would be

---

[412] Donald Beschle, "Does a Broad Free Exercise Right Require a Narrow Definition of Religion?" *Hastings Constitutional Law Quarterly*, v. 39, (2011-2012), 378: "The broad, imprecise formula for defining religion set forth in the Vietnam War-era draft cases" … created the possibility that the number of individuals who claimed the protection of the Free Exercise Clause would increase dramatically. Surely the clause could not have meant to grant any citizen the right to an exemption from any obligation he sincerely found offensive, so it should not be surprising that post-*Sherbert* decisions applied an unusually deferential version of 'strict scrutiny' to deny exemption while accepting the religious nature of the claim." The primary case that does not fit the trajectory that Beschle describes is *Wisconsin v. Yoder*, which was decided after *Seeger* and *Welsh*. It is worth noting, however, that the Court in *Yoder* cited the Amish's history as a "sharply identifiable and highly self-sufficient community for more than 200 years in this country". *Wisonsin v. Yoder* US 205 (1972) at 225. *Yoder* arguably fits Beschle's trajectory because the Court went out of its way to note that the Amish embody "Jefferson's ideal yeoman farmer", thus covertly rationalizing distinct treatment for the Amish on the one hand and groups such as ISKCON on the other. See *Heffron v. International Society for Krishna Consciousness*, 452 US 640 (1981).

to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." The Courts in *Seeger* and *Welsh* sought to "level up" the statutory exemptions for the quasi-religious and even the non-religious to the standard for religious conscientious objectors. However, if Beschle is correct, then the long-term effect of adopting a functionalist definition was in fact to "level down" the protections for religious claimants to the standard of non-religion.

Second, functionalism's inclusiveness limits its utility for efforts to distinguish religion from non-religion. I noted in Chapter 1[413] that a functionalist approach effectively renders all humans religious by counting nearly any perspective, belief or activity as potentially religious, even those who reject religion. A scheme that reads nearly all phenomena as potentially religious cannot distinguish the religious from the non-religious.

Now, advocates of functionalist definitions for constitutional purposes see this inability to distinguish religion from non-religion as an advantage because it obviates justificatory questions. I contend, however, that a satisfactory approach to saying what counts as religion should not evade the requirement to justify the special constitutional status of religion. A functionalist approach only obliquely addresses justificatory questions: it presumes that special constitutional treatment of religion narrowly defined is, in most cases, unjustifiable, and thus a functionalist approach provides a broader definition. A direct approach might also find that the special constitutional treatment of religion is unjustifiable, but it would do so explicitly. A direct approach to the

---

[413] See infra Ch. 1 II.A.2

justificatory questions has at least two advantages. First, it can propose a course of action based on its findings: should a proposed mechanism for saying what counts as religious provide no justification for its special constitutional treatment, then scholars can propose a modification of the constitutional protection of religion. Second, a direct approach is more democratic: when judges covertly determine that the special treatment of religion is not justifiable and modify their judgments of religion accordingly, they begin to embody Learned Hand's fear of judges as platonic guardians. Judges who diagnose and correct flaws in the constitutional scheme without directing the public's attention to their modifications effectively preclude the possibility of a democratic solution to constitutional flaws.

## B. Polythetic Approaches to Determining What Counts as Religion

### *1. True Polythetic Classification*

In Chapter 1, I outlined two broad versions of a polythetic approach to determining what counts as religion. Polythetic classification, as developed by philosophers of biology, relies on no single feature or set of features as necessary and sufficient conditions for membership in a class. Rather, a class is determined by a large number of features, and philosophers of biology establish membership in a class by looking to statistically significant overlap between the features of the proposed member and those of existing members of the established class.[414] On the other hand, some scholars of religion have adopted the term "polythetic classification" while using it in a different fashion. In Chapter 1, I review Bruce Lincoln's definition of religion, which incorporates four distinct features. Lincoln's definition treats each of its four features as

---

[414] See infra Ch. 1 II.B

individually necessary, but only the set of all four features is sufficient to establish membership in the category of religion.[415] I note elsewhere that Lincoln's approach is more properly understood as a complex monothetic definition, but I include it here to distinguish it from the simple monothetic definitions, which rely on a single criterion that is both necessary and sufficient to define religion. In brief, then, a truly polythetic approach uses a statistically significant overlap of features to establish membership in a category, while a complex monothetic approach identifies multiple necessary conditions for religion, while allowing that only the presence of all of those conditions is sufficient to establish membership in the class.

Neither Courts nor legal scholars have, to my knowledge, employed a truly polythetic approach to determining what counts as religion[416], and there are several reasons that courts are unlikely to do so in the future. First, polythetic classification is unwieldy. Biologists must identify dozens, even hundreds of characteristics to establish a classification because only a large number of traits can enable a determination of statistically significant overlap. Courts are unlikely to adopt a test that requires them to develop dozens of features of religions. Second, virtually no scholar of religion uses

---

[415] See infra Ch. 1 II.B

[416] George Freeman comes the closest to offering a truly polythetic approach. Supra n. 124 at 1553. He develops a list of eight features "common to most traditional Eastern and Western religions", while acknowledging that none of these features is either necessary or sufficient to establish religiosity. Freeman concludes, however, that there is no set mechanism for determining when the presence of any one of these features constitutes membership in the category of religion, so in this he falls short of a truly polythetic definition, since polythesis utilizes statistical significance to establish membership in the category. Similarly, Michael McConnell briefly extols the merits of a non-monothetic account in "The Problem of Singling Out Religion", *Depaul Law Review*, v. 50, 1 (2000), 24. McConnell does not, however, explain how judges could use a list of multiple criteria to admit new members to the category of religion, so his endorsement of polythetic classification is incomplete. I consider analogical approaches below in section C.

polythetic classification to establish the category of religion, so Courts cannot borrow a polythetic concept of religion from the field of religious studies, nor could they claim that a polythetic approach coheres with non-legal uses of the term religion.[417] Finally, existing jurisprudence regarding what counts as religion relies primarily on definitional approaches, so courts will likely be reluctant to use non-definitional approach to establish the category of religion.

However, polythetic approaches offer a few important merits, and should scholars of religion develop a truly polythetic approach to determining what counts as religion, courts should consider adopting it for constitutional purposes. First, a polythetic approach is open to modification: if several new members of a class all bear a feature not previously included in the class, then polythetic classification allows for the admission of that new feature into the class. Thus, a polythetic approach to classification not only allows the admission of new members; it also allows a modification to the class itself. Second, a polythetic approach provides a warrant for transcultural application of the term religion. Since a polythetic approach is non-definitional, it is not subject to the critique that scholars of religion impose a western framework on non-western data when they study non-western religions. Instead, polythetic classifications allows scholars to simply group a variety of phenomena based on the overlap of some characteristics, which are not necessarily determined by a prototypical western model. Finally, were a sufficient number of features of religion identified, a polythetic approach would provide a clear and relatively neutral mechanism for distinguishing religion from non-religion. In such a

---

[417] I here presume that most lay users of the term religion do not use statistical significance to warrant applications of the term to new potential members of the category religion.

system, a claimant's purported religion would either contain a statistically significant number of features from the category of religion, or it would not. The primary drawback to a system of polythetic classification for constitutional determinations of religious status, then, is the lack of any such list of features of religion.

### 2. Complex Monothetic Definitions

Complex monothetic definitions offer a number of advantages over both simple monothetic definitions and polythetic classification, and consequently some scholars have proposed complex monothetic definitions of religion for constitutional purposes. Complex monothetic definitions employ several necessary conditions to establish a category, so these approaches can narrow the over-inclusiveness that weakens simple monothetic approaches. Above in section II.A.1 I characterize Brian Leiter's criteria of comprehensiveness and categorical commands as over-inclusive, but his combination of the two criteria narrows the range of phenomena included within the term. Moreover, while complex monothetic definitions are somewhat more difficult to apply than simple monothetic definitions, they are far less unwieldy than a truly polythetic approach. True polythesis requires dozens of criteria, while most prominent proposals for complex monothetic defintions are limited to only a few necessary conditions; Leiter's definition, for example, uses only three criteria. The use of multiple criteria can also limit the western bias that troubles scholars such as Talal Asad: if scholars employ multiple criteria, then they are unlikely to rely exclusively upon cognitive concepts of religion.[418] Finally, a complex monothetic definition coheres with the apparent consensus in both

---

[418] However, complex monothetic definitions can still rely primarily on cognitive definitions. See my discussion of Bruce Lincoln's purportedly polythetic definition of religion in Chapter I  II.C. The adoption of multiple criteria only reduces the likelihood of reliance on cognitive concepts of religion.

legal scholarship and the academic study of religion that a simple monothetic definition of religion is not adequate to the variety of phenomena commonly included within the category of religion.

Despite these advantages, complex monothetic definitions suffer from a number of flaws that greatly limit their utility for constitutional purposes. First, while the multiple criteria of a complex monothetic defintion can narrow the broad inclusiveness of simple monothetic definitions of religion, a complex monothetic defintion is bound to every other flaw of its component criteria. If one of the conditions of a complex monothetic defintions is ambiguous or under-inclusive, the addition of further criteria will not amend these flaws. Brian Leiter, for example, proposes a complex monothetic definition consisting of three criteria: 1) categorical commands, 2) insulation from evidence and 3) a metaphysics of ultimate reality.[419] As I note above, all three criteria are arguably under-inclusive, and the latter two are ambiguous. Leiter's strategy of bindings these three criteria together into a complex monothetic definition does correct for the over-inclusiveness of his criteria, but it cannot correct for the flaws of ambiguity and under-inclusiveness. The addition of, for example, the "insulation from evidence" criterion to the "categorical commands" criterion does not make either less under-inclusive; rather, it makes the combined, complex definition more under-inclusive than either criterion would on its own. Polythetic approaches contrast sharply with complex monothetic definitions on this point, as a polythetic approach is not bound to any of the individual characteristics it uses to form a class. A potential member may join a class while lacking a particular

---

[419] Supra n. 106.

feature of the class, so the addition of further criteria does not render a polythetic approach under-inclusive.

Moreover, complex monothetic approaches leave little conceptual room for the possibility of modification. While polythetic approaches – and, as we shall see, analogoical approaches –incorporate a capacity for modifications to a category, scholars can only change a complex monothetic definition through a revision of the underlying concept. A polythetic approach never articulates a list of necessary and sufficient conditions for establishing a category, so the composition of that category can potentially be refined with the addition of new members to the category. A complex monothetic definition, however, can only be refined by either adding or deteleting necessary conditions, and such changes constitute a rupture with the previous version of the concept. For example, consider the claim that religion was formerly defined by theism. According to a monothetic approach, the concepts of religion and theism were identical until later additions to the concept of religion distinguished it from theism. In effect, then, adding criteria to a complex monothetic definition of a category (or creating a complex monothetic definition by adding a criterion to a simple monothetic definition) creates a new category. This sort of rupture limits historical continuity of a term: a polythetic approach might account for earlier uses of the term religion by arguing that earlier jurists and scholars simply used less precise language than modern scholars do, while an advocate of a monothetic approach has reason to suspect that earlier uses of the term religion referred to an entirely different concept than do modern uses of the term. In other words, modifications to polythetic and analogical concepts of a category represent a more

precise articulation of the category, while modifications to both simple monothetic definitions and complex monothetic definitions represent an alteration of the category.

## C. Analogical Classification

Analogical approaches, like polythetic classification, do not rely on a set of necessary and sufficient conditions to establish the category of religion; both types of approaches are therefore anti-essentialist. Analogical approaches also parallel polythetic classification in using an overlap of characteristics to establish a category, but here the parallels end: while polythetic classification uses statistical significance to determine when overlap establishes a category, analogical approaches rely on other methods to determine when common characteristics indicate membership in a category. Advocates of an analogical approach, both in the field of law and in the field of religious studies, do not offer a single methodology for determining when an overlap of characteristics establishes a "family resemblance" category.

The primary critique of analogical approaches stems from this lack of consensus regarding the proper method for establishing categories. As I note in Chapter 1, critics such as Timothy Fitzgerald claim that without a clear mechanism for establishing a category, an analogical approach cannot reliably distinguish religion from non-religion.[420] Some critics of analogical approaches in the field of law raise similar concerns. Andrew Austin, in his critique of George Freeman's proposal for a non-definitional approach to determining what counts as religion, doubts that such an approach could ever be useful to courts:

---

[420] See infra Ch. 1 II.C

> "Freeman asserts that none of the features he suggests are necessary to religion, nor are any of them sufficient to create a religion. How, then, is a court to know when a belief system is religious? Freeman himself admits that the test is not helpful in close cases…. A definition that does not help resolve such cases is not of great practical value." [421]

Austin goes on to note another weakness of non-definitional approaches, namely inconsistency: "A combination of features one judge sees as sufficient, another may consider insufficient."[422] A definitional approach can produce nearly uniform results across different cases argued in different courts, while an analogical approach to setting a category may result in a different concept of religion for every judge who hears a case that requirines a threshold determination.

### 1. Prototype Approach to Analogical Reasoning

The primary challenge for advocates of an analogical approach, then, is to establish a clear mechanism for determining when overlap of characteristics indicates a category. In Chapter 1, I reviewed Benson Saler's "prototype approach": Saler proposes relying on Judaism, Christianity and Islam as prototypical examples of religion, and then admitting new members to the category based on their resemblance to these prototypes. Several legal scholars have proposed similar prototype or paradigm strategies for determining what counts as religion for constitutional purposes, though they often disagree on which religions should compose the set of paradigm cases. George Freeman, for example, proposes looking to "traditional Eastern and Western religions", though he does not specify examples.[423] Kent Greenawalt, on the other hand, proposes looking to examples of the "indisputably religious" to set the paradigm cases; he accordingly

---

[421] Austin, supra n. 101 at 8.
[422] Ibid, 8-9.
[423] Freeman, Supra n. 124 at 1553.

includes any organizations whose religiosity "no one doubts" in this category of the indisputably religious.[424] Judge Arlin Adams, in his concurrence in *Malnak* suggests looking to "familiar religions", and while he does not specify which religions count as "familiar", he cites two prominent Christian theologians elsewhere in the decision, which strongly suggests that he considers Christianity the prototype for the category of religion.[425]

In Chapter 1, I note that Benson Saler's "paradigm case" approach is marked by his explicit adoption of western bias in shaping the category of religion; I termed his use of western monotheisms a "rapprochement with ethnocentrism".[426] Saler defends this ethnocentrism in part by noting that most scholars who study religion already implicitly operate with western models for religion, and he claims that an explicit adoption of this standard is justified if it leads to productive comparisons and analysis. Here, though, it is important to note a key distinction between academic concepts of religion and legal concepts of religion. While Saler's use of a western standard for the paradigm case of religion maybe justifiable insofar as it promotes useful scholarly comparisons[427], legal uses of the category of religion raise a different set of concerns. Eduardo Peñalver, in his critique of Freeman and Greenawalt's "paradigm" case methodologies, notes that the selection of a paradigm can prove to be dispositive:

---

[424] Greenawalt, Supra n. 2 at 767. Greenawalt specifically cites "Roman Catholicism, Greek Orthodoxy, Lutheranism, Methodism, and Orthodox Judaism" on the basis that no one would seriously contest a claim that these groups are religions.
[425] *Malnak*, Supra n. 12 at 208-210. Adams cites both Paul Tillich and Thomas Aquinas.
[426] See infra Ch. 1, II.C
[427] In fact, the historical concepts of religion that I review in Ch. 1 II.D suggest that the category of religion is, in fact, the product of western scholars applying western concepts to non-western phenomena and thereby deeming them "religions".

> "One problem with their approaches, however, is their failure to discuss in more detail the effect of the actual selection of the "paradigm cases" of religion on the outcome of the test. The choice made by a judge as to the baseline for comparison can have a significant impact on her conclusion regarding the nature of the belief system. Given a particular belief system to classify, the choice of Roman Catholicism and high church Anglicanism as the baseline of comparison might lead to one conclusion, Quakerism and Congregationalism to another, and Voodoo and Santeria to yet another. The degree of commonality between the entity to be classified and religion (represented by paradigms) depends to a great degree on what particular religions are chosen as the paradigm cases." [428]

If Peñalver is correct that choosing a "baseline for comparison" can prove dispositive, then adopting an ethnocentric paradigm will ensure that only religions similar to the western monotheisms - especially Protestant Christianity - receive constitutional protections. This concern about western bias is especially grave in light of Frederick Gedicks's oft-quoted observation that "[n]o Jewish, Muslim, or Native American plaintiff has ever prevailed on a free exercise claim before the Supreme Court."[429]

The processes for selecting paradigm cases that Freeman, Adams, and Greenawalt propose do not sufficiently dispel this concern about western bias. Adams's standard of the "familiar religions" virtually guarantees that judges will employ an implicit western bias in selecting a paradigm religion. Greenawalt's standard of the "indisputably religious" offers a more neutral standard, given that he does not directly defer to the familiarity of western religions. However, as Peñalver notes, Greenawalt's standard

---

[428] Peñalver, supra n. 1, 815.
[429] Frederick Mark Gedicks, Frederick Mark Gedicks, *The Rhetoric of Church and State*: *A Critical Analysis of Religion Clause Jurisprudence*, (Durham: Duke Universtiy Press, 1995), 116. Gedicks, in other words, worries that non-Christian plaintiffs cannot prevail in their free exercise claims; Peñalver worries that their claims will not be recognized as religious.

limits the range of religions considered to a narrow set of members whose status is not contested.[430] Moreover, Greenawalt's list of the "indisputably religious" religions includes only versions of Christianity and Judaism, suggesting that this standard is indirectly biased towards western religions. Freeman's standard of deferring to "traditional Western and Eastern religions" appears at first glance to be more inclusive, but in the absence of a clear list of paradigm cases, it is not clear if Freeman does, in fact, rely on non-western religions to substantiate the category of religion.

### *2. Application of the Prototype Approach*

Once a judge using the prototype version of an analogical approach selects a "paradigm case" of religion, they must compare this case to the group or belief whose religious status is in question. In theory, a judge could compare the paradigm case to the contested case without reference to any characteristics of either. Were a judge to make a determination of religious status based on such a comparison, he/she would invite charges of judicial nominalism: if a judge's analogical reasoning makes no reference to the characteristics of the compared phenomena, then the only standard linking various members of the legal concept of religion would be the judge's application of the term. Here again, Learned Hand's worry that judicial power may establish judges as Platonic Guardians provides a strong warning against any resort to a judge's criterion-less comparison as the standard for determining what counts as religion.

Unsurprisingly, then, advocates of an analogical approach tend to propose deriving a list of characteristics from their respective paradigm cases of religion. Freeman develops a list of eight criteria, and then parallels Saler's treatment of religion as a scalar

---

[430] Peñalver, supra n. 1, 816-817.

feature: "Taken together, these features provide us with a paradigm of a religious belief system. A belief system will thus be more or less religious depending on how closely it resembles this paradigm."[431] Greenawalt derives a general list of features from his examples of the "indisputably religious"[432], but later notes that the list of relevant features of religion will vary based on the type of case facing a court. Accoridngly, Greenawalt argues that judges must "determine the significant respects of analogy for the particular legal context," implying that the list of features for a free exercise case dealing with worship might contrast sharply with the list of features for an establishment clause case involving religious activity in schools.[433] Adams, in turn, develops a list of three "indicia" of religion from a review of the "familiar religions."[434]

Because Freeman, Greenawalt and Adams each rely on a list of characteristics to determine religiosity, their approaches appear to mirror complex monothetic definitions of religion. Were their approaches equivalent to complex monothetic definitions, they would regard each feature as a necessary condition for religion, while seeing only the

---

[431] Freeman, Supra n. 124 at 1553. Freeman specifically cites the following eight features: "1. A Belief in a Supreme Being 2. A belief in a transcendent reality 3. A moral code 4. A world view that provides an account of man's role in the universe and around which an individual organizes his life 5. Sacred rituals and holy days 6. Worship and prayer 7. A sacred text or scriptures 8. Membership in a social organization that promotes a religious belief system."

[432] Greenawalt, supra n. 2 at 767: Greenawalt's list of features of religion is as follows: "a belief in God; a comprehensive view of the world and human purposes; a belief in some form of afterlife; communication with God through ritual acts of worship and through corporate and individual prayer; a particular perspective on moral obligations derived from a moral code or from a conception of God's nature; practices involving repentance and forgiveness of sins; 'religious' feelings of awe, guilt and adoration; the use of sacred texts; and organization to facilitate the corporate aspects of religious practice and to promote and perpetuate beliefs and practices."

[433] Ibid, 776.

[434] *Malnak*, supra n. 12 at 1032-1033.

presence of all as sufficient. However, Freeman, Greenawalt and Adams all emphasize that they do not treat their features as necessary conditions for religion, and thus distinguish their analogical approaches from complex monothetic definitions. For example, Freeman and Greenawalt derive the characteristic of theism from their paradigm cases, but because theism is not a necessary condition for religion in their scheme, a movement or belief could count as religious even if it is not theistic.

By clarifying that they do not regard the features of religion as necessary conditions, Freeman, Greenawalt and Adams raise an important question: How *does* an analogical approach make use of the characteristics of religion if they are not necessary conditions for establishing religion as a category? In other words, if the presence of some characteristic sometimes indicates membership in the category of religion, and at other times does not, how does a judge determine the significance of that characteristic? As we have seen, a complex monothetic approach sees the presence of a particular characteristic as indicative of religion when each of the other necessary characteristics is present, while a polythetic approach sees the presence of a characteristic as indicative of religion when a statistically significant number of other characteristics are present. An analogical approach, however, does not offer a clear methodology for indicating when a particular characteristic signals membership in the category of religion. Without such a methodology, an analogical approach that relies on a list of features does not differ significantly from the judicial nominalism of a featureless approach. Judges can still determine what does and does not count as religion according to their own preferences if there is no consistent mechanism for explaining when an overlap of features indicates membership in the category of religion. Peñalver notes that this absence of any clear

formula for determining when characteristics indicate membership in the category contributes to judicial bias: "For a definition by analogy to restrain judicial bias, it must provide some guidelines that actually constrain a judge's analogical reasoning."[435] The question, then, is: Can the prototype approach to analogical reasoning offer a clear methodology?[436]

The importance of a clear mechanism for determining when an overlap of characteristics indicates common membership in the category of religion is high, as there is strong evidence that judges will apply the term religion inconsistently in the absence of such a mechanism. In the wake of *Seeger* and *Welch*, judges have avoided using a definitional approach to saying what counts as religion, and consequently their approaches are often either implicitly or explicitly analogical. The most obvious inconsistency in these rulings is the status of nontheistic claims to religious status. In *Seeger* and *Welch*, the Court accepted the plaintiffs' nontheistic - or, at a minimum, quasi-theistic - claims to religious status, but in *Yoder*, the Supreme Court clearly stated that a merely philosophical claim to an exemption, such as Thoreau might make, would

---

[435] Peñalver, supra n. 1 at 816.

[436] If advocates of an analogical approach cannot provide such a mechanism, there is strong evidence that judges will apply the term religion inconsistently. In the wake of *Seeger* and *Welch*, judges have been avoided using a definitional approach to saying what counts as religion, and consequently their approaches are often either implicitly or explicitly analogical. The most obviously inconsistent result is the status of nontheistic religions. In *Yoder*, the Supreme Court clearly stated that a merely philosophical claim to an exemption, such as Thoreau might make, would not qualify for protections under the religion clauses. In subsequent cases, most notably *Kaufman v. McCaughtry*, 419 F.3d 678 (2005), lower courts have counted even avowed atheists as religious. I discuss this point in Chapter 3 more thoroughly, but here I will note only that an analogical approach is not well equipped to bar inconsistent results.

not qualify for protections under the religion clauses.[437] In subsequent cases, most notably *Kaufman v. McCaughtry*, lower courts have counted even avowed atheists as religious.[438] Other lower courts, however, have refused to recognize the religious status of adherents to "spiritualist" religions.[439] In short, the absence of a clear mechanism for applying an analogical approach permits some judges to conceptualize religion broadly, while others limit the range of acceptable claims to those that more closely resemble traditional western religions.

The three advocates of the protoype approach offer different accounts of how courts should determine when an overlap of characteristics indicates membership in the category of religion, but ultimately none is satisfactory. Freeman, for his part, acknowledges that a prototype approach facilitates an understanding of religion as a scalar phenomenon, while conceding that it complicates the binary judgments necessary for determining membership in a category. Judges can deem a belief system more or less religious depending on how many of Freeman's eight characteristics they exhibit, and by how fully they exhibit those characteristics.[440] Freeman notes that although his scalar approach can explain the clear distinction between a "traditional believer" and a

---

[437] Supra n. 69 at 216: "Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses."
[438] *Kaufman v. McCaughtry*, 419 F.3d 678 (2005).
[439] See, for example, *Moore-King v. County of Chesterfield, Va.*, 708 F. 3d 560 (2013).
[440] Freeman acknowledges that some of his characteristics – he cites belief in a transcendent order and belief in a supreme being – are vague. He concludes that a belief in a supreme being, for instance, that more closely embodies the paradigm cases of "traditional western and eastern religions" should count as more religious than belief systems whose theism is more attenuated. For example, a belief system that doubts the goodness of the supreme being, or that equates faith in humanity with belief in a supreme being, rates as less religious than that of the "traditional believer". See Freeman, supra n. 124 at 1553-1555.

"traditional secularist", it is not well suited to binary category distinctions: "Between these two extremes lie a variety of borderline cases in which the question: 'Is the belief system religious or irreligious?' can not be answered unequivocally."[441] Given that a court requires a mechanism for providing an unequivocal distinction between religion and non-religion in order to make threshold determinations, Freeman's scalar methodology is ill-suited to the task.[442]

Kent Greenawalt's context-based analogical reasoning productively narrows the scope of judicial inquiry, but it does not provide a clear methodology for explaining when an overlap of characteristics is sufficient to pass a threshold inquiry. In cases involving free exercise exemptions on the grounds of a right to worship, Greenawalt suggests that judges should compare the practice of the "borderline" cases to exemptions for the use of wine by Catholics under a hypothetical prohibition regime. While such a comparison might advance a court's reasoning in a free exercise case[443], it does not resolve the question of when borderline cases should count as members of the category of religion.

---

[441] Ibid, 1556.

[442] Freeman's acceptance of the scalar logic of a prototype approach leads to results that neatly parallel Benson Saler's conclusions. See infra Ch. 1 II.C. Saler's admission of the inadequacy of a scalar system for binary judgments is blunter than that of Freeman: "The best that I can do – some will find it unsettling! – is to trace diminishing degrees of typicality, and to offer arguments as cogent as I can make them for my decisions in assigning or failing to assign specific candidates to the group comprehended by the category. In stipulating a research category explicated with reference to the clearest examples, I commit myself to the rendering and defending of analytical judgments respecting less clear cases." Saler, *Conceptualizing Religion*, 220. Saler can afford such bluntness, however, as he is convinced that binary categorization is not especially useful for anthropological research. For threshold determinations in legal cases, however, judges *must* make binary categorizations.

[443] A similar analogy between Jewish dietary laws and Santeria dietary laws was central to the court's finding in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 US 520 - Supreme Court 1993.

To answer this threshold inquiry, Greenawalt defaults to analogical reasoning about *theism* rather than *religion*. Greenawalt here argues that a practice is rendered religious by its similarity to a particular type of belief: "In the typical religious setting, use of wine is an aspect of forms of worship, such as prayer and ritual, and is connected to beliefs about some higher reality." He counts belief in a supreme being as the prototype form of a belief about a higher reality, and then admits that the beliefs of "secular humanists" in a higher reality of human brotherhood may prove relevantly similar to a belief in a supreme being.[444] Now, an analogical approach may be a strong method for establishing the category of theism, but critics both in the field of law[445] and religious studies[446] claim that a focus on cognitive definition of religions strongly favors western, and especially Protestant, concepts of religion. While Greenawalt's approach offers some standards for an analogical construction of the category of theism[447], it does not do so for the category of religion, and thereby runs the risk of substituting theism for religion in its analogical reasoning.

Judge Arlin Adams' reasoning in *Malnak* and *Africa* also fails to provide a clear methodology for determining when an overlap of characteristics indicates common membership in the category of religion. In both cases, Adams employs three "indicia" of religion – ultimate ideas, comprehensiveness, and structural characteristics – to determine the religious status of Transcendental Meditation and the MOVE organization, though he

---

[444] Greenawalt 1984, supra n. 2 at 779-780.
[445] See especially Peñalver, supra n. 1
[446] See especially Talal Asad, "Religion as an Anthropological Category" in *Genealogies of Religion*, (Baltimore, Johns Hopkins University Press, 1993.
[447] Citing Adams' reasoning in *Malnak*, Greenawalt looks to comprehensiveness and a focus on "the most important questions". Supra n. 2 at 779.

does not claim that his list of characteristics is a closed set.[448] In his concurrence in *Malnak*, Adams concludes that TM displays all three indicia, while he states in his decision in *Africa* that MOVE displays none of the three indicia. Given the apparent clarity of these results, Adams may have omitted a methodology for explaining when overlap indicates a category because he did not face a truly borderline case. Nevertheless, Adams does not clearly distinguish his "definition by analogy" approach from a complex monothetic definition: he admits one member to the category of religion that displays all three of his criteria, and bars another that displays none, leaving open the question of how we would categorize a claim that exhibited only one or two of his indicia.

Adams' decisions also indicate another drawback of an analogical approach that relies on an overlap of characteristics: his indicia are vague, and thus replicate the errors and judicial bias that plague monothetic and complex monothetic definitions of religion. For example, Adams' "first and most important" indicium is "the ultimate nature of the ideas presented".[449] In *Malnak*, Adams found Transcendental Meditation's claims that Creative Intelligence is "at the basis of all growth and progress" and is "the basis of everything," as clear indicators of the ultimate nature of its ideas. In *Africa*, however, Africa's similar statements relating all of his actions to his beliefs do not meet Adams' standards for ultimacy.[450] In *Africa*, Adams sees both the lack of a clearly extramundane

---

[448] Adams also does not explain how he arrives at threes three indicia, merely stating that: "There appear to be three useful indicia that are basic to our traditional religion and that are themselves related to the values that undergird the first amendment." This formulation does leave open the possibility of additional indicia. See *Malnak*, supra n. 12 at 207-208.

[449] *Malnak*, supra n. 12 at 208.

[450] Adams quotes Africa's testimony frequently in his decision, and much of Africa's testimony reflects the idea that all of his actions are tied to his religion. For example:

source for Africa's belief and the apparently "personal" and "social" focus of his beliefs as evidence that his ideas are not truly ultimate.[451] In *Malnak*, however, Transcendental Meditation's non-theistic, intramundane orientation and its focus on personal benefits do not disqualify it from membership in the category of religion.[452] The absence of clear standards for the criterion of ultimacy enables, and perhaps even foreordains inconsistent application: if there is no guideline for understanding the criterion of ultimacy, then judges and legal scholars will likely apply it variably.

## 3. Alternatives to the Prototype Approach

### a. Peñalver

Eduardo Peñalver adapts his critiques of the prototype approach into an alternative analogical method that offers a number of advantages. First, Peñalver compensates for the prototype model's potential for western bias by proposing a more diverse paradigm for comparison. Recognizing that any proposal to consider religions in all their diversity would prove unwieldy, Peñalver instead suggests that judges look to religions of three basic types: "As a general rule, judges should be required to compare

---

"We are practicing our religious beliefs all the time: when I run, when I put information out like I am doing now, when I eat, when I breathe." And: "…our religion is simply *the* way of life, as our religion in fact *is* life." *Africa,* supra n. 9 at 1027.

[451] For Adams, a set of this-worldly concerns must be complemented by some clearly extramundane source of meaning in order to qualify as religious: "[Africa's] concerns appear personal (*e. g.,* he contends that a raw food diet is "healthy" and that pollution and other such products are "hazardous") and social (*e. g.,* he claims that MOVE is a "revolutionary" organization, "absolutely opposed to all that is wrong" and unable to accept existing regimes), rather than spiritual or other-worldly."

[452] *Malnak*, supra n. 12 at 213: "SCI/TM provides a way — indeed in the eyes of its adherents *the way* — to full self realization and oneness with the underlying reality of the universe. Consequently, it can reasonably be understood as presenting a claim of ultimate 'truth.'" Here Adams acknowledges that Transcendental Meditations may produce primarily personal benefits, and he also acknowledges that the truths it produces are firmly grounded in the intramundane, or the "underlying reality of the universe".

the belief system in question with at least one theistic religion, one nontheistic religion, and one pantheistic religion."[453] Peñalver admits that this model cannot completely preclude the possibility of judicial bias, but such a model should limit instances when judges do not invoke non-Christian models for comparison, or when they do so only cursorily.

Peñalver also proposes a helpful complement to the various analogical models that use characteristics as the basis of comparison. Peñalver does not directly propose a methodology for determining when overlap of characteristics indicates common membership in a category, but he does propose using negative limits on a judge's use of characteristics to exclude borderline cases from the category of religion. Specifically, Peñalver clarifies that the absence of three specific characteristics is not sufficient to exclude a potential religion:

> "First, religious status may not be denied to a belief system because of its failure to contain a concept of God (or gods). Second, religious status may not be denied to a belief system because of its particular structural characteristics or lack of institutional features (for example, clergy or organized worship). Third, religious status may not be denied to a belief system because of its failure to focus on or distinguish the sacred, spiritual, supernatural or other-worldly."[454]

Peñalver himself notes that use of these negative criteria could have led to a different result in *Africa*, and he thus concludes that the criteria productively constrain judicial reasoning. On the other hand, Peñalver's guidelines serve primarily to reinforce the distinction between complex monothetic definitions and analogical approaches. A judge who claims to use an analogical approach and who then excludes a borderline case for

---

[453] Peñalver, supra n. 1 at 817.
[454] Ibid, 818.

lacking either a single characteristic or a set of characteristics is, in fact, treating that characteristic or that set as a necessary condition for religion. What Peñalver's negative guidelines do not clearly do, however, is explain whether a borderline case should be excluded for lacking all three of the characteristics above.[455]

### b. Tribe

In the 1978 edition of his *American Constitutional Law*, Laurence Tribe proposed a bifurcated standard for determining what counts as religion. Tribe argued that broad inclusiveness is consistent with what he took to be the primary goal of the free exercise clause, namely promoting individual liberty, and he therefore concluded that courts should count everything "arguably religious" as religious for free exercise purposes. For the establishment clause, by contrast, Tribe proposed that "everything arguably nonreligious" be considered nonreligion, so as to minimize court oversight of legislation.[456] Tribe's approach is analogical insofar as it rejects the use of characteristics to define the category of religion and instead invites comparisons between the inarguably

---

[455] Peñalver suggests that his negative guidelines may have led to a different conclusion in *Africa*, and given that Adams did conclude that MOVE lacked all three characteristics, one can reasonably infer that Peñalver thinks that no borderline should be excluded even if it lacks all three of these characteristics. Peñalver directly states that the characteristics may be used to *include* a borderline case, but if these characteristics partially compose the category of religion, then their absence – likely in conjunction with the absence of some other characteristics - must play some role in excluding borderline cases. If Peñalver is proposing that judges should consider neither the presence nor the absence of these three characteristics, individually or collectively, then he is in fact saying that these characteristics are not features of religion. Now, I think Peñalver wants to say that judges should not rely *exclusively* on the presence or the absence of these three characteristics, individually or collectively, to determine the religious status of a borderline case. However, this proposal is only viable with a methodology that explains how these characteristics interact with other characteristics to determine the religious status of a borderline case, and Peñalver does not propose such a methodology.

[456] Laurence Tribe, *American Constitutional Law*, (Mineola, Foundation Press, 1978), 812-887.

religious and the arguably religious in order to ensure the extension of constitutional protections to the latter. However, because Tribe provides little guidance for the standards of argumentation, his method for determining what counts is even less well defined than the other analogical approaches I describe above. For Greenawalt, Tribe's approach is "highly amorphous" and would likely result in a broad range of phenomena that are both "arguably religious" and "arguably nonreligious". [457] A single phenomenon, therefore, could be both religious and non-religious under the Constitution. Such a scenario raises questions about the compatibility of Tribe's standard with the law of non-contradiction, and it also, as Greenawalt notes, raises questions about the fairness of an arrangement that allows an "arguably religious-arguably nonreligious" to receive the protections of the free exercise clause while evading the limitations of the establishment clause.[458]

## IV. Assessment

### A. The Impossibility of Avoiding Legal Determinations of Religious Status

In parts I and II of this Chapter, I argue that Courts cannot avoid making determinations of religious status. Whatever the merits of political and justificatory considerations may be, religion clause cases are nonjusticiable without a means to make threshold determinations of religious status. I consider several strategies for avoiding threshold determinations in part II of this chapter, and with one exception, I find these strategies clearly unworkable. Sincerity tests, I claim, are at least as arduous as determinations of religious status, and are potentially more vulnerable to judicial bias. Strategies that rely on offering a replacement for 'religion', such as freedom of

---

[457] Greenawalt, "Religion as a Concept" supra n. 2 at 813.
[458] Ibid, 814.

association, freedom of speech, or multicultural rights, fail because no proposed replacement can encompass all religion clause jurisprudence. Similarly, strict neutrality cannot avoid direct determinations of religious status in some cases, and also requires an implicit concept of religion in all other cases.

The final avoidance strategy, deference to individual determinations of religious status, is more difficult to dismiss, and merits further consideration. In part II above, I note that there are two possible foundations for this strategy. The first is nominalist: if there is no stable category of religion, then all uses of the term are equally valid, and Courts have no grounds for contesting any individual's use of the term. Kent Greenawalt sharply critiques this nominalist approach, since such an approach would render incorrect invocations of the term religion impossible. Moreover, if the use of the term religion does not refer to a stable category, then no clear justification for constitutional protection of religion is possible. Gail Merel, however, proposes an alternative basis for deference to personal choice: judicial noncompetence. There are several possible arguments to support the claim that judges are not equipped to make determinations of religious status. Merel argues that any judicial determination of religious status would, at a minimum, set parameters for the definition of religion, and she takes this to be a violation of the establishment clause.[459] For Merel, then, judicial noncompetence is a product of constitutional limits on the power of the government. One might also claim that the domain of religion is categorically separate from that of government, and that any judicial determination of religious status constitutes an infringement on the sovereignty of that

---

[459] Merel, supra n. 2 at 832.

separate domain of religion.[460] In Chapter 4, I will examine one additional possible grounding for that claim: I will argue that in the context of contemporary American religion, the individual is the only valid authority for determining the religious status of their own beliefs, and that judges are accordingly not competent to determine the validity of another's claim to religious status. However, I will not frame this deference to individual determinations of religious status as an avoidance strategy; rather, I claim that it is a recognition that the significance of religion is determined by individual usage of the term.

## B. The Inadequacy of the Proposed Mechanisms for Determining What Counts as Religion

In Part III of this Chapter, I consider a range of proposals for determining what counts as religion, and ultimately conclude that none is adequate. The substantive monothetic approaches I consider above are unworkable primarily because they are frequently underinclusive, and often simultaneously over-inclusive. Moreover, many of the substantive-cognitive monothetic approaches I consider rely on concepts that are too vague to be useful in court. Monothetic functionalist approaches, by contrast, are widely over-inclusive to the degree that they effectively erase any distinction between religion and non-religion. Some scholars have proposed complex monothetic defintions, and I note that additional criteria can limit the over-inclusiveness of an original criterion. However, the addition of further criteria only worsens the under-inclusiveness of a criterion, and can do nothing to improve the vagueness that renders many substantive-

---

[460] Classically, this argument is perhaps best articulated by Roger Williams in such works as *The Bloody Tenet of Persecution for Cause of Conscience* (Macon, Mercery University Press, 2001; first published 1644). Contemporary legal scholars who frame religion as a separate sovereign also subscribe to a version of this argument. I consider these separate sovereignty approaches below in Ch. 3, Part III.A.3.

cognitive definitions unwieldy for courts. Finally, I argue that analogical approaches can only offer a stable concept by deferring to a paradigm case of religion, and I conclude that such an approach is intolerable in the field of law, as it will inevitably result in excluding religions that do not sufficiently emulate western monotheisms.

## C. Why the Absence of a Clear and Consistent Mechanisms for Determining Religious Status Limits Religious Freedom

Critically, none of the proposed mechanisms adequately meets the important first criterion: the capacity to clearly and consistently distinguish religion from non-religion. Monothetic-substantive definitions should, in theory, provide maximal clarity and consistency, but in practice, the proposed concepts are too vague to offer either. The concept of God lacks sufficient conceptual clarity to guide court determinations of religious status; and an approach that replaces theism with belief in spiritual beings only dilutes what little conceptual integrity is available in a theistic approach. Polythetic and analogical approaches to classification only further complicate the process of determining what counts as religion, since they add complicated metrics for determining when possession of certain characteristics indicates membership in the category of religion to the already complex question of what the characteristics themselves – such as theism - mean.

If judicial workload were the only concern about the difficulty of determining what counts as religion, then my evaluation of the proposed mechanisms would offer little cause for alarm. In truth, though, the absence of a clear and consistent mechanism for determining what counts calls the viability of religious freedom itself into question. If there is no logic guiding a judge's determination of religious status, then the standards for

what counts as religion are likely to vary from court to court, and even from case to case. Current religion clause jurisprudence offers ample evidence to confirm this concern: sometimes atheism is singled out as obviously areligious[461]; other times courts regard it as a religion for first amendment purposes.[462] One movement's claim that its ideas are "the basis of everything"[463] is counted as an indication of religious status; another movement's claim that "We are practicing our religious beliefs all the time" is not.[464] This variation is especially concerning because, in the absence of clear standards for religiosity, the only standard the matters is the judge's own determinations.

This supremacy of the judge's determination is concerning for two primary reasons. First, it again raises Learned Hand's worry that judges function as "a bevy of Platonic Guardians."[465] If judges rely on their own standards to determine what counts as religion, then they may be able to restrict the sorts of religion that they find undesirable. Second, any reliance on the judge's standards for what counts as religion raises concerns that new religious movements and non-western religions will not receive constitutional protections regardless of the judge's standards of what constitutes a desireable religion. If a movement is unfamiliar to a judge, then that judge is less likely to recognize its claim to religious status. I have considered several cases in this chapter in which appeals from new religious movements failed to achieve recognition in the courts; this provides at least some evidence that these movements are less likely to receive constitutional protections than more established religions are. The principle of religious freedom, however,

---

[461] See *Wisconsin v. Yoder*, supra n. 69.
[462] See *Kaufman v.McCaughtry*, supra n. 71.
[463] See *Malnak v. Yogi*, supra n. 12.
[464] See *Africa v, Commonwealth*, supra n. 9.
[465] Supra n. 80.

demands that these new religious movements receive the same protections as existing religions. The fact that those movements most in need of judicial validation of their claims to religious status are least likely to get it should serve as a stark warning to those concerned about the viability of religious freedom. The effort to develop a clear and consistent mechanism for determining what counts as religion is not, therefore, a mere academic exercise; it is necessary if constitutional protections of religious freedom are to have a future.

# Chapter 3: Why Courts Must Justify the Special Constitutional Status of Religion, and Why no Proposed Method for Doing so Is Adequate

In the previous chapter I reviewed efforts within the field of law to determine what counts as religion. In section II.B of that chapter, I noted that one argument supporting the claim that judges must make determinations of religious status is that an understanding of what counts as religion is necessary to justify its special constitutional status. In this chapter, I direct my attention to that special constitutional status: what does it consist of, must it be justified, and *can* it be justified?

I begin this chapter in Part I with a brief review of what constitutes the special treatment of religion under the American constitutional regime. In Part II, I assess the importance of justificatory questions regarding religion's special status. In part III, I consider several strategies for avoiding these justificatory questions, but I conclude that concerns about fairness, political concord and reliable threshold determinations of religious status outweigh any benefits of avoiding these justificatory questions**.** In part IV, I return to the taxonomy of mechanisms for determining what counts as religion I developed in Chapter 1 to offer a systematic review of efforts by legal scholars to explain why religion is special. The taxonomy is useful in this context, I argue, because any defense of the special status of religion is predicated on some claim about what religion is. The taxonomy of mechanisms for determining what counts as religion helpfully organizes these justificatory accounts by tying each justification of religion's special constitutional status to a particular concept of religion. I conclude in part IV that none of

the available strategies provides an adequate justification for religion's special status. In part V, I reflect on the significance of the unavailability of such a justification.

## I. What does the special constitutional treatment of religion consist of?

I begin this chapter with a description of the special constitutional status of religion, in part because a justification of this special status is necessary only if religion does in fact receive special constitutional treatment. Many religious claimants receive constitutional protections that are available to non-religious claimants as well, so one might conclude that religion is not, or at least does not need to be, constitutionally special. Religious speech, for instance, receives the same constitutional protections as non-religious speech, despite the efforts of some claimants to rely in part on the free exercise clause to support claims for exemptions to regulations on speech.[466] Similarly, courts in some cases have defended a religious group's right to association on the basis of the freedom of association rather than the free exercise clause.[467] In addition, religious

---

[466] In *West Virginia Review Board v. Barnette*, 319 U.S. 624 (1943), the plaintiffs appealed for exemptions to compulsory flag salutes on both free exercise and free speech grounds. The Court relied exclusively on the free speech clause in siding with the plaintiffs, arguing that a state could not compel its citizens to speak. The Court's finding thereby protected both religious and non-religious objectors to compelled speech. In other cases, the Court has refused to grant religious claimants protections that go beyond those of the free speech clause. For instance, in *Heffron v. ISKCON*, 452 U.S. 640, the court denied the International Society for Krishna Consciousness's appeal for an exemption to the Minnesota State Fair's time, place and manner restriction on the distribution of pamphlets during the state fair.

[467] In *Widmar v. Vincent*, 454 U.S. 263 (1981), the court specifically invoked the freedom of association and the freedom of speech over against respondent's free exercise claims. The Court accordingly distinguished this case from any in which a religious group claims a special exemption: "This case is different from cases in which religious groups claim that the denial of facilities *not* available to other groups deprives them of their rights under the Free Exercise Clause. Here, the University's forum is already available to other groups, and respondents' claim to use that forum does not rest solely on rights claimed under the Free Exercise Clause. Respondents' claim also implicates First Amendment

inmates of correctional facilities receive some accommodations for their religious practices, but courts have required prisons to make similar accommodations for non-religious groups.[468] Finally, religious non-profits benefit from special classifications under section 501( c)(3) of the federal tax code, but other non-religious, charitable non-profits also receive beneficial treatment under section 501 (c ) (3).[469] Given that courts have sometimes protected religious speech and religious rights of association without referring to the free exercise clause, some scholars propose that religious rights can be – and are – adequately protected by the jurisprudence of free speech and freedom of association.[470] Were it possible to comprehend all constitutional jurisprudence regarding religion within the concepts of free speech and freedom of association, religion would in fact not be constitutionally special, and a normative argument in favor of its special treatment would be unnecessary.

However, American constitutional jurisprudence confers numerous unique benefits and burdens on religious organizations, individuals, and activities. Most prominently, courts have used the free exercise clause, the Religious Land Use and

---

rights of speech and association, and it is on the bases of speech and association rights that we decide the case."

[468] In *Kaufman v. McCaughtry*, 419 F.3d 678 (2005), for instance, the 3rd Circuit court sided with an inmate who claimed that a Wisconsin correctional facility infringed on his first amendment rights by preventing him from holding a reading group for atheist inmamtes. The court acknowledged Kaufman's own claim that atheism is the "antithesis of religion", while nevertheless reasoning that: "whether atheism is a "religion" for First Amendment purposes is a somewhat different question than whether its adherents believe in a supreme being, or attend regular devotional services, or have a sacred Scripture." Quoted at 681.

[469] Although special treatment under the tax code is not specifically a constitutional matter, it does nevertheless speak to the special status of religion in American law.

[470] See especially William Marshall, "Solving the Free Exercise Dilemma: Free Exercise as Expression." 67 *Minnesota Law Review,* v. 67, 545 (1982-1983). I review Marshall's argument in more detail in Chapter 2, II.C

Institutionalized Persons Act (RLUIPA) and the various versions of the Religious Freedom Restoration Act (RFRA) to exempt religious claimants from a variety of neutral laws and requirements, including compulsory education requirements[471], regulations of unemployment compensation[472], zoning laws[473], employment non-discrimination laws[474], and prison regulations[475]. Scholars typically see these accommodations as special benefits for religion[476], but constitutional jurisprudence also subjects religion to a number of unique burdens. Courts have read the establishment clause to bar the use of public school buildings for religious instruction[477], readings of religious texts in public schools[478], prayers in public schools – whether compulsory[479] or merely coercive[480], conforming public school curricula to religious standards[481], financial support for parochial schools[482], and the public display of some religious symbols.[483]

The special constitutional benefits for and burdens on religion are so varied and numerous that legal scholars often find it useful to distill the contrast between treatment of religion and that of non-religion by developing simplified scenarios involving a hypothetical religious petitioner and a similarly positioned non-religious petitioner. Christopher Eisgruber and Lawrence Sager, for instance, offer two hypothetical

---

[471] *Wisconsin v. Yoder*, 406 US (205) 1972.
[472] *Sherbert v. Verner*, 374 US (398) 1963.
[473] *City of Boerne v. Flores*, 521 US (507) 1997.
[474] *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC,* 132 S.Ct. 694 (2012).
[475] See *Holt v. Hobbs* 135 S.Ct. 853 (2015) and *Turner v. Safley*, 482 U.S. 78 (1987).
[476] See, for instance, Abner Greene, "The Political Balance of the Religion Clauses."
[477] *McCollum v. Board of Education*, 333 US 203 (1948).
[478] *Abington School District v. Schempp*, 375 US 203 (1963).
[479] *Engel v. Vitale*, 370 US 421 (1962)
[480] *Lee v. Weismann*, 505 US 577, (1992)
[481] *Epperson v. Arkansas,* 393 US 97 (1968)
[482] *Lemon v. Kurtzman*, 403 US 602 (1971)
[483] *Allegheny County v. ACLU*, 492 US 573 (1989).

neighbors, one religious and the other non-religious, who both wish to open a soup kitchen in a residential neighborhood whose zoning ordinances ban all such charities. Sager and Eisgruber note that, under RLUIPA, the religious neighbor likely has a case for an exemption from the zoning ordinance, while the non-religious neighbor does not; they conclude that: "This result seems unjust on its face."[484] Similarly, Frederick Mark Gedicks wonders why a pro-life Catholic attorney assigned to represent a teenager seeking an abortion without parental consent might have a claim to constitutional relief from the assignment, while an African-American attorney assigned to represent a white supremacist would not.[485] Steven Smith focuses on unique burdens for religious claimants, wondering why "Al Agnostic", who objects to government funding of religious education might have a constitutional claim, while "Betty Believer", who objects to the inclusion of evolution and sex education in the public school curriculum, does not.[486] To this trio of scenarios I add a fourth: Sid, a Buddhist, and Peter, an atheist utilitarian, are both inmates at a correctional facility, and both are also vegetarians. Both request special accommodation of their dietary needs. Peter cites his utilitarian belief in the equality of all animals in his petition, while Sid cites his personal understanding of the Buddhist sutras. Unless Peter couches his utilitarianism in specifically religious

---

[484] Christopher Eisgruber and Lawrence Sager, *Religious Freedom and the Constitution*, (Cambridge: Harvard University Press, 2007), 11-13.
[485] Frederick Mark Gedicks, "An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions," 20 *University of Arksansas-Little Rock Law Journal*, v. 20, 555 (1997-1998), 555-556. Gedicks also wonders why a sabbatarian might find constitutional support for his refusal to work on a Saturday, while an agnostic who is also a non-custodial parent could not find similar support for his refusal if Saturday is the only day on which he can see his children.
[486] Steven D. Smith, "Taxes, Conscience and the Constitution," *Constitutional Commentary*, v. 23, 365 (2006).

terms, he is unlikely to receive constitutional support for his petition, while Sid is virtually certain to receive support for his.[487]

Whether we look to a comprehensive description of the variety of cases in which religion receives special treatment or to a carefully constructed hypothetical, the point remains the same: in a constitutional scheme predicated on the equal status of all citizens, there is, at minimum, a *prima facie* case against unequal treatment of similarly placed litigants. The need for a normative justification for the special status of religion originates with this descriptive claim that religion *is* constitutionally special. The hypotheticals developed by Gedicks, Smith, Sager, Eisgruber and others underscore the *descriptive* claim that religion is special, and thereby intensify the demand for a normative account of religion that can account for this special treatment. In the next section, I consider in further detail why such a normative account is necessary.

## II. Do Courts Need to Determine Why Religion is Special?

A description of the special constitutional treatment of religion provides, as I note above, at least a *prima facie* demand for a normative account of that special status. In this section, I expand on this minimal case for a normative account of the special status of religion by looking to three types of arguments in favor of justifying the special constitutional status of religion. The first type of argument stems from the importance of equality and fairness in liberal political theory. Because equality and fairness are central to most forms of modern liberal political theory, *any* distinction between similarly situated parties requires a justification, so a constitutional scheme that specially privileges

---

[487] "Sid" is adapted from *DeHart v. Horn*, 227 F.3d 47 (2000), in which a federal court supported a Buddhist prisoner's petition for a vegetarian diet.

and/or burdens religious citizens requires such a justification. The other two types of arguments in favor of a normative justification of the special status of religion focus on the probable consequences of a constitutional scheme that lacks such a justification. First, I review Timothy Macklem's claim that the absence of a justification of the special status of religion has deleterious effects on legal judgments of religion. Macklem claims that judges cannot coherently determine what counts as religion without reference to a normative understanding of the special status of religion. Next, I propose a probable political consequence of a justification for the special status of religion: such a justification, if satisfactory, might minimize tensions between religious and non-religious Americans.

## A. Equal Liberty, Fairness and The Special Status of Religion

Liberal political theories may diverge in some of their core principles and methodologies, but all agree on the importance – if not centrality –of equality before the law. Utilitarian ethics may place prime emphasis on utility and/or happiness, but utilitarian political theorists typically understand equality before the law as a mechanism that nearly unequivocally promotes general happiness; any violation of political equality can therefore only be justified by an immediate and clearly superior social need.[488] John Rawls rates liberty as the first of his two principles of justice[489], and he clarifies the importance of *equality* of this political liberty among citizens: "These liberties are

---

[488] JS Mill's argument in section V, paragraph 34 of *Utilitarianism* is representative of the utilitarian position on political equality: "All persons are deemed to have a *right* to equality of treatment, except when some recognized social expediency requires the reverse. And hence all social inequalities which have ceased to be considered expedient, assume the character not of simple expediency, but of injustice, and appear so tyrannical, that people are apt to wonder how they could have ever been tolerated."

[489] John Rawls, *A Theory of Justice* (Cambridge, Harvard University Press, 1971), 60: First: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.

required to be equal by the first principle, since citizens of a just society are to have the same basic rights."[490] Even modern libertarian theories, which are often couched as critiques of liberal theories of egalitarian distributive justice, still staunchly defend the importance of equality of citizens before the law.[491] It is hardly surprising that the varieties of liberal thought converge on a defense of the centrality of equality before the law, given that liberalism's critique of the *ancien regime* centered on the injustice of legal privileges accorded to the first two estates: the old European nobility and the established churches. It is therefore axiomatic to liberal political theory that any privileges accorded to one class of citizens that are not accorded to another require a justification. Moreover, the Constitution itself reflects this demand for equality before the law, as the religion clause's grant of special status to one group of citizens is anomalous in the document.[492]

Legal theorists who embrace this liberal demand for a justification of the special constitutional status of religion increasingly reach the further conclusion that religion should no longer receive special treatment if no satisfactory justification is available. This conclusion entails a range of possible changes to both religion clause jurisprudence and statutory law with respect to both the benefits and the burdens peculiar to religion in American law.[493] With regard to the free exercise clause, some scholars, such as

---

[490] Ibid, 61.
[491] Consider Nozick's *Anarchy, State and Utopia*, which is framed as a critique of liberal egalitarian theories of distributive justice, but nevertheless defends political equality.
[492] The Twenty Sixth Amendment tacitly endorses discrimination on the basis of age and citizenship status in allocating the right to vote, but justifications for both of these provisions are fairly clear. The constitution also discriminates based on age and citizenship status for access to certain privileges, specifically eligibility for certain federal offices. In general, however, that Constitution extends rights to the category of "person" without further qualification, implying that equality before the law is its default position.
[493] Micah Schwartzman provides a detailed review the possible constitutional regimes that might result from a determination that religion is not special for free exercise clause

Eisgruber and Sager, argue for "leveling up" the accommodations granted to religious objectors; they claim that the accommodation regime should be expanded to all persons whose "important commitments" are protected, regardless of the "spiritual foundations of those commitments and projects."[494] Others, such as Marci Hamilton, argue for "leveling down" those accommodations, so that neither religion nor comparable secular views receive exemptions from generally applicable laws.[495] With regard to the special burdens placed on religion by the "secular purpose" requirement of *Lemon v. Kurtzman*, some scholars propose removing it altogether and permitting both religious and non-religious grounds for state actions.[496] Other scholars suggest that the absence of a normative justification of the special status of religion may entail an imperative to amend the constitutional protections of religion.[497] In summary, then, the absence of a justification for the special status of religion conflicts with the basic liberal notions of fairness and equality before the law. This conflict further entails significant changes to constitutional jurisprudence regarding religion, if not the constitution itself. Courts and legal scholars have a strong imperative to either justify the special constitutional status of religion or

---

jurisprudence, establishment clause jurisprudence, or both. See Micah Schwartzman, What if Religion Is Not Special? *University of Chicago Law Review* v. 79 n 4, (2013).

[494] Eisgruber and Sager, supra n. 19 at 15.

[495] Hamilton, *God v. Gavel: Religion and the Rule of Law* (New York, Cambridge University Press, 2005), Ch. 9.

[496] Michael McConnell, "Secular Reason and the Misguided Attempt to Exclude Religious Argument from Democratic Deliberation." *Journal of Law, Philosophy and Culture*, v. 1 no. 1 (2007).

[497] Micah Schwartzman for example, notes that a moral judgment that religion is not special entails either rejecting the religion clauses or reconciling them with moral judgment. See Micah Schwartzman, "supra n. 28 at 52-59. Schwartzman's reconciliation strategy overlaps to some degree with Eisgruber and Sager's concept of equal liberty; he adopts Douglas Laycock's suggestion that non-religions be included within the ambit of religion for constitutional purposes in order to ensure their equal treatment. His rejection strategy, on the other hand, is premised on recognition of the Constitution's imperfections: "On this view, then, our Constitution is not perfect. It could be better."

determine definitively that no such justification is possible and that some alteration to either the constitution or to religion clause jurisprudence is necessary.

## B. Threshold Determinations and the Special Status of Religion

Even if scholars could set aside concerns about the conflict between the special status of religion and liberal political theory, there are further reasons to conclude that judges have need of some argument justifying this special status. In Chapter 2, I reviewed Timothy Macklem's preference for a mechanism for determining what counts as religion that can also provide a justification for the special status of religion. In this section, I address Macklem's more important claim that judges cannot determine what counts as religion without such a normative account of the role of religion in a particular constitutional scheme.

Macklem claims that "semantic approaches" to defining religion, which rely on descriptions of how the term "religion" is used, are undesirable because they do not provide a clear understanding of why religion should receive special constitutional treatment. The full scope of Macklem's claim is not, however, merely to prefer some mechanisms for saying what counts to others; rather, Macklem claims that judges cannot consistently or coherently determine what counts as religion without access to a normative account of the role of religion in a constitutional scheme. Macklem builds this argument on his critique of "semantic accounts", claiming that a mere survey of how the term "religion" is used will generate a wide variety of possible meanings of the term. In the absence of a definition of religion, this variety of possible meanings cannot indicate an underlying order of the concept. In order to reliably and consistently determine what counts as religion, judges need a "selection criterion" to cull only those meanings that are

consistent with the constitutional order.[498] Without a selection criterion, judges will necessarily make arbitrary determinations of what counts as religion. If, for example some observers refer to a new movement as a religion while others do not, a judge who must adjudicate these conflicting claims can only do so arbitrarily if she does not have access to some underlying concept of religion and its role in the constitutional scheme.[499]

Macklem here presumes that there is no consensus on correct applications of the term religion, and my surveys in Chapters 1 and 2 provide support for his claim. In theory, any of the mechanisms for determining what counts as religion that I describe in those chapters *could* provide a selection criterion. Benson Saler's analogical approach might rely on a scholar's determination that two phenomena are similar, while a polythetic approach might use statistical analysis of an overlap of characteristics as its selection criterion. For Macklem, however, the constitutional context of threshold determinations of religious status makes a court's work a normative task:

> "Semantic accounts of freedom of religion are incomplete because they do not tell us, other than in semantic terms, why one understanding of religion should be preferred to another in the application of a fundamental freedom. And yet our reason for wanting to know which understanding should be preferred is not semantic but moral, not descriptive but normative. Our concern is not with linguistics but with justice."[500]

Macklem goes on to claim that the normative account must rest on the purpose of religious freedom – or, put differently, the purpose of the special treatment of religion in the constitutional scheme:

---

[498] Timothy Macklem, "Faith as a Secular Value," *McGill Law Journal*, v. 45, 1 (2000) 12.
[499] Ibid.
[500] Ibid.

> That purpose can only be the moral justification for supporting the freedom, for the moral justification supporting the freedom is the only consideration that can legitimately establish the relevance or irrelevance of a particular meaning of religion in that setting; otherwise the selection would be arbitrary and thus unjustifiable.[501]

In summary, then, Macklem contends that judges cannot consistently determine what counts as religion without reference to a normative justification for the special treatment of religion within a constitutional framework. Without such a justification, judges can only arbitrarily select one meaning of the term from a variety of possibilities, and the concept of religion will accordingly vary from judge to judge, and even from case to case.

## C. Political Considerations in Favor of Justifying the Special Status of Religion

In Chapter II, I contended that judges may have a political reason for determining what counts as religion. Specifically, I claimed there that judges can provide protection to disfavored non-majoritarian religions, especially new religious movements, merely by lending the imprimatur of legal authority to those groups' claims that they are, in fact, religions. In this chapter, I note that a satisfactory justification of the special constitutional status of religion might serve a different political goal, namely easing tensions between religious and non-religious Americans.

Academics who study contemporary America very frequently argue that a stark political and moral divide marks contemporary American life.[502] Some scholars have

---

[501] Ibid, 15-16.

[502] My review of this literature is indebted to Richard Garnett's robust summary of polls, research, and punditry describing the cultural divide in American life in "Religion, Division and the First Amendment," *Georgetown Law Journal*, v. 94 1667 (2006) 1675-1677.

noted that Americans sort themselves geographically according to this partisan divide, so that liberal Americans congregate in certain zip codes, while conservative Americans congregate in others.[503] Others have noted an increase in resistance among parents to their children marrying across this partisan divide,[504] while still others note a strong preference among daters for partners who share their political views.[505] Many scholars identify religion as both a central factor in shaping this divide and as a significant point of contention between the two sides.[506] Thus, the degree of a person's religiosity is indicative of which side in the debate they are on, and those on either side of the debate have strongly divergent positions on whether religion should play a central role in American life. Sociologists such as Robert Wuthnow and James Davison Hunter argued that while late twentieth century American culture was primarily divided along political lines, and both further contend that one side of this divide seeks a central place for some kinds of religion in public life, while the other seeks a limited role for religion.[507] Some scholars have couched this divide in philosophical terms, and many frame the divide as one between " communitarian traditionalists" – especially religious traditionalists – on

---

[503] Bill Bishop, *The Big Sort: Why the Clustering of Like Minded America is Tearing Us Apart*, (Boston, Mariner Books, 2008).
[504] Shanto Iyengar, Gaurav Sood, and Yphtach Lelkes, "Affect, Not Ideology: A Social Identity Perspective on Polarization." *Public Opinion Quarterly* v. 76 n. 3 (2012): 405-431.
[505] Gregory Huber and Neil Malhotra, "Social Spillovers of Political Polarization" (2015), accessed at http://web.stanford.edu/~neilm/socialspillovers.pdf
[506] I do not, in this section, address the argument that religion is uniquely divisive; I take up this claim below in section IV.A.2.
[507] Robert Wuthnow, *The Restructuring of American Religion: Society and Faith and Since World War II*, (Princeton, Princeton University Press, 1988); James Davison Hunter, *Culture Wars: The Struggle to Define America*, 1991.

the right, and "liberal individualists" on the right.[508] Finally, some legal scholars also employ this theme of political division. Noah Feldman argues that religion is central to the political divide he sees between "values evangelicals" and "liberal secularists", and he contends that these two sides take up diametrically opposed positions on a number of types of cases that the Supreme Court must adjudicate.[509] Stephen Carter contends that elite culture in America, especially the culture of legal elites, is hostile to the openly religious.[510]

Not all of these scholars see the special constitutional status of religion as a fulcrum in the so-called culture wars, but it is not unreasonable to propose that this is the case. First, some of the scholars certainly do object to the special burdens placed upon religions: communitarians who do not follow Stanley Hauerwas in advocating for a separation of the religious community from the liberal state, implicitly reject at least some formulations of the secular purpose requirement of the *Lemon* test. Moreover, the increasing importance of the non-religious in American life[511] suggests a strong potential for public outcry over the special constitutional protections extended only to religion. A recent Pew Research survey lends some support to this claim: the poll found a sharp

---

[508] Alisdair MacIntyre, *After Virtue*, 1984. Robert Bellah, *Habits of the Heart*, 1985. Stanley Haurewas, *The Peacable Kingdom*, 1991.
[509] Noah Feldman, *Divided By God*, New York: Farrar, Straus and Giroux, 2005.
[510] Stephen Carter, *The Culture of Disbelief*, 1991.
[511] See "America's Changing Religious Landscape", Pew Research Center, 5/12/2015 at http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/ . This poll found that the religiously unaffiliated, a category including agnostics, atheists, and nones, increased from 16.1% of the population in 2007 to 22.8% in 2015. Moreover, this group comprised 36% of those surveyed who were born between 1990 and 1996. Scholars frequently further substantiate the increasing importance of the non-religious in American life by citing the increasing popularity of works critical of religion by public intellectuals who identify as atheists such as Sam Harris (*The End of Faith*), Richard Dawkins (*The God Delusion)* and Christopher Hitchens (*God is not Great*).

divide in public views on requiring businesses to service same-sex weddings, as 47% of those surveyed desired exemptions, while 49% opposed them.[512]

Some scholars contend that the Supreme Court should play a role in limiting this political divisiveness. Noah Feldman, for instance, sees the current partisanship as a "political and constitutional crisis", that he likens to the Civil War.[513] He contends that the Supreme Court must play a role in addressing this putative crisis, in large part because past Court decisions sparked much of the crisis. Other scholars, however, argue that it is not the Court's prerogative to police the divisiveness of public debate. Richard Garnett offers a particularly strong argument in support of this position, claiming that:

> "It is both misguided and quixotic, then, to employ the First Amendment to smooth out the bumps and divisions that are an unavoidable part of the political life of a diverse and free people and, perhaps, best regarded as an indication that society is functioning well."

However, even if Garnett is correct, and the Court should not act with the sole purpose of reducing rancorous partisanship, Courts may still take such a reduction as an additional reason to say why religion merits special constitutional treatment. If the Court develops a satisfactory justification of the special status of religion for some other reason – either to address concerns of fairness described above in section II.A, or to address concerns about threshold determinations described above in section II.B – then a reduction in partisan discord may simply be a "bonus" benefit to such a justification. Moreover, such a

---

[512] Pew Research Center, "Public Sees Religion's Influence Waning", at http://www.pewforum.org/2014/09/22/public-sees-religions-influence-waning-2/. The poll only indirectly gauges divisions stemming from accommodations of religious believers, as it simply asked whether businesses should be required to provide services for same-sex weddings, rather than asking if businesses owned by religious individuals should be entitled to exemptions from laws already in place.

[513] Feldman, *Divided by God*, supra n. 44, 235.

justification, if satisfactory, might in fact reduce partisan divides. If, for example, special constitutional exemptions for religious claimants can be justified by a normative account of the special value of religion, then non-religious claimants who do not receive such exemptions may find the arrangement more palatable. Conversely, if no such justification is available, then the partisan divide I describe in this section may deepen.

## III. Avoidance Strategies

In Part II above, I reviewed two types of arguments that see a normative justification of the special constitutional status of religion as necessary, and a third that sees such a justification as greatly beneficial. In this section, I consider several arguments that contend that such justifications are unnecessary. These arguments fall into four categories. First, one might call for an end to the special constitutional treatment of religion, thus removing the need for any justification of that treatment. This position is usually based on a presumption that no justification of the special status of religion is possible. Second, one could argue for a change in religion clause jurisprudence that removes the need for a justification of the special status of religion without removing that status. I consider two major strategies within this second type of argument: one could either reinterpret religion clause jurisprudence to protect another value that includes religion, such as conscience, or one might include non-religion within the constitutional category of religion. Third, one could view religion as an instrumental constitutional good, and therefore claim that any justification of the special status of religion resides with the good it promotes and not religion itself. Finally, one might argue that the status quo jurisprudence, in which religion receives constitutional protections without a stated justification for its special status, is acceptable. Ultimately I conclude that none of these

strategies is satisfactory, and that judges must provide some justification for the special constitutional status of religion.

## A. Religion should not receive special constitutional treatment, so no justification of that treatment is necessary

The most straightforward avoidance strategy is to deny that any justification of the special status of religion is possible, and to accordingly propose a suspension of all such treatment. I note above in section II.A that many legal scholars argue that there is no obvious justification for either uniquely privileging or uniquely burdening religious claimants and/or institutions. Marci Hamilton further argues that special constitutional privileges for religion cause active harm, since accommodations permit religious institutions to escape regulations designed to protect citizens from harm.[514] For at least some scholars, then, the impossibility of a justification of the special status of religion is a foregone conclusion.

Scholars who argue that religion should not receive special constitutional treatment offer two types of proposals. First, some scholars propose that courts cease adjudicating some or all cases that require special treatment of religion. Frederick Mark Gedicks, for example, has argued that courts should no longer read the free exercise clause to require accommodations.[515] Regarding existing establishment clause jurisprudence, Steven Smith once cleverly observed that:

> "… [T]he current dissatisfaction might lead a jaundiced observer to suppose that nothing could be worse than existing doctrine, but that supposition would be mistaken, both literally and essentially. Taken literally, the supposition may be too charitable: nothing-that is, a complete

---

[514] Hamtilon, supra n. 30.
[515] Gedicks, supra n. 20.

> judicial withdrawal from the establishment field might *not* be worse than the current chaotic course."[516]

Whatever the relative merits of a general retreat from religion clause jurisprudence might be, the proposal is limited by the fact that the text of the Constitution itself singles out religion for special treatment.[517] Other scholars accordingly contend that an admission that a justification for the special status of religion is impossible should entail an effort to repeal or modify the laws that codify that special treatment. Marci Hamilton, for instance, has argued for the repeal of both the Religious Freedom Restoration Act[518] and the Religious Land Use and Institutionalized Persons Act[519]. Micah Schwartzman, in considering responses to a recognition that contemporary moral judgments do not accord with the Constitution's grant of special status to religion, notes that modification of the first amendment may be necessary.[520]

In one sense, however, an avoidance strategy premised on the absence of any justification of the special treatment of religion avoids very little. Because the default

---

[516] Steven Smith, "Separation and the Secular: Reconstructing the Disestablishment Decision," 67 *Texas Law Review*, v. 67 n. 5 955 (1989) at 957. Smith goes on to explore a structuralist interpretation of the establishment clause; he argues that the clause originally functioned not to prevent establishments altogether, but to prevent the federal government from interfering with state decisions regarding establishment. See also, Steven Smith *Foreordained Failure*, (Oxford, Oxford University Press, 1995).

[517] I contend below in III.D.2 that the text itself is insufficient to establish a warrant for the special treatment of religion, but it does complicate the judicial withdrawal strategy I describe in this section.

[518] Marci Hamilton, "The Case for Evidence-based Free Exercise Accommodation: Why the Religious Freedom Restoration Act Is Bad Public Policy", *Harvard Law and Policy Review*, v. 9 (2015).

519 Hamilton, "The Constitutional Limitations on Congress's Power Over Local Land Use: Why the Religious Land Use and Institutionalized Persons Act Is Unconstitutional", *Albany Government Law Review*, v. 2 n. 2, (2009).

[520] Schwartzman, supra n. 28 at 52: "…to the extent there is a conflict, it suggests the possibility that the law ought to be modified, revised, or amended, or, if that is not possible, that other remedies be considered."

position in American jurisprudence is to presume that religion is special, a reasonable demonstration of the impossibility of a justification for the special status of religion must first take the prominent justificatory strategies into account. Given that both the text of the constitution and the tradition of religion clause jurisprudence support special treatment for religion, one can only conclude that this special treatment should be withdrawn if all types of justifications prove unsatisfactory. Put differently, any effort to alter the current constitutional scheme must be accompanied by a demonstration that religion is not special, and this demonstration is no less onerous than a demonstration that religion *is* special.

## B. Jurisprudential Avoidance Strategies

Jurisprudential avoidance strategies rely on judges to compensate for any unfairness that might result from extending constitutional protections to religious claimants that are unavailable to non-religious claimants. Proponents of jurisprudential avoidance strategies frequently concede that there is no normative justification for the special constitutional status of religion. This strategy differs from that of Marci Hamilton in that advocates of a jurisprudential approach seek to preserve religion clause jurisprudence while addressing the problem of fairness by developing a strategy to minimize or even eliminate the special treatment of religion. Both strategies I discuss below, the substitutionary strategy and the inclusive strategy, limit the special treatment of religion by including non-religion within the ambit of the religion clauses of the first amendment. Both, moreover, were articulated in separate opinions in *Welsh v. US*[521], with Justice Black defending an inclusive strategy in his majority opinion, and Justice

---

[521] *Welsh v. US*, 398 US 333 (1970).

Harlan articulating a substitutionary strategy in his concurrence, so I use that case to illustrate each strategy in my analysis below. In brief, the inclusive strategy reads non-religion into the constitutional concept of religion, while the substitutionary strategy reads religion into some other, more inclusive concept.

### 1. Inclusive Strategy

An inclusive avoidance strategy obviates questions about the fairness of the special constitutional treatment of religion by extending that treatment to the non-religious. The opinions for the draft cases of *Seeger* and *Welsh* serve as prominent examples of the inclusive strategy. Both cases addressed the Selective Training and Service Act of 1940, which allowed exemptions for conscientious objectors whose objections were based on "religious training and belief". Some of the justices expressed concern that an interpretation of the act that would exempt only religious conscientious objectors might run afoul of the establishment clause; Justice Douglas noted in his concurrence in *Seeger* that the Court had some responsibility to construe the meanings of the terms of an act in a way that renders it constitutional.[522] The court used its "parallel position" formulation[523] to categorize as religious first Seeger, who refused to directly answer questions about his belief in a Supreme Being, and then Welsh, who specifically denied the religious basis of his appeal for conscientious objection.

---

[522] *United States v. Seeger*, 380 US 163 (1965) at 188: "The legislative history of this Act leaves much in the dark. But it is, in my opinion, not a *tour de force* if we construe the words "Supreme Being" to include the cosmos, as well as an anthropomorphic entity. If it is a *tour de force* so to hold, it is no more so than other instances where we have gone to extremes to construe an Act of Congress to save it from demise on constitutional grounds."

[523] I discuss this approach to defining religion in Ch. 2 II.A.2.a

The opinions in *Seeger* and *Welsh* utilized the inclusive strategy to expand a statutory understanding of religion, but some scholars have proposed implementing an inclusive strategy for the first amendment as well. Douglas Laycock, for instance, proposes defining religion for constitutional purposes as any set of responses – positive or negative – to questions about the existence of God.[524] Some courts have also adopted a similar inclusive strategy: the Seventh Circuit Court of appeals in *Kaufman v. McCaughtry* categorized an avowed atheist as religious.[525] The court's adoption of the inclusive strategy is not surprising, since it significantly ameliorates[526] the first amendment's fairness problem without requiring a constitutional amendment. Moreover, Layock's inclusive strategy is applicable to both the free exercise clause and the establishment clause: by including both positive and negative answers to theological questions within the constitutional category of religion, Laycock reads the establishment clause to prohibit any state establishment of anti-religious perspectives.[527] Finally, given the decisions in *Seeger*, *Welsh* and *Kaufman*, the inclusive strategy is already established

---

[524] Douglas Laycock, "Religious Liberty as Liberty," *Journal of Contemporary Legal Issues*, v. 7, 313 (1996). I discuss Layock's approach to defining religion in Ch. 2 II.A.2.c

[525] *Kaufman*, supra n. 3.

[526] Proponents such as Laycock claim that the inclusive approach eliminates fairness concerns. It is possible, however, that some sincere ethical commitments that are not premised on either positive or negative answers to theological questions would not be protected by either Laycock's inclusive approach or that of the Seeger court. For instance, would an agnostic, who denies knowledge about theological questions, qualify as religious within Laycock's framework?

[527] For Laycock, this arrangement minimizes civil discord. See Laycock, supra n. 59, at 327: "The emergence of a vocal nontheistic minority in a predominantly theistic society causes serious social conflict. If the government is allowed to take sides, the two sides will fight to control the government, and the government will disapprove of, discriminate against, or suppress the losers."

in case law; in fact, it is not unreasonable to conclude that the inclusive strategy *is* the status quo in American jurisprudence.[528]

However, the inclusive strategy suffers from a significant conceptual weakness: it requires interpreting the category of "religion" to include those who specifically reject religion, namely atheists and the areligious.[529] Justice Harlan centered on this conceptual flaw of the inclusive approach in his concurrence in *Welsh*. Harlan acknowledged that the Court may interpret statutes in the manner most likely to ensure their constitutionality, but he cautioned that: "There are limits to the permissible application of that doctrine."[530] For the purposes of the draft cases, Harlan based those limits on the contrast in the statute between religion and non-religion: While the term religion may be sufficiently vague to permit "almost infinite and sophisticated possibilities for defining religion", any effort to interpret the concept to include its opposite goes too far.[531]

---

[528] I reject this conclusion for reasons I discuss below in section III.D

[529] On this point, the inclusive strategy is distinct from Tribe's standard of including everything "arguably religious" as religious for the purposes of the free exercise clause. Tribe presumably would not include atheism under his standard, while Laycock would.

[530] *Welsh*, supra n. 56 at 345.

[531] Ibid, at 352. Harlan locates atheism one the far side of the "asymptote" of the term religion: "Of the five pertinent [dictionary] definitions four include the notion of either a Supreme Being or a cohesive, organized group pursuing a common spiritual purpose together. While, as the Court's opinion in *Seeger* points out, these definitions do not exhaust the almost infinite and sophisticated possibilities for defining "religion," there is strong evidence that Congress restricted, in this instance, the word to its conventional sense. That it is difficult to plot the semantic penumbra of the word "religion" does not render this term so plastic in meaning that the Court is entitled, as matter of statutory construction, to conclude that any asserted and strongly held belief satisfies its requirements. It must be recognized that the permissible shadow of connotation is limited by the context in which words are used. In § 6 (j) Congress has included not only a reference to a Supreme Being but has also explicitly contrasted "religious" beliefs with those that are "essentially political, sociological, or philosophical" and a "personal moral

Harlan's critique exposes a number of dangers resulting from the inclusion of non-religion within the category of religion. First, it undermines any possible coherence of the term religion, and suggests, in Harlan's words, "an Alice-in-Wonderland world where words have no meaning".[532] In other words, the inclusive strategy relies on a nominalist philosophy of language: the concept of religion has no set meaning, and accordingly each usage of the term has a meaning that is distinct from every other use of the term. In fact, the opinion in *Kaufman* lends some credence to the claim that the inclusive strategy relies on a nominalist theory, as the court distinguished the use of the term "religion" in the first amendment from its uses in other contexts.[533] A nominalist theory of language is particularly dangerous for a theory of jurisprudence because it removes any linguistic limits on a judge's rulings, or, indeed, his/her exercises of power. For Harlan, the judges in the plurality opinion employed dubious hermeneutics to rewrite the statute according to their own preferences, and thereby set aside any separation of powers. A nominalist theory of language is even more dangerous for constitutional interpretation of the religion clauses, since judges may theoretically reinterpret the term religion to fit their liking if no linguistic rules can govern the uses of the term. In short, a nominalist theory of language again evokes Learned Hand's fears that the judiciary could

---

code." This exception certainly is, at the very least, the statutory boundary, the "asymptote," of the word "religion."'"

[532] Ibid at 354.

[533] *Kaufman v. McCaughtry,* supra n. 3 at 681: "The problem here was that the prison officials did not treat atheism as a "religion," perhaps in keeping with Kaufman's own insistence that it is the antithesis of religion. But whether atheism is a "religion" for First Amendment purposes is a somewhat different question than whether its adherents believe in a supreme being, or attend regular devotional services, or have a sacred Scripture. The Supreme Court has said that a religion, for purposes of the First Amendment, is distinct from a "way of life," even if that way of life is inspired by philosophical beliefs or other secular concerns."

morph into platonic guardians who presume to govern on the basis of their own superior wisdom.[534] In fact, such a model of judicial power arguably lies at the heart of both judicial strategies, since they seek to address a constitutional injustice without resorting to a constitutional amendment.

Laycock and the other scholars who support an inclusive strategy[535] do not, however, subscribe to a nominalist understanding of the term religion, as they only recognize the unfairness of singling out religion because they can detect something that is singled out. A nominalist could not identify any favoring of religion over non-religion (or vice versa), as a nominalist could not recognize any discrete boundaries separating those two groups: if one use of the term religion is distinct from all other uses of the term, then neither "religion" nor "non-religion" identifies a stable category. Laycock, however, predicates his inclusive strategy on the need to ensure both equal treatment of these two groups and the importance of protecting the government from any disputes between them. After noting some historical evolution in the concept of religion[536], Laycock acknowledges that his inclusive strategy might involve including two opposite concepts within the same term, but he denies that this results in a contradiction:

> "Assume that this is all epiphenomenal, and that in the dominant American usage, disbelief is the opposite of religion. So what? Where neutrality, equality, and nondiscrimination are part of the central purpose of a clause, it is no anomaly that the clause applies to opposites. The

---

[534] Learned Hand, *The Bill of Rights: The Oliver Wendell Holmes Lectures*, (1958), 73-74.

[535] Sager and Eisgruber notably approve of Laycock's inclusive approach.

[536] Laycock cites John Dewey's *A Common Faith* to support his claim that at least some people apply the term religion to non-believers, before acknowledging that: "This work by a handful of intellectuals is evidence of some usage, obviously not of general usage." Supra n. 59 at 328.

> whole point of neutrality, equality, and nondiscrimination is to give equal treatment to categories that are opposite in some way that has been socially significant. To prefer one set of answers to religious questions over other answers to the same questions is to violate the core of the Religion Clauses. The only way to avoid that violation is to recognize that for constitutional purposes, any answer to religious questions is religion."[537]

Here, then, Laycock argues that an inclusive reading of the term religion – one that, for Harlan, twists its meaning beyond recognition – is necessary to preserve the "core of the religion clauses". In so doing, he moves his inclusive strategy towards a substitutionary strategy: rather than reading the term religion to include non-religion, he seeks to replace the centrality of the term religion in the religion clauses with another value, namely non-discrimination. A substitutionary strategy may in fact prove more advantageous for Laycock, since it does not require a nominalist theory of the term religion, though a substitutionary strategy is vulnerable to a separate set of critiques.

### 2. Substitutionary Strategy

A substitutionary strategy centers on reading some other, more inclusive concept into the religion clauses of the first amendment to replace the term religion. Some scholars and judges have proposed interpreting the "free exercise of religion" as "liberty of conscience"; Judge Harlan's interpretation of the use of religion in the Selective Service statute in *Welsh v. US* stands as the most prominent example of this strategy. Harlan argued that a statute that offers exemptions for religiously motivated conscientious objectors, but not for non-religious conscientious objectors, could not be reconciled with the establishment clause. Moreover, he rejected the inclusive strategy that Black adopted in the plurality opinion for the reasons I outline above: Harlan contended

---

[537] Ibid, 329.

that any reading of "religion" to include "non-religion" undermines the coherence of the language entirely. For Harlan, then, the options were either to throw the statute out and forbid all exemptions, or to "graft" on a new interpretation; he opted for the latter after finding that the exemptions scheme could function without a determination of religiosity.[538] The result of Harlan's proposal would be to test conscientious objectors for conscience alone, in effect replacing the religion requirement with a conscience requirement. Harlan characterized his proposal as a "judicial patchwork" of an otherwise unconstitutional act, thus exemplifying the judicial nature of this particular avoidance strategy.

Harlan's concurrence in *Welsh* focused on a statutory use of the term religion, but an application of his strategy to the first amendment would offer some advantages.[539] First, it would address the fairness concerns regarding the special constitutional status of religion, since Harlan's reading specifically includes non-religious petitioners. Second, it would bring American jurisprudence into line with the Universal Declaration of Human Rights, which protects both freedom of conscience and freedom of religion, and to which the United States is a signatory. Finally, Harlan's proposal to evaluate potential

---

[538] In fact, Harlan approved of the plurality opinion's use of both a sincerity test and an effort to gauge the "depth" of a conscientious objector's commitment to his beliefs. See *Welsh*, supra n. 56 at 366-367.

[539] Other scholars have proposed adding a conscience clause to either constitutional amendments or to statutory restrictions such as RFRA that apply to religion. See Rodney Smith, "Converting the Religious Equality Amendment into a Statute with a Little Conscience," *Brigham Young University Law Review*, 645 (1996). Such a strategy seeks not to replace religion with conscience, but to supplement it. This strategy might address some of the fairness concerns regarding the special constitutional status of religion, but it would not eliminate the need to explain why religion is and why it has a role in the American constitutional scheme.

accommodations by looking to both a petitioner's sincerity and the depth of his/her belief might prove more straightforward than threshold determinations of religious status.[540]

The primary weakness of a conscience-focused substitutionary strategy is that the text of the first amendment refers to religion, not conscience. In fact, as Michael McConnell has noted: "Religion was not 'singled out' in the constitutional text by accident. The Framers of the First Amendment seriously considered enacting a constitutional protection for 'conscience', presumably a broader term, and deliberately adopted the term "religion" instead."[541] Thus, any effort to substitute conscience for religion is irreconcilable with even the mildest commitment to originalism. Even scholars who reject originalism must provide some warrant for deliberately replacing one term in the text with another. While the substitutionary strategy does not grant judges the broad interpretive license that the inclusive strategy does, it still gives them the right to ignore parts of the text that do not cohere with their own preferences, and thus again raises Learned Hand's fear of judges as platonic guardians. Finally, it is not clear that a strategy that focuses on conscience improves on the vagueness of the category of religion. McConnell presumes that conscience is more inclusive than religion, but other scholars argue that it could be interpreted as more restrictive than religion.[542] More to the point, a

---

[540] On the other hand, my analysis of sincerity determinations in Ch. 2 I.A.1.b suggests that sincerity tests can bedevil courts.

[541] Michael McConnell, "The Problem of Singling Out Religion," *Depaul Law Rev*iew, v.50 n. 1, (2000) 12.

[542] Rodney Smith, supra n. 74 at 645. Rodney Smith notes that while a conscience-based scheme would include more claimant than the current religion regime, it would allow for fewer types of claims: "Religion is both more restrictive and more expansive than the term "conscience'-not all conscience is religiously based, and not all religion is based on conscience." Smith, accordingly, argued for including both terms in a post-RFRA statute limiting the federal government's regulation of religion.

conscience-based strategy would replace a difficult threshold determination regarding religion with an equally difficult threshold determination regarding conscience.

## C. Conceive of Religion as an Instrumental Constitutional Good

In section B above, I consider a pair of proposals to use the religion clauses to protect some other value; in this section I consider the claims of some scholars that the religion clauses *already* protect some other value. For scholars who see religion as an instrumental good, no justification of its special status is necessary, since the constitutional protections of religion are in place to promote that other value, and not religion itself. Scholars have proposed several possible goods that might be served by the special constitutional treatment of religion. Some claim that protections of religion serve to promote civic virtue. Others claim that religion is uniquely divisive, so the special status of religion serves to promote civic harmony. Still other propose further values that religion might promote, including multicultural rights and individual liberty In theory, any of these instrumentalist views of the constitutional value of religion could obviate the need to explain how religion is special, since scholars who defend this scheme value the results of protecting and/or burdening religion, not religion itself. For example, an advocate of an instrumentalist approach focusing on civic harmony might claim that there is no need to justify the constitution's special treatment of religion, since religion is only singled out insofar as it promotes another, unequivocally important value, namely civil peace.

However, I contend that these instrumentalist approaches in fact devolve into functionalist definitions of religion, and I accordingly consider them below in section

IV.A.2. Instrumentalist views may appear to avoid explaining what religion is and why it is special because such views are not directly interested in articulating the elements of religion. Such views do, however, require a description of the likely results of the constitutional protections of religion, and these views must establish a necessary link between religion and the favored result in order to explain the special status of religion. For example, scholars who argue that the establishment clause serves to promote civic peace by limiting the role of religion in government could only justify this singling out of religion if religion is uniquely divisive.[543] However, any claim that religion is uniquely divisive amounts to a functionalist definition of religion. This is not to say that a functionalist definition of religion cannot account for the special constitutional status of religion[544], but it *is* to say that an instrumentalist account of the understanding of religion implicitly adopts a definition of religion, and in so doing implies a normative account of the special constitutional status of religion. If the establishment clause singles out religion because it is uniquely divisive, then that divisiveness itself serves as the normative justification for religion's special constitutional status. Instrumentalist accounts of the constitutional value of religion cannot therefore avoid stating why religion is special, and scholars should evaluate them using the same two criteria they apply to other proposed accounts of the special status of religion: 1) Can the account consistently and coherently determine what counts as religion? 2) Can the account satisfactorily justify the special constitutional treatment of religion?

---

[543] Noah Feldman loosely fits this description. In theory, the constitution might prohibit all divisive phenomena in series, but since the establishment clause only targets religion, anyone adopting an instrumentalist view of the clause must claim that either claim that religion is uniquely divisive or that the constitution does not target all divisive phenomena (i.e. religion is not special).

[544] I consider this claim in section III.A.2 below.

## D. Defense of the Status Quo: Threshold Determinations without a Normative Justification

Finally, scholars and judges might obviate a normative justification of the special constitutional status of religion by defending the current jurisprudence, in which judges make threshold determinations of religious status without justifying religion's special status. In section III.B above, I note that the inclusive judicial strategy that scholars such as Douglas Laycock propose has some claim to be the status quo jurisprudence. Given cases such as *Kaufman v. McCaughtry*[545], in which an avowed atheist was deemed religious for the purposes of the first amendment, it would not be difficult to conclude that American judges implicitly subscribe to the strategy of counting all sincere claims to religious status as religious. However, the inclusive strategy does not adequately describe all cases in which judges face threshold determinations regarding religious status, since some cases, notably *Africa v. Commonwealth*[546], find courts denying first amendment protections to apparently sincere petitioners. In short, then, the status quo of legal jurisprudence is that judges make threshold determinations without reference to a consistent standard of what counts as religion and without offering justifications for the special constitutional status of religion.

In this section, I identify and evaluate three types of arguments that defend maintaining the special constitutional status of religion without offering a normative justification of that status. The first approach denies that religion receives unfair treatment, and instead contends that religion is only conceptually special under the current jurisprudential regime. The second approach, which I term "textualist

---

[545] Supra n. 3.
[546] *Africa v. Commonwealth*, 662 F. 2d 1025 (1981)

nominalism" relies on the claim that religion is special merely because the text itself singles out religion; this approach avoids any further description of the special status of religion by appealing to the text itself. The third approach relies on an understanding of religion as a separate sovereign, or a separate jurisdiction, to deny the need for any effort to justify the special status of religion.

### 1. Deny That The Status Quo Is Unfair

One way of defending the status quo is to deny that the current jurisprudential regime singles out religion in an unfair way. Andrew Koppelman, in his article "Is it Unfair to Give Religion Special Treatment?" argues that while the first amendment may grant special treatment to religion, this arrangement does not necessarily entail that the constitution as a whole privileges religion over non-religious moral commitments.[547] Koppelman bases this argument on the claim that any statute or provision that protects religion does not thereby rule out statutory or constitutional protections of non-religious moral commitments. In fact, Koppelman claims it is necessary to specifically single out religion for special treatment, since religion is conceptually distinct from other nevertheless comparable moral goods that the constitution seeks to protect:

> "The state cannot regard religion as a superior source of moral obligation. It must be agnostic on that question. What it can say is that religion is one of a plurality of goods. It should, indeed, treat all of those goods, all the objects of strong evaluation, with equal regard. But if it is going to do that, then it should notice that religion is not reducible to any other good. This is why Eisgruber and Sager are mistaken in thinking that equal regard forbids rules specifically privileging religion."[548]

---

[547] Andrew Koppelman, "Is it Unfair to Give Religion Special Treatment?" *University of Illinois Law Review*, 571 (2006). Koppelman prefers to compare the treatment of religion with the treatment of other networks of "strong evaluative claims", a concept he borrows from Charles Taylor. See Charles Taylor, *Sources of the Self*.

[548] Ibid, 593.

The status quo could, therefore, be construed as fair if the statutes and constitutional provisions that protect religion are matched by relevantly similar statutory and constitutional protections for non-religious moral commitments. Koppelman cites some such protections, noting that environmental regulations that promote "the intrinsic value and undisturbed ecological patterns" are roughly equivalent to state and federal RFRAs in that each protects an important moral commitment.[549] Moreover, Michael McConnell has noted that the establishment clause serves to protect the religious and the non-religious alike from government-enforced orthodoxy, and from this concludes that "religion is manifestly not a 'privilege' that benefits believers at the expense of everyone else."[550]

Koppelman also notes, however, that the current jurisprudential regime could prove unfair if statutory and constitutional protections for religion are significantly stronger than those for other, non-religious moral commitments, and there are significant reasons to think this is the case.[551] In brief, the litany of cases and hypotheticals I list above in section I suggests that religion receives the sort of special treatment that raises questions of fairness. Moreover, even if some version of Koppelman's argument could successfully obviate the need to justify the special moral status of religion, his strategy still requires an explanation of how religion is *conceptually* special.[552] Finally, and most

---

[549] Ibid, 594.
[550] McConnell, supra n. 76 at 27.
[551] Koppelman notes that the presence of significant constitutional protections "might suggest that judicial protection of religion is unfair", and he goes on to cite approvingly *Employment Division v. Smith* as an indication of the Court's adoption of neutrality.
[552] Koppelman's own explanation of the conceptually unique status of religion is unpersuasive. For Koppelman, "Religion is a distinct kind of hypergood because it attempts to respond to the inadequacy of human existence as a whole. All religions take human life to be flawed in some fundamental way, and offer a prescription that claims to address this fundamental defect." This approach combines an under-inclusive

importantly, any strategy that does not offer a moral justification of the special status of religion cannot address Timothy Macklem's concern that judges cannot determine what counts as religion unless they understand the normative purpose for the constitutional protection of religion. For Macklem, then, a strategy that obviates a justification for the special status of religion is judicially unworkable, and it necessarily leads to an arbitrary application of the term religion, as judges have no standards to guide their determinations of what counts as religion. This arbitrariness is inherently unfair, since judges will only accept some claims to religious status, and will not be able to provide a justification of their decisions to the excluded.

### 2. Textual Nominalism

Alternatively, one could contend that any effort to justify religion's special constitutional status is unnecessary because the text of the constitution itself provides a warrant for that status. Michael McConnell notes in his article "Singling Out Religion" that "The very text of the Constitution 'singles out' governmental acts respecting an establishment of religion or prohibiting the free exercise of religion for special protections that are not accorded to any other aspect of human life."[553] McConnell goes on to claim that: "The only constitutional regime that would not 'single out' religion would be one that deconstitutionalized the issue of religion, leaving the issues regarding the extent of regulation, subsidy, and control of religious activities to the discretion of the political branches." While McConnell himself does not argue that the "singling out" of

---

substantive-cognitive claim – human life is flawed – with an over-inclusive functionalist definition – "offers a prescription that claims to address this fundamental defect" – and consequently cannot adequately account for the category of religion. I argue in Chapter 2 that is judges cannot conceptually isolate religion, then they cannot satisfactorily adjudicate religion clause cases.

[553] McConnell, "Singling Out Religion" in Depaul L.R. Vol 50, no. 1 2000 p. 9.

religion in the text of the Constitution in and of itself provides a warrant for the special treatment of religion, one can infer from the second of theses two claims that the mere presence of the term entails its special status. McConnell looks to further evidence, specifically the history of the adoption of the text, to establish his justification for the special status of religion, but could one look exclusively to the text of the constitution to justify the special treatment of religion?

If so, the only possible warrant for the special status of religion would be the presence of the term in the first amendment.[554] The Constitution does not provide an explanation of the term religion, nor does it provide a rationale for protecting its free exercise or preventing its establishment, so only the term itself can provide such a warrant. However, given that the Constitution provides no guidance for understanding the significance of the term religion, and given that the meaning of the term is far from obvious, it is not clear *what* the Constitution singles out in using the term religion. For this reason, an argument that the mere presence of the term religion justifies a particular constitutional arrangement entails a sort of textual nominalism: if the text alone justifies, then the text alone must explain, but the text offers only a name without an explanation of the category. Timothy Macklem, as I have noted, argues that investigations of the meaning of the term religion for constitutional purposes cannot be separated from an effort to understand the justification of the special status of religion:

---

[554] I have described this strategy as one that obviates the need for developing a further justification of the constitutional protection of religion, and yet I here note that the presence of the term religion itself provides that justification in this strategy. I nevertheless contend that this strategy requires no *further* justification of the special status of religion, because the mere presence of the term – that is, without further explanation – provides sufficient justification.

> "We can only determine the meaning and significance that the concept of religion ought to bear in the context of an analysis of religious freedom by referring to the purpose or purposes that justify the entrenchment of that concept in a fundamental guarantee. It follows that freedom of religion cannot be justified, explained, or applied in the absence of a moral debate over the purposes for which that freedom has been and continues to be guaranteed."[555]

The limits of the "textual nominalism" approach underscore his claim: if interpretations of the term religion can look only to the presence of the term, and not to an understanding of the purpose of constitutional guarantees of the freedom of religion – or any other wider cultural understanding of the term – then those interpretations inevitably devolve to nominalism, which is to say that they offer judges no guidance in determining what counts as religion.

Suppose, however, that a textual nominalist partially adopts Michael McConnell's admonition to consult both the text and the history of its development and adoption to gain an understanding of the term religion. Could the combination of the presence of the term religion in the Constitution and the authority of the democratic majorities who ratified the Bill of Rights justify the special status of religion?[556] Such a strategy would be one step removed from textual nominalism, and accordingly would render "avoidance strategy" a partial misnomer, but its blanket justification of democratic authority would not be particular to religion, and would thus obviate the need to explain why religion in particular deserves special constitutional treatment. However, Macklem's critique of any strategy that does not offer a justification of the special status of religion applies to this

---

[555] Macklem supra n. 33 at 15.

[556] This is not, of course, Michael McConnell's strategy. He does not rely on the mere authority of the ratifiers and framers to justify the special status of religion; rather, he looks to their debates to understand why they thought religion worthy of special treatment.

variation on textual nominalism as well. If judges cannot refer to an understanding of the role of protections for religion within the wider constitutional scheme, then they will be unable to apply the term religion consistently. The fact of a democratic decision ratifying the constitutional scheme in itself does not explain what religion is, and how its special status should be understood.

### 3. Religion as A Separate Sovereign

In the wake of *Hosanna Tabor v. EEOC*[557], several legal scholars have revisited an understanding of the religion clauses that acknowledges religion as a sovereign separate and apart from both the federal government and state governments.[558] Some of these scholars orient the *Hosanna Tabor* decision into what they perceive as long history in western, specifically Christian, legal thought, which recognizes religion as a separate sovereign.[559] The application of the ministerial exception in *Hosanna Tabor* resulted in exempting a church from the Americans with Disabilities Act, and for some advocates of the decision, this exemption is required by separate sovereign theory:

> "Although the [ministerial] exception may, in some cases, block lawsuits against religious institutions and communities for discrimination, it rests on the overriding and foundational premise that there are some questions the civil courts do not have the power to answer, some wrongs that a constitutional commitment to church-state separation puts beyond the law's corrective reach. The civil authority – that is, the authority of a constitutional government – lacks "competence" to intervene in such

---

[557] *Hosanna Tabor v. EEOC*, 132 S.Ct. 694 (2012).
[558] See especially Steven Smith, "The "Jurisdiction" Conception of Church Autonomy." San Diego Legal Studies Paper 14-177, 2014, accessed at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2537024
[559] Thomas Berg, Kimberlee Wood Colby, Carl Esbeck and Richard Garnett, "Religious Freedom, Church-State Separation and the Ministerial Exception" *Northwestern University Law Review Colloquy*, v. 106, 175 (2011).

> questions, not so much because they lie beyond its technical or intellectual capacity, but because they lie beyond its jurisdiction."[560]

Now, one could rely on a robust theory of separate sovereignty to justify the special constitutional status of religion, and indeed one scholar has already done so.[561] However, I contend that the theory of separate sovereignty more readily lends itself to an avoidance strategy. A sovereign is distinct for illiberal political theorists because they transcend demands for justification. A sovereign is not, for Hobbes, subject to the rule of justice; rather, the sovereign decides what justice is.[562] If, then, religions are separate sovereigns, then a demand for a justification of special treatment of religion is a category error. Such a posture is inconsistent with liberal accounts of sovereignty, according to which no person exceeds the authority of the law and no law exceeds demands for justification. The sovereignty that proponents of the "separate sovereignty" model advocate is, however, close to that of the illiberal theorists. There are two main reasons to conclude that separate sovereignty is illiberal sovereignty. First, proponents employ it to insulate religious institutions from the requirement to justify illiberal decisions.[563] Second, the practical effect of the application of the separate sovereignty model is to curtail the power of the liberal state.

In brief, then, an avoidance strategy built on the separate sovereignty model obviates the need to justify the special status of religion by refusing to accept liberal

---

[560] Ibid, 176.
[561] See Elizabeth Clark, "Religions as Sovereigns: Why Religion is "Special"" (2013). Unpublished paper, accessed at https://works.bepress.com/elizabeth_clark/16/ . I review Clark's argument below in Section IV.a.1.
[562] Thomas Hobbes, Leviathan, Book I.13
[563] Specifically the right of a religious organization to discriminate in hiring and firing its employees.

political theory's demand for fairness. An advocate of such an avoidance strategy would address the hypotheticals I outline in section I above - for example, the non-religious vegetarian inmate who wishes to know why the Buddhist inmate gets a vegetarian meal but he himself does not – would simply respond by saying religions do not have to justify their special treatment.

There is, however, a significant reason that such a model is unworkable, aside from its alarming reliance on illiberal political theory. Even if courts and citizens alike were to accept the illiberal premises of the separate sovereignty theory, judges would still lack sufficient guidance for applying the concept of religion. Again, Macklem's warning is germane: a normative justification of the special treatment of religion is necessary not only to establish that the special treatment is warranted, but also to help judges determine what counts as a religion. If judges cannot orient their understandings of religion within a normative account of the special status of religion, then they cannot reliably determine what counts as religion.

## IV. Approaches to Justifying the Special Constitutional Status of Religion

In section II of this chapter, I reviewed three types of arguments advocating a justification of religion's special status. While I agreed that both the liberal political tradition's demand for fairness and a pragmatic interest in maintaining civil concord have merit, I found that the most important of these arguments is Timothy Macklem's claim that judges cannot make threshold determinations without referencing an understanding of the purpose of the special constitutional status of religion. In Section III of this chapter, I considered a range of strategies for avoiding a justification of religion's special constitutional status, and I ultimately conclude that only a strategy that opposes special

treatment for religion can satisfactorily answer Macklem's concern, and such a strategy does so by eliminating threshold determinations for religious status altogether. If the only satisfactory strategy for avoiding a justification of religion's special status is to alter the first amendment, then the question remains: is an adequate justification of the special status of religion possible?

In this section I will comprehensively review the efforts of legal scholars to justify the special status of religion. To do so, I will again borrow the taxonomy of strategies for determining what counts as religion that I developed in Chapter 1.[564] While the relationship between efforts to *define* religion[565] and efforts to justify its special constitutional status may not be immediately clear, this relationship is nevertheless necessary in character. Any account of the special status of religion must rely on a feature, set of features, or agglomeration of related features that are characteristic of religion; otherwise it is not religion *per se* whose special status the account justifies. If, for instance, a purported justification of the special status of religion focuses on a feature that is not exclusive to religion – a commitment to ethics, for example – then that justification applies to a wider category than that of religion, and is, accordingly, ill suited for use in the constitutional context. The taxonomy of strategies for determining what counts as religion is therefore highly useful for a comprehensive review of efforts to justify the special status of religion, since each such effort must rely on one particular strategy for determining what counts as religion.

---

[564] As I note in Chapter 1, this strategy is substantially derived from Benson Saler's work in *Conceptualizing Religion*.
[565] Or, more accurately, to say what counts as religion.

This analysis strongly suggests that definitional accounts of religion have a distinct advantage over their non-definitional counterparts, since only definitional accounts can limit the focus of such a justification to a single feature or a small set of features. While I do ultimately conclude that this is the case – with one important caveat – I first consider whether non-definitional strategies are viable below in the sections addressing polythetic and analogical approaches to determining what counts as religion.

I propose three additional evaluative criteria that any justification of the special status of religion must meet beyond the basic requirement that the justification be particular to religion. I derive these criteria from the three arguments in favor of explaining why religion is special that I outlined in section II above. First, any justification must address the "liberal fairness" concern: does the proposed justification explain why a religious claimant merits a constitutional protection and/or burden when a similarly situated non-religious claimant does not? Second, and most importantly, any justification must facilitate judicial determinations of what counts as religion by explaining why religion is special within the constitutional order. Finally, any justification must also have the potential to promote concord, or at least understanding, among the religious and non-religious citizens whose claims the current constitutional order weighs differently. In section II, I argued that only the second evaluative criterion is indispensable, so I will weigh my evaluations of the proposed justifications for the special constitutional status of religion accordingly: any explanation of the special status of religion that does not facilitate clear, consistent determinations of what counts as religion is necessarily inadequate, while an explanation that fails one of the other two criteria may be acceptable, if not ideal.

## A. Monothetic Approaches

Monothetic strategies for determining what counts as religion focus on a single identifying feature to define religion.[566] I noted in Chapter 2 that judges and legal scholars tend to prefer monothetic approaches because they minimize the ambiguity of the concept of religion.[567] The clarity of a monothetic approach is also an advantage for justifying the special constitutional status of religion: because a monothetic approach focuses on a single feature to define religion, any justification of religion's special status must rely on that feature.

### *1. Substantive Monothetic Definitions of Religion and Justifications of The Special Constitutional Status of Religion*

A substantive definition of religion identifies religion with some unique content. Throughout this dissertation, I have subdivided substantive definitions into cognitive, practical, and affective approaches.

#### a. Substantive-Cognitive Approaches

Monothetic cognitive approaches identify religion with some unique cognitive content. In Chapter 1, I note that cognitive approaches either identify religion with a unique object of knowledge, a unique mode of knowing, or a combination of the two. Theism is an example of a cognitive approach that focuses on a unique object of knowledge (namely God), while a faith-based approach to defining religion focuses on a unique mode of knowledge.[568]

---

[566] See Chapter 1, Section II.A for more detail. Complex monothetic definitions, which I address below in section II.B, focus on a single *set* of identifying features to define religion.
[567] Se Chapter 2, Section II.A.1 for more detail.
[568] I discuss cognitive-substantive approaches in greater detail in Ch. 1 Section II.A.1.

### *i. Theism*

Theism is a substantive-cognitive approach that identifies god[569] as the unique object of knowledge that characterizes religion. I argued in Chapter 2 that legal scholars and judges alike generally find theism too under-inclusive to be a viable mechanism for determining what counts as religion. Theism does, however, offer a number of advantages for scholars who want to justify the special constitutional status of religion. First, though the concept of theism can prove vague[570], it is sufficiently associated with religion to warrant the assumption that justifications that rely on theism are particular to religion.

If theism is to justify the special status of religion, however, it must also explain what purpose the constitutional protections and burdens placed on religion play within the constitutional order. One possible theistic justification is that of separate sovereignty.[571] Michael McConnell argues that the framers subscribed to a version of the separate sovereignty argument. According to this line of reasoning, the Constitution recognizes that religious authority is supreme within its own sphere, and that all efforts by the government to either limit the free exercise of religion or to legislate its own religious authority: "were doomed to failure, and even worse, were an attempt to usurp

---

[569] Either as a single god (monotheism), multiple gods (polytheism), or the divinity of all things (pantheism).
[570] See Chapter 1, II.A.1.a.
[571] As I note above, Elizabeth Clark's "Religions as Sovereigns: Why Religion is Special" directly contends that separate sovereignty justifies the special constitutional treatment of religion. Michael McConnell argues that there is strong historical precedent for the concept of separate sovereignty in "Singling Out Religion". See pp 28-30. Now, sovereignty is almost certainly an under-inclusive framing of theism, but I consider it here because I focus on justificatory accounts in this chapter.

the place of God."[572] McConnell here contends that it is the *framers'* knowledge of God as a sovereign that explains the unique protections of religion in the constitution, but a non-originalist account of separate sovereignty is also possible. On this account, the constitution defers to religious claimants because they have knowledge of an authority beyond that of the constitutional government. This account therefore can address Macklem's worry that judges cannot reliably determine what counts as religion without some understanding of the purpose of religious freedom: judges should accept the claims of those who submit to a divine authority because the state's authority cannot impinge on divine sovereignty.

Now, the system of separate sovereignty would likely prove unworkable were it ever truly implemented, largely because the boundaries between divine authority and earthly authority are not clearly demarcated. Are claimants entitled to exemptions from the government authority whenever they believe it to conflict with divine authority? If so, the *Reynolds* Court's fear of "every man a law unto himself" would be realized.[573] The separate sovereignty explanation also fails to provide a clear answer to the fairness criterion. Non-believers, who by definition reject claims of divine sovereignty, will have little reason to agree that their religious neighbors' cognitive commitments entail constitutional protections while their own cognitive commitments do not. For this reason, a separate sovereignty argument is equally unlikely to promote concord among religious citizens and non-religious citizens. Finally, it is not clear that the separate sovereignty argument is, in fact, particular to religion. Some citizens, namely those who maintain

---

[572] McConnell, supra n 76 at 29.
[573] *Reynolds v. US*, 98 US 145 (1879)

dual citizenship, submit to a separate sovereign authority without gaining special constitutional protections. This suggests that acceptance of a separate sovereign in itself cannot explain the special constitutional status of religion.

### *ii. Existential Definitions*

In Chapter 2, I noted that courts have sometimes cited a focus on existential questions as one – if not the only – criterion for religion.[574] I argued there that an existential approach is ill-suited to determining what counts as religion, both because it is far from clear what sorts of content count as existential and because all proposed existential definitions are widely over-inclusive. Nevertheless, some judges have offered justifications for the special treatment of religion based on an existential understanding of the concept. Judge Arlin Adams, for instance, argues that the importance of the existential beliefs to individuals warrants constitutional deference because they: "are those likely to be the most 'intensely personal and important to the believer'".[575] Adams's explanation does address Macklem's appeal for an explanation of the purpose of religious freedom: the special constitutional treatment of religion serves to limit the state's power over the whatever each of its citizens value most. However, because existentialist definitions of religion are widely over-inclusive, this justification is not tailored to religion alone. Rather, Adams' justification serves to explain the importance of judicial

---

[574] See Chapter 2, II.A.1.a.ii

[575] *Malnak v. Yogi*, 592 F.2d 197 (3rd Circ. 1979), 208: "One's views, be they orthodox or novel, on the deeper and more imponderable questions — the meaning of life and death, man's role in the Universe, the proper moral code of right and wrong — are those likely to be the most "intensely personal" and important to the believer. They are his ultimate concerns. As such, they are to be carefully guarded from governmental interference, and never converted into official government doctrine. The first amendment demonstrates a specific solicitude for religion because religious ideas are in many ways more important than other ideas."

deference to any existentialist claim, and consequently fails to explain what is special about religion *per se*. Moreover, a constitutional scheme in which judges extend the protections of the first amendment to whatever an individual realizes in full the fear of "every person a law unto themselves".

### *iii. Extra-temporal Consequences*

In Chapter 2, I argued that the specificity of Jesse Choper's proposal to identify belief in extra-temporal consequences as the essence of religion renders it a more useful mechanism for determining what counts as religion than theism, belief in "spiritual beings", or existential content. Moreover, Choper identifies two separate justificatory arguments that stem from his definition. First, Choper argues that there is a "special cruelty" involved in laws that force someone to act in a way that he/she believes will result in negative consequences beyond his/her lifetime.[576] This justification addresses Macklem's appeal for an explanation of the purpose of religious freedom: the government protects the free exercise of religion because to do otherwise would place a special burden on those who anticipate extra-temporal consequences for their actions. It also addresses the fairness criterion, since this special burden of the believer in extra-temporal consequences distinguishes him/her from claimants who are otherwise similarly situated to the believer. For this reason, Choper's "special burden" explanation for the

---

[576] Jesse Choper, "Defining Religion in the First Amendment", *University of Illinois Law Review*, 1982 579 (1982), 598-599. Technically, Choper's proposal draws on the unique affective experience of the believer here, and one might conclude that his proposal belongs with the other affective justifications in section III.1.c below. However, Choper specifically argues that "extra-temporal consequences" is preferable to any justification that relies on the believer's own experience, since the believer's experience is difficult to quantify, while his definition is relatively exact.

special treatment of religion could also plausibly reduce animosity between religious and non-religious citizens.

However, several commentators question whether the burden imposed by anxiety about extra-temporal consequences for one's actions is truly unique. William Marshall, for instance, questions whether the "psychic harm" that stems from this anxiety is distinct from the harm that results form any other violation of moral principles.[577] Fredrick Mark Gedicks builds on this critique by examining the hypothetical I mention above: Is the suffering of the African-American attorney forced to represent a white supremacist is qualitatively distinct from the suffering of a Catholic attorney forced to represent a teenager seeking an abortion?[578] Gedicks and Marshall expose the primary drawback to a justification that relies on the "special burden" argument: Choper's argument depends on the believer's unique experience of burden, and experience is difficult to quantify. Choper is right to claim that knowledge of extra-temporal consequences is a source of anxiety unique to religion (and only to some religions, at that), but the justification centers on that experience of anxiety, and not the source itself. Anyone who seeks to justify the special constitutional status of religion by appealing to knowledge of extra-temporal consequences must be able to explain why the believer's experience of anxiety is unique.[579]

---

[577] William Marshall, "In Defense of *Smith* and Free Exercise Revisionism," *University of Chicago Law Review,* v. 58 n. 1, 308 (1991), 321.
[578] Gedicks, supra n. 20 at 562.
[579] I address experiential justifications of the special constitutional status of religion below in III.A.1.c.

Choper's second justification of the special constitutional status of religion links his concept of extra-temporal consequences to the government's lack of competence with regard to religious matters. Choper claims that the concept of extra-temporal consequences helpfully marks out territory that is beyond the reach of government:

> "… the extra-temporal consequences standard is consistent with a primary goal of the religion clauses – to isolate government from matters that it has neither the power nor the competence to control. Because the state can neither perceive nor determine what happens after death, it is particularly appropriate that it have minimal legislative authority to affect what may possibly occur in that realm."

Given that, as Choper puts it, the state "can neither perceive nor determine what happens after death", it is arguably superfluous to interpret the constitution as placing a formal prohibition on efforts to govern the afterlife. Regardless, the principle that Choper sets out here cannot stand. The government may well lack the competence to *directly* affect the afterlife, but any effort to bar the government from all actions that could *indirectly* affect the afterlife according to any given believer's standards is, in effect, an effort to bar government itself.

#### *iv. Substantive-Cognitive Definitions that identify religion with a unique mode of knowledge*

Some substantive-cognitive definitions do not identify religion with a unique object of knowledge, but instead propose that a particular mode of knowledge is characteristic of religion. In Chapter 1, I argued that theologians and philosophers propose a variety of frameworks for identifying some mode of understanding that is unique to religion, but in Chapter 2 I noted that all legal scholars who take this approach characterize religion as a non-rational mode of knowledge, and they often title this non-rational mode of knowledge "faith". Some scholars use this anti-rational characterization

of religion in their justification of its special status by looking to its impact on the legislative process, while others argue that faith as an anti-rational mode of understanding has value in and of itself. Whatever the merits of these two separate justificatory strategies, I contend that this concept of anti-rational understanding – regardless of how it is framed - is not sufficiently particular to religion to support a justificatory scheme.

Some scholars argue that the purported anti-rationalism of religion places unique burdens on religious citizens in the legislative process, while others use the anti-rationalism of religion to place firm limits on legislative action. Abner Greene, for example, argues that the "secular purpose" test of establishment clause jurisprudence, which effectively prohibits legislation intended for solely religious purposes, is necessary because of the anti-rational nature of religion.[580] Religion, for Greene, is characterized by references to "extrahuman sources of authority", so any legislative deliberation of religious matters necessarily excludes non-religious citizens and lawmakers – who have no access to these "extrahuman sources" - from participation.[581] Establishment clause limitations on non-secular legislation are therefore necessary to ensure that non-religious citizens are not excluded from legislative deliberation, and this, for Greene, also indicates the necessity of constitutional protections of religious practice. The free exercise clause ensures that the government will protect religious practices despite the fact that those

---

[580] Abner Greene, "The Political Balance of the Religion Clauses," *Yale Law Journal*, v. 102, 1611 (1993).

[581] Greene's framework of an "Extrahuman source of authority" is distinct in some important ways from Leiter's concept of "insulation from evidence". For Greene, religious believers may still use reasons to support their claims, while Leiter's "insulation from evidence" suggests that believers reason in a defective manner. For my purposes, however, their claims are relatively similar: both argue that religion is special because non-believers cannot participate in religious modes of reasoning.

practices cannot be addressed through normal legislative means. Greene's formula ably addresses the fairness criterion, since religious citizens receive unique protections as compensation for the significant burdens placed on their participation in the political process. However, Greene's concept of reliance on "extra-human sources of authority" is not necessarily particular to religion. Many approaches to ethics rely on appeals to authority beyond the individual human; stoic natural law theory, which looks to the order of nature, and Kantian moral theory, which looks to a moral law valid for all possible rational beings, serve as two ready examples. Now, perhaps Greene means to focus on the anti-rational character of religious reasoning, but here too the concept would not be particular to religion. Few would contend that the madman is entitled to special constitutional protection simply because others cannot access his reasoning, so some other justification is necessary to explain why religion merits special protections.

Michael McConnell also relates an understanding of religion as a unique mode of reasoning to the legislative process in order to justify the special constitutional protections of religion. Unlike Greene, however, McConnell uses this concept of religion to support claims about governmental non-competence with regard to religion. McConnell proposes that governmental competence derives from the superior capacity of a group of individuals to determine and promote the public interest.[582] However, the superiority of group deliberation disappears in the context of religion:

---

[582] McConnell, supra n. 76 at 24: "Democratic government has the greatest competency with respect to determinations about what will best serve the public interest. One could even argue that properly constituted representative institutions are a more reliable judge than any indiviual of the content of social ethics. Since we are each highly (and often unconsciously) self-centered, representatives of society as a whole may be more likely to

> "The government cannot be a competent judge of religious truth because there is no reason to believe that religious understanding has been vouchsafed to the majority, or to any governmental elite…. God does not speak through political majorities." [583]

Because McConnell here does not explain how the unique mode of understanding characteristic to religion renders it impervious to the benefits of deliberation by large groups, that imperviousness itself effectively becomes the unique characteristic of religious understanding. However, governments recognize limits to the benefits of group deliberation in other areas[584], so one cannot conclude that this imperviousness is particular to religion.

Other scholars argue that the unique mode of reasoning characteristic of religion is valuable in itself, and that this value merits the special constitutional protections of religion. Timothy Macklem identifies religion with faith, which he understands to be belief without reference to reasons in favor of that belief.[585] Macklem argues that in ideal circumstances, humans do not need to resort to faith, as their decision-making and cognition can rely on the availability of reasons. However, given that the world is not always ideal, humans sometimes must make choices with incomplete knowledge, and

---

develop and enforce mutually beneficial rules regarding how we should behave toward one another than any other decision making method that comes to mind."

[583] Ibid, 24-25. McConnell goes on to cite Madison's *Memorial and Remonstrance* in support of this claim, noting that with regard to matters of religion: "the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men." James Madison, *Memorial and Remonstrance*, p. 1.

[584] For example, the federal government does not allocate grants for scientific research according to the decisions of deliberative bodies, but instead delegates such decisions to experts via the National Science Foundation. This delegation of authority is due in part to the recognition that group deliberation is not superior to the deliberation of experts in matters of scientific research.

[585] Macklem, "Faith as a Secular Value" supra n. 33.

such decision-making is, for Macklem, characteristic of faith.[586] Such decision-making in the absence of full reasons is hardly particular to religion, so even if Macklem could establish a justification for constitutional protections based on this concept of faith, such a justification would not explain why religion *per se* merits special status.

### b. Substantive Practical Definitions

Substantive-practical definitions identify religion with some unique mode of practice or behavior. In Chapter 1, I argued that scholars in religious studies and related fields offer two main types of substantive-practice: some identify religion with a unique type of ethics, while others identify religion with ritual. In Chapter 2, I noted that legal scholars rarely rely exclusively on practice in forming their definitions of religion, though some have used both ethics and ritual for multi-factorial definitions of religion. Use of substantive-practical definitions is equally infrequent in justificatory arguments, although some have partially relied on substantive-practical definitions that focus on ethics to justify the special constitutional status of religion. Ultimately, however, justificatory arguments that partially rely on a substantive-practical definition use other aspects of their concepts of religion to justify the special status of religion, so substantive-practical definitions do no work in the justificatory aspect of these arguments.

John Garvey, for example, partially relies on a concept of ethics unique to religion in his article "An Anti-Liberal Argument for Religious Freedom". For Garvey, the ethics of religious groups is distinct in part because it is formed by divine command, and in part

---

[586] Ibid, 40-43.

because it results in some unique forms of behavior.[587] However, Garvey offers no systematic explanation of these unique forms of behavior, so his distinction between religious ethics and non-religious ethics focuses on divine command. In other words, Garvey's concept of religion is in fact rooted in a substantive-cognitive definition of religion, specifically one that focuses on theism; any ethical component to his concept of religion derives from this cognitive core of the concept. Moreover, his justification for the special treatment of religion focuses on the experience of the religious believer[588], so any latent practical concept of religion in his article does no work in his justification of religion's special constitutional status.

Other justifications appear to rely on a more practical concept of religion to justify its special constitutional status, but a proper taxonomy frames these arguments as relying on a functionalist concept of religion. Those who claim that protections of religion are necessary to promote civic virtue may appear to link religion with a particular type of behavior, but unless they offer specific description of the qualitative difference between the actions of believers and the actions of non-believers, their work is necessarily functionalist. A functionalist defense of religion sees value in its outcomes without identifying anything essential about its substance, while a substantive definition must explain what is unique about religion.

---

[587] John Garvey, "An Anti-Liberal Argument for Religious Freedom", 7 *Journal of Contemporary Legal Issues*, v. 7, 275 (1996) 286: "Religious believers are often bound by special moral obligations. These come from a moral code that has some supernatural sanction (the law in Judaism, the sharia in Islam). Such a code often demands forms of behavior that the rest of society views as superrorgatory, morally neutral, or even (occasionally) wrong."

[588] I address experiential justifications of the special status of religion below in section III.A.1.c

In fact, because a substantive-practical definition of religion relies on a description of the qualitative distinction between religious action and non-religious action, it is unlikely that any such definition will play a role in justifying the special constitutional status of religion. A *purely* practical definition, in other words, must reference behavior alone to substantiate the essential difference between religion and non-religion.[589] I noted in Chapter 1 that ethnographic studies can sometimes identify differences among the behaviors of various groups, but the methodological barriers to a trans-cultural ethnographic study of all groups whom scholars consider religious are exceedingly high.

### c. Substantive-Affective/Substantive-Experiential Definitions

In Chapter 1, I argued that proponents of substantive-affective definitions in the field of religious studies design their concepts of religion in order to limit the availability of the concept of religion to purely rational analysis. In Chapter 2, I noted that this evasion of rational analysis renders affective definitions unpopular with legal scholars, since one of the key criteria for evaluating a definition of religion in the legal context is utility in a judicial context. I also noted that no legal scholar has relied on an affective definition, nor has any scholars used an affective element as one component of a definition of religion. Nevertheless, scholars *have* used the unique experience of religious citizens to justify the special constitutional status of religion. This inconsistency dooms

---

[589] Some functionalist justifications of religion's special constitutional status are difficult to distinguish from substantive-practical definitions, but this point distinguishes the two. A functionalist defense argues that religion deserves constitutional protection because religion promotes good behavior, but the functionalist approach either does not specify what that behavior is or does not claim that religion alone can promote that behavior. A substantive-practical approach must describe activity that is peculiar to religion and then link that behavior to a justification for the special treatment of religion.

affective defenses of the special status of religion: because scholars are reluctant to define religion in experiential terms, they cannot conclude that any defense of the current constitutional scheme based on the experience of believers is, in fact, unique to believers.

John Garvey, as I note above, frames his concept of religion in cognitive and practical terms, but relies on the unique experience of believers to justify the special constitutional status of religion. Garvey defines religion in terms of the unique source of authority for religious action, but he locates the justification for religion's special status in the experience of the believer when that divine authority conflicts with the laws of the earthly government. In contrast to the experience that any non-religious person forced to choose between a moral demand and the laws, the situation of the religious citizen in the double-bind is more severe: "The harm threatening the believer is more serious (loss of heavenly comforts, not domestic ones) and more lasting (eternal, not temporary)…. Believers face a special kind of suffering; they are subject to a higher kind of duty." Like Choper, Garvey cites the knowledge of extra-temporal consequences as a cause of the believer's suffering, but it is the suffering itself that, for Garvey, warrants Constitutional protection. However, because Garvey has not qualitatively distinguished the believer's suffering from that of non-religious citizen in a double-bind, the experience alone cannot do the justificatory work his argument needs. Without an explanation of how religious experience is unique, William Marshall's rejoinder looms: "The violation of deeply held moral or political principles may cause as much psychic harm to the believer as would a violation of a religious tenet, even if the latter is believed to have the extratemporal effect." Garvey suggests that the believer's experience is "more serious", in large part because there is more at stake, but it is not necessary to conclude that the fear of God

renders the double-bind more excruciating for believers than for non-believers. The history of religion offers many examples of martyrs who more or less serenely accept the most severe state sanction for their actions – death – and their serenity derives precisely *from* their fear of God. Moreover, if the believer has a series of extra-temporal consequences to anticipate in the afterlife, then arguably more is at stake for the non-believer, who cannot expect any eternal recompense for suffering experienced in this life.

Now, I am not contending that believers should emulate martyrs and serenely accept punishment from the state, nor am I contending that the suffering of non-believers in the double-bind is worse than that of similarly situated believers. Rather, I claim that Garvey cannot establish that believers suffer in some unique manner without first explaining how their suffering is distinct from that of non-believers. However, based on my analysis of affective definitions of religion in the first chapter, such an explanation is highly unlikely. Affective definitions of religion elude rational analysis, and often they do so by design. Even if there *is* a type of suffering unique to believers, it is of little use in the legal context if no one can offer a rational means to identify it.

### 2. Monothetic-Functionalist Definitions

Monothetic functionalist definitions do not identify religion with some unique cognitive, practical, or experiential content; rather, they identify a common output of religion. I argued in Chapter 1 that scholars in religious studies and related fields have proposed a variety of functions for religion, including Emile Durkheim's claim that religion serves to bind people to a "moral community" and Clifford Geertz's claim that religion functions to organize an adherent's cultural perceptions. In Chapter 2 I noted that judges and legal scholars have rarely used functionalist definitions from the field of

religious studies, with the exception of the 1978 Harvard Note's appropriation of Paul Tillich's concept of Ultimate Concern. Other prominent functionalist definitions of religion in the legal context include the "parallel position" formula from *US v. Seeger* and Douglas Laycock's proposal to count all sets of answers to religious questions as religions. However, neither of these proposals, nor that of the Harvard Note, offer justifications for the special treatment of religion based on their functionalist concepts of religion. In fact, Laycock, the Note and the *Seeger* court are all specifically concerned with developing broadly inclusive concepts of religion in order to minimize the special treatment that might result from more narrow concepts of religion.

Other scholars, however, do use functionalist definitions to justify the special constitutional treatment for a discrete category of religion, though they usually do so implicitly. These arguments are characterized by the claim that the constitution treats religion in a special manner because religion is tied to some other good that the constitution promotes. In the remainder of this section, I identify two primary types of goods that scholars use to justify the special treatment of religion: civic virtue, and civil harmony (or the absence of divisiveness); I also consider other possible goods that religion might promote. In order for such any of these arguments to justify the special treatment of religion, and not some wider category that includes religion, they must establish a necessary link between religion and one of these three goods. I follow a number of sharp critiques of functionalist approaches in claiming that these accounts fail to demonstrate that special constitutional treatment of religion is necessary to promote any of these ends.

### a. Civic Virtue

Enlightenment era political philosophers who sought to justify state support for religion often looked to the role that ideal religious institutions might play in fostering a moral populace. Rousseau, for example, argues that the sovereign has an interest in encouraging religious belief that fosters a: "social conscience without which it is impossible to be a good citizen or a loyal subject."[590] Toqueville argued that disestablishment of religion achieved a similar effect in America, as the plurality of sects all inculcated a basic morality that was necessary, in his eyes, to prevent freedom from giving way to anarchy.[591] Early commentaries on the religion clauses offered some explanation for this effect. Justice Joseph Story, who expressed some concern that a state that does not promote "public worship of God" might not endure,[592] nevertheless suggested that the religion clause might effectively promote religion – and civic virtue – because they "exclude all rivalry among Christian sects."[593] James Madison contrasted the enduring establishments of New England with the example of Virginia, finding that the disestablishment in the latter resulted in: "the greater industry and purity of pastors and in the greater devotion in their flocks."[594] Justice Rehnquist, in his lengthy dissent in *Wallace v. Jaffree*, cited statements by the framers and early commentators on the Constitution – including Story's commentary - that approve of the moral utility of

---

[590] Rousseau, *The Social Contract*, (London, Penguin Classics, 1968), p. 186. Already with Rousseau, however, the link between religion per se and civic virtue is attenuated, since he recognizes that the religion the sovereign promotes might be a merely civil religion, and he

[591] Toqueville, *Democracy in America*, Part II Ch. 9.

[592] Joseph Story, *Commentaries on the Constitution*, p. 1869 at http://www.constitution.org/js/js_344.htm

[593] Ibid at 1871.

[594] James Madison, "Letter to Jasper Adams," in, *Religion and Politics in the Early Church: Jasper Adams and the Church-State Debate*, ed. Daniel Dreisbach (Lexington, University of Kentucky Press, 1996), 118-120.

religion; Rehnquist argued that this approval demonstrates the compatibility of that state support for public prayer with the religion clauses.[595] The enlightenment-era functionalist argument for the special constitutional treatment of religion is therefore still present – at least implicitly – in some roughly contemporary explanations of the role of religion in the constitution.

The functionalist justification of religion's special status that links religion with civic virtue is persuasive if and only if religion alone can promote civic virtue. Even a persuasive demonstration that religion does indeed promote civic virtue would fail to justify the special status of religion unless it also demonstrated that non-religious institutions, philosophies, and social organizations were incapable of promoting civic virtue. No defenses of the special status of religion on functionalist grounds include such an argument. Even if such a defense could be mounted, it would almost certainly fail both the fairness criterion and the political concord criterion for evaluating justifications of the special status of religion. If a "civic virtue" functionalist account can only succeed by demonstrating that religion alone promotes public ethics, then such an account would justify the special treatment of a religious claimant relative to a non-religious claimant on the grounds that the latter's beliefs are unethical.

### b. Divisiveness

A justification that religion merits special treatment because it is uniquely divisive runs nearly opposite to the claim that religion merits special treatment because it

---

[595] *Wallace v. Jaffree*, 472 U.S. 38 (1985), 101-105. Rehnquist stopped short of directly claiming that religion is necessary to promote civic virtue, though his endorsement of an originalist interpretation of the religion clauses, combined with his citation of Story and others, tacitly endorses this position.

promotes civic virtue. For scholars and judges who advocate this approach, religion's inherent divisiveness necessitates special constitutional burdens, so much of their reasoning focuses on the Establishment Clause. Justice Breyer, who is notable for his focus on the importance of divisiveness for religion clause jurisprudence,[596] has argued that public funding for religious schools could generate divisive social conflict in state legislatures as religious groups contend for the states resources[597], and he has also claimed that sectarian prayers at town council meetings[598] and new displays of religious symbols at government buildings may generate divisive social conflict.[599] Earlier establishment clause jurisprudence also cited the potential for social conflict as a reason for placing special constitutional limits on religious organizations and religious motivations for government actions. Justice Burger based the "entanglement" prong of

---

[596] While Justice Breyer does frequently call attention to the divisiveness of religion as one important consideration for establishment clause jurisprudence, he does not see it as the sole principle for religion clause jurisprudence.

[597] *Zelman v. Simmons-Harris*, 536 U.S. 639, (2002) at 723-724: "School voucher programs finance the religious education of the young. And, if widely adopted, they may well provide billions of dollars that will do so. Why will different religions not become concerned about, and seek to influence, the criteria used to channel this money to religious schools? Why will they not want to examine the implementation of the programs that provide this money—to determine, for example, whether implementation has biased a program toward or against particular sects, or whether recipient religious schools are adequately fulfilling a program's criteria? If so, just how is the State to resolve the resulting controversies without provoking legitimate fears of the kinds of religious favoritism that, in so religiously diverse a Nation, threaten social dissension?"

[598] *Greece v. Galloway* 134 S.C. 1811 (2014). At 1853, Breyer specifically faulted the majority opinion for "assess[ing] too lightly the significance of these religious differences, and so fears too little the "religiously based divisiveness the Establishment Clause seeks to avoid.""

[599] In *Van Orden v. Perry* 544 US 677 (2005), Breyer claimed the four decade history of the Austin monument at issue in the case strongly suggested that the monument was not divisive, and he found this claim to be "critical" for his concurrence in the decision to permit its continued display. The relative newness of the display at issue in *McCreary County v. ACLU* in part explains why he ruled differently in that case.

the *Lemon* test in large part on his claim that the establishment clause is designed to limit social conflict:

> "Ordinary political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. The potential divisiveness of such conflict is a threat to the normal political process."[600]

Moreover, one contemporary legal scholar argues that limiting social conflict between "liberal secularists" and "values evangelicals" should be the primary consideration for religion clause jurisprudence.[601]

The divisiveness argument is, however, an ineffective justification for the special status of religion for at least three reasons. First, it is unclear which sort of divisiveness proponents of the argument are targeting. In school funding cases, the divisiveness argument centers on the potential for conflict among different religious groups, while the concern in cases about religious symbols is conflict between religious and non-religious citizens.[602] Second, the divisiveness argument relies on the claim that religion is, as Richard Garnett puts it, "inherently divisive,", but there is little reason to conclude that religion is more divisive than, for instance, politics.[603] Finally, as Garnett notes, divisiveness is not obviously undesirable in a democratic system; in fact, divisions, even rancorous divisions, are inherent to a system in which the public works out matters of policy through deliberation.[604] Any justification of religion's special status that relies on

---

[600] *Lemon v. Kurtzman*, 403 U.S. 602 (1971) at 622.
[601] Noah Feldman, supra n 44.
[602] The concern in cases regarding prayer at town council meetings is arguably both.
[603] Richard Garnett supra n 37 at 1716.
[604] Ibid at 1670.

limiting divisiveness is a non-starter if divisiveness is an unavoidable – if often unpleasant - aspect of democratic government.

### c. Other Potential Functionalist Approaches

I noted in Chapter 2 that some scholars cite the protections of the free exercise clause as the primary evidence for protection of multicultural rights in the American jurisprudential tradition. One could, then, extend this argument to a functionalist justification for the special treatment of religion. On this line of reasoning, the Constitution protects religion because it seeks to promote multicultural rights. However, as I observed in chapter II, the relationship between religion and culture is ill defined, and it certainly is not the case that religion alone promotes multicultural rights. Therefore, any justification based on the promotion of multicultural rights would not be particular to religion.

Michael McConnell once proposed to use religion clause jurisprudence: "as a model for separating public from private in other areas."[605] What impresses McConnell about the arrangement of the religion clauses is the recognition that: "the government is not omnicompetent,", so he sees potential for using a model that withdraws the government from cultural conflict because it maximizes: "individual and private collective cultural and conscientious diversity." Now, McConnell is careful to note that he does not wish to extend an exemptions regime beyond the scope of religion, but one could extrapolate a functionalist position from his suggestions. If the religion clauses serve as a model for maximizing "individual and private collective" liberty, then perhaps one could justify the special treatment of religion on the grounds that protections for

---

[605] McConnell, supra n. 76 at 43.

religion promote individual and private collective liberty. However, here again any identification of religion with individual and private collective liberty is imperfect, as other institutions, ideologies, and activities also promote these liberties. Thus, any functionalist justification relying on the claim that religion promotes private collective and individual liberty would not be particular to religion.

## B. Polythetic Classification and Complex Monothetic Definitions

### *1. True Polythetic Classification*

I explained in Chapter 1 that true polythetic classification, as developed by philosophers of biology, relies on statistical evaluation of overlap on a range of possible features to establish a category. I argued there that scholars have not fully applied true polythetic classification to the category of religion, although several scholars, motivated in large part by their recognition of the shortcomings of monothetic approaches, have advocated the use of polythetic classification for the category of religion. In Chapter 2, I noted that judges and legal scholars have not made use of polythetic classification for determining what counts as religion, and I cite the unwieldy nature of polythetic statistical analysis and the lack of any precedent for polythetic classification in religion clause jurisprudence as two likely explanations for this absence.[606] I also noted there that polythetic classification offers a few important merits, including impartiality and openness to modification, and I argued that courts should consider adopting polythetic classification if scholars in religious studies or a related field were to generate a reliable polythetic mechanism for determining what counts as religion.

---

[606] I also contend that the lack of any full proposal for polythetic classification in religious studies and related fields as an additional reason for this lack of arguments for polythetic classification in the field of law. See infra, Chapter 2, Sec. II.B.1.

Whatever its potential as a mechanism for determining what counts as religion, polythetic classification is ill-suited to the task of justifying the special constitutional status of religion. The statistical analysis of a polythetic account could hypothetically establish that a justification is focused on religion and not some other phenomenon, but a polythetic account cannot adequately address the fairness criterion or Macklem's concern that a justificatory account is necessary for judges to consistently determine what counts as religion. Because polythetic classification does not rely on any single trait or groups of traits as either necessary or sufficient conditions for establishing a category, a justificatory account based on polythesis has no stable set of characteristics to reference. A mere observation that statistical analysis indicates a relevant similarity to other members of a polythetic category cannot explain why a religious claimant merits accommodations that the constitution bars to similarly situated non-religious claimants. A justificatory account must reference certain characteristics of religion in order to address the fairness criterion, but the absence of a stable set of characteristics inherent to polythetic classification bars any such reference. Were a judge or scholar to build a justificatory account out of a polythetic concept of religion, it is likely that the account would provide grounds for excluding some members of the category from legal protections. Any polythetic justification would likely reference some set of criteria, and then provide judges a strong reason to exclude members of the category of religion that lack those criteria from judicial protections of religion.

### *2. Complex Monothetic Definitions*

I explained in Chapter 1 that complex monothetic defintitions rely on a set of necessary characteristics to determine what counts as religion. No single feature is sufficient to determine religiosity, but the confluence of the set is. I noted in Chapter 2

that some scholars have proposed complex monothetic approaches for determining what counts as religion in courts; Brian Leiter notably proposes a complex monothetic definition composed of three elements.[607] I argued in Chapter 2 that complex monothetic definitions could potentially compensate for the over-inclusiveness of simple monothetic definitions, since the addition of further criteria would exclude some phenomena included in overly broad monothetic approaches. However, a complex monothetic approach only exacerbates under-inclusiveness, and it cannot correct for the vagueness of a particular characteristic.

Leiter himself concludes that the special constitutional status of religion is not justifiable after determining that none of his three characteristics provides sufficient grounds for protecting religion. This approach, however, is not adequate to the concept of a complex monothetic definition of religion, as only the *confluence* of the three characteristics, and not each individually, defines religion. Any justification relying on a complex monothetic definition, therefore, must explain why of the confluence of relevant characteristics merits special protection. With regard to Leiter's approach, a justification must explain why the combination of insulation from evidence, existential consolation, and categorical demands entails a category of phenomena that requires special constitutional protection.

## C. Analogical Classification

Analogical approaches to categorization, like true polythetic classification, do not rely on a set of necessary and sufficient conditions. Unlike polythetic classification, analogical approaches do not have a single set mechanism for establishing a category. In

---

[607] Brian Leiter, *Why Tolerate Religion*, (Princeton, Princeton University Press, 2013).

Chapter 2, I reviewed three types of analogical classification that legal scholars have employed: the prototype classification that Kent Greenawalt, George Freeman and Arlin Adams defend; Eduardo Peñalver's modified prototype approach, and Laurence Tribe's "arguably religious" standard. In this section, I will contend that Peñalver and Tribe's proposals, much like true polythetic classification, cannot provide sufficient reference to characteristics of religion to support a justificatory argument. Prototype approaches, on the other hand, merely relocate the justificatory argument to the prototype itself, and I will contend that this relocation proves too exclusive to serve as a viable approach for contemporary religion clause jurisprudence.

### *1. Prototype Approach*

A prototype approach to analogical classification uses either a single exemplary instance of a phenomenon or a small group of related instances of the phenomenon as the benchmark for comparisons with borderline cases, and uses similarity to that benchmark as the basis for inclusion in the category.[608] I noted in Chapter 2 that religious studies scholars and legal scholars alike invariably select western monotheisms – and often simply Christianity – as that benchmark. This selection effectively relocates the justificatory arguments from religion to western monotheisms, and perhaps to Christianity itself: if the concept of religion is based on similarity to western monotheisms, then any justification for the special constitutional status of religion must rest on a demonstration of the special status of those western monotheisms. Now, such an

---

[608] I noted in Chapter 2 that there are several different methods for comparing borderline cases to the benchmark, but these differences do not have any effect on justificatory arguments, so I do not review them here. See Ch. II Sec. II.C.2.

approach would likely facilitate a justificatory argument in one critical way: the category of western monotheisms is easier to define than the category of religion in general. A definition of an individual member of that category, such as Christianity, would prove easier still.

However, because a prototype approach relies on a paradigm case of religion to establish the category, it inevitably references the features, and even doctrines of that paradigm case. Timothy Macklem identifies two significant problems resulting from this reliance on the doctrines of the paradigm case. First, any use of the doctrines of a particular religion to establish the category raises establishment clause concerns: if scholars and judges rely on a particular religion to set the benchmark for the entire category, they effectively establish that religion, according to at least some concepts of the term "establishment". Second, reliance on the doctrines of a particular religion may be incompatible with the very concept of religious freedom, as those religions may not prove tolerant of other religions.[609] To these concerns I add a third: even if a paradigm approach could evade establishment clause concerns and accept the presence of other religions, it would necessarily exclude potential members of the category that do not closely resemble the paradigm. I note in Chapter 2 that the ethnocentrism of a prototype approach may be tolerable in religious studies and related fields since in those fields the breadth of the category only determines the range of potential comparisons. In law, however, a defense of rights is at stake, so the potential exclusiveness of prototype case is a serious flaw.

---

[609] Macklem, supra n. 33, 17-22.

### 2. Peñalver's Revision to the Prototype Approach

I noted in Chapter 2 that Eduardo Peñalver offers several productive revisions to the prototype approach that are designed to limit precisely this potential for exclusiveness. First, he recommends broadening the range of comparisons: "compare the belief system in question with at least one theistic religion, one nontheistic religion, and one pantheistic religion."[610] Second, he proposes ruling out several grounds for denying a claimant religious status, including non-theism, lack of a formal institutional structure, and the absence of a sacred/profane distinction. Peñalver's proposal to require comparisons with theistic, non-theistic and pantheistic religions effectively broadens the range of paradigms, and in so doing undermines the basis for a justificatory argument. The ethnocentric paradigms included in traditional prototype approaches will likely lead to intolerably exclusive results, but they do facilitate justificatory arguments by narrowing the category to a few similar examples. Now, it is possible that theistic, non-theistic and pantheistic religions share some other feature by virtue of which they are all religions, but without a description of that feature – which would effectively become a monothetic definition of religion – Peñalver's approach has no basis for justifying the special constitutional status of religion.

Peñalver's second proposal does narrow the concept of religion, but not sufficiently to provide the basis for a justificatory argument. In claiming that theism, institutional structure and a sacred/profane distinction cannot be the basis for excluding a borderline case, Peñalver effectively claims that these features are not part of the concept of religion. However, a list of three features that do not factor into the concept does not

---

[610] Eduardo Peñalver, "The Concept of Religion," *Yale Law Journal* v. 107 n. 3 (1997).

provide an indication of which features do make up the concept, and a justificatory argument is not possible without reference to a set of features that make up the category of religion.

### 3. Tribe's "Arguably Religious" standard

In Chapter 2, I review Laurence Tribe's proposal to count all "arguably religious" phenomena as religion for the purposes of the free exercise clause while counting all "arguably nonreligious" phenomena as non-religious for the purposes of the establishment clause. I note there that Tribe's standard provides even less clarity about the concept of religion than do the other analogical approaches to determining religion. Because justificatory accounts require a relatively stable concept of religion, Tribe's approach does not provide an adequate basis for an explanation of religion's special constitutional status. In addition, in Chapter 2 I review Kent Greenawalt's claim that Tribe's standards as sufficiently amorphous to permit the categorization of one phenomenon as religious for free exercise purposes and non-religious for establishment clause purposes. Any scheme that permits a phenomenon to be both religious and non-religious disables all efforts to provide a justification for the special status of religion since it effectively breaks down the distinction between religion and non-religion.

### 4. Indirect Justificatory Arguments and Analogical Approaches

Analogical approaches to determining what counts as religion do not provide a sufficiently coherent concept of religion to enable a direct justification of its special constitutional status, but scholars have used an analogical approach for indirect justificatory arguments. In "Singling Out Religion", Michael McConnell explores the utility of several monothetic approaches for justifying the special constitutional status of

religion, including functionalist justifications[611], substantive-cognitive justifications that identify religion with a unique mode of understanding[612], and substantive-cognitive justifications that identify religion with a unique object of knowledge.[613] Ultimately, however, McConnell's justification for the special treatment of religion does not rest on any of these individual arguments, but instead looks to the inadequacy of all monothetic justifications with regard to religion:

> "Religion is a special phenomenon, in part, because it plays such a wide variety of roles in human life: it is an institution, but it is more than that; it is an ideology or worldview, but it is more than that; it is a set of personal loyalties and the locus of community, akin to family ties, but it is more than that; it provides answers to questions of ultimate reality, but it is more than that. Religion cannot be reduced to a subset of any larger category. In any particular context, religion may appear to be analogous to some other aspect of human activity – to another institution, worldview, personal loyalty, basis of personal identity, or answer to ultimate and transcendent questions. However there is no other human phenomenon that combines all of these aspects; if there were such a concept, it would probably be viewed as a religion."

McConnell's claim that religion "cannot be reduced to a subset of any larger category" is a clear critique of justificatory strategies that rely on a definition of religion, and this critique actually serves – perhaps counter intuitively – to indirectly support the claim that religion merits special constitutional protection. Many scholars have documented the insufficiency of monothetic approaches for both determining what counts as religion and

---

[611] McConnell, supra n. 76 at 22: "The Framers of the Constitution were well aware of three facts. First, churches had long been the primary institutions for the development and inculcation of ideas about virtue. Second, official state alignment with a single religion was very frequently a source of discord, persecution, and even civil war. Third, government support for religion tended to weaken rather than strengthen the recipient."
[612] See section III.A.1.a.iv above.
[613] See section III.A.1.a.i above.

justifying the special constitutional status of religion[614], but McConnell aims to negate these critiques by pointing out that they do not accurately target religion. Because religion, for McConnell, always exceeds any monothetic category, no critique based on a monothetic definition of religion can succeed.

However, McConnell's defense of religion's special status is only indirect because he does not offer a clear concept of religion to replace the monothetic concepts he dismisses as incomplete. In the passage I cite above, McConnell cites five criteria that are individually insufficient for establishing religious status, so one might conclude that he is proposing a complex monothetic definition of religion. However, his claim that any other phenomenon that included all five criteria would only "probably be considered a religion" indicates that he has stopped well short of defining religion. I consider his proposal in this section because he only suggests an analogical connection between various phenomena that might be categorized as religions. In truth, though, the critical element of McConnell's approach is that it includes no mechanism whatsoever for determining what counts as religion and, consequently, provides no consistent basis for a justificatory argument. A justificatory strategy that merely highlights the shortcomings of one set of critiques is not sufficient to justify the special status of religion.[615] In effect, then, McConnell's proposal is an avoidance strategy masquerading as a justification of the special status of religion.

---

[614] See section III.A above.

[615] McConnell would likely argue that the presence of the term religion in the constitution creates a presumption in favor of the special status of religion, and that a dismissal of one set of critiques is, in fact, sufficient to demonstrate the justifiability of that special status. However, I contend that this amounts to textual nominalism. See Section II.D.2 above.

As I noted above in section II, avoidance strategies are unsatisfactory for several reasons. First, they render a consistent and coherent determination of what counts as religion impossible. The indeterminacy of the concept of religion is in fact an advantage for McConnell's indirect justification, since any critique of the special status of religion must fail if the concept itself always eludes the critic's grasp. Indeterminacy is a distinct disadvantage for courts, however, as it renders all threshold determinations of religious status arbitrary. Moreover, avoidance strategies can only address fairness concerns by dismissing their applicability to religion, but I contend that liberal constitutional systems require a justification for any legal privilege or burden.

## V. Assessment

### A. The Necessity of Justifications of the Special Constitutional Status of Religion

In part I of this chapter, I described the special constitutional status of religion by reviewing a series of cases, both actual and hypothetical, in which religious claimants are entitled to either burdens or benefits not extended to similarly situated non-religious claimants. I contended that these cases constitute a *prima facie* demand for a justification of the special status of religion. The non-religious vegetarian inmate is, I argued, entitled at a minimum to an explanation for the distinct treatments of his demand for a dietary accommodation and that of a fellow inmate who happens to be religious. In part II, I expanded on this *prima facie* case for a justification, arguing that a commitment to equality before the law, which I see as integral to liberal political theory, requires a justification for any distinction between similarly situated parties. I also noted that a satisfactory justification for the special status of religion might reduce conflict between religious and non-religious Americans. Most importantly, I supported Timothy

Macklem's claim that judges require some understanding of the normative purpose of the special constitutional status of religion in order to consistently and coherently determine what counts as religion.

Macklem's argument is important because even if scholars and judges could evade both the *prima facie* case for a justification and liberal political theory's requirement for an explanation of any special legal privileges, the need for a coherent mechanism for determining what counts as religion would remain. I argued in Chapter 2 that if there are no stable standards guiding a determination of religious status, then religious freedom is not a viable principle. Macklem's argument, which links determinations of religious status to a justification of religion's special status, again raises this concern. In part II of this chapter, I reviewed several strategies for avoiding justifications of religion's special constitutional status, and I concluded that none can satisfactorily address Macklem's concern. Jurisprudential avoidance strategies, I argued, raise Learned Hand's fears that judges effectively rule as Platonic guardians, since they permit judges to rework the meaning of the religion clauses to fit their own preferences. Defenses of existing jurisprudence are inadequate because the absence of any justification for the special status of religion contributes to the inconsistency of courts' determinations of religious status. A claim that religion is *not* special may avoid the requirement to justify the special treatment of religion, but I argued that it does require a demonstration that religion is not special, since the default position of religion clause jurisprudence is to assume that religion merits special constitutional status.

In short, then, I argue that justifications of religion's special status are necessary, and I further claim that judges who avoid these determinations effectively default to an

implicit defense of the status quo, and consequently deepen the inconsistency of the court determinations of religious status.

## B. The Inadequacy of Proposed Justifications of The Special Constitutional Status of Religion

In part IV of this chapter, I reviewed the various strategies for justifying the special constitutional status of religion, and I concluded that none is adequate. Strategies premised on a monothetic understanding of religion, whether substantive or functionalist, fail primarily because their justifications are not tailored to religion alone. For example, a justification premised on religion's capacity to promote civic virtue fails if there are non-religious means to promote virtue, just as a justification premised on the suffering of a religious citizen caught between the demands of conscience and those of law fails if non-religious citizens also suffer when caught in this same double-bind. Non-definitional strategies, by contrast, fail because they cannot sufficiently isolate what religion is. In Chapters 1 and 2, I argued that polythetic classification and analogical reasoning can provide a means for distinguishing religion from non-religion, but they do not provide a distinction that is sufficiently clear to support a justificatory argument. An observation that a class of objects shares some set of characteristics that are neither necessary nor sufficient features of that class cannot provide the basis for a claim that that class merits special constitutional protections.

## C. Why the Absence of a Justification for the Special Constitutional Status of Religion Matters

In Chapter 2, I argued that the absence of a mechanism for clearly and coherently determining what counts as religion calls the viability of religious freedom itself into question. If there are no standards guiding a judge's determination of religious status, then the protections of the first amendment only apply to those claims whom a judge

recognizes as religious. New religious movements and non-western religions are therefore less likely to receive the protections of the first amendment, and these non-majoritarian groups are precisely those most likely to require legal protections. I note above in section V.A that the absence of a justification for the special status of religion deepens this concern, since a justificatory argument is necessary to consistently determine what counts as religion.

The absence of a justification for the special status of religion raises one further concern: in Chapter 2, I concluded that religious freedom as currently constructed may not be viable, here I conclude that it perhaps should not be viable, at least as currently framed. A Constitutional grant of rights to one group that is unavailable to a similarly situated group is rare, and I argue in Part II of this chapter that the justificatory burden for such an exclusive grant of rights should accordingly be high. For example, the Constitution implicitly sanctions the use of citizenship status as a criterion for excluding voting rights, but here a compelling justification is available, since those who are not subject to the laws of the country should have no role in shaping them. If there is no similarly compelling argument in favor of denying rights to, for example, conscientious exemptions to non-religious citizens, then there is reason to question whether the exclusive grant of rights to religious claimants is still viable.

# Chapter 4: Individual Choice and a Revised Analogical Approach

In Chapter 2, I reviewed the efforts of judges and legal scholars to develop a mechanism for determining what counts as religion, and I concluded that no proposed approach is adequate to the task of distinguishing religion from non-religion. In Chapter 3, I reviewed efforts to justify the special constitutional status of religion, and there I concluded that no justification could explain why a religious claimant merits protections and/or burdens that are not available to similarly situated non-religious claimants. The absence of a viable mechanism either to determine religious status or to justify the special constitutional status of religion indicates that courts must develop new ways of conceptualizing religion.

One possible source for this new thinking is the field of religious studies. Courts have, after all, cited religious studies scholars in the past to support their efforts to determine what counts as religion[616], and legal scholars often employ frameworks for defining religion borrowed from the field of religious studies.[617] Despite this precedent, and despite the need for a sharper conceptualization of religion in American jurisprudence, legal scholars and academic theorists of religion alike frequently conclude that the theories and methods that religious studies scholars employ are ill suited for use in the field of law. Some critics claim that religious studies offers concepts of religion

---

[616] The most notable example of a court's reliance on a religious studies scholar is Judge Clark's citation of Paul Tillich in *US v.* Seeger 380 U.S. 163 (1965) at 180. Clark aimed to align his "parallel position" formulation of religion with the "ever-broadening understanding of the modern religious community," so his citation focused on both lay and academic approaches to conceptualizing religion.

[617] See, for example, George Freeman, "The Misguided Search for the Constitutional Definition of Religion," *Georgetown Law Journal*, v. 71, 1519 (1982-1983).

that are too vague or too unmoored from public understandings of the term to be useful, while others question whether court deference to expert input on the concept of religion is appropriate, given the disestablishment clause. Still others, notably Winnifred Sullivan, argue that the field of religious studies can only produce concepts of religion that are intolerably inclusive for use in courts.

In part I of this chapter, I address these critiques, and I conclude that all are insufficient. Some of the critiques suffer from a straw man fallacy, as they target concepts of religion that are, or at least should be, obsolete within the field of religious studies itself. Others presume without justification that the purpose of religious studies does not overlap with the needs of courts, while still others misunderstand either the field of religious studies or the concept of religion itself.

In part II of this chapter, I draw on the resources from the academic study of religion in order to develop a revised analogical approach to determining what counts as religion in courts. In Chapters 2 and 3, I noted several important critiques of analogical approaches; in this chapter I argue that an approach centered on individual determinations of religious status while excluding the patently non-religious best addresses most of those critiques. While such an approach does not address the demand for a justification of the special constitutional status of religion, here I argue that efforts to develop a mechanism to justify the special status of religion are counterproductive; I concluded in Chapter 3 that religion's special status could not be adequately justified, here I suggest that any justificatory strategy merely conceals this absence of a viable justification. Finally, in this part of the chapter I also explore the implications of my revised analogical approach to two topics subject to much debates in the field of law and religion: the constitutional

status of religious institutions, and the appropriate degree of deference to religious determinations of legal standards.

In part III of this chapter, I explore some possible implications of my study of contemporary legal debates for the field of religious studies. I first explore the importance of the integrity of the concept of religion in light of the interests of courts and legal thinkers in a stable, coherent approach to conceptualizing religion. I then consider the role of the claim that religion is a human universal in the context of debates over the special constitutional status of religion. Finally, I consider what impact these justificatory debates might have on discussions of the role of religion in public reason.

## I. Why Some Theorists Oppose the Use of Religious Studies in Courts, and Why These Critiques are Insufficient

In this section, I offer a comprehensive review of critiques of the application of academic theories of religion to legal determinations of religious status. These critiques fall into several general categories. First, some scholars claim that religious studies scholars develop concepts of religion that are too vague to be useful to courts. Second, other critics claim that the academic concepts of religion differ significantly from ordinary understandings of the term. Third, I note that still other critics question the relevance of scholarly input on the concept of religion in light of the disestablishment clause of the first amendment. I then consider Winnifred Sullivan's claim that religious studies scholars operate with concepts of religion that are intolerably broad for courts. Finally, I consider Sarah Barringer Gordon's claim that religious studies scholars pay insufficient attention to legal scholarship.

While each group of arguments relies on its own particular strategy, a few key themes are common to many of the arguments. First, many of these critiques are based on approaches to conceptualizing religion that are outmoded in both the field of religious studies and the field of law, and these critiques therefore only demonstrate that obsolete concepts of religion are inapplicable to legal theories of religion. These critiques can helpfully correct any lingering reliance on obsolete theories and methods in the field of religious studies, since disutility outside the field is a strong signal that certain concepts of religion are, in fact, conceptually insufficient. This category of critiques can also serve as an incentive for religious studies scholars to focus on developing and refining concepts of religion that are useful outside the field. Second, many of the critics argue that the purpose of the academic concept of religion, which they take to be generating a basis for broad comparisons, diverges significantly from the purpose of legal theorizing about religion, which is to decide cases. To a significant extent, this critique begs the question, since it relies on the assumption that the purpose of religious studies does not intersect with mundane disputes about religious status. To the extent that this critique does not beg the question, it can serve as another warning to scholars in the field of religious studies: if religious studies scholars too readily accept Jonathan Z. Smith's claim that religion is: "a term created by scholars for their intellectual purposes and is theirs to define,"[618] then they guarantee their own irrelevance. If, on the other hand, religious studies scholars attend to public debates over the meaning of religion, then their contributions can prove invaluable.

---

[618] Jonathan Z. Smith, "Religion, Religions, Religious" in *Critical Terms for Religious Studies,* edited by Mark C. Taylor, (Chicago, University of Chicago Press, 1998), 281.

## A. Critique 1: Religious Studies Only Offers Vague Concepts of Religion

Legal scholars and religious studies scholars alike often cite the absence of a clear, coherent concept of religion as one key reason to discount the relevance of religious studies scholarship to court judgments about religion. Some legal scholars warn that religious studies scholars offer concepts of religion that are either too obscure or too subtle for widespread use by lawyers and legal academics.[619] Critics of the field of religious studies – especially those within the field – also lament the vagueness of the concept of religion, arguing that this ambiguity at the heart of the field limits its utility outside the academy.[620] Scholars in the field who do apply academic theories of religion to court deliberations also cite the fuzziness of the concept of religion as a significant factor limiting their efforts. Winnifred Sullivan, who served as an expert witness in *Warner v. Boca Raton*, worries that the failure of religious studies scholars who testified in the case to articulate a single, coherent concept of religion led the judge to dismiss their theories of religion in favor of his own.[621]

---

[619] Jesse Choper, "Defining Religion in the First Amendment", *University of Illinois Law Review*, 1982, 579 (1982), 595. Regarding the Harvard Note's reliance on Paul Tillich, Choper argues that: "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."

[620] Timothy Fitzgerald, *The Ideology of Religious Studies,* 90: Fitzgerald notes explicitly that theories and methods of religious studies are especially ill-suited for use in a constitutional context: "Here is a legal and cultural context that gives significance to the definitional issue. But the context has had to be specified. On the other hand, if there is very little at stake in the definition of a word, then the fact that it is loose and vague seems not to matter."[620]

[621] Winnifred Sullivan, *The Impossibility of Religious Freedom*, (Princeton: Princeton University Press, 2005), see especially Ch. 4.

At first glance, the claim that scholarship in the field of religious studies is too vague for use in courts has merit. I argued in Chapter 2 that the primary criterion for evaluating a mechanism for determining what counts as religion is a capacity to clearly and consistently distinguish religion from non-religion. If scholars can only generate fuzzy concepts of religion, then their efforts are very unlikely to provide such a mechanism. However, I also argued in Chapter 1 that the capacity to clearly and consistently distinguish religion from non-religion as the primary criterion for evaluating theories of religion within the field of religious studies, so concerns about the fuzziness of the concept of religion may indict only a particular theory of religion rather than the field itself. For this reason, I use this section to unpack the claim that scholars within the field can only manage fuzzy concept of religion. In the remainder of this section, I highlight five possible bases for this claim, and then evaluate each of these specific critiques of the vagueness of the concept of religion.

### 1. Explanation 1: Some Approaches to Determining What Counts as Religion Are Vague

One possible basis for the claim that religious studies can only offer unsuitably vague concepts of religion is that some concepts of religion in the field *are* unsuitably vague. For instance, the few legal scholars who do cite religious studies sources when developing their own approaches to determining what counts as religion usually review and dismiss functionalist approaches.[622] Jesse Choper cites the "inherent vagueness" of

---

[622] The primary exception to this rule is the Harvard Note, (91 Harvard Law Review, 1056, 1977-1978), which embraced Paul Tillich's concept of "ultimate concern" and developed a functionalist definition of religion out of it. Many subsequent evaluations of functionalism begin with an evaluation of the Note's appropriation of Tillich. See, for example, Jesse Choper, "Defining Religion in the First Amendment", 1982 University of Illinois L. Rev., 579 1982.

functionalist approaches as a reason to doubt their utility, while other scholars argue that the broad inclusiveness of functionalist definitions renders them unworkable.[623] I argued in Chapter 2 that these evaluations are correct: functionalist approaches to defining religion cannot clearly and consistently determine what counts as religion. However, I also argued in Chapter 1 that the ambiguity of functionalist definitions of religion is a significant reason to dismiss them *within* the field of religious studies. In fact, functionalist approaches do not command wide agreement within the field, so much so that one legal scholar, Nelson Tebbe, regards this limited popularity within the field of religious studies as a reason for courts to discount functionalism.[624] In short, then, critics who cite the drawbacks of functionalism as one reason to dismiss the contributions of the field as a whole mischaracterize the appeal of functionalism within the field, and consequently miss the possibility that the field might offer other, more useful approaches.

Jesse Choper and Nelson Tebbe's easy dismissals of functionalist approaches should also caution religious studies scholars against any further uncritical adoption of functionalism. Nelson Tebbe may well be correct to claim that the popularity of functionalist approaches is declining in the field of religious studies, but functionalism is not without its defenders. I note in Chapter 1 that functionalism offers perhaps the strongest warrant for framing religious studies as the "study of everything", and its vagueness supports this broad framework for the field. Because one could construe nearly anything as religious using a functionalist approach, functionalism could support the consideration of nearly any subject within the ambit of religious studies. I argue in

---

[623] See, for example, Donald Beschle, "Does a Broad Free Exercise Right Require a Narrow Definition of Religion?" 39 Hastings Constitutional Law Quarterly, 2011-2012.
[624] Nelson Tebbe, "Nonbelievers" 97 Virginia L.R. 1111, 2011, 1132-1135.

Chapter 1 that this generality is, in fact, a significant weakness for the field, since the non-specificity of a claim to study everything in fact undermines any methodological benefits the field might otherwise offer.[625] The easy dismissal of the relevance of functionalism for a constitutional context, however, demonstrates that any framing of functionalism as the grounds for religious studies as the "study of everything" is deeply misguided, since the lack of a coherent, clear concept of religion renders the field useless in other contexts.

### 2. Explanation 2: Religious Studies Scholars Intentionally Develop Opaque Concepts of Religion

Even if one accepts my claim above that only some concepts of religion within the field are vague, critics of critics of the field might still question its application to law on the grounds that religious studies scholars intentionally avoid clear, accessible concepts of religion. The work of some religious studies scholars, especially those who favor substantive-affective approaches to defining religion, provides some basis for this claim. In Chapter 1, I noted that some scholars who identify religion with a unique experience or feeling often propose definitions based on religious experience, which, in the words of Rudolf Otto, is "only definable through itself."[626] Substantive-affective definitions of religion are, consequently, ill-suited to clarify the distinction between religious and non-religious experiences. For Rudolf Otto, this obscurity of the experience of religion to the non-religious is not a methodological problem, as he specifically disinvites from further study any reader who cannot access any recollection of a religious

---

[625] See Infra, Ch. 1, I.A: "While the absence of any limits may at first glance appear to bolster the field, in fact the adoption of a universal scope for religious studies may prove to be a substantial disadvantage: if the field neither offers a unique approach nor a unique type of data, then its usefulness is subject to question."

[626] Rufolf Otto, *The Idea of the Holy*,

experience.[627] Now, Otto's awareness of the obscurity of his experience-based concept of religion is not dispositive evidence that either he or other proponents of substantive-affective approaches intend the concept of religion to be vague, but, as I noted in Chapter 1, some critics of the field highlight several reasons scholars of religion might support vague concepts of religion. Russell McCutcheon, for example, argues that religious studies scholars find vague, experiential concepts of religion useful in ensuring the autonomy of religious studies departments.[628] For McCutcheon, religious studies departments can buttress their claims to a unique methodology – and a separate set of tenure lines – by defending a concept of religion that blocks analysis by scholars in other fields.

To some extent, the error of this critique parallels the errors of the critique I detail above in section I.A.1. While scholars such as Eliade and Otto may find some utility in the vagueness of their substantive-affective concepts of religion, their approaches are not representative of the field as a whole. My work in Chapter 1 documented a variety of methodological approaches to the concept of religion in the field, and only proponents of substantive-affective definitions arguably seek a concept that is obscure to some observers. Moreover, many of the approaches I reviewed in Chapter 1, especially the various historical approaches, focus on the *advantages* of the interdisciplinary nature of the field of religious studies, and any focus on the obscurity of the concept of religion would prove detrimental to an understanding of the field as interdisciplinary.

---

[627] Ibid: "The reader is invited to direct his mind to a moment of deeply-felt religious experience… Whoever cannot do this, whoever knows no such moments in his experience, is requested to read no further."
[628] McCutcheon, *Manufacturing Religion*, introduction.

McCutcheon's critique only demonstrates that substantive-affective definitions are not useful for work outside the field; historical approaches that court an interdisciplinary perspective might still prove useful to the field of law. McCutcheon's critique can, however, serve as a warning to scholars who, like Eliade and Otto, would seek to shore up the *sui generis* status of religion by limiting the application of other methodologies to the concept of religion. Any successful effort to insulate the field of religion from other fields of study renders the findings of religious studies irrelevant to those other fields.

### 3. Explanation 3: There is No Consensus Within the Field of Religious Studies Regarding the Concept of Religion

Alternatively, one might support the claim that academic concepts of religion are intolerably fuzzy by citing the widespread disagreement in the field about the concept of religion. This claim also has significant merit at first glance: if legal scholars find only disagreements when they look to religious studies for insight into the concept of religion, then they will have little reason to consider the field a valuable resource.[629] In Chapter 1, I developed a taxonomy of approaches to theorizing religion within the field of religious studies, and both the complexity and the variety of these approaches ably demonstrate that religious studies cannot offer a single, coherent concept of religion to legal scholars.

One interpretation of this methodological variety within the field further bolsters skepticism about its applicability to the constitutional context. In Chapter 1, I reviewed Timothy Fitzgerald's critique of family resemblance approaches to religion.[630] For

---

[629] Indeed, Nelson Tebbe sees disagreement within the field as one reason to discount the utility of religious studies scholarship for court determinations of religious status. Tebbe, supra n. 9.

[630] See infra Ch.1 Sec III.C

Fitzgerald, the fact that the field permits some scholars to frame religion as a cognitive concept, while others conceive of it in practical or affective terms indicates that there is no underlying concept of religion that would warrant some approaches while disallowing others.[631] A diversity of approaches, therefore, indicates that any conceptual clarity about religion that the field may offer is specious.

I argue, however, that the diversity of approaches does not necessarily entail a lack of methodological integrity for the field. If religion is a complex, historical phenomenon, then no single, simple monothetic approach to conceptualizing religion can be accurate, so we should expect scholars to employ a variety of approaches to understanding religion. A recognition of religion as a complex, historical phenomenon facilitates at least four alternative interpretations of the diversity of approaches and methodologies within the field of religious studies. First, the various cognitive, practical and affective approaches to defining religion might be understood as elements of a complex monothetic definition of religion. The second interpretation is a variation of the first: the variety of approaches to conceptualizing religion could be elements of a complex monothetic definition of religion that will eventually be synthesized, though no such synthesis is currently possible. Third, the various approaches might indicate traits of religion that could be incorporated into a multi-factorial concept that utilizes either analogical reasoning or polythetic classification. Fourth, if religion is a historically variable phenomenon, then scholars might reconfigure the concept to enable study of various cultural and historical contexts, so the variety of approaches may simply reflect the variety of contexts that scholars study.

---

[631] Timothy Fitzgerald, *The Ideology of Religious Studies, Ch. 4*

Of these four alternative interpretations of the diversity of methodologies within the field, only the first offers a clear rejoinder to the claim that religious studies can only offer vague concepts of religion. The second interpretation defers complete clarity on the concept of religion to future theoretical work, while the clarity of any understanding of religion as a multi-factor concept rests on the capacity of polythetic classification and/or analogical reasoning to develop a clear mechanism for determining what counts as religion. Finally, framing religion as a historical concept would not necessarily result in a vague concept, but any resulting concept of religion would be subject to revision. Scholars in the field of religious studies should also note that not all approaches to conceptualizing religion are compatible with these alternative interpretations of the methodological diversity in the field. Functionalist definitions, for instance, are incompatible with complex substantive definitions, so entertaining proposed functionalist conceptions of religion only furthers the interpretation that there is no underlying conceptual integrity to the field.

### *4. Explanation 4: The Purpose of Conceptualizing Religion in The Field of Religious Studies is Open-Ended Comparison, and This Necessitates a Vague Concept Of Religion*

In Chapter 1, I noted that anthropologist Benson Saler sees the vagueness of an analogical approach to conceptualizing religion as a methodological advantage.[632] Saler argues – rightly, in my view – that there is no obvious candidate for a transcultural concept of religion, so he concludes that only a vague, provisional concept can facilitate comparisons between his prototype cases of the western monotheisms on the one hand and non-western religions on the other. For Saler, the vague, "unbounded" nature of the

---

[632] See infra, Ch. 1 Sec II.C

comparative category of religion is valuable because it permits ethnographic comparisons between different cultural groups that do not operate with identical cultural concepts.[633] This understanding of religious studies coheres with other frameworks of the field: I noted in Chapter 1 that Jonathan Z. Smith argues that the concept of religion is a scholarly creation whose value is necessarily academic. Whatever the merits of this framework may be, it contributes to the claim that the academic study of religion is inapplicable to other fields, especially law.[634] If vagueness is a desirable quality for a scholarly definition of religion, then the field is unlikely to produce any definitions that are useful for courts.

This critique falls short because it mistakes the comparative work of ethnographers for the entirety of the field. Saler specifically designs a concept of religion to facilitate comparisons that are useful to western ethnographers working in non-western contexts, so it is unsurprising that he prefers a broad, "unbouned" concept of religion. Other branches within the field – especially historical approaches – can develop more specific concepts of religion, even if those concepts are limited to a particular historical-cultural context.

---

[633] See Saler, *Conceptualizing Religion,* 254-263.

[634] Nelson Tebbe, citing Jonathan Z. Smith's understanding of religion as a scholarly creation, notes that the goals of the academic study of religion differ so markedly from those of the courtroom that academic definitions of religion are unlikely to be useful to courts: "Saying that religion should be defined in a way that is specific to institutional objectives is not the same as saying that the endeavor is impossible. The point is only that a substantive definition that works quite well for comparativists may not work for courts."

### 5. The Field Of Religious Studies Cannot Distinguish Religion from Culture

This final critique focuses on a specific vagueness in academic concepts of religion: the relationship between religion and culture. As Winnifred Sullivan explains, a distinction between law and culture is necessary for determining what sorts of claimants merit accommodations:

> "Fair legal accommodation of differences among humans is a major problem for law. Other kinds of difference have been affirmatively accommodated by American law from time to time – differences, for example, in gender, race, ethnic origin, and culture. If religion deserves to be on this list, even given pride of place, as some would argue, then courts and legislatures will be required to decide when a particular practice is religious and when a practice is 'cultural.' Courts would have to decide whether and when Muslim veiling is religious, political, or cultural, for example, in considering whether Muslim women have the right to wear the hijab in their passport photos. And whether circumcisions, male or female, are religious or cultural, in considering whether they are legal."[635]

I noted in Chapter 1 that one significant branch of critics of the field argue that religious studies scholars cannot, in fact, distinguish between religion and culture. Timothy Fitzgerald, for example, proposes that scholars reconceptualize the field of religious studies as one of cultural studies, and he bases this proposal on his claim that scholars cannot distinguish religion from culture.[636]

However, it is not clear that court judgments of religious status in fact require such a distinction between religion and culture. Fitzgerald and Sullivan may be right to claim that scholars cannot clearly distinguish between religion and culture, but this is not equivalent to claiming that the concept of religion is necessarily vague. Rather, the difficulty might inhere in the vagueness of the concept of culture: even a clearly defined

---

[635] Sullivan, supra n. 6, 149.
[636] Fitzgerald, supra n. 17

concept cannot be readily distinguished from another concept that is thoroughly vague. More to the point, it is not clear whether the two concepts should be mutually exclusive, or why the admixture of the two would invalidate a claim to a legal accommodation. In cases involving contested claims to religious status, courts have focused on the distinction between religion and *philosophy* rather than religion and *culture*.[637]

## B. The Concept of Religion in the Field of Religious Studies Departs Significantly from Ordinary Understandings of the Term

In Chapters 1 and 2 of this work, I argued that one key criterion for evaluating methods for determining what counts as religion is coherence with ordinary concepts of religion.[638] Some legal scholars question the utility of academic theories of religion to courts on the grounds that these academic approaches depart significantly from ordinary understandings of religion. Nelson Tebbe, for example, finds fault with a cognitive-substantive definition of religion that identifies religion with belief in super-human beings because it could exclude some groups that ordinary users of the term count as religious.[639] I argued in both Chapters 1 and 2 that Tebbe's concern here is warranted: should a concept of religion exclude some examples that ordinary users of the term would include, then scholars have reason to doubt the utility of that concept. However, I also

---

[637] In *Wisconsin v. Yoder*, (406 U.S. 205 1972 at 216), the court speculated that Henry David Thoreau would not prevail on a free exercise claim because his positions were: "philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses." In *Africa v. Commonwealth* (662 F. 2d 1025 at 1033), the court characterized Africa's as "far more the product of a secular philosophy than of a religious orientation."

[638] See Chapter II Sec. II, introduction. I also note there that this criterion overlaps substantially with Kent Greenawalt's criterion of "Linkage to nonlegal concepts of religion". See Greenawalt, "Religion as a Concept", 757-758.

[639] Tebbe, "Nonbelievers" 1134-1135. Tebbe specifically cites Buddhism and Judaism as religious groups that might not be included in a category of religion based on belief in superhuman beings.

argue that ordinary usage of the term cannot be the only criterion for evaluating a concept of religion. Complete deference to ordinary usage would render religion a nominalist category since such an approach relies exclusively on usage to determine the content of the concept of religion. Like Bambrough's category of alphas[640], such a category would be arbitrary and unteachable, and an arbitrary category of religion cannot meet the standards of fairness required to justify the special constitutional status of religion, nor can it provide a consistent and reliable mechanism for determining what counts as religion.

Should a given theory of religion exclude some groups, beliefs or practices that most users of the term consider religious, scholars would have reason to revise that theory. Tebbe goes too far, however, in concluding that any dissonance between a particular theory of religion and ordinary usage of the term is grounds for excluding academic theories of religion in general from legal thinking. Any suitable methodology for the academic study of religion must aim for consonance with common usage of the term, so theories of religion in both law and religious studies must account for ordinary usage of term. Legal scholars cannot, however, rely exclusively on ordinary usage to establish the category, since any category developed without further conceptual work to link the various uses of the term will be arbitrary. If scholars in either field are to move beyond a merely nominalist framework for the category of religion, then they must offer a theory that links the usage of the term to some broader concept.

---

[640] See Ch. 1, Sec. III.C. Bambrough, "Universals and Family Resemblance" in "Proceedings of the Aristotelian Society", New Series, Vol. 61 (1960-1961) pp 207-222.

Tebbe criticizes scholars for developing theories of religion that depart from ordinary usage by excluding some groups commonly recognized as religions. An academic theory of religion could also potentially diverge from ordinary usage by including some groups not commonly recognized as religions, and I argue in Chapter 1 that this over-inclusiveness can also provide grounds for revising a theory of religion.[641] Scholars should be suspicious of a theory that both excludes some groups commonly recognized as religions and includes some groups not commonly recognized as religious. However, the possibility that new claims to religious status might conflict with the majority of ordinary usage of the term should caution scholars against treating over-inclusiveness as conclusive evidence of the failure of a theory of religion. In the final essay of *Imagining Religion*, Jonathan Z. Smith argues that scholars of religion have a pressing duty to recognize and analyze contested claims to religious status, especially those that "scandalize" ordinary users of the term.[642] For Smith, both the sensationalism and the scorn that ordinary users of the term "religion" use to characterize some new religious movements places an obligation upon religious studies scholars to "remove from the [new religious movement] the aspect of the unique, of its being utterly exotic. We must be able to declare that the [new religious movement] is an instance of something known, of something we have seen before." Here Smith's concern is that a theory of religion that relies on ordinary usage of the term religion might be subject to

---

[641] See Chapter I, Sec. II, p. 28. I argued in Chapter I that scholars should conclude that a theory that is *both* under-inclusive and over-inclusive should be especially suspect.
[642] Jonathan Z. Smith, "The Devil and Mr. Jones" in *Imagining Religion*, p 104-120. As the title of his essay suggests, the "scandalous" claim to religious status that Smith has in mind is the People's Temple of the Disciples of Christ, commonly called Jonestown.

popular prejudice; the scholar's duty, then, is to temper this prejudice by guiding future use of the term.

The possibility of popular prejudice driving a concept of religion is especially worrisome in the context of American courts. Were popular prejudice to seep into legal determinations of religious status via a court's reliance on ordinary usage of the term, courts would likely deny constitutional protections to those groups that most need them. This worry suggests that no theory of religion in the courtroom should rely exclusively on ordinary usage, and it also indicates an important role for scholars of religion. If Jonathan Z. Smith is correct in claiming that scholars of religion have an important duty to recognize claims to religious status especially when those claims are contested, then scholars must look to courts as the most significant site of these contestations of religious status.

In summary, then, any divergence between academic concepts of religion and ordinary usage of the term does not constitute a reason to dismiss scholarly input. Rather, courts should attend carefully to these divergences, since ordinary usage is likely to exclude precisely those religious groups that most need court protection. Moreover, if Jonathan Z. Smith is correct, then religious studies scholars have a strong reason to seek out these cases in which new claimants to religious status face skepticism from courts and public opinion alike. In Chapter 1, I suggested that Smith's conception of the field allows for a partial convergence of descriptive and normative functions of the field. I can think of no better example of this convergence than scholars who articulate a defense of contested claims to legal religious status: a scholar who does so ensures that all religions

receive equal protection while articulating a concept of religion that can both revise and cohere with ordinary usage of the term.

## C. Disestablishment Invalidates Expert Input on the Concept of Religion

In "Privilege, Posture and Protection: "Religion" in the Law"[643] Jonathan Weiss argues that a legal definition of religion could violate both the establishment clause and a more general principle of religious freedom: "… any definition of religion would seem to violate religious freedom in that it would dictate to religions, present and future, what they must be." In Chapter 2, I noted that some legal scholars have used this claim as the basis for one "avoidance strategy" for determinations of religious status: if we accept Weiss's claim that any judicial definition of religion violates the establishment clause, then courts should simply accept all sincere claims to religious status.[644] This "avoidance strategy" effectively defers to the individual as the authority on what counts as religion on the grounds that judicial determination of religious status represents an infringement on the individual's right to determine the substance of their own religion. Weiss's claim could also serve as the basis for excluding input from religious studies scholars for similar reasons. If the principle of religious freedom includes the right of individuals to develop their own concepts of religion, then "expert" input from religious studies scholars would also usurp the authority of individuals to determine the make-up of their own religion.

---

[643] Yale Law Journal V. 73, No. 5, (March 1964), p 600 at 604.
[644] In Chapter 2 Sec. I.A.1.a, I discuss this argument in the context of Gail Merel's article, "The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment," 45 *University of Chicago Law Review*, 805 (1978), 829.

In both her testimony and her report for the *Warner* case, Winnifred Sullivan defends this conception of the individual as the authority on religious status in American life, and thereby provides some grounds for the exclusion of her own "expert" opinion. For Sullivan, there is no essential practical, cognitive, or affective element to religion, so the individual's own determination *must* be the critical element for establishing religious status: "Each individual is, in effect, the expert on his or her own religious life, a life which may be an idiosyncratic assembly of beliefs, interpretations and practices."[645] Sullivan goes on to note that the focus on the individual as the competent authority for determining religious status is especially characteristic of American religion, since the result of disestablishment is that: "no established religious authority is publicly acknowledged as having greater authenticity than another."[646] While Sullivan can cite a range of studies on both religion in general and American religious history specifically that support this claim that the individual is the source of authority on religion in contemporary America,[647] the claim provides a potential theoretical basis for invalidating this scholarly data on religion in America. If the lay individual is the source of authority on what counts as religion in America, then scholarly analysis potentially represents an imposition nearly as grave as that of a judicial definition of religion. Moreover, Sullivan worries that the judge in the *Warner* case took her insistence that individuals are the source of authority on what counts as religion as a warrant to adjudicate based on his own

---

[645] Sullivan, *The Impossibility*, 216-217.
[646] Ibid.
[647] Sullivan cites Robert Orsi, *The Madonna of 115th St: Faith and Community in Italian Harlem, 1880-1950*; Colleen McDannell, *Material Christianity: Religion and Popular Culture in America*;

personal understanding of religion.[648] A scholarly claim that the individual is the true authority on religious matters, then, could provide judges a license to rely on their own concepts of religion without further reference to scholarly input.

However, the content of judicial determinations of religious status, as documented in both Sullivan's account of the *Warner* case and a variety of other cases I review in Chapter 2 of this work, strongly suggests that judges impose their own limited conceptions of religion when they are not constrained by any clear criteria of what counts as religion, and this possibility of judicial bias demonstrates the importance of scholarly contributions to these judgments. In Sullivan's interpretation, Judge Ryskamp relied on his "basically Protestant understanding of authority" to discount the testimony of both the Jewish religious studies scholar and the Eastern Orthodox scholar who testified at trial.[649] Ryskamp's reasoning evokes Eduardo Peñalver's concern that judges default to Western models for religion in the absence of clear criteria limiting their determinations of religious status.[650] Peñalver's concern is also born out in several other cases: I note Judge Adams's decision in *Africa* as one prominent example of a judge employing essentially

---

[648] Sullivan surmises from Judge Ryskamp's comment that her testimony on the history of Christianity was necessary even though he had "some background on that" that the judge: "regarded himself as an expert on the history of Christianity. In a very real sense, although he said he enjoyed hearing from the experts, he acted at times as if he did not really need us. He himself was expert enough." Sullivan, *The Impossibity*, 85. At other points, the judge questions the authority of the experts on the basis of his own readings of the religious texts at issue. He questions a Jewish scholar's use the actions of the patriarchs in the Hebrew Bible as a moral standard, and a Catholic scholar's determination that a "dead body [is] a sacred thing". See Sullivan, *The Impossibility*, supra n. 6 at 92-93.

[649] Sullivan, 131-137.

[650] Eduardo Peñalver, "The Concept of Religion," *Yale Law Journal* v. 107 n. 3 (1997), 815. See infra, Ch. 2 sec. II.c.1.

Christian criteria to exclude a new religious movement from constitutional protections.[651] Moreover, I conclude in Chapter 2 that judges and legal scholars have not provided a consistent, coherent concept of religion to ground their determinations of religious status, so the constraints that Peñalver argues – rightly, in my view – are necessary to limit judicial bias are not available. A judge's dismissal of scholarly expertise on religion, then, is not evidence that expert opinions on religion are superfluous; rather, it is strong evidence that scholarly input is necessary to protect non-traditional religions from judicial bias.

Moreover, scholarly input on determinations of religious status need not violate a concept of disestablishment that locates the authority of religion in the individual. In fact, as Sullivan's testimony demonstrates, scholarly input can robustly support the claim that the individual is the source of authority on religion. Such an approach does not rely on an imposition of a concept of religion from the ivory tower; rather, as I suggest above in section I.B, the initial data for scholars should be ordinary usage of the term religion, and the work of scholars is to develop a concept that can link these usages.

This defense of scholarly input on the legal concept of religion in the context of the establishment clause also frames a methodology for the field as a whole. Ordinary usage of term religion can provide the primary data not just for scholars interested in the legal concept of religion, but for all academic theorists of religion. The role of scholarly work is *not*, then, to police some individual concepts of religion as illegitimate while

---

[651] See infra Ch. 2 Sec II. C.2.

pointing to others as paradigmatic; it is to work out what concepts link the various usages of the term.

## D. Scholarly Accounts Produce a Concept of Religion that Is Unworkable for Courts

One of Sullivan's primary reasons for questioning the relevance of religious studies to legal determinations of religious status is also her basis for the claim that religious freedom is unworkable within the current constitutional regime. Religious studies and its related fields, Sullivan claims, produce concepts of religion that are intolerable to judges and legal scholars. Specifically, Sullivan worries that that judges require a limited concept of religion, while contemporary scholarship can provide no coherent means for limiting the concept of religion.[652] Courts and legal scholars alike have long worried that a combination of a robust exemption regime and a broad concept of religion would, in the words of the *Reynolds* court, "permit every citizen to become a law unto himself."[653] If courts interpret the free exercise clause to grant religious citizens exemptions from neutral laws, then a broad concept of religion could theoretically permit every citizen an exemption from any law.[654] Courts have addressed this anarchy concern in a few landmark cases by limiting the scope of religious exemptions,[655] but courts could, in theory, choose the alternative strategy of curtailing anarchy by limiting the

---

[652] In her evaluation of the *Warner* case, Sullivan notes several attempts by both the lawyers for the City of Boca Raton and the judge himself to establish some limits on legally protected religion. See Ch. 4, "Legal Religion" of *The Impossibility of Religious Freedom*, pp. 89 -

[653] *Reynolds v. United States*, 98 US 145 - Supreme Court 1879 at 167.

[654] In the *Warner* case that Sullivan documents, Bruce Rogow, the attorney for the city of Boca Raton, memorably evokes this concern by warning of the "cemetery anarchy" that would follow from a ruling supporting the religious plaintiffs' claim to an exemption from regulations on memorial monuments. Sullivan, 89.

[655] Such as *Smith* and *Reynolds*.

scope of religion itself. In *Wisconsin v. Yoder*, the Court paired arguably its strongest defense of exemption rights for religious claimants with a limitation on the range of claims that could count as religion. Considering a hypothetical claim for an exemption from Henry David Thoreau, the Court reasoned that: "Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses."[656] [657] The *Yoder* court did not offer a clear mechanism for distinguishing the religious from the "philosophical and personal", but the hypothetical case of Thoreau suggests that were such a mechanism available, the court would countenance a lasting regime of robust exemptions for religious claimants. The implication for the academic study of religion is clear: if scholars can produce a definition, or some other mechanism for limiting the scope of religion, then the courts will welcome their contributions. Sullivan rightly notes that religious studies scholarship has instead broadened the range of what counts as religious, and concludes that courts are uninterested in the contributions of religious studies.

Sullivan may be justified in claiming that scholars of religion cannot offer courts the limiting mechanism they seek, but this does not mean that scholars cannot contribute to courts' reasoning in religion cases. A court that presumes there is a relevant distinction between religious and non-religious claimants without explaining that difference – as the *Yoder* court did – effectively tables the critical work of justifying the special

---

[656] *Wisconsin v. Yoder*, 406 US 205, SC 1972 at 216.

[657] Moreover, I note in Chapter 2 that some legal scholars claim see a correlation between the broad concept of religion explored in *Seeger* and *Welsh* and the Court's decision to restrict free exercise exemptions in *Smith.* See infra Ch. 2, sec. II.A.2.d. See also Donald Beschle, "Does a Broad Free Exercise Right Require a Narrow Definition of Religion?" 39 Hastings Constitutional Law Quarterly, 2011-2012

constitutional protections of religion. Sullivan worries that courts look to religious studies scholars to provide *both* a mechanism for determining what counts as religion that can limit the scope of religious claimants *and* a justification for the special status of religion, while scholars are not equipped to do either. However, the claim that neither a limiting mechanism nor a justification is forthcoming is itself an important contribution to religion clause jurisprudence. Religion is not a tidy concept that can fit neatly into legal reasoning, and courts slip into incoherence, judicial bias or both when they presume either a justification of religion or an easy means for identifying religion is available.

A demonstration of the "untidiness" of the concept of religion is useful insofar as it redirects the attention of courts and scholars alike to more productive questions. First, scholars should consider whether there is either a subset of the broad and ill-defined concept of religion or an alternative concept that might better suit the court's needs. If, for instance, there *is* some subset of religion that would both limit the scope of exemptions and provide a clear justification for those exemptions, then it would behoove courts to articulate that concept. Even assuming *arguendo* that there is such a concept, there is no reason to conclude that judges who adjudicate free exercise cases invariably target this concept, so courts should clearly articulate the boundaries of this subset of religion. If, on the other hand, there is no concept that can justify the special treatment that courts currently accord to religion, then courts and citizens alike should address this gap by contemplating constitutional change. Finally, courts might consider whether Sullivan's concept of a religion structured by the individual's own understanding is necessarily unworkable.

The court's religion clause jurisprudence suggests that adopting a broad concept of religion would not necessarily lead to the sort of anarchy that the *Reynolds* and *Smith* courts fear, so there is some reason to conclude that Sullivan's individualistic concept of religion is viable. Under the *Sherbert* test[658], which is still active in RFRA and RLUIPA cases, a religious litigant's claim does not result in an automatic exemption from a law; rather, free exercise claims trigger a balancing test, weighing the government's interests against the burdens on the claimants.[659] In order to substantiate the claim that free exercise exemptions are tantamount to anarchy, a hypothetical proponent would need to establish that free exercise exemptions always prevail in these balancing tests. However, the Supreme Court has shown remarkable deference to claims by both the federal government and the state governments that regulations further a compelling government interest,[660] while often showing less deference to claimants' determinations of the burdens those regulations place on their own religious beliefs.[661] In short, a broad concept of religion may grant more religious claimants their day in court, but it will not guarantee that they will prevail.

## E. Religious Studies Scholars Do Not Sufficiently Attend to Legal Scholarship

---

[658] Sherbert.
[659] Cite some RFRA, and some other stuff here.
[660] See, for example, *Goldman v. Weinberger*, 475 US 503 (1986), in which the Court determined that an Air Force dress-code regulation preventing a psychologist from wearing a yarmulke furthered a compelling government interest.
[661] This is especially the case for religions that do not fall into the category of western monotheisms. See, for example, *Bowen v. Roy* 476 US 693 (1986) and *Lyng v. Northwest Indian Cemetery Protective Association*, US 439 (1988).

In a review essay published in *The Journal of Religion and American Culture* in 2008, Sarah Barringer Gordon concluded with a negative assessment of the relevance of the field of religious studies to legal debates:

> "It seems appropriate to point out in conclusion that the flourishing of religious studies, while it may be indebted to the Supreme Court in the first instance, has not produced the kind of scholarship that might in turn be useful to the Court." [662]

Gordon acknowledges in the essay that some scholars in the field do attend to legal debates; she reviews Winnifred Sullivan's *Prison Religion: Faith Based Reform and the Constitution*.[663] Gordon faults Sullivan, however, for devoting insufficient attention to religion clause jurisprudence;[664] specifically, Gordon argues that Sullivan has not offered sufficient support for the claim that the religion clauses are "incoherent". [665] Gordon's claim, then, is not that religious studies scholars do not pay attention to legal debates; she instead claims that religious studies scholars do not study those debates as lawyers, and consequently do not provide the material that lawyers demand, and she cites the need for

---

[662] Sarah Barringer Gordon, "Review Essay: Where the Action Is—Law, Religion, and the Scholarly Divide" in *Religion and Culture: A Journal of Interpretation*, v. 18 no. 2 p 249-271, at 266.

[663]

[664] Gordon at 259: "The complexity of Sullivan's investigation of religion is not matched by an equal commitment to law. Sullivan is not steeped in the case law of religion… What is missing here is attention to the richness of law in American life.

[665] Ibid at 260: "The religion clauses, in her view, are incoherent. This is a stunning point; it would be far more powerful were she to demonstrate it as a matter of law as well as of religion. Instead, Sullivan's perspective is more one-sided despite her immersion in expertise and litigation."

a constitutional definition of religion as the most important contribution that religious studies scholars could make.[666]

In this, then, Gordon ignores the key finding of Sullivan's argument. Gordon laments the failure of religious studies scholars to provide courts with a useful definition of religion, and she implies that this failure is the result of inattention to religion clause jurisprudence. Gordon may be correct in claiming that Sullivan does not focus on the history of judicial interpretation of the religion clauses, but a careful survey of religion clause jurisprudence does not alter Sullivan's conclusions. The failure of religious studies scholars to provide a convenient definition of religion is not the result of their inadequate understanding of courts' needs; religious studies scholars cannot provide a convenient definition of religion because none exists. Sullivan's claim is that contemporary religious studies scholarship demonstrates that individuals compose their own understandings of religion, so no simple, general rule for distinguishing religion is feasible. While a nuanced understanding of the various approaches to determining what counts as religion in American courts can demonstrate the flaws of each proposal, Sullivan's general claim remains apt: the efforts of courts and legal scholars to limit the range of claims to religious status is incompatible with contemporary academic understandings of religion.

## F. Assessment

In this first part of Chapter 4, I have reviewed a series of arguments opposing the use of theories and methods for the study of religion in American courts. I first considered several varieties of the most common argument: religious studies scholars can only offer vague concepts of religion. To some extent, this critique rings true: some

---

[666] Gordon concludes by suggesting that religious studies scholars develop a definition of religion for constitutional purposes, or investigate the relationship of the Ten Commandments to American law.

concepts of religion in the field *are* vague. I claim, however, that the characteristically vague approaches to conceptualizing religion either have been discarded or should be discarded, since an understanding of religion that has little use outside the field is an inadequate basis for work within the field. I next considered two critiques that question the relevance of expert opinion on the concept of religion to court deliberations. First, I noted a critique offered by Nelson Tebbe and others that religious studies offers concepts of religion that depart significantly from ordinary understandings of the term. Here again I argued that any approach within the field that matches this critique should be abandoned. I instead claim that religious studies scholars should rely on ordinary uses of the term religion as their primary input for their analysis of the concept of religion. Next, I noted Winnifred Sullivan's worry that the establishment clause bars any expert determinations of religious status. Here I claimed that the contributions of religious studies scholars need not police ordinary usage of the term, but can rather examine those uses of the term for any underlying coherence. I then took up Sullivan's primary concern in *The Impossibility of Religious Freedom*: Sullivan worries that the incongruity between contemporary academic concepts of religion and the requirements of courts renders religious studies scholarship unhelpful to courts. I argued that the unwillingness of courts to reckon with the diffusion of religion in contemporary culture should compel religious studies scholars to intervene in cases involving disputed claims to religious status. Rather than shrink from participation in courts wary of contemporary concepts of religion, scholars must demonstrate that the traditional approaches to conceptualizing religion to which judges stubbornly cling are both outmoded and deeply ethnocentric.

In summary, my claim is that *useful* scholarship in the field can play a positive – even indispensable – role in court determinations of religious status. In part II of this chapter, I explore one potential area of contribution by returning to the question of how courts should determine what counts as religion.

## II. Application of Theories and Methods in Religious Studies to Legal Determinations of Religious Status

In Chapters 2 and 3, I highlighted a pair of related challenges in American religion clause jurisprudence. First, I reviewed the efforts of courts and legal scholars to develop a mechanism for determining religious status, and I found that none of the proposed mechanisms is adequate. In Chapter 3, I looked to the problem of the special status of religion in American constitutional law, and I argued that no proposed justification of that status is persuasive. In part II of this Chapter, I take up the challenge of proposing an alternative approach to determining religious status in American courts. In so doing, I draw on my work on theories and methods for the study of religion in Chapter 1. Specifically, I make use of Renford Bambrough's defense of family resemblance approaches and my own account of historical approaches to conceptualizing religion to develop a revised analogical approach to determining what counts as religion. My approach cannot, however, develop an adequate justification for the special constitutional status of religion, but I contend that this lack of a justification serves as a helpful reminder of the worrisome exclusiveness of the religion clauses.

### A. Revising the Analogical Approach

In the earlier chapters, I have tracked four principle flaws of the analogical approach to determining what counts as religion: 1) Timothy Fitzgerald's claim that an analogical approach amounts to nominalism because it cannot identify a bounded

category of religion, 2) Eduardo Peñalver's claim that the application of the analogical approach does little to limit judicial bias, 3) the claim, articulated by Peñalver, Benson Saler and others that an analogical approach defaults to ethnocentrism because it relies on western models and 4) my claim that an analogical approach cannot provide the basis for a justification of the special constitutional status of religion. In this section, I will employ both an interpretation of religion as a historical phenomenon and some of the conceptual work on religion as a category contained in the earlier chapters of this work to address these four drawbacks. This historical, conceptually rigorous approach can, I claim, address the first three critiques, but it cannot offer a satisfactory justification for the special status of religion, so I suggest that some modification of the constitutional language may be necessary.

Given the significance of these flaws, it is not obvious that the analogical approach is the best candidate for revision among the various mechanisms for determining what counts as religion. However, the flaws of the analogical approach are not, I contend, as thorough as those of the other approaches. The various substantive monothetic definitions for religion that I review throughout the work in effect negate one another. Any strong argument that religion is primarily affective contradicts a strong argument that religion is primarily cognitive, and the abundance of affective, cognitive and substantive definitions strongly suggests that religion is too complex to be adequately captured by a monothetic substantive definition. Functionalist definitions are vague and overly-broad, and therefore cannot effectively distinguish between religion and non-religion. The complex, multi-factorial approaches to determining what counts as religion - Analogy, complex monothetic definitions, and true polythetic classification – are all

better suited to conceptualize religion than are the simple monothetic definitions. Earlier in this work I argued that neither a polythetic approach nor a complex monothetic approach is likely to produce a viable mechanism for determining what counts as religion, but I also claimed that should scholars produce such an approach, courts should adopt it. Complex monothetic definitions, I noted elsewhere[667], can correct for the overly-inclusive nature of functionalist approaches, but they cannot correct for the vagueness of functionalist criteria, nor can they correct for the exclusiveness of substantive monothetic approaches. Polythetic classification, I argue elsewhere[668], is probably ill-suited to religion because it requires dozens, even hundreds of criteria to function, while the most complex definitions of religion rarely employ even a dozen criteria. Thus only an analogical approach is likely to be suitable for revision. Moreover, judges and legal scholars have long argued for the merits of an analogical approach, so there is reason to believe that a revised analogical approach would gain acceptance in American courts.

### 1. Religion as a Bounded Analogical Category: Excluding Non-Religion

In Chapter 1, I reviewed Timothy Fitzgerald's argument that an analogical approach to religion cannot conceptualize religion as a stable category.[669] Fitzgerald claims that scholarly use of the term religion is too varied to support a single concept, and he claims that analogical categorization is not sufficient to distinguish correct from incorrect uses. In essence, then, Fitzgerald claims that religion functions as a nominalist term: the various instances of religion are linked only by common usage of the term.[670] In

---

[667] Ch. 1
[668] Ch. 1
[669] Infra Ch. 1, Sec II.C
[670] Fitzgerald, *The Ideology of Religious Studies*, Ch 4.

Chapter 1, I cited Renford Bambrough's description of the category of alphas as an example of sort of nominalist category that Fitzgerald describes. Bambrough notes that were a category truly linked by name only, then that category would necessarily be a closed class, and category would not be teachable, as there is no logic governing the addition of new members to the class.[671] Now, Bambrough concludes that analogical and family resemblance categorization *can* establish a category without reference to a monothetic definition, but any valid approach to categorization must be teachable, and there must be some mechanisms for determining which uses of the category term are correct.

The category of religion can evade Fitzgerald's nominalist criticism if there are criteria for correct usage of the term, and I claim that at a minimum, the category must exclude atheism, non-religion, most forms of Marxism, and any other belief premised on a rejection of religion. My warrant for this claim is the law of non-contradiction: atheism cannot be both religious and non-religious simultaneously, and, given that atheism is in its essence a rejection of religion, any effort to construe it as a religion is necessarily incoherent. This approach offers a few conceptual advantages. First, it obviates the incoherence that inevitably follows from efforts to categorize atheism and non-religion as religions. Second, this approach can distinguish religion from Bambrough's group of "alphas". The category of "alphas", Bambrough contends, is not teachable since membership in the category is established only by usage of the term. If religion excludes

---

[671] J. Renford Bambrough, "Universals and Family Resemblance" in *Proceedings of the Aristotelian Society*, New Series, Vol. 61 (1960-1961) pp 207-222.

non-religion, then some usages of the term are incorrect, and the category is teachable to some extent.

In arguing that the category of religion must exclude atheism and non-belief, I do not claim that no comparison between religion and non-religion is possible. In fact, the efforts of scholars such as Laycock[672] and Tebbe[673], as well as the court in *Kaufman v. McCaughtry*[674] demonstrate that religion and atheism are comparable in quite a few respects. However, not all comparisons indicate membership in a common category, and it is especially important to distinguish between mere comparisons and category-forming comparisons when category membership determines the scope of constitutional protections. My claim here is that despite the comparability of atheism and religion, any use of that comparison to establish a category is inherently contradictory because atheism is premised on the rejection of religion.

This argument for excluding atheism and non-religion from the bounded category of religion has some important consequences for existing case law. First, my argument implies that cases such as *Welsh v. US*[675] and *Kaufman v. McCaughtry*[676], were wrongly decided. In both cases, the plaintiffs explicitly denied that their appeals for exemptions were religious. Welsh struck the word "religious" from his Selective Service exemption

---

[672] Douglas Laycock, "Religious Liberty as Liberty," *Journal of Contemporary Legal Issues*, v. 7, 313 (1996). Laycock argues that religion and atheism are comparable insofar as both offer answers to theological questions.
[673] Supra n. 9.
[674] *Kaufman v. McCaughtry*, 419 F.3d 678 (2005).
[675] *Welsh v. US*, 398 US 333 (1970).
[676] Supra n. 60.

form, and explicitly denied that the basis for his pacifism was religious belief.[677] In *Kaufman*, the court acknowledged the plaintiff's "own insistence that [atheism] is the antithesis of religion" before arguing that: "whether atheism is a 'religion' for First Amendment purposes is a somewhat different question than whether its adherents believe in a supreme being, or attend regular devotional services, or have a sacred Scripture."[678] The *Kaufman* court's effort to distinguish its legal determination of religious status from ordinary understandings of the term highlights the consequences of failing to exclude atheism: a court can only include atheism within the category of religion by departing entirely from any existing understanding of the term. If the constitutional concept of religion is to bear any resemblance to other uses of the term - indeed, if it is to have any coherent meaning at all - it must exclude non-religion.

While an approach that excludes atheism and non-religion conflicts with the decisions in *Kaufman* and *Welsh*, a bounded analogical approach can admit claims to religious status from a wide range of claimants who do not explicitly reject the religiosity of their beliefs of practices. In *US v. Seeger*, for instance, the plaintiff equivocated on the question of theism, but nevertheless characterized his beliefs as a "a religious faith in a purely ethical creed."[679] Seeger's equivocation on the question of theism, indicated by his preference to "leave the question as to his belief in a Supreme Being open", stands in contrast to Welsh's choice to strike the word "religion" from his exemption application. The increasing popularity of the label "Spiritual But Not Religious" indicates the potential for future borderline cases, but many who use the label do not finally reject the

---

[677] Supra n. 61 at 341.
[678] Supra n. 62 at 681.
[679] *United States v. Seeger*, 380 US 163 (1965).

religious status of their belief. In a 2013 from the Federal 4th Circuit Court, *Moore-King v. County of Chesterfield*, a self-described "spiritual counselor", sought a free exercise exemption to a local zoning ordinance.[680] Moore-King emphasized that her beliefs were not rooted in "any particular religion", but she did not reject the characterization of her beliefs as religious.[681] Her use of the label "spiritual", therefore, indicates not opposition to religion, but a differentiation of her beliefs from those of established religions. While the court in *Moore-King* refused to accept the plaintiff's own description of her beliefs as a religion[682], I argue that, absent a specific disavowal of religion, the claims of Moore-King and others who use the label "spiritual" should qualify as religious.

Scholars and judges who reject an approach that excludes atheism and non-religion cite the injustice of extending constitutional protections to religious claimants while denying protections for non-religious claimants.[683] In arguing for excluding non-religion and atheism, I do not dismiss these justificatory concerns; indeed, I contend in Chapter 3 that religion clause jurisprudence requires some justification for the special constitutional status of religion. However, a strategy that relies on including atheism and non-religion does not directly address these justificatory concerns; such an approach

---

[680] *Moore-King v. County of Chesterfield, Va.*, 708 F. 3d 560 (2013). Moore-King also claimed that the zoning ordinances interfered with her free speech rights.
[681] Ibid at 564. According to Moore-King: "I am very spiritual in nature, yet I do not follow particular religions or practices, and `organized' anything's are not for me. I pretty much go with my inner flow, and that seems to work best."
[682] The court relied on the Court's distinction in *Winsconsin v. Yoder* between religion and the personal philosophy of Thoreau to conclude that Moore-King's beliefs were not a religion, but a way of life.
[683] In Chapter 3, I review both Justice Black and Justice Harlan's opinions in *Welsh*, as well as Doug Laycock's arguments in "Religious Liberty as Liberty" as examples of arguments that focus on the justificatory problem raised by non-religious claimants to religious status. See Chapter 3, Sec. III.B.

conceals the justificatory arguments within a determination that non-religion can count as religion for constitutional purposes. An inclusive approach amounts, then, to an avoidance strategy, as such an approach does not directly consider whether the special treatment of religion is justifiable. I consider the role of a revised analogical approach in justifying the special treatment of religion below in section A.4.

### 2. A Consistent Approach to Determining What Counts: Accept All Individual Claims of Religious Status

In Chapter 2, I reviewed the analogical approaches of George Freeman[684], Kent Greenawalt[685] and Judge Arlin Adams[686], and I concluded that none offers a clear and consistent approach to determining what counts as religion. [687] Each proposal relies on a prototype approach, which requires a judge to select an example of what Greenawalt terms the "indisputably religious". Once a judge selects a prototype religion, they must then identify some relevant features of that prototype to serve as the basis for comparison.[688] Finally, the judge must determine which features, if any, the disputed religion possesses, and whether the disputed religion possesses a sufficient number of the features to warrant its inclusion in the category of religion. The approaches vary in their descriptions of the relevant features, but none offers clear guidance for judges either on

---

[684] George Freeman, "The Misguided Search for the Constitutional Definition of Religion," *Georgetown Law Journal*, v. 71, 1519 (1982-1983)
[685] Kent Greenawalt, "Religion as a Concept in Constitutional Law" 72 *California Law Review* 72 no. 5 (1984).
[686] See *Malnak v. Yogi,* 592 F.2d 197 (1979) and *Africa v. Commonwealth*, 662 F.2d 1025 (1981)
[687] See Chapter 2, Sec. II.C.
[688] I argue in Chapter 2 that the prototype approach's reliance on a list of characteristics muddies the distinction between an analogical approach to categorization and complex monothetic definitions.

how to determine whether a disputed religion actually possesses the feature or how many features a disputed religion must possess to qualify as religious.[689]

Eduardo Peñalver argues that this absence of clear standards for applying the analogical approach leaves individual judges free to determine what counts according to their own understandings of religion. If Peñalver's assessment is correct, then the standards for what counts as religion should vary from jurisdiction to jurisdiction, and even from case to case. The contrasting results of cases such as *Kaufman* and *Moore-King*[690] strongly suggest that Peñalver's concern is warranted, and that some clearer standards for the analogical approach are required to ensure the uniformity of the law. I argue in Chapter 2 that Peñalver's own proposal provides a few useful negative limits on the analogical approach[691], but he does not present a clear mechanism for determining what counts.

My proposal, then, is that judges accept all claims to religious status that do not include claims to non-religion or atheism. This proposal clearly constrains judges from rejecting religions that they personally find unfamiliar without requiring murky theological investigations of, for example, pantheism or the parallel position test. A judge need only determine that a litigant has not rejected the religiosity of his/her beliefs and practices while invoking religion clause protections. Now, in Chapter II I described

---

[689] I detail the differences among the strategies in Chapter 2, Sec. II.C.2

[690] In *Kaufman v. McCaughtry*, supra n. 60, the Federal 7th Circuit Court determined that an atheist could make a free exercise claim, while the Federal 4th Circuit Court determined in *Moore-King v. Chesterfield*, supra n. 66, that a self-described "spiritualist" could not.

[691] Specifically, Peñalver contends that disputed religions should not be excluded for rejecting theism, institutionalism, or an extra-mundane reality.

deference to personal choice as an avoidance strategy, but here I characterize it as an analogical approach. Under my proposal, the basis for analogical comparison *is* the individual's determination that her beliefs and practices are a religion. Thus, Frank Africa's claim that "We [the MOVE organization] are practicing our religion all the time",[692] or Sophie Moore-King's claim that she is "very spiritual" despite her lack of an institutional affiliation renders their claims comparable to those of previously recognized religious claimants. In other words, disputed religions are relevantly similar to Greenawalt's category of the "indisputably religious" precisely because the individual claimants understand their beliefs and practices to be religious. In other words, deference to personal choice is not an avoidance strategy here because personal choice is constitutive of religion.

My proposal to accept all claims to religious status may appear, at first glance, to devolve into nominalism. In section I.A.1 of Chapter 2, I considered Kent Greenawalt's critique of a similar proposal. Greenawalt finds fault with the nominalism of a proposal that defers to personal choice, arguing that: "protection of religious exercise should not depend on idiosyncratic views of what constitutes religion."[693] While my proposal would likely result in judgments of religious status that some would find idiosyncratic, deference to personal choice is not equivalent to nominalism. My proposal to defer to personal choice in most cases is distinct from nominalism for two key reasons. First, the exclusion of atheists and non-believers indicates that personal choice is not the sole determinant of religious status. Under my proposal, a court cannot accept the claim of a

---

[692] *Africa v. Commonwealth*, supra n.
[693] See Chapter II, Part I Sec A.1.

litigant who denies the religiosity of her beliefs while asserting their right to make a free exercise claim, so my proposal does not require courts to completely defer to personal choice. Second, and more importantly, my proposal to defer to a claimant's determination of religious status is not based on a refusal to characterize religion, but is instead an acknowledgment of the character of religion in America. In section I.D above, I note Winnifred Sullivan's claim that historians of American religion regularly call attention to the role of the individual as the primary authority on religion in American public life. Deference to individual determinations of religious status, far from marking a reluctance to determine what religion is, in fact can be a legal mechanism that is faithful to the character of American religion.

This proposal would likely expand the scope of acceptable claims to religious status, and accordingly would prompt concerns about the anarchy that widespread free exercise exemptions entail. However, as I argue above in section I.D above, the primary cause for concern with free exercise exemptions should not be the scope of what counts as religion, but rather the extent of the exemptions regime. If free exercise exemptions grant *any* religious claimants the right to set aside laws that conflict with their own beliefs, then the *Reynolds* court's worry that citizens will become "a law unto themselves" is warranted.[694] This worry should not, however, be the grounds for denying some claims to religious status while accepting others, since such an approach fails to address the problem of anarchy and entangles the court in religious discrimination. Free exercise exemptions need not descend into anarchy, however, since a balancing test can

---

[694] *US v. Reynolds*, 98 US 145 (1879).

weigh government interests against free exercise claims. Such an approach is compatible with an expanded category of religion.

### *3. Ethnocentrism as a Point of Origin, not a Standard for Judicial Reasoning*

In Chapter II, I reviewed Eduardo Peñalver's argument that prototype analogical approaches can facilitate judicial bias by allowing judges to employ western religions, especially Protestantism, as the paradigmatic examples of religion. According Peñalver, the selection of a prototype can prove dispositive for a determination of religious status, so the western bias of a prototype model may deny non-traditional religions the protections of the religion clauses.[695] Moreover, I argue in Chapter 2 that the scholars and judges who have developed the prototype approach often derive characteristics from those paradigm cases of religion that reflect a presumption of a western model of religion.[696] The theorists of religion I discuss in Chapter 1 offer little to allay this concern that an analogical approach will facilitate the exclusion of non-western religions. Benson Saler, as I note, reluctantly accepts that the category of religion is shaped by the models of the western monotheisms that western scholars inevitably make use of in their analysis of non-western religions.[697]

My proposal corrects for potential for western bias in excluding non-western religions from constitutional protections, while raising a separate concern about western bias. My analogical approach obviates the concerns about the bias that inheres in prototype approaches by dispensing with prototypes altogether. The grounds for

---

[695] Peñalver, supra n. 36 at 815.
[696] See infra, Ch. II, sec. II.C.2.
[697] See infra, Ch. 1 Sec II.C.1ish.

analogical comparison in my approach is not the similarity of the disputed religion to the indisputably religious, but rather the claimant's accurate invocation of the category of religion. There is no possibility, then, that a judge using my approach would employ a western understanding of religion to exclude an adherent of a non-western religion from constitutional protections, since the only evaluation the judge must make is whether the claimant has contradicted their claim to religious status by simultaneously subscribing to atheism or non-religion.

Although my proposal would protect adherents of non-western and non-traditional religions from judicial bias, it does nevertheless reflect western conceptions of religion in one important way. In Chapter 1, I reviewed Talal Asad's argument that conceptions of religion that focus on the beliefs of an individual betray a Protestant bias. Asad contends that both practical and corporate elements can be construed as essential to non-Protestant religions, so any definition of religion that focuses on individual and/or cognitive elements operates with an implicitly Protestant model for religion.[698] My approach is not definitional, but it does rely on a claim that the individual claimant is the primary authority on what counts as religion, so Asad's critique is relevant to my proposal.

However, the distinction between a definition and an analogical understanding of categories attenuates the impact of Asad's critique on my proposal. Were my proposal an attempt to provide a monothetic definition of religion, reliance on individual authority would likely either exclude non-Protestant religions, or deem them less religious than

---

[698] Talal Asad, "Religion as an Anthropological Category" in *Genealogies of Religion*, (Baltimore, Johns Hopkins University Press, 1993. See infra Ch. 1, II.A.1.a.

Protestantism. My revised analogical approach, however, does not conceive of religion as a scalar category, and it does not rely on a paradigm example of religion, so my approach would not implicitly deem some religions more religious than others. I argued in Chapters 1 and 2 that one key criterion for evaluating an approach to determining what counts as religion is transcultural applicability, so Asad's critique could be reframed to target the limited applicability of an approach that relies on the individual as an authority on religious status. However, my approach would not exclude a religion for failing to recognize the individual as the primary religious authority; religions centered on, for example, some institution or practice still merit inclusion in the legal category of religion by virtue of their adherents' determinations that those practices and institutions are religious.

My proposal relies on historical characterizations of American religion as a partial warrant for my claim that the individual is the authority on what counts as religion in America, and my proposal therefore in some ways reflects the western bias that Asad describes. However, the concern about bias in the legal context is that it will result in exclusions of either new religious movements or non-Western religions from constitutional protections. My claim is that the concept of religion is determined by the history of its usage[699], and in the American context, this history includes the prominent Protestant focus on the individual as an authority in matters of religion. This understanding of the concept of religion reflects bias, but an acknowledgement that the *history* of a concept is western is not the sort of bias that should concern courts. Judges

---

[699] Indeed, this claim stems from Asad's own argument that the concept of religion is always the result of historical processes. See infra Ch. 1, sec III.Dish

require an approach that facilitates a fair application of the concept of religion, not a category purged of its western origins. Measured by this standard, my approach is unbiased in the most important respect, as I propose accepting all noncontradictory claims to religious status.

### 4. Analogy and The Absence of Justification

An analogical approach can only facilitate a fair application of the category of religion if it can provide a justification for the special constitutional treatment of religion, and I argued in Chapter 3 of this work that it cannot do so. Prototype approaches identify religion with a paradigm example of religion, and thus they shift a justificatory argument about the special status of religion to a justificatory argument about the special status of the paradigm religion. I argued in Chapter 3 that this justificatory scheme raises the worrisome sort of concerns about bias, as such an approach would only protect disputed religions to the degree that they resemble the paradigm examples of religion. Non-prototype analogical approaches, on the other hand, cannot offer a concept of religion that is sufficiently coherent to serve as the basis of a justificatory argument. An analogical approach that neither references a clear concept of religion nor invokes a paradigmatic case of religion cannot, in other words, clearly say what religion is, and therefore cannot explain why religion merits special constitutional treatment.

To see why a non-prototype analogical approach cannot justify the special constitutional status of religion, one need only consider my proposed approach. I argue that my approach to conceptualizing religion meets a minimum standard for coherence by erecting a clear boundary between religion and non-religion. My approach does not, however, offer a list of necessary or sufficient conditions for membership in the category

of religion, as it is not a monothetic approach. Since there is no set of overlapping features that all members of the category possess, the only possible basis for a justificatory argument in my approach is the distinction between religion and non-religion. Any justification for the special treatment of religion, then would have to focus on undesirable features of non-religion, since, again, an analogical concept of religion is too vague to serve as a direct basis for a justificatory argument. In Chapter 3, I described several possible functionalist justifications for the special treatment of religion, and each of those justifications includes an implied critique of non-religion. For example, I noted that theorists and judges alike have argued that religion is special because it promotes civic virtue[700], and such an argument may imply that non-religion does not promote civic virtue, or perhaps even corrupts civic virtue.[701] In theory, then, one could defend a proposal to deny special constitutional protections to non-religion on the grounds that non-religion corrodes civic virtue. However, I argued in Chapter 3 that there is no persuasive argument for a necessary link between religion and civic virtue, and I argue here that an argument for a necessary link between non-religion and a corrosion of civic virtue is unlikely to appear. Any such argument would need to establish that non-religion

---

[700] See infra, Ch. 3 Part III Sec A.2.

[701] Early modern defenders of the claim that religion promotes civic virtue, such as Rousseau and Toqueville, did not construe non-religion as a correlative to religion, so they did not subscribe to this implied claim that non-religion corrupts civic virtue. Rousseau, for his part, argues that malformed religion itself can corrupt civic virtue. See the *Social Contract*, Ch. 6. In contrast, Dwight Eisenhower's oft-quoted claim that "Our form of government makes no sense unless it is founded in a deeply felt religious faith, and I don't care what it is," implies that non-religion is not suited to the American civic order. The context of Eisenhower's statement further clarifies this implication, as he originally made this remark to describe a contrast between the American system of government and the state sponsored atheism of the soviet system. For a more complete discussion of the complicated provenance of this quote, see Patrick Henry, " 'And I don't care what it is': The tradition-history of a civil religion proof-text" in *The Journal of the American Academy of Religion*, v. 49 n. 1, March 1981, 35-49.

in all cases degrades civic virtue in order to establish the necessary link that a functionalist argument requires, and this is likely an insurmountable boundary. Moreover, I argued above in Chapter 3 that a functionalist approach cannot justify the special treatment of *religion*, since the functionalist approach focuses on the state's protection of civic virtue, and not religion itself. Similarly, even if a functionalist argument were able to surmount the significant challenge of persuasively linking non-religion with a corrosion of civic virtue, such an argument would not thereby provide grounds for denying special treatment to non-religion, but would only sanction state regulation of all activities and beliefs that corrode civic virtue.

I contend throughout Chapter 3 that a satisfactory mechanism for determining what counts as religion must provide a justification for the special constitutional treatment of religion, and my proposal does not provide such a justification. My proposal can, however, play a role in addressing the absence of a justification for the special status of religion. I concluded in Chapter 3 both that no available defense of the special status of religion is adequate and that no adequate defense is conceivable. I also noted in Chapter 3 that some judicial strategies attempt to compensate for the injustice of the special treatment of religion by either including non-religion within the constitutional category of religion or substituting another value, such as conscience, for religion. I argued there that the flaw of these strategies is they decouple "religion" from any established meaning of the term and, in the process, allow judges to construe the meaning of the term in accord with their own preferences. Judges who are concerned that the special treatment of religion cannot be justified may interpret atheism to be a religion, as the court did in *Kaufman*, while those who presume without argument that religion merits special

treatment may exclude new religions, as the court did in *Moore-King*. The dual advantage of my proposal is that it constrains judicial determinations of what counts as religion while plainly exposing the absence of any justification for the special treatment of religion. An approach that conceals the absence of a justificatory argument permits an imperfect system to continue, while my proposal demands a modification of the current system by contending that no justification for the special treatment of religion is available.

Because the revised analogical approach does not provide a justification for the special constitutional status of religion, it cannot serve as more than a temporary expedient; in fact, it is designed to expose the need for a more permanent solution. It is beyond the scope of this work to discuss possible solutions in detail, but I will briefly sketch the viability of applying the "substitutionary" approach I describes in Chapter III to a modification of the religion clauses. In section III.B.2 of Chapter 3, I described a substitutionary strategy as one that replaces religion with some more inclusive concept. I argued there that the flaw of such a strategy is that the constitution specifically selects "religion" for special treatment, so a substitutionary strategy either proposes an equivalent concept, in which case it is redundant, or it proposes a separate concept, in which case it represents a judicial subversion of the constitutional order. This flaw does not apply to my proposal, however, since I specifically seek a substitution of the concept of religion in the constitution itself. I also noted in Chapter 3 there that the primary candidate for a substitutionary strategy, conscience, is somewhat vague. However, the vagueness of the term conscience is distinct from that of the term religion in an important way. Claims for conscience-based exemptions arise in response to an agent's claim that a

law requires performance of an act that violates his/her moral beliefs, regardless of the source of those beliefs. Most debate over the meaning of term centers on how significant such a legal burden must be to warrant a claim of conscience. Legal debates over the term religion, however, center on the sorts of claims that can be counted as religion.[702] In other words, the significance of the term "conscience" is more fixed than that of the term "religion", and most debate therefore centers on the threshold at which a conscience claim is valid. Admittedly, conscience might prove a poor fit in the establishment clause, but that clause could be amended to bar respect for any establishment of both religion and non-religion.[703]

## B. Application of the Revised Analogical Approach to Other Contemporary Legal Debates

Throughout this dissertation, I have focused on the relevance of academic theories of religion to both legal determinations of religious status and efforts to justify the special constitutional status of religion. The revised analogical approach I propose does, I contend, offer a mechanism for determining what counts as religion, but it is also relevant to two other debates in the contemporary legal literature. First, some scholars argue that religious institutions have a unique role and status in religion clause jurisprudence, while others express concern about expanding the role of religious organization. Second, some religious claimants argue that courts should defer to their religious conception of some

---

[702] See, generally, Kent Greenawalt, "The Significance of Conscience," *San Diego Law Review*, v. 7, 901 (2010)

[703] Because courts often make use of historical establishments of religion to reason through the significance of the establishment clause, this modified establishment clause could look to historical establishments of atheism, as in Marxist states, as a model for establishment of non-religion.

legal standard, and some scholars have expressed concern about courts deferring to "religious subjectivism"[704].

### 1. Religious Institutionalism

Two recent Supreme Court decisions have sparked a renewed interest in a theory of religious freedom focused on a unique role for religious institutions: *Hosanna Tabor*, which recognized the "ministerial exception" to employment law as a principle of first amendment jurisprudence, and, *Hobby Lobby*, which saw the court construe a for-profit corporation as a person who can exercise religion. Some scholars have seen these decisions as an endorsement of a theory of religious freedom centered on the importance of religious institutions. For Rich Schragger and Micah Schwartzman the main claim that identifies these "new institutionalists" is that "churches are constitutionally unique and that they should have significant autonomy to regulate their own affairs."[705] One possible corollary to this central claim is that religious organizations possess some rights beyond those derived from their members, and in some cases the rights of institutions may even exceed those of their members.[706]

Defenders of religious institutionalism have offered several justifications for their position on religious organizations, and Schragger and Schwartzman helpfully divide these justifications into those that are "corporatist" and those that are "neo-medievalist".

---

[704] See especially, Caroline Mala Corbin, "Deference to Claims of Substantial Religious Burden".
[705] Schragger and Schwartzman, "Against Religious Institutionalism", in *Virginia Law Review*, v. 99 n. 5, 2013.
[706] Schragger and Schwartzman, for instance, note that: "the embrace of a robust institutional freedom could mean that some religiously-motived activities that would be barred by generally applicable neutral laws when undertaken by an individual, would be permitted if undertaken by an institution." 921 n. 13.

Corporatist accounts are largely indebted to Frederick Schauer's defense of limited deference to institutional autonomy in the context of free speech jurisprudence.[707] For Schauer, some recent free speech cases[708] demonstrate the inadequacy of general legal categories for resolving cases arising from challenges to the decisions of government-affiliated institutions as diverse as the National Endowment for the Arts and public television stations.[709] Schauer therefore concludes that free speech doctrine would benefit from some deference to the decisions of government with "potentially distinct first amendment status"[710], and this deference importantly includes an exemption of the agents of those institutions from free speech rules that apply in other contexts.[711]

A corporatist defense of religious liberty, then, focuses on the claim that some special institutions that promote the goals of the first amendment can only function properly when they are exempt from some sorts of government oversight. The transposition of Schauer's argument regarding free speech jurisprudence to the context of

---

[707] Frederick Schauer, "Comment: Principles, Institutions and the First Amendment", 112 Harv. L. Rev. 84 1998-1999.

[708] Schauer discussess *Arkansas Ed. Television Comm'n v. Forbes*, 523 US 666 - Supreme Court 1998, in which a third party candidate sued the state public television channel for barring his participation in a candidate debate, and *National Endowment for the Arts v. Finley*, in which several artists sued the NEA for impermissibly applying a decency standard to deny their applications for grants.

[709] Schauer notes for example, that the processes public libraries use to determine which volumes to add to their collections and those that the NEA uses to determine which projects to fund cannot be made equivalent: "Numerous other differences between the two domains exist as well, but surveying them here would serve little purpose. My only point is that these two processes employ professionals in different ways, and involve different kinds of decisions." Schauer, 114.

[710] Ibid at 118. Schauer specifically cites: "the arts, universities, libraries, and journalism, and possibly other instituions such as elections."

[711] Specifically, Schauer notes that agents of these institutions may engage in "content discrimination, and even viewpoint discrimination" without rising to the level of "political bosses who punish those who criticize them".

the religion clauses includes two noteworthy changes, however. First, Schauer's description of limited *judicial* deference to the decisions of certain institutions transforms to a description of general *governmental* incompetence with regard to "sovereign" institutions[712] or separate jurisdictions of social life.[713] Some scholars question whether the invocation of this new terminology of sovereignty is merely metaphorical,[714] but the greatly expanded scope of the exemptions that religious institutionalists claim suggests that the concept of sovereignty does at least some work in their arguments. This, then, indicates the religious institutionalists' second augmentation of Schauer's argument for judicial deference to institutional autonomy: while Schauer argued that institutions associated with free speech should be exempt from some rules derived from the court's free speech jurisprudence, religious institutionalists argue that religious organizations should be exempt from broad swaths of statutory law and jurisprudential principles.[715] Thus, the religious institutionalists' augmented justification for institutional autonomy could provide the basis for exempting religious organizations from a broad range of regulations.

---

[712] See especially: Paul Horwitz, "Churches as First Amendment Institutions: Of Sovereignty and Spheres," 44 Harv L. Rev. 79, 113 (2009).

[713] See especially: Stephen Smith, "The Jurisdictional Conception of Church Autonomy" via SSRN, Research Paper No. 14-177 December 2014

[714] Schragger and Schwartzman, for example, conclude that talk of sovereignty must be metaphorical: "Religious institutionalists cannot possibly mean that churches are literal and coequal juridical entities with the power to exercise coercive authority." While I agree that religious institutionalists are not (yet) defending the right of religious organizations to wield coercive authority, I do contend that they use the terminology of sovereignty as one basis for claims to exemptions that far exceed Schauer's modest call for judicial deference to some institutional decisions.

[715] Religious institutionalists most frequently appeal for exemptions for religious organizations from employment law, but they also seek exemptions from government regulation of property disputes and any adjudication of clergy malpractice claims. See Horwitz, supra n. 97 at 116-124.

Schragger and Schwartzman's second category of justifications for religious institutionalism, neo-medievalism, combines a historical argument about the origins of religious liberty with an argument about the importance of religious organizations for the structure of religious liberty. In part, the neo-medievalist argument relies on a comparison between the contemporary doctrine of the ministerial exception and various settlements between church authorities and political authorities in western history, especially the Investiture controversy. Richard Garnett, for instance, notes the differences between the contemporary context and that of the series of 11th century conflicts between Popes and Holy Roman Emperors before concluding that: "Today's context is, obviously, different, though not so different – not *too* different."[716] The two contexts are sufficiently similar, for Garnett, to warrant a claim that the concept of institutional autonomy of the church, whose origin he identifies with the Investiture controversy, is constitutive of a constitutional government. In other words, the autonomy of the church serves as a limit on state power, and any infringement of that autonomy is necessarily tyrannical. This constitutional argument revises the corporatist argument by adding another benefit of institutionalism, but it does not provide a reason other than age to distinguish *religious* institutions. Elsewhere, however, Garnett does provide an argument particular to religion when he defers to John Courtney Murray's assertion that a constitutional protection of individual conscience necessarily entails a constitutional protection of church autonomy.[717]

---

[716] Richard Garnett, "The Freedom of the Church: Towards an Exposition, Translation and Defense" in 21 *Journal of Contemporary Legal Issues,* 33, 2013
[717] Ibid.

My revised analogical approach can contribute to debates about religious institutionalism by providing a basis for critiquing both types of justifications. Schwartzman and Schragger critique "corporatist" justifications for religious institutionalisms for failing to sufficiently explain why *religious* institutions merit exemptions:

> "Advocates of religious institutionalism must explain why churches should receive more deference than other kinds of mediating institutions, which might also perform similar functions. In other words, they must explain why they are not simply offering a general and particularly robust theory of associational freedom."

A religious institutionalist could respond to this challenge by arguing that religious organizations are distinct because they promote freedom within the domain of religion. Schauer's argument relies on the distinct role that some institutions, such as libraries and universities, play in promoting the first amendment. One religious institutionalist, Richard Garnett, has argued that just as these institutions serve as the "infrastructure" for the free speech clause, so too can religious organizations be the "infrastructure" for the free exercise clause.[718] This claim that religious organizations provide the infrastructure of freedom of religion could provide a justification for a theory of the "special" role of religious institutions within a general theory of associational freedom: religious institutions serve to promote religious values, and thus merit special protections insofar as religion is a distinct domain of human life. However, my work suggests that any such argument begs the question: there is no adequate conceptual foundation for locating religion within a taxonomy of forms of human experience, so any argument that church

---

[718] Garnett, supra n. 101 at 40-41. The terminology of "infrastructure" is Jack Balkin's; see "the Future of Free Expression in a Digital Age" at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1335055

autonomy is a special form of associational freedom presumes a distinction that cannot be substantiated.

The "neo-medievalist's" historical argument provides a unique moment of relevance for research on eleventh century church-state conflicts, as there is much to question in Garnett's claim that the contemporary debates over religious institutionalism and the investiture controversy are not "too different". Indeed, Schragger and Schwartzman have already indicated many reasons to doubt the relevance of the papal-imperial conflicts to contemporary case law; they note, for instance, that 1) both the papacy and the bishops in question in the controversy exercised significant political power – indeed, any settlement at Canossa involved an assertion of papal *political* supremacy, 2) neither side in the dispute contemplated any arrangement remotely resembling liberty of conscience and 3) the investiture controversy did not result in a lasting settlement.[719] In addition, Garnett's reliance on Murray suggests that any effort to claim that individual rights of conscience *requires* constitutional protection for church autonomy suggests that some version of the traditional Catholic claim that only the "rightly-formed conscience has rights" does much of the work in his argument.[720] For this

---

[719] Schragger and Schwartzman, 931-939. To this list, one might add the unique role of the Cluniac reforms in shaping the controversy. See *The Investiture Controversy: Church and Monarchy from the Ninth to the Twelth Century*, Uta-Renate Blumenthal.

[720] In *The Problem Of Religious Freedom*, Murray specifically disavows a Lockean justification for religious freedom on the grounds that Locke empowers an ahistorical subject to determine religious truths for him/herself. While both Murray and *Dignitatis Humanae* do depart from previous Catholic tradition of endorsing regimes that enforce Catholicism, he does so on the grounds that the modern person is entitled to be free from coercion, and not to generate any and all religious views. This entitlement to freedom from coercion stems, for Murray, from the historical reality that American culture has been shaped by religious institutions. For Murray, then, a regime of religious freedom that specifically disavows the historical role of religious institutions is unjustifiable.

view, religious institutions are an integral part of any suitable justification for religious freedom because they shape and constrain the options for religious belief. However, my revised analogical approach directly contradicts this formulation of religious freedom. From the perspective of a view founded on the rights of the "rightly formed-conscience", the individual only has access to religion by virtue of institutional guidance, whether historical or contemporary. My approach, by contrast, invests the individual with the authority to determine religious status, and thus an institution can count as religious only by virtue of an individual's decisions.

My revised analogical approach coheres well with Schragger and Schrwatzman's voluntarist conception of the rights of religious organizations. Schragger and Schwartzman contend that courts should frame religious organizations as voluntary associations. In their scheme, religious organizations, like other voluntary associations, derives a right to internal governance from the autonomy of its members.[721] Schragger and Schrwatzman further contend that many of the privileges that religious institutionalists seek, including limited exemptions from employment law, are defensible within a voluntarist conception of church autonomy.[722] My revised analogical approach supports Schragger and Schwartzman's voluntarist conception of church autonomy because I identify the individual religious adherent as the authority on what counts as religion. Religious institutions, therefore, derive their religious status from the determinations of their participants, and only a voluntarist understanding of religious organizations reflects this concept of church autonomy.

---

[721] Schragger & Schwartzman, 961.
[722] Ibid, 974-981.

Now, I do not here claim that courts should only recognize religions with a voluntarist ecclesiology; rather, I propose that voluntarism is the mechanism by which courts can understand certain institutions as religious. A more robustly institutionalist understanding of religious status, such as that discussed by Talal Asad[723], can still be recognized as religious by virtue of the determinations of its adherents, even if those adherents believe the religious institution in question has priority over their beliefs. I note above in section II.A.3 of this chapter that my voluntarist framework is vulnerable to the charge of ethnocentrism in that it relies on a historically specific model of religiosity, but I dismiss this charge on the grounds that the concerns about ethnocentrism in the legal context is properly directed to the possibility of excluding unfamiliar religious groups, and not to the claim that a model for religion is rooted in one historical tradition rather than another. My revised analogical approach does not deem religious organizations with an institutionalist ecclesiology less religious than those with a voluntarist ecclesiology[724], and it could only exclude such an organization if it had no adherents whatsoever, so I conclude here, too, that charges of ethnocentrism are misplaced.

### *2. Deference to Religious Determinations of Legal Standards*

Religious claimants sometimes demand that courts defer to the claimants' religious conception of certain legal terms, and courts sometimes defer to these standards. Three examples will suffice to demonstrate the range of these religious claimants' requests for deference. First, in some cases, claimants dispute the meaning of the terms

---

[723] Asad claims that in late antique and early medieval Christianity, institutions imposed a religious structure upon individuals, and thus any voluntarist conception of religion cannot claim to be universal.

[724] This claim follows from the fact that I do not follow Benson Saler in conceiving of religion as a scalar phenomenon. See above, Ch. 4 P. II sec A.1.B

"abortion" and "abortifacient" that are established in case law and medical practice. Most commonly, this dispute focuses on whether specific medications, especially intrauterine devices and post-coital pregnancy prevention treatments, qualify as abortifacients or contraceptives.[725] Second, courts adjudicating RFRA and RLUIPA cases must determine whether a law or regulation "imposes a substantial burden" on a claimant's religious practice. In some recent cases, Courts have largely deferred to a claimant's own determination that the law in question places a substantial burden, without invoking any judicial standards for the concept of substantial burden.[726] Finally, cases addressing the contraception mandate, including both *Hobby Lobby* and *Zubik v. Burwell*, involve deference to religious claimant's determination of complicity. Both cases involve employers who claim that the mandate requires their indirect involvement of the actions

---

[725]. In *Brownfield v. Daniel Freeman Marina Hospital*, 208 Cal. App. 3d 405 - Cal: Court of Appeal, 2nd Appellate Dist., 4th Div. 1989, a hospital sought dismissal of a suit targeting the hospital's failure to provide the "morning after pill" to a rape victim on the grounds that a California law shields health care providers from any liability arising from a refusal to provide any abortion. The court refused, arguing that there is no basis for construing post-coital pregnancy prevention treatments as abortifacients. In *Hobby Lobby*, however, the Court accepted the plaintiff's "sincere religious beliefs" that both intrauterine devices and post-coital pregnancy prevention treatments are abortifacients. See Hobby Lobby, p. 2.

[726] In *Hobby Lobby*, for instance, Alito largely deferred to the plaintiff's claims that the funding an insurance plan that includes intrauterine devices and post-coital contraceptives would substantially violate their religion. Alito focused on the financial penalties that the plaintiffs would accrue were they to violate the law in order to establish this substantiality, but he simply accepts the plaintiffs' own claims that any scheme in which the they funded the insurance plans in question would burden their religion. *Hobby Lobby*, p. 32. Michael Helfland contends that an analysis of the financial penalties triggered by failing to comply with a law is sufficient to establish a "substantial burden" on religious exercise. See Helfland, "The Substantial Burden Puzzle", 5-7. However, I claim that such an approach elides the central question: does the law itself burden a claimant's religious exercise? In *Hobby Lobby*, Alito was surely correct to include that the financial penalties resulting from a failure to comply with the contraceptive mandate would constitute a substantial burden, but his only evidence that complying with the mandate is burdensome was the plaintiff's own claim.

of others, and that this involvement renders them, in effect, complicit with those actions.[727] The Court in *Hobby Lobby* accepted this formulation without invoking the well-established legal doctrine of complicity.[728]

At first glance, my revised analogical approach might appear to sanction widespread deference to religious determinations of these legal concepts. I do, after all, contend that courts should accept an individual's determination of religious status, so deference to an individual's determination of the content of that religious status might appear to be a reasonable extension of that standard. However, my argument for deference to individual determinations of religious status is premised on the lack of an acceptable mechanism for determining what counts as religion. Moreover, I contend above in section II.A.1 of this chapter that my revised analogical approach does not devolve into nominalism for two reasons: first, it does exclude some claims to religious status and, second, it is consistent with sociological and historical characterizations of

---

[727] Admittedly, Justice Alito did not invoke the concept of complicity; he instead simply noted that "This belief implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another." Now, one might conclude that this summary infers that Alito accepts the plaintiff's claim that the contraceptive mandate renders them complicit in abortion, but this summary might also apply to the Catholic doctrine of material cooperation. Given that Alito cites a Jesuit ethics textbook to support this claim, it is reasonable to conclude that he aims to include a range of doctrines that includes both complicity and material cooperation. Nevertheless, one legal scholar argues that previous jurisprudence inveighs in favor of employing the legal standard of complicity to evaluate claims to responsibility for a third party's actions such as those at issue in *Hobby Lobby*. See Amy Sepinwall, "Conscience and Complicity: Assessing Pleas for Religious Exemptions in *Hobby Lobby's* wake", 1900.

[728] Alito specifically refused to invoke any doctrine of complicity, claiming that to do so would, in effect, "provide a binding national answer to this religious and philosophical question"; Alito concludes that it is not the court's role to resolve such philosophical disputes. *Hobby Lobby*, 36-37.

American religion. Were courts to systematically defer to religious determinations of legal concepts such as "complicity" and "burden", they would openly court the rankest sort of nominalism that Justice Harlan once characterized as "an Alice-in-Wonderland world where words have no meaning".[729] Importantly, the concepts of abortion, substantial burden, and complicity *are* established in law, and thus there is no need to defer to individual conceptions of those terms.[730] In fact, accomplice liability, abortion law and balancing tests would be unworkable if those terms were not reasonably clear. In short, then, my analysis of the concept of religion suggests that it is an underdeveloped concept, but my argument does not provide support for an extensive deference to religious formulations of wide variety of legal concepts.

## III. Implications of the Revised Analogical Approach for The Academic Study of Religion

The revised analogical approach I develop in this chapter is not suited for all uses within the field of religious studies. It is most obviously inapplicable to the sorts of contexts that concern Benson Saler. In Chapter 1, I noted that Saler describes the efforts of anthropologists who study non-western cultures to build an analogy between the western concept of religion and some set of practices and beliefs in those cultures.[731] Because the revised analogical relies in part on individual usage of the term, it is not suited to this sort of cross-cultural study. Nevertheless, I contend that the application of theories and methods in the academic study of religion to legal debates generally, and the revised analogical approach specifically have several important insights for the field of

---

[729] *US v. Welsh* at 354.
[730] I do not here claim that the question of what counts as a "substantial burden" is full solved; I only claim that the concept is sufficiently established for courts to reliably refer to some common meaning of the term.
[731] See Chapter I, Part II Sec C.

religious studies. First, my approach reveals the importance of maintaining some integrity for the concept of religion within the field of religious studies. Second, I claim that my argument concerning the justificatory gap in religion clause jurisprudence raises questions about the historical role of the claim that religion is a human universal. Finally, I consider whether the partially discredited claim that religion is a "conversation stopper" is relevant to the absence of a justification for the special constitutional status of religion.

## A. Conceptual Integrity of Religion

In Chapter 1, I proposed three criteria for a viable concept of religion. First, I claimed that any conceptual framework for studying religion must be able to distinguish religion from non-religion in at least a provisional fashion. Second, I argued that any proposed concept of religion must resonate with ordinary usage of the term. Finally, I claimed that a valid concept of religion must provide a warrant for transcultural applications of the term.[732] These criteria do not amount to a demand for a single methodology for studying religion; indeed, I contend that debate over methodologies is productive for the field. Nor do they amount to a demand that the field demonstrate the *sui generis* status of religion. Religion can prove distinguishable from non-religion without *sui generis* status, since a complex phenomenon may nevertheless prove distinct from other complex phenomena.[733]

I propose these criteria for the concept of religion primarily to facilitate the applicability of religious studies to other fields. A capacity to distinguish religion from non-religion is necessary to establish that the concept identifies any unique content at all,

---

[732] See Chapter I, Part I sec D.
[733] I argue throughout this work that monothetic approaches to conceptualizing religion are not viable, so there is no foundation for the claim that religion is *sui generis*.

as a concept that is potentially applicable to any human activity, cognition or experience would be of little use to other academic disciplines. In Chapter II, I noted that the field of law has a special need for sharp distinctions among categories; courts must make threshold determinations of religious status, so any approach to religious studies that cannot distinguish religion from non-religion is of limited use to the law. Scholars such as Winnifred Sullivan[734] and Timothy Fitzgerald[735], noting the importance of category distinctions to law, contend that the legal concept of religion cannot overlap with the concepts that religious studies scholars use. I, on the other hand, argue throughout this work that this focus on category distinctions in the field of law is useful to religious studies. Religious studies scholars should, I contend, operate with a concept of religion that facilitates clear distinctions between religion and non-religion. One consequence of this focus is, I contend, the importance of distinguishing between metaphorical and taxonomical uses of the term religion. To say of an acquaintance "Baseball is his religion." is not equivalent to the claim that baseball belongs in the category of religion alongside Christianity and Buddhism, and a scholar who wishes to study baseball as a religion must explain both why baseball and religion are comparable in any respect and what useful data any such comparison will yield. A second consequence of this focus on sharp category distinctions is my claim that religious studies scholars should directly focus on the methodological warrant for studying some phenomenon as a member of a category of religion.

---

[734] See infra Ch. IV Sec. I Part D.
[735] See infra Ch. I Sec II Part C.

The arguments I review earlier in this chapter also confirm the importance of my second criterion for the conceptual integrity of religion: the resonance of academic concepts of religion with ordinary usage of the term. Nelson Tebbe, for example, argues that religious studies scholars produce concepts of religion that are of little use to courts in large part because those concepts depart significantly from common understandings of religion. The methodology I propose, however, looks to ordinary usage of the term as the key data for determining what counts as religion. I contend throughout this work that ordinary usage cannot be the sole criterion for identifying religion, since such an approach frames religion as a nominalist concept. The role of the scholar, then, is twofold: first, to identify any conceptual integrity underlying usage of the term religion, and second, to track shifts in the usage of the term, and thus any underlying conceptual integrity, through history. In this chapter, I draw from the work of several scholars in religious studies and related fields to contend that the importance of the individual as an authority on what counts as religion provides some conceptual integrity to the contemporary concept of religion.

My reliance on the individual as an authority on what counts as religion in the American context conflicts, at first glance, with Benson Saler's analogical approach to studying religion, and thus calls into question the transcultural applicability of my revised analogical approach. For Saler, the warrant for comparing western religions to the practices and ideas of non-western cultures is the scholar's determination that the two are comparable.[736] His position resonates with the work of Jonathan Z. Smith, Talal Asad and other theorists who claim that the conceptual integrity of the term religion lies in

---

[736] See infra, Ch. 1 Part II Sec. C.

scholarly usage, not ordinary usage of the term[737]. Now, I do not contest Saler's methodology for the study of religion in non-western contexts, since only a scholar's decision can provide the warrant for comparability in a culture that does not use the western term "religion". I do take exception, however, to Jonathan Z. Smith's broader claim that "Religion… is a term created by scholars for their intellectual purposes and is theirs to define." The concept of religion is shaped by more language users than just scholars; the willingness of judges and legal scholars to dismiss scholarly input into legal determinations of religious status demonstrates that judges, at least, play a strong role in shaping the evolving significance of the term. In truth, all usage of the term shapes it to some degree, and my proposal for courts to accept all individual claims to religious status represents an effort to rebalance legal determinations of religious status in favor of ordinary usage of the term. The role of the religious studies scholar should not, then, be to direct and wholly determine usage of the term religion; rather, it should be to detect the conceptual links among various uses of the term and, in the context of a culture that does not use the term, to determine if there is any warrant for its transcultural application.

## B. Revisiting Homo-religiosus

In Chapter 1, I argued that universality is not a valid criterion for establishing the conceptual integrity of religion. There, I claimed that religion does not need to be universal for the field of religious studies to have value, as a study focused on only those historical-cultural contexts that employ the concept is still useful. Moreover, I noted that abundant empirical evidence demonstrates that religion is not a human universal, so

---

[737] See infra, Ch. 1 Part II Sec. D.

universality is an unattainable standard for religious studies. I also noted in Chapter 1 that several scholars in the field of religious studies have offered critiques of claim that religion is a human universal, or put, differently, the claim that humans are properly understood as *homo religiosus*. For Russell McCutcheon, the *homo religiosus* claim promotes a conservative political agenda by framing secularists as estranged from their essential humanity.[738] McCutcheon elsewhere argues that the *homo religiosus* claim facilitates imperialism, as it allowed European colonizers to impose western models of social organization on non-western societies. In short, then, the claim that religion is a human universal is both empirically indefensible and morally suspect.

The claim that religion is a human universal may, however, provide a partial explanation for the justificatory gap – the lack of a justification for the special constitutional status of religion. Current religion clause jurisprudence, I note throughout this work, extends some constitutional protections – and a few burdens – to religious claimants that are unavailable to similarly situated non-religious claimants. This structure is notably anomalous, as the Constitution rarely grants rights to some persons without extending them to others.[739] I contend in Chapter 3 that this anomaly demands a justification, but one possible – and likely- explanation for this anomalous structure is that the framers operated with an assumption that religion *is* a human universal.

---

[738] See infra, Ch. 1 Part I. Sec. B.2.

[739] The primary exception to this claim is the right to vote, since the constitution does not extend this right to non-citizens or those under the age of 18. This exception, unlike the religion clause exception, proves the rule, as justifications for excluding the young and non-citizens from voting are numerous and obvious. Several privileges in the Constitution, most frequently the right to run for certain offices, also discriminate on the basis of age and citizenship status.

This explanation is consistent with my claim – and that of many other scholars – that the concept of religion is subject to historical change. Moreover, it is consistent with the claims of several legal scholars who contend that the special status of religion may have been justifiable at a point in American history when religion was more nearly a universal. My claim here, however, is that the justificatory gap provides religious studies scholars with data of how a historically contingent claim that humans are *homo religiosus* continues to structure American law.

## C. Public Reason and Religion as a Conversation-Stopper: A Reprise

John Rawls and Richard Rorty famously offered critiques of invoking religious justifications in political discourse that employed different reasoning to reach a similar conclusion. For Rawls, public reason always relates ultimately to the use of coercive government power, so a liberal system of government has an obligation to provide justifications for that exercise of power that are accessible to all its citizens.[740] Rorty's reasoning was characteristically pragmatistic: he argued that invoking religious reasons in public debate, especially those tied directly to divine will, tend to curtail further debate. Religious citizens should frame their debates in non-religious terms not because the architecture of liberalism demands it, but rather because conversations framed in non-religious terms are more likely to be productive.[741]

Many scholars have offered voluminous and thorough critiques of each position, and here I will note two of the most cogent critiques. Nicholas Wolterstorff argues that both Rorty and Rawls offer illiberal mechanisms for maintaining the liberal state, as they

---

[740] John Rawls, *Political Liberalism,* New York, Columbia University Press, 1993.
[741] Richard Rorty, "Religion as Conversation Stopper," in *Common Knowledge*, 1994.

seek to restrict the language and justifications that religious citizens can employ. He also questions the ready assumption of both Rorty and Rawls that their enlightenment epistemologies are obviously and inherently more accessible than the religious reasoning of their supposed interlocutors.[742] Jeff Stout similarly questions Rawls' effort to construct a "free standing" concept of justice independent of history of public reason that includes religious justifications; rather, he proposes that citizens conduct public reason within a historical tradition that includes both religious and non-religious reasons. Stout criticizes Rorty on pragmatic grounds: he argues that public reason functions best when citizens acknowledge their contrasting epistemologies, and Stout opines that any restrictions on the use of religious reasons in the public square is unlikely to solve the sorts of problems that the public square must address.[743]

The one conclusion that both Rawls and Rorty on the one hand and their critics on the other share is that the demand for publically accessible reasons functions as a burden on religious citizens. To be sure, were proponents of such a demand to develop a mechanism for enforcing this demand, religious citizens would surely find themselves constrained. My analysis of the justificatory gap – the lack of an adequate justification for the special constitutional status of religion – suggests that in some constitutional debates religion functions as a conversation stopper in a manner that *benefits* religious claimants. I described religion as constitutionally special in Chapter 3 because religious claimants are entitled to some exemptions – and subject to some burdens – not extended to non-

---

[742] Robert Audi and Nicholas Wolterstorff, *Religion in the Public Square: The Place of Religious Convictions in Public Debate*, Lanham, Rowan and Littlefield, 1997.
[743] Jeffrey Stout, *Democracy and Tradition*, Princeton, Princeton University press, 2004.

religious claimants.[744] Courts are at pains, however, to explain why religious claimants are entitled to these special benefits. The Court in *Moore-King*, which I cite above[745], argues: "To describe Moore-King's beliefs as a way of life but not a religion is not to belittle them…. We observe only that she cannot avail herself of the protections afforded those engaged in the practice of religion."[746] The *Moore-King* court's ruling specifically invokes reasoning from *Wisconsin v. Yoder*:

> "A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief."

Courts recognize, in other words, that "ways of life" and philosophies are distinct from religion, and they further recognize that these "ways of life" and philosophies are valuable, but they do not offer any justification other than the text of the constitution itself for extending constitutional protections to religion that are unavailable to non-religious claimants.[747]

---

[744] See infra Ch. 1

[745] Supra n. 66 at 571-572.

[746] The court specifically echoes the reasoning of *Wisconsin v. Yoder*: at 217: "A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief."

[747] It is worth noting that this judicial reluctance to engage with questions of religion is reflected in the court's religion clause jurisprudence more generally. Justice Scalia's opinion in *Employment Division v. Smith* foreclosed on future court determinations of the centrality of a belief or practice to a particular religion (at 886-887). The Court's deference to a religious claimant's own determination of the substantiality of a burden in RFRA cases, which I discuss above in this Chapter at Part II Sec. A.3, underscores this trend toward the court disengaging from all determinations that could be construed as internal to a religion.

I have argued throughout this work that there is no viable justification for the special constitutional status of religion. A defender of that privileged status might reply that the text of the constitution itself confers special status of religion[748], but such a strategy only underscores the role of religion as a conversation stopper in this context. If the only justification for the special status of religion is the presence of the term in constitution, then either religion is, quite literally, the "conversation stopper" for efforts to justify its special status, or any justification is deferred until further investigations of religion reveal some rationale for its elevation. My taxonomy of justificatory strategies in Chapter 3 indicates that no such rationale is forthcoming, so I conclude that in the constitutional context, religion does indeed stop the conversation in a manner that benefits religious claimants and burdens those who, like Moore-King, subscribe to religious beliefs not sufficiently similar to traditional religion.

[748] I discuss the inadequacy of textual nominalism above in Chapter III part II sec D.1

# Conclusion: The Subtle Establishment of Religion

## I. Summary of the Project

In this conclusion, I address the original purpose of the project as a whole, and I review the key findings of the project. This project was prompted, as I noted in the introduction, by Sarah Barringer Gordon's claim that religious studies scholarship has offered little useful input to religion clause jurisprudence.[749] For Gordon, courts and legal scholars have little reason to consider religious studies scholarship because academic theorists of religion do not sufficiently direct their work to the needs of courts. I aimed to rebut this claim by arguing that a careful consideration of each field offers significant benefits to the other.

My primary method for reading these two fields together has been an examination of the relevance of religious studies scholarship, especially within the subfield of theories and methods for the study of religion, to religion clause jurisprudence. I looked in particular to two key challenges in religion clause jurisprudence: the importance of threshold determinations of religious status and the need for a justification of religion's special constitutional status. My work in this dissertation demonstrates that theories for conceptualizing religion developed in the field of religious studies can offer significant, practical contributions to religion clause jurisprudence by addressing both of these challenges. My secondary focus has been to examine court determinations of religious

---

[749] See Sarah Barringer Gordon, "Review Essay: Where the Action Is—Law, Religion, and the Scholarly Divide" in *Religion and Culture: A Journal of Interpretation*, v. 18 no. 2 p 249-271.

status as useful data for religious studies scholars: I argued that these cases provide scholars an opportunity to incorporate non-scholarly debates over the category of religion into their own theories.

Because the current state of the field of religious studies does not offer any clear methodological unity, I began the work in Chapter 1 by assessing contemporary critiques of the field of religious studies. I argued there that some of the critiques place unreasonable demands on the field: in particular, I fault critics such as Timothy Fitzgerald and Russell McCutcheon for arguing that religious studies is only viable if religion proves to be a *sui generis*, transcultural, and transhisotrical phenomenon. I instead proposed three alternative criteria for evaluating the viability of the field of religious studies: 1) some mechanism for determining, in at least a provisional fashion, what counts as religion, 2) a warrant for transcultural applications of the term, and 3) some degree of consonance with ordinary usage of the term. I then used these three criteria to evaluate the various proposed approaches to conceptualizing religion within the field of religious studies. I first considered several varieties substantive-monothetic approaches, and I concluded that none of these approaches is adequate to the variety of phenomena included in ordinary usage of the term. I then argued that functionalist approaches are overly inclusive, and therefore cannot provide a clear distinction between religion and non-religion. Some religious studies scholars who are wary of monothetic definitions of religion have advocated polythetic approaches, but I argue that these scholars have substantially misunderstood polythetic classification, and I concluded that this approach is unlikely to provide a usable mechanism for determining what counts as religion.

In the remainder of Chapter 1, I reviewed two additional approaches that, I contend, offer superior foundations for conceptualizing religion. First, I considered analogical approaches to determining what counts as religion. I noted that analogical approaches are vulnerable to a critique lodged by Timothy Fitzgerald and others: non-definitional approaches cannot offer clear determinations of religious status. I then relied on Renford Bambrough's work to argue that analogical approaches can identify stable concepts without relying on an underlying definition if those who use the term share some understanding of the complex concept in question. Finally, I argued in Chapter 1 that the work of many contemporary critics of the field of religious studies could be reframed as what I term a "historical approach" to determining what counts as religion. Critics of the field frequently track the historical shifts in the significance of the term religion in order to discredit either some methodologies within the field or the field as a whole. I contended, however, that these critiques helpfully focus attention on the ways that particular groups of agents both adhere to some aspects of traditional uses of the term *and* creatively shift its meaning. I then faulted the contemporary critics of the field for focusing almost exclusively on the work of other academics to establish contingency of the concept of religion, and I argued that scholars should attend to court cases in which the religious status of a person or group is contested. These cases offer evidence of both litigants and judges playing a significant role in shaping the public understanding of religion.

In the second and third chapters, I tested my claim that religious studies scholarship can benefit legal thinking about religion. In chapter 2, I focused on the efforts of courts and legal scholars to develop mechanisms for determining what counts as

religion in American law. I considered several existing proposals to avoiding these determinations, but I concluded that those few strategies that successfully obviate determinations of religious status either offer more complicated alternatives or do not cover the full range of cases currently comprehended by religion clause jurisprudence. I then claimed that courts must make determinations of religious status both because threshold determinations are necessary for adjudicating religion clause claims, and because determinations of religious status can serve to protect new and/or unpopular religious groups. In the remainder of Chapter 2, I demonstrated that the flaws that critical theorists identify in various academic theories of religion are also present in legal approaches to conceptualizing religion. The monothetic definitions of religion that legal scholars propose exclude much that ordinary usage of the term would include, while courts have been understandably reluctant to embrace the broad inclusiveness of functionalist definitions. I gave careful attention to proposed analogical approaches, and here too I found that their central drawback is the absence of a clear mechanism for determining religious status. Following Eduardo Peñalver, I argued that this ambiguity is especially concerning in the context of American courts, since the absence of any clear rules allows judges to rely on their own standards for determining what counts as religion.

In chapter 3, I considered the special status of religion in American law. I began Chapter 3 by noting that religious claimants are entitled to a wide range of exemptions from general laws that are not available to similarly situated non-religious claimants, and I argued that this disparity constitutes the primary example of the special status of religion. I then reviewed three key reasons that courts must explain this special status of

religion: 1) any commitment to fairness requires explaining why one group merits special legal privileges that are unavailable to other groups, 2) an understanding of the special status of religion is necessary to consistently determine what counts as religion, and 3) a persuasive account of religion's special status might reduce tensions between different political factions in American society. I next reviewed several proposed strategies for obviating any determination of religion's special status. Most notably, some legal theorists have argued that judges should adopt a broadly inclusive approach to defining religion, thus minimizing religion's special legal status. I claimed that such an approach requires a deliberate misinterpretation of the term religion, and thus constitutes a judicial subversion of the constitutional scheme. I then considered the range of existing justifications of religion's special status. I found that strategies premised on a monothetic understanding of religion, whether substantive or functionalist, fail primarily because their justifications are not tailored to religion alone. For example, a justification premised on religion's capacity to promote civic virtue fails if there are non-religious means to promote virtue, just as a justification premised on the suffering of a religious citizen caught between the demands of conscience and those of law fails if non-religious citizens also suffer when caught in this same double-bind. Non-definitional strategies, by contrast, fail because they cannot sufficiently isolate what religion is. I noted that analogical approaches that rely on a prototypical case of religion provide a somewhat clear case of religion to serve as the basis of a justification, but because these approaches invariably rely on Christianity as the prototype, they raise significant concerns about fairness.

In the fourth and final chapter, I developed my claim that theories and methods in religion can address courts' needs for both a mechanism to determine what counts as

religion and a justification of the special status of religion. I began that chapter by considering several arguments against the application of academic theories of religion to court determinations of religious status. I argued that some of these critiques fail because they rely on inaccurate characterizations of the field, while others critiques offer useful correctives for the field. Finally, others argue that courts will reject the contributions of religious studies scholars because academic theories of religion do not meet courts' needs for a limited concept of religion. I argued that legal resistance to an inclusive concept of religion should, to the contrary, prompt more contributions from religious studies scholars. In the second half of chapter four, I make use of my work on theories and methods for the study of religion to develop a revised analogical approach to determining what counts as religion in American courts. One key critique of analogical approaches that I highlighted in earlier chapters is their failure to indicate a clear, bounded concept of religion. I argued in Chapter 4 that my revised analogical approach achieves a minimum standard of coherence by excluding claims from avowedly non-religious claimants. A second flaw of analogical approaches that I identified in earlier chapters is their inconsistency: the absence of a clear mechanism for determining religious status results in rulings in one court that differ from those in others. I address this flaw by proposing that courts accept all claims to religious status that do not include a disavowal of religion. What my revised analogical approach cannot do, however, is provide a justification of the special status of religion. I argued that this absence is in fact an advantage: I concluded in Chapter 3 that no account of religion's special status is persuasive, so existing approaches to conceptualizing religion in American law merely conceal the unjustified legal privilege of religious claimants. By laying bare the disparity between legal treatment of religion

and that of non-religion, my approach calls attention to the need for constitutional, rather than judicial, remedies for the special status of religion.

## II. The Subtle Establishment of the Legal Concept of Religion

In Chapters 2 and 3, I catalogued a series of flaws in contemporary religion clause jurisprudence. In Chapter 2, I argued that courts have not developed a clear and consistent mechanism for determining what counts as religion, and that determinations of religious status consequently vary from court to court, and even from case to case. In chapter 3, I argued that while religion receives special treatment in American jurisprudence, but there is no proposed justification of that special status proves satisfactory.

Here I offer a few observations about the combination of these flaws. The special constitutional status of religion extends a number of non-trivial legal privileges to religious claimants and organizations. Religious groups enjoy exemptions from compulsory education requirements[750] and zoning restrictions[751], while religious claimants have earned exemptions from unemployment compensation requirements.[752] Even in the wake of the Court's reassertion of a neutrality doctrine in *Employment Division v. Smith*,[753] courts have nevertheless broadened the range of free exercise protections for inmates in non-Federal facilities[754], and they have asserted that religious

---

[750] *Wisconsin v. Yoder*, 406 US (205) 1972.
[751] *City of Boerne v. Flores*, 521 US (507) 1997.
[752] *Sherbert v. Verner*, 374 US (398) 1963.
[753] 494 U.S. 872 (1990)
[754] *Holt v. Hobbs*, 135 S.Ct. 853 (2015)

organizations enjoy exemptions from employment law via the "ministerial exception"[755] while broadening the range of organizations that count as religious.[756] Meanwhile, claimants from western monotheistic religions can expect that courts will consider their claims religious, while those from non-western or new religions cannot reliably expect that same level of consideration from judges.[757] In other words, religious groups that are either institutionally tied to the religions that have traditionally been ascendant among European-Americans or that closely resemble those religions can expect to enjoy legal privileges, while those groups that adhere to models that differ significantly from these "traditional" American religions often do not enjoy those same privileges. This discrepancy put the limits of religious freedom in America in sharp relief, since the proper description of a regime in which some religious organizations and claimants receive special legal privileges while others do not is an establishment of some religions.

Now the sort of establishment I describe here is remarkably subtle: it is clearly distinct from the various regimes in, for example, post-reformation England in which non-attendance of the state church was a fineable offence,[758] and participation in dissenting societies was a crime. It is also distinct from post-revolutionary establishments in Massachusetts and other states that mandated the use of state funds to support a

---

[755] *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC,* 132 S.Ct. 694 (2012).
[756] *Burwell v. Hobby Lobby,* 134 S.Ct. 2751 (2014).
[757] Some courts evince a remarkable willingness to consider unfamiliar religious groups as religions. See for example *Dettmer v. Landon*, 799 F. 2d 929 (1986), in which the court considered Wicca a religion, or *Kaufman v. McCaughtry*, 419 F.3d 678 (7th Cir. 2005), in which the court considered atheism a religion. My claim, however, is that courts do not *consistently* accept claims from non-traditional litigants.
[758] As specified under Elizabeth I's Act of Uniformity.

favored religious group.[759] Most importantly, it is clearly limited by establishment clause jurisprudence, which limits the sorts of funds that religious organizations can receive from federal and state governments while also curtailing government expressions of religion. Nevertheless, it remains the case that courts find that some claims to religious status are spurious, while others are not. The contemporary constitutional regime offers special legal privileges to some religious groups, while denying protections to others. Religious groups that resemble the religions that European-Americans have historically favored are virtually guaranteed protections, while new religious movements and non-western religions that do not conform to these Christian models are less assured of constitutional protection. In short, this arrangement constitutes a subtle establishment of religion.

At first glance, my claim that free exercise clause jurisprudence amounts to a subtle establishment of religion may seem hyperbolic. Courts admittedly accept claims to religious status from a wide variety of claimants, and no religious groups can realistically expect to circumvent the well-established "secular purpose" test of establishment clause jurisprudence.[760] The current flaws of free exercise jurisprudence at worst exclude only some claims of demographically small religious groups, and those claimants could realistically expect friendlier rulings from judges more committed to an inclusive concept of religion. Given this, one could plausibly describe my use of the term "establishment"

---

[759] See, for example, *Barnes v. First Parish in Falmouth*, 6 Mass. 400, 1810 WL 938 (1810), in which a Massachusetts court upheld the use of state funds to support Congregationalist churches.

[760] See *Lemon v. Kurtzman*, 403 U.S. 602 (1971)

as alarmist, given that relatively few claimants are excluded in contemporary free exercise jurisprudence.

However, rhetoric among some Christian conservatives in the United States and elsewhere indicates an eagerness to use a restrictive understanding of the concept of religion to strip a wider range of claimants of the protections of the first amendment. Specifically, prominent evangelicals,[761] conservative legislators[762], advisers to the current president[763], and self-published authors[764] frequently make the claim that Islam is not a religion.[765] Moreover, the line of argument they use parallels the rationale the courts use to exclude some groups from religion: most of these Christian conservatives rely on the claim that Islam is a political ideology to support their further claim that it is not a

---

[761] Pat Robertson frequently claims that Islam is not a religion. During his show, *The 700 Club*, he said: "Islam is a political system that is intent on world domination. It isn't a 'religion' as such." Accessed at: https://www.youtube.com/watch?v=6R5X2CUMFoE

[762] Jody Hice, the congressional representative for Georgia's 10th district, recently wrote: "Although Islam has a religious component, it is much more than a simple religious ideology… It is a complete geo-political structure and, as such, does not deserve First Amendment protection." Hice, *It's Now or Never: A Call to Reclaim America*, (Bloomington, Westbow, 2012), 151.

[763] In a speech on August 10, 2016 at a meeting of ACT! for America, former National Security Advisor Michael Flynn claimed that "Islam is a political ideology" that "..hides behind this notion that it is a religion." He went on to state that: "it's like cancer, a malignant cancer." Accessed at: https://www.youtube.com/watch?v=UWaqLECT7lI at 24:00. On February 3, 2017, Sebastian Gorka, a deputy assistant to President Trump, refused to directly answer a question a question about President Trump's beliefs about the religious status of Islam. Transcript available at http://www.npr.org/2017/02/03/513213042/trump-assistant-on-presidents-foreign-policy

[764] Rebecca Bynum, *Allah Is Dead: Why Islam is Not A Religion*, (New English Review Press, Nashville, 2011).

[765] This same line of thinking saw Wheaton College, a conservative evangelical college, recommend the firing of Larycia Hawkins, a tenured professor, for saying in a facebook post that Muslims and Christians "worship the same God". See "Wheaton College Recommends Terminating Tenured Professor of 'Same God' comments," in *Christianity Today*, 1/6/2016, accessed at http://www.christianitytoday.com/gleanings/2016/january/wheaton-college-terminate-tenured-larycia-hawkins-same-god.html

religion.[766] Jody Hice, a congressional representative for Georgia, explicitly called for denying first amendment protections to Muslims on the grounds that Islam is not truly a religion.[767] This trend among conservative Christians may simply be one volley in a wider religio-cultural conflict.[768] Nevertheless, the claim that Islam is not a religion has clear legal implications: a group that cannot claim religious status also cannot claim the protections of the free exercise clause. In short, some Americans clearly desire an establishment of religion, and they are eager to use a narrow definition of religion to promote that goal.

Now, even if some members of congress, presidential advisers, and the president himself believe that Islam is not a religion, they would have no direct influence on the Court's approach to determining what counts as religion. However, under the Court's current approach, which provides no clear parameters for determining what counts as religion, only a limited range of religious groups can reliably expect that courts will acknowledge their claims to religious status. Given that courts have cited the incompatibility of a political focus with religious belief in the past, this conservative Christian argument that Islam is not a religion would not be obviously without merit in court. This, then, is the substance of the subtle establishment: Christian religious groups

---

[766] In *Africa v. Commonwealth* 662 F.2d 1025 (1981) at 1034, the Court reasoned that Frank Africa's claims support for a movement he described as "revolutionary organization opposed to all that is wrong" rendered his beliefs "social" rather than "otherworldly or spiritual." In *Theriault v. Silber,* 453 F.Supp. 254 (1978) at 582, the court saw the "exclusively political" focus of the Church of the New Song as evidence that the movement was "nonreligious".

[767] Supra n. 13.

[768] These same Christian conservatives arguably exaggerate the extent of the conflict, and it is not clear that the conflict is reciprocated, so the phrase "wider religio-cultural conflict" may not be entirely accurate.

enjoy the expectation of first amendment protections, some Christians actively seek to strip those rights from religious groups they perceive as theologically threatening, and these anti-Muslim Christians may have a legal basis for their claims.

Scholars in religious studies and related fields occasionally highlight the imperfect fit between the category of religion and some individual religions, including Islam. Talal Asad, for example, claims that some definitions of religion render Islam an imperfect example of the category either because those definitions favor cognitive content over practice, or because those definitions presume that religion cannot be political.[769] For Asad, however, any such incongruity does not demonstrate that Islam is not a clear example of religion, but rather that the modern concept of religion fails to conceal the mutual involvement of politics and religion.[770]

In Chapter 4, I proposed two basic remedies for religion clause jurisprudence. I argued that a regime that protects rights of conscience would ultimately prove more inclusive, and therefore more defensible, than the current protections of religion. As a temporary measure, I proposed a revised analogical approach to determining religious status that would accept all claims that do not directly disavow religion. Both of these proposed remedies would correct for the dangers of what I here describe as a subtle establishment. A "freedom of conscience" scheme would end the pretensions of Christian conservatives to use the Constitution to protect their beliefs and practices while stripping

---

[769] See Talal Asad, "Religion as an Anthropological Category" in *Genealogies of Religion* and "Secularism, Nation-State and Religion" in *Formations of the Secular*.
[770] Asad, "Secularism, Nation-State and Religion: "If the secularization thesis no longer carries the conviction it once did, this is because the categories of 'politics' and 'religion' turn out to implicate each other more profoundly than we thought."

legal protections from other groups. My proposed revision to the analogical approach, on the other hand, would maintain some legal inequality, as the areligious could not expect legal recognition of their claims for exemptions. The revised analogical approach would, however, remove any doubt about the veracity of claims to religious status by Muslims and others who Christian conservatives target.

## III. Religion in American Courts as Data for the Field of Religious Studies

In Chapter 4, I also noted that scholars in religious studies and related fields have long emphasized that the individual, rather than any institution, is the authority on religion in American society. Peter Berger described the individual's responsibility to determine their own religious orientation as the "heretical imperative,", while Robert Bellah and Richard Madsen charted the phenomenon of "Sheilaism": a religion focused on an individual's highly personalized beliefs.[771] Other scholars who work in the field of lived religion study how both individuals and groups of lay believers create their own rituals and concepts of sacred objects apart from any institutional authority.[772]

Post-war American courts have demonstrated some willingness to accept the individual as the source of authority on religion. Both *US v. Seeger*[773] and *Welsh v. US*[774] saw the Supreme Court accept claims to religious status from individuals who were unaffiliated with any institutional religion and whose beliefs diverged in significant ways

---

[771] I should note that both Berger and Bellah lamented this focus on the individual, though they did not deny its paramount status in American religion. See Bellah, *Habits of the Heart*, and Berger, *The Heretical Imperative*.
[772] See, for example, Robert Orsi, *The Madonna of 115th St: Faith and Community in Italian Harlem, 1880-1950*; Colleen McDannell, *Material Christianity: Religion and Popular Culture in America*.
[773] *United States v. Seeger*, 380 US 163 (1965)
[774] *Welsh v. US*, 398 US 333 (1970).

from traditional religions.[775] Arguably the high-water mark of the court's deference to individual determinations of religion came in the 1981 case of *Thomas v. Review Board*. Thomas, a Jehovah's Witness, quit his job at a metal foundry when he was transferred to a division that manufactured tank turrets. Thomas argued that his religious beliefs prevented him from contributing to a war effort by building armaments, but the unemployment commission for the state of Indiana denied his claim for benefits on the grounds that Thomas had failed to clearly articulate the religious principle behind his decision to quit. The Indiana court that heard Thomas's case sided with the unemployment commission, arguing that Thomas's position was based on a "*personal philosophical choice" and not a religion. The Supreme Court disagreed, and in so doing demonstrated remarkable deference to Thomas's own conception of his religious duties:*

> *We see, therefore, that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs because the believer admits that he is "struggling" with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.*[776]

Here the Court specifically denies the relevance of models derived from more structured institutional religions to an evaluation of an individual's claims of religious status. This is especially important given that the Court in *Wisconsin v. Yoder* erected a contrast between a "philosophical and personal" choice and the sorts of religious claims that merits first amendment protections.[777] The Court's reasoning in *Thomas* – and in *Seeger* and *Welsh*, strongly supports the claim that the personal is not incompatible with the religious.

---

[775] Most notably, both claimants were non-theistic.
[776] *Thomas v. Review Board,* 450 U.S. 707 (1981).
[777] *Wisconsin v. Yoder*, 406 U.S. 205 (1972) at 216.

In other cases, however, courts show far less deference to individual determinations of religious status. In Chapter 2, I reviewed courts' usage of a sincerity test to dismiss claims to religious status for a variety of reasons, including a focus on political interests, the similarity of a group's rituals to "goofy nonsense", and the absence of a formal institutional structure.[778] Courts purport to use sincerity tests to detect disingenuous claims to religious status, but in practice these tests target new, religious movements with unfamiliar practices and a strong focus on the individual. Those claims that pass these sincerity tests are frequently denied the protections of the free exercise clause on the grounds that their individualistic focus or political goals do not sufficiently resemble existing models of religion.[779] Now, courts do in other cases accept claims to religious status from non-traditional claimants, and many of these claims involve groups with either an individualistic model or a political focus.[780] This variance indicates an underlying inconsistency in religion clause jurisprudence that I have highlighted throughout this dissertation: claims that receive recognition as religious in one court are not guaranteed that status in other courts. However, claimants whose beliefs are either rooted in a traditional religion or closely parallel the models of traditional religions are virtually guaranteed acceptance in the Courts.

A review of determinations of religious status in American courts points to one additional variance that religion scholars should note. Throughout this work, I have highlighted the variability of determinations of religious status in courts, arguing that the

---

[778] See especially *US v. Kuch*, 288 F. Supp. 439 (1968) and *Theriault v. Silber,* supra n. 17. See infra, Chapter 2 Part II.B
[779] See especially *Africa v. Commonwealth*, 662 F. 2d 1025 (1981) and *Moore-King v. County of Chesterfield, Va.*, 708 F. 3d 560 (2013). See infra Chapter 2 Part III.C
[780] See *Kaufman v. McCaughtry*, 419 F.3d 678 (2005).

absence of a clear formula for determining religious status results in judgments in one court that would not stand in another. An equally important variation resides between the judicial determinations of religious status and those of the claimants themselves. Claimants have recognized a broad variety of practices, movements, and beliefs as religious. Claimants defend claims based on syncretistic religions[781], political religions[782], and western adoption of non-western religions[783]. Judges, however, tend to adhere to a more limited view of religion, as they have highlighted both syncretism[784] and a political focus[785] as reasons to doubt the religiosity of a claim or organization. Claimants, in other words, rely on concepts of religion that are familiar to contemporary religious studies scholars, while some judges still favor traditional, institutional models of religion despite their professed interest in moving beyond these traditional models.

---

[781] Both *Moore-King v. Chesterfield County* 708 F.3d 560 (2013) and Winnifred Sullivan's account of the *Warner* case in *The Impossibility of Religious Freedom* describe plaintiffs who subscribed to syncretistic religious beliefs. In both cases, the courts were highly skeptical that syncretism could amount to a true religious belief.

[782] See especially *Africa v. Commonwealth*, supra n. 8.

[783] *Leary v. United States*, 383 F.2d 851 (1967).

[784] See *Moore-King v. Chesterfield*, supra n. 10 at 622: "In this case, Psychic Sophie states on her website: "I am very spiritual in nature, *yet I do not follow particular religions or practices,* and `organized' anythings are not for me. I pretty much go with my own inner flow, and that seems to work best." (emphasis added). Although that statement leaves room for interpretation, one thing seems clear —Moore-King follows *no* religion. It is not as if she claims the mantle of Buddhism, but engages in practices in the name of Buddhism that no other Buddhist believes central to the religion. It is as if she is Lutheran one day, Buddhist the next, and an ad hoc spiritualist the day following — only, on any given day, she may be all three at once, or none at all." The court here overlooks the possibility that a syncretistic amalgamation of various religious practices can itself be a religion.

[785] See *Africa v. Commonwealth*, supra n. 8 at 1034. The court here draws a distinction between a social philosophy – specifically Africa's claim that MOVE is "a revolutionary organization ... absolutely opposed to all that is wrong" on the one hand and a "spiritual or otherworldly" philosophy that is more characteristic of religion on the other.

## IV. Description and Normativity: The Role of Religious Studies

This divergence between the claimants' concepts of religion and those of the judges should interest religious studies scholars for two important reasons. First, I argued in Chapter 1 that scholars should rely on individual usage of the term religion as the primary data for theories of religion, and I further claimed that religion clause jurisprudence, and especially the content of claims to religious status, constitutes an under-utilized resource for data on the concept of religion. My preliminary analysis suggests that the claimants' appeals to a broad, inclusive concept of religion conforms to many models that religious studies scholars use for describing contemporary religion. These cases, then, can serve as examples of the syncretistic character of American religion, or of the focus on the individual as the source of authority on religion in American life. Religious studies scholars should look not only to the outcomes of cases that involve a contested claim to religious status, but to those contested claims themselves, for data on the evolving concept of religion.

Second, the apparent preference of some judges for claims rooted in more traditional religions indicates an important potential role for religious studies scholars. In Chapter 1, I reviewed several claims regarding the purpose of religious studies.[786] There, I discussed three basic categories of proposed purposes: nominalist, descriptive, and normative. A nominalist account of the purpose of religious studies in essence denies that a consistent account of the field's purpose is possible: if all uses of the term religion are correct, then there is no conceptual unity to those uses, and consequently there can be no common purpose to various scholarly inquiry into examples of religion. A descriptive

---

[786] See infra, Ch. 1 Part III.

account, however, relies on the assumption that there is some conceptual unity to the field, and scholarly work therefore serves to illuminate that conceptual unity in some fashion. Finally, a normative account claims that work in the field serves some greater social purpose. I noted in Chapter 1 that scholars rarely subscribe directly to a normative account of the purpose of religious studies; rather, scholars frequently accuse one another of covertly promoting a normative agenda. Most commonly, scholars claim that others are either covertly promoting a theological agenda or are using the field to advance social tolerance.

In Chapter 1, I also highlighted Jonathan Z. Smith's account of the role of religious studies in *Imagining Religion* as a helpful model that transcends my simple categories of descriptive and normative accounts of the purpose of the field.[787] For Smith, the field of religious studies is fully integrated into what he sees as the enlightenment project of rendering phenomena intelligible. Smith argues, however, that this primarily descriptive project has clear implications for social tolerance. Religious phenomena that are intelligible are also tolerable, while those that dumbfound observers will only meet with intolerance. For Smith, then, the work of describing religious phenomena generates some social tolerance for the religious, and he urges scholars in the field to take up the work of rendering unfamiliar religious phenomena intelligible in order to facilitate social tolerance.

Scholars who study contested claims to religious status in American courts can play this dual role in an important way. Smith urges scholars to promote understanding of

---

[787] Jonathan Z. Smith, "The Devil and Mr. Jones" in *Imagining Religion: From Babylon to Jonestown*, 1982.

unfamiliar religions in order to broaden general social tolerance, but scholars who work with courts can help new or non-western religions secure legal protections. Scholars who explain, for example, that syncretism is not incompatible with religion could facilitate the claims of those who, like Sophie Moore-King, construct their religious lives out of elements borrowed from a variety of other religions. Scholars who, as Winnifred Sullivan does in *The Impossibility of Religious Freedom*, explain that religious practices are not always rooted in specific scriptural or institutional requirements, might bolster the claims of litigants whose religious lives are not tied to institutional religion. Such scholars may well encounter judges who are skeptical of this approach to understanding religion, but the stubbornness of judges who adhere to outmoded concepts of religion should not prompt religion scholars to withdraw from engaging with first amendment law. On the contrary, it demonstrates the importance of their contributions.

Finally, scholars who study the Court's approach to determining religious status can play a key role in exposing and extirpating what I describe above as the "subtle establishment" of some religions in American law. The courts, I argue, have no clear mechanism for dismissing the claims of Christian conservatives who argue that Islam is not a religion and accordingly does not merit first amendment protections. Courts have not developed a consistent approach to determining religious status, and some anti-Muslim Christians have parallel the arguments of courts that deny religious claims from groups that courts deem more political than religious. Religious studies scholars can highlight the significance of these anti-Muslim arguments by linking claims about the legal status of particular religious groups with a wider cultural debate over the meaning of the concept of religion. Work highlighting this link calls attention to a danger that

courts may not anticipate since legal scholars often apparently presume that the vagueness of the courts' approaches to determining religious status tends to promote inclusiveness rather than exclusiveness.[788] This work can also broaden our understanding of the nature of state establishments of religion by demonstrating that the traditional models, which focus compulsory worship, financial support for religious institutions, and state speech in support of religious ideas are inadequate to capture the varieties of religious establishments.

Future work on legal determinations of religious status in the field of religious studies should, first and foremost, focus on cases I have not reviewed here. In this dissertation, I have focused on cases that have served as touchstones for subsequent courts in their efforts to determine what counts as religion. Religious studies scholars should find compelling data regarding the range of claimants to religious status in a wide variety of cases, many of which do not feature prominently in the legal literature. Moreover, scholars might find grounds to engage with concepts I have only briefly discussed in this work. For example, courts frequently investigate the sincerity of claimants to religious status, and I only briefly touched on these "sincerity tests" in this work.[789] Scholars might also find useful data in establishment clause cases, which often test the range of practices and ideas that count as religious. Finally, in the wake of *Hobby Lobby*, a number of claimants associated with for-profit companies have pursued claims to religious status, so scholars may find useful data regarding the compatibility of business interests and religion in these cases.

---

[788] See infra Ch. 3 Part II.B
[789] See infra, Ch. 2 II.B

**Works Cited**

Talal Asad, *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam*, Baltimore, Johns Hopkins University Press, 1993.

Robert Audi and Nicholas Wolterstorff, *Religion in the Public Square: The Place of Religious Convictions in Public Debate*, Lanham, Rowan and Littlefield, 1997.

Andrew Austin, "Faith and the Constitutional Definition of Religion" 22 *Cumberland Law Review*, v. 22 n, 1, 1991-1992.

Renford Bambrough, "Universals and Family Resemblances," in *Proceedings of the Aristotelian Society*, V. 61 1981.

Morton Beckner*, Biological Way of Thought*, Berkeley, University of California Press, 1968.

Catherine Bell, "Ritual" in *The Blackwell Companion to the Study of Religion*, ed. Robert Segal, Malden, Blackwell, 2006.

Donald Beschle, "Does a Broad Free Exercise Right Require a Narrow Definition of Religion?" *Hastings Constitutional Law Quarterly*, v. 39, 2011-2012.

Thomas Berg, Kimberlee Wood Colby, Carl Esbeck and Richard Garnett, "Religious Freedom, Church-State Separation and the Ministerial Exception" *Northwestern University Law Review Colloquy*, v. 106, 2011.

Peter Byrne, "Religion and the Religions" in *The World's Religions*, ed. Peter Clarke, Milton Park, Routledge, 1988.

José Casanova, *Public Religions in the Modern World*, Chicago: University of Chicago Press, 1994.

Jesse Choper, "Defining Religion in the First Amendment", *University of Illinois Law Review*, 1982, 579 (1982).

Elizabeth Clark, "Religions as Sovereigns: Why Religion is "Special"" 2013. Unpublished paper, accessed at https://works.bepress.com/elizabeth_clark/16/

Emile Durkheim, *Elementary Forms of Religious Life*, translated by Joseph Ward Swain, Allen and Unwin, 2001.

Rem B. Edwards "The Search for Family Resemblances of Religion" in *Ways of Being Religious*, 2000.

Mircea Eliade, *Patterns in Comparative Religion*, p. xi. London, Sheed & Ward, 1958.

____ *The Sacred and the Profane*, 1961, translated by William Trask, New York, Harcourt, 1961.

____ *The Quest: History and Meaning in Religion*, Chicago, University of Chicago Press, 1969.

Christopher Eisgruber and Lawrence Sager, *Religious Freedom and the Constitution*, Cambridge: Harvard University Press, 2007.

Noah Feldman, *Divided By God*, New York: Farrar, Straus and Giroux, 2005.

Ludwig Feuerbach, *The Essence of Christianity*, Translated by George Eliot, Amherst, Prometheus Books, 1989.

Timothy Fitzgerald, *The Ideology of Religious Studies*, New York, Oxford University Press, 2000.

____ *Discourse of Civility and Barbarity: A Critical History of Religion and Related Categories*, Oxford University Press, 2007.

George C. Freeman III, "The Misguided Search for the Constitutional Definition of Religion," 71 Georegetown Law Journal, 1983.

Richard Garnett, "Religion, Division and the First Amendment," *Georgetown Law Journal*, v. 94 1667, 2006.

____ "The Freedom of the Church: Towards an Exposition, Translation and Defense" in 21 *Journal of Contemporary Legal Issues,* 33, 2013

John H. Garvey, "An Anti Liberal Argument For Religious Freedom," 7 J. Contemporary Legal Issues 275, 1996.

Frederick Mark Gedicks, *The Rhetoric of Church and State*: *A Critical Analysis of Religion Clause Jurisprudence*, Durham: Duke Universtiy Press, 1995.

____ Frederick Mark Gedicks, "An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions," 20 *University of Arksansas-Little Rock Law Journal*, v. 20, 555, 1997-1998.

Clifford Geertz, "Religion as a Cultural System," in *Anthropological Approaches to the Study of Religion*, ed. Michael Banton, London, Tavistock, 1966.

Sarah Barringer Gordon, "Review Essay: Where the Action Is—Law, Religion, and the Scholarly Divide" in *Religion and Culture: A Journal of Interpretation*, v. 18 n. 2, 2008.

Kent Greenawalt, "Religion as a Concept in Constitutional Law," 72 California Law Review 753, 1984.

____ *Religion and the Constitution*, Princeton: Princeton University Press, 2006.

____ "The Significance of Conscience," *San Diego Law Review*, v. 7, 901, 2010.

Abner Greene, "The Political Balance of the Religion Clauses" 102 Yale Law Journal 1611, 1993.

Ronald Grimes, "Defining Nascent Ritual" in *Journal of the American Academy of Religion*, Vol. 50 n. 4, December 1982.

Jeffrey Hamburger, *Separation of Church and State*, Cambridge: Harvard University Press, 2002.

Marci Hamilton, *God vs. the Gavel: Religion and the Rule of Law*, Cambridge, Cambridge University Press, 2005

____ "The Constitutional Limitations on Congress's Power Over Local Land Use: Why the Religious Land Use and Institutionalized Persons Act Is Unconstitutional", *Albany Government Law Review*, v 2. n. 2, 2009.

____ "The Case for Evidence-based Free Exercise Accommodation:Why the Religious Freedom Restoration Act Is Bad Public Policy", *Harvard Law and Policy Review* v. 9, 2015

Learned Hand, *The Bill of Rights: The Oliver Wendell Holmes Lectures*, (1958)

Michael Helfland, "Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders" *New York University Law Review*, v.86, n. 5, Nov. 2011.

Georg Wilhelm Friedrich Hegel, *Lectures on the Philosophy of Religion: The Lectures of 1827*, ed. Peter Hodgson, Oxford, Oxford University Press, 2006.

William James, *The Varieties of Religious Experience*, New York, Longmans, 1917.

"Separation and the Secular: Reconstructing the Disestablishment Decision," 67 *Texas Law Review*, v. 67 n. 5 955, 1989.

Philip Kurland, "Of Church and State and the Supreme Court," *University of Chicago Law Review*, Vol. 29, No. 1,Autumn 1961.

Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford, Oxford University Press, 1996).

Douglas Laycock, "Formal, Substantive, and Disaggregated Neutrality Towards Religion," *Depaul Law Review,* V. 39, 1990

____ "Religious Liberty as Liberty," in Journal of Contemporary Legal Issues 313, 1996.

Brian Leiter, *Why Tolerate Religion?* Princeton, Princeton University Press, 2013.

Bruce Lincoln, *Holy Terrors: Thinking About Religion After September 11*, Chicago, University of Chicago Press, 2003.

Martin Luther, *Selected Writings*, translated by John Dillenberger, New York, Doubleday, 1962.

Timothy Macklem, "Faith as a Secular Value," 45 McGill Law Journal, 1 (2000).

James Madison, "Letter to Jasper Adams," in, *Religion and Politics in the Early Church: Jasper Adams and the Church-State Debate*, ed. Daniel Dreisbach, Lexington, University of Kentucky Press, 1996,

William Marshall, "Solving the Free Exercise Dilemma: Free Exercise as Expression." 67 *Minnesota Law Review*, v. 67, 545 (1982-1983)

____ William Marshall, "In Defense of *Smith* and Free Exercise Revisionism," *University of Chicago Law Review,* v. 58 n. 1, 308, 1991, 321.

Tomoku Masuzawa, *The Invention of World Religions: Or, How European Universalism Was Preserved in the Language of Pluralism*, Chicago, University of Chicago Press, 2005.

Michael McConnell, "The Problem of Singling Out Religion", *Depaul Law Review*, v. 50, 1, 2000.

____ "Secular Reason and the Misguided Attempt to Exclude Religious Argument from Democratic Deliberation." *Journal of Law, Philosophy and Culture*, v. 1 no. 1, 2007.

Russell McCutcheon, *Manufacturing Religion: The Discourse of Sui Generis Religion and the Politics of Nostalgia*, New York, Oxford University Press, 1997.

Gail Merel, "The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment," *University of Chicago Law Review*, 45 no. 4 (1978).

Rodney Needham, "Polythetic Classification: Convergence and Consequences" in *Man*, V. 10 n. 3 (Sep. 1975).

Rudolph Otto, *The Idea of the Holy: An Enquiry into the Non-Rational Factor in the Idea of the Divine and its relation to the Rational*, Translated by John Harvey, London, Oxford University Press, 1923.

Eduardo Peñalver, "The Concept of Religion," *Yale Law Journal* v. 107 n. 3, 1997.

John Rawls, *Political Liberalism,* New York: Columbia University Press, 1993.

____, "The Idea of Public Reason Revisited," 64 University of Chicago L. Rev 765 (1997).

Jean-Jacques Rousseau, *The Social Contract*, London, Penguin Classics, 1968.

Richard Rorty, "Religion as Conversation Stopper," in *Common Knowledge*, 1994.

Benson Saler, *Conceptualizing Religion*, New York, Berghahn Books, 2000.

Frederick Schauer, "Comment: Principles, Institutions and the First Amendment", 112 Harvard Law Review, 84, 1998-1999.

Friedrich Schleiermacher, *The Christian Faith*, edited by H. R. Mackintosh and J. S. Stewart, Philadelphia, Fortress Press, 1928.

Richard Schragger and Micah Schwartzman, "Against Religious Institutionalism", in *Virginia Law Review*, v. 99 n. 5, 2013.

Micah Schwartzman, What if Religion Is Not Special? *University of Chicago Law Review* v. 79 n 4, 2013.

Christian Smith, *The Secular Revolution: Power, Interests and Conflict in the secularization of American Public Life*, Berkeley, University of California Press, 2003.

Jonathan Z. Smith, "The Bare Facts of Ritual," *Journal of the History of Religions*, v. 20 1/2, 1980

____*Imagining Religion: From Babylon to Jonestown*, Chicago, the University of Chicago Press, 1982.

____ *Drudgery Divine: On the Comparison of Early Christianities and the Religions of Late Antiquity,* Chicago, The University of Chicago Press, 1990.

____ "Religion, Religions, Religious" in *Critical Terms in Religious Studies*, Mark C. Taylor ed., Chicago: University of Chicago Press, 1998.

Robertson Smith, *Lectures on the Religion of the Semites: The Fundamental Institutions*, New York, MacMillan, 1927.

Steven D. Smith, "Separation and the Secular: Reconstructing the Disestablishment Decision," 67 *Texas Law Review*, v. 67 n. 5 955, 1989.

____ "Taxes, Conscience and the Constitution," *Constitutional Commentary*, v. 23, 365, 2006.

____ "The "Jurisdiction" Conception of Church Autonomy." San Diego Legal Studies Paper 14-177, 2014.

Wilfred Cantwell Smith, *The Meaning and End of Religion*, New York, Harper and Row, 1978.

Sarah Song, "Multiculturalism" in *Stanford Encyclopedia of Philosophy*, Edward N. Zalta ed., 2011.

Martin Southwold, "Buddhism and the Definition of Religion" in *Man*, V. 13 n. 3 September 1978.

Melford Spiro, "Religion: Problems of Definition and Explanation" in *Anthropological Approaches to the Study of Religion*, ed. Michael Banton, London, Tavistock, 1966.

Jeffrey Stout, *Democracy and Tradition*, Princeton, Princeton University press, 2004.

Winnifred Fallers Sulivan, *The Impossibility of Religious Freedom*, Princeton, Princeton University Press, 2005.

____, *Paying the Words Extra: Religious Discourse in the Supreme Court of the United States,* Cambridge, Harvard University Press, 1994.

Nelson Tebbe, "Excluding Religion," 156 University of Pennsylvania Law Review 1263 (2008).

____, "Nonbelievers" in Virginia Law Review 97, 2011.

Laurence Tribe, *American Constitutional Law*, Mineola, Foundation Press, 1978.

Edward Burnett Tylor, *Primitive Culture: Researches into the Development of Mythology, Philosophy, Religion, Art and Custom*, London, John Murray, 1871.

Tisa Wenger, *We Have a Religion: The 1920s Pueblo Indian Dance Controversy and American Religious Freedom*, Chapel Hill, University of North Carolina Press, 2009.

Donald Wiebe, *The Politics of Religious Studies: The Continuing Conflict with Theology in the Academy*, New York, St. Martin's Press, 1999.

**Index of Cases:**

*Abington School District v. Schempp*, 375 US 203 (1963).

*Africa v. Commonwealth*, 662 F.2d 1025 (1981).

*Allegheny County v. ACLU*, 492 US 573 (1989).

*Brownfield v. Daniel Freeman Marina Hospital*, 208 Cal. App. 3d 405, 1989.

*Burwell v. Hobby Lobby*, 134 US 2751 (2014).

*Christofferson v. Church of Scientology, etc*., 644 P. 2d 577 (1982).

*Church of the Lukumi Babalue Aye v. City of Hialeah*, 508 U.S. 520 (1993).

*City of Boerne v. Flores*, 521 US (507) 1997

*Davis v. Beason*, 133 U.S. 333, (1890).

*DeHart v. Horn*, 227 F.3d 47 (2000).

*Dettmer v. Landon*, 799 F. 2d 929 (1986)

*Employment Division v. Smith*, 494 U.S. 872, (1991).

*Engel v. Vitale*, 370 US 421 (1962).

*Epperson v. Arkansas,* 393 US 97 (1968).

*Everson v. Board of Education*, 330 U.S. 1 (1947).

*Fellowship of Humanity v. Co. Alameda*, 153 Cal. App. 2d 673 (1957).

*Founding Church of Scientology v. United States*, 409 F. 2d 1146, 1964.

*Goldman v. Weinberger*, 475 U.S. 503 (1986).

*Greece v. Galloway* 134 S.C. 1811 (2014).

*Heffron v. International Society for Krishna Consciousness*, 452 US 640, (1981).

*Holt v. Hobbs* 135 S.Ct. 853 (2015).

*Hosanna Tabor Evangelical v EEOC* 132 US 694 (2012).

*Kaufman v. McCaughtry*, 419 F.3d 678, 2005.

*The Late Corporation of the Church of Jesus Christ of Latter Day Saints v, United States,* 136 U.S. 1 (1890).

*Lee v. Weismann*, 505 US 577, (1992).

*Lemon v. Kurtzman*, 403 U.S. 602 (1971).

*Malnak v. Yogi*, 592 F.2d 197 (3rd Circ. 1979).

*Moore-King v. County of Chesterfield, Va.*, 708 F. 3d 560 (2013).

*Reynolds v. United States,* 98 U.S. 145 (1878).

*Sherbert v. Verner,* 374 U.S. 398 (1963).

*Sherr v. Northport-East Northport U. Free Sch. D.*, 672 F. Supp. 81 (E.D.N.Y. 1987)

*Theriault v. Silber,* 453 F.Supp. 254 (1978).

*Torcaso v. Watkins*, 367 U.S. 388 (1961).

*Thomas v. Review Board*, 271 Ind. ___, 391 N. E. 2d 1127

*Turner v. Safley*, 482 U.S. 78 (1987).

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

*United States v. Kauten*, 133 F. 2d 703 (1943)

*United States v. Kuch*, 288 F. Supp. 439 (1968).

*United States v. Macintosh*, 283 US 605 (1931).

*United States v. Seeger* 280 U.S. 163, 166 (1965).

*Van Orden v. Perry* 544 US 677 (2005).

*Wallace v. Jaffree*, 472 U.S. 38 (1985).

*Welsh v. United States*, 398 U.S. 333 (1970).

*Widmar v. Vincent*, 454 US 263 (1981).

*Wisconsin v. Yoder*, 406 U.S. 205 (1972).

*Zelman v. Simmons-Harris* 536 US 639 (2002).